

Migration, Refugee and Conflict

Week 5 – Legal Frameworks for Migration in Nepal

Bijaya Dahal

Department of Conflict, Peace and Development Studies

Tribhuvan University

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- Legal instruments is an essential entity.
- The acts,policies,directives , regulations has a diverse provisions enlisted.
- There are many legal frameworks however, this weeks course will only be dealing with few major legal frameworks on migration.
- The constitutional provisions are focused along with other basic rights of the worker.
- Nepali workers in the local level as well as Nepali foreign labor migrants both need to be protected and their respect and dignity need to be established.

1. Constitution of Nepal 2015
2. Foreign Employment Act 2007
3. Foreign Employment Rules 2008
4. Foreign Employment Policy 2012
5. Foreign Employment Tribunal Court Regulation
6. The Directive on the Management of Sending Domestic Workers for Foreign Employment,2015
7. Directive for the Rescue and Repatriation of Nepali Migrant Workers Stranded due to COVID-19,2020
8. Trade Union Act 1999
9. The Social Security Act,2017
10. Bonus Act

11. Social Security Regulations 2018
12. The Social Security Scheme Operation Directives, 2018
13. Labor Act 2017
14. Labor Rules 2018
15. Human Trafficking and Transportation Control Act
16. Occupational Health and Safety related provisions
17. Fifteen Five-year plan of Nepal (2019-2023/24)
18. The Disaster Victim Rescue and Relief (7th Amendment)
19. National Policies on Internally Displaced Persons, 2007
20. Supreme Court Verdicts on Migration
21. Immigration Act
22. Passport Act

Constitution of Nepal

- In its preamble it clearly highlights on the elimination of all forms of discrimination and has emphasized on the social justice.
- The fundamental law of land has clearly enlisted the fundamental rights that can be considered as the rights of labour.
- Article 16 focuses on right to live with dignity.
- Article 18 is on right to equality: All citizens are equal before law and no person shall be denied of the equal protection of law.
- Article 21 is on right of victim of crime: The right to justice includes social rehabilitation and compensation in accordance with law.

- Article 29 is on right against exploitation:

No person can be exploited in regards to their religion, custom, traditions, practices and other any grounds.

In addition it highlights that no one shall be subjected to trafficking nor shall be held in slavery or servitude.

Moreover, it also mentions that no one shall be forced to work against his or her will.

- Article 33 focuses on right to employment:

It ensures right to employment and highlights the terms and conditions of employment and unemployment benefit shall be provided in the federal law.

It further emphasizes on the right to choose employment.

- Article 34 is on Right to labor:

Practicing appropriate labour is the right of an individual.

The appropriate remunerations, facilities and contributory social security is their right.

In addition, they also have right to form and join trade unions and can engage in the collective bargaining process as per the law.

- Article 38 is on Rights of women:

This article also focuses on employment and social security.

- Article 42:

It focuses on right to social justice

- Article 43 :

It focuses on Right to Social Security

Part-4 of Constitution

- It includes directive principles, policies and obligations of the State.
- The Article 51 of it has also enlisted policies relating to labour and employment.
- It includes 6 points.
 - (1) To make competent and professional labour force that has remained as the main socio-economic strength of the country and enhance employment within the country, while ensuring a situation enabling all to work
 - (2) To guarantee social security, while ensuring the basic rights of all labors, in consonance with the concept of decent labour
 - (3) To abolish all forms of labour exploitation including child labour,
 - (4) To encourage participation of labors in management, while maintaining cordial relations between the labors and entrepreneurs

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- (5) To regulate and manage the sector in order to make foreign employment free from exploitation, safe and systematic and to guarantee employment and rights of the labors,
- (6) To encourage to mobilizing the capital, skills, technology and experience gained from foreign employment in productive sectors in the country.

Labor Act, 2017

- The labor act has enlisted five types of employment. It includes;

Regular employment, work based employment, fixed term employment, casual employment and part-time employment.

Regular employment is the employment contract that does not have an end date. The nature of job is regular.

Work based employment includes hiring of employees for specific work or specific services

Fixed term Employment has the contract with a specific date as per nature of job

Casual Employment includes hiring of employment for the job for a period of seven or less days in a month. It can be terminated as per the will of employee or employer.

Part-time Employment includes employee engaged in work for 35 or less hours in a week.

- Employment agreement is must for all except a casual employee.

- Provisions are also mentioned for foreign nationals seeking for employment.
- There is also grounds for cancellation of the foreign nationals work permit
- Regarding foreign nationals if they are working without obtaining work permit there is a provision for fine for the employer as well as foreign nationals.
- Outsourcing as per the nature of work is included. Employees from outsourcing company can be engaged in few works ; security services, facilitation service, business assistance service, domestic help service.
- The license holder outsourcing company: Concerned labour offices (Renewal,suspension,cancellation of license)

- Working hours maximum is 8 hours a day and 48 hours a week. The overtime is 4 hours a day and 24 hours a week.
- The overtime payment includes 1.5 times the basic salary of the employee. Other benefits can be obtained from collective bargaining/employment agreement.
- Break in a working day is 30 minutes after working 5 hours
- Moreover, this law also includes additional 30 minutes break provisions for pregnant female employees and female employees with a child below 3 years of age.

- Labor law has a provision of leaves. The weekly off, public holidays, annual leave, sick leave, compensatory leave, bereavement leave, maternity leave, compulsory leave, leave in case of miscarriage, additional leaves , paternity leave.
- Minimum salary is Nepali Rupees 15,000 and festival allowances is one month's salary a year.
- Provision for the increment of remuneration and time of payment as per the nature of employment is mentioned.
- Provision of social security fund exists. The contribution by both employee's and employer's is compulsory and is deposited in social security fund.
- Provisions of gratuity exists and it should also be deposited in social security fund.

- Provisions of medical insurance coverages of one lakh per employee equally paid by employer and employee and accidental insurance of seven lakh per employee fully paid by employer. In case employer does not provide the concerned labor office plays a major role to make employer pay with double the amount.
- Provisions for occupational safety and health
- Provisions of child care centre below age of 3 where there are 50 or more female employees
- Provisions for resting rooms, canteen, first aids
- Misconduct and disciplinary actions are also highlighted. Workplace issues are included.

- The criteria's for termination of employment is also mentioned . Prior notice is provided except for termination due to misconduct.
- Dispute settlement provisions (collective bargaining)
- Provisions for strike/lockout as per the situation.
- If the enterprise has 20 or more employees, Safety and Health Committee should be formed.

- Occupational Health and Safety provisions in Labour Act

a. To formulate safety and healthy policy by adopting mechanisms of monitoring.

b. Duties of employers towards workers is enlisted which includes;

Ensuring safe environment at workplace where appropriate safety and health provisions is ensured.

Necessary provisions to use , operate and shifting of physical, chemical and bio-degradable material and equipment's.

Trainings, information flow regarding safety of workers.

Make proper arrangements for entry and exit from workplace

Provide necessary personal safety equipment to workers

c. Responsibilities of employers to non-workers.

Non-applicability of Act

- Civil Service
- Security Forces (Nepal Army, Armed Police Force, Nepal Police)
- The entities incorporated under prevailing laws or special economic zone to the extent separate provisions are provided.
- Working journalist only if the employment agree specifically provides that the provisions of Labour act, 2017 shall be applicable.

Understanding Social Security related legal frameworks

- The Labour Act introduced the establishment of Social Security Fund
- The Social Security Act,2017 and Social Security Regulations 2018 were enacted for the establishment and operation of a social security fund.
- The Social Security Scheme Operation Directives,2018 was enacted for the implementation and management of diverse social security schemes.
- The current social security act and social security regulations require contribution of additional amount equal to 20% of the basic salary of employee.

- The major provisions in the act ,regulations and directives are as follows:
 - a. Mandatory enlisted in social security fund (both employers and employees)
 - b. Total % contribution = 31 % where 11%=contribution deducted from basic salary & 20% additional contribution by employer
 - c. Social security schemes included such as; health protection schemes,medical treatment, maternity protection, accident and disability protection, dependent family protection , old age protection schemes for employees.

Foreign Employment Act ,2007

- The preamble prioritizes on decent work and the protection of the interest of workers.
- This act aims to make foreign employment sector safe, managed and decent and protect the rights and interests of the migrant workers and foreign employment entrepreneurs while promoting that business.
- This law has provisions to protect and provide legal remedy to migrant worker
Foreign Employment Board , Department of Foreign Employment , Foreign Employment Tribunal is established under this act.
- Provisions for making foreign employment safe, systematic and decent.
- Department of Foreign Employment is for promoting fair and ethical recruitment mechanisms.

- Foreign Employment Tribunal is established to provide justice. The access to justice mechanism for deception/fraudulent and other cases in foreign labor migration.
- This act works for the protection of interests of the workers who have gone for foreign employment.
- Foreign Employment Board establishes Foreign Employment Welfare Fund (Art.32) This welfare fund is established for the social security and welfare of the workers those who have gone for foreign employment and those who have returned from foreign employment and their families. The amounts are deposited by workers as prescribed prior to going for foreign employment.

What foreign employment welfare fund does?

Mobilize foreign employment welfare fund

- Repatriating workers to Nepal
- Launching employment-oriented programs
- Bringing unattended dead body to Nepal
- Complaint mechanisms and compensations
- Scholarship schemes in education

- The appointment of labor attaché and labour counsellors for the protection of workers in destination countries.

Roles ?

Assists in dispute resolution arising between worker and employer institution

Inform government about the condition of labor and employment with factual information.

Steps taken by the destination countries for the protection of labor rights and international human rights.

Make necessary arrangements to bring back workers in the crisis/situational events and under certain circumstances.

Initiation to send back dead body with the assistance of the concerned parties

Summarizing

- This law has provisions to protect and provide legal remedy to migrant workers.
- It also has a focus on bilateral agreements between the origin and destination countries for the protection of migrant workers.
- It has a provision of operation and use of employment welfare fund.
- Clauses on non-discrimination between men and women.
- The institutional governance mechanisms and their role are also one major core aspect of this act; department of foreign employment and foreign employment board, foreign employment tribunal .
- Provisions for mandatory pre-departure orientation, medical test, insurance, welfare fund contributions in order to obtain labour approval.
- Furthermore it has highlighted on the role of labor attaché

- Foreign Employment Regulations enlists diverse provisions to implement in foreign employment.
- It has been framed under section 85 of foreign employment act.
- Foreign employment tribunal board regulation also as been developed under section 85 of foreign employment act.
- It covers the provision to file the case in case the DoFE cannot settle. In addition, in the case of person involved rather than institution/criminal offense.
- Foreign Employment Policy , 2012 emphasizes on
 - a. ensuring safe, organized, respectable and reliable foreign employment
 - b. to contribute to poverty reduction
 - c. to establish sustainable economic and social developments
- Foreign Employment Rules,2008 also includes provisions relating grievances and complaints and also focuses on claiming welfare benefits at the local level.

To achieve the above several strategies have been introduced.

Trade Union Act 1992 amended on 1999

- Focuses on legal provision regarding registration, operation of trade union and on legal provision.
- It includes registration, operation of trade union and other necessary provisions relating to it for the protection and promotion of workers rights.
- These persons are engaging in self-employment and the workers working in various industry, trade, profession or service in enterprises or outside the enterprises.
- Right to organize and freedom of association.

Human Trafficking and Transportation Control Act

- This act has provision regarding human trafficking and transportation along with the illegal business of organ of human body.
- This act has a provision to control the acts of human trafficking and transportation
- In addition, it also looks forward to protect and rehabilitate the victims of such act by enacting law.
- Provisions to establish necessary rehabilitation centres for physical and mental treatment, for social rehabilitation and for family reconciliation of the victim.
- Provisions for the assistance and economic support to be provided Nepal Government.
- The article 14 has a provision of rehabilitation fund.
- Moreover, it also focuses on reconciliation.

National Policies on Internally Displaced Persons, 2007

- It envisions building a peaceful, prosperous and internal-displacement free society through the promotion of mutual understanding, harmony and security.
- Its mission focuses on rehabilitation of internally displaced person or families. Their respect and safety is the priority of this policy.
- It focuses on providing relief, benefits and facilities developed via coordinating approaches with concerned parties.
- Minimizing the adverse effects is another provision.
- It also focuses on adopting preventive and curative measures in a long-term basis in regards to internal displacement problems and issues.
- It also focuses on conducive environment for safe, voluntary and dignified return of a person along with their rehabilitation.

Decisions and Declarations by Supreme Court

1. The issue of Free-Visa , Free-Ticket Policy :

Issued a directive to the government to effectively implement this policy.

2. Regarding enhancement of complaint handling and Investigative capabilities on foreign employment-related cases:

Show cause order by Supreme Court to develop a mechanism to handle complaints and investigate crimes related to foreign employment at the provincial and local level.

3. Appointment of labor attaché:

Directive order to the government to deploy labor attaché in countries of destination with more than 5000 workers.

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4. Right to vote:

A directive order was issued instructing government to formulate a law ensuring migrant's right to vote.

5. Repatriation of migrant workers at the Indian border affected by COVID-19:

Supreme Court ordered the government to bring all Nepali citizens stranded at Indian border willing to come home and quarantine them.

6. Repatriation of migrant workers affected by COVID-19:

The interim order was passed to take care of the health needs of Nepali migrant workers living in foreign countries. In addition, also ordered the repatriation of vulnerable Nepali workers from foreign countries.

7. Repatriation of migrant workers affected by COVID-19:

The interim order to use the foreign employment welfare fund to repatriate Nepali workers stranded abroad.

Local Government Operation Act, 2017

- Data management: Provisions to collect the information and recording data of both the domestic workers and foreign laborers at local level.
- Information and training : Focuses on management and operation of employment information centres. In addition , also emphasizes on the financial literacy and skills training for the labour force proceeding for foreign employment.
- Returnee integration: The social reunification of returnee migrant workers and the use of their knowledge, skills and entrepreneurship gained during foreign employment.

Fifteen Five-year plan of Nepal (2019-2023/24)

National Planning Commission

- To create knowledge and skills-based employment opportunities for utilizing the demographic dividend.
- Systemizing internal migration and urbanization via integrated settlements in rural and remote areas.
- Enhancing the quality of the migration-related statistics through diverse approaches; studies, researches, surveys , projection and analysis.

The Directive on the Management of Sending Domestic Workers for Foreign Employment, 2015

- This was adopted to regulate the recruitment of domestic workers for foreign employment.
- The Directive included age limit for women going for domestic work to various countries, including Bahrain, Kuwait, Lebanon, Malaysia, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.
- It also made a specific provisions on domestic workers that they may only be recruited in countries that have a bilateral agreement with Nepal.
- In addition, the recruitment agencies involved in sending domestic workers abroad needs to be separately registered with DoFE.
- The prospective workers need to take 30 days training related to domestic work from a licensed training institution and the employer is required to bear all the migration costs, including being responsible for repatriation.

The Disaster Victim Rescue and Relief (Seventh Amendment) Criteria, 2020 .

- It guides and directs the government authority to provide the necessary support to victims of natural calamities and their families
- It also has provisioned a criteria that relates to foreign employment.
- A member from the victim's family, upon the referral and decision of the District Disaster Management Committee, can go for foreign employment through Ministry of Labour, Employment and Social Security.

The Sexual Harassment at Workplace (prevention) Act, 2014

- It has a provision to protect employees and workers employed by entities as well as clients who visit the workplace to receive services.
- The meaning of sexual harassment as per this act is categorized as below:
 - a. Physical contact and advances
 - b. Showing or displaying of pornographic material
 - c. Expressing sexual motives by way of written, verbal, or non-verbal means
 - d. Demand or proposal for sexual favors
 - e. Flirting or harassing with sexual motive

- This act has enlisted responsibilities and duties of the employer
- The complaint mechanism provisions
- The punishment is placed under the act
- The victim protection and related provision exists.
- The remedy available under other law also exists.

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