

# Judicial education on the Convention on Elimination of Discrimination against Women in Nepal

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*The courts have special reason to reject – not reflect – society’s irrational prejudices. They can do no less if they are to provide all our citizens a court system which can pride itself on the delivery of quality justice.*

Sol Wachtler, Chief Judge, New York Court of Appeals

## 1 Introduction

The principle of equality is the cornerstone of every democratic society that aspires to social justice and human rights.<sup>1</sup> Article 1 of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights. Equality means that all people are equal and should be recognized as such without discrimination based on age, caste, class, ethnicity, gender, physical ability, religious or other beliefs, and sexual preference or other such factors. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was ratified by Nepal on 22 April 1991 without reservations. Article 2 of the CEDAW calls on states to “condemn discrimination against women in all its forms” and to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”<sup>2</sup> Despite the

This chapter is based on a paper presented at the colloquium “From Ratification to Implementation: CEDAW in International and National Law,” Oslo, 11–12 March 2010. It was extensively edited for publication by Anne Hellum. I am grateful to Professor Anne Hellum and others for their insightful comments and valuable feedback. I have also benefited from comments of the anonymous reviewer.

<sup>1</sup> Soli J. Sorabjee, *The World of Gender Justice* (New Delhi: Har Anand Publication, 2001) at 47.

<sup>2</sup> CEDAW Committee, Periodic Report: *International Women’s Rights Action Watch (IWRAP): Accessing the Status of Women* (1996).

obligation to proclaim their total opposition to all forms of discrimination against women at all levels and branches of government, the Government of Nepal has failed to take sufficient measures directed at legal and social reforms to address such discrimination.<sup>3</sup> In a situation where the government is reluctant to take steps to modify or abolish existing laws as well as social and religious customs, beliefs and practices that constitute discrimination against women, it is indeed an uphill task for women who seek protection against inequality and violence inflicted on them. Deficits in good governance remain the most significant obstacle to the protection and promotion of women's human rights in Nepal, as in many other South Asian countries.<sup>4</sup>

Nepal's ratification of the CEDAW did not lead to any immediate legal change within the country. In the years following the ratification, laws that defined the status of women in terms of their sex and marital status were reinforced by all branches of government – the legislative and the executive. To make the government accountable, civic organizations such as Pro Public filed a number of petitions that challenged discriminatory laws on the basis of the CEDAW in the Supreme Court.<sup>5</sup> The aim was to empower women to take court action against discriminatory laws on the basis of the CEDAW and the Interim Constitution. The outcome of the court cases indicated that the Supreme Court judges were not conversant with the principles of the CEDAW and provisions of the Nepalese Treaty Act 2047,<sup>6</sup> which provides that the provisions of international conventions take precedence when coming into conflict with domestic law. An example is the judgment of the Supreme Court in the *Meera Dhungana* case from 1994, in which the judges with reference to social norms and value systems refused to provide equal property rights to women.<sup>7</sup> Realizing

<sup>3</sup> Forum for Women, Law and Development on the CEDAW, Initial Report on *Implementation Status of the Outcome Document of Beijing Platform for Action* (Kathmandu, 2003).

<sup>4</sup> O. P. Mishra, *Public Interest Litigation and Our Rights* (Allahabad: Dwivedi Law Agency, 2003); H. M. Seervai, *Constitutional Law of India: A Critical Commentary* (Bombay: N. M. Tripathi Publications, 1991); Laurence H. Tribe, *Constitutional Choices* (Indian Reprint) (New Delhi: Universal Law Publications, 2000); Mahendra P. Singh (ed.), *Comparative Constitutional Law* (Lucknow: Eastern Book Company, 1989).

<sup>5</sup> *Forum For Women, Law and Development v. His Majesty's Government*. The Foreign Employment Act 2007 restricted women from going to the Gulf countries for employment and this was challenged. The Supreme Court justified the law, saying it is made for the protection of women; therefore, the government has to implement it.

<sup>6</sup> Section 8 of the Nepal Treaty Act of 1990.

<sup>7</sup> *Meera Dhungana v. Ministry of Law and Justice and others*, *Nepal Law Journal* 9 (1994) at 462–8.

the gap between the CEDAW's formal status in Nepalese law, on the one hand, and the judiciary's lack of knowledge about Nepal's international and national legal obligations, on the other hand, the civic organization Pro Public initiated a judicial education program. The assumption underlying this initiative was that the effectiveness of human rights and rule of law guarantees in the Constitution required extensive education of the judiciary. Since the government had not taken measures to educate members of the judiciary, it was felt that the involvement of civil society in the process of judicial education was critical. This chapter shows how women's rights litigation in combination with judicial human rights education led to legal changes in a situation where both the legislative and executive branches of the Nepalese government disregarded their duty to respect and protect women's rights to protection against discrimination. Analysis of cases decided by the Supreme Court of Nepal between 1991 and 1997 demonstrates how a lack of proper understanding about the principle of equality enshrined in the CEDAW by the members of the judiciary constituted a barrier in the judicial pronouncement. Through examination of cases decided by the same judges after a judicial education program focusing on the CEDAW, this chapter demonstrates how judicial education, under certain circumstances, may lead to significant changes in the legal position of women.

This chapter is based on my own experiences and observations as a program officer working for the Nepalese civic organization Pro Public, which was founded in 1991.<sup>8</sup> Pro Public is a non-profit, non-governmental organization comprising environmental lawyers, journalists, economists and women's rights activists. It focuses on good governance, environmental justice, and consumer control and gender justice. Government accountability is sought through a wide range of methods including advocacy and public interest litigation. Pro Public's mission is to "play the role of a social change agent to empower the Nepalese people through research, advocacy, litigation and capacity building."<sup>9</sup> Its objective is "to act as watchdog in the areas of environment conservation, consumer rights, women rights and child welfare, by way of alternative dispute resolution, negotiations and litigation."<sup>10</sup>

<sup>8</sup> [www.propublic.org/index.php](http://www.propublic.org/index.php) (last accessed 2 July 2008).

<sup>9</sup> Mission statement available at: [www.propublic.org/index.php](http://www.propublic.org/index.php) (last accessed 2 July 2008).

<sup>10</sup> *Ibid.*

As a program officer, I was involved in public interest litigation and education of judges within a program undertaken by Pro Public under the aegis of the Asia Pacific Advisory Forum on Judicial Education on Equality (APAFEJE). The main target group of this program was the upper level of the judiciary. The overall aim was to make the judges conversant with the judiciary's obligation to protect women against all forms of discrimination under international and national law. The education program was premised on the assumption that the judiciary, when educated about these obligations, would crack down on laws and practices that discriminate against women. Through my work I had a unique opportunity to observe and analyze the performance of the Supreme Court in cases that were decided before and after Pro Public's legal education program. My engagement with legal education and litigation afforded me the opportunity to observe and assess the judiciary's response to education in international law in general and the CEDAW in particular.

To assess the potential of legal education programs directed at high-level judges, I will compare Supreme Court cases concerning the rights of women that were decided before and after a legal education program directed at the judiciary was carried out by Pro Public in cooperation with the Asia Pacific Advisory Forum on Judicial Education on Equality.<sup>11</sup> My research shows that Nepal's ratification of the CEDAW in and of itself had an impact neither on legislation nor on judicial review. It shows how the Supreme Court, after a legal education program carried out by international and regional experts, began to invoke the CEDAW in national law. In a number of cases Nepalese laws and customs that discriminated against women were struck down with reference to the Nepalese Constitution and the CEDAW. In the light of these changes, I argue that if the judiciary is given proper and extensive orientation on women's human rights and the state obligation under the CEDAW, judges will uphold the state obligation to respect, protect and promote women's human rights under international and national law.

This chapter unfolds in five sections. In the section after this introduction, I situate Nepal's ratification of the CEDAW and the state obligation to respect, protect and promote the human rights of women in the broader historical, political and social landscape. The third section describes the national and regional actors and institutions involved in the judicial legal education program initiated by Pro Public. The fourth

<sup>11</sup> The Supreme Court judges who passed the judgments before and after the judicial education program were the same.

section compares cases decided by the Supreme Court of Nepal before and after the judicial education program. The fifth section shows how the Supreme Court rulings have been accepted by both the legislative and executive branches of government.

## 2 The historical and constitutional context of the CEDAW in Nepal

Nepal ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1991 without any reservations. The CEDAW thus obliges the Nepalese government to eliminate all forms of discrimination against women as defined by Article 1 and specified in Articles 5–16 of the CEDAW. In accordance with Article 2 of the CEDAW, the Nepalese government has to take all appropriate measures to ensure not only *de jure* but also *de facto* equality between women and men. Since ratification, the Nepalese government has submitted regular reports to the CEDAW Committee. The Government of Nepal's initial report was presented at the CEDAW Committee's 17th Session in 1999. The combined second and third reports were dealt with at the CEDAW Committee's 30th Session in 2004.<sup>12</sup> The Committee considered the combined fourth and fifth reports of Nepal at its 49th Session in 2011.<sup>13</sup>

The ratification and domestication of the CEDAW must be understood in the light of the political and constitutional changes that took place in Nepal in the 1990s. Before the territorial unification of Nepal in the eighteenth century, the country was divided into a number of independent and separate administrative units, and until 1990 it was ruled by a king. Since the inception of democracy in 1990 and abolition of the monarchy in 2007, Nepal has set out on a political reform process aimed at a federal state governed by a new constitution.

The legal system of Nepal has been strongly influenced by the Hindu religion and customary norms and practices. The Hindu religion is based predominantly on patriarchal norms and values. Before the introduction of the Interim Constitution of 2007, Nepal was constitutionally declared a Hindu Kingdom. Patriarchal values were, and are still, deeply rooted at all levels of law and society. The laws of Nepal have defined the status of women in terms of their sex and marital status, contradictory to the provision of Article 1 of the CEDAW. Despite the ratification of the CEDAW

<sup>12</sup> CEDAW/C/NPL/2–3 and CEDAW/C/SR.630 and 631.

<sup>13</sup> CEDAW/C/NPL/4–5 and CEDAW/C/SR. 989 and 990.

and the constitutional obligation to make it part of national law, a number of discriminatory laws governing marriage, divorce, citizenship and property rights are still in place. Gender-based violence is a serious social problem in Nepal.

Socially and culturally determined gender norms perpetuate gender hierarchies and are embedded in structures such as the family and the local community. They mediate women's access to resources and impact on their status within the family and society. Gender hierarchies within the family constrain women's rights to self-determination and equality in multiple ways. It affects girl-children's rights to education and, in turn, women's access to employment and accumulation of social capital. These factors intersect with rigidly defined and enforced gender norms to create a vicious cycle of discrimination, deprivation and low self-esteem, which constrain women, men and local communities from addressing discrimination and violence against women and girls in Nepal.<sup>14</sup>

Gender has shaped both the legal and cultural landscapes of Nepalese life, and there are many discriminatory laws against women. To date, a predominantly male judiciary interprets laws adopted by the exclusively male legislature to determine issues of male exclusivity.<sup>15</sup> Worse still, women are vulnerable to violent actions and are often abused, usually by male members of society. As stereotypical socio-cultural norms restrain Nepalese women from seeking justice, most of the violence inflicted on them goes unreported. Even those who do report gender-based violence are not treated fairly by the authorities concerned. Officials of the judicial and the quasi-judicial bodies that are in place are more inclined to support the interests of men in cases of violence committed against women and to interpret laws in favor of the male.

During the period between the Government of Nepal's initial report to the CEDAW Committee in 1997 and its current report, Nepal has undergone significant political transformation. The monarchy has been abolished, an Interim Constitution protecting human rights was adopted in 2007 and elections to the Constituent Assembly along multiparty lines were held in 2008. The Interim Constitution is the fundamental law of Nepal providing that any law inconsistent with the provisions of the

<sup>14</sup> SAATHI *Report on the Situation Analysis of Violence Against Women and Girls in Nepal*, Kathmandu (1997).

<sup>15</sup> N. N. Belbase and S. A. Pyakurel, *A Survey on Political Rights and Discriminatory Legal Provisions against Women in Nepal* (Pro Public, 1994).

Constitution shall be void.<sup>16</sup> Section 9 of the Treaty Act of 1991 explicitly states that any law of Nepal that is inconsistent with a treaty or convention acceded to or ratified by Nepal shall not be applicable. In the event of conflict between Nepalese legislation and international treaty obligations, the latter will prevail. Hence, the international instruments acceded to or ratified by Nepal constitute part and parcel of the Nepalese legal system. The Nepalese government is by implication bound to give effect to them as a part of its domestic legal system.

Since Nepal has ratified the CEDAW, the Interim Constitution requires that the state immediately abolish all existing laws that discriminate against women.<sup>17</sup> Through ratification of the CEDAW, the Nepalese state is obliged to take all appropriate measures to modify or abolish social, customary and religious norms and practices that are based in gender stereotypes.<sup>18</sup> This is a mammoth task given the social and cultural fabric of Nepalese society at different levels: the family, the local community and at the national level. To implement the CEDAW at all these levels requires a holistic approach that combines strategies of (1) guaranteeing women's individual rights, (2) giving social support to women, and (3) enhancing social and cultural change.<sup>19</sup>

In spite of these wide-reaching obligations embedded in both the CEDAW and the Interim Constitution, the pace of legislative, administrative and social change has been slow. It is the Ministry of Women, Children and Social Welfare that constitutes the national machinery for the advancement of women. As the coordinating and gender mainstreaming unit of the government, this Ministry has the overall responsibility for the implementation of the national gender equality policies and plans of action. In its comments to Nepal's Combined Second and Third Interim Reports, the CEDAW Committee commended the Nepalese

<sup>16</sup> Article 1, Interim Constitution of Nepal, 2007: "This Constitution is the fundamental law of Nepal. All laws inconsistent with this Constitution shall, to the extent of such inconsistency, be void, (2) It shall be the duty of every person to uphold this Constitution."

<sup>17</sup> Article 2, CEDAW: "States Parties should condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. More specifically, Article 2 of the CEDAW:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women."

<sup>18</sup> Articles 2(f) and 5(a) CEDAW.

<sup>19</sup> See Holtmaat's chapter in this book.

government for the National Plan of Action on Gender Equality and Women's Empowerment as it covered the twelve critical areas of concern identified in the *Beijing Platform for Action* 1995.<sup>20</sup> In its comments to Nepal's Combined Fourth and Fifth Periodic Reports, the CEDAW Committee commended Nepal for the Interim Constitution of 2007 and the Supreme Court Decision of December 2007, the Domestic Violence Act of 2009 and the Gender Equality Act of 2006.<sup>21</sup> Appreciating the Nepalese government's efforts to review and revise discriminatory legislation, "the Committee remains concerned at the persistence of a significant number of discriminatory laws and provisions."<sup>22</sup> The inadequate monitoring and poor enforcement of these laws, plans and policies were addressed by the CEDAW Committee in its comments to Nepal's Combined Fourth and Fifth Periodic Reports:

In accordance with its General Recommendation No. 6 and the guidance provided in the Beijing Platform of Action, the Committee calls on the State Party to provide the national machinery for the empowerment of women at the central and local levels, with the necessary human, financial and technical resources for their effective functioning in all areas of women's empowerment. It also calls on the State Party to strengthen its monitoring mechanism for the implementation of laws and plans of action aimed at achieving de facto equality between women and men.<sup>23</sup>

### 3 Need for and relevance of judicial education for protection and promotion of women's human rights

The Nepalese Treaty Act<sup>24</sup> and the Interim Constitution provide for an effective remedy and procedure of enforcement of rights in cases of infringements by the government. The extraordinary jurisdiction of the Supreme Court in the Constitution opens avenues for widening the concept of *locus standi* in cases of public interest. However, only an efficient, independent and gender-sensitive judiciary can protect and enforce the fundamental rights of women and other socially excluded people. As a part of the Nepalese democratization process, a number of civil society organizations that set out to empower women through legal literacy, legal

<sup>20</sup> CEDAW/C/SR. 630 and 631, para. 191.

<sup>21</sup> CEDAW/C/NPL/CO/4–5, para. 4.

<sup>22</sup> CEDAW/C/NPL/CO4–5, para. 11.

<sup>23</sup> CEDAW/C/NPL/CO4–5, para. 13.

<sup>24</sup> In cases of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, are inconsistent with the provisions of prevailing laws (section 9 of the Nepal Treaty Act 1990).



advocacy and public interest litigation have been formed.<sup>25</sup> These organizations see government accountability as key to democracy, good governance, human rights and social justice. Through its work – which involves educating both the grass roots and judiciary about women’s rights under the CEDAW and the Interim Constitution – Pro Public has used litigation as a means of domesticating the CEDAW in Nepalese law. In the following section I will show how a legal education program aimed at the Nepalese Supreme Court contributed to what today is referred to as the Court’s landmark gender equality jurisprudence.

The Forum for the Protection of the Public Interest (Pro Public) is a Nepalese non-profit, non-governmental organization (NGO) dedicated to the cause of public interest activities. As already mentioned above, it was established in 1991 by a consortium of lawyers, economists, journalists, consumers and women’s rights activists. Realizing that public interest litigation often fails because of gender bias and lack of knowledge of Nepal’s obligations under the CEDAW, Pro Public embarked on a legal education program teaching law enforcement agencies and judges about Nepal’s obligations under the CEDAW and the Nepalese Constitution. The legal education program was carried out in cooperation with the Delhi-based organization Sakshi, which has vast experience in public interest litigation.<sup>26</sup> This legal education program was predicated on the concept of the equality principle as foundational to all human rights and conceived with the view of addressing problems faced by women litigants or victims of violence with regard to the formal justice system. What set this project apart from many others that also deal with women and law was the partnership that it built up between members of the judiciary and NGOs, both nationally and regionally. This resulted in the formation of the Asia Pacific Forum for Judicial Education on Equality Issues (the Forum) in 1997 comprising a network of twenty-four Superior Court Judges and NGO leaders from Bangladesh, India, Nepal, Pakistan, Sri Lanka and the South Pacific, and involving two Senior Court Judges from Canada. So far, the Forum has facilitated judicial education on equality issues (particularly gender equality) at regional and national levels to over 450 judges.

<sup>25</sup> Sapana Pradhan Malla, *Special Measures for Women and their Impact* (Kathmandu: Forum for Women, Law and Development, 2003).

<sup>26</sup> R. Kapur and B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

The first phase of this initiative began in 1997 under the direction of a core Management Team (MT) composed of committed judicial and NGO educators from each of the five member nations. For the first six years the Forum Secretariat remained in India, under the management of Sakshi. In 2003 the MT agreed that one NGO in rotation should take the Secretariat functions for the Forum, and Pro Public took this responsibility first.<sup>27</sup>

Preliminary studies carried out in India by Sakshi in 1996 and subsequently by Pro Public in Nepal in 1997 confirmed existing fears regarding the gender bias among the judiciary and its subsequent impact on judicial decision-making.<sup>28</sup> These findings emphasized the need for judicial education on equality issues and were instrumental in defining priorities for the work undertaken by the Forum.

Cultural and historical commonalities among the countries of South Asia resulted in the project being conceived along regional lines, and developed with the view to establishing links between judges and selected NGOs. This project also created opportunities and spaces for discussions and activities regarding women's access to justice and judicial education on equality issues. This was ensured by the fact that while overall policy decisions regarding the approach to judicial education were jointly arrived at by the Management Team, responsibility for adaptation of materials to the context of each country lay with the country representatives.

The integration of gender equality in judicial decision-making at multiple levels was seen as a crucial step towards the realization of substantive justice for women. Forum members have taken a strategic approach to ensure outreach to lower courts. As this is the level where the majority of cases involving domestic violence, divorce and custody are dealt with, this is an important development. The fact that senior judges, who act as resource persons in these workshops or meetings, are high in the judicial "pecking order" minimizes or lowers resistance to the idea of gender equality. It also serves to legitimize ideas pertaining to law and gender equality that are often at war with traditionalist views of women's role and place in society. The impact of this work is evidenced in changes in judicial decision-making with regard to gender-based violence led by Forum members. While this is most visible in India, which has a more conducive political environment, the incidence of such judgments in Pakistan, where

<sup>27</sup> Financial support for the project was provided by the United Nations Development Fund for Women (UNIFEM) and the Canadian International Development Agency (CIDA).

<sup>28</sup> Belbase and Pyakurel, *supra* note 15.

retrogressive laws have vitiated the environment since the late 1970s, is a clearer marker of success.<sup>29</sup>

A survey, conducted by Pro Public, found that women lawyers and litigants are usually denied equal treatment and opportunity in the courts.<sup>30</sup> When the verdict is delivered, it will also usually be tainted by prejudice against women because judges do not consider the contextual reality. A woman rarely gets the justice that she deserves. Many judges appear to have difficulty in viewing the merits of cases regarding domestic violence on the basis of criminal evidence. Instead, they often seem to see it as a case of the wife versus the husband, a personal relationship in which the wife's behavior plays a dominant role; that is, "she must have done something to deserve the abuse." The survey also found that judges are exceedingly influenced by traditional beliefs regarding the role and nature of women and that these beliefs affect their decisions involving women's issues.<sup>31</sup> These kinds of attitudes inside the courts are often attributed to the fact that crimes such as rape and domestic abuse, that is wife battering, are underreported.

Judges who participated in the survey opined that the Nepalese social structure is such that it bestows upon a man his wife's guardianship and entitles him to act accordingly.<sup>32</sup> Therefore, if a man slaps his wife when she is at fault, he is only fulfilling his duty as her guardian. While 69 per cent of judges thought that "provocative dressing" can be an invitation to sexual assault, only 3 per cent thought it possible that a husband could commit rape: by the logic of the overwhelming majority of respondents, since the husband has a right over his wife's body, sexual intercourse – even without the consent of the wife – cannot be deemed rape. The survey also revealed the fact that a case generally takes approximately two years to come to the district court level and it might take many more years to resolve it. During the survey it was also found that many judges had not even heard about the CEDAW and, most importantly, most of the judges interviewed were found to be receptive and eager to attend judicial education workshops. To achieve judicial commitment to uphold equality jurisprudence and laws against violence against women, the study recommended that efforts should aim to educate the judges, public prosecutors and other law enforcement

<sup>29</sup> H. T. Thomas, *Gender Equality Judicial Education Project South Asia Program* (Sakshi, 23 June 2006).

<sup>30</sup> Belbase and Pyakurel, *supra* note 15.

<sup>31</sup> An example is the case of *Meera Dhungana v. Council of Ministers* 1995.

<sup>32</sup> Belbase and Pyakurel, *supra* note 15.

agencies, stressing not only the seriousness of such crimes, but also of the conscious and unconscious prejudices of judges and other law enforcement agencies. Realizing this, Pro Public, as an active member of the Management Committee of the APAFEJE, organized many one-day and three-day interaction workshops on gender sensitization for judges of the different courts in Nepal with the support from the United Nation Development Program. Similarly, it also organized Regional Protocol Meetings and Management Meetings and provided secretariat services to the APAFEJE.

The Supreme Court, as well as the senior judges of the Appellate Court, served as resource persons for the workshops organized to educate judges on gender equality.<sup>33</sup> The judges from the Southern Asian region served as resource persons in some of the initial training programs. The outcomes of this venture have been visible in the recent Supreme Court deliberation in the issue of marital rape and many other gender equality cases. A number of gender-sensitive judgments were delivered by the judges who had participated in the training workshops.

#### **4 Judicial activism and judicial education: making the CEDAW a part of Nepalese law**

The Nepalese judiciary has an obligation to deliver justice based on the established principle of human rights that are universal, indivisible and inalienable. Under the Interim Constitution of Nepal, the courts are obliged to interpret existing laws in the light of the gender equality principle embedded in the CEDAW. Of particular importance regarding the domestication of the CEDAW is the responsibility of the courts, especially the Supreme Court, to declare void such laws that contradict any convention of which Nepal is a party.<sup>34</sup> The implementation of duly ratified international conventions by the national courts as national law is crucial for domestication of women's human rights. The Interim Constitution of 2007 enshrines as its underlying principle the basic human rights of every

<sup>33</sup> Justice Kalyan Shrestha, Key Note Speech on the inaugural session of the Interaction Programme on Gender Equality and Justice, unpublished speech, Halida, West Bengal, 2001. Justice Mr. Kalyan Shrestha, Judge, Supreme Court of Nepal (then judge of the Court of Appeal) from the Judiciary and Mr. Prakash Mani Sharma from Pro Public represented the Management Committee of the Forum, which was constituted to design the courses required for judicial education.

<sup>34</sup> Article 1(a): "This Constitution is the fundamental law of Nepal. All laws inconsistent with it shall, to the extent of such inconsistency, be void."

citizen and lays the foundation for a legal system in line with the concept of the rule of law. The Constitution under the fundamental right chapter recognizes various international and regional instruments including the CEDAW.<sup>35</sup> Under Nepalese law, the human rights of individuals can be enforced through an order of the judiciary, and it the duty of the state to effectively implement international treaties and agreements of which the Nepali state is a party.<sup>36</sup>

The extraordinary jurisdiction of the Supreme Court in the Constitution opens avenues for widening the concept of *locus standi* in cases of public interest, introducing a broader concept of judicial constitutional reform in Nepal. It may be relevant in this context to mention that the Supreme Court has also said in one of its judgments that even though the Directive Principles and policies of the state cannot be enforced by the Court, the Court may take the Directive Principles into consideration.

Only an efficient and independent judiciary can protect and enforce the fundamental rights of the citizens. Even though the Constitution provides an elaborate set of commitments to respect human rights of women and to end all forms of discrimination against women, the Nepalese state has to a great extent failed to take measures to eliminate discriminatory laws and practices. This led lawyers, activists and NGOs to file several petitions in the Supreme Court challenging a number of discriminatory legal provisions prevailing in Nepalese laws. These challenges were based on the CEDAW and the Constitution.<sup>37</sup>

<sup>35</sup> See *Prakash Mani Sharma v. Office of the Council of Ministers* (June 2004), *Prakash M. Sharma v. Royal Nepal Airline & Others* (May 2004), *Meera Dhungana v. Office of the Council of Ministers* (March 2005), *Prakash Mani Sharma v. Ministry of Women, Children and Social Welfare* (January 2008), *Sapana P. Malla v. Office of the Council of Ministers* (April 2008).

<sup>36</sup> Article 33(M) of the Interim Constitution 2007.

<sup>37</sup> These lawyers and activists were Meera Dhungana (filed case for equal property right), Chanda Bajracharya (filed case for right to equality), Reena Bajracharya (filed case for discriminatory recruitment provision), Sapana Pradhana Malla (filed case against discriminatory provision on citizenship), Kabita Pandey (filed case against discriminatory provision on providing widow allowance on the basis of age), Chandra Kanta Gyawali (filed case against discriminatory citizenship right between men and women) and Prakash Mani Sharma (filed case against discriminatory provision on providing maternity leave to unmarried women). These cases were brought on behalf of the individual petitioner as well as organizations such as Forum for Women Law and Development and Forum for Public Interest Litigation.

#### 4.1 Case law before the judicial education program 1997

Prior to the above-described judicial education program, the Supreme Court upheld gender discriminatory laws and practices in a number of rulings. In a case from 1991,<sup>38</sup> the Court denied citizenship rights to the children born to Nepalese women married to foreign nationals. The Court did not take into consideration Article 9 of the CEDAW that provides that women have the same rights as men to acquire, change or retain their nationality.

In the *Meera Dhungana* case from 1994,<sup>39</sup> the Supreme Court of Nepal declared that the existing provision for inheritance of paternal property being conditional upon daughters remaining unmarried until the age of 35 is discriminatory. The Court issued a directive order to the government to introduce an appropriate bill in the legislature within a year reviewing the laws related to property rights, but it did not declare these provisions void (*ultra vires*). It should be noted that, at that time, many judges had not heard about the CEDAW. The Court further held that any steps towards changing customs and traditions should consider the impact of the changes on Nepalese society and whether Nepalese society could adapt to such changes. In the *Meera Dhungana* case the Court asked the government to take into consideration the patriarchal nature of the society and social harmony while drafting the “bill” that is supposed to introduce “equal protection under law.” The Court, in this judgment, was reluctant to introduce change at the cost of social structures. Furthermore, the Court wanted to remain oblivious to the fact that social structures are a result of practices of discrimination built up over many years.

Similarly, in the *Chandra Kanta Gyawali* case from 2002 the Supreme Court stated that the provisions of international conventions cannot prevail over the constitutional and legal provisions of Nepal unless the Parliament has formulated laws to implement such obligations.<sup>40</sup> In *Chanda Bajracharya*<sup>41</sup> and in *Sapana Pradhan*<sup>42</sup> discriminatory legal provisions of the penal law, adoption law, succession law and divorce law were challenged by public-spirited citizens on the grounds of the equality and non-discrimination principle enshrined in the Constitution and in

<sup>38</sup> *Benjamin Peter v. Department of Immigration* (December 1991).

<sup>39</sup> *Meera Dhungana v. Ministry of Law and Justice and Others* (June 1996).

<sup>40</sup> *Chandra Kanta Gyawali v. His Majesty's Government of Nepal* (February 2002).

<sup>41</sup> *Dr. Chanda Bajracharya v. Parliament Secretariat and Others* (July 1996).

<sup>42</sup> *Sapana Pradhan v. Ministry of Law and Justice* (September 1997).

the CEDAW. In these cases the Court addressed the strong influence of Hindu jurisprudence in the Nepalese legal system, evident from the fact that Article 4 of the Constitution declares Nepal as a Hindu Kingdom. Religious codes, according to the Supreme Court, play a key role in determining matters concerning family and social behavior, culture, tradition, activity and conduct. In these cases the Court concluded that laws and customs, which on the basis of Hindu religion assign different rights and duties to men and women, are a natural part of the social fabric. The Court was of the view that rights and privileges under the Hindu social system should be accepted. Similarly, in *Sabin Shrestha*,<sup>43</sup> the legal provision that requires the consent of the guardian and the approval of the government to be provided in cases of women seeking foreign employment through an employment agency was challenged. The Court, however, quashed the writ petition and justified the provision with the protectionist argument of the government and denied Nepal's obligation under the CEDAW.<sup>44</sup> In most of the abovementioned cases, the petitioners referred to the CEDAW's provisions without success.

#### 4.2 Case law after the legal education program 1997

In recent years the very same judges that passed the above-described judgments have issued a number of directive orders for the enactment and amendment of laws that come into conflict with the equality and non-discrimination principles embedded in the CEDAW. The changing jurisprudence of the Supreme Court coincides with the gender-equality education process that started in 1997. My observations as a legal practitioner involved in grass-roots legal education, test case litigation and judicial education over a long period of time demonstrate the mutual interdependence of all these factors.

In the *Reena Bajracharya* case from 2002,<sup>45</sup> the same judges who decided the *Meera Dhungana* case surprisingly declared the recruitment policy of the Royal Nepal Airlines Corporation void (*ultra vires*). Furthermore, the Court reinforced treaty jurisprudence as a national law using the definition of discrimination under Article 1 of the CEDAW. The Court stated that since the human right to equality is inseparably linked

<sup>43</sup> *Sabin Shrestha v. Ministry of Law, Justice and Parliament Affairs* (August 2002).

<sup>44</sup> The government argued that preventing women from going to the Gulf countries is aimed at providing protection from the sexual abuses that take place in those countries.

<sup>45</sup> *Reena Bajracharya v. His Majesty's Government of Nepal* (May 2001).

to the development of the nation, it is necessary to eradicate gender-based discrimination in the laws and actions based on the law. The Supreme Court stated that gender equality was a concern of the entire humanity and, as such, a matter of everybody's duty and concern. In *Sita Acharya v. Public Service Commission* the same judges referred to Articles 3, 4(1) and 4(2) of the CEDAW and the provision in Article 11(3) of the Interim Constitution that obligates the government to implement temporary special measures to achieve de facto equality between men and women.

In *Meera Dhungana v. His Majesty's Government et al.* from 2001, the Supreme Court labeled marital rape as heinous sexual crime and endorsed the sexual autonomy of women even within marriage.<sup>46</sup> In a historic verdict,<sup>47</sup> the Supreme Court ordered the government to provide citizenship to every Nepali child born within the country whose parents are unknown. Many children born to women of the Badi community, who are involved in prostitution due to economic and social marginalization, have been deprived of citizenship up until now. The Supreme Court has also asked the government to ensure the overall welfare of Badi women, including social security and provision of alternative employment.

In addition, the Supreme Court has ordered the government to take steps to end the practice of *Chhaupadi*.<sup>48</sup> *Chhaupadi* is a custom that obliges menstruating women to live in makeshift huts outside of the family home. It is still practiced in remote areas in western Nepal. According to another Supreme Court decision, women under the age of thirty-five do not need the consent of their parents or husbands to apply for a passport.<sup>49</sup>

In three recent judgments the Nepalese Supreme Court has ordered the government to improve women's social and economic rights. In one case the government was ordered to provide free medical services to women suffering from uterine prolapse.<sup>50</sup> In another case the Court called for a decent working environment for women working in Cabin and Dance restaurants.<sup>51</sup> In yet another case the government was ordered to provide

<sup>46</sup> *Supreme Court Cases on Gender-related Issues* 2010, Women Law and Development Forum (FWLD), Kathmandu, Nepal.

<sup>47</sup> *Tek Tamrakar and others on behalf of Pro Public v. Office of the Council of Ministers* (June 2006).

<sup>48</sup> *Dil Bahadur Biswakarma v. His Majesty's Government* (April 2006).

<sup>49</sup> *Punnawati Pathak & others on behalf of Pro Public v. Ministry of Foreign Affairs* (November 2006).

<sup>50</sup> *Prakash Mani Sharma & others on behalf of Pro Public v. Government of Nepal* (May 2009).

<sup>51</sup> *Prakash Mani Sharma & others on behalf of Pro Public v. Government of Nepal* (November 2009).



a widow's allowance to women from the date of their widowhood.<sup>52</sup> In each of these cases the Court engaged with the state's obligations under the CEDAW, the Treaty Act and the Constitution.

In practice, women-friendly judgments suffer from weak implementation. To ensure that successful judgments are implemented, the petitioners constantly need to monitor and follow up. Similarly, all the beneficiaries of the judgments need to be informed about the outcome of the court case, and their capacity to demand their rights needs to be enhanced. In order to ensure that the judgments are implemented by the concerned government agencies, Pro Public has filed cases in the Supreme Court where it asks the government to implement the Supreme Court judgments.<sup>53</sup>

In one such case the Supreme Court asked the government to report on the implementation status of an earlier court order. Concluding that the court order had not been properly implemented, the Supreme Court ordered the government to implement its decisions with seriousness. In response, the government set up a Judgment Execution Unit in all the Ministries. It also set up a unit in the Law and Human Rights Division of the Office of the Prime Minister to follow up and monitor the activities of all the Ministries regarding the progress made on implementation of the court orders. However, there is still a long way to go to ensure that ordinary women benefit from these legal changes. To make the government accountable, there is a continuous need for legal education directed at grass-roots women, practicing lawyers, judges, public prosecutors and other law enforcement agencies.

The above-described changes in the jurisprudence of the Supreme Court and the breakthrough of the CEDAW into Nepalese law clearly coincide with the gender equality education program that has been carried out since 1997 by Pro Public in cooperation with the APAFEJE.

An important factor regarding the relevance and legitimacy of the program was the contribution made by the then Chief Justice of India to the judges of the Supreme Court of Nepal. In his lectures, Justice A. H. Ahamadi used case law from the Indian Supreme Court to show how the Indian judiciary had used the CEDAW as a source of interpretation of Indian law. He referred to a number of cases where the Hindu law came into conflict with the CEDAW. In this way he played a significant role in creating a realization of the role of the judiciary in the promotion of human rights in general, and women's human rights and gender equality in Nepal in particular.

<sup>52</sup> *Kabita Pandey & others on behalf of Pro Public v. Government of Nepal* (February 2010).

<sup>53</sup> *Meera Dhungana v. Office of the Prime Minister*, 2004 (Writ No. 1074 decided in 2010).

In Nepal, where the judiciary is empowered to undertake strong judicial review, the CEDAW holds great promise for individual women and women's groups who want to challenge discriminatory laws and customs. Unless the Supreme Court is able and willing to declare Nepalese legislation invalid on the basis of the CEDAW, this legal potential is not realized. As shown by this study, the judges on the bench initially ignored the principle of equality and justice due to the lack of an overall understanding of the CEDAW and the CEDAW's transformative jurisprudence.

The analysis of the judgments made by the Supreme Court before and after the judicial education program took place shows that if the members of the judiciary are sensitized to and informed on the concept of women's human rights, the judiciary can be active in making the state accountable to implement/honor its international obligations under the CEDAW. This underscores the importance and need for continuous judicial education on equality issues and the existence of public interest litigation for the protection and promotion of rights of people who are discriminated against and excluded by the state.

## 5 Human rights, judicial review, accountability and democracy

It is widely recognized that the status of women in a society is one of the yardsticks by which the ability of a nation to implement instantiating democracy and good governance, participate in the increasingly global economy and redress the condition of a deteriorating environment is measured. The role of the judiciary is particularly important when the legislative and the executive branches of government fail to fulfill their legal duties. As shown in this chapter, this is a frequent occurrence in the case of protection and promotion of women's human rights in Nepal. As the guardian of the Constitution, the role of the judiciary is to keep the law alive and submit itself to the majesty of the law. If the executive branch betrays the people and the Parliament stands paralyzed, some constitutional machinery must move into action.<sup>54</sup> In such situations judges may, as demonstrated in this chapter, play a vital role in ensuring that the constitutional rights of the people are protected and enforced.<sup>55</sup>

<sup>54</sup> V. R. K. Iyar, "The justice manifesto of the human rights judiciary takes over," *Outlook*, New Delhi, March 1996.

<sup>55</sup> P. N. Bhagwati, "Independence of the judiciary in a democracy," *The Economic Times*, New Delhi, 30 July 1995.

This is absolutely essential for maintaining the rule of law and to further the cause of gender justice.<sup>56</sup>

The role of the Supreme Court, while dealing with public interest litigation relating to protection and promotion of women's human rights, is to see that the executive authorities take steps to implement and enforce national and international obligations under the Constitution and international conventions. As such, the Court has to pass orders and give directions for the protection of the fundamental rights of the people. The passing of appropriate orders requiring the implementation of the law in a situation where the legislative and the executive powers are undermining women's rights under national and international law cannot be regarded as the Court having usurped the functions of the legislative or the executive branches of government.<sup>57</sup>

In Nepal the role of the judiciary has been considered pivotal by women's rights activists. The Nepalese government is recognizing its responsibilities as defined by the Court. For example, in Nepal's Combined Fourth and Fifth Periodic Report to the CEDAW Committee, the government states that: "The Supreme Court stands as a very progressive national judicial institution for developing a landmark gender equality jurisprudence treating the rights of women with the utmost respect."<sup>58</sup> The state report describes how the Supreme Court of Nepal has issued a range of directive orders for the enactment and amendment of the laws concerning widows' allowances, women's property rights, marital rape, sexual harassment and discrimination in employment, in the wake of guarantees under the CEDAW.<sup>59</sup>

The Supreme Court and all the branches of the judiciary have been exemplary in promoting and protecting human rights through various judgments that declare a law *void* if it contradicts the rights provision in the Constitution and any convention to which Nepal is a party.<sup>60</sup> This national legal accountability mechanism is in practice strengthened by the state reporting procedure under the CEDAW. How the two supplement and reinforce each other is demonstrated by the Nepalese state's

<sup>56</sup> See *S. P. Gupta v. Union of India*, AIR 1982 SC 149.

<sup>57</sup> See [www.propublic.org/index.php](http://www.propublic.org/index.php) (last accessed 2 July 2008).

<sup>58</sup> CEDAW/C/NPL/4-5 para. 243.

<sup>59</sup> CEDAW/C/NPL/4-5 paras. 223, 224, 225, 226.

<sup>60</sup> Opening remarks by Honorable Sujata Koirala, Deputy Prime Minister and Minister for Foreign Affairs, and leader of the Nepali delegation at the Tenth Session of the Human Rights Council Working Group on Universal Periodic Review, 25 January 2011, Geneva, Switzerland.

Combined Fourth and Fifth Periodic Report of November 2010, where a number of the Supreme Court's judicial directive orders are referred to.<sup>61</sup> Of particular interest is the government's positive response to the Supreme Court's ruling in a case where the Court ordered enactment of legislation.<sup>62</sup>

The Supreme Court has also noted how a woman employee would be subjected to such harassments either with the threat of dismissal from her job or some enticing promises such as promotion, increment in salary or rewards. Such abuses have a drastic negative impact on the victim's work status and morale. Therefore, the Supreme Court ordered enactment of legislation covering all aspects of this issue including proper investigation, adequate penal provisions and relief measures for victims in such cases. The Nepalese government has submitted a bill to the Parliament on "Sexual Harassment at Workplace."<sup>63</sup>

The Nepalese government's decision to follow the decisions of the Court is a positive step towards the government commitment to fulfill its international obligations under the CEDAW. It indicates that the government, when ratifying the CEDAW and incorporating it into the Constitution, seems to have had sincere intentions.

<sup>61</sup> CEDAW/C/NPL/4–5 paras. 223, 224, 225, 226.

<sup>62</sup> *Sarmila Parajuli et al. v. Council of Ministers* (February 2006).

<sup>63</sup> Sexual Harassment at Workplace Bill 2010.