

**Initiative to incorporate Economic, Social and Cultural Rights
(ESCR) in the New Constitution- November 2009**

Final Project Execution Report

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Project execution report of the Initiative to incorporate Economic, Social and Cultural Rights (ESCR) in the New Constitution

1. Project Background

Constituent Assembly (CA) is formulating a new constitution for the Federal Democratic Republic of Nepal. The 24 thematic committees of the CA collected people's feedback from the districts. Members of civil society raised issues of their concern at different forums. Various interest groups have been organizing discussions, interactions, dialogues and workshops to determine and push forward their concerns. At this stage, we must keep in mind that this is an historical opportunity to institutionalize the commitments expressed by the State to the international forums. So, we must be careful to grab this opportunity.

Nepal has already ratified 6 core conventions. In this context, the new constitution must be formulated complying with the provisions in those conventions to which Nepal is a State party. The new constitution should expressly incorporate civil and political rights, economic, social and cultural rights, child rights, women's rights, rights against discrimination and rights against torture. Some of these rights have been incorporated in the Interim Constitution, and it is necessary to continue these rights in the new constitution. Institutionalizing these rights, we have to make further efforts to incorporate additional rights, left out in the Interim Constitution. This shall ensure that our constitutional and legal rights are in accordance with the commitments expressed before the international community.



Therefore, we should not delay in our efforts to incorporate fully the economic, social and cultural rights in the new constitution. FOHRID conducted intensive consultation, discussion and dialogue with the stakeholders to identify such rights and to make them feel ownership of the activity. Discussions were conducted on the following issues:

- a. The representative and important rights under economic, social and cultural rights,
- b. The rights that should be incorporated in the new constitution,
- c. Apart from those incorporated in the current Interim Constitution, additional provisions relating to economic, social and cultural rights that need to be included in the new constitution,
- d. Not only the civil and political rights but also the economic, social and cultural rights should be incorporated as fundamental rights. How has the international community made constitutional guarantee of these rights? What are the relevant international practice, concepts and experiences?

This initiative aimed to explore the above issues and compile the feedback received from the participants. The compiled document shall be submitted to the CA Committee for Fundamental Rights and Directive Principles of the State to incorporate them in the new constitution.

2. Project Context

International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the UN General Assembly on 16 December 1966. It came into force from 3 January 1976.

Nepal expressed significantly broader commitment towards human rights after the reinstatement of democracy in 1990. As a result, Nepal ratified ICESCR in 1991. After this ratification, State's obligation to guarantee certain rights pertinent to the fundamental needs of the Nepalese people was surfaced. The government requires ensuring adequate standard of living, food, clothing and housing for the people. The Covenant has called upon the states to ensure right to health, free and compulsory primary education for all, gradual



free secondary education for personality development and dignified life. Right to work, in the Covenant, stands for right to work for proper livelihood, right to free selection of job, right to utilize proper, clean and favourable environment for work, equal opportunity for work, limited working hours, leave and standard remuneration. Likewise, equal remuneration should be provided to men and women for similar work and the working environment for women should not be worse than that of men. However, the implementation status of the Covenant is not satisfactory in Nepal.

The Constitution of the Kingdom of Nepal, 1990 had not addressed the economic, social and cultural rights as the fundamental rights of the people. This made the implementation of certain important and basic rights under economic, social and cultural rights challenging. The government attempted to address the economic, social and cultural rights at the policy level by incorporating them under directive principles of the State. The directive principles had mentioned to utilize natural resources for national interest, ensure right to work for the labour force, prioritize development of science and technology, attract foreign capital and technology and intensify rural development. However, the relevance of the above provision became less important as the economic rights were mentioned as policy rather than rights of the people.

The April movement of 2006 brought significant hope and progress in the struggle for rights and democracy in Nepal. It was a milestone in attaining both the fundamental economic, social and cultural rights and civil and political rights. It provided 3 important achievements to the Nepalese people. First, attainment of the first and second generation rights. Second, transformation of the decade long armed conflict into peace and mainstream democratic process. Third, ousting the age old monarchy through bloodless movement. With these achievements, Nepalese people got the opportunity to abrogate the Constitution of the Kingdom of Nepal, 1990 and promulgate the Interim Constitution of Nepal, 2007. The Interim Constitution incorporated some of the economic, social and cultural rights as fundamental rights for the first time in the constitutional history of Nepal. However, many of the rights

have been left out. Now, we have the responsibility to retain the economic, social and cultural rights incorporated by the Interim Constitution and add other important rights in the new constitution.

When the nation is engaged in the constitution making process, the general stakeholders are raising voice for guarantee of rights at the highest level. We are exploring potential to incorporate civil and political rights as well as economic, social and cultural rights of the people in the new constitution. In fact, institutional development of democracy and transformation of society is impossible without unconditional guarantee of the rights of both these groups, which are fundamental rights, in the new constitution. Therefore, it was felt necessary to determine the views of civil society regarding which rights should be incorporated in the constitution as fundamental rights, to recommend in the language of constitution and to obtain commitment of the CA Members.



3. Project Objectives:

3.1 Short term objective: To conduct consultation programs at the people's level to incorporate provisions of ICESCR in the new constitution, and to submit the outcome of the consultations to the Fundamental Rights Committee of the CA.

3.2 Long term objective: To contribute for effective and progressive implementation of the economic, social and cultural rights in Nepal in accordance with the letters and spirit of the ICESCR.

4. Activities execution status and outcome

4.1 National Level Consultations

One round national level consultation and lobbying meeting was conducted with the Constitutional Committee, Committee for Fundamental Rights and Directive Principles of the State and Committee for Protection of the Rights of Minority Community on the basis of the draft produced after the closed meetings. Feedback of this meeting was considered for revision of the agenda. Discussion was conducted with the experts of OHCHR to transform the feedback into the language of the constitution and to prepare a final draft of suggestions. The outcome of this activity was compiled and submitted to the above committees by a delegation of the human rights and civil society.

4.1.1 Consultation program on "Economic, Social and Cultural (ESC) Rights as Fundamental Rights in the New constitution"

Human Rights and Democratic Forum (FOHRID) and Amnesty International Nepal jointly organized a consultation program entitled "Economic, social and cultural rights: Fundamental rights in the new constitution" on 28 July 2009 in Kathmandu. Nutan Thapaliya,

Chairperson of FOHRID and former Member, UN Committee for Economic, Social and Cultural Rights presented his paper entitled "Economic, social and cultural rights to be incorporated as fundamental rights in the new constitution" in the program. After critical opinion on the paper by Advocate Rajesh Hamal, floor was opened to obtain views from the guests and other participants. Bishnupukar Shrestha, Chairman of CAHURAST presented concluding remarks and Keshav Sigdel, Vice Chairman of Amnesty International Nepal concluded the program. Advocate Raj Kumar Siwakoti facilitated the program and threw light on the relevance of the program.

Altogether 49 participants including Bir Man Chaudhari and Hari Sripaili, CA Members representing UCPN-Maoist, Kedar Nath Upadhyaya, Chairman of National Human Rights Commission (NHRC), Prof. Kapil Shrestha, Former Member of NHRC, Prof. Dr. Birendra Prasad Mishra, former Election Commissioner, Charan Prasai, Pradeep Pokharel and Dhruva Karki, Former Chairmen of Amnesty International Nepal, representatives of OHCHR Nepal, German Embassy, human rights community, civil society, lawyers, journalists participated the program.

Conclusion and suggestion

On the basis of the working paper, opinion on the paper and feedback received from the stakeholders, the conclusion and suggestion of the program is as follows:

Conclusion: ESC rights cannot be separated from the fundamental rights

Ensuring human rights, i.e., civil and political rights and economic, social and cultural rights is the prerequisite for creation of a civilized society. Both the covenants International Covenant on Civil and Political Rights (ICCPR) and ICESCR are parts of international human rights law; hence, a State cannot formulate any domestic law to downsize them. As Nepal is already a State party to the ICESCR, it is obligatory for Nepal to implement provisions of this Covenant. The State must adopt constitutional and legal measures and establish mechanisms accordingly to fulfill this obligation. Nepal's obligation cannot be fulfilled till the people realize these rights as guaranteed in practice by the State.

It is obligatory for Nepal to ensure unconditional implementation of the international human rights law by the Nepal Treaty Act, 1991 also. At the time when more than 20 developing countries have already incorporated economic, social and cultural rights as fundamental rights in their constitutions, Nepal cannot lag behind in this regard. Therefore, the economic, social and cultural rights cannot be separated from the fundamental rights. As the Limburg Principles and Maastricht Guidelines of the Maastricht Agreement have stressed to guarantee economic, social and cultural rights alongwith civil and political rights, at least the minimum substance such as education, health, food, clean air and clean drinking water should be guaranteed by the limited resources of the State. Fulfilling economic, social and cultural rights is not impossible, if the state is sensitive towards needs of the people and shows will power. One cannot be sure that the people can enjoy the economic, social and cultural rights just by mentioning them as fundamental rights in the constitution. However, it opens door for legal struggle to guarantee these rights. The NHRC can play important role once these rights are mentioned in the constitution. Policy makers, law enforcing agencies and human rights organizations can play responsible role in this regard.

Context of economic, social and cultural rights in the Interim Constitution and the fundamental rights limited by the existing law

The list of economic, social and cultural rights enshrined in the Interim Constitution, 2007 as fundamental rights is encouraging. These rights include,

Rights regarding environment and health (Art. 16), right to education (Art. 17), right of community to protect and promote their own language, script, culture, cultural civilization and heritage and to receive education in their own mother tongue (Art. 17), right to employment

as provided for in the law (Art. 18), right to social security for a certain group of people (Art. 18), right to food sovereignty as provided for in the law (Art. 18), right to property (Art. 19), right to social justice for certain groups of people (Art. 21), protection of the minors from use in the hazardous works and army, police or conflict (Art. 22), right of disabled children to get special assistance (Art. 22), right against exploitation (Art. 29), right to proper work practices and to form trade unions, to organize themselves and to engage in collective bargaining in accordance with law (Art. 30).

The above rights have been constricted by the term "in accordance with law". This is contrary to the jurisprudence of fundamental rights and constitutionalism. According to the international practice and jurisprudence, the fundamental rights cannot be limited by the term "in accordance with law" or "as provided for in the law". The citizens must be capable to utilize fundamental rights and the State cannot run away from its responsibility to guarantee citizen's access to fundamental rights. But, the major political parties including UCPN-Maoist, Nepali Congress, CPN-UML as well as the then government escaped from their responsibility while promulgating the Interim Constitution by neglecting the international standards and imposing the term "in accordance with law" to the fundamental rights relating to economic, social and cultural rights. This reduced the importance of the fundamental rights. The fundamental rights enshrined in the Interim Constitution, which are limited by the term "in accordance with law" or "as provided for in the law" are as follows:

- Except as provided for by law no person shall be deprived of his/her personal liberty - Art. 12 (2).
- No means of communication shall be obstructed except in accordance with law - Art. 15 (4).
- Basic health services free of cost from the State will be as provided for in the law - Art. 16 (2).
- Every community shall have right to receive basic education in their own mother tongue as provided for in the law - Art. 17 (1).
- Right to receive free education from the State up to secondary level as provided for in the law - Art. 17 (2).
- Right to employment as provided for in the law - Art. 18 (1).
- Right of women, labourers, the aged, disabled, incapacitated and helpless citizens to receive social security as provided for in the law - Art. 18 (2).
- Right of every religious denomination to manage and protect its religious places and religious trusts in accordance with law - Art. 23 (2).
- Right of indigent person to have free legal aid in accordance with law - Art. 24 (10).
- Right to form trade unions, organize and collective bargaining in accordance with law - Art. 30 (2).

Imposing the term "in accordance with law" or "as provided for in the law" obstructs implementation of the above fundamental rights. The fundamental rights must not be constricted in this way. It will make the guarantee of rights and strengthening of democracy difficult. Guarantee of fundamental rights including economic, social and cultural rights is the pre-requisite for full fledged democracy. If the State does not have capacity to fulfill all the rights, only those rights which are possible to fulfill should be incorporated as the fundamental rights. The citizens must be entitled to utilize fundamental rights without any condition. Otherwise, the citizens will not trust the State, and they will be indifferent towards the State.

Recommendation

- A.** The new constitution must continue the economic, social and cultural rights enshrined in the Interim Constitution. The terms "in accordance with law" or "as provided for in the law" should be removed in the continuation of these rights. These rights must be clearly stated in the language of rights. The statutory restriction can limit implementation of

rights, and the fundamental rights cannot be enjoyed as rights. For instance, the right to education upto secondary level free of cost cannot be guaranteed in practice, if the other law has not guaranteed such education free of cost. Therefore, the fundamental rights must be guaranteed as rights and as enforceable rights.

B. The new constitution must guarantee following economic, social and cultural rights as fundamental rights:

- Every Nepali citizen shall have the right of access to adequate food, clothing and housing.
- Every Nepali citizen shall have the right to live in a clean environment.
- Every Nepali citizen shall have the right to free basic health services.
- Special group of children shall have the right to receive special assistance.
- The minors shall have right to protection from their use in the hazardous work and army, police or conflict.
- Every Nepali citizen shall have the right to free education upto secondary level.
- Every Nepali citizen shall have the right to protect and promote his / her language, script, culture, cultural civilization and heritage.
- Every Nepali community shall have the right to receive education in its own mother tongue.
- Every Nepali citizen attaining majority shall have the right to employment.
- Incapacitated, the aged and children shall have the right to social security.
- Every Nepali citizen shall have the right to property.
- The communities at the verge of extinct shall have the right to social justice.
- Every Nepali citizen shall have the right against exploitation.
- Every Nepali citizen shall have the right to proper work practice and right to form trade unions.
- Every Nepali citizen shall have the right to develop local skill, labour and technology.
- Every Nepali peasant shall have the right to utilize peasant's rights.

4.1.2 Consultation meeting on "Constitutional Provisions of Economic, Social and Cultural Rights: Opportunities and Challenges"

Till the 1990s, the world was divided in its perspective on civil and political rights (CP rights) and economic, social and cultural rights (ESC rights). This division was removed after uniformity in the view that human rights are universal, indivisible and interdependent. In fact, CP rights and ESC rights are complementary to each other. The rights cannot be complete if we attempt to go with one individual group of rights by ignoring the other. There is difference in priority regarding CP rights and ESC rights in Nepal. We are in the process of formulating a new constitution for progressive restructuring of the State and initiating a fresh start. We have felt that many political changes in the past were unable to get sustainability as they neglected ESC rights. Therefore, ESC rights should be guaranteed through new constitution to institutionalize political change. The political change cannot get sustainability if we do not guarantee ESC rights in the new constitution as unconditional fundamental rights. Present moment of Constitution making is the most appropriate to guarantee these rights.

Considering the above necessity, Human Rights and Democratic Forum (FOHRID) organized a consultation meeting entitled "Constitutional Provisions of Economic, Social and Cultural Rights: Opportunities and Challenges" in Kathmandu on 11 September 2009.

Program objectives

To explore views of experts and stakeholders about the economic, social and cultural rights to be incorporated in the new constitution.

Program methodology and participation

The program that commenced with taking seats in the dais by the chief speakers was chaired by senior human rights defender Nutan Thapaliya. The program was divided into two parts. In the first part, Advocate Rabindra Bhattarai presented his expert discussion paper entitled "**Economic, Social and Cultural rights: Basic human rights to be incorporated in the new constitution as fundamental rights**" and Nutan Thapaliya presented his paper entitled "**Need of economic, social and cultural rights under the provision of fundamental rights: Challenges and possibilities.**" The guests and other participants actively expressed their views on the discussion papers and the issue of the day in the second part. The program was facilitated by Advocate Birendra Thapaliya.

The chief speakers and panelists of the program suggested to determine the ESC rights to be incorporated in the new constitution through a separate meeting and recommend it to the Fundamental Rights and Directive Principles Committee of the CA. Accordingly, decision was made to hold an expert meeting on 14 September 2009 to determine the ESC rights to be incorporated in the new constitution. The program decided to submit the report and recommendations to the Fundamental Rights and Directive Principles Committee of the CA through lobbying to get these rights incorporated in the new constitution.

Views expressed by participants

Speaking on the occasion, **former Vice Chairman of National Planning Commission Dr. Shankar Sharma** opined that the future constitution should effectively guarantee the most necessary and basic ESC rights. The fundamental rights should be ensured as compulsory but the Interim Constitution has limited the fundamental rights with the phrase "as provided in law" and "in accordance with law". The ESC rights are the subject of progressive realization. A new provision can be incorporated in the constitution making the Head of State submit a progress report regarding how far these rights were guaranteed and what was the implementation status.

Prof. Dr. Keshav Khadka, economist said that Nepal should guarantee ESC rights as fundamental rights because Nepal is already a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). We must guarantee these rights through new constitution. Attaining these rights is impossible if we hesitate to make political commitments. This opportunity must not be missed as the international community considers fulfillment of HR obligations through economic diplomacy.

Nepali Congress Spokesperson Arjun Narasimha KC said that the ESC rights cannot be neglected as the people have expressed their willingness to achieve democracy, peace, social justice, social security and inclusiveness through Jana Andolan II. He said that we should think about how to maintain correlation between the limited resources and the increased expectations of the people. We cannot meet the aspirations of the people without guaranteeing these rights, KC stressed, we must be clear on which of the ESC rights should be regarded as fundamental rights and which as progressive realization.

CA Member from Madhesi Janadhikar Forum Atmaram Prasad Sah said though there is difference in viewing CP rights and ESC rights between the leftists and the democrats, both the factions aim for the economic and social upliftment of the people. He further added that rights of both groups cannot be ignored, and upliftment of the people is impossible without realization of ESC rights. Hence, there should be correlation between these rights. As federalism is necessary for ending discrimination, realization of ESC rights must be viewed by linking this issue to federalism.

Central Committee Member of CPN-UML Bijay Subba said that social justice should be emphasized by all. There is problem because every group wants to push their own pleading, he opined, we must go for proportional inclusion. Every community should be entitled to

study upto the university level in their own mother tongue and the ethnic communities should have primary access on water, land and forest. People's situation is deplorable as the leaders are dishonest; hence everyone must be accountable.

Nepali Congress Whip in the CA Kamala Panta opined that the people's right to life has been put into peril due to impunity, torture and insecurity. She stressed that the political change cannot be preserved if we fail to guarantee ESC rights. People raised the right to food, right to shelter, right to clothing, right to basic education and right to health as fundamental rights during opinion survey conducted in the course of drafting constitution. Right to education should be guided to make our education system more practical. She added, protection and implementation of rights is challenging in Nepal.

Constitutional expert Dr. Bipin Adhikari said that certain rights among many human rights are counted as fundamental rights. People expect more and politics weakens if we put ESC rights into dilemma. Hence, only those ESC rights which can be fulfilled must be incorporated in the new constitution. Right to health may not be guaranteed fully, but the State should provide at least Jeevan Jal to the diarrhea affected people. Instead of leaving them in the name of progressive realization, the viable rights should be incorporated as fundamental rights.

Presenting his paper entitled "Need of economic, social and cultural rights under the provision of fundamental rights: Challenges and possibilities", **senior human rights defender Nutan Thapaliya** said that though the ESC rights are fulfilled in a progressive way, certain rights must be fulfilled anyhow. Saying that there cannot be any compromise in the compulsory and free education, employment, clean drinking water, clean air, he added, Sri Lanka has guaranteed free education upto university level and India has guaranteed free education upto Metric level; therefore, Nepal should ensure compulsory and free education upto at least primary level. Poor people have neither adequate food nor they have access to decision making system. Who is responsible when 500 people died of diarrhea in the mid-western region? Who is accountable? Don't they have right to life? Why was their right violated? Is the Minister who goes to foreign trip, the Director General of the Department of Health or the Assistant Health Worker is responsible? Someone must be accountable. The ESC rights are not fulfilled due to lack of political consensus. The political parties have not understood gravity of these rights and they lack political willpower. Only a firm political will can guarantee these rights. Certain representative ESC rights should be guaranteed as fundamental rights taking into consideration the experiences of other countries and the means and resources of our own country.

Presenting his expert discussion paper entitled "Economic, Social and Cultural rights: Basic human rights to be incorporated in the new constitution as fundamental rights", Advocate Rabindra Bhattarai argued that the spirit of ICESCR, to which Nepal is a State party, implies to guarantee minimum ESC rights. Those rights which are possible to bear from the national resources should be provided. The fundamental rights should be clearly mentioned and the people must be able to enjoy them without any obstruction. We have the responsibility to incorporate CP and ESC rights in the new constitution. The right to dignified life, right to education, right to adequate living standard and employment, right to health, right to property, right to establish family, rights of children, right to work, cultural right and right to religion should be incorporated as fundamental rights.

Conclusion and suggestions

- The new constitution should guarantee fundamental rights as the constitution is the means to guarantee right to enjoy a certain level of living standard accepted by the society. People's upliftment is not possible without economic, social and cultural rights. ESC rights can be guaranteed as fundamental rights if there is political will. The state must create a situation and provide opportunity to utilize fundamental rights freely.

- The political change of the 1990 could not sustain because it had not adequately guaranteed ESC rights. The movement of 1960 and 1990 were held for democracy but the movement of 2006 was held for democracy, peace, social justice, social security and inclusiveness. The people now view ESC rights with much importance.
- The issue of distinguishing fundamental rights and constitutional rights should be determined based on the need of the country. Conflict arises when the people cannot utilize all the fundamental rights. We have ideals but we must be based on the fact.
- ESC rights should be incorporated on the basis of availability, acceptability, affordability and accessibility.
- Though the ESC rights are subject of progressive realization, certain rights must be fulfilled immediately. For instance, there cannot be compromise in compulsory and free primary education, employment, clean drinking water, and clean air.
- We must go forward with punitive approach. The official whose action or omission obstructs realization of rights should be held accountable.
- It is the duty of the State to ensure respect and realization of the fundamental rights.
- We have very insignificant revenue, and the financial assistance to the VDC and DDC is also arranged through loan. The policy level decisions about whether the budget should be allocated to the road or school is decided from the headquarters in New York or other foreign places. This obstructs accomplishing activities as planned.
- We must not forget quality while talking about ESC rights. The rights to health, rights to education and rights to access should be ensured with quality.
- The countries guaranteeing human rights have attained economic development, and those which restrict human rights are lagging behind.
- We can exercise PIL if the general citizens fail to utilize fundamental rights.
- As practiced in Ghana, the head of State should be asked to submit annual report regarding expenditure and progress of the State for guaranteeing fundamental rights.
- We cannot compromise with anyone regarding basic and fundamental human rights. Nepal's economic and development policies are not formulated in Nepal. Therefore, we are like client State / dependent State. The policy makers lack commitment towards the nation. The political parties lack will power.
- The State should entrust special responsibilities to the NHRC to ensure ESC rights. The NHRC should be asked to provide periodical reports on the efforts of the State organs to guarantee ESC rights.
- The right to dignified life, right to education, right to adequate living standard and employment, right to health, right to property, right to family, right of children, right to labour, right to culture and religion should be effectively guaranteed as fundamental rights in the new constitution.

4.2 Expert Meeting:

Expert meeting was conducted at two levels. The first expert meeting determined how and in which language to incorporate ESC rights in the new constitution. The second expert meeting determined draft of the fundamental rights. The outcome produced through the first expert meeting is given in the following sections. The outcome of the second expert meeting is given in the Lobbying section below.

ESC rights to be incorporated as fundamental rights in the new constitution

Human Rights and Democratic Forum (FOHRID) has been playing active role in the ongoing constitution making process from prior to the election of the Constituent Assembly. FOHRID has been conducting regular discussion, consultation and meeting with experts and stakeholders on the issues that are directly associated with the citizens and recommending

them to the concerned authorities. In this context, FOHRID has been exploring the representative rights to be incorporated in the new constitution as the economic, social and cultural rights. To explore ideas about how the general citizens can utilize fundamental rights without any condition and what types of constitutional provisions should be incorporated in the new constitution, FOHRID conducted an interaction program entitled "Economic, social and cultural rights: Fundamental rights in the new constitution" with the CA Members and representatives of the human rights community on 28 July 2009 in Kathmandu. On the basis of the feedback received through the above program, FOHRID conducted consultation program entitled "Constitutional provision of economic, social and cultural rights: Possibilities and challenges" with the CA Members, experts and representatives of the human rights community on 11 September 2009. Taking note of the suggestions and feedback received in the above two programs, a meeting of the experts held on 14 September 2009 finalized the rights to be incorporated and their language. The rights recommended by the meeting to the CA Committee for the Fundamental Rights and Directive Principles are as follows:

(1) Right to live with dignity

- (1) Every person shall have the right to live with dignity in a clean environment with adequate public and social security.
- (2) For the enforcement of right in the manner set out in the clause (1), apart from the remedy according to the Article 20, the State shall arrange economic and social system through law.

(2) Right regarding education

- (1) Every citizen shall have the right to receive at least primary level of education in his/her own mother tongue and the education upto the higher secondary level shall be free and compulsory.
- (2) Every citizen shall have the right to receive vocational and skill education to develop capacity to involve in the vocational and skill entrepreneurship.
- (3) Social education shall be scientific and based on the positive knowledge to develop personality by strengthening human rights and fundamental freedom.

(3) Right to adequate living standard and employment

- (1) Every citizen shall have the right to receive fair and secure employment adequate to sustain life with adequate arrangement of food, clothing and housing.
- (2) The disabled, children, the aged, persons with disability and helpless citizens who cannot involve in the employment shall have the right to social security for the arrangement of food, clothing and housing as set out in the clause (1).

(4) Right regarding health

- (1) Every citizen shall have the right to optimum physical and mental health.
- (2) Every woman citizen shall have the right to reproductive health.
- (3) Primary healthcare and maternity services shall be provided free of cost.

(5) Right regarding property

- (1) Every citizen shall, subject to public interest and law, have the right to acquire property, occupy, sell and otherwise dispose of property.
- (2) The State shall not, except in the public interest, acquire, or create any encumbrance on the property of any person, and in the situation when the State creates any

encumbrance in the personal property for the purpose of public interest, such a property shall be replaced or compensated.

(6) Right to family and right of child

- (1) Every citizen attaining marriageable age shall have the right to establish family and live conjugal life by selecting a life partner with total and independent consent.
- (2) Every child shall have the right to his or her identity, name and citizenship.
- (3) Every child shall have the right to be nurtured, receive education and protection as required for a minor from the family and State.
- (4) Every child shall have the right to be prioritized his or her best interest; to receive fair and equal treatment without all forms of discrimination and hatred; his or her expressed view to be respected; to receive protection against any form of ill treatment, exploitation and violation; and to receive cordial and dignified treatment.

(7) Right regarding labour

- (1) Every worker and employee shall have the right to proper work practices.
- (2) Every worker shall have the right to receive remuneration not less than the minimum pay scale determined by the State.
- (3) Every worker and employee shall have the right to form trade unions, to organize themselves and to engage in collective bargaining for the protection of their interests in accordance with law.

(8) Right regarding culture

- (1) Every citizen shall have the right to be engaged in his or her own cultural life.
- (2) Every person shall have the right to engage in his or her intellectual, scientific or artistic research, promote skill and creation and obtain benefit from them.
- (3) Every citizen shall have the right to protect his or her scripture, literature, records and heritage and develop language and art.
- (4) Every citizen of the minority community in terms of ethnicity, culture and language shall have the right to receive special protection from the State.

(9) Right regarding religion

- (1) Every person shall have the right to select whether or not to adopt any religion or religious belief and conviction and to adopt, practice and protect it.

Provided that the act or conduct of converting other's religion by someone and to infringe upon the religion and commitment of others is prohibited and punishable by law.
- (2) In compliance with the public order and moral conduct, every person shall have the right to run and protect trust in accordance with law by maintaining independent existence of his or her religious or religion based group or community.
- (3) Encroachment of the archaeological public heritage such as monument, memorial, temple, mosque, church, Math, Stupa, Chaitya or other traditional place or construction related to a certain religion or religious community shall be prohibited and punishable by law.

4.3 Lobbying

Lobbying by human rights and civil society delegation to recommend major ESC rights as fundamental rights in the new constitution was concluded into two levels. Brief outline of this activity is given below:

First round lobbying: A delegation of the human rights and civil society led by Chairperson of FOHRID and senior human rights defender Nutan Thapaliya on 15 September 2009 met with the President of Constitutional Committee Nilambar Acharya, President of the Committee for Fundamental Rights and Directive Principles Binda Pande, and President of the Committee for International Relations and Human Rights Padhmalal Bishwakarma of the Constituent Assembly (CA). The human rights defenders demanded on the occasion to unconditionally guarantee as fundamental rights the representative economic, social and cultural rights identified by incorporating suggestions and feedback received from the general citizens, stakeholders, experts and CA Members through several rounds of discussion, interaction and consultation. The CA Committee Presidents expressed their commitment that the new constitution must address the concerns of the general citizens and they would go forward by adopting suggestions and recommendations received from the programs

On the same day, FOHRID disseminated the feedback determined through the discussions, interactions and expert consultation meetings regarding content and language of the fundamental rights to be incorporated in the new constitution to all the 601 CA Members.

Second round lobbying: A lobbying delegation of the human rights and civil society comprising representatives of Human Rights and Democratic Forum (FOHRID) and AJAR Nepal led by Advocate Birendra Prasad Thapaliya met with the Presidents of various thematic committees of the Constituent Assembly (CA) and CA Members at their office on 8 October 2009 to request them to incorporate effective fundamental rights in the new constitution. The two organizations working together in campaign to incorporate fundamental rights and duties through the CA submitted on the occasion the suggestions and feedback collected by organizing various interactions, seminars, consultations and discussion with stakeholders and experts regarding the way to incorporate fundamental rights in the new constitution.

The lobbying delegation met and submitted the feedback to the CA Chairman Subash Chandra Nemwang, Fundamental Rights and Directive Principles Committee President Binda Pande, Constitutional Committee President Nilambar Acharya, International Relations and Human Rights Committee President Padhmalal Bishwakarma, Natural Resources and Means Committee President Shanta Chaudhari, President of the Committee for Protection of Rights of Minority and Marginalized Community Lalbabu Pandit, State Restructuring and Distribution of State Authority Committee President Lokendra Bishta Magar, President of the Committee for Determination of Legislative Organ Ramesh Rijal, President of the Committee for Determination of State Governance system Shambhu Hajara Dushadh, President of the Committee for Justice System Prabhu Sah Teli, President of the Committee for Determination of the Constitutional Bodies Gobinda Chaudhari, Natural Resources, Economic Rights and Revenue Distribution Committee President Amrita Thapa Magar, President of the Committee for Determination of Foundation for Cultural and Social Solidarity Nabodita Chaudhari, National Interest Protection Committee President Amik Sherchan, Citizen Relation Committee President Mina Pande, Public Opinion Collection and Coordination Committee President Pramod Prasad Gupta, Capacity Enhancement and Resource management Committee President Mrigendra Kumar Singh Yadav. Similarly, the delegation met with CA Members Chandra Prasad Gajurel, Dev Gurung, Ramesh Lekhak, Pradeep Kumar Gyawali, Angdawa Sherpa, Suprabha Ghimire, Narahari Acharya, Gagan Thapa, Khimlal Devkota and Sunil Babu Panta and delivered the recommendations. The recommendation was disseminated to all other CA Members by placing it to their respective pigeon holes.

During their meeting with the thematic committee Presidents and other CA Members, the delegation team requested them to guarantee the representative economic, social and cultural rights as the unconditional fundamental rights in the new constitution.

The suggestions and feedback submitted to the thematic committees of the CA and CA Members as the common document of the human rights and civil society is given below:

The fundamental rights submitted by FOHRID to the Constituent Assembly

Part 3 Fundamental rights and duties¹

(1) Right to live with dignity

- (1) Every person shall have the right to live with dignity in a clean environment with adequate public and social security.
- (2) For the enforcement of right in the manner set out in the clause (1), apart from the remedy according to the Article 20, the State shall arrange economic and social system through law.

(2) Right to adequate living standard and employment

- (1) Every citizen shall have the right to receive fair and secure employment adequate to sustain life with adequate arrangement of food, clothing and housing.
- (2) The disabled, children, the aged, persons with disability and helpless citizens who cannot involve in the employment shall have the right to social security for the arrangement of food, clothing and housing as set out in the clause (1).

(3) Right regarding health

- (1) Every citizen shall have the right to optimum physical and mental health.
- (2) Every woman citizen shall have the right to reproductive health.
- (3) Primary healthcare and maternity services shall be provided free of cost.

(4) Right regarding education

- (1) Every citizen shall have the right to receive at least primary level of education in his/her own mother tongue and the education upto the higher secondary level shall be free and compulsory.
- (2) Every citizen shall have the right to receive vocational and skill education to develop capacity to involve in the vocational and skill entrepreneurship.
- (3) Social education shall be scientific and based on the positive knowledge to develop personality by strengthening human rights and fundamental freedom.

(5) Right to family and right of child

- (1) Every citizen attaining marriageable age shall have the right to establish family and live conjugal life by selecting a life partner with total and independent consent.
- (2) Every child shall have the right to his or her identity, name and citizenship.

¹ **Fundamental rights and duties** prepared in the convenorship of Advocate Rabindra Bhattarai on behalf of FOHRID to submit to the CA Committee for Fundamental Rights and Directive Principles. This was submitted as **Common suggestions from the citizens submitted to the Constituent Assembly to incorporate fundamental rights in the new constitution**. The document was submitted by a delegation of human rights and civil society to the concerned CA Committees and CA Members to incorporate them in the Part 3, Fundamental Rights of the new constitution.

- (3) Every child shall have the right to be nurtured, receive education and protection as required for a minor from the family and State.
- (4) Every child shall have the right to be prioritized his or her best interest; to receive fair and equal treatment without all forms of discrimination and hatred; his or her expressed view to be respected; to receive protection against any form of ill treatment, exploitation and violation; and to receive cordial and dignified treatment.

(6) Right regarding property

- (1) Every citizen shall, subject to public interest and law, have the right to acquire property, occupy, sell and otherwise dispose of property.
- (2) The State shall not, except in the public interest, acquire, or create any encumbrance on the property of any person, and in the situation when the State creates any encumbrance in the personal property for the purpose of public interest, such a property shall be replaced or compensated.

(7) Right regarding labour

- (1) Every worker and employee shall have the right to proper work practices.
- (2) Every worker shall have the right to receive remuneration not less than the minimum pay scale determined by the State.
- (3) Every worker and employee shall have the right to form trade unions, to organize themselves and to engage in collective bargaining for the protection of their interests in accordance with law.

(8) Right regarding culture

- (1) Every citizen shall have the right to be engaged in his or her own cultural life.
- (2) Every person shall have the right to engage in his or her intellectual, scientific or artistic research, promote skill and creation and obtain benefit from them.
- (3) Every citizen shall have the right to protect his or her scripture, literature, records and heritage and develop language and art.
- (4) Every citizen of the minority community in terms of ethnicity, culture and language shall have the right to receive special protection from the State.

(9) Right regarding religion

- (1) Every person shall have the right to select whether or not to adopt any religion or religious belief and conviction and to adopt, practice and protect it.

Provided that the act or conduct of converting other's religion by someone and to infringe upon the religion and commitment of others is prohibited and punishable by law.

- (2) In compliance with the public order and moral conduct, every person shall have the right to run and protect trust in accordance with law by maintaining independent existence of his or her religious or religion based group or community.
- (3) Encroachment of the archaeological public heritage such as monument, memorial, temple, mosque, church, Math, Stupa, Chaitya or other traditional place or construction related to a certain religion or religious community shall be prohibited and punishable by law.

(10) Right regarding justice

(1) Right relating to justice of victim

- 1.1 Every person shall have the right to be protected from the abuse of public authority and crime and the State shall make necessary arrangements for its protection.

- 1.2 Every person victimized by the abuse of public authority and crime shall have the right to receive protection including social security from the State. For the enforcement of this right, the State shall provide reparation to the victim.

Explanation: "Reparation" means rescue, redress and compensation to be provided to the victim by the State, restitution of cash, in kind and service delivered to the victim by the offender, rehabilitation, satisfaction and guarantee of non repetition.

- 1.3 The person victimized of abuse of public authority and crime shall have the right to receive information about investigation of crime, prosecution and case in the language which the victim understands.
- 1.4 Every person victimized by the abuse of public authority and crime shall have the right to conduct or cause to conduct trial of the case related to the incident, in which s/he was victimized, by being a party to the case.
- 1.5 A person victimized of crime shall have the right to give opinion on the punishment against the offender of the crime against him or her.
- 1.6 A person victimized of crime shall have the right to give or not to give consent to reduce punishment against the offender or to pardon. For the enforcement of this right, the victim shall be consulted before taking decision to pardon the punishment.

(2) Right to criminal justice

- 2.1 No person shall be prosecuted and become liable of punishment for any act which is not an offence according to Nepal law or international law.

Provided that this provision will not obstruct investigation, trial and punishment against any person by formulating a law in the acts that are offences against humanity which are designated as crimes in accordance with the general principles of law.

Option 1

- 2.1 No person shall be prosecuted or made liable to punishment for performing any act which is not an offence according to existing law.

Provided that this provision will not be applicable to the acts which are offences according to the international law while performing such act including genocide, war crime, crime against humanity, enforced disappearance or torture.

Option 2

- 2.1 No person shall be convicted for performing an act which is not regarded as punishable offence by national or international law and punished more than applicable at the time of offence.

Provided that this does not prevent investigation, trial and punishment against any person by formulating law in case of violation of human rights and humanitarian law.

- 2.2 Any person shall have the right to receive legal remedy against impunity or genocide, war crime and crime against humanity.
- 2.3 No person shall be subjected to a punishment greater than that prescribed by law in force at the time of offence, and shall not be prosecuted or punished for the same offence for more than once.
- 2.4 No person shall be detained without being informed of the ground for such arrest in the language s/he understands and such information shall be given to his or her successor and legal practitioner also.
- 2.5 Every arrested person shall have the right to consult his or her legal practitioner. The consultation made by such a person with the legal practitioner and the advice given

thereon shall remain confidential, and such a person shall not be denied the right to be defended by his/her legal practitioner.

- 2.6 A person who is arrested shall be produced before a judicial authority within a period of twenty four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and the arrested person shall not be detained in custody beyond the said period except on the order of such authority.
- 2.7 No person accused of any offence shall be assumed to be an offender until proven guilty and s/he shall be treated as innocent person.
- 2.8 No person accused of any offence shall be compelled to be a witness against himself/herself.
- 2.9 Every person undergoing trial shall have the right to be informed about the proceedings of the trial.
- 2.10 The State shall provide appropriate compensation to any person detained in the custody, if the detention is proved to be illegal.
- 2.11 Every person shall be entitled to a fair trial by a competent court or judicial authority and s/he shall have the right to receive compensation if s/he becomes victim of miscarriage of justice as a result of criminal proceedings.
- 2.12 Every person accused of any offence shall have the right to receive service of interpreter and defense service including legal aid as necessary in the course of proceedings.

(3) Right regarding juvenile justice

- 3.1 Any child committing any act which is punishable by law shall have the right to be improved and corrected and the child committing such an act shall be included in reform activities.
- 3.2 No child shall be prosecuted, detained or sent to prison for punishment with adults.
- 3.3 A child acting against law shall be cared and improved under community reconciliation and rehabilitation method and by keeping in the reform house and the possibility of depriving freedom shall be considered only as the final option.
- 3.4 No child shall be made public as an offender and s/he shall not be counted as an offender for an act punishable by law committed by a child.
- 3.5 Every child shall have the right to get proceedings against him or her maintained as confidential.

(11) Right against torture

- (1) No person shall be subjected to torture or be treated or punished in a cruel, inhuman or degrading manner.
- (2) An act of inflicting torture or cruel, inhuman and degrading treatment or punishment shall be punishable by law.
- (3) A person victimized of torture or cruel, inhuman and degrading treatment shall have the right to receive reparation.

(12) Right to equality

- (1) All citizens shall be equal before the law. No person shall be denied equal protection of the laws.
- (2) There shall be no discrimination against any citizen in the application of laws on grounds of religion, race, gender, gender or sexual orientation, caste, tribe, origin, language or ideological conviction or any of these.

- (3) There will be equal citizenship status between men and women and the State shall not discriminate among citizens on grounds of religion, race, gender, gender or sexual orientation, caste, tribe, origin, language or ideological conviction or any of these.

To end the existing unequal or inequitable situation, the State shall make special arrangements through law for protection, empowerment or development of women, dalit, indigenous ethnic tribes (Adivasi Janajati), Madhesi or farmers, labourers or deprived or those who belong to a class which is economically, socially, geographically or culturally backward or children, the aged and people with disability or incapacity.

(13) Right to freedom

- (1) Every person shall have the right to live with freedom.
- (2) No law which provides for capital punishment or cruel punishment shall be made, and except as provided for by law no person shall be deprived of his / her personal liberty and punished.
- (3) Every citizen shall have the following freedoms:
- (a) freedom of opinion and expression,
 - (b) freedom to assemble peaceably and without arms,
 - (c) freedom to form political party,
 - (d) freedom to form unions and associations,
 - (e) freedom to move and reside to any part of Nepal,
 - (f) freedom to be engaged in any occupation, employment, industry and trade.

Provided that,

- (1) Nothing in sub-clause (a) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or communities, or on any act of defamation, contempt of court or incitement to an offence, or on any act which may be contrary to decent public behaviour or morality.
- (2) Nothing in sub-clause (b) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty, integrity or public law and order situation of Nepal.
- (3) Nothing in sub-clauses (c) & (d) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or communities, or which may instigate violence, or which may be contrary to public morality.
- (4) Nothing in sub-clause (e) shall be deemed to prevent the making of laws which are in 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 the people of various castes, tribes, religions or communities.
- (5) Nothing in sub-clause (f) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may be contrary to public health or morality, to confer on the State the exclusive right to undertake specific industries, businesses or services, or to impose any condition or qualification for engaging in any industry, trade, profession or occupation.

(14) Right against preventive detention

- (1) No person shall be held under preventive detention unless there is sufficient ground to believe in the existence of an immediate threat to the sovereignty and integrity of, or the law and order situation in, Nepal.

- (2) If an authority detains a person under preventive detention contrary to law or in bad faith, the person detained is entitled to compensation under the law.

(15) Right against untouchability and racial discrimination

- (1) No person shall, on the ground of caste, descent, community or occupation, be subject to racial discrimination and untouchability in any form of social contact. Such a discriminatory act shall be liable to punishment and the victim shall have the right to receive reparation.
- (2) No person shall, on the ground of caste or tribe, be deprived of the use of services, conveniences or utilities available to the public, or be denied access to any public place or public religious places, or be prevented from performing any religious act.

(16) Right regarding information, publication, broadcasting and press

- (1) Every citizen shall have the right to demand or obtain information on any matter of concern to himself or herself or to the public.

Provided that this shall not compel to provide information on important issues such as national security about which confidentiality is to be maintained according to law.

- (2) There shall be no prior censorship of publication and broadcasting or printing of any news item, editorial, article, feature or other reading or audio-visual material by any means including electronic, publication, broadcasting and the press.
- (3) If there is any broadcasting, publishing or print of material using radio, television, online or other types of digital or electronic equipment or medium, no such equipment or medium shall be closed, seized or registration cancelled because of such broadcasting, publication or printing.
- (3) No newspaper, periodical or press shall be closed or seized nor shall its registration be cancelled merely for printing or publishing any news items, articles, editorials, writings or other reading material.

(17) Right to privacy

Except in accordance with law, privacy in relation to the person, and to their residence, property, documents, records, statistics and correspondence, and their reputation are inviolable.

(18) Right against exploitation

- (1) Every person shall have the right against exploitation.
- (2) No person shall be exploited in the name of custom, tradition and practice, or in any other way.
- (3) No person shall be subjected to human trafficking, slavery or bonded labour or forced labour.

Provided that nothing in this clause shall prevent engaging citizens in compulsory service for public purposes.

(19) Right against exile

No citizen shall be exiled.

(20) Right to constitutional remedy

The right to proceed in the manner set out in Article ... for the enforcement of the rights conferred in this Part is guaranteed.

4.4 Compilation, publication and submission to CA Members

The compilation of discussion paper entitled " Economic, social and cultural rights" prepared under this action, the program proceeding and recommendation were compiled and 1000

copies were printed. This publication is being disseminated to the CA Members and other non state actors. It is expected that the non state actors shall utilize this as a resource material to conduct advocacy on economic, social and cultural rights. The document will help the policy makers for implementation of the ICESCR in Nepal. The publication has incorporated findings of the consultation meeting, minute of the lobbying meeting, working papers presented in program and the recommendation made to the CA Committee for Fundamental Rights and Directive Principles. The final part of this publication bears the report of the whole proceedings and recommendation made to the CA Committee for Fundamental Rights and Directive Principles in English language.

5. Assessment of outcome

This action was successful to sensitize the general stakeholders on the importance of the ESC rights. This program explored how and which of the ESC rights must be incorporated in the new constitution as the fundamental rights. The concerned CA Committees and the CA Members have expressed their commitment to incorporate representative ESC rights as fundamental rights in the new constitution. It can be expected that the CA shall pay due consideration to incorporate the ESC rights recommended through this program. On the other hand, this program has brought into discussion various aspects of IESCR and opened door for effective its implementation in Nepal. Pressure has been exerted against the government to implement the IESCR.

6. Learning and challenges

Many constitutions formulated after the 1990 have incorporated the representative ESC rights as fundamental rights. However, these rights are regarded as the subject of progressive realization. It is found that the implementation of these rights is not possible just by incorporating them in the constitution. In the light of the South African experience also, one can suspect effective implementation of the ESC rights even though the representative ESC rights are incorporated in the new constitution as fundamental rights. We have to make further efforts to ensure benefits of these rights to the people.

7. Budget

Total budget of this initiative was USD 3200. Taiwan Foundation for Democracy (TFD) provided USD 3000 and FOHRID arranged remaining USD 200 mobilizing its internal resource. Out of the total sum, USD 600 was allocated for human resources in which USD 500 was spent, USD 720 was allocated for project action cost in which USD 625.77 was spent, USD 515 was allocated for expert meeting in which USD 496.98 was spent, USD 790 was allocated for national level consultation and lobbying in which 788.57 was spent, USD 350 was allocated for periodical publication in which USD 555.69. The cost for periodical publication was arranged by transferring cost from other budget head. This has not affected the total budget approved by TFD for this project. Besides, USD 225 was spent for administration.