

An Overview of the Judicial System under Different Layers of the Government for ***Disadvantaged and Vulnerable Population***

Institute of Strategic and Socio-Economic Research (ISSR)



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**An Overview of the Judicial System under Different Layers of the
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for
Disadvantaged and Vulnerable Population**

Final Report

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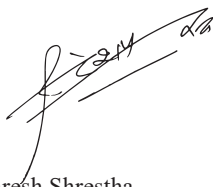
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Naresh Shrestha

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ABSTRACT

With the regime change in Nepal, the new Constitution sought for inclusion and protection of marginalized, disadvantaged, and vulnerable population with special rights under the Constitution. This paper sought to explore the special rights of such population guaranteed in the Constitution, Act, and other legal instruments. This paper compares existing international commitments with the existing constitutional and legal provisions. Similarly, this paper elucidates provision and efforts on realization of these special rights by the marginalized population. It is deduced that these populations are highly hit by calamities, both natural and human-made and require special attention. Owing to this fact, this paper traces the duty of all three levels of Government during a disaster, pandemics, calamity, other shocks, or emergency towards such group. Finally, the paper comes with findings (shortcomings in the concerned policies, constitution, laws and regulation and guidelines so concerned) and recommendation for the protection upon analyzing, and comparing with, international commitments and best practices.

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CHAPTER I

INTRODUCTION

1.1 BACKGROUND

Nepal went through several political turmoil since the inception of very first constitution of Nepal.¹ All these political turmoil seem like a drag for positive changes entrenched by the Muluki Ain (Country Code) of 1854 that legalized the rigid and hierarchical caste system. The deeply rooted discriminatory legal provisions² lasted some 110 years until the 1854 Country Code was replaced by the 1963 Muluki Ain (Country Code, 1963)³ and gradually dragged Nepal to some progression of inclusion. However, these progressions were not absolute rather obsolete. Women were another group assigned to the patriarchal system with a state-endorsed subordination.

Nepal has seen through several changes in 1963, 1990, and 2007. All these politico-legal changes addressed inclusion. These long struggles saw a neo confidence with the promulgation of the Constitution of Nepal in the year of 2015. This constitution sought for inclusion and protection of marginalized, disadvantaged, and vulnerable population with the guarantee of special rights. We now see significant changes in recent years as tripartite collaboration: The Constitution, Laws, and the changed political environment.

Nepal is now a federal state.⁴ The Constitution has distributed state power among Federation, Provinces, and local levels.⁵ All three levels have their own legislative, executive bodies.⁶ Judiciary is in a unitary form, all District Courts and High Courts are under Supreme Court.⁷ However, through their Judicial Committees local levels exercise judicial power as well.⁸ Therefore, in the federal structure, it is supposed to have worked by all level for the maximum benefits for the people especially in vulnerable situation and effective implementation of such laws and access to justice of those disadvantaged people.

We have the Constitution, laws and policies in position that vouch and sought for the inclusion, but these inclusive laws have not been tested in practice yet, particularly at the time of exigencies. Natural or human made disasters, pandemics, calamity, and other exigencies hit the marginalized and vulnerable groups the most. They lack the resources to cope with these exigencies. Deprivation of resources and reluctance of government make them more susceptible to these exigencies. It is evident that these populations need special protection during the exigencies.

1.2 RESEARCH PROBLEM

During extreme exigencies, vulnerable groups and marginalized communities are hard hit. They suffer more than rest of the population. Therefore, they qualify for the special protection from all three branches of the government.

Thus, this research seeks to address following problems:

- What are the national and international guarantees the vulnerable groups and marginalized communities relishes?
- Whether or not these national guarantees are compatible with the international commitments of Nepal?
- What role the executive and judiciary play in protection of these groups during exigencies?

1.3 OBJECTIVE OF STUDY

The objectives behind the study of this research paper are:

- To explore the special rights of marginalized, disadvantaged, and vulnerable population guaranteed in the Constitution, Act, and other legal documents.
- To test the compatibility of national guarantees with international commitments and regional commitments of Nepal.
- To explore the duty and obligations of different branches and layers of government to protect such population at the time of exigencies.

¹Nepal has replaced six Constitutions and gradually shifted it from Rana Regime, Multiparty Democracy, Panchayat System, Monarch to federal democratic republic of Nepal. Above constitutional and political changes took place in past seven decades.

²See Muluki Ain (Country Code) of 1854, Nepal [hereinafter 1854 Code]

³See Muluki Ain (Country Code) of 1963, Nepal [hereinafter 1963 Code]

⁴See Constitution of Nepal, art. 4(1)

⁵See Constitution of Nepal, art. 56(1)

⁶See Constitution of Nepal, parts 8, 14, and 18

⁷See Constitution of Nepal, arts. 127 and 128

⁸See Constitution of Nepal, art. 217

1.4 RATIONALE OF STUDY

Protection of vulnerable, disadvantaged, and marginalized population during exigencies is an obligation under the concept of ideal state. State mechanisms are negatively obliged to protect such population, particularly, when fundamental obligations are involved. State has guaranteed several rights and bestowed obligations; however, these rights and obligations are not tested in exigencies. Thus, this paper tests the rights of vulnerable population with the obligations and duties of the state mechanisms during the exigencies.

Therefore, the rationales behind this paper are:

- This paper explores national and international protections of vulnerable and marginalized population and tests the current standing of Nepal in commitments and reality.
- This paper explores the duties and obligations of state mechanism to protect such groups in exigencies and acts as a guide to state and non-state actor to realize their obligations.
- This paper may help to make change in laws and policy and helps to reform laws regarding protection of marginalized and vulnerable population during exigencies.
- This paper may also be beneficial for scholars and institutions working for the protection of vulnerable and marginalized population.

1.5 LIMITATION OF STUDY

This paper is strictly confined with the research problem stated above. This paper focuses on the protection of vulnerable, disadvantaged, and marginalized population during the time of exigencies like natural and human-made calamities, pandemics, and others. This paper extracts international conventions to which Nepal is a party, and protective laws under similar circumstances from the SAARC nations.

1.6 ORGANIZATION OF STUDY

To make the study of this paper systematic and scientific, this research paper is organized in five chapters. Chapter 1 provides for the Introduction to this paper where reader can briefly

understand the overall framework of the paper. This chapter basically introduces the premise of the research and marks the research problem, objectives, rationale, and limitation of the research. A chapter 2 proceeds on understanding marginalized groups, their situation during exigencies, and explores constitutional, legal, national, and international guarantees for such population; Chapter 3 covers judicial protection of such groups with some case laws. Chapter 4 presents obligations and duties of all three layers of government of Nepal. Chapter 5 presents the finding of overall research and tends to analyze the entire research with some of the recommendations necessary as revealed by the study.

CHAPTER II

2.1 DEFINING SPECIAL GROUPS AND THEIR RIGHTS

Human Rights are rights guaranteed to all human beings without any distinction.⁹ The UDHR, 1948 Article 7 recognizes “All are equal before the law and are entitled without any discrimination to equal protection of the law”.¹⁰ Equality before the eyes of law is a basic tenant of modern democratic society. It stands with the fundamental human rights that “Everyone is equal before the eyes of Law. No one shall be discriminated on any ground except as provided for in the law”.¹¹ The Icelandic Human Rights Center defines, “the right to equal treatment requires that all persons be treated equally before the law without discrimination. These rights guarantee that those in equal circumstances are dealt with equally in law and in practice.”¹²

Therefore, the principle of equality cannot be applied abruptly. It has certain limitation, as stated by the Icelandic Human Rights Center, “... those in equal circumstances are dealt with equally in law and in practice”.¹³ Hence, those who are not in equal circumstances must be dealt differently. Therefore, it has become more and more obvious that special groups need more express explication of their human rights. Who these special

⁹See Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810, 1948 [UDHR], art. 7

¹⁰Id.

¹¹United Nations Office of High Commissioner for Human Rights (OHCHR), Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Professional training series no. 9 New York and Geneva (2003), p. 636

¹²Icelandic Human Rights Center, The Right to Equality and Non-discrimination, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination> (last visited 19 Oct 2020)

¹³Id.

groups are? Forthrightly, it is hard to define the special groups. However, these groups hold certain fundamental characteristics or tenants that distinct them from general population. Therefore, to understand what special groups are, it is better to understand who special groups are.

A general understanding to the special groups is those who are historically marginalized, discriminated, and left out of the mainstream of development, which has minimum opportunity to say no and has minimum access at the decision-making body. A most common tenant these groups holds is, these are the groups that are “especially vulnerable to abuse of human rights; groups that are structurally discriminated against like women and groups that have difficulties defending themselves and are therefore in need of special protection”.¹⁴ In all circumstances, a) women and girls; b) children; c) refugees; d) internally displaced persons; e) stateless persons; f) national minorities; g) indigenous peoples h) migrant workers; i) disabled persons; j) elderly persons; k) HIV positive persons and AIDS victims; and l) lesbian, gay and transgender people are generally identified groups that requires special protection in laws and in action. Certainly, this is not an exhaustive list of groups in need of special protection. There are certain groups that suffer from discrimination and oppression and require special protection.¹⁵

Above mentioned groups requires special protection in all circumstances, but when it comes to health exigencies, WHO identifies “children, pregnant women, elderly people, malnourished people, and people who are ill or immunocompromised (having an impaired immune system), are particularly vulnerable when a disaster strikes, and take a relatively high share of the disease burden associated with emergencies”.¹⁶

Hence, Special groups are the groups that experience a higher risk of discrimination, poverty and social exclusion, low opportunity to participate in civil and political decision making, and relatively

lower accessibility to socio-economic opportunity than the general population.

2.2 HISTORICAL CONTEXT OF DISADVANTAGED AND VULNERABLE GROUPS (NATIONAL AND INTERNATIONAL CONTEXT-INDIA, BHUTAN, AND SAARC COUNTRIES)

Inequalities among the ‘haves’ and ‘haves not’ are deeply rooted in many societies. This is not a recent phenomenon. The inequalities are deeply rooted in the past and have been carried forward into the present.¹⁷ Many who has no access to basic rights and decision-making, or who were prevented from participating in some or all aspects of the collective life in a given society are “historically disadvantaged population” or “disadvantaged population”, the terms coined by the United Nations in 1948.

The people that are historically disadvantaged are women and children, the elderly, persons with disability, poor, and minorities (ethnic, religious, linguistic, or aboriginal) who cannot or do not participate in the social, political, or economic systems of their societies or are living under slave-like conditions, and become the targets of discrimination.¹⁸ These discriminations are not a recent doing. It can be traced back to history in different economies of South Asia. If we look in the historical context of marginalization, the trends of marginalization are almost similar. Marginalization of women is historically prevalent throughout the world. South Asia is no exception. The marginalization against women in South Asia context is systematic and widespread with patriarchal mindset and state endorsed discrimination. Faith of other vulnerable groups remains the same throughout the South Asia. Separately stating their situation via each country profile will be a repetition of their situation. However, the marginalization of other vulnerable groups should not be left unexplored, particularly about their historical development in India sub-continent.

¹⁴Icelandic Human Rights Center, The Human Rights Protection of Vulnerable Groups, available at t.ly/ZJsW (last visited 19 Oct 2020)

¹⁵Id.

¹⁶Shame Mugova & Paul R. Sachs (eds), Opportunities and Pitfalls of Corporate Social Responsibility: The Marange Diamond Mines Case Study, CSR, Sustainability, Ethics, & Governance, Springer (2019) available at <https://doi.org/10.1007/978-3-030-17102-5>

¹⁷Estes R.J. (2014) Disadvantaged Populations. In: Michalos A.C. (eds) Encyclopedia of Quality of Life and Well-Being Research. Springer, Dordrecht. https://doi.org/10.1007/978-94-007-0753-5_742

¹⁸Id.

There is a widened gap among haves and have not in India. It is believed that hierarchical character of Indian society led to the deprivation of a large section of excluded groups, constitutionally known as the Scheduled Castes (SCs), the Scheduled Tribes (STs) and the Other Backward Castes (OBCs).¹⁹ In India, exclusion revolves around the societal interrelations and institutions that exclude, discriminate, isolate, and deprive some groups based on their identity like caste and ethnicity. Historically, the caste system has regulated the social and economic life of the people in India.²⁰

Many scholars argue that the historical and legal context of today's social discrimination derives its legitimacy from the ancient scriptures of the Hindu religion. They argue that "these scriptures provide for this [social discrimination] on the assumption that there is no uniform source of the origin of the human population."²¹ There is a popular belief that the social structure of Hindu is formed in four different social groups as Brahmins, Chhetris, Vaishyas, and Sudras, otherwise known as 'The Four Varnas'. These ideas about differences in the origin as well as the related roles and responsibilities of people are the basis for a caste-based division and discrimination in society.²²

The marginalization of what we see to the SCs, STs, and OBCs in India, we see similar marginalization in Nepal. The caste-based social discrimination in Nepal was prevalent since centuries. The legalization of caste system can be seen during the reign of different rulers. Such as Jayasthiti Malla (1382-1395) divided the Newars of Kathmandu valley into 64 castes; the Varna classification can be seen in the Prithivi Narayan Shah's Divya Upadesh where he highlights Nepal as "a common garden of four varnas and thirty-six castes"; later, Ram Shah of Gorkha implemented some strict regulations, prescribing different qualities of garments for different castes, prohibiting low caste people from living in Pakka houses, and requiring them to settle in areas close to riverbanks or in rural areas.²³

The caste-based rules until the mid-19th century induced by the state were effective only in specific localities.²⁴ A legitimate countrywide caste based system and legal provisions in accordance to the caste was introduced with the Country Code of 1854, that attempted to universalize these regulations for all categories of people living in all parts of the nation. Firstly, the Code classified the caste groups into pure and impure classes and then divided them again by ranking them into five broader categories.²⁵

- a) Wearers of the holy thread (तागाधारी) or the twice-born—Brahmin, Thakuri, Chhetri, ascetic sects,
- b) Non-enslavable alcohol-drinkers (नामासनिमतवाली): Magar, Gurung Sunuwar, and some Newar castes, etc.
- c) Enslavable alcohol-drinkers (मासनिमतवाली): Cepang, Hayu, Tharu and the general category of Bhote including Sherpas, the group now known as Tamang and other groups with close Tibetan cultural affiliation, etc.
- d) Impure but touchable castes (पानीनचल्नेछोईछट्टिहाल्नुपर्ने — Castes from whom water could not be accepted but whose contact does not require aspersion of water): Newar service castes -- butchers, washermen, tanners — Europeans (Mlecch) and Muslims.
- e) Untouchable castes (पानीनचल्नेछोईछट्टिहाल्नुपर्ने — castes from whom water could not be accepted and whose contact requires aspersion of water for purification): पर्वतिया (blacksmiths, tanners, tailors) and Newar (fishermen and scavengers) service castes.

The Country Code of 1854 prescribed norms of inter-caste and inter-community relations and behavior, concerning for example, commensality, sexual relations, and physical contact. Punishments for infringements of laws were lighter for the upper castes than other categories of 'castes'.²⁶ This Country Code of 1854 governed the pattern of social relation until its provisions were amended and replaced by the Naya Muluki Ain (New Country Code) in 1963.²⁷

¹⁹Sukhdeo Thorat, Human Poverty and Socially Disadvantaged Groups in India, Human Development Resource Center, Discussion Paper Series-18 (January 2007), p. 3, available at t.ly/OyRg, (last visited 20 Oct 2020)

²⁰Id., p. 9

²¹Tulsi Ram Pandey et. al., Forms and Patterns of Social Discrimination in Nepal: A Report, Issue 8 of UNESCO Kathmandu series of monographs and working papers, United Nations Educational, Scientific and Cultural Organization (2006), p. 15

²²Id.

²³Id., p. 16

²⁴Id., p. 16

²⁵Pradhan, Rajendra, Negotiating Multiculturalism in Nepal: Law, Hegemony, Contestation and Paradox, Conference Paper, August 2007, p. 11.

²⁶Pradhan, Rajendra, The Ain of 1854 and after: Legal pluralism, models of society and ethnicity in Nepal, Conference Paper, 2015, p. 10.

²⁷See 1963 Code.

2.3 LEGAL PROTECTIONS OF SPECIAL GROUPS

When we talk of legal protections of special groups, such protections have two paradigms, (a) national legal protection and (b) international legal protection. National legal protections negatively obliges the government to protect these groups while international legal protections are soft laws where government has moral obligation but lacks legal sanctity to protect these rights unless the legal system itself uses monist approach to the domestication of international laws. The Treaty Act of Nepal, section 9(1) provides:

In case of a provisions of a treaty, to which Nepal or the Government of Nepal is a party upon its ratification, accession, acceptance or approval by Parliament, is inconsistent with a provision of prevailing laws, such a provision of the law shall be void to the extent of inconsistency for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.²⁸

This clause provisioned for the legislative actions for any international treaties and conventions to have domestic effects. This provision explains that Nepal adopts dualist approach to the treaties and conventions to which it is a party. Irrespective of the approaches Nepal adopt to its treaty obligation, Nepal has the state policy “to implement international treaties, agreements to which Nepal is a party,”²⁹. Pursuant to the Constitution and the Treaty Act, international obligations of Nepal invoke obligation for its domestication and implementation. Owing to this standpoint, let explore national and international obligation of Nepal toward the special groups.

2.3.1 CONSTITUTIONAL NORMS AND STANDARDS

National obligations towards the special groups stand on the constitutional standards and norms towards it. Constitution being the fundamental law of Nepal, obligation, if any, ascertained in the Constitution sets the founding stones for other legal or statutory obligation towards these special groups. The

Constitution has following provision that protects and guarantees the rights of special groups:

A. RIGHT TO EQUALITY

Though this right is the right guaranteed to everyone irrespective of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds, this right has acquired the *jus cogens* status as this right ascribe the status of *jus cogens*, any derogation from such rights are not permitted.³⁰

Article 18 (1) of the Constitution guarantees, “[a]ll citizens are equal before the law and no one is denied of equal protection of law”³¹ without distinction.³² However, the Constitution has envisioned the person who are not in equal circumstances requires special treatment. Therefore, the proviso of Article 18(2) foresees the need for the special arrangements for the protection, empowerment or development of the citizens including those falling under the groups requires special protections.³³

Similarly, the certain vulnerable groups are specially protected under the Constitution guaranteeing through the fundamental rights. Right against untouchability and discrimination protects persons from vulnerable groups from any forms of discriminatory actions including protection of untouchability (a discriminatory act particularly prevalent in South Asian settings) including the protection from caste-based discrimination.³⁵

B. RIGHTS OF WOMEN AND CHILDREN

Women and children are most vulnerable population, and such vulnerability is further broadening with an attitude of excluding more than half a population from the development. Several political revolutions anticipated the elimination of all the barriers against women. But unfettered realizations on the elimination of such barriers are still a no show. In the brink of these disparity, the 2015 Constitution (though also guaranteed in previous

²⁸Treaty Act, 2047 (1990), Section 9(2)

²⁹Constitution of Nepal, Art. 51.

³⁰Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331, art. 53, [hereinafter VCLT]

³¹Constitution of Nepal, Art. 18(1)

³²Constitution of Nepal, Art. 18(2)

³³Constitution of Nepal, Proviso of Art. 18 (2)

Constitutions) guarantees equal rights to women trying to curb the gender-based discrimination³⁶ and violence against women³⁷ including guarantees to participate in all bodies of the state based on the principle of proportional inclusion³⁸ and special opportunity for overall socio-economic development.³⁹

Children are most at risk of abuse. They are susceptible to beatings and physical punishment, at higher risk of infanticide, sexual abuse, forced prostitution, and educational and nutritional neglect. Globally, more than 130 million children between the ages of 6 and 11 years are not in school, 60% of whom are girls.⁴⁰ They require special protections from the state and the law. Constitution of Nepal assures rights of the child for overall personality development.⁴¹ The Constitution put obligation on both the families and the state to protect and provide children.⁴² Similarly, the child in special needs such as one who lacks care, orphans, disabled, conflict victim, displaced or vulnerable have the right to special protection and facilities from the State.⁴³

C. RIGHTS OF MARGINALIZED POPULATION

Marginalized populations are groups and communities that experience discrimination and exclusion (social, political, and economic) because of unequal power relationships across economic, political, social and cultural dimensions.⁴⁴ ‘Dalit community’ refers to communities who have been left behind in social, economic, educational, political and religious spheres and deprived of human dignity and social justice due to caste based discrimination and untouchability.⁴⁵ ‘Caste-based Untouchability’ refers to those communities, who have been discriminated against as water polluting, or touching whom requires purification,

untouchables or any community that was identified as untouchable before the promulgation of the Country Code, 1963⁴⁶. State mechanism has come with several approaches to curb discrimination against Dalit Communities. The Constitution for the first time included rights of Dalit as fundamental right.⁴⁷ It ensures the right to participate in all bodies of the State on the basis of the principle of proportional inclusion including maintaining of special provisions in law for the empowerment, representation, and participation of the Dalit community in public services as well as other sectors of employment,⁴⁸ education for Dalit Students,⁴⁹ and health and social security to the Dalit community.⁵⁰ The rights to use, protect and develop their traditional occupation, knowledge, skill and technology of Dalits is constitutionally protected rights.⁵¹

D. STATE POLICIES ON THE PROTECTION OF SPECIAL GROUPS

Directive Principles and States Policies are the guiding attributes of any state for its democratic and welfare commitments. The State is positively obliged to mobilize means and resources to implement its directives principles and state policies.⁵² Part 4 of the Constitution lists its directive principles and state policies.⁵³ The policies does not specifically provides for the protection of marginalized and vulnerable groups, however, several policy level protections are entrusted across several Articles and Sub-articles of Part 4 of the Constitution.

Article 51(c) on the policies relating to social and cultural transformation, enlist the guiding principle that the state must positively realize “to end all forms of discrimination, inequality, exploitation and injustice in the name of religion, custom, usage, practice and tradition existing in the society”.⁵⁴

³⁴Constitution of Nepal, Art. 24

³⁵Constitution of Nepal, Art. 24

³⁶Constitution of Nepal, Art. 38

³⁷Constitution of Nepal, Art. 38

³⁸Constitution of Nepal, Art. 38(4)

³⁹Constitution of Nepal, Art. 38(5)

⁴⁰World Health Organization, Fact Sheets on Child abuse and neglect, 2002, available at t.ly/hvzd (last visited 20 Oct 2020)

⁴¹Constitution of Nepal, Art. 39

⁴²Constitution of Nepal, Art. 39(2)

⁴³Constitution of Nepal, Art. 39(9)

⁴⁴The National Collaborating Centre for Determinants of Health, Marginalized Population, available at t.ly/m2TJ, (last visited 21 Oct 2020)

⁴⁵Dalit Civil Society Organizations' Coalition for UPR, Nepal And International Dalit Solidarity Network (IDSN), Human Rights Situation of Dalit Community in Nepal, United Nations Universal Periodic Review of Federal

⁴⁶United Nations Development Program, The Dalits of Nepal and a New Constitution A Resource on the Situation of Dalits in Nepal, their Demands and the Implications for a new Constitution, Kathmandu, September 2008, p. 22 available at t.ly/GejK (last visited 21 Oct 2020)

⁴⁷Constitution of Nepal, Art. 40

⁴⁸Constitution of Nepal, Art. 40(1)

⁴⁹Constitution of Nepal, Art. 40(2)

⁵⁰Constitution of Nepal, Art. 40(3)

⁵¹Constitution of Nepal, Art. 40(4)

⁵²Constitution of Nepal, Art. 49(2)

⁵³See Constitution of Nepal, part 4

⁵⁴Constitution of Nepal, Art. 51(c)(5)

Similarly, the policies relating to social justice and inclusion obliges government to keep on making appropriate arrangements for the livelihoods of the helpless single women, while according priority to them in employment on the basis of skills, competency and qualification⁵⁵ and make self-dependent the women who are vulnerable, subjected to social and family exclusion and victims of violence self-reliant by making their rehabilitation, protection and empowerment.⁵⁶

The policies has special arrangement for the Madhesi Community, Muslims, and Backward class as it emphasizes on social justice and inclusion “for equal distribution of economic, social and cultural opportunities and benefits to the Madhesi community, Muslims and backward class, and for opportunities and benefits to the indigent citizens within such communities for their protection, upliftment, empowerment and development”⁵⁷ and “for opportunities and benefits for the protection, upliftment, empowerment, and development of the citizens of the oppressed and backward regions and for the fulfillment of their basic needs”.⁵⁸

Pursuant to Part 27 of the Constitution, the National Women Commission, National Dalit Commission, National Inclusion Commission, Madhesi Commission, Tharu Commission, Muslim Commission and Indigenous and Ethnic Commission have separate Act that enables them to function and perform their duties pursuant to the power guaranteed in the Constitution⁵⁹ and the procedures prescribed in their respective Acts.

2.3.2 LEGISLATIVE NORMS AND STANDARDS

Constitutional guarantees are often realized by the legislative action that provides elaboration of those guarantees. Therefore, there are various laws in place. Nepal has general laws in place that applies equally to all in all circumstances. the Muluki Dewani Samhita (the Country Civil Code), 2074, Muluki Dewani Karyabidhi Samhita (the Country Civil Procedure Code), 2074, Muluki Aparadh Samhita (the Country Criminal Code), 2074,

Muluki Aparadh Karyabidhi Samhita (the Country Criminal Procedure Code), 2074, The Criminal Offence (Sentencing and execution) Act, 2074 combinedly we can call them general laws, provide different rights of disadvantaged people and punishment on the violation of such rights.

The Country Civil Code, 2074 (2017) has many provisions on civil matters such as rights and duty, marriage, family, persons, property, contracts, and conflicts of law (private international law).⁶⁰ The Country Civil Code, 2074 treats men and women in equal footing in terms of marriage, property and on other rights and liabilities unlike previous Country Code of 1963.⁶¹ Women were treated as second class citizen by the legal system at the initial time. In the course of time those discriminatory provisions were amended, however some of the provisions were not. Only after enactment of the new Country Civil Code, 2074 women found themselves in equal status comparing to men.

The Country Criminal Code, 2074 (2017) sets certain standards on human and social behaviors and provides for punishment on the violation of such standards. The said Code provides, inter alia, different provisions on protection of rights of vulnerable and disadvantaged people such as women, children, persons with disability, senior citizens, Dalit community etc.⁶²

Section 38 of the said Code provides that the offence was committed against an elderly person above the age of seventy five years or a person being of unsound mind by reason of physical or mental illness or a person incapable of defending himself or herself because of disability or a child is also a factor aggravating the gravity of offence.⁶³ It means if anyone commits an offence against such vulnerable groups, that offence amounts aggravating the gravity of an offence thereby the more punishment shall be imposed to on an offender.

⁵⁵Constitution of Nepal, Art. 51(j)(1)

⁵⁶Constitution of Nepal, Art. 51(j)(2)

⁵⁷Constitution of Nepal, Art. 51(j)(10)

⁵⁸Constitution of Nepal, Art. 51(j)(11)

⁵⁹See Constitution of Nepal, part 27

⁶⁰See Muluki Civil Code, 2017 [hereinafter 2017 Civil Code]

⁶¹See 2017 Civil Code, Secs. 67, 93, and 205

⁶²See Muluki Criminal Code, 2017 [hereinafter 2017 Criminal Code]

⁶³See 2017 Criminal Code, sec. 38

Sections 118 prohibits behaving on any one indecently or manhandle or annoy any woman, child or physically disabled in any public place or attempt to do such act and provides punishment of imprisonment and fine for such behaviors.⁶⁴ Section 188 has the provision on respect to woman's right on motherhood.⁶⁵ It states that no person shall cause a pregnant woman to abort by coercing, threatening, alluring, or inducing her and such act is liable to the punishment of imprisonment and fine.⁶⁶

Chapter 18 is about offence related to prohibition of rape and punishment on such offences. Section 219 under the Chapter states that where a man has sexual intercourse with a woman without her consent or with a girl child below the age of eighteen years even with her consent, the man shall be considered to commit rape on such woman or girl child and such offence is liable to the punishment up to life imprisonment and heavy fine.⁶⁷

The said Code provides for the special protection to the children recognizing them as a vulnerable group. Section 45 of the Code mentions that a person who has committed an act constituting an offence under the law shall not be liable to any sentence if that person has not attained the age of ten years at the time of the commission of such act.⁶⁸ Similarly, the Section provides for mitigation on punishment if any person (children) above 14 and below the age of 18 commits a crime.⁶⁹

Similarly, there are number specific Acts to protect and promote the rights of disadvantaged groups, such as children, women, senior citizens, persons with disabilities, Dalits, indigenous and ethnic people et cetera. Let us investigate some of the legislations they provides for the rights of vulnerable and disadvantaged population.

After the promulgation of the Constitution of Nepal in 2015, then federal parliament took an initiative to provide for the realization of fundamental rights guaranteed in the Constitution.⁷⁰ This

initiative brought about some major Acts for the implementation and realization of fundamental rights guaranteed in the Constitution for the disadvantaged and marginalized population.

(A) THE CRIME VICTIM PROTECTION ACT, 2075 (2018)

Crime victims need special protection as they are under threat and insecurity or fear. They have undergone suffer as they fall under vulnerable groups. Therefore, this Act is brought into force “to make necessary provisions on the protection of the rights and interests of the victims ... [to provide] compensation to the victims for damage sustained as a result of an offence”⁷¹. Similarly, the Act sought to “reduce adverse effects caused to the victims of crimes, [ensure] information related to the investigation and proceedings of the cases in which they have been victimized, [ensure] justice along with social rehabilitation and compensation pursuant to law, [and ensure] the right of crime victims to justice conferred by the Constitution of Nepal”.⁷² The Act in its chapter two ensures several rights including duties of the victims in the criminal justice process.⁷³

The Act provides a privilege to crime victims than others. The victims may submit a report to the prosecuting authority mentioning the damage or impact caused upon him/her⁷⁴ and the court does not presume that less damage has been caused by the sole reason that victim has not submitted the report.⁷⁵ The court may provide an order for medical treatment and compensation or any kind of interim relief amount until the final judgment is passed.⁷⁶ While making final order or judgment, the court may make an order to be paid reasonable compensation to the victim by the offender⁷⁷ and such amount is determined on the ground of various matters such as travel cost, legal fee and others.

To implement the provisions of the Act, Victim Compensation Fund, Regulation, 2077 has been framed by the Government of Nepal. The fund is considered as fund for the compensation of all crime victims. Medical treatment, relief and compensation shall be made by the fund. Therefore, this fund shall be very useful to

⁶⁴See 2017 Criminal Code, Sec. 118

⁶⁵See 2017 Criminal Code, sec. 188(1)

⁶⁶Id.

⁶⁷See 2017 Criminal Code, Chapter 18, Sec. 219

⁶⁸See 2017 Criminal Code, sec. 45(1)

⁶⁹See 2017 Criminal Code, sec. 45(2)

⁷⁰See Constitution of Nepal, Part 3 on Fundamental Rights and Duties

⁷¹Crime Victim Protection Act, 2018 [Nepal], Preamble

⁷²Id.,

⁷³Id., Chapter 2

⁷⁴Id., Sec. 25

⁷⁵Id., Sec. 28

⁷⁶Id., Sec. 29

⁷⁷Id., Sec. 30

the victims, as they feel secured and hopeful. An offender shall pay levy for the fund and reimbursed.

(B) THE RIGHT TO EMPLOYMENT ACT, 2075 (2018)

Every citizen has a right of employment.⁷⁸ Employment is not only a matter of earning but also connected with dignified life. Disadvantaged and vulnerable people do not have access to resources; thereby they cannot compete equally with other groups to have employment when not in an equal circumstance. Therefore, this act is brought to effect as an important instrument “to ensure the right of every citizen including disadvantaged and vulnerable people to employment, provide every citizen with an opportunity to choose employment according to his or her capacity, and in relation to the terms and conditions of employment and unemployment support.”⁷⁹ The Act in its chapter two ensures right to employment that comprises several labor related rights, including right to profess employment of its choice.⁸⁰

(C) THE ACT RELATING TO RIGHTS OF PERSONS WITH DISABILITIES, 2074 (2017)

Persons with disabilities face discrimination and barriers that restrict them from participating in society on an equal basis with others every day. They are commonly denied their rights to be included in the general school system and the workplace, to live independently in the community, to vote, to participate in sport and cultural activities, to enjoy social protection, to access justice, to choose medical treatment and to enter freely into legal commitments such as buying and selling property.⁸¹ Nepal is a party to the Convention on the Rights of Persons with Disabilities.⁸² The Act relating to the Rights of Person with Disabilities is promulgated “to respect and fulfill the obligations created under the Convention and to respect their civil, political, economic, social and cultural rights by doing away with discrimination against persons with disabilities”⁸³

and the Act ensures “the environment that enables persons with disabilities to earn self-reliant and respectful living by empowering persons with disabilities and getting them to have participation in the process of policy making, and development.”⁸⁴ Recognizing persons with disabilities as vulnerable group, the Act prioritizes the persons with disabilities the right to obtain security, rescue and protection in times of armed conflict, state of emergency or disaster. Likewise, the Act assigns duty to Government of Nepal to protect the persons with disabilities against exploitation, violence and harassment and gender-based violence by obtaining such information, taking legal action against wrongdoers, providing security, preventing such actions and launching awareness and counseling.⁸⁵

Furthermore, the Act ensures the right to have easy access to services and facilities such as education, health, employment, transportation and other public services and they have the right to obtain social security which Government of Nepal provide for the disadvantaged and vulnerable groups.⁸⁶ The rights included in the Act enable them to enjoy rights i.e. enabling rights.

(D) THE RIGHT TO FOOD AND FOOD SOVEREIGNTY ACT, 2075 (2018)

Disadvantaged and marginalized people are even deprived from basic rights such as food, housing, or clothing.⁸⁷ For that reason, the Right to Food and Food Sovereignty Act, 2075 (2018) is brought into effect “to implementation of fundamental rights relating to food, food security and food sovereignty of the citizens, and making appropriate mechanism therefore, and ensuring access of the citizens”.⁸⁸ The citizens mentioned in the preamble include disadvantaged and marginalized people to foods. Chapters 2 of the Act ensure the right to food and food sovereignty along with certain enabling rights.⁸⁹

⁷⁸See Constitution of Nepal, art. 33

⁷⁹Right to Employment Act, 2018, [Nepal] Preamble

⁸⁰See Id., Chapter 2

⁸¹OHCHR, Human Rights of Persons with Disabilities, available at <https://www.ohchr.org/EN/Issues/Disability/Pages/DisabilityIndex.aspx> (last visited 24 Oct 2020).

⁸²See United Nations Treaty Collection, Depository, Convention on the Rights of Persons with Disabilities available at t.ly/POcE (last visited 24 Oct 2020)

⁸³Act Relating to Rights of Persons with Disabilities, 2017 [Nepal], preamble

⁸⁴Id.

⁸⁵Id., Secs. 10 (2) and (3)

⁸⁶See Id., Chapter 3

⁸⁷Office of the United Nations High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, HR/PUB/06/12, para. 15.

⁸⁸Right to Food and Food Sovereignty Act, 2018, [Nepal] preamble

⁸⁹Id., Chapter 2

The Act aims to protect vulnerable and poor people from food insecurity.⁹⁰ Local levels are given a responsibility to identify and maintain the records of such vulnerable people who are in food insecurity due to poverty, geographical inaccessibility, and disaster or similar other reasons and local levels have been authorized to issue food support identity card to such identified people.⁹¹ Likewise, all three levels of government shall adopt necessary measure in order to reduce adverse impact likely to occur in food and nutrition security for any reason to provide food immediately in the emergency situation such as in the event of earthquake, flood, landslide, snowfall, cold wave of inferno.⁹² In such emergency, the Government of Nepal may declare food crisis zone for providing food and nutrition during such period. Disadvantaged and marginalized people who are depended on their traditional farming, the Act aims to prioritize and distribute such traditional food produced in local level.

(E) THE RIGHT TO HOUSING ACT, 2075 (2018)

It is a duty of welfare state to protect and ensure basic rights of citizens. As mentioned earlier, food, clothing, and housing are the fundamentally important for the survival of a human being. However, marginalized and disadvantaged populations are deprived of these basic needs. The Constitution of Nepal has assured to provide housing for homeless or disadvantaged people.⁹³ Pursuant to the commitment, this Act has been enacted to provide housing to all homeless citizens with appropriate and safe housing facility.⁹⁴

The Act ensures that every citizen shall have right to an appropriate housing and the responsibility to respect, protect and fulfill of such rights have been vested to Government of Nepal, Provincial Government and Local Level.⁹⁵ The Act ensures housing for all homeless persons. Government of Nepal, Provincial Government, or Local Level shall have to provide the homeless person and

family.⁹⁶ The homeless person and family shall be provided concessional financial facility as well for the housing facility.⁹⁷ For this purpose, local level shall collect the list and settlement conditions of person and family to be provided housing facility and provide identity card to the concerned persons or family as identified them as homeless. For the interim relief the Government of Nepal, Provincial Government and Local Level shall provide the person and family displaced with disaster with the temporary housing or financial support and make proper arrangement for the resettlement of the person and family fully displaced due to disaster.⁹⁸ In this way, the Act guarantees the housing rights to the homeless persons.

(F) THE RIGHT TO SAFE MOTHERHOOD AND REPRODUCTIVE HEALTH ACT, 2075 (2018)

It is now a platitude to say women are highly marginalized and disadvantaged groups of all. Child and mother mortality rate are high in the country. However, this time the Constitution of Nepal has ensured the rights of women including the right to safe motherhood and reproductive health of women.⁹⁹ Therefore this Act is put in place “to ensure right to motherhood and reproductive health service safe, qualitative, easily available and accessible, in order to respect, protect and fulfill the right to safe motherhood and reproductive health of the women.”¹⁰⁰ The Act ensures reproductive rights¹⁰¹ and right to safe abortion.¹⁰²

The Act provides that services including family planning, reproductive health, safe motherhood, safe abortion, emergency obstetric care and newborn care, reproductive health morbidity shall be disabled friendly and no one shall be discriminated enjoying such services or rights on the ground of origin, religion, color, caste, ethnicity, sex, community, occupation, business, sexual and gender identity, physical or health condition, disability, marital status, pregnancy, creed, state of being suffering from any disease or infected with virus or vulnerable to such infections, state of reproductive morbidity, personal

⁹⁰Id., sec. 4(a)

⁹¹Id., sec. 5(1)

⁹²See Id., chapter 6

⁹³See Constitution of Nepal, Art. 37

⁹⁴See Right to Housing Act, 2018 [Nepal], preamble.

⁹⁵Id., sec. 3

⁹⁶Id., sec. 7

⁹⁷Id., sec. 8

⁹⁸Id., sec. 13

⁹⁹See Constitution of Nepal, Art. 38(2)

¹⁰⁰Right to Safe Motherhood and Reproductive Health Act, 2018 [Nepal], preamble

¹⁰¹Id., Chapter 2

¹⁰²Id., Chapter 3

¹⁰³Id., Sec. 28 & 29

¹⁰⁴See Constitution of Nepal, Art. 43

¹⁰⁵Id.,

relationship or any other such grounds.¹⁰³

(G) THE SOCIAL SECURITY ACT, 2075 (2018)

The Constitution guarantees the right of social security to the disadvantaged people. Similarly, the Constitution allows to have special treatment to such groups in accordance with law.¹⁰⁵ Therefore, this Act is brought into effect “for the protection of the right to social security of the indigent citizens, incapacitated and helpless citizens, helpless single women, citizens with disabilities, children, citizens who are unable to take care themselves and citizens belonging to the tribes on the verge of extinction”¹⁰⁶. This Act ensures social security for the citizens who are unable to achieve standard of living due to their physical, mental, social, and other conditions.¹⁰⁷ Similarly, the Act sought to protect citizens belonging to the tribes on the verge of extinction.¹⁰⁸

The Act targets to provide social security to the vulnerable population namely senior citizens, indigent, incapacitated and helpless persons, and helpless single women, citizens with disabilities, children, and citizens unable to take care themselves. The Dalit and single women senior citizens, after completing the age of sixty years, and other senior citizens, after completing the age of seventy years, the destitute citizens, the citizens who incapacitated and helpless, helpless single woman including who have not had second marriage after getting divorced, (a) widows, (b) unmarried, the citizens with total disability, the children who are extremely destitute, on the verge of extinction and such children who have not completed the age of five years, the citizens belonging to the tribes on the verge of extinction and the citizens who are unable to take care of themselves are entitled to get social security allowances as prescribed by the Government of Nepal.¹⁰⁹

(H) THE ACT RELATING TO CHILDREN, 2075 (2018)

Children are another group with high vulnerability. Child needs special care and protection. Constitution of Nepal has ensured the rights of child recognizing themselves vulnerable groups.¹¹⁰ Likewise, Nepal is a party to the Convention on the Rights of the Child, 1989. The Act relating to the Children is an extension to the constitutional provision on the rights of child and domestication of the Convention. The Act ensures “to implement the Constitution and Nepal's commitment towards international community to maintain the best interests of the children, by respecting, protecting, promoting and fulfilling the rights of the child”.¹¹¹ The Act presents extensive lists of rights of child¹¹² and provisions relating to juvenile justice.¹¹³

Children, who have lost both or either of their parents, or whose parents have disappeared, or have themselves got injured physically or mentally or disability due to a disaster or armed conflict and Children belonging to deprived Dalit communities’ et al. are deemed to children who need of special protection.¹¹⁴

(I) THE ACT RELATING TO COMPULSORY AND FREE EDUCATION, 2075 (2018)

Education is the basic right, and sometimes known as an enabling right, that enables individual to enjoy other rights. The Constitution guarantees compulsory and free education up to basic level and free education up to secondary level.¹¹⁵ This Act has been enacted in order “to ensure easy and equal access and continuity of all to education, and to make education universal, useful for life, competitive and qualitative, while focusing education on the building of nation, being committed to socialism based on democratic values and norms, by implementing, on the ground, the basic human rights of every person to acquire education and the fundamental right conferred by the Constitution”.¹¹⁶ The Act ensures access to education and imposes liability on the state¹¹⁷ and at the same time guarantees

¹⁰³Id., Sec. 28 & 29

¹⁰⁴See Constitution of Nepal, Art. 43

¹⁰⁵Id.,

¹⁰⁶The Social Security Act, 2018 [Nepal], preamble.

¹⁰⁷Id., Chapter 2

¹⁰⁸Id., Section 10

¹⁰⁹See, Id., Sec. 3-11

¹¹⁰Constitution of Nepal, Art. 39

¹¹¹The Act Relating to Children, 2018, [Nepal] Preamble.

¹¹²Id., Chapter 2

¹¹³Id., Chapter 3

¹¹⁴Id., Sec. 48(k)(l)

¹¹⁵Constitution of Nepal, Art. 31

¹¹⁶The Act Relating to Compulsory and Free Education, 2018 [Nepal], Preamble.

¹¹⁷Id., Chapter 2

compulsory and free education to the children of certain age.¹¹⁸

Apart from the legislative actions to realize the fundamental rights of marginalized, disadvantaged groups, the Constitution itself has ensured certain Commissions that are mandated to protect certain vulnerable and marginalized groups. The Constitution provides for several specialized bodies and Commission for the protection of certain vulnerable, marginalized, and disadvantaged groups. Owing to these guarantees, there are several Acts enabling the constitutional Commissions to work for the welfare of marginalized, vulnerable, and disadvantaged population. Pursuant to Part 27 of the Constitution, there are seven Constitutional Commissions for the rights of certain marginalized groups, namely, National Women Commission, National Dalit Commission, National Inclusion Commission, Madhesi Commission, Tharu Commission, Muslim Commission and Indigenous and Ethnic Commission¹¹⁹ and one National Human Rights Commission pursuant to part 25 that vouch to protect human rights of all.¹²⁰ These Commissions are primarily mandated to undertake study on the pertinent issues being faced due to human rights violation and by the ethnic group including gender. Brief introduction to the Acts enabling these Commissions are:

(J) NATIONAL HUMAN RIGHTS COMMISSION ACT, 2068 (2012)

This Act has been made regarding “the functions, duties, powers and procedures of the National Human Rights Commission to ensure the respect, protection and promotion as well as effective implementation of human rights”.¹²¹ The Act is enacted to enable the Commission to function effectively based on the constitutional mandates.¹²²

As per the Act the Commission may conduct or to cause to conduct inspections and monitoring of prisons, other agencies of the Government of Nepal, public institutions or private

institutions or any other place for the protection of human rights, and to provide necessary suggestions or directives to the agency concerned with regard to the improvement to be made in such agency, institution or place for the protection of human rights, similarly it may conduct investigations on human rights violations, to monitor implementation status of the prevailing human rights laws and recommend thereof to the Government of Nepal et al.¹²³

(K) THE NATIONAL WOMAN COMMISSION ACT, 2074 (2017)

The National Woman Commission Act, 2074 (2017) establishes the National Woman Commission for the protection and promotion of the rights and interests of the woman and thereby effectively include them in the mainstream of development and making overall development of the woman establishing gender justice.¹²⁴

As per the Act the Commission has been authorized, inter alia, to work on analyzing the policy, legal aspects, programs and recommend thereof to the Government of Nepal for the reform in order to empower the women, to study on the constitutional and legal provision relating to women and recommend to Government of Nepal for the implementation, to recommend on the adoption of necessary measure to prevent violence or discrimination against women.¹²⁵

(L) THE NATIONAL DALIT COMMISSION ACT, 2074

The National Dalit Commission Act, 2074 enables to establish National Dalit Commission to respect rights of Dalit community, to protect and promote their rights and empower such community thereby eliminate caste based discrimination and include them into mainstream of nation building and development.¹²⁶

Among others, the Commission shall, among others, review, monitor and evaluate the policy and programs relating to Dalit

¹¹⁸Id., Chapter 3

¹¹⁹See Constitution of Nepal, Part 27

¹²⁰See Constitution of Nepal, Part 25

¹²¹National Human Rights Commission Act, 2012 [Nepal] Preamble.

¹²²See Id., & Constitution of Nepal, Art. 249

¹²³See, id., sec. 4

¹²⁴National Woman Commission Act, 2017 [Nepal], preamble

¹²⁵Id., sec. 3

¹²⁶The National Dalit Commission Act, 2017 [Nepal], preamble

¹²⁷See Constitution of Nepal, Art. 256; id., sec. 3

¹²⁸See, id., sec. 9-12

community, to recommend to the Government of Nepal if prevailing laws need to be revised to protect and promote the rights of Dalit community, to recommend the Government of Nepal in order to empower the Dalit community, to conduct consciousness raising program to prevent the caste based discrimination.¹²⁷

The Commission may receive any complaint relating to caste-based discrimination or untouchability and proceed it further. During its procedure, the Commission may conduct initial investigation, and have detailed investigation thereof. After having investigation, if it deems necessary, it may recommend to the Office of the Attorney General to prosecute the case.¹²⁸

(M) THE NATIONAL INCLUSION COMMISSION ACT, 2074 (2018)

The Act provides for the establishment of National Inclusion Commission including to conduct study and research works for the protection of the rights and interests of the communities, including Khas Arya, backward class, persons with disabilities, senior citizens, workers, peasants, minorities and marginalized community, backward class, people of Karnali and the indigent class.¹²⁹

The functions, duties and powers of the Commission are to study the status of implementation of the policies and laws adopted by the Government of Nepal for the inclusion of the community, class and region and make suggestions to the Government for reforms, to study as to whether there has been appropriate representation of the community, class and region in the organs of the State and make suggestions to the Government of Nepal to review the special provisions made for the representation of such community, class and region, to study as to whether the protection, empowerment and development of the community, class and region has been satisfactory and make recommendations to the Government of Nepal about policies to be pursued in the future et al.¹³⁰

(N) THE MADHESI COMMISSION ACT, 2074 (2017)

The Madhesi Commission Act, 2074 enables the Commission to protect and promote the rights of the Madhesi community and empower them.¹³¹

As per the Act, the Commission has functions, duties and powers to recommend the Government of Nepal on the matters to be reformed on policy, legal and institutional upon having study on the overall situation of Madhesi community, to formulate national policy and program and recommend it to the Government of Nepal on the protection and promotion of the Madhesi Commission in order to empower them, to study on whether the provisions relating to Madhesi community have been implemented or not et al.¹³²

(O) THARU COMMISSION ACT, 2074(2017)

The Tharu Commission Act, 2074 enables the Commission to protect and promote the rights of the Tharu community and empower them.¹³³ Among the others, the functions, duties and powers of the Commission are to recommend the Government of Nepal on the matters to be reformed on policy, legal and institutional upon having study on the overall situation of Tharu community, to formulate national policy and program and recommend it to the Government of Nepal on the protection and promotion of the Tharu Commission in order to empower them, to study on whether the provisions relating to Tharu community have been implemented or not and to suggest on the improvement on the prevailing laws relating to protection and promotion of Tharu community et al.¹³⁴

(P) MUSLIM COMMISSION ACT, 2074 (2017)

Muslim Commission Act, 2074 which provides for the Commission to protect and promote the rights of the Muslim community and empower them.¹³⁵

¹²⁷See Constitution of Nepal, Art. 256; id., sec. 3

¹²⁸See, id., sec. 9-12

¹²⁹National Inclusion Commission Act, 2018 [Nepal], preamble

¹³⁰Id., sec. 3

¹³¹The Madhesi Commission Act, 2017 [Nepal], preamble

¹³²Id., sec. 7

¹³³Tharu Commission Act, 2017 [Nepal], preamble

¹³⁴Id., sec. 7

¹³⁵Muslim Commission Act, 2017 [Nepal], preamble

Among others, the functions, duties and powers of the Commission are to recommend the Government of Nepal on the matters to be reformed on policy, legal and institutional upon having study on the overall situation of Muslim community, to formulate national policy and program and recommend it to the Government of Nepal on the protection and promotion of the Muslim Commission in order to empower them, to study on whether the provisions relating to Muslim community have been implemented or not and to suggest on the improvement on the prevailing laws relating to protection and promotion of Muslim community et al.¹³⁶

(Q) INDIGENOUS NATIONALITIES COMMISSION ACT, 2074 (2017)

Indigenous Nationalities Commission Act, 2074 (2017) established the Indigenous Nationalities Commission to identify glorious history and culture of indigenous and ethnic people, protect and promote their rights and empower them.¹³⁷

Among others, the functions, duties and powers of the Commission are to recommend the Government of Nepal on the matters to be reformed on policy, legal and institutional upon having study on the overall situation of Indigenous Nationalities community, to formulate national policy and program and recommend it to the Government of Nepal on the protection and promotion of the Indigenous Nationalities community in order to empower them, to study on whether the provisions relating to Indigenous Nationalities community have been implemented or not and to suggest on the improvement on the prevailing laws relating to protection and promotion of Indigenous Nationalities community et al.¹³⁸

Apart from above Acts on specific subject matters that specifically enables the state to protect rights of disadvantaged and vulnerable groups, there are so many Acts with generic intention to protect the rights of disadvantaged and vulnerable population.

I. CHILD LABOR (PROHIBITION AND REGULATION) ACT, 2056 (2000)

Nepali law recognizes person below age of 18 as children.¹³⁹ As vulnerable group, children are subjected to labor, sometimes forcefully. Therefore, this Act prohibits engaging children in factories, mines, or similar risky activities that are detrimental to the health and well-being of children.¹⁴⁰ The Act enables necessary provisions with regard to their health, security, services and facilities while engaging them in other activities.¹⁴¹

II. HUMAN TRAFFICKING AND TRANSPORTATION (CONTROL) ACT, 2064

Human trafficking is a *hostis humani generis* and a grave violation of human rights.¹⁴² Every year, thousands of men, women, and children fall into the hands of traffickers, in their own countries and abroad.¹⁴³ If we see the percentage of trafficking individuals, most of the victims are women and children.¹⁴⁴ Aiming to control the acts of human trafficking and transportation, and to protect and rehabilitate the victims of such crime including punishment to the perpetrator this Act was enacted.¹⁴⁵

III. DOMESTIC VIOLENCE (OFFENCE AND PUNISHMENT) ACT, 2066 (2009)

Domestic violence is violent, abusive, or intimidating behavior in a relationship. There are many types of domestic violence, including emotional, sexual, social, financial, spiritual, and physical abuse.¹⁴⁶ Nepali legal instrument recognizes domestic violence as an offence and provides punishment on such offence. Domestic Violence (Offence and Punishment) Act, 2066 (2009) has been enacted to respect the right of every person to live in a secure and dignified life, to prevent and control violence occurring within the family and for matters connected therewith and incidental thereto making such violence punishable, and for providing protection to the victims of violence.¹⁴⁷

IV. BONDED LABOR (PROHIBITION) ACT, 2058 (2002)

Bonded labor is modern-day slavery. This form of slavery existed for hundreds of years. The state has a policy to eradicate all forms

¹³⁶Id., Sec. 7

¹³⁷Indigenous Nationalities Commission Act, 2017 [Nepal], preamble.

¹³⁸Id., sec. 7

¹³⁹The Act Relating to Children, 2018, [Nepal], sec. 2(j)

¹⁴⁰Child Labor (Prohibition and Regulation) Act, 2000 [Nepal], preamble

¹⁴¹See Id., sec. 11

¹⁴²*Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)

¹⁴³UN Office Drugs and Crime, Human Trafficking, available at t.ly/9XVW (last visited 25 Oct 2020)

¹⁴⁴Id., available at t.ly/BkIh (last visited 25 Oct 2020)

¹⁴⁵See Human Trafficking and Transportation (Control) Act, 2008 [Nepal], preamble

¹⁴⁶United Nations, Domestic Abuse, available at t.ly/buoE (last visited 25 Oct 2020)

¹⁴⁷Domestic Violence (Offence and Punishment) Act, 2009, [Nepal] Preamble

¹⁴⁸Constitution of Nepal, Art. 29(3)

¹⁴⁹Bonded Labor (Prohibition) Act, 2002, [Nepal], preamble

of slavery.¹⁴⁸ However, the slavery existed in one form or another. Bonded labor has been a social stigma and against social justice. Therefore, the Bonded Labor (Prohibition) Act has been enacted to put a ban on bonded labor (Kamaay shram), to rehabilitate the freed bonded laborers and to uplift their livelihood from the perspectives of social justice.¹⁴⁹

V. CASTE BASED DISCRIMINATION AND UNTOUCHABILITY (OFFENCE AND PUNISHMENT) ACT, 2068 (2011)

Each person is equal in terms of rights and human dignity.¹⁵⁰ To discriminate based on caste is stigma for whole human society. The age long practice of caste-based discrimination and untouchability is not only contrary to human rights principle but also hindrance to social progress and human development. Thereby, the Act was enacted with the intentions that is deduced from its preamble. The preamble reads:

to have timely provisions to protect the right of each person to live with equality, freedom and human dignity by creating an environment where no untouchability and discrimination prevails on the ground of caste, race, descent, community or occupation in the name of custom, tradition, religion, culture, ritual or any other name, to make punishable to the acts of untouchability, exclusion, restriction expulsion, contempt or any other discriminatory act that is against humanity, to provide restitution (compensation) to the victim of such acts, to keep intact the national unity by strengthening the relationship subsisting among general public and to create an egalitarian society.¹⁵¹

VI. THE SOCIAL WELFARE ACT, 2049 (1992)

The Social Welfare Act, 2049 (1992) is to provide humanistic livelihood to the weak and helpless individual, class and community and make them enable; in order to provide status and respect to the welfare oriented institutions and individuals and in order to develop a co-ordination between social welfare oriented organizations.¹⁵² Various non-governmental organizations are working on for the poor, marginalized, disadvantaged people

under the regulation of the welfare council established under the Act. This Act is important for protection of rights of disadvantaged people directly through its structure and functions and indirectly through the non-governmental.¹⁵³

VII. TRADE UNION ACT, 2049 (1992)

This Act is important for the protection and promotion of professional and occupational rights of the persons engaging in self-employment and the workers working in various industry, trade, profession, or service in Enterprises or outside the Enterprises.¹⁵⁴ Workers, who are depended on their works for livelihood, fall under the vulnerable groups and need special protection of their rights.

VIII. POVERTY ALLEVIATION FUND ACT, 2063 (2006)

Poor people have been deprived of enjoying their basic rights. Due to deprivation from resources they are regarded as vulnerable group. This Act is for legal provisions to establish and operate a Fund related to poverty alleviation, for causing to implement various programs related to poverty alleviation through active participation of poor and backward class of society and to alleviate poverty from the country by providing grant and necessary assistance to the institutions involved in the activities for poverty alleviation.¹⁵⁵

IX. DISASTER RISK REDUCTION AND MANAGEMENT ACT, 2074 (2017)

The Act is for effectuate and coordinate the management of all kinds of disaster and save human life and public and private property and other important structures.¹⁵⁶ Among others, the Act sets duties, functions and power to the Executive Committees to work on the management of the disaster including framing special policy and program and implementing for the people such as women, children, senior citizen, Dalits, marginalized groups and community and persons with disabilities who are in disaster risk.¹⁵⁷

¹⁴⁸Constitution of Nepal, Art. 29(3)

¹⁴⁹Bonded Labor (Prohibition) Act, 2002, [Nepal], preamble

¹⁵⁰Constitution of Nepal, Art. 18

¹⁵¹Caste Based Discrimination and Untouchability (Offence and Punishment) Act, 2011 [Nepal], preamble

¹⁵²Social Welfare Act, 1992 [Nepal], preamble

¹⁵³Id.,

¹⁵⁴Trade Union Act, 1992 [Nepal], preamble

¹⁵⁵Poverty Alleviation Fund Act, 2006 [Nepal], preamble

¹⁵⁶Disaster Risk and Management Act, 2017 [Nepal], preamble

¹⁵⁷Id., sec. 8

2.3.3 LEGAL AID IN NEPAL

As a welfare and socialism orientated state, state is obliged to protect and promote rights of disadvantaged and marginalized people. Constitution of Nepal guaranteed, inter alia, legal aid to the indigent people. Clause (10) of Article 20 of the Constitution, under the title of right relating to justice, provides that any indigent party shall have the right to free legal aid in accordance with law.¹⁵⁸ To implement the very constitutional provision, Legal Aid Act, 2054 (1997) is in place.¹⁵⁹ Similarly, Legal Aid Regulation, 1998 is also in existence. The Legal Aid Act and Regulation provides legal aid to a person having less than the specified (40 thousand) annual income shall only be entitled to Legal Aid under this Act.¹⁶⁰ This Act guarantees the right to equal justice and legal aid for those who are unable to protect their legal rights due to financial and social reasons in which legal aid means aid to the indigent person as well as counseling and other legal services such as pleadings, preparation of legal documents and proceedings in the courts or offices on behalf of indigent person.¹⁶¹

Various institutions have been providing legal aid in Nepal in different forms. Generally, there are four sources of legal aid in practice. The sources are courts (the Supreme Court of Nepal, High Courts, District Courts). Remunerated lawyer (Baitanik Wakil) appointed by the court itself, Nepal Bar Association (through its various units and members) Legal Aid Committees under the Legal Aid Act, 2054, and various non-governmental organizations.¹⁶²

Among them some are providing legal aid for five decades. But still legal aid in the country has not yet been firmly institutionalized and integrated. Having consideration of such lack of coordination and cooperation of rendering legal aid, the Government of Nepal has recently approved a new integrated legal aid policy, 2076. The policy aims to coordinate and cooperate among institutions to provide legal aid effectively and in an integrated way. The integrated legal aid system will ultimately guarantee an access to justice to indigent party.

Besides establishing integrated approach to provide legal aid, the Integrated Legal Aid Policy, 2076 also determines goals,

purposes, and strategies. The goal of the policy is to enhance access to justice of indigent people by providing integrated quality free legal aid. Likewise, it has a purpose of, inter alia, establishing socio-legal assistance system by expanding the scope of legal aid. Furthermore, the policy has set various policies and strategies to meet its goal.

The policy aims at providing free legal aid to the following disadvantaged people:

- a. Women
- b. Dalits
- c. Indigenous and ethnic people
- d. Madhesi
- e. Tharu
- f. Minority people
- g. Person with disability
- h. Marginalized people
- i. Muslim
- j. Backward people
- k. Sexual and gender minority
- l. Khas Arya people economically poor
- m. Workers/laborers.
- n. Peasants
- o. Oppressed or people from back warded region, and
- p. A person to whom a court has ordered to provide free legal aid.

The policy establishes National Legal Aid Council under the leadership of Minister for Law, Justice and Parliamentary affairs having extended work scope than the existing Central Legal Aid Committee under the Legal Aid Act, 2054. Representation from various institutions such as Office of the Attorney General, Supreme Court, Office of the Prime Minister and Council of Ministers, Ministry of Children and Senior Citizens, Ministry of Federal Affairs and General Administration, National Women Commission, Nepal Bar Association, non-governmental organizations, rural municipality, municipality, university. Under the policy decision and directive, an Executive Committee is also established to have regular work on the matters.

The policy has the provision for the Legal Aid Committee in each province to render integrated legal aid as established by the provincial government. In local level, there shall be a district

¹⁵⁸Constitution of Nepal, Art. 20 (10)

¹⁵⁹Legal Aid Act, 1997 [Nepal]

¹⁶⁰Id., sec. 3

¹⁶¹Id., preamble, sec. 2(a)

¹⁶²Id., sec. 4

level Legal Aid Committee under the leadership of District Judge having representation from various institutions. In this way, the new legal aid policy not only redefines the existing legal aid programs and policy but also restructures the mechanisms which aiming at enhancing the access to justice of indigent people.

Free Legal Aid Committee is based in Central and District Headquarters. However, there is no provision on free legal aid at the local levels where 753 Judicial Committees with judicial powers are functional. Similarly, free legal aid is confined only to the legal cost. However, free legal aid fails to address the sectors which are very crucial to effectiveness of access to justice such as capacity building of the lawyers providing free legal aid, financial support to those victims for instance women, children and others who lose their shelter as well as their basic needs because of instituting the case, protection of victim and witnesses especially those who are in danger, awareness campaign on civil rights and procedures on remedy against infringement of rights, the judicial committee needs capacity building trainings, program to support the needy for their survival when they lose their livelihood because of lawsuits be launched, awareness campaign on civil rights and others.

2.3.4 NATIONAL POLICIES FOR THE PROTECTION OF SPECIAL GROUPS

As stated above, there are several specific Acts in position that provides for the rights of marginalized, vulnerable, and disadvantaged population. However, neither of those Acts specifically guarantees protection of marginalized, vulnerable, and disadvantaged groups during exigencies. However, there is a National Policy for Disaster Risk Reduction 2018 that invokes certain policies for the rights and protection of marginalized and disadvantaged groups during the exigencies. The Policy comes with an objective “to substantially reduce the natural and non-natural disaster losses in lives and properties of persons, health, means of livelihood and production, physical and social infrastructures, cultural and environmental assets.”¹⁶³

There are several policies set out in it that ensure protection of marginalized groups. The policies ensures for the identification of vulnerable groups and conducting capacity development activities.¹⁶⁴ The policy highlights on “access, representation and meaningful participation of women, children, senior citizen, people with disabilities and the people from economically and socially marginalized communities ensures in all steps and structures of disaster risk reduction based on inclusive disaster management concept.”¹⁶⁵ Likewise, to protect vulnerable communities from the adverse after effects of exigencies, the policy focuses on “insurance of crops, livestock and business/livelihood for risk sharing and risk transfer of vulnerable communities will be promoted and made it easily accessible. In addition, disaster affected community will be provided soft loan from banks and financial institutions”.¹⁶⁶

2.3.5 INTERNATIONAL LEGAL INSTRUMENTS FOR THE PROTECTION OF SUCH GROUPS AND THEIR RIGHTS

The right to equality and non-discrimination is recognized in the Universal Declaration of Human Rights, 1948 (UDHR) Article 2¹⁶⁷ and in different United Nations (UN) human rights instruments such as the International Covenant on Civil and Political Rights, 1966 (ICCPR) Articles 2¹⁶⁸ and 26¹⁶⁹, the International Convention of Economic Social and Cultural Rights, 1966 (ICESCR), Article 2(2).¹⁷⁰ The UDHR, 1948 Article 7 recognizes “All are equal before the law and are entitled without any discrimination to equal protection of the law”.¹⁷¹ However, these equalities are for those who are in equal circumstances. In the decades since the several conventions and declarations have been passed, it has been become more and more obvious that especially vulnerable groups need more express explication of their human rights. Thus, several declarations and conventions of the United Nations have addressed this need for a clearer articulation of the human rights of special groups, in particular, the human rights of (a) women, (b) children, (c) indigenous people, (d) people with disabilities, and (e) migrants and migrant workers. Rights of these groups are dealt separately as guaranteed under several international treaties and conventions.

¹⁶³See National Policy for Disaster Risk Reduction 2018, objectives

¹⁶⁴Id., policy 7.4

¹⁶⁵Id., policy 7.21

¹⁶⁶Id., policy 7.37

¹⁶⁷See UDHR, supra note 9, art. 2

¹⁶⁸See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, 16 Dec. 1966, 999 U.N.T.S. 171 (ICCPR), art. 2

¹⁶⁹See Id., art. 26

¹⁷⁰See International Covenant on Economic Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, 16 Dec. 1966, 993 U.N.T.S. 3 (ICESCR), art. 2(2)

¹⁷¹See UDHR, supra note 9, art. 7

A. RIGHTS OF THE CHILD

Children are the most vulnerable groups, in particular children with disabilities as they are more susceptible to conflicts, forced labor, trafficking of children's and their organs, sexual and physical violence, and psychological ill-treatment. Several human rights bodies and its mechanisms have taken an international obligation to protect children from any form of abuse. The UDHR is a pioneer in protecting children that laid the founding stone on the protection of children as in Article 25 (2) states that "All children whether born in or out of wedlock, shall enjoy the same social protection."¹⁷² The Articles of UDHR, though a declaration, have acquired the status of Jus Cogens. In the words of Li Weiwei:

The UDHR has been universally accepted.... whatever its drafters may have intended in 1948, it is now part of customary law of nations, therefore binding on all states. This assertion is supported by the many statements of international conferences referring to it, and by state practice. It has been suggested that the UDHR has the attributes of jus cogens... [T]he jus cogens status is made explicit in the ICCPR provision that even when the life of a nation is threatened by a public emergency, although the parties may take steps derogating from certain obligations under the Covenant, such measures may not involve discrimination solely on the ground of race, color, sex, language, religious or social origin.¹⁷³

Therefore, the UDHR laid the founding stone for other human rights conventions and treaties to adopt provisions that protects children from abuse. Let us investigate the principle Conventions for the Rights of Child.

The ICCPR, deliberates in Article 24 (1) a right to the protection of the child: "Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State".¹⁷⁴

The ICESCR under article 10(3) presents obligation on the state to create special measure. The said Article reads:

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.¹⁷⁵

The Convention on the Rights of the Child, 1989 is a special Convention with an elaboration of human rights standards in respect of the child. It is an elaboration of Article 24 of the ICCPR and Articles 2 and 25(2) of the UDHR. The Convention put obligation on the States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind.¹⁷⁶ Similarly, the Convention in Article 3(1) requires Government, parliament, and judiciary to take active measures to ensure the best interests of the child as a primary consideration in all actions concerning children.¹⁷⁷ Every legislative, administrative and judicial body or institution is required to apply the best interest principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.¹⁷⁸ The Convention regurgitates the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child.¹⁷⁹ Moreover, this Convention recognizes the rights of disabled children as article 23 (1) obligating state parties to ensure that mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.¹⁸⁰ Section II paragraph 21 of the Vienna Declaration and Program of Action urges States to ratify and implement the Convention on the Rights of the Child. In addition, in all actions concerning children,

¹⁷²See UDHR, supra note 9, art. 25(2)

¹⁷³Li Weiwei, Equality and Non-Discrimination Under International Human Rights Law, 19 The Norwegian Centre for Human Rights (2004) <http://www.mittendrindaussenvor.de/fileadmin/bilder/0304.pdf> (last visited 26 Oct 2020)

¹⁷⁴See ICCPR, supra note 168, art. 24(1)

¹⁷⁵See ICESCR, supra note 170, art. 10(3)

¹⁷⁶UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, art. 2

¹⁷⁷Id., art. 3(1)

¹⁷⁸Id., art. 3(2)

¹⁷⁹Id., art. 6

¹⁸⁰Id., art. 23(1)

non-discrimination and the best interests of the child should be primary considerations.¹⁸¹

Armed conflicts have the utmost detrimental effect on children. They suffer the most under these exigencies. Killing, raping, engaging in child soldiers, permanently disabling are the common consequences faced by children during armed conflict. Protection of children from adverse effects of conflicts are the prime concern. Laws of armed conflict and International Humanitarian Laws put restrictions on conducts before, during and after the armed conflicts, generally known as *jus in bello*, *jus bellum*, and *jus post bellum*. The laws and customs of armed conflicts put limits on the conducts of war that are detrimental to the interest of child. The Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ensures that children shall receive an education in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care.¹⁸² More specifically during an armed conflict, the convention protects children under the age of fifteen from being recruited as a soldier.¹⁸³

B. RIGHTS OF WOMEN

Women are most vulnerable population of all. There exist universal negative attitudes towards women particularly on equality and abilities. These negative attitudes double the discrimination when they are denied of their basic human rights. The paradigm shifts with the human rights instruments and bodies emphasize the protection of vulnerable groups.¹⁸⁴ Though the concept of equality was embodied in the eastern religious texts, it shall be wise to invoke the nature of discrimination faced by women during and after 20th century. The women were highly subjugated with minimum to no rights, especially in the decision-making process. The UN and post UN development in the protection of women is highlighted here.

The Charter of the United Nations reinforce that the people of the United Nations are determined "to reaffirm their faith in fundamental human rights in the dignity and worth of the person (and in) the equal rights of men and women"¹⁸⁵. Article 1 (3) sets out one of the purposes of the United Nations as "...promoting and encouraging respect for human rights and fundamental freedoms for all without discrimination as to ... sex".¹⁸⁶ Similarly, Article 55 (c) provides that the United Nations shall promote "...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to ... sex".

The Articles of the Universal Declaration of Human Rights has acquired the status of *jus cogens* and is recognized under customary international law.¹⁸⁷ The UDHR recognizes that "all human beings are born free and equal in dignity and rights"¹⁸⁸ and "everyone is entitled to all the rights and freedoms without distinction of any kind"¹⁸⁹. Similarly, article 7 recognizes, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination"¹⁹⁰. Article 16 ensure the equal right of men and women to marry.¹⁹¹ Article 23 (2) talks that everyone has the right to equal pay for equal work without any discrimination.¹⁹² Recognizing the women and child are in need of special protection, Article 25 (2) states that the mother and child are entitled to special assistance.¹⁹³

The Convention on the Elimination of All Forms of Discrimination against Women, 1979 is a special treaty that protects the rights of all girls and women. With the idea of ending discrimination faced by all girls and women, the United Nations accepted CEDAW on 18 December 1979 presenting obligation on the governments to end discrimination faced by girls and women in their country upon ratification.

¹⁸¹UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, Section II para. 21

¹⁸²International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Part II, Art. 4 (3) (a)

¹⁸³*Id.*, Article 4 (3) (c)

¹⁸⁴See Dinah Shelton, Protecting Human Rights in a Globalized World, 25 B.C. Int'l & Comp. L. Rev. 273, 290 (2002), <http://lawdigitalcommons.bc.edu/iclr/vol25/iss2/7> (last visited 26 Oct 2020)

¹⁸⁵United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, preamble para. 2

¹⁸⁶*Id.*, art. 1(3)

¹⁸⁷Weiwai, *supra* note 173

¹⁸⁸UDHR, *supra* note 9, art. 1

¹⁸⁹UDHR, *supra* note 9, art. 2

¹⁹⁰UDHR, *supra* note 9, art. 7

¹⁹¹UDHR, *supra* note 9, art. 16

¹⁹²UDHR, *supra* note 9, art. 23(2)

¹⁹³UDHR, *supra* note 9, art. 25(2)

The Preamble of the CEDAW affirms that

[D]iscrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic, and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.¹⁹⁴

Article 2 obliges the States Parties undertake:

To embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle and to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.¹⁹⁵

Other obligations on the States Parties are: (a) take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education,¹⁹⁶ (b) eliminate discrimination against women in employment,¹⁹⁷ (c) equal rights of men and women to access to health care and¹⁹⁸ (d) accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.¹⁹⁹

The twin conventions, ICCPR and ICESCR are prominent conventions that specifically guarantees certain rights to women. The ICCPR lists a broad spectrum of rights to be applied equally to men and women, and prohibits all forms of discrimination based on sex. The Convention puts obligation that the rights recognized in the Covenant are to be recognized without distinction of any kind including gender.²⁰⁰ It ensures the equal rights of men and women²⁰¹ and equal protection of the law

regardless of gender.²⁰²

The ICESCR obliges member states to guarantee that the rights without discrimination of any kind²⁰³ and ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights. Equal pay for men and women is fundamentals of ILO standards. It has been recognized under the Convention under Article 7.²⁰⁴ Other rights guaranteed under the Conventions are: (a) Special protection should be given to mothers during childbirth,²⁰⁵ (b) everyone has the right to an adequate standard of living, including adequate food, clothing and housing.

The provisions of CRC apply to the children irrespective of their sex. Article 2 that States parties must respect the rights in the Convention without discrimination of any kind. This anti-discrimination clause, therefore, applies to female children. Similarly, article 1 of the Convention against Discrimination in Education guarantees equal access to education of all types and levels and prohibits the limitation of any person or group of persons to education of an inferior standard.

Like children, women are highly vulnerable during the armed conflicts. They are subjected to rape and other forms of physical violence during the armed conflicts. However, rape of women and girls in situations of armed conflict, whether civil or international, constitutes a grave breach of international human rights and humanitarian law. Article 27 of the Fourth Geneva Convention states that "women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."

C. RIGHTS OF SOCIALLY AND POLITICALLY MARGINALIZED GROUPS

Equality sounds great when everyone is at the equal footing i.e. equality among equal. But there are certain marginalized groups that requires special preferences in rights. Hence, among the major human rights instruments, a chunk of provisions including certain special conventions are devoted for the rights

¹⁹⁴UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, preamble

¹⁹⁵Id., art. 2

¹⁹⁶Id., Art. 10

¹⁹⁷Id., Art. 11

¹⁹⁸Id., Art. 12

¹⁹⁹Id., Art. 15(2)

²⁰⁰ICCPR, supra note 168, art. 2

²⁰¹ICCPR, supra note 168, art. 3

²⁰²ICCPR, supra note 168, art. 26

²⁰³ICESCR, supra note 173, art. 2

²⁰⁴ICESCR, supra note 173, art. 7

²⁰⁵ICESCR, supra note 173, art. 10

protection of certain marginalized groups, including indigenous peoples, ethnic minorities, refugees, migrant workers and the those who are in poverty.

The concept of a special rule for certain groups is a recent development. However, the prominent international instruments such as the ICCPR in article 27 ensures protection of the rights of ethnic, religious, or linguistic minorities.²⁰⁶ As highlighted by the article 27 of the ICCPR, there are generally three types of minorities: ethnic, religious, of linguistic minorities. However, with the cross-border migration for employment, another type of minority is migrant workers. The international instruments also focus on the rights of Indigenous Populations. Rights of each minority populations are dealt separately.

I. RIGHTS OF INDIGENOUS POPULATIONS

UN Department of Economic and Social Affairs Indigenous Peoples presents Indigenous or aboriginal people as “inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic, and political characteristics that are distinct from those of the dominant societies in which they live.”²⁰⁷

UN-system body finds it hard to define Indigenous or aboriginal people, “considering the diversity of indigenous peoples.”²⁰⁸ Instead the UN presents certain basic criteria or peculiarity to understand the term:

Self- identification as indigenous peoples at the individual level and accepted by the community as their member; Historical continuity with pre-colonial and/or pre-settler societies; Strong link to territories and surrounding natural resources; Distinct social, economic or political systems; Distinct language, culture and beliefs; Form non-dominant groups of society; and Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.²⁰⁹

The first instrument concerning indigenous population was the C107 - Indigenous and Tribal Populations Convention, 1957 under ILO system named as Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.²¹⁰ However, it was ratified by less than thirty countries. The ILO Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989, is international law's most concrete manifestation of the growing responsiveness to indigenous peoples' demands;²¹¹ a revision of the ILO's earlier Convention No. 107 of 1957.

ILO's Convention No.169 is based on respect for “exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live”²¹² and aims at overcoming discriminatory practices affecting these peoples²¹³ and enabling them to participate in decision making that affects their lives.²¹⁴ Therefore, the fundamental principles of consultation²¹⁵ and participation²¹⁶ constitute the cornerstone of the Convention.

II. RIGHTS OF ETHNIC MINORITIES

Ethnic minorities concern the rights of persons belonging to certain groups to maintain their own institutions, language and to keep their resources. Article 27 of the International Covenant on Civil and Political Rights states that persons belonging to any kind of minority in any State shall not be denied any of their specific rights.²¹⁷ The Vienna Declaration and Program of Action provides that States are obliged to ensure that persons belonging to minority groups can effectively exercise all their human rights and fundamental freedoms without any discrimination.²¹⁸

²⁰⁶ICCPR, supra note 168, art. 27

²⁰⁷UN Department of Economic and Social Affairs Indigenous Peoples, Indigenous Peoples at the United Nations, available at <https://www.un.org/development/desa/indigenouspeoples/about-us.html> (last visited 26 Oct 2020)

²⁰⁸UN Permanent Forum on Indigenous People, Indigenous Peoples, Indigenous Voices, available at https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last visited 26 Oct 2020)

²⁰⁹Id.,

²¹⁰See International Labour Organization (ILO), Indigenous and Tribal Populations Convention, C107, 26 June 1957, C107,

²¹¹See International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169,

²¹²Id., preamble

²¹³Id., art. 3

²¹⁴Id., art. 6 b

²¹⁵Id., art. 6(2)

²¹⁶Id., art. 2

²¹⁷Id., art. 27

²¹⁸See Vienna Declaration, supra note 181,

D. RIGHTS OF THE POOR

The problem of poverty is a cycle that seems inescapable for so many people throughout the world, especially in developing countries. Poor people lack access to information, influence, and resources, which may cause them to live with poor living conditions from which they cannot escape. The General Assembly recognized that "...poverty is a complex and multi-dimensional problem with origins in both the national and international dimensions, and that its eradication in all countries, in particular in developing countries, has become one of the priority development objectives in order to promote sustainable development."²¹⁹

Commitment 2 of The Copenhagen Declaration and Program of Action provides that States commit themselves to eradicate poverty.²²⁰ Pursuant to commitment 2, at the national level States must ensure that people living in poverty have access to productive resources, including credit, land, education and training, technology, knowledge, and information, as well as public services. Similarly, articles 5-6 of the Beijing Declaration recognize that the unequal status of men and women is due in large part to the increasing poverty that is affecting the lives of the majority of the world's people, including women and children.²²¹ Article 26 focuses on measures to address poverty.²²² Furthermore, in terms of access to justice, Article 4 of the Basic Principles on the Role of Lawyers provides that "...special attention should be given to assisting the poor so as to enable them to assert their rights and where necessary call upon the assistance of lawyers."²²³

E. RIGHTS OF MIGRANT WORKERS

Migrant workers are aliens who they suffer from discrimination, poverty, and social and cultural hardships in a foreign land. To protect migrant workers, special attention has been focused on them within the UN, ILO and at the regional level. Within the United Nations the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families contains a comprehensive set of rules about the situation

of migrant workers.²²⁴ The main thrust of this Convention is that persons who qualify as migrant workers under its provisions are entitled to enjoy their human rights regardless of their legal status. However, this Convention has no legal effect in Nepal as it has not signed or ratified this Convention. Similarly, the countries receiving Nepalese migrant workers have not ratified it. Irrespective of the ratification status of this Convention, few Articles of the Convention are worth mentioning. Article 1 (1) states that the present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind and invokes obligation on the state parties to "undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind".

Similarly, under the ILO system, there are two main Conventions designed to protect migrant workers: (a) the Migration for Employment Convention (Revised), 1949 (No. 97) and (b) the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). Nepal has not ratified either Conventions. The Migration for Employment Convention (Revised) obliges national treatment to the immigrants lawfully within its territory,²²⁵ social security scheme, and other protections.

F. PERSONS WITH DISABILITY

People with disabilities are vulnerable due to the barriers such as attitudinal, physical, and financial, they face. States has capacity and resources to addressing these barriers. Legislation is first tool to address these barriers. There are international legal instruments that protects persons with disability. The United Nations Charter is the pioneer that affirms the essentiality of "a universal respect for, and observance of, human rights and fundamental freedoms for all without distinction".²²⁶ Persons with disabilities are entitled to exercise every human right guaranteed under all principle treaties and conventions from more general perspective and in a

²¹⁹Erik Thorbecke, Multidimensional Poverty: Conceptual and Measurement Issues, available at 10.1057/9780230592407_1, (last visited 26 Oct 2020)

²²⁰Copenhagen Declaration and Program of Action, A/CONF.166/9, commitment 2

²²¹United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, art. 5-6

²²²*Id.*, art. 26

²²³United Nations, Basic Principles on the Role of Lawyers, 7 September 1990, art. 4

²²⁴See UN General Assembly, International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families : General Assembly Res., 18 December 1990, A/RES/45/158, MWC

²²⁵*Id.*, art. 6

²²⁶UN Charter, *supra* note 185, art. 1(3)

²²⁷UN General Assembly, Convention on the Rights of Persons with Disabilities : General Assembly Res, 24 January 2007, A/RES/61/106,

specific convention, the Convention on the Rights of Persons with Disabilities.²²⁷ The CEDAW ensures protection of women with disability. It envisions that women with disabilities are discriminated against on two grounds: gender and disability.²²⁸ Similarly, the CRC ensure of child with disability.²²⁹

2.4 PRECEDENTS ESTABLISHED ON THE PROTECTION OF VULNERABLE, MARGINALIZED, AND DISADVANTAGED GROUPS

The Supreme Court (SC) has played a lead role in promoting and protecting human rights, entrenching important principles through its judgments in relation to internationally recognized human rights (including economic, social and cultural rights and the rights of children and women).²³⁰ Supreme Court is at the top of the hierarchical pyramid with the final power to interpret the Constitution²³¹ and it sets the legal precedent that lower courts must follow.²³² With a view to protect individual rights and rights of disadvantaged groups, the Court made several constitutional interpretations and the constitutionality of the legislation, including several orders to safeguards fundamental rights guaranteed in the Constitution. Let us explore some landmark cases decided by the SC of Nepal on the matter of protection of vulnerable population.

The Supreme Court issued so many orders in respect of enhancing access to justice. In a case of Ratna Bahadur Bagchand et. al v. Ministry of Law, Justice and Parliamentary Affairs et. al, the Supreme Court issued an order on 2062/01/08 in relation to the cases filed under No. 10A. of the Chapter on Etiquette of the Country Code to collect and go through the data on the simple and effective access of victim to the process of investigation, punishment and compensation to the victim.²³³ In a case of Dil Bahadur Bishwakarma et. al Vs. Office of the Council of Ministers, the Supreme Court issued an order on 2062/01/19 to

declare the menstrual taboo (Chaupadi Pratha) as malpractice within a month and to mobilize the local bodies to raise public awareness against the menstrual taboo.²³⁴ In a case of Santosh Kumar Mahato Vs. Office of the Council of Ministers et. al, the Supreme Court issued an order on 2062/08/09 to promptly initiate action to establish juvenile court.²³⁵ In a case of Som Prasad Paneru Vs. Office of the Prime Minister and Council of Ministers et. al, the Supreme Court issued an order on 2063/05/25 to include important contents on right of the child including prohibition on child labor in school curriculum.²³⁶

In a case of Advocate Sapana Pradhan Malla Vs. Office of the Prime Minister and Council of Ministers et. al, the Supreme Court issued an order on 2064/09/10 to make necessary laws to protect confidentiality of women, children, and persons with HIV AIDS in the court proceedings.²³⁷ In a case of Jyoti Poudel et.al Vs. Office of the Prime Minister and Council of Ministers et. al, the Supreme Court issued an order on 2066/04/28 to provide continuous free legal aid and to constitute separate fast track court for domestic violence.²³⁸ In a case of Prakashmani Sharma Vs. Office of the Prime Minister and Council of Ministers et. al, the Supreme Court issued an order on 2065/02/22 to raise public awareness on reproduction health right of women and on eradication of the problem of womb.²³⁹ In a case of Meera Dhungana Vs. Office of the Prime Minister and Council of Ministers et. al, the Supreme Court issued an order on 2066/04/03 to formulate plan, program, and budget in order to make women's development and empowerment effective.²⁴⁰ In a case of Meera Dhungana Vs. Office of the Prime Minister and Council of Ministers et. al, the Supreme Court issued an order on 2066/07/18 to enact separate appropriate law on protection of victim and witness.²⁴¹ In a case of Som Prasad Paneru Vs. Office of the Prime Minister and Council of Ministers et. al, the Supreme Court

²²⁷UN General Assembly, Convention on the Rights of Persons with Disabilities : General Assembly Res, 24 January 2007, A/RES/61/106,

²²⁸CEDAW, supra note 194, preamble & art. 1

²²⁹CRC, supra note 176, art. 2

²³⁰UNDP, Strengthening the Rule of Law and Human Rights Protection System in Nepal Program, p. 8 available at http://www.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP_NP_RoLHR_Project-Documents.pdf (last visited 26 Oct 2020)

²³¹Constitution of Nepal, art. 128(2)

²³²Id.,

²³³Ratna Bahadur Bagchand et. al v. Ministry of Law, Justice and Parliamentary Affairs et. al,

²³⁴Dil Bahadur Bishwakarma et. al Vs. Office of the Council of Ministers,

²³⁵Santosh Kumar Mahato Vs. Office of the Council of Ministers et. al

²³⁶Som Prasad Paneru Vs. Office of the Prime Minister and Council of Ministers et. al,

²³⁷Sapana Pradhan Malla Vs. Office of the Prime Minister and Council of Ministers et. al,

²³⁸Jyoti Poudel et.al Vs. Office of the Prime Minister and Council of Ministers et. al,

²³⁹Prakashmani Sharma Vs. Office of the Prime Minister and Council of Ministers et. al,

²⁴⁰Meera Dhungana Vs. Office of the Prime Minister and Council of Ministers et. al,

²⁴¹Meera Dhungana Vs. Office of the Prime Minister and Council of Ministers et. al,

issued an order on 2063/05/25 to effectively implement the provision on continuous hearing and to make arrangement for compensation to the victims.²⁴² In a case of Nigerian national OBUNNEME MICHAEL OZOR Vs. the Government of Nepal, the Supreme Court issued an order on 2071/07/03 to make necessary arrangement for service of interpreter in a trial.²⁴³

The Court is proactive specially on the matter concerning women. In *Sapana Pradhan Malla v. Office of the Prime minister and council for ministers*²⁴⁴ the court was of opinion that state shall include women into mainstream by creating adequate opportunities for the protection of them. It cannot be deemed to have done positive discrimination if someone is deprived of existing opportunities in some way, irrespective of whether or not additional career opportunities is provided or bringing into mainstream. This case highlights for a special treatment for those who are not in equal circumstances. The SC has taken similar approach in another case; *Advocate Narayan Jha v. Tribhuvan university Assembly*. The Court rules that

“positive discrimination policy to be adopted until the people or class who were not included into mainstream of state through social justice and empowerment be able to compete with other people equally. Positive discrimination and reservations are provisional arrangements as they meet a status of 'equality among equals' based on the fullest extent of competition having developed of competitive capacity through the medium of positive discrimination, empowerment and reservations. ... Since, a purpose of principle of inclusiveness is to include those class or people who were not included into mainstream of nation due economic, social, educational or cultural difficulties, the responsibility of identification of such deprived class or people lies with state.”²⁴⁵

During COVID-19 a number of public interest litigations have been filed in the Supreme Court. The Supreme Court has issued a number of orders including rescue of Nepali citizens including migrant workers from abroad, make arrangement of quarantines and keep records as per the guidelines of World Health Organization (WHO) of those who have entered Nepal and those

who were held back at the international boarder, to provide immediate relief program to the lower class people affected by the lockdown, monitoring of the quarantine, operating emergency health services, smooth delivery of agricultural products to the market, to take special care of women, children and elderly citizens in the quarantines, not to prevent minor infants and children from receiving vaccines and release the prisoners.

The Court issued a directive order against the Government to release certain category of prisoners during the Covid-19 exigencies. In the petition of *Gopal Shiwakoti et. al. v. Office of Prime Ministers, et al.* the court opined:

The world community has recognized prisoners/detainees as high risk people considering prison health is public health and prescribed physical distance as a strategy to fight against pandemic. It is high time to save prisoners' life by providing medical care and treatment without any discrimination to prevent spread of more infection since currently prisons are overcrowded. Therefore, a directive order in the name of Government of Nepal is issued to take action or make other special decision immediately on releasing or discount or concession on punishment to those vulnerable people viz. children, pregnant women, breast feeding women prisoners and other prisoner having critical health condition on the basis of priority having careful identification of their situation and having consideration of balancing vulnerability of detainees/prisoners and public safety or other special appropriate measures to minimize the overcrowded situation pursuant to Infectious Contagious Disease Act, 2020 (1964).²⁴⁶

In the case of *Roshani Poudel et al. v. Office of the Prime Minister and Council of Ministers et al.* (Writ no. 076-WO-0962) the court has realized for new integrated legislation to deal the ongoing pandemic and its adverse effect. The court held that:

Since there is no integrated law to deal with the issues related to pandemic, it is found that different bodies of Government of Nepal have been issuing standards and orders under different act or regulations as temporary or ad hoc solutions. However, the matter of Covid-19 pandemic is extensive, having

²⁴²Meera Dhungana Vs. Office of the Prime Minister and Council of Ministers et. al,

²⁴³Som Prasad Paneru Vs. Office of the Prime Minister and Council of Ministers et. al,

²⁴⁴Sapana Pradhan Malla v. Office of the Prime minister and council for ministers, NKP 2066 Decision no. 8187 issue 7

²⁴⁵Advocate Narayan Jha v. Tribhuvan university Assembly, NKP 2069 DN 8765 issue 2

²⁴⁶Gopal Shiwakoti et. al. v. Office of Prime Ministers, et al.

multi-dimensional effect to the life of people and nation and its dimensions are getting developed day by day, it has become necessary to have special arrangements to those fall under high risks groups (vulnerable people). It is required to make an integrated law to prevent the Covid-19 pandemic, to response appropriately to its effect/impact and to recover loss and to create cordial environment in society by eliminating hatred bringing recovery to its victim. Therefore, an order is hereby issued in the name of the Government of Nepal to make a law placing high risk group in top priority as well as gender friendly upon having study whether the prevailing laws including Contagious Disease Act, 2020 is adequate or not to deal pandemics like Covid-19.²⁴⁷

Likewise, in the case of *Punya Prasad Khatiwada v. Office of the Prime Minister and Council of Ministers* (Writ no. 076-WO-0958), the Supreme Court has made orders in the name of the Government of Nepal to provide adequate materials such as dress, equipments to Covid-19 front liners such as doctors, nurses, medical personnel, sanitation workers or security personnel for free of cost in accordance to the WHO standards. Similarly, the court has also ordered to conduct PCR test of all persons who are in quarantine and provide them medical care and proper arrangement of security, food, water and accommodation. Furthermore, the court has asked to provide basic medicines and materials such as masks, sanitizers preventable from contagious disease to all needy people for free of cost as basic health service has been guaranteed by the constitution as a fundamental right.²⁴⁸

Similarly, In the case of *Som Prasad Luintel v. Office of the Prime Minister and Council of Ministers* (Writ no. 076-WO-0940), the Court issued an order in the name of the Government to take extensive measure to protect Nepalese migrant workers and citizens living and studying in other countries.²⁴⁹

CHAPTER III

3.1 JUDICIAL SYSTEM OF NEPAL

The Judiciary System of Nepal is based on the adversarial model of justice. This model was set in the *Pradhan Nyayalya Ain* of 1951 (2008) and is continued till today. This legacy is carried till today by the present Constitution of Nepal. Part 11 of the Constitution provides for the Judiciary. The Constitution envisions the judiciary as independent, impartial, and competent.²⁵⁰ Article 126 affords the Courts and other judicial bodies with powers relating to justice in accordance with the Constitution and other laws.²⁵¹

The Constitution provides three tiers of Courts, which include the Supreme Court, the High Court (Court of Appeal) and the District Courts.²⁵² In addition to the courts mentioned above, judicial bodies may be formed at the local level to try cases under municipal law or other bodies as required to pursue alternative dispute settlement methods.²⁵³ Likewise, the Constitution provides for establishing specialized courts, judicial bodies, or tribunal to try and settle cases of special types and nature.²⁵⁴ The Constitution sets limitation that “no criminal offence involving imprisonment for a term of more than one year shall fall under the jurisdiction of a body other than a court, specialized court, military court or judicial body”.²⁵⁵

3.1.1 SUPREME COURT OF NEPAL

The Supreme Court of Nepal is an apex court and a court of record. It has the final authority to interpret this Constitution and laws.²⁵⁶

All courts and judicial bodies are under the Supreme Court.²⁵⁷ Therefore, it has the authority to inspect, supervise and give necessary directives to the courts, specialized courts or other judicial bodies under its jurisdiction, in relation to matters relating to judicial administration or management.²⁵⁸ Judgment

²⁴⁷Roshani Poudel et al. v. Office of the Prime Minister and Council of Ministers et al., writ no. 076-WO-0939

²⁴⁸*Punya Prasad Khatiwada v. Office of the Prime Minister and Council of Ministers*,

²⁴⁹*Som Prasad Luintel v. Office of the Prime Minister and Council of Ministers*, Writ. No. 076-WO-0940,

²⁵⁰Constitution of Nepal, Preamble

²⁵¹Constitution of Nepal, Art. 126

²⁵²Constitution of Nepal, Art. 127

²⁵³Constitution of Nepal, Art. 127(2)

²⁵⁴Constitution of Nepal, Art. 152

²⁵⁵Constitution of Nepal, Art. 152(2)

²⁵⁶Constitution of Nepal, Art. 128(2)

²⁵⁷Constitution of Nepal, Art. 128(2)

²⁵⁸Constitution of Nepal, Art. 128(3)

rendered through any interpretation of the Constitution or a law made by or any legal principle laid down by the Supreme Court in the course of trying a lawsuit is binding on all.²⁵⁹ Similarly, the Court has power to initiate proceedings and impose punishment for its contempt, “If anyone makes obstruction in the dispensation of justice by, or disregard any order or judgment handed down by, it or any of its subordinate courts”.²⁶⁰

A. JURISDICTION OF SUPREME COURT

Article 133 of the Constitution provides for the Jurisdiction of the Supreme Court. Supreme Court is endowed with the following powers:

A. EXTRAORDINARY JURISDICTION

It has an extra-ordinary power to declare the law to be void either ab initio or from the date of its decision if the law appears to be so inconsistent with the Constitution, or if any federal laws or provincial laws impose an unreasonable restriction on the enjoyment of any fundamental right.²⁶¹

Similarly, the Court has power to issue necessary and appropriate orders, provide appropriate remedies, enforce right or settle dispute if “for the enforcement of the fundamental rights conferred by the Constitution or of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern.”²⁶²

Under the extra-ordinary jurisdiction, the Supreme Court may issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition, and quo warranto.²⁶³

B. ORDINARY JURISDICTION

Apart from extra-ordinary judicial powers, the Supreme Court is endowed with judicial powers (ordinary jurisdiction). The Judicial Power the Court has been (a) Original Jurisdiction and

(b) Appellate Jurisdiction.

In original jurisdiction, “the Supreme Court, pursuant to the federal laws, have the power to originally try and settle cases, hear appeals, test judgments referred for confirmation, revise cases, hear petitions or review its judgments or final orders.”²⁶⁴ The Constitution also guarantees the principle of natural justice, that “Judges other than those having handed down the previous judgment shall make such review.”

In appellate jurisdiction, “the Supreme Court shall settle appeals from cases originally tried and settled by a High Court and matters of public importance involving questions of interpretation of the Constitution and law or cases recommended by a High Court, accompanied by its opinion that it is reasonable that decision be made by the Supreme Court.”²⁶⁵

3.1.2 HIGH COURTS

The High Courts, also known as the Court of Appeals, is empowered to hear appeals against the judgments delivered by the District Courts. The High Court has authority over the subordinate courts or judicial bodies. The High court has the power to initiate proceedings on and impose punishment for its contempt, “If anyone makes obstruction in the dispensation of justice by, or disregard any order or judgment handed down by, it or any of its subordinate courts or judicial bodies”.²⁶⁶

A. JURISDICTION OF HIGH COURT

The High Court is endowed with the power to issue necessary and appropriate orders in the form of writs such as “the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto”²⁶⁷ “for the enforcement of the fundamental rights conferred by this Constitution or for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any legal question involved in any dispute of public interest or concern”.²⁶⁸ Similarly, the

²⁵⁹Constitution of Nepal, Art. 128(4)

²⁶⁰Constitution of Nepal, Art. 128(4)

²⁶¹Constitution of Nepal, Art. 133 (1)

²⁶²Constitution of Nepal, Art. 133 (2)

²⁶³Constitution of Nepal, Art. 133 (3)

²⁶⁴Constitution of Nepal, Art. 133(4)

²⁶⁵Constitution of Nepal, Art. 133(5)

²⁶⁶Constitution of Nepal, Art. 144

²⁶⁷Constitution of Nepal, Art. 144(2)

²⁶⁸Constitution of Nepal, Art. 144(1)

Court may issue an order of injunction for this purpose. The Court of Appeal has the power to originally try certain cases as specified by law²⁶⁹ and to try cases transferred by the Supreme Court (from among the cases filed in the District Courts) taking into consideration the complexity of the issue, or to provide speedier justice in prolonged disputes.²⁷⁰

3.1.3 DISTRICT COURTS

The District Courts are the court of first instance.²⁷¹ The District Courts are responsible for trying all the civil and criminal cases. Section 7 of the Administration of Justice Act 2017 has empowered the District Courts to try all the cases under their respective jurisdiction. According to Article 151 (1) of the Constitution, the District Court shall have the power to originally try and settle all cases under its jurisdiction, to try petitions under law, including petitions of habeas corpus and prohibition, hear appeals under law from decisions made by quasi-judicial bodies, hear appeals from decisions made by Local level judicial bodies formed under the State law, institute contempt proceedings and punish for contempt under the Federal law if anyone makes obstruction in the dispensation of justice by, or disregards any order or judgment by, it or any of its subordinate courts.²⁷²

Similarly, the District Court has the authority to inspect and supervise and give necessary directive to the subordinate judicial bodies that is established in accordance with the province law.²⁷³

Furthermore, District Court is also empowered to hear appeal against the decision of the Judicial Committees.

3.1.4 JUDICIAL COMMITTEES

There are 753 Judicial Committees in local levels. Pursuant to Section 47 of the Local Government Operation Act 2074, it has the powers as follows:

- Adjudicating powers in relation to tiny cases and power to settle a dispute only through mediation in relation to all the civil disputes that may be settled through compromise and

- Criminal disputes that carry imprisonment up to one year.

3.2 JUDICIAL PROTECTION OF MARGINALIZED AND VULNERABLE GROUPS

The Supreme Court of Nepal has the sole power to declare any law to be null and void if the law appears to be so inconsistent with this Constitution, or if any federal laws or provincial laws imposes an unreasonable restriction on the enjoyment of any fundamental right. We highlighted commitments of Nepal under both national and international legal instruments including fundamental rights of the marginalized and vulnerable groups. If the any of the law that poses unreasonable restriction on the enjoyment of fundamental rights, or is inconsistent with the Constitution that guarantees rights of marginalized and vulnerable groups, the Supreme Court is the only body that may declare such legal arrangement null and void.

The Supreme Court has issued a portion of judgments since 1990's onwards that declared certain laws null and void to protect the rights of marginalized and vulnerable population.²⁷⁴

Similarly, the Supreme Court and High Courts has power to issue necessary and appropriate orders, provide appropriate remedies, enforce right or settle dispute if “for the enforcement of the fundamental rights conferred by the Constitution or of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern.”²⁷⁵

Therefore, only the Supreme Court and high court has the power to protect the rights of marginalized and disadvantaged population before and during exigencies though it's extraordinary and writs jurisdiction. However, other courts may protect their rights by rendering decision on the violation of rights and through legal remedies but may not avoid such violations. For example, labor court enforces rights of labor.

²⁶⁹Constitution of Nepal, 144(3)

²⁷⁰Constitution of Nepal, 145

²⁷¹Constitution of Nepal, 148

²⁷²Constitution of Nepal, 151(1)

²⁷³Constitution of Nepal, 148(2)

²⁷⁴Somprasad Paneru and Others v Office of the Prime Minister and Council of Ministers and Others, Writ No. 3215 of the year 2061 Right of children kept as Kamlari (bonded labour); Tek Tamrakar and Others V HMG Cabinet Secretariat and Others, Writ No. 121 of the Year 2060, Right of Women belonging to Badi Community; Prakash Mani Sharma and Others v GON, Office of Prime Minister and Council of Ministers and Others, Writ No. 064WO0230, Reproductive Health and Uterus Prolapse

²⁷⁵See Constitution of Nepal, arts. 133 and 144.

3.3 ACCESS TO JUSTICE

Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination, or hold decision-makers accountable. The Declaration of the High-level Meeting on the Rule of Law emphasizes the right of equal access to justice for all, including members of vulnerable groups, and reaffirmed the commitment of Member States to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all.²⁷⁶ For the assurance of access to justice to the marginalized and poor people various initiatives have been taken by the judiciary of Nepal, such as appointment of court paid lawyer (baitanik) in each court (including Supreme Court, High Courts and District Courts), establishment of Commission on Access to Justice, Judicial Sector Coordination Committee, Strategic plan of Supreme Court, free availability of templates/forms that needed to be filled up during court proceedings, arrangement of interpreter, priority to vulnerable groups during hearing of cases in court of law.

3.3.1 ARRANGEMENT OF COURT PAID LAWYER (BAITANIK WAKIL)

If it is deemed necessary to provide free legal aid to indigent people, in all layers of court the Supreme Court, High Courts and District Courts-court paid lawyer service is rendered. The court paid lawyer service includes preparing of legal documents and advocating to the court of law representing the indigent party. The other services provided by the court paid lawyer includes: advocacy, preparation of legal documents, counseling, to fill up the template application, to render legal service to prisoners or detainees at prison.

Currently there are two court paid lawyers in the Supreme Court and one court paid lawyers in each high courts and district courts. Remuneration of such lawyers are paid by the courts; no party is needed to pay them. In each court there is a separate chamber of court paid lawyer. Indigent people can get service upon contacting him/her or can get information about court paid lawyer upon having contacted in a concerned court.

3.3.2 ACCESS TO JUSTICE COMMISSION

In order to ensure easy access to justice to those indigent people who are unable to seek justice due to economic and social condition such as children, women, indigenous/nationalities, senior citizens, person with disabilities, helpless, the Commission was established on 2072/4/10 (2015 July 26) pursuant to sub-clause (e) of Rule 13 of the then Supreme Court Regulations, 2049. The Commission was reshuffled and established in the Supreme Court as provided in sub-rule (1) of Rule 120 of the Supreme Court Regulation, 2074 that the Chief Justice may form sectorial committees or commission as per necessary. Currently there are 18 members representing, Supreme Court Justice Mr. Anil Kuimar Sinha heads the Commission, and it includes representation of justice providing bodies and targeted groups as well.

The Commission coordinates among concerned bodies in order to enhance access to justice of targeted group (indigent people) by formulating policy and programs. There is a secretariat to implement such policies, programs and decisions made by the Commission.

The Commission conducts, inter alia, awareness programs among indigent of disadvantaged people, to formulate strategic plan aiming at enhancing the justice delivering mechanism and enjoying their rights, to develop effective support system to ensure access to justice to the indigent people. To conduct these initiatives the Commission identifies the indigent people, helpless people, prepare reference materials relating to right of such people, and develop the system on delivering pro-bono service.²⁷⁷

3.3.3 JUDICIAL SECTOR COORDINATION COMMITTEE

To cooperate and coordinate among concerned bodies of judicial sector and other stakeholder the Judicial Sector Coordination Committee was established in central level by the decision of Supreme Court dated 2061.05.11. Following the establishment of the central Commission, the Supreme Court on 2061.7.13 decided to establish the judicial sector coordination committee in appeal courts and district courts as well. Later on the concept of judicial sector coordination committee was formally incorporated in the Supreme Court Regulation, high court regulation and district

²⁷⁶Access to Justice - United Nations and the Rule of Law, United Nations, and the Rule of Law (2020), available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (last visited 3 Nov 2020).

²⁷⁷न्यायमापहुँच, Supremecourt.gov.np (2020), <http://supremecourt.gov.np/a2jc/Page/about> (last visited 3 Nov 2020).

court regulation on 2067.4.3, which gave legal basis to the concept and decision.

THE SUPREME COURT REGULATION, 2074

Rule 117 of the Regulation has a provision on the Central Judicial Coordination Committee. As per the regulation, the committee shall be formed under the Chairmanship of a justice as designated by the Chief Justice. The other members are represented from High Courts, District Courts, National Judicial Academy, Ministry of Law, Justice and Parliamentary Affairs, Judicial Council, Office of the Attorney General, Nepal Police, Nepal Bar Association, Ministry of Finance, National Planning Commission, Prison Management Department, civil society.

The functions, duties and powers of the Committee are, inter alia, to coordinate and strengthen relations among stake holders in order to enhance judicial proceedings and access to justice and supervise the subordinated committees.

THE HIGH COURT REGULATION, 2073

Rule 166 of the Regulation provides that a High Court Judicial Sector Coordination Committee shall be formed in order to, inter alia, discharge function of court, subordinated courts or judicial bodies under the leadership of Chief judge of the High Court. The Committee includes the representation from various sectors such as Chief District Officer of the concerned district, head of the concerned Government Attorney, head of the Regional Police Office, Chairperson of concerned Bar Association Unit, and representative from civil society.

THE DISTRICT COURT REGULATION, 2075

Rule 97 of the District Court Rule provides for District Judicial Coordination Committee under the leadership of a District Judge who work as a main judge. Other members of the Committee include Chief District Officer, District Government Attorney, concerned Bar Association Unit, Chief of the Prison, Secretary of the District Coordination Committee, member of civil society.

3.3.4 STRATEGIC PLAN OF THE JUDICIARY

The strategic plan in judiciary started from the years of 2061 (2004/2005) having the purpose of overall reform in functions and management of judiciary. Up to date three strategic plans (2004/05-2009/010) 2009/010-2013-2014) 2014/015-2018-19) have been implemented. To continue the reform, process the fourth strategic plan 2018/019-2022/023 (2076/077-2080/081) is being implemented.

The current strategic five years plan sets mission, vision, values, goals and purposes. The mission is to ensure justice to all. The vision is to dispense fair and impartial justice on the basis of the Constitution, law and recognized principles of justices. The values are beliefs in law, free, fair and competence, autonomy, accountability, fairness, quality, integrity, inclusiveness, ownership and participation. Besides that, the strategic plan sets five goals including efficient and quality justice delivery, enhancing access to justice, promotion of judicial good governance.

From the above statement, it can be deduced that the strategic plan aims at enhancing the access to justice of indigent and disadvantaged people thereby ensuring the justice to all.

3.3.5 OTHER INITIATIVES BY THE JUDICIARY

In addition to above mentioned legal provisions, plans and policies, the judiciary has taken other initiatives as well to enhance access to justice of the indigent people. Even though these steps seem very minor they are very important in order to ease and enhance access to justice to the indigent people. Some of the initiatives are discussed below.

3.3.5.1 AVAILABILITY OF FREE TEMPLATE AND FILLING UP SUCH TEMPLATE

Template of minor application to be submitted at the court has been made available on the Supreme Court website. Templates of application are made available for free of cost to indigent service seeker and managed to fill up such templates. Such templates are made easier to fill up. Court paid lawyer help to those indigent people to fill up and prepare such application. Such templates are made available in the court.

3.3.5.2 ARRANGEMENT OF INTERPRETER

Arrangement of interpreters have been made available for free of cost in all courts to indigent people those who do not understand the language in court proceeding including recording of statement of witness. The Supreme Court has made directives for this purpose and made remuneration for the interpreters as well. Those who are willing to get such service may contact to a relevant court.

3.3.5.3 PRIORITY ON HEARING OF CASES

Disadvantaged and vulnerable groups are given priority in court proceedings in order to enhance access to justice of those groups. Pursuant to Section 28ka. of the Administration of Justice Act, 2073 (2016), the court shall give priority to the indigent or vulnerable people, inter alia, in a case where persons with disabilities and children, person having physical disparity or people with above the age of seventy five involve as a party to the case, case related to violence against women, case related to caste based discrimination and untouchability during the court proceeding, hearing and dispensation.

3.3.6 INITIATIVES BY OTHER INSTITUTION

The ‘Enhancing Access to Justice through Institutional Reform Project (A2J) has been launched by the United Nations Development program for the duration of July 2018 to December 2020. The project aimed to lead reforms in the legal aid system in Nepal towards the implementation of the Integrated Legal Aid System which aims to coordinate and regulate accessible socio-legal aid service provision throughout Nepal. The Project works to strengthen Judicial Committees (JC), established as an effective mechanism of justice delivery at the community level, be engaged in the reform of the criminal and civil justice system, provide professional opportunities to women and vulnerable categories of people through its scholarship and internship programs and explore opportunities to support effective delivery of justice for inclusive economic development.

CHAPTER IV

4.1 DUTIES OF THE GOVERNMENT BODIES DURING EXIGENCIES

Nepal is a geophysical sensitive country with numerous natural and other calamities. In most of the cases Nepal suffers from natural and human-made exigencies such as health emergency, armed conflicts, pandemics, and epidemics. Human-made exigencies are though avoidable, the natural exigencies, health hazards, pandemics are not avoidable. They require preparedness with imposition of certain roles and responsibilities on the government of Nepal.

With the new Constitution, Nepal now is a federal country with three tiers of governments; namely, federal, provincial, and local levels. Each level of government is endowed with certain enumerated and concurrent powers in the Constitution. Likewise, the Constitution provides for the Emergency Power to the Federal and State government in the times of grave emergency.

Disaster Risk Management is included in Schedule 7, Schedule 8 and Schedule 9, implying that DRRM falls under the sole authority of local government, along with shared authority between federal, provincial and local levels. However, the Constitution directs that laws made by local government to exercise any authority shall not be inconsistent with federal laws or any laws made by the province or the National Assembly. Similarly, the laws made by provincial government cannot defy federal laws.

Similarly, there are legal arrangements that impose rights and obligations on all three tiers of governments. Contagious Disease Act, National Strategy for Disaster Risk Management, 2009, Climate Change Policy, 2011, National Disaster Response Framework, 2013, Water Induced Disaster Management Policy, 2015, National Reconstruction and Rehabilitation Policy, 2015; Local Government Operation Act 2017, Disaster Risk Reduction and Management Act, 2017, and National Policy for Disaster Risk Reduction, 2018 are major legal and policy arrangements.

The Contagious Disease Act, 2020 (1964), which has as many as

²⁷⁸ Access to Justice - United Nations and the Rule of Law, United Nations and the Rule of Law (2020), <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (last visited 3 Nov 2020).

five sections, in its Section 2 provides ample power on the Government of Nepal (Federal government) to apply all necessary measures to curtail the outbreaks. It allows authorized government officials to issue orders, whichever required, to control or abate the outbreak of infections. The officials are permitted to check or inspect any person, pedestrian, goods, or vehicles if they suspect the person or goods may be carrying infections.

The Act nowhere prescribes for welfare functions to be carried out by the state for the welfare of the vulnerable citizens amid health emergency-like situations. The law does not necessarily oblige the government of Nepal to ensure the arrangement of food or compensation or financial assistance to the daily wage earners, migrant labourers, informal sectors or poor and needy ones who would not have suffered otherwise.

This way, the legislation confers blanket power on the Government of Nepal to curtail the outbreak of infection but it does not necessarily explain the duties of the government towards its vulnerable citizens. Nor do the laws explicitly and authoritatively recognize the rights of citizens during the outbreak of any disease. Also, the epidemic laws don't oblige the state to adopt scientific measures required to curb the spread of infection.

Evaluating these legal and policy arrangements, below given tiers of governments are bestowed with following roles, responsibilities, and duties to protect lives and properties of people during exigencies.

4.1.1 FEDERAL GOVERNMENT

The Constitution provides the federal government with the power to declare state of emergency throughout entire country or of any specified area if a grave emergency arises threatening to the sovereignty, territorial integrity or the security of any part thereof, as a result of war, external aggression, armed rebellion, extreme economic disarray, natural calamity or epidemic.²⁷⁹ Though the Constitution provides for the suspension of

fundamental rights during the state of emergency, certain fundamental rights are non-derogable such as right to life, right to equality, right against torture, right to health.²⁸⁰ Likewise, the right to constitutional remedy in regard to non-derogable fundamental rights and the right to the remedy of habeas corpus cannot be suspended.²⁸¹ Apart from the declaring the state of emergency in exigencies, the Constitution endow the federal government concurrently with the provincial government power on "Early preparedness for, rescue, relief and rehabilitation from, natural and human made calamities".²⁸²

Likewise, the several legislations impose obligation on the federal government during the exigencies. The most prominent one is the Disaster Risk Reduction and Management Act, 2074 (2017) (The DRRM Act, 2017), which replaced Natural Disaster Relief Act, 1982 (NDRA). After enactment of the DRRM Act, 2017 Act disaster risk management became more organized in spirit of the Constitution of Nepal, 2015. The Act under section 2 defines "non-natural disaster" as a disaster aroused out of pandemic, famine, fire, flu, various accidents, deforestation, leakage of harmful gas or chemicals, physical infrastructures damages and similar kinds of disaster and "natural disaster" as a disaster out of snowfall, earthquake, storm, flood, landslide, heavy rain, drought, and other similar natural disaster.

The DRRM Act, 2017 sets out formal structures, roles and responsibilities at federal, provincial, district, and local levels. At federal level there is provision for a DRRM National Council, Executive Committee, and National Disaster Risk Reduction and Management Authority (NDRRMA). The First Amendment of the DRRM Act 2017 in 2075 (2019) also includes a provision for a Province Disaster Management Council (Chapter 6, Section 13Ka) and further specifies the structure and functions of Provincial Disaster Management Executive Committees.

The Act also stipulates a structure (a Disaster Management Committee) and DRRM functions for each local government. Local governments are also guided by the Local Government Operation Act, 2074 (2017 AD), which established disaster management structures and functions for each local government

²⁷⁹Constitution of Nepal, Art. 273(1)

²⁸⁰Constitution of Nepal, Art. 273(10) proviso

²⁸¹Id.,

²⁸²Constitution of Nepal, Schedule-7 (Relating to clause (3) of Articles 57, Article 109, clause (4) of Article 162, and Article 197) List of Concurrent Powers of Federation and State

and their ward units. The DRRM Act led to the establishment of the National Disaster Risk Reduction and Management Authority (NDRRMA), to coordinate and implement DRRM-related functions in the country. The DRRM Regulations, 2076 further elaborate the functions of different government decision-making mechanisms in line with provisions of the DRRM Act 2017.

At the federal level, various structures exist for disaster management. The DRRM National Council which is headed by Prime Minister and DRRM Executive Committee, headed by Minister for Home Affairs, are the apex bodies, mandated to formulate and implement necessary policies, strategies and plans for Nepal. The Ministry of Home Affairs is the nodal ministry for DRRM. However, all ministries and departments have significant roles to play in DRRM. Under the policies and plans formulated by the Council, some of the functions, duties and powers of the DRRM Executive Committees are as follows:²⁸³

- a. To prepare national policy and plan on disaster management and refer to the Council,
- b. To implement sectorial, recovery, integrated policy, plan and program as approved by the Council,
- c. To determine roles of public, private and other sectors on disaster management and manage to include the matter of disaster management into their policy, plan and program,
- d. To enhance institutional capacity of federal, provincial and local levels to handle disaster management,
- e. To cause to include disaster management into curriculum of secondary levels or higher levels education,
- f. To transfer people who are in high risk zone to secured zone,
- g. To frame special policy and program and implement for the people such as women, children, senior citizen, Dalits, marginalized groups and community and persons with disabilities who are in disaster risk,
- h. To develop and operate national early warning system,
- i. To manage to provide relief to disaster victim immediately.

Under the Ministry of Home Affairs, the Act provides on formation of National Disaster Risk Reduction and Management Authority. The Authority discharges the following functions under direct control and direction of the Executive Committee:

- a) To implement the plan and programmes as approved by the Council and Executive Committee,
- b) To act as a central resource body on the task of disaster risk reduction and management,
- c) To carry out study or research on potential disaster, their causes and measures to prevent them,
- d) To provide economic and technical assistance to provincial and local level committees on formulation plan on disaster management and to facilitate to other sectors,
- e) To cause to formulate search and rescue task in federal, provincial and local levels and develop their capacity to discharge their functions effectively.

The Government of Nepal (Federal government) may declare a crisis-hit region to a specific region if any crisis around therein by publishing notices in the Nepal Gazette. During such declaration, the Government of Nepal has power to issue following orders et.al:²⁸⁴

- a) To close as required, the governmental or non-governmental office or educational institute or other institution in Disaster Area,
- b) To prohibit the activities which may cause adverse effect on Relief Work in Disaster Area,
- c) To depute the employee of the government office or non-government offices or of institutions,
- d) To evacuate or caused to be evacuated the people from the Disaster Area to the area of safety,
- e) To requisition movable or immovable property of any individual or institution on temporary basis for a prescribed period, if such property is required to be used for the purpose of Relief Work,
- f) To evacuate or cause to be evacuated goods and commodities from Disaster Area to the areas of safety,
- g) To make use of the means and resource of the government,
- h) To requisition, and make use of, the means of transportation owned by nongovernmental offices, associations or individual of the concern district for a fixed period of time,
- i) To requisition the food grains, clothes, medicine, construction materials and other item belonging to non-governmental offices, institutions and individuals of the concern district and distribute it to the victims of Natural Calamity,
- j) To try to save the land, houses, factories, temples and shrines

²⁸³Disaster Risk and Management Act, 2074 (2017), Sec. 8

²⁸⁴Disaster Risk and Management Act, 2074 (2017), Sec. 32 and 33.

and religious places and other significant objects and places from destruction.

k) To constitute aid group and send them to Disaster Area,

l) To take other necessary safety measures for the safeguard of the life and property of the common people,

With above legislation, the Government of Nepal (GoN) has taken several institutional, policy, relief, rescue, treatment and other related measures to respond and recover from the adverse impact of COVID-19. Pursuant to the decision of the Council of Ministers dated 29 March 2020, a COVID-19 Crisis Management Center (CCMC) has been formed at the federal level, and similar structure has been established in provincial and local level in order to effectively carry out plans and programs to combat against the pandemic.²⁸⁵ The GoN has approved the COVID-19 Prevention and Control Fund Operation Guideline, 2020. The GoN announced relief packages for needy people. The local level is authorized to provide essential food items for needy people in the designated zone. During distribution of relief package, special arrangement and priority has been given to women, children, senior citizens, person with disabilities etc. Health infrastructures have been upgraded, and hospitals throughout the country have been kept ready to manage any cases related to health. The GoN has been covering all the costs of identification, prevention, control and treatment of infected persons. Necessary arrangements have been made to continue the supply of essential Goods and Services during the lockdown period. Moreover, special arrangements have been made by the Government of Nepal, for the rescue/repatriation of Nepali citizen including migrant workers who are in need of return due to COVID-19 from abroad. So far, around fifty thousand people have been rescued/repatriated. During this repatriation process, pregnant women, people who have lost their job, those with health issues and those who have lost their family members were given priority.

The Government of Nepal, by its decision dated October 5, 2020(2077.06.19 BS), passed a resolution that Government shall conduct test and provide treatment for free of cost to

economically poor, disabled or people in a helpless condition, helpless single woman, person with severe disability, senior citizen, front liners health workers, sanitation workers, security personnel infected with covid-19. The decision shall apply in all kinds of government hospitals, non-government and private hospitals. Likewise, all private or cooperative, community hospital and medical colleges shall allocate 50 per cent of total beds, ICU and other similar kinds of infrastructures for the treatment of covid-19.

Despite all the efforts made by the GoN to control this global pandemic, lack of sufficient resources, technical capacities, new political structure have created challenge to ensure full enjoyment of the social, economic, cultural and civil and political rights by the people of Nepal.

4.1.2 PROVINCIAL GOVERNMENT

The Constitution provides for the request by any province to seek declaration of state of emergency if there arises a grave emergency in a State by a natural calamity or epidemic, in whole of the State or of any specific part thereof.²⁸⁷ Chapter 13 of the Constitution of Nepal defines the structure of provincial government.²⁸⁷ It highlights the decentralization of legislative, financial and administrative powers to the seven provincial governments. It also allocates concurrent authority on disaster management to the provinces, along with federal and local governments. In exercising the concurrent authority between the three tiers of government, the roles of provinces are particularly prominent in bridging between federal and local government in disaster management responsibilities, to ensure efficient and effective coordination.

The Disaster Risk Reduction and Management Act, 2017 assigns coordinating, facilitating and monitoring roles to the provinces, in addition to supporting local government on disaster management.²⁸⁸ The Act makes provision for one Provincial Disaster Management Council and a Provincial Disaster Management Executive Committee.²⁸⁹ The Ministry of Internal Affairs and Law (MoIAL) is assigned disaster risk management

²⁸⁵Decision of Council of Minister, 29 March 2020

²⁸⁶Constitution of Nepal, art. 273(2)

²⁸⁷Constitution of Nepal, chapter 13

²⁸⁸Disaster Risk Management Act, 2017 [Nepal], preamble.

²⁸⁹See Id., sec. 14

²⁹⁰Id., sec. 14(1)

²⁹¹Id., sec. 14(2)

²⁹²See Constitution of Nepal, schedule 8

roles for each province.²⁹⁰ Although institutional structures can be assigned to disaster risks management responsibilities under the MoIAL. According to the Act, the main role of the Provincial Disaster Management Council is to ‘prepare policies and plans; and provide policy-related guidelines and directives to the Provincial Disaster Management Executive Committee’.²⁹¹ The Act assigns at least 19 functions to each Provincial Disaster Management Executive Committee, including the formulation and implementation of necessary policies, laws, programs, plans, and guidelines, in line with federal disaster risk management laws. Provincial Disaster Management Committees have been assigned responsibility and authority to assess disaster events and recommend to the federal government whether to declare a partial or province wide state of emergency.

4.1.3 LOCAL GOVERNMENT

In Nepal, local government is closest to the people. Local government leadership is integral to disaster governance. The Constitution of Nepal mandates local government leadership on disaster management.²⁹² However, local governments are new under the federal system, and are in the process of setting up structures, functionaries and capacity to exercise their constitutional authority.

The Constitution has given the list of concurrent powers of federation, province and local level focusing on early preparedness for, rescue, relief and rehabilitation from, natural and human-made calamities for disaster management in Schedule-9, along with vesting the disaster risk management power to local levels in Schedule-8. Various Local levels have made their specific laws in respect of management of disaster.

The Disaster Risk Management Act, 2074 has provisions on formation of district disaster management committee under the leadership of chief district officer representing various members within district offices and local disaster management committee under the leadership of chairperson of rural municipality or mayor of municipality. The Act assigns duties to the District disaster management committee, inter alia, to assist to implement policy, plan and programs as approved by Council, Executive Committee and Provincial Committees, to formulate disaster

response plan and implement it within district, to undertake search and rescue as per availability of resources and provide necessary accommodations and build temporary infrastructure. Likewise, the functions, duties and powers of Local Disaster Management Committee include, inter alia, to formulate and implement local disaster management plan in line with policy and plan as approved by the Council, to cause to allocate budget to local level for disaster management, to carryout tasks related to disaster management by coordinating among government, private, non-government, local social mobilizers, to keep record of disaster victim and rate their victim status and distribute identity card thereof.²⁹³ The Act not only assigns duties to governments of all three levels and respective bodies but also expects to have cooperation, coordination among all tiers of governments to deal with disaster.

The Local Government Operation Act, 2017 (2074), a comprehensive Act to empower local levels to discharge their functions, empowers local bodies to govern themselves. It recognizes that local people and local bodies are the most appropriate points of entry to meet the disaster management needs at the local level. The Act authorizes to undertake the following functions with respect to disaster risk reduction by local bodies:

- Local level policies, legislation, standards, plan implementation, monitoring and evaluation related to disaster management;
- b) Disaster preparedness and response plan, early warning system, search and rescue, advance store of relief materials, distribution and coordination at local level;
 - c) Local embankment, river and landslide control, river management and evaluation;
 - d) Hazard mapping and identification of settlements at risk and transformation;
 - e) Coordination between federal, state and local level and local community organizations and coordination with private sector in order to disaster management;
 - f) Establishment of disaster management fund and operation and utilization of resources;
 - g) Plan formulation, implementation, monitoring and evaluation for disaster risk reduction;
 - h) Resettlement and rehabilitation after disaster;

²⁹⁰Id., sec. 14(1)

²⁹¹Id., sec. 14(2)

²⁹²See Constitution of Nepal, schedule 8

²⁹³Disaster Risk and Management Act, 2074 (2017), Chapter 7.

Data management and study and research about local level disaster;

- k) Development of local emergency work operation system; and
- l) Implementation of community based disaster management.

In addition to the authority to handle disaster management, As per the provision of the Constitution, the Local Government Operation Act, 2017 (2074) authorizes the local levels for the constitution of the Judicial Committees in each local level headed by vice chairperson of rural municipality or deputy mayor in municipality.²⁹⁴ The Judicial Committee has two types of judicial powers. As per sub-section (1) and (2) of Section 47 of the Local Government Operation Act 2074, the judicial committee has the jurisdiction to settle disputes such as disputes on nourishment of senior citizens, bringing up of minor children and nourishment of husband and wife, house rent equivalent to annual two million five hundred thousand rupees, etc and to settle the disputes only through mediation such as disputes on divorce, libel, and other civil cases where general public may be plaintiff and which may be settled through compromise as per the law in force and those criminal disputes that carry imprisonment up to one year. . The Committee settles disputes aroused in local level through adjudication and mediation.²⁹⁵ The Committee is important in the sense that it may identify genuine issues behind disputes as the disputes are from the same local levels and members of committees are also from the same, thereby the Committee considers each case sensitively including the cases where marginalized and disadvantaged people are involved.

Recognizing local government capacity to achieve the commitments of the Disaster Risk Reduction and Management Act 2074, and for local governments to fully exercise their disaster risk management authority and other powers as vested by constitution and other laws it is necessary for them to be able to identify the shortfalls in the capacity that they need to develop.²⁹⁶

4.1.4 LOCAL LEVEL BEST PRACTICES

The study team reviewed efforts from government and non-government levels in setting-up frameworks and guidelines

for local governments to enhance their capacity in taking leadership for disaster management. The following sections discuss some international efforts and country practices.

a. Bangladesh Local Disaster Management Committees. In Bangladesh, Local Disaster Management Committees have facilitating or self-mobilization roles including volunteer mobilization. Bangladesh has over 16 million volunteers with different skills for disaster response, mobilized at the community level through NGOs and government offices. Federal agencies are lead agencies in preparedness and response action (DMB, 2010). In recent years, Bangladesh has been quite successful in effectively responding to disasters such as coastal and river-basin floods. According to the Centre for Excellence in Disaster Management and Humanitarian Assistance (CEDMHA, (2017)46), the Disaster Management Bureau (DMB) performs specialist support functions at the national level, in collaboration with the District and Upazila authorities (sub-units of districts) and appropriate line ministries, under the authority of the Inter-Ministerial Disaster Management Coordination Committee (IMDMCC).²⁹⁷

b. Philippines: Good Governance Act. The Philippines has made provisions to award provinces, cities, and Barangays (village, district or ward) with a seal of Good Local Governance (DILG, 2014 47), based on their performance. Minimum criteria and indicators have been set to evaluate overall performance in different sectors. Disaster Management is one of these sectors, with 12 performance indicators.²⁹⁸

²⁹⁴Constitution of Nepal, Art. 217

²⁹⁵Local Government Operation Act,2017 (2074),Sec. 46

²⁹⁶Disaster Risk Management Act, 2017 [Nepal], sec. 16

²⁹⁷Opml.co.uk (2020), <https://www.opml.co.uk/files/Publications/a1594-strengthening-the-disaster-risk-response-in-nepal/delineation-of-responsibility-for-disaster-management-summary-english.pdf?noredirect=1> (last visited 12 Nov 2020).

²⁹⁸Id.

CHAPTER V

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

The Constitution of Nepal has ensured inclusion of each group or section in each layer and structure of state. It aspires to walk each member of society together and no one is left behind. The Constitution has covered the maximum number of fundamental rights that ranges to first generation rights (civil and political rights) to fourth general rights (collective and developmental rights). Those rights include rights of disadvantaged or vulnerable people as well. Since the main structure of Nepal is of three levels, namely Federation, the Province and Local level, all three levels exercise their power of state of Nepal as provided in the Constitution and law. The Constitution in its schedules provides powers of each level and concurrent powers as well. Under the power provided in the Constitution, all three levels have made laws.

There are a variety of directive principles, state policies as mentioned in the Constitution in addition to the fundamental rights. Those principle and policies are also being implemented along with fundamental rights in accordance with the availability of resources. Various legislations have been made to implement the fundamental rights as provided in the Constitution. Likewise, various sectorial policies and programs are being made and will be made as per the demand of time and context on the basis progressive realization to implement those state policies. Several laws have been made to implement the fundamental rights that protects, promotes, and respects the rights of vulnerable population. The present laws may not be relevant forever and they are not permanent inscription either, rather they can be reformed as per the need of time and changing context. Based on state capacity, institutional capacity and financial capacity other necessary legal measures can be made in respect of implementation of fundamental rights and state policies. Even though Nepal has adopted variety of advanced legal measures, it lacks institutional mechanism, administrative capacity, program and policy to implement such provisions. In this regard, the primary task of this time is the implementation of the prevailing

laws in an effective way by enhancing administrative capacity, institutional mechanism, programs and policies to support the implementation of legal measure with the maximum utilization of available resources. For this purpose, along with the implementation of Acts made under fundamental rights of Constitution, framing of regulation under such Acts is necessary. Pursuant to the constitutional mandate, the federal legislature drafted several Acts to implement the fundamental rights guaranteed by the Constitution. However, these Acts do require the regulations that are necessary for the actual realization of such fundamental rights. The most important regulations are regulation on the rights of housing and regulation on right to food and food sovereignty.

It shall not be wrong to say that Nepal has national laws, international obligations, and necessary policies in place to protect the vulnerable groups. However, the implementations of such laws are still to be tested. The most rigorous test will be of the laws in regard to the implementation of fundamental rights and those of the commission on the several vulnerable groups and communities. Similarly, Nepal is a party to several international conventions and under the mandates given by those international conventions, it has laws in place. The part 3 of the Constitution of Nepal is most extensive one regarding the protection of human rights as fundamental rights. As mentioned earlier, these fundamental rights have several enabling Acts in place. Therefore, laws are not the problem here for protecting fundamental rights. But the question remains the positive realization in protection of several vulnerable groups. However, above statements is not free of criticism, the problem with above laws and Acts enabling fundamental rights are mostly relevant in normal circumstances, they lack provisions to deal during exigencies. There are Acts for health and natural hazards, but those acts rarely envisioned the circumstances, particularly in the exigencies.

When there are legal loopholes or the laws are ambiguous to include the protection of vulnerable and marginalized population during the exigencies, the role of judiciary is most important. Judicial review on the executive, legislative, and administrative action has been the corner stone of good governance and the rule of law. Judiciary throughout the world has played major role in protecting those who are susceptible to injustice and discrimination. Judiciary of Nepal is no exception to it. Nepalese Judiciary has made various orders in respect to protect, promote and respect rights of vulnerable people, however effective implementation of orders of court is needed and justice must be felt by the targeted people. Judicial initiatives are highly appreciable to enhance access to justice to all. Judiciary should develop its institutional capacity, institutional autonomy to make feel justice for all and its effective delivery. During exigencies, judiciary has played special role in protecting vulnerable and marginalized groups and the groups who are in danger of health emergency. Also, the existing Contagious Disease Act, 2020 (1964) is insufficient to deal with the pandemic like present Covid-19 pandemic in terms of prevention, protection, and treatment.

The laws and judicial decision are paper based responsibilities. The actual implementation of those laws, policies, and decisions are at the hand of executives. It can be said that if legislative and judicial actions are not honored, the executive shall face constitutional and legal consequences. This is often a vicious circle to further marginalize such communities. Therefore, the possible solutions to protect such groups are honor of legislative and judicial actions by the executive. The Constitution has envisioned cooperation, coordinate, and coexistence among all three levels,

namely federation, province, and local levels, particularly for those who are susceptible to the adverse effects of exigencies. At the constitutional level and principally, the power to protect people during exigencies lies in the hand of federal government. However, the federal government lacks specific plan of action during the emergency. The government lack preparedness to any natural or human made crisis. The situation of the government inability was seen during the 2015 Earthquake and 2019 Covid

pandemic. Disaster Risk Reduction and Management Act, 2017 provides for the various tiers of mechanisms for the disaster management. But none of these mechanisms were in place before the Corona pandemic. On the good note, the government took an immediate action to CCMC to manage Corona pandemic related exigencies. Finally, though there are various activities are being carried out by all the layers of government they barely target the vulnerable and disadvantaged people. Similarly, the government barely allocates financial and other resources to these exigencies.

5.2 RECOMMENDATIONS

Based on description made in the earlier chapters and conclusion reached above, the following recommendations are made:

1. EFFECTIVE IMPLEMENTATION OF CONSTITUTIONAL AND LEGAL PROVISIONS

As highlighted above, Nepal has constitutional and legal provisions in place, but its implementation is nearly negligent. The reason behind such could be the nominal allocation of resources. Therefore, it is recommended that the government must take action to implement existing constitutional and legal provisions that direct or indirect effects towards the protection of vulnerable groups.

2. ENACTING NEW LAWS AND POLICIES SPECIFIC TO THE PROTECTION OF VULNERABLE GROUPS

The above study finds that there are laws in place, but those laws do not specifically guarantee protection to those who are vulnerable. Therefore, it is recommended that the legislative action is required to enact laws that are more specific on protective rights of people who are vulnerable during exigencies. Similarly, a new legislation is necessary to deal with the pandemic. While formulating such law, marginalized and disadvantaged such as women, Dalits, children and other vulnerable people should be prioritized while considering the state resources and financial and institutional capacity. The court has also made an order to formulate a new integrated law to address the issue aroused during pandemic like Covid-19, giving high priority to vulnerable groups.

3. DEVELOPMENT OF INSTITUTIONAL AND FINANCIAL CAPACITY

The above study also investigated the constitutional and legal provisions that whether or not they are potent to protect vulnerable groups irrespective of existence of any specific laws, the study concludes that the problem is not with the laws in place, but its implementation. It is conclusive that there is both institutional and financial absence to protect the vulnerable groups, both during normal circumstances and during emergency. Therefore, it is recommended that the government must develop institutional and financial capacities.

4. EFFECTIVE COORDINATION AMONG THREE LEVELS OF GOVERNMENT

Coordination among the necessary stakeholders is most important to manage exigencies. The Constitution and existing law expect that there must be coordination among three levels of governments in many ways. During this pandemic it is expected to have work in more effective and close coordination among these three levels of governments. Therefore, it is recommended to have effective coordination among all three levels of government.

5. EMPOWER THE VULNERABLE AND DISADVANTAGED GROUPS

Above study clearly presents that there are various political, legal, administrative, and other measures to protect, promote and respect the rights of marginalized people. These are more of a top-down approach to protect these people. With top-down approach, these groups are susceptible to adverse effects and often are dependent on government action for protection. Therefore, it is recommended that these groups need empowerment, a bottom-up approach to protect vulnerable groups. Therefore, programs like capacity building, awareness rising can be undertaken to enhance and empower such groups.

6. TO PROMOTE STEWARDSHIP

A high level of political commitment is required to deal with the pandemic and protect marginalized groups from the adverse effect of such pandemic. Coordination and cooperation among political level which not only support government's initiatives but also uplifts the confidence of people thereby keeping them hopeful for the future.

7. STRENGTHENING THE CAPACITY OF PROVINCES AND LOCAL LEVELS

It has not been long that Nepal has adopted the federal structure of state. This is a new practice for Nepal. Legal, administrative, and financial infrastructures are being established to institutionalize the federalism and it is still taking place. Constitution has allotted the state powers to all three levels, namely federation, provinces, and local levels. However, as province and local levels are just established, they are having new practice, therefore it is necessary to enhance their capacity to exercise their power and deliver effective service.

8. DEVELOPING NEPALI LEGAL SYSTEM IN LINE WITH INTERNATIONAL STANDARD

Nepal has become a party to various treaties. Among them Nepal has become party to seven core human rights conventions out of nine. Nepal has committed toward international community by being party to those instruments to develop its laws, practice, institutions and human resources in accordance with international standard. Therefore this is a high time to reform it having special priority to vulnerable and disadvantaged people as they are specifically protected by international instruments as well.

9. TO ENHANCE EFFECTIVENESS OF FREE LEGAL AID

Currently only a person having less than the specified (40 thousand) annual income is entitled for free legal aid. Beneficiary of free legal aid has to be widened to dalits and indigenous/nationalities as well. Likewise, unlike current practice, free legal aid should be expanded in quasi-judicial bodies as well thereby more vulnerable groups can be benefitted from this policy. Similarly, the District Legal Committee has to be expanded to all 77 districts and manage employees and required resources for the offices for effective legal aid. The most effective way to provide legal aid would be through local levels, therefore local levels have to allocate budget and develop human resources to provide legal aid to vulnerable population. For this purpose it is desirable to have cooperation and integrated approach among all three tiers of governments and other stakeholders. Furthermore, it should cover capacity building of the lawyers providing free legal aid, financial support to those victims for instance women, children and others who lose their shelter as

well as their basic needs because of instituting the case, protection of victim and witnesses especially those who are in danger, awareness campaign on civil rights and procedures on remedy against infringement of rights etc and identification of needy people.

10. TO DISSEMINATE ABOUT SERVICE AND FACILITY

The state has been providing various services and facilities targeting to vulnerable groups such as free legal aid, arrangement of court paid lawyer, templates and filling up application in courts, facility of interpreter, right to receive compensation to crime victim and so on. However, large sections of such targeted groups seem unaware of their rights and benefits. Therefore, it is necessary to disseminate about services and facilities provided by the state thereby such vulnerable groups will not be misled and reached to wrong door. For this purpose, programs like awareness raising, capacity building, advertisement in mass media can be conducted.

11. TRAINING FOR JUDICIAL COMMITTEE MEMBERS

Training on fundamental principles of justice and basic procedures to be followed while imparting justice should be given to the judicial committee as it consists of the local level politicians. Further, training should also be given to them on mediation. Mediator may not give its verdict, parties to the dispute have the powers to choose mediator, decide the process of mediation, and decide the dispute themselves. Training on opening on mediation centers should also be given to them.

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