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Kathmandu School of Law (KSL)

Suryabinayak-4, Bhaktapur, Nepal, Ph: 6634455, 6634663,

Email: info@ksl.edu.np, www.ksl.edu.np

Paradigm Shifts in Internalization of International Law: A Case Study of Growing Human Rights Jurisprudence in Nepal

Prof. Geeta Pathak*

Abstract

The concept of internalization (domestication) of international law, underpinning the traditional theories of 'monism and dualism,' is being shifted along with the change in the contexts. Internalization can be mapped out through the process and result indicators of recognition of international legal norms through incorporation or transformation in the domestic laws, including the Constitution. The success of the internalization of international human rights law depends on the political will of the government and independent judiciary. The state practices, including decisions of the courts, discussed in this paper, further indicate the eventual changes in the process. Most importantly, the level of internalization can be measured by jurisprudential trends of application of international law in general and the international human rights instruments in particular. The second part of this paper minutely observes the 'bramble-bush effects' on the laws and jurisprudence developed along with democratization in Nepal since 1990. Nepal is an interesting case study due to its experiment of the theories of monism and dualism. Although the Treaty Act of Nepal explicitly recognizes the higher legal status of international agreements or treaties to which Nepal is a party, the Constitution of Nepal does not recognize the same. Nevertheless, the situation of ratification and accession of a large number of human rights treaties without reservation and growing thematic human rights jurisprudence reasonably justify the greater scope of internalization of international human rights laws in Nepal.

Introduction

International human rights law is not only one of the modern branches of public international law, but a heartfelt empirical testament proliferated with the hope of conveying normative values in the dorms of the states. Taking human rights home is indicative of their recognition of the need to comply. But the question arises whether States are willing to respect, protect and fulfill their international obligations.¹ Principles

* Prof. Geeta Pathak is Professor of Kathmandu School of Law. She is Steering Committee Member of the Asia Pacific Masters Program (APMA) under the Global Campus of Human Rights.

¹ Article 2(2) of the UN Charter requires all Members to fulfill their obligations in good faith. See *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 1969, art. 26.

of good faith,² analogous to *pacta sunt servanda*³ further strengthen these obligations towards international law, including international human rights treaties. The success of internalization of international human rights laws depends on the political willingness of the government⁴ and independence of the judiciary. Numerous human rights treaties explicitly mention the responsibility of the State to take legal and other measures for domestic implementation. The core human rights treaties⁵ require the provisions for State parties to adopt legislative and other measures to give effect to the relevant rights. Article 2 (2) of the International Covenant on Civil and Political Rights, 1966 (ICCPR)⁶ can be referred as one of the examples⁷. Notably, some treaties are effective or functional only after the criminalization of acts such as the Genocide Convention⁸ (1948), the UN Convention against Torture (1984)⁹, the four Geneva Conventions (1949)¹⁰ and so on. In order to prevent, punish, and provide the reparations including compensation to the victims, the State parties to these conventions are obliged to adopt legislative,

² In 1625, Hugo Grotius presented a general theory of treaties based on the concept of natural justice. He focused in particular on the scope of general applicability of the principles of equity and good faith. See, H Ziegler *Völkerrechtsgeschichte*, Second edition, 2007 cited at Oliver Dorr, 'Introduction: On the Role of 'Treaties in the Development of International Law', Springer-Verlag GmbH Germany, 2017, para 6 available at https://www.researchgate.net/publication/301181232_Introduction_On_the_Role_of_Treaties_in_the_Development_of_International_Law, accessed on 10 September 2018.

³ *Pacta sunt servanda* is a Latin term, which means agreements must be kept. It is based upon the principle of good faith, which indicates that a party to the treaty cannot invoke provisions of its domestic law as a justification for a failure to perform. The legal definition is available at <https://definitions.uslegal.com/p/pacta-sunt-servanda/>, accessed on 12 September 2018. This principle is stipulated in the preamble, paragraph three, and Article 26 of the VCLT. This provision has been interpreted in conjunction with article 53 regarding *jus cogens* and a number of other provisions under the VCLT. See Kirsten Schmalenbach, 'Article 26 Pacta Sunt Servanda', pp. 427-476, at 'Vienna Convention on The Laws of Treaty, A Commentary, Dörr et. al. (eds.), Springer-Verlag Berlin Heidelberg, 2012.

⁴ Wade M. Cole, 'Mind the Gap: State Capacity and the Implementation of Human Rights 'Treaties' *International Organization*, 2015 available at <https://www.cambridge.org/core/journals/international-organization/article/mind-the-gap-state-capacity-and-the-implementation-of-human-rightstreaties/F6F0A33C5909506F3AA200AF32989150>, accessed on 26 September 2018.

⁵ The UN human treaties having their monitoring mechanisms are regarded as core treaties. As of now, there are nine core human rights treaties. Each of these instruments has established a committee of experts to monitor implementation of the treaty provisions by its States parties. Some of the treaties are supplemented by Optional Protocols dealing with specific concerns, whereas the Optional Protocol to the Convention against Torture establishes a committee of experts. See Office of High Commissioner of Human Rights Official Website available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>, accessed on 25 August 2018.

⁶ Article 2(2) of the ICCPR states: "...each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

⁷ *International Covenant on Civil and Political Rights*, 999 UNTS 171, adopted on 16 December 1966, art 2.

⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277, adopted on 9 December 1948.

⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, adopted on 10 December 1984.

¹⁰ The four Geneva Conventions of 12 August 1949 are international humanitarian law treaties, ratified or acceded to by virtually all States. They protect the wounded and sick in armed forces in the field (GC I); wounded, sick and shipwrecked members of armed forces at sea (GC II); prisoners of war (GC III); and civilians (GC IV). Geneva Conventions do not permit derogation.

administrative, judicial, or other measures. However, there is a doubt whether States are ready to shoulder these obligations. The answer is self-evident, especially in a given situation where States have put reservations¹¹ even on the key provisions such as right to justice, equality and non-discrimination and some non-derogable rights that hold the *jus cogens*¹² or the rules of customary international legal norms¹³.

Amidst the dichotomy between international and national legal order, the paper attempts to explore the theories or approaches that help in synchronization of international human rights law with the domestic legal system. Chapter one of the paper explores the theories of internationalization of international law underpinning the theories of monism and dualism and their conceptual, philosophical, political, and constitutional constructs, including some state practices. Chapter two examines the status of 'internalization' of international human rights treaties to which Nepal is a party. The paper provides glimpses of growing thematic human rights jurisprudence adopted by the Supreme Court of Nepal. The range of cases may help in understanding the judicial trends of application and interpretation of international human rights provisions along with constitutional guarantees in Nepal.

Part 1: Theories and Practices of Internalization of International law

The word 'internalization' used in this article is synonymous with 'domestication.' Although both words are related to the same process, I have chosen the former with a feeling that the process of internalization is not merely formalism but a profound realization of the process of building ownership over the normative values of universalism of international law. Theories and understandings may be relatively modified, shaped, or changed, but the underlying essence of human dignity and worth of human values remain forever.

The ongoing debate over the political, philosophical, and legal significance of the theories of monism and dualism has given a wide range of the margin of appreciation to the governments and all other entities of the State. The scholars argue that the debate is related to national and international politics, not really about the essence. "In the general field of international law, the debate may not matter because eventually both of them lead to the implementation of international law"¹⁴

¹¹ For example, countries like Australia, France, Italy, Netherlands, Sweden, the United Kingdom of Great Britain, the United States of America, and many others have put significant reservations. For example, see the status of reservations on different provision of ICCPR. See generally, Eric Chung, 'The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations', 126 *The Yale Law Journal* 170, 2016.

¹² *Jus cogens* is a peremptory norm "accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. See *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 1969, art. 53.

¹³ Tullio Treves, 'Customary International Law,' Oxford University Press, 2006 available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393>, accessed on 25 September 2018.

¹⁴ Makumi Mwangiri, 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice', vol. 3, no. 1, *Journal of Language, Technology & Entrepreneurship in Africa* p. 144, 2011, p. 152.

The varied State practices are not coherent in the 'internalization of international law.' Directly or indirectly, States have been formulating and upholding the 'state sovereignty'¹⁵ and defending the mandate and actions. Majority of the governments are less concerned to ensure the rights of the individuals. Domestication or internalization of international legal norms deals with the relationship between international and municipal law that are underpinning to the most complex and debatable schools of monism and dualism.

According to monism, international law is superior to all the national legal orders allowing for 'automatic incorporation'¹⁶ of international law that applies in the domestic jurisdiction immediately and directly, without translating¹⁷ into domestic laws where the treaty is considered to become a binding part of domestic law. The provision of such incorporation can be expressly employed in the Constitution itself. In other words monism signifies the "supremacy of international law even in the sphere of domestic law, coupled with views on the individual as a subject of international law."¹⁸ Traditional monism was based on a hierarchical legal system maintained that there was only a single legal order in which all norms, municipal and international, existed in harmony, provided that municipal laws are consistent with international law.

Hans Kelsen¹⁹, whose thought shifted from constitutional to international law,²⁰ was firmly persuaded that public international law and domestic law are not two separate legal systems but connected based on recognition.²¹ In support of this, the monistic

¹⁵ The principle of sovereign equality of UN Member States is guaranteed in Art. 2(1) UN Charter. Scholars of international law accept, "Sovereign equality is a fundamental axiomatic premise of the international legal order." As Tomuschat states: "These latter principles, although politically of the highest importance, maybe logically classified as pertaining to a secondary normative category since they are designed to ensure and guarantee the effectiveness of sovereign equality, still the Grundnorm (basic principle) of the present-day international legal order." See Juliane Kokott, 'States, Sovereign Equality,' Oxford Public International Law (2011) 161 available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1113>, accessed on 15 August 2018.

¹⁶ The terminology of 'automatic treaty incorporation' denotes to a domestic constitutional approach to treaties that in practice operates to ensure that treaties become automatically incorporated into the domestic legal order. See generally Mario Mendez, 'The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts' at *The Legal Effects of EU Agreements*, Oxford University Press, 2013.

¹⁷ See Karen Knop, 'Here and There: International Law in Domestic Courts', vol. 32, *New York University Journal of International Law and Politics* p. 501, 2000, p.504. Other scholars have independently used the metaphor of translation: see, eg, McLean, 'Problems of Translation', cited at Edgar & Thwaites 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law', vol. 19, no. 1, *Melbourne Journal of International Law* 24, 2018.

¹⁸ M. W. Janis, 'Individuals as Subjects of International Law', *Cornell International Law Journal*, 1984 available at: <http://scholarship.law.cornell.edu/cilj/vol17/iss1/2>, accessed on 25 September 2018.

¹⁹ Hans Kelsen was a European legal philosopher and teacher who immigrated to the United States in 1940 after leaving Nazi Germany. Kelsen is most famous for his studies on law and especially for his idea known as the pure theory of the law. Kelsen was born in Prague, Czechoslovakia, on October 11, 1881 available at <https://www.encyclopedia.com/people/social-sciences-and-law/law-biographies/hans-kelsen>, accessed on 15 August 2018.

²⁰ See generally Francois Rigaux, 'Hans Kelsen on International Law,' vol. 9, *European Journal of International Law* p. 325, 1998.

²¹ H. Kelsen, *Principles of International Law*, Second Edition, 1966, pp. 553-88 ; J. Starke, *An Introduction to International Law*, Sixth Edition, 1967, pp. 68-90.

scholars have brought two key points “first, the opaqueness of this domestic judicial determination; and, secondly, the fact that in legal orders where treaties are automatically incorporated it is this determination which will be of critical importance to the fortunes of the individual litigant and to the domestic effectiveness of treaty norms.”²²

The single legal order does not mean the absence of national legal order; rather, a synchronization of international order with the national constitutional norm in a cohesive manner. Some scholars belonging to monism argue that “the constitution sets the pattern for the legal order ... a hierarchy of the various legal rules is developed, and a single legal order thus created. The validity of each rule will depend on the constitution, the basis of the legal order.”²³ Some representatives of this school (i.e. monism) claimed that the universal legal system existed as a hierarchy in which the national law derived its validity from the superior international law. According to Kelsen, “the unity of the legal system, which finds its expression in the doctrine of monism, is a consequence of the unity and indivisibility of legal validity. Hence, there can be only one legal system.”²⁴ Kelsen’s approach of monism imbeds the following four elements:²⁵

- i) the identification of law and state;
- ii) the idea that a legal order is a compound of norms, the validity of which relies on a hypothetical basic norm, the *Grundnorm*;
- iii) the exclusion of any factual element in the construction of a legal order; and
- iv) the repudiation of any reference to other non-logical premises, such as morals or natural law.

Unlike radical monism, which believes in a hierarchical position of national and international law, moderate monism emphasizes harmony and coherence rather than a hierarchy of the norms. It argues that domestic and international elements of this universal order penetrate each other.²⁶ However, it is to be noted that moderate monism consequently accepts the primacy of international law in terms of applicability (not limited to the use of provision only) to sustain the compliance only and should not be concluded as promotion of hierarchy. Professor Verdross, who has been considered as a founding father of international constitutionalism,²⁷ clarifies moderate monism as a “systematic concept on international constitution at the top of the unitary legal order” to systematize the national legal order.²⁸ Kelsen accepts²⁹ that these two streams are

²² Ibid, p. 33.

²³ Schermers & Blokker, ‘International Institutional Law,’ Fifth revised edition, 2011, p. 1145.

²⁴ Alexander Somek, ‘Kelsen Lives’, vol. 18, no. 3, *European Journal of International Law* p. 409, 2007, p. 409.

²⁵ Ibid, pp. 325-343.

²⁶ Rett R. Ludwikowski, ‘Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy’, vol. 9, *Cardozo Journal of International and Comparative Law* p. 253, 2001.

²⁷ Thomas Kleinlein, ‘Alfred Verdross a founding Father of International Constitutionalism’, vol. 4, *Göttingen Journal of International Law* p. 385, 2012, p. 408.

²⁸ Ibid.

²⁹ Paul Gragl, ‘International Law in Domestic Legal Orders, legal Monism, Law Philosophy and Politics’, Oxford University Press, 2018, p.115.

analogous to each other like the relation between Constitution and other legislation, provided they go hand in hand in a consistent manner.

Opposing the legal theory of monism, the dualists argue that national and municipal laws were substantially different and existed separately. According to them, international laws are 'subordinate to any applicable municipal legal authority'.³⁰ The followers of dualism reject the horizontal understanding of international law presented by Kelson and his followers.³¹ According to dualists, monism possesses "highly fictitious understanding of the world: Nothing less than the unity of the legal world order is proclaimed." The dualists further criticize "the idea brought by monists that norms can only derive from other norms; the conclusion drawn is that any national law is derived from international law". Extreme dualists even argue that international law was not law but only a system of international morality. This assumption is based on the state-centric traditional international law that jealously supports the primacy of state sovereignty. This, however, is an argument, which does not reflect reality. The term dualism has been sometimes used interchangeably with pluralism³² that believes not only the sources, but also the subjects of both legal systems are different. The concept of pluralism recognizes the existence of several autonomous legal systems.³³

The fundamental difference between these two systems stemmed from the fact that the rules and norms of international law grew out of custom while the main components of the municipal law evolved from the legislation.³⁴ Whatever may be, "the undeniable fact is that international law is today applied in municipal courts with more frequency than in the past. In so doing, courts seldom question the theoretical explanation for their recourse to international law."³⁵

³⁰ Jonathan Turley, 'Dualistic Values in the Age of International Legisprudence, vol. 44, *Hastings L.J.* p. 185, 1993.

³¹ Professor Turley suggests an alternative, endogenous basis for dualism: Rather than evolving as a by-product of horizontal understandings of international law. See *Ibid.*

³² J.G. Starke, *An Introduction to International Law*, Butterworths, 1977, pp. 81-82; See also Compare Paul S. Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism', vol. 20, *Ind. J. Global Legal Stud.* p. 665, 2013, pp. 665-95 with Mireille Delmas-Marty, *Les Forces Imaginantes Du Droit*, vol. I, *Le Pluralisme Ordonne*, 2006; See also Mireille Delmas-Marty, 'Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World' vol. 44, *Naomi Norberg trans.*, 2009; With regards to constitutional pluralism, See Mattias Kumm, 'The Moral Point of Constitutional Pluralism', in Julie Dickson & Pavlos Eleftheriadis (eds.) *Philosophical Foundations of European Union Law* p. 216-220, 2012.

³³ See generally Wolfrum R., 'Legal Pluralism from the Perspective of International Law' in Kötter M.et. al (eds) *Non-State Justice Institutions and the Law Governance and Limited Statehood*, Palgrave Macmillan, London, 2015.

³⁴ See Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, vol. 4, *S.D. L. Rev.* p. 25, 1959; J.G. Starke, 'Monism and Dualism in the Theory of International Law', 17 *Brit. Y.B. Int'l.* p. 66, 1936; Edwin Borchard, 'The Relation Between International Law and Municipal Law', vol. 27 *V.A. L. Rev.* p. 137, 1940; Curtis A. Bradley, 'The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law', vol. 86, *Geo. L. J.* p. 479, 1998; Mark W. Janis, *International Law and Municipal Law*, in *An Introduction to International Law*, Third edition, 1999; Jordan J. Paust, *International Law as the Law of the United States*, 1996.

³⁵ G Ferreira & A Ferreira-Snyman, 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism', vol.17, *PER*

State Practices: Constitutional Recognition of International law and Judicial Trends:

In Europe, international law is often regarded as 'community law' and domestic laws as 'internal law'. The Treaty of Rome³⁶ bestowed an obligation³⁷ of general loyalty to the Community but did not contain any express clauses about the supremacy of the Community law. The European Court of Justice has developed this doctrine step by step. As early as 1963 the European Court of Justice (ECJ) declared that the Treaty of Rome was more than an agreement creating obligations between the contracting parties. In *Van GendEn Loos v. Nederland Administratie Der Belastingen*³⁸, the Court stated:

"We must conclude from this that the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within the limited fields, and the subjects of which comprise not only the member-States but also their nationals. Community law, therefore, apart from legislation by the member-States, not only imposes obligations on individuals but also confers on them legal rights."

The Court established the foundations for two fundamental doctrines-a) direct applicability and b) direct effectiveness of community law.³⁹ The Court reminded the second doctrine that certain treaty provisions impose not only the obligations on the member-states but "produce direct effects in the legal relations between the member-states and their citizens."⁴⁰ Through the *Van Gend* and subsequent cases, the European Court of Justice laid down the principle of the supremacy of Community law and explained fundamental rules of conflict between the Community law and the national laws. *First*, the Court stated that direct applicability of the Community law meant that the conflicting provisions of current national law would have to be inapplicable; *second*, it would "preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions"⁴¹ For example, Article 94 of the 1983 Constitution of the Netherlands declares:

Potchefstroom, 2014.

³⁶ The Treaty of Rome was adopted on 25th March 1957 that established the European Economic Community (EEC) which is seen as a major stepping stone in the creation of the EU available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0023>, accessed on 27 August 2018.

³⁷ Article 5 of the Treaty of Rome stated that " Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's Tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

³⁸ *Van Gend & Loos v. Netherlands Inland Revenue Administration*, Judgment of the Court of 5 February 1963 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026>, accessed on 6 September 2018.

³⁹ Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, vol. 43, *Vand. L. Rev.* p. 1105, 1990.

⁴⁰ Treaty of Rome (n 36).

⁴¹ *Ibid.*

"statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions." The Constitution resolves that in the conflict between the treaty and the Constitution, the treaty may prevail if this result was approved by the vote of two-thirds of the Parliament, the number of votes needed to amend the Constitution.⁴²

Although the Belgian courts did not initially confirm the priority of Community law over the domestic law, the Court of Cassation rejected this argument. It confirmed that a treaty prevails in a conflict with a Statute. Professor T.C. Hartley commented: "in other words, the Court declared, in this case, that Belgium was a monist country. Consequently, the conflict was not between two statutes, but between two instruments of a fundamentally different nature: a treaty and a statute."⁴³ The Court then continued:

*"The rule that a statute repeals a previous statute in so far as there is a conflict between the two, does not apply in the case of a conflict between a treaty and a statute. In the event of a conflict between a norm of domestic law and a norm of international law that produces a direct effect in the internal legal system, the rule established by the treaty shall prevail. The primacy of the treaty results from the very nature of international treaty law."*⁴⁴

This means, the treaties which have created Community law have instituted a new legal system in whose favor the Member States have restricted the exercise of their sovereign powers in the areas determined by those treaties. Similarly, in Luxembourg, the supremacy of international law over national law was confirmed by the rulings of the Court of Cassation and the Council of State.⁴⁵

The member-States following a dualistic approach challenged some conclusions inherent in the logic of the principle of supremacy of community law:⁴⁶

- *First*, they were not inclined to accept that the position of Community law in the national legal structures stems from the Community law itself.
- *Second*, the transfer of competencies does not mean the full subordination of member-states' law to Community law.

Generally speaking, it took several years for the original member-states, following dualistic traditions, to recognize the principle of supremacy of Community law:

- The strongest objections were from the countries following dualistic approach,

⁴² See *The Netherlands Constitution*, 1983, art. 91(3).

⁴³ Cour de Cassation, 'Belgium', C.M.L.R. 330 at Trevor C. Hartley, *The Foundations of the European Community Law*, 1998, pp. 235-36.

⁴⁴ Ibid.

⁴⁵ Cour de Cassation, Pas. lux, vol. 16, p.150, 1954; Conseil' Etat, Pas.lux, vol. 26, p.174, 1984; See K. Lenaerts, 'Constitutional Law of the European Union' at K. Lenaerts, P Van Nuffel & R. Bray (eds.), 1999, p.507.

⁴⁶ See Neil MacCormick, 'The Maastricht-Utreil: Sovereignty Now', vol. 1, *Eur. L.J.* p. 259, 1995, p.304.

such as Germany and Italy who after World War II incorporated strong protections of human rights into their constitutional laws. They claimed that the Treaty of Rome did not originally have any special provisions protecting human rights and the national courts may recognize the direct effect of Community law only as far as this law does not fundamentally alter the Constitution. In *Costa v. ENEL*⁴⁷, the Italian Constitutional Court originally stated that Community law would apply by the state judges only by virtue of the adaptation of national law into the Community law.

- The significant shifts can also be seen in Canada since the enactment of the Canadian Charter of Rights and Freedoms in 1982.⁴⁸ As a result of being colonized by Britain in 1867, Canada failed to have constitutional provision addressing the incorporation of international law into the domestic level. Like UK, a vertical approach of dualism required the "implementation" or "transformation"⁴⁹ of treaties through the legislation before the judicial branch would consider such treaties. Since 1982, the Supreme Court of Canada became proactive in implementing international commitment and bringing a large number of human rights jurisprudence. Due to this rigid framework, the Courts could not really come up with human rights friendly jurisprudence except one landmark intervention took place in 1945 in the case of *In Re Drummond Wren* "where the Court struck down a covenant restricting the ownership of land on the basis of race by referring to the Universal Declaration on Human Rights."⁵⁰ This jurisprudence of application of informal document like UDHR has been much appreciated by the world community.⁵¹
- After 1982, although the Court could not reject the old model, positive changes are seen. The case of *National Corn Growers' Association v. Canada (Import Tribunal)* set the example where the Supreme Court held that "the Court should look to the treaty itself to assess whether the transforming legislation is ambiguous. Further, *in Canada (Attorney General) v. Ward of Citizenship and Immigration*⁵², the Court reiterated that "when legislation represents the legislation so as to be consistent with international law." The Court has also stated that in interpreting treaty provisions, reference may be made to the Vienna Convention on the Law of Treaties,⁵³

⁴⁷ *Flaminio Costa v. ENEL*, 1964, Case 6/64. It was a landmark decision of the European Court of Justice which established the primacy of European Union law (then Community law) over the laws of its member states'. See Reference for a preliminary ruling: *Giudiceconciliatore di Milano – Italy*, Case 6-64, European Court of Justice, 15 July 1964; See Paolo Megnozzi, 'European Community Law From the Treaty of Rome to the Treaty of Amsterdam', at Patrick Del Luca (trans.) second edition, 1999, p.95.

⁴⁸ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 [Charter].

⁴⁹ *Francis v. R.*, S.C.R. 618, [1956]; *Capital Cities Inc. v. Canada* (CRTC) 2 S.C.R. 141, [1977] cited at *Anne Warner La Forest*, 'Domestic Application of International Law in Charter Cases: Are We There Yet?', 37 *U.B.C. L. Rev.* p. 157, 2004, p.163.

⁵⁰ O.R. 778, [1945] 4 D.L.R. 674 (Ont. H.C.).

⁵¹ See UNGA Res 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

⁵² *Canada (Attorney General) v. Ward of Citizenship and Immigration* 2 S.C.R. 1324 [1990].

⁵³ *Ibid*; See also *Chan v. Canada (Minister of Employment and Immigration)*, 3 S.C.R. 593, [1995].

which in turn, provides for reference to the preparatory work of treaties. These cases have been considered important benchmarks allowing a more connected relationship between national and international law and detangle the complexities in cases where treaties have been ratified by the executive and transformed by the legislative branch.

- In the UK, the case of *Trendtex Corporation v. Central Bank of Nigeria*⁵⁴ raised one fundamental question. What is the place of international law in our English law? Lord Denning clarifying the distinction between incorporation and transformation found the possibility of application of both rules in English legal system with condition that “One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with the Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law...”⁵⁵
- But the problem of the superiority of Community law was even more controversial in the United Kingdom⁵⁶ where it seemed to distinctly clash with the principle of legislative supremacy of the British Parliament where Lord Denning's opinion was widely discussed but was not confirmed by the House of Lords. In *Regina v. Secretary of State for Transport ex parte Factortame LTD*⁵⁷, Lord Bridge, speaking for the Chamber, stated:

*"If the supremacy of Community law over the national law of Member States was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community...Under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law."*⁵⁸
- Regarding the internalization (domestication) process in the USA, the Constitution explicitly states that a treaty, like the Constitution itself, is the "supreme law of the land."⁵⁹ However, treaty adoption system of US seems complex, as it requires the participation of both the Senate and the President, but not the House of Representatives. The President can ratify a treaty only with the "advice and consent"⁶⁰ of the Senate. A two-thirds majority is required before the Senate

⁵⁴ *Trendtex Corporation v. Central Bank of Nigeria*, T. No. 3663, 1975 available at <http://www.uniset.ca/other/css/1977QB529.html>, accessed on 16 September 2018.

⁵⁵ Ibid, p.553.

⁵⁶ On 23rd June 2016, the United Kingdom (UK) voted to leave the European Union (EU).

⁵⁷ *R. v. Secretary of State for Transport Ex p. Factortame* (No. 2) 1 All E.R. 70, [1990].

⁵⁸ Ibid.

⁵⁹ U.S. Constitution, art. VI, clause 2.

⁶⁰ Ibid art. II, sec. 2, clause 2.

consents to a treaty's ratification by the President. This may be one of the reasons of the US not being a party to many important treaties.

Scholars of international law do not have a uniform understanding of the position of the USA, whether it falls in the category of monism or dualism. Some authors, simply having a look at the language of the Constitution of the USA place it into the position of 'monism'. For example, Louis Henkin argues that the United States "began with very, very monist dispositions."⁶¹ He claims that the Supreme Court's late nineteenth-century decision in the Chinese Exclusion Case.⁶² The Supreme Court rejected the challenge, upholding the authority of the Federal Government of the United States to set immigration policy and pass new legislation that would override the terms of previous international treaties. However, in the other Chinese exclusion case (one out of five) of *Chew Heong v. United States*⁶³, the appeal was granted and *Heong* was allowed to re-enter the country. This is the only one out of five cases against Chinese Exclusion Act that was decided against the United States government. The decision affirmed that a Chinese citizen had the benefit of rights promised in treaties with China unless the treaties had been clearly and explicitly repealed by Congress. Similarly, another related case that was decided somewhat differently is that of *United States v. Wong Kim Ark*,⁶⁴ where the Supreme Court held in a 6-2 decision that a child born in the United States to parents of foreign descent is a citizen of the United States unless the parents are: 1) foreign diplomats, or 2) the child was born to parents who are nationals of an enemy nation that is engaged in a hostile occupation of the country's territory. This follows classic English common law tradition in favour of equality of citizenship in the history of the United States of America. The Supreme Court's ruling determined the 14th Amendment to the U.S. Constitution and granted birth right citizenship to all persons born in the United States regardless of race or nationality. The decision brought an important precedent.

- Despite its historical hybrid approach to treaty incorporation as mentioned above, by the latter half of the twentieth century, the American legal system shared with its common law counterparts a fairly strict dualist approach to human rights treaties. In the United States and throughout the common law world, judges understood that rights treaties were non-self-executing and required implementing legislation to be enforceable in the courts. In reality, the USA follows the hybrid approach in which some treaties enjoy self-executing status while others are treated as non-self-executing"⁶⁵. For example, while ratifying the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the United States declared that these two treaties

⁶¹ Louis Henkin, 'Implementation and Compliance: Is Dualism Metastasizing?', vol. 91, *Am. Soc'y Int'l L. Proc.* p.515, 1997, p.515.

⁶² *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁶³ *Chew Heong v. United States*, 112 US 536, [1884].

⁶⁴ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) available at <https://supreme.justia.com/cases/federal/us/169/649/>, accessed on 25 September 2018.

⁶⁵ Melissa A. Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties,' vol. 107, *Colum. L. Rev.* p. 628, 2007, p.640.

were not to be self-executing.⁶⁶

- The up heels in law and decisions of the courts do not suffice the monistic status of USA, rather portray the mixed approach of internalization of international law including human rights law.
- There are many other countries similar to the USA that have not fully integrated treaty obligation into their domestic law. For instance, Australia provides the provision that the treaty may “not form part of Australia's domestic law unless the treaties have been specifically incorporated into Australian law through legislation.”⁶⁷ India has more or less the similar provision of the requirement of “legislation for giving effect to international agreements”⁶⁸ India has adopted ‘Guidelines/Standard Operating Procedures on the Conclusion of International Treaties in India’.⁶⁹ The SoP clarifies that “according to the Indian Constitutional scheme, making of international treaties is an executive act. A Treaty is concluded with the approval of the Union Cabinet. It is not placed before the Parliament for discussion and approval. However, where the performances of treaty obligations entail alteration of the existing domestic law or requires new enactment, it would accordingly require legislative action.”⁷⁰ The same has been followed by the decisions of the Supreme Court and High Courts of India.⁷¹
- The supremacy of the constitutional laws concerning the internalization of international law is also not clear. Very few countries have incorporated explicit provisions in the constitutions emphasizing the country's recognition of universal rules and regulations of international law and an intention to harmonize the internal laws with international obligations.⁷² Following are a few critical examples

⁶⁶ The Senate, in its Resolution of Advice and Consent to CERD, subjected that advice and consent to the declaration that “the United States declares that the provisions of the Covenant are not self-executing.” 140 CONG. REC. 14326, 14326 (1994). For the reservations, understandings, and declarations, as submitted to the U.N. upon depositing the U.S. instrument of ratification, see International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171, available at https://treaties.un.org/pages/viewdetails.aspx?chapter_4&src_treaty&mtmsg_no_iv4&lang_en#EndDec. See, accessed on 15 September 2018; See also Ian M. Kysel, ‘Domesticating Human Rights Norms in the United States: Considering the Role and Obligations of the Federal Government as Litigant’, vol. 46, *Geo. J. Int’l L.* p. 1009, 2015, p.1011.

⁶⁷ Australia Human Rights Commission, Fact Sheet 7: Australia and human rights Treaties, 2009 available at http://www.hreoc.gov.au/education/hr_explained/download/FS7_Australia.pdf, accessed on 15 September 2018.

⁶⁸ See, *Constitution of India*, 1950, art. 253 which states that “Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

⁶⁹ This Guidelines/SoP was adopted in August 2017 and revised in April 2018. The revised version is available at <http://www.mea.gov.in/images/SOP-forwarding-letter-to-Ministries-with-revised-SOPs.pdf>, accessed on 18 September 2018.

⁷⁰ See Part B of the SoP; *Ibid.*

⁷¹ For example, in the case of *Maghanbhai v. Union of India*, AIR 783 SC, 1969 the Supreme Court held that legislative power belongs to the Parliament and anything to be enforced as law should go through the parliamentary process. The precedent has been reaffirmed by high courts of India. See the case of *Shiva Kumar Sharma and Others v. Union of India*, AIR 64 Del. High Court, 1968.

⁷² See, *Hungarian Constitution* (amended 1949) art.7/1 which provides “the legal system of the Republic of Hungary accepts the universally recognized rules and regulations of international law and harmonizes the internal laws.”

to mention:

- Although, 1997 Constitution of Poland⁷³ states, "the Constitution is the supreme law of the Republic of Poland (article 8), it also proclaims "The Republic of Poland shall respect international law binding upon it." (Article 9). And also gives effect to the international law by stating, "a ratified international agreement shall constitute part of domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute" (Article 91(1). Similarly, Article 87 includes 'ratified international agreements' in the list of the source of Source of law of Poland, which gives guidelines to the legislators to incorporate the provisions in national laws.
- The Constitution of Russia also included "commonly recognized principles and norms of international law."⁷⁴ However, unlike the Constitution of Poland mentioned above, it is not clear whether these "commonly recognized principles" would have to be formally incorporated into the domestic laws or simply assimilated.
- The Constitution of Romania goes even further in stating the following:⁷⁵
 - 1) Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party;
 - 2) If there is disagreement between the pacts and treaties on fundamental human rights to which Romania is a party and domestic laws, then international regulations will have priority."
- The Constitution of Estonia stipulates: "State power shall be exercised solely on the basis of this Constitution and such laws which are in accordance with the Constitution. Universally recognized principles and norms of international law shall be an inseparable part of the Estonian legal system."⁷⁶
- Kenya is one of the examples of a newly democratizing country that has come up with relatively a pluralistic and human-centric Constitution⁷⁷ as a product of empirical testaments. Although, Kenya is a dualistic country with a clear provision of supremacy of the Constitution, the following provisions give validity to the international law to be considered as a source or guidelines for maintaining national legal order:

⁷³ Constitution of Poland, 1997, available at https://www.constituteproject.org/constitution/Poland_1997.pdf, accessed on 29 September 2018.

⁷⁴ See *The Constitution of Russia* (amended 1993), art.15, that states "the commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component of its legal system."

⁷⁵ See *The Constitution of Romania* (amended 1991), art.20.

⁷⁶ See *The Constitution of Estonia*, (amended1992), art.3.

⁷⁷ *The Constitution of Kenya*, 2010, published by the National Council for Law Reporting with the Authority of Attorney General, available at <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke019en.pdf>, accessed on 23 September 2018.

- “The general rules of international law shall form part of the law of Kenya” -Art. 2(5)
 - “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”- Art. 2(6).
- Following the above provisions, the Kenyan Constitution explicitly acknowledged the earlier legislations that had transformed the international provisions into domestic law. The transformation of 1949 Geneva Conventions into Geneva Conventions Act, 1968⁷⁸ of Kenya (chapter 198 of the laws of Kenya) is worth mentioning.
- The shifts can also be seen in the Asia-pacific countries like Vietnam that was totally isolated from the international legal system. Remarkably, for the first time in history, the new Constitution of Vietnam, 2013 provided the provision to comply with the UN Charter and all treaties to which Vietnam is a party.⁷⁹ It has even adopted the Law of Treaties (LT) 2016 more or less similar to the VCLT. The LT provides “in case of conflict between Vietnamese legal normative documents with a treaty to which Vietnam is a party, the treaty will prevail, except the Constitution.”⁸⁰ This language ‘except the Constitution’ denotes the status of Vietnam as ‘dualist’ in the pipeline of moderated dualist.

The above examples show the intention of the drafters of Constitution and/or legislations that tend to assimilate international law into their countries' legal framework. The approach is also seen being more moderated along with the process of democratization. The countries that have newly promulgated or amended their constitutions as a result of struggles or referendum are seen keen to adopt the approach for the welfare of the individual and group, as suggested by Professor Hersch Lauterpacht.⁸¹ Nepal can be taken as one of the interesting case studies of paradigm shifts.

Part II: Internalization of International Laws in Nepal: Enabling Laws and Growing Human Rights Jurisprudence

The success of the internalization of international laws depends on the political and

⁷⁸ This Act incorporates portions of the 1949 Geneva Conventions into Kenyan law. “Section 3 provides for the punishment of persons who commit or are accessories to grave breaches. Reference is made to specific articles of the Geneva Conventions. Section 3 also provides a basis for universal jurisdiction by permitting prosecution of any person, irrespective of nationality or the place where the breach was committed.” National Implementation Database of ICRC, available at <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/E547A7559C2479FF412567930048C0FF>, accessed on 20 September 2018.

⁷⁹ *Constitution of Vietnam*, 2013, art.12.

⁸⁰ Article 6(1) of the LT of Vietnam (2016).

⁸¹ Professor Lauterpacht is a renowned figure who developed a modern approach “based on principles of legal normativism, legal completeness and absolute justice”. His writings and contribution are remarkable. For example, ‘The Function of Law in the International Community (1933)’, and ‘An International Bill of Human Rights (1945)’ and also contributed to the adoption of the 1950 European convention of human rights and also, to the Development of International Law by the International Court (1958). See <https://www.theguardian.com/law/2010/nov/10/my-legal-hero-hersch-lauterpacht>, accessed on 16 August 2018.

judicial willingness and ability of the State that is to be embedded in the Constitution and applied through the constructive interpretation of the Courts. Prof. Janet McLean has rightly pointed out that domestic laws play a 'crucial gate-keeping role'.⁸² Internalization of universal values is a democratic norm that proliferates along with democratization. The case of Nepal may be referred as one of the successful examples of 'fast-track growth' of laws and case law jurisprudence virtually sailing towards the waves of international human rights law.

Being an independent country since time immemorial, Nepali legal system was not influenced predominantly by common law or civil law; rather resembled the essence of both and followed a mixed or hybrid⁸³ legal system, including her own indigenous values mainly guided by the Hindu religious scriptures and their basic tenets.

Prior to 1948, Nepal had no formal Constitution. The Government of Nepal Act, 1958 (*Nepal Sarkarko Baidhanik Kaanoon –BS 2004*) was introduced as the first Constitution of Nepal. From 1948 to 2015 (2004 BS-2072 BS), Nepal promulgated seven Constitutions in different political regimes. The year 1990 (2047 BS) brought two most important instruments; 1) Constitution of the Kingdom of Nepal, 2047 (1990), and 2) the Treaty Act of Nepal 2047 BS (1990)⁸⁴, as a successful outcome of peoples' movement (called *Jana Andolan I*) against the monarchy. The era of 1990 was instrumental in providing the scope of bringing the issues of interpretation and compliance of the treaty obligation of Nepal before the Supreme Court of Nepal. The provision of judicial review was firstly introduced in 1990⁸⁵ that was reaffirmed by the Interim Constitution of Nepal 2007⁸⁶ and in the existing Constitution of Nepal, 2015⁸⁷ subsequently.

Treaty Domestication Process under the Constitution of Nepal:

Nepal can be a party to the treaty either passed by two-thirds or a simple majority depending on the nature of the treaties. Alike the previous constitutional provision, Article 279 (2) of the Constitution of Nepal, 2015 requires a two-thirds majority of the members present at a joint sitting of both houses of federal parliament for the ratification of the following treaties:

⁸² See, Janet McLean, 'Problems of Translation: The State in Domestic and International Public Law and Beyond' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems*, Federation Press, 2005, pp. 210, 213; See also Janet McLean, 'Divergent Legal Conceptions of the State: Implications for Global Administrative Law' 2005, pp. 68(3– 4); Law and Contemporary Problems pp. 167, 173 in Edgar & Rayner, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law', vol. 19, no. 1, [2018] *Melbourne Journal of International Law* p. 2, 2018, p.3.

⁸³ Lukas Heckendorn Urscheler, 'Innovation in a hybrid system: the example of Nepal', vol. 15, no. 3, *Potchefstroom Electronic Law Journal*, 2012 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164257, accessed on 26 September 2017.

⁸⁴ *Treaty Act*, Nepal, 2047 BS (1990).

⁸⁵ *The Constitution of the Kingdom of Nepal* 2047 BS (1990), art. 88(1).

⁸⁶ *Interim Constitution of Nepal* 2063 BS (2007), art. 107(1).

⁸⁷ *The Constitution of Nepal*, 2072 BS (2015), art. 133(1).

- peace and friendship
- defense and strategic alliance
- boundaries of the State of Nepal, and
- natural resources, and the distribution of their uses.

The treaties other than related to the above are ratified or acceded by a simple majority. This means that the international human rights treaties do fall under the latter category to be ratified by a simple majority. This may be one of the reasons for Nepal becoming a party to significant numbers of human rights treaties listed below.

Legal Effects of the Treaties to which Nepal is a party:

The Treaty Act of Nepal 1990 defines ‘treaty’ as an agreement concluded in writing between two or more States or between a State and Intergovernmental Organizations.⁸⁸ Section 9 of the Treaty Act incorporates two concepts of giving domestic effect to the ratified or acceded international instruments as follows:

1. In case of the provisions of a treaty to which Nepal is a party, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws. - Section 9(1)

2. In case legal arrangements need to be made for its enforcement, Government of Nepal shall initiate action as soon as possible to enact laws for its enforcement-Section 9(2)

Section 9 of the Treaty Act of Nepal carries following *four* aspects:

- *Relationship* between a treaty and domestic law. Ratified treaty provisions are ‘as good as laws of Nepal’
- *Priority* to the ratified treaty if the domestic laws are found inconsistent with the treaty provision/s
- *Transformation* of treaty provision in the legislation for the enforcement of treaty
- *Obligation* of Government to initiate and expedite action for the enactment and enforcement

While the former two provisions signify the supremacy of ratified treaties, the latter oblige the state to enact the laws for the enforcement of ratified treaties. Therefore, one should not characterize Nepal as a monistic country simply by having a look at the language of Section 9 (1). This needs to be analyzed in conjunction with section 9 (2) and Article 279 of the Constitution. The position of Nepal is dualistic as it still maintains the supremacy of Constitution⁸⁹ that prevails in all matters, and the treaty obligations are implemented through the enabling legislations.

⁸⁸ Treaty Act, Nepal, 2047 BS (1990), art. 2(a).

⁸⁹ Article 1 (1) of the Constitution of Nepal, 2015 states, “Constitution is the fundamental law of Nepal, any law inconsistent with this Constitution shall, to the extent of such inconsistency, be void.” Article 1(2) further provides the “duty of every person to observe this Constitution.”

Scope of Internalization of Human Rights under the Constitution of Nepal:

The Constitution of Nepal, 2015⁹⁰ proclaims the essence of democratic norm and values, civil liberties, fundamental rights, human rights, full freedom of the press, and independent, impartial and competent judiciary and the concept of the rule of law. It also aims to ensure equality, prosperity and social justice, by eliminating discrimination based class, caste, region, language, religion, gender and all forms of caste-based untouchability.⁹¹

The fundamental rights of the Constitution begins with 'right to life with dignity (article 16), following the right to liberty (art.12), right to equality (art. 18), right to justice (Art. 20) and the rights of victims (art, 21), and range of other civil, political, economic, social, cultural and development rights.⁹² This Constitution made a good attempt by transforming the human rights instruments to which Nepal is party as listed in the table below. The Constitution goes beyond the technicality by transforming some provisions of treaties to which Nepal is not a party and non-treaty human rights instruments. The concept has further been promoted by the Constitution that bestows power to the courts to apply recognized principles of justice apart from the constitutional and legal provision.⁹³

Similarly, the Constitution does incorporate the state responsibility, directive principles⁹⁴ including the provision for protection and promotion of human rights⁹⁵, and the policies addressing political, economic and social transformation through social reconstruction. The provisions regarding relief measures to victims of conflict, including rehabilitation and elimination of discriminatory laws are worth mentioning.

Most importantly, Article 47 of the Constitution guarantees the 'Implementation of fundamental rights' that obligates State to adopt the legal provisions for the implementation of the rights conferred by the 'fundamental rights', within three years of the commencement of this Constitution. Following this time bound provision, Nepal has enacted a number of enabling legislations for the implementation of fundamental rights of the Constitution that also converge the human rights instruments. The following list of table provides the glimpse of enabling legislations:

⁹⁰ The Constitution of Nepal was promulgated by second Constituent Assembly on 20 September 2015 by replacing the Interim Constitution of Nepal 2007.

⁹¹ See generally the Preamble of the *Constitution of Nepal*, 2072 BS (2015).

⁹² See, Part III of the Constitution. Article 16 to 47 guarantee 31 fundamental rights; Article 48 provides the provision of duty of citizens; Ibid.

⁹³ See Ibid, art. 126 (1).

⁹⁴ See Ibid, Part IV of the Constitution.

⁹⁵ See Ibid, arts. 51(b) (2), 52 & 56(6).

Human Rights Treaties to which Nepal is a Party⁹⁶ and Harmonizing Domestic Laws

Human Rights Treaties, date of Ratification (R)/ Accession (A)	Constitutional Fundamental Rights and Legislations
<p>Convention on Civil and Political Rights (ICCPR), 1966 [14 May, 1991 (A)]</p> <p>Optional Protocols related to Individual Communications, 1966 [14 May, 1991 (A)]</p> <p>Second Optional Protocol to the International Convention on Civil and Political Rights/ Aiming at The Abolition of the Death Penalty, 1989 [4 June, 1998 (A)]</p>	<p>Constitutional Fundamental Guarantees Right to live with Dignity and Against Death Penalty (Art.16), Right against Exile (Art. 45) Right to Freedom (Art 17), Right to Equality (Art. 18), Right to Communication (Art. 19), , Right to Justice (Art. 20), Rights of Victim of Crime (Art. 21), Right against Torture (Ar. 22),Right against Preventive Detention (Art. 23) and Right to form Political Party(Art. 17(c)) , Right against exploitation (art. 29) Non-suspendable rights including remedies during State of Emergency (Art. 273 (10))</p> <p>Legislations:</p> <ol style="list-style-type: none"> i. <i>Muluki</i>(National) Civil Code 2017, Criminal Procedures 2017, (General Principles of Criminal Justice Part 1 Chapter 2) ii. <i>Muluki</i>Criminal Code 2017, Part 2 Chapter 15 (Illegal Detention Offence) iii. Treaty Act, 1990 (Section 9) iv. Local Government Operation Act, 2017 v. Act Relating to Printing and Publication, 1992 vi. Compensation Act, 1993 vii. Constituent Assembly Member Election Act, 2017 viii. Judicial Administration Act, 1992 ix. National Human Rights Commission Act, 2012 x. An Act for Amending some Nepal Act Relating to Penal Provisions, 1999 (To amend provisions relating to abolition of death penalty) xi. Political Parties Act, 2016 (With Amendments) xii. Local Level Election Act, 2016 xiii. Election (Crime and Punishment) Act 2017 xiv. Legal Aid Act, 1997 xv. Nepal Citizenship Act, 2006

⁹⁶ See the “List of Multilateral Treaties to which Nepal is a Party and a Signatory”, Published by Government of Nepal, Ministry of Law and Justice and Parliamentary Affairs, Revised on March 2018.

<p>International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 [14 May, 1991 (A)]</p> <p>Ratified ILO Conventions: C 14 Weekly Rest (Industry) Convention C 100 Equal Remuneration Convention C 111 Discrimination (Employment and Occupation) Convention C 131 Minimum Wage Fixing Convention C 105 Forced Labor Convention C 144 Tripartite Consultation (International Labor Standards) Convention C 182 Worst Form of Child Labor C 169 Socio-economic, Political, Cultural rights of Indigenous and Tribal People</p>	<p>Constitutional Fundamental Guarantees: Right to basic education in their mother tongue, Right to Free Education from the State up to secondary level (art. 31), Right regarding Health Care (Art. 35), Right regarding Employment (Art. 33), Right to Social Security (Art. 43), Right of Women (Art. 38), Right of Children (Art. 39) and Right of Senior Citizen (Art. 41) with Constitutional Remedy (Art. 46)</p> <p>Legislations:</p> <ol style="list-style-type: none"> i) <i>Muluki</i> Criminal Code 2017, Part 2 Chapter 9 (Religion Related Offence), Chapter 11 (Marriage Related Offence), Part 5 Chapter 15 (<i>Wages related</i>) ii) Labour Act, 2017 and Rule 2018 iii) Senior Citizen Act, 2006 iv) Right to Employment Act 2018 v) Social Security Act 2018 vi) Contribution-based Social Security Rule 2018 vii) Consumer Protection Related Act 2018 viii) The Public Health Service Act 2018 ix) Housing Right Related Act 2018 x) The Right to Food and Food Sovereignty Act 2018 xi) The Act Relating to Compulsory and Free Education Act 2018
<p>Convention on the Political Rights of Women 1952, [26 April, 1966 (A)]</p> <p>Convention on the Elimination of All form of Discrimination Against Women (CEDAW) 1979 [22 April 1991 ®] Optional Protocol to CEDAW, 1999 [3rd Jan. 2007 ®]</p>	<p>Constitutional Fundamental Guarantees: Right to Equality (Art. 18), Women's rights (Art. 38), Rights relating to Social Justice (inclusive and proportionate representation of women (Art. 42) Constitutional Remedy (Art. 46), Right against exploitation (Art 29-including Human Trafficking)</p> <p>Legislations:</p> <ol style="list-style-type: none"> i) National Civil Code 2017, Part 3 Family Law, Chapter 1, 2 and 3 (Marriage Related Provision), Part 4 Property Law ii) <i>Muluki</i> Criminal Code 2017, Part 2 Chapter 11 (Marriage Related Offence), Chapter 13 (Abortion Related Offence) Chapter 18 (Rape Offense) iii) National Women Commission Act, 2017

	<ul style="list-style-type: none"> iv) Domestic Violence (Offence and Punishment) Act, 2009 and Regulation 2010 v) Prevention of Sexual Harassment in Workplace Act, 2014 vi) Safe Motherhood and Reproductive Health Right Related Act, 2018 vii) Witchcraft Accusation (Crime and Punishment) Act, 2014 viii) Human Trafficking (Control and Punishment) Act 2007 and its Regulation 2008
<p>International Convention on the Elimination of all forms of Racial Discrimination (ICERD) 1965</p> <p>[30 Jan, 1971 (A)]</p>	<p>Constitutional Fundamental Guarantees: Right to live with Dignity (Art. 16), Right to equality (art. 18) and Right against Untouchability and Discrimination (art. 24) Rights of <i>Dalit</i> (art. 40)</p> <p>Legislations:</p> <ul style="list-style-type: none"> i) <i>Muluki</i> Criminal Code 2017, Part 2 Chapter 10 (Untouchability and other inhuman and degrading treatment related Offences) ii) Local Government Operation Act, 2017 iii) Racial Discrimination and Untouchability (Offence and Punishment) Act 2018 (With Amendments)
<p>Convention against Torture, Inhuman Degrading Treatment and Cruel Punishment, 1984</p> <p>[14 May, 1991 ®]</p>	<p>Constitutional Fundamental Guarantees: Right to live with Dignity (Article 16), Right to Justice (Art. 20), Right against Torture (Ar. 22), Right against Preventive Detention (Art. 23)</p> <p>Legislations:</p> <ul style="list-style-type: none"> i) Criminal Code 2017, Part 4 Chapter 15 (Illegal Detention and Criminalization of Torture) ii) Torture Compensation Act, 1996
<p>Convention on the Rights of the Child, (CRC) 1989 [14 September, 1990 (A)]</p> <p>Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000 [31 October.2005 ®]</p> <p>Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 2000 [(20 Jan.2007 ®)]</p>	<p>Constitutional Fundamental Guarantees: Rights of children: Art.39) with Constitutional Remedy (Art. 46), Rights</p> <p>Legislations:</p> <ul style="list-style-type: none"> i. Children Act, 2018 (Umbrella Act) ii. Child Labour (Prohibition and Regulation) Act, 2000 iii. The Act Relating to Compulsory and Free Education Act 2018 iv. Police Act & Military Act (minimum age of recruitment is 18 years) v. Human Trafficking (Control and Punishment) Act 2007 and its Regulation 2008

<p>Convention on the Rights of Persons with Disabilities, 2006 [7 May 2010 ®]</p> <p>Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006 [7 May 2010 ®]</p>	<p>Constitutional Fundamental Guarantees: Right to live with Dignity (Art. 16), Right to equality (Art. 18)</p> <p>Legislation: i. The Act Relating to Rights of Persons with Disabilities, 2017 (With Amendments)</p>
<p>Slavery Convention 1926 [7 Jan 1963 (A)]</p> <p>1953 Protocol amending the Slavery Convention 1926 [7 Jan, 1963 (A)]</p> <p>Supplementary Convention on the Abolition of Slavery, The Slavery Trade and Institution and Practices similar to Slavery, 1956 [7 Jan, 1963 (A)]</p> <p>The Suppression of the Traffic in Person & the Exploitation of the Prostitution of Others 1949 [10 December, 2002 (A)]</p> <p>SAARC Convention on Trafficking in Women and Children, 2002</p>	<p>Constitutional Fundamental Guarantees: Right to life with Dignity (Article 16) and Right against Exploitation including Enslavement, Human Trafficking and Forced Labour (Art. 29)</p> <p>Legislations i) Labour Act, 2017 and Regulation 2018 ii) Bonded Labour (Prohibition) Act, 2002 iii) Child Labour (Prohibition) Act, 1999 iv) Human Trafficking and Transportation (Control) Act, 2007 and its Regulation 2008</p>
<p>Convention on the Prevention and the Punishment of Genocide, 1948 [17 Jan, 1969 (a)]</p>	<p><i>Muluki</i> Criminal Code 2017: Crime and Punishment on Genocide (Part 2 Chapter 4)</p>
<p>Constitutional bodies related to human rights and their Acts: National Human Rights Commission (Part 25) and its Act 2012 Other Commissions such as National Women’s Commission, National Dalit Commission, National Inclusion Commission, Indigenous Nationalities, <i>Madhesi</i> Commission, <i>Tharu</i> Commission, Muslim Commission and their Acts adopted in the same year 2017</p>	

Other important Legislations:

Muluki Criminal Code: Provisions on Heinous or Serious Crimes, Crime Against Humanity and other crimes (Part 2 Chapter 1 and 4)

Personal Privacy Related Act 2018

The Crime Victim Protection Act 201

Enforced Disappearances Inquiry, Truth and Reconciliation Commission Act, 2014

The Truth and Reconciliation Commission Rules, 2016

Growing Jurisprudence: Application of Treaty Act and Human Rights Provisions

There is a greater scope of implementation of the above treaties to which Nepal is a party. Once the treaty is passed by the parliament with the process mentioned above, they become 'as good as the law of Nepal.' Pursuant to which, several old legal provisions (other than constitutional provisions), contradicting with constitutional provisions and international human rights laws, have been declared null and void. Following are some of the examples of application of Treaty Act and human rights instruments:

Meaning and criteria of treaty:

Since 1990, the Supreme Court of Nepal has observed a number of cases related to the procedural and substantive issues of interpretation of the Treaty Act that are being applied and interpreted together with the relevant provision of the Constitution. In line with the criteria required by Article 2(1) of the VCLT⁹⁷, the Supreme Court of Nepal in the very first case of *Advocate Balkrishna Neupane v. Prime Minister (PM) Girija Prasad Koirala*⁹⁸ (popularly known as Tanakpur case) has observed that an agreement between two States in written form, whatever its designation, is a treaty. This case raised three major issues; (i) whether accord signed by the PM of Nepal with India and defended by him was just an 'understanding' or a 'treaty' as defined by Section 2(a) of the Nepal Treaty Act? (ii) whether they needed mandatory approval by a two-thirds majority present in the parliament under Article 126(2) of the Constitution? (iii) and, whether the accords infringed Nepal's sovereign rights over her water and territory. The Supreme Court held that "whichever way a document is named, it is a "treaty" if it is an agreement creating rights or obligations as between two countries in written form for the purposes of Section 2(a) of the Treaty Act 1990."⁹⁹ This case clarified that the word treaty may include various names provided they meet the criteria set forth in the Constitution and the Treaty Act.

The Supreme Court has also rejected some petitions on the ground of lack of

⁹⁷ Nepal has not ratified the VCLT; See, Ibid.

⁹⁸ *Balkrishna Neupane v. Prime Minister Girija Prasad Koirala*, NKP 2054 (1997), p.77.

⁹⁹ Ibid, cited at Surya Prasad Dhungel et.al, 'Commentary on the Nepalese Constitution' Kathmandu, DeLF, September 1998, p.675.

jurisdiction. The case of *Gyanraj Rai v. the Government of Nepal*¹⁰⁰ can be referred as one of the examples where petitioner had challenged a tripartite agreement concluded among UK, India, and Nepal because it violated the right to equal pay and pension of Gurkhas in the British Army. The Supreme Court dismissed the writ petition giving the reason that the said treaty falls under the 'diplomatic relations' between the contracting States. Thus any disputes resulting from such relations could not be reviewed under the extra-ordinary jurisdiction of the Supreme Court of Nepal.¹⁰¹

Scholars of international authors have pertinently observed how “diverse interpretations given by the Courts have blurred”¹⁰² in their 'analysis of finding a distinction between section 9(1) and 9(2) in hierarchical order. The dynamics of legal interpretation in Nepal is seen often guided by 'textualism' than 'purposivism'.¹⁰³ For example, in case of *Dinesh Kumar Sharma v. Office of the Council of Ministers*¹⁰⁴, the Special Bench of the Supreme Court of Nepal interpreted that treaty laws are only 'equivalent to law' and are 'not a law' of Nepal per se.¹⁰⁵

The above interpretation of 'Treaty Act' has limited the Supreme Court's earlier jurisprudence that had already acknowledged the 'Aladdin's lamp effect' of Section 9 (1) of Treaty Act. For example, in the case of *Advocate Jyoti Paudel et al. v. Nepal Government*¹⁰⁶, the Supreme Court explicitly recognized the 'primacy of treaty obligation as enshrined in Section 9 (1) of the Treaty Act' and concluded that “Nepal cannot derogate from its obligation once it becomes a party of a treaty or convention. After being state party to a treaty or convention, the provision should be complied with verbatim in good faith...”¹⁰⁷ Interestingly, one of the judges, who reached to this conclusion was also present in the earlier case i.e. *Dinesh Kumar*¹⁰⁸ along with other judges and who had rejected the writ petition by interpreting that “treaty laws are only 'equivalent to law' and are 'not a law' of Nepal per se”.¹⁰⁹

The cases of Equality and Non-discrimination:

The case of *Meera Dhungana*¹¹⁰ brought the issue of constitutionality of clause 1 and

¹⁰⁰ *Gyan Raj Rai v. Cabinet Secretariat and Others*, WN. 2651, 2002.

¹⁰¹ Ibid.

¹⁰² Surya Subedi, 'When a Treaty a Treaty in Law?' An Analysis of the Views of the Supreme Court of Nepal on a Bilateral Agreement between Nepal and India', vol. 5, *Asian Yearbook of International Law*, 1995, p. 201.

¹⁰³ Valerie C. Brannon, 'Statutory Interpretation: Theories, Tools, and Trends', Congressional Research Service, 2018, pp. 11-15.

¹⁰⁴ *Dinesh Kumar Sharma v. Office of the Council of Ministers*, NKP 2063 BS (2007), p.1136.

¹⁰⁵ Ibid, para 18.

¹⁰⁶ *Advocate Jyoti Paudel et al. v. Nepal Government*, WN WO-0424, 2064 cited at *Some Landmark Decision of Supreme Court of Nepal*, vol. 2, 2010, p.561.

¹⁰⁷ Ibid.

¹⁰⁸ *Dinesh Kumar Sharma v. Office of the Council of Ministers*, NKP 2063 BS (2007), p.1136.

¹⁰⁹ Ibid.

¹¹⁰ *Meera Dhungana and Meera Parajuli v. HMG, Ministry of Law and Justice*, NKP 2052 BS (1995), p.462.

16¹¹¹ of the partition of property (*Aungsabanda*) in the previous *Muluki Ain* (National Code). This case of the 1990s gained a lot of limelight. The petitioners claimed that these clauses were clear contraventions of Right to equality and Right to property guaranteed by Article 11 and 17 of the Constitution of the Kingdom of Nepal and Article 15 of CEDAW. The Supreme Court unanimously rejected the question of unconstitutionality. However, the Court issued directive order to the respondent Government to:

*"introduce an appropriate bill to Parliament within one year...by making necessary consultations as to this matter with the recognized Women's organizations, sociologists, the concerned social organizations and lawyers...and by studying and considering also the legal provisions made in other countries in this regard".*¹¹²

Despite some chauvinist observation, this judgment opened the issue to be discussed in the context of women's human rights. Since the Supreme Court ordered the Government to introduce an appropriate bill and to consult with civil society, many organizations had been involved in conducting public hearing, seminars, advocacy, lobbying, and drafting the bill.¹¹³ Lawyers and some other members of the legal fraternity criticized the directive order of the court. They raised the question about the referral of the case by the Supreme Court to the government with instructions to formulate legislation as an intrusion into the power of parliament and the executive under the separation of powers. Nevertheless, the parliament, for its part, seemed happy to accept or compromise even though on any other issue, a direction from the Court attempting in the legislative process would have been strongly resisted.¹¹⁴

This is exactly what the Supreme Court of Nepal observed in the case of *Advocate Jyoti Paudel*¹¹⁵ regarding formation of fast track court to provide access to justice to the victims of gender-based violence. The Court clarified that even though it is not appropriate for the court to intervene the matter of legislative policy in accordance with extra-ordinary jurisdiction of the Court, as a guardian of the fundamental rights, the Court can issue appropriate order in the name of the government. The Supreme Court further instructed the government of Nepal to adopt law and all other required measures for the effective Implementation of the provision of CEDAW and Constitutional provisions on right of equality, right to justice and the rights of women.¹¹⁶ This case reasonably construed

¹¹¹ Clause 16 of the Chapter on the partition of property (*Aungsabanda*) of then *Muluki Ain* stated, "The daughter who has reached the age of 35 and remained unmarried is entitled to get a share in the property as equal to the sons. If she gets married or elopes after receiving the share in the property, then she has to return the remaining property to the person who is entitled to it."

¹¹² Ibid.

¹¹³ See generally Paternal Property: Equal Rights to Daughter & Son (Compiled News), Institute for Legal Research and Resources, 1996.

¹¹⁴ See Surya Prasad Dhungel et.al (n 99), pp. 117-118.

¹¹⁵ *Advocate Jyoti Paudel et. al. v. Nepal Government*, WN WO-0424, 2064 cited at *Some Landmark Decision of Supreme Court*, vol.2, 2010, p.561.

¹¹⁶ Ibid.

that the Court order is valid if “intrinsic to compliance with the obligation to respect and guarantee human rights” ...to organize the State in such a way as to ensure that, among other things, the structure and operation of State power is founded on the true separation of its executive, legislative and judicial branches, the existence of an independent and impartial judiciary and implementation by the authorities in all their activities of the rule of law and the principle of legality”.¹¹⁷ Anyways, the case of *Meera Dhungana*,¹¹⁸ has played an instrumental role in bringing constitutional guarantees of gender equality, including equal property rights of son and daughters¹¹⁹ regardless of age, marital status, or any other grounds. The *Muluki Civil Code*¹²⁰ has further recognized the equal status and entitlements to both son and daughter in obtaining the property rights¹²¹ and other matters in the line of constitutional guarantee of right to equality discussed above.

Similar was the case of *Lili Thapa*¹²² regarding the gender equality on the property rights of single women, in which the court, upon taking a stand on the ground of equality and invoking numerous constitutional provisions and international human rights laws, held that everyone's right to equality, freedom and life is based on the dignity and respect of each person, deprivation of women of these rights is not tolerable in any pretext. If the existing provision continues to exist, it will create such a situation where women will be leading their distressful life without having the right even to use their property. Such a provision will be in direct contradiction to the principle of gender justice and universal norms of justice. Consequently, ‘Gender Equality Maintaining Some Nepal Amendment Acts, 2006’, repealed the discriminatory provision. This Act has been regarded as one of the important benchmarks for ‘harmonizing gender equality’ in Nepal.

The case of *Rina Bajracharya*¹²³ brought a very comprehensive jurisprudence of gender equality. The petition had challenged the Staff Service Regulation for Royal Nepal Airlines Corporation, 1974 for being discriminatory against the female airhostess in comparison to the male counterparts. The Supreme Court held that the provision inflicted sex discrimination among employees, and declared section 16.1.3 of the Regulations ‘null and void’. The court observed as follows:

¹¹⁷ See ‘International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – A Practitioners Guide’, Second edition, International Commission of Jurists, 2007, p.20.

¹¹⁸ *Meera Dhungana* (n 110).

¹¹⁹ Article 18 (5) of the Constitution of Nepal provides ‘All offspring shall have the equal right to the ancestral property without discrimination on the ground of gender’. Previously, the Interim Constitution of Nepal, 2007 had guaranteed this right under the fundamental guarantee to the ‘rights of women’ under Article 20.

¹²⁰ *National Civil Code*, 2017(*Muluki Devani Sambita* 2074 BS).

¹²¹ See Chapter 10, Section 205, provision relating to Partition (*Aungsabanda*).

¹²² *Women for Human Rights, Single-women Group and Lili Thapa v. Prime Minister and Office of Council of Ministers*, NKP, 2062 BS(2005).

¹²³ *Reena Bajracharya and Others v. Royal Nepal Corporations, Cabinet Secretariat and Others*, NKP 2057 BS (2002), p. 376.

*"Men and women are both human beings, and the right which is inherent in a human being is equally available to men and women. There can be no debate in this regard. The right to equality is an inalienable right. The right to equality is the soul of the democratic system. The discrimination of sex is an indicator of civilization."*¹²⁴

The Court explicitly recognized the provision of equality guaranteed by Universal Declaration of Human Rights that prohibits sex discrimination, guarantees equal protection before the law and safeguards the right to choose the profession, right against unemployment and equal remuneration for equal work.¹²⁵ The Court by defining the distinction and exclusion based on sex as gender-based discrimination against women underpinning to Article 1 of the CEDAW, issued the writ as demanded by the petitioners. Following are some of the important ratios that Court observed while reaching into the conclusion:¹²⁶

- The ratification of CEDAW is done to achieve the objective of the Constitution. That is why the conventions are given higher status to the law in Nepal.
- The main function of the judiciary is to translate the spirit and objective of the Constitution in practice.
- Due to discriminatory tradition prevailing over a long time, there are circumstances, which help the existence and enactment of discriminatory laws inadvertently.
- Hence, to set up a society based on justice, there has been a great need to uproot discrimination socially.

The court elaborating the provisions of the CEDAW with special reference to the UDHR, eventually, held that "the Treaty Act, 2047 (1990) in its Section 9 clearly provides that the Convention to which Nepal is a party deserves a status higher than the existing laws of the land making their implementation simple and efficient".

Application of the Treaties to which Nepal is not a party: The case of Enforced Disappearance:

Nepal is not a party to the UN Convention for the Protection of Enforced Disappearance (CPED), 2006. However, in the case of *Rabindra Prasad Dhakal*,¹²⁷ the court held that;

"Whatever complex or easier circumstances may appear for the conduct of its affairs, a state cannot exempt itself from its responsibility of protecting person

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid, p.12.

¹²⁷ *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government, Home Ministry and Others* NKP 2064 BS (2007), p. 169.

and property of its citizen and also addressing the concerns related thereto with responsibility and priority. If a state fails to fulfill such primary responsibility, peace of such state would be disturbed through internal rebellion and eventually the state may face the crisis of its existence".¹²⁸

The Court even considered that the CPED has not established separate values other than prevailing international human rights laws rather it has reinforced the values enshrined in the mainstream human rights laws, and therefore, the fact of non-ratification of this convention by Nepal does not provide any ground to deny the state responsibility created by mainstream human rights instrument. The judgment further reads *'our judicial system has adopted the approach that the court can give necessary directives if state cannot demonstrate sensibility and responsibility with regard to the violation of human rights.'*¹²⁹

The judgment has brought a non-conventional jurisprudence going beyond formalism. The case is especially important to establish the nexus between contents under different human rights instruments having similar objectives.

Glimpse of Growing Thematic Human Rights Jurisprudence:

Apart from the above, the Supreme Court has observed various other issues related to intersectional discrimination such as person with functional limitations (disability)¹³⁰, Caste Discrimination¹³¹, social exclusion¹³² and traditional cultural practices¹³³, rights of indigenous peoples¹³⁴ and sexual minorities¹³⁵. The Court has decided a number of crucial issues related to civil and political rights related to unlawful and arbitrary deprivation of liberty, including violation of right to fair trial¹³⁶, right against torture¹³⁷, provisions allowing amnesty for those who committed serious violation of human

¹²⁸ Ibid, p.216.

¹²⁹ Ibid.

¹³⁰ *Nepal Disability Human Rights Center v. Government of Nepal* cited in *Some Decisions of the Supreme Court Nepal*, 2012, p.406.

¹³¹ *Man Babadur B.K. v. HMG*, WN 2505, NKP 2049 BS (1992).

¹³² *Mohan Shasankar v. the Office of Prime Minister and Council of Ministers and other*, WN 3416, NKP 2063 BS(2007).

¹³³ See the practice of *Chaupadi* challenged in the case of *Dil Babadur Bishwokarma v. Office of the Prime Minister*, cited in *Some Landmark Decision of The Supreme Court Nepal*, 2010, p.61-9; See the case of accusation of witchcraft in *Reshama Thapa v. HMG. Office of the Prime Minister* cited in *Some Landmark Decision of The Supreme Court Nepal*, 2010, p.11-37; See also the case of bonded girl child (*Kamalarī*) *Som Prasad Paneru et. al. v. Office of the Prime Minister*, cited in *Some Landmark Decision of The Supreme Court Nepal*, 2010, p.192-213; See also the case of Citizenship of Badi Community, *Tek Tamrakar and Others for Pro Public v. Office of Prime Minister and Council of Ministers and Others*, NKP 2062 BS (2005), p.680.

¹³⁴ *Lanyers Association for Human Rights of Nepalese Indigenous Peoples v. Nepal Government*, NKP 2070 BS (2013), p.61.

¹³⁵ *Sunil Babu Pant and others v. The Government of Nepal and others*, cited in *Some Landmark Decision of The Supreme Court Nepal*, 2010, p.387.

¹³⁶ *Advocate Lila Mani Poudel v. Cabinet Secretariat*, WN 3553, 2056 (2004).

¹³⁷ *Devendra Ale v. Office of the Prime Minister*, cited in *Some Landmark Decisions of the Supreme Court of Nepal*, 2010, p. 28.

rights and justice to victims of armed conflict¹³⁸. The judiciary of Nepal has already acknowledged the justiciability of economic, social and cultural rights such as right to food security and food sovereignty¹³⁹, education¹⁴⁰, employment,¹⁴¹ health and reproductive health¹⁴², Right to healthy environment¹⁴³ and so on. These cases are few examples of internalization of thematic human rights under the formal and informal human rights instruments and fundamental guarantees under the Constitution giving legal effect to Section 9 of the Treaty Act of Nepal.

Conclusion:

Internalization of international law is not merely formalism but a deep realization of the process of building ownership over the normative values of universalism of international law. Domestication or internalization of international legal norms deals with the relationship between international and municipal law that are underpinning to the most complex and debatable schools of monism and dualism. The success of the internalization of international law particularly human rights laws depends on the political willingness of the government and independent judiciary. Numerous human rights treaties explicitly mention the responsibility of the State to take legal and other measures for domestic implementation. However, the varied State practices are not seen coherent in ‘internalization of international law’. Directly or indirectly, the States have been formulating and, sustaining or upholding the ‘state sovereignty’ and defending the mandate and actions of the governments and are less concerned to ensure the individual and collective rights of the peoples.

Today the traditional concepts and theories of monism and dualism do not exist in true sense. The international law scholars seem confused due to the double standard in laws and practices of the States. Nevertheless, these theories are being shifted or changed along with the democratization process and the changes in the socio-economic conditions of the countries. Most importantly, the countries like Vietnam have also turned into moderate dualist by transforming the international human rights provisions into their Constitutions and enabling legislations that are also recognized by the Courts. However, the developed countries like USA are seen shifting their Constitutional legacy of ‘supremacy of international law’ into the mixed or hybrid approach as reflected in their Courts’ decisions.

¹³⁸ *Madhav Kumar Basnet and others v. Government of Nepal*, WN 069-WS-0057, 2014; See also, *Suman Adhikari & others v. Office of the Prime Minister*, NKP 2074 BS (2015).

¹³⁹ *Prakashmani Sharma v. Nepal Government*, 2009 cited in *Some Decisions of the Supreme Court Nepal*, 2012, p.284.

¹⁴⁰ *Advocate Srikerishna Subedi v. Nepal Government*, cited in *Some Decisions of the Supreme Court Nepal*, 2012, p.361.

¹⁴¹ *Prem Bahadur Khadka v. Nepal Government of Nepal*, WN 2064/0719 (2008).

¹⁴² *Laxmi Dhikta v. Nepal Government* cited at *Some Decisions of the Supreme Court of Nepal*, 2011, p. 376; See also *Prakash Mani Sharma and Others v. Ministry of Women, Children and Social Welfare and Others in Human Rights and Gender Justice* cited at *Some Decisions of the Supreme Court of Nepal*, 2009, p. 414.

¹⁴³ *Shiva Prasad Poudel v. Nepal Government* cited at *Some Decisions of the Supreme Court of Nepal*, 2014, p. 268.

The shift can also be traced in Nepal since 1990 together with the constitutional provision of 'judicial review' under the extra-judicial jurisdiction of the Supreme Court and Section 9 of the Treaty Act 1990 that opened avenues for ample of cases related to internalization of international law including international human rights law. The Constitution of Nepal further provides the scope of transformation and implementation of laws through enabling legislations. The judgments of the Supreme Court, today, are necessarily based on the core human rights values of equality and non-discrimination especially prioritizing the right of women, *Dalits* and other physically, socially and culturally marginalized groups including the sexual minorities. The critical issues such as disappearances became successful in garnering attention from the courts. Despite some up heels created by diverse interpretations of the Court, yet, Nepal's position can be concluded as moderate duelist moving towards progressive transformation.