State Practice of Asian Countries in International Law

Nepal

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AIR LAW – CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR (MONTREAL CONVENTION), 1999

Nepal acceded to the Convention on 16 October 2018. The Convention amended the Warsaw Convention. It also consolidates the Warsaw convention and related treaties dealing with civil aviation. The convention applies to international carriage of passengers, baggage and cargo. Article 17 of the Convention provides for the liabilities of the international carriage. Article 21 makes provisions for “compensation in case of death or injury of passengers.” The compensation provided is mentioned in Special Drawing Rights that is described in Article 23.

CRIMINAL LAW – CRIME VICTIM PROTECTION ACT, 2018

Article 21 of the Constitution of Nepal, 2015 provides the right of victims to justice. Right to victims is elucidated in the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power and under Article 25 of the United Nations Convention against Transnational Organised Crime. In this regard, the Act is a comprehensive one that provides various rights to crime victims like the right to fair treatment under Section 4, right against discrimination according to Section 5, right to privacy under Section 6, right to information relating to investigation under Section 7 and other rights for crime victims.

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CRIMINAL LAW – PARTICIPATION IN INTERNATIONAL PROGRAMS

Nepal participated in the eighth session of the Working group in Trafficking in Persons as an observer. It was the first time Nepal participated in the session. Nepal has ratified the United Nations Transnational Organized Crime Convention, the parent convention of Trafficking in Persons and Smuggling of Migrants Protocols. The protocols are not ratified by Nepal yet.

ENVIRONMENTAL LAW – NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION TO THE CONVENTION ON BIOLOGICAL DIVERSITY, 2010

Nepal acceded to the Protocol on 28 December 2018. The protocol aims at implementing the objective of “fair and equitable sharing of benefits arising from the utilization of genetic resources” set by the Convention on Biological Diversity. Article 4 of the Protocol provides for access to genetic resources with the prior informed consent of the State party (the country of origin). The State party shall take steps to ensure involvement or consent of the indigenous and local communities. Article 7 provides for access to traditional knowledge associated with genetic resources held by the indigenous and local communities with their “prior and informed consent or approval”. Mutually agreed terms are to be established in this regard. Article 10 calls for creating a global multilateral benefit-sharing mechanism “to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources and traditional knowledge associated with genetic resources”. Article 23 provides for technology transfer to the developing country parties, especially the least developed country and small island developing countries.

**ENVIRONMENTAL LAW – RIGHT TO HEALTHY ENVIRONMENT –
RIGHT TO LIFE – *PARENS PATRIAE* PRINCIPLE TO PROTECT
BIODIVERSITY AND ENVIRONMENT**

Adv. Bhagwati Paharo et al. v. Prime Minister and the Council of Ministers [NKP 2075 Vol. 9 Decision No. 10087, Dated 29 April 2018]

The Ministry of Physical Infrastructure and Transport has entered into a contract with Manakamana Darshan Private Ltd., J.V. Doppelmayr Silevan, Austria and Chitwan Co-E Nepal Pvt. Ltd. to establish cable cars from Basundhara Park to Bouddha Peace Stupa and other physical structures in the name of development within Basundhara Park. The contract has provision to use Basundhara Park for twenty years. The area is swampy and consists of a dense forest, Raniban which is a biodiversity park. The World Peace Biodiversity Park in Raniban area is the only biodiversity park in the west and a prominent tourist area. The applicant claims that the contract made by the government is harmful for the environment and beauty of the area. It violates the right to life guaranteed under international law and national laws. The property granted under the contract for twenty years is also claimed to be unlawful.

The issues highlighted before the Court were, what are the effects of construction of cable car station in Batam in Basundhara Park via Raniban to the Buddisht Stupa? If the land acquired by the government for a particular purpose is being used for another purpose, is it legal? The decision made by the Pokhara Valley City Development Committee to give consent to the Ministry of Physical Infrastructure and Transport and detailed project report for the Memorandum of Understanding of Pokhara Cable Car between the Ministry and Manakamana shall be dismissed or not?

The apex Court held that Nepal is a party to the Convention on Wetlands of International Importance, 1971. Due to this international obligation to protect the swampy areas and wetlands arises. Establishing cable cars and other physical infrastructure in the area would lead to cutting of trees and consequently, hamper the biodiversity of that area. Nepal is a party to the Convention on Biological Diversity, 1992. The Convention specified the responsibility of establishing a protected area or area system, establishing necessary guidelines for conservation, establishing guideline for conservation, promoting natural conservation, including ecosystem, in order to preserve biodiversity. However, the Batam station cable car stoppage at Basudhara Park via Raniban to the Buddhist Stupa would lead to deforestation and thereby, violate State's obligations under the Convention. Therefore, the Court directed not to conduct activities that affect biodiversity.

The Court in its *ratio decidendi* held, “While the State may be able to obtain private property for the benefit of the public on the basis of the concept of eminent domain and our existing legal system. However, by virtue of such rights of the State to use the private property for the private interest of a private company or individual of power cannot be done.” Further, the Court observed that “the adverse effects on a person’s health because of being in a polluted environment leads to violation of right to environment linked to the right to life of a person. To assure this right, healthy environment is necessary. Healthy environment consists of ponds, rivers, forests, fresh climate and environmental balance. By virtue of being a protector of citizens and as per the principle of *Parens Patriae*, the responsibility to protect its citizens is of the State.”

ENVIRONMENTAL LAW – CLIMATE CHANGE – WRIT OF MANDAMUS

Adv. Padam Bahadur Shreshta v. Office of Prime Minister and Council of Ministers [NKP 2076 Vol. 3, Decision No. 10210, Dated 25 December 2018]

Climate change is a global threat today. With regard to Nepal, increasing temperature (0.06% every year) is a major concern. Concerned authorities have formulated policies like National Adaptation Programme of Action (NAPA), 2010, National Framework for Local Adaptation Plan for Action (LAPA), 2011, Climate Change Policy emphasising on conservation of forests and biodiversity, agriculture and food security, climate disaster, urban living and infrastructure, water resources and energy and public health. The policies are not implemented properly. The applicant submitted an application to the respondent requesting to make laws to address the issue of climate change. The respondent failed to frame laws on addressing climate change. Therefore, the applicant filed the writ of mandamus. The following prayers were addressed by the Supreme Court:

1. Since there is no legal provision for mitigating climate change in the Environment Protection Act, a separate climate change law is necessary. Therefore, it is incumbent on the respondent to formulate a law on climate change and implement it.
2. Until the Climate Change Mitigation Act is enacted, the existing climate change policies should be implemented immediately and effectively.
3. Since the implementation of aforementioned policies is very slow, a unit for climate change mitigation in all municipalities and villages in

all districts of all seven provinces should be established. There is a need to make and implement an action plan to prevent the effects of climate change immediately.

4. Climate change affects the Himalayan region to lower reaches of the Terai. Therefore, it is imperative to create an effective implementation plan to protect its direct and indirect impact on livelihoods.
5. Until the policies are implemented or relevant laws are formulated to address climate change, the applicant prays to the Court to grant an interim order.

The Supreme Court held that environmental justice can be achieved by ensuring right to a clean environment, including safety of human lives without causing destruction to humanity. Nepal is a party to the Convention on Biological Diversity, 1992, the United Nations Framework Convention Climate Change, 1992, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1982. These conventions aim at mitigating climate change, protection of forests and bio-diversity. Apart from signing these international agreements, it is imperative to have a conscientious or promotional arrangement in addition to the regulatory arrangement by national laws on environment protection including punitive and compensatory arrangements. The Court issued a writ of mandamus to the respondent. The Court ordered the respondent to make laws relating to climate change as soon as possible and implement the policies formulated so far. The Court applied the principle of *parens patriae* to highlight the responsibility of the state in mitigation of climate change by the protection of the environment.

HUMAN RIGHTS – PRIVACY ACT, 2018

The primary aim of the Privacy Act is to ensure right to privacy guaranteed under Article 28 of the Constitution of Nepal. The preamble of the Act mentions “privacy of the matters relating to body, residence, property, document, data, correspondence and character of every person, to manage the protection and safe use of personal information remained in any public body or institution”. Article 12 of the Universal Declaration of Human Rights recognises the right to privacy as a human right. Nepal ratified the International Covenant on Civil and Political Rights in 1991. Article 17 of ICCPR states, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and

everyone has the right to the protection of the law against such interference or attacks.” Thus, the Act is passed to fulfil Nepal’s international obligations as well as to elucidate the rights granted in the Constitution.

HUMAN RIGHTS – PUBLIC HEALTH SERVICE ACT, 2018

The Public Health Service Act is passed to give details to Article 35 of the Constitution of Nepal that guarantees right to get free basic health service and emergency health. Article 3 (1) of the Act describes the right as “Every citizen shall have the right to obtain quality health service in an easy and convenient manner.” Section 50 of the Act obliges creation of National Public Health Committee. One of the functions of the Committee enumerated in Section 51 is “to cooperate, coordinate and monitor to apply international policy, strategy and commitment related to public health in the national interest of Nepal.” Nepal became a party to the World Health Organization Constitution on 2 September 1953. One of the major principles of the WHO Constitution is “the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and States”. The Public Health Service Act is one of the steps towards complying with these international obligations.

HUMAN RIGHTS – RIGHT TO EMPLOYMENT ACT, 2018

The Act was passed to provide right to employment mentioned in Article 33 of the Constitution. The Act is passed “in order to ensure the right of every citizen 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”. Section 6 of the Act prohibits discrimination and states, “except for a special provision made by the prevailing law for any particular class or community with respect to the provision of employment to the unemployed, no person shall make discrimination on the ground of one’s origin, religion, colour, caste, ethnicity, sex, language, region, ideology or similar other ground”. The Act is a positive step towards ensuring international obligations under Convention Concerning Discrimination in Respect of Employment and Occupation or Discrimination Convention, 1958 (ratified on 19 September 1974), Minimum Wage Fixing Convention, 1970 (ratified on 19 September 1974), Convention Concerning Forced or Compulsory

Labour, 1930 (ratified on 3 January 2002) and Convention Concerning the Abolition of Forced Labour, 1957 (ratified on 30 August 2007).

HUMAN RIGHTS – RIGHT TO FOOD AND FOOD SOVEREIGNTY ACT, 2018

Article 36 of the Constitution of Nepal provides for fundamental right related to food, food security and food sovereignty of the citizens. The Act explains this provision. Furthermore, the Universal Declaration on Human Rights mentions in Article 25 about right to food as part of an adequate standard of living. As per the international obligations, Article 11 of the International Covenant on Economic, Social and Cultural Rights mentions, “The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

HUMAN RIGHTS – RIGHT TO SAFE MOTHERHOOD AND REPRODUCTIVE HEALTH ACT, 2018

Article 38 (2) of the Constitution of Nepal guarantees fundamental right to safe motherhood and reproductive health of women. Right to safe motherhood and reproduction falls under the broader framework of right to health. ICESCR provides right to health in Article 12. ICCPR General Comment 14, paragraph 44(a) states that “basic reproductive, maternal (pre-natal as well as post-natal) and child health care” is a part of the core content. Article 16 of the Convention on Elimination of Discrimination against Women guarantees women equal rights to decide “freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.” Section 3(3) of the Act states the same principle, “Every woman shall have the right to safe motherhood and reproductive health. Every woman shall have the right to determine the gap between births or the number of children.” CEDAW Committee’s General Recommendation 24 provides that States shall prioritise the “prevention of unwanted pregnancy through family planning and sex education.”

HUMAN RIGHTS – SOCIAL SECURITY ACT, 2018

Article 43 of the Constitution of Nepal provides for right to social security. The Act has been passed to ensure this fundamental right. According to Section 3 of the Act, right to get social security allowance is granted to senior citizens, indigent, incapacitated and helpless persons, helpless single women, citizens with disabilities, children and citizens unable to take care of themselves. The enactment addresses the human rights of the vulnerable in the society.

HUMAN RIGHTS – ACT RELATING TO CHILDREN, 2018

The Act aims at “respecting, protecting, promoting and fulfilling the rights of the child guaranteed under Article 39 of the Constitution. This enactment is towards ensuring the fulfilment of international obligations of Nepal under the Convention on the Rights of the Child 1989 (ratified on 14 September 1990). Similar to the provisions in the convention, the Act provides for right to life in Section 3, right to name, nationality and identity in Section 4, right against discrimination in Section 5 and other rights specific to child.

HUMAN RIGHTS – ACT RELATING TO COMPULSORY AND FREE EDUCATION, 2018

Article 31 of the Constitution provides for fundamental right to acquire education. The Act is passed to make this right effective. Under international human rights instruments, right to education is enunciated in Article 26 of UDHR, Articles 13 and 14 of ICESCR, Articles 28 and 29 of Convention on the Rights of Child, Article 10 of CEDAW, Article 5 of Convention on Elimination of all forms of Racial Discrimination, and Article 24 of the Convention on the Right of Disabled. Thus, through these international instruments obligations are created for Nepal and this legislation is towards complying with them.

**HUMAN RIGHTS – FREEDOM TO LIVE WITH DIGNITY –
FREEDOM OF MOVEMENT**

*Adv. Parasmani Bhatrai and Others v. Prime Minister and Office
of Council of Ministers* [NKP 2075 Vol. 60, Decision No. 9984, Date
29 January 2018]

During the blockade, there was hindrance at customs points at Nepal-India border. During these times, transport of goods was hampered. The hindrance in transportation of goods resulted in affecting supply of essential goods like food, medicine, fuel, clothes etc. Nepal is a party to international treaties and agreements that confer rights to a landlocked State. Furthermore, as far as bilateral relations between India and Nepal are concerned, there exists the Nepal-India Transport Treaty that further facilitates trade and movement of goods.

The contention raised by the applicant was that the defendant has created hindrance in the basic fundamental rights conferred in the Constitution. The question before the court was whether an interim order should be granted or not.

The apex Court held that Article 16(1) of the Constitution ensures right to live with dignity. Article 6 of the International Covenant on Civil and Political Rights, 1966 sets obligations for the State to protect the right to live with dignity. After the promulgation of the Constitution in 2015, Nepal sent a team under the Minister of Foreign Affairs to India to negotiate with the Government of India. Nepal's Embassy in India took diplomatic steps to solve the issue. The reply in writing explained that the Minister of Foreign Affairs informed the international community about the crisis hindering movement across the Indo-Nepal border. The impact was explained at the UN Human Rights Council's World Periodical Conference in Geneva. The Court dismissed the writ because the lives of people in Nepal had attained normalcy with guarantee of right to live with dignity. The Court also held that Nepal's government is trying to fulfil its international obligations under the treaties ratified.

The *ratio decidendi* of the case is that freedom is never absolute and it has some restrictions. Moreover, with regard to the international agreements and the obligations set forth by them, implementation is expected from the civilised nations. However, there is no dispute that the international agreements can be applied in the national sphere according to the needs, resources and capabilities of State parties.

**HUMAN RIGHTS – RIGHT TO VOTE – FREEDOM OF SPEECH
AND EXPRESSION – CITIZENS IN FOREIGN EMPLOYMENT TO BE
FACILITATED WITH VOTING RIGHTS DURING ELECTIONS**

Managing Director of Law and Policy Forum for Social Justice, Adv. Prem Chandra Rai v. Government of Nepal, Office of the Prime Minister and the Council of Ministers [NKP 2075 Ashoj Vol. 6, Decision No. 10039, Date 21 March 2018]

The Constitution guarantees the right to vote to every citizen. The international laws also ensure this right. However, citizens who are abroad (as migrant workers) are deprived of the right to vote. According to the Election Commission, the total number of voters is more than 14 million. Whereas, according to the data published by the Government of Nepal in 2008/2009, the total number of persons with labour permit during this period is 2.7 million. However, since there is no provision for nationals in foreign country to vote, more than 3 million Nepalese citizens abroad appear to be excluded from the voting rights. Some other States have the provision for external voting but Nepal lacks it.

The issue brought before the Court was should citizens staying abroad for foreign employment to be allowed to vote from outside Nepal during elections? The Court held that “the character of democratic governance is to act in accordance with the wishes of the people and election is a means of expressing their wishes. The right to vote for citizens should be interdependent with the freedom of thought and expression because the citizens express their views on the basic questions such as whom to elect and what laws and policies are to be formed in a democracy.” The Court opined that in the light of various national laws and international law regarding the voting rights of citizens, the Nepali sovereign people would exercise their sovereignty through adult franchise.

The Court decided in accordance with Article 11, UDHR that ensures the freedom of thought and expression. Article 21(3) of UDHR enunciates that the will of the people to be expressed through elections is the basis of government's authority. Similarly, freedom of speech and expression is elucidated in Article 19 of ICCPR and Article 25 of the Covenant talks about citizen's right to participate in the matter of public interest either by himself or his freely elected representative by exercising adult franchise. Human Rights Committee's General Comment 25 paragraph 11 mentions that the State should adopt effective measures to ensure that all citizens have access to voting rights. Article 41 of the Convention on the Protection of Migrant Workers, 1990 states

that persons and their families in foreign employment shall have the right to vote and to be elected in the election of their country as prescribed by law. Even though Nepal has not ratified the Convention, it appears that international law recognises the right of citizens of foreign employment to participate in elections in their own country. Therefore, the Court ordered to take necessary steps to make arrangement to ensure the right of voting for all citizens of foreign countries for various purposes without limiting the right to vote of Nepali citizens in foreign employment.

HUMAN RIGHTS – RIGHT TO EDUCATION – LACK OF NEPALI CITIZENSHIP

Om Prakash Sah v. Nepal Government, Home Ministry and Others [NKP 2076 Jeshta Vol. 2, Decision No. 10195, Date 14 April 2018]

Om Prakash Sah, the applicant has attained the School Leaving Certificate and completed his Higher Level Education. He cleared the entrance exam for Mechanical Engineering Department of Purbanchal Campus, Dharan. During enrolment, he was asked to submit a copy of his citizenship. He applied for the citizenship card to the concerned authorities. They denied to grant him one on various reasons. Hence, the applicant filed the writ petition requesting the Court to order the authority to grant him the citizenship card as soon as possible. He also prayed to the Court to order the University not to quash his enrolment and not to curtail the right to education because of lack of citizenship.

The issues brought before the Court were on the right to education and right to citizenship. The apex Court decided that the applicant has approached the wrong authority to grant citizenship and hence, the Court could not order on that regard. However, the Court held that the cancellation of enrolment of the applicant on not possessing the citizenship card is unjust. The Court opined that right to education is guaranteed under the Constitution as well as under various international conventions. Article 26(1) of the UDHR guarantees right to education. Article 13 of the ICESCR, 1966 also guarantees right to education. The Constitution of UNESCO, 1945, signed by Nepal also mentions right to education. The *ratio decidendi* of the decision is that deprivation of natural rights such as right to education based on the reason that the student does not possess Nepali citizenship was held to be unconstitutional.

**HUMAN RIGHTS – CHILDREN’S RIGHTS – DEATH OF
CHILDREN DUE TO LOW QUALITY OF VACCINES UNDER
GOVERNMENT’S PROGRAM**

Adv. Dal Bahadur Dhami et al v. Prime Minister and Office of Council of Ministers [NKP 2075 Shrawan Vol. 4, Decision No. 9997, Date 28 June 2018]

The government of Nepal under the Children Immunization Program vaccinated children of Doti district for measles. Pursuant to immunization, four children passed away. Health Ministry, the respondent to the case took responsibility towards formation of a committee, investigation and submission of a report in this regard. However, the ministry failed to submit a report. Therefore, the applicant filed a writ petition praying for certiorari or mandamus.

The issue before the Court is with regard to the violation of right to life of children due to the careless act of government. It is questioned whether the government has taken necessary measures regarding the vaccination or not.

The Court held that under international instruments, right to health is guaranteed under Article 25(1) of the UDHR, Article 12(1) of the ICESCR, and Article 24 of the Child Rights Convention. General Comment 14 of the ICESCR interprets right to health as including the freedom of health and entitlement of health. Thus, under international laws and the interim constitution of Nepal, the Nepal government has accepted the responsibility to guarantee the right to health of its citizens. Therefore, the distribution of vaccines is one of the primary duties of the government. The evidence adduced before the Court proves that vaccines were not tested properly and death of children was caused due to the carelessness of the government. The Court decides to grant Rs. 10,000,000 to the family of the deceased children. It also orders to provide free service to those who had wrong effect of the vaccine. The Court also ordered the government to check the quality of vaccines for its international standards. The Court held “right to health is under economic, social and cultural rights. For the implementation of these rights, the State should take necessary measures to progressively utilise the available resources. Since the rights related to the basic needs of human life such as food, housing, basic education and health are under the State’s core minimum obligations. Thus, for the implementation of these rights the economic conditions and issues, including the availability of resources are irrelevant. The State shall take immediate steps to implement these rights.”

INTERNATIONAL ORGANIZATIONS – CONSUMER PROTECTION ACT, 2018

The Consumer Protection Act came into effect on 18 September 2018. Article 44 of the Constitution of Nepal provides the right of consumers. To elucidate the right therein, this Act was passed. Section 24 of the Act provides for duties of the Consumer Protection Council. One of the duties is “to draft necessary policies to cooperate with national and international organizations or institutions related to the rights of consumers”.

TERRORISM – CONVENTION ON COOPERATION IN COMBATING INTERNATIONAL TERRORISM, TRANSNATIONAL ORGANIZED CRIME AND ILLICIT DRUG TRAFFICKING, 2009

The Convention was framed under the Bay of Bengal Initiative for Multi-sectoral Technical and Economic Cooperation (BIMSTEC). Nepal ratified the Convention on 19 August 2018. As suggested from the name of the convention, Article 1 obliges the State parties to cooperate in combatting international terrorism, transnational organized crime and “illicit trafficking in narcotic drugs and psychotropic substances including their precursor chemicals” by “mutual assistance in the prevention, investigation, prosecution and suppression of such crimes.”

TREATIES – INTERNATIONAL AGREEMENT FOR THE ESTABLISHMENT OF THE UNIVERSITY FOR PEACE, 1980

Nepal acceded the International Agreement for the Establishment of the University for Peace on 27 September 2018. The Agreement was adopted by the United Nations General Assembly by resolution 35/55 dated 5 December 1980. Article 2 of the Agreement provides that the headquarters would be in Costa Rica. Article 3 confers certain privileges and immunities and legal capacity for the smooth functioning of the university. Article 4 makes provision for financial contribution voluntarily by the State parties. However, Nepal has made reservations to Article 4. Article 2 of the Charter of the University for Peace elucidates the aims and purposes of the University as “the university shall contribute to the great universal task of educating for peace by engaging in teaching, research, post-graduate training and dissemination of knowledge fundamental to the full development of the human person and societies through the interdisciplinary study of all matters relating to peace.”