

Supreme Court, Division Bench

Honorable Justices Hari Prasad Sharma and Khil Raj Regmi

Order

Writ No. 2942, 2059

Petitioners:

Advocate Raja Ram Dhakal of Khanigaun VDC-4, Nuwakot; Presently, General Secretary of Human Rights, Environment and Alternative Development Institution situated at Putalisadak-32, Kathmandu Metropolitan City, Kathmandu District

Advocate Raju Gurung of Shreenathkot VDC-7, Gorkha; Presently, General Secretary of Human Rights Concern Center situated at Putalisadak-32, Kathmandu Metropolitan City, Kathmandu District

Against

Opponents:

Honorable Prime Minister, Office of Prime Minister, Singadurbar, Kathmandu

His Majesty's Government, Ministry of Law, Justice and Parliamentary System, Singadurbar, Kathmandu

Honorable Minister of law, justice and parliamentary system, Singadurbar, Kathmandu

His Majesty's Government, Secretariat of Council of Ministers, Singadurbar, Kathmandu

His Majesty's Government, Parliament Secretariat, Singadurbar, Kathmandu

National Assembly, Singadurbar, Kathmandu

Subject: Certiorari and Mandamus

The summary of the facts and decision of the petition lodged as per the Art 23/88(2) of the constitution of the kingdom of Nepal, 2047 is as follows:

We are the people affiliated with 'Foundation for Human Rights, Environment and Alternative Development (HEAD-Foundation) which is dedicated in promoting rule of law, democracy, humanitarian laws and human rights in nation and work for the best interest of the people as per the provisions of constitution and national and international laws. The government cannot ensure the rights of people merely by participating or ratifying the international treaties and agreements. Our assumption is that the government in order to apply the international treaties should enact national laws to respect it and work in a transparent manner for the protection of the people. The reports of Amnesty International, Human Rights Commission and NGO's reveal that 'since the declaration of peoples' war by Nepal Communist Party (Maoist) in 1996; thousands of innocent civilians have been illegally executed in the name of security operations. Nepal has ratified the Geneva Convention on the obligatory international humanitarian laws to be followed during war on 7 February 1964. The government ought to amend the national legislation that comes in conflict with the provision of international conventions. The government has yet not implemented this. In this context, in order to ensure the implementation of the humanitarian laws and provisions of Art 49 of first Geneva Convention, Art 50 of second, Art 129 of third, Art 146 of forth and the provisions of Art 80 of first treaty that Nepal has ratified, the following measures have to be strictly initiated. The enactment of the legislations, directories and provisions of penalties in breaching the sentiment of first additional treaty of Geneva Convention comes in the question. The prohibitory acts and the penalty in breach should be included in the national law or in the disciplinary regulation of armed force. In addition, the court and authority to undertake it should be also defined. The provision reserved by Art 80(1) of first treaty paper describes, "the high contracting parties and struggling parties would without any delay initiate necessary measures to implement the liabilities of this treaty paper." In the above articles, the obligatory liabilities to be implemented by the nations party to convention are defined. However, Nepal has failed to adhere the provisions despite 40 years of signing it. After the war broke out between the rebels and Government, hundreds of thousands of innocent people have been deprived of their fundamental right to life due to hostility. The common people are being assaulted and deprived of their traditional rituals such as marriage ceremonies, funeral ceremonies etc. (Kaule incident of Nuwakot which happened recently is the burning example of this). This is direct breach of Art 12 of the constitution. The provisions of the international treaties and agreements so far have not been enacted as national laws, which has not only crippled the basic right guaranteed by the constitution but also have neglected the directing theories and policies of state as proposed by the constitution.

According to Art 9 Sub Art 2 of Treaty Act, 2047, Nepal fails to enact legislations to implement the Geneva Convention against the Art 49 of first treaty paper, Art 50 of second, Art 129 of third, Art 146 of forth and Art 80 of first treaty. Hence the petitioners appeal to issue the interim and directive order to the government to promptly enact or ensure to enact the national laws to implement the humanitarian laws of Geneva Convention.

If there is any justification to the allegation, submit written reply to the office of attorney general within 15 days. The order of 'show cause' of this court on 2059/9/16 to the opponents.

The office of Prime minister and minister of Law, Justice and Parliamentary System replied that 'Human Rights Act 2053 has been enacted as per the Art 9 of Treaty Act 2047 of Nepal to meet the notion of the convention and NHRC (National Human Rights Commission) has been doing its work under this act. So the allegation charged by the petitioners is totally false and fictitious and be quashed.'

The National Assembly replied that 'the executive bears the responsibilities of treaty and the government traces out the required laws in nation and submit the proposed bill. Hence the writ is eligible to be quashed.'

The secretariat of council of ministers replied that 'the petitioners have without any ground made this secretariat opponent, so the writ deserved to be quashed. The legislative body is authorized to trace out the required laws and enact it. NHRC was established bearing Geneva Convention in mind and it is acting as national law as per Art 9 of Treaty Act 2047. Hence the allegation of opponents has no validity and be quashed.'

The entire papers and files regarding the writ were studied.

Advocate Raja Ram Dhakal and Gopal Krishna Ghimire on behalf of the petitioners pleaded that 'Nepal as a party should enact the laws to adhere the spirit of the The Geneva Conventions.' The writ regarding the human rights and humanitarian laws of the petitioners in the present context seems rational as the innocent civilians are being victimized due to the war lacking the legislation. So, it becomes responsibility of state to enact national laws to implement sentiment of Geneva Convention. So the order of direction be issued to enact the legislations.

On behalf of the opponents, Deputy Attorney General Narendra Pathak defended pleading that 'the petitioners seem ambiguous on themselves whether the need is enactment of legislation as per Treaty Act or an issue of directive order. The Geneva Convention applies in the conditions of war and armed revolts. However, the current condition falls under the criminal justice system. As the legislations have been already enacted respecting the convention, the writ be voided.'

The question to be decided is whether it is appropriate to issue order as appealed by the petitioners.

The petitioners' appeal to this court is to issue an order of direction to the state to undertake enactment or ensure enactment of national laws to implement the provisions of Geneva Convention in the context that thousands of innocent civilians have been illegally executed. Nepal has approved the provisions of Geneva Convention to follow the obligatory liabilities during the war on 7 February 1964. However, when the opponents' narration were considered, it detailed to quash the writ as the international provisions that Nepal ratifies act spontaneously as national law as per the Art 9(2) of Treaty Act and that the state has already enacted Human Rights Commission Act as per Geneva Convention.

The Geneva Convention of August 12, 1949 mainly focuses on the reformation of the state of the injured soldiers of the war, injured/unhealthy soldiers at sea and jeopardized ships, the treatment towards the war prisoners and protection of the civilians during the war. Nepal is party to the above conventions from the accession of 7 August, 1964.

The petitioner's relation to the writ was found meaningful as it has shown concern on the effectual implementation of the international agreement Nepal has signed and besides, the subject is of public nature and has been lodged by the advocates affiliated with the human rights organizations.

After the genocide and destruction of world war II, the provisions of international treaties about the responsibilities of the war waging parties towards the war-affected people to ensure their interest and security was realized inadequate. Consequently, a need of broad international humanitarian law which could encompass all the dimensions was felt. In an attempt to fulfill this need, number of international-level discussions and interactions were carried out and the conventions regarding land war, war prisoners and civilians were approved in the city of Geneva in 1949. This convention chiefly includes the interest of the war waging soldiers and war-affected people and the regulations to be followed by the war waging parties. If considered the main 4 conventions of Geneva, the first one focuses on the reformation of the state of the injured soldiers of the war, the second one on injured/unhealthy soldiers at sea and jeopardized ships, the third one on the treatment towards the war prisoners and the forth one on protection of the civilian during the war. In addition, the art 2 of Geneva Convention clearly accepts that these conventions would apply in the condition of declared war between two high contracting parties or in the case of other armed struggle.. The Geneva Convention seems to be related with the humanitarian law that applies in the condition of war.

But the petitioners in their appeal were found to have raised questions mainly regarding the protection of the human rights of the civilians who did not take part in war. As human right is a subject, which is perpetually received by entire mankind from the time inborn, it also applies during the time of arm conflict. However humanitarian laws are unconditional by nature as it applies during the time of arm conflict or in the specified condition. In fact, the terms human rights and humanitarian laws are different entities and different conditions. There is national constitution, legislations and other numerous international instruments relating to human rights playing active role to safeguard the human rights. The Geneva Convention is the humanitarian law which completely applies in the condition when two or more high contracting parties are waging war. As the current condition of Nepal is not that of declared war, further consideration is not felt necessary. (We are under progress to file a review petition before Supreme Court of Nepal to Review this Interpretation)

In consideration, whether the enactment of the national laws regarding the subject, Nepal being a party, is rational, the Geneva Convention defines that 'the high contracting parties must undertake to respect and to ensure respect for the present convention in all circumstances' and the art 49 of first convention, art 50 of second convention, Art 129 of third convention and art 146 of forth convention also define 'the high contracting parties can undertake to enact any legislations necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any grave breaches of the present convention defined in the article. Above mentioned articles and common article 1 of Geneva Convention accounts that 'the high contracting parties have to respect the notion of the convention in all circumstances and enact laws of national level as well. Moreover, Art 9(1) of Treaty Act 2047 describes that 'if the provisions of the international treaties, which Nepal is party to, come in conflict with the acting law of nation, the acting law will be nullified to the extent of conflict and the provisions of the treaties will act as national law in this regard.' The Art 9 Sub Art 2 also defines that 'His Majesty shall initiate to enact legislation at the earliest possible to implement the treaties, to which Nepal is party, if any additional liabilities come underway.

As this court on 2059/01/19 has already delivered its verdict that 'the laws have to be enacted in order to implement the agreements Nepal has signed in the previous case of certiorari writ registered as case no. 55, 2058 by Mira Dhungana against the opponents including Ministry of Law, Justice and Parliamentary System, the treaties and agreements Nepal has signed apply as the national laws and the acting laws of nation will be nullified to the extent it come in conflict with these treaties and agreements. In this context, after the consideration of art 9(2) of the Treaty Act, it was noted as appropriate and necessary to enact the national laws in order to implement Geneva Convention and respect it's spirit.

His Majesty's government in its written reply sanctioned the fact that 'though the Human Rights Commission Act, 2053 has been enacted in the process to implement the provision of Geneva Conventions, the laws to address all the dimensions have not been enacted, for which the process is ongoing.'

Therefore, if the spirit of the convention has been breached, enactment of national laws as per the provision of conventions for the implementation of Geneva Convention was found appropriate and rational.

Therefore, hereby, this order of direction is issued to the opponents His Majesty Government to accomplish required study and research in this regard and take initiative to enact the appropriate laws as per the sentiment of Geneva Conventions.

Please give information of order issued to the office of Attorney General and submit the file as per rule.

I agree with above judgment.

Justices

Hari Prasad Sharma

Khil Raj Regmi

Poush 25, 2060 (9 January 2004)

Nepal