

Volume 6 Issue 2 July 2018  
Special Issue on Human Rights and  
Democratisation

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# Kathmandu School of Law Review

ISSN 2091-2110

Volume 5

Issue 2

November 2017

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Kathmandu School of Law Review

Volume 5, Issue 2, November 2017  
ISSN 2091-2110



KSL



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# Citizens of an Enemy State: The Enemy Alien Disability Rule in the Constitution of Nepal

*Prakat Khati\* and Kundan Raj Sharma*

## Abstract

*The Enemy Alien Disability rule has been a constant feature of many of Nepal's constitutions in the past and is also featured in its present Constitution. Under this rule, citizens of an enemy state are not protected by the fundamental guarantees of the right to criminal justice and are disabled from seeking constitutional remedies such as a writ of habeas corpus. In this context, a legal and normative analysis of this rule and its compatibility with current norms of Human Rights and of Humanitarian Law is warranted. This article intends to conduct analyses of the historical, normative and legal aspects of this rule.*

## Introduction

The Constitution of Nepal (2015) has retained the legacy of its predecessors by denying some constitutional protections relating to the right to criminal justice to citizens of an enemy state. The Nepalese Constitutions of 2063 B.S.<sup>1</sup>, 2047 B.S.<sup>2</sup>, and 2015 B.S.<sup>3</sup> provide that the Right to be informed of the reason of arrest, the right to consult a lawyer with confidentiality and to be represented by a lawyer and the right to be presented in front of a judge within 24 hours of arrest need not be accorded to citizens of enemy state. More progressively, the current constitution provides for the right of all people, including citizens of enemy state, the right to be informed of the reason for being arrested<sup>4</sup>. However, the right to consult and be represented by a lawyer and right to be presented in front of a judge within 24 hours of being arrested are still not guaranteed<sup>5</sup>. The provision, as it stands today, reads,

Article 20 Rights relating to justice:

- (1) No person shall be detained in custody without informing him or her of the ground for his or her arrest.
- (2) Any person who is arrested shall have the right to consult a legal practitioner of his or her choice from the time of such arrest and to be defended by such legal practitioner. Any consultation made by such person with, and advice given by, his or her legal practitioner shall be confidential. Provided this clause shall not apply to a citizen of an

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<sup>1</sup> The Interim Constitution of Nepal, 2063 B.S., art 24 (2) and (3).

<sup>2</sup> The Constitution of Kingdom of Nepal, 2047 B.S., art 14 (5), (6) and (7).

<sup>3</sup> Constitution of Kingdom of Nepal, 2015 B.S., art 3 (6), (7) and (8).

<sup>4</sup> Constitution of Nepal, 2072 B.S., art 20.

<sup>5</sup> Constitution of Nepal, 2072 B.S., art 20 (2) and (3).

enemy state. Explanation: For the purpose of this clause, "legal practitioner" means any person who is authorized by law to represent any person in any court.

- (3) Any person who is arrested shall be produced before the adjudicating authority within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to such authority; and any such person shall not be detained in custody except on the order of such authority. Provided that this clause shall not apply to a person held in preventive detention and to a citizen of an enemy state.

This constitutional norm can be traced back to Constitution of Nepal promulgated in 2015 BS (1959 A.D.). Sir Ivor Jennings was invited as adviser in drafting that constitution. Interestingly, this rule is also present in constitutions where Sir Jennings had had a role in drafting, for example, Constitution of India<sup>6</sup> and Federal Constitution of Malaysia<sup>7</sup>. It is interesting to note that the language of Article 21 of the Indian Constitution and similar Articles of Nepalese constitutions of 2063<sup>8</sup>, 2047<sup>9</sup> and 2015<sup>10</sup> are similar in this respect i.e., no obligation to accord the right to be informed of the reason of arrest, right to consult a lawyer in confidence and to be represented by him/her or the right to seek a writ of habeas corpus, are provided. While the current Nepalese constitution guarantees right to know the reason of arrest, it does not guarantee the latter two. This is a significant progress in terms of according protection according to International Human Rights and Humanitarian Law standards but progress on the extension of habeas corpus right and the right to legal representation is still required.

While an absence of protection from the constitution does not preclude protection that may be given by a subsequent piece of legislation or an international instrument; which in Nepal has the status of an Act of Parliament<sup>11</sup>; it disables the aliens from seeking judicial remedy, especially remedy via exercise of the Courts' extraordinary jurisdiction<sup>12</sup>.

Among other states, there is a general recognition that foreign citizens are also entitled to the same basic human rights as their own citizens While some states<sup>13</sup> have explicitly enumerated the rights of foreign citizens, others such as Canada<sup>14</sup>,

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<sup>6</sup> Constitution of India, 1949, art 22 (1), (2) and (3).

<sup>7</sup> Federal Constitution of Malaysia, 1957, art 5 (3), (4) and (5).

<sup>8</sup> The Interim Constitution of Nepal, 2063 B.S., art 24 (2) and (3).

<sup>9</sup> Constitution of Kingdom of Nepal, 2047 B.S., art 14 (5), (6) and (7).

<sup>10</sup> Constitution of Kingdom of Nepal, 2015 B.S., art 3 (6), (7) and (8).

<sup>11</sup> Treaty Act, 2047, Nepal, art 9(1).

<sup>12</sup> The Constitution of Nepal, 2063 B.S., art 133.

<sup>13</sup> See for example, The Constitution of Sweden, where an alien lawfully staying in Sweden enjoys equal freedoms of expression, congregation, political and religious opinions, association, demonstration and all rules to protect integrity and rule of law as well as protection of property vis-a-vis a Swedish citizen in Peter Nobel, 'The Alien Under Swedish Law', 11, COMPo L. Y.B. 165, 1992, p. 168.

<sup>14</sup> The Canadian constitution guarantees basic human rights to "everyone", which has been read to protect non-nationals living in the country; See, e.g., Yamani v. Canada, 1995, 1 F.T.R. 174 (Can.).

Italy<sup>15</sup> and Germany<sup>16</sup> extend these rights to “everyone” or to “all persons” going so far as to include “even those who have entered [the country] illegally”<sup>17</sup>. Even for states such as the United Kingdom which do not have a written Constitution, instruments such as the European Convention on Human Rights (ECHR) provide grounds for extending fundamental rights protection to all persons regardless of their nationality.<sup>18</sup>

The debate surrounding whether fundamental human rights guarantees and equal protection of law extends to citizens of an enemy state gathered momentum in the USA in the years following the 9/11 attacks. The internment of civilians in the infamous Guantanamo Bay detention facility and the lawsuits that emanated there from brought this issue to the judicial spotlight. However, the debate is not novel in the American constitutional law tradition. In fact, James Madison argued that those subject to the obligations of the US legal system ought to be entitled to its protections too. He argued,

“[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage”<sup>19</sup>

Subsequently, the promulgation of the American Enemy Aliens Act<sup>20</sup> reinvigorated this debate by taking a position that was the polar opposite of that of Madison. The Act stipulated that,

“[W]henever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, . . . all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.”<sup>21</sup>

<sup>15</sup> La Costituzione, Nepal, arts. 13, 14, 17-21, and 24.

<sup>16</sup> Germany's Basic Law establishes "human rights" and "everyone's rights" that apply equally to all persons without regard to citizenship. See, Ruth Rubio-Marin, *Immigration As a Democratic Challenge; Citizenship and Inclusion in Germany and the United States*, pp. 187-88.

<sup>17</sup> See, in context of Italian constitutional law, Bruno Nascimbene, 'Lo Straniero nel Diritto Italiano', Cass.,sez. Un., 21 February 2002, p. 2513.

<sup>18</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, art. 14.

<sup>19</sup> Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Taylor & Maury, 1836.

<sup>20</sup> Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, 577 (codified as amended at 50 U.S.C. § 21 (2000)).

<sup>21</sup> Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, 577 (codified as amended at 50 U.S.C. § 21 (2000)).

This now begged the question whether the constitution and especially the Bill of Rights provided protection to “we the people” or to all persons<sup>22</sup>. The debate achieved a temporary resolution when the Enemy Aliens Act subsequently sunsetted after two years of its enactment due to vehement opposition from the Republican Party<sup>23</sup>. However the debate resurfaced in *Rasul v. Bush*<sup>24</sup> when two Australian citizens and twelve Kuwaiti citizens, who were captured abroad during hostilities between the United States and the Taliban, sought a writ of Habeas Corpus from the US Supreme Court. The U. S. military had held them and approximately 640 other non-Americans captured abroad—at the Naval Base at Guantanamo Bay.

The court was faced with the question of whether it had the jurisdiction to hear a writ petition of Habeas Corpus given that the petitioners were neither US citizens nor situated in sovereign US territory. Justice John Paul Stevens, in the courts majority decision, held that, although the US did not hold “ultimate sovereignty,” over the territory of the detention facility, the “plenary and exclusive” jurisdiction exercised by the United States over the territory of the Guantánamo Bay naval base was sufficient to guarantee habeas corpus rights to foreign nationals held there.<sup>25</sup> This decision overturned the previous standing rule laid down in *Johnson v. Eisentrager*<sup>26</sup>, which ruled that,

“[A]liens detained outside the sovereign territory of the United States [may not] invoke a petition for a writ of habeas corpus.”<sup>27</sup>

Thus it is clear that US legal history has a cyclical tendency to favor or reject the extension of Habeas rights to foreign citizens. As the law stands today, however, *Rasul v. Bush* is indicative of recognition of such a right of enemy aliens.

### What is an Enemy State?

The definition of an “enemy state” becomes central in the discussion of the rights of an enemy alien or a “citizen of an enemy state”. The label of an enemy state may be used extensively in political dialogue and diplomatic discourse to indicate a range of different relationship statuses between states. Not all such cases include a de facto or de jure state of declared war between states that label each other as enemies.

However, a legal determination of an enemy status of a state vis-à-vis another state is widely accepted to exist if and when inter alia there is a condition of legitimately declared war between such states. This is demonstrable in the Enemy Aliens Act of the United States that reads,

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<sup>22</sup> See, Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*, 1996, pp. 52-63.

<sup>23</sup> David Cole, ‘Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?’, 25 T. Jefferson L. Rev., 367-388, 2003.

<sup>24</sup> *Rasul v. Bush* 542 US 466, (2004).

<sup>25</sup> *Rasul v. Bush* 542 US 466, (2004), para. 6.

<sup>26</sup> *Johnson v. Eisentrager*, 339 U. S. 763, (1950),

<sup>27</sup> 215 F. Supp. 2d 55, 68, (DC 2002).

“[W]henever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States....”

The act is also indicative of the possibility of an enemy status existing when there is no declared war but a situation of actual or anticipated incursion on the sovereign territory of a state which necessitates forceful measures to be taken in response.

In Nepal’s case, its Constitution has set out in its Directive Principles that the state should set its policies towards norms of world peace<sup>28</sup>, it nevertheless does not preclude war in situations where International Law in general and the UN Charter in specific allows legitimate use of force i.e. self-defense<sup>29</sup> or in consonance with Chapter 7<sup>30</sup>. Nevertheless, Nepalese constitution provides powers pertaining to war and defense to the Federal level<sup>31</sup>. Further, the power to declare emergency as a result of war or external aggression or armed rebellion is vested upon Government of Nepal subject to approval of both houses of the Federal Parliament<sup>32</sup>. Thus, one can fairly draw a conclusion that both houses of Federal Parliament jointly exercise the constitutional power to declare war, and as a corollary, declare a certain state as its enemy.

### **Distinguishing Between Alien Enemies and Citizens of an Enemy State**

Academics<sup>33</sup> and courts<sup>34</sup> agree that non-nationals are an “easy case” of a “discrete and insular minority” that deserves heightened protection and judicial solicitude. They agree that the alien in foreign territory has no representation and that they have been subjected to substantial prejudice throughout the course of history. It has been empirically demonstrated that the general public presumes that aliens do not deserve to enjoy the same rights and protections that citizens enjoy. Upon inquiring upon their views on rights, excluding the right to vote, a US poll showed that more than half the respondents considered that non-citizens were not worthy of the same rights as citizens<sup>35</sup>. This view is generally held in a framework of norms that stipulate that citizenship is a special status requiring allegiance and dispensation of legal obligations towards the state in return of which the state offers its protection and privileges.

However, there exist robust norms that justify the extension of fundamental rights to not only citizens but to all persons. As discussed earlier, Madison argues that the presence of the alien in the sovereign territory presumes that s/he is required to demonstrate the same allegiance and to be similarly duty-bound towards the state, albeit temporarily and for such time as s/he is living in the

<sup>28</sup> Constitution of Nepal, 2072 B.S., art 51(m)(1).

<sup>29</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XV, art. 51.

<sup>30</sup> Ibid, chp. 7.

<sup>31</sup> Constitution of Nepal, 2072 B.S., sch. 5.

<sup>32</sup> Constitution of Nepal, 2072 B.S., art. 273(1).

<sup>33</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 1980, pp. 161-62.

<sup>34</sup> *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

<sup>35</sup> Deborah L. Acomb, ‘Poll Track for December 15, 2001’, NAT’L J., Dec. 15 2001.



states territory. Therefore, it seems neither just nor righteous to deny fundamental protections of the constitution to aliens insofar as they reside in the territory legally.

Another question that demands normative resolution is whether the enemy status of the country of which the alien is a citizen should affect his rights in the state of his/her residence. Rousseau has posited<sup>36</sup>, and it has been generally agreed, that a state of war is a relationship between states and not between individual soldiers; and thus by extension, citizens. Thus, the state of war should not affect the status of citizens that are not in any manner contributing to the war. This implies that spies, saboteurs, propagandists and combatants, *inter alia*, would obviously not enjoy the same level of constitutional protection. It is our position that for the aliens who do not, by their actions, forfeit their rights, the fundamental guarantees should remain in place.

The normative bedrock of our position is the fact that fundamental rights are owed to persons as a matter of human dignity and not on the basis of their allegiance to a particular political system or government. As David Feldman has written,

"[T]here are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity."<sup>37</sup>

As Yale Law Professor Alexander Bickel wrote, *Dred Scott* teaches that

"[A] relationship between government and the governed that turns on citizenship can always be dissolved or denied [because] citizenship is a legal construct, an abstraction, a theory." It is far more difficult to deny that a human being is a "person."<sup>38</sup>

The rights, especially of dignified and humane treatment, stem from something far more fundamental than citizenship, *i.e.*, the quality of being a human being. In this regard, the Enemy Alien Disability Rule, fails the normative test by preconditioning the enjoyment of these protections upon citizenship. If one was to agree that the state cannot take a citizen's life, liberty, or property without due process of law, there is no normative reason as to why it can do so to a non-citizen. It is also important to note that the denial of *habeas corpus* imposes an equal amount of restriction of liberty on both citizens and non-citizens.<sup>39</sup> The position that the liberty of the former is worthy of protection while that of the latter is not, is simply untenable.

The rights of political freedom, due process, and equal protection are among the minimal rights that the world has come to demand of any society. In the words of

<sup>36</sup> Jean Jacques Rousseau, *Social Contract*, 1762.

<sup>37</sup> David Feldman, 'Human Dignity as a Legal Value - Part I', *Pub. L.*, 682, 1999, pp. 690-91.

<sup>38</sup> Alexander M. Bickel, *The Morality of Consent*, 1975, p. 58.

<sup>39</sup> See, for example, Testimony of Larry Parkinson, Deputy General Counsel, FBI, before H.R. Sub-committee on Immigration of the Judicial Committee, The Secret Evidence Repeal Act, Hearings on H.R. 2121, 106th Congo 18,36 (Feb. 10,2000) arguing that foreign nationals are entitled to diminished due process protection.

the Supreme Court, these rights are "implicit in the concept of ordered liberty."<sup>40</sup> The Universal Declaration of Human Rights (UDHR), which has also been described as the "Magna Carta of contemporary international human rights law," is manifestly based on "the inherent dignity and ... the equal and inalienable rights of all members of the human family."<sup>41</sup> There is a consensus among the scholars of international law that the Universal Declaration extends its rights to non-nationals and nationals alike.<sup>42</sup> The Universal Declaration explicitly guarantees the rights of due process and equal protection.<sup>43</sup>

In a similar manner, the International Covenant on Civil and Political Rights (ICCPR) extends its protections generally to non-citizens. This fact is further made apparent and explicit in the commentary on ICCPR published by the Human Rights Committee which provides that "in general, the rights set forth in the Covenant apply to everyone ... and irrespective of his or her nationality or statelessness."<sup>44</sup>

These principles are also the basis of the Declaration on the Human Rights of Individuals who are Not Nationals of the Country in which They Live, adopted by the U.N. General Assembly in 1985. It expressly guarantees to non-nationals, among other rights, the right to life, the right not to be subjected to arbitrary arrest or torture, due process and equality before the courts<sup>45</sup>. It is interesting to note that while international instruments generally prohibit discrimination on a number of grounds, including national origin, they generally do not expressly prohibit discrimination on grounds of nationality.<sup>46</sup> However, there exists a consensus between scholars of international law and human rights that nationality-based discrimination is not expressly permitted under the human rights framework, except in pursuance of the implementation of otherwise lawful immigration laws, or in times of war, where it becomes necessary to defend the nation.<sup>47</sup>

<sup>40</sup> Palko v. Connecticut, 302 U.S. 319, 325 (1937).

<sup>41</sup> Richard B. Lillich, *The Human Rights Of Aliens In Contemporary International Law*, Manchester University Press, 1984, p. 41; Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

<sup>42</sup> Richard B. Lillich, *The Human Rights Of Aliens In Contemporary International Law*, Manchester University Press, 1984, p. 43; Baroness Elles, 'International Provisions Protecting the Human Rights of Non-Citizens', 45, U.N. Doc. E/CN.4/Sub.2/3921Rev.1, U.N. Sales No. E.80XrV.2 (1980); David Weissbrodt, 'Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: The Rights of Non-Citizens', 30, U.N. Doc. E/CN.4/Sub.2/2001/20 (2001); Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, 2001.

<sup>43</sup> Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948), preamble, arts. 7-11, 19, and 20(1).

<sup>44</sup> General Comment 15, The Position of Aliens Under the Covenant, Human Rights Committee, U.N. Doc. HRIIGEN/I/Rev.1, at 18 (1994), 27th Sess. 1986, para. 7.

<sup>45</sup> U.N. GAOR, 40th Sess., Supp. No. 53, at 252, U.N. Doc. A/40/53 (December 13, 1985).

<sup>46</sup> '[N]ational origin' refers to a person's descent, not to his juridical nationality." See <sup>46</sup>Richard B. Lillich, *The Human Rights Of Aliens In Contemporary International Law*, Manchester University Press, 1984, p. 46.

<sup>47</sup> Baroness Elles, 'International Provisions Protecting the Human Rights of Non-Citizens', 45, U.N. Doc. E/CN.4/Sub.2/3921Rev.1, U.N. Sales No. E.80XrV.2 (1980), p. 299; David Weissbrodt, 'Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: The Rights of Non-Citizens', 30, U.N. Doc. E/CN.4/Sub.2/2001/20 (2001), p. 30.



The only civil and political rights that international law does not generally guarantee on equal terms to citizens and non-nationals are the right to vote, the right to run for elective office, and the rights of entry and abode.<sup>48</sup> Thus, equal protection of the law and the rights to a fair trial are not limited in their applicability *rationae personae* by the citizenship status of persons.

Since the Enemy Alien Disability Rule is operational only when there is a state of declared war between states, an alternate body of laws becomes applicable. International Humanitarian Law in general, and the laws applicable in situations of International Armed Conflict, specifically, becomes applicable in protecting certain groups of persons and in regulating the conduct of hostilities.

The first question that needs resolution in applying IHL in this situation is to determine under which rule of IHL the citizens of an enemy state receive a status of protected persons. The Fourth Geneva Convention in its Article 4 defines protected persons as:

“Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

The commentary on the Convention further clarifies this definition by stating that:

” On the territory of belligerent States, protection is accorded under Article 4 to all persons of foreign nationality and to persons without any nationality. The following are, however, excluded:

- (1) Nationals of a State which is not bound by the convention;
- (2) Nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are;
- (3) Persons covered by the definition given above under A who enjoy protection under one of the other three Geneva Conventions of August 12, 1949.<sup>49</sup>”

While this definition is multifaceted and complex, the following relevant rules emanate from it:

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<sup>48</sup> B. G. Ramcharan, ‘Equality and Nondiscrimination’, in Louis Henkin ed., *The International Bill Of Rights: The Covenant on Civil and Political Rights*, 1981, pp. 246, 263.

<sup>49</sup> Jean Pictet, *Commentary on the Geneva Conventions of August 12, 1949*, Vol. IV, ICRC, 1958, p. 46.

- 1) The contextual requirement of the presence of an armed conflict or a state of occupation must be fulfilled in order to render the Geneva Conventions applicable *rationae materiae*. However, there is no need for a formal declaration of war, or for recognition of the existence of a state of war by the parties<sup>50</sup>.
- 2) The person (who ought to be protected) must be “in the hands” of another party to conflict or to an occupying power. Here, the expression “in the hands of” need not necessarily be understood in the physical sense and it simply means that the person is in territory which is under the control of the Power in question.<sup>51</sup>
- 3) The protection is preconditioned on the ratification of the Geneva Conventions by the state of which the person is a national since a Convention is *res inter alios acta* in so far as concerns a State which is not bound by it, and it cannot, therefore, lay any obligation on such a State<sup>52</sup>.

In the case of citizens of an enemy state that have been arrested or detained in Nepal, such persons shall become protected under Article 4 since:

- 1) There will be a state of International Armed Conflict between Nepal and the state of which the persons are citizens because a declaration of war is a necessary condition for the state to be legally categorized as an Enemy State.
- 2) Nepal is a state party to all the Geneva Conventions.
- 3) In order for Nepal to have lawfully arrested or detained them, the arrest should have taken place either in Nepalese sovereign territory or in territory occupied by Nepal. In both cases, such persons will become protected by Article 4 since they are in the hands of Nepal.
- 4) Such persons are not accorded better protection by any other Article of the Geneva Conventions I, II and III.
- 5) They are, by definition, not nationals of a co-belligerent or a neutral state in order for the exception to Article 4 to apply.

Thus it can be categorically shown that citizens of an enemy state detained in Nepal will become protected persons under Article 4 of the Fourth Geneva Convention. The question, now, becomes whether the rights to a fair trial in general and right to habeas corpus and the right to legal representation in particular, are protected by the Fourth Geneva Convention.

Article 27 of the Fourth Geneva Convention provides general protection to such persons by providing them an entitlement, in all circumstances, to respect for their persons, their honor *inter alia*. Article 33 prohibits the punishing of any protected person for crimes which they have not personally committed. Similarly, Article 42 specifies that a civilian may only be interned or placed in assigned residence if “the security of the Detaining Power makes it absolutely necessary”.

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<sup>50</sup> Ibid, p. 20.

<sup>51</sup> Ibid, p. 47.

<sup>52</sup> Ibid, p. 19.

These rules, when interpreted in conjunction, will necessarily require a judicial evaluation of the arrest of the person so as to ensure that the arrest or detention is legal and warranted because of genuine security concerns of the state. Not conducting such a judicial evaluation would be injurious to the person of such enemy aliens. Also, the determination of whether a crime was actually committed by the enemy alien will inevitably require conducting a fair trial along with all the fundamental guarantees that must be provided in a fair trial.

The ICTY in the Delalić case, while deliberating on the legitimacy of the internment of civilians, interpreted Article 42 as permitting internment only if there are “serious and legitimate reasons” to think that the interned persons may seriously prejudice the security of the detaining power by means such as sabotage or espionage. Again, a just determination of whether such concerns exist is preconditioned on a judicial examination of the situation. Such an examination would not be possible, or at the very least, just, in the absence of fundamental guarantees such as the access to a legal counsel and the recourse to a writ to habeas corpus.

The prohibition of arbitrary detention is also based on customary rules of international humanitarian law. Rule 99 of the ICRC’s enumeration of Customary International Humanitarian Law<sup>53</sup> prohibits the arbitrary deprivation of liberty on the basis that it is not compatible with the requirement of humane treatment to civilians provided for in Rule 87. Detention that is not in conformity with the various rules provided by the Geneva Conventions is referred to as “unlawful confinement”. “Unlawful confinement” of civilians is a grave breach of the Fourth Geneva Convention.<sup>54</sup>

Upon examining the normative and legal aspects of the Enemy Alien Disability Rule, one can conclude that it has, at best, a weak normative basis and that it has no basis in either International Human Rights Law or in International Humanitarian Law. In fact, it is in contravention of numerous rules and principles of both these bodies of laws. It is also apparent from a comparative constitutional study that this rule is a vestigial remnant of the post Second World War constitution drafting efforts and thus is not based on modern day norms and standards of human rights or IHL. While most states have done away with this obsolete rule, a few states have, throughout their constitutional history, preserved this rule. The same is the case for Nepal where the rule has enjoyed a place in her constitutions since the late 1950s.

The manners in which this rule can be contested and eventually deleted from our constitution are manifold. Constitutional amendment, judicial review and complementary legislation are among the few avenues that can be pursued. However, the legal analysis of the validity and the relative superiority of one such method above another are beyond the scope of this article.

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<sup>53</sup> Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC, Rule 99.

<sup>54</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Art. 147.