

CHAPTER ONE

INTRODUCTION

Background of the Study

Constitution is a fundamental political and legal document of a nation promulgated to exercise sovereignty. It sets up framework of the government and defines how it ought to operate. It declares certain rights for citizens and also provides procedures and means for protection of their rights. The principles of democracy, rule of law, human rights and social justice have become universal phenomena today which are guaranteed through the constitution. As Meena and Bhattacharjee (2016) proclaim, "Constitution remains guiding principle that modules a nation as per the dreams and aspirations of the people of specific country" (p. 19). However, the constitution is defined from different angles.

At one point, Aristotle conceptualizes constitution as "the way of life, the state has chosen for itself" (Quoted in Mukharjee and Ramaswamy, 1999, p. 121). Similarly C.F. Strong defines Constitution as "a collection of principle according to which power of government, the right of the governed and the relation between two are adjusted" (1973, p.10). Likewise, Ivor Jennings with reference to to the legal practices in the British system, remarks: "If the constitution consists of institutions and not of the paper that describe them, British constitution has not been made but has grown-up and there is no paper" (1963, p.8). Unlike Jennings' version of the unwritten constitution in the British system, K. C. Wheare and Hood Phillips define the term constitution that is used to "denote all written and unwritten principles regulating the administration of the state" (Quoted in Law Study Help, 1996, p.1). Another scholar Dieter Grimm (2016) provides two different meanings of constitution, "Firstly, the word refers to the nature of a country with reference to its political conditions. Secondly, Constitution refers to a law that concerns itself with the establishment and exercise of political rule" (2016, p. 3). This definition emphasizes on the empirical and normative concepts of governance.

From the above definitions, constitution is understood as a body of rules whether it is written or unwritten that determines organization of the state as well as the relationship between the government and the governed. Constitution can be written or

unwritten, enacted or developed, rigid or flexible, unitary or federal, monarchical or republican, presidential or parliamentary, aristocratic or democratic. Ideological nature, organizational mechanism and distributive people's verdict, statutory instruments of parliament, judicial precedents or interpretation of courts decisions, conventions and customs, international conventions, treaties, academic works of eminent jurist and political scientists can be taken as the sources for the formulation of a constitution. Whatever the kind and source it could be, it legitimizes state powers. And, fundamental rights are considered as the main thrusts of democratic constitutions which guarantees human rights as well.

Fundamental rights are generally considered as human rights. Fundamental rights are not the readymade gifts of the state rather they are inherent rights as Bhattarai (2073) argues: "It can be said that all fundamental rights fall under human rights but not all human rights are written as fundamental rights. Therefore, fundamental rights are constitutionally guaranteed human rights" (p.72). Human rights are those basic rights to which a human being is entitled. These are natural rights that a state needs to protect. Simply, for the sake of survival, every human being needs minimum rights regarding to namely food, clothes and residence. The Universal Declarations of Human Rights (UDHR) 1948, has proved to be a landmark document that recognizes a world in which all human beings enjoy the rights, such as freedom of speech and belief, freedom from want and freedom from fear to the people of the world which are the higher aspirations of all human beings. This document has bagged the consensus from all parts of the world. It has its roots in religions, cultures and philosophies across the world. In that sense, it represents a global agreement on the set of standards required for the achievement of a more equitable and egalitarian world where every human being can live and grow with uninterrupted right and dignity. The law of the land envisages the provision of fundamental rights. Every state is itself entitled as welfare state. The major indicator of a welfare state is its obligation and accountability to articulate the human rights as fundamental rights in the constitution and their sincere execution. Fundamental rights are related with the concept of individual freedom. They emphasize on the principle of supremacy of law. The states codify these rights in their constitutions in the name of fundamental rights.

Magna Carta (1215) has been hailed as the written source of the fundamental rights, equality before law, the right of the personal liberty, the right to property and the right of free movement (Turner, 2003, p. 2). Similarly, Petition of Rights of 1628 is another key document in the history of fundamental rights. It safeguarded the liberties of the people by securing the supremacy of the law. Dahal (2049) puts:

Bill of Rights 1689 which famously declared 'no taxation without representation' and Act of Settlement of 1701 are seen as complementary charter to the Bill of Rights which are taken as a milestone in the development of fundamental rights. Although Great Britain has no written constitution but the fundamental rights have been better protected by court in accordance to ... charter and rights. (p.110)

UDHR (1948) had declared many fundamental rights for human beings. This Declaration was ratified by the UN General Assembly on 10 December 1948. Coincidentally, the first constitution of Nepal was also promulgated in the same year 1948, under the Rana regime. Since then, Nepal has promulgated seven different constitutions; the Government of Nepal Act, 1948, the Interim Government of Nepal Act, 1951, the Constitution of the Kingdom of Nepal, 1959, the Constitution of Nepal, 1962, the Constitution of the Kingdom of Nepal, 1990, the Interim Constitution of Nepal, 2007 and the Constitution of Nepal (2015), (Bhandari, 2016, p. 49). This indicates that Nepal has been passed through a long history of constitution making and implementing process in its political history.

Nepal has passed through various political upheavals in its history such as oligarchy, democracy, authoritarian and republican system. All of the constitutions made so far have the provision of fundamental rights. For instance, the Government of Nepal Act 1948 part 2, the Interim Government of Nepal Act 1951 part 2, the Constitution of the Kingdom of Nepal 1959 part 3, the Constitution of Nepal 1962 and the Constitution of the Kingdom of Nepal 1990 in part 3 (Tripathi, 2002, pp.15-120). Similarly, the Interim Constitution of Nepal 2007 and the Constitution of Nepal 2015 have also the provision in the same part. The provisions of fundamental rights are gradually added in one after another constitution (Singh, 2016, p.47). Thirty-one fundamental rights have been incorporated by the constitution of Nepal 2015 part 3, article no. 16 to 46 (pp. 9-26). In this way the provisions of fundamental rights have been incorporated in

the constitutions of Nepal's political history. Constitutional development of Nepal has also some kind of relationship with the constitutional development in other countries in the world including India.

When India gained independence on August 15, 1947, the constituent assembly of India, made up of elected delegates, was tasked with drafting a constitution for the country. Fundamental rights were included in the first draft of constitution in February 1948, the second draft on 17 October, 1948 and the third and final draft on 26 November, 1949, by a drafting committee. The new constitution, promulgated on 26th January 1950, which proclaimed India as "a sovereign socialist secular democratic republic" (Sharma, 2017, p.55) now consisting of 28 states each with substantial degree of control over its own affairs, and 7 less fully empowered union territories (Constitution of India, Schedule, One) with 395 articles 8 (Later 11) Schedules, and numerous amendments. It is the longest and more detailed constitution in the world (Kapur and Mishra, 2010, p. 63). For the purpose of securing justice, liberty and equality for all Indians the Constitution of India adopts two distinct concepts- democracy and socialism at a time though they are mutually contradictory (Sharma, 2017). In the real sense, democracy emphasizes on individual freedom whereas socialism stresses on collective ownership. Acharya (2008) holds his view on the nature of Indian constitution amusingly, "the constitution includes a detailed list of fundamental rights, a lengthy list of 'directive principles' of the state policy and much shorter list of the 'fundamental duties' of the citizen" (p. 365). This shows that Indian constitution has provisions of wider fundamental duties and rights.

The provision of fundamental rights articulated in part 3rd of the Indian constitution guaranteed basic civil liberties such that all Indians can lead their lives in peace and harmony as citizens of India. These include individual rights common to most liberal democratic system (Singh, 2017), such as equality before law, freedom of speech and expression, freedom of association and peaceful assembly, freedom to practice religion, and the rights to constitutional remedies for the protection of civil rights by means of writs such as *habeas corpus*. Violations of these rights result in punishments as prescribed in the Indian penal code subject to discretion of the judiciary. On constitutional embodiment of India, Brij K. Sharma asserts that the constitution focuses on the six fundamental rights. They are right to equality, right to freedom,

right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedy (Sharma, 2017, p.75). Thus, there is wider coverage of fundamental rights in the constitution of India.

In this context, it would be interesting to compare the constitutional provisions between and among constitutions. This study has compared the constitutional arrangements of fundamental rights articulated in the constitution of Nepal, 2015 and the constitution of India 1950.

Statement of the Problem

The Constitution of Nepal 2015 and the Constitution of India 1950 were produced of and adopted by the Constituent Assembly (CA) of respective country reflecting commitments and determination on many national and international forums. The idea of a Constituent Assembly in Nepal dates back to the 1950s when the country was, for the first time, entering into democracy, after the end of 104-year old autocratic Rana rule. However, it was not until fifty-eight years later that Nepal started drafting a constitution through an inclusive and participatory CA after the election of a couple of CA in 2008 and 2013 (IDEA, 2015, p.1). Although the constitution was drafted through CA, the preamble of the Constitution of Nepal does not adequately represent the commitments to equality, dignity and human rights. However, it enlists the liability to human rights alongside other goals such as "independence of judiciary" and "full freedom of the press" which in essence fail to recognize many of the listed commitments under the human rights paradigm.

Nepal's Constitution of 2015 provides a long list of fundamental rights. It includes a number of fundamental rights even not guaranteed by many developed countries. Nepal has pledged to guarantee more fundamental rights in the constitution beyond her capacity to fulfill them (NCWA, 2021, p. 55). Adhikari (2016) highlights provision of part III, Article 16 to 46, and he remarks: "there is a provision of affirmative action for historically prejudiced or disadvantaged communities among the others" (p. 72). It is incorporated under Article 18(3) of the constitution (LBMB, 2016, p. 12). Actually it is bestowed upon the constitutionally listed clusters.

The Constitution of India 1950 has encompassed the partial fundamental rights of the Indian citizens. Right to property has shifted into constitutional rights from

fundamental rights. It has given less fundamental rights than Nepal's constitution (Jha, 2018, p.179). There are differences in the provisions of inclusiveness, citizenship and property rights. Unlike in India, constitution of Nepal guarantees proportional representation in all electoral bodies and assure social justice. Both the constitutions were drafted through constituent assembly which declared themselves as secular multiparty democratic republic countries.

The assurance of the fundamental rights in part III of the Indian constitution represents a tectonic shift in constitutional philosophy from the Government of India Act 1935. The Constitution of India 1950 part III has incorporated twenty fundamental rights from article 14 to article 32 (Dalal, 2009, p.779). Then after it was put in a wider governance structure, but with minimal protection to the governed. "Part III replaces this notion of authority with a bidirectional vision of rights and duties" (Choudhry, Khosla & Mehta, 2016, p.581). This indicates that there are both similarities and differences in the constitution of Nepal and India in the provisions of fundamental rights. It would therefore be significant to contrast the provisions in the constitutions of countries with similar kind of political regime.

Moreover, the research efforts which have been made regarding the constitutional provision of fundamental rights of the existing constitutions of Nepal and India also do not focus on the gap highlighted here. Studies done so far in this aspect do not compare the existing constitutional provisions. This study, therefore, explores the similarities and differences comparing the provisions on fundamental rights in the constitutions of Nepal and India. The following research questions have been formulated to address the research problem identified here.

Research Questions

This study has compared the two constitutions based on the following questions:

1. What are the provisions of fundamental rights in the Constitution of Nepal 2015 and the Constitution of India 1950?
2. How are the constitutional provisions similar and different in terms of fundamental rights incorporated in the Constitutions of Nepal 2015 and India 1950?
3. How can the fundamental rights of the Constitution of Nepal and India 1950 be examined from the liberal and post-modern theories?

Objectives of the Study

This study had the following objectives: Nepal and India both have put efforts to prioritize the liberalism based democracy. The basement of their constitution outgrowths is western medieval political philosophy. Concurrently, John Locke (1689) indicates that the civil government can help people to gain the basic human rights of health, liberty and possession (cited in Myers, 1999, p.630). It is often argued that democracy and liberalism usually proceed instantly. Mellalli (2015) asserts that "the Constitution of India is the largest in the world and oldest in South Asia"(p. 10). The newly enacted constitution of Nepal has become the foremost document to set 33 percent parliamentary seats reserved (Article 38) for women across the South Asian countries. This is a major breakthrough (Jha, 2018, P.90). This charter of Nepal claims as the bundle of fundamental rights and a model document for inclusive governance. Each country has their own fundamental rights in their constitutions. However, the nature of dimensionality and conformity shows the variations.

1. To assess the constitutional provisions on fundamental rights in the Constitution of Nepal (2015) and the Constitution of India 1950.
2. To identify and describe the similarities and differences in the constitutional provisions of fundamental rights incorporated in the present Constitution of Nepal and India.
3. To examine the provisions of fundamental rights of the constitution of Nepal and India in liberal and post-modern inclusive democratic theories.

1.4. Justification of the Study

Democracy survives by giving equal opportunities to all citizens in all aspects. Democratization also means by limiting the power of powerful and empowering the weak. An assertive society at grassroots and effective management by commonsense at the centre can do well democratizations (Panta, 2001, p. III). This highlights on how important democracy is. But this kind of provisions is determined through constitutional provisions.

The trend of the constitutional development in Nepal till the abolition of monarchy was a case of systematic conflict between the people's aspirations for democracy and

kings' ambitions for unlimited powers (Bhandari, 2016, pp. 68-69). The Constitution of Nepal 2015 was enacted and embraced by the Constituent Assembly (CA) elected for constitutional process for political/legal policy. However, it could not continue for a long.

With the possibility of progressive realization, the new constitution of Nepal is equipped with a long list of fundamental rights, including economic, social and cultural rights (Naidu, 2016, P.10). Undoubtedly, as the part of right to remedy, these rights can be claimed at the provincial high courts and supreme courts. For the constitutional guarantee of inclusiveness and proportional representation, after popular demands from marginalized communities' constitutional commissions were created along with the National Human Rights Commission. If any discrimination presents against rights of respective communities, obviously these commissions have a mandate to receive complaints or recommend changes in laws, policies and practices so as to assure their rights.

Under article 84 (1) (a) prospects the population and geography both shall be the basis of constituency delineation. One-third women representation in parliament is guaranteed under article 84 (8), rights of women as fundamental rights under article 38 (1), both 'spouses shall have equal rights in property and family affairs" under article 38 (6), rights of senior citizens under article (41) are attached as fundamental rights (LBMB, 2016, pp. 22-24). The 2015 constitution approves 'all languages given by mother in Nepal shall be the national languages' which is "a unique provision of new constitution" (Dahal, 2018, p.155). The present constitution of Nepal has incorporated 31 types of fundamental rights under part III article 16 to 46. This study examines the unique features articulated under this constitution and also reveals some lapses for the attainment of the equality, liberty and freedom of the Nepalese citizens.

The constitution of India evolved through a long period of time and stood in present form. Chakrabarty (2011) proclaims that "India's freedom was achieved basically through a compromise with imperialists, thereby, handing over power to the bourgeoisie" (p. 35). India moved through several constitutional and other landmarks. Among others India Regulating Act of 1773 was the first step of the British Government to control affairs of the East India Company (EIC). With Pit's India Act of 1784 Indian affairs came under the direct control of the British Government.

Charter Act of 1853 for the first time introduced local representation. Central Legislative Council (CLC) and Government of India Act of 1859 ended the rule of East India Company (EIC) and the British crown started to rule in India directly. Later Indian Councils Act of 1909 associated Indians with the executive council and introduced communal representation in state affairs. Government of India Act of 1919 brought several changes in Indian society, introduced direct election for the first time in India and gave voting rights to a few people on the basis of property tax or education, separated provincial and central subjects, introduced bicameralism. In the same way, Government of India Act of 1935 provided the basis for the establishment of "All India Federation" and provincial autonomy. Ultimately in 1947, the British Parliament passed the Indian Independence Act, 1947.

Accordingly, British rule ended and "declared India as an independent and sovereign state from 15 August 1947 that divided British India into India and Pakistan and gave options for the Indian princely states to join either India or Pakistan or to remain independent" (Mellalli, 2015, pp.7-8). The elections of Constituent Assembly (CA) were held in India in July 1946 even before the enforcement of the Indian Independence Act, 1947 which led to the constitution making process.

The words of the preamble to the constitution have been borrowed from clauses 1, 5 and 6 of the objectives resolution. It contains the great purpose and principles laid down in the constitution. The phrase "we the people of India" denote that it is constitution of the people, for the people and by the people of India. In the Preamble, the people of India strongly declared; "In our Constituent Assembly this twenty-sixth day of November 1949 do hereby adopt, enact and give to ourselves this Constitution" (Constitution of India, 1950, p.1). The Preamble declares India as an Independent Sovereign Republic.

Under the part III (Article 12-36) the constitution makers have made a vast list of human rights and fundamental freedoms in the name of fundamental rights. It has adopted a number of human rights stated in the UDHR, 1948. These provisions of the constitution are called the Magna Carta of India. The fundamental rights have been made in the constitution in accordance with the trend of modern democratic thought. They include certain basic and natural rights which are necessary to promote and protect the human dignity of individuals. The fundamental rights mentioned in part III

of the Indian constitution, summarized by Dalal (2009), are: "Right to Equality (Articles 14-18), Right to freedom (Articles 19-22), Right against Exploitation (Articles 23-24), Right to Freedom of Religion (Article 25.28), Cultural and Educational Rights (Articles 29-30) and Right to Constitutional Remedies (Articles 32-35)" (p.781).

The Part III of the constitution has guaranteed equality before law, equal protection of law, freedom of speech and expression, protection of life and personal liberty, freedom of religion, rights of minorities and a number of other fundamental rights. For the enforcement of fundamental rights, a person may file a suit against the state. However, state is authorized to impose some restrictions in the interests of society. The constitution of India puts certain limitations, as Upadhyay (2014, p.26) states "These limitations on fundamental rights are stated in the constitution itself. Any law or executive action which violate Fundamental Rights be declared void".

Adhikari (2015) observes on fundamental rights of Nepal:

The Constitution of Nepal (2015) has introduced many changes in the erstwhile constitutional system of Nepal. Apart from federalism, it consolidates people's competitive multi-party democratic governance system, civil liberty, fundamental rights, human rights, adult franchise, periodic elections, complete press freedom and an independent, impartial and competent judiciary, and the concept of rule of law, it embraces multi-ethnic, multi-lingual, multi-cultural state based on diverse geographical specifics. (p. 57)

A term 'socialism oriented' used in preamble is contested and controversial issue due incorporation of liberal and socialist values at a time. The provision of the restrictions of the fundamental rights under article 17 right to freedom remains ambiguous. In Article 20 (2), it is not clear why a citizen of an enemy state is not under the protection to the criminal justice. Inherently everyone is supposed to have this right. Regarding the property right under article 25, expropriation and compensation of the property is not considerably analyzed. Article 26, which ensures the right to religious freedom, proselytize is prohibited which contradicts with freedom of religion and secularism. Right to clean environment under Article 30 right to 'Social justice' under

Article 42 still remain under disputes. Hence, this study has explored the justifiable and logical solutions to solve the aforementioned shortcomings of fundamental rights. It is a useful source for the students of human rights and the researchers of constitutionalism.

The constitution of India sets a most elaborate declaration of human rights as compared with the bill of rights contained in any other existing constitution. The provision of chapter III are detailed covering a variety of topic and some are purely the outcome of the peculiar social conditions, prevailing in India. Some of the rights conferred by the constitution are limited to the Indian citizens only; such as freedom of speech, assembly and cultural and educational rights in case of others, as equality before the law, religious freedom, etc., such limitation does not exist, these are applicable to the citizens and aliens alike (Kapur & Mirsra, 2012, pp. 94-97). The Indian constitution's guarantee of freedom of speech and expression should not be subject to the whims of a few individuals.

The fundamental rights under the Indian constitution were intended to serve three important purposes namely: a) to prevent the executive from acting arbitrarily, b) to ensure some amount of security and protection to various types of minorities, and c) To promote and foster social revolutions by establishing the conditions necessary for achieving justice; social, economic, and political. (Turukmane, 2014, pp. 124-125). Thus, the constitution assigns all political, social and economic rights.

Contrary to this, there are various criticisms against the Indian constitutional provision of fundamental rights. It is said that the enforcement of right to employment has not been practicable till date due to the limited resources and economic situation of the country. Similarly, Sarojini (1976) points out that the restrictions, exception and explanations, with which the fundamental rights are hedged around, have the effect of depriving the rights in practices. Displaying disparity between principle and practices, Baer (2009) criticizes that there is a vast gap between the fundamental right guaranteed in the constitutions and reality of these right in practice (pp.417-468).

The provision for preventive detention and suspension of fundamental rights has also been deeply criticized. Further, critics point out that although article 17 has constitutionally prohibited untouchability, the evil still exists in many parts of the country.

This dissertation dealt with the comparative study of fundamental rights in Nepal and India. Each country has their own fundamental rights according to their constitutions. The researcher has made a comparative study of the fundamental rights incorporated in the constitutions of Nepal (2015) and India (1950) to find out the importance of fundamental rights given in these two countries and analyze more information regarding fundamental rights in the detailed manner. This is how it contributes in understanding and analyzing the constitutional provisions on fundamental rights in the constitutions of Nepal and India from the perspective of liberal democracy.

Limitation of the Study

This study is focused on the comparative study of the provisions on fundamental rights under hitherto implemented constitutions in Nepal since 1948 to 2015 and the constitution of India 1950. In terms of area, objectives, methods and generalization it has its own limitations. In terms of theory, this study adopts liberal, post-modern and inclusive theory of rights. The main content of analysis are taken from two constitutions. Other necessary secondary data were obtained from various secondary sources which include books, journal articles, reports, etc. Therefore, study is limited to available secondary data. Likewise, the study has made a closer look at the provisions of fundamental rights mentioned in the constitution including the political, social and cultural transformation of India. In this analysis the international declarations, agreements, covenants and protocols related to the development of human rights in the world are included. Thus the study has covered the provisions of fundamental rights mentioned in the constitutions of Nepal and India in the reference of global declaration of human rights. With numerous constrains this study has focused on fundamental rights of the Constitution of Nepal (2015) and the Constitution of India 1950. The study is thus focused on the Constitution of Nepal (2015), the Constitution of India (1950), the Constitutional interpretation of Nepal and India, the Constitutions which came into force in the past, UN Declarations of Human Right (1948), International Covenant on Economic, Social and Cultural rights (1966) with Optional Protocols and International Covenant on Civil and Political rights (1966).

Organization of the Study

This research is framed into nine chapters:

Chapter one outlines introductory section that includes introduction, statement of the problems, research questions, significance, objectives, scope and limitation and organization of the study. Chapter two has included literature review. The literature related to the constitutional provision of fundamental rights and their theoretical and practical application has critically reviewed.

Chapter three has incorporated research methodology which includes research design, study area, sources and nature of data, data collection methods, data analysis, ethical considerations and conceptual framework. Chapter four has attempted to explore the discourse of fundamental rights with philosophy of East and West, natural rights/social contract/liberal schools of thoughts versus Marxists thoughts, expansion of right and international conventions and declarations and literature dealing with both formal and operational parts of fundamental rights in Nepal and India.

Chapter five has overviewed modern sovereign state; concept, history and evolution of fundamental rights. In particular, it also briefly narrates on the state of fundamental rights in UK, USA, France and South Africa. Chapter six has analyzed and commented on constitutional history of India. This chapter has also overviewed the constitutional development of India and analyzed the provision of Fundamental Rights stated in 'The Constitution of India 1950'.

Chapter seven has elaborated constitutional history of Nepal. It has sketched chronological history of human rights in Nepal. It has overviewed the constitutional development in Nepal since the inauguration of first one in 1948 to the now 2015 constitution. Obviously the focus is in fundamental rights. Chapter eight has portrayed on the comparative study of the constitutional provision of fundamental rights articulated in the present Constitution of Nepal (2015) and the Constitution of India 1950. It has showed similarities and differences between these two constitutions. This is a core analytical part of the research.

Lastly, chapter nine is the final chapter of this research which has included overall summary, conclusions and final thoughts and theoretical reflections.

CHAPTER TWO

REVIEW OF THE LITERATURE

This chapter has dealt with various concepts, theories and empirical studies on constitution and constitutional provisions of fundamental rights. The chapter has further attempted to engage the debate on major issues such as natural rights, human rights and fundamental rights based on different perspective like classical ideology oriented, Marxist and liberal. It has also identified the reflection of liberalism in democratic governance, contrast between components of liberalism and constitutional provision of fundamental rights, similarities and differences, determinant factors, and strengths and weaknesses with especial reference to the constitutions of Nepal and India. While analyzing, due attention is given to distinction between human rights and fundamental rights. Ghosal distinguishes as "All fundamental rights are definitely human rights, but human rights recognized by the states through their constitutional guarantees are only considered as fundamental rights" (2010, p.1105). The human rights obtain the position of fundamental rights only after the constitutional accreditation.

Constitution and Constitutionalism

The term constitution and constitutionalism have different meanings, even though they are reciprocal to each other. A constitution is a combination of the fundamental laws, customs, conventions, rules and regulations that stipulate how a country is governed, so far as it concerns constitutionalism it refers a principle which is not just a constitution but also puts limitations to the activities of individuals and the government. The constitution is also considered as legal, political, economic and social-cultural document of a nation which lays down powers and functions of state organizations, rights and duties of the citizens and demarcates the relations between state and citizens. Grimm (2016) elucidates constitutionalism as "The implication of constitutionalism is that in exercising its power the government should be limited by law. Its authority over the people is dependent on its observance of the limitations under the law those limitations are enshrined in the constitution" (2016, p. 8). The Constitution generally connotes its higher legal status in comparison to other laws.

Constitution

Constitution simply means a politico-legal document having constitutional laws and other rules. Hence, the constitution is regarded as the highest law of the land of all nations. It creates the institutions of the government, define and limit their powers, and ensures the rights of the people. The term 'constitution' also refers to the nature of a country with reference to its political conditions and concerns itself with the establishment and exercise of political rule. Thus, the constitution refers the empirical and normative concept of governance.

Correspondingly, a constitution is a collection of principles according to which power of government, the right of the governed and the relation between two is maintained. In the words of Aristotle constitution is "the way of life, which the state has chosen for itself" (as cited by Ross, 1937, p. 4). The constitution expresses the values of the states, defines the polity and people and the limitations of the government within the state. It signifies that the constitution is a supreme law of the land promulgated to exercise sovereignty.

The basic elements of a good constitution include clarity, brevity, comprehensiveness, flexibility, assertions of rights, judicial independence, and directive principles and state policy. Fundamental Rights are the central provisions of any type of constitution and considered as the core theme of the human rights (Evans, 2001, pp.623-40). The constitution is an important phenomenon of a free democratic state which organizes and controls power, ensures human rights, balance the competing claims of social and individual interests, mirror the culture and experience of the country, and operate as vehicle of national progress and unity (Where, 1960, pp.2-8). According to him, the constitution is an expression of prevailing society.

The rise of dictatorships in Europe (Germany, Italy and Russia) brought grave setbacks to the constitutional development in the world history. The whole Europe plunged into the Second World War. This fierce, murderous war did not end the dictatorships only but also out broke the movement of nationalism constitutionalism and democratization of the state (Kurki, 2011, p. 1574). Then, the wave of change spread all over the world.

The constitution is not only the supreme law of the country, it is also a fundamental framework of governance and a mechanism for social equilibrium. It "institutionalizes the legal system and the rule of law and concept of constitutionalism. It is a guarantor of fundamental rights and democratic practices" (Schumpeter, 2011, p.270). One of the functions of a constitution is defining and maintaining human rights and protecting the individual members of the political community against illegitimate interference with their rights. Contrary to this, the rulers define it in a prerogative way for their convenience. The constitutional provision may not come in to practice automatically. In order to implement them constitutionalism is required.

Constitutionalism

Constitutionalism is an idea of limited government which offers guidelines for the making and institutionalization of Constitution. Constitutionalism is defined as "a doctrine that a government's authority is determined by a body of laws or constitution" (*Dictionary of Britanica*, 1981, Vol.8). As Kharel opines, "Although constitutionalism is sometimes regarded as a synonym for limited government, that is only one interpretation and by no means the most prominent one historically. More generally constitutionalism refers to efforts to prevent arbitrary governor "(2016, pp. 104-5). In his words constitutionalism is an antithesis of arbitrary government.

Nate Sullivan and Jeffrey Perry has explored the constitutionalism as "a political philosophy based on the idea that the government authority is derived from people and should be limited by the constitution that clearly expresses what the government can and cannot do" (2012, p. 2). Similarly Susanne Baer argues, "In constitutionalism, though certainly depending on one's political, ethical and philosophical assumptions, a triangle concept of dignity, liberty and equality may in-form an adequate understanding of fundamental rights" (2009, p. 441). Constitutionalism has a vibrant history among the English people and that tradition has passed on to other nations, most notably to the US as Americans.

The roots of constitutionalism go way back to 1215; King John of England was forced by a group of wealthy nobles to sign in a document famously known as Magna Carta. The Magna Carta set certain limits on the king's power. The practical importance of Magna Carta has been exaggerated over the years, but nevertheless, it did set a

precedent for limited government. It entrenched in 1689 with English Bill of Rights, which was signed by King William III of England King William III, who came to power in what is called the glorious revolution. Basically, the people of England were tired of King James II's pro-catholic policies and invite William, who was a protestant, to come to invade their country and become their new king. Historically, "The English Bill of Rights is a foundational constitutional document that helped to inspire the American Bill of Rights" (Bellamy, 2007, p. 17). It shows that the Bill of Rights in the United States is an extension of the British Bill of Rights.

John Locke (1632-1704) has played a huge role in cementing the philosophy of constitutionalism. According to his approach, "government is a sort of contract between the people and the state, and if the state abuses its power or does not hold up its end of the bargains, the people have right to make the contract null and void. Eventually the concept of constitutionalism diffused in USA and the whole world" (Grimm, 2016, p.6). Further justification for the development of constitutionalism has put in the book 'Constitution and Constitutionalism' (2020)-"The theoretical foundation of modern constitutions were laid down in the great work on the Social Contract, specially those of Thomas Hobbes and John Locke in the 17th century and Jean-Jack Rousseau in the 18th" (Acharya, 2020, p.18). It is reasonable to believe that today's modern constitutions reflect shifting patterns of social contract.

The core objective of constitutionalism is seen as safeguarding each member of political community, as each person is supposed to possess a sphere of genuine autonomy and ultimately, it is expressed in the name of human rights. The concept of fundamental rights is the transformation of human rights through the process of globalization to nationalization. It is an outcome of concept of constitutionalism.

Human Rights and Fundamental Rights

Since the human rights and fundamental rights are reciprocal to each other, they are different phenomenon. Obviously, all human rights are not fundamental rights but all fundamental rights are human rights. When basic human rights get entry to the national constitution with judicially enforceable provisions transform into fundamental rights.

The foundation of both human rights and fundamental rights are based on the doctrine of natural rights which ultimately precedes the rise of liberal democracy. Hence the conception of human rights is taken as basic and necessary element of a democracy. In the language of N. Jain, "It is implausible in a dictatorship or any kind of authoritarian regime, be it 'Communist', military dictatorship. In fact, the concept of human rights evolved from the doctrine of Natural Rights in the 17th century, which preceded the rise of liberal democracy" (2006, p. 143). The concept of Natural Rights is an outgrowth of the doctrine of Natural Law which has dominated philosophical thought. Chrysippus expressed such ideas in the opening words of his book *On Law*.

Sabine (1959) narrates the relation of natural rights with state law as- "Law is the ruler over all the acts both of Gods and men. For all beings, that are social by nature the law directs what must be done and forbids"(p.136). According to Sabine, the concept is a law that is higher than any human authority, guiding and directing men's affairs.

The law is divine law in middle law age that was identical with natural law. Barker quotes, "The Lex which was Rex to mediaeval thinkers was law which did not proceed from a human legislator. So far as it was revealed, it was the stern daughter of the voice of God; so far as it was natural, it was the inevitable outcome of the reason in man" (Hearnshaw, 1950, p.19). In his opinion, the term "law" is synonymous with "natural law" or "God's voice".

Aquinas also looks upon law as mere expression of cosmic reason at various levels. It is notable that this belief in natural law does not suggest any concept of natural rights. In the "Leviathan", Hobbes assumes "Every man has a 'right to life' and the right to its preservation" (1651, p.78). Hobbes writes, " The contract is dissolved automatically and man returns to protect the life of the individual" (Hobbes, 1651, p.79). In his book "Leviathan", Hobbes emphasizes the value of life.

John Locke's convictions that tally with the doctrine of natural rights finds full expression and in him the right to life is coupled with two other rights, namely, liberty and property. In fact, what is life to Hobbes is property to Locke. In this way the derivation of natural rights from natural law is completed in John Locke's *Two Treaties on civil Government*. Locke's ideas of life, liberty and property are natural

rights and are fundamental rights, appealed to revolutionaries and freedom fighters both in Europe and the Atlantic. They find expression in the American Declaration of Independence, 1776 and in the French Declaration of the Rights of Man, 1789. These two declarations are of great historic importance (Jain, 2006, p.144). These two declarations guided and directed the political developments and constitutional rights.

Hence, the fundamental rights are distinct from the ordinary rights in the reason that the former are inviolable and judicially enforceable if infringed by any accord. "No law, ordinance, custom, usage, or administrative order can abridge or take them away" (NCERT, 2015-16, p.60). Any law which is contradictory of any of the fundamental rights, void. In part III of both the Constitution of Nepal and India there is a provision of fundamental rights. They are formulated with ideological perspectives.

Ideological Perspective of Fundamental Rights

In fact ideology is a body of ideas that reflects beliefs of a nation, political system, class, etc. Manoranjan Mohanty states, "Ideology is statement of the ends, means and method of analysis" (1977, p. 10). The ideology is "an inter- related set of convictions or assumptions that reduces the complexities of a particular slice of reality to easily comprehensible terms and suggests appropriate ways of dealing with that reality" (Hunt, 1990, p. 108). Hunt further clarifies that "the comprehensive and mutually consistent set of ideas by which a social group makes sense of the world may be referred to as an ideology" (1990, p. 108). Hunt finds that a collection of ideas eventually converts into ideologies.

The philosophy and science determine the special role in 'theory' and 'ideology' building. As Hacker distinguishes:

In theory, philosophy makes a disinterested search for the principles of the good state and good society and science makes disinterested search for knowledge of political and social reality. Similarly, in ideology, philosophy rationalizes for current or future political and social arrangements and science distorts description or explanation of political and social reality. (2006, p.5)

Several ideologies are propounded by different philosophers. Scholars have used ideology in religion, political philosophy, and the sociology of the knowledge.

Capitalism, communism, socialism, liberalism, Marxism, Hinduism, Taoism, Maoism etc. are the living examples of ideologies. Different ideas, philosophies and approaches are followed during the study of an ideology.

Ideologies are further defined as the body of ideas that exist in culture. There are several kinds of ideologies which articulate what and how people can think about religion, politics, and art. "Ideology is the thinking of society which incorporates the forms of social realization that exist at any meticulous period" (Pathak, 2005, p. 30). "Ideology is simply the scholarly construction of competing theories" (Dijk, 1998, p. 1). Hence, it can be easily said that the 'ideology' is nothing more than a scholastic fabrication of opposing theories.

The ideologies and fundamental rights have a reciprocal relationship. The modern ideology does not concern with the political system and model of constitutions that a country adopts rather it stresses on the human rights which are naturally inherent in human beings by birth. The Marxist ideology focuses on class-based liberty whereas western liberal ideology advocates on individual liberty. Thus, the ideologies influence the constitutional provision of fundamental rights.

The Modern Perspective of Fundamental Rights

The modern concept of fundamental rights assigns its origin to human rights. Although both of these terms apparently seem to have the same connotation, "human rights are naturally inherent in human beings by virtue of their birth whereas fundamental rights are co-related with the freedoms and rights" (Tripathi, 1999, p.2). There has not been made a universal definition, concept and interpretation of the human rights. Simply, "human rights mean the right to be human and the right to correct inhuman wrongs" (Shrestha, 2001, P.20). Human rights are the result of the human race's unceasing quest for justice and freedom.

Human conscience and reason, reflected in the constant striving of the human race for justice and freedom. However, the history of the concept of human rights is also as old as the history of mankind. It is a history of human revolution for norms and values of human rights against unjust, oppression and discrimination since the primitive age. There is no evidence of the origin of this concept from any specific society, polity, religion or culture. However, "the modern concept of human rights looks largely

influenced by western culture but Eastern philosophy and culture of ethics, non-violence and friendship have also contributed in great extent in the evolution of concept of the human rights" (Shrestha, 2001, p.21). Human rights emerged as a result of the traditions and practices that arose in western and eastern society in the past, according to Shrestha.

The concept of the development of human rights is supposed to date back to ancient Greece and Rome. The earliest germs of human rights can be traced back to revolts by the slaves in ancient Greece for the recognition and restoration of some of their basic rights and to Magna Carta on which King John of England was forced to sign on June 15, 1215. It is believed that the primary source of human liberties was the actual acceptance of this British charters which played a vital role in the evolution of the concept of human rights.

Besides, the American Independence Declaration of 17 July 1776, the Virginia Declaration of Rights (1776), the first ten Amendments introduced in the American Constitution on December 15, 1791 and the French Declaration of the Rights of Man and Citizen (1789) were some other significant landmarks in the development of human rights. In short, "the history of constant struggle and countless sacrifices for the recognition of the rights of man for his development with dignity contributes to the constitutional provision of fundamental rights" (Tripathi, 2002, p.338). He claims that fundamental rights were created to honor dignity of life.

Western Liberal Perspective on Fundamental Rights

The modern concept of human rights is the reflection of struggles made by western countries time to time. Magna Charta 1215, Petition of Rights 1628, Habeas Corpus Act 1679 and Bill of Rights 1689 are the notable examples.

A set of liberal concept is a foundation of constitutionalism. Generally, liberalism stands against the coercive interference of government, any kind in any walk of life whether moral or religious, social or political. It believes that government is necessary to protect individuals from the others and the ruling authority itself. As Thomas Paine (1776) expressed, government is at best "a necessary evil". The complementary components of government like laws, judges and police are needed to secure the individual's life and liberty, but their coercive power may also be turned against him.

John Locke, Adam Smith, Montesquieu, Thomas Jefferson, John Stuart Mill, Lord Acton, T.N. Green, John Dewey, and contemporaries such as Isaiah Berlin and John Rawls are certainly liberals but they do not agree about the boundaries of toleration, the legitimacy of the welfare state, and the virtue of democracy, to take rather central political issues. They do not even agree on the nature of the liberty they think liberals ought to seek (Berlin, 1969, pp. 122-34). He contends that democracy's value is liberty.

Hacker, A. has classified the typology of liberalism as, 'Reformist Liberalism', 'Free-Market' Liberalism', 'Utopian Liberalism', and Democratic Liberalism (2006, p. 237). This is politico-democratic liberalism. John Locke, Jean Jack Rousseau, Montesquieu, Thomas Jefferson and John Rawls have contributed to reflect the minimum human values such as; life liberty and property in the name of fundamental rights in constitution building.

Thomas Hobbes (1651) has argued that preserving life was the most important function of government. In his classic philosophical treatise, 'Leviathan' Hobbes described, life without government as life in a "State of nature". Without rules, people would live like predators, stealing and killing for personal benefit. In Hobbes' classical phrase, life in a 'state of nature' would be "solitary, poor, nasty, brutish and short". In this regard, he believed that "complete obedience to Leviathan's strict laws was a small price to pay for the security of living in a civil society" (Janda, Berry & Goldman, 2008, p. 6). The concept of government was imagined in order to maintain social security.

Hobbes has included the recognition of the existence of the individual and individual rights along with the concepts of rationality, self-interest, competitiveness, and calculation as individual attributes. Hobbes did not consider the ruler or monarch to be ordained by God or some external force, "but by the people themselves since 'authority' is given by the subjects themselves" (Hobbes, 1651, p. 14). Hobbes as positive law theorist believed that human rights needed strong laws to protect them. He opines, the rights can be given and taken away by the state, they are not universal. It just contrasts with the provision of universal declaration of human rights.

John Locke is widely known as "a founding father of liberalism" (Haakonssen, 1988). He argued that human society was in peace, happiness and harmonious situation in natural state. The men entrusted their right to the civil society or community by mutual contract as their general will. This 'will' could be reflected through the limited government which could not rule against the natural right of the men mentioning as second treaties of the government.

Locke has pleaded a limited sovereignty, for reason and experience taught that the political absolutism was irrational. Describing the characteristics of a good state, Locke said it existed for the people who formed it, and not the vice versa. He proclaims that "sovereignty had to be based on the consent of the people subject to the constitution and the rule of law. It would be limited, since its powers were derived from the people and were held in trust. It was also limited by natural laws and individual rights" (Locke, 1960, p. 402). Beyond the English settlement of 1688 Locke's concepts of constitutionalism, toleration, natural rights, limited consensual and law based authority, pluralism and property had a significant impact in establishing and nurturing a liberal society in England.

Thomas Jefferson referred John Locke's words as "We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness" (Janda, Berry & Goldman, 2008, p. 7). Their conceptions of the right to life and liberty are critical to living a happier life.

Janda, Berry and Goldman have further argued on the principles underlying the declaration were rooted in the writings of the English Philosopher. "Locke argued that people have God-given, or natural, rights that are inalienable - that is they cannot be taken away by any government" (Janda, Berry & Goldman, 2008, p. 7). In addition, Locke believed that all legitimate political authority exists to preserve these natural rights, and this authority is based on the consent of those who are government. "The idea of consent is derived from social contract theory, which states that the people agree to set up rulers for certain purposes, and that they have the right to resist or remove rulers who persists in acting against those purpose" (Janda, Berry & Goldman, 2008, p.71). They conclude that the ultimate authority rest in the people.

In his 'Discourse on Inequality (1755),' Rousseau depicts the natural man as a 'noble barbarian.' In the wild, men are equal, self-sufficient, and satisfied. They have an exquisite bliss and a primal simplicity in their lives. The state is thus a bad thing, yet it is necessitated by men's inequities. Rousseau takes a modified vision of the civil state in Social Contract, believing that the civil state's advantages outweigh those of the natural state.

Asirvatham (1961) rightly synthesizes as:

what man loses by the social contract is his natural liberty and an unlimited right to all which attracts him and which he can obtain, what he gains is civil liberty and the property of what he possesses. To avoid error in the reckonings we must carefully distinguish natural liberty, which has no bounds but the power of individual, from the civil liberty which is limited by the general will; and possession, which is only the effect of force on the right of the first occupant, from property, which can only be founded on a positive title (p. 80).

Jean Jack Rousseau proposed the social contract idea, which argued that all members of a community had agreed to build a civilized society in exchange for equality from the government. Rousseau's theory inspired for constitution building with the provision of equality rights in it.

A Theory of Justice (1971) by John Rawls is a profound, nuanced, wide-ranging, and methodical work in political and moral philosophy. He proposed in a philosophical review article "Justice as Fairness" (1958) that the way to develop a theory of justice was to ask ourselves what arrangement we would have reached if we were devising basic political and economic institutions of our society through a Social Contract made under conditions that guaranteed the contracts' fairness. However, that scarcely explains the impact on non-philosophers. His concept of Justice (1971) aims to discover what rights we have against one another, starting from the ground up - rights against our government, such as the right to a fair trial or the right not to be forced to fight in an unjust war; civil and political rights, such as the right to vote and the right to choose our own occupation and exploitation. Consequently, his concept enters in the form of fundamental rights in the modern constitutions, but still lacks to compare

the constitutional provisions of fundamental rights between or among the countries.

Ryan has disputed that:

The modern liberalism project puts upon individuals the burden of making choices about the use of those resources that former societies may not have done, and certainly offers fewer transcendental comforts than the moral projects of earlier ages (Ryan, 2012, p. 472).

"Since liberal democracy and human rights are understood as two sides of the same coin" (Evans, 2001, p. 623). Most liberal theories conclude by placing a higher premium on individual liberty than they do on democratic government. While John Locke does not juxtapose these two values in an explicit way, both Tocqueville and Mill make the tension between majority rule and individual rights, and it is important to note that Tocqueville and Mill all feel obliged to sanction democracy, even though their chief concern is to establish free society (Hacker, 2006, p.242). In post-cold war period, the campaigners of liberal democracy focus on; the principle of accountability, a high degree of autonomy and acting in the whole interest of the people. Jain (2006) very interestingly examines as that the liberal democracy grants maximum protection and minimum risk to the life, liberty and property of the criminals.

The right to political freedom, which includes the right to vote and the right to freedom of expression, is vital to democracy. In international documents we can observe intelligibility between democracy and fundamental rights as expressed in Article 25 of the International Covenant on Civil and Political Rights (ICCPR) 1966, "No country is genuine democracy unless it recognizes and protects, as a fundamental rights, the rights to vote at genuine periodic elections which shall be by universal and equal suffrage and shall by secret ballot, guaranteeing the free expression of the will of the elections". Similarly, no society can claim to be a true democracy unless it acknowledges and respects the right to freedom of inquiry, speech, and press, which we can call the right to freedom of expression for simplicity's sake. Obviously, a citizen cannot actively engage in the political life of his or her country by voting or otherwise unless he or she has the right to freedom of expression, which is guaranteed by Article 19 of the ICCPR.

Evans (2001) summarizes the contribution of the UN as:

United Nations has contributed to the global reach of the 'idea' of Universal Human Rights. On the other hand, as an organization based upon sovereign equality and non-intervention, the UN cannot respond to the demand for universal Human Rights, it has itself engendered. This is reflected in the claim that the UN is good at standard setting but poor at implementing those standards. (p.629)

In short, "the UN remains responsive to the demands of the state not to people and their demand for rights" (Fellice, 1999, p.563). Fellice underlines the UN's responsibility in ensuring human rights protection.

UNO, United States (US) and European Union (EU) proclaim that it is democracy first then only human rights. This version hurts the developing countries and accuses that the developed countries are placing the 'democratic cart' before the 'economic horse' (Mahabubani, 1992, p.7). The leaders of the developing countries argue that their first task is to build a strong economy that nurtures the common interests of the middle classes, breaks down traditional traits and provides the economic conditions for democracy and human rights. Kishore Mahabubani argues the condition in most developing states necessitates a "period of strong and firm government, committed to radical social reform in order to 'break out the vicious circle of poverty sustained by social structures contained in vested interests opposed to real change'" (1992, p. 8).

Edward Luce doubts on the unipolar dominance of western liberal democracy recurring the pre post-Cold War events. He argues that "the westerns should be particularly wary of the siren song of history. Those who cannot remember the past are condemned to repeat it" (Luce, 2017, p.16). Liberal democracy, according to Luce, is the outcome of previous experience.

It is a great challenge to maintain equilibrium among democracy, human rights and liberal economic policy. Democracy, liberalism, and human rights are mutually reinforcing phenomenon. "Demand for democracy and human rights may bring a challenge to current economic and social practices, which must be countered by strengthening" (Evans, 2001, p.628). He worries that in the name of democracy, market-preserving authoritarianism can occasionally trump humanitarian voices.

After World War II, the world was divided into three blocs: capitalist, socialist, and developing countries. The capitalist bloc, led by the United States, prioritized civil and political rights, whereas the communist bloc, led by the former Soviet Union, prioritized economic and social rights. Developing countries focused on the right to development, including collective community fears, fraternity, peace, and self-determination, as well as the state's duties and responsibilities toward individuals. Following the conclusion of the Cold War, cultural and religious divides emerged between industrialized and developing countries, rather than between capitalists and communists.

The western liberal perspective on human rights focuses on the provision of UN Declaration of fundamental Rights (UDHR), 1948. Nonetheless, The United Nations World Conference on Human Rights 1993, Vienna, finally addressed, "the controversy over the universality of the Declaration of Human Rights (DHR) due to the differences of religious-cultural relativism" (Pathak, 2005, P. 35). Specifically, the western liberal philosopher stresses on freedom, liberty and equality and they extremely focused on individuality.

The concept of human rights institutionalizes after evolution of bill of rights (1689) from Europe and engendered after the enforcements of UN Declarations of Human Rights (1948) and International Covenant on Economic, social and Cultural Rights (1966). Concerning to human rights, Nepal and India stood to break through the fundamental rights being a democrat country in 1951 and 1947 respectively.

Fundamental Rights in India

Historical precedents such as England's Bill of Rights (1689), the United States Bill of Rights (approved on September 1787, final ratification on December 15, 1791) and France's Declaration of the Rights of Man inspired the development of constitutional guarantees of fundamental human rights in India (created during the revolution of 1789 and ratified on 26 August 1789). The fundamental rights in India were included in the First Draft Constitution (February 1948) the second Draft Constitution (17, October 1948) and final Draft Constitution (26 November 1949), prepared by the drafting committee.

Fundamental Rights for Indians attempted to correct imbalances in pre-independence social practices as well. They've also been used to abolish untouchability, making it illegal to discriminate on the basis of religion, race, caste, sex, or birthplace. They also prohibit human trafficking and forced labor (a crime). They also protect religious and linguistic minorities' cultural and educational rights by allowing them to keep their languages and build and manage their own educational institutions (Constitution of India 1950, Part III, Art. 12 to 35). It is called the Indian Bill of Rights. Initially, 7 fundamental rights were guaranteed but after the deletion of the Rights to property from the list of fundamental rights (44th Amendment Act 1979) their number came down to six.

Fundamental Rights in Nepal

Though Nepal has approved seven constitutions so far, the practice of incorporating citizen's rights into constitutional and legal instruments has a very short history. The Government of Nepal Act of 1948 was the first constitutional law in Nepal to grant the Rana Prime Ministers broad powers. The purpose of this constitution act was to eliminate the kings' power and influence. By utilizing the undemocratic powers afforded by the constitution of 1948, the Ranas became autocrats. However, this constitution was only in place for a short-time. In order to keep his power, the then-king Tribhuvan sought assistance from India's Prime Minister in overthrowing the Rana rule. The days of the Rana dynasty came to an end with the promulgation of the Interim Constitution of Nepal, 1951, by the king. The king was declared the state's head in this constitution. King Mahendra then established constitutions on two separate occasions. The king was given unrestricted power and sovereignty under the constitutions of 1959 and 1962. The 1990 constitution, adopted by then-King Birendra, safeguarded democratic credentials in a healthy manner. It survived for more than 16 years until being replaced by the second interim constitution of 2007. Finally, the constitution of Nepal 2015 was adopted by the Constituent Assembly (CA) elected for this purpose. It was proclaimed by the president of Nepal on September 20, 2015. It has 35 parts 308 Articles and 9 schedules. Part III Article 16 to 46 covers the provision of fundamental rights of the citizens.

While talking about the constitutional arrangement of fundamental rights under the Constitutions of (2015), it offers a long list of fundamental rights in part III (Article 16-

46) alike the Indian Constitution. The Constitution of Nepal too classifies that fundamental freedoms of speech and expression, freedom of movement and reside across the country, hold peaceful assembly, form union and association or carry out trade and commerce are the sacrosanct and inviolable rights. These fundamental freedoms have been detailed under article 19 (1) of Indian constitution are somehow similar to article 17 of Nepal constitution. Similarly, rights to equality and equal protection of law, life and liberty, or education have been considered as fundamental rights in Nepal. The constitutional framework avoids all kind of discrimination on the basis of race, creed, caste, sex or place of birth. The constitution has successfully abolished untouchability. The rights of criminal justice system like protection against ex-post facto law, double jeopardy and prohibition against self-incrimination have been acknowledged by the constitution. The constitution prohibits employment of children at hazardous places. Moreover, the freedom to practice, propagate, or process a religion has been secured. The religious minorities are allowed to establish and administer educational institutions and the minority community member having district language, script or culture have been conferred.

The Constitution of Nepal (2015) lays down some unique fundamental rights for the citizens. It includes rights of women (Art. 38), right to social justice (Art. 42). right to social security (Art. 43), rights of consumers (Art. 44), right of children (Art. 39), rights to food (Art. 36), rights to health care (Art. 35), right to communication (Art. 19), right to justice (Art. 20), right to property (Art. 25), right to information (Art. 27), right to privacy (Art. 28), right against exploitation (Art. 29) right regarding clean environment (Art. 30), right to language and culture (Art.e 32), right to employment (Art. 33) and rights regarding labour (Art. 34) (Tripathi, 2016, p.118). These rights are a relatively new arrangement in Nepal's human rights discourse.

Variants of Fundamental Rights: Countries and Context

An attempt has been made to explore the varied organized opinions and perspectives adopted by various intellectuals and political scientists while reviewing the literature connected to the genesis and development of fundamental rights.

Philosophy of Rights

Philosophy of rights have three dimensions. Firstly, rights and obligations are correlative concepts; that is, each right is accompanied by a corresponding duty.

Secondly, every right necessitates social acceptance; without it, rights are meaningless claims. Finally, a right is not a selfish claim. It is a disintegrated desire and it is something which is capable of universal application. E. Ashirabatham (1961) determines that which we have been offered rights time to time are the outcome of five distinct theories; i) the theory of natural rights, ii) the legal theory of rights, iii) the historical theory of rights, iv) the social welfare theory of rights, and v) the idealistic or personality theory of rights. The different philosophers and political theorists have defined rights on their choice in which political, socio-cultural they have been accustomed. The rights that are guaranteed by the Constitution with remedies are called fundamental rights.

The concept of human rights had begun right from the start of the human civilization on earth. In order to live happily and run life smoothly human being needs these rights. To achieve liberty and basic freedom from the beginning of the history man struggled for his/her existence against the nature. Thus the struggle marched the way to the concept of human rights. It is difficult to define the human rights. Human rights are indispensable for the human dignity which they can enjoy from birth to death.

Human rights signify all those rights which are inherent in our nature and without which we cannot live. Human rights are commonly understood as "inalienable fundamental rights to which a person is inherently entitled simply because she or he is human being" (Madan, 2017, p. 1). These rights are concerned with dignity of the individual which secures personal identity and promote human community. The concept of human rights is associated with the protection of the individuals from the exercise of the government or the state authority. Human rights are essential to live human life with fullest potentiality in a broadest form. The traditional Indian literature constrains the same spirit of human civilization for securing human dignity and development of personality.

The concept of human rights is an integral and essential element of modern democracy. It is one of the most widely discussed and debated ideas of national and international policies since the second half of the last century. The swings of human civilization necessarily touch two ends of the same continuation. On the one hand,

there are events of deprivation, inequality, exploitation, killing and all kinds of indignant activities towards human being and humanity. On the other, there are attempts to protect humanity, human values, rights, equality, liberty and other ethnically desired goals. The concept of human rights emerged as an idea in the latter domain and became so much popular within a considerably "shorter time frame that all the across of political society, from cruelest tyrant and most repressive governance to the weakest rebel and even the crudest manipulators all prefer to identify themselves as champion of human rights" (Ghosal, 2010, p. 1103). Gradually, human rights became a central element of the modern democracy.

Historically, fundamental rights were largely derived from various political and moral philosophies; religious testaments such as the Vedas, the Smritis, the Buddhist cannon, the Quran, the Bible as well as other secular codes of conduct and social norms adopted by different societies. In modern times, the nature and scope of fundamental rights are defined and recognized on the basis of certain political ideologies and international and regional human rights instruments (Tripathi, 2002).

Human rights were developed in the context of certain historical, social, political, and philosophical situation in Europe, however, the concept of globalization advocates for the inclusion of human rights in international treaties (McCorquodale and Fairbrother, 1999, p. 740). The term human rights was first used in the charter of United Nations in 1945. Later, it was further clarified by the Universal Declaration of Human Rights which was adopted by the United Nations in 1948.

However, the political philosophers and jurists commonly suggest that the origin of contemporary rights and liberties can be traced to ancient times. The Egyptian precepts of *ptahotep* dating from 3550 B.C. had the humility to declare thus: "Do justice, comfort the mourner, oppress not the widow, and expel no man from the possession of his father ..." (Rai, 1981, p. 37). The code of Hammurabi the world's most ancient code of laws dating from the second millennium B.C. - concerns slaves' rights, freedom, and women's rights. To illustrate how high sense of justice and freedom had been cultivated by the people of the Vedic Age, we can refer to the Ishvaku's verdict of guilty in a trial involving the King and *Purohita* who in a chariot had run over and killed a child on the street. The Chinese emperors of "the Chou

dynasty (1122-255 B.C.) had established a number of schools and infirmaries all over their extensive dominions, had redistributed lands, and provided states loans, free of interest, to the needy farmers in order to reduce social inequalities" (Rai, 1981, p. 37).

It is common place among the scholars of western liberal democracy to seek the antecedents of human rights in the ancient Greek concepts of *isotimia* (equal respect for citizens), *isogoria* (equal liberty to speak and meet in public), and *isonomia* (equality before law). They also point to the stoic nation of equality for all persons as adopted by the Romans.

Similarly, in the Hindu-Buddhist context, scholars identify the concept *rita* of Vedic origin as the source of human rights and freedom. *Rita* represents the idea of natural law. It is from *Rita* that the concept of *dharma* or *dhamma* developed in the later Vedic age. In the words of Radhakrishnan, *rita* "Stands for both the *Satya* or the truth of things as well as the *dharma* or law that, with equal impartiality, regulates the conduct of human beings (Rai, 1981, p. 38).

Nagendra Singh, the well-known Indian jurist has stated that Buddha the enlightened, had rightly observed some centuries before Christ that the very heavens are centered in the ethics of fraternal love of humankind which is not only the origin of all human rights but which should continue their ultimate safeguard also (Singh, 1069, p. 55).

Tracing the birth of human rights thus leads us to the very birth of human civilization. So far as Nepal is concerned, it is in the cradle of Hindu Buddhist syncretic culture and civilization and, as such, it finds itself in the continuum of human rights heritage of Asiatic origin (Rai, 1981, p. 38). Simply, it can be claimed that Nepali society's Hindu Buddhist culture led to the codification of human rights. Likewise, Mohanty (2013) writes, "Human Rights should be regarded as sacrosanct and maximum opportunity should be allowed in ensuring human rights to all citizens" (p. 16). He focuses on empirical approaches of human rights through human rights education.

Eastern Philosophy on Rights: Hindu-Buddhist Context

In the Hindu-Buddhist context, the meaning of the right of the community or individual cannot be understood without a reference to the concept of *dharma*. As

Singh rightly puts it, "the highest rules of religion, the supreme principles of philosophy and the benign tenets of economic well-being constitute the concept of human rights" (Singh, 1969, p. 56).

On the authority of *dharma*, and for that matter on the authority of *dharmasastras* (codified law), men in the Hindu-Buddhist society interacted and imposed on one another, individually or collectively, certain rights and duties. *Dharma* connoted the enjoyment of certain rights or the accomplishment of specific obligations, whether individual or collective, with a moral and spiritual feeling of responsibility toward others or society as a whole. *Dharma* was a source of allegiance for both the King and the people. It was a compelling reason to constrain the king's intentional exercise of sovereign power. In fact, "the Hindu-Buddhist political theory vests sovereignty on *dharma*. Buddhism emphasizes on attainment of rights on the degree of loyalty towards the duties" (Siwakoti, 2019, p.112). Both Hinduism and Buddhism place equal emphasis on performing one's obligations before asserting one's rights.

In the non-western system of values, it is the collective good that is valued more than individual rights, and so it is the obligations or the discharge of one's duties to oneself and to other's that is stressed more. "If man did his duty and was ethnically right in his actions, the right consequences would inevitably follow. Rights as such were not emphasized this outlook stands out in marked contrast with the modern assertion of rights, rights of individuals, of groups or nations" (Nehru, 1951, p.70). It may be noted that in the 'Islamic Polity', sovereignty belongs to God alone, and human beings have certain God-given rights which are realized through human wisdom serving the good of the society as a whole.

Therefore, *dharma* furnishes a criterion for the tenor of the Hindu-Buddhist way of life. It is conducive to the highest good, the collective good. The Hindu-Buddhist idea of collectivism or the highest good is reflected in the Vedic Hymn which says: "*Survey bhawantu Sukhina Survey Santu Niramaya*" (Rai, 1981, p. 40). Everyone, he believes, should strive for peace and pleasure.

It is generally recognized that there is a tradition of human rights in Asian culture. The integration of freedom and consciousness of rights or duties with law and common good consciousness is a phenomenon which cannot be ignored in studying the nature and character of human rights in the Asian context, because "the religious, ethnical, social, political and customary law", that is to say, *dharma* originally governs the life of the Hindus and Buddhists "The people of Asia", as Walter Robert Corti has rightly observed, "neither understand nor desire freedom in our sense of the word, as we understand it. Truth, humanity and liberty belong inseparably together we ourselves must constantly bear this interdependence in mind" (Corti, 1961, p. 25). Here, Corti shows relation of humanity with liberty.

Western Philosophy on Rights: Liberal versus Marxist Thoughts

Different ideologies formed in the Western and Eastern worlds have resulted in fundamental rights. They encompass all forms of liberalism, socialism, Marxism, Hinduism, Buddhism, Christianity, and Mohammedanism.

Liberal Thoughts

Fundamentals rights is the modern term of natural rights. "They are moral rights which every human being everywhere at all times ought to have simply because of the fact that in contradiction with other beings, he is rational or moral" (Upadhyay, 2014, p. 20). "They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out his own life in the manner he like best" (AI Report, 1967, p. 1656). It claims that a man acquires such rights by birth.

The human rights and fundamental freedoms give opportunity to an individual to develop his personality in his own way. It is obligation of the society and state to provide sufficient means for the healthy development of human personality. For the real triumph of the human rights and fundamental freedoms the executives, legislators and judges, must initiate world-wide movement.

Different approaches can be observed in the evolution of human rights. The foundation of fundamental rights proceeds from the medieval period where

Philosopher Hobbes, Locke, and Rousseau have claimed them as natural rights which could never be infringed by the government. However, the term "human rights" became popular after WWII, when it was first used in the United Nations Charter and then in a number of international conventions and declarations. Indeed, there is no consistency in the definition of human rights in such international instruments. "The expression 'human rights' is not expressly defined in the charter of the United Nations and in other international instruments. The expression has been used in variety of meanings in accordance with the varying contents and situations" (Upadhyay, 2014, p. 20).

John Locke argues in *Two Treatises* that life, liberty and property under the rule of law are must in democracy, elected government for the protection of basic human rights perform as the typical agent of the 'subject' (Laslett, 1960, pp.59-61). These three components; life, liberty and property are necessary tools for constitutional government but sometime it explores the expansion of life as the democratic practices tereon. Similarly, A. Lizphart concludes that "the liberal democrats emphasize on majority rule, individualism and personal liberty" (Lizphart, 2008, p.111). The concept of rule of law was developed to limit the monopoly of the state.

Besides the above, Hobbes assumes that 'every man has a 'right to life' so that the social contract man or body of men" doesn't deprive the individual contract is dissolved automatically and man returns to protect the life of the individual.

Black's Law Dictionary (10th Ed. 1995) defines:

Fundamental right is a right derived from natural, fundamental or constitutional law. It is a significant component of liberty, encroachment of which is rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the law violates the due process clause or the Equal Protection of the Amendment. As enunciated by the Supreme Court, fundamental rights include voting, interstate travel, and various aspects of privacy (Such as marriage ad contraception rights)-Also termed fundamental interest. (p. 789)

In addition, Michael J. Perry announces in his journal "Liberal Democracy and the Right to Religious Freedom recognizes and protects, as a fundamental legal right, the right to vote at genuine periodic elections which shall be by universal and equal suffrage and was by secret ballot" (2009, p. 621), assuring the free expression of their views was the election.

Likewise, Christopher Hobson (2012) stresses an approach: "liberalism first, democracy later. Furthermore, his conceptual analysis was overly restricted: democracies are liberal or they are illiberal"(p. 451). Hobson attaches liberal approaches to rights and requires to revise this issue as a challenge.

Similarly, Daryl Glaser (2014) mentions that liberalism also requires a clear distinction between equality and uniformity. Liberal substantive equality usually entails a greater sameness of individual means to pursue diverse, self-chosen ends. This duality implies necessary restrictions on the type and extent of equalization permissible (p. 67).

Albert W. Dzur (2002) familiarizes "Liberal nationalism is an important recent development in political theory that challenges liberals to acknowledge the significance of nationality in people's lives, and its role in the justification and implementation of liberal policies" (p.191). In the views of such patriots the national identity serves basic human needs. So, basic rights are necessary.

Finally, Daniele Albertazzi and Sean Mueller (2013) highlights as "particularly, the idea that the power of the majority must be limited and restrained, the purity of individual rights and the principle of the division of power shave all come under threat in contemporary Europe" (p.61).

Moreover, Milja Kurki (2010) poses fundamental change in democracy promotion. Crucially, a comprehensive agreement "continues to exist on the belief that democracy promotion entails liberal democracy promotion, that is, the promotion of certain key liberal democratic procedures - encompassing electoral processes and institutionalization of rule of law, freedoms of expression, press and association" (Kurki, 2010, p. 363). Similarly Smith (1994) poses that "belief in rights of the individual, toleration, consensus-building, and the legitimacy of liberal democratic procedural governance."

How can the equality occur in multi-geographical and multimedia holder state?

Meantime, Janda K., Berry M. Jeffrey and Goldman J. (1992) highlight "the political equality, social equality, equality of opportunity and equality of outcomes in civil society" (Janda, Berry & Goldman, 1992, p.15). As provided by the democratic norms and values: every citizen should be addressed equally.

Mary Ann Glendon (1991) differentiates US individual rights in contrast to the socialist view. She critiques the legal profession's concentration on gaining individual civil rights, as well as the considerable emphasis on the distinction between law and morality in American legal education. Person rights take precedence in the United States, in contrast to the socialist outlook of continental European culture, where dignity is both fundamental to the common good and an attribute of the individual. She has advocated for a return to the United States' foundational values, emphasizing accountability and sociality (p.143).

Thus, 'human rights' are those rights, which are given by the nature to individuals for their existence. They are natural, universal, immutable and inviolable. These rights adhere in our nature and without these rights we cannot live as human beings. Individual is the central subject of human rights and fundamental freedoms. It is the responsibility of the government to protect and promote human rights. The World Conference on Human Rights, 1993 has resolved that human rights and fundamental freedoms are the birth right of all human beings, their protection and promotion is the first responsibility of Governments [The Vienna Declaration and Programme of Action, 1993, Part 1 (1)].

Marxist/ Socialist Thoughts on Rights

A Marxist approach is a collection of ideas and analysis created by Karl Marx in reaction to the western industrial revolution and the establishment of industrial capitalism as the dominant economic mode in the nineteenth century. Marx raised the voice of the emancipation of the poor from all kinds of discrimination, exploitation, and suppression. He advocated the system of social justice that puts the last first that substantively can maintain equality, dignity, and justice to everyone and forever. "To establish an egalitarian society, freedom and equality should be treated equally as two sides, head and tail of the same coin" (Marx, 1842, p.6). Marx emphasized economic

and social freedom, resource transformation, service delivery, and social justice in his treatment of equality and freedom. Likewise, Rawls unfolds, "the inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty" (1999, p. 204).

John Rawls (1971) focuses on reconciliation of liberty and equality for basic structure of society. Rawls extends the meaning of justice through fairness, objectivity, equality of opportunity as cited by Amartya Sen (2009). However, Sen criticizes Rawls as giving a credit of justice without guarantee of the considering effects of human's behaviour and rights "for revitalizing the interest in ideas of what justice meant and the stress put on fairness, objectivity, equality of opportunity, removal of poverty, and freedom" (Sen, 2009, pp. 52-54). He is particularly concerned with the right to equality and a fair legal process.

Karl Marx (1818-1883) criticized that the concept of natural theory of human rights. He believed that in class divided society where the ownership of means of production belongs to few, the concept of universal human rights or nature rights is nothing but illusionary, a historical and a utopian (Ghosal, 2010, P. 1107). Marx severely criticizes that the natural theory of human rights is nothing but an instrument for the bourgeoisie to consolidate their rights in society. Marxist/socialist thoughts do not emphasize the investment of huge costs not only materiality, but also in terms of human happiness.

International Conventions/Declarations and Globalization of Rights

There are three key documents of human rights which include three categories of rights: i) UDHR, 1948; ii) ICCPR, 1966; and iii) ICESCR, 1966. These rights are all interrelated, interdependent and indivisible.

The provision of these international instruments of human rights are not obligatory to all nation states. "The character and nature of human rights is determined in the crucible of a specific socio-political culture" (Aziz, 1978, p.2).

The contents of fundamental rights of domestic constitutions are indispensable part of international instruments of human rights. If a state is a signatory of any international convention or any part of it and arranges some contradictory provisions against those

conventions in such situation the national charter will be null and void to the extent of inconsistency and the provision of international come into operation. Since the establishment of the United Nations Charter in 1945, the body of international human rights law has grown significantly. It is founded in the 1948 Universal Declarations of Human Rights, which are widely acknowledged as a source of international customary law and hence legally obligatory.

There are nine additional basic human rights treaties, as well as a large number of other international treaties that are directly relevant to human rights. They are: International Convention on the Elimination of All Forms of Racial Discrimination 1965; International Covenant on Economic, Social and Cultural Rights 1966; International Covenant on Civil and Political Rights 1966; Convention on the Elimination of All Forms of Discrimination against Women 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; Convention on the Rights of the Child 1989; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990; Conventions of the Rights of Persons with Disabilities 2006; and International Convention for the Protection of All Persons from Enforce Dissappearance 2006. States that have ratified these accords are required to put them into effect through legislative and other means, as well as to report on their progress.

Gopal Ram Das (2013) clarifies the present work is a modest attempt at delineating international provisions of human rights that is conceived as universal and egalitarian. However, he explains the natural rights of human legally. So, he focuses on inalienable nature of fundamental rights to which a person is inherently entitled.

Comparing South African Constitution with Irish Constitution Anne Hughes (2011) concludes- "the human dignity has occupied a more prominent place in South Africa, where it is mentioned in the text, but in Ireland it appears only in the Preamble. The focus in South Africa is on substantive equality (p.iii).Hence, in Ireland, the constitutional equality guarantee has been confined to formal equivalence.

Upadhyaya (2015) focuses on five fundamental features of human rights as Universal, Independent Indivisible and Inalienable rights. He summarizes from the Universal Declaration of Human Rights 1948 (p. 176-177).

Similarly, Oestrich (2017) looks into approaches of development and argues promotion of all round development of human beings. In addition, Jaro Jasmine (2017) deals with the respect of right comparing with India and Canada regarding fundamental rights (pp. 52-55). Nonetheless, Keith Ewing (2010) opines that EU charter of fundamental rights for legally grounded social rights. Stephen Shedly (2016) synthesizes the concept of human rights. Mariane S. Karobeva (2003) states that the institution of protection of civil rights in the legislative acts examined the optimum level of development.

Cuyvers (2017) asserts on European System of fundamental rights:

EU fundamental rights, therefore, have no general application, and the CJEU has no general fundamental rights jurisdiction. Despite these limitations, however, the protection offered by EU fundamental rights was seriously developed and improved by first developing substantive EU rights, both as general principles and via the Treaties, and secondly, by expanding the scope of EU law as such (p. 228).

Ewing (2013) focuses, "where there is political will, there is a legal solution" (p. 8). Likewise, Rodl (2013) highlights, "Issue of a normative justification of the horizontal effect of fundamental rights in private law," (p. 1015). Jian He (2010) brings, "The idea of constitutional protection of human rights which is in accordance with its National Conditions and national characteristics" (p. 50). Christopher Forsyth composes the idea of prerogative remedies come to find themselves in the Indian constitution through the constitutional law with the disagreement as to when rights could be suspended (p. 175).

The court must determine the preferred social and political approach (as cited in *Constitutional provision of fundamental Rights: Commentary and Cases*, 1997). The main objective of the constitution can be unfolded having the judges' role and authority to influence the preferred aspiration (Davis, 1997, p. 27). Similarly, Ninan Koshy (1994) sketches "democracy and human rights are of limited interest when social unrest threatens the smooth continuation of the practices of globalization. Thus,

questions concerning accountability are asked by parliament when the maintenance of the global political economy is at stake"(32).

Midlarsky (1998) brings an attitude as:

The relationship between democracy and Islam has emerged to the forefront of international debate. The study argues a threat to the basic values of the West including, its democratic mode of governance? It is the task of this article to address this question by means of an empirical analysis of the relationship between democracy and paradigm of civilization conflict. (p. 485)

Midlarsky claims the democracy the debate of the fundamental rights can raise an attack in democracy.

Loewenstein (1937) concludes that the provisions of constitutional rights enshrined in the American constitution reassured to associate several states in the direction of planning a strong federal state avoiding anti-extremist legislations (p. 658). In this way the fundamental rights contributed to strengthen federalism in USA.

UN Declarations of Human Rights (1948) and International Covenant on Economic, Social and Cultural Rights (1966) guide and direct rights not only in the USA, France, Nepal and India but also all over the world. The provisions of these Declarations and Covenants are binding to the states ratifying them. De, D.I. (2000) truly argues, "The articulation of highly cherished rights are useless until the guarantees of the rights to move to the Supreme Court to enforce fundamental rights," (De, 2000, p. 847).

Similarly, Evans (2001) highlights the globalization of the state and the prospective for greater levels of communication, facilitated by the rapid spread of information technology, has encouraged the belief that the prospects for protecting human rights and the global phenomena can be issue of each human (p. 2). The more he relates democracy promotion to economic growth and development, the interests of global capital and finance and conditions for globalization, than with human rights and human security (p.638).

Robert McCorquodale and Richard Fair brother (1999) posit their view on 'Globalization and Human Rights'; international human rights are globalized. They

operate beyond all borders all state mechanisms. They have become part of the discourse in all most all societies, speaking to both the elites and the oppressed, to institutions and to communities. Human rights are both a part of globalization and separate from globalization. However, this globalized characterization of human rights is subject to criticism as it doesnot reflect universal values, but rather western, European ones.

Sen (2004) discusses, human rights are the criticisms in social ethics, sustainable by public reasoning" and further he associates that "the understanding and aviability of these ultimately linked with the reach of public discussion, between persons across borders. The viability and universality of human rights are dependent on their ability to survive open critical scrutiny in public reasoning" (Sen, 2004, pp. 4-5). Besides, legislation implementation of human rights requires public recognition, agitation and monitoring; and of course impartiality and objectivity, cutting the confinement of the borders of the nation He emphasizes on universal nature of human rights and global jurisdiction.

Literature Dealing with Fundamental Rights in Nepal

The trend of incorporating fundamental rights in the constitution of Nepal begun with the promulgation of the Government of Nepal Act, 1948. The present constitution of Nepal attempted to maintain a balance between equality and liberty, viewing them as a compatible values.

Acharya (2008) explains the democratic constitution have a number of elements, in which fundamental rights are key features of every constitution.

Krishna Pahadi and Purushwotam Dahal (2008) opine- human rights are the substance gift of human civilization. As per the civilization changes; the protection and promotion of human rights become more perspicuous. For the respect of human dignity, the domain of human rights is broadened. New approaches of human rights are evolved through the upheaval movements operated by civil society (p. 111).

Muni (2015) comments that the Nepal's Constitution, promulgated on 20 September 2015, has become a highly controversial document in spite of many impressive features. It has been disapproved by the large constituencies of the marginalized

groups-the Madhes, Janajatis, and women, however, the flexible Nepali Constitution has ample room for amendments and given the political will, reasonable solutions would surely be possible.

Likewise, Naidu (2016)-adds the newness i.e. republicanism, federalism, secularism and inclusive democracy are the features of constitution of Nepal that declared in 2015 (pp.169-72). In the same way, Singh (2019) poses that "The new constitution embraces the principles of republicanism, federalism, secularism and inclusiveness finally ended the chances of monarchical revival" (2019, p.96)

Adhikari (2020); A Treatise on the Constitution of Nepal 2015- opines that the fundamental rights and duties included in the Constitution are extensive and of vital importance to address the myriad of socio-economic dissonance that persist in Nepal in terms of caste, class, gender, geographical location and the status of various marginalized communities (p.91).

Tripathi (2016); in 'The constitution of Nepal: A Critique' synthesizes that the Constitution of Nepal 2015 may compete for the top position among the world constitutions in guaranteeing plethora of fundamental rights of the people and it has been liberal enough to incorporate all the rights mentioned in the international instruments of human rights. Further he has remarked the new Constitution has also guaranteed some novel and even third generation rights such as victim's rights, Dalit's rights, senior citizen's rights, consumer's rights and the rights to food sovereignty, employment, residence and health (pp.118-119).

Adhikari (2020); in 'The state of Constitution Implementation and Federalism in Nepal' has made an assessment on the comprehensive catalogue of fundamental rights in the 2015 Constitution as he puts that there is an immense anomaly between the economic capability of the country and the promise made about fundamental rights. For instance, there is a vast difference between the constitutional commitment and the country's capacity to make investments in health and education. Rights relating to employment and shelter are directly related to the country's economic strength. Implementing such fundamental rights is impossible without raising national income and productivity, and improving economic condition with the current resources (p. 13).

Karna (2020) comments that the new Constitution fails to address the demands of inclusive rights, social justice related to affirmative actions raised by marginalized groups such as Madhesi, Janajati, Tharu, Muslims, Dalits and others. Concurrently, he suggests that the political rights won after a hard struggle need to be enjoyed by backing them with duties and morality. The Constitution can still be reevaluated through amendments which will also help in removing difficulties related to transitional rights and to avoid shortcomings of the statute and make wider acceptance.

Dina (2020); in puts her view- that the Constitution of Nepal 2015 is "Women-friendly". It has ensured one-third mandatory presence of women Member of Parliaments (MPs) and in all the state structure. Accordingly, it has clearly made mandatory the posts of either the President, Speaker or Deputy Speaker, Chairperson or Vice Chairperson to be given to women. It also has provision for a separate Women Commission for the sake of women empowerment. The Public Service Commission (PSC) provisioned a higher limit of 40 years so that women can join government services (pp. 39-41).

Hachhethu (2017)' synthesizes his view on new Constotution of Nepal 2015 that it curtails the space of all identity-based federalism, electoral system based on inclusive representation and reservation/affirmative action. So the amendment of the new Constitution to broden the scope of identity and inclusion, particularly in federal design, is sensible to move ahead towards a new vista of nation building in conformity to the concept of inclusive democracy (pp. 379-380).

From the discussion all above, avoiding all the hinderances of the earstwhile constitutions of Nepal the present Constitution expresses the determination to creat an egalitarian society to ensure equitable economic opportunities, prosperity, and social justice through the sincere implementation of fundamental rights guaranteed to the citizens in Part III. A reevaluation of shortcomins of the constitution may be beneficial through amendments when needed. Though the constitution did not come with about without controversy, the time to draw conclusions on new Nepali statute has not arrived yet.

Literature Dealing with Fundamental Rights in India

There is a long and tedious history behind the development of fundamental rights in India. These rights has transformed to their present form with the emergence of democracy. The people of India had faced numbers of struggle and humiliations during the colonial rule to attain their fullest development as human being. Here an attempt has made to review the literature related to fundamental rights in India.

With a view to aspire to address 'the general will' of the Indian citizen, fundamental rights had to be guaranteed as an integral part of forthcoming Constitution of India. Seervai asserts "fundamental rights would be written into the Constitution given by the nature and history of the struggle for freedom in India" (1993, P.1449).

Singh and Shukla (1995); have made a discourse on fundamental rights. A fundamental right as defined in the Constitution, differs from a non-fundamental right in one vital respect which is inviolable in the sense that no law, ordinance, custom, usage or administrative order can abridge or take away of fundamental right. If any law violates any of the fundamental rights is null andvoid. They are binding to legislative and executive both. No any constitutional amendment is allowed if it goes against the basic structure of the Constitution core values of fundamental rights.

Mukharjee (2007) in his book 'Constitution of India' has discussed that many issues were endorsed in different Articles but main thrust is implied on the main Article that is the right to life, and all about the individual rights of a citizen which are very essential for the existence of human being (p.45).

Manohar Gupta (2011) summarizes in his article 'Political science Key Concepts' that "rights are made essential asset of our life and with help of rights we can have the proper protection and security of our life" (p. 17).

To some extent, what long right can be fixed without law? Law is guaranteed by state. The state is formation of people in democracy. In this concern, comparing Nepali and Indian constitution is fruitful. This research reflects the opportunity and justice of people because both are democratic countries. Equality, liberty, security, life and society: the political terms are mostly used.

Anup Chandra Kapur and K.K. Mishra (2012) posit the dynamic aspirations of man require dynamic fundamental rights according to nation-state. Similarly, regarding fundamental rights adding the idea of Janda K., Berry, M. Jeffrey and Goldman focus on specific fundamental rights for certain citizen group. (p. 278).

This research comparing Nepal and India confirms what the basic rights are for people to survive.

Research Gaps

Ideologies and constitutional arrangements of fundamental rights contradict. Marxism is class-based philosophy and proclaims – 'putting the last first to ensure the equitable society'. The literature that reviewed during this study made largely focused on the evolution, and constitutional arrangements, the definition of human rights and fundamental freedoms of both Nepali and Indian constitutions, and rest of others analyze about the UN Declaration of Human Rights, 1948 and post-natal protocol and covenants. However, they disremember to quantify, clarify and distinguish about the constitutional provision of fundamental right.

With a literature review, this study has attempted to address on the following questions; whether both Nepali Constitution (2015) and Indian Constitution of 1950 have framed as per the liberal thoughts. Despite, this study has attempted to examine how far both constitutions are compatible with post-modern inclusive democratic philosophies. Therefore, to analyze and explore the attributes of both constitutions, this study has aimed or planned to fulfil the gaps related to the comparative study of the constitutional provision of fundamental rights under these two constitutions.

CHAPTER THREE

RESEARCH METHODOLOGY

The research demands both conceptual or theoretical study, and the critical analysis of information and data. The conceptual framework explains pathway and provides life to the research and the purpose of critical analysis is to persuade; look for evidence, logical reasoning, and contrary to evidence etc. This study has followed extensively descriptive method, using both primary (Government) and secondary data, even though widely related to qualitative natures. As this was a comparative study of the provisions fundamental rights in Nepali and Indian constitutions; in liberal, inclusive and post-modern philosophical grounds.

Philosophical Position in the Research

The liberal, inclusive and post-modern philosophical ground have been applied while comparing the constitutional provision of fundamental rights, designed under the 2015 Constitution of Nepal and 1950 Constitution of India. While exploring and examining the provisions of Indian constitution with the eyes of post-modern inclusive philosophies, only those amendments which were made after 1970s are kept in notice. The study followed both inductive as well as deductive approach. Inductive approach of reasoning has been applied in order to analyze germination and development of fundamental rights in global and national contexts of both Nepal and India. While deductive approach has been applied for the examination of fundamental rights of both constitutions in the light of aforementioned philosophies and international instruments of human rights.

The research design has been developed based on prior literatures, the research questions and objectives. It consists of study area, nature and sources of data, data collection method and procedure, data analysis method and procedure and ethical consideration.

Research Design

This study has adopted the qualitative research design. To answer research questions, the research design has consisted of overall research plan, procedures, strategies and techniques. Due to the nature of research topic; explorative, and descriptive strategies have been applied in the research to assist in the interpretation and comparison of

qualitative findings. Interpretive and descriptive research design have been pursued largely based on secondary data sources.

Study Area

The primary texts of the Constitution of Nepal (2015) and the Constitution of the Democratic Republic of India 1950 have been chosen as the study area of this study.

Nature and Sources of Data

The nature and sources of data of this study were secondary, however, if we assume the governmental publications i.e. Constitution, Law, Declarations, Conventions, Covenants as the primary sources, this study has largely used the aforementioned government data. Despite, the larger nature of data was secondary; out of which, books, journals, magazines and newspapers were taken as the main sources.

Data Collection Method and Procedure

The constitutional documents, legal statutes, rules, regulations, proclamations etc. have categorized as primary sources of data and scholarly books, journals, periodical, articles, newspapers etc. are used as secondary sources. The electronic data through webpages have also used. Contents developed during the constitution drafting discourses have also been used as the first-hand information.

Data Analysis Method

The collected data have interpreted/described; applying analytical, historical and comparative methods. The facts, figures, information and feedbacks were gathered during study have been comparatively as well as systematically described and analyzed in scientific way. After the collection of data analysis was done, using cross tabulations according to the nature, generations of fundamental rights and their provisions under international instruments of human rights have also be analyzed. Because of the nature of the study, no statistical processing was employed.

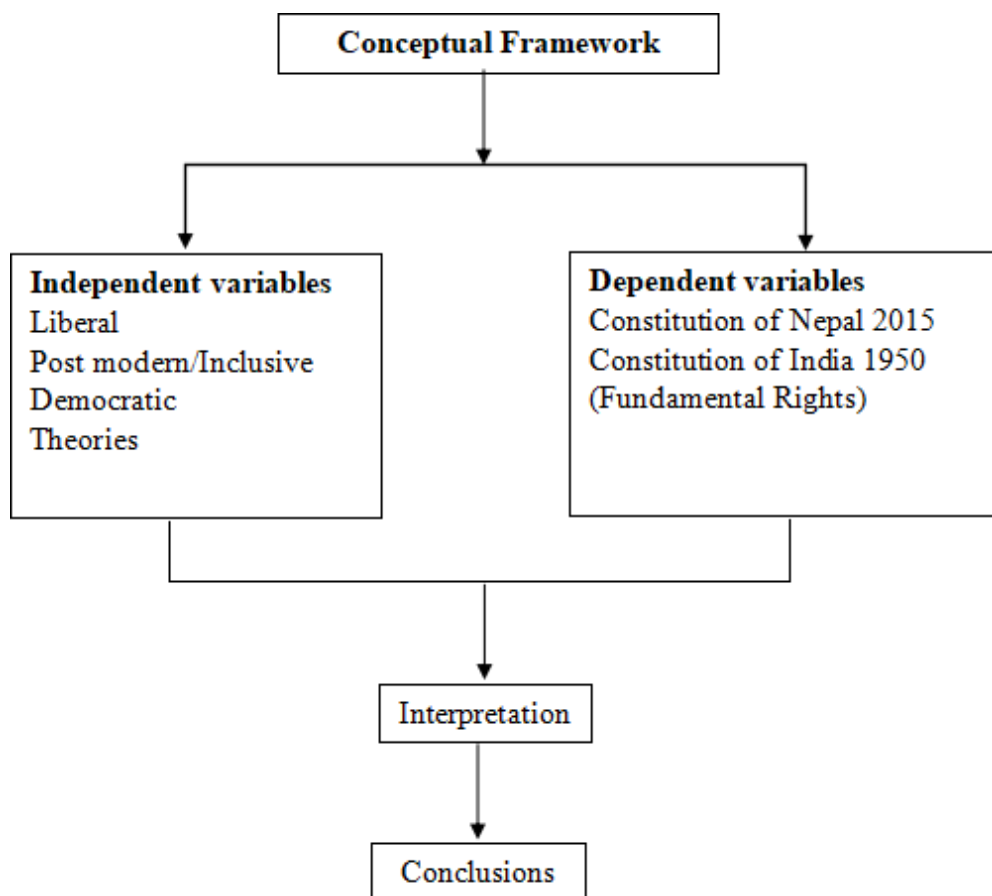
Ethical Consideration

The proper ethical consideration has been maintained to the contents created by the original source. The researcher has tried to be unbiased, maintained neutrality, and adopted a balanced approach while collecting and adopting data. The rules, norms and practices of well standardized American Psychological Association (APA) sixth

edition version and "Tribhuvan University: A Manual on Formulating and Organizing Dissertations" manual published by Faculty of Humanities and Social Sciences Dean's Office Kritipur, 2014 has been sincerely followed during this research study.

Conceptual Framework of the Dissertation

This dissertation has attempted to examine the major attributes made by the present Constitution of Nepal and India on the constitutional provisions of fundamental rights. The conceptual framework has been based on dependent and independent variables. The fundamental rights provisions of the Constitution of Nepal 2015 and the Constitution of India 1950 have been taken as dependent variables while liberal post-modern inclusive democratic theories have been taken as independent variables. The contents have been interpreted in the light of these two different variables and reached to the logical conclusions.



CHAPTER FOUR
DISCOURSE ON RIGHTS: PROVISIONAL AND OPERATIONAL
EXPERIENCE OF NEPAL AND INDIA

Discourses on Rights

Rights are generally associated with the freedoms, claims or privileges of the citizens that are recognized by the national law. Their primary purpose is to protect the citizens from outside interference and provide resources for happy living. According to Maclean and Mcmillan (2009), the term 'right' deserves four dynamics; a right is a liberty, a right is a claim, a right is a power i.e. the capacity to change legal relations, and, a right is an immunity that is the absence of the liability to have a legal position altered (p.464). Various theories are developed such as theory of natural rights; legal theory of rights; idealist theory of rights; and historical theory of rights to explain the rights of the individuals.

The theory of natural rights claims that the rights are built on law of nature and no any human agency creates them. John Locke was the propounder of this theory. He argued that nature has made all men free and rational and given him rights like right to life, liberty and property. It became very popular in upholding the freedom of the individual against the authority of the state. This theory is criticized for ignoring obligation of a man and state as a source of rights (Jatkar & Rao, 1990, pp. 113-114). The state is not regarded as a source of rights under the natural right approach.

Another theory, the legal theory of rights, emphasizes, contrary to the theory of natural rights, on the state as main source of all rights. Rights are not created by nature rather by the state, whose membership brings right to a man. Without support of the state, rights remain merely in potential condition. However, pluralists criticizing the state is not the only source of right give importance to the various associations.

The idealist theory of rights is against the legal theory of rights which links rights with moral development of man and looks at the rights primarily from the ethical

point of view. But this theory is criticized for being vague and ambiguous in its operation.

Summing up all the theories discussed above, the historical theory of rights synthesizes that the rights are the result of historical evolution developed on the basis of customs and usages of the individuals. Even today, many countries' legislation recognizes many traditions which create rights (Maclean and MCMillan, 2009, pp. 463-465). But this theory has some defects because all products of history or customs cannot be considered as rights or continued as rights for example slavery, untouchability, child marriage etc which were banned by modern state. After all, bringing ideas from different theories it can be argued that every theory has some contributions in the evolution of rights. Some rights are the product of history; some are the result of state legislation; some are inherent in human nature and some stand for promotion of social welfare. In course of development of human civilization, man gradually progressed to become a full-fledged human being with a multi-dimensional social, cultural, economic and political personality (Mc Crquodale & Fairbrother, 1999).

Rights are broadly categorized into three generations. Firstly, Civil and Political Rights: Under this category, a person can involve in politics, form a government or revolt. Secondly, the Economic, Social and Cultural Rights: which includes right to property, worship, believe of ideology, education, marriage, establishment of business and company and contract so on. The third generation is Collective or Group Rights. Minority Rights, Right to Development, Right to social Education come under this group (Luitel, 2019, p. 269). The concept of nationhood, sovereignty and citizenship tends to specific constitution and constitutionalism which confirms rights and enforcement mechanism in the form of fundamental rights and constitutional remedy.

Reflection of Theories on Rights

Rights in a concrete sense includes a power or privilege inherent in one person who can exercise upon others. Human rights are those god-gifted natural rights provided to human beings for their survival in the world. They can be differently termed as fundamental rights, constitutional rights, natural rights, liberties etc. Fundamental

rights have become almost core value of the universally accepted liberal ideals. There are certain doctrinal and philosophical foundations among the fundamental rights in terms of specific values and spirit which underlie in the constitutional guarantees. The constitution interprets the general orientation and operation of the state. It is a legal, political and social instrument that enshrines human rights and manifests their judicial remedy (Bhatt, 2004, p.249). Constitution generally connotes its higher status in comparison to other laws and often said as 'supreme law'. "It organizes and disperses powers, expresses identity, limits and directs state powers, recognizes international law. The constitution has a foundational role for the continuity, stability and certainty of a country" (Hedling, 2017, pp. 1-8). For the purpose of defending human rights, the constitution limits the government's authority.

However, nations have adopted constitutional amendment procedures. Many constitutions contain unamendable provisions. Sometimes the constitution itself expresses in a broad term that certain basic characters cannot be altered. The Constitution of Nepal (2015) Article 27 decides: "This constitution shall not be amended in a way that contravenes with selfrule of Nepal, sovereignty, territorial integrity and sovereignty vested in people." Normally fundamental rights guaranteed once are not amended, omitted or shifted to constitutional rights. In fact, "the constitutions of free democratic states organize and control power, ensure human rights, balance the competing claims of social and individual interests, mirror the culture and experience of the country, and operate as vehicles of national progress and unity" (Where, 1960, pp. 2-8). Fundamental rights due to their "Judicially enforceable nature, constitute the most important limitation on the powers of the government" (Rai, 2011, p. 3). It limits the hegemony of the government.

The natural law school proclaims that the state was envisioned with a view to protect the rights of the citizens which they had acquired by nature when such rights are approved and applied by the legal document of the state they convert into legal rights when certain rights are constitutionally protected, considered as fundamental rights. In *Kesavananda Bharati vs. State of Kerala (1973)* case the Supreme Court of India distinguishes the basic two differences between fundamental rights and other rights as mentioned hereunder:

First, these rights cannot be taken away except by an amendment of the constitution which is not an easy course, especially after the emergence of the basic structure doctrine. Second, the adjective fundamental carries the connotation that the rights selected for special constitutional protection are qualitatively different from and superior to the ordinary legal rights. [See *Kesavanand Bharati vs. State of Kerala (1973) 4 Sec 225; AIR.1973 SC 1461*]

In political theory, the fundamental rights are intimately connected with liberal ideals. It means that the main objective of fundamental rights is to protect individual's freedom, equality and independence. Life, liberty and property are the basic components of liberalism. Today these rights have become internationally agreed norms, values, standards or rules which are designated for holistic development of human beings promoting human dignity, human values and human personalities, self-development and human existence. These rights are natural, fundamental, subjective, inherent, individual and collective, multi-disciplinary and dynamic. They are incorporated in the constitution with theory of essentiality, inalienability, and equality and non-discrimination principle of universality, supremacy, indivisibility, human dignity, imprescriptibility and practicability.

John Locke's idealism highly influences the prevailing parliamentary democracy of India and Nepal today. His ideas reject absolutism and prepare room for parliamentary democracy. The fundamental rights provisions under the current constitutions of Nepal and India incorporate liberty and equality of an individual as per the doctrine of John Locke. Even though, fundamental human rights are indivisible they are categorized into three groups according to their nature. Various international mechanism's treaties, conventions, covenants and declarations developed and promulgated in the international level such as UDHR, 1948, ICCPR, ICESCR, CRC, CEDAW etc. have become important tools for the protection and promotion of human rights (Khatiwada, 2017, p.106). The fundamental human rights preserved under national and international instruments are classified into three groups. "The term three generations was initially proposed in 1979 by Czech Jurist Karel Vasak at the International Institution of Human rights in Strasbourg" (Upadhyay, 2015, p.180).

Firstly, civil and political rights which are popularly known as first generation rights. They are related to the protection of personal life and liberty and allow to a person to

participate in state affairs. Rights to life, liberty, security of a person, right to privacy, home and correspondence, right to own property, right against torture, freedom of thought, conscience and religion, freedom of movement, right to vote, right to be elected etc. come under this group.

Secondly, economic, social and cultural rights widely constituted as second generation rights. These rights are fundamentally based on the concept of social equality and related to the guarantee of minimum necessities of the life to human beings. Right to social security, right to work, right to rest and leisure, right to standard of living, right to education, right to participate in cultural life and right to social and international order are approved under this category.

Thirdly, the collective or group rights are recognized under this pattern. These rights are envisaged for remedying the sufferings of members of disadvantaged, marginalized, vulnerable and oppressed groups. Rights of children, minorities, women, indigenous peoples are recognized under this group.

The liberal democracy which prevails both in Nepal and India incorporates the fundamental components of liberal individualism political theory. Right to life, liberty and property have secured their position in their constitution. However the Indian constitution has shifted right to property to constitutional rights from fundamental rights since its forty-fourth amendment of 1978 A.D (Bhatt, 2004, p. 502). In fact, the constitutional rights are not basic and do not apply to everyone, unlike fundamental rights. Moreover, these two countries have approved "Civil and Political Rights" which are protected in articles 3 to 21 of the UDHR and the ICCPR. Economic, social and cultural rights under articles 22 to 28 of UDHR get entry to their constitution and also recognize the economic, social and cultural rights provisions of ICCPR. The modern sovereign states scrutinize and adopt the major components of such instrument in their constitutions as per the ideological and political system they preferably accompany.

Reflection of Political Ideology in Fundamental Rights

Ideology is a set of thoughts. It is "the statement of end, means and methods of analysis" (Mohanty, 1977, p. 10). It is a holistic outlook of driving a social system basing on certain means, methods and ends. "It is used as a hypothetical tool for

social change in the society" (Pathak, 2005, p.30). Notably, two major political ideologies have developed in the world, i.e. Marxism and capitalism. Marxism prospects communism through socialism. Marxist ideology stresses upon freedom and equality. It focuses on equal access of basic requirements such as food, housing, clothing, education, health care and participation in all state affairs. Unlike Marxism, capitalism pleads on individualism and majoritarian democratization in state affairs. The civil and political rights, prospected by liberal political ideologist during the 18th Century in Western Europe and first adopted in USA ascended in the form of first generation rights in UN charters and UDHR, 1948 and it stood as global religion of liberal democracy. With contrast the Marxists and socialists challenged the liberal concept. While the liberals focus on liberty, socialists focus on equality, political and economic freedom. Marxists and socialists expanded the scope of human rights. Thus, liberals generated first generation rights, while the Marxists generated the second generation rights, which are socio-economic in nature (Rao, 2010, p. 52). The Marxist/socialist ideology emphasizes on not only materiality, but also on the happiness of mankind.

The constitutional provisions of fundamental rights largely depend on the nature of state and the ideological strength of various socio-political forces present in the political system. If the states are plural, democratic or capitalist style can only observe, respect and incorporate individual rights as fundamental rights placing various restrictions on them on so called 'reasonable grounds'. Likewise, if the state is of socialist communist nature in the Marxist sense, the provision of fundamental rights certainly differs from those of monarchical, dictatorial and capitalist nature. Obviously, the socialist regime could give less emphasis on individual rights and more stress on the incorporation of economic, social and cultural rights (Siwakoti, 2009, p.141). In theory, the socialist system places a greater premium on group rights than individual rights.

Marxism, consolidated during the 19th century that focuses on social, economic and cultural rights generated second generation rights. These rights were guiding principles in the erstwhile Constitution of Soviet Union (USSR) after the 1917 revolution. These rights widely influenced in the formulation of International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. Eventually,

these rights regenerated in the current constitutions of Nepal and India under fundamental rights and duties, and the directive principles of state policies. Nepal and India both passed through the different political upheavals until formatting the current constitutions. Undoubtedly, the historical backdrops influenced the major characteristics of their constitutions.

Evolution of the Human Rights in Nepal

The evolution of human rights or fundamental rights in Nepal has been greatly influenced by Hindu and Buddhist philosophies and traditions as well as international human rights instruments. The conceptual framework of the development of human rights in ancient Nepal of the different stages can be analysed and described linking to each other based on politico-legal nature.

Human Rights in the Kirant Period

The history of the development of the Nepali civilization and culture can be traced back to the Age of Truth (Satya Yuga). According to Hindu belief, King Manu, who is said to be the first king of the world, ruled Nepal in the Age of Truth and Nepal was known as the land of Truth (*Satyawati*). It was called the land of solitary meditation and penance (*Tapovan*) in the Silver Age (*Treta Yuga*). Similarly, Nepal was known as the ladder of Salvation (*Muktisopan*) in the Copper Age (*Dwaper Yuga*); and it is known as 'Nepal' in the Iron Age, i.e., the present age of science and technology (Acharya and Uprety, 2015, p. 1).

The Kiratas are the earliest known inhabitants of Nepal. They were the aborigines of north-eastern Himalayas. They came to Nepal about 700 B.C. and ruled here. But there are no other proofs except the chronicle (bamsavali) written by Kirpatrick. They have left no authentic records like inscriptions or manuscript colophons. In the Kirant period, the society was governed by Mundhum, the greatest legend of Kirants like Vedas to Hindus, which was considered to be a constitution in the dynasty. There was an open hearing system in the Chumlung (the House of Lords) (Acharya & Bhattarai, 2009, p. 242). During the Kirants period physical punishment was legal. They believed that the God was a root of justice and he would be angry if the justice was insecure. The Kiranta thought Dharma as an integral part of justice. The legal system

was based on the 'eye for an eye' principle. Convicted persons were taken before the Chumjung or state council, to admit their crime. If they did not confess, they were forced to eat mud. Those who committed adultery among their patrimonial kin were expelled from the community and forced to live in a cave (Khanal, 2006, p. 91). In such time, the basic human rights were not preserved by the state. Those kinds of behaviors created havoc among the citizens.

Human Rights in the Lichchhavi Period

In Lichchhavi period, the legal system was based on *Dharmashastra*, including religions, myths and realities. In this period, contrary to present day rule of law, the ideas of human rights were addressed by "the Hindu-Buddhist conception of the *dharmic* system of collective good" (Acharya, 2009, p. 243). Generally, the legal system in the Lichchhavi period was founded on Dharmashastra.

The Lichchhavi kings established the *panchali*, *gosti*, and *sangha* to run their daily administration. The *panchali* dispensed the highest level of justice. Implementing appropriate policies and programs King Amsuvarma (588-621 A.D.) attempted to maintain religious harmony and impartiality under his reign as "he was constantly guided by Kautilaya's *Arthashastra*, he seemed to have believed in liberal monarchy and *Dharmanaya* of the Hindu-Buddhist tradition" (Rai, 1995, p. 127) to fulfil needs of mutual faith and liberty alongwith "the principles of *dharma* like justice, equality and freedom, Amsuvarma further strengthened and reformed the institutions of *Panchali, gosti, and sangha*" (Chalise, 1992, p. 64). Likewise, the administrative powers were decentralized to the body of Panchayat in his time.

In Lichhavi era, the human rights flourished within the domain of religious principles. "The depiction of '*Shreemanank*' and '*Shreebhogini*' in Mandeva's coin reveals that the women had equal status during Lichchhavi period" (Banjade, 2075 B.S., p.65). Even though numbers of complications arose at all the levels of *Hindu Buddhist* society, there was harassment particularly to the lower caste people in this period.

Human Rights in Malla Period (1200-1768)

The Kathmandu valley was ruled by the Malla dynasty (1140-1768) from the beginning of the 13th century. In this period, the King Jayasthiti Malla (1354-1395) constituted numerous rules and brought reforms in immediate society in Nepal. Generally, the reforms can be characterized into two types. Firstly, "the formation of social rules and regulations completely on the basis of Hinduism and secondly, the creation of many castes and allotment of separate professions to them" (Thapa, 1995, p. 4). Nepali society gradually lost the Hindu-Buddhist religious balance during the rule of Hindu King Jayasthiti Malla. Afterwards the society was transformed into a Hindu state based on *Varna* system that categorizes the society into four castes: Brahmin, Chhetri, Baisya, and Sudra. This division resulted in societal discrimination and injustice. Sudras were relegated to the untouchables, or dalits, as a result of their mistreatment. Despite the government's formal abolishment of the caste system, it still exists in Nepal today. Likewise, Jayasthiti Malla "imposed restrictions on the dress the untouchables could wear. He introduced the system of fines for offenses as a form of punishment, and tightened and regulated the entire caste system in general" (Pathak, 2005, p. 55). During the Malla Era in Nepal, the *Varna* system governed the whole social structure.

Many social and economic reforms also introduced during the medieval period. Mahendra Malla, the King of Kantipur (1529-1560 A.D.) was very kind-hearted man who would take his meal only after his populace. He banned gambling. His motto was - "Always benefit the people and speak truth" (Thapa 1973, pp. 244-245). Throughout the Malla rule, agriculture, art, architecture, trade, industry increased gradually. The Malla rulers created a civil code based on Manusmriti, Yanjavalkyasmriti, Mitakshara commentary, Naradsmriti, and Brihaspatismriti, which advanced the community. There were peaceful relations during the Malla rule except during that of Jayasthiti Malla. Both groups have their own rituals for worshiping the same idol. Despite the fact that the Muslims were Indian refugees, they were allowed to settle in the valley. Notwithstanding, "they were not allowed to convert Hindus or Buddhist or to slaughter cows, as the Hindus worship cows even today. But, Mallas allowed the

catholic missionaries and also granted them some land as *birta*" (Thapa, 1973, pp. 113-114). Permission for widow marriage, right to occupation, right to individual property for women and equal protection of law signify the existence of some fundamental rights in Malla Era (Banjade, 2018, pp.72-74). During this period, all religions seem to have "fused together to enrich the Nepalese art even outside of Nepal. As a whole, Mallas accomplished a lot of social and economic reforms in Nepal, except the re-enforcement of casteism" (Pathak, 2005, p. 55). At the time, there was a cordial relationship between all religions.

Human Rights in Shah Period (1769-1846)

The then King of Gorkha principality, Prithvi Narayan Shah was the founder of modern Nepal. He conquered small principalities and unified them into a mighty greater Nepal in 1768. He stood out "as a powerful force in the emergence of Nepali nationalism because he brought unity out of the prevailing chaos. In his reign, Nepal made a distinct advance from a long organization of tribal systems to a kingdom" (Shah, 1996, p. 25). The unification of Nepal introduced patrimonial political and administrative system. Prithvi Narayan Shah and his descendants ruled the country on the basis of executive proclamation and doctrine of Hindu *Dharma Shastras* and ethical codes. The king Prithvi Narayan Shah defused the Christian's conspiracy of Genocide of Nepali civilization and regularize the country through his divine instructions (Banjade, 2018 p.76). History shows that King Prithvi Narayan Shah was a staunch supporter of Hinduism's purity.

Gradually, the governing structure converted into despotic ruthless monarchy. "The absolute Shah dynasty ruled over the country for a long period of time leaving the people as mere subjects from whom obedience was extracted through coercive methods by the state" (Chauhan, 1971, p. 11). During this period, all the laws were unwritten and based on the personal will of the kings. There was no awareness of human right. There was no international environmental impact during that period. Historically, it is proved that some of the Shah kings were very cruel in case of upholding powers and their courtiers behaved the opponents cruelly that forced them to live the lives like that of animals. Later, however, Shah Kings administered justice

bestowing to legal inheritance of Ram Shah. No other kings after Ram Shah made remarkable legal reforms except Surendra Bikram. However, King Prithvi Narayan Shah wanted to evolve a reformed legal code and judicial system incorporating the versions expressed in his *Divya Upadesh*.

Human Rights in Rana Period (1846-1951)

The 'Kot Massacre' of 1846 was the first episode in the history of Nepal that initiated Rana regime. Afterwards, Junga Bahadur Rana became the prime minister of Nepal keeping the governing king captive. He founded the Rana rule in Nepal, usurping real governing power in his hands from the then shah King Rajendra Bikram Shah.

Afterwards, Jung Bahadur Rana turned into the prime minister and the commander-in chief of Nepal. "During that period, death penalty and exile for adultery and other crimes continued" (Khanal, 2006, p. 96). The Rana prime ministers ruled the country with iron hands through executive fiat and pre-emptory orders without caring for the rights, liberties and welfare of the people. Needless to say, during those repressive days it was unthinkable to talk about the concept of individual rights of the Nepalese citizens who were treated by the ruling coterie as subdued subjects. Consequently, all along that period the Nepalese people remained "Socially backwards, economically poor and politically in Slumber" (Chaturvedi, 1993, p.32). During this time, Nepali society remained in the shadows.

Though the Ranas seized all powers in their hands, they still showed some notable examples in the formal evolution of legal jurisprudence. Janga Bahadur Rana enacted first codified law called 'Muluki Ain' 1910 B.S. (1854 A.D.), impressed "by the British parliament and the Napoleon code when he returned back to Nepal from his formal visit in England and France. Probably this could be described as the first ever constitutional document of Nepal which assured, at least in principle, limited equality before law" (Dhungel, 1987, p. 2). The code stated that it had been established so that from then on, everyone, regardless of caste, creed, or culture, would be treated equally for the same offense, with no discrimination in the amount of punishment meted out, despite the fact that there were numerous provisions that could be used to determine the level of punishment based on caste hierarchy. "One of the fundamental features of

the *Ain* was its universal subjection. Through this *Ain* the king was commanding all including himself to accept the sovereignty of law. He was subjecting himself to abide by the authority of law (Karki, 1981, pp.1-6). Muluki Ain of 1910 B.S. (1854) could have become, like Magna Carta, since it was the first comprehensive and systematic enacted modern law of Nepal. It is a highly significant constitutional document with its preface on it which had systematized different branches of law in an orderly way in a form of an Act.

This *Muluki Ain* is a consolidation and integration of all orders (*Sanads*), Royal orders, ordinance, customary or traditional practices etc., and made a singular contribution to streamline the judicial administration. In the field of religion, it granted everybody freedom to observe their religion, except carrying out cow slaughter, without hampering other's religions. It can be noted as very liberal and tolerant attitude towards religion. The civil code also prohibited forced labor except for the public purposes. It also allowed the people the freedom of practice any profession of their choice without any fear of losing their social status. Besides, the civil code attempted at restraining, although only to a limited extent, the inglorious social practices of *Sati Partha* (a widow burning herself at the pyre of her dead husband) by prohibiting widow-burning in certain condition. However, this evil practice could be eradicated once and for all only on Ashadh 25, 1977 B.S. (1920) by the then Rana Prime Minister Chandra Shumsher Rana who prohibited it through a promulgation prescribing "capital punishment for one who compelled a widow to become a *Sati*" (Tripathi, 2002, pp. 17-18).

Slavery was authorized under Muluki Ain, which was enacted in 1854. The legislation of the time classified children of the slaves as born slaves who were obligated to work for their parents' masters. Even those classified as lower castes were held responsible for the misbehavior of any girl from a higher caste, and those who failed to pay the government's levy on revenue were forced to work as slaves. However, the credit goes to "the Rana Prime Minister Chandra Shumsher who abolished the inhuman and exploitative practice of slavery in 1925 and set free a numbers of slaves to lead their

lives as free citizens" (Tripathi, 2002, p. 18). It was a significant development at the time.

Even though, the civil code of 1853 and other existing laws of the Rana regime first discouraged and afterwards abolished the inhumane practices of *Sati Partha* and *Kamara Kamari* (Slaves) and tried to introduce some other legal reforms, it was not at all sincere to dismantle social structure based on Hindu 'Varna' system. Confiscating the property of convicts, degrading them to a lower caste by forcing them to eat pork or degrading a *Sudra* (a person belonging to the lowest Hindu *Varna*) by compelling him to taste the flesh of dog were examples of some cruel and inhumane practices recognized by law. Cruel and uncivilized types of punishment like shaving off the head of a convict, piercing or engraving some special sign on his face or out casting him or forcing him to eat human excretion and so on were legally in vogue till 2020 B.S. (1963) when New Muluki Ain abolished those social stigmas once and for all (Tripathi, 2002, p. IX). At the time, the technique of punishment may be described as brutal.

In fact, the feudal autocratic Ranas ruthlessly suppressed the voices of the people and infringed the naturally inherent rights and fundamental freedoms of the people. Basic human rights, participatory liberal democratic exercises were beyond the imagination of the ordinary people. The duality of the rule of king and Rana co-existed from Jung Bahadur to Mohan Shamsheer. The king was depoliticized, isolated from the people. The Ranas hold unlimited and unbridled power. However, they tried to bring some positive reforms by the end of their regime. "There was huge dissatisfaction against the Ranas among the people. Finally, leading to a revolution in 1950 overthrew 104 years-old autocracy" (Panta, 2001, p. 16). Despite certain adjustments, the Rana rule came to an end due to its violent behavior.

The Government of Nepal Act 1948 and Fundamental Rights

The constitutional history of Nepal is not long while compared to developed countries of the world. There are certain determinant factors in the evolution of the Government of Nepal Act 1948. Since 1846, the Rana prime ministers retained sovereign power

and remained center of power in Nepal until the revolution of 1950-51. Many of the nobles who participated in the consultative court called the Assembly of Lords, or *Bharadari Sabha* had been slaughtered at the Kot Massacre in 1846. Junga Bahadur Rana, after his official visit to Britain and Europe in 1851 started to use the *Bhardari Subha* as counseling body for the state affairs. Nearly hundred years, this council assisted as rubber stamp for the Rana autocracy. The next major efforts at institutional development were initiated in 1947 by Padma Shamsheer Rana, a liberal Rana prime minister, who appointed a constitutional drafting committee to draft the first constitution. Subsequently, the Government of Nepal Act 1948 was announced. This constitution, written with the help of Indian advisers, superficially changed the Rana system. It established a bicameral legislative body. The entire membership of one house and a majority of another House were selected by the prime minister, who could reject any measure that the legislature might pass. There was a cabinet of at least five members, of whom at least two were chosen from among the few elected members of the legislature (Naidu, 2016, p.35).

The Government of Nepal Act, 1948 enlisted specific fundamental rights and duties such as freedoms of speech, press, assembly and worship; equality before law; free elementary education for all; and equal and universal suffrage. Despite the appearance of reforms, the alterations made in the Rana system by the constitution were slight. The more conservative Ranas disagreed with the reforms and perceived the constitution as a dangerous precedent. Hence they forced Padma Shamsheer to resign and suspended promulgation of the constitution. "The Interim constitution became effective in September 1950 but remained in force only until February 1951, when the Rana monopoly was broken and the creation of new constitutional system began" (Naidu, 2016, p. 36).

The preamble of the Government of Nepal Act 1948 opened with a fervent desire of the Rana ruler to bring 'all social, economic and political' development in Nepal; "to provide for the increasingly closer association of our dear people in Nepal in every branch of administration" and to secure for Nepal her rightful place in the committee of the nation (The Government of Nepal Act, 1948, p.1). It was ironical that the

preamble tried to achieve the modern values without providing any opportunity to the people to participate in the political system (Tripathi, 2002, p.21).

Similarly, Part II of the Act was most important one as it contained two sections dealing with the rights and duties of the people. In fact, it would be no exaggeration to say that constitutional recognition of fundamental rights in Nepal really commenced with the Government of Nepal Act, 1948. Prime Minister Padma Shamsher Rana in his inauguration speech had observed that "with regard to fundamental rights - we have tried to make provisions for the common good" (Neupane, 1969, p. 197). Section IV of the Act professed to guarantee basic democratic freedom of person i.e. freedom of speech, liberty of the press, freedom of assembly and discussion, freedom of worship, compete, equality in the eyes of law, cheap and speedy justice, universal free and compulsory elementary education, universal and equal suffrage for all adult and security of private property. However, those fundamental rights were made not only "subjects to the principles of public order and morality" but also to the existing laws of the state and the laws and rules to be made in the future. Of course, no democratic constitution in the world provides for absolute and unrestricted fundamental rights. But subjugating the fundamental rights granted by the then supreme law of the country (i.e. the government of Nepal Act 1948) to ordinary law, both prevalent and prospective, was against all norms of democratic principles in fact, it was cleverly calculated step intended to clip the wings of the rights so granted (Tripathi, 2002, p. 22).

The Act imposed certain duties to the Nepali citizens (part five) - "to promote public welfare, to contribute to public funds, to be in readiness to labour physically and intellectually for the safety and well-being of the realm and being true allegiance to the king and the prime minister and be faithful to the state and its constitution."

The formation of a *Pradhan Nayalaya*, besides the creation of courts of first instance and courts of Appeal were other notable provision of the Act. The Rana prime ministers could appoint the Judges of *Pradhan Nayalaya* since the qualification and experience for the post was not clearly mentioned. The prime minister had the discretionary power to appoint or dismiss any judge of the court. Hence it can be

easily said that the independence of judiciary and sincere commencement of fundamental rights were infringed by the government.

Apart from the Act of 1948, the Rana rulers had also enacted some other laws related to human rights, such as, the freedom of Speech Act 1949, the press and publication Act 1949 the Assembly and Association Act 1949 and the Civil Rights Act 1950.

These rights were from individual rights and rights to criminal justice background and habeas corpus. However, these rights were more declaratory in nature, short of any effective remedial rights. All these rights were subjected to the authoritarian system under the exclusive power and prerogative of the Rana Prime Minister who used to exercise all legislative, executive and judicial power. Not only that, those rights were lurches in manifold restrictions, provisions and limitations. They were also not backed by any enforcement mechanism. Above all, there was no congenial political and judicial situation to allow people to exercise those rights (Shrestha, 1993, p. 6).

The fundamental rights provisions of the Government of Nepal Act, 1948 were based on democratic values but unfortunately the Act never came into force as Prime Minister Mohan Shumsher, the successor of Padma Shumsher, paid no attention towards the implementation of the Act. So the then opposition political forces came against the absolute state authority. The political forces of that time started their agitation and continued for political reforms, civil and political rights and the establishment of a democratic system. The armed movement conducted by Nepali Congress Party with the sympathy of immediate King Tribhuvan ended achieving the formal abolition of autocratic Ranarchy, establishing multi-party democratic system of government and promulgation of the Interim Government of Nepal Act, 1951.

Democratic Movement in Nepal (1951-1961)

The overthrow of the Rana oligarchy in 1951 is popularly explained as a revolution ending tyranny and introducing a democratic era. In many ways this cannot be disputed that the post-Rana years saw Nepal tentatively opening up after a lengthy period of restricted contact with the outside world. But the revolution of 1950-1 marked no fundamental social and economic lacuna. Egalitarian ideals found their

way onto the political agenda, but those who proposed the creation of a new, equitable society rarely wanted one. Instead, they used the rhetoric of people's power and the prospect of progressive policies as tool to discredit and dismantle the opposition (Brown, 2010, p. 23). In reality, the decade was marked by several upheavals.

The journey of democracy in Nepal engulfed and cuffed into various ebbs and falls. In the real sense, the first wave of democracy started in 1951 A.D., after the end of Rana rule and the introduction of parliamentary system of government under the governance of the king. During this period, the Interim Government Act 1951 guaranteed fundamental rights to the people. But, the constitution failed to maintain the power relationship between kings and people, though it remained the most progressive of all constitutional documents in the history of Nepal. This movement led political activities take a new drive; ban on political parties was lifted. The official advent of democratic practice took an unset from the time. Mass awareness and gross participation on politics marked a new record (Dahal, 2018, p. 166). Because of the ongoing disorder between the king and the people, this time remained chaotic.

The Interim Constitution of 1951 reciprocated the conventional powers to the king, established a judicial branch, and created a bill of rights. But, for the next several years, rather than holding the elections, King Tribhuvan simply appointed new ministries when no consensus could be reached. Eventually, the next king, Mahendra agreed to parliamentary elections in 1959, following substantial pressure from the people. "Just before the elections, King Mahendra promulgated a new constitution, which provided for a mostly-elected, bicameral legislative body" (Naidu, 2016, p.3). The king appointed half of the Upper House and retained extensive executive powers. The liberal policies of the new government aroused the king, however, and he suspended the constitution one year later, "using interparty conflicts and violence within the country as an excuse to assume emergency powers. By the end of 1961, political parties were banned. Afterwards, King Mahendra imposed the new Panchayat constitution in 1962" (Naidu, 2016, p. 3). Consequently, the democracy was curtailed and partyless system was introduced.

The 1951 Interim Constitution and Fundamental Rights

After the revolution of 1951, King Tribhuvan promulgated the Government of Nepal Act 1951 with the advice and approval of the council of ministers. This constitution transferred the traditional powers to the king. This constitution popularly known as 'Interim Constitution' got seven amendments during the eight years of its existence in between 1951 to 1959. During this constitutional discourse, "The second, fifth and sixth amendment were made by the King on the advice of the council of ministers, but the rest were made by him in the exercise of his extraordinary powers" (Dhungel, 198, p.22). The discretionary power used by the king in the amendment of the constitution aroused dissatisfaction among the populace.

The Interim Constitution also established a supreme court, made the king commander of the armed forces, reiterated and enlarged upon the fundamental rights included in the Rana Constitution of 1948 where it announced "numerous social and economic objectives of the government. These objectives were to promote the welfare of the people by securing a social order in which social, economic and political justice pervaded all the institutions of national life" (Naidu, 2016, p. 36). Thus, the constitution endorsed few democratic norms and values in the democratic saga of Nepal.

The fundamental rights of the citizens were composed in part II of the Interim Constitution under the Directive Principles of State Policy in the name of social justice and freedom. Article 4 of the Interim Constitution states that "The state shall strive to prompt the welfare of the people by securing and protecting as effectively as it maynstitutions in the national life" (Panta, 2001, p. 309). Similarly, Article 5 emphasized the importance of right to equality for women in order to maintain a favorable social environment. Likewise, Article 5 guaranteed access to education, health care, and remuneration for all citizens. It also safeguarded "child laborers, the elderly, the sick, and the crippled"(Panta, 2001, p. 310). Article 14 ensured that "everyone is treated equally in the eyes of the law". Similarly, Article 15 states that "no discrimination shall be made against any citizen on the basis of religion, race, caste, sex, birth place, or any of them" (Shrestha, 2075/76 B.S., p. 332). Article 16

ensures that all citizens have equal access to job opportunities. The significant fundamental Rights to all citizens were mentioned in Article 17 as:

Freedom of speech and expression; Freedom to assemble peacefully and without arms; Freedom to form association and unions; Freedom to move freely in any part of Nepal; Freedom to reside and settle in any part of Nepal; Freedom to acquire, hold, and dispose of property; and Freedom to carry on any profession, occupation and trade or business. (Dahal, 2001, p.311)

The Interim Constitution did not incorporate fundamental freedoms only it also included right to criminal justice. Article 18 stated that: "(1) No person shall be punished for an act which was not forbidden by law when the act was done, nor shall be subjected to a punishment greater than that prescribed by the existing law when the offense was committed, (ii) No person shall be prosecuted or punished more than once for the same offense in a court of law; and (iii) No person accused of any offense shall be compelled to testify against himself." In the same way, Article 19 guaranteed, "No person shall be deprived of his life or personal liberty except according to the procedure established by law or the rules to be made by His Majesty's Government for public good, or for the maintenance of public order or for the security of the state" (Panta, 2002, p. 311). Hence, Articles 18 and 19 placed a high value on the rule of law and personal liberty with the creation of *Pradhan Nayalaya* which was mentioned in Article 32. There were certain misunderstandings since the fundamental rights were retained within the directive principles of state policy. Following King Tribhuvan's death, it was extremely difficult to fully and methodically execute the interim constitution. King Mahendra at the succession on the throne, "aimed to exercise active leadership as per the Hindu tradition of *dharma* and *dharma Shastras*" (Pathak, 2005, p.60).

Nonetheless, the Interim Constitution of Nepal 1951 is a significant institutional document in the evolution and development of fundamental rights in Nepal. In fact, promulgated by King Tribhuvan, this constitution strengthened the authority of the king, and introduced certain reforms such as the creation of Supreme Court and the inclusion of fundamental rights and social economic goals to be pursued by the state.

The Constitution of the Kingdom of Nepal 1959 and Fundamental Rights

The Constitution of 1959 was formed by a drafting committee under the chairmanship of Bhagawati Prasad Singh (Mishra, 1985, p. 25). This constitution was promulgated by King Mahendra on 12 February, 1959. The most important aspect of this constitution was that it proclaimed election of CA despite enacted by the king. However, "the constitution formally brought into being and democratically elected parliamentary system under a constitutional monarchy legitimized, the King retained ultimate sovereignty, even though the document itself did not explicitly grant this power" (Naidu, 2016, p.37). The constitution was framed in ten parts and 77 Articles.

The constitution of 1959 was designed as British Westminster model of parliamentary system. The king could entertain the executive powers as advised and assisted by a council of State (Raj Sabha) and council of ministers (Cabinet) consisted of officers of parliament, ministers, ex-officio, former ministers, and royal appointees. The general direction and the control of the government were entrusted to the council of ministers, headed by a prime minister required to command a majority in the lower house of parliament, to which the council was collectively responsible.

As a head of the state, the king was an indispensable part of the legislative arm of the government under the 1959 constitution consisted of the king and two houses (The senate and the House of Representatives) which had the power to make laws. The House of Representatives, composed of 109 members from direct election, and the upper house, composed of 36 members of whom half were nominated by the House of Representatives and half were chosen by the king. All bills approved by the two houses required the assent of the king to become law. The constitution guaranteed the king wide latitude to nullify the parliamentary system. The king could suspend the operation of the cabinet and perform its functions himself if he determined that no person could command a majority in the house as prime minister. During the "emergency conditions, the king could suspend either or both houses of parliament, assume their powers, and suspend the constitution in whole or part. In December 1960, King Mahendra invoked these emergency powers to dissolve the Nepali Congress Party Government" (Naidu, 2016, p. 38). This step of royal takeover

demolished the recently cultivated democratic demeanors, banned political parties, imprisoned the leaders then started an active and absolute rule of the king. This was the first regression of democracy in Nepal.

Despite some constitutional controversies and power struggle between the king and the parliamentary government, the constitution of 1959 embodied few silver lines. Article 1 of the constitution stated that the constitution as the fundamental law of Nepal and further declared the law inconsistent to the extent of inconsistency would be declared null and void.

Part III of the Constitution of 1959 was the most important section which contained seven articles. It had guaranteed several fundamental rights to the people of Nepal with a view to establishing a welfare state. This constitution guaranteed various civil and political rights such as personal liberty, political liberty, equal protection of the law, right to property, right to constitutional remedies etc. irrespective of any religion, sex, caste, race or tribe.

Article 3 (1) of the constitution contained with the right to personal liberty with twelve clauses (Tripathi, 2002, p.52). The central guarantee of this Article 3 (2) was that no person shall be deprived of his life or personal liberty save in accordance with the law. It also provided protection against trafficking in human beings, slavery and forced labour. It guaranteed against ex-post facto legislation and retrospective punishment and declared that no person shall be punished for an act that was not punishable by law at the time of its commission, or "subjected to a punishment greater than that prescribed by law for an offence at the time of its commission" [Article, 3 (3)]. The constitution also provided protection against double jeopardy. Article 3 (4), and self-incrimination Article 3 (5). To provide protection against arbitrary arrest and illegal detention the constitution provided that a detenu must be informed at the earliest of the "grounds of his arrest and be allowed to consult and be defended by a legal practitioner of his choice" Article 3 (6). Such a 'detenu' are supposed to be presented before the nearest judicial authority with in a period of twenty-four hours from such arrest excluding the journey time consumed 'en route' and must not be kept in custody beyond the said period except on the order of a judicial authority, Article 3

(7). But this constitutional guarantee was not made available to any person arrested or detained or any enemy alien under any law providing for preventive detention. And the method of preventive detention was also regulated by the constitutional provisions made through Article 3 (9) to 3 (12). "The constitution also prohibited detention of a person for more than three months unless so recommended by an Advisory Board" (Tripathi, 2002, p. 53). It was a huge obstruction in democratic system.

Similarly, Article 4 of the constitution guaranteed "equal protection of the laws" (Shrestha, 2075/076 B.S., p.374) to all citizens and also assured that in the application of general laws. There should be no discrimination against any citizen on grounds of religion, race, caste or tribe. It also prohibited discrimination on grounds of sex in respect of appointments to the services of the crown. This article also prohibited discrimination of hatred, contempt of court, of enmity between people belonging to different areas, or between different classes of people, castes or tribes.

Right to religion is mentioned in Article 5 of the constitution which granted permission to every citizen to practice and profess their own religions having regard to the current traditions as handed down from ancient times, and no person was allowed to convert another person to his religion. Although this constitutional guarantee of freedoms of practicing one's religion was indicative of the secular concept of the state, this provision, if read with Article 1 (3) of the constitution which enjoyed on the king to be an adherent of Hindu religion, in effect, made the state a Hindu State against all norms and modern values of secularism.

Article 6 of the constitution contained right to property. This Article mentioned that "no person shall be deprived of his property save in accordance with the law" and "every citizen is entitled to acquire, hold and dispose of property". The guarantees of the four political liberties were: speech and expression; freedom of assembly without arms freedom to form association or unions and freedom of residence in any part of Nepal.

The provisions of fundamental rights are meaningless without the constitutional protection or judicial remedies. Article 9 of the constitution had made the

fundamental rights as justifiable and enforceable with provision of constitutional remedies. According to this provision every citizen had right to file a petition in the Supreme Court that sought appropriate proceedings for the enforcement of the fundamental rights as guaranteed by part III of the constitution. To protect the fundamental rights, the Supreme Court was well equipped with power to issue appropriate directions or orders or writs like *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari*.

The fundamental rights guaranteed in the part III of the 1959 constitution were not absolute or unconditional. These rights could be suspended during the emergencies in the name of 'Public good' under Article 8 (1) (a) and (b) the state could infringe those fundamental rights for the purpose of following objectives:

- a. The maintenance of law and order within Nepal;
- b. Security of Nepal;
- c. Good relations between Nepal and other countries;
- d. Good relations among different classes or sections of the people, or between people of different areas;
- e. Generally good manners, health, comfort or convenience or decency or morality and economic welfare of the citizen of Nepal;
- f. Prevention of international disturbance or any attempt to subvert this constitution or any law in force for the time being or any other like attempt;
and
- g. Prevention of contempt of court or of parliament (Panta, 2001, p.289).

With the due observations of the aforementioned conditions of 'public good' any one can easily assume that the fundamental rights mentioned in the 1959 constitution depended on the mercy of the existing ruler or the king.

The constitution of 1959 was like a cocktail document seeing as it was the mixture of west minister model of parliamentary democracy and absolute monarchy. The emergency powers vested to the king came to be true to evoke the king to dissolve the elected law making body and council of ministers at a time. Despite these short

comings, this document became a great step towards democratization, modernization and liberalization of the Nepalese society. "It established universal adult franchise, independent judiciary, elected government, multiparty democracy and enforceable fundamental rights" (Kharel, 2016, p. 172). The assertive King Mahendra retained major powers under the 1959 constitution, including the prerogative to choose half of the members of Upper House and the power to suspend parliament on specific conditions. King Mahendra abolished the Nepali Congress Party government, exercising these emergency powers on December 17, 1960.

The Panchayat Constitution of 1962 and Fundamental Rights

On 16 December 1962, King Mahendra promulgated a new constitution formally known as "Constitution of Nepal". This was also known as the Panchayati Constitution. When this constitution issued, the process of parliamentary democracy was deadlocked and ushered in a Panchayati democratic system making the king the real and authoritarian ruler. The transformation of parliamentary democracy into the Panchayat system was the result of a number of factors including political incidents, social and economic tensions, and system's incapability in the fulfillment of common men's aspirations (Chaturvedi, 1992, p. 92).

The Panchayat system coined under the 1962 constitution was an institution of great antiquity (Naidu, 2016, p. 38). It was the fourth constitution of Nepal made in the time period of fourteen years. The ideological root of the Panchayat System was previously contained in the ideas of the Indian Leader Jai Prakash Narain and the Constituent Assembly debates. Notwithstanding to any ideological base, in the ancient time, each caste group system of Nepal formed its own Panchayat or council of elders, a sociopolitical organization operational on a village level that could expand to include neighboring districts or even function on a zonal basis. In fact, it was a correct historical representation of Nepalese and Indian cultural expression. The 1962 constitution was based on some elements from other "guided democracy" constitutional experiments - notably "Basic Democracy" in Pakistan "Guided Democracy" in Indonesia, and the "Dominant Party System" in Egypt (Naidu, 2016, p. 38). Explicitly, it was a royal authoritarian document.

The 1962 constitution vested the sole power to the king. The king had the power not only to amend the constitution but also to suspend it by royal proclamation during the emergencies. The supremacy of king in each branch of the government meant, therefore there was no system of checks and balances of any kind in between the three branches, and that the concept of a separation of power was meaningless in practice. The underlying principle of the 1962 constitution was "the idea of monarchical sovereignty under which the King was not only head of the state, but also combined the rights of sovereignty with the powers of an absolute ruler" (Dhungel, 1998, p. 31).

The discretionary power of the king was to appoint the judges of Supreme Court commissioners of the constitutional organs and ambassadors, commander in chief of armed forces, zonal commissioners of each of the administrative zones etc. proved the authoritarian modality of the Panchayat system. The political parties were banned and the party-less Panchayat system was introduced.

The 1962 constitution contained various duties and fundamental rights to the Nepalese citizens. The most significant part of the constitution was its III chapter which guaranteed fundamental rights to the citizens of Nepal and called for them to discharge certain obligations towards the state. The constitution ensured the fundamental rights in nine articles granting "the right to equality, the right to freedom, the right against exile, the right against exploitation, the right to religion, the right to property, right to constitutional remedies and so forth" (Pathak, 2005, p. 62). Whereas Article 9 deliberated the duties of the citizens towards the nation and anticipated that they would remain devoted and loyal to the state while trying not to infringe upon the rights of the others. Article ten assured- "all citizens are equal in protection of law without any discrimination whatsoever on the basis of religion, race, sex, caste and tribe in respect of appointment in the government or other public services".

Obviously, "the provisions of the article were in consonances with the UN conventions and laid down the foundations of the rule of law" (Chaturbedi, 1992, p. 101).

Correspondingly, right to freedom as contained in Article 11 of the constitution granted liberty to life, speech and expression; to peaceful assembly (without arms)

formation of unions and associations, to shift and live anywhere in the country and to acquire and enjoy property and dispose it off. However, a curb was imposed by the first amendment on the formation of unions and associations engaged in party politics. Judicial and legal right was granted to every individual. The rights were well in consonance with Right to Freedom as contained in the constitution of India.

Obviously, this Nepalese constitution was also influenced by the constitution of India to a considerable extent (Chaturvedi, 1992, p. 101). Thus the Rights to Freedom were mentioned in the same vein in both constitutions of Nepal and India although Nepal had few restrictions in the name of social good.

The Article 12 granted Right against Exile to the citizen of Nepal. In the consonance with the provision laid down by the U.N. Charter of Human Rights, the subsequent Article 13 assured Right against Exploitation Prohibiting 'traffic in human beings', slavery and forced labour. Notwithstanding with this prohibition, compulsory service could be enforced by law for public purpose. In the same continuation it provided right to religion in accordance with the Nepalese tradition.

Article 14 of the constitution was devoted to Right to Religion, which assured that everyone may profess and practice his traditional religion handed down to him by his descendants. In some extent this guarantee apparently resemble the provision made by Article 18 of the Universal Declaration of Human Rights and Article 18 (1) of the International Convent on Social and Political Rights in that it guaranteed the freedom to practice one's traditional religion only. Unlike the absolute freedom granted by UN documents to practice any religion of one's choice as stated above, Article 14 of the 1962 constitution continued one's freedom of religion in the sense that one was not allowed to practice any other religion of one's choice and was compelled to adhere to the religion practiced by his family from the past (Tripathi, 2002, p. 64). This constitutional provision of religion contradicts with the modern concept of democracy with secularism.

The Article 15 ensured right to property and revealed that 'no person shall be deprived of his property save in accordance with the law.

Additionally, the following criminal justice administration related rights were guaranteed in Article 11 (3-7) of the constitution (Tripathi, 2002, p. 63).

- i) Right not to be punished retrospectively for an act which was not punishable by law when it was done;
- ii) Right not to be subjected to a punishment greater than that prescribed by law for an offence when the offence was committed;
- iii) Right against double-jeopardy prohibiting prosecution and punishment of any person more than once for the same offence;
- iv) Right against self-incrimination which guaranteed that no person accused of any offence shall be compelled to be a witness against himself.
- v) Right to be informed of the grounds for arrest or detention.
- vi) Right to seek legal consultancy and defense by a legal practitioner of the defense's choice; and
- vii) Right to produce before a judicial authority within 24 hours excluding the period of journey from the place of arrest such authority

Nevertheless, the pre-information and legal consistency of the criminal cases were not immunized to the person of enemy state and a person who was arrested or detained under preventive detention law mentioned in Article 11 (8) of the 1962 constitution.

Article 71 of the constitution of 1962 preserved and protected the rights and provided the supreme court power to issue directions, orders or writs-such as Habeas corpus, Mandamus, Prohibition, 'Quo-Warranto' and Certiorari in case the same were obstructed by the individuals, institutions or the state.

However, such freedoms were severely restricted in the name of 'public good' through Article 11 (II a) of the constitution. Similarly, Article 17 of the constitution, further stated that law may be made for the sake of public good to regulate or control the exercise of the rights. This includes the preservation of security of Nepal, maintenance of law and order, of friendly relations with the foreign states maintenance of the good relations amongst the people of different classes or professions or between the people of different areas; of good conduct, health, comfort,

economic interest, decency or morality of the people in general, for the protection of the interests of minors or women (Saran, 1983, p. 82). Thus, the state kept a number of situations in which, if it so felt, the state might put check or curb on the enjoyment of the rights.

The restrictions provisions of 1962 constitution of Nepal were in consonance with provision of Spain (1936), Ireland and India (Chaturvedi, 199, p. 10). Following partial provisions of UDHR, "the Panchayat constitution had prioritized on economic and social rights to all the people at the expense of their civil and political rights" (Pathak 2005, p. 62).

The constitution of Nepal 1962 contained a stronger and more explicit statement of royal authority that the king could not only amend the constitution but also had the power to suspend it by royal proclamations during the emergencies.

The Popular Movement (1990)

The wave of democracy and political liberalization were first introduced in Nepal along with the end of Rana oligarchy in the year 1951. Democratic practices with a parliamentary system of government were brought into existence, like the holding of general election on the basis of universal adult franchise and the forming of popular government of elected representatives. The Interim Government of Nepal Act 1951 guaranteed fundamental rights to the people, despite the constitution failed to maintain the power relationship in between the king and the people. The objectives of drafting a new constitution from the people's representatives elected through the Constituent Assembly and established of parliamentary monetary system were progressive provisions of this constitution. But soon after eight years King Mahendra handed down another constitution to the people in 1959 despite the fact that the Interim Government of Nepal Act provided this power of framing a new constitution to the people's representatives (Acharya & Upreti, 2015, p. 199).

Nevertheless, the then King Mahendra dismissed the parliament and abolished the multi-party system and introduced party-less Panchayat System on December 15, 1960. After one year he promulgated the new Panchayat Constitution on 16th

December 1962. This constitution conferred all powers - executive, legislative and judiciary to the king. The council of ministers was to help and advise him in the execution of his powers. Sovereignty was vested in his hands, few *punchas* in the name of people's representatives were exploiting the people of Nepal.

Panchayat Polity did not provide the required flexibility for the wider political participation for the multi-party forces. Banned political parties which were seeking some outlet of reforms of participate in the Panchayat polity were either discouraged or defeated in the elections. Each candidacy who wanted to contest the elections had to be the member of any class organization. The class organization had supposed to represent the interests of various groups or as if political parties. Similarly, voices of liberal *Panchas* were neglected outright. These deprived forces both in legislature and outside created a cacophonous environment so as to expose the undemocratic character of the system. The Panchayat government never recognized the modern forces, intellectuals, teachers, students, and technicians, who emerged as a consequence of its own limited modernization efforts and efforts made by friendly nations and their governments. It relied heavily on traditional political status and bureaucrats. The middle class finding little opportunity for mobility resorted to revolutionary techniques. It is the main source of urban opposition to government. The basic cause of failure of Panchayat System has been described as "This outcome is the log product and suppression of heavy power centre equipped with weapons over brain-driven academic centre such as academicians and intellectuals" (Sharma, 2002, p. 7). Thus it can be said that the Panchayat Polity entrenched its crematory itself.

There were no options with the supporters of the multiparty system except awaking people and campaigning against the bad deeds of the Panchayat system. They were compelled either to support the newly-introduced non-party Panchayat system; remain in self-exile in India or work secretly inside Nepal "The NC and communist parties of Nepal remained particularly active in opposing the non-party personal rule of the king inside and outside Nepali" (Dahal, 2001, p. 64).

The struggle of the political parties for the restoration of democracy and termination of Panchayat system was inspired by the changing global scenario in the last two

years of the 1980's and the increasing active role of NGO's and INGOs "At the end of 1989, the Indo-Nepali trade and Transit controversy lingered painfully on, bringing significant economic hardships to the people of urban Nepal, and particularly to those living in the Kathmandu Valley. Moreover, there was no sign of a resolution to the crisis. The Nepali government fulminated against the great-power bully in New Delhi and stirred up nationalist sentiments against 'foreign interests' in order to win popular support through a show of jingoism. But reviving the off-used and rather worn anti-India card could not be relied upon to dampen political opposition permanently. People were becoming angry and impatient. Momentous events in eastern Europe then provided a dramatic demonstration of the possibilities open to dissenters" (Brown, 1996, p. 114). This phenomenon played a significant role to sensitize the morale of the anti-Panchayat activities.

The blowing of democratic waves in eastern Europe and in other parts of the world, including Mongolia, Albania and South Africa also affected Nepal, whereas, immediate King Birendra and his advisors (*Panchas*) seemed to be unaware of the trends of change in the world. Hence, the party-less monarchical rule for 30 years led to a steady deterioration in the moral and material conditions of the people of Nepal. As a result, all sections of the people were dissatisfied with the government. The failure of the renewal of trade and transit treaty with India also created dissatisfaction among the people that resulted in mass movement. The mass revolution of 1990 was not self-originated phenomenon. It can only be understood in the context of 30 years of political struggle against the Panchayat system. The major factors are described as:

The revolution was not caused by only one major factor, but by the interplay of several important elements. One of these combinations was that of a planned movement and an unexpected mass uprising in the Kathmandu Valley. There was a favorable environment for such a movement both externally and internally. Local discontent caused by the Indian trade embargo [against Nepal] coincided with the international wind of democracy caused by the East European revolutions only a few months earlier" (Huftun, 1994, p. 20 cited by Dhungel, 1998, p. 35).

The Nepali Congress organized a 3-day national conference on 18th January, 1990 at Chhetrapati Kathmandu where the delegates of leftist party and human rights activists attended including the political party representatives of India, Japan, Finland, Spain, West Germany and Great Britain. In spite of the speculations of the Panchayat government, the conference continued for three days deciding the Nepali Congress would work closely with leftist wing to launch a peaceful struggle for democracy on 18 February 1990, i.e., Nepali's Democracy Day, the day when democracy was introduced for the first time in Nepal, in 1951 A.D. The struggle would include processions and mass meetings. Picketing of government offices, general strikes included the closure of shops and stoppage of public transport, courting mass arrests and defiance of government orders. Other groups like communists and human rights forum were also urged to help organize mass participation (Acharya, 2015, p. 201).

In the meantime, two largest political parties of Nepal the NC and the United Left Front (ULF), consisting of seven communist parties of Nepal, decided to prepare for the movement against the arbitrary Panchayat system. They were dedicated to substitute party-less Panchayat system by a multi-party democracy. Some of the leftist politician and intellectuals took some positive initiatives in this direction on 16th October 1989 that was called for United People's Movement (UPM) for safeguarding the nation and the restoration of the people's rights against the monocratic Panchayat system (Dahal, 2001, p. 65).

Before pursuing the joint movement or *Jana Andolan* (people's movement), the leftist parties began to organize themselves into a bloc. On January 15, 1990 the seven leftist political parties of Nepal formed a 21 member ULF and a 7-member secretariat under the chairmanship of Mrs. Sahana Pradhan, the widow of Puspa Lal. This was an encouraging step in the history of people's movement. The ULF expressed its strong determination to replace Panchayat system by multi-party democratic system for that purpose they appealed to the general public to support in their mass movement (Dahal, 2001, p. 65). In addition to this two other relatively radical leftist parties namely; CPN Mashal and CPN Masal and few other small leftist parties formed a

United National People's Movement (UNPM) to overthrow the Panchayat System and restore multiparty democracy in the country with their separate way.

A joint steering committee was formed to drive the mass movement by the representatives of Congress and the ULF. Despite all negotiations it proved impossible to set aside decades of animosity and to form an official cross party body to orchestrate the movement. So rather than establishing a joint congress- communist organization, the parties undertook to peruse separate but complementary campaigns. As a result, there was no unified single leadership and the informal alliance operated as a loose coalition. Even without a firm organizational base, however, the arrangement worked well, at least in the early days of the mass movement. In fact, it is the nature of the joint movement where different political forces came together from separate political ideologies to fulfill the common goal and objectives.

The anti-Panchayat agitation began on 18 February. This was Nepal's Democracy Day, traditionally a holiday to celebrate King Tribhuvan's historic proclamation which promised to bring democracy to Nepal. The Panchayat system also co-operated the day as its own and used it to stage annual demonstration in its own support. In 1990, the government planned an even greater spectacle to underline its power, and pressure was placed upon all government employees to attend the celebration. The *Jana Andolan* also planned to use the day to launch a counter-demonstration to mark the beginning of the movement. The resulting clashes were inevitable as supporters of the movement encountered the official government procession on the streets of Kathmandu. A general strike was called for the following day and the commercial and transport sectors in Kathmandu were shut down. The leaders of the movement could be satisfied that the opening phase of their campaign had been a surprising success (Brown, 1996, pp. 116-117). The agitators rallied with their flags shouting "We want freedom", "Down with the Fascist Panchayat System". Soon, they started throwing stones and bricks at the official procession causing Prime Minister and other leaders to flee from the procession. In the meantime, the anti-Panchayat protestors clashed with the police in different places. The police force made *lathi* charges, used tear gas to control the demonstrators. But the demonstrators did not give up their hope and

marched boldly facing the *lathis*, tear gas and bullets of the police. A group of the students come out of Tri-Chandra Campus and attached the statue of King Mahendra, nearby the campus, in Darbar Marg. They damaged the marble around the statue. Just as a student climbed up the effigy and tried to install therein the party flag, he was shot dead (Acharya, 2015, p. 202-203). The incident put the kerosene over the burning flame and the agitations got more aggressive all over the country.

The mass movement continued for fifty days and culminated in bloody clashes on the streets of Kathmandu in early April. A curfew was enforced and negotiations between the palace and the leaders of the joint movement resulted in a partial diffusion of the crisis when the king agreed to drop the ban on political parties. Between the launch of the movement and this apparent triumph, the movement experienced varying fortunes. It proceeded in fits and starts. There were many lulls and, at one time, it seemed as if the agitation was about to stall. It was after this low point in activity that the movement reactivated itself and flared up in early April to reach a new level of popular participation (Brown, 2015, p. 117).

The movement overwhelmingly spread over the country. There were several counter clashes between the demonstrators and the police in Hetauda, Rampur, Bharatpur, Narayangarh, Janakpur, Biratnagar, Birgunj, Pokhara, and Bhairahawa in addition to the three districts of Kathmandu valley. Almost all the students, teachers, doctors, lawyers, farmers, labourers, government and non-government took part in the mass movement. At the end of the movement, the official death toll was 80, while some 1307 people were injured (Acharya, 2015, p. 203).

The mass movement for the restoration of democracy was started on 8th February and terminated on 9th April 1990. On April 6, just three days before the end of the uprising, the then King Birendra charged the council of Ministers with having failed to understand the "tradition of public consent" and of having caused loss of life and property. He announced the formation of new council of ministers under the then legislature member Lokendra Bahadur Chand which was asked to hold talks with "people holding different views" contrary to his wishes, the security forces shot dead several dozen unarmed demonstrators in the streets outside the royal palace on April

6, the situation was out of control, even the political leaders of the movement hardly manage it. After two days later the King lifted the ban over political parties and deleted the term "Party-less" from the 1962 constitution (Dhungel, 1998, pp. 35-36). In fact, the King had no alternative but to declare liquidation of the Panchayat system due to intensive and aggressive movement. Soon after the royal declaration, the victories demonstrations and celebrations were organized in different parts of the country. The political course modified into the constitutional monarchical parliamentary system from the absolute monarchy.

Constitution of Nepal 1990 and Fundamental Rights

After the restoration of parliamentary form of multi-party democracy and liquidation of monocratic Panchayat system the mass movement was called off. In newly emerging platform the three important political forces of Nepal - the king, and the two partners in the 1990s mass uprising the NC and the communist of the ULF started their negotiation over the formation of an interim government "On 16 April 1990 the king appointed Krishna Prasad Bhattarai as the Prime Minister to head the Interim Government" (Tripathi, 2002, p. 124). On April 18, 1990, Prime Minister named other ministers retaining the defense and foreign affairs portfolios. The prime minister and other ministers were from the NC, three from the ULF, two from human rights activists with two royal nominees." The palace had proposed that a limited number of the opposition figures be added to Nepal's existing council of ministers which would be entirely the king's nominees. The opposition forces angrily turned down the offer on April 17, 1990 demanding the complete control of any interim government would likely to remain in power until the holding of the General Elections in Nepal" (Dahal, 2001, p. 71-72).

With two major tasks the interim government was entrusted. First, announcement of a new democratic constitution in which sovereignty would be vested in the people, and second the timely holding of general elections according to the new constitution. The interim government performed these given task successfully.

King Birendra, on, "May, 1990, through a Royal Proclamation, announced the appointment of a seven-member constitution Reforms Commission headed by Bishwanath Upadhyay, the justice of Supreme Court. This unilateral Royal Proclamation generated a lot of heat and controversy and caused hostile reactions as it was interpreted by the people and the intelligentsia as a calculated Royal move to assert as if it was its sole prerogative and power to give a constitution to the nation. In fact, all previous constitutions were promulgated in the exercise of the King's sovereign powers and prerogatives over the kingdom of Nepal. But the agitation launched by the joint front of Nepali Congress and the United Leftist Parties was directed, besides other things, at the recognition of the people's sovereignty (Tripathi, 2002, p.126). So the rebellion political forces never could go back from their key issue.

The preliminary formation of constitution recommendation commission of the king became a subject of grew criticism or controversy among the political parties of Nepal. Some members of the constitution commission resigned and denied to join the office. Pressures mounted on the place for formation of a new commission that would include representatives of the political parties. The king had no alternative except reconstituting a new constitution recommendation commission again headed by Bishwanath Upadhyay. The other members of the commission were three congressmen Daman Nath Dhungana, Laxman Aryal and Mukund Regmi, three from the leftist front Bharat Mohan Adhikari, Madhav Kumar Nepal and Nirmal Lama and two independents, Ramananda P. Singh and Pradhyumna Lal Rajbhandari. This commission was formed with the consent and consultation of the major democratic political forces. This commission was broader in nature than the previous one (Dahal, 2001, p. 73).

The Nepali Congress and the United Leftist Front jointly announced the following 8-point directive on April 24, 1990, in anticipation of the formation of a new constitution, which was reported in the Nepal Press Digest of April 1990:

- i) The new constitution must be fully democratic; ii) The king must become constitutional monarch; iii) The king must act only on the advice of council of ministers; iv) All institution and laws not conducive to democratization must

be repealed; v) Democratic rights must be ensured for all citizens; vi) Institutions and processes must be developed for the protection of democracy; vii) A free election must be held as soon as possible, and independent election commission must be forecast for this purpose; and viii) There should be press and academic freedom and equal rights for women. (Pathak, 2005, p. 63)

To achieve the aforementioned objectives, the constitution recommendation commission was given the responsibility of devising and consolidating constitutional monarchy and parliamentary democracy in Nepal within a period of three months. Hence the framers of the constitution were nicely acknowledged of the significance of their responsibility so that they made a common consensus on major issues immediately.

To facilitate the work of the commission, each of its nine members was assigned specific topic on which he (there were no women members) would collect suggestions from political parties and the general public and report back to the other eight members. Individual, academic, institutional and expertise views were collected from inside and outside the country. The chairman of the commission Bishwanath Upadhyay announced the completion of the commission's draft text and submitted to council of minister on 1st May, 1990. This draft was then revised by the council of ministers and submitted to the King on October 11, 1990. In spite of having some reservations on the draft constitution the King Birendra was compelled to promulgate the new constitution on November, 1990 (Dhungel, 1998, p. 40).

This constitution of the Kingdom of Nepal, 1990 was the first constitution to recognize the people as the source of the state power. It was a monarchical-democratic constitution. It was clearly stated in the preamble to the constitution that safe guarding the fundamental human rights of each Nepali citizen maintaining fraternity and unity among the people on the basis of freedom and equality, consolidating universal adult franchise, parliamentary system, constitutional monarchy and multi-party democracy and providing for an independent and competent judicial system; this constitution was framed through the broad based participation of the Nepali people though the demand of the constituent assembly was

postponed as compromises expressed through the mass movement the sovereignty was inherent to the Nepali people (Acharya, 2015, p. 209).

The 1990 constitution was the fifth constitution in the constitutional history of Nepal. It contained 23 parts, 133 articles and 3 schedules. It had envisaged constitutional monarchy, bicameral legislature, independent judiciary, guarantee of the fundamental rights of the people and vesting the sovereignty to the people. It also mentioned about the civilian control of the military, freedom of expression, universal franchise, respect of human rights, and guarantee to freedom of religion. Part I of the constitution dealt with the preliminary matters and part II was the provisions regarding citizenship.

Part III of the constitution guaranteed fundamental rights to Nepalese citizens, like the right to equality, freedom, press and publication, regarding criminal justice, against preventive detention, exploitation and exile, information, property, culture and education, religion, privacy and constitutional remedy. These fundamental rights were mentioned from Article 11 to 23 of the 1990 constitution.

Article 11 was related with right to equality. This article guaranteed equal protection for all without distinction to religion, race, sex, caste, tribe or ideological conviction or any of these. Similarly, Article 18 laid down six fundamental freedoms, viz. freedom of speech and expression, right to assemble peacefully without arm, freedom to form association or unions, to move throughout Nepal, right to reside across Nepal and freedom to practice or carry on any trade, business or occupation. Article 13 slammed any form of censorship on media or seizing of press or cancellation of registration of newspaper only because of dissemination of a news story. Still, the provision was loaded with exceptions. It provisioned that reasonable restriction could be imposed on this freedom if any act tends to jeopardize the harmonious relation substituting among the people, defame a person, lower down the authority of court, incitement of an offence or immorality or airs sedition.

Article 14 provided for presumption of innocence and self-incrimination, ex-post facto law and double jeopardy. Also right to be represented before the law court by his counsel was protected. On the other hand, right against preventive detention was

preserved in article 15, where in article 15 (1) mentioned as: "no person shall be held under preventive detention unless there is sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the kingdom of Nepal". Similarly, Article 15 (2) clarified: "any person held under preventive detention shall, if his detention was contrary to law or in bad faith, have the right to be compensated in a manner as prescribed by law". Right to information was given a fundamental right to citizen under Article 16.

Right to property was protected under Article 17 (1), (2) ad (3) where all the citizens had right to acquire, own, and sell and otherwise dispose of, property was exempted according to existing law. The state could not requisition, acquire or create any encumbrance on, the property of any person except in public interest The basic of compensation and procedure for giving compensation for any property requisitioned, acquired or encumbered by the state in the public interest, should be as prescribed by law. Article 18 of the 1990 constitution guaranteed cultural and educational right. Each community residing within the kingdom of Nepal had the right to preserve and promote its language, script and culture under this provision. Further, everyone had right to operate schools up to the primary level in its own mother tongue for imparting education to their children.

Every person had the freedom to profess and practice his/her own religion as handed over down to him/her from ancient times having due regards to traditional practices. No one could convert anyone's religion to another. Every religious denomination had the right to maintain its independent existence and for that purpose to manage and perfect its religious places and trusts was deserved in Article 19 (1) and (2) of the constitution. Article 20 (1) and (2) secured right against exploitation. Traffic in human beings, slavery, serfdom or forced labour in any form was prohibited. Any contravention of that provision could be punishable by law. But the compulsory service for the public interest was not barred. There was a prohibition for forced labor in the name of employment in factories mines and any other hazardous work.

Article 21 guaranteed a right against exile. The word 'exile' referred to banishment or expulsion from the country and that was therefore different from deportation within

the country or extradition of any sort. Except as provided by law the privacy of a person, house, property, document, correspondence and information of anyone were invisible under right to privacy of Article 22.

Article 23 guaranteed right to constitutional remedy. It was a major element of the constitution that secured the right to act in the way outlined in Article 88 for the implementation of the constitutional rights conferred by Part III. That provision represented major political instrument for enforcement of fundamental rights at the macro level. But it was a fact that the provision was not significantly practiced in Nepal.

Interim Constitution of 2007

The Interim Constitution of Nepal 2007 was an ad hoc instrument used to administer the country's administration until a new Constitution was drafted by the Constituent Assembly. It superseded the Kingdom of Nepal's Constitution of 1990, paving the way for a republican regime in Nepal.

Prelude of the Constitution

The political arrangement of Nepal in the post 1990 suffered from two critical weaknesses. First the drafting process of 1990's constitution came to be widely criticized for its exclusivity. Secondly, the constitution of 1990 also failed to stabilize relations between the monarchy and democratic political forces. It is said that the constitution is a common document of mutual contract of immediate political forces of the time. In 1990, democracy was re-advent out of a compromise between the traditional elite and the professional middle class. The poor were not a party to the compromise in the real sense. After the historical triumph of the people's movement, the succeeding governments failed to impress the poor. They never thought of equal distribution of power and wealth to the people. They never intended to restructure the existing social and economic order.

Neither, the Nepali Congress government nor the government from the CPN (UML) and others imparted their activities as per the expectations of the general public. The

representative parliamentary democracy of Nepal remained just rhetoric. As democracy has been successful in those societies in which political competition and the development and institutionalization of parties preceded the adoption of democratic electoral system (Dahl, 1971, pp. 38-32). But the political parties of Nepal do not have a long-standing tradition in Nepal not only the political system has to institutionalize, but also the political parties themselves have to be institutionalized. The immature performance of the political parties and assertive and monocratic nature of the palace are responsible for the dissolution of the constitution of the kingdom of Nepal 1990. However, the genesis of the people's war persuaded by the Maoists in between 1996 to 2006 should not be ignored for the demise of the 1990 constitution.

The constitution of 1990 was criticized as it was not made by a constituent assembly but by a nine-member commission, including three royal representatives. The country was declared as Hindu kingdom, meaning secularism was neglected.

Since there were records of several massacres case in post –unification, Narayanhiti Royal Palace Massacre of 2001 was the last episode which twisted the direction of Nepalese history and paved the way out for eroding traditional norms and values of institutions in Nepal. The sudden demise of King Birendra and ascendance of King Gyanendra to the throne, brought significant changes to the pattern of governance. "From the very beginning, the king started centralizing all political powers within the palace" (Acharya and Upreti, 2015, p. 262). The king accomplished his mission by February 2005 bringing sole governing power under royal control. It saw a major uproar within the political circle in Nepal inviting the second people's movement.

The following year saw significant political turmoil, where the king was forced to reinstate the parliament in the month of April 2006. The following month, the parliament decided to curtail all political powers of the king. The Maoist and the government signed a peace accord in November 2006, declaring a formal end of a 10 year armed insurgency. "By January 2007, a number of senior Maoist leaders joined mainstream politics, becoming part of the interim government and interim parliament. By December 2007, the parliament decided to abolish the constitutional monarchial system, which was one of the key points which were made in the peace deal between

the Maoist and the government by May 2008. Nepal was declared as a republic state bringing an end to a 240 years old rule from the palace" (Jaiswal, 2016, p. 24). The interim constitution of Nepal became a charter to settle the forthcoming transitional political, social and economic trajectory of Nepal. The new constitution enacted through a constituent assembly was taken as an improvement to rescue the country through the political trauma of Nepal.

The 2007 Interim Constitution of Nepal was the sixth constitution in the history of Nepal. It turned off the leverage to the 240 years old institution of monarchy and it came into force by January 15, 2007. The twelve point accords concluded between the Maoist and seven political parties and the popular revolution of 2006 became an ample situation and fertile ground to dismantle the constitution of the kingdom of Nepal 1990. The interim constitution became a pioneer document for entering and mainstreaming to the Maoist rebels. "This constitution almost retained the constitutional provisions that of the previous constitution in the question of courts tier and independent constitutional bodies. One more constitutional body was incorporated that was a National Human Rights Commission. This constitution in the beginning of its promulgation suspended the institution of monarchy or put its position in ice and for some of times prime minister performed the function of head of the state too.

On May 28, 2008 upon its fourth amendment in the Interim Constitution by voting in the first meeting of CA I, Nepal was declared a republican state. In May 18, 2006 the declaration of secularism was made. This constitution was regarded to a document to provide political, social and economic justice. The first Constituent Assembly election took place during the life of this constitution but could not promulgate constitution till its deadline and later the elected Constituent Assembly was dissolved and second Constituent Assembly held in 2013 under the chairmanship of the CJ of the Supreme Court Khilraj Regmi. The Second Constitution Assembly was successful in mission of promulgating the constitution on 20 September 2015 (Kharel, 2019, p. 213).

The government and the Maoists reached an eight-point agreement on 16 June 2006, committing to draft an Interim constitution. Eventually, the Interim Constitution

drafting committee was formed under the leadership of former justice of Supreme Court, Laxman Prasad Aryal. The committee was entrusted to ensure the people's rights obtained by the people through the people's movement in 1990, the commitment expressed in the 12 Point Agreement between the Seven Political Parties and the CPN Maoist, and democratic rights achieved through recently held historical people's movement. The commission prepared a draft constitution and submitted to the government within one and half months of its inception. This constitution became the lengthiest constitutional document even enacted in Nepal. The code of conduct agreement of May 26, 2006 was the major guiding principle for drafting the interim constitution (Kharel' 2016, p.208). Some of those principles were:

- a) To respect the popular mandate expressed through the historic people's movement in favor of full democracy, progress and peace;
- b) To be committed to the Universal Declaration of Human Rights 1948 (UDHR) and the basic principles and norms concerning international humanitarian law and human rights.
- c) To fully comply with the 12 points Agreement reached between the seven political parties and the CPN (Maoist).
- d) To be dedicated to democratic values and norms, such as a comparative multi-party system of governance, civil freedoms, fundamental rights, human rights, press freedom, and the rule of law;
- e) To guarantee the fundamental rights of the Nepali people to participate in the process of framing a constitution by participating in the election of constituent assembly without being influenced by fear, threats, or violence; and
- f) To put democracy, peace, prosperity, and progressive social change, and the independence, sovereignty, and dignity of the country at the center.

The draft committee completed its task on 15 December 2006 and on 15 January 2007 the reinstated House of Representatives promulgated the Interim Constitution. Within the given guidelines the election of constituent assembly held in 2007 and 2013 under this interim constitution 2007.

Fundamental Rights and the Interim Constitution of Nepal 2007

Despite being regarded as the best constitution of the world, the constitution of the kingdom of Nepal 1990 became the worst (Malagodi, 2010, p. 20) and it did not last more than 16 years. Political instability, a decade-long Maoist armed insurgency and Royal takeover made the political system of that time defunct. Second People's Movement succeeded in overthrowing Royal government and eventually replacing it with seven party alliances led by Nepali Congress leader Girija Prasad Koirala. That government formed a committee to draft a constitution which would guide the nation until constituent assembly promulgates new constitution. This constitution drafting committee was led by Laxman Prasad Aryal. On 18 December 2007 Interim Parliament approached a bill amendment to constitution of 1990 and promulgated the Interim Constitution of Nepal 2007 (Panta, 2007, p. 15). Despite the fact that it was only an interim constitution, it served for eight years.

The preamble of Interim Constitution of Nepal 2007 declared the constitution was promulgated respecting:

the mandate expressed in favour of democracy, peace and progression through historical struggles and people's movements launched by the people of Nepal at various times since before 1951 to till the date and pledging to accomplish the progressive restructuring of the state in order to solve the problems existing in the country relating to class, ethnicity, region and gender. It further declared that its aim was to guarantee the basic rights of the people of Nepal to make a constitution for them for their own and to take part in a free and fair election to the constituent assembly in an environment without fear. (The Interim Constitution of Nepal, 2007, p. 1)

The Interim Constitution of Nepal 2007 has granted altogether twenty-one fundamental rights. Among them many were continuation of the fundamental rights of the constitution of kingdom of Nepal 1990. The list of 21 fundamental rights mentioned in part III Article no.12 to 32 of the interim constitution of Nepal 2007 were as follows: Right to freedom (Article 12), Right to equality (Article 13), Right against untouchability and Racial Discrimination (Article 14), Right relating to

publication, broadcasting and press (Article 15), Right relating to environment and health (Article 16), Right relating to Education and Culture (Article 17), Right relating to Employment and Social Security (Article 18), Right to Property (Article 19), Right to Women (Article 20), Right to Social Justice (Article 21), Right to the Child (Article 22), Right to religion (Article 23), Right relating to Justice (Article 24) and Right against Preventive Detention was mentioned in Article 25 of the interim constitution. Likewise, Right against Torture, Right to information Right to privacy, Right against Exploitation, Right relating to Labour, Right against Exile and Right to Constitutional Remedies were guaranteed under Articles 26- 32 of the Interim Constitution (Kharel, 2016, pp. 191-192).

The fundamental rights not mentioned in the 1990 constitution but granted in the Interim Constitution of Nepal 2007 are described in brief as follows:

1. Right against Untouchability and Racial Discrimination

The Interim Constitution of Nepal 2007 ensures right against untouchability and racial discrimination in Article 14. It states that no one will be "discriminated against as untouchable and subjected to racial discrimination in any form on ground of caste, race, community or occupation. This article has made such discriminatory treatment punishable and victim would be entitled to compensation as determined by law" (Shrestha, 2076 B. S., p. 595). Similarly, this article restricted few conducts which were punishable by law. They were as follows:

No person will be deprived of the use of services, facilities or utilities available to the public or of public place or religious sites or functions on ground of caste or race."Production or distribution of any goods services or facilities only to the person belonging to any particular caste or tribe and prevention from purchasing or acquiring such good, services facilities based on his caste or tribe is prevented". Any act of demonstration to show superiority or inferiority of the person belonging to any caste, tribe or origin or to justify social discrimination on the ground of caste or race or to publicize ideology based on racial superiority or hatred or to encourage caste discrimination in any manner shall not be allowed. (Bashyal, 2009, p.128)

2. Right Regarding to Environment and Health

The environmental rights indicate any assertion of a human right to environment conditions of the specified quality. The state recognizes the right of every citizen to protection of health and to the enjoyment of the highest attainable standard of physical and mental health and with a view to ensuring of the effective exercises of this right (ICJ Report, 2009, p.18). The Interim Constitution under Article 16 granted right relating to environment and health. It could be regarded as a new right in Nepalese constitutions, as stated that "every person should have the right to live in a healthy environment and they have the right to basic health services free of cost from the state, as provided in law" (The Interim Constitution of Nepal, 2007, Article:16).

3. Right Relating to Employment and Social Security

Right to employment is prospected to combat the ill effect of unemployment in the social and economic life of the nation. Thus the Interim Constitution of Nepal 2007 for the first time operates as the fountain source of employment law (Sharma and Dahal, 2009, pp.249-252). For the sake of social security, the right to employment is guaranteed.

Article 18 of the Interim Constitution had granted rights about employment and social security. It was another new kind of right in Nepalese constitutions. This article had mentioned the following rights to its citizens.

- i) Right to employment, as provided in law,
- ii) Right to social security to women, labour, aged, disabled, incapacitated and helpless as provided in law.
- iii) Right to food sovereignty to every citizen.

4. Right to Women

Women's right mean the equal rights to the women despite their age, sex, race and colour. The Convention on Elimination of All Forms of Discrimination against Women 1979, stresses on state obligation in order to ensure non-discrimination and equality in the spheres such as participation on the political and public life of the

nation, nationality, education, employment, healthcare, economic and social life, and marriage and family relations (Das,2013, pp. 106-108).

Article 20 of Interim Constitution had granted rights of women. It prohibited all kind of discriminations against women by virtue of sex and it granted every woman right to reproductive health and reproduction. Similarly, it stated that "no woman should be subjected to physical, mental or any other kind of violence and such act will be punishable by law besides sons and daughters".

5. Right to Social Justice

The fundamental rights and directive principles in the constitution in a way, theoretically make provisions for social and economic justice in a democracy (Adhikari, 2010, p.319). Article 21 of the Interim Constitution of Nepal 2007 had stated that "the economically, socially or educationally backward women, Dalits indigenous peoples Madhesi communities, oppressed classes, poor farmers and labours should have the right to take part in structure of the state on the basis of the principle of 'proportional' inclusion".

6. Child Rights

The Convention on the Rights of Child (CCRC) defines a child as "every human being below the age of eighteen years unless, under law applicable to the child, majority is attained earlier" (Khadka, 2009, p.226). Article 22 of the Interim Constitution of Nepal granted rights of the child. It was new provision in Nepalese constitutions. Before it, rights of the child were not granted in such a specific way. These rights are as follows:

- i) Every child should have the right to his or her identity and name. ii) Every child should have the right to nature, basic health and social security. iii) Every child should have the right against physical, mental or any other form of exploitation. Such exploitative act should be punishable by law; and any child so treated should be given such compensation as might be determined by law. iv) The helpless, orphan, mentally retarded, conflict victim, displaced,

vulnerable and street children should have the right to get special facilities from the state for their ascertained future. v) No minor should be employed to working any factory, mine or engaged in any similar other hazardous work or used in army, police or conflict. (Shrestha, 2075/076 B.S., p.597)

7. Right against Torture

'Torture' may be understood as anything done by act, words or conduct which lowers human dignity. Article 26 of the Interim Constitution of Nepal 2007 had granted right against torture. It stated that "no person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment and any such act should be punishable by law" (Dhungel, Adhikari, Bhandari & Murgatroyd, 1998, p.153). This article further added that such person should be provided compensation as determined by law.

8. Rights relating to Labour

This right was designed to protect the rights of workers such as the right to wage, right to collective bargaining, right to leave, right to rest and right to form trade union and become the member of trade union of his/her choice and the right to receive the amount of social security after retirement (Pradhananga, & Upreti, 2016, p.7).

Article 30(1) and (2) of the Interim Constitution of Nepal 2007 mentioned the provision about the right relating to labour. It was new right in Nepalese constitutions. Before the constitution this right was not included in any previous constitutions. It stated that "every worker and employee should have the right to appropriate labour exercise and they had the right to form and join in trade unions and to engage in collective bargaining for the protection of their respective interests as provided in law" (LBMB, 2007, p. 11).

Aftermath of decade long Maoist armed revolt and popular movement of seven party alliance uprising of 2006 overthrew the 240 years old monarchy and the constitution of the kingdom of Nepal 1990. Consequently, the Interim Constitution of Nepal 2007 was crafted through a political understanding developed amongst the seven party

alliance government and Maoist rebels until the new constitution was promulgated by the Constituent Assembly. The Interim Constitution, 2007 was the first constitution written by the members of parliament. It gave a mandate to the constituent assembly to enact a formal constitution which would institutionalize the concept of republicanism, federalism and secularism in the country.

The Interim Constitution of 2007 had 21 fundamental rights in it (Kharel, 2016, p.191). However, the constitution adopted almost all the provisions of the prior constitution it added few new provisions which were not included in erstwhile constitutions. Those rights were rights against untouchability and racial discrimination, right relation to environment and health, right relation to employment and social security, right of women, right to social justice, right of the child, right against torture and right relating to labour.

Chronology of the Development of Fundamental Rights of Nepal

Nepal does not have a very long legal instrumental history of human rights as compared to the European and American countries. Though it can be traced back to ancient Vedic and *Upanishad* age where the people were treated on the basis of executive fiat and tenet of Hindu *Dharmashastras* and ethical codes (Tripathi, 2002, p. 15). The Hindu-Buddhist scholars identify the concept of *Rita* of Vedic of origin as the source of human rights and freedom. *Rita* represents the idea of natural law. It is from *Rita* that the concept of *dharma* developed in the later *Vedic* age. *Rita* stands for both the *Satya* or the truth of things as well as the 'dharma' or the law of evolution (Radha-Krishnan, 1963, p. 56). These concepts approximately mean the law that governs the universe, the law that operates in ritual and sacrifice, and the law that with equal impartiality regulates the conduct of human beings (Rai, 1981, p. 38). Thus, the birth of human rights leads to the very birth of human civilization. Human rights are intended to human beings who help to reduce human sufferings hardships, difficulties, disparities, in justices and inequalities caused by whatever reasons (Bhusal, 2016, p.23). The situation of human rights implementation, Lichchhavi periods and during ancient Kiranta, Lichchhavi periods and the Malla dynasty of medieval age persisted through the same schooling. During Shah Dynasty, especially in the time of King Prithvi Narayan the legal system handled by reasoning. During the

years of Ranarchy Nepalese citizens were treated as subdued subjects. Consequently, all along that period the Nepalese people remained "socially backward economically poor and politically in Slumber" (Chaturvedi, 1993, p. 32).

The law of the land (Muluki Ain) 1854 is considered as the first codified law of Nepal which was enacted during the early Rana period. The Nepal Government Act 1948 is measured as the first written constitution of Nepal. It adopted some fundamental rights regarding the personal liberty and property along with some duties. In 1950 (2006 B.S.) the personal freedom and Human Rights Acts came into force which served as supplementary instruments for the protection of human rights. The Interim Constitution of Nepal, 1951 also had some provisions for fundamental rights. In 1955 Nepal became the member of UNO and upheld international obligations for protecting human rights. "The parliamentary constitution of 1959 and the Panchayat Constitution of 1962 both had adopted the basic human rights and fundamental freedoms with certain limitations" (Bhusal, 2016, p. 24).

In fact, the constitution of the kingdom of Nepal 1990 accepted the concept of human rights for the first time in the constitutional history of Nepal. It expressed full commitment towards human rights in its preamble. Human Rights Commission Act 1997 was enacted under it. The commitment towards human rights continued even in the Interim Constitution of Nepal 2007 as the previous constitution and the National Human Rights Commission was recognized as the constitutional body for the first time. Following the promulgation of Interim constitution, "the act against Human Trafficking 2008 an enacted and the Human Rights Commission Act, 2012 replaced the previous Act of 1997" (Pradhananga & Upreti, 2016, p.2).

The present constitution of Nepal incorporates the comprehensive legal and structural provisions for the human rights guaranteeing fundamental rights. The list of fundamental rights articulated under part III Article 16 to 46 comprises of the economic, social and cultural rights, in addition to political and civil rights. These fundamental rights are consistent with the human rights provision of the United Nations Human Rights conventions. Recently, in 2018 seventeen new Acts are passed by the parliament for the execution of the fundamental rights incorporated in the Constitution of Nepal 2015. Additionally, various Nepalese Acts are enacted for the protection and promotion of fundamental human rights in Nepal. The major legal or

constitutional instruments of Nepal which established, fostered and guaranteed human rights and fundamental rights can be expressed in the following chronological order:

Human Rights Supporting Documents Announced in Rana Era

- 1854 (1910 B.S.): First Announcement of the Law of the Land (Muluki Ain)
- 1920 (1977 B.S.): Declaration of Elimination of 'Sati' System.
- 1924 (1981 B.S.): Declaration of Elimination of Slavery System
- 1931 (1988 B.S.): Amendment of Laws Relating to Capital Punishment
- 1948 (2004 B.S.): The Government of Nepal Act Announced.
- 1949 (2005 B.S.): Announcements of Acts Relating to Fundamental Rights (Tripathi, 2002, pp. 15-18).

Human Rights Supporting Documents Announced During Democracy Era

- 1951 (2007 B.S.): Interim Government Act Introduced.
- 1952 (2008 B.S.): Declaration of Pradhan Nayalaya Act.
- 1955 (2012 B.S.): Announcement of Civil Rights Act.
- 1956 (2013 B.S.): Announcement of Supreme Court Act.
- 1959 (2015 B.S.): Promulgation of the Constitution of the Kingdom of Nepal.

Human Rights Supporting Documents Announced in Panchayat Era

- 1962 (2019 B.S.): The Constitution of Nepal (Panchayat Constitution) Promulgated
- 1963 (2020 B.S.): The Law of the Land (Muluki Ain II) Announced
- 1964 (2021 B.S.): The Social Security Act Passed.
- 1964 (2021 B.S.): Land Reform Act Announced.
- 1974 (2021 B.S.): Act of Evidence Announced.
- 1988 (2045 B.S.): Extradition Act Introduced.
- 1989 (2046 B.S.): Social Security Act Announced.

Human Rights Supporting Documents Announced after Re-advent of Democracy Era

- 1990 (2047 B.S.): Promulgation of the Constitution of the Kingdom of Nepal
- 1990 (2047 B.S.): Nepal Treaty Act Announced
- 1991 (2048 B.S.): Labour Act Passed

- 1991 (2048 B.S.): Press and Publication Act Passed
- 1991 (2048 B.S.): Judicial Administration act Passed
- 1991 (2048 B.S.): Local Level Election Act Passed
- 1991 (2048 B.S.): Act Regarding to Children Passed
- 1992 (2049 B.S.): National Broadcasting Act Passed
- 1996 (2053 B.S.): Act of Compensation against Torture Passed
- 1996 (2053 B.S.): Environment Protection Act Passed
- 1997 (2053 B.S.): National Human Rights Commission Act Passed
- 1998 (2055 B.S.): Local Self Government Act Passed
- 1999 (2056 B.S.): Child Labour Prohibition Act Passed
- 2001 (2058 B.S.): Ethnic People Empowerment National Council Act Passed

Human Rights Supporting Documents Announced after Democratic Republic

Era

- 2007 (2063 B.S.): Declaration of Interim Constitution of Nepal
- 2007 (2063 B.S.): National Human Rights Commission Act (II) Passed
- 2007 (2063 B.S.): Constituent Assembly Election Act Passed
- 2007 (2063 B.S.): Senior Citizens Act Passed
- 2007 (2063 B.S.): Poverty Alleviation Fund Act Passed
- 2007 (2063 B.S.): Human Trafficking Prevention Act Passed (Pahadi and Dahal, 2008, pp.221-332).
- 2011 (2068 B.S.): Racial Discrimination and Untouchability (Crime and Punishment Act Passed)
- 2012 (2069 B.S.): National Human Rights Commission Act (III) Passed
- 2015 (2072 B.S.): Promulgation of the Constitution of Nepal
- 2017 (2074 B.S.): The law of the Land (Civil and Criminal Codes) Act Passed
- 2018 (2075 B.S.): Different Seventeen Acts Passed for the Implementation of Fundamental Rights under the Constitution of Nepal 2015 (LBMB, 2018, pp. 1-320).

Nepal as a liberal democratic country is fully committed to human rights, particularly after the promulgation of the constitution of 2015. Besides aforementioned constitutions, acts and declarations, the government of Nepal has introduced a number of human rights and fundamental rights protection measures over the years

(Pradhananga and Upreti, 2016, p. 1). As the saying reads "a hungry bird flying in the sky is happier than a bird in a golden cage", Bishal Khanal (2016) has rightly stated "liberated soul overcomes the world" (p. 35).

Fundamental Rights in the Indian Context

The origin and evolution of the human rights movement in India has been contextualized within the analytical framework of a postcolonial democracy. The purpose behind the concept of human rights is to accord an apolitical moral principle to provide basis for the effort to protect the unprotected that are harmed by their own sovereign government (Gorman, 2005, p. 684). Human rights are moral rights that human beings have specifically against the governments but on the other hand, human rights are basic or constitutional rights as each state ought to set them forth in its fundamental legal texts and make them effective through appropriate institutions and policies. These rights are the fundamental installments that all persons enjoy as protection against state conduct prohibited by international law or custom. The provision of fundamental rights in the constitution of India is based not on the principle of natural justice inherent in the British Common Law but also on the American Principle of constitutional guarantee. There is distinction between human rights and fundamental rights. All fundamental rights are definitely human rights, but tho human rights being recognized by the states through their constitutional guarantees are considered as fundamental rights.

The concept of human right is not the product of Christian Civilization alone; these are the common outcomes of the norms, culture and customs prevailing in the ancient world including Indian sub-continent. The UDHR (1948) is not a sudden product of western civilization, however it is a breakthrough on the discourse on which the idea of human rights is already prevailing for centuries. "In fact the language of human right is the product of European countries but the concept of human rights is as old as the Indian culture. The human expressed their concern towards human rights and fundamental freedom for all since the Vedic Age" (Madan, 2017, p. 1).

Human Rights in Ancient India

The Ancient Hindu legal philosophy contributed sufficiently for the regulation of the behaviour of the ordinary persons as well as the king. Two basic principles, viz., *Dharma* and *Danda*, which were prevailing from "Vedic Aryans has several elements of a regulatory mechanism for religious practices. The king had power to implement this system and the laws under it. He was also bound follow the laws made by Vedas, *Sastras* and other religious bodies" (Upadhyaya, 20 14, p. 21).

Detailed principles were made for the orientation of the king in ancient India. "The duty of the king was to uphold law, and he was as much subject to law as any other person, his important duty was administration of justice in accordance with local custom and usages, and the written codes" (Desai, 1979, p.3).

Writers of *Dharmasastra* had devoted the highest importance to moral qualities and enjoyed them upon all with all the emphasis they could commend; "but as their main purpose was a practical one, viz., to guide people to right acts in everyday life, they dealt more elaborately with the acts, rites and ceremonies that each person had to do with reference to his station in society' (Desai, 1979, p.3).

The history of human rights in ancient India begins from the Vedic period (fifteen century B.C.). A wide range of stories and announcements were discovered that alluded to the concept of human rights. In the Vedas, the concept of equality is used to represent human rights. The Vedas characterize everyone's equality as follows: "No one is superior or inferior; all should serve for the benefit of all, and all should progress collectively" (Madan, 2017, p. 1). Kautilya sums up the concept of welfare state should be for the happiness of the citizens very magnificently. Manu did not focus on the civil and legal rights only but also conceptualized a number of economic rights in his time. Since the facts and stories, "it is truly revealed that the society under Vedic period was well stimulated and organized and committed towards human rights. It is unfortunate that the decline of human rights was witnessed with decline of Mauryan Empire" (Madan, 2017, p. 2).

Human Rights and Freedoms in Medieval India

The Medieval period of India is the Muslim era. "The life of Hindus was very critical and their rights were grossly violated. Muslim rulers tried to impose their religion and culture upon non-Muslims" (Smith, 1976, p. 120). The Muslim rulers interfered Hindu culture, religion and their human rights in the period. Gradually they improved their treatments over Hindus.

The Mugal rulers Akbar and Jahangir attempted to establish policy of universal reconciliation and tolerance. Under this Empire, judicial administration had all basic principles of modern theories of due process of law, fair trial and independent judiciary. Competently, in one place Akabar adheres that, if he was guilty of an unjust act he would rise in judgment against himself. Akabar always gave regard to right and justice, which was followed by his son Jahangir. It is said that Jahagir arranged chain bell to hang outside the palace so that any person might approach for justice. It is submitted that system was better than modern judicial system, which is lengthy, time taking and guiding in the hands of layers (Tyagi, 1981, p. 123). During the Mugal period, Akbar granted religious freedom to non-Muslims. He permitted to hold discussion on question of religion and theology. He appointed non-Muslims at various important offices. He married a Rajput princess and allowed her freedom to worship Hindu gods. He gave people freedom of religion, worship, faith belief. He believed in the path of sukh-i-kul or universal tolerance or peace-with all (Tyagi, 1981, pp. 123-124). Thus, Mugal emperors except Auragjeb gave regard to human rights, fundamental freedoms, justice, dignity and rule of law.

Human Rights and Freedoms in Modern India

In India, the modern period started from the advent of British Empire with the introduction of India regulating Act 1773. With this Act, British very badly suppressed to the Indian citizens in in all the spheres of life such as social, economic, political and religious rights. They were told that they did not deserve any rights. Basic rights such as rights to life and livelihood, right to freedom, right to expression right to equality, right to preach etc. were denied to them. In such an atmosphere, the

Indian leaders and people felt that their rights had been lost in the hands of the colonial rule. So they thought of diverting back of fight for their rights perhaps the first categorical demand for fundamental rights appeared in the constitution of India Bill 1895. The Bill guaranteed every Indian- "the right to expression, right to equality before law, right to property right to personal liberty, right to education etc. A series of resolution were passed between 1917 and 1919 for demanding civil rights and equality. Another major development was drafted by Mrs. Besant's common wealth of 1925" (Madan, 2017, p.2). The bill comprised a list of seven fundamental rights: i) Liberty of person, ii) Freedom of conscience and free profession and practice of religion, iii) Free expression of opinion, iv) Free elementary education, v) Use of roads public places, courts of justice and the live, vi) Equality before law, irrespective consideration of nationality, and vii) Equality of the sexes.

A new resolution popularly called as Nehru Report was passed in 1927 and came into effect in May 1928. It secured the fundamental rights of the Indian citizens which had been denied to provide them in the past. Likewise, the Karanchi Resolution adopted by the congress session held in March 1931 was another achievement came in context to fundamental rights. The movement for rights was gradually progressing and "the decade of 1940's was generally marked by the emergence of fundamental rights in Indian context was the 'Supra Committee Report' published at the end of 1945" (Hedge and Mukherjee, 1973, p. 478). After independence, various laws were made and suggestions came time to time from the various committees to extend the concept of fundamental rights by covering the entire mankind.

The historical trajectory of the development of human rights and fundamental freedoms of modern Indian era is the result of spontaneous struggle of Indian people.

Motilal Nehru Committee Report, 1928

In 1927, the Indian National Congress held its session at Madras. By resolution, it reiterated that "basis of any future constitution for the country must have a declaration of fundamental freedoms. It appointed a committee under the chairmanship of Motilal

Nehru. The committee submitted its report in 1928. The committee recommended some of these important rights" (Subramanian, 1997, p. 56).

- 1) Personal liberty and inviolability of dwelling place and property.
- 2) Freedom of conscience and of profession and practice of religion subject to public order and morality.
- 3) Right of free expression of opinion and to assemble, peacefully and without arms and to form association and unions subject to public order and morality.
- 4) Right to free elementary education, maintained and aided by the state without distinction of caste and creed,
- 5) Equality for all citizens before law and civil rights;
- 6) Right of every citizen to writ of habeas corpus.

The Nehru committee recommended for a numbers of fundamental rights; civil, political, social, economic and cultural rights for the welfare of the people.

The Pledge of Independence, 1930

In a session held in Lahore in 1929, Indian National Congress adopted the acquisition of 'Purna Swaraj' (Complete Independence) as its goal. The pledge of independence was adopted on 26 January 1930. It provides: "We believe that it is the inalienable right of Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth. We believe, therefore, that India must sever the British connection and attain 'Purna Swaraj' or complete independence" (Dev, 1996, pp. 13-15).

The independence provided the inalienable rights of the Indian people. It recognizes freedom, necessities of life, full opportunities of growth and right to self-determination as a human right.

The Supra Committee (1944-45) in its "Constitutional proposal" recommended that the written code of fundamental rights should be provided in the constitution. It proposed for two kinds of justifiable and the non-justifiable- fundamental rights. The committee realized that it was for the constitution making body 'to enumerate first the list of fundamental rights and then to undertake their further division into justifiable and non-justifiable rights and provide an independent machinery for their

enforcement" (Heldge & Mukherjee, 1973, p. 478). The objective of all these efforts was to secure human rights constitutionally.

India's Charter of Freedom, 1947

The Constituent Assembly meeting of India held on 9 December 1946 started to frame the constitution. The meeting adopted the 'India's charter of freedom' through a resolution on 22 January 1947. It declared:

The Constituent Assembly declared its firm and solemn resolve to proclaim India as a Independent sovereign republic and to draw up for her future governance a constitution shall be guaranteed and secured to all the people of India justice, social economic and political, equality of status, of opportunity, and before the law, freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality" (Upadhyay, 2014, p. 14).

Chronology of the Development of Rights in India

The history of the concept of human rights and fundamental freedoms begins from the arrival of human culture which developed in the Vedic Era and it "passed through the medieval and modern times and reached its due importance with the framing of the constitution of India in which due importance has been given to human rights in context to fundamental rights, directive principles and fundamental duties" (Madan, 2017, p. 2). Some of the important national events and statutes which enhanced the glory of human rights in India are enlisted in the following chronological order:

Rights in Colonial Era

- 1829 : The practice of Sati was formally abolished.
- 1923 : Workmen's compensation Act.
- 1926 : Trade Union Act.
- 1928 : Motilal Nehru Committee Report
- 1929 : Child Marriage Restraint Act
- 1930 : The Indian Pledge
- 1931 : Fundamental Rights and Economic Program
- 1933 : Children (pledging of labour) Act
- 1936 : Payment of wages Act

1946 : Industrial Employment Standing Orders Act

Rights in Post-Colonial Era

- 1947 : Industrial Dispute Act.
- 1947 : India's Charter of Freedom
- 1948 : Minimum Wages Act
- 1950 : The Constitution of India
- 1950 : Caste Disabilities Removal Act.
- 1955 : Protection of Civil Rights Act
- 1956 : Immoral Traffic Act.
- 1961 : Maternity Benefit Act
- 1961 : Dowry Prohibition Act
- 1976 : Bonded Labour (Abolition) Act
- 1976 : Equal Remuneration Act
- 1985 : Employment of Children Act
- 1986 : Child Labour (Prohibition and Regulation) Act
- 1986 : Environmental Protection Act
- 1986 : Juvenile Justice Act
- 1986 : Indecent Representation of Women (Prohibition) Act
- 1987 : Commission of Sati (Prevention) Act
- 1989 : The Scheduled Castes and Scheduled Tribes (Prevention and Atrocities) Act
- 1990 : National Commission for Women Act
- 1992 : National Commission for Minorities Act
- 1993 : National Commission for Safari Karmacharis Act
- 1993 : Establishment of Human Rights Commission
- 1993 : National Commission for Backward Classes Act
- 1993 : Mental Health Act
- 1995 : The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act
- 2005 : Right to Information Act
- 2010 : The Right of Children Free and Compulsory Education Act.

(Madan, 2017, p.5)

From the historical perspective of human rights development of India, it is concluded that incorporation of the human rights and fundamental freedoms under the constitution indicates that the constitution designers of India were influenced by the

Magna Carta and Bill of Rights of England and Provisions of the American and French constitutions. However, human rights and fundamental freedoms specified under Indian constitution are on more solid footing than British civil liberties, which had been developed on account of Magna Carta and Bill of Rights. The rights specified in these charters are "based upon to contact between king and parliament. Like the American constitution, the human rights and fundamental freedoms are specifically provided in the constitution" (Upadhyay, 2014, p.29).

Motilal Nehru Report (1928), the Independence Pledge (1930), India's Charter of Freedom 1947 and the provision of the charter of the United Nations and Universal Declaration of Human Rights, 1948 were the major documents from which the immediate constitution designers of India were highly influenced (Upadhyay, 2014, p. 29)). The provision of Human Rights and fundamental freedom of India is the product of the total sum of national and international efforts.

The present constitution of India was a product of discontentation expressed by Indian people against the human rights infringement made by the Government of India Act, 1919 and the Government of India Act 1935 both of which contained no affirmation of fundamental rights. In the constitutional discourse of India, the Constitution of 1950 is the only Constitution which for the first time, adopted some values of liberal democracy and constitutionalism.

CHAPTER FIVE

MODERN SOVEREIGN STATE: CONCEPT AND EVOLUTION OF FUNDAMENTAL RIGHTS

Evolution of Modern Sovereign State

The term 'state' is a contemporary invention, as it was unknown to the Greeks. They used 'polis' translated as 'City State' in English. Polis was more 'a city community' than a 'state'. The term 'state' came into practice only in the sixteenth century when the Italian political thinker, Niccolo Mechiavelli, used it in his book, 'The Prince' (Jatkar & Rao, 1990, p.27). "Mechiavelli's state was a secular entity, with no relation to the Church. It was morally isolated with no obligation to anything outside itself" (Mukharjee & Ramaswamy, 1999, p. 157). He claims that the state was a secular institution separate from the Church.

Since the state is considered as a necessary and universal institution, it deals as a sovereign and independent entity capable of entering into relations with other states and enjoying international personality. It is a distinct set of political institutions whose specific concern is with the organization of domination, in name of the common interest, within a delimited territory. "The state is arguably the most current concept in the study of politics and its definition is therefore the object of intense scholarly contestation" (Maclean & Macmillan, 2009, pp. 506-507). According to them, the meaning and position of the term "State" is evolving with time.

Blackstone highlights the mandatory nature as, "Sovereignty is the supreme, irresistible, absolute, uncontrolled authority in which the highest legal power of the state resides" (Blackstone, in by Dahal, 2018, p. 179). He focuses on supremacy of sovereignty.

The modern state is sovereign state; it is an independent in the face of other communities. It may infuse its will towards them with a substance which need not to be affected by the will of any external power. L. J. Laski argues, "It is moreover the territory that it controls. It issues order to all men and all associations within that area, it receives order from none of them. What it purposes is right by the mere

announcement of intention" (Laski, 2010, p. 44). Sovereignty is superior to all other institutions, and it gets no orders from them.

Sovereignty is fundamental to study about politics, especially politics of state and statelessness. It separates domestic from international, inside from outside, hierarchy from anarchy, order from chaos, and security from insecurity. Mishra (2008) conceptualizes that "Sovereignty's foundational nature makes it a difficult concept to evade. Additionally, in as much as it is a product of European experience, its historical origins and supposed expansion to non-European parts of the world have registered impressive literature" (p. 66). Theorists of international relation have, though relatively infrequently, also become curious with sovereignty.

G.N. Sabine (1920) defines on sovereign state as:

The sovereign state is specifically a modern phenomenon and its appearance was the epoch-making event of the early modern period. It was born of century long contests, and political theory, then as now, was largely an attempt to state the general drift of the events and to bring the newer tendencies to a successful birth (p.303).

Further, he illustrates with "The state achieved its modern form by the gradual emancipation of the kingship from three political institutions: the Church, the Holy Roman Empire, and the corporations or great feudal lords" (Sabine, 1920, pp. 303-304).

The sovereignty is defined from different angles, "the first systematic exposition was carried out by Jean Bodin, although some scholars would interpret the origins of this concept to Machiavelli" (Walker 1993, pp.26-49). His concept of '*souveraineté*' featured centrally in his work '*Les Six Livres de la République*' or Six Books of the Republic (1576). Hinsley (1986) argued that "The civil war between Calvinist Huguenots and Catholic monarchy presented a crisis of order in France. Bodin sought to do away with medieval conception of segmented society, arguing that ruler and ruled be united into a unitary body politic where the sovereign would be above human law" (pp.120-25). Bodin conceptualized Sovereignty as "supreme power over citizens

and subjects unrestrained by law" (cited in Camilleri 1990, p. 16) Or "the absolute and perpetual power of the republic" (Hinsley, 1986, p. 122). English philosopher Thomas Hobbes too experienced the ravages of the civil war in his country and considered the crisis of order the central concern of his times. Suitably, his *Leviathan*, published in 1651, offered an omnipotent sovereign as the only alternative to complete anarchy. Hobbes elevated "Sovereignty to a level of absoluteness which could not be improved. People alienated their rights to this sovereign and the sovereign was unbound by law, human, natural or divine. Sovereignty's conception was absolute and absolutist" (Mishra, 2008, p. 66). Thus Hobbes keeps sovereignty above the law and advocate in favour of absolute monarchy.

Such unregulated Sovereignty had its threats. "John Locke, though he scarcely used the term and almost never referred to Hobbes, sought to ground Sovereignty in constitutional theorydividing it between ruler and ruled" (Hinsley, 1986, pp. 144-149). But this weakened Sovereignty, and the efforts of Bodin and Hobbes. Jean-Jacques Rousseau's *Social Contract*, published in 1756, sought to rescue it from the constitutional trap while seeking to avoid the authoritarian implications of Hobbes' thesis. "For Rousseau, state Sovereignty was indivisible and unlimited, but the state, in which Sovereignty lay, was a result of social contract" (Philpott, 2003, p. 206). If Rousseau's treatment of Sovereignty was remarkable, "it was better punctuated by Immanuel Kant. ... Kant's conception of Sovereignty was an attempted reconciliation between freedom and consent of Rousseau and absolute authority of Hobbes" (Camilleri, 1990, pp. 18-19). Kant's views on sovereignty include those of Rousseau and Hobbes.

The development of Sovereignty from Bodin to Kant is a story of one such significant endurance. In many ways, the rigorous pruning Sovereignty received from these philosophers led to it being adopted, in time, by almost all of the western states. They provided much of the philosophical underpinnings of evolving state system in Europe between 17th and 20th centuries. "The lingering attraction of absolute Sovereignty, however, fetched disastrous consequences in the first half of the 20th century in the form of two world wars, especially the second" (Betani, 1996, pp.91-109).

The political philosopher Carl Schmitt proclaims, the state prevails perpetually in the ever-present possibility of annihilation. It requires a sovereign that, in the face of existential threat, exercises an authority superior to law itself. The sovereign, for Schmitt, has the power to decide the "exception". This radical view of Sovereignty was developed in his 'Political Theology', published 1992. "It threatened to tear apart the laborious constitutional-legal limits accorded to sovereignty in the two centuries prior by constitutional liberalism" (Frye 1966; Wolin 1990, p. 3). The fears widely opened the threats of extremes of state sovereignty. Bertrand de Jouvenal, a French philosopher, expressed concerns over the concept in his 1957 book *Sovereignty: An inquiry into the Political Good*. Absolute sovereignty encourages totalitarianism which emanate from the latter's will. This was dangerous, he reasoned, and there was little hope to be heralded in constitutionalism alone. He suggested that shared moral concerns of the citizenry should be the source of will that the sovereign must execute (Philpott 2003). Jacques Maritain a step further, suggesting that political philosophy must consider eliminating sovereignty as a word and as concept (Maritain, 1950, pp. 343-344). Maritain reasoned that Sovereignty was an "intrinsically wrong" concept. It accords the sovereign an absolute status, which is unwelcome. Three other reasons make it so. It hinders the growth of international law and world state, and leads to centralism in the domestic arena and runs contrary to the democratic notion of accountability (Maritain, 1950, pp. 344-357).

The political scientists pose that sovereignty and nation building are reciprocal to each other. "A sovereign state strengthens nation building" (Mishra, 2008, p. 66).

Institutionalization of idea of equal citizens, market building, realization of universal social protection and the encroachment of the rule of law are the major four key propositions for the nation building. Which are essential "for addressing the issues of identity, ethnicity, clash of civilizations, ending gender discrimination, solving the citizenship issues, and ensuring a just and inclusive society" (Bhandari, 2016, p. 97). The said propositions are possible via the concept of constitutionalism, even though the political and social stability of the state largely depends upon constitution how it operates.

The idea of fundamental rights is a comparatively recent phenomenon in the history of political thought. Its root can be traced to the social contract theorists such as John Locke and Rousseau. During seventeenth and eighteenth centuries, they insisted that the individuals possess certain natural rights which serve as the very foundation of the political order and may not be abolished illegitimately by the governments. "This idea provided the basement of individual rights and liberties. The American Declaration of Independence and French Declaration on the Rights of Man and Citizens were based on the same vein" (Khosla & Semwal, 2011, pp. 929-930). Individuals are endowed with fundamental natural rights that serve as the bedrock of the political order.

In ancient Greek city states, the citizens were recognized by certain rights and privileges but it was refused to aliens. The rights were conventional which could be guaranteed and taken away. "The concept of human dignity and equality which was emerged by stoic and Christianity foreshadowed a more universal and abiding conception of rights" (Gorman, 2005, pp.685). Both the stoic and Christians believed in the divine origin of creation. Hobbes and Locke asserted the conception of natural rights, offering to ground the newfound nature of the independent and sovereign state on a principle that would recognize the rights of its people. Their notion did not find wide support among monarchs of their own time, who were enjoying the unlimited powers associated with the rule of an absolute sovereign but with the passage of time, "the conception of natural rights took root and then followed the regimes which were committed to a universal conception of human rights" (Khosla & Semwal, 2011, p. 929). The concept of human rights emerged as a result of popular sovereignty.

The constitutions today adopt a bill of rights that determines the legal rights of the individual which has been prevailing within the society since long. However, the position of a bill of rights goes beyond that since it also serves as a proclamation of the fundamental values upon which the society is formed, i.e. human dignity, freedom and equality. To maintain harmony among them "constitutional rights help to protect vital interests of individuals, such as the right to health, housing, security of the person and participation in the conduct of public affairs" (Dixon, 2015, p. 406).

The individual and group freedoms are preserved under fundamental rights. Tushnet (2001) explores the evolution of fundamental rights in three stages: (i) initially encompassing a set of basic civil liberties, such as the rights to own property and to make social contracts, (ii) they expanded to include rights of participation in politics and the right to enjoy freedoms on an equal basis with others, and (iii) then to incorporate social welfare rights. Increasingly, rights to cultural and environmental preservation are seen as fundamental as well. Fundamental rights can be limited only if doing so will clearly advance important public interests, to an extent proportional to the limitation.

Moreover, Tushnet discusses the situations for the limitations on fundamental rights in case of their contradictory arrangements. Traditionally, the interests justifying limitations on fundamental rights include health, safety, the Public welfare, and morality, but modern constitutional systems typically restrict the power to limit fundamental rights in the name of morality alone. Fundamental rights can be limited as well when one such right clashes with another. Sometimes one right is given substantial priority over others, while in other cases the clashing rights are balanced against each other. Both of these approaches present difficult problems of application and justification. Constitutional systems protect fundamental rights through moral commitments among the population and by government officials, and, increasingly, through systems of judicial enforcement of widely varying designs (Tushnet, 2001, pp. 5852-5853).

Additionally, the development of constitutionalism has been considered as an outcome of humanistic paradigm shift. In the beginning it focused on its institutional dimension, specifically in the organization of the State and its body of organs. But today, it is the key to the life of individuals, as well as the happiness of people. Consequently, guarantees of human rights have become a key component of constitutional law. Almost all changes of the State, whether it is economic, social or political sectors, are to be directed by rights-related issues. In fact, this is not a difficult obligation when undertaking constitutional reforms or adopting a new

constitution. Fundamental rights and procedural protections should be clearly expressed for proper implementation.

Bills of rights and related mechanisms play an important role in societies. Such charters are evolved in long course of time, facing challenges in their development. They should determine which values are to be taken into account and protected in case of conflicting interests, how and in which way to strike a balance between different values and interests, and between the will of the majority and the rights of minorities. The bill of rights drafted under the constitution of a country are "respected and implemented over a period of time, usually becomes not only an effective umbrella protecting the individual, but also the backbone of a harmonious and democratic society" (Jain, 2006, pp. 151-152).

These points need to be stressed in this context: since large-scale human rights violations are among the most frequent sources of internal conflicts, a bill of rights and its protection mechanisms and procedures, expressing the aspirations and interests of all parties, if duly implemented is one of the most effective tools to restore peace or to prevent conflicts from occurring. For perpetual peace, the different dimensions have to be kept in account. Some constitutions attempt to maintain the relationship between the individual and the State without guaranteeing individual rights unlike they emphasize on articulating duties only. "Even though human rights create duties on the part of the State, the content of constitutional provisions should not be reduced to the latter (UN Human Rights, 2018, pp. 10-11).

Social Contract Theory is a political and philosophical foundation for modern sovereign state. A liberal democratic state as architected by social contract theorists encompasses major elements of natural rights; life, liberty and property in the form of fundamental rights in its constitution. Democracy, human rights and rule of law are the basic principles of modern constitutional state.

The constitutions, which could govern the life of the society today, are often seen as "Social Contracts". Generally, in a democratic country the people determine themselves how they should organize, resolve different interests and shape their state.

They less emphasize on social contract held in between State and the citizenary. Consequently, the functions of the constitution become even more important in a society during vulnerable time of conflicts and tensions. "A human rights based constitution may be an effective tool to prevent or sustainably resolve conflict taking in the oppressions of the people by the government" (UN, 2018, pp. 6-7).

Thomas Hobbes proclaims that Social Contract Theory is supplementary to modern moral and political theory. In the same way, the most well-known proponents of this tremendously significant idea, that has become the most dominating doctrines in moral and political thought in the history of the modern West, are John Locke and Jean-Jacques Rousseau. In this idea, Glaser (2014) delimits the moral and political aspects of the Social Contract as "In the twentieth century, moral and political theory regained philosophical momentum as a result of John Rawls' Kantian version of Social Contract theory, and was followed by new analyses of the subject by David Author and others" (pp.25-26). The Social Contract Theory is a common resolution of Hobbes, Locke, Rousseau and Kant. According to this idea, the state arose from a freely entered into agreement among equal and autonomous persons living in a state of nature to join a society and obey a government formed by them for the protection of their natural rights. This idea displays that the state has been the outcome of a first-stage agreement between the people to join, followed by a second-stage agreement between the people and the ruler, in which the ruler was given authority and power.

The theory of Social Contract signifies two major opinions to which the human mind always adheres the worth of freedom; "the idea that 'will' and not 'force' is the basis of government; and the value of justice or the idea that 'right' and not 'might' is the basis of all political society and of every system of political order" (Jatkar & Rao, 1990, pp. 96-97).

The Social Contract Theory pursues to clarify the foundation of societies and governments. It mainly concerns on the deliberate approval that people give to the establishment of the government.

The most prominent theorists of social contract and natural rights during 17th-and 18th were Hugo Grotius, Thomas Hobbes, Samuel Pufendorf, John Locke, Jean-Jacques Rousseau, and Immanuel Kant. They solved the problem of political authority in a different way. Grotius assumed that "individual human beings had natural rights; Hobbes asserted that humans consent to abdicate their rights in favor of the absolute authority of government (whether monarchical or parliamentary); Pufendorf disputed Hobbes's equation of a state of nature with war" (Laski, 2010, pp.89-95).

Samual Salzborn (2015) very precisely highlights, "No freedom without sovereignty- but conversely, and recalling the twofold thrust of sovereignty it does not allow individual freedom." So, freedom and sovereignty are complementary to each other. The concept of natural rights played a significant part in Locke's legal and political theory. In fact, he declared life, liberty, and property his three cardinal rights, which heavily inspired and dominated the 1776 Declaration of American Independence. According to Locke, the state was created to ensure and preserve individuals' natural rights. His individual's 'inalienable' rights were enshrined in numerous constitutions and guaranteed to the individual even today.

John Locke (1632–1704) is regarded as one of the most influential thinkers. He is dubbed the "Father of Classical Liberalism" by many. He is similarly essential to Social Contract Theory as one of the first British empiricists, following Francis Bacon's legacy. In his renowned book *Two Treatises on Civil Government*, he developed his Social Contract Theory (1690). Surprisingly, his work had an impact on the development of epistemology and political philosophy. The concepts of John Locke "influenced Voltaire and Rousseau, many Scottish Enlightenment thinkers, as well as the American revolutionaries. His contributions to classical republicanism and liberal theory are reflected in the United States Declaration of Independence" (Myers, 1995, pp.632-633). The political doctrines that emerged as a result of the Renaissance promoted the state's ultimate sovereignty, weakening the importance of the person.

Natural law and Social Contract' doctrines were needed to be interpreted to defend individual rights against the sovereign's ultimate power. John Locke observed the Glorious Revolution of 1688 and the surge of individualism that swept England at the

period, greatly influencing political and legal doctrines. So, Locke, "came out with a new interpretation of the Social Contract rejecting Hobbes' earlier concept of state of nature" (Singh, 1959, p. 321). Locke puts liberal views on "Social Contract".

The concept of Social Contract was of John Locke endowed on new secular approach to natural law in which the power of the government was conceded on trust by the people to the rulers and any infringement of the conduct by the rulers was treated as a breach of the people's fundamental natural rights which justified revolt against the government. Locke advocated for a constitutionally limited government. "The nineteenth century doctrine of laissez faire was the result of individual's freedom in matters relating to economic activities which found support in Locke's theory. Unlike Hobbes who supported State authority, Locke pleaded for the individual liberty" (Forde, 2009, p. 428). In fact, sovereignty is inherent in the people. Governments were only the representatives and that such government could be reasonably removed if they miscarried to perform their tasks to the people. He attempted to create actual protections against violations of natural rule by the government. Locke claimed that the sovereign did not uphold all rights but ultimate power remained within the people. Locke's Social Contract was dedicated to sovereignty and law. Sovereignty received from 'Will' of the people. This would remain with the people. Moreover, he proclaimed that sovereignty resided in the people but not with the state, and that the state was supreme, but only if it was bound by civil and natural law.

The subjects were imagined as the basis of sovereignty and the state as the patron of individuals' liberty. Locke argued, under Social Contract power was surrendered not to the sovereign but to the community. He opined that everywhere there was only a political society where everyone had quitted his natural power to the society, resigned it up into the hands of the community. Locke used the phrase "there and there only" to emphasize the importance of the "will" of the people in forming a political society. In this way, every member of the community surrendered his natural power with free will explicitly or implicitly and resigned it into the hands of the community in exchange for the discharge of functions to the people, hence a political society comes with power to preserve property and punish offences. However, the power cannot be

more than that the people had in a state of nature before they entered into a society and gave it to the community for nobody can give more than what he has. The term 'community' of Locke denotes "the government of the people by the people for the people", therefore "community rights should prevail over individual rights and the rights are surrendered into community because the sovereign is the people and only comes from the people. Thus, hands of the community mean the governor who is governing by the 'Will' of the people" (Treatise Concerning Government, II, Sect., 151). The people's 'Will' is a deciding factor in the formation of a community.

Locke argued that the people surrendered all their rights to the sovereign authority in order to preserve and enforce the law of nature. The other rights such as right to life, liberty and estate were retained in the people themselves because these rights were considered natural and inalienable rights of the citizens. Consequently, it can be said that Locke advocates a partial surrendering of rights by the individuals. Lock's idealism gets highly reflected even in the modern day parliamentary democracy. His ideas granted theoretical form to the reaction against absolutism and prepared for parliamentary democracy.

Moreover, Locke's guidelines of liberty and equality have applied a strong influence upon Fundamental Rights as guaranteed under the constitution of liberal democratic countries like Nepal and India. Liberty and equality of an individual are highly respected and thus protected by the government. As per Locke's ideas, sovereignty resides in the people. According to Social Contract Theory the political power exerts from the people and not from the grace of God.

Hence, Social Contract Theory of Locke is a forerunner of democratic theory i.e. "the government of the people, by the people and for the people", as defined by Abraham Lincoln- the former president of USA. As a result, modern democratic governments, such as those in Nepal and India, which adhere to free and fair election rules, are founded on social contract theory. As a result, the Social Contract Theory is put into practice in Nepal and India by electing select people to create the government. The main issue in these countries is that the governments are not adhering to Locke's Social Contract ideals. The government and the people must live under the principles

of 'Pactum Unionis and Pactum Subjectionis,' with due respect and obedience to the duties and rights that come with them.

A constitution exists in every political community, and it is assumed that the constitution reflects the "will" of the people. And, because the constitutions of Nepal and India reflect the "will" of the people, they obligate everyone to follow the terms of their constitutions, i.e., to live according to agreed-upon processes and to respect the community. The goal of Social Contract Theory's jurisprudence is to foster peace and harmony, which is the bedrock of democratic nations like Nepal and India.

Concept and Evolution of Human Rights/Fundamental Rights

Hereunder, this chapter deals with evolution of fundamental rights, UDHR 1948 and countries specific experiences.

Human rights express our needs, goals and what we see as our entitlements. But, "human rights are not just a way of thinking; it is also a set of legal and political doctrines. These doctrine limit government powers and shape individual's expectations. They privilege certain behaviours and prohibit other" (Lawrence, 2012, p. 11) with the establishment of the UN, basic human rights practices which have gradually come into effect since the end of the Second World War.

Human Rights and United Nations are bound up with the history of modern sovereign state. On the one hand, state is an organization primarily responsible for protecting the human rights and fundamental freedoms of its citizens. Indeed, protections for individual freedoms were first introduced and codified in the context of the state. On the other hand, states have often been found the perpetrators of human rights abuses (Das, 2013, pp. 11-14). The state's primary responsibility is to protect individual liberties.

Human rights intermediate certain differences between the state as protector and the state as abuser. They set the boundary between legitimate and illegitimate encroachments by the state on individual dignity and autonomy, drawing the line between acceptable and unacceptable exercises of state power. In other words, "they

are a way for individual to enforce their own power against their government and its laws and actions" (Lawrence, 2013, p. 15). The right to life, liberty, and security of person and respecting human rights are the chief concerns of the states.

The concept of human rights evolved from the time immemorial. The principle of human rights is apprehensive with the prevailing understanding, truth, and universally the same starting with the League of Nations (LN), it has been formally modernized. However, internationalization and institutionalization of human rights really began after the establishment of United Nations (UN) October 24, 1945 (Pathak, 2006). The main goal is to respect and promote human rights and justice of Inter-State armed conflicts over the entire territory of a State.

The international community felt a frightful need of some bold steps to curb the growing in toleration and enmity among countries. As a result of this initiation, organization under different names came out to preserve and promote human rights.

The League of Nations

The First World War formally ended with the Treaty of Versailles concluded at the Paris resulting to Peace Conference in 1919. The main objective of league was "to promote international co-operation and to achieve international peace and security" (Rover, 1998, pp. 69-70). Its objective was to promote international harmony among different nations of the globe and to promote brotherhood and to end the culture of warfare among themselves (Bohara, 2018, p. 73). It was established with a pious mission to create a universally harmonious environment where an individual can entertain his or her fundamental rights without any fear or terror. However, the League of Nations Covenant was broadly silent on the issue of human rights it became pioneer step for the germination of United Nations and persuing human rights activities.

The United Nations and Conceptual Evolution of Human Rights

After the devastating destruction of World War II, various nations throughout the world decided to create an international system of laws and treaties to protect the

world from additional disaster, which led to the establishment of the United Nations (UN). The UN's preamble declares the organization's objective to save future generations from the misery of war by preserving international peace, combating aggression, and developing good ties among nations. "It aimed at solving the international problems of economic, social, cultural, and humanitarian character, in addition to promoting and encouraging respect for human rights and fundamental freedoms" (Sen, 1995, pp. 213-221).

The charter of the United Nations Article 1 (3) declares to achieve international co-operation "in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (*New Encyclopedia Britannica*, 1981, Vol. 8, p.1186). Correspondingly, "Articles 55 and 56 of the charter state obligation of member states particularly to promote human rights without distinction of race, sex, language or religion" (Quinn, 1999, p. 15). Identically, this provision emphasizes on equality of all.

The International Bill of Human Rights (IBHR) which consists of three documents the Universal Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, is the additional provision of UNO. Likewise, the implementation of protection of civilian persons, unarmed constants and hostages has become the sole international concern at the time of war. Consequently, "human rights have become an international concern rather than sternly domestic issues only. Gradually, the United Nations has also codified the rights concerning the requirements of men, women, children, refugees and minorities" (Pathak, 2006, p. 39).

After World War II

The ending of devastating World War II triggered the modern human rights movement and indelibly altered the relationship between the individual, the state, and international law. "During World War II, millions of civilians were imprisoned and murdered by the Nazi regime on the basis of their religion, ethnicity, political

affiliation, disability, or sexual orientation" (Lawrence, 2012, p.19). World War II practiced the massacre of thousands of lives on the basis of religion, ethnicity and affiliation which was really regretful. Historically, after the Second World War, the first instance of the systematic practice of constitutional provision of fundamental rights was followed. The colonial states bloomed into the liberal democracies from the gloomed tyrannies.

The Second World War was succeeded by a period of universal human rights euphoria. In the aftermath of the war, the international community turned its attention to the respect and promotion of human rights. In the darkest days of that period, the military regimes of Argentina, Chile, Uruguay, Paraguay, Bolivia, Brazil, Ecuador and Peru cooperated each other by sharing intelligence agencies concerning political opponents. The UDHR, the International Covenant on Economic, social and Cultural Rights (ICESCR), and the ICCPR with its two optional protocols herald a new era for international law and still stand as the foundation for human rights in the world (Kyriakou, 2012, pp. 2-3). The provisions of human rights reflect the reaction of the international community to the horrors of that war and of the regimes which unleashed it as affirmed in UN charter.

Post-United Nations Evolution

With the end of the monstrous war (World War II) in 1945, some powerful nations sought for a rapid restoration of peace to preserve and maintain human dignity and they agreed to obey international regulations.

Human Rights Clauses of the UN Charter

Immediately after World War II. In 1945, the United Nations was founded. "The devastating effects of World War II in terms of casualties, atrocities, and destruction had exposed the unacceptable and inhuman nature of large-scale armed conflict" (Castellan, 2012, p. 15). The recent concept regarding human rights started only after the promulgation of the United Nations Charter. "The United Nations Charter was ratified in 1945, with key provisions on human rights. Many states have been

established on the basis that individual members have certain rights, which must be respected by those governing bodies" (Bohara, 2018, p. 74).

The preamble of the UN charter appeals to all member states "to save succeeding generations from the scourge of war", "to reaffirm faith in fundamental human rights", "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained", and "to promote social progress and better standards of life in larger freedom" (Castellan, 2012, p. 15). The state includes for the right not to be subjected to arbitrary arrest, the right to fair trial by a competent tribunal, presumption of innocence, and freedom from the application of ex-post facto-laws.

The UN Charter's preamble- "Promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (UNHCR, 1995, p. 15)- is an elementary objective of the United Nations and its member States. The UN is bound by certain promises to respect and protect fundamental human rights. The UN is determined to preserve human dignity and human worth by carrying out different regulations against those involved directly and indirectly in inhuman activities like abduction, arbitrary arrest, killings and disappearance of the innocent (Bohara, 2018, p. 75). Certain promises to respect and protect fundamental human rights bind the UN.

Human Rights for Peace and Security

The primary source of authority for the promulgation of human rights standards by UN bodies is found in the UN charter itself (United Nations, 1996, p. 5). Human Rights are applicable even during conflict time. Armed Conflict involves restriction to derogations of some fundamental rights due to respect by the states. The State's obligation is the maintenance of peace and security. The charter of the UN makes several references to the principles of the dignity and equality of all human beings.

The World Conference on Human Rights (Vienna Declaration and Program of Action 1993) reaffirmed:

The international community must treat human rights globally in a fair and equal manner, on the same footing, and with some emphasis. While the significance of national and regional particularities must be born in mind, it is the duty of the states, regardless of their political, economic and cultural systems, to promote and protect all human right and fundamental freedoms (Part I, Para, 5).

The conference declared that: "The promotion and protection of all human rights and fundamental freedoms must be considered as a prime objective of the United Nations in accordance with its purpose and principles, in particular the purpose of international cooperation" (Vienna Declaration and Program of Action, Part I, Para 4).

Internationally, when a state has become a party of a treaty for the protection of human rights, it expressly agrees to be bound with the treaty. "It is important to remember that central feature of this discussion is that UN Member States are often not impartial or consistent in raising human rights issues which cover various activities done by an individual or a group of individuals" (Bohara, 2018, p. 76). Inhumane actions such as abduction, arrest, detention, torture and disappearance are all same which make humanity ashamed.

Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948, combining the voices expressed during Second World War. Despite the fact that the UDHR is a non-binding resolution, some argue that it has gained the force of international customary law, which national and other courts may apply in appropriate circumstances. This declaration appeals all member nations to promote a number of human, civil, economic and social rights, proclaiming these rights as part of the foundation of freedom, justice and peace in the world. Such announcement of UDHR was "the first international effort to limit the behavior of states and press upon them, duties to their citizens following the model of the rights duty duality" (Das, 2013, p. 12).

The UN Human Rights Commission framed UDHR chaired by Eleanor Roosevelt, began to discuss an *International Bill of Rights* in 1947. In the beginning, there was a debate among the members of the *Committee* on the form of such a bill of rights, and whether, or, how, it should be applied. The drafting body advanced its functions accompanying treaties held in between UDHR building discourse. The renowned scholars were assigned for much of the cross-border research and the organization of the document respectively, where the articles of the declaration were interpretive of the general standard of the preamble. The document was designed by ReneCassin, a French lawyer to include the basic principles of dignity, liberty, equality and brotherhood in the initial two articles, followed sequentially by rights relating to individuals or groups including spiritual, public and political rights; and economic, social and cultural rights. Cassin recognizes that "rights in the context of limits, duties and the social and political order in which they are to be realized. Humphery and Cassin intended the rights in the UDHR to be legally enforceable through some means, as is reflected in the third clauses of the preamble" (Das, 2013, p.13), whereas it is essential, "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (Preamble of the Universal Declaration of Human Rights, 1948).

Certain provisions of the UDHR were "researched and written by a committee of international experts on human rights, including representatives from all continents and all major religions, and drawing on consultation with leaders such as Mahatma Gandhi" (Das, 2013, p. 14). The insertion of civil, political, economic, social and cultural rights was predicated on the assumption that all human rights are indivisible and that the different types of rights listed are indivisibly connected. This principle was not then opposed by any member states; however, this principle was later subject to significant challenges (Das, 2013, pp.14-15).

The Universal Declaration was categorized into treaties, namely: i) a covenant on civil and political rights; and ii) social, economic and cultural rights. Both covenants begin with the right of people to self-rule and to sovereignty over their natural assets.

This dispute over whether human rights are more fundamental than economic rights has sustained even today.

The drafters of the covenants primarily anticipated to include only one instrument. Initially, they included only political and civil rights, though economic and social rights were also proposed. The disagreement was put forth on basic human rights. There was a debate whether economic and social rights are ambitious, as compared with basic human rights which all people enjoy purely by being human. In fact, the application of economic and social rights depends on capacity of wealth and the availability of resources. Furthermore, unlike basic human rights, which are determined only by the nature (mental and physical abilities) of human beings, whose social and economic rights should be acknowledged is based on ideology or economic theories. It was contested whether economic rights were proper subjects for contractual commitments, and whether a lack of agreement on such rights would weaken political-civil rights. There was broad agreement and a clear consensus that the mechanisms required to ensure or induce compliance with socioeconomic undertakings were distinct from those required to enforce or induce compliance with civil-political rights.

Such arrangement and the passion among the majority number of participants to human-rights law directed to design the two covenants. The developing countries including Soviet Union had argued for the inclusion of all rights. Both covenants allowed states to derogate some rights. The effort of making an integrated single treaty with mutual consensus remained ineffective.

Human Rights, Fundamental Rights and Civil Rights

Human rights, fundamental rights and civil rights have certain substantive differences though they give nearly synonymous expressions. Although 'human rights' is a wider phrase which at once embraces both civil and fundamental rights, there is a basic difference in regard to the meaning and concept of these phrases. Human rights are naturally inherent in human beings by virtue of their birth whereas fundamental rights

are co-related with the freedoms and rights which a man is entitled to by virtue of his association with the state as its citizen (Lamichhane & Jyakhwo, 2019, p.1).

Human rights signify such common rights which have been recognized, on the basis of the consent and mutual understanding of the international community, by the international law for the people residing in every part of the world. "Human Rights in fact, are human attributes of humanity inherently possess the quality of mutual dignity and equality, which is necessary for co-existence of every individual (Sangroula, 2010, p.365).

On the other hand, civil rights and fundamental rights are created for the citizens of a particular country by the elementary law of that land. To be more specific, fundamental rights are guaranteed by the supreme law of the land, i.e., the constitution whereas civil rights are the creation of the general (civil) law of the land. In other words, human rights are merely a statement of principles and declarations made by the international community under the international law whereas fundamental rights are the supreme command of the constitution of a country and obligatory to the state organs at the same time. Fundamental rights are distinguishing features of modern democratic values. H. B. Tripathi asserts that "the modern concept of fundamental rights owes its origin to human rights. In short, 'human rights' is a vast concept which is wide enough to accommodate the fundamental rights as well as the civil rights" (Tripathi, 2002, p. 2-3).

The fundamental rights are primarily meant to protect individuals. The theory of fundamental rights is intimately connected with liberal individualism in political theory. The individual rights have to be protected not only from the oppression of the state power and from the state's interference in the sphere of his individual autonomy, but also from the manifold shackles of other varieties which had kept him chained all along his life. Indeed, 'human rights', is the modern name of what were earlier known as natural rights. That expression was used to distinguish the rights from so called positive rights originated by grants from the state. On the other hand, the belief of the natural law school is that the state itself has been brought into existence with a view to protect these rights.

As Rai (2011) debates:

The adjective 'fundamental' emphasizes the special nature of these rights in two respects: First, these rights cannot be taken away except by an amendment of the constitution which is not an easy course, especially after the emergence of the basic structure doctrine. Second, the objective fundamental carries the connotation that the rights selected for special constitutional protection are qualitatively different from and superior to the ordinary legal rights (pp. 3-4).

In this regard Ghosal (2010) has rightly drawn attention to the distinction between human rights and fundamental rights as-"All fundamental rights are definitely human rights, but human rights those are being recognized by the states through their constitutional guarantees are considered as fundamental rights" (p.1105). Hence the constitution of different countries drafted and adopted a list of fundamental rights with the provision of enforcement.

Countries' Specific Experiences

The idea of human rights is established on the acceptance that every individual is a subject of dignity and rights. Throughout the history, different schools of thoughts converged in the origin and development of the awareness of human rights, which are formally recognized in the universal declaration of human rights.

As certain writers claim and justify the monopoly of western civilization on the evolution of the concept of human rights, "the human rights consciousness has remote origins and developed with contributions from different schools of thought, especially those based on different religions, philosophies and law schools" (Beitz, 2009, pp.16-17). With this perspective, it is possible to identify a first historical stage in the origin and development of human rights in religious and classical philosophical trends on natural rights, which recognized people as endowed with innate, absolute, universal and inviolable rights. What cannot be denied is that "western civilization manifested a greater articulation and juridical-political implementation of religious, philosophical ideals" (Perry, 1998, 625). In western civilisation, religious and philosophical principles were more expressed and implemented in legal and political terms.

The leading religious traditional, like Hinduism, Judaism, Buddhism, Confucianism, Christianity and Islam, in spite of their differences, contradictions and conflicts, share the same vision of commitment to "respecting the dignity of all the people and the resultant task of fraternity, solidarity and protection of the defenseless and least protected" (Gordon, 2003, 241). It was a promise to uphold the dignity of all persons.

The history of human rights extends to a long past. It can be traced back to the Greek and Roman civilizations. In "ancient Greek City state, citizens were allowed the use of some rights of which two were particularly vital 'ISOGORIA' (equal freedom of speech) and 'ISONOMIA' (equality before the law)" (Hidayatullah, 1972, p. 281). Even today both rights continue the heart and soul of the concept of human rights. Likewise, if we look back at our eastern civilization even in the *Ramayana* era and the *Mahabharat* era, the rulers also had to abide by some established rules and regulations in dealing with their subjects. However, this provision contradicts with divine theory.

Those rules and limitations defined and regulated the connection amid the governors and the governed. In the ancient times, even a king was not considered above the law. A king was also enjoined upon to look after the welfare of his people and guarantee them some rights. A study of the ancient chronology reveals that some of the kings used to go around 'inognito' to learn firsthand about the woes and sufferings of their subjects and to remedy them so far as possible (Tripathi, 2002, p. 3-4). Some kings were cautious to look after their people's welfare and promise them certain privileges.

Man has fearlessly struggled and fought for his rights, freedoms and human dignity at every turn of human history. The modern concept of human rights has taken shape during the long and persistent development of the democratic societies. These rights were established through generations of conflicts and struggle, suffering and sacrifices. The great drama of rights goes far back into the English and American political history. Most of all, the British people can be credited with a systematic start of the pioneer work of asserting and defending individual liberty and basic human rights through persistent struggle. Fundamental human rights and human rights are different phenomenon where the fundamental human rights acquire high degree of priority in judicial review.

United Kingdom

The concept of fundamental human rights actually started from the United Kingdom (UK) although it has no written constitution. It is said that the 'right of man' is originated from common law system. This is the great contribution of the UK offered to the world. The present day extensive debates on human rights are the result of the ideological revolution and constant struggles and countless sacrifices of people. It will be misleading to assume that human rights are a product of the 20th century. It should always be remembered that the earliest charters of the fundamental rights are to be found among the British constitutional documents (Tripathi, 2002, p. 4). These constitutional documents have a significant impact on the global development of fundamental rights.

Magna Carta 1215

Magna Carta 1215 is considered as the most ancient and important historical charter of United Kingdom relating to the foundation of human rights. It was a charter granted by King John in 1215. Initially it was known as 'Carta Liberatum', *Magna Carta* was the culmination of a protest against the arbitrary rule of King John. The king was forced into signing this great charter by the revolting barons. "From the point of view of constitutional law the most important clauses of the Charter are 38th, and 39th" (Sen, 1966, p.124). "Traditional interpretation has found in this charter the source of the four fundamental rights: equality before the law, the right of personal liberty, the right to property and the right of free movement" (Sen, 1966, p. 124). *The Magna Carta* focuses on the rights to equality, liberty, and property.

The amazing vitality of *Magna Carta* has given it an importance in the protection of individual liberties for transcending its role in the dispute between King John and Barons. Time and again it has been called upon as and when liberty has been threatened by despotic powers, and its provisions have been linked with some of the most essential liberties embodied in most of the democratic constitutions of the modern times.

Petition of Rights 1628

The petition of Rights 1628, generally known as the "Great Charter of the Liberties of England" (Bhatt, 2004, p. 43). It guarantees individual rights and liberties of the British after the *Magna Carta*. The charter declares and constitutes that no individual may be imprisoned, or be denied his liberties or customs, or be illegitimated or exiled. King Edward III of Britain declared that no person should be forced to give any loans to the king against his will, none should be charged and be compelled to pay any tax, aid, or what was not set by common consent in parliament, concerning several rights and liberties of the citizens. He stated by authority of the legislative body that "no man of what estate or condition that he be, should be put out of his land or tenements, nor taken imprisoned, nor disinherited, nor put to death, without being brought to answer by the due process of law" (Agrawal, 2008, p. 9). The *Magna Carta* not only secured individual rights, but it also outlined how to seek redress.

In the same way, "to ensure personal liberty and justice in the land *Habeas Corpus* Act in 1640 was initiated. *Habeas Corpus* means-bring the prisoner (of conscience) before the court" (Pathak, 2005, p. 36). As a result, the modern judiciary gained tremendous power in preserving individual rights as a result of these provisions.

English Bill of Rights 1689

The parliament of England passed "The English Bill of Rights Act" on December 16, 1689. The Bill created separation of powers, limits the powers of the king and queen, enhances the democratic election and bolsters freedom of speech. The Bill of Rights declared that the king has no overriding authority. The Bill conflicts the "customary laws, and clarified the rights and liberties of the citizens. It lays down the twin foundations, viz., the supremacy of the law, and the sovereignty of the nation, upon which, the English constitution rests" (Upadhyay, 2015, p. 185). It further clarified the rights and liberties of the citizens.

In the Glorious Revolution of 1688, King James II of England was abducted and fled from the country. He was succeeded by his daughter Mary and her Dutch husband William of Orange. Before William and Marry could be proclaimed king and Queen they had to agree to accept the Bill of Rights which they did in February, 1689.

The English Bill of Rights assured specific rights of the citizens of England from the power of the crown. The Bill was an Act of parliament. The Bill of Rights was later added on to by the Act of Settlement in 1701. Both of these contributed to the establishment of parliamentary sovereignty, which "gives the legislative body of parliament absolute sovereignty and makes it supreme over all other government institutions. The Bill of Rights shrunk many of the powers of the crown. In fact, the United States Bill of Rights was modeled after the English Bill of Rights" (Upadhyay, 2015, p. 186). Thus, the US Bill of Rights were the continuance of English Bill of Rights.

Habeas Corpus Act 1679 and 1816

The Habeas Corpus Act 1679 and 1816 contributed for an effective mechanism for the protection of basic right of personal liberty. Although some provisions of earlier charters like Magna Carta and the petition of Rights had declared the imprisonment of a prisoner by the command of the King without show of cause as illegal, it was not until the Habeas corpus Act of 1679 that the writ became fully established as an effective remedy in nearly all causes. The *Habeas Corpus Act* created no new right and introduced no new principle. Alternatively, "it strengthened a right already existing by providing that the writ should be issued by the judges during vacations as well as in term time, and that the prisoners should be brought before the court promptly so that the legality of their imprisonment could be determined" (Tripathi, 2002, p.7-8). Finally, it contributed to the development of an effective framework for safeguarding the fundamental right to personal liberty.

Even though various defects were found lurking in the Habeas Corpus Act 1679, there was no protection where the judges abused their power and fixed the bail too high. Secondly, the return to the writ might not be truthful. Thirdly, it did not apply to civil detention. The first defect was made on clause 10 of the Bill of Rights, 1689 which declared the "excessive bail ought not to be required". The other two defects were eventually, remedied by the Habeas Corpus Act of 1816 so far as civil care were concerned. Thus, these two acts have done for the liberty of English man more than could have been achieved by any declarations of rights (Tripathi, 2002, p. 16).

Act of Settlements, 1701

Another important British Statute is the Act of Settlement 1701. Although mainly it granted for the succession to the throne, it also added specific provisions corresponding to the throne, and certain provisions complementary to those contained in the Bill of Rights. The Bill of Rights and the Act of Settlement marketed the victory of parliament.

United States of America

The Americans too have strengthened the concept of human rights. The expression 'fundamental rights of man' was stated in the declaration and constitutional instruments of many states in America (Agrawal, 2008, p. 10). For instance, "the Virginia Bill of Rights, 1776, the American Declaration of Independence 1776" (World Book International, 1996, p. 2), the constitution of the United States of America, 1787, and the US Bill of Rights, 1791. All these documents favour human freedom, human rights and human dignity as triangular corners.

Virginia Bill of Rights, 1776

The Virginia Convention meeting in Williamsburg adopted a Declaration of Right on June 12, 1776, three weeks before the American Declaration of Independence was signed. Some of the provisions of the Declaration were founded upon the doctrine of Natural Rights. For example, Article 1 declared that "all men are by nature equal, free and independent, and have certain inherent rights" such as the right to life and liberty and the right to property. Article 6 and 7 of the Declaration reiterated two of the provisions of the British Bill of Rights. Article 6 provided that the elections of all members to serve as representatives of the people ought to be free. And, Article 7 stipulated that the power of suspending law or their execution by any authority without the consent of the representatives of the people was an infringement of the right of the people. Besides, the Declaration also contained some other ringing phrases such as:

. . . that all power is vested in, and consequently derived from the people, . . . that government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community . . . that the legislature or executive powers of the State should be separate and distinct from the Judiciary; . . . that no man be deprived of his liberty except by the law of the land or the judgment of his peers; that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained by despotic governments . . . sections 2, 3, 5, 8 and 12 of the constitution of Virginia, 1776. (Tripathi, 2002, pp. 8-9)

American Declaration of Independence, 1776

M.R. Upadhyaya (2015) quotes that "The Declaration of Independence, written by Thomas Jefferson and adopted by the Second Continental Congress, states the reasons the British colonies of North America sought independence in July of 1776" (pp. 186-187). The Declaration charges the king with tyranny and affirms the independence of the American colonies. In the history of mankind, the Declaration of Independence has great significance as it warrants the right to revolt against a government that no longer guaranteed the man's natural and inalienable rights. "The declaration opens with a preamble describing the document's necessity in explaining why the colonies have overthrown their ruler and chosen to take their place as a separate nation in the world" (Upadhyay, 2015, pp. 186-187). It was a turning point event in the history of worldwide independence movements.

The American Declaration of Independence (ADI) represented the spirit of Americans and marked as fountain source of the liberties of the American people. The thirteen United Colonies declared themselves "free and independent and absolved from all allegiance to the British Crown" (Tripathi, 2002, p. 8). This was one of the major impacts in American history for human rights which proclaim the right to life, liberty and the pursuit of happiness (Bohara, 2018, p. 80). This has a significant impact on human rights in American history.

American Bill of Rights, 1791

The Bill of Rights 1791, imposed limits on the national government but not on the state governments. It plays a central role in American law and government, and remains a fundamental symbol of the freedoms and culture of the nation. The U.S. constitution was enacted on 17th September, 1787. The most conspicuous defect of the original constitution was the omission of a Bill of Rights concerning private rights and personal liberties. James Madison proposed the U.S. Bill of Rights twelve amendments. It largely responded to the constitution's influential opponents, including prominent founding fathers, who argued that the constitution should not be ratified because it failed to protect the basic principles of human liberty. Ten of these were ratified by the state legislatures. The Bill of Rights was formulated out of these ten constitutional amendments. The main gist of the Bill of Rights is that the citizen be protected against the abuse of power by the states' authorities. The U.S. Bill of Rights was "influenced by George Mason's 1776, Virginia Declaration of Rights, the 1689 English Bill of Rights, works of the Age of Enlightenment pertaining to national rights, and earlier English political documents such as the Magna Carta (1215)" (Upadhyay, 2015, p. 188). Actually, the Bill of Rights lists both civil liberties and civil rights. Rights and liberties of the constitution mean the protections enshrined in the Bill of rights and in the first section of the fourteenth Amendment (Janada, Berry and Goldman, 2008, p. 536). The list includes freedom of religion, freedom of speech and the press, the right to peaceable assembly and petition, the rights of the criminally accused, the requirements of due process, and the equal protection of laws.

French Contribution

The French Declaration of the Rights of Man and Citizen of 1789, is one of the basic charters of human liberties, containing the principles that inspired the French Revolution. This Declaration greatly influenced and inspired by the American Bill of Rights, was a natural and direct product of the philosophy of the 18th century. It recognized and declared some fundamental rules valid for all human societies. The first Article of the Declaration stipulates that all men are born free and live free, and are equal in law. Recapturing the spirit of Article 39 of Magna Carta, Article 7 of the

Declaration guarantees that no person shall be accused, arrested or detained except in cases determined by law, and according to the procedure established by it. Article 8 prohibits cruel and unusual punishment whereas Article 9 stipulates that every person is presumed to be innocent until declared culpable. Likewise, Article 17 reechoed the political faith of the period that the right of property is sacred and inviolable. This Article stipulated that no one can be deprived of his property except in cases of public necessity, judicially established, and on the condition of just and previous indemnity. Similarly, article 16 of the Declaration, which laid down the principle that every democratic constitution which must contain as a bill of rights. Today most countries have endeavored to codify these natural rights according to their respective needs and socio-economic and political context. This proclamation is regarded as a watershed moment in the history of human rights.

The modern constitutional provisions of human rights and fundamental freedoms are influenced by the Magna Carta and Bill of Rights of England and Provisions of the American and French Constitutions. However, human rights and fundamental freedoms specified under the constitutions of these two countries i.e. Nepal and India are on more solid footing than British Civil liberty, which had been developed on account of Manga Carta and Bill of Rights. The rights specified in British Charters are based upon a contrast between king and parliament. Likewise, the American Constitution, the human rights and fundamental freedoms are specifically provided in the constitutions.

The African Contribution on Human Rights

The African human rights system evolved in two distinct stages in manner somewhat similar to that of British American and French. The first stage consisted of the adoption in 1981 by the organization of African Unity, now the African Union of the African Charter on Human and people's Rights. It entered into force in 1986 and in the meantime got ratified by all fifty-three member states of the African Union. The charter was created on African commission on Human and people's Rights, but not a court. The African Court of Human and Peoples' Rights was established later by means of a separate protocol that came into force in 2004. The court was formally

inaugurated only in 2006 (Buergenthal, 2006, pp797-798). It was a notable step in human rights protecting discourse.

The catalogue of the rights that the African charter guarantees differs from its European and American counterparts in several important respects. The charter proclaims not only rights but also duties, and it guarantees both individual and peoples' rights in addition to civil and political rights (African charter on Human and People's Rights, 1986), the African charter sets out a series of economic and social rights. The charter permits the states parties to impose more extensive restrictions and limitations on the exercise of the rights it proclaims than the European and inter-American Human rights instruments. It also does not contain a derogation clause, which leaves the question open whether all rights in the African charter are derogatory. The charter's catalogue of rights was heavily influenced by the rights proclaimed in the Universal Declaration of Human Rights and the two international covenants on Human Rights. African Historical traditions and customs are also reflected in some provisions of the charter, particularly those dealing with duties of individuals and family matters. There is a provision of human rights commission with quasi-judicial powers and African Court of Justice with full-fledged power to impart the justice and strengthen the rights of human and the peoples.

The African charter is highly influenced by South African constitution and fundamental rights provision encompassed in it. The South African Constitution provides clear pointers towards the development of South African conception of justice. It proclaims its objective as building a bridge between the authoritarian past of apartheid and the non-racial democratic society of a new South Africa. It offers to make significant contributions to a reconstructed society. It is proclaimed that the abstract principles in terms of which the right must be located should be set out in a vision of society based on openness, transparency, freedom and equality (Davis, Cheadley & Haysom, 1997, p.16). The Constitution of the Republic of South Africa of 1996 encompasses post modern socio-political values and guarantees "the rights to adequate housing, access to health care, food, water, social security, basic education, language and culture and environment" (Phuyal, 2020, p.307). The 2015 Nepali constitution is largely inspired by these arrangements.

Section 1 of the South African Constitution states: human dignity, the achievement of equality and the advancement of human rights and freedoms' as the first set of foundational values, and the Bill of Rights in chapter two features equality, human dignity, and several liberties (in that order). In addition, section 39 of the African constitution provides, "when interpreting the Bill of Rights a court, tribunal, or forum must promote the values that underline an open and democratic society based on human dignity, equality and freedom" (The Constitution of the Republic of Africa, 1996). Similarly, the preamble opens with statement of 'respect for human dignity, liberty and equality'.

In India, human rights and fundamentals freedoms are the result of a number of recommendations and resolutions adopted by the Indian National Congress during the British Rule such as Motilal Nehru Committee Report (1928), the Independence Pledge (1930) and Fundamental Rights and Economic Programme (1931) and India's Charter of Freedom 1947 (Upadhyay, 2014, p. 29). It was a progressive effort in preserving human dignity, liberty and equality.

The history of modern Nepal began in 1769 and since then it has passed through various periods of political, social, ethnic and cultural movements. "The first legal code called *Muluki Ain* was enacted in 1910 B.S. (1854) during the Rana regime. It was influenced by British Bill of Rights. It has numerous infringements of modern fundamental rights. It could have become like Magna Carta" (Dhungel, 1987, p. 2) even though it was enacted on the foundation of traditional Hindu caste system. The modern human rights and fundamental freedoms of Nepal are the result of all the seven constitutions enacted in the past starting right from the Government of Nepal, Act, 1948. The first six constitutions met their premature death but the current one of 2015 enjoys the highest degree of political legitimacy due to its comprehensive involvement of people through the Constituent Assembly. It promises to be "a people's constitution" imparting the basic human rights and fundamental freedoms (Tripathi, 2015, p.36). It was a more advanced document for human rights protection.

The constitution makers of Nepal and India are influenced by the provisions of the charter of the United Nations and Universal Declaration of Human Rights, 1948. The

provisions of human rights and fundamental freedoms of these countries are the product of a number of national and international considerations. They are on more solid footings than any constitution of the world or any international enforcement agency.

CHAPTER SIX

CONSTITUTIONAL PROVISIONS OF FUNDAMENTAL RIGHTS IN INDIA

Context

India is often referred as the land of cultural plurality and diversity. It is a home for thousands of ethnic groups, tribes, castes, and religions. The Indian society is "regionally diverse (North/south/est/west), communally differentiated (Hindu/Muslim/Sikh/Christian/Buddhist, etc.), socially stratified and culturally discrete" (Betteille, 1993, p.45). Having total 329 million acres of land area, this multicultural country is occupied by multitudinous groups and sub-groups. The ancient India was governed by Hindu-Buddhist legal philosophies and the Medieval period was reigned by "Muslim rulers who attacked on Hindus, their culture, religion and human rights" (cited in Upadhyaya, 2014, p. 22). India came under the British rule in 1858. Due to the suppression of colonial rule, the feeling of nationalism grew amongst the people of India and thus participated in anti-British civil disobedience movement in 1920 under the leadership of Mahatma Gandhi. The movement resulted into Indian independence ending British rule in 1947. The Constitution building process undertook to legitimize the verdict expressed through the India's Charter of freedom (1947). However, the civil rights movement was already begun during the colonial period associated with the national liberation movement (Chakrabarti, 2011, p.34). The Constitution building process legitimized the 'Indian liberation movement'.

The economy of India was run by traditional agro-based mode of production during colonial era, though some industries were set up under the control of British East India Company. Gradually, the economy transformed into modern technology based liberal industrial economy. The liberalization of economy thus followed the nation's liberalized polity. Now India has around 1,352 (million) population, 2,113 GDP per capita (USD), 2,857 GDP (USDbn) and 6.1% economic growth (in 2018). Today, the Federal Republic of India practices liberal democratic system of governance with the principle of separation of power, check and balance, independence of judiciary and rule of law (Sahoo, 2020, pp.9-23). The journey of constitution building process was guided from the provisions of Indian's charter of freedom. It stated that the future constitution would guarantee to the people of India: social justice, economic and

political equality of status and of opportunity. It would also provide "freedom of thought, expression, belief, faith, worship, vacation, also association and action to the people of India. The provision of the 'India's Charter of Freedom' has been adapted in the preamble and other provisions of the constitution" (Hedge & Mukharjee, 1973, p. 478). The Constituent Assembly declared India as an Independent Sovereign Republic. "The making of the Indian Constitution offers a leading example of democratic constitution writing under conditions of deep ideational disagreement" (Learner, 2016, p.55). The fundamentals of Indian Constitution be examined by observing major features.

Major Features of India's Current Constitution

The constitution of India was drafted and enacted by a Constituent Assembly of India. The original constitution contained 395 articles and eight schedules. But today with subsequent amendments, additions and deletions, it has 470 articles and 12 schedules.

The present Indian constitution is the longest written constitution in the world. "It provides a mixture of federalism and unitarianism, and flexibility and rigidity. Since its promulgation on 26th January, 1950, it has been successfully guiding the path and progress of India" (Kapur & Mishra, 2012, p. 6). Indian constitution also has certain features which were designed based on the necessity of time and context.

1) Written and Detailed Constitution

The Constitution of India 1950 is a written text including the legitimate rule of the country. It was duly enacted by the Constituent Assembly adopting full-fledge democratic procedure. "It consists of 395 articles divided into 22 parts with 12 schedules and 104 constitutional amendments. It is a constitution of both the centre and states of Indian union. It is longest in the world" (Sharma, 2017, p. 36). Still, it is considered a detailed constitution in the world.

2) Adopted Constitution

The Constituent Assembly of had made Indian constitution in December 1946. The first session of the Assembly was held on 9th December, 1946. "It passed the objective Resolution on 22 January, 1947. Then after it initiated the process of constitution making in the right earnest and was in a position to finally pass and adopt the

constitution on 26th November 1949" (Gautam, 2019, p. 54). The charter came into force on 26 January 1950.

3) Preamble of the Constitution

The Constitution of India is a 'well-designed' document which announces the philosophy of the constitution as it was the product of the 'Will' of the people. "It declares India as a sovereign socialist secular democratic republic and a welfare state, committed to secure justice liberty and equality for promoting fraternity and dignity of the individual and unity and integrity of the nation" (Chakrabarty, 2017: p.86).

4) Declaration of a Democratic Socialist State

Constitutionally, India declares itself as a socialist state. "Although right from the very beginning, India's constitution fully reflected the spirit of democratic socialism, it was only in 1976 that the preamble was amended to include the term socialism" (Sharma, 2017, p. 52). It is known as a major feature of Indian constitution. "India's constitution is committed to secure social, economic and political justice for its entire people by ending all forms of exploitation and by securing equitable distribution of income, resources and wealth. This is to be secured by peaceful, constitutional and democratic means" (Mellalli, 2015: p.22).

Today people of India enjoy equal civil and political rights under the present constitution and involve in the political phenomena. They elect their government through free and fair elections which are held periodically for electing governments for all its activities, the government of India is responsible for her people. The sovereign power is vested in the people.

5) Secularism

The term 'secular' implies that state is neither religious nor anti religious. It means it is neutral on religious matters. The Constitution of India aims to establish a secular state. It is aptly conceptualized that "The Constitution of India declares state secular, detaching from religions dogmas by forty- second amendment further, and Indian secularism guarantees equal freedom to all religions. It grants the right to religious freedom to all the citizens" (Mellalli, 2015: p.23). The provision of secularism is perfectly reflected under fundamental rights provisions of India. It doesnot concern on

religion only but also in state mechanism. "An important manifestation of secularism in India is the abolition of communal electorates and the adoption of the provision that elections are to be held on the basis of universal franchise and joint-electorates (Turukmane, 2014, p.61).

6) Republic State

The word republic has significant sense in political science. Simply, republic means that the country has an elected President as a head of the state and there is no space for inherited monarchy. The preamble of the constitution declares India to be a Sovereign Democratic Republic. "In a republic there is no hereditary ruler and all authorities of the state are directly or indirectly elected by the people" (Sharma, 2017, p.40). Defining republican system of India Mellalli (2015) recounts "the constitution has an elected head of the state that is the president who wields power for a fixed term of five years. After that, people elect president through Electoral College" (p.23).

7) Union of States

Article One of the constitution declares that "India is a union of states. It includes 28 States and 7 Union Territories as specified in First Schedule of the constitution".

8) Federal System with Unitary Bias

Federalism in its spirit is the process of the division of state authority among its federal units. The Constitution of India by its title declares itself as a federal state. "Indian constitution describes India as a union of states (Article 1) of the Constitution which implies that Indian federation is not the result of any agreement among the units and the units cannot secede from it" (Choudhry, Khosla, & Meheta, 2016, p.540). Thus, federalism has become an identity of Indian political system.

9) Rigidity and Flexibility

In the present Indian constitution, some of its provisions can be amended in a difficult way while others very easily by passing a simple law it means not expecting for two-third majority. According to article 368 of the constitution "it encompasses partly rigid and partly flexible provisions" (Mellalli, 2015, p.13). Hence, the Constitution of India is both rigid and flexible.

10) Establishment of Fundamental Rights and Duties

Fundamental rights and duties are core contents of the Indian Constitution. Part III Articles 12-35, the constitution of India grants and guarantees fundamental rights to all its citizens. It is called called Magna Carta of the Indian citizen. Originally, 7 fundamental rights were granted but after the deletion of the right to property from the list of fundamental right (44th amendment act 1979) their number came down to six.

Choudhry, Khosla, & Meheta (2016) summarize these rights as follows:

i) Right to Equality I Right to Equality (ii) Right to Freedom (iii) Right to Freedom from Exploitation (iv) Right to Religious Freedom (v) Right to Culture and Education; (vi) Right to Constitutional Redress (Art.32). The citizens' fundamental duties are described in Part IV A (article 51A) of the constitution. i) The constitution, the national flag, and the national anthem are all to be respected, (ii) uphold and safeguard India's sovereignty, unity, and integrity; and (iii) revere the lofty principles of the independence movement. (iv) Defend the country and render national services when called upon, (v) Promote the common brotherhood of all Indians and renounce any practice demeaning to women's dignity, (vi) Preserve the rich heritage of the nation's composite cultures, (vii) Protect the natural environment and have compassion for living creatures, (viii) Develop scientific temper, humanism, and the spirit of inquiry and reform, (ix) Safeguard public property and adjure violence, (x) strive for excellence in all individual and group activities, and (xi) parents' responsibility to send their children to school for education. (p.699)

11) Provision of National and State Human Rights Commission

In order to protect all people's human rights, the union parliament passed the Protection of Human Rights Act, 1993, in conformity with the Indian constitution. The National Human Rights Commission was founded as a result of it. It functions as an independent commission with the status of a civil court for the purpose of preventing violations of people's human rights; such commissions can also be constituted at the state level.

12) Directive Principles of State Policy

The Indian government's federal and state governments are guided by the Directive Principles of State Policy. One of the most notable characteristics of the Indian constitution is Part IV, which deals with the basic principles of state policy (Article 36-51). It guides the government in developing new policies "to ensure adequate means of livelihood, fair distribution of wealth, equal pay for equal work, protection of children, women, labor, and youth, social security, local self-government, protection of the interests of the weaker sections of society" (EBC, 2011, pp. 38-39). It also strives to promote cottage industries, rural development, international peace, friendship, and international cooperation, among other things.

13) Legislature with two chambers

The Indian constitution establishes a bicameral legislature at the center, consisting of the Rajyasabha (Council of States) and the Lok Sabha (House of Commons). Kapur & Mishra (2012) mention that "The Lok Sabha is the lower, popular, directly elected house of the parliament. Its maximum strength stands fixed at 550 presently Lok Sabha has 545 members. The people of each state elect representatives in proportion to their population" (p.313). Rajya Sabha is the Upper house of the Indian bicameral legislature.

14) Parliamentary System of Government

The Indian Constitution (Article 74) establishes a parliamentary system of government, in which the council of ministers has real executive power and the president is just a ceremonial ruler. The council of ministers is collectively responsible before the Lok Sabha for all policies and actions. "Lok Sabha can remove the ministry by passing a vote of no confidence. The cabinet in fact, the prime minister has the power to get the Lok Sabha dissolved by the president. The state parliament also works in the similar basis" (Kapur & Mishra, 2012, p.84). It has established a parliamentary system of government.

15) Universal Suffrage without Communal Representation

Universal adult franchise is another boldstep addressed by the Indian constitution. The Article 326 of the Constitution provides for universal adult suffrage under which "all registered men and women above the age of 18 years have the right to vote in elections" (Mellalli, 2015, p.10). Due to the country's high illiteracy rate, no qualifications are required to exercise this right. Except for the schedule castes and tribes and Anglo-Indians, the constitution makes no reservations for seats in parliament.

16) Single Citizenship

India is the single independent and sovereign integrated state. Presently it has 28 states and 7 Union Territories. Chakrabarty (2017) notes that Article 5-11 provide, "All citizens enjoy a common uniform citizenship. They are entitled to equal rights and freedoms, and equal protection of the state" (p.136).

17) Provision of Independent Judiciary

The Indian constitution establishes an independent judiciary (Article 76), which ensures that the government operates in compliance with the provision of constitution. "It serves as a watchdog over individuals' liberties and fundamental rights in both the union and the states. Indian judiciary has an autonomous organization and the states. It works as an independent and powerful judiciary" (Kapur & Mishra, 2012, p.326). Competent judiciary has become an identity of India.

18) Judicial Review

In the case of the High Courts, the authority of judicial review is enshrined in Articles 226 and 227 of the Indian Constitution. In terms of the Supreme Court's Articles 32 and 136 of the Constitution, the Indian judiciary has come to control every element of governmental and public functions through judicial review. The supreme law of the land is the constitution. The Supreme Court serves as the constitution's custodian, protector, and translator, as well as the people's fundamental rights. For this purpose, it exercises the power of judicial review. By it the Supreme Court of India determines "the constitutional validity of all laws made by the legislatures. It can reject any law which is found to be unconstitutional. Indian judiciary has been becoming more active

towards the performance of its social obligation through public Interest Litigation system" (Kapur & Mishra, 2012, p.326). The court of record exercises the power of judicial review.

19) Emergency Provision

The emergency provision in the Indian constitution is one of its most distinctive aspects. The president is granted special powers, known as Emergency powers, by the constitution in the event of armed revolt, external aggression, or failure of the state's constitutional system (Article 352-360). The emergency, which lasted from 1975 to 1977, was widely criticized for its abuse of authority, but the authorities said it was necessary to protect the Indian state from internal and external threats.

20) Special Provision for Minorities

Minorities, schedule castes, and tribes, for example, are given particular rights and provisions under the constitution."It provides for reservation of seats in the legislatures for the people of scheduled castes and scheduled tribes. The reservation is provided in governmental jobs. The reservation is extended up to 2020" (Sharma, 2017, p. 126). With the provision of Article 30(1) of the Constitution, "the Indian society divides into minority and majority for conferring special privilege, confining its availability only to the truly vulnerable social segment is essential as it alone can overcome the handicaps without causing imbalance" (Bhat, 2004, p.468). It establishes special provisions for minorities.

21) Provision regarding language

The constitution makes specific provisions for defining the union's language, regional languages, and the Supreme Court and high courts' languages. Article 343 declares Hindi in Devanagari script to be the official language of the union (1). It also provides the continuance of English language in Art. 343(2). "A state legislature can adopt the language of the province as its official language. The constitution recognizes 22 modern Indian languages under Schedule Eight" (Chakrabarty, 2017, p.148). Thus, the constitution makes specific provisions for defining the position of national languages.

22) A Consolidation of Several Sources

The founding fathers of India drew on a variety of sources when drafting the Indian constitution. Their journey was led by the national movement's principles and ideas. They were influenced by the national push to establish secularism as the ideal. They used several provisions of the Government of India Act 1935, and they were influenced by and adopted some characteristics of foreign constitutions.

The parliamentary system and bicameralism were influenced by the British constitutional structure. The United States Constitution led them to believe in republicanism, judicial independence, judicial review, and the Bill of Rights. They were encouraged by the socialist international movement to accept socialism as a goal. Similarly, the constitutions of Canada, Australia, Germany, and Ireland affected them.

23) Compromise between Judicial Review and Parliamentary Supremacy

The constitution of India adopts distillation of American system of judicial supremacy and English system of parliamentary supremacy. "Parliament in India is not as supreme as the British parliament and at the same time judiciary in India is not as supreme as in the United States of America which recognizes no limit on the scope of judicial review" (Turukmane, 2014, p.63). The constitution compromises between judicial review and parliamentary supremacy.

Observations on Indian Constitution

- i) Indian constitution is very comprehensive. Some provisions seem redundant to be considered a part of constitution.
- ii) There is a strong bias towards centre according to the federal structure.
- iii) Privileges of the parliament and state legislatures are left upon them to decide which has not been codified till date though one does not expect such a provision to be enumerated in the constitution but Indian scenario might entail one such provision.
- iv) The constitution is too bulky and too complex for layman to understand. In fact it is considered a paradise of lawyers.

- v) There is a high degree of protection to civil servants accorded under Art.311.This provision is much misused and abused.
- vi) Anglo Indian community doesn't really require two seats in Lok Sabha anymore. The fears of 1950s are certainly gone and this provision may be repealed to uphold right to equality.
- vii) Schedule (read with art 31B) which accords protection to a law vis-à-vis fundamental right needs to be revisited.
- viii) There is no provision to maintain efficiency of legislature like minimum number of working hour's minimum number of hours to be spent on legislation budget discussion etc.
- ix) The speaker exercises very powerful authority and there may be a case to revisit his /her powers.
- x) Anti-detection in which a voter is free to choose any candidate but a law maker is not free to voice his opinion. This is antithetical for democratic ethos.

A number of crucial fundamental rights are excluded from India's constitution, including economic and social rights such as the right to labor, education, and social security, as well as rest and leisure.It also lacks theoretical consistency and a coherent system of values and beliefs. The constitution- "contains internal contradictions between various provisions which represent competing principles and perspectives, such as modernity and traditionalism, social reform and social conservatism...liberalism and individual rights versus communitarianism and special group rights" (Learner, 2016, p. 69). It is also argued that the constitution of India does not represent the will of the people of India because the Constituent Assembly (CA) was chosen by indirect elections and only around 10 percent people of the country had voting rights on the basis of education, wealth and taxes they were paying, who had elected the Electoral College for CA members.

The Fundamental Rights and Freedoms Enshrined under the Present Constitution of India

When the British parliament passed the Indian Independence Act, 1947, India became independent on 15, August, 1947. After, two years the Constituent Assembly drafted the constitution for the country under the chairmanship of Dr. Ambedkar. The assembly finalized the constitution on 20th November 1949 (Acharya, 2008, p. 365).

The Indian constitution, adopted by the Constituent Assembly on November 26, 1949 came into force on 26 January 1950. It is a comprehensive document containing 395 articles 22 parts and 9 schedules. The constitution has wide provisions regarding human rights and fundamental freedoms in the chapter of preamble, fundamental rights and directive principles of the state policy. The Fundamental Rights of India are contained in the constitution's Part III.

India's constitution guarantees civil freedoms, allowing all Indians to live peacefully and harmoniously as citizens of the country. Individual rights such as equality before the law, freedom of speech and expression, freedom of association and peaceful assembly, freedom to practice religion, and the right to constitutional remedies for the protection of civil rights through writs such as habeas corpus are all common to most liberal democracies. Violations of these rights result in punishments outlined in the Indian Penal Code, which are subject to the judiciary's discretion. Fundamental Rights are defined as human liberties that every Indian citizen has the right to enjoy in order to develop their individuality properly and harmoniously. These rights pertain to all citizens, regardless of race, birthplace, religion, caste, creed, color, or sex. They are enforceable, but only under particular conditions. The constitution focuses mainly on the six fundamental rights. "These are right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedy" (Constitution of India, 1950, Art. 14-35).

The constitution of India 1950 has made a vast list of fundamental rights under part III (Articles 12-35). It has adopted "a number of human rights stated in the Universal Declaration of Human Rights 1948. These provisions of the constitution are called Magna Carta of India. The fundamental rights have been made in the constitution in accordance with the trend of democratic thoughts" (Upadhyay, 2014, p. 26). It has made an extensive list of civil, political, economic, social and cultural rights.

6.4.1 Constitutional Provisions

The Constitution of India 1950 declares specific fundamental rights of the individual out of which, some of these can be claimed only by a citizen of India, while others can equally be claimed by non citizens and group also. The provision of fundamental rights in the constitution of India is based, not any on the principle of natural justice

inherent in British Common Law but also on the American principle of the constitutional guarantees (Sen, 1952, p.32). Part III of the Indian Constitution contains a list of fundamental rights with provision of enforcement of those rights in Art.32 and the limitation for the collective security in Art. 19 cl. 2-6 and Art.22 cl.7. The fundamental rights are given in part III (Art.12-35) of the constitution of India. The aim of Article 12 was to declare an instrumentality or agency of the state having operations outside India and the main objective of Article 13 was to secure paramountcy of the Constitution in regard to fundamental rights. The fundamental rights are binding to legislative and executive both and none of them can be taken away even by a constitutional amendment if it forms the basic structure of the Constitution (Singh, 2013, p. A-41). Balancing the organs of the government, the constitution protects all varieties of fundamental rights- civil, political, social, economic, and cultural rights.

However, Part III of the constitution contain most of the civil rights, but there are political rights as well. Right to speech, assembly and association given under Article 19 are simultaneously civil as well as political rights because these rights facilitate political participation. The rights under Articles 15(2), 17, 23 and 24 represent social rights, but many of the economic rights are established under directive principles. The right to education is confirmed under article 21A and the right to conserve culture preserved in Article 29. Religious linguistic and minority rights are guaranteed under Article 30 (Rai, 2011, p.2). The other provisions of fundamental rights are described as follows:

Right to Equality: Equality is an equally important concept. Article 14 to 18 constitute the right to equality. This right is guaranteed as; "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India" (Constitution of India: 1950, Articles, 14). The constitutional concept of equality in India has been given a wide reach because of the insistence by the courts that its interpretation should be deep and its application meaningful (Gledon, 1991).

The provision of equality belongs to the rule of law. The arbitrary act of executive is beyond the spirit of constitutional law and violation of the Article 14. However, this article concerns with equality before law and equal protection of law but "while

recognizing the paramount nature of the fundamental rights in judicature, recognize the need on considerations of reality to have certain limitations" (Bakshi, 2012, p.25).

Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth

The objective of right to freedom of religion under the Indian constitution was to sustain the principle of secularism in India (Turukmane, 2014, p. 128). All inhabitants of India have religious freedom under Articles 25, 26, 27, and 28 of the constitution. The state is prohibited from discriminating against citizens on the basis of religion, race, caste, sex, or place of birth, or any combination of these factors. No citizen shall be subject to any disability, liability, restriction, or condition based solely on religion, race, caste, sex, or place of birth, or any combination of these factors, with respect to: a) access to shops, public restaurants, hotels, and places of public entertainment; or b) the use of wells, tanks, bathing ghats, roads, and places of public resort maintained entirely or partially with state funds or dedicated to the use of the general public. This article has no bearing on the state's ability to provide particular provisions for women and children. Nothing in this article, clause (2), or article 29 prevents the state from establishing specific provisions for the advancement of socially and educationally disadvantaged persons, as well as the scheduled castes and tribes. (Constitution of India, 1950, Articles, 15)

The Indian constitution ensures equal access of all the citizens to public places. With Article 15 clause (IV) the state can make special provision for the advancement of socially and educationally backward classes of citizens under public interest litigation principles.

Equality of opportunity in matters of public employment

In areas relating to employment or appointment to any office under the state, all citizens shall have equal opportunity.

"No citizen shall, on grounds of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the state".

"Nothing in this article shall prevent parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the government of, or any local or other authority within, a state or union territory, any requirements as to residence within that state or union territory prior to such employment or appointment".

"Nothing in this article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state".

"Nothing in this article shall prevent the state from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the state in favor of the scheduled castes and the scheduled tribes which, in the opinion of the state, are not adequately represented in the services under the state. Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof is a person professing a particular religion or belonging to a particular denomination".

(Constitution of India: 1950, Articles, 16)

In areas of public employment, the state is prohibited by Article 16 of the constitution from discriminating against anyone. However, there are few exclusions where people from a specified domicile area can only apply for specific positions. The state can set aside particular positions for members of the backward classes, scheduled castes, or tribes who are underrepresented in the state's services.

Abolition of Untouchability: This provision was adopted to avoid all kinds of discrimination prevailing in the the society. Untouchability has been outlawed in India and its practice in any form is forbidden. Practice of untouchability is an offence and anyone doing so is punishable by law. The enforcement of any disability arising out of 'Untouchability' is an offence punishable in accordance with law" (Constitution of India: 1950, Articles, 17). The primary purpose of eliminating discrimination was to protect the dignity of the victims.

To abolish untouchability, "Indian parliament passed Anti Untouchability Act, 1955 and Civil Liberties Protection Act, in 1976. For the security and upliftment of backward community, National Commission for scheduled tribes and castes came into operation since 1955" (Dalal, 2009, p.782). Further, critics point out that in spite of prohibition of untouchability with Article 17 of the constitution, the evil still exists in many parts of the country. In India, social exclusion is practiced on the basis of caste and untouchability based exclusion where a group of people being excluded or denial of the rights and opportunities which the majority enjoys.

Abduction of Titles

No title, not being a military or academic distinction is conferred by the state. No citizen of India shall accept any title from any foreign state. No person who is a citizen of India shall, while he holds any office of profit or trust under the state, accept without the consent of the president any title from any foreign state. No person holding any office of profit or trust under the state shall, without the consent of the president, accept any present involvement, or office of any kind from or under any foreign state. (Constitution of India: 1950, Articles, 18).

Under Article 18, the Indian citizens cannot accept any titles conferring from foreign states. However, "the Supreme Court of India upheld the validity of certain awards such as Bharat Ratna and Padma Vibhushan received by Indian citizens on 15 December 1995" (Turukmane, 2014, p. 127).

Right to Freedom of Speech

Individuals have the right to free speech and expression in order to engage in public activities. All citizens have the right (a) to freedom of speech and expression, (b) to assemble peacefully and without arms, (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (f) to practice any profession, or to carry on any occupation, trade, or business," according to the Indian Constitution of 1950. The Constitution of India: 1950, Articles, 19 articulates rights to freedom of speech in the following way:

Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the

said sub clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, in the interest of the sovereignty and integrity of India or public order, reasonable restrictions on the right conferred by the said sub clause.

Nothing in sub-clause (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes or prevent the state from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any scheduled tribe.

Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the state from making any law relating to, (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the state, or by a corporation owned or controlled by the state, of any trade, business, industry or service, whether to the exclusion, complete or partial of citizens or otherwise.

Indian constitution is considered as distinct transcendent of the American constitution. But the restrictions clauses 2-6 of Article 19 renders the guarantees to individual liberty entirely futile. In the same clause, the court is entitled to test the reasonableness of restriction both from the substantive and the procedural point of view. The judiciary can supervise over legislative and executive action. However, "there is no fixed standard of reasonableness provided in the constitution and to draw correct line will be the eternal problem of the political morality" (Sen, 1952, p. 36).

Protection in Respect of Conviction for Offences

No one is convicted of an offence unless the act charged as an offence was performed in violation of a law in effect at the time the offence was committed, and no penalty is imposed that is larger than that which might have been imposed under the law in effect at the time the offence was committed. "No one is prosecuted and punished more than once for the same offense. No one who has been charged with a crime is forced to testify against himself". (Constitution of India: 1950, Article, 20).

To defend the right to life and personal liberty, this article states that no punishment can be imposed that is more than what the law of the land prescribes at the moment. This provision is relevant with the principle that "no criminal law can be made retrospective, that is, for an act to become an offence, the essential condition is that it should have been an offence legally at the time of committing it. Moreover, no person shall be compelled to be a witness against himself" (Turukmane, 2014, p.130). To defend the right to life and personal liberty of the citizen is an obligation of the state.

Protection of Life and Personal Liberty

"No person is deprived of his life or personal liberty except according to procedure established by law" (Constitution of India: 1950, Articles, 21).

Under this provision "no citizen can be denied his life and liberty except by law and a personal life and personal liberty can only be disputed if that person has committed the crime. This liberty do not exempt the right to die. Through the 86th amendment of 2002 incorporating Article 21(A) right to primary education was endorsed as a part of the right to freedom. And it was matured by Right to Education Bill in 2008.

Protection against Arrest and Detention in Certain Cases

With Article 22(1) "No one will be detained in custody without first being notified of the reason for their detention, nor May they be denied the opportunity to consult with and be represented by a lawyer of their choice". Every person who is arrested and held in custody is required to appear before the nearest magistrate within twenty-four hours of their arrest, excluding the time required to travel from the place of arrest to the

magistrate's court, and no one is held in custody beyond that time without the permission of the magistrate. "Nothing in clauses (1) and (2) shall apply - (a) to any person who for the time being is an enemy alien, or (b) to any person who is arrested or detained under any law providing for preventive detention" (The Constitution of India, 1950, p. 20).

Article 22(4) of the Constitution defines the procedure and limitation of preventive detention as "No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless (a) an advisory board consisting of persons who are, or have been, or are qualified to be appointed as, judges of a high court has reported before the expiration of the period of three months that there is in its opinion sufficient cause for such detention. Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by parliament under sub clause (b) of clause (4), or (b) such person is detained in accordance with the provisions of any law made by parliament under sub clauses (a) and (b) of clause (4)" (The Constitution of India, 2008, p. 20).

When a person is detained in accordance with an order issued under any law allowing for preventive detention, the authority issuing the order must inform the person of the grounds for the custody as soon as possible and provide him with the earliest opportunity to object to the order.

"Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority consider to be against the public interest to disclose parliament may by law prescribe - (a) the circumstances under which and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an advisory board in accordance with the provisions of sub-clause (a) of clause (4), (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (b)" (Constitution of India: 1950, Articles, 22).

However, the constitution of India has imposed some restrictions on aforementioned provisions. The provision of Preventive Detention and the suspension of fundamental rights has also been criticized deeply. In the interest of sovereignty, integrity and independence of India, the government can restrict over these freedoms. Right to life and liberty never be suspended. But six freedoms; freedom of speech and expression, freedom to assemble peacefully without arms, freedom to form association, freedom to reside and settle in any part of territory of India and freedom to practice any profession or to carry out any occupation can be suspended during of state of emergency only.

Prohibition of Traffic in Human Beings and Forced Labour

Human trafficking, the trafficking of beggars, and other forms of forced labor are illegal, and any violation of this rule is a crime punishable by law. "Nothing in this article shall prevent the state from imposing compulsory service for public purpose, and in imposing such service the state shall not make any discrimination on ground only of religion, race, caste or class or any of them" (Constitution of India: 1950, Articles, 23). The Indian constitution prohibits human trafficking and forced labor.

This constitutional arrangement under Article 23 is related to right against exploitation. Trafficking of young women across the border, beggar and such other forced labour are outlawed in accordance with Article-23. The contravention of this provision will be an offence punishable. Even though, "the state can impose compulsory service without any discrimination for the public welfare or in the interest of the nation"(Dalal, 2009, p.784). The constitution deals with the right to be free of exploitation.

Prohibition of Employment of Children in Factories

"No child below the age of fourteen years is employed to work in any factory or mine or engaged in any other hazardous employment" (Constitution of India: 1950, Articles, 24).

This provision prohibits the employment of children below the age of 14 years in factory, mine or any other hazardous activities and is an offence. For effective enforcement of the provision of laws the state has passed a number of laws. "Child labour has been prohibited in 15 works like bidi making, domestic servant, tea shops, hotels, dabas, building and construction works, carpet making etc."(Dalal, 2009, p.784). Children under the age of 14 are not allowed to work under this rule.

Right to Freedom of Religion

Freedom of conscience and free profession, practice and propagation of religion come under right to freedom of religion. It enables realization of the goal of social justice. According to Art. 25(1) it is a subject to public order, morality and health and to the other provisions of this part. "All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. Nothing in this article shall affect the operation of any existing law or prevent the state from making any law - (a) regulating or restricting any economic, financial political or other secular activity which may be associated with religious practice; (b) Providing for social welfare and reform or the throwing open of Hindu religious institution of a public character to all classes and sections of Hindus Explanation 1: The wearing and carrying of Kirpans is deemed to be included in the profession of the Sikh religion. Explanation II: In sub-clause (b) of clause (2) the reference to Hindus is construed as including a reference persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions is construct accordingly" (Constitution of India: 1950, Articles, 25). It makes it possible to achieve the goal of social fairness.

Article 25 deals with the freedom of conscience and the free profession, practice, and propagation of religion to all individuals, subject to public order, morality, and health, as well as the rest of this section's provisions. If the state has the authority to regulate or prohibit actions in advance, it can do so if the preceding criteria are not met.

Freedom to Manage Religious Affairs

Subject to public order, morality and health every religious denomination or any section thereof has the right – "(a) to establish and maintain institutions for religious

and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire moveable and immoveable property and (d) to administer such property in accordance with law" (Constitution of India: 1950, Articles, 26).

Under this provision, the state authorizes to every religious denomination or section with freedom, "to manage religious affairs i.e. to establish and maintain institutions for religious and charitable purpose; to manage its own affairs in matter of religion; to own and acquire moveable and immoveable property; and to administer such property" (Dalal, 2009, p.784). However, no things prevent the state to regulate or restrict such freedoms in accordance with laws.

Freedom as to Payment of Taxes for Promotion of any Particular Religion

For promotion of any particular religion the Indian Constitution has exempted freedom to pay taxes- "No person is compelled to pay any taxes, the proceeds of which are especially appropriate in payment of expenses for the promotion or maintenance of any particular religion or religious denomination" (Constitution of India: 1950, Articles, 27). This agreement states that no one will be forced to pay taxes for the promotion and support of any religion.

Religious Worship or Attendance at Religious Institutions in Certain Educational Institutions

Right to freedom of religion is provided to all citizens of India under Articles 25, 26, 27 and 28 of the constitution. "No religious instruction is provided in any educational institution wholly maintained out of State Funds Nothing in clause (1) shall apply to an educational institution which is administered by the state but has been established under any endowment or trust which requires that religious instruction is imparted in such institution. No person attending any educational institution recognized by the state or receiving aid out of state funds is required to take part in any religious instruction that may be imparted in such institutions or to attend any religious worship that may be conducted in such institution or in any premises attached there to unless such person or, if such person is minor, his guardian has given his consent thereto" (Constitution of India: 1950, Articles, 28).

In accordance with this provision, religious communities can set up charitable institutions with their own and all the individuals are set free in attendance at religious worships in all those educational institutions which are partially or fully paid by the state.

Protection of Interests of Minorities

Article 29(1) is aimed to safeguard the cultural rights of the minorities. If any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. No citizen is denied admission into any educational institution maintained by the state or receiving aid out of state funds on groups only of religion, race, caste, language or any of them (Constitution of India: 1950, Articles, 29).

This provision delivers right to any section of the citizens residing in any part of the Indian territory to conserve and protect its culture, language and script i.e. it protects the interests of minorities and provides equal opportunities to all citizens irrespective of religion, race, caste, language, or any of them for the admission in any educational institutions funded by the state.

Right of Minorities

The Indian constitution of 1950 guarantees right to all kinds of minorities of India under Article 30. According to it:

All minorities, whether based on religion or language, have the right to establish and administer educational institutions of their choice. In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority referred to in clause (1), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property in such as would not restrict or abrogate the right guaranteed under that clause. The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

This Article 30 permits equal rights even to minorities to establish and administer educational institutions. During the compulsory acquisition of such property the state should pay equal and adequate compensation and there should not be discrimination among the educational institutions on the ground that a particular institution, managed or run by minority, based on religion or language, while granting aid to them.

Saving of Laws Providing for Acquisition of Estates etc.

Notwithstanding anything contained in article 13, no law providing for – "(a) the acquisition by the state of any estate or of any rights therein or the extinguishment or modification of any such rights, or (b) the taking over of the management of any property by the state for a limited period either in the public interest or in order to secure the proper management of the property, or (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license, is deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19: provided that where such law is law made by the legislature of a state, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the president, has received his assent; provided further that where any law makes any provision for the acquisition by the state of any estate and where any land comprised therein is held by a person under his personal cultivation, it is not lawful for the state to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation

at a rate which is not less than the market value thereof".(Constitution of India: 1950, Articles, 31A).

Validation of Certain Acts and Regulations

Regardless of any judgment, decrease, or order of any court or tribunal to the contrary, none of the acts and regulations listed in the ninth schedule, nor any of their provisions, are deemed to be void or even to have become void, on the ground that such act, regulation, or provision is inconsistent with or takes away or abridges any of the rights conferred by any provisions of this part. (Constitution of India: 1950, Articles, 31 B).

Saving of Laws giving effect to certain directive principles

"Notwithstanding anything contained in article 13, no law giving effect to the policy of the state towards securing all or any of the principles laid down in part IV is deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19; and no law containing a declaration that it is for giving effect to such policy is called in question in any court on the ground that it does not give effect to such policy: Provided that where such law is made by the legislature of a state, the provisions of this article shall not apply there to unless such law, having been reserved for the consideration of the president, has received his assent". (Constitution of India: 1950, Articles, 31C).

Saving Laws in Respect of Anti-National Activities

It was repealed by the constitution (forty-third amendment) Act 1977 (Constitution of India: 1950, Articles, 31D). It was inserted by 42nd Amendment and omitted by the 43rd Amendment. In fact, it sought to save laws which provided for prevention or prohibition of anti-national associations. Such laws were to be immune from challenge on the ground of violation of Articles 14, 19 or 31. The immunity was conferred only Central laws. It was the gift of 1975's emergency period (Sharma, 2017, p. 131).

Right to remedies

The provision of right to constitutional remedy under Article 32 of the constitution is a due respect to the values of 'equal justice for all'. Right to remedies empowers the citizens to move a court of law in case of any denial of the fundamental rights.

The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed. The Supreme Court has power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranted and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.

Without prejudice to the powers conferred on the supreme court by clauses (1) and (2), parliament may by law empower any other court to exercise within the local limit of its jurisdiction all or any of the powers exercisable by the supreme court under clauses (2). The right guaranteed by this article is not suspended except as otherwise provided for by this constitution. Article 31 'A' constitutional validity of state laws not to be considered in proceedings under article 32 (Constitution of India: 1950, Articles, 32).

Right to constitutional remedies is considered as the soul and one of the significant features of Indian constitution. A right without a remedy remains worthless. It becomes valuable when there is an effective means to implement it. Under this provision the citizens can complain to the Supreme Court in case of any violation of their rights given in this part and court has the powers to direction, order and writs in the nature of Habeas corpus, Mandamus, Prohibition, Certiorari or Quo Warranto to restore these rights according to Article 32 and 226 of the constitution. However, these rights can be suspended during the state of emergency.

Power of Parliament to Modify Rights Conferred by This in Their Application

Parliament may by law, determine to what extent any of the rights conferred by this part shall, in their application to - (a) the members of the Armed Forces; or (b) the members of the forces charged with the maintenance of public order; or (c) persons

employed in any bureau or other organization established by the state for purposes of intelligence or counter intelligence; or (d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any force, bureau or organization referred to in clauses (a) to (c), be restricted or abrogated, so as to ensure the proper discharges of their duties and the maintenance of discipline among them. (Constitution of India: 1950, Articles, 33).

Restriction on Rights Conferred by this Part while Martial Law is in force

Regardless of the foregoing provisions of this part, parliament may by law indemnify any person in the union's or a state's service or any person in respect of any act done by him in connection with the maintenance or restoration of order in any area within India's territory where martial law was in effect, or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done under martial law in such area. (Constitution of India, 1950, Articles, 34)

The Role of Legislature

"Notwithstanding anything in this constitution - (a) Parliament has, and the legislature of a state shall not have, power to make laws - (i) With respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by parliament; and (ii) for prescribing punishment for those acts which are declared to be offences under this part, and parliament shall, as soon as may be after the commencement of this constitution, make laws for prescribing punishment for the acts referred to in sub-clauses (ii), (b) any law in force immediately before the commencement of this constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptation and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by the parliament. In this article; the expression 'law in force' has the same meaning as in article 372" (Constitution of India: 1950, Articles, 35).

The Indian constitution has adopted the American principle of judicial supervision of legislature and executive action. The concept of reasonableness tries to harmonize individual liberty with collective interests of the society. So it may be concluded that

the guarantee of fundamental rights in the Indian constitution are not absolute but circumscribed by the power of the state for the needs of public security. There has been an adjustment between the conflicting interests of the individual and the society but the balance is towards the security of the state. Social revolution is leading towards the evolution towards the constitution in which individual liberty is subjected to the need of public security and the constitution of India is no exception (Sen, 1952, pp.36-37).

Liberal Democracy and Fundamental Rights in India

Liberal democracy and fundamental rights are analogous to each other. Democracy requires active protection, and even promotion, of dignity. "Liberal democracy is a liberal political ideology and a form of government in which representative democracy operates under the principles of classical liberalism" (Bhat, 2004, p.18). Also called western democracy, it is characterized by elections between multiple distinct political parties, a separation of powers into different branches of government, the rule of law in everyday life as part of an open society, a market economy with private property and equal protection of human rights, civil rights, civil liberties and political freedoms for all people. To define the system in practice, liberal democracies often draw upon 'constitution, either formally written or unmodified, to delineate of government and enshrine the social contract. After a period of sustained expansion through the 20th century, liberal democracy became the predominant political system in the world (Hanson, 2014, pp. 37-39). It shows that fundamental rights and liberal democracy are parallel to each other.

In fact, human rights are fundamental and necessary elements of liberal democracy. Certainly the idea of human rights emerged from the conviction of natural rights which itself preceded the rise of liberal democracy. In the present day, global politics human rights are being abused by western nations demanding observance of human rights in bilateral relations where it suits their national interests, and openly attacked, threatened and menaced by religious fundamentalists and by militant terrorist groups. Liberal democracy which is the haven of human rights also holds maximum protection and minimum risk to the life, liberty and property of the people including criminals and the terrorists. Taking advantage from ambiguities of the judicial process of the constitutional republics the terrorists and criminals are immune. To avoid terrorism, "it will be necessary to withdraw the protection of judicial process and

human rights from the terrorists. These measured are necessary to save democracy from its internal foes and to uphold human rights" (Jain, 2006, p.143).

Although, India claims to be one of the largest democratic countries in the world, it has little historical background of democracy in the world. In fact, India stayed into democracy as result of a long association with the British as a part of the British Raj. It underwent infinite adoptions. The social peculiarities of India include such factor as caste, regionalism, language, differences and religious pluralism. Social conflict, sometimes violent and at other tunes dormant, largely formed the background for the transition of democratic institutions in India. The transitory phase is a phase of turmoil, largely a bi-product of the attempt at modernization. In the long run, only a democratic society can have a democratic political system. India has to yet adopt democracy as a way of life. But something becomes a way of life only after a long and gradual process involving generations. Nevertheless, despite the numerous trails and tribunals, India has proved to be a shining example of democracy (Shuttle, 1994, p.411). For citizens of democratic countries, liberal democracy has become a way of life.

As propounded by European medieval political thinker John Locke, the liberal democracy encompasses life, liberty and property, in the same vein the framers of modern Indian constitution included these components in the constitution of India, 1950 as the provision of fundamental rights. After the 24th amendment of 1978, right to property has shifted into the constitutional rights. The episode pushed Indian liberal democracy into disputes, even though the adoption of liberal democracy in India has laudable objectives which enable individuals to pursue their personal goals of dignity and maturity in a democratic culture.

The constitution of India has encompassed wide enough lists of fundamental rights which are essential for the development and growth of the personalities of citizens of the country. Originally, the constitution contained seven fundamental rights. But the right to property was repealed in 1978 by the forty-fourth constitutional amendment, reducing these rights to six only which are classified so right to equality (articles 14-18), right to freedom (Articles 19-22), Right against exploitation (Articles 25-28), cultural and educational rights (Articles 29 and 30), and the rights to constitutional remedies (Article 32). "These rights have been protected against infringement by the state excepting certain specific circumstances provided under the constitution"

(Chakrabarty, 2017, p. 100). The right to property is no longer a fundamental right, though it is still a constitutional rights in India after 1978.

There appears a certain positive orientation towards inclusive democracy under Article 16 of the constitution. It targets at the weaker section of the society for affirmative actions. The three groups that receive direct benefit from Indian state-sponsored affirmative action programmes are the Scheduled Castes (SCs), Scheduled Tribes (STs), and diverse and less well-defined residuum known as the 'Other Backward Classes'. Under the Constitution of India parliamentary seats are reserved for historically disadvantaged groups; SCs and STs in federal and state legislative assemblies and for both historically disadvantaged groups and women at all local levels of Panchayat and municipalities. Articles 330 and 332 of the constitution provide the reservation of seats for SCs/STs in the central and state legislatures in direct proportion to their population size and these are mandatory in nature.

Unfortunately, there is no any provision of reservation of seats for women in national and state legislatures unlike for SCs and STs. Therefore, the representation of women in central and state legislative body is not up to mark. The reservation of seats at the local level are comparatively better steps after the 73rd and 74th amendments of the constitution. However, it reveals that the electoral process in India even today is not sufficiently inclusive for women.

Another criticism points out that the fundamental rights in India do not comprise over a number of important economic and social rights such as the right to work, right to rest and leisure, education and social security. Article 34 of the constitution puts restrictions on fundamental rights while Martial law is in force in any area. There is a vast gap between the fundamental rights guaranteed in the constitution and reality in practice.

CHAPTER SEVEN

THE CONSTITUTION OF NEPAL 2015 AND FUNDAMENTAL RIGHTS

Contexts

The Constitution of Nepal 2015 affirms Nepal as a secular, federal, multiparty democratic, and parliamentary republic divided into seven provinces. It defines Nepal as a "multi-ethnic, multi-lingual, multi-religious, multi-cultural country with common aspirations of people living in a diverse geographical region, and being committed to, and united by a bond of allegiance to the national independence, territorial integrity, national interest, and prosperity of Nepal" (The Constitution of Nepal, 2016, pp.1-5). At the same time, there is another perspective of analysis that Nepal is a country of social diversity – a home of three broad ethnic groups: (1) *Khas Arya* (2) *Madhesi* and, (3) *Janajati*, each constituting approximately one-third of national population of the country and the Nepali state has been made on disparity and inequality among different social groups.

Nepal's socio-cultural landscape is comprised of some 120 ethnic and caste groups, living mostly in mixed multi-ethnic settlements. According to 2011 census, the total population numbered 26.5 million, which is comprised of 125 castes. The 2011 census reported that the religion with the longest number of followers in Nepal was Hinduism 81.3% (of the population), followed by Buddhism 9%, Islam 4.47%, Kirat 3.1% and others 0.5% (Shrestha, 2020, pp.1-13). It shows the heterogeneous character of Nepali society.

Nepal's gross domestic product (GDP) for 2018 was estimated at 28.8 billion (USD) and per capita GNP 1,004 (USD), with an annual growth rate calculated at 6.8% signifying one of the fastest growing economies in the world. However, still Nepal ranks in 165th position in the world (MoF, 2019).

The Constitution of Nepal (2015)

The Constitution of Nepal (2015), may be considered the best among the constitutions of Nepal promulgated since 1948. The insertion of extensive list of fundamental rights

is "the result of and freedoms the continuous struggle of the people of Nepal and manifestation and recognition of the carvings of the people for liberty" (Acharya, 2020, p.148). The present constitution of Nepal, is the encapsulation of the collective will of the Nepali people as a whole contains within it 35 Parts and 308 Articles, all the novel, modern and progressive features of a democratic, inclusive, and humanistic polity that the people have aspired for during the several decades of their political struggles and revolutions. The constitution restructured Nepal into a federal republic, moving away from constitutional monarchy and a unitary system of governance.

Since the end of 10 year-long armed conflict in 2006, Nepal has passed through the significant socio-political change with the promulgation of its new constitution 2015. This transformation sets the restructure of the state, creating seven federal provinces, among other key provisions. A new constitution has been promulgated by the first president of the Federal Republic of Nepal on 20 September 2015. "The making of a new constitution in Nepal was intended to institutionalize its democratic gains that it achieved from the various political struggles launched by the people led by the political parties over a period of six decades and half" (Malla, 2017, p. 30). The Constitution of Nepal 2015 is the seventh written constitution of Nepal and the first one promulgated by the people elected Constituent Assembly. It was made on the mandate of the mass movement of 2006 and the provisions and procedure directed under the interim of constitution of Nepal 2007. But the time frame and procedure was reviewed and changed in time and again. Article 138(1) of the Interim Constitution had focused on restructuring of the state and local-self government stating-"There shall be made progressive restructuring of the State with inclusive democratic federal system of governance, by doing away with the centralized and unitary structure of the State so as to end discriminations based on class, caste, language, gender, culture, religion and region". However, some sections of Nepali society complained that the new Constitution curtails the major aspects of inclusive democracy; i.e. identity based federalism, electoral system based on inclusive representation, and reservation/affirmative action.

With Article 138(3) of the Interim Constitution, the Constituent Assembly was entrusted for the final settlement on the matters relating to the restructuring of the State and the form of the federal system of governance. Then the first Constituent Assembly election was held in 2008. The first CA failed to bring the new constitution within the deadlines and the second CA election was held on November 2013 which finally made the new constitution on 20 September 2015. This constitution announced Nepal as the Federal democratic republic nation. Nepal became the youngest republic in the world (Dahal, 2017, p. 151). Thusly, six and half decade's long Nepal's continuous struggle for a constitutional development culminated the present constitution of Nepal 2015.

It will be more advantageous to narrate the constitutional developments after 2008. The process of forming a republican constitution was started with holding the first elections for shaping a constituent Assembly. By July 2008, the first president of the Republic was selected, which even saw the formation of a coalition government led by Maoist leader Prachanda, the Nepali Congress remaining in the opposition (Jaiswal, 2016, p. 2). The total 601 members were in the CA out of them 240 were elected from direct election (First past the post) election, 335 were elected by proportional representation method and 26 were nominated. Total 26 political parties including 2 independent law makers had represented in first CA. The CPN (Maoist) emerged as the largest party with total 229 members. As per the third amendments of Interim Constitution of 2007, "the initial tenure of the CA was for 2 years, the 8th amendments made it for 3 years. Its 4 years of lifetime including two additional years could not promulgate the constitution and dissolved without completion of the mission" (Thapa, 2016, p.34). Again political instability appeared in the country. The political parties were unable to make a consensus.

The dissolution of the first CA caused a political deadlock. With the dissolving of the first CA, the then Maoist Prime Minister Baburam Bhattarai announced that the second CA Election would take place on November, 2012. But, it was forced to step aside in March 2013. With mutual consensus among the major political parties, "an interim government was set up under the leadership of the chief Justice of the

Supreme Court, Khil Raj Regmi. Elections for the new Constituent Assembly were held on November 19, 2013" (Naidu, 2016, p. 6). Nepali Congress stood first with 196 seats and CPN UML and the Maoist Party got 2nd and 3rd position respectively in second CA election. The first meeting of the second CA convened on 22 January 2014 and adopted its rules of procedures on 21 March 2014 and "the debates about the composition of the permanent constitution continued" (Naidu, 2016, p. 6) from CA I to II.

The devastating earthquake of 25 April 2015 in Nepal compelled to the major political parties to seek a consensus on major national issues. However, an unimaginable national crisis was looming large but in the midst natural disaster and political uncertainties, major political parties reached in the 16 points agreements for drafting the new constitution on June 24, 2015, which proved as an ice breaker for the existing stalemate. The drafting process of the constitution geared up. The first draft was sent to the people for their opinion (Thapa, 2016, 34). It was then presented for approval at the CA meeting.

Ultimately, a draft was prepared to promulgate the new constitution through the elected Constituent Assembly (CA). Even though the previous first CA remained unsuccessful, the second CA got a landmark success as a historical task with the constant efforts of eight years. The people's exciting "dream of promulgating the new constitution through the CA has been accomplished with the promulgation of the new constitution by the president Dr. Ram Baran Yadav on September 20, 2015" (Kharel, 2016, p. 198). With years of continuous effort, the second CA achieved a remarkable success.

In the meeting of the CA "a total of 507 votes were cast in favor of the Constitution Bill while 25 votes went against it. Major three political parties of Nepal-Nepali Congress (NC), CPN (UML) and UCPN (Maoist) and a majority of fringe parties voted in support of the Bill" (Adhikari, 2016, p. 40). The members of Rastriya Prajatantra Party-Nepal (RPP-N) voted against the Bill. But, "some Terai based parties boycotted the constitution finalization and adoption process. Of the total 598 CA members, 532 were present at the meeting" (Naidu, 2016, p. 139). But Terai

based all political parties showed their discontent towards the certain provisions of the constitution. They wanted to reinstate citizenship and constituency delineation provisions of Interim Constitution. Such as "delineation of Constituencies based on population, geography and special characteristics, the right to participate in the state structures of the basis of principles of proportional inclusion; and acquisition of naturalized citizenship to be automatic on application" (Jaiswal, 2016, pp. 6-7). The government of Nepal had tried to address their demands through the first amendment of the Constitution of Nepal, but still they have some more complaints. However, "the Constitution of Nepal 2015 has incorporated the popularity will of the people; it has provided more rights than rest of the previous constitution and has provided duties for the first time in the constitutional history of Nepal" (Dahal, 2017, pp. 155-156). So, it can be booked as wonderful attainment in the constitutional discourse of Nepal.

Republicanism, federalism, secularism and inclusiveness are the major new characteristics of the constitution of Nepal 2015. Its preamble declares that a commitment to establishing the foundations of socialism by adopting "democratic norms and values, such as people's competitive multiparty democratic governance system, civil liberty, fundamental rights, human rights, adult franchise, and periodic elections, complete press freedom, independent, impartial, and competent judiciary, and the concept of rule of law".

Major Characteristics of the Current Constitution of Nepal

Nepal has finally succeeded in promulgating a new constitution on September 20, 2015, through the second term of the constituent assembly, shifting from centuries-old monarchy to federal republic (CA).

The Interim Constitution of Nepal 2007 (2063), which was framed to allow for the election of a Constitution Assembly in order to make a new constitution. By May 28, 2010, the new constitution was supposed to be in place. The house was unable to complete the task due to disputes among political parties on a number of matters. As a result, the house's term was repeatedly extended. "On May 25, 2011, eventually the supreme court of Nepal ruled that the repeated extension of the interim constitution was not right. It reasoned that an elected house is not supposed to extend its term

again an elected house going beyond the reasonable electoral mandate" (Naidu, 2016, 138). The Supreme Court ruling marked a crunch moment in the debate over the constitution.

The Constituent Assembly was dissolved on May 28, 2012, and new elections for the Constituent Assembly II were held on November 19, 2013, under a special agreement reached by the major parties and approved by the president. After that, the political leaders promised to write a new constitution within a year. The new legislature stated unequivocally that the new constitution would be enacted on January 22, 2015.

However, there were different arguments on issues including "system of governance, judicial system and federation issues like number, name and areas of the provinces to be carved, the constitution could not be finalized and promulgated in time. Ultimately it becomes possible to finalize and adopt the constitution" (Naidu, 2016, p.139). The new constitution embraces four major fundamentals of republicanism, federalism, secularism, and inclusiveness.

The constitution was written in a participatory process by an inclusive CA. The major three political parties in Nepal, the Nepali Congress (NC), the Communist Party of Nepal (CPN-UML), and the United Communist Party of Nepal (UCPN-Maoist), as well as a majority of fringe parties, voted in favor of the Bill, with only a few votes against it. Before the promulgation, several attempts were made to create a broader political agreement by holding extensive discussions. Members of Nepal's Rastriya Prajatantra Party voted against the bill (RPPN). Some Terai-based parties, on the other hand, boycotted the process of finalizing and adopting the constitution. "Out of the total 598 CA members 532 were at the meeting. The Bill of the new constitution was also accepted with more than a two-third majority on September 16, 2015" (Singh, 2017, p. 1). It advocated for Nepal's political system to remain stable.

1) Provision of Preamble

The Preamble has the following crucial features: i) The constitution was adopted and announced in the name of 'We the people of Nepal, in exercise of the sovereign power inherent in us'; ii) The people of Nepal have the sovereign power and the right to autonomy and self-rule by maintaining Nepal's independence, sovereignty, geographical integrity, national unity, freedom, and unity; iii) It recalls historical

Peoples Movements and reminds people of the struggles and sacrifices made by people for national interest, democracy, and freedom; iv) It recognizes the martyrs, disappeared, citizens and the victims of people's movements; v) It declares that the feudal, autocratic, centralized, and unitary system of government has ended all forms of discrimination and oppression in the past; vi) It affirms its commitments to Nepal's multiethnic, multilingual, multicultural, and diverse geographical specificities, as well as the end of discrimination based on class, ethnicity, region, language, religion, and gender discrimination, including all forms of racial untouchability, in order to protect; vii) It also conveys the will to build an equal society based on the idea of proportional inclusion and participation, in order to secure a fair economy, prosperity, and social justice. viii) People's commitment to a competitive multiparty democratic governance system, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, total press freedom, and an independent, impartial, and competent judiciary, as well as the notion of the rule of law (Naidu, 2016, P.139).

It is argued that the framers of the constitutions, particularly the representatives of two larger parties (Nepali congress and CPN-UML) have never fully accepted the idea of Nepal as a federal republic state. Such lack of commitment can be observed by its omission in the title of the constitution. It would be much better if the name could have replaced with 'Constitution of the Federal Republic of Nepal'. No recognition of 'Madhes Movement' in the Constitution has disappointed to the concerned community even today. National *Dalit* Network of Nepal had proclaimed that the Preamble of the constitution had to declare the state to be "Just and equitable and free from untouchability".

2) Written Constitution

The new constitution has 35 parts, 308 articles, 9 schedules, and a preamble, and it contains many innovative and progressive measures, despite the fact that it is a long text. The first and most important explanation appears to be political. Things have gotten overly complicated as a result of the parties' mistrust. Many issues have been thoroughly addressed in the constitution. This constitution is not only the federation's constitution, but also the constitutions of all provinces and a significant statute for municipalities. The uniqueness of the Constitution of Nepal, as has been remarked, is

that it was not written by a committee or council, but by an elected Constituent Assembly. However, the Constitution is commented as it is overly wordy and repetitive.

3) The Constitution as a Central Document of the Nation

This provision connotes the supremacy of the constitution. This constitution, according to Article 1, is Nepal's fundamental law. All laws that are incompatible with this constitution are void to the degree that they are incompatible. The Supreme Court will declare the inconstancy under Article 133. The constitution also emphasizes that it is everyone's responsibility to uphold the constitution.

4) Multiculturalism and Secularism

According to the concept of secularism and multiculturalism, all religions and cultures are equal before the state and no religion and culture shall be given preference over the others. Despite with the the largest Hindu majority in Nepal, the state continued to be a secular state with the motive of political divergence to the religion due respect to pre-historic traditions and religious and cultural freedoms. Nepal's constitution states the country to be an independent, indivisible, sovereign, secular, and inclusive state in Articles 4 and 26. The demarcation linked to this clause makes it clear that the term 'secular,' as defined above, refers to the safeguarding of historic religions and cultures, as well as religious and cultural freedom. Article 26 of the Constitution ensures the freedom to proclaim, practice, and protect one's religion according to one's personal convictions.

5) Sovereignty Inherent to the people

The system shall be created by people; hence, the sovereignty and state authority of Nepal are vested in her people. Article 2 has stated that their exercise shall be as stipulated in this constitution. It is a non-amendable provision of the constitution, as stated in Article 274, that no modification to this constitution shall be made in such a way as to jeopardize the people's sovereignty.

6) A Single Citizenship System

Generally citizenship determines an individual's status in the state including their rights and obligations. The major citizenship provisions are addressed in Article 11 of the Nepali constitution. Unlike the US constitution, which provides for dual citizenship (federal and state), the Nepali constitution provides for single citizenship (2). According to Article 11 clauses (1), (2), and (3), in order to acquire citizenship by ancestry, one must have a Nepali father or mother at the moment of birth (3). Despite the fact that the mother and father are unknown, each child has a guardian (5). If a foreign woman marries a Nepali citizen and aspires to become a citizen of Nepal, she can do so under federal law.

7) Provision of Fundamental Rights

Part III of Nepal's current constitution has a broad list of fundamental rights. Article 18 of the Constitution includes a provision for affirmative action for historically biased or disadvantaged communities, among other things (3). Article 42 provides for the right to integration and involvement in the state system, which extends to all communities in the country. From article 16 to 48, a list of essential rights is accessible.

The titles of the fundamental rights mentioned in the Constitution of Nepal 2015 are as:

Rights to live with dignity, (16), Right to freedom (17), Right to equality (18), Right to communication (19), Right to justice (20), Right of victim of crime (21), Right against torture (22), Right against preventive detention (23), Right against untouchability and discrimination (24), Right relating to property (25), Right to freedom of religion (26), Right to information (27), Right to privacy (28), Right Against exploration (29) Right to clean environment (30), Right relating to education (31), Right to language and culture (32), Right to employment (33), Right to labor (34), Right relating to health (35), Right relating to food (36), Right to housing (37), Right of women (38), Rights of the child (39), Right of Dalit (40), Rights of senior citizens (41), Right to social justice (42), Right to social security (43), Right of the consumer (44), Rights against exile (45), Rights to constitutional remedy (46), implementation of fundamental rights (47) and Duties of citizens (48). (pp. 9-26)

To honour the commitments expressed in this part the state must uphold fundamental rights by passing and implementing the required major legislation. Mainly, women's rights as well as the rights of gender and sexual minorities seeking appropriate legislation and implementation.

8) Specific Independent Constitutional Commissions are established.

The Nepalese constitution establishes the Dalit Commission, Janajati Commission, Medhesi Commission, Tharu Commission, and Muslim Commission, as well as the national human rights commission. These commissions "are created outside the framework of Fundamental Rights, and in different chapters, have a mandate to recommend changes in laws, policies, and practices of areas for continuing and protection the fundamental rights" (Bhandari, 2016, p.290). It is worried that the provision of over number of constitutional commissions may lesson their significance.

9) Inclusiveness

The term 'inclusion' is defined as it is to fulfill the physical, emotional, and basic needs of all the people, groups or castes. It has to be achieved by respecting their dignity and their own culture and also reducing the disparities between and advantaged groups and reducing gap in existing opportunities and access. In addition to this, it is to help to build a just society by ensuring rightful sharing of power and resources for their active participation as a citizen (Thapa, 2017, p.17). The subsequent arrangements of the government are supposed to follow the aforementioned motive of the inclusiveness.

Nepal's constitution proclaims the government's intention to construct a just society based on the idea of proportional inclusion and participation, while also assuring economic equality, prosperity, and social justice. The constitution encompasses "the inclusion through the provision of preamble, fundamental rights, directive principle, political participation power sharing, commissions and political parties" (Bhandari, 2016, p.278). The preamble of the constitution has also clearly stated to build an egalitarian society founded on the proportional inclusive participatory principles. But there is a counter argument that "the constitutional provisions related to inclusion are placed as vague, ambiguous and largely non operative. At top of that, ethnic identity is rejected in framing of the federal structure" (Hachhethu, 2017, p. 376). But there is

no doubt, compared to the past constitutions the 2015 constitution is more liberal, inclusive and flexible. Dissatisfactions can be addressed by reforms as prescribed in the Constitution.

10) Establishment of Directive Principles and State Policies

The state's instructions for governance are also laid forth in the constitution, which includes directive principles, policies, and obligations. While the policies proposed by the legally mandated thematic committees are based on contemporary needs. Long-term principles, policies, and duties are discussed in Chapter 4. As stated in Article 49, it is the responsibility of the state to "mobilize the necessary resources and means for their implementation". Despite the fact that citizens cannot claim these values and policies as a matter of right, Article 53 of the Constitution compels the government to "produce an annual report on its activities and achievements in implementing these principles, policies, and obligations".

11) Outlining National Language and Language of the Nation

As stated in Articles (6) and (7), Nepali remains the official language of Nepal (7). In addition to Nepali, all mother tongues spoken in Nepal must be considered national languages (Article 71); a province may choose one or more national languages that are spoken by the majority of the people in that province as the official language of that province, as specified by provincial law. Article 7 accepts the term "as-other." Language issues will be decided by the Nepalese government based on the recommendations of the language commission, which will be constituted by the federal government within a year. This panel has the authority to determine the criteria for a language's official status and make a proposal to the government. It is also to make a recommendation to the government on the steps that should be taken to protect, promote, and develop languages, as stated in Article 287. (6).

12) Federalism with Three Layers

In part 5, the constitution has restructured Nepal as a federal country with three layers of government. After the enactment of the 2015 Constitution the country became a federal democratic republic thus breaking the 240 years' history of kingdom and ending the unitary system (Adhikari, 2020, p. 99). As- other is recognized under

Article 7 of the Constitution. The Nepalese government will decide on language issues based on the recommendations of a language commission that will be constituted by the federal government within a year. This panel has been given the authority to determine the criteria for a language's official status and make a proposal to the government. It is also to make a recommendation to the government on the steps that should be taken to protect, promote, and develop languages, as stated in Article 287 (6) of the Constitution. A National Natural Resources and Fiscal Commission has been established to define broad grounds and procedures for the allocation of money from the federation consolidated fund to federal, provincial, and local governments in accordance with the constitution and legislation (Articles 250-251). The federal commission will approve the provincial border demarcation, and the provinces will be named by a two-thirds majority in the provincial legislature (Article 295).

To achieve the federal objectives, part 5 of the constitution sets out some key principles. At first, the state powers of Nepal shall be exercised by all the three levels of government. Federal, provincial and local bodies work in accordance with this constitution. Secondly, the power of each level of the structure has been set out in the given schedules and shall be exercised in accordance with this constitution and the federal law. Then the constitution also sets out concurrent/shared power of the federations and the province, and federation province and the local level (Bhandari, 2016, p.310). "The 'federalization' initiative must be backed up and boosted to accelerate its effective implementation, as work thus far has been unsatisfactory" (Adhikai, 2020, p. 639).

13) Parliamentary System of Governance

At the federal and provincial levels, Nepal continues to be a parliamentary system. Nepal's form of government, according to Article 74, shall be "multiparty, competitive, federal democratic republican parliamentary system based on plurality" at the federal level, it has a bi-cameral parliament; president to be elected by the national parliament as well as the provincial legislative body. As provisioned in Article 105(5) of the Nepal's constitution, the prime minister is elected by the legislative-parliament based on majority. There are three significant differences from the Westminster system. First, the prime minister cannot dissolve parliament, and

second, no vote of no confidence against the prime minister can be proposed for two years after his or her election. Third, any no-confidence motion in the House of Representatives that seeks to remove the prime minister must include a proposal for a new prime minister to take his or her place immediately. Thus, states that "the name of the member proposed for prime minister should be mentioned when tabling the no confidence motion under clause (4)" (Naidu, 2016: p.145). It is a perpetual way for the formation of the government.

14) Executive power assigned in the Council of Ministers

The Constitution of Nepal is broadly based on principles of separation of powers where "the executive powers of the country shall vest in the council of ministers while the president would be constitutional head of the country" (Kharel, 2019, p.122). (1) The president shall exercise his or her rights and duties as provided for by this constitution and federal laws; (2) while exercising rights under clause (1), the president shall perform all works with the consent and recommendation of the council of ministers, except where the works must be performed expressly under the recommendation of some agency or official. Such consent and suggestion shall be delivered to the president through the prime minister, and (3) the decision or order made in the president's name as provided for in section (2), as well as the certification of credentials in that respect, shall be carried out in accordance with federal legislation. "As an Institutional head, the president is to promote national unity of Nepal. Similarly, the constitution states that 'compliance and protection of the constitution shall be the main duties of the president'" (Naidu, 2016, p.146). Thus the president is supposed to promote Nepal's national unity.

15) Constitutional Bench and Independent Judiciary

Multiparty democracy, individual independence and freedom, fundamental rights, human rights, adult franchise, periodic elections, press freedom, the rule of law, and a fair, independent, and capable judiciary are all core democratic values reflected in Nepal's constitution. Part 11 of the constitution establishes a constitutional bench, which will allow the Supreme Court to focus on constitutional matters. This bench will be made up of five judges. The chief judge, the head of the constitutional commissions, and members of the constitutional commissions will all be nominated

by the constitutional council. "The judicial council will nominate the judge of the Supreme, High and District Court, the judicial system is an integrated one. Apart from Supreme Court, Nepal will have High court in each province and District Courts as necessary" (Bhandari,2016, p.278). The Nepali judicial system has two distinguishing features: a 'Constitutional Bench' and an 'Independent Judiciary'.

16) Elections in a Mixed System

In terms of the election system, a hybrid system combining FPTP (First Past the Post) and PR (Proportional Representation) has been chosen (Proportional Representation). The House of Representatives of the federal Parliament will have 275 members, with 165 elected using the FPTP system and 110 using the PR system. Similarly, the National Assembly will have 59 members, 56 of whom will be elected by an electoral college made up of interested provincial assemblies and local governments, and three of whom will be nominated by the President (on the recommendation of the government).

The legislature of federal provinces will be unicameral. The legislatures of the seven states will have a total of 550 members, with 60 percent of them elected using FPTP and 40 percent using PR. The state's chief minister will be elected by the provincial assembly, while the province's head will be selected by the President.

17) Political Party Provisions in the Constitution

Articles 269-272 continue the provisions on political party registration and operation, requiring them to register their names with the Election Commission in line with the procedures established by law. The political party's constitution and bylaws should be democratic. There should be a mechanism for the political party to elect office bearers at the Federal and Provincial levels at least once every five years, as well as proportional participation in the executive committees at various levels of the party to reflect the variety of Nepal.

18) Articulation of Emergency Powers

If a grave emergency threatens Nepal's sovereign territorial integrity or the security of any part of the country, such as war, external aggression, armed rebellion, extreme

economic disarray, natural disaster, or epidemic, the president may declare or order a state of emergency for the entire country or any specified part of it (Article 273). In such a serious circumstance, the relevant province may request that the Nepalese government declare a state of emergency, which will be enforced, by proclamation or order.

The president may suspend the fundamental right specified in part 3 while issuing an emergency declaration. However, while a proclamation or order issued under this article is in effect, some key fundamental rights, such as the right to a constitutional remedy and the right to habeas corpus, are not suspended. "In case the petition is filed, the court may arrange the compensation and punish the guilty according to federal law. The president may at any time during its continuance revoke the proclamation or order relating to state of emergency" (Kharel, 2016, p.42). The president may withdraw the state of emergency at any moment.

19) Establishment of Constitution Amendment of Procedure

Article 274 allows amendments to the constitution if they do not jeopardize Nepal's self-rule, sovereignty, territorial integrity, or people's sovereignty. A proposal for a constitutional amendment can be proposed to either chamber of the federal legislature. Within 30 days after its presentation in either chamber of the federal legislature, the measure must be published for the general public's review. Flexibility is one of the significant provision of this constitution, one which will ensure that the changing aspiration of the people of Nepal will find full expression in the constitution although it is argued that amendment on boundary and jurisdiction of provinces is different and complex. No restrictions have been laid down on amending the constitution to further democratization of the document or consolidation of the preambular aspirations.

20) Separation of Powers and Supremacy of Law

The Constitution of Nepal has followed the horizontal system of separation of powers among the legislative, executive and judiciary. The Westminster model influences the system of governance, and ruling power is distributed among the executive, legislative, and judicial branches. The judiciary, as an apex court with the capacity to interpret the constitution, is entrusted with the final adjudicating power.

21) Provision of Directive Principles, Policies and Obligations of the state

Part 4 of the constitution contains the state's directive principles, policies, and obligations (Articles 49 to 55). According to Article 49, "The directive principles, policies, and obligations set forth in this part shall be the guiding principles for the state's governance" (LBMB, 2016, p. 27). The state must mobilize or cause to be mobilized the necessary means and resources to carry out the principles, policies, and commitments outlined in this article. Similarly, article 50 is concerned with the directive concept, while article 51 is concerned with the state's policies. Policies linked to national unity and national security, the state's political and governance structure, social and cultural transformation, the economy, industry and commerce, agricultural and land reforms, and development are among the sub-clauses of article 51. Article 52 indicates "the obligations of the state as it shall be the obligations of the state to make Nepal a prosperous and affluent country by protecting and promoting fundamental rights and human rights, pursuing directive principles of the state and gradually implementing policies of the state" (Bhandari, 2016, p.283). According to this provision of the constitution, it is the state's responsibility to preserve and promote fundamental rights in order to make Nepal a prosperous country.

According to Article 53, the government of Nepal is required to "present to the president an annual report detailing the efforts taken and achievements made in implementing the directive principles, policies, and obligations of the state"(LBMB, 2016, p. 43). A committee in the federal parliament will monitor and assess whether the directive principles are followed during the constitution's implementation. Article 55 states in this regard that no question shall be made in any court as to whether or not any matter contained in Part 5 has been implemented.

22) Adult-oriented Franchise System

The universal franchise system is guaranteed under Articles 84(5), 176(5), and 222(5) of the current constitution. According to the aforementioned articles, every person above the age of 18 is eligible to vote in federal, provincial, and local government elections. It is the foundational concept of a democratic society based on equality.

23) National Anthem, Flag and Symbol

Schedules 1, 2 and 3 determine the national flag, anthem, and national symbol, according to articles 8(2), 9(1), and 9(2) of the constitution.

24) Referendum Provision

There is a referendum clause in Part 32 of Article 275 of the constitution. Article 275, clause (1), stipulates that a two-thirds majority of the total number of members of the federal parliament can call a referendum on any topic of national concern. It is indicated in clause (2) concerning a referendum.

Observation on new Constitution

The constitution of Nepal consists of all the important features that are necessary for a thriving federal democratic state (Adhikari, 2016, p.123). It envisions a more inclusive state and a more participatory democratic system than previously. It also promises to strengthen the people's competitive multiparty democratic governance system, civil liberty, fundamental rights, adult franchise, regular elections, total press freedom, and a rule of law notion. To maintain and promote unity in variety, social and cultural solidarity, tolerance, and harmonious attitudes, the state declares multi-ethnic, multi-lingual, multi-cultural, and multi-geographical policies by ending discrimination based on class, caste, religion, language, region, and gender. The new statute is very flexible as everything in it can be modified, except for clauses on nationality, indivisibility and sovereign power provided to the people.

Whatever constitutional models experienced in Nepal in the past, none of them has survived for an adequate time. All the previous constitutions died because of failure of Nepalese leaders to stick to institutions and rule of law. However, federalism, republicanism, secularism, inclusivity with proportional representation are considered as major attributes of new constitution but still there are certain critics from Tharu and Madhesi community on the provision of constituency delineations. They demanded that the constituencies of the Legislative-parliament be divided on the basis of population alone against the firm determination of three major political parties of the time who wanted to make representation based on both population and geography, in

order to include the vast hilly and mountainous areas that have a low population density.

The new constitution has also offered a long range of fundamental rights, including economic, social, and cultural rights, which can be asserted through the Provincial High Courts and Supreme Court as part of the right to redress.

The citizenship provisions which has become a debating issue under the new constitution authorizes women to confer citizenship to their children, on par with men, but women groups and the Madhesi community still argue that further change is necessary lest the provisions make women "second class" citizens. They doubted that the new Constitution likely to face a number of challenges in its implementation (Singh, 2019, p. 169). However, for non-fulfilment of this clause, meaning where a person whose 'father or mother' is a Nepali, s/he is entitled to get citizenship by naturalization and naturalized citizens are barred from holding vital government offices. Making an assessment on constitution building process of Nepal through CA, Deepak Thapa (2019) analyzes "The new constitution adopted in 2015 water down some of these provisions, but it also gave birth to a federal Nepal" (p. x). In this plight, Krishna Hachhethu (2017) puts his view- "the mission of making Nepali state in the form of inclusive democracy remains as an unaccomplished task since the new constitution, promulgated in September 2015 by CA-II, tracks back from a lot of progressive contents entertained by CA-I" (p.367). The main three political parties argued that the geo-political situation, and the large population of neighbouring countries India and China, compels them to restrict "unwanted population growth." Further they insisted that 'this is the unique feature of Nepali Constitution' and only the narrow minded people criticize such welcoming provision.

In Nepal's constitution, the need of reforming political party institutions cannot be overstated. However, there are no clear regulations in the constitution regarding financial openness inside political parties. It hasn't addressed the issue of campaign money and the corruption that has resulted from it. Despite its importance and heated national debates, the constitution lacks an electoral threshold provision. As a result, Nepal will continue to be a country with a plethora of little political parties. By focusing on the rights specified in Part 3 of the constitution, it was possible to make many of the constitutionally protected fundamental rights immediately enforceable. It

is stated in Article 47. "For the enforcement of the rights conferred in this part, the state shall make legal provision, as required, within three years of the commencement this constitution."

For proportional inclusion, it was not required to construct the ethnic group of 'Khas-Arya.' This group has always been competitive and does not require government protection in this situation. Any proportional representation system must be built on the notion of inclusion, as well as the approach to ensuring a proper degree of representation and participation of underprivileged populations in state organizations. Women, Dalits, Janajatis, Madhesis, and minorities are five groups in Nepalese society that want proportional inclusion.

Based on existing socio-political indices, the concept of inclusion should operate within these groups for those who are underprivileged and underrepresented. Article 176 (6) explains how the concept of proportional representation in federal and provincial elections is complicated by the creation of various organizations, leaving the question of how inclusion would operate in the current circumstance unanswered. It was feasible to better structure the provisions, offering the best reflection to the leaders' political concessions.

It would have been preferable to draft the constitution before deciding on the names and boundaries of the provinces. In such instance, the federal commission would only have to deal with the less significant issues, such as those regarding special constructions. Even as the Nepali constitution considered as the first country to ensure rights of women as fundamental right under article 38 and a broad-based living document for the women still fails to knock down all boundaries while transferring her identity to her young ones. If a man marries a foreigner, the children born from them would get citizenship without any hassle while same treatment is not there with woman marrying a foreigner. According to women rights activities this is huge gender bigotry. A naturalized citizen to hold any form of judicial, constitutional and legislative top posts while the same provision has not been enshrined in other SAARC nations. Even though, Nepal is a residence of more than 81% Hindus according to 2011 census, the country has been declared as secular state despite dissatisfactions of the majority of people.

As S. D. Muni (2017) points out, despite many impressive features, the new constitution has remained controversial. It has been disapproved by few segments of society such as *Madhesi*, *Janajati*, and women. They are agitating as their aspirations have not been substantially addressed. There are six disappointed groups, namely, the Madhes-based parties, the *Janajati* groups, women (feminists), monarchists, Hindu fundamentalists and splintered extreme Maoists. Mainly they have discontentments on the carving of federal provinces, proportional representation, citizenship rights, the identity of the Nepali State, and its ideological parameters (pp. 15-19).

Provisions of Fundamental Rights

The constitutional history of Nepal has undergone a numbers of ups and downs since the beginning of Nepal's Government Act 1948. Due to the absence of people's participation in constitution building process all the six constitution from the government of Nepal Act 1948 to the Interim Constitution of Nepal 2007 failed to internalize the interest and aspirations of the people and the changing patterns of the time. It is needless to say that the earlier five constitutions got their premature death due to people's ownership on them. But the Interim Constitution of 2007 was only for transitional arrangement till it was replaced by the new permanent Constitution prepared by the Constituent Assembly.

Tripathi rightly describes:

As a result of the various armed and unarmed revolutions / movements in the recent past, the first Constituent Assembly was democratically elected and entrusted primarily with the duty of making a new democratic constitution ensuring direct and wider participation of the common people adopting the method and process of collecting and assimilating their opinions and suggestions. As the new constitution in the offing likely to be made by the people through their democratically elected representatives in the Constituent Assembly, it is hoped that this time the common Nepali people will not only realize ownership of the constitution rather they will also be guided by a sense

of patronizing the constitution. Thus, the new constitution promises to be a 'people's constitution' in the real sense of the term. (Tripathi, 2015, p. 36)

The constitution of Nepal (2015) offers a long list of fundamental rights under part III (Article 16-48). In fact, the constitutional provisions of fundamental rights are the indicators to evaluate in what extent the constitution is people's friendly. "It is fallacy to regard fundamental rights as a gift from the state to its citizens. The Constitution does not confer fundamental rights. It conforms their existence and give them protection" (Bhattarai, 2073, p.72). It is directly concerned with the general citizens or the entitlement holders of the country.

The latest two constitutions of Nepal are liberal towards human rights. The present constitution is a step forward to provide additional fundamental rights to the people, but all of the fundamental rights conferred by this constitution are not completely new, which are based on the previous constitution. Like, the Interim Constitution of Nepal 2007 and the Constitution of India 1950, the Constitution of Nepal 2015 too clarifies that the fundamental freedoms of speech and expression, movement, reside across the country, hold peaceful assembly, form union and association, or carry out trade and commerce are the sacrosanct and inviolable rights within the meaning of fundamental rights. And rest of the rights are also guaranteed with the same kind of assurances. The progressive and due transformations of the fundamental rights from interim constitution to the present constitution can be observed as follows (Thapa, 2016, p. 48).

- a) Total 21 fundamental rights were provided by the Interim Constitution of Nepal 2007 whereas 31 fundamental rights are provided by the constitution of Nepal 2015.
- b) 19 fundamental rights are unchanged but slightly or completely changed in title (Right to publication, broadcasting and press is provided on the title of Right to communication).
- c) Six new fundamental rights are introduced.
- d) Six new articles are created for the fundamental rights separating from their combined form of the Interim Constitution.
- e) The definition, interpretation and scope of most of the fundamental rights are broadened.

A comparative look at the Interim Constitution of Nepal, 2007 shows that, in contrast to the 21 fundamental rights incorporated in that constitution, the present constitution has extended the number to 31, undoubtedly it seems to be rather ambitious and comprehensive (Tripathi, 2015, p.37). The extended list of the fundamental rights available under article 16 to 46 of the constitution of Nepal are as follows:

Table 7.1: Fundamental Rights Guaranteed by the Constitution of Nepal 2015

S.N.	Type of Rights	S.N.	Type of Rights
1	Right to live with dignity - Article 16	17	Right to language and culture with dignity - Article 32
2	Right to freedoms - Article 17	18	Right to employment - Article 33
3	Right to equality - Article 18	19	Right to labour - Article 34
4	Right to communication - Article 19	20	Right relating to health - Article 35
5	Right to justice - Article 20	21	Right to food - Article 36
6	Right to victim of crime - Article 21	22	Right to housing - Article 37
7	Right against torture - Article 22	23	Right to women - Article 38
8	Right against preventive detention - Article 23	24	Right to the child - Article 39
9	Right against untouchability and discrimination - Article 24	25	Right to Dalit - Article 40
10	Right to property - Article 25	26	Right to Senior Citizens - Article 41
11	Right to religious freedom - Article 26	27	Right to social justice - Article 42
12	Right to information - Article 27	28	Right to social security - Article 43
13	Right to privacy - Article 28	29	Right to the consumer - Article 44
14	Right against exploitation - Article 29	30	Right against exile - Article 45
15	Right to clean environment - Article 30	31	Right to constitutional remedies - Article 46
16	Right to education - Article 31		

- Implementations of fundamental rights - Article 47

- Duties of citizens - Article 48 (The Constitution of Nepal, 2016, pp. 9-26).

These comprehensive catalogue of the fundamental rights incorporated in the present constitution of Nepal are alike with accepted principles of human rights jurisprudence embodied in the Universal Declaration of Human Rights UDHR, (1948), ICCPR (1996) the International Covenants on Economic, Social and Cultural Rights (1966), the covenant on Elimination on All forms of Discriminations against women (1979), The Child Rights Convention (1989) and the constitutions of some democratic countries like USA, England, India etc. The fundamental rights shaped within the constitution of a certain country are affected by the political economic, social, cultural and religious factors of the time. As a result, the contents of the fundamental rights may vary from nation to nation depending on the level of their development, economic growth as well as social and political consciousness. In fact, the large list of the fundamental rights under the present Nepalese constitution is broad-based elaboration of the basic components of John Locke's liberalism.

A general classification of these fundamental rights indicates that "11 of the rights are concerned with civil and political rights of the citizens whereas 12 of them are closely related to the economic, social and cultural rights" (Tripathi, 2015, p. 39). The majority of these rights go equivalent to the international human rights framework.

The common fundamental rights provided by the Interim Constitution of Nepal 2007 and the constitution of Nepal 2015 can be examined as follows:

1. Right to Live with Dignity

The Interim Constitution of Nepal 2007 has merged this right in Article 12 under 'right to freedom' whereas the constitution of Nepal 2015 has made a separate article, which means the present constitution has given greater emphasis on the right to life. Regarding "right to live with dignity, article 12 (1) of the Interim Constitution and Article 16 (1) and (2) of the present constitution read exactly the same. This right is consistent to article 3 of UDHR and Article 6 (3) of ICCPR" (Thapa, 2016, p. 48). The current constitution has written in the same way.

The provision of Article 16 (1) puts "No law shall be made providing for the death penalty to any one" was incorporated to adopt the provision of Article 1 of ICCPR Optional Protocol, 1989 (CA Report, 2009, p.15). This provision is more apparent than the provision of US Constitution-"No person shall be deprived of his life, liberty or

property without due process of law" and the provision of Article 21 of the Constitution of India 1950-"No person shall be deprived of his life and personal liberty except according to procedure established by law" (CA Report, 2009, p.152). Thus, Nepal has become second South Asian country to avoid death penalty after Bhutan.

2. Right to Freedom

Right to freedom represents 'No Harm Theory' of J.S. Mill where he has stated: "Individual are rational enough to make decision about their good being and choose any religion they want to. Government should interfere when it is for the protection of society" (Mill, 1976, p.75). The constitution of 2015 provides right to freedom under article 17 and mentions right to liberty on 17 (2) of the constitution of liberty except as provided by the law. The phrase except as provided by law means no person shall be deprived of his/her personal liberty under this article is not consistent with and as clearly defined as the Article 9 of the ICCPR.

The Interim Constitution of Nepal 2007 incorporates this right under Article 16. Right to hold opinion without interference is consistent with Article 19 (1) of ICCPR. The Constitution of Nepal 2015 has added the restriction clauses on 'Freedom to opinion and expression' as - 'opinion and expression that undermines nationality and independence of Nepal, harmonious relation between the federal units, incites caste based discrimination and untouchability and disrespect of labour. These clauses are overly imposed and ambiguous than that on the international human rights laws; Article 19 (3) of ICCPR states: "It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, (a) for respect of the rights or reputations of others, 9 (6) for the protection of national security or of public order, or of public health and morals" (Upadhyay, 2015, p.229). As a result of this constitutional clause, it may be subject to specific limitations.

Likewise, in the restriction clauses of 'Freedom to assemble peaceably and without arms', the constitution of 2015 has added the grounds of restrictions to the Interim Constitution. Nonetheless, this is consistent with Article 21 of ICCPR, which states "imposed in conformity with the law and which are necessary in a domestic society in the interests of national security or public safety, public or the protection of public

health, morals or the protections of the rights and freedoms of others." (Upadhyay, 2015, p.230). The 2015 Constitution appears to be a continuation of the Interim Constitution, as it includes the grounds for restrictions.

The Interim Constitution of 2007 has combined restriction clauses which shall impose restriction as provided by law for the 'Freedom to form political parties' and Freedoms to form unions and association'. Apart from this, the constitution of 2015 has made separate restriction clauses for both the freedoms and it profoundly widened the grounds of restriction. In addition to the Interim Constitution, any act that may undermine Nepal's "nationality and independence, constitute espionage against the nation, divulge national secrets" (Shrestha, 2075/76 B.S., p. 593), render assistance to any foreign state, organize representatives in a manner that undermines Nepal's security, act of sedition, act that undermines the harmonious relations between the federal units, incite to caste-based or communalist violence has been added. Similarly, restrictions on freedom to form a political party and freedom to form unions and associations under Article 17 (2) (c) and (d) also lack conformity with ICCPR. As comparing to the restrictions on freedom of association under Article 22 of ICCPR, the provisions in Interim Constitution seem narrower and require the restrictions be "prescribed by law, be necessary a democratic society in the interests of national security or public safety, public health or morals or the protection of the rights and freedoms of others"(LBMB, 2007, pp. 5-6). The limitation clause allows legislation to be enacted that are in the public's interests.

The limitations clause relating to freedom of movement allows the laws "which are the interest of the general public, or which are made to impose reasonable restrictions on any act which may jeopardize the harmonious relations subsisting among federal units and the people of various castes, tribes, religions or communities"(Pahadi and Dahal, 2065 B.S., p.259). Again, it is beyond the acceptable international standard. Article 12 of the ICCPR permits only the restrictions as provided by law which are "necessary to protect national security public order, public health or moral or rights and freedoms of others". The constitution goes beyond this standard by allowing for limitation "in the interest of the general public" without further qualification, or when judged to undermine "harmonious relations" without requiring an actual threat to public order or the rights and freedoms of others, health or morals of others.

The present constitution under Article 17 (3) has added some more grounds in respect of the restriction clauses of Interim Constitution 2007 freedom to move and reside in any part of Nepal. They are; "any act which may constitute or incise violent acts'. Both the Constitutions have omitted 'Freedom to leave country, including his own'.

The restriction clause of Article 17 (2) (e) empowers laws to "impose restrictions on any act that may be harmful to public health or morality" in regard to the freedom to practice any profession. Similarly, it guarantees all Nepalese citizens the freedom to move and remain in any part of the country, but the same article under the restriction clause restricts a non-right citizen's to leave any country, even his or her own, as protected by the ICCPR. The overall provisions of Interim Constitution are not consistent with the present constitution. The constitution of 2015 has added some more restrictions for the same freedoms. So the present constitution comes to be proved more restrictive than its' erstwhile.

3. Right to Equality

Right to equality is the most intimate and practical instrument of justice. It is not monolithic. It is a composite concept of human values aspiring for justice (Bhatt, 2004, p.189). The formal model of equality is based on classical liberalism. It is cumulative contextual and persistent. Mainly it is formal and substantive (Subedee, 2009, p.86). Provision of right to equality is structured under Article 13 of the Interim Constitution of 2007 and Article 18 of the 2015 Constitution. However, these provisions appear to be flawed on compared to international human rights standards. The lists of the categories of the groups are narrow and the people with disabilities, sexual minorities and having lower economic status are left out. There are a number of shortcomings including lack of explicit prohibition of indirect discrimination and lack of clear provision of ensuring the right to substantive equality, among others (Shah, 2017, p. 37). The new provision must still be tried out in practice.

However, the right to equality has been further enlarged to ensure equality even in some specific areas of social life. This right is one of the important fundamental rights incorporated under the Article 18 of the present constitution. The concept of equality has been enshrined in the constitutions of Nepal since a long time. Under the section 4 of the first written constitution of Nepal 1948, the concept of equality had been

incorporated. The Interim Government of Nepal Act in its Article 13, Constitution of Kingdom of Nepal 1959 in its Article 4, Constitution of Nepal 1962, in its Article no. 10 and the constitution of the kingdom of Nepal 1990 Article 11, the concept of equality had been incorporated. The Constitution of Nepal 2015 has made the fundamental rights incorporated under part III are non-amendable and even in the situation of declaration of emergency. In the country, the article 18 of the constitution cannot be suspended which is the right to equality.

The Article 18 (3) of the present constitution raises two more issues: first is that the constitution; "Provided that nothing shall be decreased to present the making of special provisions by law for the protection, empowerment or advancement". Secondly, "it does not effectively convey that the creation of 'Special measures' is contemplated by CEDAW, the ICCPR, ICERD and ICECR in situations where it is necessary to achieve substantive equality" (Tamrakar, 2016, pp. 20-21). Article 18(3) of the Constitution of Nepal (2015) has addressed the rights of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI).

Article 18 (5) of the current constitution guarantees equal access to ancestral property without discrimination based on gender, which is a new clause from the Interim Constitution of 2007. This is a revolutionary step towards the gender equality. This is also in accordance with CEDAW requirements. Article 13 (a) of CEDAW states that the equality on men and women in 'The rights to the family benefits'.

4. Right against Untouchability

Each person is equal in terms of rights and human dignity, to make a punishable the act of untouchability, to protect the right to each person to equality, freedom and dignity, including the provision of compensation to the victims of such act, right against untouchability is guaranteed in the constitution (Pradhananga & Upreti, 2016, pp. 5-6).

Article 14 of the Interim Constitution 2007 and Article 24 of the 2015 Constitution have prohibited any form of untouchability and discrimination on the grounds of caste, decent, community and occupation. The present constitution has also added two more clauses prohibiting any forms of discrimination with or without making untouchability on the ground of caste in work place. Moreover, "the 2015 constitution

has provided apparent provisions as it has guaranteed all rights as defined in Article 1 (1) of International Convention on the Elimination of all forms of Racial Discrimination (ICERD)" (Pahadi & Dahal, 2065 B.S.,p.241). Another important advancement of the new constitution for this right is provision of punishment and compensation considering them as a severe social offence for the victim from racial discrimination and untouchability in accordance with law. With this development the system of 'Dalit' has been formally abolished. However, in the line with the saying that 'Rome was not built in a single day' as changing social practices may take some more time.

Article 24 of the present constitution of Nepal has clearly stated:

No person shall be subjected to any form of untouchability or discrimination in any private and public places on grounds of his or her origin, caste, tribe, community, profession, occupation or physical condition. In producing or distributing any goods, services or facilities, no person belonging to any particular caste or tribe shall be prevented from purchasing or acquiring such goods, services or facilities nor shall such goods, services or facilities be sold, distributed or provided only to the person belonging to any particular caste or tribe. No act purporting to demonstrate any person or community as superior or inferior on grounds of origin, caste, tribe or physical condition or justifying social discrimination on grounds of caste, tribe or untouchability or propagating ideology based on untouchability and caste based superiority or hatred or encouraging caste-based discrimination in any manner whatsoever shall be allowed. No discrimination in any form shall be allowed at a work-place with or without making untouchability on the ground of caste. Any act of untouchability and discrimination in any form committed in contravention of this Article shall be punishable by law as a severe social offence, and the victim of such act shall have the right to obtain compensation in accordance with law. (LBMB, 2016, pp.16-17)

This inhumane malpractice of the Nepalese society is the vices of orthodox of Hindu society. It was developed with a view of enforcing the version of rigid caste system. The whole society was divided on behalf of occupation as Brahmin, Kshatri, Vaisya and Sudra. As Dalit category has been used amongst the fourth category of the social

scale -the so-called untouchables in India, gradually it entered in to the Nepalese territory even during the period of so reformist king Jayasthiti Malla, during the 14 century. This unjust system legally continued during the 104 years of autocratic Rana regime. But after the advent of democracy in 1951, it went on discounting (Sambahak, 2016). Against this background, it can be optimistically anticipated that the problem of untouchability and social discrimination imposed over the 'Dalits' community in Nepal would be ended practically as well.

5. Right to communication

The term communication refers to the right of imparting or exchanging of information, ideas or feelings. This right is mentioned for the first time in the constitution of 2015 in this form. This was conferred as 'Right to Publication, Broadcasting and press' in the Interim Constitution of Nepal 2007. The specific intention of drafting this provision under Article 19 of the constitution was to make any system of advance censorship of the press, or "prior restraint" unconstitutional. Right to communication often known as- "the right of the fourth estate" (Dhungel, 1998, p. 141), which enhances the opportunities of the individuals to obtain fulfillment, advance knowledge and the search for understanding which are considered as the process of self-government. Rights to press and publication relating to the production of books, newspapers, periodicals, electronic media-including news screens, email, internet, Facebook, twitters etc. come under this.

Both the Interim Constitution of 2007 and the constitution of 2015 have prohibited the prior censorship, even though, in the initiation clause [Article 19 (1)], the constitution of 2015 has further widened the grounds of restrictions than that of the Interim Constitution. The constitution has also enumerated freedom regarding mass communication. Acharya (2020) quotes that:

Any act of sedition, defamation, contempt of court, or incitement to an offence, or any act that is contrary to decent public behavior or morality, may jeopardize the harmonious relations that exist among the people of various castes, tribes, or communities; or any act of sedition, defamation, contempt of court, or incitement to an offence, or any act that is contrary to decent public behavior or morality which may jeopardize the harmony could be restricted by

the Interim Constitution, whereas the present constitution has added 'any acts that undermine nationality or harmonious relation between the federal units, acts of hatred to labour, acts of incitement of caste based untouchability as well as gender discrimination on the ground of restriction. (p.44)

Pursuant to the international human rights law, the grounds of limitation be (a) necessary (as opposed to merely "reasonable"), (b) that the reference to "decent public behaviour" be removed, as with the "affecting harmonious relationships, and instead be replaced with the language of where necessary to preserve the rights and regulations of others, for the protection of national security of public order or of public health or morals" Dahal, 2017, p. 164). Thus the restriction clauses of both the constitutions are much wider than it has suggested.

Furthermore, the Article 19 (2) of the constitution of 2015 has made the provisions of regulating the media by law by stating "nothing contained in this clause shall be deemed to present the making of an Act to regulate radio, television, online or any other form of digital or electronic equipment press or other means of communication" (LBMB, 2016, p. 13). The restriction provision of the constitution can limit the communication right made by law.

6. Right to clean environment

Environmental rights are considered the third generation of human rights. The environmental rights indicate any assertion of a human rights to environmental conditions of a specified quality (Lammichhane and Jyakhwo, 2019, p. 21). These rights were incorporated within a same article (16) of the Interim Constitution of 2007 whereas these are spitted into two in Articles; Article (30) as rights to clean environment and Article (30) and Article (35) as right to health, making them more comprehensive. The provisions do not guarantee every person's right to live in a healthy and clean environment or the right to adapt in order to be safe from the negative effects of climate change; rather, they guarantee a victim's "right to compensation/damage in accordance with the law for any damage caused by pollution or degradation of the environment" (LBMB, 2016, p. 19). Moreover, this right also creates some scope for the state to make any "necessary legal provisions for striking a proper balance between environment and development" for the sake of national

development. The provision of Article 30 (3) of the present constitution aligns with the provision of Article 12 (2) (b) for the ICESCR which states for full realization of this right, the state party shall include those necessary for the "improvement of all aspects of environmental and industrial hygiene" (Pahadi and Dahal, 2065, p.251).

7. Right to Education and Culture

As regards to educational and cultural rights the Interim Constitution of 2007 Article 17 (1) and (2) had guaranteed free education up to secondary level. This right is recognized by ICESCR but does not completely comply with Article 13 of ICESCR and Article 26 of UDHR (CFRD, 2066 B.S., pp. 265-270).

The constitution of 2015 incorporates right relating to education in Article 31 and fits lateral cultural rights into right to language and culture of Article 32. Article 31 (2) of the constitution is commendable for providing a constitutional right to free primary and secondary education for every citizen. This, is consistent with Nepal's obligation under the ICESCR to make primary education available "Free to all", and to ensure that secondary education is made generally available and accessible to all by appropriate means, and in particular by the progressive introduction of free education. "Under the ICESCR, Nepal must also ensure that fundamental education is "encouraged or intensified as far as possible for those persons who have not received or completed whole period of their primary education" (Adhikari, 2010, p. 277). More likely, the provision of free higher education for disabilities and economically indigent people, free education for people with visual, hearing and speaking impairment are positive advancements of the present constitution towards the commitment of educational right.

The right to engage in the cultural life of one's community is guaranteed by Article 32 (1), which provides that "every person and community shall have the right to participate in the cultural life of their communities" (Naidu, 2016, p. 151). Similarly, Article 32 (3) further clarifies that "every Nepalese community residing in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilization and heritage" (LBMB, 2016, p. 20). Most of the multi ethnic nations have guaranteed such rights.

8. Right to Employment and Social Security

Right to employment under the Constitution of Nepal "seems like cracking a hard nut for the government to implement" (Tripathi, 2015, p.40). Article 18 (1) of the 2007 Interim Constitution had prescribed this right, although the same right is mentioned in Article 33 of the 2015 constitution. These provisions are completed with the provisions of ICESPR.

According to Article 33 of the 2015 Constitution, "Every citizen shall have the right to employment". Not only that the provision to clause (2) describes that "every unemployed citizen shall be entitled to receive unemployment allowance unless s/he gets any employment as provided in law" (LBMB, 2016, p.20). The constitution also guarantees the freedom and right to choose the employment. It also has enlisted rights regarding "to social security for indigent citizens, incapacitated and helpless citizens, helpless single women, citizens with disabilities, children, citizens who can't take care of themselves and citizens belonging to the tribe in the verge of extinction" (LBMB, 2016, p.25) eligible to enjoy this right. These rights seem to be more problematic for Nepal government due to its vulnerable economic condition. As most of the employment opportunities are in the hands of private sector but the issue of how the government can solve the situation seems unanswerable and contradictory.

9. Right to Property

John Locke, the social contract theorist has claimed "property is that portion of natural reward with which man has mixed his labour and state came into existence for its preservation" (CFRDS, 2066 B.S., p.241). With contrast to view of Locke, Hugo Grotius has argued that "State is ultimate owner of the property whatever is within its territory" (CFRDP, 2066 B.S., p.241). Hence, the right to property has gone as a controversial issue throughout the history of mankind. But it is argued that the constitution should guarantee the access to the material resources that make life worth living (Kharel, 2016, p.300). Despite being a socialist constitution, the Nepal's constitution had clearly guaranteed property rights.

Right to property is one of the basic components of liberal democracy. The Interim constitution of 2007 had provided this right under Article 19 clauses (a), (b) and (c). The provision stated that (a) right to acquire, own, sell and dispose the property in

accordance with law, (b) not to encumber private property by the state except in public interest, and (c) compensation provision if requisitioned by the state. This provision shows conformity with the provision of UDHR Article 17 (1) and (2) (Kharel, 2016, p. 306). It is one of the most basic elements of liberalism.

The provision of property right under the constitution of Nepal 2015 seems to be generally in accordance with the international norms and practices. There is no drastic change compared to the provision of Interim constitution. In fact, the state is regarded as the ultimate owner of whatever property is within its territory. Conventionally, the state is supposed to be automatically endowed with the inherent power of acquiring property within its jurisdiction in the public interest. Similarly, the state can confiscate the property of any person acquired in an unlawful manner. While acquiring private property for public purpose the state should pay compensation as determined by law.

The Article 25 of the Constitution of Nepal 2015 has mentioned the rights relating to property in five clauses as:

- a) Every citizen shall, subject to law, have the right to acquire, own, sell, dispose, acquire business profit form, and otherwise deal with property;
- b) The state shall not, except for public interest, requisition, acquire, or otherwise create any encumbrance on, property of a person;
- c) The basis of compensation to be provided and procedures to be followed in the requisition by the state of property of any person for public interest in accordance with clause (2) shall be as provided for in the act;
- d) The provision of clauses (2) and (3) shall not prevent the state from making land reforms, management and regulation in accordance with law for the purpose of enhancement of product and productivity of lands, modernization and commercialization of agriculture, environment protection and planned housing and urban development;
- e) Nothing shall prevent the state from using the property of any person, which it has requisitioned for public interest in accordance with clause (3), for any other public interest instead of such public interest. (LBMB, 2016, pp. 17-18)

10. Rights of Women

The women of Nepal suffer from extreme discrimination, like the women in most developing countries. "No women should be discriminated against in any way merely

for being a women and no discrimination on the grounds of marital status" (Adhikari, 2010, p. 268). Hence, the needs of special rights were recognized for the first time for women in the Interim Constitution of 2007. This constitution prohibited the discrimination based on ground of gender and ensured the right to reproductive health. It prohibits the physical, mental and other violence against women and provided the equal rights for the ancestral property.

The constitution of Nepal 2015 is more comprehensive than the interim one including some new generation rights (Acharya, 2020, p.43). Article 38 of the constitution ensures that 'every woman shall have equal lineage right without gender based discrimination" and also have the right to safe motherhood and reproductive health. Similarly, clause (c) under this Article 38 stipulates on the women's rights as:

No woman shall be subjected to physical mental sexual, psychological or other form of violence or exploitation on grounds of religion, social, cultural tradition, practice or on any other grounds. Such act shall be punishable by law, and the victim shall have the right to obtain compensation in accordance with law. The provision of equal and proportional inclusion in state affairs is guaranteed under Article 38 (d) of the constitution. The women of Nepal can enjoy additional opportunities "in education, health, employment and social security on the basis of positive discrimination as stated in clause (e) "The spouse shall have the equal right to property and family affairs as prescribed by clause (f) of the article 38 of the constitution. (p.22)

The new constitution has provided such rights to the women grounded on the principle of equality to ensure inclusion and equal sharing of benefits of democracy. The 2015 constitution retained the mixed electoral system at the federal and provincial levels although the share of the proportional representation (PR) part went down to 40 per cent from the 56 per cent provided in the Ineterim Constitution of Nepal 2007. The new charter of 2015 has ensured the women will make at least 33 per cent in federal and provincial legislature and 40 percent in the local levels. Such a constitutional provision will provide wider opportunity to create an equitable future for all genders.

11. Right to Social Justice

The fundamental conception of the democracy is the system in which the people select their own representatives and is also the system, which ensures the rights of the excluded community to participate in state mechanism. So, in multi-ethnic, multi-cultural and multi-linguistic country, their justifiable representation in state mechanism through the electoral and recruitment system is of vital importance for the practice of inclusive democracy.

The equal distribution of wealth, opportunities and privileges within a society can be defined as social justice. "Justice should go beyond the boundaries of a state or a region, and these are based respectively on the relevance of other people's interests for the sake of avoiding bias and being fair to others" (Sen, 2010, p.402). This can be obtained through institutions and services that work to make sure people can equally access the benefits of social cooperation and against socio-economic inequality. The fundamental instruments of human rights have recognized the need for social protection. Article 22 of the UDHR 1948 states that "everyone, as a member of society, has the right to social security" (Bhusal, 2016, p.30). Moreover, ICESCR 1966, Article 9 refers to "Right of everyone to social security, including social insurance" (Pahadi and Dahal, 2065 B.S., p.250). The interim constitution of Nepal 2007 for the first time in the constitutional history of Nepal introduced this right to social justice under the Article 21 as, "Women, *Dalits*, indigenous ethnic groups, Madhesi communities, oppressed groups, the poor farmers and labourers, who are economically, socially or educationally backward. The entitled group shall have the right to participate in the state structures on the basis of principle of proportional inclusion" (LBMB, 2016, p.22). On the basis of the principle of proportional inclusion, the entitled group shall have the right to participate in state structures.

The Article 42(1) of the constitution of Nepal 2015 has vigorously broadened the criteria of disadvantageous groups for the enjoyment of this right. It has added "Tharu, minorities, people with disabilities, marginalized communities, Muslims, Pichhada class, gender and sexual minorities, youths, and economically backward 'Khas Aarya' to the list of people who are eligible for the right" (Tripathi, 2015, p. 14).

It ensures that the poor and citizens on "the verge of extinction have the right to specific opportunities and benefits in education, health, housing, employment, food, and social security in order to protect, uplift, empower, and develop themselves" (LBMB.2016, p. 25). Right to education, health, housing, employment, food, and social security are preserved under this provision in order to protect, uplift, empower, and develop individual personality of the citizens.

Moreover, Article 42(3) of the constitution has provided right to live with dignity and honour to "the disable citizens with the identity of diversity and equal to the public service and facilities"(LBMB, 2016, p. 25). A separate provision for farmers providing access to land, selection and protection of local seeds and agro species has been made in order to empower farmers. This is an important concept to enhance the production of agriculture in the county. Similarly, the constitution has shown respect by granting families of martyrs, families of disappeared persons, democracy activists, and victims of conflicts and displaced, people with incapacities, and sufferers in accordance with land the right to priority in education, health, employment, housing, and social security.

12. Right of Children

Right of child which is also mentioned in Article 22 of the Interim Constitution of Nepal 2007 is a new provision in the constitutional history of Nepal. There were no such rights in the previous constitutions. It has accepted and followed the essence of UN convention of the Rights of child 1989. It has guaranteed children's rights to a name and identity, education, health, nutrition, and social security, as well as protection from all forms of exploitation. It has also provided special care and facilities from the state for helpless, orphaned, mentally retarded, conflict victims, displaced, and street children, as well as prohibiting their use in mines, factories, and other hazardous workplaces (Pahadi & Dahal, 2065 B.S., pp. 293-306). It appears that there is a positive attitude toward human rights protection.

In this connection, the present constitution of Nepal 2015 has made some more genuine advancement under article 39 than in the provisions of Interim Constitution. It prohibits child marriage, child trafficking, abduction/keeping them in hostage, use of children in sexual works and recruiting child in any armed groups including

military and police (LBMB, 2016, pp. 22-23). It has also prescribed the child justice with the provision of punishment and compensation in accordance with law.

13. Right to Religion

The meaning of right to religion or '*Dharma*' is to adopt or adhere. Right to religion in the constitution advocates "the freedom of individual or community, in public or private manifest religion or belief in a teaching, practice, worship and observance; the concept is generally recognized also to include to freedom to change religion or not to follow any religion" (Kharel, 2016, p. 269). The freedom to change faith or not follow any religion is also widely regarded as part of the notion.

Right to religion is a constitutionally guaranteed fundamental right under both constitutions of Nepal 2007 and 2015. Though it was incorporated even in the prior constitutions that the religion is a spiritual matter which means to adopt or adhere. Religion is defined as the belief in the presence of a God or Goddess, as well as the behaviors associated with their worship. The right to profess, practice, and be present in his or her own religion, as handed down to him or her from ancient times, was stipulated in Article 23 of Nepal's Interim Constitution of 2007. The provision also forbids persons to convert another person from one religion to another.

Similarly, Article 26 of the present constitution of Nepal provides for the rights to religious freedom. The constitution appropriately protects the fundamental human rights to freedom of religion as set out in article 18 of the ICCPR where mentioned as "Every one shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of this choice, and freedom, either individually or in community with others and in public or private, to manifest his religion of belief in worship, observance, practice and teaching" (Pahadi and Dahal, 2065 B.S., pp. 258-259). However, the limitations on the freedom making it internationally unacceptable from the human rights perspective Article 26 (1) of the constitution forbid persons to "Convert another person from one religion to another". Such a limitation is commented as an infringement of freedom of expression as well as freedom of religion. However, Article 26 of the present Constitution of Nepal 2015 has clearly guaranteed that "every person shall have the right to profess, practice and

preserve his/her own religion as handed down according to his or her conviction" (LBMB, 2016, p.18).

14. Right Relating to Justice

Justice is a moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs (Law, 2009, p.351). The rights related to justice embodied in Article 20 of the present constitution of Nepal 2015 are virtually a carbon copy of similar rights embodied in Article 24 of the Interim Constitution of Nepal, 2007. As in the Interim Constitution, the rights related to justice have incorporated ten components, such as, "right to information, the right to consult and be defended by a legal practitioner of one's choice" (LBMB, 2007, p. 10), presumption of innocence, the right against self-incrimination, safeguards against ex-post facto legislation and double-jeopardy, the right to fair trial, free legal aid to the incapable etc. All these rights are mainly inspired by and modeled on the basic principles of criminal justice and fair trial enshrined in article 14 and 15 of the International Covenant on Civil and Political Rights, 1966 (Tripathi, 2015, p. 50). All of these rights are primarily based on the 1966 International Covenant on Civil and Political Rights (ICCPR) articles 14 and 15.

In this context, the constitution of Nepal 2015 has followed all the provisions Article 9 (3) and 14 of ICCPR and it is a progressive advancement of the provision of Interim Constitution of Nepal 2007. In Article 20 (2) of the present constitution provides right of arrested person to consult with the legal practitioner of her/his choice. Unlike in the Interim Constitution, this provision is more applicable for the citizens of enemy states, which to some extent, has persuaded in Article 9 (3) of ICCPR (Pahadi & Dahal, 2065 B.S., p.257).

15. Right against Preventive Detention

The provisions of Article 25 of the Interim Constitution of Nepal 2007 and Article 23 of the present constitution 2015 have guaranteed rights against preventive detention. The provision of Interim Constitution states "No one will be held under the preventive detention unless there is a sufficient ground of the existence of an immediate threat to the sovereignty integrity or law and order situation of state of Nepal" It also

guaranteed that anyone kept indefinitely in preventative detention in violation of the law or in bad faith would be compensated.

Similarly, Article 23 of Nepal's 2015 constitution allows anyone to be held on a preventive basis if there is sufficient reason to believe there is an immediate threat to Nepal's sovereignty or law and order situation. This provision matches with provision of article 9 (3) of ICCPR. "Persons cannot be a subject of arbitrary arrest or detention." In the absence of "being suspected of criminal activity", no person can be detained. Article 23 (1) might permit detention of persons for unjustifiable reasons with a reference to somewhat loose "law and order" justification.

16. Right against Torture

Torture is characterized as "the offence committed by a public official of intentionally inflicting severe physical or mental suffering on any person anywhere in the world" (Law, 2015, p.623). The practice of torturing upon a person during the investigation of any case can cause mental agony and forceful acceptance of accusation.

Right against torture was granted under Article 26 of the Interim Constitution 2007, which is an entirely new right in constitutional history of Nepal. Rights given in Article 26 specifies that no one should "be subjected to physical or mental torture or cruel, inhuman, or humiliating treatment" (LBMB, 2007, p. 10) while being investigated or awaiting a trial. Similarly, it adds that "any act in contrary shall be punishable by law and any person so treated shall be provided with compensation as may be determined by law" (Acharya, 2008, p.618).

Likely, Article 22 (1) of the present constitution of 2015 states, "No person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment"(LBMB, 2015, p. 15). Further Article 22 (2) clarifies that "any act in clause (1) shall be punishable by law, and any person who is the victim of such treatment shall have the right to obtain compensation in accordance with law" (LBMB, 2016, p.15). In this way the provision of the new constitution is the continuation of the provision embodied in the Interim constitution.

17. Right to Information

Right to information makes the functions of the state open and transparent pursuant to the democratic system and makes the state responsible and accountable towards the citizen (Pradhananga and Upreti, 2016, p.8). Right to information has been incorporated as fundamental rights under the same constitutional provision of the Interim Constitution 2007 and the constitution of Nepal 2015. Right to information is not an elite issue because it is entertained as constitutional and legal rights both.

Article 27 of the interim constitution protects this right as: "everyone has the right to demand or obtain information of any matters of concern to him/her or to the public. Unlikely, further it states; "nothing in this article shall be deemed to compel any person to provide information on any matter about which confidentiality is to be maintained according to law" (CFRDP, 2066, p.191). The exceptional provision is excessively vague as it does not define as clearly as the Article of ICCPR does. Thus, it may hinder the freedom of opinion and expression. The provision under the same Article 27 of the Constitution of 2015 incorporates the same rights as protected by Interim Constitution of 2007 in the same Article 27.

18. Right to Privacy

Privacy connotes with secrecy which "promotes independence, independence helps to secure autonomy and autonomy is essential if a person is to address his personal and spiritual concerns" (Dhungel, et al, 1998, p.187). Right to privacy is essential to autonomy and the protection of human dignity; serving as the foundation upon which many other human rights are built. It enables us to create boundaries and protect ourselves from unwanted interference of the state privacy is a fundamental human right which is articulated in the constitutions of the countries and in all major regional and international human rights instruments.

In the constitutional history of Nepal, the right to privacy was for the first time, enshrined in Article 22 of the constitution of the Kingdom of Nepal 1990 (Tripathi, 2002, p. 277). There was a provision of right to privacy under Article 28 of the Interim Constitution of Nepal 2007 where the privacy rights are protected as: "Except in circumstances provided by law, privacy in relation to the person, and to their residence, property, documents, records, statistics and correspondence, and their

reputation inviolable" (Acharya, 2008, p.618). Consequently, the constitution of 2015 has also guaranteed these rights under the same Article 28. A person's privacy, including "his or her residence, property, documents, data, correspondence, and everything relevant to his or her character" (LBMB, 2016, p. 19), is inviolable until compelled by law, according to the Article 28. Thus the constitutional provision remains silent to the 'right to the protection of law; as recognized by UDHR (Article 12) and ICCPR (Article 17). The right to privacy may affect in the unobstructed use of right to information.

19. Right against Exploitation

Right against exploitation prohibits slavery and forced labour. The objectives of the provision of this right in the constitution is to protect "the rights of the workers such as the right to wage, right to collective bargaining, right to leave, right to rest and right to form trade union of his/her choice and right to receive the amount of social security after retirement" (Pradhananga & Upreti, 2016, p.7).

Right against exploitation is not new in Nepali constitution. It has been mentioned since the 1959 constitution. Article 29 of the Interim Constitution of Nepal 2007 had granted these rights as "(a) Every individual has the right to be free from exploitation; (b) no one shall be exploited in the name of any custom, tradition, or usage, or in any other way; (c) no one shall be trafficked or held in slavery or servitude; and (d) no one shall be forced to work" (Acharya, 2020, pp. 41-42). This provision is a continuation of earlier ones.

Similarly, Constitution of 2015 has prohibited the additional grounds of exploitation such as, religion and usage in Article 29 (2) along with custom, tradition and practice which were already defined by the interim constitution. The supplementary clause of Article 28 (d) of the constitution allows the state to enact a law requiring citizens to be engaged in compulsory service for public purpose (LBMB, 2016, p19). This provision contains a significant risk of a state introducing a scheme amounting to forced or compulsory labour which is prohibited by the Article 8 (3) of the ICCPR (Pahadi & Dahal, 2065 B.S., p 256).

20. Right Relating to Labour

Right to labour belongs to International Labour Act. ICCPR, ICESCR have eight different rights under "right to labour, right to personal dignity, right to work, right to wages and standard of living, right to freedom of trade, Unions, right to collective bargaining, right to strike, right to security of service and right to benefits of social security" (FRDP, 2066, p.281-282). Rights related to labour concerns with the main elements of right to work, access to employment, freedom from forced labour and labour security.

The Interim constitution of Nepal has granted this right under Article 30. Article 30 (1) stated that "every employee and worker shall have the right of proper work practices" (Acharya, 2008, p. 618). The provision of 'proper work practice' does not interpret the condition of work as 'Just and favorable condition of work' defined by Article 7 of ICESCR. That includes fair wages and equal remuneration and decent living, additionally safe and healthy working environment and rest, leisure and reasonable limitation of working hours with holdings with pay. In Article 30 (2), the rights to form unions, organize themselves and to engage in collective bargaining for the protection of their interest in accordance with law is provided which is also recognized by Article 8 of ICESCR (LBMB, 2016, p. 21).

Some positive advancements have been made in this right in the present constitution of Nepal 2015. Article 34 (2) has made the provision of appropriate remuneration, facilities and contributory social justice etc. (Acharya, 2020, p. 43). It also remains salient to interpret; 'Proper work practice' as per aforesaid definition of ICESCR.

21. Right against Exile

The term 'exile' means to be away from one's home, village, city, state, town etc. Moreover, "the word 'exile' refers to banishment or expulsion from the country and this is therefore different from deportation within the country or internment of any sort" (Dhungel, et al, 1998, p. 186). Article 9 of the Universal Declaration of Human Rights 1948 states: "No one shall be subjected to arbitrary arrest, detention or exile" (Lamichhane and Jykhwo, 2019, p. 116). The Interim constitution 2007 and the

constitution of Nepal 2019 Article 45 show the conforming with the provision of UDHR (Article 9) as "No citizen shall be exiled."

22. Right to Constitutional Remedy

Intangible declarations of fundamental rights in the constitution are useless, unless there is significant means to make them operative. An ideal state is one, in which there is the maximum amount of preference satisfaction. As Dr. Ambedkar called the right to constitutional remedies, 'the heart and soul' of the constitution (CFRDP, 2066 B.S., p. 376). There is no meaning of any constitutional provision of Fundamental Right without remedies. Only the effective implementation of rights justifies the constitutional guarantees of the fundamental rights (Tripathi, 2002, p. 282). Effective remedies mechanism can prove the justification of rights. Except the Government of Nepal Act 1948, all the constitutions of Nepal have made specific provisions of constitutional remedies for the enforcement of fundamental rights. Article 32 of the Interim Constitution 2007 and Article 46 of the Constitution of Nepal 2015, which provided for the right to constitutional remedies. It is arranged to empower the extra-ordinary jurisdiction of the Supreme Court of Nepal seeking judicial review of executive and legislative actions of the state violating any fundamental right and for enforcement of the other legal right not accompanied by adequate or effective remedy or for resolution of any constitutional or legal issue of public interest.

In addition of the Supreme Court, the constitution of Nepal 2015 has made the High Court for the proceedings for right to constitutional remedy in Article 46. It refers to Article 133 and Article 144. Article 133 has made the provision of the jurisdiction of Supreme Court (LBMB, 2016, p.26). The extra-ordinary jurisdiction of the Supreme Court in the field of human rights and fundamental rights is the same as the Interim Constitution Article 144 is about High Court, which is the highest provincial court. Timilsina and Shrestha (2017) outlines the the jurisdiction of the Highcourt as:

The High Court shall have the authority to issue necessary and appropriate orders for the enforcement of fundamental rights for which no other remedy has been provided or for which the remedy, if provided, appears to be inadequate or ineffective, or for the resolution of any legal question arising out of any dispute of public interest or concern. (p. XXX)

Rights and remedies are mutually interrelated issues. "The fundamental rights conferred by the constitution shall become justifiable immediate after promulgation of the constitution and the aggrieved citizens shall be supposed to have every right to enter the court for enforcement of such rights in the event of their violation" (Tripathi, 2015, p. 52). But, the Article 47 of the new constitution had retained for three years for implementation. Such a provision intended to keep the enjoyment of fundamental rights on hold is not at all consistent with the conviction of Constitutionalism.

7.5.1 Additional Fundamental Rights Conferred by the Constitution (2015)

The Constitution of Nepal 2015 embodies almost all the rights which were adopted by the previous constitutions including the Interim Constitution of 2007. Six new fundamental rights have been added to the current constitution: the right to be a victim of crime, the right to food, the right to shelter, the rights of Dalits, the rights of senior citizens, and the rights of consumers. Out of these six, one is related to civil and political rights and rest five are related to economic, social and cultural rights (Bashyal, 2016, p. 4). These rights can be explained as follows:

1. Right of Victim of Crime

One of the new rights provided by the new constitution is the victim's rights. Acharya (2020) puts his view on victimological rights as "Victims of crime have a right to know about the investigation and any actions taken in the case in which they were involved. Victims of crime have the right to social rehabilitation and compensation in accordance with the law as a result of this right" (p. 45).

The rights of the victims of crime is based on the principles of; 'right to access of justice and fair treatment, 'right to restitution', 'right to compensation', and 'right to assistance' (CFRDP, 2066 B.S., p. 227). Article 21 (1) of Nepal's 2015 constitution guarantees the right of a crime victim to receive information about the investigation and procedures of the case in which he or she is a victim. Similarly, article 21 (2) confers "right to justice including social rehabilitation and compensation in accordance with law" (LBMB, 2016, p. 15). However, this article has been silent regarding the rights to be treated with dignity, respect and sensitivity, protection, restitution from the offender, return of personal property and speedy trial as

recognized by the criminal justice (Shrestha, 2075/076 B.S., p. 719). These rights have to be guaranteed during and after the trial for the justice for a victim.

2. Right to Food

Right to food is guaranteed in the new constitution as a signing party of the International Covenant on Economic, Social and Cultural Rights 1966 under which "Every citizen shall have the right to food, to protect himself/herself from the vulnerable conditions of life owing to the scarcity of food and to food sovereignty in accordance with law" (Acharya, 2020, p. 47). Right to food had entered for the first time in Nepal's new charter.

Right to food is a human right but now it has become fundamental rights under the present constitution of Nepal 2015 (Bashyal, 2016, p.5). It protects the right of all human being to live in dignity, free from hunger, food insecurity and malnutrition. The Interim Constitution of Nepal had also provided that in Article (18) as "every citizen shall have the right to food sovereignty as provided for in the law" (Tripathi, 2015, p.44). But this was incorporated as the component of under employment and social security right. The present constitution in Article 36 has embodied with three specific contents: (a) Every citizen has a right to food, (b) every citizen has the right to be safe from being in danger of death due to food scarcity, and (c) every citizen has the right to food sovereignty in line with the law. The aforesaid rights ensure security against threat to one's life due to scarcity of food is a positive step towards guaranteeing the economic right to the citizen including adequate food, clothing and housing, and the right of everyone to be free from hunger as provided in Article 11 of the International Covenant on Economic, Social and Culture Rights, 1966.

3. Right to Housing

Right to Housing has been inserted for the first time in the new constitution, which should be considered to a novel and ambitious exercise in our present constitutional discourse. UN Human Rights Committee (General Comment 4) on the Rights to Adequate Housing has observed that "The right to housing should not be interpreted as a shelter simply having a roof over one's head or inclusively as a commodity rather it should be seen as the right to live somewhere in security, peace and dignity" (Cited in CFRDP, 2066 B.S., p.296).

Another new fundamental right introduced in the new Constitution of 2015 relates to the right to housing. The Article 37 guarantees for appropriate housing for everyone. However, the right to housing can be considered a novel and ambitious exercise for Nepalese context though it is already recognized by ICESCR in Article 11 (1). UN Human Rights Committee has observed that "The right to housing should not be interpreted as a shelter simply having a roof over one's head or inclusively as a commodity rather it should be seen as the right to live somewhere in security, peace and dignity" (Upadhyay, 2015, p.226). As stated under Article 37, "every citizen shall have the right to an appropriate housing, and no citizen shall be evicted from the residence owned by him or her nor shall his or her residence be infringed except in accordance with law" (Constitution of Nepal, 2015). The second statement relating to 37 (2) may contain some risk of forced eviction in the name of exception seems contrary to the provisions of international human right law.

4. Right of Dalits

Literally, the word 'Dalit' is defined by the National Dalit Commission as, "Those communities who, by virtue of caste based discrimination and untouchability, are most backward in the social, economic, educational, political and religious spheres and are deprived of human dignity and social justice" (Cited by Bashyal, 2009, p. 125).

The term *Dalit* denotes "broken/scattered". Hence, in Nepalese context it is termed for backward castes or so called untouchables who were excluded from the four-fold *Varna* system of Hinduism (CFRDP, 2066 B.S., p.313). The Constitution of Nepal 2015 has taken a revolutionary step for the emancipation of *Dalits*. Article 40 guarantees the right to join in state organizations based on the proportional inclusion method, the right to free education from primary to higher education with scholarships, the right to health and social security, "the right to use, preserve, and develop traditional occupations, knowledge, skills, and technology, and the right to use, preserve, and develop traditional occupations, knowledge, skills, and technology" (LBMB, 2016, p. 24). Article 40 (5) and 40 (6) make the state more responsible towards the *Dalits*. The state is obliged to arrange land to landless and house to houseless for once. This provision is aligned towards the international human rights laws including CERD. However, the constitution protects only source right related to economic social and cultural rights but remains completely silent including Article 24

(rights against untouchability and racial discrimination) for the absolute guarantee of civil and political rights of the *Dalit* community which is serious problem of our country. Moreover, the clauses are confined by law, thus, leaves a space of speculation whether these rights will be enjoyed in full fledge or not by the concerned parties (Thapa, 2016, p. 67). Nevertheless, the provisions of such rights in the constitution displays the sensitivity and seriousness of the state towards eradicating the malady of untouchability and discrimination practiced on the basis of caste or descent in Nepal. Despite a long history of fighting against caste-based discrimination and untouchability Nepal has expressed its commitment to eliminate them by ratifying several international human rights treaties such as ICERD, ICESCR, ICCPR, CEDAW, CAT and CRC as well as submission to the Universal Periodic Review (UPR) process, though still has not made domestic laws compatible with these international standard (Kisan, Charmakar and Nepali, 2015 p.viii).

5. Rights of Senior Citizens

Ageing is a natural process. Elderly persons must be addressed urgently with utmost care. Older person should be able to live in dignity and security and should be free from exploitation and physical and mental abuse. The senior citizens' rights are inserted in the constitution with the principles of 'Independence', 'Participation', 'Care', 'Self-fulfillment and Dignity of the Persons' (Tripathi, 2015, p. 47).

The Senior Citizens Act 2006 of Nepal defines the senior citizens as "People who are 60 years and above". Collins (2003) defines ageing as "a natural process, which inevitably occurs in human life cycle. It brings with it a host of challenges in the life of the elderly people" (p. 24). So, the problem of elderly people must be addressed urgently and with utmost care, keeping all these in consideration, the constitution of Nepal 2015 has provided the rights of senior citizens in Article 41 stating "the senior citizens shall have the right to special protection and social security from the state" (LBMB, 2016, p. 24). Article 25 of the Universal Declaration of Human Rights and the U.N. General Assembly held on 16, December 1991 have also recognized special security for elderly citizens (Tripathi, 2015, p. 47).

6. Consumer's Right

Consumers are those persons who consume goods and services. Each consumer has a right to quality product and service (Acharya, 2020, p. 48).

Former US president John of Kennedy had dispatched his message in eight points for consumer's rights such as "right to safety, right to be informed, right to choose, right to be heard, right to consumer education, right to redress, and compensation, right to access of basic needs and right to clean and healthy environment" (CFRDP, 2066 B.S., pp. 367-368). Article 44 of the Constitution of Nepal 2015 has introduced this right for the first time in the constitution. The right to standard goods and service for everyone is protected under this provision. But the constitution falls short to make parameters of the quality and standards of the service and goods. The consumers who are the victims of low quality goods and services can claim for compensation in accordance with law (Acharya, Ibid, p. 48). This provision can be stated as the progressive advancement of the provision of the consumers protection act, 1997 which provides for certain rights of the consumers, especially the right to be secure about the sale and distribution of consumable commodities and services which may cause damage to the life due to undue commercial activities.

Through the comparative study of the constitutional provision of fundamental rights under hitherto implemented constitution it can be concluded that the present constitution of Nepal 2015 has made more positive advancement than the erstwhile constitutions of Nepal. In terms of letter and spirit, the constitution provides the imprint of being human rights oriented but its application is challenging. "The mere constitutional arrangement does not count the success, rather its success or failure depends on due implementation" (Bashyal, 2016, pp. 8-9). The constitutional and legal provisions and obligations become worthless until the fundamental rights are enjoyed in full fledge with judicial safeguards. The limitations clauses in the name of public good may create unnecessary interference and obstruction in a justifiable implementation of the rights. There should be sincere commitment amongst the state authorities for their due implementation.

Fundamental Rights in Terms of Liberal Democracy in Nepal

Fundamental rights are characterized as a group of human rights which are recognized by the state through constitutional arrangements. Fundamental rights are the modern name for what have been traditionally known as 'natural rights' (Upadhyaya, 2014, p. 20). The concept of fundamental rights is the gradual outgrowth of natural law.

Natural rights encompass only three rights; dignity, liberty and property rights where

as FR are extended areas. Philosophers such like John Locke and Jean Jacques Rousseau who considered that man is born "with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of nature" (Forde, 2009, p. 432). The natural law principle emphasizes that every fundamental right is inherent in men and it existed even prior to the origin of the state, and the state cannot violate it but must protect and recognize it (Sen, 1960, p. 178). It is believed that human rights are those rights which are essential, basic, natural and inalienable for human being and it is the duty of the state to recognize and allow them for free play. They are required to preserve human liberty, personality development and for the promotion of effective social and democratic life.

Dignity, liberty and equality are the basic components of fundamental rights (Jain, 2006, p. 150). When we think of fundamental rights, we should consider all three of them in relation to one another and each has distinct meaning. Greek Philosophers like Plato and Aristotle also held the belief that the entity of the state came into existence for the sake of safeguarding such rights of the citizens which were clearly related to life, liberty, equality, property and dignity of the people. Even the social contract theorists such as Lock and Rousseau argued that the people retained those rights with themselves and delegated only other rights to the state for their governance, and thus obligated the state to ensure safeguards against any interference with those natural rights in return. In fact, the power of state was derived with the consent of individuals. However, the age long conflict between man and the state kept fundamental rights insecure and the state imperil. Consequently, it is required to have in place a fitting adjustment between individual independence and social control so as to seek and establish a stable and balanced equilibrium between the rights of the individual and the interests of the community. The constitutionalists therefore, advocated for incorporating a list of fundamental rights in every democratic constitution and guaranteeing their inviolability or safeguards against infringement by the executive and legislative wing of the state (Tripathi, 2015, p. 31). However, some countries like USA, France and UK secured such fundamental rights under different Acts even today.

Liberalism, Democracy and Fundamental rights are the triangular and complementary components of modern democratic welfare state. These three elements collectively compose a common sense of constitutionalism (Baer, 2009, p. 468). It is rightly argued that "the constitution of the free democratic states organize and control power, ensure human rights, balance the competing claims of social and individual interests, mirror the culture and experience of the country, and operate as vehicles of national progress and unity" (Coherence, 1960, pp.2-8). The constitution determines the power and position of the state and the citizens.

Liberal democracy is a liberal political ideology and a form of government in which representative democracy operates under the principle of classical liberalism also called western democracy as it was developed in 17th century in Europe. It is characterized by election between multiple political parties, a separation of powers into different branches of government, the rule of law, open society, market economy with private property, and equal protection of human rights, civil rights and liberties with political freedom to all. In fact, the liberal democracy operates under the constitutional arrangements. Obviously, the "concept of liberal democracy is tied to the idea of self-governing community, a community of citizens defined by national sovereignty, the territorial nation-state, self-determination and domestic jurisdiction" (Evens, 2001, p. 624). Democracy has stood as "the world's new Universal Religion" (Corcoran, 1983, p. 14). It has become universal elementary value of the governance.

The liberal democracy has four distinct versions. As Tony Evans categorizes:

The first assumption is that the territorial state is the appropriate community of democratization. The second assumption places the principle of accountability as the centre of all forms of liberal democracy. Accountability is guaranteed by the practice of holding periodic multi-party elections to representative assembly. The third assumption is that democratic states continue to exercise a high degree of autonomy, including the capabilities to pursue policies that further the interests of the people and fourth and final assumption is that the democratic state acts in the interests of the whole of the people, act in the interests of particular national or global groups. (pp. 624- 625)

All these assumptions ultimately prove the definition of Abraham Lincoln (1809-1865) as "democracy is the government of the people, by the people, for the people".

The modern constitutional democracies and fundamental rights reflect significant attributes of human personhood and condition of dignified life. They enhance the worth of human beings by vesting better opportunities suitable a dignified life and by inculcating a sense of responsibility (Bhatt, 2004, p. 18). Thus, the liberal democracy and fundamental rights bloom within the territory of a sovereign state. Human rights and democracy are complementary agendas. Both of them are seen as crucial reflections of the politic-economic relations, positions and interests of actors and are crucially seen as contested rather than consensual harmonious nation. The basic values of democracy, social justice and secularism stand on the interaction of liberty, equality and property. As Lipson relates "The interaction between freedom of speech, expression, assembly and association, and right to equality enables the working of democracy" (Lipson, 1964, pp. 229-230). Thus, "liberal democracy and human rights are understood as two sides of the same coin" (Carothers, 1994, p. 109). Human rights and liberal democracy are corresponding.

Conceptually, human rights and fundamental rights are considered as an integral and necessary component of liberal democracy. It "evolved from the doctrine of 'Natural Rights' in the 17th Century and preceded the rise of liberal democracy" (Jain, 2006, p. 143). Later on the American people proclaimed in 1776 the political principles to which the new republic would be dedicated they put for most the self-evident truth that all men are equal because they posse "certain unalienable rights". They maintained that governments are instituted to secure these rights. This Virginia Declaration of Rights was the reflection of Philosopher John Locke's imagination of "an actual social contract between individuals and the state at the setting up of civil society in which citizens, in order to secure the protection of their property, handed over certain powers to government, in return for the guarantee of certain rights" (Dhungel, 1998, p. 95). It can be credible only under constitutionalism.

The liberal conception of fundamental rights introduced in Nepal only during the 1950's people's revolution fightingfor the establishment of democracy in place of

autocratic Rana rule. The real journey of human rights scrutiny started with the constitution building discourse in Nepal. Hitherto seven attempts have been made for constitution building in Nepal in 1948, 1951, 1959, 1962, 1990, 2007 and 2015. The Government of Nepal Act, 1948 enacted but remained unimplemented.

In 1951, King Tribhuvan issued the interim constitution, which strengthened the king's power and authority and included reforms such as the establishment of the Supreme Court and the inclusion of fundamental rights such as the right to equality, freedom, criminal justice, the right against exploitation, and the right to life, property, and child, among others. It also contributed to the state's economic and social goals.

The 1959 constitution followed the provisions of interim constitution and pursued the procedural democratic models with structural framework. Parliamentary elections were held on the basis of adult franchise. Despite the establishment of a bicameral parliament, the aggressive king Mahendra retained crucial rights such as the prerogative to nominate half of the members of the senate and the ability to suspend parliament in specific circumstances. This democratic experiment did not exist long. In 1962, the Panchayat constitution came into force eliminating multiparty democracy. This system infringed the rights of the citizens and centralized the political power in the hands of monarch. The 1990 mass movement restored multiparty democracy and introduced a new constitution that lifted the ban on political parties and described a democratic representative system in which the king's authority was limited and citizens' fundamental rights such as the right to equality, freedom, press and publication rights, criminal justice, right against preventive detention, right to information, right to property, cultural and educational rights were all protected. "Although the 1990 constitution substantially increased the democratic character of the state, critiques have argued that this text did not adequately represent all sections of the society" (Jaiswal, 2016, p. 19). This constitution was unliberal in providing civil and political rights to the citizenry.

The Interim Constitution of Nepal, 2007 was promulgated through political understanding for an interim period until a new constitution would be drafted by the constituent assembly. It had 15 parts, 175 articles and 3 schedules. This constitution

was taken to be a fundamental law of land. It had provided a long list of fundamental rights which were slightly more elaborative and extended than the previous constitutions. This constitution adopted the basic components of liberal democracy. Basic human rights, multiparty democracy, periodic elections, secularism, separation of powers among different branches of government, rule of law were the major characteristics of this constitution. This constitution was replaced by the constitution of Nepal 2015, which was drafted and promulgated by constituent assembly on 20th September 2015.

The dream of Nepalese citizens to build a constitution through the Constituent Assembly came to be true when a new constitution was promulgated on 20th September 2015 for the first time in the constitutional discourse of Nepal. But there are substantial number of people or groups from *Madhesi*, *janjati* and *Dalit* community who are still unsatisfied with the several provisions of the new constitution which exclude them in many matters in their language. With a rigorous exercise of eight years the constituent assembly completed its task. Since the signing of comprehensive peace accord on 21st November 2006 the state formally ended the decade long armed internal conflict. The new constitution substituted the interim constitution, which was adopted in 2007 after Nepal declared itself as a Federal Republic. The interim constitution of Nepal had established a number of fundamental rights and assured the full-fledged citizen sovereignty. The new constitution of 2015 has adopted almost all the basic characters of the interim constitution and further it has adopted six more fundamental rights and institutionalized the secularism, republicanism, federalism, socialism and inclusiveness. It also adopts basic characteristics of liberal democracy.

The constitution of 2015 has continued all the provisions of fundamental rights of Interim Constitution Nepal 2007 and has strengthened the scheme of social protection and widely increasing social, economic and cultural rights. 'Right to clean environment and right to health', 'right to education and right to language and culture, and 'right to employment and right to social security' have been separated and provided in separate articles. 'Right relating to food' and 'right to housing' is new

additions. This constitution has moved forward by recognizing 'Rights of Dalits', 'Right of Senior Citizens', and 'Rights of consumers' in this list (Bashyal, 2016, p. 4-11). In terms of group rights, the Interim Constitution has already granted 'Rights of women' and 'Rights of children'.

Nepal has transformed into a progressive and democratic 'New Nepal' through the latest constitutional discourse. Geopolitically it is situated along an opposite axis of India and China with their inter-incredible, politico-economic systems. Nepal, India and China all have incorporated socialism in their constitutions. Fundamentally there is a vast difference between western model Indian liberal democratic socialism and Marxist Philosophy based on communism oriented Chinese socialism. The western model criticizes that human rights and liberal democracy is inconceivable in Chinese socialism. Contrary to this, the Chinese socialists complain as the western keep their so called liberal democratic cart in front of economic horse that ultimately empowers the bourgeois and weakens the situation of large number of working class. With various constraints and dilemmas, Nepal turns towards the western liberal democracy via its new constitution. The exhaustive list of fundamental rights provided under Nepali constitution looks more ambitious than practical as compare to her limited economic resources available in the country.

CHAPTER EIGHT

FUNDAMENTAL RIGHT UNDER CONSTITUTIONS OF NEPAL AND INDIA: A COMPARATIVE ANALYSIS

The departure of the constitutional history of Nepal moves through great junctures. There was no constitutional law till the promulgation of the Government of Nepal Act, 1948. This Act was brought "to check-up the growth of anti-Rana Opposition" (Kharel, 2019, p. 86). The despotic and totalitarian Rana rule wanted to be legitimized through this act as pretending with liberating to people. But it was doomed to die from its inception due to dishonour from the Rana family and dissatisfactions of the people. Consequently, the Interim constitution of Nepal 1951 repeated it after the anti-Rana revolution of 1950-51. In the name of democracy, the Interim constitution just "reasserted the king's supreme executive, legislative, and judicial powers" (Singh, 2016, p. 24). Overthrowing Ranas from the regime it failed to institutionalize democracy and to hold the election of constituent assembly for drafting new constitution.

After a long havoc of time, King Mahendra repealed the Interim Constitution granting The Royal Constitution of 1959. Though, the constitution of 1959 was envisioned to practice parliamentary democratic system under constitutional monarchy as modeled on British System, the king Mahendra retained ultimate sovereignty and abused state authority to dissolve the democratically elected government and imposed party-less Panchayat Constitution of 1962. This document did not radically reform the provisions of 1959 Constitution only but also adopt the many features of the Rana system. The king was the sole source of authority and real power was remained in him. The parliament served as an advisory body of the king. The constitution abolished all political parties. But it did not last long due to its monocratic nature. The popular movement of 1990 toppled the Panchayat System and re-introduced the parliamentary democratic system of government under constitutional monarchy adopting the constitution of the kingdom of Nepal 1990. The constitution laid down basic fundamental rights, sovereignty to the people, multi-party democracy based on parliamentary system. The chaos created by dis-accountability of the political parties to the people, unfaith of Maoists exclusive nature of the governing system, lack of the

proportional election system and anti-constitutional encroachments of kings over state affairs brought this constitution into demolish.

Nepal was rocked by a civil war for a decade in between 1996 to 2006. The communist party of Nepal (Maoist) broke out an armed revolt to establish a communist system displacing existing west minister model parliamentary system with constitutional monarchy. But the king did not remain constitutional and rather he took over power. On the one hand political parties were sidelined and on the other, warring Maoists were treated as insurgents. The parliamentary parties including CPN (UML) and Nepali Congress made seven party alliance and started peaceful movement against the despotic action of the King. Meanwhile in 2005, the parties and the Maoists made a common agreement to fight jointly and pursued the movement against the king for the restoration of multi-party democracy with republicanism, secularism, inclusiveness and comprehensive democracy. It could be legitimized by a constitution made from popularly elected Constituent Assembly. The monarch surrendered in April, 2006 and accepted that the sovereignty was laid with people. Subsequently, the Maoists ended their war and became a part of the democratic structure (Naidu, 2016, pp. 76-77). Interim Constitution of Nepal, 2007 came into force until the Constituent Assembly built the current constitution. A couple of elections were held for the constituent assemblies in 2008 and 2013 respectively to accomplish the determination made by seven party alliance and the Maoists through the comprehensive peace Accord (CPA). Exclusively, the Madesh based parties waged their movement demanding to restructure the state mechanism with concept of federalism. This new version in Nepalese politics accommodated in the Interim Constitution as a task to be carried out through constitution building process. Liberal democracy, socialism and inclusiveness stood as paramount canvas. For comparative judgment in between two constitutions it is better to overview briefly the ideological and political perspective of India prior to promulgation of the constitution in 1950.

There are similar and different backdrops in between the constitution building discourse of Nepal and India. From the inception of the Indus valley civilization, Indian culture has been the outcome of an amalgamation of diverse cultures and religions that came into touch with the enormous Indian sub-continent over a long stretch of time. "The origin and evolution of the human rights movement has been

contextualized within the analytical framework of a 'post-colonial' democracy" (Ray, 2003, p. 3409). The whole social system was governed by ancient Hindu laws; 'Dharmasastras' and 'Arthasastras', the Buddhist doctrine of non-violence and thoughts and by 'Muslims' 'faithfuls' and 'kafirs' till British East India Company come into regime.

Later on, "British imperialism created in India a structure of society which made its evolution into a modern capitalist economy" (Bagchi, 1973, p.92). The successful assertion of the constitutionally guaranteed fundamental rights in India were inspired by England's Bill of Rights (1689), the United States Bill of Rights (1787), and French Declaration of Rights of Man (1789). The three important components of human freedoms; freedom of expression, freedom from arbitrary imprisonment and freedom from custodial violence are the inalienable civil and political rights of the citizens against the state constitute historical landmarks in the evolution of liberal democracy in India.

But, the Rowlatt Acts (1919) provided comprehensive authority "to British government and the police, and allowed indefinite arrest and detention of individuals, warrantless searches and seizures, restrictions on public gatherings, and intensive censorship of media and publications" (Turukmane, 2014, p. 123). Annoyed with the provisions of Rowlatt Acts, the Indian aborigines waged nonviolent civil disobedience mass campaigns demanding guarantee of civil freedoms and curtailing government power. But "these demands for human rights by the Indian National Congress were not recognized by the British Rulers" (Upadhyaya, 2017, p. 23). The National Congress was a vehicle for the voices of Indian citizens who were articulated via various movements.

Motilal Nehru Commission, 1928 composed of the representatives of immediate major political parties proposed a number of fundamental rights and economic programs for the welfare of the people. Subramanian (1997) illustrates some of the important rights as:

Personal liberty and inviolability of dwelling place and property; freedom of conscience and of profession and practice of religion subject to public order and morality; right of free expression of opinion and to assemble peaceably

and without arms and to form association and unions subject to public order and morality; right to free elementary education . . . maintained and aided by the state without distinction of caste and creed; equality for all citizens before law and in civil rights; right of every citizen to writ of habeas corpus.

(Subramanian, 1997, p. 56).

The Nehru Committee highly emphasized on both civil and political rights and economic, social and cultural rights. Most apparently, the Indian National Congress adopted the resolutions of Nehru Committee and the Indian Pledge, 1930 in 1931 committing to the defense of fundamental civil rights, as well as socio-economic rights. When the Congress pledged to socialism in 1936, they were motivated from the former Soviet Union, which inspired the fundamental rights and responsibilities of Indian citizens in the form of second generation rights. "During 1944-45 Sapru Committee recommended for two kinds of rights to be accommodated in the constitution one justifiable and the other non-justifiable with independent machinery for the enforcement" (Upadhyaya, 2014, p. 24). Later on, these both rights were addressed in the Indian constitution under fundamental rights and directive principles.

In the historical trajectory of democratic transformation of India, the Indian Independence Act, 1947 became bedrock. When Indian Independent Act passed on 18 July 1947 by British parliament it divided British India into two independent states; India and Pakistan, which were to be dominions under the Commonwealth of Nations until they had each finished drafting and enacted a new constitution. The main provisions of the Act, as mentioned by Mahendra Pal Singh (2012, p. A-17), were as below:

1. India and Pakistan two independent dominions shall be set up in India as from 15 August 1947.
2. The territory of Indian Dominion shall include all the British Indian Provinces except those that comprise Pakistan, i.e. the areas covered by the province of East Bengal, west Punjab, Sind, Baluchistan and N.W.F.P.
3. The Indian states on there shall be free to accede to either of the two new dominions.

4. In each dominion there shall be a governor general appointed by the King.
5. The legislatures of each of the two dominions shall have the full powers to make all laws, including extra-territorial laws, and no law shall be invalid on the ground that it is consistent to the laws of England or any provision of any existing or future Act of parliament of the UK nor an order in council shall extend to the new dominions.
6. As from 15 August 1947 the Government of UK shall have no responsibility with respect to the territories included in British India.
7. The British Crown's supremacy over the Indian States will fall, and all treaties and other agreements with them that existed at the time the Act was passed will be nullified.
8. The powers of the dominion legislature shall be exercised from their respective constituent assemblies.
9. Till the new constitution is framed, the act of 1935, with necessary modifications and adaptations, shall be the constitutional law of India.
10. The Governor General shall by his orders make such provisions for the effective operation of this Act and all matters incidental to it as seem to him to be necessary or expedient.

With the enforcement of this Act, the one hundred Eighty-two years old British Rule came to an end and Indian entered into new political Era owning full-fledge sovereignty and independence.

From the great historical turmoil, Indian citizens learned a big lesson and carried themselves towards the direction of liberal democratic system of governance with federalism, republicanism and socialism. The Constituent Assembly chaired by Dr. Ambedkar undertook the task of drafting a new constitution on 26 November 1949 and it came into effect on 26 January 1950.

Nepal and India moved through distinct ideological and political discourse before drafting their present constitution. Nepal passed over the cross-cuttings of autocratic Rana rule, monocratic kingship, party-less Panchayat system and multi-party democracy to modern form of "independent, indivisible, sovereign, secular, inclusive democratic, socialism oriented federal democratic republican state" (Constitution of

Nepal, 2015, Article 4). Conversely, India travelled through conventional Hindu states, religiously biased Muslim Era, British Colonial Era to modern "Sovereign Socialist Secular Democratic Republic State" (Preamble of the Constitution of India, 1950).

Reflection of Socio-economic and Cultural Values on Fundamental Rights

Nepal and India bear a common spectrum of socio-cultural and economic uniformities due to their political and geographical proximities. The citizens of Nepal and India share people to people relation from the time immemorial. The customs, rituals, religion and behavioral pattern are so similar that it is difficult to make distinction between them" (Shukla, 2006, p. 356). Though there are many non-Hindu communities as well, Nepal and India both are Hindu dominant states. The economy of these developing countries is mainly based on agriculture. National movements of these two countries were widely influenced by western liberal ideas and socialism. The open border facilities and uncontrolled cross border migration in between these countries have been lobbying wide ranging interaction with the people mainly in Terai region of Nepal. All these issues are potential to adopt similar type of political, economic, socio-cultural principle and policies even in the state-craft. However, they have been advancing through distinct dimensions.

Nepal departed from unsettled historical transition till transforming monarchy to a current democratic, federal republic, socialism oriented, inclusive and secular state. Previously, six constitutions were handled to accomplish this task. The kings attempted to run the country consolidating sole power into their hands "to promote the notion of one nation sharing a common culture in the post 1951 era" (Sharma, 2012, p. 46). The political events boomed after 1990 in the name of civil society, Maoist uprising and ethnic and non-governmental organizations modified the character of Nepal's national sphere.

Deeply rooted socio-economic and cultural inequalities, social exclusion, violence, discrimination, structural inequalities, corruption and lack of political will were the determinant factors that reflected through the Maoist movement. The state failed to address the demands of basic quality of life, livelihood, food and water, health, housing and education. The people friendly slogans of the Maoist attracted to the

poor, discriminated, minorities and marginalized sections of the society. It provoked for regional identity-based parties, Dalits, women, ethnic people and minorities to be organized and fight against the existing regime. The regressive action of the King Gyanendra was another catalyst to be accompanied with the seven political parties to Maoists. "The aspirations of Nepalese people shown in the Jana Andolan II were not only for change in government but also for the strengthening of a human rights culture, including economic and social justice" (UNDP, 2007, pp. 29-30). These components were taken as references while constituting socio-economic and cultural rights under the present constitution of Nepal.

Likewise, India also transformed from multifarious junctures for the emancipation of all kinds of constraints regarding to poverty, inequality, discrimination prevailing in concurrent India during its constitution building discourse. The process of modernization of India "emerged during the national movement of independence from the colonial rule" (Singh, 2012, p. 151). British East India Company very badly exploited the Indians in their 182 years long rule over India. The people did not raise their voice for national independence only but also against all forms of economic, social and cultural inequalities created by forth front elites. Including civil disobedience movement against the British, the Indians agitated their voice through "peasant movements, tribal movements, Dalit movements, backward caste/class movements, women's movements, Naxalite movements, religious movements, human rights/civil liberties movements, industrial working class movements student's movement and so on" (Sugunakaraju, 2012, p. 241). These movements raised the issues of violation of right to life, deprivation of livelihoods, cultural discrimination and social exclusion, environmental degradation and so forth (Sugunakararaju, 2012, p. 248). The issues of caste and untouchability was raised by Dalit movement challenging hierarchical Brahminical socio-cultural order and issue of poverty, minimum wages, landlessness of peasants, exploitation of tribal in mining factories were raised by Naxalite movement. This movement introduced a revolutionary change in the political, economic, social and cultural arena of India. The traditional monopoly of the elites and priestly castes were severely eroded the economic, social and cultural right with legal and judicial remedies adopted in the constitution of India 1950 and its transcending amendments.

The concept of India's democratic socialism is the outcome of an evolutionary process (Dan, 1965, p. 71). It sees the fusion of considerable amount of Marxism and the ideas of Gandhism to create egalitarian society in India. The principle of democratic decentralization is applied in federal structure of the state.

More or less, the current constitutions of Nepal and India encompass economic, social and cultural right inspired by their historical movements. Each country they have their own choice, complications and prospects during constitutional designs. It is appropriate to examine the nature of the constitutions by pointing features they possess on it like; ideals, conformity and potentiality.

Comparisons between Present Constitutions of Nepal and India

Despite the fact that the constitutions of Nepal and India were drafted 65 years apart, they share some similarities. "Nepal and India have close proximity with open border and freedom of movement between people. The geographical, historical, economical and socio-cultural factors have shaped Indo-Nepal political settings" (Lama, 2016, p.82). Both the Nepali and Indian constitutions contain nearly identical basic elements. Gautam (2019) superficially associates as:

Both constitutions are committed to socialism based on democratic principles and values, such as the people's right to a competitive multi-party democratic system of governance, civil liberties, fundamental rights, federal republic, secularism, adult franchise, and periodic elections, full freedom of the press, and an independent, impartial, and competent judiciary, as well as the concept of the rule of law. (p.67)

Both the constitutions have the incorporated certain significant features of fundamental rights such as; fundamental rights as an integral part of constitutions, detailed and comprehensiveness, enforceability of rights, provision of suspension during emergencies, constitutional superiority of fundamental rights and special rights for minorities. "The insertion of the 'being committed to socialism' in Nepali Constitution was only intended to appease the public" (Jha, 2018, p.84). Both the constitutions have failed to fully adopt the characteristics of liberal democracy and the characteristics of socialism in the true sense from the ideological perspective.

Differences between Two Constitutions

Despite the many common features between the constitutions of Nepal and India, there are some significant variances. Gautam (2019) aptly differentiates these two constitutions as follows:

Nepal is an independent, indivisible, sovereign, secular, inclusive, democratic socialism oriented, federal democratic republic state, while India is a sovereign, socialist, secular, democratic republic state. As a result, all mother tongues spoken in Nepal are national languages of Nepal, but India has no unique national language. (p. 67)

Despite the fact that Hindi is the official language of India, according to Article 343(1) of the Indian constitution. The Constitution provides that Hindi in Devanagari script shall be the official language of the Union. Similarly Article 343(2) also provided for continuing the use of English in official work of the Union for a period of 15 years (i. e., upto 25 January 1965) from the date of commencement of the Constitution. Schedule eight preserves 22 languages for the formation of different commissions.

The dignity, liberty and equality are the fundamental rights' triangle of constitutionalism, but the Indian Constitution contradicts on it and makes a trajectory of property right from fundamental rights to constitutional rights with Forty-fourth Amendment Act 1978. Single federal citizenship with specific federal identity in Nepal but Indian constitution has not given any definite federal identity. In Nepal, sovereignty is inherent, while in India, it is ambiguous, despite the fact that the preamble opens with the phrase "We, the people of India." Women's equal rights in ancestral property are clearly specified in Nepal's right to recognition, but no such explicit rights are mentioned in India, even though equality under equal circumstances is mentioned in Article 14. According to Articles 84 and 86 of the Constitution Nepal has accepted both the first past the post and proportional representation election systems, however India has approved the first past the post system only. Differentiating the constitutional provision of secularism of two countries Gautam (2019) sketches as: "In Nepal, secularism means the protection of the 'Sanatana

Dharma' Cow as the National Animal and the prohibition of religious conversion, however in India, secularism means (a) 'Sarv Dharma Sambhava', (b) 'Dharma Nirpekshata', and (c) 'Protection of minority rights" (p.68). In Nepal, the fundamental rights of the Nepali citizens are articulated in the constitution point by point such as the constitution of USA, UK, France and Germany concerning with no classification constitution model unlike the Constitution of India 1950 which regulates under classification model and divides the rights of the citizens into six categories.

The post modern values emphasize on self expression instead of defence to authority. Comparatively, the Constitution of India imposes several restrictions on fundamental rights in the name of public good or litigation.

Nepal and India both promulgated their constitutions through popularly Constituent Assemblies. Both the countries have adopted parliamentary form of government and independent judiciary based almost similar philosophy of liberal democracy while introducing federalism in spite of their distinct socio-economic, cultural and geographical backgrounds. Except for those "ethnic, Madhesi (plain-based) groups with regional roots who were dissatisfied with both the process of finalizing the constitution and its ultimate provisions, the majority of Nepalese people from all segments of the national population" (Gautam, 2019, p. p.70) hailed the constitutional promulgation. A few people from Madhesis and Janajatis had felt that "the delineation of provinces, questions of identity, minority rights, proportional representation and inclusion remained restrictive" (Hachhethu, 2017, p. 63) under the new constitution. They had worries about the provisions on carving up constituencies based on geography and population, provincial representation in both the Lower and Upper Houses of the federal parliament, the proportional representation theme, and various issues relating to new citizenship provisions. In spite of their discontents in certain issues of the constitution, eventually, they participated in local and general elections which were held in 2017. But, still they have their reservations on certain provisions of the constitution namely on citizenship provision, constituency deliniations and proportioanal representation.

Pointing to the positive attributes of the new constitution Adhikari (2020) highlights that "federalism, republicanism, secularism and inclusiveness are the major attributes of the constitution of Nepal. It stands as the first national constitutional charter in

South Asia to include explicit mandate of one-third representation to women in legislative apparatus" (p. VII). The charter establishes a fair corpus of linguistic provisions, such as recognizing all languages spoken by the mother as national languages. Part III (Article 16-46) of the Nepali Constitution contains provisions linked to fundamental rights that are progressive in nature. Right to information, right to communication, right to justice, right to victim of crime, right against torture, right to free legal aid, right to privacy, right to property, right to a clean environment, right to language and culture, rights to women, Dalits, senior citizens, and right to social security are just a few examples of progressive provisions (Gautam, 2019). Other notable features of the Nepali constitution are demarcation based on population and geography, as well as a flexibility in amendment.

The Constitution of India also seeks to establish a welfare state "guaranteeing social, economic and political rights. Independent and impartial judiciary, equitable constituency delineations are the imitating characters of Indian constitution" (Turukmane, 2017, p. iv). The consolidation of perfect justice, an independent judiciary, and the rule of law are essential for a country's democratic credentials, social growth, and priority. It is feasible because of the free and fair appointment of judges to the courts, which we can see both constitutionally and practically in India. Nepal, like India, might use a collegium system to pick Supreme Court judges, reducing the power of the government of the day in the legal system. Despite criticisms, the Nepali constitution received 85 percent support from the Constituent Assembly, compared to only 67 percent support from India's Constituent Assembly for its constitution.

Summing up two constitutions, the Indian constitution appears to have more liberal/democratic rules for recruiting Supreme Court judges, although Nepal's 2015 Constitution has widely guaranteed post-modern democratic norms of inclusive democracy.

Fundamental rights are the core values and themes of the constitutions. For the justification of sole faith of a nation it is appropriate to scrutinize the provision of fundamental rights with the eyes of international mechanisms of human rights such as; UDHR, ICCPR and ICESCR will be more understandable.

(Note: for further details see Table 8.1 in Appendix-I).

The Current Constitutions of Nepal and India in the Eyes of International Bill of Human Rights: UDHR, ICCPR and ICESCR

Human rights are conceived as universal and egalitarian rights. These rights may exist as natural rights or legal rights, in both in national and international laws. In the same spirit under the principle of recognition it became the concern of whole world of humanity to examine whether the constitution of the nation states incorporate the basic components of various international mechanism of humanitarian laws or not. It is more appropriate to show similarities and differences of fundamental rights provisions under the constitution of Nepal and India with reference to the provision of UDHR, ICCPR and ICESCR to which both countries have become a party.

Comparison of the Fundamental Rights under the Current Constitution of Nepal (CoN) and International Provision of Human Rights

There are enough grounds on which the fundamental Rights (FR) provisions under the Constitution of Nepal 2015 are connected to the provisions of International Instruments of Human Rights (HR) i.e. UDHR 1948, ICCPR 1966, and ICESCR 1966. Article 16 of CoN expresses right to live with dignity to every person and no law shall be made providing for the death penalty to anyone. It ties with UDHR Article 1 where it declares "all human beings are born free and equal in dignity and rights" and the announcement of right of self-determination in Article 1 of ICCPR and ICESCR it is related to first generation rights of CPR.

The provision of Article 17 related to "Right to freedom: (1) No person shall be deprived of his or her personal liberty except in accordance with law (2) Every citizen shall have the freedom of opinion and expression, freedom to assemble peaceably, freedom to form political parties, unions and practice any profession" is parallel to UDHR-Article: 13 Right to freedom of movement, Article 18, Right to freedom of thought, conscience and religion, Art.19, Right to freedom of opinion and expression, Art. 20, freedom of association and assembly. ICCPR- Art.11 freedom from Ex-post-facto law, Art. 12, Right of movement, freedom of thought, conscience and religion, Art. 19, freedom of expressions which related to CPR but there no such provision stands in ICESCR.

The most prominent right under Article 18, "Right to equality: (1) All citizens shall be equal before law. No person shall be denied the equal protection of law (2) No discrimination on the grounds of origin, religion, race, caste, tribe, sex, physical condition, class, language region, ideology (3) Equal payment in the same work (5) All offspring shall have the equal right in ancestral property" accommodates the provisions of UDHR. Art. 7 Right to equality, ICCPR-Art 3 and 26 Right to Equality for equal protection of law. ICESCR Art. 3- Right to Equality to ensure the right of men and women to the enjoyment of all economic, social and cultural rights. It narrates the provision of CPR.

"No publication and broadcasting or dissemination or printing of any news, item, electrical, feature article or other reading, audio and audio-visual material through any means whatsoever including electronic publication, broadcasting and printing shall be censored" articulated in Art.19 of the CoN under right to communication is equivalent to UDHR: Art. 12 freedom from arbitrary interference with privacy, family, home, correspondence, Art. 18 Rights freedom of thought, conscience and religion, Art. 19, Right to freedom of opinion and expression, ICCPR- Art. 18 Right to freedom of thought, conscience and religion, and Art. 19, Right to freedom of expression.

Likewise, right to justice under Art. 20: (1) provides as "No person shall be detained in custody without informing him or her of the ground for his/her arrest"; (2) "Right to consult a legal practitioner"; (3) "Right to be produced in judiciary within 24 hours of arrest, free, fair trial of course" adopts the provisions of UDHR-Art. 9- "Right against arbitrary arrest detention or exile", and Art. 10-Right to fair trial. It is also consistent with Art. 11- "Right to be presumed innocent until proven guilty", ICCPR-Art. 14," Right to fair Trial", and ICESCR-Art11-"Right to meaningful life".

Similarly, Art. 21 of the Nepali Charter- "Right to victim of crime: (1) A victim of crime shall have the right to get information about the investigation and proceedings of a case in which he or she is the victim (2) A victim of crime shall have the right to justice including social rehabilitation and compensation" represents the provision of UDHR-Art. 22- "Right to social security", ICCPR. Art. 4 and 5 "Right related to Derogation", and ICESCR Art. 5, "Right related to Derogation".

Right against torture is related to criminal justice. Article 22 of CoN guarantees: "(1) No person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment (2) The victims of the torture have the right to obtain compensation". This provision affirms the supplies of UDHR Art. 5- "Right against torture", ICCPR-Art. 7 "Right against torture" and ICESCR-Art. 11- "Right to meaningful life".

Right against preventive detention under Art.23: "(1) No person shall be held under preventive detention unless there is a sufficient ground of the existence of an immediate threat to the sovereignty territorial integrity or, public peace and order of Nepal (2) Right to information to the family of detenue 3) Right to obtain compensation if proved innocent" is compatible with UDHR: Art. 9, "right against arbitrary arrest detention or exile", ICCPR Art. 9 (3 and 5), "Immediate proceedings before a court and compensation in awful arrest/detentions".

Untouchability has been declared inhuman practice under Art.24 of CoN- "Right against untouchability and discrimination: (1) No any form of untouchability and discrimination on the basis of origin caste, tribe, community, profession, occupation or physical condition. (2) No discrimination in purchasing and selling goods. (3) No community is superior and inferior on the basis of caste. (4) No discrimination in workplace (5) contravention of those provision taken as severe social crime." It is well-suited with UDHR Art. 2, "No discrimination on the enjoyment of rights", ICCPR: Art 2 as per the provision of UDHR "No distinction on the basis of race, colour, sex religion, political or other opinion origin, property, birth for other status", and CERD: Art. 1 (1), No discrimination on the ground of origin, tribe, occupation, physical condition and descent.

Right to property as a sympathetic rights anticipated in Art. 25: "(1) Every citizen shall, subject to law, have the right to acquire own, sell, dispose, acquire business profits from, and otherwise deal with the property. (2) The state shall not, except for public interest, requisition, acquire or otherwise create any encumbrance on property of a person. (3) Right to compensation if the property is requisite by the state" is relevant to UDHR. Art. 17 (1 and 2)- "right to property to everyone alone as well as in association with others. No one shall be arbitrarily deprived of his property", ICCPR- Art. 1 (1 and 2) – "All people have the right of freely pursue their economic

development and dispose their wealth and resources without prejudice to anyone", and ICESCR: Art. 1 (1)- follow as per the provision of ICESCR.

Art. 26 of CoN- "Right to religious freedom: (1) Every person who has faith in religion shall have the freedom to profess, practice and protect religion according to his/her conviction. (2) Right to operate and protect religious sites, and (3) But no right to convert anyone from one religion to another" characterizes to UDHR. Art. 18- "Everyone has the right to freedom of thought, conscience and religion; includes freedom to change his religion or belief and freedom, either alone or in community with other and in public or private, to manifest his religion in teaching, practice, worship and observance", and it is similar with the provision of ICCPR-Art 18 and provision of UDHR. But, process of religious conversion differs with the provision of UDHR and ICCPR.

Right to information under Art.27 is another imperative arrangement of CoN: "Every citizen shall have the right to demand and receive information on any matter of his or her interest or of public interest". It is well-matched with UDHR: Art. 19-"Everyone has right to seek, receive and impart information and ideas", and ICCPR: Art. 1 (2). It is also consistent with UDHR and ICESCR Art. 19- " Right to information concerning human rights".

Right to privacy as a fundamental rights is preserved in Art.28 of the Nepali constitution. Where- "the privacy of any person, his/her residence, property, document, data, correspondence and matters relating to his/her character shall, except in accordance with law be inviolable". It is related with the provision of UDHR: Art. 12- "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation" and ICCPR-Art 17 matches with the provision of UDHR where it forbids to arbitrary or unlawful interference on privacy.

Right against exploitation under Art.29: "(1) Every person shall have the right against exploitation. (2) No exploitation on the grounds of religion, custom, tradition/usage practice or on any others grounds. (3) No slavery, trafficking and servitude. (4) No work against his/her will and (5) The victims shall have the compensation" is pertinent with the provision of UDHR: Art. 4 where-" no one shall be held in slavery

or servitude; be prohibited in all their forms" and ICCPR: Art. 8 (1, 2 and 3) which prohibits slavery, slave trade, servitude, force labour and ICESCR: Art. 6 and 7 which recognize the right to work, includes fair wages and equal remuneration, safe and healthy work condition, equal opportunity of promotion, rest, leisure and reasonable limitation of work, holidays with pay.

Article 30 of the Nepali constitution guarantees- Right to clean Environment: "(1) Every citizen shall have the right to live in a clean and healthy environment. (2) Right to obtain compensation to victim. (3) Exempts state to maintain environmental balance". This provision is consonant with the provision of ICESCR: Art. 12 (2) (b) which guarantees "the improvement of all aspects of environmental and industrial hygiene". UDHR and ICCPR do not contain this right. It is quite unique under CoN.

Right to Education is ensured under the Art. 31 of the CoN as: "(1) Every citizen shall have the right of access to basic education: (2) Right to have compulsory and free education up to basic level and free education up to secondary level from the state (3) Free higher education for disables and economically indigent citizens (4) Free brail script education to the visually impaired citizens (5) Right to get education in mother tongue". This provision is pointing to the UDHR: Art. 26 (1), (2) and (3)- "free and compulsory elementary education. Parents have a prior right to choose education to their children" and the provision of ICESCR: Art. 13 and 14, which provide these rights similar with the provision of UDHR. The CoN incorporates almost provisions of UDHR and ICESCR.

Right to language and culture with dignity is another significant right under Art. 32 of the new Nepali constitution which guarantees: "(1) Every person and community have the right to use their languages (2) Right to participate in the cultural life and (3) Right to preserve and promote language, script, culture, cultural civilization and heritage". These arrangements are alike with ICESCR: Art 15 (1) (a) (b) and (c) and (2), (3) which recognizes the right to take in cultural life, full realization and promotion of it.

Right to employment is a significant arrangement under Art. 33 of CoN where it has assured as: "(1) every citizen shall have the right to employment as provided to federal law and (2) Every citizen shall have the right to choose employment". We can

trace back its lineage to the provision of UDHR Art. 22, 23 (1), (2), (3) and (4) and 25 which recognize the right to work, free choice of employment, right to equal pay for work and to join in trade union and ICESCR Art. 6 (1) and (2)- Right to work in productive employment.

Article 34 of the CoN has mentioned "right to labour as every labourer shall have the right to fair labour practice" and assures appropriate remuneration and social security, and form and join trade unions which is consistent with the endowment of ICESCR: Art. 7 (a), (b), (c) and (d) and Art. 8 (1) (a), (b), (c) and (d) and (2), and (3) provide right of labourer of fair wages, equal opportunity for promotion, leisure, rest, holidays and to join in trade unions.

The new Nepali constitution ascertains for Right relating to health under Art. 35 as: "(1) Every citizen shall have the right to free basic health services from the state, and no one shall be deprived of emergency about medical treatment (3) Equal healthy services, and (4) Clean drinking water and sanitation". This provision of CoN covers statements of ICESCR: Art. 12 (1) and (2) (a), (b), (c) and (d) which recognizes the right of the highest attainment of physical and mental health development of the child, industrial hygiene control from endemic and epidemic and medical service and medical attention in the event of sickness.

Right to food has been accorded in Art. 36 for three components of rights: "(1) Every citizen shall have the right relating to food, (2) to be safe from the scarcity of food, and (3) Right to food sovereignty in accordance with law". It is perpendicular to UNDHR: Art. 25 (1) which states- "everyone has the right to a standard of living with adequate food" and ICESCR: Art. 11 (1) and 2 (a) and (b) that recognizes the right of food with the facilities of importing and exporting to ensure and equitable distribution of world food supplies in relation to need.

Right to housing has been anticipated under Art. 37 of the Nepali constitution as: "(1) every citizen shall have the right to an appropriate housing; (2) residence of citizens will not be infringed except in accordance with law". It incorporates; the UDHR: Art. 15 (1) which provides right of an appropriate housing and ICESCR Art. 11 (1) which recognizes such rights.

Right to women under Art. 38 of CoN stands for: "(1) Every women shall have equal lineage right without gender discrimination, (2) Safe motherhood and, (3) No any mental, physical, sexual or any violence and the victim shall have the right to obtain compensation in accordance with law, (4) Right to participate proportionately in all state bodies, (5) Health employment and social security, and (6) Equal right in property and family affairs". But these arrangements under UDHR, ICCPR and ICESCR are salient. However CEDAW: Art 6 suggests to be appropriate measures including legislation, to support all forms of traffic in women and exploitation of prostitution of women.

Right of child is ascertained under Art. 39 of Nepali statute where: "(1) Every child shall have the right to name and birth registration along with his or her identity (2) Right to education health, maintenance, proper care, sports, entertainments etc. (3) Right to elementary child development and child participation (4) No work in factory mine, hazardous place (5) No child marriage, (1) No recruitment in army, (7) No physical torture at home, school or any other place (8) Right to juvenile friendly justice (9) Right to special protection to helpless, victims of conflict and displaced or vulnerable (10) Right to compensation if victimized". The protection of these rights can be traced back to Convention of the Rights of Child (CRC) 1989.

Similarly, Article 40 of the Nepali constitution guarantees for Right to Dalit: "(1) the Dalit shall have the right to participate in all bodies of the state on the basis of principle of proportional inclusion and also the special provision for empowerment and employment. (2) Provision of free education with scholarship, (3) Special provision for health and security, (4) Right to use, protect and develop their traditional occupation, (5) Land for landless, (6) Proper housing, and (7) Proportional opportunity to both men and women Dalits" alike the provision of UDHR: Art. 2, "Non-discrimination on enjoyment of Right", ICCPR: "Right against discrimination" and ICERD: 1969- "Elimination of all forms of racial discrimination".

Senior Citizens' Rights are designed under Art. 40 of CoN as: "The senior citizens shall have the right to special protection and special security from the state". These rights are recognized under Art. 25 of UDHR in the name of "right to meaningful life" and in ICESCR: Art. 11, entitled as "the right of everyone to an adequate standard of living including adequate food, clothing and housing".

Article 42 of the CoN has identified right to social justice to the people belonging to marginalized classes and communities such as women, *Adibasi, Janajati, Dalit,s, Madhesi, Tharu, Muslims* etc. as: "(1) The economically, socially and educationally backward women, Dalit, indigenous nationalities, Madhesi, Tharu, Muslims, backward classes, minorities, marginalized communities persons with disabilities gender and sexual minorities, farmers, labourers, oppressed or citizens of backward regions and indigent Khas-Arya shall have the right to participate in the state bodies on the basis of principle of proportional inclusion, (2) Indigent (3) Disables, (4) Farmers and (5) The families of the martyrs shall have right to get special opportunities". In this plight two international instruments oh human rights; UDHR (Article 22) and ICCPR [Articles 9 (3) and 14] recognize social security. This right is criticized by indigenous nationalities of Nepal as it has not been able to address the fundamental issues of indigenous people as well as of the oppressed, neglected and marginalized groups.

Right to social security under Art. 43 is next landmark declaration as a fundamental rights in CoN: "The indigent citizens, incapacitated and helpless citizens, helpless single women, citizens with disabilities, children and tribes on the verge of extinction have the right to social security, in accordance with law" (LBMB, 2016, p. 25). This right is envisioned from the mechanisms of human rights; UDHR: Art. 22, ICCPR Art. 9(1) and ICESCR Art.9 which provide right to social security, right to liberty and security of person, and the right of everyone to social security including social insurance.

The consumers' right is located in Art. 44 of the CoN as: "(1) Every consumer shall have the right to obtain quality goods and services, (2) persons suffered injury from any substandard goods or services shall have the right to obtain compensation" rights alike UDHR- Art. 25- "Right to meaningful life" and ICESCR: Art 11- "meaningful life with food adequacy". Likewise Art. 45 of CoN preserves 'Right against Exile' as "No citizen shall be exiled". It is also protected by UDHR: Art. 9 in the arrangement of "right against arbitrary arrest, detention or exile".

The chapter of fundamental rights (Art.46) in the CoN has also stipulated right to constitutional remedies and enforcement of fundamental rights. According to which "there shall be a right to obtain constitutional remedies in the manner set forth in

Article 133 or 144 for the enforcement of the right conferred by part III" of the CoN 2015. UDHR 1948 (Art. 8) confirms this right as "everyone have the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the national constitution or by law". It is also recognized by ICCPR 1966(Art. 14) as "right to fair trial".

Implementation of fundamental rights is guaranteed in Art. 47 of CoN which has stated as: "The state shall, as required make legal provisions for the implementations of the rights conferred by this part, within three years of the commencement of this constitution". ICCPR (Art. 28 to 53) concerns with the specific procedures of carrying out of the provisions of the covenant. Additionally, ICESCR: Art. 16 to 31 concerned with obligations of state parties and general and specific procedures of carrying out treaty obligation.

Duties of citizens are imposed under Art. 48 according to which "every citizen shall have the duties: to safeguard the nationality, sovereignty and integrity of Nepal, while being loyal to the nation, to abide by the constitution and law, to render compulsory service as and when the state so requires, to protect and preserve public property" (LBMB, 2016, p. 26). This can be considered as the continuation of UDHR Art. 29 and 30 which is concerned with "the rights and obligations of persons, community and states to create environment for full realization of all rights. Everyone has duties to the community in which alone the free and full development of his personality is possible".

From the aforementioned comparison it become clear that the current Constitution of Nepal has made substantial progress in protecting fundamental rights as affirmed in the international instruments (mainly in UDHR, ICCPR and ICESCR) of human rights. However Nepal is still awaiting effective implementation. Unless all rights are realized in practice, they, as mere written words, hold no meaning. Hence, the primary focus now should be on the establishment of enforcement mechanism for a full-fledged realization of the rights that are enshrined in the Constitution of Nepal 2015.

(Note: for further details see Table 8.2 in Appendix-II).

Comparison of the Fundamental Right under the current Constitution of India (CoI) and International Provision of Human Rights

Rights are those condition of social life without which no man can be at his best.

Rights guaranteed under the constitution of any country protect to rights of an individual from others and also the arbitrary action of the state. The Constitution of India (CoI) 1950 has guaranteed fundamental rights to its citizen under part III (Articles 12-35). In India, initially seven categories of "rights were guaranteed but after the deletion of right to property from fundamental rights with 44th Amendment Act 1979 their number came down to six" (Madan, 2017, p. 1). This sub-title makes a comparative look over the fundamental rights of Indian constitution with the provision of international instruments (more likely- UDHR, ICCPR and ICESCR) of human rights.

Article 12 of the CoI has defined the jurisdiction of the Indian State as: "In this part, unless to context otherwise requires, the state includes the government and parliament of India and the government and the legislature of each of the states and all local or other authorities within the territory of India of under the control of the government of India". It is designed almost relevant as per the format of the preamble of UDHR para-6, where it is mentioned that "every member state has pledged themselves to achieve in cooperation with the United Nations".

In Art. 13 of the CoI, it is stated that the state shall not create any law that is inconsistent with or in derogation of fundamental rights, and that the "state shall not make any law that takes away or abridges the rights given by this section". It represents the objective of UDHR: Art. 29 (2) and (3), in which the exercise of rights and freedoms are entrusted to everyone and that shall be subject only to such limitations and "no case be exercised contrary to the purposes and principle of the United Nations"(Lamichhane and Jyakhwo, 2019, p.11). Such rights are intended to protect individual liberty from the state.

Right to equality before law is mentioned under Art. 14 of the CoI. According to the constitutional provision the "state shall not deny any person equality before the law or the equal protection of the laws within the territory of India" (EBC, 2011, p. 10). These rights are nearly same with that delivery of UDHR: Art. 7 which declares that

"all are equal before the law and are entitled without any discrimination to equal protection of the law" (Lamichhane and Jyakhwo, 2019, p.116). ICCPR Art. 3 also ensures the "equal right of men and women to the enjoyment of all civil and political rights". Likewise, ICESCR: Art. 3 also recognizes in the same way.

Article 15 of the CoI further re-affirms the social equality and equal access to public areas as: "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth". It is relevant with the provision of ICCPR- Art. 26, which prohibits discrimination and confirms equal protection of law and guarantee to all persons equal and effective protection.

Equality in matters of public employment under Art. 16 as- "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to office under the state and no discrimination on the ground of religion, race, castes, sex, descent, and place of birth residence or any of them. And provision of reservation for scheduled castes and tribes" matches with the provision of UDHR (Art. 23), "right to employ without any discrimination" and ICCPR Art 25(2), which recognizes "to have access on general terms of equality, to public service in his/her country" (Lamichhane and Jyakhwo, 2019, p.154). In truth, it is a synthesis of human principles aimed at achieving justice.

The prohibition of untouchability is incorporated in Article 17 of the CoI, which states that untouchability is abolished and that its practice in whatever form is prohibited. This provision declares that the practice of such activities as an offense and punishable by law. This is related with UDHR Art. 2,- "No discrimination on the enjoyment of rights and no distinction on the basis of race, colour, sex, religion, political or other opinion, origin, property, birth or other status" and ICCPR Art. 2, and also as per the arrangement of ICERD 1 (1) - "No discrimination on the ground of origin, tribe occupation, physical condition and descent".

'Abolition of Titles' in Art. 18 of CoI is quite different provision which states as: "(1) No title, not being a military or academic distinction shall be conferred by the state (2) No citizen of India shall accept any title from any foreign state. (3) No person holds any office under state, accept title without consent of the President. (4) No person holding any office of profit trust under the state shall, accept any present from foreign

state without the consent of the President". It is not prohibited by any international human rights agreement. It simply falls under the notion of state sovereignty.

Article 19 of the CoI ensures freedom of speech and expression as- "(1) All citizens shall have the right (a) to freedom of speech and expression; (b) Freedom to assemble peacefully without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of territory of India; and (g) to practice any profession, or to carry on any occupation, trade or business" which is compatible with the provision of UDHR Art. 19, where it states that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions receive and impart information and ideas" (Lamichhane and Jyakhwo, 2019, p.119). ICCPR Art. 19 (1) and (2) also recognizes these rights as to hold opinions and freedom of expression without interference.

Right to criminal justice is articulated in Art.20 of CoI which implements principle of constitutionalism as: "(1) No one can be awarded punishment which is more than what the law prescribed (ii) No one can be convicted twice for the same offence. (iii) Protection of life and personal property". It is parallel to the provision of UDHR: Art. 10 where "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him" (Upadhyay, 2015, p. 219). So, it recognizes right to criminal provisions of UDHR.

Under Art. 21 of the CoI, "no citizen can be denied his life and liberty expected by law and every child has the right to get free and compulsory education" as per the UDHR: Art. 3 and 26 provision of right to liberty and compulsory elementary education for children, and ICCPR: Art. 6 (1) Right to life and Art. 9 (1) Right to liberty. Likewise ICESCR: Art.13 (b), and 14 provide compulsory and free elementary education.

"No one can be arrested without being told the ground for his arrest and arrested citizen has to be brought before the nearest magistrate within 24 hours" bestowing under Art 22 of the CoI. It is also preserved in UDHR: Art. 9 and 12 where it is carved as "no one should be subjected to arbitrary arrest and interference with his privacy". ICCPR. Art. 9 (2), (3) and (4) provide in the similar vein as "information of

the reason of arrest anyone arrested brought promptly before judge or other officer and timely proceedings before a court".

With the provision of Art. 23 of CoI abolition of trafficking in human beings and beggars (forced labour) are prohibited and any contravention of this provision shall be an offence and punishable in accordance with law. It is nearer to UDHR: Art. 14 (1) where "Everyone has the right to seek and to enjoy in other countries asylum from persecution"(Upadhyay, 2015, p. 220). This right is endorsed under right to liberty.

Article 24 refers to the 1989 International Convention on the Rights of the Child (ICRC), which prohibits the employment of children under the age of 14 in hazardous jobs such as factories and mines. UDHR Art. 25 (2) incorporates this right as "motherhood and childhood are entitled to special care protection and assistance".

Religious freedom to all citizens of India is entrusted under Art. 25 of the CoI which grants freedom of conscience and free profession, practice and propagation of religion. UDHR: Art 18 protects this right as- "Everyone has the right to freedom of thought conscience and religion; this right includes freedom to change his religion or belief and freedom to change this religion or belief and freedom, either alone or in community with others" and ICCPR: Art 18 (1), (2), (3) and (4) also ensure the same right.

Entertaining the provision of Art. 26 of the CoI the Indian religious communities can set up charitable institution of their own. This right is preserved by UDHR under Art 18 (2) and (3) and ICCPR Art. 18 (2) and (3) also protect the minority right in same manner. Likewise, "No person shall be compelled to pay taxes for the promotion of a particular religion" (LBMB, 2016, p. 19) is protected under Art.27 of the CoI. It is equivalent to the provision of UDHR: Art. 18 and ICCPR. Art. 18 which preserve the same version.

Article 28 prohibits that "State run institutions cannot impart education that is pro-religious"(LBMB, 2016, p. 19). UDHR Art. 18 and ICCPR Art 18 also regularize it accordingly. Article 29 of the CoI assures that "no citizen can be discriminated against for admission in state or state aided institutions" (LBMB, 2016, p. 19). It is associated to UDHR: Art. 22 and 23 (1), (2), (3), and (4), where "everyone as a member of society has the right to social security and is entitled to the realization of economic,

social, and cultural rights indispensable for his dignity and the free development of his personality (Upadhyay, 2015, pp. 221-222), in accordance with the organization and resources of each state, through national effort and international cooperation and in accordance "with the organization and resources of each state", under ICESCR: Art. 8 (1).

All minorities based on religions or language can set up their own educational institutions to preserve and develop their own culture under Art.30 of the CoI. UDHR: Art. 22 provides this right under economic, social and cultural rights. ICCPR Art. 9 (3) and 14 also provide this right in some extent. Specifically, Art 27 of ICCPR provide the minority Rights.

Articles 31 and 31A- Compulsory acquisition of property (Omitted by 44th amendment of the constitution) survey of laws providing for acquisition of estates etc. (Omitted by 45th amendment). But these rights are secured under UDHR- Art. 11 (1) and (2) ICCPR, Art 1 (1) and (2)) and ICESCR: Art. 1 (1) and (2). These rights were amended with the 45th amendment and moved to constitutional right under Article 300A of the CoI.

To move a court of law in case of and denial of the fundamental rights is empowered through the provision of Art. 32 and 226 of the constitution. This is related to the enforcement of rights through constitutional remedies as UDHR Art. 8 ensures everyone to effective remedy of the fundamental rights through competent courts. It is also guaranteed as right to fair trial under Art.14 of ICCPR.

The constitution of India clearly outlines the "power of parliament to modify the rights conferred by this part in their application etc"(EBC, 2011, p. 35). is set up under Art 33 of the CoI on which parliament may, by law determine to what extent any of the rights conferred by this part shall, in their application to Armed Forces; or the members of the force charged with the maintenance of public order or persons employed in any bureau or in connection with the telecommunication systems set up for the purposes of any force bureau or organization referred in clause (a) to (c). UDHR: Art 29 (2) states to such limitations as are determined by law. It was recognized under the amended rules framed under the police forces by the Restriction of Right Act, 1996 of India.

The mostly criticized provision of "restriction on rights conferred by this part while marital law is in force in any area" (LBMB, 2016, p. 21) is in Art. 34 of the CoI. But the UDHR: Art. 29 (2) also authorizes national legislature to make such restrictions.

Additionally, "Legislation to give effect to the provisions of this part"(LBMB, 2016, p. 21) is designed under Art.35 of the CoI by which "Notwithstanding anything in this constitution shall have right to make necessary laws" (LBMB, 2016, p. 21). It is related to international practice of principle of constitution and rule of law.

The fundamental rights provided for the Indian citizens have also remained at overturning the inequalities of pre-independence social practices. Specifically, they have also been used to abolish untouchability and thus prohibit discrimination on the basis of religion, race, caste, sex or place of birth. Trafficking of human beings and forced labour are outlawed. They also protect cultural and educational rights of religious and linguistic minorities by allowing them to preserve their languages and also establish and administer their own educational institutions. Limitations on the fundamental rights and provision related to preventive detention and the suspension of fundamental rights are against the measuring standard of international instruments (UDHR, ICCPR and ICESCR) of human rights. The nature of fundamental rights of India has two dynamics; some fundamental rights such as the right to life and personal liberty are functional for persons of any nationality whether others such as freedom of "speech and expression and freedom to reside and settle in any part of the country are reserved to the citizenry only, including non-resident Indian citizens".

(Note: for further details see Table 8.3 in Appendix-III).

Comparative Analysis of Fundamental Rights under the Current Constitution of Nepal and India

There are two models concerning the design of fundamental rights in the constitutions in all countries of the world: classification and no classification model. No classification or itemized model which means regulating the fundamental rights of the citizens point by point such as the constitution of USA, UK, France, Germany and Nepal and the classification of constitution model regulates the fundamental rights of the citizens by the way of dividing them into different categories (He, 2010, p. 50).

The Constitution of India 1950 comes under classification model and divides the rights of the citizens into six categories.

Both Nepal and India have their own fundamental rights based on their necessity. Generally, they have similar arrangements however Nepalese Constitution has more varieties of fundamental rights. Fundamental rights have played vital role in both countries without any discrimination. They are enforceable by court. Hence, the right to constitutional remedies given to under Article 46 of the Nepalese Constitution and by Article 32 of the Indian Constitution are equivalent. The fundamental rights of these countries are suitable for citizens of both countries to enjoy accordingly.

To live a life with dignity is an innate desire of mankind. It is applicable when the constitution of a country adopts the major rights and liberties in it with the government of high degree of reliable procedure and mechanism. The countries have their own fundamental rights according to their conditionality. The constitution of Nepal and India both have their own fundamental rights based on certain theories, principles, norms and values adopted as the necessity of time. The constitution of Nepal (2015) incorporated a long list of fundamental rights under part III Articles 16 to 46. However, Article 47 and 48 under the same part enumerated implementation time and fundamental duties of the citizens.

Similarly, the constitution of India (1950) had also adopted the basic rights and liberties in the form of fundamental rights under part III, Article 12 to 35. The aim of Article 12 was to declare an instrumentality or agency of the state having operations outside India and the main objective of Article 13 was to secure paramountcy of the Constitution in regard to fundamental rights. Article No. (33), (34) and (35) of the Indian constitution accredited to the parliament for with law necessary amendment and restrictions to be laid down in accordance with law. Rest of the articles describe other provisions of fundamental rights.

Nepal and India both regularized liberal democracy. These two countries have put efforts to prioritize the liberalism preceded democracy, allowing the latter flourish. Liberal democracy has almost become universal values. If democracy does not comprise of fundamental rights and freedoms it remains imperfect. It is often argued that democracy and liberalism usually proceed hand in hand. The multiparty liberal democracy flourished delimiting the range of authoritative rule separating the power

among the three wings (legislative, executive and judiciary) of the government. Coincidentally both of the constitutions embodied the fundamental rights under part III of their concurrent constitutions. The concept of fundamental rights is taken from the US Bill of Rights popularly said as Magna Carta of the citizens. Constitutionally, these rights are justifiable, if any infringe presence over there, the people can go to judiciary for remedy. They are neither absolute nor permanent due to the reasonable restriction clauses allowing parliament to make necessary laws and amendment over them. The state mechanism (federal, provincial and local) government is responsible to provide these rights.

The provisions of fundamental rights remain useless unless a reliable mechanism is made for constitutional remedy with competent judicial review. Supreme Court can declare any law null and void if it violates any fundamental rights. "The Constitution of Nepal in 2015 committed itself to the goal of socialism through the adoption of democratic values based on competitive multiparty politics- including periodic election, adult franchise, press freedom, civil liberty and an independent and impartial judiciary" (Mahat, 2020, p. 1).

The constitutions of both countries enormously ensure all civil and political, economic, social and cultural and group rights for the fullest physical, mental and moral development of the every citizen. To make the life meaningful and worthy, the fundamental rights are not protected only, but secured also with due compensation if they are grossly violated.

Right to autonomy and self-rule, the proportional inclusive and participatory principles are some of the basic foundations of Nepal's Constitution 2015, Adhikari (2017) illustrates that "it confers 16 civil and political rights, 10 economic, social and cultural rights and five group rights out of the 31 fundamental rights" (p. 167).

Civil and Political Rights

Under civil and political rights, Article 16 of the constitution provides for the right to live with dignity to every person. More importantly, the Constitution guarantees the right to equality, as the fundamental right, to all citizens without discrimination "in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language, ideology or on similar other grounds"(LBMB, 2016, p. 12). Similarly, a

citizen of Nepal has the right to stand in elections. The constitution ensures rights in filling candidature "by political parties for the election to the House of Representatives under the proportional electoral system, representation of women, Dalits, indigenous peoples, Khas Arya, Madhesi, Tharu, Muslims and backward region on the population" (LBMB, 2016, p. 12) is ensured and the similar provision has to be followed for State Legislature.

Table 8.4: Civil and Political Rights under the Constitution of Nepal (2015)

S.N.	Nature of fundamental right	Article
1	"Right to live with dignity"	Article 16
2	"Right to freedom"	Article 17
3	"Right to equality"	Article 18
4	"Right to communication"	Article 19
5	"Right relating to justice"	Article 20
6	"Right to victim of crime"	Article 21
7	"Right against torture"	Article 22
8	"Right against preventive detention"	Article 23
9	"Right against untouchability and discrimination"	Article 24
10	"Right to property"	Article 25
11	"Right to freedom of religion"	Article 26
12	"Right to information"	Article 27
13	"Right to privacy"	Article 28
14	"Right against exploitation"	Article 29
15	"Right against exile"	Article 45
16	"Right to constitutional remedy"	Article 46

(Source: The Constitution of Nepal, 2015)

Economic, Social and Cultural Rights

The Constitution of Nepal 2015 provides economic, social and cultural rights. Article 42(1) provides for the rights to the indigenous people of Nepal to part in the public mechanism on the basis of inclusiveness, also "the indigent citizens and citizens on the verge of extinction have the right to get special opportunities and benefits in education, health, housing, employment, food and social security for their protection, upliftment, empowerment and development" (LBMB, 2016, p. 12) under Article 42 (2). Similarly, farmers have "right to access to lands for agro activities, and select and protect local seeds and agro-species" (LBMB, 2016, p. 25) using traditionally.

Table 8.5: Economic, Social and Cultural Rights

S.N.	Name of fundamental right	Article
1	"Right to clean environment"	Article 30
2	"Right relating to education"	Article 31
3	"Right to language and culture"	Article 32
4	"Right to employment"	Article 33
5	"Right to labour"	Article 34
6	"Right relating to health"	Article 35
7	"Right relating to food"	Article 36
8	"Right to housing"	Article 37
9	"Right to social justice"	Article 42
10	"Right to social security"	Article 43

(Source: The Constitution of Nepal 2015)

Collective Rights

The constitution further recognizes collective or third generation rights in article 30, the status of all languages spoken as mother tongues in Nepal are the languages of the nation. Article 31(5) has provided for right to receive education in mother tongue, for the purpose, to open and operate schools and educational institutes pursuant to law. In addition, the Constitution explicitly recognizes the right of every person and community to use their languages, and to participate in the cultural, and to promote its language, script, cultural civilization and heritage under Article 32. Further, the law of the land provides for the policy guidance to make special provisions for equal distribution of economic, social and cultural opportunities and benefits to the Madhesi community, Muslims and backward class, and for opportunities and benefits the indigent citizens within such communities for their protection, upliftment, empowerment and development. Connecting to this Article 56(5) of the constitution clearly states that "any special, protected or autonomous region can be set by the federal law for social, cultural protection or economic development" (LBMB, 2016, p. 44).

Table 8.6: Collective Rights under the Constitution of Nepal 2015

S.N.	Nature of fundamental right	Article
1	Right of women	Article 38
2	Right of children	Article 39
3	Right of Dalit	Article 40
4	Rights of senior citizen	Article 41
5	Rights of consumer	Article 44

(Source: The Constitution of Nepal, 2015).

The framers of the constitution of India were not influenced only by US Bill of Rights and British Common Law Rules, but also "very much influenced by the Idea of Karl Marx, Declaration of Human Rights and former Soviet Constitution" (Turukmane, 2014, p. 117). The Constitution of India incorporates the characters of three generations of rights, i.e. Civil and Political Rights, Economic, Social and Cultural Rights and Group or collective Rights under part III Articles 12 to 35.

Civil and Political Rights under the Constitution of India 1950

Table 8.7: Civil and Political Rights under the Constitution of India 1950

S.N.	The nature's rights	Article
1	Equality before law	Article 14
2	Social equality and equal access to public area	Article 15
3	Abolition of untouchability	Article 17
4	Abolition of titles	Article 18
5	Freedom of speech: Expression, assembly, movement, migration and occupation (Right to freedom)	Article 19
6	Protection in respect of conviction for offences	Article 20
7	Protection of life and personal liberty	Article 21
8	Protection against arrest and detention in certain cases	Article 22
9	Prohibition of traffick in human beings and forced labour	Article 23
10	Freedom of conscience and free profession, practice and propagation of religion	Article 25
11	Prohibition to state run institutions to impart education that is pro-religious	Article 28
12	Right to constitutional remedies	Article 32

(Source: The Constitution of India, 1950).

Economic, Social and Cultural Rights in India

Table 8.8: Economic, Social and Cultural Rights

S.N.	Name of the rights	Article
1	Equality of opportunity in matters of public employment area	Article 16
2	Prohibition of employment of children in factories.	Article 24
3	Religious communities as set up charitable institution of their own	Article 25
4	Prohibition to lay down taxes for the promotion of particular religion.	Article 25
5	prohibition to make discrimination against for admission in state or state aided institution	Article 29
6	To preserve and develop their own culture for all minorities, religions and linguistic	Article 30

(Source: The Constitution of India, 1950)

Group or Collective Rights in India

Table 8.9: Group or Collective Rights in India

S.N.	Nature of Fundamental Rights	Articles
1	Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.	Article 29(1)
2	Protects the equality of the citizens, as it guarantees protection against discrimination on the basis of religion, race, caste or language.	Article 29(2)
3	Right of minorities to establish and administer educational institutions	Article 30
4	Prohibits the government from denying minority educational institutions State funds	Article 30(2)

(Source: The Constitution of India, 1950)

The constitution of India incorporated extensive list of civil and political rights as specified by UDHR and ICCPR. But, very few economic, social and cultural rights are assured under the fundamental rights provision. Unlike the provision of ICESCR, these rights are most tactfully settled under directive principles and state policies. Equal pay for equal work, provision for just and humane conditions of work and maternity relief" (EBC, 2011, p. 40) , right to work, to education and public assistance in certain cases, opportunity for children, compulsory education for children, living wage, etc. for workers and nutrition and standard of living more likely related to economic, social and cultural rights and group or collective rights are kept in part IV under Directive Principles and State Policies which are not enforcing arrangements to the state as compare to the fundamental rights.

Nepal and India both promulgated their constitutions by constituent assembly adopting democratic procedure. Under the fundamental rights provisions of both constitutions, the right to equality before the law and equal protection of the law, prohibition of discrimination on the basis of caste, sex, religion, race, or place of birth, and abolition of untouchability are nearly identical to those stated in Nepal's Article 18 and 24 and India's Article 14, 15, 16, 17, and 18 under the right to equality group. But Nepal only has addressed rights of LGBTQI in its constitution. UDHR- Article 2, 7 and 23, ICCPR - Article 3, 25 (2) and 26, and ICESCR Article – 3 also

incorporate these rights. Similarly, the provisions of freedom of speech and expression, to assemble peacefully without arms, to form associations and unions, to move freely throughout the country, to reside and settle in any part of the country and to practice and profess any occupation, trade or business under Article 17 of the Nepalese Constitution and Articles No. 19, 20, 21 and 21 (a) and 22 of the constitution of India ensure and protect the parallel right with the same corresponding senses. These rights are protected in Article 10, 13, 19 and 26 of UDHR, Article 6, 12, 19 (1, 2), 9 and 15 of ICCPR and article 13 of ICESCR.

The provision of right to live with dignity under Article 16 of the Constitution of Nepal (CoN) partially matches with the arrangements of the right to life and personal liberty specified in Article 21 of the Constitution of India (CoI). Though the former one prohibits death penalty to anyone under Article 16 (2) of the CoN but the lateral detached from it. Right against exploitation addressed in Articles 29, 34 and 39 of CoN resembles to the provisions of articles of the CoI. These mutual corresponding adaptations include prohibition of all forms of forced labour, child labour and traffic in human. Also abolishes the "employment of children below the age of 14 years in dangerous jobs in hazardous places like industries, factories, mines" etc. These provisions appear as the reproduction of the settlements of Article 4 of UDHR, Articles 8 (1), (2) and (3) ICCPR and Articles 6 and 7 of ICESCR.

Both the neighbouring countries' constitutions declare secular state, nonetheless they include right to freedom of religion in Article 26 of CoN and Articles 25, 26, 27 and 28 of the CoI just as equivalent to the Article 18 of the UDHR, Article 18 of ICCPR and Article 1 (1 and 2) of the ICESCR. Right to Freedom of Religion in adjacent countries embraced the freedom to profess, practice and protect their religions. According to their conviction on it, freedom of manage religious affair operate and protect religious sites and institutions guarantees of equal preference to all religions from the state are described under these clauses. These rights are not absolute due to reasonable restrictions that can be laid over such activities which may curse the public order, morality, peace and health of the citizens.

Educational and cultural rights archived from Article 26 (1), (2) and (3) of UDHR and Article 13 and 14 of ICESCR contain in Article 31 and 32 of the CoN and Article 29 and 30 of the CoI. Rights relating to education, culture and language deal with right of access of basic education and preserve the right of any section of citizen to conserve

their culture, language or script and cultural civilization and heritage. Every community has right to get education in mother tongue "open and operate schools, educational institution in accordance with law" (LBMB, 2016, p. 20). In this sense, right to open and operate schools and educational institution means right to effectively manage and conduct the affairs of education.

Right to constitutional remedies equivalent with provision of Article 8 (Right to effective remedy) and Article 14 (Right to fair trail) of ICCPR is protected in Article 46 of the CoN and Article 32 to 35 of CoI. The remedial provision "empower every citizens have a right to move a court of law in case of any denial of the fundamental rights" (Jasmine, 2017, p. 53). The courts are authorized to safeguard these rights of the citizens if it finds any person deprived of these fundamental rights from the arbitrary action of the state or anybody else; and can set free the victims and order for compensation according to the degree of violation against the culprits. The courts according to Article 133 and 144 of the CoN and Article 226 and 251 of the CoI to protect the fundamental rights guaranteed on part III of the both constitutions can issue several types of writs based on the nature of offense namely habeas corpus, mandamus, prohibition, quo warranto and certiorari. These rights can be suspended by the government when the emergency is declared in the country. Supreme courts of both countries can declare any law null and void in case any fundamental rights are violated.

The current Constitution of Nepal and India 1950 both have certain substantive similarities with respect of fundamental rights provision. Both constitutions pay their sincere faith to the basic human rights. Nepal declares as federal and India mentions as union of states for the system of federalism. Both the countries coin similar type of enforcement mechanism for fundamental rights i.e. independent judiciary. Both are secular states though Nepal defines it distinctly including the freedom of practice, profess and protect of 'Sanatana Dharma'. Emergency powers provision adopted in both constitutions trigger threat over fundamental rights. International practice of judicial interpretation and minority rights are welcomed in both constitutions. Public service litigation and social service litigation are considered with the reasonable restrictions clauses after the certain fundamental rights provisions. Socialism oriented governing system and pluralism are arranged to adopt the economic, social and cultural rights of the citizen and to guarantee the theory of inclusiveness.

However, the constitutions of Nepal and India both embrace the principles of republicanism, federalism, secularism, socialism and inclusiveness (Singh, 2019, p. 96) as similar attributes; they have certain distinct differences in fundamental rights matters. Right to live with dignity provision Article 16 (2) of the CoN prohibits death penalty to anyone but the constitution of India has been practicing under Penal Code Act beyond the ideals of John Locke; life, liberty and property and also the provision of UDHR. Reversely, Nepal renounces the death penalty in its 2015 Constitution. Right to communication and information guaranteed as fundamental rights under the articles 19 and 27 are the noble concepts of the CoN whereas the CoI protects these rights by legal acts. Right to property with due compensations in case of legal confiscation is protected under Article 25 of the CoN whereas this right is deleted from fundamental rights in CoI with the 44th and 45th amendment act and dragged it to Article 300A as constitutional rights. Women's Rights (Art. 38) Child Rights(Art. 39), Rights related to Dalit (Art. 40), Senior citizen's Rights (41), Right to Employment (Art. 33), Right to Housing (Art. 37) are the broader spectra under CoN, however the CoI preserved these rights under directive principles and state policies. Moving a step ahead, Article 21 (2) of the CoN has ensured right right of victim of crime including rehabilitation and compensation for the victims of crime, however this right in India is recently recognized by judicial pronouncement.

The Constitution of Nepal under Article 38 recognizes the rights of women expressing explicitly that "Women shall have equal ancestral rights without any gender based discrimination." Property right is not fundamental right in India and it seems not introduced yet. Moreover, Nepal's Constitution has adopted the principles of positive discrimination and proportional inclusion to give women the right to participate in all agencies of the state mechanism and in health, education, employment and social security, while, India still has to go with a long way to ensure it. Right to free legal aid is a fundamental right in Nepal but it comes under legal rights in India.

With the provision of Article 46, 133 and 144 both the High Court and Supreme Court of Nepal are entrusted to entertain the writs on violation of both fundamental rights and legal rights in Nepal, but in India Supreme Court entertains writs only on violation of fundamental rights and High Court on both legal and fundamental rights.

Adopting the principles of secularism constitution of Nepal declares that the state would have no religion as it endows it in Article 26 only. The constitution of India has

covered Articles 25 to 30 concretize the right to religion and culture. The constitution of Nepal ensures right to allow religious instructions and lessons through educational curriculum or through religious minority institutions nowhere, while, the constitution of India ensures same rights as fundamental rights under Article 28.

Under Right to clean Environment of Article 30- of the constitution of Nepal, the victim shall have the right to obtain compensation for any injury caused from environmental pollution or degradation. In India the "right to clean environment" is not explicitly stated in the constitution. However, the Supreme Court of India has announced it to be incorporated under right to life. Likewise, right to free education from primary to higher level for differently able and economically poor citizens have kept under fundamental rights in Nepal while in India such facility is limited in primary level only. The constitution of India mainly focuses on individual rights, whereas the constitution of Nepal accommodates group rights; women rights Dalit rights, Janajati rights, child rights, senior citizens' rights, etc. Social justice has been ensured in Nepal in all spheres of social life for schedule caste and tribes under Article 42 of the constitution. But this right is enjoyed by such communities in India for the purpose of justifiable employment in public services only.

In fact, the basic values of democracy, social justice and secularism stand on the interaction of liberty, equality and property. The interaction between freedom of speech, expression, assembly and association, and right to equality enables the working pace of democracy (Lipson, 1964, p. 229-230). The overall assessment of fundamental rights shows a mixed bag of outcomes. Nepal has made important progress towards greater inclusiveness as compare to India. Sometimes it is adverse in practice that high caste Hindus of India- whose representation from north India in early year of independence was around $\frac{2}{3}$ of total (in representation to Loksabha and Bidhan Sabha), now dropped into around 30%- reversely the representation of backward is jumped from $\frac{1}{3}$ to $\frac{2}{3}$ in corresponding period. The Constitution of Nepal 2015 distributes 60% seats for FPTP system and 40% seats for PR. Madhesis, Tharus and some indigenous nationalities have their dissatisfaction on these arrangements and have demanded that the new constitution ought to have retained the provisions of the Interim Constitution as far as inclusion is concerned.

Findings of the Study

Both Nepal's and India's constitutions include a range of economic, social, cultural, and collective rights. Fundamental rights in Nepal and India share some common characteristics, such as being comprehensive and detailed, being an integral part of the constitution, being qualified and enforceable, being amendable with flexibility, allowing for the suspension of rights, and having constitutional superiority over fundamental rights. Though the constitutions of Nepal and India were both drafted by Constituent Assemblies and based on the ideas of republicanism, federalism, secularism, and inclusiveness, there are some discrepancies between them.

Due to the inclusive viewpoints of an extensive list of 31 essential rights relating with no classification constitution model under Part III Article 16-46, the Nepali Constitution of 2015 is more progressive than previous constitutions. Most key civil, political, social, economic, and cultural rights are incorporated and integrated. Right to Equality (Art. 14-18), Right to Freedom (Art. 19-22), Right against Exploitation (Art. 23-24), Right to Freedom of Religion (Art. 25-28), Cultural and Educational Rights (Art. 29-30), and Right to Constitutional Remedy (Art. 29-30) are the twenty fundamental rights regulated by the Indian Constitution of 1950, which divides citizens' rights into six categories (Art.32). The Indian Constitution of 1950 established seven fundamental rights, however property rights were changed from one to the other.

Only the Nepali Constitution of 2015 confers additional fundamental rights, such as the right to food, the right to shelter, the right of Dalits, the right of senior citizens, and the right of consumers. Both constitutions feature limitation articles on fundamental rights and suspension provisions for certain fundamental rights during emergencies, thanks to the federal structure of enforcing mechanisms and consolidated judicial review systems. Both Nepal's and India's constitutions feature more fundamental rights in Part III than the Bill of Rights of England, the

The Nepali Constitution of 2015 enshrines John Lock's values of liberty, independence, and equality, yet Article 19 clauses 2–4 of the Indian Constitution deftly penetrate the perplexing provision of the death sentence against the provisions of articles 14, 19, and 21. The 44th amendment to the Indian Constitution, which

excludes basic rights, turns the right to property under article 19(1) (f) and article 31 to constitutional or legal rights, which are specified in Article 300A. However, the Nepali constitution, in Article 16(2), under the right to live with dignity, abolishes the death sentence and establishes the right to property in Article 25 of the fundamental rights, making it theoretically more progressive than the Indian constitution. The right to life is a natural right, but it is also a social contract obligation to a sovereign state. A number of key economic and social rights, including as the right to labor, rest and leisure, free and compulsory education, and social security, are not included in India's fundamental rights. However, these rights appear to be mentioned in order in Articles 31, 33, 34, and 43 of the Nepali constitution, which correspond to the provisions of Art. 23(1), (2), (3) and (4), Art. 26(1), (2) and (3), Art. 22 of the UDHR, Art. 6(1) and (2), Art. 7(a), (b), (c) and (d), Art. 8 (1), (a), (b), (c) and (d), Art. 8 (2) and (3), and Art.\

With Art. 20(10) and Art. 39(A), both the Nepali and Indian constitution guarantee free legal help in seeking quick judicial remedies in a vulnerable circumstance. In Nepal, both the High Court and the Supreme Court are entrusted with hearing writs on violations of both fundamental and legal rights under Article 46, 133, and 144; however, in India, the Supreme Court only hears writs on violations of fundamental rights, while the High Court hears writs on both legal and fundamental rights.

The Indian constitution's fundamental rights unit is largely concerned with civil and political rights, and it lacks theoretical consistency and a unified set of ideas and beliefs. It advantageously incorporates economic, social, and cultural rights into 'Directive principles and state policy' that are not legally obligatory. But, most critically, the Nepali constitution provides not only for both of them, but also for collective rights in the fundamental rights section.

In terms of the right to a clean environment in Nepal's current constitution, victims of environmental pollution or degradation have the fundamental right to receive compensation from polluters under Art. 30(2). Unlike Nepal, India's constitution does not clearly include the right to a clean environment.

Article 47 of the Constitution of Nepal 2015, which deals with the application of fundamental rights, stipulates that legal provisions for the enforcement of the

applicable basic rights must be made within three years of the Constitution's entry into effect. Such a measure aimed at delaying the enjoyment of fundamental rights is incompatible with the conviction of constitutionalism.

Both the constitutions have failed to fully adopt the characteristics of liberalism and characteristics of socialism in the true sense from the ideological perspective. In this plight India moves to the socialist direction while Nepal is still puzzled by adopting mutually contradictory philosophies altogether. The right to property is no longer considered a fundamental right in India, but it is nonetheless guaranteed under the constitution. The Right to Property was removed from the list of Fundamental Rights in 1978 because it posed a significant obstacle to achieving the goals of socialism and equitable wealth distribution. The embrace of the most disputed ideas of liberalism and democratic socialism at the same time is a huge bigotry for both Nepal's and India's constitutions. Neither Nepal nor India can ensure property rights by putting their souls in socialism, nor can India demonstrate its commitment to liberal ideas by removing property rights from the list of essential rights.

With extensive post-modern features of inclusive democracy that correspond to the basic component of liberalism and major international instruments of human rights, the constitutional provision of fundamental rights in Nepal 2015 appears to be more advanced than the provision of fundamental rights in India 1950 even considering the amendments made under Indian constitution after 1970s.

CHAPTER NINE

SUMMARY AND CONCLUSIONS

Summary

The Constitution is a supreme political and legal document of the land, consisting of fundamental rules. The origin of written constitution is credited to the United States of America back in 1787. The provisions and due practices of fundamental rights ensured in a constitution justify the intensity of loyalty of a nation to the welfare states. Fundamental rights are included in constitution in order to develop personality and preserve dignity of every individual citizen.

Historically, Nepal has experimented seven constitutions so far with the constitutions of Nepal 1948, 1951, 1959, 1962, 1990, 2007, and the Constitution of Nepal 2015. All these constitutions can be summarized into three categories: i) Limited- the constitutions of 1948 and 1962 which outlawed existence of political parties and even infringed civil and political rights; ii) liberal constitutions (the constitutions of 1959 and 1990) with civil and political rights; and iii) the constitutions with third generation rights- the constitutions of 2007 and 2015. The 2015 constitution was required because preceding statutes did not meet the aspirations of the citizenry.

However, India has quite different trajectory in the constitution building. The constitutional experiment of India can be divided into three phases: Constitutional experiment of British East-India Company (1773-1857), experiment of the British Crown (1858-1947), experiment of the Constitution of India 1950 onwards.

This study has compared the constitutional provisions on fundamental rights in the Nepali Constitution of 2015 and the Indian Constitution of 1950, as well as the historical contexts of the two countries. While making comparison, it focused on exploring similarities and differences, strengths and weaknesses regarding the provisions of fundamental rights of these two constitutions. The present constitutions of Nepal and India were the results of various efforts made to prioritize the 'liberalism preceded democracy'. The basement of their constitution outgrowths from western medieval political philosophy. It is often argued that democracy and liberalism usually proceed instantly which is considered in this study.

The prior literatures available in the national and international context focused only on the evolution, development and constitutional arrangements. However, a few number of scholars have revealed the stereotypical definition of human rights and fundamental freedoms only, and rest of others analyze the UN Declaration of Human Rights, 1948 and post-natal protocol and covenants. Hence, still it was required quantifying, clarifying and distinguishing about the constitutional provision of fundamental right.

In order to compare the provisions of fundamental rights in the Indian constitution it has made a closer look at the provisions in the context of political, social and cultural transformation of India. Besides the constitutional provision of fundamental rights, the study has also portrayed international declarations agreements, covenants and protocols related to the development of human rights in the world scenario.

Focusing on the review of previous literatures this study aims to fulfill the inadequacies of the literatures associating with the points: i) In what extent liberal philosophical thoughts are reflected in constitutions of Nepal and India both as they have adopted liberal democratic system of governance?, ii) The political liberalist John Locke announces 'life', 'liberty' and 'property' as the basic components of the liberal democracy. Contrary to this, the Indian constitution infringes the right to property from the fundamental rights and practices capital punishment against the universal provision of right to life, how far is it justifiable? And iii) How can the similarities and differences and the strengths and shortcomings be analyzed?

This study adopted the research in qualitative research design. The nature of this research is qualitative content analysis. Due to the qualitative nature of data it has followed explorative strategies to analyze the contents gathered from the text. The qualitative contents were interpreted to draw findings. The focus was on fundamental rights mentioned in the Constitution of Nepal 2015 and the Constitution of the Democratic Republic of India 1950. The study is limited to the Nepal's Constitution of (2015), the Indian Constitution (1950), Nepali and Indian constitutional interpretations, UN Declarations of Human Rights (1948), International Covenants on Economic, Social, and Cultural Rights (1966) and International Covenant on Civil and Political Rights (1966), as well as Optional Protocols of international human rights instruments. In addition to the different governmental and non-governmental

agencies and persons related to the issue of fundamental rights of Nepali and Indian constitutions were consulted as far as possible. Books, articles, and criticism were also borrowed from some other sources. In order to analyze and interpret the political theory of liberalism and post-modern democratic values of inclusive democracy were adopted even considering the latest amendments made under Indian constitution. The constitutions experimented during the Rana period, Democratic period, Panchayat period, Restoration of Democracy and the Federal Republic era are the main sources for the study of constitution of Nepal. Similarly, the constitutional experiments of India during the rule of East India Company, under the British Crown and the Indian Independence movement (1947) are the main references for Indian context.

Nepal entered into modern phase in 1768 and since then it has passed through various political, social, ethnic and cultural upheavals. The first legal code called *Muluki Ain* was enacted in 1910 B.S. (1854) and it was influenced by British Bill of Rights though it had numerous infringements of modern fundamental rights. The modern human rights and fundamental freedoms of Nepal are the result of all the seven constitutions enacted in the past starting right from the Government of Nepal, Act, 1948. The first six constitutions expired prematurely but the current one of 2015 has gained the highest degree of political legitimacy due to its comprehensive participation of people through the Constituent Assembly. It was built, with the motive of strengthening democracy and the rule of law, protecting and promoting basic liberties of the people, 'leaving no one behind' and creating a just, equitable, tolerant, open and socially inclusive nation in which the needs of the most vulnerable are met. Imparting the basic human rights and fundamental freedoms the present constitution of Nepal deserves to be 'a people's constitution'. Associated to the earlier constitutions of Nepal, the 2015 Constitution is observed as a liberal, people-centric document based on modern values of constitutionalism. However, we can hear the voices of dissatisfaction against this constitution even today.

The Constitution of Nepal 2015 has been rejected by historically marginalized groups, including Madhesis, Janajatis, women's activists, Dalits and religious minorities. They take the constitution as it was violating the repeated commitments made for inclusive and progressive state during Nepal's peacebuilding process. Despite such limitations, the 2015 Constitution is accepted in many ways a progressive document in terms of

advancing women's rights in several areas and also it has recognized Lesbian, Gay, Bisexual and Transgender (LGBT) rights.

The constitution builders of Nepal and India are impressed by the provisions of the Charter of the United Nations and Universal Declaration of Human Rights, 1948. From the historical perspective of fundamental rights development of India, it is concluded that incorporation of the human rights and fundamental freedoms under the constitution was due to the influence of Magna Carta and Bill of Rights of England and Provisions of the American and French constitutions. Hereby, it must be recalled that the Constitution of India was built at time when the country was passing through extraordinary stress and strain. The forces of disintegration that raised their issues subsequently and threatened the very existence of the young republic called for drastic measures to ensure security of the social order.

The Constitution of Nepal 2015 may be considered the best among the constitutions of Nepal promulgated since 1948. Human rights and fundamental freedoms specified under present constitution of Nepal are on more solid footings and deserve some more attributes even than the concurrent Indian constitution though it was built in between 65 years of time differences. Averting all the hindrances of former constitutions of Nepal, the new constitution of 2015 was promulgated predominantly standing on almost similar liberal democratic values which were followed while making Indian constitution. Both Nepal and India adopted the Constituent Assemblies to draft their constitutions, which have essentially identical characters. Both are dedicated to socialism based on democratic ideals, such as competitive multi-party system of governance, loyalty to the civil liberties, fundamental rights, federalism, republicanism, secularism, adult franchise, and periodic elections, full freedom of the press, and an independent and impartial judiciary, as well as the concept of the rule of law. Both constitutions encapsulate superiority of the fundamental rights, special provisions for minority rights, flexibility with provision of amendments are and largely inspired by similar liberal values.

However, they still associate with some differences. Nepal is a federal democratic republic state that is independent, indivisible, sovereign, secular, inclusive, and socialist. India is a sovereign, socialist, secular, and democratic republic. As a result, "all mother tongues spoken in Nepal are national languages of Nepal" (LBMB, 2016,

p. 4), But in India there no certain definition of it, despite the fact that Hindi is the official language of the country, according to Article 343 clause 1 of the Indian constitution. In Nepal, sovereignty is inherent, whereas it is uncertain in India. Women's equal rights in ancestral property are clearly specified in Nepal's right to recognition, but no such explicit rights are mentioned in India, even though equality under equal circumstances is mentioned in Article 14. In Nepal, during the federal and provincial elections both the proportional and first-past-the-post systems of representation are applied, although in India, only the first-past-the-post system is followed. In Nepal, an independent judiciary with a constitutional bench has been in place for ten years, while there is no such provision in India. In Nepal, secularism includes protecting the 'Sanatana Dharma' Cow as the national animal and prohibiting religious conversion, however there are three different definitions of secularism in India: a) 'Sarv Dharma Sambhava', b) 'Dharma Nirpekshata', and c) 'Protection of minority rights.'

With similar socio-economic, cultural, and geographic backgrounds, both countries' constitutions followed a nearly same ideology when implementing federalism. The demographic diversity of Nepal has had a significant influence on the Constitution of Nepal and government structure. Nepal has also aspired to introduce parliamentary form of government and independent judiciary.

In Nepal, out of 601 members of the Constituent Assembly, 597 (91%) participated in the constitution making process. Among all 85% casted their vote of assent in favor of constitution as compared to the reality of 67% of the Constituent Assembly members' acceptance in India (Tripathi, 2015, p. 7). However, India still advises to avert the certain provisions that contradict to the provisions of preceding Interim Constitution of Nepal 2007 tuning with the discontented Madhesh based forces of Nepal.

Nepal's new Constitution for the first time include an expresses mandate for women to have one-third representation in the legislative apparatus in South Asia. The fundamental rights enshrined in Part III of the Nepali Constitution (Articles 16-48) are progressive in nature. Out of them "right to information, right to communication, right to justice, right to victim of crime, right against torture, right to free legal aid, right to privacy, right to property, right to a clean environment, right to language and culture, rights to women, Dalits, senior citizens, and right to social security" are just a

few examples of progressive provisions. Other notable features of the Nepali constitution include constituency delineation based on population and geography, as well as a flexible constitution amendment mechanism that keeps amendments within the boundaries and jurisdictions. The Constitution has rebuilt three layers of governance, resulting in an inclusive election system based on a 60-40 split between the First-Past-the-Post (FPTP) and Proportional Representation (PR) systems.

The Constitution of Nepal 2015 also has affirmative action for backward and disadvantaged communities. It ensures the participation of women in state structures guaranteeing one third of the seats in the Federal Parliament as well as the provincial assemblies and 40 per cent representation at the Local Level.

The provision made by the present constitution of Nepal relating to referendum is unique and innovative. A decision may be reached on such matter through referendum if a two-third majority of the total members of the Federal Legislature sees its necessity.

The Constitution of India establishes fundamental political convictions, the structure, procedures, powers, duties for government institutions, and sets out fundamental rights, directive principles, and the duties of the citizens seeking to create a welfare state where there should be political, social and economic justice and aspires changes according to the needs of the time and situations. The Indian constitution has imitated the characteristics of an independent and impartial court, as well as equitable constituency delineations. The consolidation of perfect justice, an independent judiciary, and the rule of law are essential for a country's democratic credentials, social growth, and priority. It can be achieved through the constitutionally and empirically free and fair appointment of judges in courts, such as in India. Nepal should adopt a collegium system for appointing Supreme Court judges, similar to India, to limit the inspiration of the government on the courts.

In comparison to Nepal, the Indian constitution appears to have more liberal/democratic rules for recruiting the judges of Supreme Court, although Nepal's constitution has hugely assured post-modern democratic norms of inclusive democracy.

Fundamental rights are the core values and themes of the constitutions. For the logical justification the study has scrutinized the provisions of fundamental rights incorporated under the constitutions with the eyes of international mechanisms of human rights such as; UDHR, ICCPR and ICESCR.

Conclusions

Fundamental rights are enshrined in the constitution to help citizens develop their personalities and maintain their dignity. The fundamental rights are subject to change and modification in demand of people's aspirations in a due course of time. The fundamental rights help not only in protection but also in prevention from violation of human rights. The fundamental rights facilitate the citizens not only in the protection but also in the prevention of from violation of human rights. Fundamental rights embody natural rights, human rights, civil rights and constitutional rights. The constitution of Nepal incorporates extensive number of economic, social, cultural and collective rights. However, there still remain some unresolved issues in the 2015 Constitution of Nepal in its implementation and wider acceptance despite various progressive developments. The fundamental rights of Nepal and India still have some common salient features. In both of the constitutions rights are comprehensive and detailed; they are integral part of the constitution, qualified and enforceable, amendable with flexibility. Moreover, there are provisions of the suspension of the rights, constitutional superiority of the fundamental rights and special rights for minorities.

Constituent assemblies drafted both constitutions, which were ratified by 85 percent and 67 percent of members in Nepal and India, respectively. Though they share certain salient features including principles of republicanism, federalism, secularism and inclusiveness. They contain possess definite differences.

Research Question-1/Objective-1

- 1) The Constitution of Nepal 2015 is more progressive in comparison to its prior constitutions due to the inclusive perspectives of intensive list of fundamental rights. The charter incorporates a list of 31 rights concerning with no classification constitution model under Part III Article 16-46. Incorporating and integrating most of the major civil, political, social, economic and cultural

rights of the people as prescribed in the international instruments of human rights including the UDHR (1948), ICCPR (1966) and ICESCR (1966), the Constitution has been liberal enough.

- 2) The additional fundamental rights conferred by the Constitution of Nepal 2015 only are rights of victim of crime, right to food, right to housing, right of Dalits, right of senior citizens and consumer's right. Article 47 resembles 3 years' time-limit for the application of fundamental rights deliberated by part III of the constitution being inconsistent with the principle of constitutionalism. Simultaneously, Article 48 incorporates the duties of the citizens.
- 3) The Constitution of India 1950 which regulated twenty fundamental rights with classification model and divides the rights of the citizens into six categories; specifically, Right to Equality (Art.14-18), Right to Freedom (Art.19-22), Right against Exploitation (23-24), Right to Freedom of Religion (Art.25-28), Cultural and Educational rights (Art. 29-30) and Right to Constitutional Remedy (Art.32). Art. 33 gives parliament the capacity to amend the rights bestowed by Part III of the constitution in their application to forces, etc., whereas Art. 12 integrates a definition and Art. 13 confers legislation inconsistent with or in derogation of the fundamental rights. Art.34 lays down restriction in rights conferred by part III while martial law is in force in any area. Likewise, Art.35 incorporates legislation to give effect to the provision of fundamental rights in part III of the constitution.
- 4) Originally, there were seven fundamental rights under the Constitution of India 1950 but the property rights have been shifted from the fundamental rights by the 44th amendment Act, 1978.

Research Question-2/Objective-2

- 1) Both the constitutions of Nepal and India were built through the Constituent Assembly and adopted the principles of republicanism, federalism, secularism and inclusiveness based on liberal democratic ideals with civil and political rights and oriented to socialism with economic, social and cultural rights while drafting the constitution.
- 2) With the federal structure of enforcing mechanism and consolidating judicial review systems both the constitutions have laid down limitation clauses on

fundamental rights and suspension provisions of certain fundamental rights during the emergencies.

- 3) Despite the differences in classification and non-classification models, both constitutions feature more fundamental rights in Part III than the Bill of Rights of England, the Bill of Rights of the United States, and the Declaration of the Rights of Man of France.
- 4) John Locke's theory of liberalism emphasizes on three major components of fundamental rights; i.e. life, liberty and property. Most clearly, the Constitution of Nepal 2015 incorporates all these components but absurdly Article 19 clauses 2 to 4 of the Constitution of the India tactfully penetrate the paradoxical provision of death penalty against the provision of article 14, 19, and 21 itself. Abstaining from fundamental rights the 44th amendment of Indian Constitution converts provision of right to property under article 19(1) (f) and article 31 to constitutional or legal rights degenerating in Article 300A. But Nepali constitution in Article 16(2) under right to live with dignity discards death penalty and has become second South Asian country to avoid it after Bhutan and also envisages right to property in fundamental rights in Art. 25 and, theoretically it comes to be more progressive than Indian constitution however, right to freedom protected in their own proposition under fundamental rights section. The supreme court of Indian verdicts bold, farsighted and fair decisions to fulfill the lacunae of these ever debating issues: right to life and property prudently. In any case, while the right to property is property is still a constitutional right, it is no longer a fundamental right. Right to life is a natural right and by social contract it is liability to a sovereign state.
- 5) A number of important economic and social rights, including as the right to labor, rest and leisure, free and obligatory education, and social security, are not included in India's fundamental rights. But these rights are apparently mentioned serially in Article No. 31, 33, 34, 43 of the Nepali constitution corresponding to the provision of Art. 23(1), (2), (3) and (4), Art. 26(1), (2) and (3), Art.22 of UDHR, Art. 6(1) and (2), Art. 7(a), (b), (c) and (d), Art.8

(1), (a), (b), (c) and (d) and (2) and (3) and Art. (9), Art. 13, and 14 of ICESCR.

- 6) The ordinary people of both India and Nepal are poor and judicial remedy and enforcement are costly and out of their reach. Nepal guarantees free legal aid with Art. 20(10) in seeking immediate judicial relief in such a vulnerable situation whereas Indian constitution lays down on 39A in this plight.
- 7) With the provision of Article 46, 133 and 144 both the High Court and Supreme Court of Nepal are entrusted to entertain the writs on violation of both fundamental rights and legal rights in Nepal, notwithstanding this, in India Supreme Court entertains petition of writs only on violation of fundamental rights and High Court on both legal and fundamental rights.
- 8) The fundamental rights unit of Indian constitution resolves round the civil and political rights (first generation rights) only, lacking theoretical consistency and coherent system of values and beliefs. It stocks economic, social and cultural rights (second generation rights) advantageously into 'Directive principles and state policy' with no binding force. But most importantly, the Nepali constitution yields not both of them only even it magnetizes collective rights (third generation rights) more profoundly under the fundamental rights section.
- 9) Despite criticisms, the Nepali constitution received 85 percent support from the Constituent Assembly, compared to only 67 percent support from India's Constituent Assembly for its constitution.

Research Question-3/Objective-3

- 1) Nepal has passed through the experiments of seven constitutions so far fighting for democracy, strengthening welfare state, the rule of law and protecting and promoting freedoms and liberties of the people. But all the predecessor constitutions remained abortive to fulfill the dreams of Nepali citizens. Only Nepal's 2015 constitution, which includes the right to information, right to communication, right to privacy, right to justice, right of crime victims, right against torture, right to free legal aid, right to property, right to a clean environment, right to language and culture, rights of women, Dalits, senior citizens, and right to security. These provision are more progressive even than the constitution of India today.

- 2) Nepal's new constitution is more progressive and enthusiastically institutes several positive elements for the empowerment of women in the country and it is a socio-cultural reflection of the time. Article 38 of the constitution ensures right to women as fundamental rights, unlike the provision of erstwhile Nepali constitutions and concurrent Indian constitution. The constitutional provision setting aside 33 percent representation of women in Nepal's legislature is a significant breakthrough. The constitution of Nepal explicitly recognizes the property rights of the women stating that "women shall have equal ancestral right without any gender-based discrimination." But India still has to introduce similar rights for women where it confirms one-third representation only in local level (Art. 243D) and property rights for women are no more fundamental rights.
- 3) The first amendment introduced to article 42 of the Constitution of Nepal 2015 has assured significant proportional representation in the state mechanism that can be measured as a positive orientation, even though, it is argued that important assurances that were enshrined in the Interim Constitution of 2007 have subsequently been clawed back in the new statute notably the reduction of proportionate representation in parliament from 58 percent under the interim constitution to 45 percent under the new constitution. Under the Constitution of India, parliamentary seats are reserved for historically disadvantaged groups; Schedule Castes (SCs) and Schedule Tribes (STs) in federal and state legislatures. Articles 330 and 332 of the constitution provide the reservation of seats for SCs and STs in direct proportion to their population. Conversely, unlike SCs and STs, there is no any provision for reservation of seats for women in national and state legislatures. However, 33 percent representations of women at local level are comparatively better arrangements after the 73rd and 74th constitutional amendments. Therefore, the reservation of women in national and state legislatures is not up to mark in India.
- 4) With regard to right to clean environment of the present constitution of Nepal the victims of environmental pollution or degradation have the fundamental right in Art. 30(2) to receive compensation from the polluters. Unlike in Nepal right to clean environment is not explicitly mentioned in Indian constitution and the victims cannot claim compensation against the polluters as a fundamental right.

- 5) Article 47 relating to implementation of fundamental rights under the Constitution of Nepal 2015 has laid down a time frame of three years of the commencement of the Constitution to make legal provisions for the enforcement of the relevant fundamental rights. Such a provision intended to keep the enjoyment of fundamental rights on hold is not at all consistent with the conviction of constitutionalism. A fundamental right cannot be suspended making it relative to the enactment of any law. It is so because fundamental rights are, in fact, Natural rights which are not provided rather simply acknowledged by the constitution. The fundamental rights guaranteed by the constitution acquire the status of justiciable rights immediately after the promulgation of the constitution. Such restrictions imposed against the enjoyment of fundamental rights cannot be acceptable and tends to deteriorate a state from the trustworthiness. But again the laws around 17 in numbers have already been passed from the federal legislative for the execution of fundamental rights.
- 6) The Constitution of Nepal 2015 has confirmed an end to all forms of discriminating against women. However, there is a problem in practice due to the deep-rooted patriarchal dogmas, attitudes, and cultural malpractices. It is therefore, necessary for the State to make laws to harmonize the concept of inclusion of one-third women in every structure and institutions of society as guaranteed in the constitution. The debate over policy remedies should proceed in light of empirical evidence.
- 7) The judges for judiciary in India are appointed from collegians of prominent law experts and jurists and avoid unnecessary derogation of executive and politics which ultimately strengthens democratic values, rule of law and independence of judiciary as a whole, but unfortunately in Nepal, the constitutional council and judicial council which are liable to the appointment of chief justice of supreme court and other judges comprises with the dominant members of political background consequently influence the independence of judiciary and tends to committed judicial execution. Indian judiciary deserves competency and strengthens fundamental rights by judicial interpretation. Nepal could possibly adopt a collegians system for appointing

Supreme Court judges, similar to India's, to limit the influence of the government of the day in the judiciary.

- 8) Looking over the years, the judiciary of India due to its firm decisions has been boon to upheld rule of law, sustain constitutional values and preserve from despotism. Indian judiciary has been strengthening fundamental rights through judicial interpretations. But, the Nepalese judicial system within the border of constitution waits under observation. In India judiciary has helped democracy flourish despite repeated failures of other organs. Nepal also can play an instrumental role in cementing walls of fundamental rights and knocking down all the boundaries resting upon discrimination, bias, prejudice and undemocratic principles if presents in provision and practices.

- 9) While the right to property is still a constitutional right in India, it is no longer a fundamental right. Since the Right to Property created a lot of problems in attaining the goal of socialism and equitable distribution of wealth, it was shifted from the list of Fundamental Rights in 1978. It is an affirmative action towards the Marxist socialist ideology and remarked as an attempt to reshape property relations in society to achieve its goal of economic development and social distribution. It is a great bigotry for both the constitutions of Nepal and India due to the adoption of the most contentious ideals of liberalism and the democratic socialism at a time. Neither Nepal can guarantee property right by paying soul faith on socialism nor can India show its sincerity to liberal ideals by abolishing property right from fundamental rights. Both the constitutions have failed to fully adopt the characteristics of liberalism and characteristics of socialism in the true sense from the ideological perspective. In this plight India moves to the socialist direction while Nepal is still puzzled by adopting mutually contradictory philosophies altogether.

With intensive postmodern features of inclusive democracy corresponding to the basic component of liberalism and major international instruments of human rights, the constitutional provision of fundamental rights under the constitution of Nepal 2015 comes to be more advanced as compared to the provision of fundamental rights under the constitution of India 1950 even considering the lateral amendments made under

the Indian constitution after 1970s. But, the Nepali judicial system within the border of constitution still awaits observation.

In conclusions, both constitutions are largely inspired by liberal values, though the Nepali constitution has incorporated more post-modern inclusive-constitutional democratic ideals such as at least 33 percent women representation in Federal and Provincial Parliament, 40 percent in Local level governments (20 percent guaranteed for Dalit women), and 45 percent reservations in government employment, equal parental property rights, equal right to employment, third sex rights or LGBT rights, right to justice, and compensation, which favored more progressive than the Indian Constitution. Moreover, in comparison to Nepal's constitution of 2015, this study solely looked at post-1970s constitutional amendments in India through postmodern discourses. Later amendments to the Indian constitution also seemed more modern than post-modern or inclusive.

Final Thoughts, Theoretical Considerations and Knowledge Contribution

In terms of fundamental rights, Nepal and India's constitutions are very similar. First, civil and political rights such as the right to life, freedom, equality, expression, justice, privacy, constitutional redress, and protection from torture, untouchability, exploitation, and exile have been incorporated into both Nepal's and India's constitutions. These rights are commonly referred to as the first generation of rights, and they are mostly associated with modern liberal political philosophies. They can be viewed as recognition and continuation of the English Bill of Rights 1689, the French Rights of Man 1789, the United States Bill of Rights 1791, and the UDHR 1948 provisions. Second, both constitutions include economic, social, and cultural rights, collectively referred to as "second generation" rights. These rights include the right to education, language, and culture, as well as the right to work and social justice, all of which are founded on neo liberal political ideologies and respect the principles of the ICCPR and the ICESCR. Third, both constitutions have heavily integrated collective or group rights, dubbed the third generation of rights, which are influenced by neoliberal political ideologies and the new modern welfare state model. Such as the right to education, the right to Dalit, the right to religion, the right to language, script, and culture, and so forth. As a result, Nepal and India's constitutions incorporate the fundamental rights that liberals assume.

There are certain similarities between Nepal and India's constitutions, but there are also notable variances. Nepal's fundamental rights include post-modern political concepts such as democracy, social justice, and secularism. These arrangements are also heavily influenced by the South African Constitution of 1996. Part III of Nepal's 2015 constitution asserts the right to a clean environment, free and compulsory education, language and culture, work, labor, housing, social justice, social security, as well as rights relating to women, health, and food, and gives them legal weight. However, it has been argued that using a populist approach to constitution-making may prove harmful in the long run if the country fails to implement them due to a lack of resources and economic capacity.

Despite this, India's 1950 constitution recognizes the right to free and compulsory education, as well as rights to public health and environmental protection, as "Directive Principles and State Policy" that are not enforceable in court. Minority rights under Article 30 (2) of the CoI, on the other hand, appear to be more affirmative. In comparison, the Nepali constitution's provision of fundamental rights appears to be more forward-looking. Nepal and India's constitutions, like those of other countries, studied in this research are forward-looking in that they feature fundamental rights based on core assumptions of liberal, neo liberal, and postmodern philosophy. The constitutional provisions are the result of natural-law advocacy for fundamental human rights. This conversation keeps humanity at the forefront of human rights discussions. Constitutional provisions highlighting fundamental rights can be used to extend and secure such rights. The constitutions of Nepal and India essentially include such rights, as stated by liberals with the important components of 'life, liberty, and property.'

When it comes to the most recent fundamental rights claimed by postmodern thinkers and philosophers, Nepal's constitution is significantly broader. However, in India's Constitution, the right to property is no longer a fundamental right, and the right to life is not protected, even if the death penalty is still used. It is believed that the property right was elevated to a constitutional right in order to achieve socialism's goal of equitable wealth distribution.

As a result, the basic rights clauses in Nepal's 2015 constitution are more progressive or forward-looking, encompassing fundamental rights assumed by liberal, neo-liberal, modern, and postmodern philosophical and theoretical perspectives. This research

compared the constitutional provisions of fundamental rights in Nepal's and India's current constitutions using liberal and post-modern ideologies. It has looked at the parallels and differences between the two charters. Despite the similarities in the normative constitutional frameworks of both countries, the Nepali constitution can provide some beneficial suggestions to those researchers and institutions seeking to expand their knowledge in this sector.

Appendix-I

The substantial similarities and differences between the Constitution of Nepal 2015 and Constitution of India 1950

Table 8.1

S. N.	Features	Similarities	Differences
1	Nature of the constitution	Written, democratic, republic, federal socialist, secular, rigidity with flexibility.	Indian constitution is the longest in the world and Nepalese medium size.
2	System of governance	Parliamentary democratic system of government. Nepal- Article 74 and 105, India- Article 74 and 79.	The form of government in Nepal is multi-party, competitive, federal democratic, republican, parliamentary based on pluralism. Bi-cameral at the center and unicameral at provincial level. In India parliamentary form of government based on West minister model. Bi-cameral legislature both at the center and few provincial level.
3	Fundamental Rights	Nepal- Article 16-46. India- Article 12-35.	Nepal- property right as a constitutional right whereas in India legal rights.
4	Directive principle and state policies.	Nepal- Article 49 to 55. India- Article 36 to 51.	Nepal- Article 49 states as the guiding principles for the governances. India- adopts them as policy blue prints for future.
5	Citizenship	Nepal- Article 10 to 11. India- 5 to 11. Both the countries adopt single federal citizenship provision.	Single citizenship with federal identity in Nepal and in India, every citizen has equal right wherever he/she may reside. Nepalese citizenship policy is somehow dominated by gender-biased policy.
6	Language	Nepal- Article 6, 7 and 287. India- Article 343.	All mother tongues spoken in Nepal are National languages but in India no national language. Hindi is mentioned in

			Article 343 as official language and English could be used for initial 10 years. Provision of Schedule eight is for certain commissions to determine national language.
7	Executive powers	Nepal- Article 66 and 75. India- Article 52 and 53.	Article 75 of the Nepalese constitution- the executive power is vested in council of ministers. Article 53 of the Indian constitution entrusted to the president.
8	Independent of Judiciary and judicial review	Nepal- Article 126 to 161. India- Article 226, 227 and Supreme Court power Article 32 and 136.	Independent judiciary with the constitutional court for 10 years in Nepal. India- judicial review is part of fundamental rights. Nepal has a provision of judicial council for the recommendation of the judges of SC. India- collegiums of judges with no politics recommend the judges.
9	Election System	Adult Franchise with age of 18. Nepal- in Article 84(5), 176(5), 222(5). India- Article 326.	Proportional and single majority system in Nepal but in India first past the post system only.
10	Political parties	Nepal- Article 269 to 272. India- based on democratic norms and values.	Constitution of political parties in Nepal should be democratic and periodic conferences for the approval of leadership. No separate provision in India.
11	Emergency powers	Declared by president in both countries. Nepal- Article 273. India- Article 352 to 365.	If a grave emergency arises, the president may declare or order a state of emergency partly or wholly. In India constitutionally categorized; national, provincial and financial when the

			constitutional mechanism is considered failed.
12	Amendment of the constitution.	Nepal- Article 274 and India- Article 368.	The federal parliament with 2/3 majority can amend the constitution in Nepal. India makes amendment with mixed model: simple majority, special majority.
13	Inclusiveness and minority provision	Special provision for minorities and schedule castes, tribes etc.	Nepal-proportional representation of women, geography and population in all sectors. Right to woman is in wider sense, at least 33 percent in all sectors in India narrower sense, no specifically mentioned.
14	Provision of referendum	Nepal- Article 275 and in India no special provision.	The federal parliament of Nepal with 2/3 majority can hold a referendum in national issues except sovereignty, national integrity and national territory. No referendum provision in India.
15	Constitutional commission	Nepal- part 21, 22, 23, 24, 25, 26 and 27. India- article 315,-323 and 325-329.	Commission for the investigation of abuse of authority, public service commission, election commission, national human rights commission, national natural resource and fiscal commission and other commissions but in India only public service commission and election commission.
16	Layers of federalism	Nepal and India both have three tiers of government i.e. federal, provincial and local.	Nepal with seven states and India with twenty-eight states in the commencement.

Source: Self Prepared

Appendix-II

Comparison of the Fundamental Rights under the Current Constitution of Nepal (CoN) and International Provision of Human Rights

Table 8.2

Articles	Fundamental Rights (FR) under the Current Constitution of Nepal	Provisions under International Instruments of Human Rights (HR)
16	Right to live with dignity: (1) Every person shall have the right to live with dignity (2) No law shall be made providing for the death penalty to anyone.	UDHR Article 1: All human beings are born free and equal in dignity and rights. ICCPR Article 1: Right of Self-determination. ICESCR Article 1: Right, of self-determination. Related to first generation rights of CPR
17	Right to freedom: (1) No person shall be deprived of his or her personal liberty except in accordance with law (2) Every citizen shall have the freedoms of opinion and expression, freedom to assemble peaceably, freedom to form political parties, unions and practice any profession.	UDHR-Article: 13 Right to freedom of movement, Article 18, Right to freedom of thought, conscience and religion, Art.19, Right to freedom of opinion and expression, Art. 20, freedom of association and assembly. ICCPR- Art.11 freedom from Ex-facto law, Art. 12, Right of movement, freedom of thought, conscience and religion, Art. 19, freedom of expressions. Related to CPR but no in ICESCR
18	Right to equality: (1) All citizens shall be equal before law. No person shall be developed the equal protection of law (2) No discrimination on the grounds of origin, religion, race,	UDHR. Art. 7 Right to equality, ICCPR-Art 3 and 26 Right to Equality for equal protection of law. ICESCR Art 3 Right to Equality to ensure the right of men

	<p>caste, tribe, sex, physical condition, class, language region, ideology (3)</p> <p>Equal payment in the same work (5)</p> <p>All of spring shall have the equal right in ancestral property.</p>	<p>and women to the enjoyment of all economic, social and cultural rights. Related to CPR.</p>
19	<p>Right to communication: No publication and broadcasting or dissemination or printing of any news, item, electrical, feature article or other reading, audio and audio-visual material through any means whatsoever including electronic publication, broadcasting and printing shall be censored.</p>	<p>UDHR: Art. 12 freedom from arbitrary interference with privacy, family, home, correspondence, Art. 18 Rights freedom of thought, conscience and religion, Art. 19, Right to freedom of opinion and expression.</p> <p>ICCPR- Art. 18 Right to freedom of thought, conscience and religion, Art. 19, Right to freedom of expression.</p>
20	<p>Right to justice: (1) No person shall be detained in custody without informing him or her of the ground for his/her arrest (2) Right to consult a legal practitioner (3) Right to be produced in judiciary within 24 hours of arrest, free, fair trial of course.</p>	<p>UDHR-Art. 9 Right against arbitrary arrest detention or exile, Art. 10-Right to fair trial.</p> <p>Art. 11- Right to be presumed innocent until proven guilty.</p> <p>ICCPR-Art. 14, Right to fair Trial, ICESCR-Art 11-Right to meaningful life.</p>
21	<p>Right to victim of crime: (1) A victim of crime shall have the right to get information about the investigation and proceedings of a case in which he or she is the victim (2) A victim of crime shall have the right to justice including social rehabilitation and compensation.</p>	<p>UDHR-Art. 22. Right to social security. ICCPR. Art. 4 and 5 Right related to Derogation. ICESCR Art. 5, Right related to Derogation.</p>

22	Right against torture: (1) No person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment (2) The victims of the torture have the right to obtain compensation.	UDHR Art. 5- Right against torture. ICCPR-Art. 7 Right against torture ICESCR-Art. 11 Right to meaningful life.
23	Right against preventive detention: (1) No person shall be held under preventive detention unless there is a sufficient ground of the existence of an immediate threat to the sovereignty territorial integrity or, public peace and order of Nepal (2) Right to information to the family of detenu (3) Right to obtain compensation if proved innocent.	UDHR: Art. 9, right against arbitrary arrest detention or exile. ICCPR Art. 9 (3 and 5), Immediate proceedings before a court and compensation in awful arrest/detentions.
24	Right against untouchability and discrimination: (1) No any form of untouchability and discrimination on the basis of origin caste, tribe, community, profession, occupation or physical condition. (2) No discrimination in purchasing and selling goods. (3) No community is superior and inferior on the basis of caste. (4) No discrimination in workplace (5) contravention of those provision taken as severe social crime.	UDHR. Art. 2, No discrimination on the enjoyment of rights. ICCPR: Art 2 as per the provision or UDHR No distinction on the basis of race, colour, sex religion, political or other opinion origin, property, birth for other status. CERD: Art. 1 (1), No discrimination on the ground of origin, tribe, occupation, physical condition and descent.
25	Right to property: (1) Every citizen shall, subject to law, have the right to acquire own, sell, dispose, acquire	UDHR. Art. 17 (1 and 2) right to property to everyone alone as well as in association with others. No

	business profits from, and otherwise deal with the property. (2) The state shall not, except for public interest, requisition, acquire or otherwise create any encumbrance on property of a person. (3) Right to compensation if the property is requisite by the state.	one shall be arbitrarily deprived of his property. ICCPR-Art. 1 (1 and 2) - All people have the right of freely pursue their economic development and dispose their wealth and resources without prejudice to anyone. ICESCR: Art. 1 (1) follow as per the provision of ICESCR.
26	Right to religious freedom: (1) Every person who has faith in religion shall have the freedom to profess, practice and protect religion according to his/her conviction. (2) Right to operate and protect religious sites, and (3) But no right to convert anyone from one religion to another.	UDHR. Art. 18 Everyone has the right to freedom of thought, conscience and religion; includes freedom to change his religion or belief and freedom, either alone or in community with other and in public or private, to manifest his religion in teaching, practice, worship and observance, ICCPR-Art 18 some as provision of UDHR. Process of religions conversion differs with the provision of UDHR and ICCPR.
27	Right to information: Every citizen shall have the right to demand and receive information on any matter of his or her interest or of public interest.	UDHR: Art. 19 Everyone has right to seek, receive and impart information and ideas. ICCPR: Art. 1 (2). Consistent with UDHR provision. ICESCR Art. 19 Right to information concerning human rights
28	Right to privacy: The privacy of any person, his/her residence, property, document, data, correspondence and matters relating to his/her character	UDHR: Art. 12, No one shall be subjected to arbitrary interference with his privacy, family, home or

	shall, except in accordance with law be inviolable.	correspondence, nor to attacks upon his honour and reputation. ICCPR-Art 17 matches with the provision of UDHR and forbids to arbitrary or unlawful interference on privacy.
29	Right against exploitation: (1) Every person shall have the right against exploitation. (2) No exploitation on the grounds of religion, custom, thinking usage practice or on any others grounds. (3) No slavery, trafficking and servitude. (4) No work against his/her will and (5) The victims shall have the compensation	UDHR: Art. 4, no one shall be held in slavery or servitude; be prohibited in all their forms. ICCPR: Art. 8 (1, 2 and 3) prohibits, slavery, slave trade, servitude, force labour. ICESCR: Art. 6 and 7 recognize the right to work, which includes fair wages and equal remuneration, safe and healthy work condition, equal opportunity of promotion, rest, leisure and reasonable limitation of work, holidays with pay.
30	Right to clean Environment: (1) Every citizen shall have the right to live in a clean and healthy environment. (2) Right to obtain compensation to victim. (3) Exempts state to maintain environmental balance.	ICESCR: Art. 12 (2) (b) guarantee the improvement of all aspects of environmental and industrial hygiene. UDHR and ICCPR do not contain this right. It is quite unique under CoN.
31	Right to Education: (1) Every citizen shall have the right of access to basic education: (2) Right to have compulsory and free education up to basic level and free education up to secondary level from the state (3)	UDHR: Art. 26 (1), (2) and (3) free and compulsory elementary education. Parents have a prior right to choose education prior right to choose education to their children ICESCR: Art. 13 and 14

	Free higher education for disables and economically indigent citizens (4) Free brail script education to the visually impaired citizens (5) Right to get education in mother tongue.	provide these right similar right with the provision of UDHR. The CoN incorporates almost provisions of UDHR and ICESCR.
32	Right to language and culture with dignity: (1) Every person and community have the right to use their languages (2) Right to participate in the cultural life and (3) Right to preserve and promote language, script, culture, cultural civilization and heritage.	ICESCR: Art 15 (1) (a) (b) and (c) and (2), (3) and recognizes the right to take in cultural life, full realization and promotion of it.
33	Right to employment: (1) every citizen shall have the right to employment as provided to federal law and (2) Every citizen shall have the right to choose employment.	UDHR: Art. 23 (1), (2), (3) and (4) recognize the right to work free choice of employment, right to equal pay for work and to join in trade unions. ICESCR Art. 6 (1) and (2) Right to work in productive employment.
34	Right to labour: (1) Every labourer shall have the right to fair labour practice, (2) Appropriate remuneration and social security, and (3) Form and join trade unions.	ICESCR: Art. 7 (a), (b), (c) and (d) and Art. 8 (1) (a), (b), (c) and (d) and (2), and (3) provide right of labourer of fair wages, equal opportunity for promotion, leisure, rest, holidays and to join in trade unions.
35	Right relating to health: (1) Every citizen shall have the right to free basic health services from the state, and no one shall be deprived of emergency about medical treatment	ICESCR: Art. 12 (1) and (2) (a), (b), (c) and (d) recognize the right of the highest attainment of physical and mental health development of the child, industrial hygiene control from endemic and

	(3) Equal healthy services, and (4) Clean drinking water and sanitation.	epidemic and medical service and medical attention in the event of sickness.
36	Right to food: (1) Every citizen shall have the right relating to food, (2) to be safe from the scarcity of food, and (3) Right to food sovereignty in accordance with law.	UNDHR: Art. 25 (1) states everyone has the right to a standard of living with adequate food. ICESCR: Art. 11 (1) and 2 (a) and (b) recognizes the right of food with the facilities of importing and exporting to ensure and equitable distribution of world food supplies in relation to need.
37	Right to housing: (1) every citizen shall have the right to an appropriate housing, (2) residence of citizens will not be infringed except in accordance with law.	UDHR: Art. 15 (1) provides right of an appropriate housing. ICESCR Art. 11 (1) recognizes the right.
38	right to women: (1) Every women shall have equal lineage right without gender discrimination, (2) Safe motherhood and, (3) No any mental, physical, sexual or any violence and the victim shall have the right to obtain compensation in accordance with law, (4) Right to participate proportionately in all state bodies, (5) Health employment and social security, and (6) Equal right in property and family affairs.	UDHR, ICCPR and ICESCR are salient in this matter but CEDAW: Art 6 suggests to be appropriate measures including legislation, to support all forms of traffic in women and exploitation of prostitution of women.
39	Right to child: (1) Every child shall have the right name and birth registration along with his or her identity (2) Right to education health,	Convention of the rights of Child 1989 (CRC) protects these rights.

	<p>maintenance, proper care sports, entertainments etc. (3) Right to elementary child development and child participation (4) No work in factory mine, hazardous place (5) No child marriage, (1) No recruitment in army, (7) No physical torture at home, school or any other place (8) Right to juvenile friendly justice (9) Right to special protection to helpless, victims of conflict and displaced or vulnerable (10) Right to compensation if victimized.</p>	
40	<p>Right to Dalit: (1) the Dalit shall have the right to participate in all bodies of the state on the basis of principle of proportional inclusion and also the special provision for empowerment and employment. (2) Provision of free education with scholarship, (3) Special provision for health and security, (4) Right to use, protect and develop their traditional occupation, (5) Land for landless (6) Proper housing, and (7) Proportional opportunity to both men and women Dalits.</p>	<p>UDHR: Art. 2, Non-discrimination on enjoyment of Right. ICCPR: Right against discrimination. ICERD: 1969- Elimination of all forms of racial discrimination.</p>
41	<p>Right to senior citizens: The senior citizens shall have the right to special protection and special security from the state.</p>	<p>UDHR: Art. 25 recognizes to right to meaningful life. ICESCR: Art. 11, recognizes the right of everyone to an adequate standard of living including adequate food, clothing and housing.</p>

42	<p>Right to social justice: (1) The economically, socially and educationally backward women, Dalit, indigenous nationalities, Madhesi, Tharu, Muslims, backward classes, minorities, marginalized communities persons with disabilities gender and sexual minorities farmers, labourers, oppressed or citizens of backward regions and indigent Khas-Arya shall have the right to participate in the state bodies on the basis of principle of proportional inclusion, (2) Indigent (3) Disables, (4) Farmers and (5) The families of the martyrs shall have right to get special opportunities.</p>	<p>UDHR: Article 22 provide this right under social security. ICCPR: Article 9(3) and Art. 14 recognizes this right in some extent.</p>
43	<p>Right to social security: The indigent citizens, incapacitated and helpless citizens, helpless single women, citizens with disabilities children and tribes have the right to social security, in accordance with law.</p>	<p>UDHR: Art. 22 provide right to social security. ICCPR: Art 9 (1) Everyone has right to liberty and security of person, ICESCR: Art. 9 recognizes the right of everyone to social security including social insurance.</p>
44	<p>Right to the Consumer: (1) Every consumer shall have the right to obtain quality goods and services, (2) persons suffered injury from any substandard goods or services shall have the right to obtain compensation.</p>	<p>UDHR- Art. 25 preserves with right to meaningful life. ICESCR: Art 11 protects this right under right to meaningful life with food adequacy.</p>
45	<p>Right against exile: No citizen shall be exile.</p>	<p>UDHR: Art. 9 recognizes as right against arbitrary arrest, detention or exile.</p>

46	<p>Right to constitutional remedies:</p> <p>There shall be a right to obtain constitutional remedies in the manner set forth in Article 133 or for the enforcement of the right conferred by this part.</p>	<p>UDHR: Art 8 provides everyone the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the national constitution or by law.</p> <p>ICCPR: Art. 14, right to fair trial</p>
47	<p>Implementation of fundamental rights: The state shall, as required make legal provisions for the implementations of the rights conferred by this part, within three years of the commencement of this constitution.</p>	<p>ICCPR: Art. 28 to 53 concern with the specific procedures of carrying out of the provisions of the covenant.</p> <p>ICESCR: Art. 16 to 31 concerned with obligations of state parties and general and specific procedures of carrying out treaty obligation.</p>
48	<p>Duties of citizens: Every citizens shall have the following duties: (a) to safeguard the nationality, sovereignty and integrity of Nepal, while being loyal to the nation (b) to abide by the constitution and law, (c) to render compulsory service as and when the state so requires, (d) to protect and preserve public property.</p>	<p>UDHR: Art. 29 and 30 are concerned with the rights and obligations of persons, community and states to create environment for full realization of all rights.</p> <p>Everyone has duties to the community in which alone the free and full development of his personality is possible.</p>

Source: *The Constitution of Nepal, 2015, pp. 9-26.*

UDHR: <https://www.un.org/es/documents>pdf>.

ICCPR: <http://www2.ohchr.org/english/law/ccpr>.

<http://www.escr-net.org/resources/section-5-background-information-icescr>.

Appendix-III

Comparison of the Fundamental Right under the current Constitution of India (CoI) and International Provision of Human Rights

Table 8.3

Article	Fundamental Rights under the current Constitution of India (CoI)	Provision under the International Instruments of HR
12	Definition: In this part, unless to context otherwise requires, the state includes the government and parliament of India and the government and the legislature of each of the states and all local or other authorities within the territory of India of under the control of the government of India.	UDHR: Preamble, para-6, whereas member states have pledged themselves to achieve in cooperation with the United Nations.
13	Laws Inconsistent with or in derogation of the fundamental rights, the state shall not make any rights, the state shall not make any and which takes away or a bridges. The rights conferred by this part.	UDHR: Art. 29 (2) and (3), in the exercise of rights and freedoms, everyone shall be subject only to such limitations and no case be exercised contrary to the purposes and principle of the United Nations.
14	Right to equality before law. The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.	UDHR: Art. 7 all are equal before the law and are entitled without any discrimination to equal protection of the law. ICCPR: Art. 3 ensure the equal right of men and women to the enjoyment of all civil and political rights, ICESCR: Art. 3 also recognizes in the same way.
15	Social equality and equal access to public areas: Prohibition of	ICCPR-Art. 26, prohibits and discrimination in equal protection of

	discrimination on grounds of religion, race, caste, sex or place of birth.	law and guarantee to all persons equal and effective protection.
16	Equality: in matters of public employment. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to office under the state and no discrimination on the ground of religion, race, casts sex, descent, and place of birth residence or any of them. And provision of reservation for scheduled castes and tribes.	UDHR: Art. 23, right to employ without any discrimination. ICCPR: Art 25(2), recognizes to have access on general terms of equality, to public service in his/her country.
17	Abolition of untouchability: Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.	UDHR: Art. 2, No discrimination on the enjoyment of rights. ICCPR: Art. 2, is also as per the provision of UDHR, No distinction on the basis of race, colour, sex, religion, political or other opinion, origin, property, birth or other status. ICERD: 1 (1) No discrimination on the ground of origin, tribe occupation, physical condition and descent.
18	Abolition of Titles: (1) No title, not being a military or academic distinction shall be conferred by the state (2) No citizen of India shall accept any title from any foreign state. (3) No person holds any office under state, accept title without consent of the president. (4) No person holding any office of profit trust under the state shall, accept any	No any international instrument of HR prohibit it. Just it belongs to doctrine of state sovereignty.

	present from foreign state without the consent of the president.	
19	Freedom of speech and expression: (1) All citizens shall have the right (a) to freedom of speech and expression; Freedom to assemble (b) peacefully without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of territory of India; and (g) to practice any profession, or to carry on any occupation, trade or business.	UDHR: Art. 19 states that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions receive and impart information and ideas. ICCPR: Art. 19 (1) and (2) recognize the right to hold opinions and freedom of expression without interference.
20	Right to criminal justice: (1) No one can be awarded punishment which is more than what the law prescribed (ii) No one can be convicted twice for the same offence. (iii) Protection of life and personal property.	UDHR: Art. 10 everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.
21	(i) No citizen can be denied his life and liberty expected by law. (ii) Every child has the right to get free and compulsory education.	UDHR: Art. 3 and 26 provide right to liberty and compulsory elementary education for children. ICCPR: Art. 6 (1) Right to life and Art. 9 (1) Right to liberty. ICESCR: Art.b13, and 14 provide compulsory and free elementary education.
22	(i) No one can be arrested without being told the ground for his arrest. (ii) Arrested citizen has to be brought before the nearest magistrate within 24 hours.	UDHR: Art. 9 and 12, No. one should be subjected to arbitrary arrest and interference with his privacy.

		ICCPR. Art. 9 (2), (3) and (4) provide information of the reason of arrest anyone arrested brought promptly before judge or other officer and timely proceedings before a court.
23	Abolition of trafficking in human beings and beggar (forced labour) are prohibited and ant contravention of this provision shall be an offence punishable in accordance with law.	UDHR: Art. 14 (1) Everyone how the right to seek and to enjoy in other countries asylum from persecution.
24	Abolition of employment of children below the age of 14 years in dangerous jobs like factories mines etc.	UDHR: Art. 25 (2) incorporates motherhood and childhood are entitled to special care protection and assistance. ICRC: International conviction of Right of Child 1989 protects these rights.
25	Religious freedoms to all citizens of India: Freedom of conscience and free profession, practice and propagation of religion.	UDHR: Art 18 Everyone has the right to freedom of thought conscience and religion; this right includes freedom to change his religion or belief and freedom to change this religion or belief and freedom, either alone or in community with others. ICCPR: Art 18 (1), (2), (3) and (4) ensure the same right.
26	Religious communities can set-up charitable institution of their own.	UDHR: Art 18 (2) and (3) and ICCPR Art. 18 (2) and (3) also preserve the right in same manner.

27	No person shall be compelled to pay taxes for the promotion of a particular religion.	UDHR: Art. 18 and ICCPR. Art. 18 senses the same version.
28	State run institutions cannot impart education that is pro religious.	UDHR Art. 18 and ICCPR Art 18.
29	No citizen can be discriminated against for admission in state or state aided institutions.	UDHR: Art. 22 and 23 (1), (2), (3) and (4), Everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state of economic, social and culture rights indispensable for his dignity and the free development of his personality. Right free choice of work. ICESCR: Art. 8 (1) provide right to work.
30	All minorities, religions on linguistics can set up their own educational institutions to preserve and develop their own culture.	UDHR: Art. 22 provide this right under economic, social and cultural rights. ICCPR: Art. 9 (3) and 14 provide this right in some extent. Specially, Art 27 of ICCPR provide the minority Rights.
31 31 A	Compulsory acquisition of property (Omitted by 44 th amendment of the constitution) survey of laws providing for acquisition of estates etc. (Omitted by 45th amendment).	These rights related to the provisions of UDHR- Art. 11 (1) and (2) ICCPR, Art 1 (1) and (2)) and ICESCR: Art. 1 (1) and (2) were amended with the 45th amendment and moved to constitutional right article 300A of the COI.

32	Empower the citizens to move a court of law in case of and denial of the fundamental rights.	UDHR: Art. 8 ensures everyone to effective remedy of the fundamental rights through competent courts. ICCPR: Art. 14 guarantees right to fair trial.
33	Power of parliament to modify the rights conferred by this part in their application etc. Parliament may, by law determine to what extent any of the rights conferred by this part shall, in their application to Armed Forces; or the members of the force charged with the maintenance of public order or persons employed in any bureau or in connection with the telecommunication systems set up for the purposes of any force bureau or organization referred in clause (a) to (c).	UDHR: Art 29 (2) states to such limitations as are determined by law. It was de recognized under the amended rules framed under the police forces by the Restriction of Right Act, 1996 of India.
34	Restriction on rights conferred by this part while marital law is in force in any area.	UDHR: Art. 29 (2) authorities to national legislature to make such restrictions.
35	Legislation to give effect to the provisions of this part. Notwithstanding anything in this constitution shall have right to make necessary laws.	Related to international practice of principle of constitution and rule of law.

Source: *The Constitution of India, 1950, pp. 9-37.*

UDHR: <https://www.un.org/es/documents>pdf>.

ICCPR: <http://www2.ohchr.org/english/law/ccpr>.

htm<https://www.eschr-net.org/resources/section-5-background-information-icescr>.

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