Volume 1 • Number 1 • 2007

NJA LAW Journal

National Judicial Academy
Nepal

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Volume 1 • Number 1 • 2007

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This issue may be cited as: 1 NJA L.J. (2007)

Publisher: **National Judicial Academy**
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Printed at: Format Printing Press, Kathmandu, Nepal.

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27 September 2007

Message from Acting Chief Justice

I am very pleased to know that National Judicial Academy is bringing out the "NJA Law Journal" which will have specific focus on Justice.

After many years of sweat and toil of the judicial community, the NJA was established in 2004 through an Act of Parliament as an autonomous institution for undertaking judicial education and research in the justice sector. And since then it has been very active in undertaking trainings and other capacity building exercises for judges, government attorneys and other target groups, and also conducting research in areas that require immediate intervention for reform.

Today, through its varied activities the NJA has made a name for itself in and outside the country as a leading training and research institution and a reform vehicle of the Nepali judiciary. I am confident that the NJA Law Journal will help it to move forward bringing in the experience of academia and practitioners for judicial reform in Nepal. I congratulate the NJA team for taking this initiative and also extend my best wishes for its successful pursuits in trainings, research and publications.

Kedar Prasad Giri

Kedar Prasad Giri

Acting Chief Justice
&
Chair, Governing Council
National Judicial Academy
Nepal

NJA-Nepal

राष्ट्रिय न्यायिक प्रतिष्ठान
NATIONAL JUDICIAL ACADEMY

Message

It is a matter of personal satisfaction for me that National Judicial Academy has been able to bring out the **NJA Law Journal,** as its annual publication with an objective to contributing in academic research and writing in the law and justice sector in Nepal. Conducting research in cutting edge areas of law and justice is one of the objectives of the Academy. Right from its inception in 2004 the NJA has taken this seriously undertaking research in many areas of law and justice and making it complementary to the capacity building activities for judges, government attorneys, judicial officers and lawyers. As can be witnessed from various articles and judgments included in this issue, the Journal does have a **Justice** focus which it should continue in future as well. I am confident that the Journal will meet the expectation of the academic community both in Nepal and abroad.

While I welcome the inputs from our esteemed readers as well as their meaningful contributions, I congratulate the editorial team for its hard work and perseverance in bringing out the journal in this shape. I also sincerely wish that the NJA team will be able to maintain the standard and regularity of the Journal in the years to come.

Tope Bahadur Singh

(Tope Bahadur Singh)
Executive Director &
Justice (retired), Supreme Court
Nepal

Sept. 2007

रामशाहपथ, काठमाडौं, नेपाल
सर्वोच्च अदालत, एनेक्स
फोन नं. : ९७७-१-४२१५६०४, फ्याक्स: ९७७-१-४२१५६०५
पोष्ट बक्स नं. २४८६५

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ARTICLES

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Nepali Judiciary: Achievements and Challenges

– Kalyan Shrestha*

Even though nearly sixty years have been spent to get the most suitable constitution, Nepal seems to be in perennial transition. The impact of political instability is felt in every sector of the state including the judiciary. Every time the constitution is changed, the chapter on the Judiciary invariably gets tinkered, in most of the cases without bothering to consult the judiciary and sometimes even ignoring its views. The current Interim Constitution is no exception to this. Yet, the judiciary is continuously doing its best to nurture the rule of law and protect the rights of the people. The article takes a stock of its achievement, draws a snapshot of how it started from the scratch, where the very concept of the separation of power and the rule of law were not well entrenched and highlights its contribution. It also raises constitutional and legal issues created by recent "expeditions" and their impact on the independence and smooth functioning of the judiciary. Towards the end it makes a call to take a broader view and wider collaboration to address the numerous challenges facing the judiciary. The author very boldly states that even during dictatorial regimes the judiciary tried its best and "made significant headway towards upholding the rule of law in the light of its own experience and the aspiration of the people." The author while calling the judiciary to reform itself as, according to him, the current delivery does not match with the expectation of general public, also makes a humble plea to all "not to throw the baby with the bath water" in the name of reform. He asks for more understanding to the values of judicial independence and nature of the judicial process before making serious departures in the judicial system.

1. Introduction

In its bid to modernize and democratize, Nepal has been passing through various stages of transition since the first successful mass movement of 1950. Nepal has already made a long journey in its road to political resolution, yet stability has so far not been achieved. Various models of political systems have been put in place but without success. Most of the national resources have been spent either in search of a suitable alternative model or defending the existing ones. The impact of instability can be experienced in all the fields including the judicial system.

The basic thrive of the 1950 mass movement was to set up a democratic system based on a constitution drafted by the "constituent assembly", which has remained unaccomplished to date. Nepal experimented with many constitutions but all of them were issued by the King through the exercise of royal prerogatives and inherent state power. Many unique expeditions took place after the unveiling of the 1990 Constitution, but due to turbulent insurgency propelled by the Maoist group, this constitution, despite reluctance of

* Currently Justice at Supreme Court of Nepal, Hon. Justice Shrestha was the founding Executive Director of the National Judicial Academy, Kathmandu, Nepal.

the mainstream political parties and the King to change it, could not survive. Early this year, it was officially repealed to be replaced by the new Interim Constitution.

The Interim Constitution is unique in many respects. It was promulgated as an outcome of the agreement between the seven political parties (pro-parliamentary system) and the Maoist Party (rebellion). It was officially adopted by Parliament. It did away with all powers that were traditionally held by the monarch. It envisages an election for the constituent assembly to draft a new constitution. It recognizes that the Nepali state is in need of massive reconstruction, forging values such as federalism, inclusiveness, participatory process, multiparty system, political pluralism, sovereignty of the people, recognition and protection of human rights etc. Whereas many of the concepts such as federalism, state reconstruction etc. are yet to be clarified, it seems that the makers of the present Interim Constitution are overwhelmed by the expectations that the peremptory ideas incorporated by them are furthered in the constitutional change.

Interestingly, the political parties envisage political dialogue for the continued implementation of the Constitution, and give the impression that it has been a handmaid of politicians who could change it anytime they like without holding consultations with rest of the people. Some of the important underpinnings of the present Interim Constitution are the principle of separation of powers providing for check and balance between different constitutional organs and the rule of law. Certain departures have been made in the new constitution regarding the organization and management of the judiciary from the previous one. Though the Interim Constitution has demonstrated its commitment to uphold the independence of the judiciary and to maintain the principle of the rule of law, its sincerity and effectiveness will have to be zealously guarded in course of time. In the light of this constitutional development, it would be worthwhile to discuss the nature and importance of the judicial process, its achievements and challenges.

The Nepali judiciary is standing at the cross-road amidst the wave of political cross-currents and perennial transition. How far has the transition affected the judiciary or how will the judiciary be able to manage the transition; how is the current transition impinging upon the independence of the judiciary; how could the Bench, the Bar, the civil society and other justice sector actors save its independence; these are some of the burning questions that cry for answer. Retaining public trust through efficient discharge of its constitutionally entrusted responsibility has been the objective of the judiciary all along when we commenced the journey some 60 years back. How have we performed during this period; does our performance provide adequate rationale for us to stand up against all possible onslaught on its independence; or should we also gear up for modernizing the judiciary making us able to live up to the expectations of the people; these are some of the issues I have taken up for discussion in this article. A quick flash back may give one to understand that there are more challenges than achievement. But I do believe that unless we examine the environment within which the judiciary had to work during the period of political instability and objectively evaluate its achievements, we will be doing a sort of injustice to the institution which has withstood the test of time. It is in this context that the article recounts history but, in no way to discount the challenges that the judiciary is facing.

2. Impact of Political Instability in the Judicial System

Historically, the judiciary has been one institution which is hard hit in any event of political change. For example, the Interim Government Act, 1950 did not make any significant provision for the independent judiciary, which was later addressed through the promulgation of a separate Act called "Pradhan Nyayalaya Ain" in 1951. As soon as the Chief Court (Pradhan Nyayalaya) was organized under this Act, a series of conflicts surfaced mainly between the executive and judiciary. Judicial strictures or resolutions were taken as interference with the functioning of the executive. Many a times, the judiciary had to initiate contempt actions against high ranking officials of the government including the Home Minister. Once the then Chief Justice Hari Prasad Pradhan had to state the reason in defence of the judicial action to the effect that the government is like an eagle which circles freely in the open sky; citizens are like chickens whom the eagle always tricks to entrap whereas the judiciary, like the mother of those chicks, spreads its wings over them to protect them from the eagle whenever it tries to swoop down and catch them.[1] Putting itself into peril, the judiciary has had to protect the freedoms of the people. Not even the King was happy with the judiciary as the latter resisted accepting his command to make a judicial review of the cases the King referred to the latter, already decided by it.

As the relationship between the judiciary and the executive continued to be under strain, the then government took such a revengeful action that it repealed the Chief Court Act (The Pradhan Nyayalaya Ain) and substituted it with the new Supreme Court Act in 1956. The whole idea behind doing so was to oust the then Chief Justice Hari Prasad Pradhan from office and create a legally favorable environment for the government. The chief justice always construed the governance system from the point of view of limited government and opined that even though a comprehensive constitution did not exist, it did not mean that there was no constitutional system at all. The Interim Government Act, known as Interim Constitution, the Chief Court Act, 1951 and the Personal Freedoms Act, 1949 combined together made up the constitutional law of the country. This opinion is in line with the British constitutional system. The difference between having a written and unwritten Constitution could however be practically felt. Had there been a well-written and comprehensive constitution which incorporated the provision of independent judiciary, it would not have been that easy to remove him by substituting the Chief Court Act by the Supreme Court Act. There is a material difference between a judiciary created by ordinary law and by the constitution.

Chief Justice Hari Prasad Pradhan had led the judiciary at such a time when the constitution in the form of a codified text did not exist, the concept of limited government based on the norms of a written constitution was yet to be set out, the basic ideas of the rule of law were yet to be pronounced and the idea of rights and writs were not well entrenched. Adopting such norms was crucial in the process of modernization of the Nepali legal system. The Hari Prasad Pradhan court was, thus, instrumental in laying the basic foundations of the rule of law in Nepal.

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[1] HARI BANSH TRIPATHI, FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW IN NEPAL: EVOLUTION AND EXPERIMENTS 33 (Pairavi Prakashan, Kathmandu, 2000).

After Chief Justice Hari Prasad Pradhan was unceremoniously sacked in 1956, there were other occasions where the chief justices were either sacked or forced to resign or transferred to assume other responsibilities. For instance, Chief Justice Aniruddra Prasad Singh was transferred to the Election Commission, Chief Justice Bhagvati Prasad Singh was asked to resign following a protocol issue during his visit to Australia; Chief Justice Dhanendra Bahadur Singh was asked to resign following the promulgation of the new constitution i.e. Constitution of the Kingdom of Nepal, 1990. Other Chief Justices also have had to face the threats of premature retirement under one pretext or the other.

Judicial independence has been jealously watched by the political elites, most of the time with a sense of competition than cooperation. The political leaderships wanted that justices owed allegiance to them. They always wanted to make sure that the judicial response either confirm or be in harmony with their political moves. In this process, either the judicial structure or its jurisdiction used to be revisited. The tenure of judges and their conditions of service were changed. Changes were made in the modes of appointments, often making provision of reappointment. Politically motivated expeditions were more discernible than the genuine desire for reforms. Whereas reforms are always warranted in order to put the rule of law in good repair, measures taken were seldom commensurate to the reform exigencies. Rather, sometimes amendments were made that brought about negative implications. For instance, during the Panchayat period, the tenure of Supreme Court justices was reduced to ten years through the 2nd Amendment to the Constitution of Nepal in 1973. In the 1990 Constitution, the position of additional justices at the Supreme Court was removed, but the position of *ad hoc* judges was created. There was no material difference between them in term of qualifications and conditions of service except that sitting additional justices were removed by the operation of law.

Recent political developments seem to be more skeptical to the role of the judiciary. Some new areas of interventions were envisaged in terms of the relationship between the judiciary and other organs. The reinstated House of Representatives required the judiciary to keep working in line with their Political Declaration. They declared that their "Declaration" stands above the constitution. Hence, the House of Representatives asked the Supreme Court justices and other judges to take a fresh oath before the House, failing which they would be disqualified to serve as a judge. This bid, however, was aborted following the understanding reached between the judiciary and legislature preceded by the resistance of the Supreme Court justices. But with the promulgation of the new Interim Constitution, again, a new oath was required to be taken by all judges including the Chief Justice. Ironically, even before the Prime Minister took his own oath of office, he administered the oath to the Chief Justice. Unusually, for the first time, judges had to take the "oath of secrecy" also. There are many curious provisions in the new Interim Constitution of 2007 which will be discussed in due place. A question is sometimes asked by the concerned sector as to whether the judiciary would be able to ensure compliance with the constitutional norms by all including the political community. A new situation has emerged in terms of the adjustment of the role or relationship between the political forces and the judiciary. The effects of political transition have been spreading rapidly to the judicial sector also. At this critical juncture, therefore, the judiciary will have to assess its

philosophical imperatives, its importance in ensuring respect for the rule of law, its achievements and challenges in the light of the recent developments.

3. Importance of Independent Judiciary

Judicial functions are always subject to public scrutiny. Reform of the judiciary is always relevant to make sure that its performance is commensurate with its expected roles. In order to perform such roles, the structural and functional independence of the judiciary have unique importance. They need to be maintained at all times, be it a normal time or transition. The transitional justice basically does not depart from the ordinary system of justice. It is, moreover, a management strategy to share the burden successfully in the light of newly emerging situations and exigencies. Otherwise, once the fabric of justice is broken, it will take longer time to revive. During the transitional period, organs of the state will have to be proactive and deliver services more promptly and efficiently than before. The judicial process should not be an impediment in itself. It should rather be a partner and facilitator in the management of transition in a smooth manner. Other organs must not be scared because of the judicial interventions.

It would be worthwhile to recall Alexander Hamilton who explained in Federalist 78 in support of the proposed US Constitution in 1788. He said, "the judiciary from the nature of its functions will always be the least dangerous branch... the judiciary... has no influence over either the sword or the purse; no distinction either of the strength or the wealth of the society and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment." It will rather help to maintain the sanctity of the authority of the state by restoring values on which the state will be founded.

An independent and impartial judiciary is the constitutional right of all Nepali people. The primary beneficiary of judicial independence is not the judiciary itself but the society at large. The whole idea of the written constitutional government with provisions such as the right to justice the right against torture etc. will be futile if the justice system is not made robust. The rule of law which is the basic value of the constitution cannot endure unless the judges who are responsible for interpreting and applying the law and the constitution are guaranteed functional independence.

Madam Justice Claire L'Heureux Dube, former Justice of the Supreme Court of Canada emphasized that judicial services like health care should be free in an ideal society in order that all may seek justice before the courts or other forums, whatever be the state of their financial resources. This idea is important in the sense that the right to justice with which alone freedoms can better be protected, should remain unencumbered. Freedom, not only peace and order, depends upon impartial enforcement of the rule of law of which courts are the ultimate guardians.

Special regard must be made to maintain peace and security in society, which can be achieved only by the rule of law. "Peace and order exist when there is general conformity with *a priori* rules, breach of which result in penalties, nullifications or other disadvantages imposed by the state. If a miscreant goes unpunished by the state, the victim will take the remedy into his own hands, so will the unpaid creditor, the wronged

spouse, the injured and the disgruntled citizen. In order to achieve peace and order the government must provide laws that broadly speaking tend to diminish injustice and a mechanism to redress injustice by application of those laws.[2] Our hope for sustainable peace will vanish once we allow the rule of law to crumble in the name of conflict or transition. It is like missing a torchlight amidst deep darkness.

It is the hallmarks of a free society that disputes are resolved according to law by courts whose authority depends not so much upon force available to the state but upon popular (if not universal) acceptance of the authority of their decisions.[3] Hence popular respect for the administration of justice by the courts is essential for peace, order and good government in a free society based on the rule of law.[4] As the rule of law can never be a second priority in any society based on constitutional government, the judicial organization cannot be of secondary importance. Judicial roles become more important during transition because there will be no other institutions left which will be able to offer guardianship to the fundamentals of governance system, since it occupies a center stage in the resolution of disputes. With innovative approaches, diligence, mediational practices and genuine desire for accommodating the interests of the people, the judiciary can make headway towards resolutions, at a time when political forces might utterly lack consensus on issues that are important for reconciliation and sustainable peace through resolution of disputes.

The politicians view that in the post-conflict scenario political issues are to be resolved with priority, and the legal issues should not come in the way. But lasting peace and resolution of conflict would be unthinkable without handling the rule of law related issues hand-in-hand with the political issues. For the politicians, the judicial system might seem as less instrumental or credible to their road-to-peace, but it may often be a difference in perception only.

The problems of judicial independence are generally embedded in a country's history, culture, and philosophical understandings. Society expects certain roles of the judiciary, which is critical in fostering independence. The judiciaries in transition often have struggled to free themselves from transitional domination by elites, political parties or the executive, which is not an easy job at all. The perception of the legislature or the executive about the judiciary or the perception of the judiciary about itself sometimes creates friction. The operation of courts becomes difficult in countries where courts are looked upon as suspects. In some cases, the judiciary has been linked to pre-democratic regimes or monarchical or aristocratic powers. Even in these situations, the judiciary will have to make sure that it effectively plays its due role as an integral part of limited government.

Basically, the conflict between the legislature or the executive and the Judiciary arises when there is a competition for power. While the judiciary inherently retains its power to interpret the provisions of the constitution and the law, this power is by no means unlimited. The constitution itself provides several checks on the judiciary to maintain the system of separated powers such as pardon, withdrawal of the cases, reduction of judicial sentences, enforcement of judgments, impeachment of judges etc. Further, the legislature

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2 The Hon. Sir. Gerard Brenman, Chief Justice of Australia, *Why be a Judge?* (Judges Conference, Dunedin, 1996), p. 2.
3 *Id.*
4 *Id.*

can effectively nullify a court's interpretation of a statute simply by passing a new law or amending a certain provision. It can react to a court's constitutional interpretation by introducing a constitutional amendment. The judges, too, are aware of such external checks. They are mindful of self-imposed limitations as well.

The legislators in the post conflict scenario seemed to believe that they, in fact, represent the entire sovereign people, and hence supreme. But in a society where a written constitution is adopted, such an idea of legislative superiority cannot be appreciated. In fact, written constitution itself is the sovereign. A separate judicial branch would be designed under the written constitution to guarantee democratic freedom by preventing the concentration of power in government. A written constitutional system will promote a constitutional government, which also requires that majority rule be balanced with minority rights.

In the post conflict situation, minority rights or the rights of the indigenous community have been one of the most potent issues. In order that lasting peace can be built, these issues must be addressed holistically and equitably. Whereas political issues have to be dealt with by the political forces, the role of the judiciary in protecting the rights of the minorities and the indigenous communities is nonetheless important. By the very nature of the judicial function and the responsibility entrusted with the judiciary to maintain the delicate balance between the three major organs of the state through the use of the power of judicial review of the acts of other organs, the judiciary will have to maintain the supremacy of the constitution.

Susan Sullivan Lagon succinctly opines- "the counter-majoritarian nature of the judiciary is actually an advantage rather than a flaw. Limits on governmental power and guarantees of individual rights would be meaningless without some institutional means of curbing the power of the majority. The judiciary is the perfect vehicle for protecting minority rights while the other two branches are more responsive to the majority. Unlike other office holders, the judges have no constituents; they represent the constitution and derive their authority from it."

The political powers that have emerged from the mass movement have to exhibit that in the process of political resolution they pursue the interest of all communities, and the voices of all including political parties big or small will be heard. Otherwise, their political resolution may not be enduring, and would be confronted with the problem of legitimacy and acceptability.

The alliance of eight political parties has enjoyed all the authority of state and decided upon the forms and substance of the constitution. Informal consultations within the alliance have been preponderant over the formal authority of the state organs. Such an exercise may derogate the authority of constitutional functionaries. Further, those who are not given access to such deliberative process may not find good reasons to adhere to the resolutions that the alliance passes. What is absent in the current political process is the participation of the concerned sectors. The present Interim Constitution has touched upon many important areas relating to the judiciary. The latter publicly demonstrated some of its concerns. But these concerns were totally ignored even after being communicated to the Prime Minister. The makers of the present constitution prescribed in the constitution that

the judiciary will consider the mandates of the mass movement[5] while administering justice. Whereas the expression "the mandates of the mass movements" is political in nature and legally imprecise, even so, the expectations from the judiciary have been that judges should have ideological orientation and adhere to them. To ask the judges to have certain ideological orientation may be one way of allowing them to be swayed by extraneous considerations other than the law itself, which may not be always a right thing to do. The constitution being the basis of the rule of law should be the only Dharma for the judges. Periodic demands on the part of the political forces requiring judges to show allegiance in certain ways would not ultimately help in maintaining the rule of law and stability in the society.

What is important is that the judiciary can be expected to discharge its duties in accordance with the constitution and the laws made under it in an independent and impartial manner. Here, may be reminded what George Washington once said: "The true administration of justice is the firmest pillar of good government. If the operation is left to the political organs of the government, judicial independence will be in jeopardy." It will mean its failure to restrain any branch of government to impinge upon individual rights. If the judiciary cannot be relied upon to decide cases impartially according to the law and, not based on external pressures and influences, its role is distorted.

The relevance of the judiciary in the present time has been more expanded than before. In the countries in transition to democratic governance the judiciary faces an even greater challenge. It has to serve as a focal point when political and economic forces struggle to define the shape of the society. It has to encourage fair competition and economic growth in the light of globalization of economic activities, and hence, resolve increasingly, national and international commercial disputes with a higher level of consumer satisfaction. The judiciary of the day will be judged from the standpoint of how effectively it has been able to contribute to the equitable and stable balance of power within the government, how far it has been a key to countering public and private corruption, reducing political manipulation and increasing public confidence in the integrity of the government. But it will be unrealistic to think that the judiciary can carry the burden of resolving these complex problems without the cooperation of other organs and the community. It can play the leadership role only when it completes its own evolution and begins the task of confronting multitude of problems before it.

The judiciary should find a special position to be effective in managing the transition, in order that the sense of justice prevails in its bid to resolve the conflict for enduring peace. Managing a justice system in the situation of transition is not an easy task. The judiciary plays an important role in the transitional justice initiatives such as reconciliation, rehabilitation, reconstruction, and in ensuring respect for human rights, combating impunity, building sense of confidence in the rule of law enhancing effectiveness of the state institutions.

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[5] NEP. INTERIM CONST., 2007, art. 100(2).

4. Judicial Contribution

Obviously, the most basic and the most important function of the judiciary is the resolution of disputes according to law. The Nepali judiciary has started its modernization process with the promulgation of the first Interim Constitution, 1950 and the Pradhan Nyalaya Ain (The Chief Court Act). Until then the justice system was traditionally organized. Judges used to be appointed by the government without following any appropriate criteria that were suitable to the needs of the independent judiciary. Judges would learn the craft of judging while on the job. Their independence and impartiality were not secured. The Rana Prime Ministers used to hold the highest judicial power. They could make or unmake any law. Any judgments rendered by the courts could be confirmed or reversed by them.

Starting a journey from that point and reaching to the present position, where the judiciary is serving as the chief arbiter of justice under the supremacy of the constitution is not a small achievement. During the initial period of its modernization process, the judiciary had to try hard to understand by itself and to make others understand the basic philosophy of the rule of law in society. As the country did not have the history of independent judiciary, it had to struggle for creating conditions for the working of the independent judiciary. In order to transform from the traditional to modern justice system, and to be in line with the norms of contemporary judiciaries across the region, the judiciary had to take many radical steps. For example, there were no constitutional foundations suitable for the independent judiciary. There was nothing like an organized Bar. The legal profession had no respectable position in society. Legal education was not organized. The laws were parochial. The service conditions of judges and court officials were terribly unsatisfactory. The preconditions necessary for an independent and impartial court were absent. Marching from this point, the then Pradhan Nyayalaya, later substituted by the Supreme Court took, a leadership role to lay the foundations upon which the modern judiciary stands. Several constitutions and more importantly the 1990 Constitution and the present constitution made definite provisions regarding the security of tenure and other service conditions of judges. Today, the Bar is organized and the right to legal counsel has found constitutional recognition. The nominee of the Bar participates as a member in the Judicial Council which is responsible for the appointment of the judges as well as for taking disciplinary actions against them. The Attorney General as a chief government legal advisor is the constitutional body and enjoys the authority to decide whether or not to prosecute. The appointment, dismissal and other conditions of service of the judges are constitutionally defined and protected. Hence, substantial ground works necessary for the independent judiciary have been completed.

Regarding the contribution of the judiciary, it is always a subjective evaluation. As has been mentioned earlier, the nature of judicial process has been definite, but its working and the necessary environment for its smooth functioning have been influenced by the political upheavals. The influence of political cross currents is more pronounced during the constitutional change.

The most notable contribution of the judiciary is found in its endeavor to uphold the rule of law. People believe that their freedom depends upon impartial enforcement of

the rule of law, and that courts are the ultimate guardians of their freedoms. People know that the judges are not infallible, even so, they believe that impartial and fearless courts determined to exercise their proper powers are their final defense against tyranny.

Now the constitution vests the judicial power in the judiciary which dispenses justice according to the constitution, laws and recognized judicial principles. This power emanates from the sovereignty of the people as expressed in the constitution. It may be submitted that in the same way as the Parliament enjoys sovereignty in making laws, the courts enjoy sovereignty in interpreting and applying the law. In the past, the Constitution of 1962 recognized the King as the fountain of all powers including the judicial power. He used to give periodic commands to the Supreme Court to review its own judgments though he did not sit in the seat of justice. The power of the King was taken as a major barrier to the independence of the judiciary. The 1990 Constitution did away with this, and internalized and entrenched the values of independent judiciary. As elsewhere, Nepali legal community pays deep respect to the famous provision of the *Magna Carta* of 1215 of England which guarantees that "no person shall be taken or imprisoned or dispossessed or outlawed or exiled or in anyway destroyed except by the lawful judgments of his peers and the law of the land." The preamble of the present constitution bestows itself upon the foundation the rule of law, equality, freedom, comity and human rights.

Many significant exercises made by the courts have been in the area of protection of fundamental rights. When Nepal entered the era of written constitution, the idea of fundamental rights was still nebulous, and so was the law of writs. When fundamental rights were recognized in the constitution, the responsibility of the courts suddenly increased as they were required to protect the rights by issuing appropriate writs. Since Nepal always remained an independent nation, she did not have the experience of implementing the laws of writs.

Nepal made a limited but indirect importation of the values of the English legal system through India in the form of cultural goods. However limited it may be, the impact of the English legal system has been of a lasting nature. To date, the law of remedies, particularly writs are understood according to the common law practice. Law of writs can be taken as one of the areas where the common law has deeply influenced system of justice.

Almost all constitutions of Nepal unveiled after 1950 have vested writ jurisdiction with the Supreme Court. The Supreme Court at all times, under different constitutions, has been exercising this extraordinary jurisdiction. The highest court has been a synonym to writs court. Various writs have been issued to defend and maintain the supremacy of the constitution, to settle disputes between the parties, to contain the organs of the state within their legitimate bounds, to implement laws to bridge the gaps of law, and above all, to protect the people from the tyranny of the government.

This jurisdiction has been often times problematic too. In the initial years after the mass movement of 1950 the then Executive was not happy with the exercise of writ jurisdiction by the Pradhan Nyayalaya (Supreme Court) and, hence, was taken away later by amending the Pradhan Nyayalaya Ain in 1953.

The writ jurisdiction has been exercised to define the limitations of different organs under the constitution. The Court contended in *Sarbagyaratna Tuladhar* v. *Rastriya*

Panchayat[6] (Legislature in the Panchayat System) that it holds the power of interpretation of the constitution, and thus can see the limits of privileges of the legislature. The legislature cannot interfere with the constitutional jurisdiction of the court.

The Panchayat period (1960-1990) did not remain significant from the point of view of judicial review of legislations. The constitution of 1962 known as the Panchayat Constitution declared that it is the fundamental law of the land, and any law inconsistent with it is void. But as the constitution gave the monarch a sacrosanct position, and as he was considered a source of all laws under whose name the laws would be promulgated, there existed a judicial psyche not to annual any legislation unconstitutional. There were some constitutional provisions which would authorize the executive power holders to issue rules, but their expediency, legality and legitimacy would not be open to test. A rather ridiculous scenario which emerged then is that some rules were more fundamental than the fundamental law of the land itself.

During the Panchayat period, the court had to limit its role to regular adjudication. Even within this closed environment, the judiciary had issued writs of various natures including habeas corpus and certiorari. Students unions were allowed to operate, newspaper censorships were reviewed and detainees were ensured fair trial. Even so, the failures of the judiciary came to surface on many fronts. During this period, the need for reforms in the judicial system as a whole was underlined and a Royal Commission was constituted for recommending measures for the reform of the judicial system. The report addressed many issues that were relevant to the smooth functioning of the independent judiciary. It discussed about the level of public trust in the judiciary and suggested many measures for massively overhauling the judicial system ranging from the restructuring of the tiers and jurisdictions of the courts, conditions of service of the judicial personnel, reforms in laws, reforms in the appointment procedure etc. It took, however, years to implement the report.

Even though, the decisions of the Supreme Court would be final according to the constitution of 1960 particularly because the King could issue commands to the Supreme Court to review the decisions given by it, and at times repeatedly, it led to perpetual uncertainty. A Judicial Committee was set up by the constitution itself to look into such petitions and recommend the King for the judicial review. Practically, on occasions, decisions of the Supreme Court were, in fact, reversed also. In addition, a Special Petition Department (Bishesh Jaheri Bibhag) was set up at the Royal Palace to receive petitions from the people. This department used to separately make submission to the latter where upon the King used to issue commands to various courts and other offices to do certain acts.

There might be some people who still see the relevance of such a mechanism to facilitate the review of the decisions of the Supreme Court. But the uncertainty created by frequent review and revision was more precarious than the chances of correcting the fallibility of the judges. The present Interim Constitution has made some unique arrangements regarding the review procedure of the cases decided by the Supreme Court. Until now, the same bench which decided the case would make review under certain

[6] NKP 168 (SC 2035 BS)

conditions laid down by law. But now, a new bench consisting of judges other than those who participated in the earlier bench will hear the review petition. That has virtually transformed the review jurisdiction into an appeal, which is in contradiction to the basic idea of review. As a matter of fact when other judges make the fresh hearing it is not a review hearing. How will this provision work in actuality is yet to be seen in practice. Yet, the danger attached with it is the lack of finality and certainty even at the Supreme Court level. Many additional judges may be required to handle the flood of causes created by the new provision and due to cumbersome lengthy hearing procedure the review might entail.

In rest of the matters, the Panchayat period is marked by judicial efforts in evolving the judicial process in the ordinary course of action and developing jurisprudence in many areas of law. Many important interpretations were made in regard to the powers and limitations of the constitutional functionaries. Various types of judicial remedies were identified and evolved. The due process issues were more significantly dealt with and a fairly good amount of judicial principles were enunciated, many of which are considered as lamp posts even to date.

The Nepali judiciary entered a new era following the successful mass-movement of 1990. The Constitution of the Kingdom of Nepal made provisions for the reorganization of the judiciary.

The constitution termed "independent and competent" judiciary as its basic feature. The judicial sovereignty was vested in the judiciary itself. The constitution gave wide ranging powers to the judiciary regarding the protection of fundamental and legal rights. A very creative and powerful jurisdiction over public interest matters was created for the Supreme Court and which was quite broader in scope compared to the power of the courts in many other jurisdictions. With this, the Supreme Court did not remain merely a reactive court to wait for the real cases for resolution. Instead, it could consider matters that were important for the implementation of the constitution or to give remedy to the public in matters of public importance.

This jurisdiction has given important avenue for the court to reflect upon issues more creativity. Many important judgments have been already delivered by the Supreme Court which gave interpretations on various articles of the constitution such as the power and positions of the King, the Prime Minister, the Parliament and of itself, their limitations, the manners in which they could be exercised. All have been interpreted by the court on different occasions.

During the post 1990 period, The House of Representatives was dissolved more than once on the recommendation of different Prime Ministers, and each time the action was examined by the court. Many times, the Supreme Court had to enter to political questions in the guise of legal issue as well. And more often than not, it has fallen into controversy for its political orientation also. Though at times the court has voiced that purely political questions is not justiceable, often legal questions having political consequence have come to the court which it has found difficult to avoid. In fact, it is not always possible for the Supreme Court to completely dissociate itself from legal issues that have political consequence. Its own understanding or philosophy on the issue, its capacity to manage them from the judicial standard, the political culture of the day, its standard

practices, norms and values, all should be taken together to evaluate the performance of the judiciary.

The judiciary under the Constitution of the Kingdom of Nepal, 1990 and the present one in a continuum occupy unique and important place in the entire judicial history. No other judiciary had enjoyed so much authority under the constitution in this country than the present one. It has aroused the hopes of the people and hence more responsibilities for itself. Then at times, it has also frustrated for reasons of its own and others.

Practically, the judiciary in the post 1990 period had the occasion to test the application of almost all tender points of the constitution, be it the citizenship or dissolution of parliament, or the authority to conclude treaty and their domestic applicability, executive privilege to inquire into any action, the necessity doctrine, the autonomy of the constitutional bodies, the enforceability of the directive principles, the power of the King etc. It had to touch upon all civil and political rights as well as economic, social and cultural rights. The court made important headway in matters such as human rights, gender equality, environmental rights, corruption control, rights of the child, and civil service issues. The proactive and creative contributions of judges are discernible in many areas. On some occasions, constitutionality of various statutory provisions have been examined and declared *ultra vires.* While at others, directives have been issued to reform the law or implement it in the light of contemporary legal development particularly from international human right laws.

Unfortunately the 1990 Constitution could not be taken to its natural directions. In the final years, it had to witness unprecedented upheavals in terms of its acceptability and implementation. The King seized the executive power from the elected Prime Minister, and under his own chairmanship, formed the cabinet by invoking Art. 127 which were meant for clearing up the problems as a last resort measure relating to the implementation of the constitution rather than creating any opportunity for him. Unfortunately, the King took this contingency as an opportunity for himself to rule. The King neither followed the due process which was a condition precedent to the exercise of Article 127, nor was the Article exercised for the purpose it was stipulated.

A Royal Commission without any constitutional back up was constituted in the name of inquiring into corrupt practices and abuses of authority by the members of the previous governments, but, in fact, that was basically motivated by political vendetta. Consequently, the then Prime Minister Mr. Sher Bahadur Deuba and many other senior leaders were sent behind the bar. The implications of royal takeover were manifold. The very limits of constitutional monarchy were exceeded, Parliament was already dissolved. Personal freedoms of the people were jeopardized and security forces were exceedingly relied upon. Consequently, they exceeded their limits and abused the human rights of the people. The Royal adventure boiled up the situation which ultimately ignited the rebellion mood in the people.

At this juncture, ex. Prime Minister Mr. Sher Bahadur Deuba and other leaders submitted petition before the Supreme Court against the functioning of the Royal Commission. The Supreme Court constituted a five member Constitution Bench to hear this

case. The court had a historic moment to pay its highest esteem to the supremacy of the constitution and proscribe any adventure that went against the principle of constitution. In its historic judgment the court left no stone unturned to say to the effect that the sovereignty of the country resided in the Nepali people, and hence they were the only source of the state power. Since there already existed a constitutional body to investigate into corruption and the abuse of authority, the establishment of the Royal Commission was not warranted.

The judgment rejected all the premises of the royal takeover, and legitimized the causes and concerns of the dissident political community. The court had to protect the leaders and other people from the oppressive measures of the government. The entire judiciary had to issue hundreds of writs of habeas corpus every now and then to release the illegally detained leaders and other people who were particularly detained with a view to restrain them from participating in the mass movement. It helped the movement to keep its momentum. The mass movement ended up with the proclamation of the King to reinstate the dissolved House of Representatives and he returned back all powers he had seized from the people. Since then, a new political process has started. The government is now run by the alliance of major political parties with a mandate to hold election for the constituent assembly for drafting a new constitution.

Ironically, we have now a new Interim Constitution which demands fresh allegiance from the judges.[7] The courts are asked to apply the constitution and laws in accordance with the "spirit of the mass movement." As the institution of Head of the State is in a limbo, a new arrangement has been made regarding various actions relating to the judiciary. For example, the Chief Justice will be appointed by the Prime Minister at the recommendation of the Constitutional Council, where politicians are in majority. The Chief Justice is requited to take an oath before the Prime Minister. The Supreme Court will have to submit the annual report to the Prime Minister. The Chief Justice and the Justices of the Supreme Court can be deputed to such works other than the judicial deemed fit by the cabinet in consultation with the Judicial Council. The composition of the Judicial Council has been redesigned in such a way that majority held hitherto by the members of the judiciary in it has been reversed.[8] The implications of aforementioned provisions in the maintenance of independence of the judiciary and the rule of law, and their relation with the smooth transformation from transition to sustainable peace must be impartially examined.

Over the years, the singular contribution of the judiciary, if I may say so, can be seen in terms of its commitment to the rule of law. By this, the judiciary did not mean to defend the oppressive measures of the government, but to protect the people from their wrath. The judiciary has, though not infallibly, zealously guarded personal freedoms of the people at all times, good or bad.

The protection of human rights by applying the international standards at the domestic level is a commendable judicial exercise. The judiciary has been consistently contributing to the progressive development of jurisprudence in many areas not only by way of interpretations of statutes but also through directives issued to the government to

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7 See NEP. INTERIM CONST., 2007, art. 162(2). Under this article all judges were required to take a new oath of allegiance to the constitution otherwise judge would lose their job instantly. No reason is given why they were required to do so.

8 *Id,* art., 100(1), 103(1), 109, 110, 113.

review, reform and enact necessary laws, as part of the latter's responsibility under the constitution. This function has been complementary to the law making function of the legislature and the executive. It has stood as a final arbiter in the constitutional set up; an arbiter generally received not only by virtue of the legal authority, but also by the popular acceptability of its decision. Although, of course, not infallible, the judiciary has resolutely shown its willingness and capacity to serve as a final defense against tyranny.

5. Challenges

The judiciary like any other organization works under certain environment. The political climate that is required for the smooth functioning of an independent judiciary did not remain as conducive as it should have been in the entire modern political history of Nepal except during a brief period of one and half decade of the implementation of the Constitution of the Kingdom of Nepal 1990. Even under that constitution, during the concluding years it tended to be affected by the royal takeover. It has run through many vicissitudes trying always to adjust with the political changes, yet without compromising its basic values or services.

Despite its efforts to maintain its Dharma as an independent and impartial dispenser of justice, it has encountered the problems of arrears, delay, eroding quality and above all mounting consumer dissatisfaction. Some problems are its own and others are created by external factors, which must be holistically resolved. In order to be able to deliver the services as expected, the judiciary will have to specifically deal with some of the issues which otherwise would render its efforts futile and tarnish its image.

The judges need to revisit themselves why they become judges. There might be a time in history where judges were revered and invested with an aura of infallibility. It happened so because people did not properly understand the judiciary or they were not used to question the social or state institutions.[9]

5.1 Interaction with Society and Limitations of Judges

Now, judging is not what it used to be. The judges are more criticized now. They face more difficult tasks than ever before. To be a judge is not to gain personal acclaim nor is it an easy life style. In order to maintain impartiality, a judge recuses from a social situation to avoid possible embarrassment in the discharge of his/her duties. This self-ordained seclusion which leads to loneliness in life is not that easy to bear. Though the judges would work with factual judgment on evidence, their affiliations are sometimes misconstrued in a way that is prejudicial to the nature of their work. It becomes especially inconvenient when a judge is deputed to non-judicial work by the government.

A judge is always expected to maintain self-restraint, and so, allowed to exercise his or her discretion to determine whether a particular relationship affects his/her work. But who will take the responsibility when the government deputes a certain judge to a non-judicial function under some pretext? This is particularly so in view of the new

[9] *Supra* note 3.

constitutional provision which allows the government to depute even Chief Justice to a certain non-judicial work. There is even a possibility that the power could be used as an attempt to displace him/her or to disturb the independence of the judiciary.

5. 2 Criticism of Judges

The dispiriting criticisms not based on fact often dishearten the judges either to refrain from performing the way they used to or change the course, or to mediate between those who gave such impressions. Only a few judges either have the skills or inclination to maintain a relationship with the media which preserves judicial dignity and appropriate reticence while communicating an insight into the works of the courts.[10] It is true that judges have to respect criticisms even against them, but restraint has to be maintained by the media or the public so that they do not destroy the confidence of the public in the administration of justice. If public scrutiny of judges is used as the plaything of controversy to destroy public confidence in the administration of justice according to law, an enormous disservice would be done to the society. All should be reminded that if the criticism erodes the confidence, it also erodes the power of the judiciary to protect the very right to constructive criticism.

5. 3 Self Restraint

To be a judge in a society which is so divided, so disturbed, and so confused, which is suffering from illiteracy, poverty and underdevelopment is full of challenges and responsibilities. A judge foregoes all the delights of intellectual life including the demands of family life, recreational activities or other extra-curricular activities. What would, I believe, bound a judge to remain with the judiciary is the "inner satisfaction." The satisfaction of judicial life necessarily flows from an inner conviction of service to the society, from the satisfaction of the aspirations of litigants, of the profession, of the public and most importantly, of oneself, and from the mutual esteem of judicial colleagues.[11]

To gain such a satisfaction, a judge will have to evoke many things such as skills and qualities of the highest order, unquestioned integrity, humane understanding, and knowledge of the law, social awareness, wisdom, patience and industrious character which is by no means easy to achieve. The pain of leading a lonely life will remain exasperating. Despites all such inconveniences a judge will have to have self direction and drive. No expression of satisfaction can satisfy the judge unless his/her own standards are satisfied. This awareness will have to be seriously embedded in the mind of a judge. The entire judicial community and the public at large should encourage them to uphold such values.

5. 4 Need of Judicial Reform

We envision our judiciary to be independent, impartial, competent, transparent, accessible, participatory and representative of the diversity that exists in the society. For this, necessary conditions at the constitutional, legal, institutional and managerial level have to be created. The Strategy Plan of the Judiciary is being implemented by the Supreme Court

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[10] *Id.*
[11] *Id,* p. 9.

to address this imperative in a certain manner. Though judicial reforms are to be primarily initiated from within the judiciary, it is not necessarily an internal process. All the justice sector actors must concurrently initiate reform agenda for themselves, and an overall target should be set and achieved through their joint and several efforts. Whatever has been done so far is far little than what is necessary. A time has now come to draw attention of all constitutional and public functionaries towards the needs of the judiciary.

5. 5 Public Confidence

The judiciary has to be mindful of its image. The confidence of the people in it as a justice dispenser remains central to how far it has been well performing or how far it requires its own reform. Public confidence in it depends on various factors.

Basically manifest adherence to the basic elements of the judicial method, impartiality, procedural fairness, the pursuit of justice in the application of law and exposure to public scrutiny will determine whether judges have commanded the confidence of the community they serve. Occasional research and report indicate that our judicial services are yet to reach to the needful in a manner that they should have reached. The level of consumer satisfaction is not as expected. Our performance rating has not been satisfactory both at the national as well as international level. Such a rating will affect not only the overall investment climate, but also overall credibility of the entire polity. Therefore, enhanced confidence should be the outcome of the whole reform process.

To enhance public confidence in the judiciary, community understanding of the nature of judicial works and their requisite support, judicial commitment to deliver its services to the best of its capacity, its structure, process, resources, management, all have to be complementary to transform the vision of the judiciary into a living reality.

5. 6 Checks on Judicial Power

The community for which the judiciary serves must understand that judicial power is by no means unlimited. There are numerous checks on its authority- constitutional, statutory or customary. The constitution also provides several checks on the judiciary to maintain the system of separated powers. Public hearings, pardon, reprival of judicial sentences, enforcement capacity or enforceability all directly or indirectly affect the confidence in the judiciary. To attribute all the failings to the judiciary which are created by the external factors will not be a fair assessment. A balance sheet must be issued on the accounts of failures and successes of the judiciary stating the reasons therefore.

5. 7 Modes of Appointment of Judges

All along, one of the common concerns regarding the independence of the judiciary has been about the appointment of judges. There are various models regarding the appointment of judges in the world. There is no single formula which can be whipped off for all situations. In the UK, the appointment is made by the cabinet on the basis of merits. But that system could not be popular in other jurisdictions for the reason that it lacked democratic representation and transparency. The election of judges was taken as an

alternative method to the executive appointment. That process was highly politicized and could not ensure meritorious selection.

The provision of a council to recommend for appointment has been more popular these days. The appointment through the council is seen as a step forward in maintaining judicial independence. But rarely have those countries with Judicial Councils marked completely satisfactorily. The Councils neither have been able to check the politicization of appointments nor have they ensured merit based selection. Due to high politicization of the council in Venezuela, the council itself was abandoned.

Unless merit based selection is ensured, good candidates will not come forward. It is believed that once a system is established which ensures merit based selection, the appointees act more independently because they know they were selected on merit.

5. 8 Performance Evaluations

The court will have to make sure that a judge possesses all qualities relevant for being a fair and impartial judge. Criteria should be appropriate and the procedure adopted for the selection must also be fair and transparent. But this alone does not suffice. To ensure that, many issues relating to judges such as the security of tenure, performance evaluation on certain reasonable grounds, expeditious handling of complaints, disciplinary actions and continuing education programs and implementation of code of ethics are important areas to be considered. Regarding performance evaluation definite criteria need to be developed. No consensus exists on how relevant factors such as seniority, efficiency, quality of decision-making and the number of cases disposed should be assessed. Neither seniority nor quantitative indicators, nor speed at the expense of qualitative indicators and justice can be preferred. The present judiciary seems to be oblivious of this need. Disciplinary actions should be expedient. Complaints must be timely and responsibly handled. Transparency in this process should be maintained. At the same time, steps need to be taken to guard against unhappy litigants using the process to harass judges who decided against them. Complaints on merits of decisions should be excluded as far as possible.

5. 9 Administrative and Financial Autonomy

There are virtually two models regarding the structure of the judiciary:

1. The judiciary dependent on the executive department for administration and budgetary functions.
2. The judiciary as a separate branch having same degree of self-government and budgetary control over its operation as the executive branch acts over its operation.

Europe follows the first model. But it is all set to embrace policies where the responsibility of judicial administration and budget is transferred from the executive to the judiciary itself. The US adopts the second model. The US Congress created the Administrative Office of the US courts. The federal judiciary manages its own funds and operations. It also develops its own budget request which is submitted to the Office of Management and Budget (OMB) by law. The OMB must include the judiciary's proposed

budget in the submission of the President's budget to Congress without change, although OMB is permitted to comment on it.[12]

The provision of adequate budget has a direct and indirect causal link with the independence of judiciary. In the absence of necessary budget, quality judges and other human resources cannot be attracted or retained. The likelihood of corruption can hardly be diminished. The judicial processes including oral proceedings cannot be correctly recorded and physical working environment cannot be created. Actually, inadequate budgeting undermines respect for the judiciary both in the eye of judge and in the eye of the public. Based on the experience of different jurisdictions, around 1% of the total budget is normally allocated for the judiciary. For example, the Philippines allocates slightly over 1 percent, Romania 1.73 percent, Costa Rica 1.5 percent, Pakistan 0.8 percent at the provincial level and less than that at the central level. The Nepali judiciary receives a less than 1 percent (0.64 in FY 2063/64). Whereas it deems always correct to allocate adequate budget for the judiciary, the latter must ensure improved performance and greater independence to justify that. Judiciaries do not seem to have proper judicial management and ability to present its financial needs.

5. 10 Relationship with the Bar

The relation of the judiciary with the Bar and other actors of the justice system must be maintained in a spirit of mutual cooperation and understanding. Time and again, hostile expeditions have come to surface against the judiciary for political reasons. At a time when the judiciary is put under attack due to fragile political scenario, the relation happens to be even more important. The members of the Bar are the natural allies of the judiciary, but if they join the political band wagon, tension between the Bar and Bench will be compounded. The judiciary is prone to loose its strength when divisions are created between the Bench and the Bar. The impact can be experienced in term of the overall derogation of the rule of law. The impact will not be limited to the ordinary people but the entire Bar and the judiciary itself.

5. 11 Developing Judicial Capacity and Attitudes

Judging these days is more challenging. Each day a new issue emerges. To address that, a judge must acquire new knowledge, skills and capacity. Without looking into professional development, mere willingness to uphold integrity cannot bring about any result. It is often believed that judges who do not respect themselves as professionals are less likely to withstand corruption and other outside pressures. Pressure works when resistance is weakened. Training should be a continuous process, and should be linked up with the performance. Over the years, training needs of the judges have been emphasized, and a number of trainings have been imparted. To what extent it has materially impacted their performance is yet to be accessed. The National Judicial Academy and the employer

[12] US Agency for International Development, Washington D.C., *Guidance for Promoting Judicial Independence and Impartiality* 2002, p. 24).

organizations must undertake periodic evaluations, and pursue appropriate training policy which can make trainings effective to bring about desired results.

5. 12 Managerial Capacity

The judiciary is rated in terms of its orientation to the principles it is supposed to protect. But much depends upon its capacity to bring its knowledge into practice. A court system needs strong managerial capacity at every level such as securing and disbursement of budget, personnel management, court operations, physical planning, public relations record management, execution of judgment, information management and strategic planning. To date, there is nothing like a judicial management which as a separate discipline is implemented. Not even a single person is trained specifically in it. The handling of managerial issues in a non-professional manner can never bring the desire effects.

5. 13 Enforcement of Judicial Decision

One of the most serious challenges facing by the Nepali judiciary is the enforcement of judicial decisions. Most of the criminal sentences are not executed. The situation is more worrying where the accused has been on bail and the decision goes against him. The enforcement of judicial decisions is left with the judiciary itself which is practically never a perfect idea. In civil matters, as the parties themselves do take personal interests, implementation of the judgments by the courts might be relatively better. But since the implementation of decisions in criminal cases require the use of information network, security coordination and continuous surveillance, court system with its traditional management capacity cannot handle it. The executive by no means can absolve itself from its responsibility to implement the judicial decisions, which otherwise can create a security problem for the maintenance of law and order.

The judiciary will lose credibility, even where it has worked honestly and fairly, if its decisions are not implemented. The problem becomes complicated when the decision is against the government, or if a decision cannot be implemented without the cooperation of the government. It is seen that a good number of decisions are not complied with by the government, particularly in the area of environment and public interest matters.[13] In that situation, a judge will be in a dilemma as to whether he/she has to make a correct decision and face the consequence of non-compliance and invite attacks on his/her own power, or make a decision that avoids controversy. The danger of inability of courts to compel compliance is that it may discourage judges from making hard and often unpopular decisions. It is submitted that the executive branch should comply with the judicial decisions and take full charge of their implementation.

5. 14 Effectiveness of the Judiciary

The effectiveness of the judiciary depends on its independence, efficiency and integrity reflected in her decisions. Not only that cases need to be processed efficiently, they also need to be decided impartially. The judiciary might have a good name in deciding cases

[13] *See* Status of the Directive Orders Issued by the Supreme Court (Findings of the Study Research Report 2063 BS), National Judicial Academy, Kathmandu, Nepal

fairly, but if it fails to reduce the bulk of its case loads in a timely manner, its effectiveness is lost. When cases languish for unreasonably longer time they invariably deny the rights of the concerned people. The judiciary need not only be fair and impartial, it also needs to be effective.

5. 15 Accountability

So much has been written regarding the independence and impartiality of the judiciary. Yet, there is still a reverberating interest to see the judiciary performing in an accountable manner. The judiciary is not left free to act according to its whims and fancies. It has to be accountable to public for both its decisions and operations. If its decisions go too far from public sentiments, a correction will be called for by way of a legislative amendment. Its operational impropriety will be more distinctly questioned. There is a consensus about the need for an effective and accountable mechanism, but designing it in such a manner that does not prejudice the judicial independence or impartiality is a complicated job. The difference between independence and accountability must be properly understood. "Independence addresses freeing the judiciary from prior control of its decisions, on the other hand, accountability focuses on having mechanisms in place by which the judiciary as an independent body is required to explain its operation after the fact.

6. Conclusions

The judiciary does not work in a vacuum. It influences the public and, in turn, gets influenced by them. The understanding of the people about the judicial process, readiness to cooperate with it, and the confidence they have in it definitely help it to implement the rule of law and protect its independence. If the people become indifferent, the judiciary will be either unaccountable or weak. Currently, a scarry trend of taking laws into hand with a rebellious mindset is witnessed. Such a trend is the very antithesis of the rule of law. When victims have to vindicate the wrongs by taking laws in their hands, the foundations of the rule of law will be effectively ruined. When lawlessness looms around, the cause of justice will ruin by itself. A bonafide mission cannot be achieved in a mischievous way. While the judiciary can be criticized hundred times for its failures, it cannot be abandoned like a baby with the bath water in the name of its failures. In order that the norms and values reflected in laws are respected, people must join their hands to consolidate the strength of the judiciary. The hands that strengthen the judiciary will strengthen the authority and confidence of the polity itself. The judiciary must be ready to discharge its responsibility with a genuine sense of accountability. Judicial independence can operate properly only when the judges are learned in the law and comport themselves with integrity and impartiality.

Starting from the foundation of archaic law and dictatorial regime, and without any external support, the Nepali judiciary has made a significant headway towards upholding the rule of law in the light of its own experience and the aspirations of Nepali people, though often times it had to pass through troubled water due to political conflicts. To my mind it must move ahead consolidating its achievements. It cannot miss directions

while navigating across the sea. Its directions must be clear. It must be able to assure that all in the boat will be taken safely to the bank. A sense of trust in the judiciary and belongingness among all state actors in the judicial process can be the only safe way to navigate the judicial boat across the troubled water of the present kind. Ironically, the Nepali political elites seem to have underrated the contributions made by the judiciary without having due regard to what stages it had been forced to pass through and with what amount of resources it was asked to meet the challenges ahead of it. The contributions of an institution like the judiciary cannot be seen in terms of physical development though there are always visible links between physical development and the judicial functions. What the judiciary nurtures is the values and the norms of behaviour. A sense of security and the confidence in the mind of the people are instrumental to sustaining peace in society. The utility and the potential of the judicial services in doing so cannot be overemphasized.

Transitional Justice for the Promotion of Peace and Democracy in Nepal

– Dr Ananda M Bhattarai[♣]

Transitional justice is relatively a new but widely discussed topic in Nepal. The author explains terminologies, discusses jurisprudential and legal issues such as the right to truth, justice, and reparation, brings comparative experience and also highlights the challenges that Nepal is facing in checking impunity, establishing accountability, healing the wounds, repairing the wrongs, rekindling the faith of the people in the state institutions and promoting reconciliation in the society. He examines and analyses the initiatives of the government to establish the Truth and Reconciliation Commission in Nepal and argues that the government should have a comprehensive, holistic approach to transitional justice where legal reforms should be equally emphasized. He maintains that a half hearted approach would only complicate the matter and make peace hostage of political myopia.

1. Introduction

After the signing of comprehensive peace agreement, and promulgation of the interim constitution of Nepal, "Transitional Justice" has attained academic and activist interest in Nepal. Though the commitment shown by forces that came to power after the April Movement seems to be waning, it does not belittle the national need to prioritize the agenda of transitional justice such as checking impunity, healing the wounds and achieving reconciliation in the country. In fact, lasting peace and democracy in Nepal heavily depends on how we address transitional justice issues. As said by Kofi Annan "Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives".[1] The consolidation of peace and democracy in post-conflict situation is difficult unless grievances of the victims are addressed through justice mechanisms. Similarly, strengthening of the rule of law and rekindling the faith of the people in state institutions are necessary for the justice process to work. Justice and peace are not contradictory forces. If pursued properly, they promote one another. In this write up, therefore, I focus on theoretical underpinnings, values, mechanisms of transitional justice, present comparative experience, examine the current effort of the government to establish the Truth and Reconciliation Commission (TRC, henceforth) highlight issues and challenges and point out possible way forward with regard to institutionalizing transitional justice mechanism in Nepal.

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1 *See* UN Security Council, *"The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies,"* Report of the Secretary-General, S 2004/616

2. Understanding Transition

In common parlance 'transition' refers to a journey with a starting and a finishing point, a situation where things are rather unsettled. It might not be so in the matter of governance where transition could also be viewed in a continuum. The transitional justice literature draws two scenarios; the first referring to a paradigmatic shift from an authoritarian to a democratic regime; the second pertaining to "conflicted democracies"[2] where warring forces within the country enter into peace vowing for more democracy, participation and empowerment. In the first case, once the transition begins, there is no widespread resistance to the need of change of the political order. The non-representative, totalitarian, self-centered, selfish, ethnic or militaristic regime with questionable legitimacy begins to unravel like the house of card.[3] Here, the transition is from non-democratic to democratic government, from illegitimate to legitimate regime, from disregard to the respect of the rule of law, from denial of human rights violation to its acknowledgement and readiness to have corrective mechanism, from repressive to transformed institutions. In authoritarian regime, law is considered as an obligation of citizen rather than its own whereas law provides an overarching framework in democracy.[4]

In the second scenario, despite the government being democratic with representative, participatory and inclusive qualities, discord in the processing of conflicting interest and views sometimes lead to social tension or violence. Therefore, here the transition is from violent conflict to non-violent contestation, and possibly from procedural to substantive democracy. Since the legitimacy of the regime is not an issue here, transition in such regimes can also be studied from the perspective of openness, equity, inclusion, responsiveness, transparency and accountability etc. Here the question is more of reformation rather than transformation or of narrowing the gap between actuality and optimal performance. Successful transition calls for vesting legitimacy to law and legal institutions amongst communities where the exclusion during the conflict is said to be most pronounced.[5] Since regular introspection of government function is possible in democracies, transition remains open ended.

In some countries the transition is more complex. It implies transition both from autocracy to democracy and from conflict to peace, socioeconomic transition which requires a shift from feudal, exploitative to egalitarian regime and takes a rather long time.[6] When a discussion on transitional justice in Nepal is made this type of transition also needs to be taken into account.

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2 Conflicted democracies are democracies which have a deep seated and sharp division in the body politic, whether on ethnic, racial, religious, class or ideological ground and secondly the division has reached such a level that violence has resulted or is likely to result. *See* Fionnuala Ni Aolain & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUMAN RIGHTS QUAQRTERLY 172-213, 176 (2005)

3 While Chile, Argentina and Greece were military autocracies, many Eastern European countries where regime change occurred were communist regime. Here transition started with Gorbachev's glasnost to the fall of Berlin wall and to the collapse of Soviet Union and the soviet backed communist governments.

4 Fionnulala Ni Aolain & Colm Campbell, *Supra* note 2, p. 183-85

5 *Id*, p. 189

6 For instance, Argentina, South Africa, Nepal etc.

3. Giving Sense to Justice

What is justice asked Socrates in Plato's Republic, and ever since, this has been one of the leading questions of philosophy and all social thinking. In Platonic doctrine, justice is not only a virtue but the highest of all, and indeed the sum of them all...[7] justice is linked to morality, nobleness and even to divinity.[8] Overtime other values such as balance, equilibrium, equity, and rights have also been linked to justice.

Justice is the foundation of every civilized society. Whether the society is in a peaceful situation or in conflict, justice is a perennial quest of human beings. Many jurists have struggled to give meaning to the term 'justice' and tried to study it from different perspectives. In the course, many adjectives have been added to this term. The process continues even today.[9] However, justice has some core values. They are accountability, fairness and vindication of rights . In other words, justice is an expression of accountability and fairness. It tries to protect and vindicate rights and prevent and punish wrongs. Justice implies regard for the rights of the accused, for the interests of victims and the well-being of society at large.[10]

In post conflict situations there is often a tendency to view justice and peace as opposing concepts. This view got further support by the work of the South African Truth and Reconciliation Commission which gave amnesty to offenders in exchange of the acknowledgement of guilt and some expression of remorse. This was understood to be a compromise of justice in the interest of peace. It was then argued that there is a tension between justice and peace and a trade-off between the two was required.[11] This is present even today among peace building experts and also among politicians reflected mostly in their emphasis on reconciliation sans other justice mechanism. Clearly, while international human rights community emphasizes for justice, peace seems to be a domestic affair.[12]

Why is peace considered as opposing to justice? David Bloomfield views this to be a fall out of a classical retributive approach to justice. Though its value cannot be underestimated for peace and order in society it could still be taken as complementary to other forms of justice such as restorative justice (focusing more on victim than the offender), or social justice (emphasizing on fairness for all, transformation of unjust relationship, rooting out discriminatory practices etc) or distributive justice (providing opportunity to the marginalized groups and individuals). As mentioned earlier, if justice implies order and morality, or establishing golden mean, equilibrium, peace and reconciliation. This could be facilitated through restoration of rights of the individuals and communities. Since justice and reconciliation are intertwined, interactive and interdependent, too much focus on one side of the relationship undermines the balance

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7 C.K. Allen, ASPECTS OF JUSTICE 5 (1958)

8 "Justice stands high and mighty in the moral hierarchy and has always been thought of by philosophers as belonging to the noblest part of man and by theologians as partaking of divinity itself;" says C.K. Allen, *Id,* p. 10

9 Adjective such as natural, positive, universal, particular, written, unwritten, political, social, economic, commutative, juridical, sub-juridical, constitutional, administrative, retributive, restorative, providential, educative, corporative, national, international, parental, corrective, distributive etc are used to qualify justice.

10 *Supra* note 1, p. 4.

11 David Bloomfield, *"Strategies for Reconciliation: Are Justice and Peace building Complementary or Contradictory,"* in SDC, DEALING WITH THE PAST AND TRANSITIONAL JUSTICE: CREATING CONDITIONS FOR PEACE, HUMAN RIGHTS AND THE RULE OF LAW, Conference paper 1/200657- 64, 57.

12 *Id,* p. 58, citing Donna Pankhurst 1999. If one analyses the statements of Louis Arbor on various occasions about the peace process in Nepal and that of Nepali political leaders one can clearly *see* the cleavage. For instance, Ms Arbor on Jan 22, 2006 in Kathmandu said the sustainability of the [peace] requires serious attention to accountability for past wrongs .

between the two.[13] If one takes 'reconciliation" as an umbrella term for an inclusive process in which truth recovery and recognition, justice, healing, forgiveness and restoration of civic trust, building social solidarity and cohesion, each are subsumed and move in the same direction. Then there is perhaps no need to look at justice as a counterpoint to peace.

4. Impunity v Justice

Impunity is defined as "the impossibility, *de jure or de facto*, of bringing the perpetrators of violations to account-whether in criminal, civil, administrative or disciplinary proceedings-since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victim."[14]

As such impunity and justice are mutually opposing concepts. One is pushed to the back burner at the victory of the other. According to Diane Orentlicher[15], "impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."[16]

In countries ravaged by internal war impunity is a serious challenge due to the prevalence of violence at all level of society and incapacity of the state institutions to deal with them. Impunity also arises due to either the absence of law that proscribe certain behavior or the non-availability of appropriate recourse. Violence continues though in subtle form in the post conflict situation as well. How the state deals with impunity largely depends how the conflict ends or what strength it gets in the post conflict situation. Generally speaking, if peace is restored by military victory of one force over the other, the force in power uses the criminal justice mechanism but where the peace is the result of comprehensive peace agreement transitional justice instruments come into play.[17] These instruments are used in peace building largely because of the enormity and scale of violence where normal state instrumentalities such as the police, prosecution, the courts and the prison systems are either inactive or ineffective.

5. Transitional Justice

Societies in transition whether from autocracy to democracy or from conflict often lack strong, independent, and impartial institutions to do justice to citizens. Sometimes the issues of justice are so vast and varied that existing state institutions are either

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[13] *Id*, David Bloomfield *Id*, p. 60-61
[14] E/CN. 4/2005/102/Add. 1 definition
[15] Independent Expert appointed by the UN to update the Set of Principles to Combat Impunity. *See* E/CN. 4/2005/102/Add. 1
[16] *Id*, Principle 1
[17] Yasmin Sooka, *Dealing with the Past and Transitional Justice: Building Peace Through Accountability*, in SDC, DEALING WITH THE PAST AND TRANSITIONAL JUSTICE: CREATING CONDITIONS FOR PEACE, HUMAN RIGHTS AND THE RULE OF LAW, Conference paper 1/2006165-182, 170

incompetent or incapable of meeting these challenges. Many countries in post conflict situations have therefore used transitional justice measures which are much wider than the normal justice process. A tentative outline of transitional justice is given by the Secretary General in his report to Security Council, where transitional justice is said to comprise "the full range of process and mechanisms associated with a society's attempts to come to terms with the legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[18] These measures are both judicial and non-judicial engaging all state and non-state actors. Accountability is established by truth seeking and truth telling mechanism which is followed by investigation and prosecution, reparation, removal of the abusers and institutional reform to check reoccurrence. The approach here is holistic and each measures are connected, and move on the pathway leading towards reconciliation.

Transitional justice mechanisms are tailored by domestic need and try to meet the objectives outlined in domestic policy stipulations. They endeavor to address injustices of the past; consolidate peace, open space for peaceful resolution of disputes, instill faith of the people in the state; restore quickly the rule of law; prevent recurrence of conflict and finally secure sustainable justice for future.

Transitional justice initiatives owe much to international humanitarian and human rights law than domestic law. One can trace at least the following obligations of the state in international human rights and humanitarian law.

- First, states should unearth the truth, the whole truth about what happened. That is the right of the victims and society at large.[19]
- Second, states must investigate, prosecute, and eventually sanction.[20] A corollary to this is the positive obligation of the state to establish a competent system of justice capable of dealing with human rights abuses and crimes.[21]
- Third, states have a duty to provide equal access to justice, provide effective and prompt reparation for the harm suffered. [22]
- Fourth, states must cleanse or purge the military forces so that these crimes are not committed again.[23]
- Finally, states have the duty to promote, ensure respect for and implement international law, and ensure that their laws are compatible and consistent with and provide at least the same level of protection for victims as that required by their international obligations . [24]

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[18] UN Security Council "The ule of Law Report of the Secretary General", *Supra* note 1.

[19] Report of the Independent Expert to Update the Set of Principles to Combat Impunity E/CN/4/2005/102/Add. 1 Principle 2 states every people has the inalienable right to know the truth about past events ...; Principle 4 states; "Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate." *See* also A/RES/60/147 (21 March 2006), Principle III & V which among others defines victims as "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law."

[20] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Violations of the International Human Rights Law and Serious Violations of International Humanitarian Law, GA/Res/60/147 Principle 3

[21] Relevant in this regard are art 7, 10, of UDHR, art 2(3)(a)(b), 10, 14

[22] *Supra* note 20.

[23] *Id*.

[24] For this purpose they are required to incorporate norms of international into their domestic law, adopt appropriate procedures and measures that provide fair, effective and prompt access to justice, so as to ensure the same level of protection for victims as required by international law. *Id*.

5.1 Justice v Vengeance

Generally the initiatives to transitional justice mechanisms are taken up after the change of the regime. For this reason they are oftentimes erroneously understood as measures aimed at taking actions against former rulers or officials associated with them. As a matter of fact, transitional justice mechanism is based on the rule of law. This means that all persons, institutions and entities- public or private- are accountable to law. They derive their authority from law which are democratically enacted, publicly promulgated and are just, fair and reasonable. In that sense justice is an antithesis to vengeance. The justice mechanism adheres to the supremacy of law, equality before law, accountability to the law, fairness in the application of the law, independence of the judiciary, legal certainty, avoidance of arbitrariness and legal transparency.[25]

5.2 Right to Truth and Justice

Truth is the agreement of the mind with reality. Truth pertains to ideas which could be validated, corroborated and verified.[26]'Judgment needs to be made in ascertaining truth.[27] Defining truth Aristotle said; "To say what is that it is not, or of what is not that it is, is false, while to say what it is of that it is, and of what is not that is not, is true."[28] However, such a version of truth might not be acceptable to post modernists such as Michel Foucault according to whom 'truth' is a construct of political and economic forces that command majority of power within the societal web. He says, it is "a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements".[29] There can be dispute as to whether truth is a reality or a political or social construct, but it is a relative term. The claim about the truth could be proved or disproved by credible evidence the standard of which depends on whether the wrong is civil or criminal.

Justice is a right. Major international human rights instruments have recognized this right as a compendium of the following rights:

- The right to equality before laws and equal protection of laws; the right to equality before court and tribunals, [30]
- The right to an effective remedy for the violation of human rights,[31]
- The right to be treated with human dignity when deprived of liberty,[32]
- The right to a fair and public hearing by an independent and impartial court or tribunal and procedural rights to justice,[33]
- The right to be presumed innocent until proved guilty according to law in a public trial.[34]

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25 *See Supra* note 1, S/2004/616 para. 6.

26 Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction*, 88 INTERNATIONAL REVIEW OF THE RED CROSS (No 862) 245-273, 250 (2006) citing William James ESSAYS IN PRAGMATISM,160, (1948)

27 But a judgment is only said to be true when "it confirms to the external reality" said Thomas Aquinas; *See, Id* citing William James ESSAYS IN PRAGMATISM, 160, (1948)

28 *Id.* Citing Aristotle, Metaphysics, 1011b25

29 *Id.* He further maintains; "truth is linked to a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it.
Quoting and citing Foucault in fn 23, 23.

30 UDHR art 7, ICCPR art 14(1)

31 ICCPR art 2(3)(a),

32 ICCPR art 10

33 UDHR art 10, ICCPR 2(3)(b), art 14

34 ICCPR art 14

One of the major objectives of the transitional justice mechanism is unearthing of truth from among denied or contested versions and situations. Recovery of truth is necessary not only for meeting out justice in the criminal process by segregating guilt from innocence, or fighting against impunity or deterring or preventing future violations[35] but also for publicly unburdening the grief of the survivors, and dependents of the tortured, the wounded, the maimed and the dead. It is also necessary for preparing a common narrative of what happened in the conflict, how were the victims wronged, in order to uphold their rights and to draw out reparation measures, remove human rights abusers from the scene, and ultimately secure reconciliation in the society.[36] The revelation of truth assists the reintegration of victims into their communities and facilitates the establishment of *status quo ante* position. Truth could be revealed through under-oath statement of the perpetrator, or the victim, factual or forensic recovery or other circumstantial evidence or narratives and therefore take visual, aural or artistic forms such as photograph, maps or other sketches. Recovery of truth provides a basis for non-prosecution, and amnesty-for truth or "use immunity" situations.

Since transitional justice process takes a victim centered approach what rights do victims have with regard to truth is a pertinent question. This right arises when another rights guaranteed is not respected, and is said to be violated when the information is not provided by concerned authorities.[37] The right to truth may be respected by disclosing report of investigation or other facts contained in public documents and by conducting public trials.

5.2.1 Right to Truth under International Law

The right to truth has not been clearly recognized in any international hard law instruments nor has it been established as a customary right or its contours been clearly fixed. However, overtime it is emerging as a legal concept in various settings under different guises. For instance, an implicit recognition of this right can be traced in international humanitarian law in the form of the right of the families to know the fate of their relatives.[38] The ICRC has confirmed it to be a rule of customary law applicable in both international and non-international conflicts.[39]

Under the international human rights law, the right to truth is studied from the point of view of an emergent right as well as a concomitant of several other rights such as the right to justice, the right against torture, the right to information etc. Various

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[35] It is said that by exposing truth societies are able to prevent the recurrence of similar events, knowing truth is said to be essential to heal rifts in communities.

[36] In Azanian Peoples Organization (Azapo) and Others v the President of the Republic of South Africa and Others, Ishmael Mohamed, took the view that the victims could reclaim the lost status through such a process. He observed; "The TRC Act seeks to address this massive problem by encouraging survivors and dependents of the tortured and the wounded, the maimed and the dead t unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what in truth happened to their loved ones, where and under what circumstances it happened, and who was responsible." *See* 8 BUTTERWORTH'S CONSTITUTIOAL LAW REPORTS/BCLR 1015(CC) (1996), available at www.doj.gov.za/trc/legal/azapo.htm (June 20, 2007).

[37] Yasmin Naqvi, *Supra* note 26, p. 249

[38] For instance, under art 32 and 33 of the Additional Protocol I of the Geneva Convention 1949 parties to armed conflict are called upon to search for persons who have been reported as missing.

[39] *See* Rule 117 in ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Vol. 1) (Cambridge Univ. Press, 2005), p. 421.

international human rights institutions[40] have recognized this right and enshrined it as a guiding principle in numerous instruments setting up truth and reconciliation commissions as well as in national legislations.[41] Similarly, it is also appearing in a more concrete form in soft law instruments on human rights. For instance, UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of human rights law and serious violation of IHL recognizes the right of the victim to access relevant information concerning violence for "the verification of facts and full and public disclosure of truth".[42] They are also entitled to search for whereabouts of the disappeared, identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies.[43] Thus, the right of the victim or their families to know the truth about the circumstances in which violation of their rights took place is emerging as imprescriptible right. The right to truth about past event is not only a right of the victim or their family members, but in case of heinous crimes, it is emerging as "inalienable right" of the people at large, as such right provides a vital safeguard against impunity and recurrence of violations.

As mentioned earlier, the right to truth is also considered as complementary to several rights guaranteed by international human rights instruments such as the right to justice, right against torture,[44] the right to protection of families,[45] the right of the child to family relations.[46] The Human Rights Committee in several of its communications and reports recognized the right to know as a way to end or prevent the reoccurrence of psychological torture of families of victims of enforced disappearance,[47] an obligation of the state party to provide effective remedy in case of violation or, in case of death, right to know the exact condition of death including the location of the burial site.[48]

Another right, on which the right to know the truth could be based, is the right to information. This right is by and large entrenched in both domestic as well as international

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[40] For instance, the Inter-American Commission on Human Rights and Court of Human Rights, UN Working Group on Enforced or Involuntary Disappearance and the UN Human Rights Committee draw upon the right to know the truth to uphold and vindicate other rights such as the right of access to justice and the right to an effective remedy and reparation. *See* First Report of the Working Group on Enforced or Involuntary Disappearance to the Commission on Human Rights", UN Doc.E/CN.4/1435, 22 Jan. 1981 para. 187; *See* also Inter-American Commission, Report No 136/99, 22 Dec 1999 para. 221

[41] *See* Yasmin Naqvi, *Supra* note 26, p. 255.

[42] *See* A/RES/60147, 21 March 2006 Principle para. 22(b)

[43] *See* Basic Principle and Guidelines on the Right to a Remedy and Reparation for the Victim of Gross Violation of International Human Rights and Serious Violations of Humanitarian Law, A/RES/60/147 21 March, 2006 Principle IX para. 22 *See* also CHR Res 2005, 19 April 2005 ECOSOC Res 2005/35, 25 July 2005 Principle 22(b) and Principle 24 ...It further provides that "victims and their representatives should be entitled to *See*k and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violation of international humanitarian law and to learn the truth in regard to these violations." *See* also Report of the Independent Expert (Diane Orentlicher) to Update the Set of Principles to combat Impunity E/CN4/2004/102/Add.1 8 February 2005, Principle 4

[44] ICCPR, art 7.

[45] ICCPR, art 23

[46] CRC, art 8 & 9

[47] UN Doc. CCPR/C/38/D/343/1988 (Appendix); *See* also, *inter alia*, Views of 16 July 2003, *Sarma. Sri Lanka case*, Communication No 950/2000, UN Doc. CCPR/C/77/D887/1999, para.9.7; "Concluding observation of the Human Rights Committee: Algeria", UN Doc. CCPR/C/79/Add.95, of 18 August 1998, para. 10; and "Concluding observation of the Human Rights Committee: Uruguay, UN Doc. CCPR/79/Add.90, of 8 April 1998 para. C.

[48] *Id.*, para 11; Views adopted on 30 March 2005, *Khalilova v Tajikistan* case, Communication No 973/2001, UN Doc. CCPR/C/83/D/973/2001; and views adopted on 16 Nov. 2005, *Valichon Aliboev v Tajikistan* case, Communication No. 985/2001, UN Doc. CCPR/C/85/D/985/2001; the right to truth is also inferred as part of the right to be free from torture or ill treatment, the right to an effective remedy and the right to an effective investigation and to be informed of the results by the European Court of Human Rights

laws.[49] However, it is not a non-derogable right like the right to life or the right against torture. The claw back clauses restrain this right. This right could be restricted for the purpose of protecting the reputation or the right of others or to protecting national security, public order, public health or morals.[50] Then the question arises whether the right to truth could be denied even in situation of alleged violation of humanitarian law or gross violation of human rights on any grounds mentioned above. The answer to this is an emphatic no, for an affirmative interpretation would water down non-derogable rights such as the right against torture, the right to life and the right to justice.

The right to know the truth has also been inferred as a concomitant to several aspects of the right to justice by regional human rights organizations and courts. For instance, the European Court of Human Rights has inferred this right as part of the right to be free from torture or ill treatment, the right to an effective remedy and the right to an effective investigation and to be informed of the results.[51] Similarly, the court has also held that a state's failure to conduct effective investigation "aimed at clarifying the whereabouts and fate" of "missing persons who disappeared in life-threatening circumstances" would constitute violation of its obligation to protect the right to life.[52] The African Commission on Human Rights and Peoples' Rights has followed a similar approach to that of the European Court of Human Rights. [53] The Inter-American Commission on Human Rights goes a step further in explicating the state party's obligation to "guarantee the full and free exercise of the rights" takes the view that ensuring the right for the future requires a society to learn from the abuses of the past. It, therefore, views the right to know the truth both as an individual right of the victim, and family and the society at large.[54]

5.3 Right to Truth v Amnesty

The word "amnesty" like "amnesia" has a Greek origin where it means "forgetfulness" or "oblivion". Amnesty generally refers to prospectively barring criminal prosecution of a person or class of persons for a particular set of actions or events. Amnesty is an official act based on legal power generally exercised by the executive wing of the state. It can be contrasted with pardon, which most often than not is a post conviction indemnification of criminal responsibility. Pardon exempts from serving all or part of their sentence but does not expunge the conviction. Amnesties can be blanket or partial and be both *de jure* and *de facto*. In the former case, amnesties are granted either passing a special law or invoking an existing provision of law whereas in the latter they come into existence by simply not prosecuting the accused. Amnesties can be both blanket and partial. Blanket amnesty refers to all types of offences committed within a given period of time. But a partial

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[49] For instance, *See* NEP. INTERIM CONST. 2006, art 27 which guarantees every citizen the right to s eek and acquire information on matters of "personal or public concern". This is an improvement on art 16 of NEP. CONST. 1990 under which information could be sought only on matters of "public concern". In countries where the right to information is not clearly guaranteed, it is interpreted as constitutive right to speech and expression.

[50] ICCPR, art 19

[51] *See inter alia*, Judgment of 25 May 1998, *Kurt v Turkey*, Application No 24276/94; Judgment of 14 Nov 2000, *Tas v Turke*y, Application No 24396/94; and Judgment of 10 May 2001, *Cyprus v Turkey*, Application No 25781/94.

[52] *See* Judgment of 10 May 2001, *Cyprus v Turkey*, Application No 25781/94, para. 136; *See also*, *inter alia* Judgment of 18-12-96, *Askoy v Turkey*, application No 21987/93; and Judgment of 28 March 2000, *Kaya v Turkey*, Application No. 22535/93.

[53] *See Amnesty International v Sudan*, Communications No 48/90, 50/91, 52/91, 89/93 (1999), para. 54.

[54] *See* Annual Report of the Inter-American Court of Human Rights, 1985-1986, OEA/Ser. L/V/II.68, Doc.8 rev 1, of 28 Sept 1986.

amnesty is limited to specific crimes or events.[55] Then there are other types such as self-amnesties, and post transition amnesties. The former generally occur in the case of regime change, where the outgoing power-holders through amnesty orders or agreements try to deny the government to be to choose its own course to justice and accountability.[56]

Truth and amnesty have rather enigmatic relations especially in the context of transitional justice. People supporting amnesties view it as helping the revelation of truth. They claim that people will be prepared to tell the truth only if it does not bite them. Hostilities do not come to an end unless some sort of amnesty is granted on the warring side by the party on power. Too much emphasis on opening wound, according to this view could perpetuate vengeance and even jeopardize reconciliation. "Don't disturb the dragon on the Patio", comes another saintly advice. The society cannot move on and achieve reconciliation if it relishes to willow in the sludge of the past, others say.

Even though there is merit in these assertions cautions should be taken in accepting them as whole truth. As such, forgiveness is not opposed to justice, especially if it is not punitive but restorative. Here, justice does not seek primarily to punish the perpetrator but looks to heal a breach, to restore a social equilibrium that the atrocity or misdeed has disturbed.[57] The surest road to peace and reconciliation is justice and unearthing of truth is a precondition of the same. Where amnesties exclude the possibility of bringing to trial, the perpetrators of serious violations of human rights, one of the most commonly implemented means of finding out the truth is frustrated. Suppression of justice for convenience bridles impunity. Amnesty is a suspect in that regard. If amnesty impedes or erodes the right of the victims to a fair and effective remedy, or significantly impinges on other fundamental rights, or if it abnegates the state's international obligations, then it cannot be accepted.[58]

The reconciling effect of amnesty is also questioned. There is also no guarantee that amnesty that condones violence prevents future recurrence of crime of human rights abuses. Rather the reverse has been proved true in many cases. Amnesty has the proclivity of breeding impunity.

Caution against amnesty should also be taken from the perspective of international obligation of the state. Amnesty is not wholly a domestic affair.[59] International

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[55] Laura M Olson, *Provoking The Dragon On The Patio Matters Of Transitional Justice: Penal Repression v Amnesties*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 862, pp 275-294, 283.

[56] These types of amnesties are looked upon with great suspicion as they allow the perpetrator to be judges in their own cases, thus influencing the course of justice.

[57] *See* "*Are We Ready to Forgive"* Desmond Tutu interviewed by Anne A. Simpkinson, 2001 available at http://www.beliefnet.com/story/88/story_8880_1.html#cont. (Apr 21, 2007)

[58] It would however be a mistake to say that international law does not allow amnesty. For instance, S 6(5) of the Additional Protocol II to the Geneva Convention calls for "broadest possible amnesty" after non-international armed conflict.

[59] Even though a couple of countries facing conflict situations such as Argentina, Uruguay, Chile, Brazil, Peru, Guatemala, El Salvador, Honduras, Nicaragua, Haiti, Ivory Coast, Angola and Tongo in the last decade passed broad amnesty laws, the international law position has not been changed. *See* Laura..., p. 288.

law abhors blanket amnesty, especially the amnesty to the gross violation of human rights and serious violation of international humanitarian law.[60]

Amnesties that prevent the truth from coming out by blocking investigations and preventing those responsible for violations from being identified and prosecuted have been ruled to be invalid under international law.[61] Amnesty and other measures of clemency are recommended to be kept under the following bounds.[62]

- Amnesty could follow investigations only after ensuring that those responsible for serious crimes under international law prosecuted, tried and duly punished;
- Amnesties and other measures are without effect to victims' right to reparation or prejudice their right to know;
- Person who has been granted amnesty has the right to refuse it and request for retrial...if he has not been fairly tried.

Amnesty prior to investigation is frowned upon because it contributes to the perpetuation of impunity. Especially note worthy in this regard is the approach of the U.N. Human Rights Committee on blanket amnesties. It states:

"...amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines the efforts to establish respect for human rights, contributes to an atmosphere of impunity among the perpetrators of human rights violations."[63]

The argument that amnesty laws are necessary for reconciliation or for mending social divisions may falsely assume that there are no other means to do so.[64] The truth seeking mechanism does not in all cases warrant prosecution. Administrative mechanisms, vetting and lustrations as well as other legal and institutional reforms which spring from truth seeking, may equally be effective. Therefore, zeroing amnesty to disclosure of information, justice and national reconciliation need to be seriously considered.[65] Such an approach could make decisions on amnesties more accountable.[66] Caution should be taken against taking amnesties for political expediencies or shaking the faith on the rule of law and dignity of human person.

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60 Crimes such as war crimes, crimes against humanity or genocides, tortures, apartheid, extrajudicial killing, rape, terrorism etc fall in this category. As with IHL a number of international treaties oblige a state to prosecute or extradite persons accused of acts prescribed in the treaty with varying degree of universality of jurisdictions. A number of international conventions can be referred in this context. *See* for instance, the 1930 Convention Concerning Forced Labor and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide require states parties to punish individuals for crimes committee in their territory. The 1999 Convention for the Suppression of the Financing of Terrorism requires states parties to punish or extradite individuals for crimes committed on their territory or by their nationals. The 1979 International Convention against the Taking of Hostages, the 1984 Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment and the 1994 Inter- American Convention on Forced Disappearance of Persons require states parties to extradite or prosecute offenders for crimes committed anywhere. The 1956 Slavery Convention and the 1973 Convention on the Suppression and Punishment of the Crime of apartheid appear the strongest, in that they require state parties to prosecute, without the choice of extraditing, for crimes committed anywhere. The 1998 Rome Statute of ICC establishes jurisdiction over genocide, war crimes and crimes against humanity, including the crime of apartheid, thereby inferring a duty to prosecute these crimes on the part of the states parties who wish to take advantage of the complementary regimes.

61 *See Garay Hermonsilla et al. v Chile*, Case 10.843, Report No. 36/96, Inter-Am, CHR, OEA/Ser. L/V/II. 95 Doc. 7 rev. at 156(1997)

62 Draft Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, E/CN.4/2005/102/Add.1 Principle 19 & 24

63 Human Rights Committee, "*Preliminary Observations on Peru",* para. 9, U.N. Doc. CCPR/C/79/Add.67 (1996).

64 *See* John Dugard, "*Is the Truth and Reconciliation Process compatible with International Law? An Unanswered Question*" 13 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 258, 267 (1997)

65 Amnesties that are tied to disclosure of information about violation and even acceptance of guilt, readiness to pay compensation as was the case in South Africa are facilitative of the transitional justice objectives.

66 In fact the term "accountable amnesty" is emerging as a novel concept in international law. *See* Ronald C Syle, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?* 43 VIRG. J. INT'L LAW 173, 245 (1999)

The right to truth is an important component of the right to justice. Denial of truth may amount to denial of justice. As justice is one of the three pillars of transitional justice, amnesty to the extent it prevents truth seeking or victims' right to reparation should be discouraged, but to the extent it promotes restorative justice either through individual reparation measures or through collective measures of apologies or commemoration should be encouraged.

6. Transitional Justice and Reparation

Reparation is one of the less contentious issues in transitional justice discourse. Reparation is an inclusive term used to include, restitution, compensation, rehabilitation, satisfaction and even guarantee of non-repetition.[67] As such repairing of harms is part and parcel of all established legal systems. Reparations in criminal laws are drawn also on the premise that perpetrator should not enjoy the spoils of crimes.

The basic objective of reparation at an individual level is *restitutio in integrum*, full restitution, the restoration of the *status quo ante*, and where this is not possible provide compensation in proportion to harm.[68] At the social level especially in the context of serious crimes, reparation measures embrace larger objectives such as reduction of social disharmony, fostering of trust, and promotion of social reconstruction and cohesion.

There are basically two factors that need to be considered with regard to reparation. The state is primarily responsible for repairing wrong where the sufferings of the victims result from the acts or omissions that can be attributed to the state. But where they result from acts or omissions of a person, legal person or other entity, such person or entity is primarily responsible to provide reparation. Here, the state steps in only where such person or entity is unwilling or unable to meet its obligation or the real offender has not been identified.[69] This is probably because the right to effective remedy is a non-derogable right and cannot be cribbed and cabined upon the identification of the offender.

It is argued that reparation should not be a payment in exchange of silence or acquiescence of victims and their families nor should it be contingent upon identification of the offender. Instead, it should enable beneficiaries to think that the state is trustworthy and is taking their well-being seriously. Reparation measures should be designed in such a way that they help to rekindle trust and faith in the state. Trust is both a condition and a consequence of justice. A properly designed reparation scheme contributes to justice as victims are encouraged to report crimes to authorities. Reparation measures should, therefore, cohere with other justice initiatives including criminal prosecutions, truth-telling, and institutional reforms.

The UN Basic Principles stress that reparation measures should be adequate, effective and prompt and intended to promote justice. They should also be proportional to

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[67] *See* Basic Principles and Guidelines on the Right to a remedy and Reparation for Victims of Gross Violations of Int'l Hrt. Law and Serious Violations of IHL A/RES/60/147 Principle IX

[68] Pablo de Greiff, *Reparations and the Role of International Cooperation*, in SDC, DEALING WITH THE PAST AND TRANSITIONAL JUSTICE: CREATING CONDITIONS FOR PEACE, HUMAN RIGHTS AND THE RULE OF LAW, conference paper 1/2006 Dealing with the Past- Series pp. 40-56, 51

[69] This seems to be the scheme of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims...A/RES/60/147 Principle IX

the gravity of the violations and the harms suffered. As mentioned before, reparation in the context of gross violation of human rights and serious violation of humanitarian law keeps a very broad promise and includes the following:

- *Restitution*
  - Includes restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- *Compensation*
  - Includes economically assessable damage for physical harm, lost opportunities, material damages and loss of earnings, moral damage, costs required for legal or expert assistance and treatments
- *Rehabilitation*
  - Include medical and psychological care as well as legal and social service, resettlement, transition and assistance to regain economic life.
- *Satisfaction*
  - Include measures aimed at cessation of continuing violations, public disclosure of truth, search for the whereabouts of the disappeared, identity of children abducted and killed, assistance in the recovery, identification and reburial of the bodies, restoration of dignity, the reputation and the rights of victims, public apology, judicial and administrative sanctions against perpetrators, commemorations and tributes, inclusion of the accounts in education and educative materials,
- *Guarantee of non-repetition*
  - Include measures such as effective civilian control of military and security forces, abidance to due process, fairness and impartiality in civilian and military proceeding, strengthening the independence of the judiciary, protection of human rights defenders and other professionals, priority to human rights and humanitarian law education, observance to code of conduct and ethical norms by public servants and law enforcement officers, mechanism for conflict resolutions, legal reforms to proscribe human rights violation.

The transitional justice literature emphasizes that reparation measures should be complete. A well designed reparation program contributes to justice precisely because reparations constitute a form of recognition- the materialization of the recognition that citizens owe to those whose fundamental rights have been violated.[70] Special care should be taken not just in implementing effective outreach measures to publicize the existence of the programs. Victims should also be involved in the design and implementation of reparation programs. Great attention should be paid to the rights, interests and concerns of the groups of victims who are traditionally marginalized such as the minorities and *dalits*. Programs of reparations should also cohere with social investment plan.

A question generally arises as to the design, funding and implementation of reparation measures. Is reparation an international or local concern? International community takes the view that reparation is a domestic affair. Given the enormity of

[70] Yasmin Sooka, *Supra* note 17, p 320 (citing Pablo de Grieff)

violence and scanty resources that conflict ridden countries have at their disposal it is a very tall order that they alone can meet. Therefore it should be a matter of shared responsibility. It is true that the focus of international community should be primarily on reconstruction of destroyed infrastructure and life, but leaving reparation to domestic discretion and resources would many a times mean perpetuation of injustice to the victims.

7. Transitional Justice and Prosecution

Prosecution is one important component much desired by victims in the transitional justice strategy. Why prosecute? The obvious answer is deterrence. It is the most effective insurance against future recurrence. By bringing out the truth about past violations and punishing the offender they deter future offenders.[71] Prosecution helps the society to demonstrate how much importance it attaches to the legal norms that prohibit serious offences.

Rationale for prosecutions of massive human rights violations is to convey to citizens a disapproval of violations and support for certain democratic values. A strong expression of formal disapproval by State institutions can help to persuade citizens as well as institutions of the centrality of those values. Trials can help draw the distinction between conduct that is condoned and conduct that is condemned by the State, which contributes to the public's trust in State institutions.

Prosecution comprises the retributive element actuated through criminal trials. This is not to say that prosecutions leading to punishment should forget rehabilitative goals. Prosecutions are aimed at moving a society beyond impunity and a legacy of human rights abuses. Generally speaking prosecution is supposed to have the effect of separating collective guilt from individual guilt. It removes the stigma of historic misdeeds from the innocent members of the party or group that may otherwise be collectively blamed for the atrocities committed on other communities and people.[72] But prosecution does not handle systemic injustice or address violence committed by regime, the misdeeds of repressive regime, actions or inactions of its instrumentalities including the judiciary nor does it advance proposals for institutional reforms.

In a situation where conflict ends with comprehensive peace agreement that opens access to and sharing power with the insurgents, the decision to prosecute those involved in the conflict is not an easy decision. Where those involved in the conflict feel threatened with and targeted by such decisions if such groups come to power they always try to avoid prosecution that puts them to the dock. In such situations the threat that prosecution might impose such as breaking of the peace process are overblown to the extent of demanding blanket amnesty. While the challenge of de-politicization of criminal trial and abidance of fair trial norms is a *sine-qua-non* of an effective transitional justice process, the fear of relapse however does not exonerate the state from abiding by its international obligations. International law is clear on the issue that states need to either

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[71] Diane E. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. (1991) PP 2537, 2542.

[72] Juan E. Mendez, *Accountability for Past Abused*, 19 HUMAN RIGHTS QUARTERLY (1997) PP 255, 274

extradite or prosecute the perpetrator involved in gross violation of international human rights law and serious violation of international humanitarian laws. Serious crimes under IHL are crimes against humanity, war crimes and genocide (also called as system crimes), originally enshrined in the Geneva Conventions and Protocols, and later taken up by the Treaty of Rome 1998. The Rome Treaty which aims at checking impunity gives an inclusive definition of these crimes.[73] The jurisdiction of the International Criminal Courts can be invoked if the domestic courts are either incapable or unwilling to provide justice to the victims or shield the perpetrator through sham prosecutions. Other crimes that are proscribed are torture, extrajudicial killings, disappearance, rape, slavery, apartheid etc. These crimes constitute the gross violations of human rights.

Except in matters pertaining to system crimes and gross violation of human rights states can exercise sovereign authority with regard to prosecution or non-prosecution. They need to make a balance between deterrent and restorative objectives of justice by attaching due priority to society's goal of reconciliation. This is also because the role of justice in situation of transition is different from other times. It needs to assist conflict transformation and peace building efforts by creating appropriate strategies. Too little or too much emphasis on prosecution could therefore be not much productive.

When the gravity of the situation demands prosecution, there are a number of other decisions that a state (in confidence of the victims) needs to take such as whom to prosecute, how to prosecute and where to prosecute so as to ensure the independence, accountability, fairness and effectiveness of the justice process.

The decision on who to prosecution is made by looking at the overall objective such a decision would serve. The critical question here is whether it is the big fish who ordered the violation or the persons who pulled the trigger. Too much concentration on the former, as it allows many perpetrators go free, may look arbitrary and be against the principle of equality before law.[74] Similarly, the focus on trigger pullers might be construed as scapegoating and in some situations cause docket congestion or be even beyond the capacity of normal judicial process.[75] Therefore, decisions on prosecutions need to be made keeping in mind the gravity of offence, the right of the victims, concerns of the society and over and above, all three components of transitional justice objectives- peace justice and reconciliation.

Where only a few perpetrators can be prosecuted creates challenges of what to do with the remaining perpetrators (and their victims). But non-prosecution should not mean that they should escape any form of accountability. Efforts should always be made to bridge the impunity gap. Other measures such as vetting or lustration could used to deal with other perpetrators or such peoples could be involved in community reconciliation schemes.[76]

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73 *See* Rome Statute of ICC 1998 S 5, 6, 7, 8

74 For instance, in Sierra Leone restricted prosecution to high-level perpetrators in its statute of the Special Court

75 One example comes from Rwanda, where approximately 120,000 individuals were detained in connection with the 1994 genocide. If it has been estimated that Rwandan national courts and the International Criminal Tribunal in Rwanda (ICTR) would need at least 100 years to try them all. In order to alleviate the situation, the Rwandan government set up *gacaca,* an alternative system of transitional justice using participatory and proximity justice whereby individuals from the communities act as "people's judges". The *gacaca* sticks to the categorization of the accused according to the degree of gravity of their crime. *See* Laura M Olson, *supra* note 55 at p 293.

76 For example, thousands of military and civil servants not prosecuted in Greece in 1974 were subject to a far-reaching vetting process. In Timor Leste – low level perpetrators were subjected to community reconciliation processes and may be required to perform community service.

With regard to how and where to prosecute, the transitional justice literature indicates the possibility of creation of retro-active laws. This is what the framers of the Interim Constitution of Nepal attempted to do by inserting a provision which provided for retro-active laws on crime against humanity and war crimes.[77] It created a kind of a ripple in the legal community as the community was not much aware about such possibility under international law.[78] The deletion of the provision that allowed the enactment of retro-active laws in the final text owes more to the unawareness and unfamiliarity that gave a chip to the leaders to take decisions political convenience. But now with the Supreme Court decision issuing directives to the government to bring out law on disappearance, the trial of perpetrators under such law seems possible.[79] Given that Nepali criminal law is of feudal vintage and thus very incomplete and archaic, unless a robust legal framework is in place, it will be difficult to prosecute many perpetrators or meet needs and concerns of the victims.

Decision on the venue, jurisdiction and applicable law on prosecution basically depends on local competence. So long as there is local capacity to do effective justice, international law refrains from intervention. The transitional justice literature advances at least five guiding considerations for prosecutorial initiatives[80]. They are:

- Clear political commitment;[81]
- Clear strategy[82]
- Necessary capacity and technical ability[83]
- Particular attention to victims[84]
- Relevant law and trial management skills[85]

There are as many as four types of prosecution strategies that could be embraced in post-conflict situations. The first is domestic trial under normal or special law. A subtype of domestic trial is the establishment of special court outside the domestic legal system as was the case in Sierra Leone.[86] Second is the creation of hybrid tribunals which work in-situ and under special law. Third is the creation of ad hoc tribunals such as those created for former Yugoslavia and Rawanda- both created under the security council mandates. The fourth is the prosecution in the international criminal court. What type of system that a

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77 *See* NEP. INTERIM CONST. 2007 (draft), art 24.

78 *See* ICCPR, art 15(2) which allows retrospective laws to sanction acts which were "criminal according to the general principles of law recognized by the community of nations". Crimes under IHL such as war crimes, genocide, crimes against humanity, and other crimes such as torture, murder, rape, enforced disappearance, slavery and apartheid come under this category.

79 *See Rajendra P Dhakal* v. *Government of Nepal, Ministry of Home, Singh Durbar, Kathmandu and Others*, Writ No 3575 for the year of 2055 BS, (SC 2063.2.18) (2007 AD).

80 UNOHCHR, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: PROSECUTION INITIATIVES, New York 2006, p. 2

81 Initiatives should be underpinned by a *clear political commitment* to accountability that understands the complex goals involved. Policy makers can depoliticize the pursuit of justice by discussing accountability in a manner that respects the presumption of innocence, does not detract from fairness or the appearance of fairness, and reflects an understanding of the complex goals that such a policy seeks to achieve.

82 Initiatives should have *a clear strategy* that addresses the challenges of a large universe of cases, many suspects, limited resources and competing demands

83 Initiatives should be endowed with *the necessary capacity and technical ability* to investigate and prosecute the crimes in question, understanding their complexity and the need for specialized approaches.

84 Initiatives should *pay particular attention to victims*, ensuring (as far as possible) their meaningful participation, and ensure adequate protection of witnesses.

85 Initiatives should be executed with a clear understanding of the *relevant law* and an appreciation of *trial management skills*, as well as a strong commitment to due process

86 In Sierra Leone, this resulted in the establishment of the Special Court, which sits outside of the domestic legal system and is governed by its own Statute and Rules of Procedure and Evidence. A recent model is the War Crimes Chamber in Bosnia and Herzegovina, which became operational in 2005. This Chamber was established through a combination of international agreements and domestic legislation and the international component is due to be phased out over a number of years. *See* UNOHCHR, RULE OF LAW, *Supra* note 80, p. 30

country adopts is a domestic choice dependent on domestic resources and its capacity to convince the international community about its capacity and commitments in the Nepali scenario the first and the second possibilities are discussed.

8. Transitional Justice and Reconciliation

Reconciliation is the third important component of transitional justice. It is attempted through the pursuit of accountability, truth and reparation, the preservation of peace, the building of democracy and the rule of law.

Reconciliation process is often termed as complex, ambiguous, subjective and contextual. Every one who is a party to the conflict tries to give the most convenient interpretation of reconciliation. Reconciliation is often invoked to justify a lack of accountability for human rights violations to put the past under the rug or as a pretext to avoid political destabilization. "The problem with 'reconciliation' is not that it is devoid of content; the problem is instead that reconciliation is such an intuitively accessible concept that everyone is able to imbue it with his or her own distinct understanding"; said James Gibson.[87]

As such reconciliation entails an end to antagonism, forgiveness, healing and repair of valuable relationships and a mutual conciliatory accommodation between antagonistic or formerly antagonistic persons or groups. The promotion of societal cooperation, peaceful coexistence, acknowledgement of the past, the building of sustainable democracy, promotion of a human rights culture, rekindling of trust in institutions, the building of a shared future are some of the substantive components of reconciliation.

Reconciliation needs to be understood at individual, societal and national level meaning reconciliation between individuals, within or between groups or communities, and at a national or international level. While at the individual level and at the societal level forgiveness and healing up of the wound have a direct bearing, at the national level, other factors such as democracy and economic development should go hand in hand with reconciliation process.

Reconciliation is achieved through a long, slow, arduous and at times tedious and even frustrating process through the participations of all actors both state and non-state. For this cessation of hostilities is the first precondition for transitional justice measures. The brutalities and violence sometimes make one skeptic about the usefulness of the whole initiatives.[88] It seems to require some form of action or shift of position to bring about transformation. There is no consensus on what facilitates or is necessary for reconciliation. There is no single path to reconciliation or a single correct way to devise such a process. There is no standard recipe for success. Different countries have taken varying approaches to the issue of reconciliation. Therefore, a road map for reconciliation prepared through widest possible consultation is essential for facilitating transitional justice initiatives.

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[87] James Gibson cited in presentation by ICTJ in Kathmandu in Dec 2006.

[88] "Reconciliation by whom? After someone takes away your daughter, tortures her, disappears her, and then denies having ever done it-would you ever want to "reconcile" with those responsible- would you ever want to reconcile with those responsible? That word makes no sense here. The political discourse on reconciliation is immoral, because it denies the reality of what people experienced. It is not reasonable to expect people to reconcile after what happened here" Chilean Journalist Hoarcio Verbitsky cited in Yasmin Sooka supra note 17 at p 322

9. Transitional Justice Mechanisms: Comparative Experience

Many conflict ridden countries have developed suitable models of transitional justice for themselves. The most fundamental issue in the development of transitional justice mechanism is the holistic approach, suitable strategy and an agreed road map that operationalizes individual activities. The components of transitional justice mechanisms in comparative setting are:

- Truth and Reconciliation Commissions
- Commissions of Inquiry
- Criminal proceedings
- Alternative/community based proceedings
- Reparations,
- Vetting
- Reconciliation measures
- Institutional Reforms

9.1 Truth and Reconciliation Commission

The Truth and Reconciliation Commissions (TRC) are one part of the transitional justice component created by the peace agreement to reveal denied or contested truth about what happened during the conflict, and in doing so bring the voices and stories of victims, often hidden from public view.[89] Truth Commissions are defined as "official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years."[90] TRCs conduct investigation and research, public hearing and submit report identifying corrective mechanisms. Unlike inquiry commissions, TRC cover all serious crimes and human rights violations committed over a specific period of time say from the beginning of conflict to the signing of peace accord. TRCs do not replace the need for prosecutions, they do offer some form of accounting for the past, and have thus been of particular interest in situations where prosecutions for massive crimes are impossible or unlikely- owing to either a lack of capacity of the judicial system or a *de facto* or *de jure* amnesty. TRC may also strengthen any prosecutions that do take place in the future. Over 20 conflict ridden countries of Asia, Europe, Africa and Latin America including countries Argentina, Chile, South Africa, Peru, Ghana, Morocco, El Salvador, Guatemala. Timor-Leste, Sierra Leone, Liberia etc. have constituted TRCs with varying mandate to address large scale violations. Diverse UN agencies such as the Security Council, OHCHR, UNDP are involved in the creation of TRCs and other transitional justice mechanisms. [91]

9.2 Prosecutions

Prosecution in post conflict situation may be initiated either by the state organ as part of the normal procedure or as per the recommendation of TRCs or inquiry commissions.

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[89] UNOHCHR, RULE OF LAW TOOLS FOR POST CONFLICT STATES, Truth Commissions, United Nations 2006 (HR/PUB/06/1) at p 1

[90] *See* Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, E/CN.4 2005/102/Add.1

[91] *Id.*

Countries have adopted different models to conduct trials of the perpetrators involved in gross violations of human rights and serious violation of IHL. One of such measures is the creation of special tribunal or chambers under the domestic law within the country itself. But countries have gone for hybrid and international tribunals as well. The following table presents different types of trials conducted in a number of countries.

International	Hydrid (Mixed)
Ad hoc ICTY (Yugoslavia) YCTR (Rawanda) Permanent Int'l Criminal Court	Kosovo, E. Timor, Sierra Leone, Cambodia, Bosnia

9.3 Reparations

Reparation initiatives are either clubbed with truth seeking mechanism or launched independently under an agreed program. In some cases the TRCs are mandated to provide compensation as interim release package but they are not well suited to do that as it might skew the investigation itself.

The nature and types of reparation is designed to suit special situation of a country. For instance in Chile reparations were given for families of killed or disappeared only. They included cash payments to families[92], medical benefits[93], educational benefits to children[94], reinstatement and backdating of retirement pensions, and symbolic reparations.[95] Other countries have focused on other aspects such as creation of memorials etc.

9.4 Institutional Reforms

The purpose of institutional reform is to rebuild shattered institutions to ensure the rule of law, human rights and good governance and justice. Institutional reform entails a number of activities such as re-establishing police service, crime prevention, judicial development, legal education, prison reform, prosecutorial capacity, victim protection and support, civil society support, citizenship and identification regulation, and property dispute resolution are also undertaken in the transitional justice initiatives.

9.5 Vetting and Dismissals

Vetting entails a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary. The inclusion

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[92] This included monthly pension paid by check, amount: $481/month ($5,781/year) for lifetime (except for children of victim - to age 25). The total beneficiaries of the program were 4,886 and total cost to state entailed $13 million/year. Source: ICTJ presentation in Kathmandu **18-20 December 2006**

[93] Medical benefits included monthly medical allowance, calculated at 7% of the above pension. The total cost to state was $950,000/year. Besides, free access to special state counseling and medical program was also included in the medical benefit. Source ICTJ presentation in Kathmandu **18-20 December 2006**

[94] This included full coverage of tuition and expenses for university training until age 35. This program incurred the state $1.2 million/year. Source: ICTJ presentation in Kathmandu **18-20 December 2006**

[95] This included public commemoration in stadium where political prisoners had been detained and tortured. Names of victims were flashed on stadium's electronic scoreboard. A monument was in main graveyard in Santiago. Waiver of mandatory military service was granted for children of victims. Source: ICTJ presentation in Kathmandu **18-20 December 2006**

of due process element distinguishes vetting from purges. An opportunity to explain ones position is given before removal of the alleged perpetrator. Impartiality of the whole process is ensured in the vetting process. Vetting was implemented in a number of countries such as Bosnia Herzegovina, Kosovo, Timor-Leste, Liberia and now in Haiti.

10. Nepali Scenario and Recipe for TJ Mechanism

A number of factors such as the scale of violence, its impact on the victims and the society at large, the need to provide reparation measures, and over and above the need to stamp out impunity should guide the transitional justice process in Nepal. If we reflect upon what happened during the 11 year period of conflict the following stand over others:

- Death of 13,000 people
- Detention of 137 people for 18 months permanently handcuffed and blindfolded. Disappearance of 49 people from RNA Barrack, from December 2003.
- Doramba killings where 18 people shot dead many of them point blank
- Killing of labourers at work in Kotwada airport, in Kalikot district
- Madi killings in Chitwan where a bus was blown off killing 39 people and injuring scores of others
- Kidnapping, extortion, arsons
- Demolition of infrastructures
- Possession and destruction of property
- Extra-judicial killings
- Disappearance of hundreds of people.[96]
- Displacement, forced recruitments,

By any standard the conflict in Nepal is very colossal that calls for a comprehensive and holistic approach to peace, justice and reconciliation. This is perhaps the reason that the comprehensive peace agreement (CPA) with the Maoists[97] and later the Interim Constitution provided for similar responses in the form of creation of Truth and Reconciliation Commission and National Peace and Rehabilitation Commission and the State Restructuring Commission.[98] Later the Constitution, though feebly, confirmed it. The creation of a separate ministry for peace and reconstruction also confirms the importance attached to transitional justice measures. Even though political agenda is still in the fore front at the moment the agenda of peace, justice and reconciliation should go in tandem with it.

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[96] Different statistics are given by different organizations. While figure given by the Home Ministry (Baman Prasad Commission) is 602, the National Human Rights Commission gives the figure as 925 persons (645 disappeared by the state and 260 by the Maoists). The ICRC which earlier stated the figure as 812 now adds the number as 1042. See the news in Kantipur daily and Himalayan Times Aug 30, 2007. .

[97] On Nov 8, 2006 Seven Political Parties & Maoist signed an accord whereupon the Maoists agreed to come stop their violent campaign. This accord was endorsed by Nov 22, Comprehensive Peace Agreement between the Maoists and the government. The CPA in 5.2.4 states; "For the purpose of normalizing the unusual situation created by the conflict, for the reparation of victim and disappeared both the parties have agreed to establish National Peace and Rehabilitation Commission". Similarly in 5.2.5 it calls for the establishment of Truth and Reconciliation Commission In order to find out truth pertaining to the gross violation of human rights and humanitarian law and for creating an environment of peace and reconciliation in society. Similarly in 7.1.3 the parties to the agreement show their community to stamp out impunity.

[98] *Id.*

10.1 Draft TRC Bill

Very recently the government of Nepal through the Ministry of Peace and Reconstruction has circulated a draft Bill on TRC. This bill has been criticized, and rightly so, by the human rights and the donor community for several deficiencies. A couple of them are discussed below:

- The preamble states that the purpose of the TRC is to unravel truth only in "gross violation of human rights and crimes against humanity". One might argue that the bill has followed the constitutional prescription. The Constitution has set out the jurisdiction of TRC on matters "pertaining to cover the identification of truth in gross violations of human rights and crimes against humanity that occurred during the armed conflict and creation of reconciliation in society".[99] However, this mandate is incomplete because it does not cover other humanitarian crimes such as war crimes and genocides. There is a need that the mandate of the TRC is broad enough to cover all major crimes and abuses that have an impact on society. The causes of conflict or their fall out have guided countries while delineating mandate.[100]
- Selection of the Commissioners is another area which is much criticized. The draft Bill provides that the commissioners will be selected on the nomination of a three-member committee constituted on the consensus of political parties represented in the Legislature-Parliament.[101] This, in other words, means that the commissioners will be selected by the eight political parties that are in power. There is no representation of the human rights community, and civil society in the selection process. The Bill does not lay down criteria or qualification, nor does it provide for public hearing prior to their selection. Only an inclusive and widely representative TRC (this includes regional, gender, ethnic representation as well) can command the faith of the victim and other affected population.
- The draft Bill provides that the TRC will have no jurisdiction in matters that have been already decided as per the law.[102] Even though the right against double jeopardy is an old rule of common law, later entrenched in constitutions, it is a rule which should be taken with much circumspection, especially in cases where sham prosecutions and tainted acquittals take place. In recent times initiatives have been made several common law jurisdictions England, New Zealand and many states of Australia where provisions have been made for the re-opening of trail at the order of appellate courts.[103] Therefore, where cases are not properly investigated and tried, the TRC should not be barred to inquire into such cases.
- A serious problem comes from section 23 and 24 of the draft Bill where reconciliation is not only emphasized but is also made a precondition for getting

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[99] *See* NEP. INTERIM CONSTi 2007, art 33 (S).

[100] For instance, the TRC in Sierra Leone investigated human rights and IHL violations and violation of economic cultural and social rights. Similarly the TRC Liberia investigated "economic crimes such as exploitation of natural or public resource to perpetuate armed conflicts"; In Ghana the TRC studies 'illegal seizure of property" in Peru it investigated the violation of Civil and political rights. *See* UNOHCHR, RULE OF LAW TOOLS FOR POST CONFLICT STATES, Truth Commissions, United Nations 2006 (HR/PUB/06/1) fn 4, p. 9

[101] *See* the "Draft Bill on Truth and Reconciliation Commission Act 2064" (TRC Bill, henceforth) S. 4

[102] *Id* S. 15.

[103] *See* Ann Black Double Jeopardy Revisited: Why Several Common law Countries are Tinkering with One of the Law's Most Treasured Principles, (in this issue of the journal).

compensation.[104] The power to require for reconciliation is unrestrained irrespective of the gravity of the offence. Even in gross violation of human rights and crimes under humanitarian law, where the perpetrator and the victim have reconciled then the TRC cannot recommend for prosecution. This is a serious flaw.

- The most damaging is the provision relating to amnesty.[105] The TRC is empowered to recommend for amnesty even the cases of gross violation of human rights and crimes under humanitarian law, if it is found that such violations or crimes have occurred "in the course of fulfilling the duty" or "for achieving political objective". These two expressions have been carefully selected perhaps at the insistence of state security forces and the insurgents to obviate any situation where they could be dragged into prosecution. But this has created a situation where the justice component is likely to be seriously undermined.

Generally speaking the creation of appropriate legal framework for the TRC is an important work. Even though TRCs can be created by executive degree, given the situation of South Asia where policy do not get implemented easily and do not have the capacity to make power holders accountable. The law unlike the deficient draft bill that is circulated now, should set out its mandate boradly, the qualification of the commissioners, the power to grant amnesty or recommend prosecution[106] and even mandatory recommendations,[107] follow up procedures. Besides, it should also incorporate values such as public hearing, use immunity, confidentiality and evidentiary standards to be adopted in naming and recommending for prosecution. The linkage of the work with prosecution and preservation of archives are other important considerations that should be kept in mind while drafting the law on TRC. Given that previous inquiry commission reports such as the Mallik Commission and Rayamajhi Commission reports are not honestly implemented, caution should be taken so that the TRC report does not get consigned to oblivion.[108]

11. Challenges: Justice, Peace and Democracy

There are a number of challenges with regard to institutionalization of peace, justice and democracy in Nepal. A country of feudal vintage Nepal has long struggled to get the best constitution that stamped out inequality, exploitation, marginalization and promoted open and rights based plural, egalitarian society that abided by the rule of law and justice. The election to the Constituent Assembly might help the people to realize their dream. But the justice process should not be made hostage to political stalemate or machination. The agenda of justice should also get due importance and cohere with the political process.

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[104] *See* the views of Sandra Bedias, the acting representative of the OHCHR Nepal in Kathmandu Post on 13 August 2007, where she has taken the same view. She further states that "the Bill has inbuild coercive elements that unnecessarily put undue pressure on victims, and their families to accept the apology. The victims have to accept the apology. The incentive, in a country which poor , is significant. If you reconcile, you can compensate, if you don't you get nothing."

[105] Draft Bill S 25

[106] Except the South African TRC, the power of other TRCs is found to grant amnesty limited to crimes which do not amount to gross violations of human rights or crimes under IJL.

[107] The TRCs in El Salvador and Sierra Leone were granted power to make mandatory recommendations. *See* RULE OF LAW, *Supra* note 96, p. 13.

[108] The Supreme Court of Nepal in Rajendra Prasad Dhakal, has identified serious limitation of the Inquiry Commission Act and called for the enactment of a comprehensive Act. *See* decision dated June 1, 2007 (Writ no 3575)

Even though the commitment to establish a TRC and other transitional justice measures has not died down, forces that prioritize peace over justice seem to be trying to put the latter to the backburner. The justice agenda that found space in the peace agreement, and later in the draft constitution, got watered down when the interim constitution was promulgated.[109] Even the provision pertaining to TRC which should have gotten a place in the chapter on interim measures got relegated to Part IV of the constitution. This being so, the human rights community, both domestic and international, is lobbying for the justice agenda, an agenda.[110] They argue for a comprehensive TRC process that enjoys full political support and commitment and is created after the consultation with political actors, the victim population, the human rights community and the civil society. [111]

The selection of commissioners is another challenge. The Commissioners should be persons of high integrity, social respect, neutrality, independence and commitment to human rights.[112] Regional, ethnic, gender representation are other considerations. Given the advantage of local ownership and the cost, the TRC should as far as possible be home spun without being hostile to expert and other support of the international community, even though a hybrid commission is also a proposal worth trying. In case of Nepal as there is very scanty knowledge and expertise on subjects such as exhumation, DNA sample collection and profiling, ballistics, mining and the like the expert service of international community is highly desirable.

The improvement of the existing legal framework is another serious challenge with regard to checking impunity and ensuring the non-repetition of crimes and human rights violations. Current legal frameworks on both criminal and civil matters have several shortcomings. For instance:

- The criminal laws do not have general principles on criminal law and punishment in them
- There is no law on victims that recognizes their rights including the right to know the truth, the right to remedy, reparation and participation in the trial.
- There is no law on kidnapping, disappearance, hostage taking, extortion, criminal use of force, criminal tress-pass, perjury, criminal destruction of property etc. Our laws on organized crimes are sketchy and incomplete.
- There is no law on omission crimes and command responsibility, due to which unaccountable and abusive behaviors have not been checked.
- Compensation of wrong is yet to be the basis of our civil and criminal laws. Due to lack of tort jurisdiction many civil wrongs are uncompensable.
- We hardly test our laws on the touchstone of "the recognized principles of justice". Judicial review is not done on that basis.

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[109] For instance, the Constitution improved the provisions relating to Criminal justice and Fair trial. It also opened up the possibility of enacting retro-active laws war-crimes and crimes against humanity, the right against impunity and recourse in crimes against humanity were guaranteed as fundamental rights. Similarly the Constitution also criminalized torture. *See* NEP. INTERIM CONST. (draft), art 25 & 26

[110] *See* the speech of Ms Louis Arbor given Kathmandu on Jan 22, 2007 at a program organized by Himal South Asia where she said that sustainability of durable peace social justice and democracy "requires serious attention to accountability for past wrongs...selective amnesia can seriously threaten the democratic gains".

[111] See INSEC, THE COMMENTS AND SUGGESTIONS ON DARFT BILL MADE FOR MAKING PROVISIONS RELATING TO THE TRUTH AND RECONCILIATION COMMISSION, 2007

[112] Judges, religious leaders, psychologists, educators, expert on violence against women or children, human rights professionals are some of the possible members. *See Id.*

- We are yet to endorse the idea of comprehensive settlement based on claims and counter claims, a settlement that may go beyond the claim in the court that can take place at any stage of the proceeding.
- Our substantive and procedural laws are so archaic that their ritualistic application results in perpetuation of injustice.
- In criminal cases our system does not really help those who repent and speak the truth.
- There is no clear mechanism to correct the gross miscarriage of justice.
- At the institutional level we do not consider "generation of public good will" as our basic duty to people. The slavish application of irrational and often unjust laws is equated with the abidance to the norms of "the rule of law".
- We never thought that there can be claims and counter claims. In most of the common law jurisdictions this is entrenched for centuries.[113] The disposal of case only on the basis of the claim of the plaintiff has made the justice system lopsided.
- Our approach to joinders and rejoinders is incomplete.
- Our land laws are guided by revenue collection but not by land management principles.
- These are just a couple of instances to illustrate shortcomings of the legal framework. Even where there are laws they are either obsolete or incomplete be that on matters relating to life, liberty or property. The bottom line of legal reform is that the current judicial process that relies largely on *Muluki Ain* cannot cater the present needs. Legal reform should find very high priority if we are to stamp out impunity and provide justice. This will also address many allegations of irregularity in the judiciary and help the judiciary to win public trust.

12. Conclusion

The purpose of this article was to explain terminologies, dwell on theoretical underpinnings, values, mechanisms of transitional justice. In various sections I threw light on different shades of important values of transitional justice such as peace, accountability, justice and reconciliations, and in the course, dwelt upon the right to truth, justice and the impact of impunity, vengeance and amnesty on the right to justice. I tried to clarify that transitional justice initiatives come into play only when the normal justice sector institution are incompetent or inefficient or when the legal and judicial approach to the issue is not suitable.

In the section on comparative scenario of transitional justice I emphasized that there is no single model of transitional justice. It is tailored to the needs of individual country. Where there is sufficient domestic capacity the international community does not implant itself in the domestic transitional justice initiatives. It rather backstops them. Therefore, in our own context, it is the Nepali people who should design and implement the

[113] For instance, *See* Civil Procedure Code of India, Order VIII.S.1 & 6 A, B, C

transitional justice measures and address the challenges with our collective wisdom and the support of international community.

The literature on transitional justice brings in experiences where instead of seeking full criminal prosecutions for war criminals and human rights abusers, governments are increasingly turning to truth commissions, and the truth-telling exercise is becoming a substitute for criminal prosecution.[114] The draft TRC bill currently circulated also indicates such proclivity of the political leadership. We should be cautious about this. Too much indulgence on reconciliation with less focus on justice helps only to perpetuate the culture of impunity that the country is still facing. Therefore, serious look on the justice aspect by political leadership and the state institutions is highly imperative without whose support the transitional justice measures may not succeed.

One issue that needs to be immediately taken up in Nepal is legal reform without which suffering of the people cannot be mitigated nor can the faith of people in the state institutions be rekindled. In recent years some initiatives are being taken to improve the legal framework in the form of separate draft penal, procedural and civil codes. It is high time that our legislators took cognizance of these developments and promulgated these law by seeking cooperation of the Bar, Bench, civil society, and other justice sector actors who could give critical inputs for their improvement. Besides, as Nepal has an open border with India there is also a need to have Mutual Assistance Treaty with India and other neighbors so that there is no safe heaven for criminals. Accession to the Treaty of Rome would be one right step in the direction of stamping out impunity from the country.

Finally, as Louis Arbor said, Nepal has a very heavy agenda of justice. A half hearted approach to transitional justice would only complicate the matter and make durable peace and democracy a hostage of political myopia. All of us should be aware about this and move with common resolve to use transitional justice for the promotion of peace and democracy in Nepal.

[114] *See* 88 INT'L REVIEW OF THE RED CROSS p 222 (No 862 June 2006) (Editorial)

Public Interest Litigation in Comparative Perspective

– Dr. Hari Bansh Tripathi*

Public interest litigation (PIL) is a vehicle used by South Asian judiciaries to rectify mal-governance and usher social transformation. The author terms it 'as effective weapon of creative judicial engineering'. While the PIL gave the people in areas of 'low social visibility', the downtrodden, the teeming masses, the hitherto neglected minions an access to justice, it also earned the courts much needed respect and appreciation. The author discusses the concept of PIL, brings out its salient features, examines the rationale and comparative practices in Nepal, India, Pakistan and Bangladesh, the four countries where this is in much vogue today. He also traces its history and development in the USA and the UK where it has lost its old glory. Even in South Asia PIL is now coupled with pragmatism, where, as indicated by the author, courts are cautious about not allowing this jurisdiction being abused by 'personally or politically motivated interlopers ... or to frustrate legitimate policies. The author rightly says that it is a new jurisprudence 'which has come to stay' and hopefully will not be 'wished away'.

1. Introduction

Judiciary is believed to acquire legitimacy by responding to, in fact by stirring, the deep and durable demand for justice in human society. The process of democratization, multifarious rights movements, enhancement of public awareness, internalization of the concept of welfarism and incorporation of the socialist ideal and the dictates of directive principles of State Policy have sharply shifted the focus from legal and traditional justice to substantive justice. In order to facilitate access to justice for all classes of people the judiciary today is trying to demolish the barriers of poverty that exit between the poor man and the justice system. In recent years the judiciary has been struggling hard to evolve a new jurisprudence which could bring justice within the reach of the common man, particularly the marginalized masses. Those weaker sections of the society who are unrecognized, weak, helpless and indigent have been deprived of access to justice due to their poverty, illiteracy, ignorance and backwardness. Justice cannot be brought within their reach so long as the traditional conceptions of adversarial litigation are not dismantled.

With the growth of judicial power in the contemporary society judges in their part started realizing that since the traditional litigation process is highly expensive, time consuming and dilatory in process, it is for them to devise and innovate some less formal and people friendly procedure of justice. It was this realization that accounted for the emergence of poverty jurisprudence which made the judges sensitized to the plight and problems of the marginalized masses and thus eventually led to the birth of Public Interest

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Litigation (PIL). The underlying philosophy of Public Interest Litigation is to bring justice within the reach of every man and woman and at the doorstep of every needy person. It is guided by the central objective of making basic human rights meaningful to the large masses of people. Justice PN Bhagwati has rightly observed in this context that "a modern judiciary can no longer obtain social and political legitimacy without making substantial contributions to issues of social justice".[1] PIL is an effective weapon of creative judicial engineering which empowers the judiciary to become a vehicle of social justice and an effective means of social transformation.

2. Concept of Public Interest Litigation

The term 'Public Interest Litigation' ordinarily means a legal action which is initiated before a court of law for the purpose of enforcement of general interest of the public.[2] PIL is a creative judicial weapon innovated by the apex judiciary through the means of judicial activism. It aims at protecting and vindicating the rights and interests of the marginalized sections of the society who are socially backward, politically unconscious and economically oppressed and exploited and, for this reason, who cannot approach the court to seek remedial relief. PIL also contemplates legal proceedings for vindication or enforcement of the fundamental or legal rights of a group of people or community who are incapable of enforcing them for various reasons like indigence, incapacity, illiteracy, unawareness or ignorance of law. It is in this context that Justice PN Bhagwati described PIL as "the strategic arm of the legal aid movement"..."which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity".[3] Thus the court has developed a new paradigm of judicial process which envisages an affirmative proactive role of the judiciary for ensuring access to justice for those who cannot invoke the judicial process for a variety of reasons. This could be made possible chiefly by relaxing the rule of *'locus standi'* and allowing public spirited persons or organizations to enter the court on their behalf for the sake of seeking judicial relief for their maladies.

This liberalization of the rule of *'locus standi'* is motivated chiefly by the following four considerations:

- to enable the court to reach the disadvantaged people who have been denied their rights,
- to enable individuals or groups of people to raise matters of common concern arising out of dishonest or inefficient governance,
- to compel and caution the executive which appears to have failed in discharging its constitutional or statutory duties or obligations, and
- to increase public participation in the process of constitutional adjudication.[4]

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1 PN Bhagwati, *Judicial Activism and Public Interest Litigation,* 23 COLUMBIA JOURNAL OF TRANSNATIONAL LAW, 566 (1985).
2 *Janata Dal* v. *H.S. Chaudhary,* AIR 1993 SC 893.
3 *People's Union for Democratic Rights* v. *Union of India,* AIR 1982 SC 1473.
4 S.P. SATHE, JUDICIAL ACTIVISM IN INDIA, 202 (Oxford University Press, New Delhi, 2002).

3. Distinguishing Features of PIL

The jurisprudence of Public Interest Litigation has, in fact, emerged out of a reaction to the traditional concept of adversarial litigation which serves as a vehicle for settling disputes between private parties about private rights and interests. But Public Interest Litigation is fundamentally different from private law litigation. Abraham Chayes has described some identifying features of Public Interest Litigation which can be briefly described as follows:[5]

1. In Public Interest Litigation the scope of law suit is shaped primarily by the court and the parties rather than being limited by a specific past event such as a breach of contract or personal injury.
2. The party structure is not rigidly bilateral but sprawling and amorphous.
3. The fact enquiry is not historical and adjudicative but predictive and legislative.
4. Relief is often prospective, flexible and remedial having broad impact on many persons including even absentees. It is not limited to compensation for a past wrong given only to a party to the law suit.
5. The remedy is often negotiated by the parties than imposed by the court.
6. The decree or judgment does not terminate judicial involvement on the affair but requires continuing participation of the court.
7. The judge is not passive who rather plays an active role on organizing and shaping the litigation to ensure a just and viable outcome.
8. The subject matter of the law suit is not a dispute between private individuals about private rights, but a grievance about the operation of a public policy.

4. Rationale Behind PIL

The movement of Public Interest Litigation has been greatly influenced by the advent of the Welfare State and the concept of welfarism which replaced *"laissez faire"*. Since several activities originally treated as being entirely under the individual domain have today turned into matters of public concern and intervention, the State has now become not only a provider of welfare services, a regulator and an entrepreneur, but also instrumental in protecting the rule of law. Not only that, today the ever increasing intricacies and complexities of the society tend to generate some situations in which a single human action can be beneficial or detrimental to a large number of people. In such a situation the traditional adversarial litigation, which, as has been said earlier, is basically a two party affair, proves entirely inadequate to address the problem. PIL, against this background, emerged as a necessary rejection of *laissez faire* notions of traditional jurisprudence in order to cope with the new important diffuse and meta individual rights. These new social rights require active intervention by the State and other public authorities. Thus with the total transformation of the rights scenario and the multi-dimensional role of the modern State today the issues of social justice and egalitarianism can be suitably addressed only if the judiciary shows the willingness and determination to travel beyond the fundamental

[5] Abram Chayes, *"The Role of Judge in Public Law Litigation"* 89 HARVARD LAW REVIEW 11 (1976).

principles of the traditional Anglo-American legal system which requires the presence of the plaintiff's personal stake at issue, relief germinating from right and judges acting as passive arbiters of the facts presented by the opposing parties to the dispute. This necessitated the need for abandoning the individualistic, essentially *"laissez faire"* nineteenth century concept of adversarial litigation, which gives the right to sue (standing) only to the person who is personally aggrieved. On the contrary, in PIL cases, the injury suffered by the person need not be direct, distinct and palpable. Also, the injury suffered need not be substantial and of physical or pecuniary nature. Also, unlike in adversarial litigation in Public Interest Litigation the judicial redress is sought not by a person in whom a legal right is vested and to whom some legal injury has been caused, rather any person having 'sufficient interest' can come forward to ignite the jurisdiction of the court to enforce a public right or pursue a public cause.

4.1 PIL and 'Sufficient Interest'

The relaxation in the rule of *'locus standi'* has revolutionized the whole concept of litigation and created the test of "sufficient interest" for initiating any PIL proceedings. Any person with sufficient interest in the issue has the *'locus standi'* to challenge any public injury or to enforce the performance of any public duty. Any person having sufficient interest is entitled to ask for the enforcement of the rights arising under the social welfare scheme or the welfare programs. Any one can move the court to compel the government or any governmental authorities to perform their duties towards the poor and the deprived or to caution or restrain them from transgressing their constitutional or statutory limits causing infringement to the fundamental rights of the common man. The Indian Supreme Court has excelled all other foreign courts in liberalizing the rule of *'locus standi'* in the leading case relating to judges' transfer (*S.P. Gupta v. Union of India*). Justice PN Bhagwati, speaking for the seven member bench, observed:

> "Any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objectives".[6]

What is 'sufficient interest' has been no where clearly defined or explained. However, the Indian Supreme Court has, in the above mentioned judges transfer case, held that it should be left to the discretion of the court to decide about the nature of sufficient interest based on the merits of the individual cases. "What is sufficient interest to give standing to a member of the public would have to be determined by the court in each individual case. It is not possible for the court to lay down any hard or fast rule or any

[6] *Supra* note 3, p. 149.

straitjacket formula for the purpose of defining or delimiting sufficient interest. It has necessarily to be left to the discretion of the court".[7]

In the same case the Indian Supreme Court has also cautioned against complacent and casual acceptance of every proceeding brought before the court in the name of PIL without taking preliminary precautions about the nature of the case and intention of the petitioner. The Indian Supreme Court has also emphasized that before entertaining such a petition the court must see to it whether the individual who moves the court for judicial redress is acting *'bona fide'* with the intention of vindicating the cause of justice. If he is acting for personal gain or private profit or out of political motivation or other oblique considerations, the court should not allow itself to be activised at the instance of such a person, and must reject his application at the threshold.[8]

The Supreme Court has further observed that the strict rule of *'locus standi'* which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busybody or meddlesome interloper but who has 'sufficient interest' in the proceeding. Thus in the process not only the traditional rule of *'locus standi'* but also other technicalities ought not to be allowed to stand in the way of justice dispensation obstructing the poor man's access to justice or realization of the public interest for the benefit of the marginalized sections and downtrodden people of the society. Justice PN Bhagwati has very aptly observed that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities.

In *Radheshyam Adhikari v. Cabinet Secretariat of His Majest's Goverment & Others*, also known as the Ambassador's appointment case, (Writ No. 989 of the year 2047 B.S.), speaking on behalf of a Full Bench, Chief Justice Vishwanath Upadhyaya also observed that in order to activate the extra-ordinary jurisdiction of the apex court under Article 88(2) of the Constitution of the Kingdom of Nepal, 1990 mere normal desire or concern of the petitioner cannot be deemed sufficient. No body can be deemed to have the right to bring before this court for judicial determination any dispute regarding any matter in which he has no 'meaningful relationship or substantial interest'. There must be established a reasonable cause or basis of the relationship or concern of the petitioner with the subject matter of dispute as a citizen of the country or as a member of the Nepali society or any community of peoples. CJ Upadhyaya, therefore, further observed that if any one is to be allowed to institute any kind of dispute regarding any public right or interest under extra-ordinary jurisdiction of the apex court, the flood of such petitions would possibly not only intimidate the efficiency and effectiveness of the court but also frustrate the propriety of such a constitutional provision which is not at all the intention of the constitution.

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7 *Id.*
8 *V. Satyam Reddy* v. *Union of India,* AIR 1996 180.

5. Public Interest Litigation and Judicial Activism

Judicial activism denotes a concept intending to make interpretation of the law or the constitution from the perspective of not only the law but also justice. It is also an attempt at freeing the judiciary from the constraints and technicalities of traditional system of judicial adjudication in the interest of social justice. Judicial activism is directed towards a more dynamic interpretation of the principles of social values and justice enshrined in the constitutional scheme beyond what the framers of the constitution had originally contemplated. Thus it makes the constitution a living, dynamic document. Judicial activism can also be defined as a judicial process of activating the legal mechanism to play a vital role in socio-economic transformation of the society by articulating the concept of liberty, equality and justice. Quite in contrast to the traditional concept of judiciary as a neutral umpire, judicial activism today acts as an active catalyst in the constitutional process.

PIL and Judicial activism are both interrelated concepts. Since PIL itself is a by-product of judicial activism, PIL and judicial activism go hand in glove. Judicial activism through the strategy of PIL paves the way for the participation of public spirited persons and conscious citizens in the development process and also asserts the capabilities of the legal system to afford justice also to the downtrodden, depressed and deprived sections of the society.

Judicial activism without the extensive power of judicial review would become spineless and meaningless. In the modern era of constitutionalism judicial activism is deemed essential to protect and preserve the supremacy of the constitution through the effective weapon of judicial review of the administrative and legislative acts of the state. Furthermore, judicial activism needs to be promoted also for the creation of an egalitarian society by protecting and promoting the interests and welfare of the depressed and deprived people. Besides, judicial activism is also necessary to chastise the state to perform its statutory or constitutional duties and obligations and at times also to warn and restrain it from transgressing its limits and encroaching upon the jurisdiction of others. Besides, in the recent past judicial activism has been also sometimes successfully exercised to compel the State to undertake positive steps to implement its constitutional commitment towards amelioration of the welfare of the backward and the needy. Above all, judicial activism has exploded the myth that judges only interpret the law and do not make law. Now the judges have proved themselves to be creators of law, initiators of change and protectors of the weak and the oppressed. Thus judicial activism and PIL work as a delivery system of social justice.

6. Comparative Development of PIL in Various Jurisdictions

The term 'Public Interest Litigation' is believed to have originated in the United States of America. It has been variously described in different jurisdictions. PIL is also known as Public Law Litigation in the USA Prof. Upendra Baxi of India prefers to describe this movement as Social Action Litigation (SAL). Since it is primarily concerned with challenging state repression and governmental lawlessness in order to eradicate the problems of social

inequality and discrimination, SAL seems to be a more appropriate description of this movement. Furthermore, Rajeev Dhavan uses the term 'Public Interest Law'.

The term 'Public Interest Litigation' was first used in the USA in the late 1960s and early 1970s when a special type of case sought to represent the underrepresented or unrepresented interests of the society in the law courts. It comes as a part of the greater movement of Public Interest Law that included legal aid movement, alternative dispute resolution, lobbying and so on. The commendable success of PIL in the USA subsequently influenced other jurisdictions including Canada, Australia and England.[9]

A brief discussion of the nature, evolution and practice of PIL in other jurisdictions would be helpful to understand the jurisprudence of PIL in the comparative perspective.

6.1 PIL in the USA

Public Interest Litigation in the USA started as an offshoot of the broader movement of Public Interest Law. No doubt, the American society is generally typified by arrogant capitalism and excessive individualism. But at the same time is it is also characterized by a strong tranquil undercurrent of collectivism, social mindedness and caring concern for the community. This concern for the society also got reflected in the legal field resulting in the emergence of Public Interest Law which includes a number of developments such as legal aid, research, formation of public opinion, lobbying and litigation conducted by specialized lawyers and organizations. Public Interest Law provided legal representation to a variety of unrepresented groups or interests in the American society. Although Public Interest Law began in the late 1970s involving activities financed by private foundations and the general public to serve the environmentalists, consumers, old persons, women, children, prisoners, detenues and diverse other groups unrepresented in the decision making process of the state, there were a number of movements and programs which could be identified as the roots of Public Interest Law in America. These roots made substantial contributions to shape up and structure the underlying ideology of Public Interest Law.

The first major root of Public Interest Law goes as far back as 1870s when the legal Aid Movement started in the USA and the first Legal Aid Office was established in New York City in 1876. This Legal Aid Movement was remarkable chiefly for its two main features. Firstly, for the first time 'pro bono' work became institutionalized displaying commitment and enthusiasm to serve the people. Secondly, the movement reflected not only an individual lawyer's concern, but also the concern for the community as a whole. The second root can be traced to the works of the Progressive Era Reformers who, at the turn of the 20th century, during the time of rapid industrialization and social and political changes, aimed at checking the evils of unregulated business. The third and the most significant root lies in the American Civil Liberties Union (ACLU) and it offshoot the National Association for the Advancement of Colored People/Legal Defense and Educational Fund (NAACP/LDEF). ACLU founded during World War First mainly focused on lobbying for the protection of the democratic rights of the citizens and also acted as a watchdog of governmental corruption and abuse of power. Similarly, NAACP is credited to have initiated a movement aimed at

[9] NAIM AHMED, PUBLIC INTEREST LITIGATION, CONSTITUTIONAL ISSUES AND REMEDIES, 2 (Bangladesh Legal Aid Services Trust (Blast)-Dhaka - 1999).

emancipation of the Black Americans from the legal, political and economic disabilities challenging various inequalities through litigation. Those legal battles against inequalities resulted in several victories which helped to consolidate the foundation of Public Interest Law in the USA Also, some landmark judicial verdicts in cases like *Brown v. Board of Education*[10] (1954), *NAACP v. Button*[11] (1963), *NAACP v. Albama ex rel. Patterson*[12] (1958) etc. aided, to a great extent, the forceful social movement of equality and recognized litigation as one of the strategies of the greater movement of social reform. Besides, the enactment of a legislation in 1974 creating an independent Public Corporation to manage the legal service program helped institutionalize the legal service Program as a part and parcel of the cosmos of Public Interest Law. Gradually, support from charitable organizations like the Ford Foundation, government funded legal aid organizations and public interest law firms, besides the stress laid by the private Bar and the law schools on 'pro bono' activities, eventually helped institutionalize PIL as a part of the American legal system which has now become "a permanent fixture of the American legal landscape."[13]

The model of Public Interest Litigation that has evolved in the USA is marked by some distinctive characteristics which are peculiar to its social and environmental context. Justice PN Bhagwati holds the view that the US model of PIL is hardy fit to be transplanted to a developing country like India. The US model requires substantial resource investment which is always faced with resource scarcity in spite of the affluence of the American society. But the spread of poverty and ignorance and the lack of adequate resources in India or, for that matter, in any other developing country will always create impediments in the smooth functioning of PIL. Not only this, the issues taken up by PIL in the United States are starkly different from those experienced by the developing countries. "The United States model is, I believe, more concerned with civic participation in governmental decision making and it seeks to represent "interests without groups" such as consumerism or environmentalism. These no doubt form the issues of public interest litigation in India also, but the primary focus its on state repression, governmental lawlessness, administrative deviance and exploitation of disadvantaged groups and denial to them of their rights and entitlements."[14]

Thus, the basic thrust of Public Interest Law in the USA has been to ensure that citizens whose lives may be affected by governmental policies have a right to participate in the formulation of those policies. It is in this sense that a Report by the Council of Public Interest Law, USA (1976) has described Public Interest Law as "the name given to all efforts undertaken to provide legal representation to groups and interests that have been unrepresented or underrepresented in the legal process. Those include not only the poor and the disadvantaged but also ordinary citizens who because they cannot afford lawyers to represent them have lacked access to courts, administrative agencies and other legal forums in which basic policy decisions affecting their interests are made."

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10 347 US 483 (1954).
11 371 US 415 (1963).
12 357 US 449 (1958).
13 Fred. Strasser, *"Public Interest Law Acquires the Concerns of Middle Age,"* 7 NATIONAL LAW JOURNAL, 1-8 (1985).
14 *Supra* note 1, p. 369.

In the United States of America much of Public Interest Law has been a triumphant effort to extend the right to citizens to be heard in matters and forums from which they had been previously excluded. In 1966 Justice Warren E. Burger opined, in *Office of Communication of United Church of Christ v. F.C.C* (1966), that since government agencies cannot adequately represent all facets of the public interest, citizen groups must be given the right and opportunity to participate in the administrative process. Thus, in the American judicial system socially conscious activists, individuals and organization have come forward to advance the cause of unrepresented constituencies like the poor and the helpless, consumers, minorities, women etc. and have often times successfully used the strategy of PIL to eradicate plethora of discrimination and inequalities.

Unlike in the judicial system of other jurisdictions, in America all PIL cases, even those involving constitutional issues, start at the District Court level and therefrom travel upward to the Supreme Court level. But some times the rules of appellate procedures allow some cases to go in appeal directly to the Supreme Court if they involve any issue of major public interest and the apex court grants the permission for the same.

Public Interest Law in the USA suffered serious backlash in and around the 1980s. This backlash was caused mainly for two reasons. Firstly, the vested interests including commercial interests and conservative elements in the American society did not feel comfortable with the remarkable achievements made by PIL and became more organized and came together to attack those new achievements. Secondly, a new wave of conservatism swept the national scene which resulted in the emergence of counter tendencies. This led to the growth of increasing skepticism among the advocates, people, press and even academicians about the relevance of judicial activism as a means of correcting governmental abuses by resorting to the strategy of PIL. Therefore, 1980s and the period thereafter have witnessed a state of restraint and gradual decline for Public Interest Litigation in the US judicial regime. During this period the US Supreme Court is believed to have displayed conservatism in granting standing and has rather taken recourse to standing to reject Public Interest Litigation suits without entering into consideration of the merits of the case.[15]

Whereas PIL is gaining popularity in developing countries it is relatively losing its charm and appeal in the American context. These days the American Courts are generally not open to PIL issues unless they are specifically authorized by some statute. Unless there is a very specific statutory PIL scheme the American courts are today generally reluctant to entertain PIL petitions. Some critics say that the things have come to such a pass that describing today someone as 'an activist judge' in the USA is often regarded an insult or a censure. Unlike in the 1960s and 1970s when the American society was in favor of activist judges, today the Americans generally resent the very idea of judicial activism and rather subscribe to the view that a judge should only interpret and apply the law, and not legislate from the Bench.

Nevertheless, it would be a misrepresentation of the facts to conclude that PIL has completely lost its flavor in the USA. Notwithstanding the reverse trend and declining enthusiasm for PIL, Pubic Interest Law has survived and become an integral part of the

[15] *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 US 464 (1982).

mainstream American judicial process for seeking relief and remedy for issues involving public concern. This is manifested by the appreciative mood of the lawyers as a community and the society as a whole who still stress the role and relevance of PIL in social reform and increasing civic participation in governmental decision making process.

6.2 PIL in United Kingdom

The development of PIL in the United Kingdom is mainly a story of the evolution of the rule of *'locus standi'*. The strict doctrine of *'locus standi'* originally laid down by the Anglo Saxon Jurisprudence required that a person who invoked the jurisdiction of the court could be heard only if he had suffered a 'legal injury' as a consequence of the violation of his legal rights. However, the changed circumstances of 1970 forced English courts to liberalize the doctrine of *'locus standi'*. It was Lord Denning who is credited to be chiefly responsible for this liberalization. In 1970 a number of liberal judges including Lord Denning came forward to extend the meaning of the term *'locus standi'* enabling the activists to approach the court.[16]

In 1957 Lord Denning in *R. v. Thomas Magistrate's Court ex parte Greenbaum*[17] departed from the old test of strict doctrine of *'locus standi'* and granted standing to a newspaper seller in regard to a dispute over a pitch in a street market.

The ruling made in the famous *Blackburn cases* by Lord Denning went a long way to liberalize the rule of *'locus standi'* and help the evolution of PIL in England. Lord Denning granted *'locus standi'* to Raymon Blackburn, a public spirited person, who brought a series of cases to the court and, through the rulings given in those cases, substantially developed the concept of Public Interest Litigation in England. For example, in *R. v. Commissioner of Police of the Metropolis, ex parte*,[18] Blackburn approached the court alleging that the big gambling clubs of London were openly breaking the law. In *R. v. Police Commissioner, ex parte Blackburn*[19], Blackburn alleged that the laws against pornography were not being enforced and there was a danger of obscene publications being seen by his children, just as by any one's children. In yet another case relating to pornographic films, *R. v. GLC ex parte Blackburn*,[20] Blackburn came to the court alleging that pornographic films were being exhibited in London and the greater London Council was doing nothing to stop them. Expressing the opinion that as a citizen of London Blackburn, whose children faced a danger of being harmed by those pornographic films, had 'sufficient interest' to move the court. What Lord Denning further observed sheds adequate light on the nature of PIL:

> "I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects then anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts, in their discretion, can grant whatever remedy is appropriate".

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16 LORD DENNING, THE DISCIPLINE OF LAW, (Butterworths, London - 1979).
17 5 LGR 129 (1957).
18 2 QB 118 (1968).
19 QB 241 (1973).
20 1 WLR 550 (19.76)

The same principle had been earlier asserted by Lord Denning in 1973 in the famous *McWhirter case*[21] in which one Mr. Ross McWhirter approached the court seeking an injunction to stop the telecast of a film on television about an actor called Andy Warhol which, as reported by some newspapers, was an outrageous film and likely to offend public feelings. The court granted an injunction to stop the telecast of the film. Thus the development of PIL in England seems to be mainly a story of the evolution of the *locus standi* rules.

It is also worth noting that in England the development of PIL mainly took place in the ambits of administrative law where administrative actions are open to challenge by common citizens.

Naim Ahmed, a Bangladeshi researcher, has raised an interesting point that the success of the English activists in terms of PIL appears to have been less pronounced than that of the Americans for two reasons. One reason is the difference of legal and political culture- the Americans are more litigation oriented than the English. Another reason involves the history of the English Administrative Law which had become conservative and non-adventurous during and after the II world War, and its development could start only during the 1960s. It was for this reason that the Administrative Law took some time to adjust with the growing demands of social justice.[22]

6.3 PIL in India

The development of PIL in India is believed to have been influenced and inspired by the development of its counterpart in America. SK Agrawala holds the view that the inspiration for PIL in India came from the American experience.[23] However, the Indian Supreme Court innovated new methods and devised new strategies for the purpose of providing access to justice to large masses of the downtrodden and deprived people. They are the people who are denied their basic human rights and to whom freedom and liberty have no meaning at all in spite of the constitutional assurance for the same. Even after the lapse of more than three decades of Indian independence and promulgation of a democratic constitution avowing to bring justice, social, economic and political, the failure of the state to create a just, equal and egalitarian society free from oppression and exploitation caused unexpressed disillusionment among the people. The situation was further compounded during the emergency (1975 - 76) clamped by Prime Minister Indira Gandhi. It was during this period that a nationwide movement for free legal services was launched as one of the key-points of the twenty point programme announced by Indira Gandhi. Many judges led by Justice Krishna Iyer and PN Bhagwati displayed a strong sense of social consciousness and became a part of a nationwide movement for legal services. The perception of the failure of the State to resolve the wide spread socio-economic problems motivated a number of conscious citizens, non-governmental organizations and social action groups to raise the voice against the miserable plight of such marginalized sections of the society, who were left with no choice but to knock at the door of the judiciary. This subsequently

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21 *Attorney General* v. *Independent Broadcasting Authority,* QB 629 (1973).
22 *Supra* note 9, p. 11.
23 SK AGRAWALA, PUBLIC LITIGATION IN INDIA: A CRITIQUE, 8, (Tripathi and Indian Law Institute, New Delhi - 1985).

resulted in judicial activism, which inspired a number of social activist judges like Krishna Iyer and PN Bhagawati to find a new way to revitalize the constitutional power of the court in favour of the people. This led to the birth of the innovative strategy of Public Interest Litigation intending to bring law into the service of the poor and the oppressed. The courts, through PIL, sought to rebalance the distribution of legal resources, increase the access to justice for the disadvantaged in order to secure social justice and make human rights and fundamental freedoms meaningful to them. In short, PIL in India emerged and developed as a most powerful and efficacious tool to render remedial justice through judicial process to the socially, economically and politically disadvantaged sections of the society.

PM Bakshi, an Indian jurist, is of the opinion that the seeds of the concept of PIL were initially sown in India by Justice Krishna Iyer[24] in 1976, who, in *Mumbai Kamgar Sabha v. Abdulbhai*, without assigning this terminology, had observed:

> "Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural people, the urban lay and the weaker societal segments for which law will be an added terror if technical mis-descriptions and deficiencies in drafting pleadings and setting out the cause title create a secret weapon to non-suit a party. Where foul play is absent, and fairness is not faulted, latitude is a grace of processual justice. Test litigation, representative actions, *pro bono publico* and broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural shortcomings."

Emphasizing the need for relaxing the traditional rule of *'locus standi'* for espousing the cause of public interest before the law court, justice Krishna Iyer further observed:

> "Even Article 226, viewed on wider perspective, may be amenable to ventilation of collective or common grievances as distinguished from assertion of individual rights, ... Public interest is promoted by a spacious constructions of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualization of the right to invoke the Higher Courts where the remedy is shared by a considerable number, particularly when they are weaker."

However, it was in *Fertilizer Corporation Kamgar Union* v. *Union of India*[25] that the terminologies 'Public Interest Litigation' and 'epistolary jurisdiction' were first used by Justice Krishna Iyer. Justice Iyer had declared in this case, "law, as I conceive it, is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction."[26]

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[24] PM BAKSHI, PUBLIC INTEREST LITIGATION, 5 (Ashoka Law House-New Delhi - 2004).
[25] 2 SCR 52: AIR 1981 SC 344.
[26] *Id*, p. 354.

The first public interest case in the Indian Supreme Court was filed by Kapila Hingorani, a senior advocate, in 1979 in the form of a writ of *habeas corpus, Hussainara Khatoon* v. *State of Bihar*[27], bringing to light the fact of unlawful detention of 18 prisoners who were suffering detention awaiting trials for very long periods. This writ petition ultimately led to the revelation of over 80,000 such prisoners who were languishing in various prisons for long awaiting their trial to start.

In the early 1980s and thereafter a good number of cases were brought before the court focusing on the interest of the public or vulnerable social segments. Those landmark cases helped in the construction of the new rules of standing. In *People's Union for Democratic Rights v. Union of India* Justice Krishna Iyer emphasized the need for evolving "a new strategy by relaxing this traditional rule of standing in order that justice may become easily available to the lowly and the lost and thus gave "a new dimension to the doctrine of *'locus standi'*, which has revolutionized the whole concept of access to justice in a way not known before to the western system of jurisprudence."[28] All this led to the liberalization of the rule of standing permitting thereby a member of the public, having no personal interest or oblique motive, to approach the court for the enforcement of the constitutional or legal rights of socially or economically disadvantaged persons who, on account of their poverty or total ignorance of their fundamental rights, are unable to enter the portals of the court for judicial redress.

The most significant exposition of PIL jurisprudence came in the landmark verdict given by a seven member Bench presided by Justice PN Bhagwati in *SP Gupta & Others v. Union of India & Others* (1982).

> "Today a vast revolution is taking place in the judicial process; the theater of law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom liberty and justice have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered legal wrong or legal injury or whose constitutional and legal rights have been violated but who by reason of their poverty or economically disadvantaged position are unable to reach the court for relief."[29]

In fact, the Supreme Court of India, in *Sunil Batra* v. *Delhi Administration*,[30] for the first time accepted a letter written to the Supreme Court by Sunil Batra, an inmate of Tihar Jail Delhi, highlighting the inhuman torture inflicted on a fellow prisoner by the jail administration. The letter was treated as a writ petition, and while disposing that petition the apex court issued certain directions, including taking suitable action against the erring

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27 AIR 1979 SC 1360.
28 3 SCC 235: AIR 1982 SC 1473.
29 AIR 1982 SC 149.
30 3 SCC 488: AIR 1980 SC 1579.

officials and also expanded the scope of *habeas corpus* to check the violations of fundamental rights of under trials and convicted prisoners.

Thus the credit goes to some activist judges like Krishna Iyer and PN Bhagwati of the Indian Supreme Court for revolutionizing the whole concept of PIL. PIL is now deeply rooted in the Indian judicial system and has become a permanent feature of the humanitarian jurisprudence. The impact of the Indian experiments in PIL has been also felt in a number of SAARC countries which have common law based legal systems.

6.4 PIL in Pakistan

Since both India and Pakistan are developing countries and their socio-economic conditions are more or less similar, the problems of poverty and social injustice, governmental lawlessness and executive apathy towards the plight of the poor are as rampant in Pakistan as in India. But the scenario has been further compounded in Pakistan on account of continuing failure of democracy for prolonged periods resulting in intermittent imposition of martial law and frequent interferences in the constitutional arrangements. All this contributed to deterioration of the condition of fundamental rights which were arbitrarily declared annulled, curbed or non-applicable from time to time. The frequent imposition of martial law at intermittent intervals had demoralizing effects also on the judiciary which curbed its judicial power and obstructed its smooth functioning. The weaker sections of the society, because of their economic or social position, remained cut off from the rest of the society and could not approach the court for relief. However, there was a general perception among the people, which was also shared by some judges, that the traditional litigation of the Common Law system was not opportune for providing justice to the people. Chief Justice Hamood Ur-Rahaman in 1975 appealed to discard the principles of justice based on Anglo-Saxon ideas. Similarly, Justice Afzal Zullah repeatedly refused to apply English legal principles on the ground that they were inadequate to ensure justice. Naim Ahmed, a Bangladeshi researcher, cites the cases of *Hazi Nizan Khan v. Additional District Judge* (PLD 1976 Lah 930) and *Ghulam Ali v. Ghulam Sarwar Naqvi* (PL 1990 SC 1) [31] to prove the point.

Only after the lifting of martial law in Pakistan in 1985 and resumption of the constitution, the Pakistani judiciary experienced some congenial atmosphere to give expression to its newly heightened social consciousness. The judges gradually became more appreciative of their role and responsibility and tolerant about the fair criticism of the judiciary. The media, particularly investigative journalism, played a more vital role in exposing and highlighting social evils plaguing the society. All this helped in the development of PIL in Pakistan in the late 1980s. The developments of PIL and judicial activism in neighboring India also played its part in influencing the Pakistani judiciary to adopt PIL as a strategic means of addressing the socio-economic problems of the people.

It was in the famous case of *Benazir Bhutto v. Federation of Pakistan* that the Pakistani court pronounced a new public interest standing refusing to take a conservative or traditional stand, granting standing to a political party which had challenged a new order by the martial law government for registration of political parties. The court held in this case

[31] *Supra* note 9, p. 18.

that an applicant need not be aggrieved if he appears *'bona fide'* for the enforcement of the fundamental rights of a group or a class of persons who are unable to appear before the court. This principle was further reiterated in the leading case of *Darshan Masih alias Rehmentay v. The State* where the Pakistani Supreme Court recognized its epistolary jurisdiction and, acting on the basis of a telegram demanding enforcement of fundamental rights of bonded laborers, granted them relief. The *Darshan Masih* case is a leading case which enunciated the philosophy of PIL and laid down the rules of standing and procedure of PIL in Pakistan.

Chief Justice Afzal Zullah and subsequently CJ Nashim Hasan Shah deserve some credit for the development of PIL in Pakistan. A judicial conference held in Quetta (15th-16th August 1991) stressed the responsibility of the judiciary to take notice of the violations of the rights of citizens. The judges attempted to create a special procedural structure to deal with PIL cases. Despite challenges, PIL has now become embedded as a permanent feature of the Pakistan judicial system.

6.5 PIL in Bangladesh

Kazi Mukhlesur Rehman v. Bangladesh, popularly known as *the Berubari ca*se, is generally regarded as the starting point of PIL in Bangladesh.[32] The petitioner Kazi Mukhlesur Rehman, an advocate by profession, came to the court challenging an international treaty signed by the Prime Ministers of Bangladesh and India in May 1974, allowing India to retrain the Southern half of South Berubari Union No. 12 on the ground that the agreement involved cession of territory and was entered into without lawful authority by the executive head of government. Since the petitioner had come to the court as a citizen his standing was disputed. But Chief Justice Sayeem granted him *'locus standi'* on the ground that the petitioner agitated a question involving a constitutional question of grave importance which threatened his right as a citizen to move freely throughout the territory of Bangladesh and to reside and settle in any part therein. The court held that the question is not whether the court has jurisdiction but whether the petitioner is competent to claim a hearing. Reinterpreting a citizen's right *vis-à-vis* the power of the state, CJ Sayeem observed: "it appears to us that the question of *locus standi* does not involve the court's jurisdiction to hear a person but the competency of the person to claim a hearing so that the question is one of discretion which the court exercises upon due consideration of the facts and circumstances of each case."[33]

The Berubari case cast enormous influence on the development of PIL in Bangladesh. It has been time and again resorted to and relied upon by the PIL petitioners in subsequent PIL cases attempting to acquire standing. However, the period of 1975-1986 following *the Berubari case* (1974) remained almost barren from the PIL viewpoint. This was so because of the imposition of martial law and suspension of the Bangladesh constitution. However, after its establishment in 1978 the Madaripur Legal Aid Movement, the first village based and grass-root legal aid organization, was engaged in spreading the idea of legal rights of the poor and started assisting public interest activities.

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[32] *Id*, p. 22.
[33] 26 DLR (SC) 44 (1974).

PIL can flourish only in an environment conducive to proper functioning of constitution and the rule of law. Even after the withdrawal of martial law on Nov. 11, 1986, the democracy introduced by military ruler General Ershad was controlled and guided. Nevertheless, concerned citizens defying Gen. Ershad's autocratic rule, started coming to the court agitating public interest issues. This period also saw a number of lawyers starting to form themselves into groups to fight *pro-bono publico* cases.

The year 1987 is regarded as a year marking the beginning of PIL cases in Bangladesh. In *Anwar Hossain Chaudhary v. Bangladesh*[34], also known as the 8th Amendment case, the majority judgment of the court, confirming its power of judicial review, held that the basic structure of the constitution cannot be altered, and thus voided the Eighth Amendment which had decentralized the higher judiciary. This 8th Amendment case is sometimes also described as a forerunner of PIL cases in Bangladesh.

However, in *Bangladesh Sangbadpatra Parishad v. the Government of Bangladesh* in which the constitutional authority of a wage Board for fixing the wages of newspaper employees was challenged by an association of newspaper owners, the Appellate Division refused standing to the petitioner on the ground that it was not a person aggrieved: "The petitioner is not espousing the cause of a downtrodden and deprived section of the community unable to spend money to establish its fundamental rights and enforce its constitutional remedies. It is not acting *pro-bono publico* but in the interest of its members."[35]

Only after democracy started functioning in Bangladesh, some significant PIL cases relating to personal liberty were agitated before the court in 1992 and immediately thereafter. In *Ayesha Khanam & Others v. Major Sabir Ahmed & Others*[36] the court expanded the orbit of *habeas corpus* by giving standing in a case of private detention involving the issue of a mother seeking the custody of her child. Similarly, investigative journalism gave birth to a leading case, *State* v. *Falu Mia,*[37] which resulted in the release of Falu Miya after 21 years in jail who had overstayed in prison due to administrative callousness.

State v. Deputy Commissioner, Satkhira & Others,[38] also known as *Nazrul Islam's case*, was initiated *'so moto'* by Justice MM Hoque who came across a newspaper reporting about the plight of one Nazrul Ialam who had been detained in the prison for 12 years without any trial. This case resulted in subsequent release of Nazrul Islam from illegal detention.

The year 1994 witnessed the filing of a considerable number of PIL cases in Bangladesh which fell into two broad categories: one involving political issues and another dealing with environmental and consumer concerns. In *Anwar Hossain Khan* v. *Speaker of Bangladesh Sangsad Bhaban & Others,* also known as the Parliament Boycott case, the *'locus standi'* of a political activist was upheld by the court who had sought the enforcement of his fundamental right of being represented in Parliament. The court held: "As constitutions are a solemn expression of the will of the people, the Supreme law of the

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34 1989 BLD (Spl) 1.41 DLR (AD), 165, (1989).
35 12 BLD (AD) 156 (1992).
36 46 DLR 399 (1994).
37 Unreported, Criminal Misc. 1755/1993.
38 45 DLR 643 (1993).

Republic, any violation by anybody including the members of the Parliament shall be called in question by each and every citizen of Bangladesh."[39]

However, the Bangladesh judiciary also appears to be no less cautious about the possible misuse of PIL by political and constitutional activists who sometimes tried to litigate the special interests of the privileged few in the name of the people. Refusal of standing by the court in the famous *MPs Resignation case*[40] is an instance to the point. Taking a clue from the Sangbadpatra case, the petitioner who had come to the court as a conscious citizen was denied standing on the ground that he did not have any constitutional or legal right that was violated.

In the recent past the Bangladesh courts have considered several PIL petitions concerning genuine social interest. For example, when in *Salish Kendra & Others v. Government of Bangladesh* [41] eviction of Slum dwellers in Dhaka without making any alternative arrangements for their rehabilitation was challenged by the petitioners, the court ordered to undertake the eviction process in phases, giving the slum dwellers reasonable time, and making arrangements for their rehabilitation. Thus PIL has now become embedded in the Bangladesh legal system and is gradually moving towards gaining maturity.

6.6 PIL Scenario in Nepal

Nepal is probably a learner and beginner in the area of Public Interest Litigation. Nevertheless, the Nepali system has taken some definite steps to institutionalize the jurisprudence of Public Interest Litigation. The concept of PIL has not only been recognized rather it has been also accorded constitutional recognition.[42]

The introduction of the Ninth Amendment to the National Civil Code (Muluki Ain) in 1986 can be treated as the starting point of the concept of PIL in the Nepali legal regime. This Amendment made a provision for the institution of a suit by a person in regard to matters involving public interest. Section 10 of the chapter on the Court Procedure (Adalti Bandobastako) grants *'locus standi'* to an individual to move the court on behalf of the public at large by securing permission from the court in regard to issues which involve public interest or concern. However, since this power is generally exercised by the courts of first instance, which do not have writ jurisdiction in practice, this has not proved much effective in securing public good.

The movement of PIL in other jurisdictions, particularly in neighboring India, was bound to influence the Nepali legal community. The 1990 constitution drafting committee, comprising mainly legal professionals and led by a sitting Supreme Court Judge Vishwa Nath Upadhaya, felt the need for granting constitutional status to the innovative strategy of PIL. Unlike in other countries where the justices had to display activism in order to explore a judicial basis for Public Interest Litigation within their constitutional or legal framework, the 1990 constitution specifically designated a role for the Supreme Court to

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[39] 47 DLR 46 (1995).
[40] *Raufique (Md.) Hossain* v. *Speaker* 15 BLD 383 (1995).
[41] 19 BLD (HCD) 489 (1999).
[42] DR. HARI BANSH TRIPATHI, FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW IN NEPAL (EVOLUTION & EXPERIMENTS), 301, (Pairavi Prakashan-Kathmandu - 2002).

entertain PIL petitions in matters of public interest. Article 88(2) of the constitution empowered the Supreme Court "to issue necessary and appropriate orders" also "for the settlement of any constitutional or legal question involved in any dispute of public interest or concern" or for the enforcement of such a right. This provision of Article 88(2) elaborating the extra-ordinary jurisdiction of the apex court has been virtually lifted from the 1990 constitution and transplanted in the present Interim Constitution of Nepal, 2063 (2006 AD). Here, it will not be out of context to refer to the question raised by this writer in his book titled Fundamental Rights and Judicial Review in Nepal (Evolution and Experiments) in regard to the relevance and practice of PIL in Nepali legal regime.[43] Since there is a specific provision about PIL in the National Code and there is also specific stipulation of PIL jurisdiction of the apex court in the Nepali constitution itself, is there any scope or relevance left for PIL in Nepal in the sense PIL is practiced in other jurisdictions, which do not have specific legal or constitutional provision for PIL.

In the Nepali legal system PIL does not seem to be necessarily dependent on the discretion of judges or judicial activism. Since our law and the constitution specially mandate for the PIL jurisdiction, it can be rightly said that the Anglo-American model of PIL has lost much of its substance and relevance in the Nepali context. But the difference ends there. Because both in the Anglo-American model of PIL as well as the Nepali model of PIL, practical, realist and sensitive approach of the judges handling the PIL cases are needed in common to obtain effective relief or redress in the public interest.

7. PIL and the Nepali Judiciary

Although *Radheshyam Adhikari v. Secretariat of the Council of Ministers & Others* (1991), also popularly known as *the Ambassador's Appointment case*, was the first case dealing with the concept of public interest and *'locus standi'* to move the court for enforcement of any public interest, it is, in fact, *Surya Prasad Dhungel v. Godabari Marble Industries Pvt. Ltd. & Others* (1995) which is generally believed to have initiated the practice of PIL in Nepal (by extending the meaning of right to life as also incorporating the right to a clean and healthy environment) and setting the trend for asking the concerned authorities to make suitable arrangements for protecting public interest.

But long before the introduction of a formal legal provision regarding public interest jurisdiction of the law courts in the National Code, the Supreme Court of Nepal had, as early as in 1965 in *Banarasi Mahato v. Election Officer of Dhanusha & Others*,[44] relatively, relaxed the rule of 'personally aggrieved person standing' in favor of public interest standing and enunciated some basic principles regarding what we generally know today by the name of PIL. The petitioner, a voter of Sabaila Village Panchayat, had challenged a notification issued by the Election Officer regarding holding of election of Dhanusha District Panchayat without first completing the election of Sabaila Village Panchayat, as it would lead to the deprivation of representation of the latter in the District Panchayat. The Division Bench comprising Justice Nayan Bahadur Khatri and Justice Dhanendra Bahadur Singh,

[43] *Id,* pp. 301-302.
[44] NKP 154 (SC 2022 BS).

upholding the standing of any candidate or voter whatsoever to bring the suit for the enforcement of a public interest, held that it was the duty of the court to suitably address such a petition brought before the court in public interest. But the apex court also cautioned that such a petition should be brought with a pure intention and clear heart and should not be moved at anybody's provocative instance. Nor should it be of vexatious nature. The observations made by the learned justices in this case are indicative of the fact that the Supreme Court of Nepal appeared to be willing to liberalize the rule of standing for bringing a cause of action in public interest long before the formal initial of PIL in Nepal.

In the leading case of *Surya Prasad Sharma Dhungel v. Godabari Marble Industries Pvt. Ltd. & Others*[45], the petitioner challenged environmental pollution and degradation caused by the defendant industry and sought enforcement of the right of the public to live in a healthy environment. Although the Supreme Court did not give specific relief to the petitioner, it, however, extended the meaning of the fundamental right to life and held that since clean and healthy environment is an indispensable part of human life, right to a clean and healthy environment is undoubtedly embedded within the right to life. Thus the apex court recognized the right to environment as an extension of the right to life, and, therefore, issued a directive to the government to enact necessary legislation for environmental protection.

Radhe Shyam Adhikari v. Secretariat of the Council of Ministers and Others,[46] popularly known as *the Ambassador's Appointment case*, offers an exhaustive explanation of the meaning, philosophy and concept of Public Interest Litigation. Delivering the judgment on behalf of the Full Bench Chief Justice Vishwa Nath Upadhyay observed that a dispute of public interest or concern signifies a dispute related to the collective right or concern of the general public or any class of people. In order to enter any dispute as a public interest in the apex court that dispute must be based on the constitution or law and should be worthy of judicial resolution. The apex court created a rigid test of the petitioner's 'meaningful relation' or 'substantial interest' in the subject matter of the dispute in order to ignite the jurisdiction of the court. And this relation or interest of the petitioner must be established by a justifiable reason or ground. Furthermore, it was also held that the petitioner was also required to convince the court about his ability to duly represent the people concerned with 'the public interest or concern' involved in the dispute. The court further observed that if any casual person was allowed to ignite the extra-ordinary jurisdiction of the apex court the efficiency and capability of the court shall not only be adversely affected by a deluge of such petitions rather it would also defeat the very purpose of the above mentioned constitutional provision. The learned Chief Justice held that the petitioner who was the then president of Nepal Bar Association could not show as to how he had got 'meaningful relation with' or 'substantial interest' in the appointment of an ambassador who acts as per the policy and instructions of the Majesty's Government. Rather the petitioner's interest appeared as if it was some sort of curiosity. The CJ, therefore, did not deem it essential to decide the case on the merit of *'locus standi'* but proceeded to deal with the petition only because it raised some significant constitutional

[45] Supreme Court Bulletin (SAB), No. 20, p. 1 (1995).
[46] NKP, 821 (SC 2048 BS) (1991 AD).

issues worthy of resolution. This appears to be a tactical approach of the apex court which gave a rigid interpretation of *'locus standi'* and yet did not reject the writ petition on that ground of *'locus standi'* as it wanted to avoid criticism of the legal fraternity. It is beyond comprehension why Chief Justice Vishwa Nath Upadhyay could not discern the meaningfulness of the petitioner's relation with or substantial interest in the disputed issue, since the petitioner being the chairperson of the umbrella organization of the legal practitioners of Nepal had every right even as a conscious and informed citizen of Nepal to challenge the constitutionality of the appointment of the Ambassador because the King 'prima facie' seemed to have infringed Article 35(2) of the Constitution of the Kingdom of Nepal, 1990 in making the impugned appointment of the Ambassador purely in his own discretion.

This rigidity of interpretation in granting *'locus standi'* to public spirited persons to agitate PIL issues before the court was indicative of the well guarded mood of the Supreme Court of Nepal in regard standing in the initial years of PIL in Nepal. For example, in *Dol Raj Paudel v. Ministry of Forest and Soil Conservation*[47] also, the petitioner who had raised the issue of forest fire in Nepal causing destruction of forest species, flora and fauna, livestock and the environment was refused *'locus standi'* by the court comprising Justices Surendra Prasad Singh and Krishna Jung Raymajhi on the ground that the petitioner could not explain what kind of constitutional or legal right of the petitioner had been infringed nor did that issue raise any constitutional or legal question involved in any dispute of public interest or concern.

The parameter thus devised for *'locus standi'* in public interest litigation by the court (particularly in *the Ambassador's appointment case*) was generally criticized by the legal profession. Most of them seemed to be skeptical as to what actually the expression "meaningful relation" meant and about the danger of the court receding to a conservative position simply by pointing out the absence of meaningful relation of the petitioner in difficult cases. The awareness of the justices about this resentment of the legal profession may have, perhaps, guided the apex court to abandon very soon its rigidity as regards the requirement of 'meaningful relationship' in immediately succeeding decisions[48] of some other PIL cases. In *Bal Krishna Neupane* v. *HMG, Ministry of Water and Power Resources*[49] and in *Bal Krishna Neupane v. PM Girija Prasad Koirala and Others*,[50] the court upheld the *locus standi* of the petitioner to resort to Article 88(2) by way of petition to enter the court to seek information from the government on issues which involved the nation's right and responsibilities and thus to get relief if anything is done in contravention of the constitution. Reversing its earlier stand, the Supreme Court also held that every citizen has a 'meaningful relation' with the economic development of his country and its environment and it cannot be held improper if a citizen shows his curiosity about what type of treaty or agreement or understanding has been reached with a foreign country by his government regarding the exploitation of such natural resources. Likewise, Advocate Bal Krishna

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47 Supreme Court Bulletin (SCB), No. 20, p. 1 (1995).
48 Kedar Nath Upadhyaya, *Nyayadoot*, pp. 3-4 (1998).
49 Supreme Court Bulletin (SCB), No. 24, p. 5 (1995).
50 *Id,* No. 11 p. 4 (1992).

Neupane, in yet another PIL petition[51] successfully challenged Section 4(1) of the Labor Act, 1991, which prescribed eligibility of appointment of foreign nationals as workers or employees in Nepali industries or companies, as violative of the right to profession or occupation granted only to the Nepali citizens under Article 12(2)(e) of the 1990 constitution. The apex court declared this provision *'ultra vires'* because it forced Nepali citizens to compete with foreigners in the labor market.

The promulgation of the first democratic constitution of Nepal in 1990 aroused the democratic aspirations and kindled the rights awareness of the Nepali people to such an unprecedented level that in the ensuing years the apex court was deluged with plenty of PIL petitions involving a variety of issues concerning fundamental freedoms,[52] equality,[53] untouchability,[54] gender discrimination,[55] environmental protection[56] etc.

A perusal of some PIL decisions made over the years shows that the Supreme Court of Nepal has sometimes also framed social issues for the purpose of public discourse and has often preferred the 'modus operandi' of issuing directives to the government to make necessary arrangements or enact appropriate legislation.[57] The leading case of *Meera Dhungana v. HMG & Others* [58] is a case to the point in which the apex court issued a directive to the Executive to arrange for presenting, after having extensive consultations with the concerned stakeholders, a suitable Bill in the Parliament regarding a daughter's right to her share in the parental property. So was the case in *Chanda Bajracharya v. HMG* (Writ No. 2826 of the year 2051 BS) where also the apex court asked the Executive to undertake extensive consultations with various stakeholders and then present an appropriate Bill in the Parliament to address the issue of gender discrimination present in various legal provisions. Some commentators described the referral of the issue by the Supreme Court to the Executive with instructions, to enact a legislation as "a classic fudge by the Supreme Court which denied a legal remedy to the petitioner" and also "an intrusion into the powers of Parliament and the Executive under the separation of powers doctrine".[59] But as the later course of events would prove, the apex court had rightly sent back the ball to the court of Parliament which did extensive home work and subsequently deliberated on the sensitive issue in greater detail and, through the collective wisdom of the lawmakers, introduced a revolutionary amendment to the law on partition guaranteeing the right to equal share for a daughter in the parental property.

However, it is regrettable that the Supreme Court of Nepal, in *Sharmila Parajuli (Pro public) v. HMG & Others*,[60] lost a crucial opportunity to display judicial activism to formulate and issue appropriate guidelines, pending enactment of a comprehensive

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51 *Bal Krishna Neupane* v. *HMG & Others,* NKP 450 (SC 2050 BS) (1993 AD).
52 *Ambar Bahadur Gurung* v. *Kathmandu District Police & Others,* NKP 31 (SC 1992 AD).
53 *Iman Singh Gurung* v. *Military Court of the Royal Nepal Army & Others,* NKP 710 (SC 1992 AD), Also, See *Babu Ram Poudyal* v. *HMG & Others,* NKP 138 (SC 1994 AD)
54 *Man Bahadur Bishwakarma* v. *HMG & Others,* NKP 1010 (SC 1992 AD); *Advocate Ratna Bahadur* Bagchand & Others v. *HMG & Others*, SCB pp. 4-8 (2005).
55 *Reena Bajracharya & Others* v. *RNAC & Others,* NKP 367 (SC 2057 BS) *Sapana Pradhan Malla* v. *Ministry of Law, Justice & Parliamentary Affairs,* SCB 5, (1996 AD).
56 *Yogi Narhari Nath* v. *HMG,* NKP 33 (SC 1996 AD); *Prakash Mani Sharma* v. *HMG*, SCB N. 12, p. 5, (1998 AD)
57 Tripathi, *supra* note 42, p. 304.
58 NKP 462 (SC 1995 AD).
59 SURYA DHUNGEL ET AL, COMMENTARY ON THE NEPALI CONSTITUTION, 117-118 (DELF, Kathmandu - 1999).
60 Writ No. 55 of the year 2057 BS, (SC 02/01/2057 BS) (2000 AD)

legislation, in order to prevent sexual harassment of working women at their workplace and simply instructed the Executive to enact an appropriate and comprehensive legislation on the issue. It is incomprehensible why the apex court became reluctant to take any clue from the landmark judgment delivered by the Indian Supreme Court in *Vishaka and Others vs. State of Rajasthan and Others* (1997) 6 SCC, 242) which in similar circumstances had developed some suitable guidelines having the authority of law, pending enactment of suitable law on the subject, to create an environment against sexual harassment.

Our discussion on PIL and judicial activism will remain incomplete without making a reference to the famous *Marital Rape case*, *Advocate Meera Dhungana vs. HMG & Others*.[61] This is a leading PIL case which not only exhaustively deals with the concept and philosophy of Public Interest Litigation but has also given a severe blow to the traditional outlook of male domination in the society and has made tremendous contributions to restore dignity and honor of women. A Special Bench presided by Justice Laxman Prasad Aryal rightly observed that the National Code, in its definition of the crime of Rape, does not seem to exempt forceful sexual intercourse with one's own wife and held that any person should be held criminally liable for perpetrating the inhuman crime of forceful sexual intercourse with a woman against her wishes (which would clearly amount to the crime of rape) irrespective of whether or not the victim is his own wife.

This brief discussion of PIL movement in Nepal shows how PIL has made considerable advance in a short span of time and has now become an integral feature of the Nepali judicial system. PIL would always be relied on as an effective weapon for the protection and promotion of the fundamental rights of the common people, particularly, the downtrodden and the deprived, and also for the creation of a social order based on equality and justice. However, it is regretful to note, as some legal practitioners bemoan, that still some justices, feeling hesitant to come out of their preconceived values, notions and mindset, are reluctant to be liberal and activist to espouse the cause of public interest and social justice. On the other hand there is also the need for discouraging the increasing trend of bringing before the court some frivolous petitions or plaints motivated by personal or political interest or oblique considerations under the guise of PIL. The courts should, therefore, see to it that its process is not abused by personally or politically motivated interlopers in order to delay or damage or frustrate legitimate policies or development programs of the government or to serve their own political or personal objectives. At the same time the court must also be cautious not to overstep the limits of its judicial function and encroach upon the legislative or executive jurisdiction of other organs of the State.

8. Concluding Remarks

Public Interest Litigation is, as justice Krishna Iyer has rightly said, "a product of the creative judicial engineering". It is a strategy of giving the poor and the oppressed meaningful access to justice. It is virtually a rejection of the 'laissez faire' notions of traditional jurisprudence in order to cope with new important rights which are 'diffuse and meta individual'. The liberalized notion of standing has been instrumental behind the birth

[61] *Id.*

of Public Interest Litigation, which allows third party intervention in the judicial process on behalf of the dispossessed, disadvantaged and deprived masses. Unlike the Adversary litigation, Public Interest Litigation is a kind of cooperative and collaborative litigation involving the court, the petitioner and the government or a public authority, and each of them share in common the realization of a statutory or constitutional commitment to social justice, the rule of law, good governance and basic human rights. Over the years Public Interest Litigation has been pursued for the purpose of redressing public injuries, enforcing public duties, protecting special, collective or diffuse rights or vindicating public interest. In various jurisdictions in the accordance with their needs and requirements, the strategy of PIL has been used to fight against violations of human rights, dishonest or efficient administration and environmental degradation and deprivation of the weak and poor. With the increasing complexity of the modern society, PIL activism is fast moving into new areas arousing some heightened expectations not only for vindicating the governmental commitment to the welfare of the oppressed and the victimized but also for effectuating social control maintaining communal harmony, preserving the rule of law and preventing the decline in public morality.[62] Public Interest Litigation has thus finally come to stay and now cannot easily be wished away.

[62] Parmanand Singh, *Public Interest Litigation,* XXIV ANNUAL SURVEY OF INDIAN LAW, 122 (1998)

Global Standards of Judicial Independence

– Tek Narayan Kunwar[♣]

Judicial independence is the most cherished value of constitutional government. The judiciary undertakes the mission of imparting fair and impartial justice based on the constitution and recognized principles of justice for which it needs to be independent, impartial and accessible. Even though the foundation of an independent system of justice was laid down by the 1990 Constitution, not much has been done by way of setting standards of judicial independence. The article attempts to define judicial independence, looks into the concept of separation of power and judicial independence, discusses a few other concepts such as the rule of law, impartiality, accountability and also collects and collates the global information on judicial standards. The author also advances some suggestions for the implementation of judicial independence. Though written in a global perspective, it has immense value to the Nepali justice sector as well.

1. Introduction

Judicial Independence comprises principles that decisions of the judiciary should be impartial and not subject to influence from the other branches of government or from private or political interests. Judicial independence is secured by giving judges long, and sometimes lifetime, tenure and making them not easily removable. Judicial independence means that judges are free to decide cases fairly and impartially, relying only on the facts and the law. It means that judges are protected from various pressures like political, legislative, special interest, media, public, financial, or even personal pressure.

Independent and professional judges are the foundation of a fair, impartial, and constitutionally guaranteed system of courts of law known as the judiciary. This independence does not imply judges can make decisions based on personal preferences but rather that they are free to make lawful decisions even if those decisions contradict the government or powerful parties involved in a case.

In democracies, independence from political pressures of elected officials and legislatures guarantees the impartiality of judges. Judicial rulings should be impartial, based on the facts of a case, individual merits and legal arguments, and relevant laws, without any restrictions or improper influence by interested parties. These principles ensure equal legal protection for all. The power of judges to review public laws and declare them in violation of the nation's constitution serves as a fundamental check on potential government abuse of power even if the government is elected by a popular majority. This power, however, requires that the courts be seen as independent and able to rest their decisions upon the law, not political considerations.

♣ District Judge, Mugu District Court, Nepal

An independent judiciary assures people that court decisions will be based on the nation's laws and constitution, not on shifting political power or the pressures of a temporary majority. Endowed with this independence, the judicial system in a democracy serves as a safeguard to the people's rights and freedoms. The role of the judiciary in any society must be to protect human rights by way of due process and effective remedies. This role cannot be fulfilled unless the judicial mechanism is functioning independently, with its decisions based solely on the basis of legal principles and impartial reasoning. This article gives an overview of the factors comprising judicial independence, institutional independence, individual independence, impartiality and accountability through the experience of various countries.

2. Judicial Independence Defined

The independence of the judiciary can be defined in many ways. Some scholars have produced long lists of criteria the judiciary must meet; others focus on more narrow aspects of judicial independence. But most agree that a truly independent judiciary has three characteristics:-

- **It is impartial:** Judicial decisions are not influenced by the judge's personal interest in the outcome of the case. Some analysts incorporate into "impartiality" the idea that judges are not selected primarily because of their political views but on merit.
- **Judicial decisions, once rendered, are respected:** Either the parties to the case must comply voluntarily with the decision, or those with the power to coerce compliance must be willing to use this power if compliance is not forthcoming.
- **The judiciary is free from interference:** Parties to a case, or others with an interest in its outcome, cannot influence the judge's decision. In practice, protecting judges from private persons with an interest in the case means preventing judicial corruption and coercion.

Under any definition, judicial independence is multi-dimensional and multifaceted. Accordingly, the conceptual framework for assessing judicial independence, described below, is designed to capture the dynamics that encourage or impede judicial independence. Some selected definitions are given below:

- "Judicial Independence- Freedom from direction, control, or interference in the operation or exercise of judicial powers by either the legislative or executive arms of government."[1]
- "A truly independent judiciary is one that issues decisions and makes judgments which are respected and enforced by the legislative and executive branches; that receives an adequate appropriation from Congress; and that is not compromised by politically inspired attempts to undermine its impartiality.... Judicial independence includes the independence of an individual judge as well as that of the judiciary as a branch of government. Individual independence (otherwise known as decisional independence) is both substantive, in that it allows judges to perform the judicial

[1] Excerpt from: Legal Words Dictionary, Reed International Books, http://www.butterworths.com.au/legalwords/html/000801.htm (1st May, 2007)

function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, adequate compensation and security."[2]

- "Judicial independence is the freedom we give judges to act as principled decision-makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent, judges are not influenced by personal interests or relationships, the identity or status of the parties to a case, or external economic or political pressures."[3]
- "Judicial independence is the freedom that a judge should have to decide a case in front of her based on the facts and law, free from outside pressures or special interests."[4]
- "Judicial independence is widely considered to be a foundation for the rule of law... [M]ost agree that a truly independent judiciary has three characteristics. First, it is impartial. Judicial decisions are not influenced by a judge's personal interest in the outcome of the case...Second, judicial decisions, once rendered, are respected...The third characteristic of judicial independence is that the judiciary is free from interference. Parties to a case, or others with an interest in its outcome, cannot influence the judge's decision."[5]
- "Judicial independence is a concept that expresses the ideal state of the judicial branch of government. The concept encompasses the idea that individual judges and the judicial branch as a whole should work free of ideological influence."[6]
- "The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without and restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[7]
- "Judicial independence refers to the insulation of the judiciary from the influence of other political institutions, interest groups, and the general public."[8]
- "If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."[9]

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2 Excerpt from: *An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence*, Chicago: American Bar Association, 1997 (pp. ii-iii).

3 Excerpt from: Brennan Center for Justice Resources: Questions and Answers about Judicial Independence. http://www.brennancenter.org/resources/resources_jiqanda.html 2001 (3rd May 2007)

4 Excerpt from: League of Women Voters: Creating A Just Society: Judicial Independence. http://www.lwv.org/join/judicial/ 2001 (2nd May 2007)

5 Excerpt from: The World Bank Group – Legal Institutions of the Market Economy. Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs. http://www1.worldbank.org/publicsector/legal/judicialindependence.htm 2001 (1st May 2007)

6 Excerpt from: American Judicature Society: Center for Judicial Independence. What is Judicial Independence? http://www.ajs.org/cjiJI.html 2001 (1st May 2007)

7 Excerpt from: United Nations Office of the High Commissioner for Human Rights. Basic Principles on the Independence of the Judiciary. (Endorsed by UN General Assembly 1985) http://www.unhchr.ch/html/menu3/b/h_comp50.htm (1st May 2007)

8 Excerpt from: G. Alan Tarr. "Judicial Independence and State Judiciaries," in Judicial Independence: Essays, Bibliography, and Discussion Guide (Teaching Resource Bulletin #6). Chicago: American Bar Association Division for Public Education, 1999.

9 Excerpt from: James Madison. The Federalist No. 78, at 469.

- "We must keep in mind that judicial independence is a means toward a strong judicial institution. The strong judicial institution is a means toward securing the basic goals of people: human liberty and a reasonable level of prosperity."[10]
- "Judicial Independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture, it has proven superior to any alternative form of discharging the judicial function that has ever been tried or conceived. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans."[11]
- "The law makes a promise—neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob."[12]
- "The independence of all those who try causes between man and man, and between man and his government, can be maintained only by the tenure of their office. I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary."[13]
- "Chief Justice Rehnquist has stated that the independent judiciary is one of the 'crown jewels' of the nation's system of government. Certainly, judicial independence is an essential ingredient of the protection of individual liberty and equality in our constitutional system. Moreover, the independent judiciary checks the legislative and executive branches of the federal government, thereby helping to maintain our constitutional commitments both to separation of powers at the national level and to federalism in nation-state relations."[14]
- "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."

3. Separation of Powers and Judicial Independence

Independence of the judiciary recognize from the notion of the separation of powers, whereby the executive, legislature and judiciary form three separate branches of government, which can constitute a system of checks and balances aimed at preventing abuses of power. This separation and consequent independence is a key to the judiciaries effective functioning and upholding of the rule of law and human rights. Without the rule of law, there can be no realization of human rights.

The principle of separation of powers in government is the rock layer of a democratic state based on the rule of law. The judicial power is one of the three powers of a democratic government. It is pursuant to this power that justice is dispensed in disputes

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[10] Excerpt from: Honorable Stephen G. Breyer. "Comment: Liberty, Prosperity, and a Strong Judicial Institution," in Judicial Independence and Accountability, Law and Contemporary Problems, Volume 61, Number 3 (Summer 1998).

[11] Bruce Fein and Burt Neuborne, "Why Should We Care About Independent and Accountable Judges," Judicature, Volume 84, No. 2 (Sept-Oct 2000).

[12] Excerpt from: Honorable Anthony M. Kennedy. Address to American Bar Association symposium, Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice, held December 4-5, 1998, Philadelphia, Pennsylvania.

[13] Excerpt from: John Marshall, address to the Virginia State Convention of 1829-30. Proceedings and Debates of the Virginia State Convention of 1829-30 at 616 (1830).

[15] Mistretta v. United States, 488 U.S. 361, 407 (1989)

not only between citizens and citizens but also between citizens and other government organs and agencies. Hence the need to vest this judicial power in a mechanism independent of the legislative and executive powers of the government with adequate guarantees to insulate it from political and other influence in order to secure its independence and impartiality. Understanding of, and respect for this scheme of arrangement in constitutional government, is a *sine qua non* for the effective and sound system of justice within which judges could discharge their roles independently and impartially. It is the want of understanding of and respect for this broader concept which has resulted in the present universal concern for judicial independence. It has shown that of the three arms of the government the judiciary is the most vulnerable needing security and protection.

The doctrine of the separation of powers dictates that each branch of government is to be separate from the others. The twin objects behind this doctrine are to ensure that no branch of government becomes too powerful and to allow each branch to act as a check or balance on the others. The constitutional system adopted in the world does not abide by a strict application of separation of powers. As in the United Kingdom, people claim more strongly on the independence of the judiciary from the legislative and executive branches of government. However, there are some exceptions to this: most notably, judges are appointed by the executive and can be removed from office through constitutional processes that requires an address of the legislature. In sharp contrast to the United States, however, there is no clear separation of power between the executive and the legislature in other countries. Executive government is conferred on the political party with the largest majority in the Lower House, and members of parliament head the various departments of executive government. It should be recalled, however, that pure separation of power does not provide stable government.[15] Separation of powers does not imply unaccountable power, such that each branch of government has some role to play in other branches.

4. Rule of Law and Judicial Independence

Rule of law means that no individual, president or private citizen, stands above law. Democratic governments exercise authority by way of law and are themselves subject to law's constraints. Laws should express the will of the people, not the whims of kings, dictators, military officials, religious leaders, or self-appointed political parties. Citizens in democracies are willing to obey the laws of their society, then, because they are submitting to their own rules and regulations. Justice is best achieved when the laws are established by the very people who must obey them. Under the rule of law, a system of strong, independent courts should have the power and authority, resources, and the prestige to hold government officials, even top leaders, accountable to the nation's laws and regulations. For this reason, judges should be well trained, professional, independent, and impartial. To serve their necessary role in the legal and political system, judges must be committed to the principles of democracy.

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[15] Maurice Vile, *Constitutionalism and the Separation of Powers*, 1967, extracts in Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials*, Law Book Company, Sydney, 1999

The laws of a democracy may have many sources: written constitutions; statutes and regulations; religious and ethical teachings; and cultural traditions and practices. Regardless of origin, the law should enshrine certain provisions to protect the rights and freedoms of citizens: Under the requirement of equal protection under the law, the law may not be uniquely applicable to any single individual or group. Citizens must be secure from arbitrary arrest and unreasonable search of their homes or the seizure of their personal property. Citizens charged with crimes are entitled to a speedy and public trial, along with the opportunity to confront and question their accusers. If convicted, they may not be subjected to cruel or unusual punishment. Citizens cannot be forced to testify against themselves. This principle protects citizens from coercion, abuse, or torture and greatly reduces the temptation of police to employ such measures.

5. Judicial Independence and Impartiality

There are two types of independence i.e. institutional and individual. Institutional independence requires the judiciary to be able to function without any influence from the government or other state agencies. This is usually necessitated by either the constitution or other legal provisions in all but socialist countries or those with military dictatorships. However, throughout the world, it is the practical realization of this principle that is more problematic. This can either be because legal provisions themselves are shaky, or that they are not being enforced as they should be. Together with institutional independence, it is essential that individual judges are also guaranteed the independence to undertake their work effectively. The two are obviously linked, and if there is no institutional independence, there is little chance of there being any individual independence. Both entitle and require judges to ensure that judicial proceedings are conducted fairly and the rights of all parties are respected; both require that judicial accountability is upheld.

Judicial impartiality is another aspect of judicial independence; while judicial independence requires that the judiciary be able to function effectively without undue interference from political or other agencies, judicial impartiality requires the judiciary to base their decisions on facts and in accordance with the law. Judges should thereby not have any preconceptions regarding issues they are deciding upon, nor should they favor either of the parties to the dispute. This includes the arbitrary use of contempt of court proceedings. Judges can enjoy freedom of expression and association while in office. These freedoms must be exercised in a manner that is compatible with the judicial function and that does not affect or appear to affect judicial independence or impartiality. Judges should not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may appear to affect their independence or impartiality. Judges shall not exercise any political function.

6. Judicial Independence and Accountability

Whether judges are appointed or elected it is their performance on the bench and their accountability for improper activities that is crucial. While there is great debate as to how judges are put on the bench, the public's dissatisfaction with the so-called independence of the judiciary and with the inadequacy of the judicial disciplinary machinery is disregarded by the Bench and Bar.

Judges are standard setters in society. They interpret and develop the law upon which society is structured and human relationships are conducted. Their actions and conduct, both within and outside the Court, must at all times be above suspicion and seen to be so if they are to command the respect and confidence of the public. Suspicious conduct of one or two judges is enough to tarnish the image of the entire judiciary. It follows that those appointed to this high position of esteem and respect must be only persons with proven competence, integrity, probity and independence. There should be no compromise on these standards. Judges appointed for lesser qualifications or for other considerations, political or otherwise, would eventually bring disrepute to their own institution.

Accountability and transparency are the very essence of democracy. Not one single public institution, or for that matter even a private institution dealing with the public, is exempt from accountability. Hence, the judicial arm of the government too is accountable. However, judicial accountability is not the same as the accountability of the executive or the legislature or any other public institution. This is because of the independence and impartiality expected of the judicial organ.

Judges are accountable to the extent of deciding the cases before them expeditiously in public (unless for special reasons they conduct the hearing in-camera), fairly and delivering their judgments promptly and giving reasons for their decisions; their judgments are subject to scrutiny by the appellate courts. No doubt legal scholars and even the public including the media may comment on the judgment. If they misconduct themselves, they are subject to discipline by the mechanism provided under the law. Beyond these parameters, they should not be accountable for their judgments to any others.

However, it must be stressed that the constitutional role of judges is to decide on disputes before them fairly and to deliver their judgments in accordance with the law and the evidence presented before them. It is not their role to make disparaging remarks about parties and witnesses appearing before them or to send signals to society at large in intimidating and threatening terms, thereby undermining other basic freedoms like freedom of expression. When judges resort to such conduct, they lose their judicial decorum and eventually their insulation from the guarantees for judicial independence. No doubt judges too have freedom of expression, but in the adjudicating process, they must be circumspect with their expressions to maintain their objectivity and impartiality.

7. Global Standards of Judicial Independence

A number of international and regional human rights instruments mandate an independent, impartial and competent judiciary. However, there is no actual definition as to the exact meaning of an independent judiciary. Various guidelines have been set forth internationally in documents such as the UN Basic Principles on the Independence of the Judiciary. While these documents are not binding on member states, they evidence high-level support for the principle of judicial independence. In addition, international and regional human rights courts and commissions have interpreted the provisions of human rights treaties and shed some light on the minimum standards and components of the right to a fair trial and judicial independence. The following are many of the international and regional, governmental and non-governmental, documents, guidelines and principles, which promote, define and interpret the principle of judicial independence in every region of the world.

7.1 Universal Declaration of Human Rights (UDHR)[16] article 10: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

7.2 International Covenant on Civil and Political Rights (ICCPR)[17] article 14(1):"... in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.."

7.3 Vienna Declaration and Programme for Action in 1993[18] "Every state should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development."

7.4 European Convention for the Protection of Human Rights and Fundamental Freedoms(ECHR)[19] article 6(1): *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*;

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16 *Universal Declaration of Human Rights*, 12/10/1948, United Nations, G.A. res. 217A(III)
17 *International Covenant on Civil and Political Rights*, 12/16/1966, United Nations, GA resolution 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force on March 23, 1976
18 Paragraph 27, Vienna Declaration and Programme for Action in 1993
19 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 11/04/1950, Council of Europe, European Treaty Series no.5, entered into force on March 9, 1953

7.5 Inter-American Convention on Human Rights (IACHR)[20] articles 8(1) *"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature."*

7.6 African Charter on Human and People's Rights (ACHPR)[21] articles 7(1) *"Every individual shall have the right to have his cause heard. This comprises … (d) the right to be tried within a reasonable time by an impartial court or tribunal"* and 26 and 26 *"State parties to the present Charter shall have the duty to guarantee the independence of the Courts."*

7.7 The UN Basic Principles on the Independence of the Judiciary [UNBP] (1985)[22] It calls on member States to guarantee judicial independence domestically through constitutional or legal provisions and highlight the standards for the independence of the judiciary, including separation of powers, technical competence, judicial qualifications, judicial selection, and conditions of service, security of tenure, training, immunity and judicial discipline. "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.[23]" The UNBP are complemented by the UN Basic Principles on the Role of Lawyers (1990) and the UN Guidelines on the Role of Prosecutors (1990), which present guidelines related to the rights, duties and responsibilities of lawyers and prosecutors respectively. There is an understanding that the guarantee of judicial independence and fair trials cannot be achieved by setting guidelines applicable to the judiciary and individual judges but rather its fulfillment requires to address the broader legal community.

7.8 Latimer House Guidelines for the Commonwealth, 1998[24] Preserving judicial independence the Latimer House Guidelines for the Commonwealth, 1998 has taken greater effort. The guideline has addressed three focal areas of judiciary which are:-

a. Judicial appointments

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the

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20 *Inter-American Convention on Human Rights*, 11/22/1969, OAS Treaty Series No.36, 1144 U.N.T.S. 123, *reprinted* in Basic Documents in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), entered into force on July 18,1978

21 *African Charter on Human and People's Rights*, 06/27/1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21, 1986

22 *UN Basic Principles on the Independence of the Judiciary*, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26 09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53 (1985)

23 Principle 1-UNBP,1985

24 Commonwealth Law Ministers' and senior Officials Meeting in London in November 1999, 2001& 2002.

quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable; such appointments should be subject to appropriate security of tenure. Judicial vacancies should be advertised.

b. Funding

Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

c. Training

A culture of judicial education should be developed.

Training should be organized, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practicing lawyers as part of their ongoing professional development training.

7.9 Recommendation No. R (94)12 on the Independence, Efficiency and Role of Judges (1993)[25] The Council of Europe attempted to present in a coherent, synthetic manner the set of principles and elements that constitute "judicial independence". The principles highlighted cover a wide range of issues, including the separation of powers, constitutional

[25] Recommendation No. R (94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 10/13/1993, 518th Meeting of the Ministers' Deputies, Council of Europe

guarantees of independence, the jurisdiction of ordinary courts, freedom of expression and association, ethical standards, objective and transparent selection and disciplinary processes and judicial access to information.

7.10 Council of Europe Recommendation (1994)[26]

General Principles on the Independence of Judges has recommended the following:

1. All necessary measures should be taken to respect, protect and promote the independence of judges.
2. In particular, the following measures should be taken:
    a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles...
    b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.
    c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency...
    d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.
    e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case...
    f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest...
3. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

7.11 European Charter on the Status of Judges (1998)[27]

It was adopted by judges from 13 Western, Central and Eastern European countries as well as representatives of the European Association of Judges and of the European Association of Judges for Democracy and Freedom (MEDEL) under the leadership of the Council of Europe Directorate of Legal Affairs. The Charter defines the key elements to be included in the stature of judges, with a view to "ensuring competence, independence and impartiality" and therefore constitutes "a means of guaranteeing that the individuals whose rights are to be protected by the courts and judges have the requisite safeguards on the effectiveness of such protection." Taking into account the differences between the various national

[26] Principle 1, Council of Europe Recommendation (1994)
[27] *European Charter on the Status of Judges*, DAC/DOJ (98) 23, 07/08-10/1998, Strasbourg, Council of Europe

systems, the Charter addresses a number of key issues, including judicial selection, training, security of tenure, judicial career development, liability, remuneration, termination of office and judicial councils. It also calls upon member States to enshrine fundamental principles and guarantees of judicial competence, independence and impartiality in their domestic legal system.

7.12 Syracuse Principles (1981)

Independence of the judiciary is defined by two ways on Syracuse Principles (1981)[28] as-

1. That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and
2. That the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature."

7.13 New Delhi Standards (1982)

This is called Pre-UNBP Instruments. Before the adoption by the UN of the Basic Principles on the Independence of the Judiciary in 1985, a number of preliminary guidelines and sets of standards had been adopted by various organizations, such as the "New Delhi Standards" (1982)[29], the "Tokyo Principles" (1982)[30] and the Montreal Universal Declaration on the Independence of Justice (1983).[31] The latter was approved by some 130 jurists representing 20 international organizations at the 1st World Conference on the Independence of Justice and addresses issues regarding international and national judges as well as lawyers, jurors and assessors.

7.14 Montreal Universal Declaration on the Independence of Justice (1983)

In July 1983, the Universal Declaration on the Independence of Justice (The Montreal Declaration) was adopted at the First World Conference on the Independence of Justice, which similarly recognized that there was no single proper method of judicial selection, provided that it safeguarded against judicial appointments for improper motives;[32] and that participation in judicial appointments by the Executive or Legislature was consistent with judicial independence, so long as appointments were made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participated. The Declaration stated that candidates for judicial office should be individuals of integrity and ability, called for equality of access to judicial office[33] and stated that "the process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects".[34]

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28 Article 2, Syracuse Principles (1981)
29 Code of Minimum Standards of Judicial Independence, "New Delhi Standards", New Delhi, India, 1982
30 Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 07/17-18-1982, Tokyo, Japan, LAWASIA Human Rights Standing Committee
31 *Universal Declaration on the Independence of Justice*, Montreal, Canada, 1983, World Conference on the Independence of Justice
32 2.14(a)
33 Article 2.11
34 Article 2.13

7.15 Universal Charter of the Judge (1999)

The Universal Charter of the Judge (1999)[35] has defined the term "Independence" as follows: Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them. The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence." Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary." Another effort with international ambitions has been recently launched under the leadership UN's Judicial Group on Strengthening Judicial Integrity, which was originally composed of the Chief Justices of a number of countries of the Asia and Africa.[36]

7.16 The Bangalore Principles[37]

The Bangalore Principles of Judicial Conduct are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to provide the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature and lawyers and public in general, to better understand and extend support to the judiciary. These principles pre-suppose that judges are independent and impartial and established to maintain judicial standards which are intended to supplement and not to derogate from existing rules of law and conduct which are bind on the judges.

There are six paramount values identified in these principles which cover the global standard of judicial conducts. They are:

Value 1	Independence
Principle	Judicial Independence is pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual aspects.
Value 2	Impartiality
Principle	Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
Value 3	Integrity
Principle	Integrity is essential to the proper discharge of the judicial office.
Value 4	Propriety
Principle	Propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge.

[35] Article 1 of the Universal Charter of the Judge, 1999
[36] *Id,* Article 2
[37] The Bangalore Principles of Judicial Conduct, 2002

Value 5 Equality

Principle Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Value 6 Competence and Diligence

Principle Competence and diligence are pre-requisites to the due performance of judicial office.

The Bangalore Principles of Judicial Conduct, 2002 is a draft document which has been prepared by judges using as reference a large number of existing national codes and international instruments. It is part of process of developing broad principles appropriate to an international code of judicial conduct, drawing on the best practice and precedents in many jurisdictions of the world. The Bangalore principles are more comprehensive in its elaboration than any of the national codes now in existence. However, the Bangalore principles have two major shortcomings. The first is that it does not take note of the practices in the civil law system. It is the product of judges mainly drawn from the common law jurisdictions. The second is that it does not recommend any mechanism for enforcement. The code only states that "by reason of nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions." Thus by leaving to the concerned States mechanism for implementation, it gives them room for non-action.

7.17 Tokyo Principles (1982)

The Tokyo Principles present the work of the LAWASIA Human Rights Standing Committee to identify principles and conclusions on the independence of the judiciary in the LAWASIA region. More importantly, a Committee of Experts convened by the International Association of Penal Law, the International Commission of Jurists and the Center for the Independence of Judges and Lawyers drafted the “Syracuse Principles” (1981), which lay much of the ground work for the adoption of the UNBP four years later. These principles address the independence of the judiciary but also, *inter alia*, the qualification, selection, promotion and discipline of judges; training; working conditions; and administrative and financial arrangements of the judiciary.

In July 1982, Law Asia adopted the Tokyo principles in which it was acknowledged that there was no single essential method of appointment; what was more important was that the method employed should be such that ensured the appointment of persons fit to be judges, that provided safeguards against appointments being influenced by inappropriate factors, and that was directed to the appointment of judges of independence, capacity and integrity.[38] These principles also gave support for the formation of a Judicial Service Commission, or the adoption of a procedure for consultation pursuant to which those concerned in the administration of justice could participate.[39]

[38] Article 10 of the Tokyo Principles (1982)
[39] *Id.*

7.18 Beijing Principles (1995)

In Asia, the "Beijing Principles" (1995)[40] were adopted at the 6th Conference of Chief Justices of Asia and the Pacific Region. The main objective of the Conference was the promotion of "the administration of justice, the protection of human rights and the maintenance of the rule of law in the region". To this aim, bearing in mind the Tokyo Principles and Revised Statement, the Chief Justices attempted to draft minimum standards for judicial independence, taking into account national differences. The main recommendations cover a wide range of topics in attempt to identifying consensus principles for the Asia and Pacific region, including judicial appointment, security of tenure, judicial resources and remuneration, court administration and the relationship of the judiciary with the executive. According to the Beijing Principles (1995) the independence of the judiciary requires that:-

a. The Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
b. The Judiciary has jurisdiction, directly or by way of review, over all issues of a justifiable nature."

The adoption of the Beijing Statement represented the achievement of a remarkable consensus between the Chief Justices from countries reflecting the divergent cultures of the different nations in the region. It was a tribute to the determination of the Chief Justices that they were able to reach agreement on the minimum standards necessary to secure judicial independence in their respective countries.

7.19 Judges' Charter in Europe (1993)

The European Association of Judges has adopted the Judges' Charter in Europe (1993)[41], which recalls that *"the independence of every Judge is unassailable. All national and international authorities must guarantee that independence."* The Charter aims at defining a certain number of fundamental principles while taking into account the existing differences among European States as a result of differing legal traditions and practices.

7.20 Caracas Declaration (1998)

In Latin America, the Caracas Declaration (1998)[42] was adopted at the 1998 Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts. The Declaration aims at creating a framework for the enforcement of the principles contained in the Declarations of the Ibero-American Heads of States[43] and Governments regarding the administration of justice, thus establishing mechanisms strengthening the judiciaries of Ibero-American States. The main recommendations cover a variety of issues related to judicial independence in Ibero-American States, including judicial independence, formation and training, alternative conflict resolution, and corruption. The Ibero-American Supreme

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40 *Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, "Beijing Principles", 1995, 6th Conference of Chief Justices of Asia and the Pacific Region

41 *Judges' Charter in Europe*, 03/20/1993, European Association of Judges

42 *Caracas Declaration*, 03/04-06/1998, Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, Caracas, Venezuela

43 Organization of Ibero-American States for Education, Science and Culture is an international organization comprising Spanish and Portuguese speaking nations of Americas and Europe plus Equatorial Guinea in Africa.

Courts and Tribunals attending this Summit, aware that autonomy and independence of the Judicial Power are essential premises for their effective functioning, formulate the following policies:

a. In order to ensure the judicial independence, it is necessary to apply and create norms, which ensure the self-government of the judicial power and regulate access to the administration of justice, respect to the judge's stability, and to the judicial career, as well as permanent training of its administrative and jurisdictional personnel...
b. To strengthen the professional vocation of the Judge as guarantor of the independence of the Judicial Power..."

7.21 Beirut Declaration (1999)

In the Middle East, the "Beirut Declaration" (1999)[44] was the result of the debates of a conference on "The Judiciary in the Arab Region and the Challenges of the 21st Century" hosted by the Lebanese Bar Association in Beirut in June 1999. The Arab Center for the Independence of the Judiciary and the Legal Profession convened the conference to which and 110 Arab jurists from 13 Arab States participated. The Declaration called upon Arab States *"to include the UN Basic Principles on the Independence of the Judiciary into Arab constitutions into Arab constitutions and laws, and in particular, to penalize any interference in the work of the judiciary..."* The main recommendations issued in the Declaration covered issues, including judicial appointment, security of tenure, training, freedom of association and judicial resources.

8. Some Suggestions

With the aim of strengthening the ability of the judiciary to perform its constitutional duties, a set of universally accepted international and constitutional judicial independence norms should be implemented. These are some suggestions for which every country's three branches of government should be humble to implement them:

1. There should not be any inappropriate interference with the judicial process by either public officials of other branches of government or private individuals or entities. Nor should judicial decisions be subject to revision, except upon appellate review.
2. Judges should perform their duties free from improper influences and without undue delay. They should ensure that judicial proceedings are conducted fairly and that the rights of parties are respected.
3. Not only must judges be impartial, they must be seen by all to be impartial. Accordingly, in the exercise of their rights to freedom of expression, belief, association and assembly, judges should conduct themselves in such a manner as

[44] *Recommendations of the First Arab Conference on Justice, "Beirut Declaration"*, 06/14-16/1999, Conference on "The Judiciary in the Arab Region and the Challenges of the 21st Century", Beirut, Lebanon

to preserve the dignity of their office and the impartiality and independence of the judiciary.

4. Tribunals that do not use the duly established procedures of the legal process should not be created to displace the jurisdiction of the ordinary courts, nor should judicial power be vested in organ by their very nature of their appointment are incapable to exercise.
5. Governments are obliged to provide adequate resources to enable the judiciary to perform its functions properly. Resources and career incentives at present, including salaries, benefits and court facilities, are not adequate and they should never be reduced.
6. Persons selected for judicial office should be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection or promotion should be based on objective factors, in particular, ability, integrity and experience, and shall include safeguards against improper influences.
7. Judges must have guaranteed tenure until retirement or the expiration of their term of office, where such exists.
8. Judges should enjoy personal immunity from civil suits for acts or omissions in the exercise of their judicial functions.
9. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that render them unfit to discharge their duties. Judges have the right to a fair and expeditious hearing concerning complaints or charges against them. All disciplinary, suspension and removal proceedings shall be determined in accordance with established standards of judicial conduct.
10. Legislation, judicial information and court decisions should be made available to the public.
11. Decisions of the courts should be enforced fairly and effectively.
12. Governmental and Non-Governmental groups must vigilantly safeguard the independence of the judiciary and the rule of the law. The three branches of government, individually and collectively, all have a solemn and legal responsibility to respect and uphold a state's constitution.
13. Implementing these goals and giving real meaning to the concept of the rule of law and judicial independence will require ongoing attention and oversight by individuals, governmental and non-governmental groups, as well as an independent media.
14. The leadership of each country's three branches of government, as well as civil society and the media should make every effort to ensure these constitutional principles are respected and implemented in practice.
15. Each state should support the creation of country rule of law that bring together well respected representatives of all three branches of government, as well as civil society, to promote, monitor and annually publicly report on each country's progress in implementing these principles.
16. Though the judicial independence principles are not exhaustive by any means, every country should respect these norms as fundamental, universally accepted and relatively no controversial.

9. Conclusion

The independence of the judiciary is the cornerstone of a democratic system. The court and the judges should exercise their functions free from direct or indirect interference by any person or entity. This freedom should be applied both to the judicial process in pending cases, including the assignment of cases to particular judges. A court should be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure. The court and the judges should be entitled and required to maintain the confidentiality of their deliberations.

In a country like Nepal challenges to the independence of the judiciary have occurred mainly because the standards have not been well discussed. Recent challenges are complex and multifaceted. However problematic, the current situation can be viewed as an opportunity to revisit the standards of independent judiciary, and courts can use this as an opportunity to educate the nation about our evolving judicial heritage and its importance and relevance. The people have to value an independent judiciary and be willing to defend it. And to win public affection, the judges must do their jobs well. People must feel that they can resolve disputes satisfactorily and in a reasonable amount of time. It is not enough for the judiciary to be independent of the executive and of all other external influences. The Judges, because of the high office they hold and the plenitude of powers they exercise, must be seen to have qualities of excellence of mind and heart.

Lastly, greater political will is needed for enhancement of judicial independence. The inadequate quality of judicial performance and allegation of corruption have reduced the public confidence in the judiciary and as a result created obstacles for access to justice, especially for the poor and vulnerable. This has called for a greater degree of judicial accountability and more effort from the judiciary itself. There must be greater awareness among the political and judicial leaders as well as the public of the significance of an independent judiciary. Both the governors and the governed must understand that they need an independent judiciary to uphold the rule of law and protect human.

Nepali Experience and Experiment with Arbitration on Commercial Disputes

– Om Suvedi*

More than 25 years have past when Nepal first enacted the arbitration law. The author sketches the development of arbitration in Nepal, how it tried to model its law after the UNCITRAL Model Law. He has also made a survey of the cases pending in the court and also examines problems in the execution of arbitral award. The survey shows that much is yet to be done to address the current challenges and speed up disposal of cases and petitions in the court. Capacity building and improvement of law are his other suggestions for institutionalizing arbitration in Nepal.

1. Introduction

With the advent of commercial activities in the society less time consuming, less adversarial and less formal methods of dispute settlement were devised and used in lieu of formal process of litigation in the court colloquially termed as the alternative disputes resolution (ADR, henceforth) methods which overtime became popular. ADR methods got applied worldwide in almost all judicial systems. And in the course, different variations and permutations of ADR such as negotiation, conciliation/mediation, mediation + arbitration (med-arb), mini trial, arbitration, fast-track arbitration were also developed.[1]

Of the all ADR techniques, mediation was widely used in Nepal at the societal level where local leaders, usually village or clan elders or other respectable persons in society resolved disputes. The resolution so made used to be accepted by the parties in dispute as well as by the society at large. However, Nepal did not have a well developed arbitral legal regime until the early eighties. The first law on the subject was the Arbitration Act 1981. Before this, statutory recognition to arbitration was given by the Development Board Act, 1956 which accepted arbitration as the chosen method of dispute settlement whenever dispute or difference between the parties arose.[2] With the Arbitration Act coming into existence, a couple of cases have been decided by Supreme Court and other courts and cases are also pending in the district courts seeking the execution of the arbitral award. The 1981 Act is now replaced by the 1999 Act of the same name. In 2002 the Supreme Court of Nepal also promulgated the Arbitration (Court Procedure) Rule. How is the legal regime on arbitration operating in Nepal; what has been the role of the court so far and what direction should the legal regime take in order to further systematize and institutionalize arbitration in Nepal: these are the key concerns of this article. After presenting the sketch of historical development of arbitration law, I make a quick examination of the relation of the local law with the UNCITRAL Model law following which a review of the judicial trend up to 1999 and

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1 PC Rao, *"Alternatives to Litigation in India,"* ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS, 24 - 32 (Universal Law Publication Co. Pvt. Ltd., India 2002)

2 *See* Development Board Act, 1956 S. 9

also the trend following the new enactment is made. The role played by appellate courts in the development of arbitration law and giving shape to arbitral proceedings is examined. For this a survey of the activities of the court has been made. The execution of arbitral award and the problems encountered at that stage is another focus of discussion and in the final part, some suggestions and recommendations are made for the improvement of law and the prevailing practice on arbitration.

2. Development of Law on Arbitration in Nepal

As mentioned earlier, the process of settlement of disputes was a common practice in the society which was not developed as we see today. Trade was very much based on Dharma. And due to the adherence to the path of religion, fair play in the trade was generally the norm, and where dispute arose it was amicably settled. The formal system of court litigation and arbitration, as we see today, were not developed.

In our country, the introduction of the modern concept of arbitration is not very old. The foundation on the subject was laid down by the enactment of Development Board Act, 1956. The Act gave recognition to the concept of arbitration in the judicial system and authorized its use in disputes involving the Government on the one hand and the donor or construction companies on the other.[3] As the international contractors or donors believed in their own way rather than our needs, generally the arbitration was modeled after the ICC, Paris. It was very costly and inconvenient for developing country like ours. After persistent persuasions the UNCITRAL Rules began to be sparingly used. This paved a new way and brought about innovative dimension in the speedy settlement of disputes. Steps were taken to make donors believe in the legal regime prevalent in the country as well as to reduce the case loads of arbitral nature found registered in regular courts of all tiers. Arbitration clauses began to be inserted in different state transactions but with different connotations and purposes. The development of international relations, involvement of foreign construction companies in development activities in Nepal, the expansion in trade, commerce and investment cumulatively ushered the evolution of a new legal regime on the subject finally leading to the enactment the Arbitration Act in 1981.[4]

3. Need of a New Legal Regime

Arbitration Act, 1981 remained in practice for 18 years before it was replaced by the new Act. Even though the law had many good provisions, it lacked some legal provisions needed to be an ideal law on the subject. Many experts believed that the Act was basically found to be ineffective and inadequate. The general shortcomings of the Act may be summarized as follows:

- Incompleteness and inadequacy of the Act by which the defaulters were benefited;
- Unnecessary delays and interfaces made by the courts in the arbitral process;

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3 *Id.*

4 IC Sharma, *"Recent Development in Arbitration Law in Nepal,"* NEPAL LAW REVIEW 1-2 (Vol. 13, Nepal Law Campus, Nepal)

- Appointment of inefficient arbitrators lacking knowledge of arbitral process and procedure who often favored
- Lack of institutions supporting arbitrations;
- Paucity of literatures relating to arbitration;
- Lack of law providing action against the biased arbitrators;
- Drafting of defective arbitration clauses in contracts;
- Lack of proper arbitral knowledge among the judges, arbitrators and lawyers.
- No definition of nature of dispute given[5]
- No of arbitrator is one if no number is given[6]
- If no arbitrator is appointed according to the procedure given, the district court to be requested for appointment[7]
- Incase of lack of unanimity, wide discretion for the district court to appoint a person as an arbitrator[8]
- District court to maintain the panel of arbitrators[9]
- District court to appoint another arbitrator if the one appointed earlier dies or becomes vacant by any other reason[10]
- Award, if no unanimity of the arbitrators in opinion, last resort to be a judge specified by or by the chief judge of the Appellate Court.[11]
- Invalidation of the award by the Appellate Court.[12]

4. Emergence of New Legal Regime: Arbitration Act, 1999

The lacunae and the inadequacies mentioned above which were felt during the exercise of the 1981 Act for nearly 18 years led to the enactment of Arbitration Act, 1999. This law was by and large a local adaptation of the Model UNCITRAL Law.[13] The following are some of the salient features of the new Act:

- Conferment of party autonomy;
- Rejection of some inappropriate principles laid down by the apex court;
- Quicker completion of arbitral proceedings;
- Disqualifying persons having bad record from being an arbitrator;
- Lessening of judicial intervention in the arbitral process;
- Granting of supervisory jurisdiction to the Court of Appeal over arbitral process;
- Clear and express procedures of arbitral proceedings;
- Fixation of time limitation for the appointment of arbitrators and submission of claim and counter claims;
- Determination of own jurisdiction by the arbitration tribunal itself;

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5 *See* Arbitration Act, 1981, S. 3
6 *Id,* S. 4
7 *Id,* S. 5.2
8 *Id,* S. 5.3
9 *Id,* S. 6
10 *Id,* S. 7
11 *Id,* S. 18
12 *Id,* S. 21
13 Adopted by UNCITRAL on 21 June 1985, the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985 Model_arbitration.html (August 15, 2007)

- Oath taking by arbitrators;
- Emphasizing on expedient and inexpensive arbitral proceeding; and
- Committing to adopt international trade usages and new trends in the arbitral proceeding etc.

The Act also comprises delay mitigation mechanism, appointment of qualified arbitrators, lesser courts' intervention, procedures speedy and short time consuming, award enforcement mechanism and everything whatever is considered as making arbitration less time consuming than litigation, is taken care of. We may also consider following points in the new Act:

- Special procedural regime for international commercial arbitration;
- Arbitration agreement and settlement of disputes;
- Composition of arbitral tribunal;
- Jurisdiction of arbitral tribunal;
- Conduct of arbitral proceeding;
- Making of award and termination of proceedings;
- Recourse against award;
- Recognition and enforcement of foreign arbitral award,

Besides these improvements based mainly on UNCITRAL Model Law, some new provisions have been added to accommodate the judicial culture and also to make arbitration law more justice oriented and time friendly. These two areas have been very much criticized during the exercise of the old Act. If grouped together point wise, they are:

- Enforcement of the award - time frame of 45 day[14]
- Interest to be paid - defaulting party to pay interest on the amount set by the award[15]
- Cost of arbitration proceedings- parties compelled to pay the fees and arbitration expenses[16]
- Devolution of rights and liabilities –if death occurs of any party, insanity or disappearance of any party.[17]
- Fees payable for the execution of the award- fees at the rate of 0.5% of the total amount to be received by the party to be paid.[18]
- Deposition of case file of arbitration to the district court[19]
- Power to frame rules- Supreme court is empowered to make rules[20]

5. Borrowings from the UNCITRAL Model LAW[21]

United Nations Commission on International Trade Law has developed a Model Law on commercial arbitration to be applied in the settlement of commercial disputes. It is divided

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14 *See* S. 31 of Arbitration Act 1999
15 *Id*, S. 33
16 *Id*, S. 35
17 *Id*, S. 38
18 *Id*, S. 41
19 *Id*, S. 42
20 *Id*, S 43
21 Resolution 31/98, adopted by United Nations General Assembly, 31st Session, (Dec. 15, 1976)

into more than three dozen chapters. Model law has provisions which fit in all the legal systems and have practical implications on all occasions. Countries like India have adopted almost all the provisions of the Model law, including the conciliation aspect of the ADR. The table below compares the provisions of the Model Law and the Arbitration Act 1999.[22]

Provisions	UNCITRAL Model Law (Articles)	Arbitration Act, 1999 (Sections)
Special procedural regime for international commercial arbitration	International scope	21.1
Arbitration agreement and settlement of disputes	7/8/9	3.1/2(ka)/3.2/4
Composition of the arbitral tribunal	10/11/12(1)15/13	5/6/7/9.1/9.2/10/11
Jurisdiction of the arbitral tribunal	16	16
Conduct of arbitral proceedings	18/19/20/21/22/ 24/24(3)/25/26 and 27	22/21/17//17.1/12/13/14/ 20/19/21.1ga/15 and 23
Making of award and termination of proceeding	28 to 32	17.1/17.7/18.1/17.7/ 26/24/25/26.4/26.3/27/ 28/29
Recourse against the award	34.5	30 and 39
Recognition and enforcement of foreign arbitral awards	35 and 36	34

6. Arbitration (Court Procedure) Rules, 2002

The courts are supposed to intervene in different stages of arbitral proceedings only when it is required by law. The new Rule which regulates the court procedure is the first in its origin. It was framed by the Supreme Court and is expected be applicable in the administration of commercial as well as other areas of laws where arbitration processes comes into play. A chart is given in Annex 1 which is a step by step description of the provisions of the said Rule and the courts which are involved in such proceedings. It shows the time limit prescribed by the Rule within which the concerned work must be done by the prescribed authority. It also tries to clarify the time reduction, types of documents to be screened by the courts, authorities responsible for a particular work, steps of procedures to follow, fees and other ancillary matters.

[22] Prof. Bharat Bahadur Karki, *UNCITRAL Model Law in International Commercial Arbitration 1985 and Nepalese Arbitration Law,* NEPCA BULLETIN, Issue No. 15, (NEPCA Kathmandu - 2061 BS)

7. Judicial Trend up to 1999

After the inception of arbitration provisions in the Development Board Act, 1956 the application and use of arbitration process came into practice. However, no specific case law is found until the enactment of the Arbitration Act, 1981. Slowly and gradually it began to change. From early 1993 we encounter cases relating to arbitration under cases heading as Certiorari, Transactions, Compensation, Mandamus plus Certiorari, or claims for re-imbursements, etc.

The first notable decision was made by the Supreme Court regarding court's non-intervention aspect of arbitration law. The case was based on non-intervention by the court through extraordinary jurisdiction until and unless the conditions stipulated in the concerned contract documents provided for. According to the Supreme Court, the ordinary jurisdiction of a lower court was the right place to go for getting redress of the grievance.[23]

Another case setting a precedent was concerning the rights created by the contractual relationship between the parties. The apex court interpreted that contractual rights are not at par with the Legal and Constitutional Rights. So the subject cannot be entertained through the extraordinary jurisdiction as provided in the Constitution.[24]

A case decided by the Katmandu District Court also came to the Supreme Court. It concerned the appointment of arbitrator(s) whereby the district court had appointed the chief arbitrator according to Section 5(2) of the Arbitration Act 1981. In this case the court had interfered and made an appointment of the chief arbitrator in the place made vacant by the refusal to act by the former chief arbitrator who had refused to work. The Supreme Court upheld the decision.[25] A case where the court declined to intervene in the merit of arbitral award was *Nepal Rastra Bank* v. *Rajendra Man Sherchan,*[26] a division bench of the Supreme Court did not intervene in the merit of the award. The court held that so long as legal questions are interpreted correctly by the tribunal, the court has no business to quash the award. The court should not go to examine the correctness of the arbitral award with regard to interpretation of fact and evaluation of evidence. By these decisions the court ruled in consonance with the provision of Section 21(3) of the Arbitration Act 1981 which didn't allow courts to interfere as they do in the exercise of appellate jurisdictions over the decisions of the lower court or quasi-judicial authorities. Arbitral proceedings should not be taken like court litigation. This is a clear and transparent guideline for commercial as well as other types of arbitral proceedings conducted in the territory of Nepal, where Nepali law is the *lex fori*.

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[23] *Naresh Vikram Subedi* v. *Chief District Officer Rolpa and Others* NKP, Vol. 2 (SC 2044 BS)

[24] *Karisma Impex* v. *National Trading Ltd. and Others,* Writ No. 1568 of the year 2048, This is published in **Collection of Judgments relating to Arbitration** (NEPCA 2052 BS)

[25] *Poshnath Nepal* v. *Bhandari Builders and Others,* Writ No. 2137 of the year 2042 (SC 1/5//2044 BS) This is published in **Collection of Judgments relating to Arbitration** (NEPCA 2052 BS)

[26] Civil *ad-hoc* no. 37 of the year 2048 BS (SC16/3/2049 BS) This is published in **Collection of Judgments relating to Arbitration** (NEPCA 2052 BS)

8. Judicial Trend After 1999

The Supreme Court has made a landmark decision in *Bridge Line Corporation v. Agricultural Inputs Corporation*.[27] The court has interpreted the existing arbitration law and set a good precedent. It has taken the view that courts should not make unwanted interference. While rejecting the writ petition the court held that so long as there is an alternative provided for in the law, writ jurisdiction should not be invoked as a usual course of action; the available alternative should be followed. The apex court held that it can entertain application or appeal only against the Appellate Court order or decisions. Thus the leading cases show a gradual shift of the courts to non- intervention while interpreting the legal provisions in the Arbitration Act.

The use of adjudicator in Nepal Government's construction contracts is an old practice. Especially the FIDIC format contracts contained such clauses whereby the engineer overseeing the project was to act as dispute settler or mediator or an arbitrator as an initial step in sorting out differences that arise during the performance of the contract. The court practice regarding the appointment of the adjudicator is confusing. Generally it is thought to be out of the arbitration practice. The apex court in *Amodananda Mishra v. Appellate Court Patan and Others*[28] held that section 7 of the arbitration Act does not bar from appointing an arbitrator if the adjudicator is not appointed in time. It was also held that the Arbitration, Act 1999 is not silent on the issue of non-appointment of the adjudicator and the intervention of the Appellate Court in appointment of the arbitrator(s) is valid for the reason that there must be some way out which helps in the settlement of the disputes that arises or might arise from the contract or agreement. It was a clear cut mandate for the courts to go on with the process of deciding on the issue of appointment of an arbitrator even if the parties fail on the issue of appointing the adjudicator.[29]

Flora Nepal Pvt. Ltd v. Appellate Court Patan[30] is a unique example of unnecessary intervention by the Appellate court. It is regarding the appointment of an arbitrator by invoking Sec.7 of the Act. In this case the appellate court, by entering into the merit of the case, had declined to appoint the arbitrator as, according to it, the transaction between the parties itself had been frustrated. On the writ petition filed by the applicant, the apex court cautioned the lower courts that it should not cross the limit imposed by the Legislature, and so should remain confided within the limit of the ambit of Section 7 of the Act which should be the guiding principle, and not other matters. It observed, the court has no authority to go into the merit of the case and see whether the parties have done one way or the other. The decision of the Supreme Court is a lesson to the lower courts to see the arbitration cases with self-restraint.

Nara International Himalayan Spring Water Co. Ltd v. Hulas Steel Industries Pvt. Ltd. and Others[31] also pertained to the appointment of arbitrators under Section 7 of the new Act. The case in question had a provision whereby the dispute was to be settled by an arbitration tribunal comprising three arbitrators, one from each party and the third as

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27 NKP 286 (SC 2062 BS)
28 NKP 633 (SC 2062 BS)
29 The other important decisions on the area of appointment of the arbitrators are writ no. 2861, 3100 and 3048 of different years spanning from 2004 to 2006.
30 NKP 376 (SC 2062 BS)
31 *Supreme Court Bulletin,* Vol. 22, Falgun 2061 BS

mutually agreed upon. The respondent party didn't appoint its arbitrator, and later on when the award was made by the single arbitrator appointed by the court, the petitioner raised the question of the number of arbitrators to be three not the single one appointed by the court. It was ruled by the Supreme Court that the question should have been raised while the appointment of the arbitrator was being made and that failure to perform an obligation by one of the parties should not adversely affect the other party. The court observed that the petitioner had no legal standing to challenge the award so made. It was also ruled that there is no number of arbitrator specified when the court has to appointment under Section 7.5 of the Act. Arbitration agreement is also part and parcel of the whole contract agreement. So even where the contract is frustrated, and the arbitration clause remains operative. Its non-observance could mean refusal to perform the contract. By the decision of the apex Court it has been made clear that even if the agreement entered into between the parties provides for the appointment of three arbitrators, where due to some reasons it could be done, the arbitral process cannot be stalled and one arbitrator appointed by the appellate Court would be enough to make an award which would be final and binding for the parties to the contract in question.

The extension of time for filing petition or appearance in the tribunal (*Myad tarikh thamne*) is one of the questions solved by the apex court very recently. As the Court Procedure Rules came into operation very recently, there was a lot of confusion on many areas of the procedures to be adhered to in the arbitral proceedings. In *Melamchi Drinking Water Committee* v. *Sanaula Khimti Construction Company*[32] the Supreme Court chastised the lower court that due to some very flimsy reason the court should not decline to provide justice to anybody who comes for justice. General procedural laws i.e. the Chapter on Court Procedure of the National Code (Muluki Ain) is applicable where the legal procedures are not specified and no distinct special law exists in this regard.

A very noteworthy and guiding example is the decision made again by the Full Bench of the Apex Court in the case of *Bridge Line Corporation*. The case is interesting in the sense that the court reversed the decision of the division bench which has held that so long as there was alternative remedy available the parties under arbitration law cases should take that recourse and not invoke the extra ordinary jurisdiction of the court. The decision was widely criticized as it had created confusion as well as overlapping of jurisdiction. The Full Bench made an unanimous ruling that the absence of the provision for appeal whereby appeal could be heard by the appeal courts over the arbitral awards only the writ jurisdiction is applicable whenever the situation so desires.

In a nutshell, the Supreme Court of Nepal has made some landmark decisions and has set guiding principles, given correct interpretations on arbitration related cases. It has taken great care in guiding lower courts so as to make the arbitration cases faster, smoother, less costly, less formal and development friendly.

[32] NKP 593 (SC 2062 BS)

9. Role Played by the Appellate Courts in the Development of Arbitration Law

The new Act Arbitration Act, 1999 has given a leading role to the Appellate Court in contrast to the earlier Act of 1981. A number of disputes are now registered in different appellate courts. A representative example of the workload of Appellate Court Patan on arbitration cases has been collected for study and is given in Annex 2. The Annex shows in detail the time consumed, orders or other problems in the courts' procedures etc. One of the cases pertains to the challenge of the International Court of Arbitration award by the Nepal Electricity Authority which is the latest on the entry register. The courts record shows only one case requested for the execution of foreign arbitral awards so far.

The cases decided or running in the Appellate Court Patan show the trend of resorting to the court for help rather than for whiling away the time. The rate of and time spent for disposal shows that the courts have given more attention to such cases than other cases filed in that court. Altogether 15 cases have been registered since 2062/11/10 (February 22, 2006) requesting mainly setting aside of the arbitral award or the appointment of arbitrators. The early trend in the decisions made shows that with the framing of the Court Procedures Rules, the processing of the cases has been more arbitration friendly and less time consuming.

10. Arbitral Award Execution: A Time Consuming Exercise

As the execution of award is the most important part of the arbitration cases, a survey of case load at the busiest court has been taken which is given in Annex 3. The list does not show any foreign arbitral awards which are supposed to be enforced like the arbitral awards made in Nepal. The other cases also do not indicate that they are being enforced in timely manner.

Generally it is found that the execution of arbitral awards - domestic as well as international- is not satisfactory. It is found that whenever the respondent is the Government, payment is delayed or almost not made. Katmandu District Court record shows some nine arbitral awards pending for of execution. One case which was decided by the tribunal on 3rd September 1997 and registered for execution on 2059/4/13 (July 29,2002)[33] It was concerning a guarantee given by the then government for building a ropeway to supply lime stones for the Project. The tribunal's award was against the government. Now it seems, instead of complying with the arbitral award, the government is whiling away time by invoking the extraordinary jurisdiction of the Supreme Court. It does not seem to be very easy for the courts to enforce such award which has gone against the government. Even the courts' communications are not answered in time and if answered not in a positive manner. This violates the international obligation of our country created by being party to the concerned instruments

[33] *Damodar Ropeways and Construction Pvt. Ltd.* v. *Nepal Government*. If one takes the first filing for arbitration into consideration this dispute is pending for nearly 30 years.

11. Conclusion and Way Forward

In different sections above we discussed the development of laws and case laws on arbitration. We also surveyed cases pending in the Appellate Court Patan and Kathmandu District court. Our purpose was to show a new trend emerging in the area of arbitration law. As is evident from the court practice and it has also been our experience that much still needs to be done to change the working culture of our court staffs and of the judges. The essentials ingredients of arbitration are; speed, quality, informality, confidentiality, cost effectiveness and finality. These core values must be observed by any country that keeps an agenda of economic development and wants to attract foreign investment. Though ad-hoc and institutional arbitration both were used by Nepal in the past, she has not been able to develop a viable venue for arbitration. As a result, she is rather exploited and subjected to substandard conditions by the international arbitration institutions. Negligent approach in designing contract provision is costing the country dearly. It has been always easy for the international NGOs, Contractors or Donors to win cases against Nepal.

The analysis of the case law shows mainly two areas where parties come to court. The first is the appointment of the arbitrator(s); and second is the quashing of the award given by the tribunal. The survey of cases shows that the appointment is still taking time more than required (more than a year in some cases!).

Parties also enter the court to set aside the award. The cases studied show no positive trend in this area also. Any award given by the tribunal is challenged and the disposal of the claim takes a long time. The general trend is to treat the case like other general cases registered in the courts. The procedures in the service of process, asking for the concerned documents and other necessary procedures take a long time.

Yet another area that requires serious review is the execution of the arbitral awards (see table 3) which frustrates the very notion of arbitration which is quickness. Whenever the government is a party it does not abide by the award(s). Rather it wants to take excuses to make the execution of award time consuming. The review of case law shows that we have not been able to grasp the spirit of the arbitration and arbitral procedures are not followed by the courts, parties, lawyers, governments and also by the concerned parties. It is found to be a general norm prevailing among the practitioners to seek court intervention just to make the other party suffer. This litigative attitude is not healthy which needs to quickly change. Since Nepal has become party to ICSID and also to the New York Convention on the execution of foreign arbitral awards, our responsibilities have also been increased. We must make our legal regime and human resources as well as the court system ready. Human resource associated with the judiciary need sensitization, education and facilities to expedite and keep abreast of the subject matter. Judges also need in-depth training on the area of their work. They should also be made aware of the reality through inter-action between the stake holders and different agencies.

A look into the functioning of the Arbitration Act is needed to make it more functional and less problematic. The following recommendations are therefore suggested:

1. The 1999 Act is said to be drafted on the Model law on Arbitration and Conciliation but it neither incorporates all the arbitration clauses nor does it incorporate a single word

on Conciliation. Our traditional legal system also allowed and encouraged "mel-milap" or the mediation/conciliation as a dispute settlement process. Today the Nepali Courts encourage amicable settlement in almost all cases where it is legally permissible to do so. Therefore, provisions on the arbitration part of the Model Law and conciliation aspect need to be included so as to make the Act more effective.

2. Code of Conduct for the arbitrators should also be framed so that the other provisions like oath taking would take more strength.
3. The Act uses the term "ordinarily" regarding time limitation. It is submitted that limitation should be strictly abided by.
4. Section 14 of the Act is very tight in appearance. In practice it is seen that the time limit of three months is not practical to resort to arbitration within that period. So it may be made practical by raising the time limit for the purpose which would be more practical and not only of theoretical value.
5. It is desirable that the law clearly provides that where parties fail to reach a consensus to appoint their respective arbitrators the ruling of the Supreme Court should be taken as a guideline.
6. Appointment of arbitrators has been very time consuming. The cases discussed above have shown that the time limit prescribed is rarely observed. Therefore, it is suggested that courts abide by the time prescribed by law for the appointment of arbitrator.
7. The Act uses the expression "public interest" and "public policy". It has wide ranging implications and it may not be practical to retain both clauses. So the Model law clause "public policy" should be retained so as to take little risks.
8. The law places the government in par with other litigants. Where it is a party to the dispute, the court need not ask or take concurrence of the government whenever some monetary liability has to be born by the latter.
9. Volumes of cases pending in the court for execution and enforcement show that the district court is really burdened with cases. In many of these cases the government is supposed to fulfill its obligation. But it is found that the government is not responding and whiling away the time because it has no money to pay for such unnecessary liabilities.
10. Successive governments have made big blunders regarding applicable law venue of dispute settlement. Such casual approach is detrimental to national economy. As far as practicable we should follow the UNCITRAL Rules which is friendlier and hopefully followed by many countries within the umbrella of UN and practicable to our needs.

ANNEX – 1

Court Involved in Administering the Rules[34]

Rule (Rules)	Section (Act)	Court involved	Subject Matter
4	7/8	Appellate Court	Application/Petition
5	7(1)/11/16		Appointment of Arbitrator
	21/25		Rejoinder by the other party
	30		Amount total (of the dispute)
			For appointment of Arbitrator
			Seeking comments from Government where financial liability seems to lie on the Government
6		Registrar Appellate Court (every year)	Maintaining the Panel of Arbitrator(s)
7/8/9	11(3)/11(4)	Appellate Court	Removal of Arbitrator
	16(1)		Interim order/ Interlocutory order
			Hearing date fixing, etc.
			Validity of Contract, etc
			Hearing date for opposite party
			Disposed within in 30 days
	21(2)		Application for quashing interim order/decision of arbitrator
			Other party appearance
			Written rejoinder by such party
			Clearance by arbitrators
10	23	District Court	Evidence collection
			Written request by arbitrator in the court
			Contempt of Court
11	30(1)	Appellate Court	Application and proceedings
			Revocation of arbitrator's award
			Written rejoinder by the other party
			15 days
12	32	District Court Tahasil Section	Enforcement of award
			To be taken as the District Court's own decision
13	34(1)	Appellate Court	Foreign arbitral award
			Opposite party to be notified
			Hearing completion 10 days to district Court
	34(2)	District Court	To be executed as if award made in Nepal
14		Appellate Court	Date of appearance fixing

[34] *See,* Court (Arbitration) Procedure Rules, 2002, Law Book Management Committee, Government of Nepal

			Representation may be made legal courses
15		Courts (all tiers)	7 days for date of appearance extension
			Service of process may be made to legal counsel or Representative
			Foreign State residing party as is provided in Nepal's Law
16		Appellate Court	Annual Report to be submitted to Supreme Court
17		Courts (all tiers)	Continuous hearing
18		Appellate Court	Single bench
19			Translation of Awards
20		Registrar- Appellate Court	Documentation
		Registrar- District Court	
22	3(2)	Courts (all tiers)	Running cases –commercial nature- civil cases to be referred to mediation/ arbitration if requested by the parties through a joint application in the concerned court

ANNEX– 2

Cases Decided and Running in the Appellate Court Patan[35]

S.N	File No.	Date of entry	Applicants	Respondents	Case	Remarks decided
1	33	062/11/10	Application Inspects Corporation	JI Trading Pvt. Ltd.	Quashing of Arbitral award	064/03/04
2	34	062/11/10	Shyam L. Vaidya	Ministry of Finance and others	Appointment of arbitrator	063/05/18
3	35	062/11/10	Shyam L. Vaidya	Ministry of Finance and others	Appointment of arbitrator	063/05/18
4	42	063/01/17	Friends Construction Pvt. Ltd.	NCCN Construction Co. Ltd.	Appointment of arbitrator	063/04/28
5	64	063/06/03	Chakraborty Avian National Academy	HM Gyanendra Hospital and Others	Appointment of arbitrator	063/07/23
6	69	063/06/03	Udaya Mohan Shrestha	Ministry of Finance & others	Appointment of arbitrator	063/12/28
7	74	063/07/10	Gaurasky Bayupi Prithivi Joint Venture	Department of Irrigation & others	Appointment of arbitrator	063/09/23
8	75	063/07/17	Mukta and Acharya Pvt. Ltd.	Nepal Institute for Media Education	Appointment of arbitrator	063/09/23
9	83	063/08/25	Image Channel Pvt. Ltd.	Nepal Television	Appointment of arbitrator	063/11/29
10	84	063/08/27	Bipin K. Pokharel	Department of Roads & others	Appointment of arbitrator	063/12/14
11	2334	063/09/06	Melamchi Drinking Water Development Board	Sunali Khimti Construction Company Pvt. Ltd.	Quashing of arbitral award	063/11/21
12	80	063/08/07	Lama Construction	Bagmati Irrigation Project	Appointment of arbitrator	Running
13	88	063/11/01	Shaligram Singh	Dr. Arjun K. Singh	Appointment of arbitrator	Running
14	93	063/12/29	Archana Rana	Dr. Jyoti Rana	Appointment of arbitrator	Running
15	2778	064/01/16	Nepal Electricity Authority Central Office	International Court of Arbitration	Setting aside of award	Running

[35] Courtesy: Case Division, Appellate Court Patan, Lalitpur (July 2007)

ANNEX – 3

Details of Running Cases for the Execution of Arbitral Awards in Kathmandu District Court[36]

S.N.	Date of Reg.	Complainants	Respondents	Date of awards made	Summary of the cases	Present status of the cases
1.	2059-04-13	Damodar Construction Co. Pvt. Ltd. Arvinds Majumdar	Nepal Govt. Ministry of Finance	3rd Sept 1997 Appellate Court 2059/01/09	Awards made in favor o complainant based on section 21 of Arbitration Act, 1981 on the demand made by the plaintiff (complainant) regarding guarantee amount, compensation and interest according to the guarantee Agreement of 1983 with two respondent	Court's Tehasil Section is communicating the government very often bat the government has filed writ petition the Supreme Court and has answered - payment according to award cannot be made until the writ becomes final.
2.	2059-09-29	Larson and Turbo Ltd.	Nepal Govt. Ministry of Water Resources Sunsari Marching Irrigation Dev. Board	21st Aug 2000 A.C. 2059.08.05	Complainants demand expenses and interest according to according to section 21 of the Arbitration Act, 1981 basing on the agreement made between the Board and the Company. Awards made partial claim only fulfilled	The same situation as above
3	2062-07-11	Waiba Construction KB Lama	Nepal Govt. Ministry of Physical Panning and construction	2061-09-21 A.C. 2062/05/01	Construction Contract between the parties on Kalikot Jumla Road. Demand by the plaintiff for payment according to	Department of Roads Still not responding to the communication made by the Dist. Court

[36] Courtesy: Tahasil Section, Kathmandu District Court, Kathmandu (July 2007)

					the award made by the tribunal	
4	062.11.12	Arya Int'l	Udaypur Cement Industries Ltd.	2062.09.04	The amount awarded by the Tribunal has already been paid the demand presently regarding the pay back of VAT amount as decided by the Tribunal	Correspondence with the Udaypur cement Industries is done and is not yet answered
5	2063.01.15	Pratibha Rice Mill	UN Food Program	2062.10.15	Partial claim of the claimant accepted by the Tribunal Total amount US 321000 NRs. 120557/50	WFP claimed the impurities and facilities under the Sec. 2 of 1946 agreement establishing the UN. It also communicates that no such decision by any Appellate Court of Nepal has not yet been received by the UNFA
6	2063.05.02	Nepal Airlines Corp.	Jagirdhan Gurung and others Mukti Nath Tours and Travels	2063/02/24	Awards made in favor of the complainant on the non payment of the disputed amount	Complaints over the decision made by the Tehasildar being submitted to the bench according to section 61 of the Court Procedure
7	063.05.02	Nepal Airlines Corp.	Akash Travels and Tours Team Pvt. Ltd. Hills Queen Travels (3 cases)	2063.02.24 063.0225 063.02.26	Non payment of agreed amount by the sales agent and award made in favor of the claimant	Service of process summon being re-issued
8	063.10.05	Nepal Construction Company Ltd	Divisional Road Office Hetauda	063.07. 23	Claim according to the Arbitration	Submission answered amount not

					Act, 1999 for the payment of amount to be paid to the contractor	yet deposited.
9	2064-/01/02	Angtawa Sherpa	Nepal Govt. Melamchi Drinking Water	2061.11.18	Increment in the wage rate due to non-use of explosives and there by use of nammer and Chisel in breaking rocks-on the contract made between the Melamchi Water Dev. Board and the Sunaula Khimti Const. Company regarding Road Construction Contract	Corresponden ce is in progress-a-skiing for the deposit of the awarded sum.

Economic and Social Rights: Constitutional Aspiration and Their Enforceability

– Nahakul Subedi*

Economic social and cultural rights which for a long time were understood as the aspirations to be progressively realized, are now making inroads to the domestic jurisdiction as enforceable rights. South Africa was the first country that rejected the compartmentalization of the civil and political rights (CPR) and economic, social and cultural rights (ESCR), and now Nepal has repeated this by inscribing a host of ESCRs as enforceable rights. The author examines and analyzes these rights and also tries to assess the challenges ahead in making these rights as achievable realities.

1. Introduction

Traditionally Economic and Social Rights (ESRs, hereinafter) were protected by variety of instruments at the regional and international level. After promulgation of Interim Constitution of Nepal, 2007 these rights have found an entry into domestic jurisdiction as enforceable rights. In a country like Nepal where the majority of the people live in abject poverty, and where untouchability and various kinds of discriminations are practiced in large scale, the ESRs would be major tools to uplift the life standard of the marginalized section. Though rights are indivisible and interdependent, recognition of the ESRs as enforceable rights is very significant much has still to be done in obtaining their actual enjoyment. Many countries in the world, the ESRs are yet to attain legal enforceability, the situation is slowly changing and now Nepal has taken this bold step towards making these rights enforceable. Recognition of ESRs as enforceable rights, among other things, opens the door for actual enjoyment of these rights. Insertion of the ESRs is, therefore, one of the major features of Interim Constitution.

In this article, I try to analyze the state's obligation to respect ESRs under the international law as well. A short explanation about its meaning, ambit and scope, implication and significance has been given on each ESRs under the Interim Constitution. An analysis has been made on the strength, weaknesses overlapping, enforceability of ESRs and the role of various actors including the executive, the legislature, the judiciary and the civil society to transform these rights into realities.

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2. Understanding Economic and Social Rights

The core of economic and social rights (ESRs, henceforth) is the rights to adequate standard of living[1]. According to Article 25(1) of the Universal Declaration of Human Rights, everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. The term "adequate standard of living" appears in Article 11 of International Covenants on Economic, Social and Cultural Rights (ICESCR, henceforth) and Article 27 of the Convention of the Rights of the Child (CRC, henceforth) also. The term *"adequate standard of living"* refers to the most basic needs such as food, clothing, housing, medical care and necessary social services to which every human being is entitled.[2] It does not confine rather to specific rights. The right to an adequate standard of living concerns to all underlying economic and social issues, that is to integrate everyone into a humane society.

Referring to these economic, social and cultural issues as "rights" the International Bill of Rights[3] developed a legal framework in international law and gave individuals legitimate claims against the state and non-state actors for the protection and guarantee of human rights. The jurisprudence developed after 1976 has proved that the ESRs were frequently mislabeled as "benefits," meaning that individuals had no basic claim to things like food, shelter and social security.

It should be noted that all human rights are indivisible and interdependent. Human beings deserve to live in freedom, justice and dignity. It obviously links the ESRs to civil and political rights. Without enjoyment of economic, social and cultural rights people cannot adequately realize the civil and political rights. These are mutually reinforcing.[4] The very notion of inalienability and indivisibility of all human rights rejects the notion of trade off between the rights and the social economic goods. The concept of interdependency and inalienability of all human rights also made the prioritization of one right over the other irrelevant.[5]

Robert Dahl links the civil and political rights to economic and social rights to comprise justice. The first gives freedom of choice protected against external interference (negative freedom) called equal liberty while the later prefers on equal consideration of interest or equal freedom of self-development (positive freedom).[6] It is argued as necessary for the preservation and viability of democracy and primary rights of self-governance.[7] Unlike classical liberal theory of rights, positive freedom is not difference-blind and responses to individual differences and needs into basic conception.[8] It makes

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1 UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948) art. 17, 25, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966) art. 6, 11 etc.

2 Asbjorn Eide, *Economic and Social Rights* in HUMAN RIGHTS: CONCEPTS AND STANDARDS 129 (Janusz Sumonides ed., Rawat Publication New Delhi, 2002)

3 International Bill of Human Rights, which includes the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966)

4 See http://astepback.com/DRD_sample.pdf (P BRAIN FISHER, THE DECLARATION ON THE RIGHT TO DEVELOPMENT PARADIGM) (3rd Nov. 2006)

5 Dr. Ananda M Bhattarai, Domestic Human Rights Advocacy: Approaches and Strategies at http:// www.inseconline.org/workshops/ws3human (15th Aug. 2007)

6 ROBERT DAHL, A PREFACE OF ECONOMY DEMOCRACY 25 (Berkeley University of California Press 1985)

7 *Id*

8 CAROL C GOULD, RETHINKING DEMOCRACY 3 (Cambridge the MIT Press 1978)

just outcome viable in decision making[9]. Hence, the ESRs have been placed in the foundation of whole human rights system.[10]

3. Genesis: Consensus within Disagreement

The idea of rights is deep-rooted with the history of mankind. Many philosophy and political theories have evolved analyzing the rights and liberties. So far as the ESRs are concerned, they emerged as a consequence of industrialization.[11] They relate to national origin of economic and social rights especially in European states. While looking at their international origin, it is found that after the establishment of ILO in 1919, it introduced these rights in the forms of minimum standard of wages, freedom from discrimination in employment, insurance, protection from forced labour etc.[12]

While establishing UNO, it's Charter clearly affirmed the faith in fundamental human rights, dignity and worth of person and the equal rights of men and women to promote social progress and better standard of life.[13] But the influences of post-war politics could be clearly witnessed on drafting charter.[14] In spite of strong lobbying by many countries to include "the maintenance of full employment," the Charter only stated that the UN shall promote higher standard of living. The proposal for full employment and condition of economic and social progress was opposed on the ground that any such undertaking would involve interference in the domestic economic and political affairs of the states.[15]

Despite the earlier wrangling over formulations, however, the effort to make comprehensive human rights treaty went on. Consequently, General Assembly adopted Universal Declaration of Human Rights in 1948. Many ESRs were included in it. But it was adopted as Declaration which lacked any binding force. The reason behind the failure to make a binding treaty was the dichotomy of primacy of classical political and civil rights over economic and social rights.[16] The Commission on Human Rights took 18 years to make these rights binding. Again, they were adopted as two separate covenants. Behind the drafting of separate covenants was the logic that civil and political rights were enforceable and justiciable while economic social and cultural rights were not. Civil and political Rights of individual against the state is regarded as unlawful and unjust action of the state while the ESRs were to be progressively implemented.[17] Thus, the question of drafting two covenants was related to the question of implementation. With this dilemma International Covenant on Economic, Social and Cultural Rights was adopted by General Assembly on 16 December 1966 and entered into force on 3 January 1976.

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9 CAROL C GOULD, GLOBALIZING DEMOCRACY AND HUMAN RIGHTS 17 (Cambridge University Press 2004)
10 *Supra* note 2, p. 129
11 GALBRAITH JOHN KENNETH, A JOURNEY THROUGH ECONOMIC TIME 93 (Houghton Mifflin, Boston 1994)
12 HENRY J STEINER, PHILIP ATSON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 787 (Oxford University Press London 1998)
13 UN CHARTER, pmbl.
14 Nahakul Subedi, *Relation Between Development and Human Rights*, 31, SOPAN 14 (Dec. 2006)
15 A.H. ROBERTSON , JG MERILLS, HUMAN RIGHTS IN THE WORLD 3 (Manchester University Press, New York 1992)
16 Dinah Shelton, *Protecting Human Rights on Globalizing world* in INTERNATIONAL LAW 357 (Charlotte Ku and Paul F Diehi eds.,Viva Books Limited, New Delhi 2004)
17 *Supra* note 15, p. 245

Interestingly, in recent years, no division is being made between civil and political rights and economic, social and cultural rights[18] in contrast to the time of Bill of International Human Rights. It was in sharp contrast to their own social and political ideology. Since the ideological rift has ended by the end of last century, there should be no reason to continue this rather sterile dichotomy between the two sets of rights.

4. The Coverage of ESRs: Benchmark ICESCR

Based on above discussion, if the bottom line of the ESRs is adequate standard of living, it goes beyond the basic necessities of food, clothing and housing and brings within its sweep the notion of inherent dignity and of equal and inalienable rights of all members of human family which is the foundation of freedom, justice and peace in the world.[19] The ESRs enable everyone to participate in everyday life without unreasonable restriction. It necessarily means, *inter alia* that every one shall enjoy their basic needs under condition of dignity.

Based on the rights protected by International Bill of Human Rights[20] all people have the right to self-determination.[21] By virtue of this right people are free to determine their political status and freely pursue their economic, social and cultural developments.

The ESRs primarily build on a number of constitutive rights that provide an adequate standard of living[22] such as availability of food, clothing and housing. The right to work[23] and work related rights including rest and leisure, favourable conditions of work,[24] trade union rights[25] are also recognized. It further assures the right to social security including social insurance,[26] the right to education,[27] the right to highest attainable standard of physical and mental health[28] and the right to participate in cultural life.[29]

The growing importance of the ESRs can be witnessed from the fact that many ESRs are now incorporated in many other international human rights instruments such as CRC, Convention on the Elimination of All forms of Discrimination against Women (CEDAW), Convention on the Elimination of Racial Discrimination (CERD), Vienna World Conference on Human Rights Declaration and Plan of Action, Conventions of the International Labor Organization.[30] These instruments create different levels of obligations to the state parties.

Under Article 2 of the ICESCR, state parties have undertaken legally binding obligations to take steps, to the maximum of their available resources, to 'achieve progressively' the full realization of rights incorporated in that covenant. The concept of

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18 For example, Asbjorn Eide claims neither political or civil rights nor economic or social rights to the Convention on the Elimination of All forms of Discrimination Against Woman- CEDAW, Convention on the Rights of the Child-CRC (*See* Supra note 2) WHILE some schools of thoughts take these instruments as part of Economic and Social Rights, see http://www.cesr.org (basic primer of Economic and Social Rights) (Feb. 20, 2006)

19 ICESCR (1966), pmbl.

20 *Supra* note 3.

21 ICESCR (1966) art. 1

22 *Id*, art. 11

23 *Id*, art. 6

24 *Id*, art. 7

25 *Id*, art. 8

26 *Id*, art. 9

27 *Id*, art. 13

28 *Id*, art. 12

29 *Id*, art. 15

30 Nepal is signatory to the 18 international human rights treaties

progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. So, it establishes clear obligations on the state parties to move as expeditiously as possible towards the realization of these rights using all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights.[31]

5. Nepali Context: The Emergent Constitutional Aspiration

One of the most fundamental demands of the 1990 Mass Movement was the guarantee of the basic human rights[32] while the Mass Movement-II of 2006 demanded the social and economic rights vis-à-vis justice for the excluded and vulnerable sections.[33] The violence and conflict that went in Nepal during the last decade and a half can be rooted to the cause of state's non-compliance of the obligation to help people to realize their economic and social rights. In fact, one of the major reasons behind the issuance of Interim Constitution is the progressive restructuring of the state to resolve existing problems based on class, caste, religion gender etc.[34] This has direct bearing on the realization of the ESRs.

The Constitution guarantees a wide variety of fundamental rights and also the right to proceed to the Supreme Court for enforcement of these rights. The Constitution guarantees both civil and political rights and economic, social and cultural rights.[35] Though there were a wide variety of fundamental rights in 1990 constitution,[36] they were basically civil and political in nature. But the Interim Constitution has included many social and economic rights such as the right to environment and health,[37] the right to work and social security,[38] the right against untouchability and racial discrimination,[39] labour-related rights,[40] the right to social justice[41] and the right of children[42] and women[43] as enforceable rights. Besides, the Interim Constitution also includes a couple of socio-economic rights such as the right to property[44] and educational and cultural rights.[45] The Constitution has provided due value to the right to equality,[46] personal freedom[47] and privacy[48] also.

There is strong overlapping among several civil and political rights and economic and social rights. The two sets of rights can never be separated in a watertight compartment. For instance, the right against untouchability and racial discrimination (Art 14), the right of women(Art 20) and child (Art 22), the right of religion (Art 23), the right

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31 JANUSZ SYMONIDES, HUMAN RIGHTS CO NCEPTS AND STANDARDS 125-126 (Rawat Publication, New Delhi, 2002)
32 SURYA P DHUNGEL ET AL, COMMENTARY ON THE NEPALESE CONSTITUTION 51 9 (Delf Lawyers Inc. Kathmandu 1998)
33 *Historic Resolution: Pave the Way for Future*, GORKHAPATRA DAILY (May 19, 2006) at 1.
34 NEP. INTERIM CONST. (2007) pmbl.
35 There is a strong school of thought that since all rights are mutual reinforcing there is no meaning of classical division of rights as civil and political rights and economic, social and cultural rights. *See* also *Supra* note 18
36 NEP. CONST. (1990)
37 *Supra* note 34, art. 16
38 *Id*, art. 18
39 *Id*, art. 14
40 *Id*, art. 30
41 *Id*, art. 21
42 *Id*, art. 22
43 *Id*, art. 20
44 *Id*, art. 19
45 *Id*, art. 17
46 *Id*, art. 13
47 *Id*, art. 12
48 *Id*, art. 28

regarding labour (Art 30) etc. can be counted as both civil and political rights and economic and social rights.

The constitutional provision of the right to social justice[49] stands as the most fundamental among the ESRs. It implies that all citizens must be treated equally irrespective of their status in society. The doctrine of social justice promises justice for humanity and with perfection.[50] The Interim Constitution has determined the right to social justice as a major tool for progressive restructuring of the state by resolving existing problems in the country based on class, caste, region, gender and other socio-economic differences. The whole thread of social justice is based on the equalitarian theory and protective discrimination.[51] Of course, the right to social justice aims to empower the backward class in order to enable them to participate in the state mechanism on the basis of proportional and inclusive principle.

The constitutional provision of right against untouchability and racial discrimination[52] safeguards against the menace of discrimination which is practiced on a vast scale and in a relentless manner in Nepal, especially in remote and illiterate areas. Though the previous constitution had also criminalized untouchability, it was based only on caste and not in other grounds. The Interim Constitution prohibits the untouchability on any ground such as caste, descent, community, tribe or occupation. The ambit of this right has been extended three fold: First, it prohibits the discrimination of a person as an untouchable on any ground and ensures non-deprivation of the use of public services and utilities and access to public places and religious act. Second, it declares the violation of the right mentioned above as criminal offence and makes the perpetrator liable to punishment. Third, the victim of such menace is entitled to compensation as provided by the law. However, unlike the Constitution of India,[53] Nepali Constitution does not abolish the practice of untouchability rather only prohibits it. The strength and significance of the term 'prohibit' and 'abolish' seem different.

The Constitution provides the rights regarding the work practice[54] and social security.[55] The 'right to work' is normally understood in regard to employment in the service of and paid by others, as distinct from self-employment. It should be noted that nowhere in the human rights system is there an express reference to a right to self employment. As a consequence, the right to work implies the freedom from forced labour. The term 'the right to proper work practice' used in Article 30 (1) denotes employment derivative rights such as the right to safe, healthy and just working conditions such as working hours, paid

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[49] Art 21 "Right to Social Justice: Women, Dalit, Indigenous tribes, Madheshi community, oppressed group, the poor peasant and labourers, who are economically socially or educationally backward, shall have the right to participate in the state mechanism on the basis of proportional inclusive principles"

[50] JULIUS STONE, HUMAN LAW AND HUMAN JUSTICE, 323 (Stanford University Press, Standford, California, 1968)

[51] SURENDRA BHANDARI, COURT-CONSTITUTION AND GLOBAL PUBLIC POLICY, 119 (Democracy, Development and Law 1999)

[52] Art 14 "Right against untouchability and Racial Discrimination: (1) of the Constitution reads as" No person shall, on the ground of caste, descent, community or occupation, be subject to racial discrimination and untouchability of any form. Such a discriminating act shall be liable to punishment and the victim shall be entitled to the compensation as provided by the law."

[53] Article 17 of the Indian constitution reads as "Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence"

[54] Art 30 " Right Regarding Labour: (1) Every employee and worker shall have the right to proper work practice.
(2) Every employee and worker shall have the right to form trade unions, to organize themselves and to perform collective bargaining for the protection of their interest in accordance with law."

[55] Art 18 " Right regarding Employment and Social Security: (1) Every citizen shall have the right to employment as provided for in the law. (2) Women, labourers, the aged, disabled as well as incapacitated and helpless citizens shall have the right to social security as provided for in the law. (3) Every citizen shall have the right to food sovereignty as provided for in the law.

holiday and rest periods etc. the right to a fair remuneration, the right of women and young persons to protection in work etc. The second part of Article 30 includes the instrumental rights related to work and labour such as right to form trade union, right to organize, the right to collective bargaining etc. This right provides favourable frameworks for the unimpeded exercise of employment derivative rights.

As discussed above, the right to work as incorporated in Art 30 of the Interim Constitution does not create the right to self-employment. So the right to employment under Art 18 generally creates the rights regarding social security. The right to social security refers to the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond one's control. Social security ensures social insurance as a member of society. The constitution has guaranteed the right to social security to women, labuorers, the aged, disabled as well as incapacitated and helpless citizens.

The constitution has guaranteed food sovereignty to every citizen as a part of social security. It generally refers to 'minimum standard of nutrition and other basic necessities' *inter alia* adequate food.[56]The adequacy of food can be broken down into several elements such as adequacy and stability of the food supply, culturally acceptable foodstuffs, economic, social and environmentally sustainability, safe (i.e. free of toxic and contaminants) and meeting the minimum quantity and quality (i.e. energy and nutrition level) etc. It also includes the right of the farmers to seed and power to deny privatization of ownership over seed. In a country like Nepal where the majority of the people live in abject poverty and hundreds of people die of starvation and famine, the right to food sovereignty and the right to food have great value. In fact, the right to work, food and other social security do not only take 'food first' approach but it also secures dignity and self-realization, taking the 'livelihood approach'.[57]

The constitutional provision of the right of women[58] and the right of child[59] carry great value to the realization of the ESRs. Women as marginalized and discriminated group in the past have been far behind men in terms of their advancement in many field such as health, education, employment, social status, recognition, rights and responsibilities and so on. The Constitution has inscribed the rights of women in order to help them realize the gains of overall development and empowerment. The Constitution has tried to ensure equality by adopting appropriate measures to eliminate discrimination against women in areas such as reproductive health, reproduction and use of ancestral property. Nepali women need special healthcare arising from their unique role in relation to reproduction.[60] The reproductive health covers all aspects of women's needs before any decision is made

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[56] EIDE ASBJORN ET.AL., *Food Security and the right to food in international law and development*, TRANSTIONAL LAW AND CONTEMPORARY PROBLEMS,1 (University of Iwoa, 1991)

[57] SIMON MAXWELL AND THOMAS FRANKENBERGER, HOUSEHOLD FOOD SECURITY:CONCEPTS, INDICATORS, MEASUREMENT; A TECHNICAL REVIEW 71 (UNICEF/IFAD 1992)

[58] Art 20 "Right of Woman: (1) No one shall be discriminated in any form merely for being a woman. (2) Every woman shall have the right to reproductive health and other reproductive matters. (3) No physical, mental or any other form of violence shall be inflicted to any woman, and such an act shall be punishable by law. (4) Son and daughter shall have equal rights to their ancestral property."

[59] Art 22 "Right of Child: (1) Every child shall have the right to his/her own identity and name. (2) Every child shall have the right to get nurtured, basic health and social security. (3) Every child shall have the right against physical, mental or any other form of exploitation. Any such an act of exploitation shall be punishable by law and the child so treated shall be compensated in a manner as determined by law. (4) Helpless, orphan, mentally retarded, conflict victims, displaced, vulnerable and street children shall have the right to get special privileges from the State to their secured future. (5) No minor shall be employed in factories, mines or in any other such hazardous work or shall be used in army, police or in conflicts."

[60] B Adhikari, *Reproductive Health and Law*, THE KATHMANDU POST, (April 11, 1995) at 5

about whether or not to conceive. It seeks access to information and support services covering sexuality, occupational health, family planning, pregnancy, psychological health and violence against women.[61] It further extends to free health services if necessary and adequate nutrition during pregnancy and lactation. The constitutional provision of equal right of women in ancestral property has empowered women to exercise the capacity that includes various procedures to administer the property.

The protection of child rights under Article 22 of the Interim Constitution move from infancy to childhood i.e. beginning from the right to their identity. Since countless number of children in Nepal are facing problems such as illiteracy, malnutrition, mistreatment, sickness, disability, forced labour and exposure to natural calamities, the constitutional provision of the right to nutrition, basic health and social security brings rays of hope to the peaceful and prosperous growth of the children. The constitutional provision regarding the rights of children aims at protecting their innocence and vulnerability. It gives more emphasis to orphan, helpless, mentally retarded, conflict victims, displaced and street children whose situation is more pitiable entitling them to special privileges from the state.

The constitution through provisions such as the rights regarding environment and health[62] tries to address contemporary concerns expressed globally for the preservation of natural environment, the degradation of which threatens the very existence of mankind. The right to live in clean environment is an aspect of the right to life. The right to live in clean environment creates the state obligation for the protection of environment preventing further damage by increasing awareness in general public about environment cleanliness. The ambit of clean environment extends the meaning of safe and healthy livelihood, the right to be free from ecological destruction, protection from hazardous wastes and so on. The violation of this right creates civil and criminal liabilities and its victim entitled to receive full compensation and reparation for damages.[63]

So far as the right to health is concerned, it is structured as "the right to get basic health service free of cost from the state". The right to health was included in UDHR as 'the right to standard of living, adequate for the health and well being of himself and of his family.'[64] Likewise, Article 12 of the ICESCR imposes on the state parties an obligation to recognize the right to the enjoyment of the highest attainable standard of physical and mental health. The guarantee of 'basic health service' at least for a country like Nepal has much significance. The country is suffering from higher infant mortality rate, malnutrition, epidemic, occupational diseases, unhygiene, poor sanitation and many other health related problems. The guarantee of the right to health creates obligation of the state to take specific measures for the purpose of safeguarding public health. Thus, this right imposes an obligation on the state to ensure the right to access to health service which is a basic pre-condition for living a dignified life.

The health related rights, guaranteed by Art 16, carry two major dimensions; first, the right to access to health services and second, state's obligation to take specific

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61 *Supra* note 32, p. 218

62 Art 16 "Right Regarding Environment and Health: (1) Every person shall have the right to live in clean environment. (2) Every citizen shall have the right to get basic health service free of cost from the State as provided for in the law.

63 Seminar Proceeding, THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, Washington DC (Oct 14-27, 1991)

64 UDHR 1948, art. 25

measures for the purpose of safeguarding public health. Though the government of Nepal has adopted the 'health for all strategy' it has fewer possibilities to provide direct assistance to the individual. So the establishment of extensive, efficient and affordable primary health care facilities in the urban and remote areas would be necessary for facilitating people to enjoy this right.

Besides, wide varieties of ESRs are set out as 'unenforceable rights' in part of directive principles and policies of the state in the constitution. These principles stand as general guidance to the state for building a just and welfare society.

Economic and social rights, whether included in fundamental rights or directive principles, are introduced in the Third World as a tool to increase the influence of poor and rural people in policy and decision making.[65] Generally, new constitutions accept these rights as a tool to stop further deterioration 'the global justice deficit' and 'the global democracy deficit.'[66]

6. Experiences and Implementation: Question of Justiciability

As Hohfeld's scheme of 'jural relation', rights and freedom correlatively create duty and liability to other parties[67]. Based on this analogy, Hohfeld argues that if "x" has right against "y" then "y" is under the duty to "x". It may be argued that conferring a right to someone constitutes an acceptance that the interest represented by that right ought to be recognized and protected by others.[68] Thus, the rights largely constitute the limitation on the power of the other side. The rights in legal sense create correlative duty to the government. So far as fundamental rights are concerned, it is directed against legislature and constitution itself. It was argued that fundamental rights are sacrosanct and can not be curtailed even by the amendment of the constitution[69]. So, the justiciable right provided by the constitution requires a mechanism to promote the constitutionalism and its 'justiciability' is the ground to differ from the lists of judicially unenforceable rights.

Some scholars argue that the ESRs should be left to be achieved by suitable social policy or political program.[70] But, since we have included wide a variety of ESRs in the part of fundamental rights, we rejected the traditional view of taking the ESRs as unenforceable social claims. In fact, rejecting the idea of enforceability of the ESRs would distort the nature, meaning and goals of the fundamental rights.

The philosophy behind the entrenchment of the ESRs in the Nepali constitution is the promotion of welfare, prosperity and well-being of the people. These rights obligate the state to take positive action in certain directions in order to achieve socio-economic goal set by the constitution called social and economic democracy.[71] It bears the modern philosophy of 'welfare state'. Since Nepali society is fragmented into many religious,

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65 *Supra* note 11

66 THOMAS POGGE, PRIORITIES IN GLOBAL JUSTICE, 7 (Oxford University Press, Blackwell, 2001) (Pogge argues that because of wide discrepancy of wealth and income, diversely situated countries/people become failure to realize economic human rights and large number of people remain impoverished condition, which he called 'global justice deficit'. He further argues the domination of intergovernmental and transnational organization, which lacks the input and participation and correlate lack of accountability concerning the decision which affects people' life is 'global democracy deficit'.

67 RAYMONE WACKS, SWOT JURISPRUDENCE 195 (Financial Training Publication, London, 1987)

68 *Id.*

69 *Golak Nath v. State of Punjab,* AIR 1967, SC 1643

70 *Supra* note 15, pp. 292-296

71 MP JAIN, INDIAN CONSTITUTIONAL LAW 737 (Wadhwa and company, Nagpur, 1998)

cultural and linguistic groups and minorities, it was necessary to declare social, cultural and economic rights to ensure justice and equality. But the crucial question, however, is how real or effective these rights are in practice. The efficiency and effectiveness would be established only after true realization of these rights.

The ESRs inscribed in the constitution have at least two distinctive features. First, the constitution distributes them into judicially enforceable rights (Part III of the constitution) and the other, social and economic rights which the state must respect in law and policy-making as well as in governance (Part IV).

Within judicially enforceable rights, some distinction can be made based on the nature of such rights. With regards to the ESRs, some elements can be made more easily justiciable than others i.e. the right to property under Art 19 of the Interim Constitution [72] and the right to freedom from forced labour under Art 29[73] are among most obvious examples. On the other hand, the right to live in clean and healthy environment (Art 16)[74] and the right to social security (Art 18)[75] seem to be subject to legislation.

We can acknowledge that better economic condition of the country is often essential for the realization of some ESRs. But their absence is no justification for the abuse or violation of such rights. More particularly, given the present chaos that the country is trying to solve by further ensuring some of the solidarity rights to linguistic, cultural and religious minorities as well as to socially, economically, backward classes, they are of immense significance.[76]

The right to social justice inscribed in Article 21 of the constitution which guarantees 'the right to participate on the basis of proportional inclusive principles' links to the right to self-determination. Only by the wide participation of the excluded and downtrodden in nation-building process a truly prosperous country can be developed. It is a major tool for the progressive restructuring of the country. It cannot be achieved at once. So, the right to social justice creates the obligation on the state to progressively secure these rights for the people.

It needs to be stressed that some rights cannot be realized without further concretization through legislation. For example, Art 18(2) of the constitution provides the right to social security as attributed by law. Such legislation further entrenches rights, creates institutions for facilitating the realization of the right and provides resources to the people to secure such rights.[77]

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[72] Art 19 "Right to Property: (1) Every citizen shall, subject to the laws in force, have the right to acquire, own, sell and otherwise dispose of the property. (2) The State shall not, except in the public interest, requisition, acquire, or create any encumbrance on the property of any person. Provided that this clause shall not be applicable on property acquired through illegal means.
(3) Compensation shall be provided for any property requisitioned, acquired or encumbered by the State in implementing scientific land reform programme or in public interest in accordance with law. The compensation and basis thereof and operation procedure shall be as prescribed by law.

[73] Art 29 " Right against Exploitation: (1) Every person shall have the right against exploitation. (2) Exploitation on the basis of custom, tradition and convention or in any manner is prohibited. (3) Traffic in human beings, slavery or serfdom is prohibited. (4) Force labour in any form is prohibited. Provided that nothing in this clause shall prevent for enacting a law allowing the citizen to be engaged in compulsory service for public purposes.

[74] *Supra* note 62

[75] *Supra* note 55

[76] *Agreement on Government and Indigenous Janajati: Called Off protest Program*, GORAKHAPATRA DAILY August 8, 2007 at 1

[77] *Review of Legislation harmonization with international obligation of the State*: GORKHAPATRA DAILY, Feb 28, 2007, p. 1-3

The Part IV of the constitution offers the state an opportunity to use the constitution as an instrument for social change. It gives scope for the development of human rights and their place in the modern Nepal.[78] In course of time, some efforts have been made through the judicial interpretation even during the operation of 1990 Constitution. The court made wonderful balance between the individual rights and those of society as a whole.[79]

The ruling established by the Supreme Court especially in protection and promotion of women's right, children's right, environment, tenant's interest etc are landmark.[80] Though the state's obligation to ensure the realization of such ESRs still remains an aspiration, however, the judicial efforts is towards making the ESRs, specially directive principles, enforceable in practice.[81]

In many respects the ESRs emerge not just as imposing limitations on the power of the state, guaranteeing "free space" for the pursuit of individual and collective life projects but also call upon the state to play a positive role. The stamping out of untouchability, constitutional proscription of many forms of slavery, trafficking, serfdom and forced labor require the state to act positively. Without this and steadfast cooperation of dominant sectors of the society, implementation of the ESRs would still remain a distant dream. The Supreme Court has played a vital role in the elimination of evil practices.[82] However, the impact of the decision of the court is yet to be studied. In the view of Prof. Upendra Baxi, implementation of the ESRs enhances the reach of fundamental rights beyond the state, to the civil society.[83]

7. The ESRs and Remedies: Rays of Hopes and Dilemma

Remedy makes the right real. If there is no remedy there is no right at all.[84] Opponents of the ESRs argue that they are not judicially enforceable and that they are too vague to monitor effectively. Yet, many sovereign states have enshrined the ESRs in their constitutions, and there are numerous examples of courts applying domestic and international law to protect the ESRs. The ESRs are *sine qua non* of fundamental rights vis-à-vis human rights. Vagueness can not exclude the ESRs to be fundamental rights.

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78 *Supra* note 32

79 *See Man Bahadur Bishwakarma v. HMG* NKP 1010, (SC 2049), *Sapana P. Malla s. HMG* NKP 387, (SC 2061), *Pradosh Chhetry v. HMG* writ no 3059-061, *Meera Dhungana v. HMG*, NKP 462, (SC 2052) , *Yogi Narahari Nath v. Secretariat of Council of Ministers and others*, NKP 33 (SC 2053 BS) (1996 AD) etc.

80 *i.e. Surya Prasas Dhungel v. Secretariat of Council of Ministers and others*, NKP Golden Jubilee Issue 169 (SC 2052 BS) (1995 AD), *Yogi Narahari Nath v. Secretariat of Council of Ministers and others*, NKP 33 (SC 2053 BS) (1996 AD), *Gopal Siwakoti v. Secretariat of Council of Ministers and others*, NKP 255 (SC 2051 BS) (1994 AD) *Mithilesh Kumar Singh v. Secretariat of Council of Ministers and others*, NKP 478 (SC 2056 BS) (1999 AD) etc.

81 *i.e. Yogi Narahari Nath v. Secretariat of Council of Ministers and others*, NKP 33 (SC 2053 BS) (1996 AD), *Prakash Mani Sharma v. Secretariat of Council of Ministers and others*, NKP 312 (SC 2054 BS) (1997 AD) etc

82 *i.e. Advocate Tek Tamrakar v. Secretariat of Council of Ministers and others*, 3, Writ No 211 of the Year 2060 (SC 2062/5/30) (2005 AD), *Dil Bahadur Bishowkarma v. Secretariat of Council of Ministers and others*, 3, Writ No 44 of the Year 2062 (SC 2062/10/6) (2006 AD), *Advocat Ratna Bahadur Bagchand v. Secretariat of Council of Ministers and others*, 3, Writ No 46 of the Year 2061 (SC 2062/1/8) (2005 AD) etc.

83 Upendra Baxi, *The State and Human Rights* in PEOPLE'S RIGHTS 341-342 (Manoranjan Mohanty et.al. eds., SAGE Publications, New Delhi 1998)

84 Latin legal maxim, *ubi jus ibi remedium.*

8. Conclusion

Traditionally, fundamental rights were regarded as tools for providing check and balance to the state power and the right movement was focused to disempower the state. The then state was regarded as the sole actor to enforce the rights. But, now the concept has changed. Non-state actors have also the responsibility to respect and promote the rights enshrined in the constitution. To realize such rights empowerment of the state institutions and civil society is necessary. The constitutional guarantee of the ESRs has offered a wider scope to the right jurisprudence and given a more congenial atmosphere and space to both state and non-state actors to play positive roles. As discussed above, constitution has laid the responsibility on the executive, the legislature, the civil society and private sectors as well as the judiciary to transform these rights to achievable realities. Therefore, it is an opportunity for the judiciary to establish a pragmatic nexus between law and life. Without massive reforms of traditional types of judicial system and mechanism for delivery of legal justice, the judiciary cannot play a desired role in upholding constitutional aspirations. It is necessary for the judges to play the role of catalyst in transforming the constitutional expectations to legally enjoyable rights.

Though there was somber disagreement in drafting the constitution as to whether to include or not some socio-economic right such as the right to work, unemployment compensation allowances etc. within the chapter of fundamental rights[85], the constitutional conception of fundamental rights is historic. Anticipating the future development of human rights, the Interim Constitution can be taken as a model for governance.

[85] THE KANTIPUR DAILY, January 7, 2007

Double Jeopardy Revisited: Why Several Common law Countries are Tinkering with One of the Law's Most Treasured Principles

– Dr. Ann Black*

The double jeopardy rule is an ancient rule of common law firmly entrenched in modern constitutions. The recent trend in several common law jurisdictions is to revisit this rule and refine some of its unjust permeations. In this article the author elaborates on the features, operation and rationale of the rule against double jeopardy in the common law bringing out different variations within common law jurisdictions and vis-à-vis other jurisdictions. It explains why and how the rule was modified in England and New Zealand and the reasons why double jeopardy principles have been under siege in Australia. It also gives the current position in that country where the High Court reaffirmed the inviolability of the rule. The author also discusses arguments for and against its reform as have been canvassed in Australia. She also gives her views on the need to revisit the double jeopardy rule.

1. Introduction

The legal principles collectively known as the rule against double jeopardy have a long standing pedigree in both the common law and in other legal traditions of the world. The ancient Code of Hammurabi, early Greek and Roman law and the Old Testament book of *Nahum*[1] contained principles preventing a person from being judged or convicted twice for the same act or omission. In the continental civil law the principle *Non Bis in Idem* (not twice for the same thing) had wide adherence as a legacy of Justinian's writings on civil law.[2] In the common law, which is the law derived from England and developed through its courts of law, the rule displays its old Norman-French origins through the terms used in the courts: *autrefois acquit,* which is pleaded when a person charged with an offence claims to have been previously tried and acquitted of that very same offence, and *autrefois convict,* which is the plea raised when the person has been tried and convicted for that same offence. The pleas prevent the second prosecution proceeding and are seen a fundamental protectors of fairness and justice in the criminal proceedings.

Many modern day constitutions contain articles in which the rule against double jeopardy is entrenched. The Constitution of Nepal states that 'no person shall be prosecuted or punished for the same offence in a court of law more than once'.[3] The Constitution of India has an identical provision[4] as does the Constitution of Pakistan[5] whilst the Japanese Constitution of Japan simply states that no person shall be placed in double

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1 THE NEW ENGLISH BIBLE, BOOK OF NAHUM, Ch 1.9

2 MARTIN FRIEDLAND, DOUBLE JEOPARDY 15, (Clarendon Press, 1969)

3 NEP. CONST. (1990), art.14, cl..2.

4 IND. CONST. (1949), art. 20, cl. 2.

5 PAK. CONST. (1973), art. 13 (a).

jeopardy.[6] The Constitution of the United States of America enshrined the principle against double jeopardy in its Fifth Amendment; "Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb" which has been held though application of the Fourteenth Amendment to extend to state, as well as federal, American law.[7] As this expression uses the word "jeopardy" it may be the derivation of the unifying phrase used in many diverse jurisdictions to encapsulate the pleas, doctrines and rules of criminal proceedings that prevent a person being twice put in jeopardy of criminal prosecution and thus punishment for the one event or incident. It is enshrined in the *International Covenant on Civil and Political Rights* (ICCPR) to which most nations of the world are signatories and also in the *European Convention on Human Rights* (ECHR). Regardless of whether their legal systems are founded on the common law or codified civil law tradition, each member of the Council of Europe and all members of the European Union have signed this convention. The Seventh Protocol, Article Four, provides:

(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has been finally acquitted or convicted in accordance with the law or penal procedure of that State.

Given the universality of the rule against double jeopardy and its endurance over centuries as a cornerstone of fairness and justice in the criminal law, it may seem surprising that, after centuries of absolute adherence, several common law countries are tinkering with the principle. These countries include England, New Zealand and Australia. Each has a jury of twelve persons as the factual determiner of an accused's guilt or innocence. In these countries, there is no move for the rule to be abolished, despite some newspaper assertions to that effect, but a strong case has been articulated for certain changes to be made to the prohibition. The changes advocated would allow for a retrial following an acquittal, in certain special circumstances. Reforms have already been legislated for in England[8] and New Zealand.[9] In Australia, where criminal law is a matter for the states,[10] several state governments have draft bills or Acts modifying the application of the double jeopardy rule,[11] whilst the Standing Committee of Attorneys-General has expressed support for reform and is seeking agreement between the states with a desire for a common approach to be employed across the Australian states. Yet finding agreement is difficult with government members, legal professionals, judges, academics and the general public divided on the issue of whether tinkering with this longstanding principle is, or is not, serving the interests of justice.

This paper will elaborate on the features, operation and rationale of the rule against double jeopardy in the common law noting different permeations within common law jurisdictions and *vis a vis* other jurisdictions. It will explain why and how the rule was modified in England and New Zealand and explain the reasons why double jeopardy principles have been under siege in Australia and the current position in this jurisdiction. It

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6 JAP CONST (1946), art. 39.
7 *Benton v. Maryland*, 395 US 784 (1999 AD).
8 Criminal Justice Act, (UK) 2003 AD; Criminal Procedure and Investigations Act, (UK) 1996 AD.
9 Crimes Act, (NZ) 1961 AD.
10 AUST. CONST. (1901), art. 51.
11 Criminal Code (Double Jeopardy) Amendment Bill,(QLD) 2006 AD; Criminal Appeal Amendment (Double Jeopardy) Bill, (NSW) 2003 AD; Crimes (Appeal and Review) Amendment (Double Jeopardy) Act No 69, 2006 AD.

will be shown how four cases in particular have been the impetus for revisiting the ancient rule and that the tinkering with it has to a large degree been a result of the hard issues raised in each. The case of *Carroll* in which the High Court of Australia reaffirmed the inviolability of the rule will be discussed as well as the arguments for and against its reform, as have been canvassed in Australia. The legislative response is also considered. The conclusion is that

2. Features and Operation of the Common Law Rule against Double Jeopardy

"[It is] a universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence" Sir William Blackstone.[12]

The rule against double jeopardy as enunciated in Blackstone had been implemented in England during the time of King Henry II and had become entrenched in English law by the 18th century. As the creation of the courts it was not contained in a written Constitution or in legislation passed by parliament but in a series of rules and procedures that embodied the principle. These have three separate functions and operations.[13] The first and best known of these is the prohibition placed on retrial of an offence for which the person had been previously acquitted or convicted: the *autrefois acquit* and *autrefois convict.* These special pleas can be raised to protect a person from being prosecuted for the same offence a second time, but also it allows protection against any offence for which the person could have convicted in the first trial, that is, it includes those offences arising from the same act or omission, for which the person was also in jeopardy for at the first trial. Thus an accused person who was charged with, and then tried for murder was simultaneously in jeopardy during the trial for a conviction for the lesser homicide offence of manslaughter. An acquittal of the murder charge gives rise to a permanent bar against the person being subsequently tried for manslaughter as well as for murder, arising from the same factual acts or omission, as does a conviction for either murder or manslaughter. This principle extends to the situation where a person was tried and acquitted of manslaughter and is subsequently charged with murder arising from the same set of facts. As manslaughter is always an alternative verdict to murder, the accused is in jeopardy again of being convicted for manslaughter. These pleas are strictly applied and can be raised as a bar to subsequent charges, even where the evidence used in the earlier trial is shown to be tainted, say by perjury, wrongly admitted, or is the result of an erroneous direction to the jury by the trial judge. It is the application of the rule in tainted cases that has fuelled recent criticism and will be discussed in some detail later.

The second operation uses the principle that a person should not be tried for a second time on substantially the same facts. House of Lords in the case of *Connolly*[14] established that, outside the boundaries of the strict *autrefois* rules, protection against double jeopardy is provided by a special application of the abuse of process rules. The

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12 William Blackstone, Commentaries *on the Law of England* (1789) (1966) reprint, Bk 4 c26, 329 cited in GEORGE THOMAS, DOUBLE JEOPARDY 84 (New York University Press) 1998 AD.

13 Chris Corns, *Retrial of acquitted persons: Time for reform of the double jeopardy rule?,* 27 CRIM LJ, 80, 84 (2003 AD).

14 *R v Connolly* AC 1254 [1964 AD] The principle that a person should not be tried for a second time on substantially the same facts because it is an abuse of process is simply known in the United Kingdom as the 'Connelly principle'.

general principles of abuse of process cover cases in which it is not possible for the defendant to receive a fair trial,[15] and cases in which, although the defendant could be fairly tried, it is unfair to put him or her on trial.[16] In this second category is where a person has been acquitted of an offence and is subsequently charged with another offence but both arose the essentially same facts and events. It is a variant of double jeopardy pertaining to a collateral challenge to an acquittal. An acquittal cannot be undermined or controverted in later proceedings, even if the offence charged is different but would discredit the earlier acquittal.[17] This was the basis of the High Court of Australia's decision in *Carroll,* and is a manifestation of the inherent power of the court where abuse of process is found. This will be discussed later in section 111.

Double jeopardy also operates in sentencing in that it prevents a double punishment. A person can not be punished twice for the same conduct where it gives rise to two offences. For example, if a person is tried with the offence of dangerous driving causing death they cannot at a later time be tried and punished for manslaughter for the same wrongful act. This principle has been affirmed by the High Court of Australia[18] and is now also found in legislation pertaining to sentencing.[19] Section 17 of the *Criminal Code of Queensland* reflects this principle but interestingly provides for one important exception. This is the situation where a victim subsequently dies from conduct for which the defendant was previously tried, convicted and punished. So where an accused person may have been sentenced and punished for doing grievous bodily harm to a victim and the victim subsequently dies from those same grievous injuries, the accused can be also be prosecuted and punished for causing the victim's death, irrespective of the earlier conviction and punishment for causing grievous bodily harm. Given Australia's federal system of law, the Commonwealth *Crimes Act* 1914 prohibits double jeopardy punishment for the one act if it contravenes both federal and State laws.[20]

There are a couple of limitations on the application of the rule against double jeopardy in some common law jurisdictions. Pleas of *autrefois acquit* and *convict* typically apply to crimes and misdemeanours, which are cases heard on indictment, that is before a jury, and do not apply to summary proceedings, though similar provisions can be contained in other legislation dealing with summary offences. Nor do the pleas apply to sentencing matters even though theoretically the defendant is exposed a second time to the punishment provisions. The prosecution in some jurisdictions[21] and in others the Attorney-General[22] or either[23] can bring an appeal against the leniency of a sentence and appeal courts do have power to increase, as well as to reduce, the original sentence. However, there are inherent protections in that such prosecution appeals must be used rarely, and must be shown encompass an important principle and be in the public interest. A manifestly inadequate and inconsistence sentence could meet the public interest

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15 For example cases where essential evidence has been lost, or there has been excessive and prejudicial pre-trial publicity.
16 This includes cases where the defendant has been brought within the jurisdiction in unlawful or unconscionable ways.
17 Id, 85. Also referred to as the rule in *Sambasivam* AC 458. [1950 AD]
18 *Pearce v R*, 194 CLR 610 (1998 AD).
19 For example, Interpretation of Legislation Act, (VIC) 1984 S. 51.
20 Crimes Act, (Commonwealth) 1914 S. 4C (2).
21 Criminal Code (WA) 1913 S. 688 (2)(d).
22 Criminal Code (QLD) 1898 S. 669A (1).
23 Criminal Appeal Act (NSW) 1912 s5D (1).

standard. The position was affirmed by the High Court of Australia in *Griffths v The Queen*[24] as per the judgment of Murphy, J:

> "an appeal by the Attorney-General should be a rarity, brought only to establish some matter of principle and to afford opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons."[25]

3. Rationale for the Common Law Rule against Double Jeopardy

The longevity, importance and strict application of the rule in the common law are grounded in concepts of fundamental fairness and justice. This is especially important given the power imbalance between the accused and the prosecution. Criminal trials in the common law are adversarial, not inquisitorial, and so it is the State, with all the resources, finances and power of the government, who must prove the charge against an accused. Because of the disparate resources and power, it would be oppressive if an accused could be subjected to repeat investigations and to repeat trials, or even to the possibility of this occurring. The imbalance is highlighted today given the technology and forensic tools currently available, and given the extended time taken for criminal trials. This rationale was forcefully stated by the Supreme Court of the United States in 1957, when Black J wrote the oft quoted words:

> 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'[26]

His Honour's last comment that a second trial would enhance the likelihood of a person being wrongfully convicted reflects that statistical risk that would occur with any additional exposure to criminal trial and verdict. As noted by several commentators this is especially likely given that the prosecution would be aware of the details of the defence case after exposure in the first trial.[27] There is also the possibility that juries may become aware that an accused was being retried and in assuming there may be new convincing evidence of guilt being employed which may adversely negate or impact upon the defendant's presumption of innocence in the second trial.

Linked to this reason is the concern that if prosecutors knew they could be given a 'second bite at the cherry' that they might be less thorough in their investigations, even that some evidence might be held back as way of insurance in case a second trial was needed. However, criminal courts always have an inherent power to prevent an abuse of process and it would seem unlikely that prosecutors would take such an obviously risky

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24 *Griffiths v R,* 137 CLR 239, (1977 AD).
25 *Id*, p. 329.
26 *Green v. United States*, 355 U.S. 184, 187, (1957 AD).
27 Corns, *supra* note 13, p. 86.

course. However, the operation of the rule against double jeopardy necessitates an efficient and effective investigation and prosecution. When there is only one chance for the prosecution to put their case to the jury it has the salutary effect of ensuring the case is as strong as the state and its agencies can make it.[28]

An essential reason for the rule is the need for finality. All cases coming before courts of law need to result in a decision that is final, binding and conclusive: the principle of *res judicata.* Finality is essential to preserve confidence in the legal system. Even where a court outcome may be found wanting or 'imperfect', finality remains desirable. This view was clearly expressed by Lord Wilberforce in *Ampthill Peerage*[29] which was cited with approval by Gleeson CJ and Hayne J of the High Court in *Carroll*.[30] It also reflects the accusatorial nature of the common law which is "not, as such a search for the truth of what occurred so much as a search for a conclusion on whether the prosecution, representing the state, has proved the guilt of the accused to the requisite standard."[31]

> "Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality."[32] [*The Ampthill Peerage* [1977] AC 547, 569]

Finality in the criminal justice system serves a range of interests. First, it serves the individual who has been accused of an offence and then undergoes a trial. The anxiety, stress and financial implications for any individual, factually guilty or innocent, brought to trial or awaiting verdict are enormous. An accused person needs to know that after an acquittal the emotional and financial drain of the trial will have ended and his or her normal life, as well as reputation, can be restored. It would be onerous for an acquitted person to live with the fear that there always remained a possibility for the case to be retried. It has been noted that the stress and fear not only affect the truly guilty but also the totally innocent.[33] Second, finality is also important to the families, friends and work colleagues of an accused person as their lives are also affected by the process and need reassurance that the matter has come to an end with the court decision. Third, in addition to the emotional and individual dimension, the justice system as an entity also needs matters to conclude. Efficient administration of justice, both in the investigative and trial stages, requires closure and finality. Community confidence in the trial process is important. If

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28 The Hon Justice Michael Kirby, *Carroll, double jeopardy and international human rights law,* 27 CRIM. LJ 231, 241 (2003 AD).
29 *The Ampthill Peerage*, AC 547, 569 [1977 AD].
30 *R v Carroll* 55 HCA 170 [2002 AD].
31 The Hon Justice Michael Kirby, *Carroll, double jeopardy and international human rights law,* 27 CRIM. LJ 231, 236 (2003 AD).
32 *The Ampthill Peerage* [AC 547, 569 [1977 AD].
33 Model Criminal Code Officers Committee or the Standing Committee of Attorneys-General [MCCOC] Discussion Paper, Model Criminal Code, *Issue estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, 3, (2003 AD).

after a jury trial an acquittal could be re-opened and the case retried, the whole criminal trial process could be undermined. This would impact particularly on the inscrutability of the jury verdict and also to some extent on the adversarial system as noted earlier.[34]

Given the rationale for the rule against double jeopardy in the common law system as a foundational concept embedded in notions of justice, fairness and morality, and given its general adherence since the time of *Magna Carta*, it seems surprising that such a hallowed principle, would now many centuries later, be subject to media scrutiny, legal and political debate and ultimately modification by Parliament. The answer as to why this has occurred lies in couple of highly publicised cases in England, New Zealand and Australia which, in the mind of the public and many commentators, failed to serve the interests of victims, their families and the wider community. The court of public opinion turned against the double jeopardy protections. It was portrayed in the media as an antiquated rule which could shield heinous killers. The demand grew for the law to be modified so that the state could ensure the law resulted guilty persons being punished. However, whilst everyone supports the conviction of guilty persons, the maxim that it is better that ten guilty people go free than that one innocent person be convicted remains paramount. The unconscionable incarceration of an innocent person has been seen to far outweighs the injustice to those who feel that a guilty person is free. The balance between the two is tested when new evidence becomes available that could prove the guilt of a person already acquitted of an offence, or that the evidence used in the trial was tainted or corrupted in some way, or where after an acquittal, a person confesses with un assailable proof of their actions. This is particularly of concern in cases of murder, rape and serious personal injuries. Victims, their families and the community have come to believe the double jeopardy principle tips the balance too far in favour of the accused and are demanding the scales of justice to be adjusted to also consider the rights of victims. Members of the judiciary, counsels for the defence and civil libertarian groups have, in the main, opposed any significant change to the law whilst politicians, prosecutors and the media have generally supported reform of the law.

4. The Events and their Impetus for Reform

In this section the cases that gave impetus to the modifications of the double jeopardy rule are explained together with the processes each nation, the United Kingdom, New Zealand and Australia went through in reaching their own distinctive reform to the law against double jeopardy. It is particularly interesting to see how the facts and concerns surrounding each of the cases have very much shaped the legal response.

4.1. United Kingdom

The case that ignited the debate across England arose from the killing in April 1993 of Stephen Lawrence, a black man, by a group of five or six white youths. It was believed the attack was racially motivated. The main eye witness was unable to identify the youths responsible. On the basis of insufficient evidence the Crown prosecutors decided not to proceed but a private prosecution was brought against three suspects. All three were

[34] *Supra* note 26.

acquitted of the offence for want of evidence. Under English law this meant they could never be tried again in any circumstances for the murder of Lawrence an official investigation[35] followed and it decided "there is no doubt whatsoever but that the first MPS [police] investigation was palpably flawed and deserves severe criticism."[36] However, whatever information then came to light about the murder could never see the three acquitted youths prosecuted. Questions were raised as to whether in modern times the absolute protection of *autrefois acquit* may sometimes lead to injustice.[37] Among the recommendations of the Inquiry was:

> "That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented."[38]

The first tinkering with the protection against double jeopardy took place in 1996, when the *Criminal Procedure and Investigations Act* (1996)[39] allowed for an acquittal to set aside where evidence in the trial was shown to be tainted through an administration of justice offence involving witness or juror interference or intimidation in any proceedings which led to the acquittal. It was conditional on the High Court finding that, but for the interference or intimidation, it was likely that the accused would not have been acquitted.[40] Also required was that it was in the interests of justice to take these proceedings against the accused who had earlier been acquitted. When the Court quashes the acquittal, new proceedings may be taken against the accused for the offence of which he or she was acquitted.[41]

This change set the mood for more reflection and debate on further reforms to double jeopardy. In response to growing public disquiet, the United Kingdom Law Commission undertook a specific review of double jeopardy and prosecution appeals. The Commissions report was issued in March 2001.[42] It stated:

> "Our main recommendations on double jeopardy are that the Court of Appeal should have power to set aside an acquittal *for murder only*, thus permitting a retrial, where there is compelling new evidence of guilt *and* the court is satisfied that it is in the interests of justice to quash the acquittal; and that that power should apply equally to acquittals which have already taken place before the law is changed."[43]

A comprehensive review of the criminal justice system in England was also being undertaken by Lord Justice Auld in 2001[44] and he reconsidered the reform recommendations made just months earlier by the Stephen Lawrence Inquiry. Lord Auld

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35 *The Stephen Lawrence Inquiry:* Report by Sir William McPherson of Cluny http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm
36 *Id,* para 2.10
37 *Id,* para 7.46
38 *Id,* chapter 47, Recommendation 38.
39 Criminal Procedure and Investigations Act (1996) S. 54 –S. 57
40 *Id*, S. 55
41 *Id*, S. 54
42 The Law Commission No. 267 *Report to Parliament on Double Jeopardy and Prosecution Appeals* (March 2001 AD) http://www.lawcom.gov.uk/docs/lc267(1).pdf
43 *Id*, para 1.18
44 Lord Justice Auld, *Review of the Criminal Courts of England,* (Sept. 2001 AD) http://www.criminal-courts-review.org.uk/

supported the proposals for a statutory exception to be made to the rule against double jeopardy in light of wider reforms to criminal justice which aimed to "control crime by detecting, convicting and duly sentencing the guilty."[45] His main concern was the recommendation that retrials be limited to cases of murder. He asked: "What principled distinction, for individual justice or having regards for the integrity of the system as a whole, is there between murder and other serious offences capable of attracting sentences that in practice may be as severe as the mandatory life sentence? Why should an alleged violent rapist or robber, who leaves his victim near dead, or a large scale importer of a drug, dealing in death, against whom compelling evidence of guilt emerges, not be answerable to the law in the same way as an alleged murderer?"[46] There were now two respected reports advocating reform.

The debate continued in the media also, fuelled once more by another prominent case - the murder in 1989 of Julie Hogg, a 22 year old pizza deliverywoman from northern England. She had been strangled. Some years later, Billy Dunlop admitted to strangling her but there was nothing police could do, as he did not confess until after he had been tried twice and acquitted of the murder. He was subsequently sentenced in 2000 to six years imprisonment for perjury, but because of double jeopardy protections, he could never be tried again for Julie Hogg's murder. Her mother campaigned for the repeal of the double jeopardy protection because she wanted to see her daughter's killer brought to justice. The Northern Echo, a local newspaper that supported Julie Hogg's family wrote: "Intended to protect the innocent from persecution and repeated trials until a satisfactory verdict is reached, the double jeopardy law has also shielded the guilty, allowing them to parade their freedom once they had been acquitted, beyond the reach of justice."

The pressure continued to grow for changing the rule against double jeopardy. A discussion paper entitled *Justice for All* followed in July 2002.[47] A bill was introduced later that year, and was strongly debated in the Parliament before being ultimately was passed into law in 2003[48] receiving Royal Assent and coming into effect in 2005. The legislative changes to double jeopardy were significant.

Now in the United Kingdom, retrials after acquittals are permitted in respect of a number of serious offences, where new and compelling evidence has come to light.[49] Unlike the recommendation of the Law Commission which went only to murder, Section 75 of the amended Act allows retrial for offences which carry a maximum sentence of life imprisonment, and for which the consequences for victims or for society as a whole are particularly serious. There are 30 qualifying offences listed in Schedule 5 to the Act as meeting this criteria and include, for example, murder, manslaughter, kidnapping, genocide; robbery and criminal damage; some drug offences, such as unlawful importation, production and supply; sexual offences such as rape and incest and terrorism and war crimes. Evidence is new if it was not adduced in the proceedings in which the person was acquitted[50] and

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45 *Id* , p. 629.
46 *Id*, p. 633.
47 *Justice for All*, Cm 5563 (London TSO, 2002) at http://image.guardian.co.uk/sys-files/Politics/documents/2002/07/17/Criminal_Justice.pdf
Commentary on the White Paper, see Paul Roberts, *Justice for all? Two bad arguments (and several good suggestions) for resisting double jeopardy reform)* 6 INT. J. OF EVIDENCE & PROOF, 197–217.
48 Criminal Justice Act (UK) 2003 AD.
49 *Id*, S. 78 (1).
50 *Id*, S. 78 (2).

compelling evidence means it is reliable, substantial, and appears highly probative of the case against the acquitted person.[51] Factors to be considered by the court include whether a fair trial would be possible, the length of time since the commission of the offence and whether the police and prosecution were duly diligent in the investigation and in the trial.[52] To prevent the possible harassment of acquitted persons in cases where there is not a genuine question of new and compelling evidence, safeguards were put in place. One is that the personal consent of the Director of Public Prosecutions (DPP) is required for both the re-opening of investigations and for the making of an application to the Court of Appeal for the acquittal to be quashed and the case retried.[53] A further safeguard is that there can only be one application made to have an acquittal reopened. There are also comprehensive prohibitions and limitations placed on reporting of retrials in the media to reduce prejudicial effects and it is an offence for a publisher to breach these restrictions.[54]

Since the legislation came into effect the first case referred to the Court of Appeal (November 2006) was that of Billy Dunlop.[55] Dunlop had argued that he would not have made such admission if he had known that he might face retrial (the law not being on the statute book at the time) and therefore it was not in the interests of justice for him to be retried. The Court of Appeal held that the public would rightly be outraged were the exception to the double jeopardy rule not to be applied in the present case simply on the basis that Dunlop would not have made the confessions if he had known it would lead to a retrial. The court saw no injustice in allowing a retrial in his case.[56] Faced with the admissibility of the new confessional evidence, Dunlop pleaded guilty and was convicted and sentenced for Julie Hogg's murder. In response to this outcome, David Plunkett, Britain's Home Secretary, a vocal advocate for the reform of the rule against double jeopardy said:

> "There was enormous controversy and difficulty in getting this change through parliament - including the opposition voting against. But this legal milestone demonstrates how right it was to ensure that justice is done, and the truth obtained at last."[57]

4.2 New Zealand

In New Zealand it was the case of Moore[58] that led to the New Zealand Law Reform Commission reviewing their double jeopardy protections. In May, 2002, Kevin Moore was tried with two other gang members for the murder of a member of a rival gang. A defence witness gave Moore and his co-accused an alibi. They were acquitted of the murder. In August, 1999 Moore was convicted of conspiracy to pervert the course of justice in relation to the false alibi evidence. He was convicted. When sentencing Moore for the maximum of seven years the judge said:

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51 *Id*, Ss. 78 (3) (a)-(c).
52 *Id*, S. 79.
53 *Id*, S. 76.
54 *Id*, S. 83, S. 84.
55 *R v Dunlop,* 1354 EWCA. Crim [2006 AD]
56 *Id*
57 Matthew Taylor, *Justice At Last: killer pleads guilty in Britain's first double jeopardy trial,* THE GUARDIAN, September 12, 2006.
58 *R v Moore, 3 NZLR.* 385 (HC) [1999AD].

> "The conspiracy to pervert the course of justice to avoid your rightful conviction for murder and a life sentence of imprisonment must be as serious as any that could be committed. It must call for a deterrent sentence..... That maximum sentence is an encouragement to offenders like you to commit the type of conspiracy you committed. The law does not permit you to be retried for the murder as you were acquitted of it because of your conspiracy. You escape the sentence of life imprisonment that should be the minimum you receive.....The maximum sentence of seven years imprisonment is itself a very lenient sentence in you case when by your conspiracy *you have literally got away with murder and avoided life imprisonment."* [59][Italics added]

Moore appealed his sentence. The Court of Appeal dismissed stating: "This offending falls squarely within the band or bracket comprising the worst class of cases under the section and qualifies for the maximum term."[60] Moore could not be retried for the murder because of the double jeopardy provisions contained in Section 26 of the *New Zealand Bill of Rights Act* (1990) and in the *Crimes Act* (1961).[61] There was concern in the legal and wider community that a person could secure an unmerited and wrongful acquittal by perverting the course of justice, say by perjury or by bribery, and that when this perversion came to light and was proven in a court of law they could at most receive a seven year sentence. This, it was feared, provided an incentive for accused persons charged with serious offences like murder and rape to resort to perjury and other such acts, collectively known as administration of justice offences. These offences include perjury, attempting or conspiring to obstruct or pervert the course of justice; fabricating evidence; bribery of a judicial or law enforcement officer, corrupting or bribing juries and witnesses.[62]

Given the perception that the case of Moore had brought the law into disrepute, the Minister for Justice asked the New Zealand Law Reform Commission to consider and report on the case of Moore and to make recommendations on how the law should treat an accused who has secured acquittal of a serious crime by abusing the processes of justice.

The report[63] followed a discussion paper[64] which invited submissions from the legal and wider community. The Commission also considered the changes that had been made in 1996 in the United Kingdom which allowed for retrial following a tainted acquittal. After considering a range of options from retaining the status quo, increasing the maximum sentences for administration of justice offences, and abandoning double jeopardy rules, the Commission ultimately recommended a limited and principled exception to the double jeopardy rule. Three requirements were laid down for the departure from the rule:

- be confined to acquittals in the most serious classes and kinds of case, those crimes carrying more than 14 years imprisonment (murder, rape, wounding, serious drug offence);
- require conviction of an administration of justice crime;

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59 *R v Moore,* unreported, T31/99 High Court , Palmerston North Registry , 17 September, 1999 AD per Doogue J. p. 5.
60 *R v Moore*, unreported, CA399/99, 23 November 1999 AD.
61 Crimes Act (NZ) 1961, Ss 357-359.
62 Crimes Act (NZ) Ss 108, 116, 117, 113, 101, 104, 117.
63 New Zealand Law Commission. Report 70, *Acquittal following perversion of the Course of Justice*, March 2001.
64 New Zealand Law Commission, Preliminary Paper 42, *Acquittal following Perversion of the Course of Justice: A Response to R v Moore*, September 2000.

- be dependent upon the judgment of the High Court that certain conditions have been met; included in these is that it is more likely than not that but for the administration of justice crime, the acquitted person would not have been acquitted; that the prosecution has acted reasonably; and that it was not contrary to the interests of justice to take these proceedings.[65]

The New Zealand reforms were quite restrictive as an actual conviction of an administration of justice offence is a precondition. This effectively means the accused in New Zealand will undergo three, not two, jury trials. New Zealand has limited this exception to cases involving the most serious offences, whereas other jurisdictions including the United Kingdom have no limitations leaving it to the discretion of the court. However the United Kingdom specified interference with or intimidation of the witness of juror whereas New Zealand's exception is for any administration of justice offences. Nor will the New Zealand law have a retrospective operation. Lastly, New Zealand considered, but rejected, an exception to be made when new and compelling evidence came to light, concluding:

> "No case has been established in New Zealand for a new evidence exception to the rule against double jeopardy'.[66]

4.3 Australia

By way of background, unlike the other common law countries considered, being England and New Zealand, Australia is a federation with the Australian Constitution giving the states express power to make criminal law.[67] The six states and two territories of Australia are self-governing with their own Parliaments and court systems, with the Supreme Court the highest court each State. This federation means that there are eight separate criminal law jurisdictions. Although all are common law derived the criminal law in some areas is different. Queensland, Western Australia, Tasmania and the Northern Territory have criminal codes governing their criminal law and procedure, whereas the other states rely more on the common law. However, the High Court of Australia is the highest appellate court in the nation and hears appeals from each of the states and territories. Under the Australian system the Commonwealth government has a limited role in enacting criminal laws. The High Court of Australia has held that because the Commonwealth government has the power to make laws with respect to matters which are incidental to the execution of any power vested in the parliament of government of the Commonwealth, it can make criminal laws but only in respect of to one of the agencies referred to in Section 51 (xxxix). The consequence for the rule against double jeopardy is that whilst there is adherence to the principle there have developed, over time, differences between the states on its implementation.

In Australia, it was the case, or series of cases,[68] involving Raymond Carroll that gave cause for Queenslanders, and ultimately all Australians to rethink double jeopardy protections. The question was whether the criminal laws in Australia designed to protect

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65 *Id* p. 16.
66 New Zealand Law Commission, *supra* note 63, p. viii.
67 AUST. CONST. (1900) S. 51.
68 *R v Carroll* 19 A. CRIM. R 410 (1985AD); *R v Carroll* QCA 394 [2001AD]; *R v Carroll* HCA 55 [2002]or 213 CLR 635 (2002 AD).

individual liberty and the overriding presumption of innocence could be too readily invoked by guilty persons to evade punishment. Where did the responsibility of the state lie? There was emerging a belief that persistent criminals were able to manipulate the criminal justice system and the overriding responsibility of the state was to ensure that the criminal justice system remained sufficiently balanced between rights of individuals and rights of the society. The perception in the media was that it had become skewed against victims.

The case that catapulted the debate into the media involved the murder in 1973 of 17 month old baby Deidre Kennedy. She had been taken at night from her cot, sexually abused, strangled to death, then dressed in stolen female underwear and finally abandoned on the roof of a toilet block in the city of Ipswich, Queensland. There were bruises on her legs that experts said were consistent with teeth marks. After years of investigation, Raymond Carroll, a 17 year old RAAF electrician at the time of the murder, was eventually charged. At his trial in February, 1985 he denied involvement and gave sworn evidence that he had not killed the baby and that he was at the Royal Australian Airforce Base in South Australia at the time of Diedre's death, not in Ipswich. There were witnesses who supported that fact he had in fact attended the course in South Australia but there was one witness who gave sworn testimony Carroll had been seen in Ipswich on the day of the murder. Odontologists gave evidence regarding the bite marks on the baby's leg using cast impressions to link these to Carroll. Plus there was similar fact evidence given by Carroll's former wife who testified that he had bitten the thighs of his own baby daughter after locking himself in a bedroom with her. In March 1985, the jury returned a verdict of guilty and Carroll was convicted of her murder. In November, 1985, Carroll appealed his conviction on the ground evidence had been admitted that was prejudicial and inconclusive.

The Court of Appeal Queensland upheld the appeal and overturned the conviction. This was because of differences in expert opinion as to whether the bite marks on the baby's body precisely matched those of Carroll's teeth. Carroll had his own expert witness who contested the findings of the Crown's odontologists. The court ruled the verdict therefore was unsafe and unsatisfactory. As well, the court ruled inadmissible the testimony of Carroll's first wife. Also, the prosecution had not been able to prove the untruthfulness of Carroll's alibi of being in South Australia at the time of the murder. The Court acquitted Carroll of the murder. He walked out a free man, innocent in the eyes of the law.

However, disquiet remained in the community as the crime was particularly repugnant. No other person was charged with the baby's murder and it seems some police were still convinced that Carroll was the killer. The case was re-opened when witnesses came forward who claimed that Carroll had admitted his guilt to them and when further evidence was produced that Carroll was not at the South Australian Base at the time of the murder. Advances in forensic evidence also confirmed a stronger match with the bite marks. Despite this new evidence, the rule against double jeopardy contained in section 16 of the Queensland Criminal Code meant that Carroll could not be charged with Deidre Kennedy's murder a second time.

To get around the double jeopardy rule the Crown decided, in February 1999, to charge Carroll with perjury, pursuant to the Criminal Code(Qld) section 123(1). Perjury is not an alternative verdict to murder in Queensland law which meant he had not been technically in jeopardy for perjury thereby *autrefoi*s acquit under section 16 of the Code was not open. The indictment stated that in giving evidence in a judicial proceeding, namely

the trial for the murder of Deidre Kennedy, Carroll, had "knowingly given false testimony to the effect that he did not kill Deidre Kennedy". Perjury is lying under oath – in this case, the oath that was given when he was sworn in as a witness. The Crown's case was that when Carroll gave evidence in his murder trial to the effect that he did not kill Deidre, he was knowingly giving untrue testimony. Carroll's counsel submitted that the indictment for perjury should be stayed on the basis that these new proceedings constituted an abuse of process. The application raised the lapse of time between proceedings and the similar issues between the two cases. The trial judge ruled that double jeopardy did not apply and there was no abuse of process because the evidence in 2002 was different and stronger than that presented at the first trial. For a second time, the jury found Carroll guilty and he was convicted and sentenced for perjury.

Carroll appealed his conviction to the Court of Appeal of Queensland which unanimously upheld it. The judges concluded that the perjury trial was effectively a re-trial and was therefore an abuse of process as 'the principle of double jeopardy' had been substantially breached. In considering the actual evidence, the court found this jury verdict on perjury to also be unsafe and unsatisfactory.[69] Again Carroll was left a free man.

The prosecution in Queensland sought special leave to appeal to the High Court of Australia which was granted but the appeal was dismissed. [70] There was unanimous agreement of the five justices of the High Court that the perjury trial amounted to an abuse of process. Both trials came to focus upon the same issue - did the respondent kill Deidre Kennedy?

> "In the present case, there was manifest inconsistency between the charge of perjury and the acquittal of murder. That inconsistency arose because the prosecution based the perjury charge solely upon the respondent's sworn denial of guilt. The alleged false testimony consisted of a negative answer to a question, asked by his counsel, whether the respondent killed the child. The fact that the question asked was whether the respondent killed Deidre Kennedy rather than whether he murdered her, or whether he was guilty, is immaterial. Discretionary decisions do not turn upon such differences. Once such manifest inconsistency appeared, then the case for a stay of proceedings was irresistible."[71]

Dismissal of the appeal was not founded on narrower *autrefois acquit* principle but the inherent common law principle that a second trial can not controvert an earlier acquittal. McHugh J explained that, " the long established policy of the law is that an acquittal is not to be contradicted or undermined by a subsequent charge that raises the same ultimate issue or issues as was or were involved in the acquittal."[72] In regard to the second trial for perjury, Gaudron and Gummow JJ found: "the laying of that indictment was vexatious or oppressive in the sense necessary to constitute an abuse of process; in substance there was an attempt to relitigate the earlier prosecution".[73]

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69 *R v Carroll* QCA 394 paras 1, 72 &75 [2001].
70 *R v Carroll* HCA 55, [2002].
71 *Id,* para. 42.
72 *Id,* para. 118.
73 *Id, para.* 114.

However, the decision of the High Court of Australia did not put an end to the debate on reform of double jeopardy. So although the highest court in Australia had clearly and unequivocally ruled that the double jeopardy protections were entrenched in our system of justice, the court of public opinion was not satisfied. Just as had occurred in England, the newspapers and other media outlets took up the cause, demanding changes to the double jeopardy laws along the lines of the legislation in the United Kingdom (as outlined above). The common law is always subject to the will of Parliament so legislation can modify a court ruling, though it does so cautiously. The advocates wanted legislation to be enacted across the country to allow for a retrial where new evidence became available. The catchcry was to introduce a 'Deidre's law.' Many newspaper articles and editorials as well as television and radio programs promoted the cause and Deidre's mother became the figurehead for the reform. *The Australian* newspaper was so strident in its objection to the Carroll acquittal that it recommended a civil trial should be mounted against Raymond Carroll.[74] Opinions of former High Court judges, including two former Chief Justices of the Court[75] prominent legal counsel and various judges in the states of Australia were quoted in support of such changes or at least a review of the existing law. The accumulated effect of the varied but recurring media attention was described simply by Justice Kirby as a "campaign".[76] It bore results.

Although a public petition to government initiated in Queensland for the immediate implementation of a Deidre's law[77] collected over 300,000 citizen's signatures, the first state to produce draft legislation along English lines was New South Wales. It was election time in the state of New South Wales in 2003 when its Premier, Mr Bob Carr announced in his election platform that if he was re-elected changes would be made to the double jeopardy law. True to his election promise a consultative draft bill [78]was released in September that year, followed by a report to the Attorney- General reviewing the safeguards contained in the bill.[79] Legislation modifying the rule against double jeopardy was passed in October, 2006.[80] The changes are similar to those in the United Kingdom requiring retrial only in rare and exceptional circumstances where the judge directed the jury to acquit or a court ordered an acquittal, and where there is shown to be fresh and compelling evidence.[81] It applies to offences with a maximum sentence of 15 years imprisonment, such as murder, gang rape and commercial supply or production of illicit drugs. Tainted evidence instrumental in an acquittal within a 15 year time frame is also included. For a retrial it has been established that it is in the to interests of justice and only one application for a retrial can be made and only one retrial held. The Director of Public Prosecutions (DPP) must approve re-investigations. Although the Act has been passed by the Parliament it has not been proclaimed by the Governor so is not yet in operation. Other states have introduced and debated draft bills. In Queensland the *Criminal Code (Double*

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74 Jamie Walker, *Body of Evidence*, WEEKEND AUSTRALIAN, 15-16 February, 2003, p. 16. Available at http://www.ourcivilisation.com/signs/deidre.htm

75 Sir Harry Gibbs and Sir Anthony Mason see *Id*.

76 Kirby, *supra* note 31, pp 238 - 240.

77 See http://www.peterdutton.com/pdf/DoubleJeopardyJuly06.pdf. Featuring Peter Dutton MP and Faye's Kennedy's Double Jeopardy Deidre's Law Petition.

78 Criminal Appeal Amendment (Double Jeopardy) Bill, (QLD) 2003 AD.

79 Advice to the Attorney-General: safeguards in relation to proposed double jeopardy legislation, November 2003.

80 Crimes (Appeal and Review) Amendment (Double Jeopardy) Act, (NSW) 2006 AD.

81 An application for a retrial on the basis of fresh and compelling evidence or a tainted acquittal can be made only for offences that carry a maximum penalty of life imprisonment. These offences include murder, gang rape and the supply of large commercial quantities of drugs.

Jeopardy) Amendment Bill (2006) was introduced by independent member of Parliament, Peter Wellington. It was debated but not passed by Parliament on the ground that a national uniform approach was preferable.

One of the challenges in Australian criminal law reform is the federal nature of government, as gaining consensus across six states and two territories has proven difficult. The Council of Australian Governments (COAG) which is comprised of all State and Territory leaders set up a committee to review double jeopardy laws and seek agreement on a uniform response to double jeopardy reform. Central to the national debate was a discussion paper emanating from the Standing Committee of Attorneys-General for a Model Criminal Code (MCCOC).[82] Consultation was extensive. The paper recommended that the laws on double jeopardy be changed so that a person acquitted of an offence would not be precluded by the rule against double jeopardy in three situations. The first was to allow an acquitted person to be prosecuted for an administration of justice offence, such as perjury, or bribery of a juror committed during the original trial.[83] The second is to allow for retrial of the original or similar offence where it is a very serious offence and fresh and compelling evidence comes to light.[84] The third also applies to very serious offences when the acquittal is shown to be tainted. If the Court of Appeal believes that 'it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted'[85] a retrial of the original or similar offence would be allowed. These three situations will now be discussed with their merits and demerits analysed.

5. STATUS Quo or Revision? A Commentary

5.1 Prosecution for an administration of justice offence connected to the original trial

Although there are many administration of justice offences[86] they typically arise in two circumstances. The first deals with bribery of a juror and second is perjury. Both go to the heart of the criminal trial and its integrity. If, after a person has been acquitted of an offence, evidence can be produced to show that the accused, or another person acting in the interests of the accused, gave money or benefits to a juror, in order that the juror find the accused person to be not guilty, then the person should be tried for the offence of bribery. This would be accepted by most as logical and just, even though it raises an implicit assumption that the acquitted person was most likely guilty of the offence. However, perjury which is also an administration of justice offence, is not so straightforward as was seen in the case of *Carroll.* The case clarified that if an accused person gives false, that is perjured evidence, in his or her trial, there cannot be a later prosecution for perjury where

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82 MCCOC, Model Criminal Code Discussion Paper*: Issue estoppel, Double Jeopardy and prosecution against acquittals,* Chapter No 2, November 2003 AD.

83 *Id,* p. ii.

84 *Id,* p. iii.

85 *Id,* p. iv

86 For example, Chapter 16 'Offences Relating to the Administration of Justice' Criminal Code (QLD)1899 includes S.119B Retaliation against a judicial officer, juror, witness or their family; S. 120 Judicial corruption; S121 Official corruption; S.122 Corruption of Juror by treats and intimidation; S.123 Perjury; S126. Fabricating evidence; S 127 Corruption of witnesses; S128 Deceiving witnesses; S129 Destroying evidence; S130 preventing witnesses from attending court; S131 Conspiracy to bring false accusation; S132 Conspiring to defeat justice.

the evidence would controvert the earlier acquittal decision. In particular, Gummow and Gaudron JJ made it clear that perjury should not be construed "to expose defendants who are acquitted after exercising their statutory right to testify in their behalf to a subsequent prosecution for perjury in respect of their denial on oath of guilt on the first charge."[87] Part of the rational for this comes from the fact that over a century ago an accused in the common law system was prevented from giving evidence for or against themselves at trial.[88] The motive for changing that law was to enlarge the rights of an accused, and not to put them in peril of a prosecution for perjury where their evidence proved to be false. Justice Kirby extends this further opining that to put a person on trial again for perjury represents a weakening of the privilege against self-incrimination.[89]

A second reason given why perjury should be excluded is that the trial process already takes that possibility into account because it is designed to determine which witnesses are telling the truth and which are lying especially through the process of cross-examination at trial.[90] However there remains something disquietening about a justice system that allows person who has taken a solemn oath at their trial to 'tell the truth and nothing but the truth' to avoid any legal consequence if he or she breaches that oath and proceeds to give untrue testimony. Nor should it matter whether the factual issues are substantially the same or different or how the perjury comes to light. Gummow and Gaudron JJ indicated there was a difference when they stated that proceedings for contempt may lie against a defendant who publicly boasts of success in securing an earlier acquittal by perjured testimony.[91] It seems the act of perjury of itself should be the key factor not the means by which it became known. As the MCCOC paper noted: 'The fact that one happens to be the accused in a criminal trial does not and should not confer a licence to lie on oath.'[92]

5.2 Retrial of the original or similar offence where there is fresh and compelling evidence

The importance of finality in its many forms underpins concerns for any exception to be made to *autrefois acquit* allowing for retrials albeit in limited circumstances. The ramifications of lack of finality have been discussed earlier at III. Allowing a possibility of a retrial in circumstances where there is new or fresh evidence has been described as fundamentally changing the criminal justice system as an acquittal would not be absolute but conditional on no new compelling evidence coming to light.[93] It is accepted that there always have been an exception to finality, when new evidence points to show a wrongful conviction. This has always been a ground for quashing a verdict which hitherto had been final, in the sense that all appeal processes had been exhausted. However even though one can accept that the consequences of a wrongful conviction are more serious than a

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87 *R v Carroll*, HCA 55, [2002]. para 109.

88 Prior to 1897, in Queensland an accused could not neither be examined nor cross-examined and was not competent to give evidence for or against himself or herself. This was consistent with the common law at the time. Section 3 of the Criminal Law Amendment Act, 1892 made an accused person a competent but not compellable witness.

89 Kirby, *supra* note 31, at p 237

90 NSW and UNSW Councils for Civil Liberties, Submission to the Model Criminal Code Officers' Committee's, *Issue Estoppel. Double Jeopardy and Prosecution Appeals against Acquittals*. February 2004.

91 *R v Carroll*, HCA 55,[2002]. para 88.

92 MCCOC *supra* note 82, p. 71.

93 NSW & UNSW Council for Civil Liberties, *supra* note 90, citing Baroness Kennedy of The Shaws, p. 5.

wrongful acquittal, there are some important reasons why retrials should in limited circumstances of fresh and compelling evidence be allowed.

The first of these lies in the fact that the rule emerged at a very different time in our history both in terms of the role of the state and the criminal law itself. 800 years ago, the common law was dominated by brutal punishments with a large range of offences for which the death penalty could be invoked. The consequences of a second trial were life-threatening. This is no longer the case, though it must be accepted that imprisonment for 15 years remains a harsh outcome. It also was a time when eye-witness accounts were the main form of evidence. Now new technologies have been developed, including DNA testing, and more are undoubtedly in the wings which can be used to prove conclusively, or at least with considerable certainty,[94] vital facts. Certainly, DNA can never prove all elements in the commission of an offence and is not 100% accurate. However, its role is important to the extent that there are DNA databases established in most states of Australia and in many countries of the world where DNA testing is invoked to prove guilt or innocence. The technology has been successfully employed to enable jury verdicts of guilt to be set aside when it was not available for the original trial. It is, the words of Justice Kirby, 'a new ingredient'[95]and a rational legal system should be adjusted to take it into account, whether the original verdict was guilty or not guilty.[96]

In a similar vein, when a acquitted person subsequently makes a confession of guilt, which is reliable as the details provided in the confession disclose intimate knowledge of the commission of the crime, then to invoke the *autrefois acquit* rule as a bar to a subsequent retrial, cannot, in the eyes of the community, serve the cause of justice. This was what occurred in the case of *Billy Dunlop,* as was discussed earlier. Although such cases are rare the law should never be seen as giving confessed killers immunity solely because there was an earlier acquittal. A charge for contempt of court which Gummow and Gaudron JJ said would apply if the person 'boasted' in public about their guilt, does not go far enough. A second trial in which the confession is the new, fresh and compelling evidence should be available.

Even the strongest advocates for reform of double jeopardy do not argue that a second trial should be readily available. They argue that strict safeguards should be put in place to ensure routine use and abuse never become possible. Both the legislation in the United Kingdom and the New South Wales Act and the proposals of the MCCOC agree that in any reform of the rule the following safeguards should be assured:

1. Police can only re-open an investigation after an acquittal when an independent authority, either the Director of Public Prosecutions or an appellate judge decide there are cogent reasons for doing so.[97]
2. The appeal court must decide that the evidence is sufficiently 'fresh' or 'new'. There is a legal distinction between the two. England selected 'new' defining it as new if the evidence was not adduced in the proceedings in which the person was

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[94] See Barbara Hocking, Hamish McCallum. Alison Smith & Chris Butler, *DNA, Human Rights and the Criminal Justice System* 3 (2) AUST. J. HUMAN RIGHTS, 208 (1997).
[95] Kirby *supra* note 31, p. 240.
[96] *Id.*
[97] Criminal Justice Act (UK) S. 76.

acquitted.[98] This means the evidence could have existed at the time of the trial but was not, for some reason presented in court. 'Fresh' evidence is more restrictive in that it could not have been obtained for use in the original trial. New South Wales opted for fresh evidence defining it as not being adduced in the proceedings for which the person was acquitted and could not have been adduced with the exercise of reasonable diligence.[99] The MCCOC proposals also support fresh evidence and this appears a strong safeguard against sloppy police or prosecutorial work in an original trial.

3. The appeal court must decide the evidence was compelling and the definition of "compelling" in both jurisdictions is that it is reliable, substantial, and appears highly probative of the case against the acquitted person.[100]
4. The appeal court must be satisfied that the investigation and prosecution in the original trial were conducted diligently.
5. The appeal court must be satisfied that the accused will be able to receive a fair trial and that it is in the interests of justice for the retrial to occur. [101] For example, if the length of time passed is too great it may go against the interests of justice.
6. The offence which is to be retried must be a very serious one. In each jurisdiction homicide offences and other offences punishable by life imprisonment,[102] which is 15 years custodial sentence or more, are included.
7. The application for a retrial can only be made once.[103]
8. Reporting restrictions or a prohibition should be imposed.[104]

5.3 Retrial of the original or similar offence where the acquittal is tainted.

As already outlined, a tainted acquittal refers to a jury verdict where the verdict was largely the result of an administration of justice offence being committed in the trial, such as, fabricated evidence given by either the accused or another witness for the defence, as occurred in Moore's case, or is a result of undue influence being brought on a juror. For a retrial in these circumstances of a tainted acquittal, there are two legal responses. One is for the accused, or another, to have been actually convicted of an administration of justice offence, as discussed above, in the trial for which they were acquitted and that it is more likely than not that, but for the commission of that offence, the accused person would have been convicted. This requires three jury trials and has led to claims of triple jeopardy.[105] The second response is that recommended by the Law Commission for England and Wales,[106] which does not limit it to a conviction of an administration of justice offence but includes situations where the High Court is satisfied, to the criminal law standard, that an administration of justice offence has been committed but it is not reasonably practical to

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98 *Id*, S. 78 (2)
99 Crimes (Appeal and Review) Amendment (Double Jeopardy) Act (NSW) 2006 AD, S. 9D.
100 *Id* S. 9D; Criminal Justice Act (UK) S. 78(3) (a)-(c). Also. Supported by MCCOC *supra* note 92, p. 75.
101 Crimes (Appeal and Review) Amendment (Double Jeopardy) Act (NSW) S. 9C; Criminal Justice Act UK S. 79; MCCOC, *supra* note 92, p. 75
102 Crimes (Appeal and Review) Amendment (Double Jeopardy) Act (NSW) S. 9B, Criminal Justice Act UK S. 75 (8) and Schedule 5; MCOOC, *supra* note 92, p. 75.
103 Criminal Justice Act UK S. 75; MCCOC *supra* note 92, p. 75.
104 Criminal Justice Act UK S. 82 &S83; MCCOC *supra* note 92, p. 75.
105 NSW & UNSW Councils for Civil Liberties, *supra* note 90, p. 14.
106 Law Commission for England and Wales, *supra* note 42, para 5.10.

apprehend or to identify that person.[107] With this approach there would be two jury trials and one determination by a judge. Clearly, the greater protection lies in the situation where a conviction of the administration of justice offence is the necessary precondition for a retrial.

The arguments for and against the inclusion of perjury as an offence which could trigger a retrial have been set out under the earlier discussion on prosecution for an administration of justice offence. The MCCOC argues that not including perjury amounts to 'conferring a licence on accused persons to lie under oath'[108] which has to be weighed against the exposure to triple jeopardy which appears oppressive. A way round this may be that compelling evidence that an accused person under oath in their trial lied on material facts, such as alibi, could be dealt with on the grounds that it is "fresh and compelling" evidence[109] rather than as a tainted acquittal. The tainted acquittal would be limited to interference and intimidation of witnesses and jurors.

6. International Law Considerations

Any modifications made to the principle against double jeopardy need to be in accordance with international law. One tenet of international law to be considered is the *International Covenant on Civil and Political Rights* (ICCPR) which Article lays down a prohibition against double jeopardy. Article 14(7) of the ICCPR states:

> "No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure for each country."

Much turns on the word 'finally' given that it is set in the context of the law for each country. Article 14(7) has not been interpreted as prohibiting appeals against convictions or acquittals as finality in the case is pending. It is common in civil jurisdictions for appeals against acquittals. The United Kingdom considered the international law dimension before enacting its modifications to double jeopardy in its report to Parliament in 2001with reference to Article 14(7) by the United Nations Human Rights Committee (the treaty body charged with implementing the ICCPR). The Human Right Committee expressed the view that the reopening of criminal proceedings "justified by exceptional circumstances" did not infringe the principle of double jeopardy.[110] The Commission reasoned that the reopening permitted by the Article must be distinguished from a new prosecution. A prosecution appeal is an ordinary procedure which may be invoked before the decision has become *res judicata*. Reopening is an extraordinary procedure which may be invoked *after* the decision is *res judicata* and can be distinguished from a fresh prosecution which is prohibited.

The European Convention also uses the word finally in its equivalent section, Art 4(1) but specifically goes on in Art 4(2) to provide for the "reopening of prosecution cases

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[107] *Id*, para 5.19.
[108] MCCOC, *supra* note 92, p.74.
[109] NSW &UNSW Councils for Civil Liberties, *supra* note 90, p. 14.
[110] Law Commission for England and Wales, *supra* note 42, para. 3.6.

in accordance with domestic law if there is evidence of new or newly discovered fact, or if there has been a fundamental defect in the previous proceedings which could affect the outcome of the case." Here the reopening is the application to a court of appeal for an order for a retrial[111]which is seen as conceptually and procedurally different and not in breach of the core principle against double jeopardy.[112] Australia however is not a signatory to the European Convention but is to the ICCPR, though the treaty has not been incorporated into Australian law by legislation. However, as a signatory there is an obligation to adhere to the rules of international law and Justice Kirby points out that any citizens who were retried after an acquittal and felt the Australian exceptions to double jeopardy amounted to a new trial rather than a reopening might communicate that complaint to the treaty body[113] for determination.

A second international law concern is the retrospective operation of the law which, when introduced, allows an exception to the rule in the case of new or fresh and compelling evidence. The Law Commission in the United Kingdom considered this and concluded that because the retrospective operation in international law treaties applies to substantive law, that is criminal acts and omissions, and not to procedural law, the new legislation was therefore not in breach of either ICCPR Art 15 or ECHR Article 7:

> "We consider that the arguments in favour of giving the exception retrospective effect are powerful. Substantive retrospective criminal legislation renders an act, which was legal when it was performed, subsequently illegal. In the case of the procedural change we propose, the alleged act was already a crime. The new procedure merely makes it possible (or easier) to bring the offender to justice, a desirable outcome whenever it is achieved."[114] Without retrospection, the legislation would take many years to have impact and if the rule is relaxed it should apply to past and to future cases without limit."[115]

In Australia, the New South Wales legislation and also the recommendation of the MCCOC is for its operation in cases of fresh and compelling evidence category is for it to apply retrospectively. It is recommended that one important requirement for the Court of Appeal to consider in making a determination is the length of time since the original acquittal and the alleged commission of the relevant offence.

> "The Committee believes that empowering the Court in this way provides an appropriate balance between ensuring that retrials of past crims based on, say, fresh evidence can proceed in appropriate circumstances with potential abuse of these exceptions if investigators and prosecutors dip too far back in the past."[116]

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[111] Corns, *supra* note 13, p.88.
[112] *Id*
[113] Kirby, *supra* note 28, p. 245.
[114] Law Commission for England and Wales, *supra* note 42, para 4.44
[115] *Id,* para 4.45.
[116] MCOOC, *supra* note 92, p. 105.

7. Conclusion

Any modification to a longstanding principle such as the one under consideration in this paper will be controversial. Inevitably in a democracy with a staunchly independent judiciary, legal profession, media and representative parliament, supporters and detractors will publicly and vociferously critique both the existing law and any proposed changes to it. Supporters refer to the process of review and reform to double jeopardy undertaken in the three common law jurisdictions of the United Kingdom, New Zealand and Australia as 'modernising'[117] an ancient or antiquated rule, whilst those advocating the status quo describe the reform process as a reversal, even a tragic demise[118] of a non-negotiable principle. Relevant insights into law reform in the common law system can be gained as the views of the public, the media, reviews and recommendations of distinguished bodies of senior lawyers and judges, decisions of judges, and ultimately the nature of debate and votes in parliament: all contribute to the direction law will take in their country.

As has been shown, in each of the three jurisdictions, the single greatest catalyst for a reviewing the rule against double jeopardy came directly from court cases: murder cases whose outcomes were seen as unpalatable in the eyes of the public. Each case was quite distinctive and different in the dimension of the rule against double jeopardy it exposed as flawed and unjust. In England, it was the case of the death of Stephen Lawrence where an inept investigation and prosecution led to an acquittal for want of evidence, subsequently barring any later trial based on more thorough identity evidence. This case was followed by another murder case in which after an acquittal, the perpetrator of the crime, Billy Dunlop, confessed. The resultant perjury charge was insufficient in the eyes of the public and many in the legal profession agreed. In New Zealand it was the case of a gang murder for which Moore escaped conviction through acquiring a fabricated alibi. In Australia, it was the case involving the heinous murder of the 17 month old baby when jury's two verdicts of guilty, first for the baby's murder and second for perjury, were quashed by the courts of appeal, though in the eyes of the public there was sufficient evidence for Carroll to be punished on both accounts.

Confidence in the legal system was called into question in each of these countries. The public's responses were emotive and vocal with the media fuelling the sense of grievance. The involvement of the media has been widely criticised. The New South Wales Council for Civil Liberties claimed to be "greatly disturbed by the way this case [Carroll] has been used by the media to create political pressure being brought to erode the rule against double jeopardy... [the] media campaign is as ill-informed as it is well-resourced."[119] However, two aspects are important here. The first is that an independent press in a society with free speech means contrary views are also presented, which did occur in this case.[120] If a newspaper article seems ill-informed, each citizen is free to challenge it and provide a

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[117] Dutton, *supra* note 77.
[118] Andrew Haesler, The Rule against Double Jeopardy: its tragic demise in New South Wales, Paper presented to *Lawyers Reform Association Seminar on Double Jeopardy* (Sydney, 18 June 2003) p. 7.
[119] NSW & UNSW Councils for Civil Liberties, *supra* note 90, p.11.
[120] Reporter and media commentator Richard Ackland was a strong advocate for rejecting all changes to the rule. For example, see Richard Ackland, Carroll Case Questions Jeopardy but Single Issue Media Stunt in Not in Doubt', SYDNEY MORNING HERALD, 13 December, 2002, p. 17.

contrary view. That is healthy: nothing, including long-standing principles is beyond scrutiny, debate and comment within the confines of the law. A recurring criticism was that the response was 'knee-jerk' and that laws, especially ones as old and fundamental as this protection, should not be changed because of one or two isolated cases. This view was expressed by the Law Institute of Victoria: '"a proposal to alter the fundamental principles that underlie the operation of our system as a whole, on the basis of one case, or a limited number of cases reported in the media, is not warranted in our view."[121]Whilst the law should not be decided solely on the basis of 'hard' cases or a rare case of injustice, exceptions to rules, even long standing highly principled ones are not uncommon in law, including the common law of crime. Even the most basic of rights in criminal jurisprudence that the standard of proof must be beyond reasonable doubt is subject to some limited exceptions.[122]

The second aspect is that review and ultimate reforms undertaken in United Kingdom and New Zealand were first considered by distinguished legal bodies in the form of law commissions. These are not legally ill-informed persons but reputable, experienced lawyers and judges who consulted widely and who, after developing a discussion or preliminary paper, called for submissions from all interested parties before making their recommendations. Similarly in Australia, it is the Attorneys-General of the country, from each state, territory and the Commonwealth Attorney-General who produced the discussion paper and called for submissions to be made. The endeavour is serious, the consultation process extensive, and their final recommendations warrant attention. Of course, the ultimate decision will be made in the Parliament. So although the trigger may be the public and media hype in regard to a particular case, the actual process it put in place is measured, consultative and reasoned.

It is widely acknowledged that there are very limited circumstances[123] when a Carroll, Moore or Dunlop type case will arise and this fact needs to be weighed against the effective and fair operation of the criminal justice system as a whole. But if the rule against double jeopardy can be tinkered with, or fine –tuned, to rectify legitimate concerns in cases of wrongful acquittals, and do so without undermining double jeopardy's continued primacy and operation in our legal system, then it is appropriate to reconsidered such a course of action. This is the task undertaken, or being considered, in the three jurisdictions discussed in this paper.

Tinkering with the rule against double jeopardy to prevent tainted acquittals is valid. After all, the rationale for having crimes against administration of justice is to preserve the integrity of the trial and justice process.[124] An acquittal obtained by intentionally fabricated evidence, by lying under oath, knowingly misleading the court, bribing, intimidating or interfering with witnesses or with jurors in order to secure his or her acquittal and succeeding, destroys the fundamental objective of the justice system: to conduct a fair trial. Clearly such an accused should be subject to a prosecution of the

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[121] Law Institute of Victoria, Submission to the MCCOC on '*Issue estoppel, Double Jeopardy and Prosecution Appeals against Acquittals'* (November 2003 AD).

[122] In defences such as insanity and diminished responsibility the standard is balance of probabilities and in other exculpatory provisions where the persuasive onus rests with the accused. Proof of jurisdiction in criminal matters is to the standard of balance of probabilities. See *R v Thompson* 169 CLR 1 (1989AD).

[123] In the United Kingdom, there have been no cases to date brought under the 1996 Act dealing with tainted acquittals and just one, that of Dunlop, under the 2003 legislation allowing retrials for fresh and compelling evidence.

[124] New Zealand Law Commission, *supra* note 64.

relevant administration of justice offences, including the contentious offence of perjury. Where a perjury charge could controvert an earlier finding of not guilty and an acquittal, as occurred in Carroll's case, the evidence of perjury, if sufficiently strong and compelling, could be treated as new and compelling evidence. The next question is, should such a person who has been convicted of an administration of justice offence thereby proven in a court to have knowingly undermined the system of justice and its protections, then claim the protection of double jeopardy to avoid punishment for a most serious crime? The answer from New Zealand was: "By intentionally subverting the system they may lose their right to the double jeopardy protection; an accused can reasonably expect to be subject to the criminal prosecution system only once for an offence, provided he or she has not deliberately perverted the process."[125]

Tinkering with the rule in cases where new or fresh and compelling evidence comes to light after an acquittal does have more inherent challenges. The most significant is that it violates the principle of finality. And whilst its retrospective operation can be seen as procedural, it does mean that, if the law changes, all persons who have been acquitted of the most serious of offences, could become eligible for retrial and possible conviction. In the United Kingdom and in the model proposed by the MCCOC the judge retains the right to determine whether it is in the interests of justice, or not, to proceed with a new trial. Accordingly despite the existence of new evidence the judge may be persuaded that because a person has got on with their lives and conducted their affairs of the assumption of their acquittal's permanence that it is not in the best interests of justice to re-open the case. Essentially, the fairness in the case of fresh and compelling evidence will, in practice, rest with the implementation of the safeguards contained in the legislation design to ensure that fairness. The court has to apply these safeguards before allowing a re-trial. It also will lie in the integrity of the trial process itself. An additional overlooked safeguard is that it is the jurors in the common law system who will make the second determination. The jury at the re-trial would be able to find the accused person not guilty of the crime, despite the Director of Prosecutions and the appellate court judges believing the new evidence was also compelling. In recognition of democratic accountability, it is the jurors in the who have the last word.[126]

To sum up the climate of change a British Member of Parliament explained:

> "The double jeopardy rule has been an integral part of our criminal legal system for many centuries and should remain as such. But the time has now come to refine some of its unjust permeations in order better to protect the integrity of the system and of the citizens of this country."[127]

[125] *Id*, para. 36.
[126] Paul Roberts, *supra* note 47, p. 203.
[127] Paul Stinchcombe MP, quoted in Law Reform Commission, *supra* note 110, para 4.49.

Face to Face with Corruption

– Surya Nath Upadhyay[♣]

Combating corruption is a long and tiring battle which requires close collaboration of all the stakeholders and a firm political commitment which is very crucial. In this article the author presents his experience of fighting corruption when he was 'face to face with corruption' for six years as head of a constitutional body entrusted to prevent and combat corruption. As succinctly explained by the author, there are a number of hurdles such as the pervasive impunity, low morale, low salary, frequent intervention and politicization of the bureaucracy, poor record keeping and the like. Besides, close nexus among the policy makers and brokers and black marketers, lack of cooperation between various state agencies including the justice sector agencies has made the combat against corruption really complicated. The author argues that unless leaders are committed and the strategy of controlling corruption gets functional support and commitment of other vital organs of the state, the CIAA alone cannot correct the malaise. He is for building a broad coalition against corruption and wonders when such a day would come 'to this beautiful but spoiled country of ours'.

1. Introduction

Corruption as we define in simple terms is "the use of public office for personal gain." This is a phenomenon of public administration which is found in almost all the countries of the world. However, the countries are at varying scales in terms of the prevalence of this phenomenon. Some are more corrupt than the others.

The basic reason for this may be found in the psychology of human beings, in other words, the "instinct" than on the need based compulsions. As the phenomenon has gripped the countries, societies and the institutions created by human beings, the same human beings are out in their bid to control it. This dual role could better be explained by the fact that there exists a continuous struggle between virtues and vices within us and we, therefore, need to exalt ourselves to a state above all of these and be a human being in the real sense of the term. This struggle is manifested outwardly in a collective effort by creating various laws, institutions and mechanisms to control the vice within us. However, it also has manifested itself in the form of corruption which generally takes place at the personal level but may adopt a collective strategy at times. Having had the opportunity of working in an institution mandated to work against and control this vice, I had the rare occasion of being face to face with this vice for more than half a decade. The sweet, sour and traumatic experience, the outward exhilaration of celebrity, the tremendous pressure some direct and some subtle, the unbearable tension, the aura of power and prestige, the dangers and opportunities, the sense of achievement and deep frustration that one goes through in such as situation have their own story to tell. However, at this juncture without

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♣ Mr. Upadhyaya, a noted legal scholar, was head of the Commission for the Investigation of the Abuse of Authority, a Constitutional body from Nov. 2000 to Nov. 2006.

being elaborative I may venture to point out some aspects of this experience in our country. These points are, of course, personal and may not be claimed to be of universal character. However, they certainly do give a picture of the situation which might be taken up as points for future course of action in this country if not for other countries suffering from the brunt of corruption and abuse of power.

2. The Pervasiveness of Impunity

If one looks at the law of the country it has all the characteristics of a modern law on corruption. We have a long tradition of legal governance and considerable efforts of corruption control in the past. However, it is a pity that Nepal appears in the group of countries which are considered to be seriously affected by corruption. The history of our fight against this menace has started simultaneously with the unification of the country. From then on, to the present age of ours, this fight is on. Yet in contemporary Nepal one would not be able to find even a single important person who has been highly placed in the decision making and publicly perceived as corrupt by the people, convicted and is in the cell behind the bars. Not only that, there are very few cases of corruption in which people have been put in jail or the ill-gotten assets were attached. Our bureaucracy is laden with the incidents of scandals of corruption but all these evaporate in the realm of enquiry, investigation or litigation at the court. The final outcome concurs and further confirms the general impression of the people, which is carried by a popular Nepali idiom – *Thulalai Chain Sanalai Ain (Law applies only for the powerless, small fry whereas the bigger fry is always beyond the reach of Law)*. It is not only the case of corruption, in almost all the cases, be it revenue pilferage or evasion, poaching and trading of endangered wild animals, arson and loot, and even murder, impunity has been the biggest problem. It is a matter of shame that successive governments have either withdrawn the serious criminal cases or lessen the punishment to a considerable degree and let loose the convicted criminals in one or the other pretext. This all has helped in eroding respect for law in the general people. Therefore, the challenge first of all is to establish and demonstrate that a crime gets punished.

3. The Bureaucracy

Our bureaucracy suffers from low morale and skill. It has been the victim of frequent interventions- some are attributed to policy changes while others to the play of various interests. The situation is further compounded by low level of salary and other perquisites. In this milieu it is not surprising that it is profusely infected by all kinds of corrupt behaviours. One my get around any law or get anything done or undone by buying or influencing the public service institutions. Those who have come in touch of public office have almost the same experience. One does not need any example. Such behaviour has almost been the accepted norm.

4. The Management of Information and Record

The bureaucracy thrives in systems and procedures which follow a certain behavioural pattern. Records and information provide the basics for its function. Unfortunately, in our country we are very weak in all these things. Systems and procedures may be violated, mended, made flexible, ignored or missed if one knows how to get around and get the things done. Go to any district office and ask for the true copy of the order to issue the citizenship certificate of some years back or a record of your vehicle registration, or the payment of your fees or service charges of some years back you would not be able to get. If you want to look at the study report of some water resource projects prepared by the concerned institution, it may only be found in the cupboard of the house of an engineer or the commission agent. It shall not be found where it is supposed to be. The records of the land registry are either not available or not dependable.

In the backdrop of the above characteristics of our public offices it is natural that it provides natural ground for corruption to breed and grow. Therefore, unless an overall improvement in the procedures, systems and record keeping are made, control of corruption would not be possible.

Besides, some very vital points infecting the public office by creating "free for all" and "any thing can happen" any situation any institution or person devoted to the task of controlling corruption in this country will be facing the following challenges.

4.1 Corruption Control – Whose Responsibility ?

As a matter of fact, control of corruption has not become the agenda of work for those who claim themselves to be the leader of this country and have promised better life for us. Except occasional public utterances, no serious joint and concerted effort has been made from the executive side of the government in this regard. There are examples where high placed public office holders have colluded with the black marketers and similar nefarious elements to use the state machinery for their personal gains. One can find examples of such cases such as gold smuggling through the international airport, smuggling of fertilizers from India etc. where the whole state machinery was put to the service of the black marketers. Even the changes in the law of corruption made five years back could only come by the very open, strict and high pressure from the multilateral financing agencies and other arm twisting agencies and governments. There have been occasions when those who have been in power have gone against the CIAA, their own machinery, in the court while remaining in the position. It is a shame to see that a convicted, though by the lower court, sits in the legislature and decides the fate of the country. Hence, the conclusion is: unless the control of corruption becomes the main agenda of the highly placed executives and public office holders, it would be a far cry.

4.2 The Uneasiness within the CIAA

The appointment of the commissioners of the CIAA is to be made by a Constitutional Council composed of the high level politicians. The appointment in such positions has almost invariably been influenced more by political consideration than competence of the candidate. It has become almost customary to fill in the vacancies by allotting the position

to the parties in power, and the party concerned is supposed to propose its choice. Such a candidate is latter seconded formally by other members of the Constitutional Council. It is obvious that those who come to fill in the vacancies in this manner will have to show their loyalty to their respective parties. Hence, the mental set-up, attitude and perception of the commissioners varies in such a way that the whole atmosphere becomes uneasy. It is difficult to maintain unity and group-work in the Commission. On the other hand, if we would have a single commissioner in the CIAA we might perhaps have more problems. Therefore, one needs to be extra-sensitive and careful in the appointment to ensure that the incumbent maintains impartiality and honesty. The recent culture that has been shown by the eight party alliance as depicted in high level appointments, if followed in this case also, it shall be very difficult to make the CIAA effective, impartial and independent.

4.3 The Employees of the CIAA

The professional officers of the CIAA are brought on secondment from other agencies, and belong to one or the other cadre services of the government. They work for certain number of years in the CIAA and go back to their parent services and the institutions. This creates problems of expertise building and retention within the institution, loyalty and devotion of the officers and proper use of their expertise etc. There is yet another important aspect in the case of those employees who come from Attorney General's Office. They are public prosecutors who have specialized role. They are mainly accountable to the Attorney General. The Attorney General is appointed by and is accountable to the Prime Minister. It is obvious that if the Prime Minister is not determined to promote, strengthen and support the CIAA, the latter will not be effective. Therefore, first and foremost requirement for any anti-corruption strategy to be successful in Nepal, the Prime Minister or the Chief Executive of the government needs to be determined and supportive. It demands the personal commitment and devotion of the leader. It is debatable whether an institution of this type should or should not have its own cadres. Given the size of the institution and also the risks involved in having its own cadres, it may be worthwhile to devise other ways to retain those who are good and have acquired specific skills in the profession, and at the same time, to weed out those who are more of a liability than assets for the institution.

4.4 The Nexus of Corruption and Patronage

The experience of many countries show that corruption grows and blooms under the patronage of high level decision makers mainly and to some extent the patronage of the criminal elements of the society. It is found that such a patronage is provided in the shape of intimacy, friendship, socialization and even business partnership between the corrupt and the politicians and power brokers. Many a times it takes the shape of a covert or overt nexus in whose radius one would find people of other sectors of the society like media, security, justice etc. Its tentacles go on spreading far and wide engulfing the whole society, the country and even beyond. It may also take the shape of procedures, customs, behaviour pattern and becomes imbedded in the system in such a way that it is hard to separate from the normal legal behaviour. It enriches few at the cost of many. When it grows out of proportion it creates failure of governance and the state machinery, which

leads to social unrest, commotion, struggle between the several factions, and may even take the shape of armed rebellion. The history of nations bears the testimony of such gradual and devastating developments. It is obvious that the happenings of Nepal for the last 15 years bear some traits of such development. Therefore, control of corruption is basic for any state to run in a proper way, and it can only be done if the leaders are committed and the strategy of controlling corruption gets functional support and commitment of the other vital organs of the state.

4.5 Strategy to be Homegrown

It is a pity that even after centuries of our existence as a nation we have not been able to grow self-confident. Our confidence has been so shattered that everyone from outside has a bit of one or the other advice to give to us on our governance. We have not been able to govern ourselves. We have created a mess of everything and a conscious citizen is bewildered as to how should we come out of this conundrum. We have not been able to recognize the immense opportunities and cash them for our benefit. In the case of corruption control, we have a long history of corruption control efforts. We have faced ups and downs in our crusade against this menace. We learned from our mistakes and have tried to improve. Examples of such learning are many. For more then two decades we thought that a specialized agency under the Ministry of Home Affairs with legal authority would be effective in controlling corruption. However, the experience has been that an institution controlled by the Ministry would not in real sense be effective. It was also learnt that a special service of the employees manning the special agency created for the purpose of controlling corruption finally turns rusted if no outlet to weed out the deadwoods or the corrupt is provided. The case in point is the Special Police Department which was established by the government by a law in 1960 and empowered for corruption control. Over time it gradually turned to be an agency which is neglected by the government in terms of its priority to overall strengthening and equipping the government bureaucracy. It lacked leadership and failed to attract the attention. It was felt that this agency would not, due to its status, be able to achieve the goal. It would not be able to control corruption at the high level of bureaucracy which is so vital and perhaps the starting point of any strategy to control corruption. Then the Constitution was amended and a constitutional body was created with all encompassing powers. It was the agency which enjoyed sweeping and wide discretionary powers. It did not have only the power of investigation but also prosecution and adjudication. It acted as a police, a prosecutor and a judge of the first instance at the same time. After a few years of experience, its failure became obvious. The cases which it investigated, prosecuted and decided could not stand at the appellate level. Its wide ranging authority was abused, and it was made subservient to the high executive and political authority. It flouted the norms of justice. This bitter experience was reflected in the drafting of the chapter on constitutional organs in the 1990 Constitution. Not only the name was changed it's authority was trimmed and brought to the level of investigation and prosecution. It was stripped of its authority to decide cases. In due course of time, the Special Police Department was dismantled. The CIAA was strengthened. It started to bite and became effective in spite of many hurdles. However, it seems that such activism of the CIAA was not digested. The chapter on the CIAA in the recently promulgated Interim Constitution to a greater extent replicates the 1990 Constitution. However, if one closely

looks at the provisions one would find several points which depict that the CIAA has not only been made weak but also completely powerless to respond and solve the legal problem which is hampering its effectiveness. It is a pity to see that this body enjoying a constitutional status could be stripped of its authority by a single stroke of an ordinary law passed by a simple majority of the Parliament. This is a predicament of our Constitution making that a constitutional amendment required two third majority whereas its real strength and status could be shattered by a law. Not only that, this body though enjoying a constitutional status has been made subservient to those lower level authorities who come under its jurisdiction. In the case of departmental action it has become very evident. Under the present Interim Constitution, the decision of the Commission (which is normally composed of five commissioners) made after extensive investigation, could easily be ignored or flouted by a lower level functionary. The recent interpretation of the Supreme Court has reduced the CIAA to a powerless authority in the case of departmental action against the public position holders. In this situation the CIAA would turn into an institution which sounds high but has little substance.

Besides the institutional arrangements, our efforts at the legislation front also have been a reflection of our experience. The Anti-corruption Act of 1959 lasted till 2002 AD. It was only in 2002 that the Anti-corruption Act of 1959 was replaced by the new Act with the same name. Besides, the CIAA Act was also amended. These two instruments again are the product of the experience gained during the period of ten years after the establishment of multiparty democracy in the county. Those ten years of our exercise of multiparty democracy, on the one hand, have been very positive in many respects such as education, health, transportation, communication and the overall human development, while on the other, the democracy miserably failed in upholding the norms of ethics and good governance. Corruption became a habitual behaviour in all fronts. First of all, it affected the governance and higher echelon of the decision making. It became difficult to differentiate between the normal behaviour and a corrupt behaviour of the political leaders. Those who were supposed to promote ethics in the government and deliver services to the people became the forerunners in the race of corruption. As is the usual course of action in countries like ours which is heavily dependent on foreign assistance, the donors started to raise this issue and exert pressure to control corruption. Besides them, there has been forceful public demand, lobbying and media campaign against corruption in the public. All this finally culminated into the drafting of the existing laws for empowering the CIAA. The CIAA, on its part, acted rather effectively after it was equipped with more teeth to bite through the new law as was expected. The CIAA was also in the mean time strengthened by fulfilling the vacant positions. Many strides were made to strengthen the institution. The CIAA emerged as an institution of reckoning in the country. However, along with the achievements that it gained it also faced the challenges which, to a greater extent, were impinging upon its advancement and effectiveness. The experience has been very much rich and suggesting many lessons. This paper accounts some of those lessons which one may keep in mind while trying honestly to control corruption in this country.

4.6 Are They Government Employees or the Party Cadres?

One of the predicaments of our government apparatus - the bureaucracy is that it is heavily politicized in the sense that its employees are aligned with one or the other political party. All the major political parties have their employees wings legally registered and active in their own way. Like other sister organizations of the parties they report to the concerned party and are run by the dictates of the party command. Their enthusiasm, activity, and flexing of muscles and powers are visibly found to have been boosted when their party is in power. The flouting of existing norms and ethics, the bending or even making amendments in favour of some group or individual is a normal behaviour. In this exercise, those who are near to the political bosses or bound in the group, whose party is in power, get all sorts of benefits at the cost of the other group whose party is not in power. Such a disadvantaged group would not also hesitate to imitate the other group when any such chance is found. As a matter of fact, this kind of groupings is practiced at the educational campuses where they get their training who latter carry that legacy to the government offices. In their bid to get favours, the employees, no matter whether they are in the lower or higher echelons of the bureaucracy, have made themselves subservient to the personal wishes of their political bosses. They have been given trade union rights and have sprung to a powerful pressure group. The effect of this kind of behaviour is already seen in the performance of the bureaucracy. The bureaucracy's strength is being eroded day-by-day. In this kind of atmosphere the CIAA would not be in a position to maintain its neutrality which is so vital for its success. Unfortunately, the responsibility squarely goes to the political parties, who have for their convenience and to achieve their political ends, used this segment of the society many a times. The future looks very bleak in this regard. It would take decades to disinfest the bureaucracy with the political colour.

4.7 The use of Anticorruption Agency as a Tool for Political Scoring

In the name of controlling corruption, quite often, it is seen that corruption control agency is used for political scoring. The charges of corruption are levied against the past-government officials and politicians by the new government in power. In a situation where the new government comes into power by deposing the existing government through military coup or any unconstitutional method, such practice of levying corruption charges against the erstwhile politicians is much common than during the change of government by normal means of election. The reason perhaps is the new government's self-created compulsions to establish its legitimacy or to be proved different than the earlier one. It may also be true that the erstwhile government was indeed corrupt and the people wanted to get rid of that. To remain independent and neutral at such juncture is a daunting challenge for the anti-corruption agency. The experiences have been that very few anti-corruption institutions have resisted such move. Normally, it has been seen that they succumb to their political bosses. As a matter of fact, if the agency goes out of the way, its legitimacy itself is threatened. In India this is much in practice in states like Bihar, Uttar Pradesh and Tamil Nadu where the chief ministers and their colleagues have been subjected to prosecution on charges of corruption by the governments that replace them. Similarly, in Pakistan the new military government that has come in power has used this method. In Bangladesh, in the recent years, such actions are being taken. In Malaysia, this method

was reported to have been used by Mahathir government. In the African continent, in some troubled countries where power is usurped through military coup, such incident is seen. Relating to this scenario, it is also found that the prosecution finally fails in the court and the accused is relieved of the charges. In the case of Nepal also, it was used by the King. After usurping power unconstitutionally he set-up a new agency for anticorruption in total disregard of the norms of justice and law and by ignoring the already existing agency set-up for the purpose. The newly constituted agency started its actions against politicians on false and flimsy charges. Even the ex-prime minister and ministers were charge sheeted. They had to suffer for some months in jail. Such action by the King, however, was annulled by the apex court later. The situation got to the worst politically, and finally, a mass revolution in the country toppled the King's rule. The lesson that comes out of all this is that one should not try this method, but should ensure that the agency's independence and autonomy is maintained against any such move.

4.8 Should not a Coalition against Corruption be Created to Fight the Odds?

As corruption is very much entrenched in the society where a nexus operating in both covert and overt ways exists. The nexus is very powerful. Often times, the nexus is developed by conscious efforts, and in the leadership of one or the other group of corruption prone section of the society, while at other time, it evolves because of the matching of interest and objectives of the corrupt groups. In such situations the tentacles of corruption gets flourished by the support of different corrupt groups within various sections of the society. Therefore, an agency alone, no matter how much dedicated it might be, cannot fight corruption. The crusade against corruption has to be fought by all particularly important sections of the society such as the media, agencies like the auditor general, the ministry in-charge on behalf of the government, the police, the attorney general, the judiciary, and above all, the top leader of the executive – the Prime Minister or the President. It is necessary that a coalition is built among these agencies against corruption by supporting one another. However, it is easier to say but difficult to practice. On the contrary to this desired situation, one would find that agencies which ought to be supporting one another create difficulties for the anti-corruption agency to do work. The CIAA faced quite many odds when it started to jump on the top leadership of the various agencies. It was so obvious that the leadership on many occasions came openly against the CIAA. Therefore, the lesson is that the coalition against corruption has to be made and strengthened.

In this connection it may be necessary to point-out that all the public institutions have a definite role to control corruption. Each and every institution may create its own strategy to check corruption in its operation provided it has the will. The impact of the honest implementation of such strategy by those who have the direct bearing upon the control of corruption would be very obvious. Take for example the revenue investigation department, the office for the recovery of government dues, the department of immigration, the customs, the police etc; if these institutions become effective, corruption would automatically be lessened. However, they have been found to be ineffective in checking corruption. It is not that they are not equipped with authority and law. The reason perhaps is the priority by those who have the responsibility. Those who have vested

interest, and thrive on the leakage of revenue, would certainly not be interested in making these departments more capable. Similarly, those who are the defaulters would not be interested in putting dues recovery as their priority. This is clear.

4.9 Improvement and Correction in the Root

It is clear that ultimately the fate of the nation lies in the hands of people who are in politics and reach at times to a level where they make decisions for the nation. These decisions affect everyone in the country. Therefore, one has to look at how a politician is bred, from which back drop he or she comes to the picture, what kind of lessons he or she learns while he or she is in the cradle of political party. The Constitution of the Kingdom of Nepal 1990 had a special chapter on political parties to ensure that their functions remain democratic and ethical. However, unfortunately they were flouted more than followed. The resultant effect is the webs we are witnessing day by day in the country. Nobody in the country knows for sure what would be the future of Nepali people. It is not only the political parties, the King as well has to share the major responsibility for this malady. Therefore, one needs to go to the root cause. If we clean the root of all afflictions, the stem, trunk and leaves of a tree are certainly going to be healthy.

4.10 Small Things Matter Much

In the case of corruption control even small things matter much in a country like ours where the system of governance is weak. Take, for example, the case of immigration and import revenue office at the international airport. We don't need very sophisticated administrative apparatus to ensure that the tourists, who are coming to visit this beautiful country, and those of us who go to other countries, don't face hassles, the taxi is easily available on prefixed rate to reach to their destination, the incoming and outgoing traffic are not harassed by the police and other checking authorities etc. This looks so easy but we have not been able to fix it, whereas we bank our economy substantially on tourist trade. Almost every month for one or two days, we face garbage dumping on the street in our capital city of Kathmandu. The traffic is so erratic that it is not sure whether those who commute by vehicles would comeback home after they are out. The pavements are full of hawkers and peddlers. All these are not big issues. It is not that we don't like to improve. But somehow we blame one another. We argue much and do little. All of us are demanding something from the government or society but none of us want to give to the society. This is what has bred corruption and abuse of power. In the vocabulary of corruption "big fish" and "small fish" suggest special meaning. The strategy to control corruption advises to go after "big fish". It is important to catch the "big fish". However, in a country like ours where system of government is weak, perhaps it is other way round. We need to improve small things and start to strengthen the rule of law at the ground level and at the same time hammer on "big fish" of the pond of corruption.

4.11 What Do We Do with Our Judiciary

In regard to control of corruption, the role of judiciary is vital and can not be ignored. All that happens in other areas gets frustrated if this organ of the state does not behave in a manner befitting its status. The history of our judicial institution shows that it has been

strengthened or weakened according to the nature of the rulers. At times when the rulers were conscientious it was strengthened while at others it was moulded to the wishes of the chief executive. Even after independence from the Rana oligarchy, this institution remained tied up more or less with its legacy. It was only after 1990 it started to breathe a fresh air of independence. However, the institutional legacy is hard to go out easily. In the name of independence and autonomy, it was insulated in such a way that it became almost impregnable for improvement particularly to control corruption. If the initiation would not come from within the judiciary itself, nothing from outside would be able to do for improving its present "not very clean" image. In a country like ours, which basically is rooted to its feudal social relations and weak economy, an initiative from within the judiciary against corruption is hard to expect. The recent history of 10/15 years is a testimony to that. Hence, some ways must be found for controlling corruption, nepotism, favoritism and flouting of norms in the judiciary. Perhaps, the corruption within judiciary has to be looked as a special case and devise various methods preventive as well as curative from within the judiciary and from outside. Unless we do something with the judiciary, the control of corruption would be a far cry, because after all, every thing goes there ultimately. The history of corruption control shows that the judiciary has not only been less forthcoming it has, at times, been very conservative particularly in the perspective of active anti-corruption drive.

5. Conclusion

In this short note I presented my views on the current situation of corruption and the ineffectiveness of state institutions to prevent, control and combat corruption. The observations I made are based on my personal experience when I happened to be face to face with corruption while heading the CIAA. In conclusion I would say that commitment and dedication is the starting point of corruption control in any society and it is more so in countries like ours. The question is when such commitment and dedication would come to this beautiful but spoiled country of ours.

Regulating Public Service Behavior to Combat Corruption Selected Approaches, Practices and Themes

– Dr. Kishor Uprety[*]

Regulating the behavior of people holding public office is one of the biggest challenges in combating corruption both in the developing world as well as in leading industrialized countries. In developing countries where corruption is rampant it creates further problem as the poor are badly hit due to siphoning of resources and to quote Kofi Anan "undermining government's ability to provide basic services." The author in this article discusses the approach of multilateral institutions such as the World Bank, the IMF, OECD etc. and also brings in comparative experience from Europe, North-America, South America, Africa, Australia and Asia where countries have devised different approaches to combat corruption including legislative, prosecution and other approaches. The common point in all these countries, as the author emphasizes, is that "combat is primarily a result of strong political will for which legal techniques and tools can be devised as needed". Majorities of countries take a multi-pronged strategy such as strong legislation with enhanced sanction, transparent guidelines and manuals on procurement and financial management and communication and awareness campaign.

1. Introduction

Most studies define what corruption is, often indicating how difficult it is to ascribe a clear-cut meaning to the term. Commonly, it is defined as illegal acts related to power, official institutions, and the civil and public service, or is defined in relation to the personal and monetary gain that is involved for the corruptor. Depending on how corruption is initially defined, related illegal activities (e.g. bribery, extortion, or fraud) are included within that definition, and are examined as specific forms of corruption. Hence, it appears that corruption can mean everything and nothing, referring to a multitude of sins.[1] Although it has something to do with the abuse of power and/or money, a consistent use of one conceptual formulation is often lacking or theoretically unsubstantiated.[2] But, no doubt, corruption is a serious societal problem, and because of its all-degenerative characteristics, combating it becomes a specific development issue.

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1 *See* Mathieu Deflem, *Corruption, Law, And Justice: A Conceptual Clarification,* JOURNAL OF CRIMINAL JUSTICE 23(3):243-258; *See* also, Claes Sandgren, *Combating Corruption: the Misunderstood Role of Law*, 39 INT'L LAW. 717 *(*Fall 2005). Also most people perceive corruption as a failure of institutional controls over bureaucrats or a failure of the legal system that controls the behavior of bribe payers. *See* Philip M. Nichols, *Corruption as an Assurance Problem,* 19 AM. U. INT'L L. REV. 1307 (2004) at 1.

2 *See* Deflem, *Supra* note 1 at 243.

The overall development of a country does not only depend on sound economic policies but also on compliance of government officials and citizens to the laws, rules, regulations and codes of conduct. Where officials are corrupt, compliance is seldom the optimal goal for citizens, since bribery and illegal activity yield higher rewards. When a public official pursues his/her personal interest, in direct conflict with the interests attached to the public function, the balance of authority both among government entities and between state and civil society is damaged. Moreover, when the general population assumes that government officials are not bound by the restraints of their public functions, its incentive to bear the heavy cost of obedience to the law is accordingly affected. Corruption, from that perspective, also leads to a loss of faith in the government, and thus questions its legitimacy.[3]

Transparency International 2005 Corruption Perceptions Index

Country rank	Country	2005 CPI score*	Confidence range	Surveys used
5	Singapore	9.4	9.3 - 9.5	12
6	Sweden	9.2	9.0 - 9.3	10
9	Australia	8.8	8.4 - 9.1	13
11	United Kingdom	8.6	8.3 - 8.8	11
14	Canada	8.4	7.9 - 8.8	11
17	USA	7.6	7.0 - 8.0	12
18	France	7.5	7.0 - 7.8	11
32	Botswana	5.9	5.1 - 6.7	8
46	South Africa	4.5	4.2 - 4.8	11
65	Ghana	3.5	3.2 - 4.0	8
78	Senegal	3.2	2.8 - 3.6	6
	Sri Lanka	3.2	2.7 - 3.6	7
88	Benin	2.9	2.1 - 4.0	5
	India	2.9	2.7 - 3.1	14
97	Argentina	2.8	2.5 - 3.1	10
	Malawi	2.8	2.3 - 3.4	7
117	Afghanistan	2.5	1.6 - 3.2	3
	Nepal	2.5	1.9 - 3.0	4
	Uganda	2.5	2.2 - 2.8	8
126	Russia	2.4	2.3 - 2.6	12
144	Pakistan	2.1	1.7 - 2.6	7
158	Bangladesh	1.7	1.4 - 2.0	7

The problem of corruption is not unique to the developing world: it is common in leading industrialized countries too. No country can actually claim to be wholly virtuous. The only difference is that in some countries the level of corruption is extremely high, and in others relatively low (see Table).[4] Nonetheless, efforts to combating corruption have been ongoing in both worlds, both on international as well as national spheres.

[3] For additional detail on the techniques used to conduct corrupt acts, *see* HELPING COUNTRIES TO COMBAT CORRUPTION. THE ROLE OF THE WORLD BANK (World Bank, September 1997) at 8-20. *See* also *generally* W. P. OFOSU-AMAAH ET AL, COMBATING CORRUPTION: A COMPARATIVE REVIEW OF SELECTED LEGAL ASPECTS OF STATE PRACTICE AND MAJOR INTERNATIONAL INITIATIVES (World Bank 1999). *See* also Deflem, *supra* note 1 at 243-258; *see* also Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development,* in FINANCE & DEVELOPMENT (World Bank, 1998).

[4] *See generally*, Daniel Kaufman et al, *Measuring Corruption. Myths and Realities*, in DEVELOPMENT OUTREACH (World Bank, Sep. 2006) at 37-41.

2. Approach of Multilateral Institutions

Kofi Annan, the former Secretary-General of the United Nations**,** in his statement on the adoption by the General Assembly of the United Nations Convention against Corruption noted as follows:

> "Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid".

Indeed, multilateral institutions, and international financial institutions (IFIs) in particular, have acknowledged the damaging effects of corruption. The most proactive reaction to this problem came in 1995 when the then President of the World Bank declared war on corruption, claiming that corruption is the single greatest obstacle to development.[5] The World Bank further concluded that corruption undermined development by distorting the rule of law and weakening the institutional foundation on which economic growth depends.[6] As a matter of fact, since 1996, the World Bank alone appears to have supported more than 600 anticorruption programs and governance initiatives developed by its member countries.[7]

It is also generally admitted by all IFIs that the harmful effects of corruption are especially severe on the poor who are hardest hit by economic decline, are most reliant on the provision of public services, and are least capable of paying the extra costs associated with bribery, fraud, and the misappropriation of economic privileges. Corruption sabotages policies and programs that aim to reduce poverty. The World Bank, for instance, considers that attacking corruption is critical to the achievement of its overarching mission of poverty reduction. Paul Wolfowitz, former President of the World Bank, referring to the complexity involved in addressing the problem of corruption, noted:

> "...fighting corruption requires a long-term strategy that systematically and progressively attacks the problems, and that is why any strategy for solving the problem requires the commitment and participation of governments, private citizen, and private businesses alike."[8]

In view of the above, the last few years have witnessed a burst of law making at both the national and international levels on the subject of corruption. Leading international organizations (such as the United Nations, the World Bank, the International Monetary Fund, the Council of Europe, the European Union, the Organization of American States, the Organization for Economic Co-operation and Development the Global Coalition for Africa, and the International Chamber of Commerce) have articulated anti-corruption

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5 *See* Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 INT'L LAW. 717 *(*Fall 2005).

6 *See generally* World Bank Website at http://intranet.worldbank.org/WBSITE/INTRANET/ SECTORS/ PUBLIC SECTOR ANDGOVERNANCE/INTANTICORRUPTION/0, menu PK:383910~page PK:151716 ~piPK: 176772~ theSitePK:383902,00.html (as of Feb. 14, 2007); *see* also http:// www. adb.org/ governance/ default.asp. ADB for instance focuses on anticorruption, corporate regulatory frameworks legal and justice reform, participation of the civil society in public decision making, pro-poor service delivery, public administration, public financial management, sub-national or local governance; *see* also Frannie Leautier, et al, *Can Private Sector Action Tackle Corruption?* in DEVELOPMENT OUTREACH, *supra* note 3, at 2.

7 *See* World Bank Website, *supra* note 6.

8 Paul Wolfowitz, (Speech delivered in Jakarta, Indonesia. Apr. 11, 2006), quoted in Leautier et al, *supra* note 6 at 1.

policies and strategies. The concerted drive at the multilateral level to confront the problem of corruption has given birth to a number of anti-corruption instruments, which collectively make up the current international legal regime to combat corruption. The burst of law making began with the 1995 European Union Convention on the Protection of the European Communities' Financial Interests and its two additional Protocols, followed by the 1996 Inter-American Convention Against Corruption (Inter-American Convention) and the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ending with the 1999 Council of Europe Criminal Law Convention on Corruption. Valiant though these developments have been, as commented by a scholar, these instruments do not go far enough in dealing with the global problem of corruption.[9]

Nevertheless, a quick review of the agenda and plans of international institutions reveals that an anticorruption strategy of a country, to bear fruit, should be comprehensive, and first and foremost be geared towards increasing political accountability and improving public sector management, which can be further facilitated by restraining powers, and promoting a competitive private sector along with a proactive civil society.

2.1 Political Accountability and Public Sector Management

Increasing political accountability means placing constraints on the behavior of public officials by institutions with the power to apply sanctions on them. As political accountability increases, the costs to public officials of making decisions that benefit their private interests at the expense of the broader public interest also increase, and thus work as a deterrent/disincentive to corrupt practices.[10]

Indeed, accountability relies heavily on the effectiveness of the sanctions and the capacity of accountability institutions to monitor the actions, decisions, and private interests of public officials. In this context, attempts are made to ensure political competition, regulate political parties and campaign financing, ensure transparency and devise clear rules and legal instruments.

The reform of the internal management of public resources and administration is another important tool to reduce opportunities and incentives for corruption. This type of reform aims at achieving a meritocratic civil service with monetized and adequate pay, enhancing transparency and accountability in budget management and in tax and customs, achieving policy reforms in sectoral service delivery, and implementing decentralization with accountability. Often greater public oversight plays a significant role in the reform process.

2.2 Containment of Power Abuse

Containing power abuse by public officials can be attempted directly by regulating their personal behavior or indirectly by increasing competition in the society which becomes a deterrent to abuse of power.

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[9] Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law,* 34 INT'L LAW 149 (Spring, 2000).

[10] *See generally*, Susan Rose-Ackerman, *Redesigning the State to Fight Corruption. Transparency, Competition and Privatization.* Public Policy for the Private Sector. Note No. 75 (World Bank. Apr. 1996) at 1-4.

(a) Direct Restraints on Power

Corruption thrives in an environment of monopoly of service, administrative discretion and lack of accountability. The institutional design of a state is, therefore, an important mechanism in checking corruption. Of particular importance is the development of institutional restraints within the state which is most effectively achieved through separation of legislative, judicial and executive powers and establishment of cross-cutting oversight responsibilities among state institutions. Effective constraints by state institutions on each other can diminish opportunities for the abuse of power and penalize abuses if they occur. Creating independent and effective judiciary, issuing anticorruption legislation, promoting independent prosecution and enforcement, establishing audit organizations, anti-corruption agencies, ombudsman, and civil service commission and ensuring legislative oversight are all important in this respect.[11]

However, the establishment of effective anti-corruption laws and agencies is only part of the solution to the problem. Containing corruption also, in parallel, requires a range of measures to improve the efficient delivery of government services. Furthermore, since often the vast majority of corruption involves small-scale payments to low-level bureaucrats for public services which the briber is entitled to receive, it is important to link anti-corruption programs with bureaucratic reforms to introduce civil service efficiency measures, and to establish a freedom of information regime along with a culture of openness.

(b) Competitive Private Sector and Proactive Civil Society

The degree to which powerful elites influence decisions and policy-making of the state constraints the implementation of a fair, competitive, honest and transparent private sector and thus hinders broad-based economic development. The ability of powerful interests to capture the state can be constrained by economic policy liberalization, greater competition, regulatory reform, good corporate governance, promotion of business associations, trade unions, and transnational cooperation.[12]

Along with a vibrant private sector, the citizen groups, nongovernmental organizations, trade unions, business associations, think-tanks, academia, religious organizations, media and similar civil society organizations can also play an important role in constraining corruption. The role of the civil society organizations can be effective in awareness-raising, pressuring governments as well as international organizations for change and working with various sectors to implement innovative anticorruption reforms. But, in order to hold civil society groups to the same accountability standards as people in public office or private companies, a high degree of public scrutiny is also indispensable.

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[11] *See generally* for detail, REFORMING PUBLIC INSTITUTIONS AND STRENGTHENING GOVERNANCE. A WORLD BANK STRATEGY (World Bank, Nov. 2000).

[12] *See generally* Leautier *et al*, *supra* note 6; *see* also Worth D. Macmurray, *Private Sector Response to the Emerging Anti-Corruption Movement*, in DEVELOPMENT OUTREACH, *supra* note 3, at 25-27; *see* also, Ronald E. Berenbeim and Jean Francois Arvis, *Implementing Anticorruption Programs In The Private Sector*, PREM Notes (World Bank. Apr. 2002), at 1-4.

3. Approach of Selected Countries

Whilst the multilateral organizations appear to be pretty clear about the thematic improvements needed to control corruption, countries are not necessarily in that position. Yet, efforts to regulate the behavior of public servants abound. A quick review of practices shows that attempts to contain corruption in countries are made essentially in two phases. The first phase is to lay a legal and regulatory framework and establish behavioral codes which recommend a set of positive acts and behavior conducive to a society which intends to be corruption-free (preventive phase). The second phase is to combat an act of corruption which has occurred (curative phase). The first phase deals with corruption *ex ante*; the second phase deals with corruption *ex-post*. Also, each and every country has its own way of dealing with corruption: through organic laws, through general or specific legislative enactments, or through non-legislative means, such as codes of conduct, manifesto, or mere declarations. The following paragraphs briefly review the legal and institutional mechanisms developed by a small sample of countries (selected on a random basis) to combat the corrosive effects of corruption.

3.1 Preventing Corruption

While fully acknowledging that proper enforcement is necessary to prosecute corruption, priority should also be given to stop corruption from happening. Discouraging the conduct of corrupt practices is fundamental to the preventive phase, which relies on explicit obligations supported essentially by positive law.

(a) Constitutional Approach

In Asia, where the level of corruption is considerably high,[13] the constitutions have not necessarily been the vehicle for articulating country focus on corruption eradication with perhaps the exception of the Afghanistan Constitution that bestows upon the government the duty of maintaining public law and order and eliminating administrative corruption.[14]

But there are countries, mostly in Africa, that articulate in their constitutions, their goal of eliminating corruption. For instance, Ghana through its Constitution expresses that commitment, specifies the behavior of public officials, and prevents corrupt practices by obligating the public officials to declare their assets. The Ghanaian Constitution states: "The State shall take steps to eradicate corrupt practices and the abuse of power."[15] Moreover, under the economic objectives, it specifies that Ghana would take all necessary actions to ensure that the national economy is *managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare*.[16] The Ghana Constitution also requires a person who holds a public office to submit to the Auditor-General a written declaration of all property or assets owned by, or liabilities owed by, him whether

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[13] For instance, the ranking in 2005 was Sri Lanka (78th), followed by India (88th), Afghanistan (117th), Nepal (117th), Pakistan (144), and Bangladesh (158th). *See* TRANSPARENCY INTERNATIONAL, 2005 Corruption Perception Index, *in* http://ww1. transparency. org/ cpi/2005/cpi2005.sources.en.html#cpi

[14] AFG. CONST. (2004). art. 75 (3), Ch 4.

[15] GHANA CONST. (1992). art. 35 (8).

[16] *Id. (Emphasis added).*

directly or indirectly before taking office, and at the end of his term of office.[17] Such declaration can, on demand, be produced in evidence before a court of competent jurisdiction, or before a commission of inquiry, or before an investigator appointed by the commissioner for Human Rights and Administrative Justice.[18] Based on the comparisons, any property or assets acquired by a public officer after the initial declaration and which is not reasonably attributable to income, gift, loan, inheritance or any other reasonable source is deemed to have been acquired in contravention of the Constitution.[19] The above focus, needless to emphasize, conveys a strong message as to the commitment of the country to combat corruption.

With a slight shift of focus, the Constitution of South Africa emphasizes on a fair public sector procurement system to attain socio-economic objectives.[20] It prescribes that procurement for any organ of State should be carried out through a system that is fair, competitive, transparent and cost effective.[21] The Constitution also allows for the implementation of procurement policies which takes into account categories of preference in the allocation of contracts and the protection, or advancement, of persons, or categories of persons, disadvantaged by unfair discrimination. This, however, cannot be achieved without adhering to sound financial management, which *inter alia* includes principles of value for money, good financial control, eliminating and countering corruption and ensuring that all contractors have a "good standing" insofar as their tax and service charge obligations are concerned. Good governance includes aspects such as value for money, good financial control, countering corruption, meeting tax and service charge obligations as well as adhering to prescribed labor practices.

In similar vein, the Constitution of Uganda, devoting an article on accountability, emphasizes that all public offices shall be held in trust for the people; all persons placed in positions of leadership and responsibility shall, in their work, be answerable to the people; and finally all lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices.[22] The Constitution has further made an obligation for public leaders to declare their property when they assume office, and periodically declare their assets, for which purpose a Committee is also established.

(b) Legislative Approach

Countries that opt to actually deal with the issue of corruption through legislative enactments do so through a single or a combination of instruments. Therein, a marked emphasis is ostensible on political accountability and public sector management, through proper governance of public offices and officials. In that connection, as the examples in the following paragraphs will show, attempts are made to regulate their conduct, to ensure that they do not misuse authority, to

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17 *Id*. at art. 286 (1).
18 *Id*. at art. 286 (3).
19 *Id*. at art. 286(4).
20 *See generally* S. AFR. CONST. (1996).
21 *Id*. at art. 217.
22 UGANDA CONST. (1995). art. 36.

apply restrictions on officials to receive gifts or gift-like foreign travel or use their influence improperly, and to generally define, determine and penalize corrupt acts.

(i) In Europe: The first example is that of Russia, which with myriad legislation on the prevention of corruption, provides an interesting example of prohibiting bribery of a broad group of government officials.[23]

The Russian legal framework consists of both civil and criminal law.[24] As a general principle, the Civil Service Legislation prohibits persons defined as "civil servants" from: (i) engaging in paid activity (with the exception of educational, scientific or other creative activity); (ii) receiving fees from legal or physical persons in connection with the performance of official duties; and (iii) taking foreign business trips at the expense of legal entities or individuals.[25] The Law 119-FZ generally defines civil servants as employees holding "state positions", which broadly includes positions within state bodies that perform executive, legislative or administrative functions, but excludes positions within state-owned enterprises that perform commercial operations.[26] In addition to Law 119-FZ, a Presidential Decree On the Combat Against Crime in the Civil Service System, issued on April 4, 1992 ("Decree 361") by President Yeltsin's as his first effort to regulate corruption in the state bureaucracy, prohibits state employees from: (i) engaging in entrepreneurial activity; (ii) rendering individuals and corporations any assistance not provided for by law which involves the use of their official position and receiving compensation, services or privileges in exchange for providing such assistance; (iii) performing other paid work, engaging in entrepreneurial activity through intermediaries, or confiding in third parties with respect to official matters; and (iv) participating in the management of joint-stock companies, limited liability companies or other management entities, either independently or through representatives.

The restrictions noted above are also part of the Russian Antimonopoly Law[27] which prohibits state and government officials from engaging in independent entrepreneurial activity, owning enterprises, voting in the general meeting of an economic partnership or society, either independently or through a representative,

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[23] Unlike in the United States, however, the line between government officials and private individuals is not always easily discernible, especially with respect to former state enterprises which remain partially state-owned. In addition, different Russian anti-corruption enactments contain varying definitions of government employees. *See* also *infra* for detail on the US provisions.

[24] *See generally* Christopher F. Dugan and Vladimir Lechtman, *Current Development: The FCPA In Russia And Other Former Communist Countries,* 91 A.J.I.L. 378 (Apr. 1997). *See generally*, Daniel Kaufmann & Paul Siegelbaum, *Privatization & Corruption in Transition Economies*, J. INT'L AFFAIRS, Winter 1997, at 419- 425.

[25] The primary Russian Federation anti-corruption legislation controls payments to civil servants. The term civil service legislation is used to refer collectively to the legislation comprising the Federal Law 119-FZ On the Fundamentals of Civil Service of the Russian Federation, of July 31, 1995 (Law 119-FZ), the Regulations of the Federal Civil Service, as approved by Presidential Decree 2267 of December 22, 1993, and amended on April 29, 1994 (the Regulations), and the Register of State Posts of Federal Civil Servants, as approved by Presidential Decree 33 of January 11, 1994, and amended on July 13 and August 9, 1995 (the Register). In addition, an earlier 1992 decree forbade all civil servants from exploiting the powers of their office to engage in entrepreneurial activities. *See* for instance Ukaz Prezidenta Rossiiskoi Federatsii o bor'be s korruptsiei v sisteme gosudarstvennoi sluzhby, art. 1, Rossiiskaia Gazeta (Apr. 4, 1992).

[26] But, the Civil Service Legislation is relatively detailed and each potential scenario should be examined in reference to the particular rules to determine if an individual would be considered a civil servant for its purposes.

[27] On Competition and the Restriction of Monopolistic Activities in Commodity Markets, of March 21, 1991, as amended through May 25, 1995 (the Antimonopoly Law).

and holding office in any administrative structure of an economic entity. Officials of the federal executive bodies, or the executive bodies of local self-government agencies, or officials of for-profit or non-profit organizations, and individual entrepreneurs, bear civil, administrative or criminal liability for violations of the law. With regard to the obligations of local officials, they are also reiterated in the RSFSR Law No. 2449-1 which specifically prohibits officials of oblast administrations from receiving any kind of income from enterprises operating within the oblast.[28] Violations of this provision can result in disciplinary penalties, including dismissal.

Under the 1996 Civil Code of the Russian Federation (the Civil Code), the state and municipal employees are prohibited from accepting gifts in connection with either their official position or fulfillment of their duties. The Civil Code provides that damage which is inflicted upon an individual or a legal entity as a result of unlawful actions or inaction of state agencies, local self-government agencies, or officials of these agencies, would be compensated by the state.

The scrutiny of travel by Executive Officials is another noteworthy aspect of the Russian legal framework. The Presidential Decree No. 981 prohibits officials and executives of central federal bodies of the executive branch and senior officials of the President's Administration and Government staff from taking official or personal trips abroad at the expense of receiving parties, enterprises, institutions, organizations or individuals.[29] This prohibition against foreign trips does not apply if such travel takes place in accordance with international agreements.

The Russian Criminal Code (the "Criminal Code") contains an expansive prohibition against commercial bribery.[30] It prohibits individuals from making unlawful payments to employees of "commercial or other organizations" for the purpose of influencing such employee to take action in connection with such employee's official position and in the interests of the person or entity making the payment.[31] Indeed the scope of this provision is broad because "Commercial Organization", as defined in the Russian Civil Code, is any entity which regards profit-making as its principal activity. Violation of this provision of the Criminal Code is punishable with a fine which can be increased if the crime is repeated.[32]

In addition, the Criminal Code prohibits *misuse of authority*, defined as any act which is contrary to the lawful interests of the organization and performed for the purposes of either extracting gain and advantage from that person or to harm another person, and which results in significant harm to either the rights and lawful interests of citizens or organizations or the lawfully protected interests of the state. The Code brings within its purview all persons who either permanently or temporarily fulfill organizational-managerial or administrative-economic functions in either commercial or non-profit organizations, regardless of the form of ownership.[33] Penalties for misuse of authority can include a fine or an imprisonment.

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[28] On Kray and Oblast Soviets, Soviets of People's Deputies and Kray and Oblast Administrations, of March 5, 1992, as amended June 24, 1992, April 2, July 23 and December 22, 1993 (Law 2449-1).
[29] On the Foreign Travel of Officials of Central Federal Bodies of the Executive Branch, of July 2, 1993 (Decree 981).
[30] Signed on June 13, 1996 and became effective on January 1, 1997.
[31] Criminal Code (1996) S. 204.
[32] *See Id.*
[33] Provided in Note (1), art. 201.

The second example is that of the United Kingdom, which has historically been combating corruption on the basis of both general as well as specific legislation.[34] The Public Bodies Corrupt Practices Act, for instance, deals with corruption in office as a misdemeanor[35] and specifies penalty for such offenses. Any person on conviction is liable (i) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; and (ii) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both.[36]

In addition the person is liable to pay the amount or value of any gift, loan, fee, or reward received by him, to be adjudged incapable of being elected or appointed to any public office for five years from the date of his conviction, and to forfeit any such office held by him at the time of the conviction. In the event of a second conviction for a like offense the person is liable to be adjudged to be forever incapable of holding any public office, and to be incapable for five years of being registered as an elector, of voting at an election of members to serve in Parliament or in any public body.[37] Finally, if such person is an officer or servant in the employment of any public body, he is liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled. Indeed, the Act does not grant any immunity.

The control of corrupt transactions with agents is governed by the 1906 Prevention of Corruption Act.[38] Indeed, misdemeanor charge can be made: (i) if any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from and any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principals affairs or business, or for showing or forbearing to show favor or disfavor to any person in relation to his principals' affairs or business; (ii) if any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principals' affairs or business, or for showing or forbearing to show favor or disfavor to any person in

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[34] For an extensive study on the legislative aspects of corruption, *see* The Report of the Law Commission, Legislating the Criminal Code: Corruption. (1997) Consultation Paper No. 145 in http:www. lawcom. gov. uk/docs/cp145.pdf (as of Feb. 14, 2007).

[35] (1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanor.
(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor. *See* Public Bodies Corrupt Practices Act (1889). S.1.

[36] Public Bodies Corrupt Practices Act (1889). S.2 (22).

[37] The expression "public body" means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom.

[38] Prevention of Corruption Act (1906).

relation to his principals' affairs or business; or (iii) if any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal. The persons charged with misdemeanor are liable to imprisonment or to a fine or to both.[39]

With regard to specific legislation to combat corruption, the Prevention Of Corruption Act 1916 appears to be the most interesting.[40] Indeed, where in any proceedings against a person for an offense under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of the Queen, any Government Department, or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from such institution, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly unless the contrary is proved.

The third example is that of Sweden which, through its Penal Code, approaches the problem of corruption, visibly with more dents. The provisions of the Penal Code create offenses of bribery and bribe-taking,[41] and apply to both the public and the private sectors. According to the Swedish law, bribery is a form of corruptive supply. "Bribery" occurs when a person gives or promises or offers any bribe or improper remuneration, to any employee, or any other person belonging to one of a number of specified categories, in respect of his or her service. The specified categories are (i) any person engaged in public services, whether in central or local government; (ii) any person whose assignment is governed by any statutory regulation; (iii) any person serving in the armed forces or other national defense units; (iv) any other person vested with public authority; and (v) any person acting as fiduciary in legal, economic or technical matters.

The law also defines the act of bribe-taking, which is a form of corruptive demand.[42] This offense is committed by any employee, or any person in one of the above categories, who receives, accepts a promise of or requests any bribe or improper remuneration in respect of his or her service. It is immaterial whether the bribe-taking occurred before taking up or after leaving the service.

The illicit payments are defined by the Penal Code as any bribe or improper remuneration. A bribe is a payment given in advance, whereas improper remuneration is a payment made subsequently. The requirement that such a payment be "improper" implies ethical considerations, depending on custom and public opinion. In practice, the question of impropriety depends on whether a payment is likely to attract and influence someone in the position of the recipient in such a way as to cause him or her to feel under an obligation to the briber. Improper payments, it should be noted, also include payments made to third parties, made in

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[39] *See* for detail, The Report of the Law Commission, Legislating the Criminal Code: Corruption. Consultation Paper No. 145, *supra* note 34.
[40] For detail, *see Id.*
[41] Penal Code (1962). Ch. 17, art. 7.
[42] Dealt with by the Penal Code (1962) under Ch.20. art. 2.

order to influence another, and in such cases the third party may also be punished for complicity.

Regarding the presumption of improper influence, it should be noted that the actual effect of the bribe or bribe-taking is irrelevant; it is immaterial that the recipient can prove that he or she was not influenced by the bribe. It is necessary only that the payment be given or offered for the employees service. Some professional or business relationship has, therefore, to be proved to exist between giver and receiver. If both the gift or offer and such a relationship are proved, the recipient is presumed to have been influenced by the gift or offer.

(ii) In North-America: The first example is that of Canada which has contained its law relating to corruption in the Criminal Code,[43] falling within the category of offenses against the administration of law and justice.[44] It deals with crimes against the State and government, rather than the public at large, and is therefore limited to corrupt transactions involving government officials. On the other hand, the Criminal Code creates an offense of secret commissions which is not limited to the public sector.[45]

The offenses relating to bribery and corruption contained in the Criminal Code include the bribery of judicial officers, the bribery of other public officers, frauds on the government, breach of trust by a public officer, the influencing of a municipal official, the selling or purchasing of office and the influencing or negotiating of appointments or dealing in offices.[46] Noteworthy again is that each offense includes "corruptly" as a fault element, a term which is not statutorily defined but has been considered by the courts.

The Canadian Criminal Code, dealing with the secret commissions offense, is directed at secret transactions with an agent concerning the affairs of his or her principal. It provides that every one commits an offense who corruptly gives, offers or agrees to give or offer to an agent, or being an agent, demands, accepts or offers or agrees to accept from any person, any reward, advantage or benefit of any kind as consideration for doing or forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal or for showing or forbearing to show favor or disfavor to any person with relation to the affairs or business of his principal.[47] This section also specifies that the person who commits such offense is guilty of an indictable offense and liable to imprisonment. It is important to note that the donor or recipient of a secret commission must have acted "corruptly".

The second example is that of the United States. Certainly, most countries in the world have passed laws against bribery of their own officials, but only a few have

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[43] Criminal Code. Part IV
[44] For a brief discussion, *see* The Report of the Law Commission, Legislating the Criminal Code: Corruption. Consultation Paper No. 145, *supra* note 34.
[45] *See* Criminal Code. S. 426.
[46] *See* Criminal Code. Part IV. S. 3-9.
[47] *See* Criminal Code. S. 426

laws prohibiting their nationals and corporations from bribing foreign officials.[48] The United States' efforts against corruption can therefore be acknowledged as the most comprehensive due to its undertaking of a multifaceted approach to combat bribery in international business transactions. Indeed, the United States Foreign Corrupt Practices Act (FCPA)[49] prohibits American companies from bribing foreign officials, politicians, or political parties. Such an act committed abroad can also be prosecuted. In addition, the FCPA which was enacted in 1977, largely in response to disclosures in the early 1970's of questionable payments by large companies, sets forth provisions on record-keeping and accounting practices, thus prohibiting the establishment of corporate slush funds used to finance illegal payments.

The bribery provisions of the FCPA make it illegal for any company, whether or not publicly traded, to bribe any foreign official for the purpose of obtaining or retaining business. A "foreign official" is defined as someone having discretionary authority. The FCPA, as amended in 1988, clarified that certain payments known as "grease" or "facilitating" payments were not intended to be covered by the Act. An exception to such prohibition is made for payments intended to expedite or secure the performance of a routine governmental actions, which include obtaining permits, licenses, or other official documents, processing governmental papers, such as visa and work orders; providing police protection, mail pick-up and delivery, loading and unloading cargo, and actions of a similar nature. A violation of the FCPA occurs when payments other than grease payments are made corruptly to obtain or retain business.

The original FCPA, as enacted in 1977, required that the company have "reason to know" that the improper payment was being made. The 1988 amendments changed that standard to a knowing requirement. A person meets this standard if he or she is aware that he or she is making an improper payment, that the circumstances for an improper payment exists, that the improper payment is substantially certain to be made, that the person has a firm belief that the circumstances exist, or that the improper payment is substantially certain to occur. The FCPA, for whatever value it may dispense, has been hailed as exemplary by the proponents of the anti-corruption activism.[50]

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[48] It is believed that bribery in international transactions distorts national economies, particularly those of developing countries, by diverting scarce resources; undermines the creation and legitimacy of democratically accountable institutions; and unfairly disadvantages companies which, because of legal constraints or corporate practice, refuse to pay bribes. Like the United States, Malawi also legally condemns bribery of officials in a foreign land. Indeed the Malawi law has effect in relation to citizens or residents of Malawi, outside as well as within Malawi, and where an offense is committed by a citizen or resident of Malawi in any place outside Malawi, the person may be dealt with in respect of such offense as if it had been committed within Malawi. S*ee* Malawi Corrupt Practices Act of 1995. S.53. Such provision, although difficult to enforce, no doubt, benefits fair competition and helps reduce corruption.

[49] Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977), *as amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, § 5003(c), 102 Stat. 1107, 1419 (1988) (codified at 15 U.S.C. § 78dd (1994)).

[50] Actually, the United States has been an example of how a transparent system should operate. Modern technology prevalent in the American business environment permits a high level of transparency within the procurement system. Transparency in the federal government procurement system is maintained in many ways, particularly by (1) publishing all of the statutes, regulations, and rules that define the process; (2) publicizing requirements to maximize competition; (3) articulating clearly in every solicitation; (4) announcing to all unsuccessful offerors (and the public) which offeror received the award and in what amount and debriefing unsuccessful offerors and explaining how the procurement rules were followed; (5) providing for "protest" or "disappointed offeror" procedures; and (6) employing appropriate oversight, such as government inspectors general, to periodically audit agency actions. *See* Megan A. Kinsey, *Transparency In Government Procurement: An International Consensus?* 34 PUB. CONT. L.J. 155 (Fall 2004). *See* also Andrea Goldbarg, *The Foreign Corrupt Practices Act And Structural Corruption,* 18 B.U. INT'L L.J. 273 (Fall 2000), at 288.

Another behavior that has been slated as seriously unethical by the United States is the gift-taking by public officials. The Congressional Ethics Code, 1977, of the United States sets standards of conduct and limits congressional outside earned income, honoraria fees, and gifts. For instance, the Gift Rules applicable to the House of Representatives prohibit any Member, officer, or employee of the House of Representatives to knowingly accept a gift (meaning any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value, and including gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred). In similar vein, a gift to a family member of a Member, officer, or employee, or a gift to any other individual based on that person's relationship with the Member, officer, or employee, is also prohibited if it is given with the knowledge and acquiescence of the Member, officer, or employee and the Member, officer, or employee has reason to believe the gift was given because of the official position of the Member, officer, or employee. The Rule attempting further to be precise, clarifies that if food or refreshment is provided at the same time and place to both a Member, officer, or employee and the spouse or dependent thereof, only the food or refreshment provided to the Member, officer, or employee shall be treated as a gift.

(iii) In South-America: The South American example is that of the Argentinean Code of Ethics for the Public Administration, inspired by the U.S. Standards of Ethical Conduct for Employees of the Executive Branch and U.S. regulations on disclosure of personal wealth.[51] When the Argentine Ethics Code was promulgated in early 1999, there was already substantial public pressure for reform due to repeated corruption scandals denounced by the Press. Some statutes dealing with public corruption had long been on the books but had been rarely implemented. One statute even placed the burden of production at trial on the public official accused of increasing his wealth at public expense, requiring any government official whose wealth substantially increases during his period in office to show the court the origin of all wealth acquired. Argentina adopted the U.S. approach of establishing administrative standards on the ethical conduct of government officials, in addition to the existing criminal provisions. The Ethics Code, enacted by a Presidential decree, also had the effect of increasing the functions of a National Office for Public Ethics (the Anti-Corruption Office), which in turn generated an increased role for several NGO's in ensuring government compliance with the new norms. Also, the Anti-Corruption Office recorded rapid success in obtaining information from foreign governments because it developed the expertise to collect information, and continued to maintain close professional links with counterparts in other countries. This was also due to the visible international role it was given through its participation in the follow-up mechanisms for the implementation of the Inter-American Convention Against

[51] Decree 41/99, Codigo de Etica de la Funcion Publica (Ethics Code], 1999-A ADLA 139 (B.O. Feb. 3, 1999) (giving the original enactment).

Corruption, which provides for sharing of best-practices and for peer review of the practices of anti-corruption offices by the officials of other parties.[52]

(iv) In Africa: South Africa attempted to prevent corruption on the basis of general as well as specific legislation. The first criminal offense of bribery in South African law was the corruption of judicial office. This offense was later extended to other officers of state and then to all state employees. The law was later again extended to electoral corruption and, more recently, to bribery in the commercial sector. The law of bribery was originally a mixture of common law and statute. It is now, however, governed entirely by the Corruption Act 1992, an Act which followed from a report of the South African Law Commission. Prior to the enactment of the 1992 Act, South African criminal law contained separate offenses to deal with the bribery of State officials and commercial bribery. The bribery of State officials was dealt with by the common law offenses of bribe-giving and bribe-taking, whereas commercial bribery was subject to the provisions of the Prevention of Corruption Act 1958.

According to the 1992 Corruption Act, a person is guilty of offense who corruptly gives or offers or agrees to give any benefit, to any person upon whom (i) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law, or to anyone else, with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty to commit or omit to do any act in relation to such power or duty; or (ii) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law and who committed or omitted to do any act constituting any excess of such power or any neglect of such duty, with the intention to reward the person upon whom such power has been conferred or who has been charged with such duty because he so acted.[53]

Such person is also guilty of offense if he corruptly gives or offers or agrees to give any benefit, to any person upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any post or any relationship of agency or any law and who corruptly receives or obtains or agrees to receive or attempts to obtain any benefit of whatever nature which is not legally due, from any person, either for himself or for anyone else, with the intention (i) that he should commit or omit to do any act in relation to such power or duty, whether the giver or offeror of the benefit has the intention to influence the person upon whom such power has been conferred or who has been charged with such duty, so to act or not; or (ii) to be rewarded for having committed or omitted to do any act constituting any excess of such power or any neglect of such duty, whether the giver or offeror of the benefit has the intention to reward the person

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[52] *See* Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process,* 51 AM. J. COMP. L. 839 (Fall 2003), at 851-853.

[53] *See* Corruption Act (1992). S. 1.

upon whom such power has been conferred or who has been charged with such duty, so to act or not.[54]

In view of the language of the law, it is clear that the offense may be committed by both a donor and a recipient. Each of these forms of the offense may in turn be committed in respect of a future or a past act of corruption. The offense of the corruptor essentially consists in corruptly giving any benefit of whatever nature which is not legally due to certain persons with a specified intent. The offense of the corruptee consists in corruptly receiving or obtaining any benefit of whatever nature which is not legally due, from any person, either for himself or for anyone else, with a specified intent.

Finally it is important to note that the 1992 Act does not itself contain any definition. The avoidance of definition appears to be an express intention of the framers of the legislation, who seemingly intended to ensure a broad coverage for the law and to rely more on the wisdom of judges.

Contrasting with the perfection of South Africa, the Western African nation of Benin provides an example of poor crafting of corruption related law.[55] Although the law generally considers breach of honor all criminal acts committed by a state agent and holds them liable to be declared unfit for holding any state employment in the future,[56] it also states that the *simples delits* (minor delictual acts) do not constitute breach of honor. This proviso, due to its linguistic ambiguity, has an effect of impeding law enforcement. The Benin law also condemns misappropriation of funds by an agent of the state, of partially owned state owned enterprise, and other public officials.[57] An interesting aspect of the law is the detailed nature of the scope of corruptor and act of corruption. Indeed, it brings all elected person, arbitrators or experts in a tribunal, doctors, surgeons, dentists or nurses, within its purview. This overly wide coverage actually engenders inefficiency in law enforcement.

Interestingly indeed, the Benin law does not come out of nowhere. It appears to have derived from a similar law in Senegal, the provisions of which are inherently prone to confusion. The Senegalese Penal Code (Chapter on Corruption) brings within its purview all elected persons, public administrative judicial or military officials, all agents and staff of the public administration, all citizens in charge of public services, managers or agents of a public enterprise, a professional group, a cooperative or a private organization with public service missions, or an association or foundation recognized as public utility. Similarly included are arbiters or experts appointed by a tribunal or parties, who against illegal compensation, render a judgment or provide advisory opinion, for or against a party. One should note that the scope of the Senegalese law is not only excessively broad but also impossible to justly enforce. Indeed, for instance, it also considers corruption the act of a doctor, a surgeon, a dentist or a midwife who fraudulently certifies or dissimulates the

[54] *Id.*
[55] Ordinance 79-23 (May 10, 1979).
[56] *Id.* arts. 1 and 2.
[57] *Id.* arts. 3 through 6.

existence of a disease or incapacity or the cause of a death, an act that could also be considered in the realm of medical malpractice.

(v) In Asia: Of all the countries in the world combating corruption, Singapore is considered one of the best examples.[58] The Singaporean Corrupt Practices Investigation Bureau (CPIB) has earned the public's confidence and has become a regularly cited example of success.[59]

The role of the CPIB includes corruption prevention and investigation. Besides investigation, it conducts research into administrative and operating procedures of corruption-prone government departments and recommends measures to reduce opportunities for corruption, including screening services to ensure that those on adverse records are not appointed to key position.[60] Singapore's anti-corruption policy recognizes that corruption control has a strategic significance in national development, provides a source of competitive advantage, and is part and parcel of good governance for the common citizens.

Actually, in 1959, when Singapore attained self-government, it inherited from the British a government service where corruption was rampant. Enforcement action then was difficult against the corrupt because of: (a) weak laws (the offence was non-seizable and the powers provided to the officers of the CPIB were inadequate to enable them to carry out their duties effectively); (b) difficulty in gathering evidence (the weak anti-corruption law had resulted in many corrupt public officers getting away with their crime); (c) lack of awareness and education amongst the people about their rights; (d) inadequate pay of public officers compared with those in the private sector (as a result, integrity in the public service was lacking and some of the public officers resorted to corruption to make ends meet); and (e) short secondment of CPIB officers from the Singapore Police Force (lacking full commitment to combating corruption especially when it involved their fellow police officers).[61]

The law was revamped to give more special powers to CPIB officers and to enhance punishments for corruption offences. The Public Prosecutor was allowed, among other things, to order the Comptroller of Income Tax to provide information to the CPIB about the offenders. Also, the concept that corruption does not pay was further fortified by the Enactment of The Corruption, Drug Trafficking and other serious Crimes (Confiscation of Benefits) Act 1999 with power to confiscate the freeze and confiscate properties and assets obtained by corrupt offenders.

It is important to note that in Singapore, both the giver and the receiver of a bribe are guilty of corruption and are liable to the same punishment. Any person who is convicted of a corruption offence can be subjected to a fine or sentenced to imprisonment or to both. If the offence relates to a government contract or involves

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[58] For instance, it ranked fifth in the corruption perception index 2005, preceded only by Denmark, New Zealand, Finland and Iceland. *See* TRANSPARENCY INTERNATIONAL, 2005 Corruption Perception Index, *in* http://ww1.transparency.org/cpi/2005/cpi 2005. sources.en.html#cpi

[59] Established in 1952, it derives its powers of investigation from the Prevention of Corruption Act (Ch. 241).

[60] Muhammed Ali, *Eradicating Corruption: The Singapore Experience* (Paper presented at the Seminar on International Experiences on Good Governance and Fighting Corruption. Thursday, Feb. 17, 2000, Bangkok).

[61] *Id.*

a Member of Parliament or a member of public body, the term of imprisonment can be higher. Besides fine and imprisonment, the person convicted of corruption offence will be ordered by the court to return the amount of bribe, which he had accepted. In addition to the punishment, the court is also empowered to order the confiscation of the property obtained by corrupt offenders. Moreover, a public officer who is convicted of a corruption offence will lose his job, his pension and benefits, and will be debarred from any future public appointment. A public officer who is convicted of a departmental charge may, depending on the severity of the charge, receive one or a combination of the following punishments: (a) dismissal from the service; (b) demotion; (c) stoppage or deferment of increment; (d) fine or reprimand; (e) retirement in the public interest.

The next example is that of Pakistan, which in order to fulfill both the need and demand to eradicate corruption and to promote the incontrovertible process of accountability, promulgated the Accountability Ordinance, 1996 (*Ehtesab*).[62] The Pakistani Accountability Ordinance has two objectives.[63] Its main objective is to provide for the eradication of corruption from the public offices and its ancillary objective is to provide for effective measures for prosecution and speedy disposal of cases involving corruption. In principle, the Accountability Ordinance applies to every holder of public office,[64] although its focus is clearly on higher ranking members of the bureaucracy and legislatures both at the federal and provincial levels. Most importantly, it brings within its purview not only those holding certain public offices, but also those who held such public offices, in the past.

The subject matter itself is covered extensively by a broad definition of the term "corruption and corrupt practices". Defined mainly in terms of financial corruption (acquisition of property by illegal or unfair, non-contractual means or through abuse of power), the term includes political corruption (committing or causing rigging of elections) as well. The Accountability Ordinance takes an outcome based approach and goes beyond the traditional transaction oriented definition (i.e. the act of giving and taking illegal gratification) to include living unjustifiably beyond one's means as an offense of corruption and corrupt practice. Accordingly, possession of any pecuniary resources or moveable or immovable property, whether situated within or outside Pakistan and whether owned directly by a person or any of his dependents, disproportionate to the person's known sources of income, which he cannot reasonably account for, constitutes corruption.

(vi) In Australia: Under the Australian criminal law of corruption, a distinction is drawn between bribery, which is confined to public officials, and secret

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62 For detailed discussion, *see* Tariq Hassan, Corruption and Accountability in Pakistan, November 13, 1997, http;// www. Erols.com/ziqbal/corrup/htm

63 *Id.*

64 The term has been defined to include: a Past President and Governor of a Province, past and present Prime Minister, other Federal ministers, advisors and assistants, members of parliament, Auditor General and Attorney General (but excludes federal judges), past and present chief Minister, other provincial ministers, advisors and assistants, members of provincial assembly, and Advocate General (but excludes provincial judges), senior civil servant, at both the federal and provincial levels, including those serving on government owned, controlled or administered enterprises, but excluding specifically members of armed forces, other than those serving on government owned, controlled or administered enterprises, and persons giving illegal gratification.

commissions offenses, described as "essentially an attempt to create a bribery offense for corruption in the private sector". Whereas bribery originated in the common law, secret commissions offenses are entirely statutory.[65] Indeed, the offense of receiving a secret commission is committed when an agent corruptly takes a payment from a person as an inducement or reward for doing any act in relation to the principals business. In 1905 the Commonwealth enacted the Secret Commissions Act. The Act provides that any person who, without the full knowledge and consent of the principal, directly or indirectly, being an agent of the principal accepts or obtains or agrees or offers to accept or obtain from any person for himself or for any person other than the principal, or gives or agrees to give or offers to an agent of the principal or to any person at the request of an agent of a principal, any gift or consideration as an inducement or reward; for any act done or to be done, or any forbearance observed or to be observed, or any favor or disfavor shown or to be shown, in relation to the principals affairs or business, or on the principals' behalf; or for obtaining or having obtained or aiding or having aided to obtain for any person an agency or contract for or with the principal, such person shall be guilty of an indictable offense.[66]

The act of giving the gift has further been explained. Indeed, a gift or consideration is deemed to be given as an inducement or reward if the receipt or any expectation thereof would be in any way likely to influence the agent to do or to leave undone something contrary to his duty.[67] Finally, a useful clarification provided by the Act states that in any civil or criminal proceeding, evidence is not admissible to show that any such gift or consideration is customary in any trade or calling.[68]

3.2 Prosecuting Corrupt Behaviors and Acts

Once an act of corruption is committed the state needs to prosecute. Prosecutorial practices vary enormously amongst countries. Depending on their legal tradition, political system or priorities, countries handle the cases through regular, ordinary, or specialized courts, or through commissions or authorities.

In Uganda, for instance, the office of the Inspector General of Government has been granted constitutional authority to enforce what is known to be a Leadership Code of Conduct by arresting and prosecuting those suspected of wrongdoing. In Tanzania, pursuant to the Prevention of Corruption Act, the President himself appoints the Director General as well as the directors at the Prevention of Corruption Bureau, but has not been given any broad mandate. The Corrupt Practices Act 1995 of Malawi provides for the appointment of the Director of the Anti-Corruption Bureau by the President, but treats the Bureau as a Government department. The Anti-Corruption Commission investigates offenses committed under the Zambian Corrupt Practices Act of 1980. The Lusophone Africa maintains a framework consisting of a blend of commission/tribunal/authority, perhaps due to the Portuguese influence on its legal systems. Guinea Bissau for instance,

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[65] For detail, *see* The Report of the Law Commission, Legislating the Criminal Code: Corruption. Consultation Paper No. 145, *supra* note 34.
[66] Secret Commission Act (1905). S. 4(1).
[67] Secret Commission Act (1905). S. 4(2).
[68] Secret Commission Act (1905). S. 9.

created the High authority Against Corruption in 1995.[69] Along the same spirit, in late 1990s, the Mozambican government submitted a draft bill on High Authority Against Corruption, which the parliament rejected without debate. In France, corruption matters are dealt with by the investigating magistrate who can refer the case to trial. In the United States, independent counsels play such investigative role. In Botswana, pursuant to the 1994 law regarding Corruption and Economic Crime, the Directorate for investigation and prosecution of civil servants and corrupt businessmen, has responsibilities for investigation, prosecution, and education of public and for ensuring prevention of the crime. Also a 1994 law, establishing an Ombudsman, guarantees and promotes the integrity and honesty in the acts of civil servants. The Ombudsman can investigate all actions taken by, or on behalf of, a government agency or services, which in the public's opinion, would have been unjust. In Senegal, a special court (*Cour de Repression de l'Enrichissement Illicite)* was established to examine citizen's complaints about government corruption falling under the law regarding illicit enrichment. The court was legally established but all the judges were not appointed, and the court never saw the day. It so happened particularly because of a perceived difficulty in applying the provision regarding the burden of proof (which, pursuant to the law, lied on the defense side), which went against the general principle of law.[70] Indeed, according to the law on illicit enrichment which severely condemns all illegal enrichment, a crime is deemed to be committed when a person cannot justify the legal origin of his earnings or when his lifestyle does not correspond to the legal earnings.[71]

In Pakistan, the Accountability Ordinance provides for a Chief Ehtesab Commission (CEC) for the purposes of inquiries, investigation and prosecution into allegations of corruption and corrupt practices.[72] The CEC has been given wide powers including the power to seek the required assistance and call for documents and information relevant to any proceedings pending before it and the power to punish for contempt.[73]

A corruption case can be initiated by the CEC on a referral from the appropriate federal or provincial government, receipt of a complaint, or its own accord. In a sense, the CEC acts as a clearing agent for all corruption cases. In order to institute a case, it is required to obtain proof and evidence in support of allegations made by the government or complainant even though the Accountability Ordinance has the effect procedurally of shifting the presumption of guilt to an accused person giving or accepting illegal gratification or living unjustifiably beyond his means. Where a prima facie case is made out, the CEC refers the case to the court and appoints a special prosecutor for conducting the trial. Where no prima facie case is made out, the CEC rejects the reference or complaint and

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69 Law No 6-B/95 published on 17 July 1995, and the Regulamento dated August 1996, published on 12 December 1996.

70 The measures for prosecution prescribed by the Senegalese Law rose certain fundamental procedural issues leading, inter alia, to a derogation of the principles of procedural law and the shift of the burden of proof. The notion of summary procedures which always affect the due process of law is implied. The principle of criminal procedural law is generally to presume innocence unless proven guilty. The principle of civil procedure is also defendant-oriented even though the burden of proof under evidentiary requirements is less stringent. The Senegalese legislation was considered to have the effect of reversing the presumption of guilt and curtailing the evidentiary requirements for proving innocence and for that reason, its application was feared.

71 Code Penal. art. 163 (bis).

72 The CEC is required to be a person who is or has been a judge of the Supreme Court of Pakistan.

73 It should be noted that contempt is normally a power of the court and not a prosecutorial power such as that exercised by the CEC.

records his reasons for such rejection. While the CEC performs a prosecutorial function, a bench of three High Court judges discharges the judicial function. All offenses under the Accountability Ordinance are non-bailable but detention cannot exceed fourteen days on the whole. An appeal can be made to the Supreme Court within seven days of the judgment by the High Court.

The effective measures for prosecution under the Accountability Ordinance include the extraordinary powers of the court to forfeit property obtained through corruption and corrupt practices (including forfeiture of property found to be disproportionate to the known sources of a person's income). The court even has the power to freeze the property of an accused if it has "reasonable grounds" for believing that the accused has committed the offense. The Accountability Ordinance prescribes mainly penal remedies since corruption is probably regarded as a public offense and not considered as an offense against any one person.

Singapore, along with detailed legislative measures, also took administrative measures to reduce the chances of public officers from getting involved in corruption and wrongdoings and making the CPIB more effective. These measures included (a) replacing the police officers on secondment with permanent civilian investigators; (b) giving the CPIB a free hand to act without fear or favor against anyone irrespective of his social status, political affiliation, color or creed; (c) removing opportunities for corruption in government work procedures; (d) streamlining cumbersome administrative procedures; (e) slashing down excessive red tape which provides opportunities for corruption; (f) reviewing public officers' salaries regularly to ensure that they are paid adequately and comparable to that of the private sector; (g) reminding government contractors at the time when contracts are signed that bribing public officers administering the contracts may render their contracts to be terminated and reminding that a contractor who gives bribe may be debarred from any public contract.

Moreover, strict guidelines were included in the government instruction manual[74] to prevent public officers from getting involved in corruption. Such instructions, *inter alia*, included that a public officer: (a) cannot borrow money from, or in any way put himself under a financial obligation to any person who is in any way under his official authority or has official dealings with him; (b) cannot use any official information to further his private interest; (c) is required to declare his assets at his first appointment and subsequently annually; (d) cannot engage in trade or business or undertake any part-time employment without approval; (e) cannot receive entertainment from members of public; and (f) cannot accept any share issued by a company offered to him through a private placement without the appropriate approval.

Finally, the responsibility of combating corruption is not considered to be lying with the CPIB alone. Whilst it is entrusted with the responsibility of investigating cases of corruption, the primary responsibility of prevention of corruption rests with the respective government departments. A Permanent Secretary of a Ministry is responsible for ensuring

[74] Instruction Manual No. 2. S. L. cited in Ali, *supra* note 60 at 5.

that each department has a committee to review anti-corruption measures, and that reasonable and adequate measures are taken to prevent corrupt practices.[75]

4. Conclusion

The foregoing review permits us to conclude that the combat against corruption need not be led in the same way by all countries. Countries or legal systems can take approaches that suit them most.[76] However, it is important for countries to ensure that institutions created to combat corruption, whatever their form or status, have ample jurisdiction over the matter and enough resources to carry out prosecutorial functions. Indeed, the form does not matter, the substance (i.e. jurisdiction and resources) does. Also, one common point for all countries is that the combat is primarily a result of strong political will for which legal techniques and tools can be devised as needed. Clean countries are not "clean" simply because they have harsh penal law systems, but because they have strong legal systems and good systems of governance.[77]

In this context, thus, once political will is present, the key to ensuring that public actors make a strong commitment for the eradication of corruption is to devise a technique that constitutionally and legally defines and prohibits corrupt acts and behaviors and which strengthens the institutions mandated to fight corruption. The rules that regulate the activities of individuals within a society are important and matter, and are a major determinant of how individuals and organizations behave. The behavior of public officials and the entrepreneurs who bribe them can be analyzed effectively only within the context of existing rules. Thus, without a clear understanding of a country's laws, institutions, and social mores, any effort to analyze or understand corruption within that society would be futile. Similarly, any technique to combat corruption that does not take into consideration the impact of existing rules on the behavior of individuals (including civil servants, entrepreneurs, voters, and politicians) within the society would be ineffective. Rules define how individuals can interact with each other, provide a means for the settlement of conflict, and generally place constraints on individual behavior, as well as that of the group and collectivity. Effective rules allow individuals to pursue their private ends in such a way that they do not infringe on the ability of others to do the same. The rules that regulate socio-political interaction can be explicit (e.g., a written constitution or legislative enactment) or based on custom and tradition (ethical and moral). Anticorruption and ethics laws generally encompass a variety of statutes that prohibit bribery, nepotism, conflicts of interest, and favoritism in the award of contracts or the provision of government benefits. Such laws often also require public servants to disclose their incomes and assets. When drafting such laws, the instinct is to list every activity that could conceivably be considered

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[75] This includes: (a) improving work methods and procedures; (b) improving cumbersome work methods and procedures to avoid delay in granting permits, licenses, etc; (c) reviewing procedures, which promote corrupt practices to prevent them from occurring; (d) devising control system to ensure junior officers who are given power to make decision have not abused such powers; (e) ensuring that supervisors and administrative staff take anti-corruption measures seriously and that they are not lax in checking and reporting their subordinates; (f) rotating the officers periodically; (g) ensuring that besides routine checks, surprise checks are also carried out systematically and regularly by senior officers as part of their duties; and (h) reviewing anti-corruption measures.

[76] *See generally*, Richard E. Messick, *Writing An Effective Anticorruption Law,* PREM Notes (World Bank. Oct. 2001).

[77] *See* also, Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law,* 39 INT'L LAW. 717 (Fall 2005).

corrupt and then write language making each illegal. But people are endlessly creative in finding ways to enrich themselves or their friends and family at the public's expense. As drafters realize this, the rules they write become more general. The result is often a broadly drawn provision setting out a general standard.[78] And that is where the big challenge lies: balancing the need and ensuring enforceability.

One final observation seems warranted. There is generally a prevailing perception that if the provision regarding the eradication of corruption is part of an organic law, it carries more weight than if it is only included in a general law. But the discussion carried out throughout this paper tells us that such a conclusion would be incorrect. Indeed, some countries fight corruption through their constitutions, some attempt to combat it through general legislation, and some control it through specific legislation. But the majority of the countries deal with corruption with a combination of all the above. Again, depending on the nature of the problem they are faced with, countries lay emphasis on transparent rules regarding procurement or financial management, or focus on enhanced sanctions. Obviously, the choice depends on the country, the political will, the legal and cultural legacy, the level of civic awareness, and the nature and gravity of the problem.

[78] *See* Messick, *supra* note 76.

Developing Jurisprudence on Illicit Enrichment: A Bird's Eye View

– Kumar Chudal*

Corruption by public office holders is a very serious problem in Nepal. The author, in this short note, discusses the strategies developed in comparative and international law, where countries have developed different strategies. Nepal has also criminalized illicit enrichment, and according to the author, if the law is effectively enforced it would perhaps deter such miscreants.

1. Introduction

Corruption is an offence committed for personal gain by deceitful means which violates the public duty of faith towards the state. It is an act of doing something with the intent to give or gain illegal advantage in course of official duty. It takes many forms and can range from trivial to epidemic. Mostly corruption occurs when an official is offered something of value in exchange for favor. It can occur in the private sector or in the public and often occurs in both simultaneously. A public servant or an interested client may initiate it. It can entail acts of omission or commission. Leaking the revenue, getting illegal benefit and causing illegal loss of public property with *mala fide* intension are some examples of common forms of corrupt practices prevailing in the society as a whole. Dr. A M Bhattarai describes corruption in three distinct perspectives such as moral, economic and institutional in which corruption in institutional perspective is always dreadful and severely hampers the whole society.[1]

Corruption not only undermines ethical values and justice in the society, it also damages democratic institutions, national economy and the rule of law. Corruption is linked to and facilitates other forms of serious crimes, in particular transnational organized crime and economic crime including money laundering. Corruption hurts the poor disproportionately—by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.[2] No country of the world is beyond its reach but developing countries are more vulnerable to this malaise. Without effective control of corruption, campaign of good governance or transparency would be an elusion and the rule of law only a myth. The breeding nature of corruption depends upon the family values, the social attitudes, the nature of the enterprises, and after all the environment of the nation itself. Sometimes complex nature of corruption increases due to international situation too. The development of modern technologies and tricks has added more complexity for the

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1 *Dr. A M Bhattarai, "The Role of Women in the Campaign against Corruption,"* Paper Presented at a Seminar in Kathmandu organized by SWAT (April 20, 2004)

2 Mr. Kofi Annan, the then United Nations Secretary-General, in his Statement on the adoption by the General Assembly of the United Nations Convention against Corruption, 2003

identification and investigation of the crime of corruption. It has even been accepted that corruption is one of the key reasons for breeding terrorism.

In this short note I present the highlights of efforts of different countries in developing jurisprudence on illicit enrichment. While doing so, I bring comparative and international experience on the subject, and give my view on how Nepal can develop similar jurisprudence.

2. Developing Legal Regime on Illicit Enrichment

The prevention of corruption has overtime become world agenda and has got priority in every nation of the world. It is receiving much attention as the world entered into the twenty-first century. Depending upon their conditions and necessities, states have applied different approaches, strategies and institutional frameworks to fight corruption. In some countries namely India and USA the executive authority, under its general power, has taken responsibility to investigate and prosecute and some countries namely Nepal, Lesotho, Sweden, Argentina have established constitutional bodies with independent powers to investigate and prosecute the cases of corruption. Though the name may be varied, each and every country has corruption control arrangements. Ombudsman model is one of the recognized one representing institutional arrangements for the prevention of corruption. It has wide spread recognition. The mechanism of which has been adopted in many parts of the world including Nepal. Despite all efforts of controlling arrangement, numbers of corrupt practices are going on in the world where high-ranking and influential personalities are indulged. The practice of money laundering is being used as a trouble-free tool for converting bribe-money and other ill-gotten property into white-money.

Nonetheless, the world is frontward with its diehard effort to combat corruption applying desired legal provisions, arrangements and mechanisms. The efforts and strategies are made at the domestic level through domestic laws, regulations and court practices and at the regional or international level it is endeavored through the development of global normative systems. Indeed, the investigation and prosecution of corruption is particularly a difficult task and successes are still too rare. Corruption is always kept in secret and therefore individual behavior of corrupt agent is difficult to detect methodically in real life. Due to its secret nature it is considered and treated as an organized crime.

As the corruption is developing in new dimensions, reaching new heights and posing new challenges a compatible jurisprudence has also been developed to tackle it. In the recent years responding the emergent nature of corruption, a new jurisprudential development on criminalizing disproportionate property[3] as an *ipso facto* offence of corruption has got momentum in many parts of the world. In order to promote compliance with new anti-corruption measures, many countries have enacted laws requiring public officials to explain the sources of their wealth. Writing in the fourteenth century, Abdul Rahman Ibn Khaldun said, "The root cause of corruption was the passion for luxuries living

[3] The words 'disproportionate property' also denotes 'ill-gotten property', 'illegal enrichment' or 'illicit enrichment', 'unusual wealth' as well.

within the ruling group. It was to meet the expenditures on luxury that the ruling group resorted to corrupt dealing"[4] The truth still exists. A public person collects illicit assets for his/her personal benefits. Whatever the means and reasons, if a public person earns significant amount of property sooner or later it is used and, thus, comes to public notice. Experts have come up with varied tools and techniques to unearth corruption. Using multiple techniques, using proper randomization process and using multiple data sources etc. are the various dimensions used for scientific measurement of corruption[5], and criminalizing disproportionate property is one of the succinct tools in the process. And if the public official is strictly made liable for proving the source of legal income of such property earned during or after his tenure, his efforts to earn such amount of property by corrupt means will be slighter. Most of the people would prefer to be seen, honest and respected for their personal way of life. Public officials are more conscious and aware of their reputation in the society. They try to preserve it forever. It also ensures that unlawful behavior is quickly identified and dealt with. Therefore, an ethic-based approach[6] can essentially be preventive instrument for the purpose because a compatible standard of life (with the earning) is the measuring rod for the ethic in common. Therefore, if the legal action against holding disproportionate property activates it is assumed that the public official becomes reluctant to earn illegal property having the fear of investigation and prosecution even during or after retirement. The provision regarding illicit enrichment takes the deterrent approach to punishment supported by theories of criminology that prevents a public official from committing corruption and earning illegal property which may expose his/her fault. Therefore, the jurisprudence of disproportionate property has developed as a key and effective tool for combating corruption in many countries.

3. Country Practices

3.1 India

In India, the concept of disproportionate property was introduced as a concept since 1947. In 1964 the Santhanam Committee recommended to create laws for holding disproportionate property as a substantive offence of corruption. The recommendation included the amendment to the corruption Act. The Act came into force in 1964. The Prevention of Corruption Act, 1988 has made the provisions that a public servant is said to commit the offence of criminal misconduct if he/she has disproportionate property to his/her known sources of income.[7] The concept of ill-gotten property has achieved significant success in combating corruption in India. A lot of issues aroused during the administration of justice are settled by the courts.

3.2 Hong Kong

The jurisprudence of disproportionate property has positive impact in the Hong Kong for prevention of corruption. The Prevention of Bribery Ordinance, 1971 provides that "(1) Any person who, being or having been a Crown Servant – (a) maintains a standard of living

4 R. KLITGAARD, CONTROLLING CORRUPTION, 7 (University of California Press 1987)
5 *See* N. Manandhar, *Measuring Corruption,* THE KATHMANDU POST, June 12, 2004 at 3.
6 *See* PUBLIC SERVICE ETHICS, MONITORING ASSETS AND INTEGRITY TESTING, TI Source Book 2000, Chapter 20
7 The Prevention of Corruption Act, 1988 S. 13 (1) (e)

above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property come under his control, be guilty of an offence.[8] There was "syndicated" corruption mainly in the police in Hong Kong. In other words, a whole group of corrupt officers were involved in the collection and distribution of bribed money. The Ordinance made an immediate impact and cracked down the existing level of corruption so much so that within a year 295 police officers, including two superintendents and twenty-six inspectors, took early retirement or resigned from Royal Police Force[9].

3.3 China

Describing the legal provisions in China, Xiu Fujin writes that any large amount of income and payoff should be reported and registered to the supervision organ in time. Anyone who exposes the economic problems [disproportionate property] of officials could gain rewards in proportion so as to promote the mass to join the work of anti-corruption[10]

3.4 Botswana

The Director or any officer of the Directorate authorized in writing by the Director, may investigate any person where there are reasonable grounds to suspect that a person maintains a standard of living above that which is commensurate with his sources of incomes or assets; or is in control or possession of pecuniary resources or property disproportionate to his present or past known sources of income or assets. A person is guilty of corruption if he fails to give a satisfactory explanation as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control or possession.

3.5 Norway

In Norway, those accused of crime of bribery must be able to demonstrate the source of their assets. Otherwise the prosecution is authorized to seize such property and declare them public property.

3.6 Other Countries

In Thailand, the Organic Act on Counter Corruption, 1999 defines the unusual increase of assets and criminalizes if it is ill-gotten[11] Ireland and the UK are, under certain circumstances, legally entitled to seize assets without being obliged to fully prove that these were gain through crime if the defendant is unable to explain the origin of such assets.[12] Sri Lanka has made compulsory for all public servants and all those in public

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8 Prevention of Bribery Ordinance, 1971 S. 10, Hong Kong
9 *Supra* note 4, p. 105
10 Xiu Fujin, *Strengthening Combating Corruption and Building a Clean Government,* Paper Presented in 7th Asian Ombudsman Association Conference, Beijing China (22-24 May, 2002)
11 "Anti Corruption Action Plan for Asia and the Pacific" Tokyo, Japan, (ADB and OECD Publication 28-30 Nov. 2001)
12 "Effective Prosecution of Corruption," (ADB/OECD Publication 2003) p. 5

offices, including politicians, to make a declaration of assets upon assumption of office, and from time to time thereafter, to make fresh declaration.[13] During the Yeltsin's presidency in Russia, there was a proposal that every single public official, from the President to the street cleaners, should make written declarations of assets to the tax police. In 1999 the new rules were introduced for the members of the in-coming European Commissioners to declare any financial interest and asset which might create a conflict of interests in the performance of their duties.[14]

Argentina has provided the system called *Bright-line rules* under which every year all employees above a certain pay level must publicly disclose all assets they hold directly or indirectly.[15] Such laws feature in many countries like Latvia, where the law penalizes illicit enrichment of officials who cannot justify possession of assets in excess of their normal source of income, and Lithuania, where the asset declaration law has been successfully used to remove corrupt officials from office. Likewise, in Indonesia there is an establishment of Assets Declaration Commission in which high-ranking public officials are liable to declare their assets. The unusual enrichment is declared as an offence of corruption in Indonesia. Canada has applied 'Principle-Based Approach' under which procedures are made to declare to assets of public officials.[16] The United States of America does not establish illicit enrichment as a separate offence. However, as a party to the Inter-American Convention against Corruption, it has accepted the concept. In addition, the Racketeer Influenced and Corrupt Organization Act was enacted by Congress in USA as Title IX of the Organized Crime Control Act of 1970. The Act provides for the investigation on wealth and also penalties including asset forfeiture. An alternative to criminalization of unexplained wealth could be suggested to provide administrative sanctions.[17]

3.7 Nepal

Recently, Nepal has enacted the laws to criminalize holding of disproportionate property by a public person as a crime of corruption. The Commission for the Investigation of Abuse of Authority (CIAA, henceforth) is responsible for investigating and prosecuting the cases of corruption including the case relating to disproportionate property. Mainly after the unveiling of the 1990 Constitution people were more optimistic about the clean and good governance, which was belied as government after government got indulged in unfair political power game and controversies. Due to great public outrage a high-level Judicial Inquiry Commission on Property, was established in 2002 to find out the facts of property of public persons. The report was later handed over to the CIAA for further investigation and necessary action. By then, the Prevention of Corruption Act, 1961 was replaced by the Prevention of Corruption Act, 2002. Section 20 of the Act criminalized illicit enrichment as an *ipso facto* offence of corruption, resting the burden of proof on the suspect. Under these substantive legal provisions, the CIAA initiated a number of investigations and even prosecuted cases of illicit enrichment against high-level politicians and bureaucrats

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13 *Supra* note 6.
14 *Id.*
15 *See* Fighting Corruption in Latin America: A Judge's View, Website: www.worldbank.org, The Judge is Ricardo M. Rojas who has investigated over 100 allegations of illicit enrichment.
16 *See* The Conflict of Interest and Pose Employment Code: Canada's Principle-Based Approach
17 e.g., Italian Law No. 575/1965 (cited from "*The Global Program against Corruption- UN Anti corruption Toolkit*, 3rd ed., Vienna 2004, p. 456

including former Ministers. Many allegations of corruption relating to holding disproportionate property are under trail in the court of justice. After the commencement of the Act in 2002, till date, sixty-two cases of illicit enrichment are brought to the Special Court for justice which exercises original jurisdiction, and among them twenty-six are decided on which seven were convicted and nineteen were acquitted.[18] In addition, the Act provides the provisions for annual assets declaration for all levels of public persons. It is a general realization among the people that after the commencement of the laws on illicit enrichment public persons are, to some extent, deterred to commit corruption. Furthermore, it is also a general perception of civil society that the legal provision of criminalizing disproportionate property as the crime of corruption could have positive impact in combating corruption in the country if equal emphasis is given to its effective implementation.

4. International Instruments

Generally international law provides global concept and urges nations to implement as per their national capacity, requirement and demand. Based on this foundation like in many other disciplines, jurisprudence of unusual wealth has gotten shape in international arena under international law. The Article 20 of the United Nations Convention against Corruption, 2003 has provided that "[s]ubject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income." The provisions are product of high deliberations based on the experience of States for evolving of States effective measure to curb corruption. Therefore, illicit enrichment is emerging as a global concept to which State parties to the Convention are committed to introduce in the national law.

5. The Inter-American Convention against Corruption

This Convention was adopted on March 28, 1996 and applies within the Organization of American States and has determined to make effort to prevent, detect, punish and eradicate corruption in the performance of public functions. To achieve its goals Article IX of the Convention stipulates that " Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offence a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions. Among those States Parties that have established illicit enrichment as an offence, such offence shall be considered an act of corruption for the purpose of this Convention." Though in soft language, the Organization for Economic Co-

[18] KANNON BIO-MONTHLY, Bhadra, 2064 (Aug-Sept. 2007), p. 32

operation and Development (OECD) provides the succinct provisions including the anti-money laundering mechanism which provides room for criminalizing illicit enrichment.

6. Illicit Enrichment as Effective Measures

Campaigners generally advocate three ways e.g., reducing opportunities for corruption; changing the incentives; developing constraints on corruption to aggressively tackling corruption. Accountability and transparency are major components for fairness and integrity which can be fostered by the measures of disclosing income and assets. In the traditional criminological and human rights perspective some of the thorniest issues relating to illicit enrichment are still in debate in many countries. India has got a great achievement to settle the issues like burden of proof, limitation of prosecution through judicial interpretation in the cases of *Krishnananda Agrihotri v. State of M.P.*, *Sajjan Singh v. State of Punjab*[19] etc. Hong Kong can be cited as an important and successful example of the criminalization of illicit enrichment. Nepal is developing jurisprudence on the matter. Many controversies including the interpretation of limitation are still waiting for final verdict of the Supreme Court. However, it is determined on the legal philosophy of illicit enrichment for effective and durable mechanism against corruption. Basically, the access of media or citizen vigilance can be more effective in the situation of illegal enrichment offence. The purpose of the law is not only to punish the culprits and deter the society but also to educate people against social evils and create a civilized society free from immoral acts.

7. Conclusion

In different sections above we enumerated initiatives to criminalize illicit enrichment. Different countries have taken strategies most suitable for them. In many instances illicit enrichment has been criminalized and burden of proof shifted to the accused. This means that if the accused cannot show the legal source of earning then it is presumed that the property is illegally earned. The evidentiary standard in criminal trial is, of course, "beyond reasonable doubt" from which the courts cannot escape. To what extent the shift of burden affects this test is yet to be determined by the courts. Theoretically when, burden is shifted to the accused "preponderance of evidence" could be set as standard in corruption cases. Such a shift is no doubt in favour of justice and for this no legal amendment is required. An alternative recourse, of course, could be clubbing criminal and civil action. In some countries a person who has property, the source of which is not or could not be satisfactorily disclosed, he can be charged for a civil wrong. And that he/she held a public office and accumulated such a wealth could be a criminal wrong inviting criminal action. When a person is charged for both wrongs, since the civil wrong can be established on preponderance of evidence, even if the criminal action fails he/she could still be made responsible for civil wrong. Such a strategy, if properly worked out, can check corruption and also contribute to the jurisprudence on illicit enrichment. For all initiatives, of course, political commitment and coalition building are fundamental.

[19] AIR 1964 SC 464

Judicial Responses to Sexual Harassment at Workplace

– Rajendra Kharel*

The sexual harassment at workplace is undoubtedly a pervasive and serious problem for women of our society. It is a form of gender specific violence against women. It contains many issues of human rights such as dignity of women, right to equality, right to work, and productivity of the organization as well. In this article, the author examines the evolution of the laws and case laws on sexual harassment in US, UK, Denmark, India and Nepal, covering many landmark judgments. He further highlights the adverse effects of sexual harassment on victims and organizations as well. The author argues that the employers' liability is important to control sexual harassment at workplaces. It is also an organizational issue. So effective internal mechanism must be developed within the organization to prevent sexual harassment at workplace. Finally, he concludes that judges, prosecutors, police and other law enforcement agencies also have to play a positive role to implement law effectively.

1. Introduction

Over the past twenty-five years, feminists have succeeded in naming 'sexual harassment' and defining it as a social problem. Newspapers, movies and television program depict women workers who are forced to endure sexual advances and decry the fact that women must contend with such abuse. The legal system too, has recognized the problem. The higher judiciaries of the many countries have affirmed that workplace sexual harassment violates women's human rights. Public awareness about the legal rights has continued to develop and women workers have filed sexual harassment complaints in increasing numbers. Feminist and lawyers have inspired a body of popular and legal opinion condemning harassment in such a brief period of time which is a remarkable achievement.

Women face sexual harassment irrespective of the work they do, whether they are doctors, architects, domestic workers or teachers. In the cities and villages, though the number of women in workforce is rising, there is little or no change in attitudes towards women in the family and community. The risks of women at work being victim of sexual harassment from superiors or colleagues is endless. So, all women have good reason to be concerned about sexual conduct at work. Because of myths and stereotypes women's ability to recognize and deal with sexual harassment has been restricted. Physical touch, suggestive language and subtle advances have often been viewed as 'normal'. A victim of sexual harassment has much more than her bodily integrity to protect. Her livelihood and reputation are at stake.

For women, sexual harassment remains an impediment to equal opportunity, dignity and security at the workplace. Sexual harassment affects the economic gains of the enterprises as the victim becomes less motivated and less productive; thus both quality and quantity get reduced. Every incident of sexual harassment leaves a traumatic impact

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on the victim. This makes sexual harassment one of the most offensive and demanding experiences undergone by any working women. It subjects women to a feeling of revulsion, disgust, anger, and helplessness and results in severe emotional and physical stress. The resultant trauma, anxiety, nervousness depression ultimately destroys her work efficiency and in many cases compels her to leave the job.

Recognizing this social problem even in the absence of a comprehensive law on sexual harassment at the workplace, the judiciary in different countries has attempted to provide justice to the victims. In 1997, when the Supreme Court of India and in 2002 the Supreme Court of Nepal recognized sexual harassment at workplace as a violation of fundamental right of women to work, it was considered a giant step in the realization of the rights of women. In *Sharmila Parajuli's case* the supreme court of Nepal's used ratification of CEDAW in recognizing sexual harassment as a punishable crime. In this article, I focus on the areas of definition, evolution, kinds and impact of sexual harassment. I also deal with the judicial response to sexual harassment by the apex court of the USA, India and Nepal.

2. Evolution of Sexual Harassment Law

In the United States, the Civil Rights Act of 1964 Title VII prohibits employment discrimination based on race, sex, color, national origin or religion. The prohibition of sex discrimination covers both females and males, but the origin of the law was to protect women in the workplace, and that is its main emphasis today. This discrimination occurs when the sex of the worker is made a condition of employment or where this is a job requirement that does not mention sex but ends up barring many more persons of one sex than the other from the job (such as height and weight limits).

Barnes case (1974) is commonly viewed as the first sexual harassment case in America, even though the term "sexual harassment" was not used. In 1976, *Williams case* established sexual harassment as a form of sex discrimination when sexual advances by a male supervisor towards a female employee, if proven, would be deemed an artificial barrier to employment placed before one gender and not another. In 1980 the Equal Employment Opportunity Commission (EEOC) issued regulations defining sexual harassment and stating it as a form of sex discrimination prohibited by the Civil Rights Act of 1964[1]. In the 1986 case of *Michelle Vinson* v. *Meritor Savings Bank*[2], the Supreme Court first recognized "sexual harassment" as a violation of Title VII, established the standards for analyzing whether the conduct was welcome and levels of employer liability, and that speech or conduct in itself can create a "hostile environment." The Civil Rights Act of 1964 added provisions to Title VII protections including expansion of the rights of women to sue and collect compensatory (punitive) damages for sexual discrimination or harassment, and the case of *Ellison* v. *Brady*[3] resulted in rejecting the reasonable person standard in favor of the "reasonable woman standard" which allowed for cases to be analyzed from the perspective of the complainant and not the defendant. Also in 1991, *Jenson* v. *Eveleth Taconite Co*[4]

1 http.wikipedia.org/w/index/php (As of 10th Jun., 2007)
2 A77 US57 (1986), 106 S.ct. 2399
3 924 F. 2nd 872. 9th cir.1991
4 Supra note 1.

became the first sexual harassment case to be given class action status, paving the way for others. Seven years later, in 1998, this case would establish new precedents for setting limits on the "discovery" process in sexual harassment cases, and allowing psychological injuries from the litigation process to be included in assessing damages awards. In the same year, the courts concluded in *Faragher* v. *City of Boca Raton, Florida*[5]*, and Burlington* v. *Ellerth*[6], that employers are liable for harassment by their employees. Moreover, *Oncale* v. *Sundowner Offshore Services*[7] set the precedent for same-sex harassment, and sexual harassment without motivation of "sexual desire", stating that any discrimination based on sex is actionable so long at it places the victim in an objectively disadvantageous working condition regardless of the gender of either the victim or the harasser.

In India, the case of *Vishaka* v. *State of Rajasthan*[8] has been credited with establishing sexual harassment as illegal. In Israel, the 1988 Equal Employment Opportunity Law made it a crime for an employer to retaliate against an employee who had rejected sexual advances, but it wasn't until 1998 that the Israeli Sexual Harassment Law made such behavior illegal.[9]

In May 2002, the European Union Council and Parliament amended a 1976 Council Directive on the equal treatment of men and women in employment to prohibit sexual harassment in the workplace, naming it a form of sex discrimination and violation of dignity. This Directive required all Member States of the European Union to adopt laws on sexual harassment or amend existing laws to comply with the Directive by October 2005.[10]

3. Defining Sexual Harassment

Sexual harassment is a form of gender specific violence against women[11] while sexual harassment and rape are the more commonly recognized form of violence against women. Less extreme types of inappropriate sexual behavior can be similarly intimidating and repressive. Thus, a women victimized by sexual harassment is subject to pressure, degradation or hostility that her male workers don't have to endure.[12]

Every day in workplace man uphold the image that their jobs demand masculine mastery by acting to undermine their female colleagues' perceived competence to do the work. The forms of such harassment are wide ranging. They include characterizing the work as appropriate for man only; denigrating women's performance or ability to master the job; providing patronizing form of help in performing the job; withholding the training information, or opportunity to learn to do the job well; engaging in deliberate work sabotage; providing sexist evaluation women's performance or denying them deserved promotion; isolating women from the social network that confer a sense of belonging; denying women the perks or privileges that are required for success; assigning women sex stereotype service tasks lie outside their job descriptions; engaging in taunting, pranks, and other forms of hazing designed to remind women that they are different and out of

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5 118 S.Ct. 2275
6 118 S.Ct. 2257
7 Supra note 1
8 AIR (1997) SC 241
9 Supra note 1
10 *Id.*
11 CEDAW Committee General Recommendation No. 19, para 17
12 William Petorocelli and Barabara Kate, 19 *Sexual Harassment on the Job*, (Nolo Press 1992)

place; and physically assaulting or threatening to assault the women who dare to fight back; of course, making a women the object of sexual attention can also work to undermine her image and self confidence as a capable worker. Yet much of the time, harassment assume a form that has little or nothing to do with sexuality but everything to do with gender.[13]

At the most basic level, harassment or other sexually coercive behaviors constitute violence against women because like all forms of violence such behavior undermine the inherent human dignity of its victim.

Sexual harassment to be committed against any person is an act of sexual nature that is against individual freedom and fundamental and human right of that person. It is said that sexual harassment not only affects victim, but it causes a form of violence to her dignity. Normally, sexual harassment is regarded to be an act committed against the will of the concerned women. This includes any act from rape to sexual exploitation such as teasing, touching body, using abusive words, showing or sketching pornographic pictures or figure of making symbols of such nature or twinkling eyes. There is no doubt that such acts grossly affect the work performance, health and professional life of the victim.

The General Recommendation No. 19 of the CEDAW Committee under the Convention on Elimination of All Forms of Discrimination against Women, 1997 has defined sexual harassment as including "such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by word or action. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the women has reasonable grounds to believe that her objection would disadvantage her in connection with her employment including recruiting or promotion or when it creates a hostile working environment"

In Australia National Committee on Discrimination in Employment and Occupation has defined sexual harassment inclusively as arising when a person is denied equality or opportunity or treatment because that person has refused to grant sexual favors or to accept conduct of sexual nature, such act being conduct that a reasonable person would regard as offensive; or a person denied protection against conduct of a sexual nature, such act being conduct that a reasonable person would regard as offensive.[14]

The European Union defines sexual harassment as follows:[15]

Any conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work including conduct of superior and colleagues, constitutes an intolerable violation of the dignity of workers or trainees and is unacceptable if:

- such conduct is unwanted, unreasonable and offensive to the recipient;
- a person's rejection of or submission to such conduct of the part of employers or workers (including superior or colleagues) is used explicitly or implicitly as a basis of a decision which affects that person's access to vocational training, access to

[13] Walshok, *Blue Collar Women: Pioneers on the Male Frontier* (1981) pp. 221-222.
[14] Tenth Annual Report 1982-83 (1983/47
[15] 29 C.R.F. 1604. 11(d) 1997

employment, continued employment, promotion, salary or any other employment decisions and

- such conduct creates an intimidating, hostile or humiliating working environment for the recipient.

In *Vishaka's case*[16] the Supreme Court of India for the first time legally defined sexual harassment as an unwelcome sexual gesture or behavior whether directly or indirectly as:

- sexually colored remarks
- physical contact and advance
- showing pornography
- a denial or request for sexual favors
- any other unwelcome physical or verbal conduct being sexual in nature

3.1 Denmark

Sexual harassment is defined as, when any verbal, non-verbal or physical action is used to change a victim's sexual status against the will of the victim and resulting in the vectim feeling inferior or hurting the victim's dignity. Man and woman are looked upon as equal, and any action trying to change the balance in status with the differences in sex as a tool, is also sexual harassment. In the workplace, jokes, remarks, etc., are only deemed discriminatory if the employer has stated so in their written policy. Women are viewed as being responsible for confronting harassment themselves, such as by slapping the harasser in the face.[17]

3.2 France

Article 222-33 of the French Criminal Code describes sexual harassment as, "The fact of harassing anyone using orders, threats or constraint, in order to obtain favors of a sexual nature, by a person abusing the authority that functions confer on him..." Moral harassment occurs when an employee is subjected to repeated acts (one is not enough) the aim or effect of which may result in a degradation (deterioration) of his conditions of employment that might undermine his rights and his dignity, affect his physical or mental health or jeopardize his professional future. Sexual as well as the moral harassment is recognized by the law.[18]

3.3 United Kingdom

The Discrimination Act of 1975 was modified to establish sexual harassment as a form of discrimination in 1986. It states that harassment occurs where there is unwanted conduct on the ground of a person's sex or unwanted conduct of a sexual nature and that conduct has the purpose or effect of violating a person's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them. If an employer treats someone less favorably because they have rejected, or submitted to, either form of harassment described above, this is also harassment.[19] An analysis of the above definition,

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16 AIR 1997 SC 241
17 Supra note 1. Law number 1385 of Dec. 21, 2005 regulates this area.
18 *Id.*
19 *Id.*

shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favors and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.

4. Effects of Sexual Harassment

The effects of sexual harassment can vary depending on the individual, and the severity and duration of the harassment. Often, sexual harassment incidents fall into the category of the "merely annoying." However, many situations can, and do, have life-altering effects particularly when they involve severe/chronic abuses, and/or retaliation against a victim who does not submit to the harassment, or who complains about it openly. Indeed, psychologists and social workers report that severe/chronic sexual harassment can have the same psychological effects as rape or sexual assault. Moreover, every year, sexual harassment costs hundreds of millions of dollars in lost educational and professional opportunities, mostly for girls and women.

5. Common Effects on Victim

Common professional, academic, financial, and social effects of sexual harassment:

- Decreased work or school performance; increased absenteeism
- Loss of job or career, loss of income
- Having to drop courses, change academic plans, or leave school (loss of tuition)
- Having one's personal life offered up for public scrutiny --the victim becomes the "accused," and his or her dress, lifestyle, and private life will often come under attack.
- Being objectified and humiliated by scrutiny and gossip
- Becoming publicly sexualized
- Defamation of character and reputation
- Loss of trust in environments similar to where the harassment occurred
- Loss of trust in the types of people that occupy similar positions as the harasser or their colleagues
- Extreme stress upon relationships with significant others, sometimes resulting in divorce; extreme stress on peer relationships, or relationships with colleagues
- Weakening of support network, or being ostracized from professional or academic circles (friends, colleagues, or family may distance themselves from the victim, or shun them altogether)
- Having to relocate to another city, another job, or another school
- Loss of references/recommendations

Some of the psychological and health effects that can occur in someone who has been sexually harassed: depression, anxiety and/or panic attract, sleeplessness and/or nightmares, shame and guilt, difficulty concentrating, headaches, fatigue or loss of motivation, stomach problems, eating disorders (weight loss or gain), feeling betrayed and/or violated, feeling angry or violent towards the perpetrator, feeling powerless or out of control, increased blood pressure, loss of confidence and self esteem, withdrawal and isolation overall loss of trust in people, traumatic stress, post-traumatic stress disorder, complex post-traumatic stress disorder, suicidal thoughts or attempts.[20]

Effects of sexual harassment on organizations [21]

- Decreased productivity and increased team conflict
- Decrease in success at meeting financial goals (because of team conflict)
- Decreased job satisfaction
- Loss of staff and expertise from resignations to avoid harassment or resignations/firings of alleged harassers; loss of students who leave school to avoid harassment
- Decreased productivity and/or increased absenteeism by staff or students experiencing harassment
- Increased health care costs and sick pay costs because of the health consequences of harassment
- The knowledge that harassment is permitted can undermine ethical standards and discipline in the organization in general, as staff and/or students lose respect for, and trust in, their seniors who indulge in, or turn a blind eye to, sexual harassment
- If the problem is ignored, a company's or school's image can suffer
- Legal costs if the problem is ignored and complainants take the issue to court.

6. Kinds of Sexual Harassment

Studies on sexual harassment cases and experiences of women have shown two types of sexual harassment; one where sexual favors are demanded for employment benefit (i.e. *quid pro quo* harassment), and the other which involves a constant abuse of power, unrelated to favors, to demand a victim and creates hostile working conditions for her (i.e. hostile working environment harassment). The two categories have evolved over the years in western jurisprudence and are broadly descriptive to reintegrate that they are conclusive or intended to limit the scope and nature of the problem.

In the USA, the first case addressing the issue of sexual harassment under civil rights law was *Meritor Savings Bank* v. *Vinson.*[22] In this case Michelle Vinson brought a claim of sexual harassment against her supervisor and the bank after she was discharged for excessive use of sick leave. Vinson stated that she was frequently asked during and after business hours to engage in sexual relation with the supervisor. In fear of losing her job, Vinson testified that she agreed to some of the sexual encounters with her supervisor and was raped on others, as well as being fondled by her supervisor in the presence of other

[20] *Id.*
[21] *Id.*
[22] 477 US 57, 106 S Ct. 2399 1986.

employees. In this case the justices defined two types of actionable sexual harassment: *quid pro quo* or hostile work environment.

7. Quid pro quo Harassment

Quid pro quo means "something for something." This type of harassment occurs when an employee is required to choose between submitting to sexual advances or losing a tangible job benefit. An essential aspect of *quid pro quo* harassment is the harasser's power to control the employer's employment benefit. This kind of harassment most often occurs between supervisors and subordinate. In *quid pro quo* cases, the harassment consists of "unwelcome sexual advance, request for sexual favors and other verbal or physical conduct of a sexual nature.[23]

- *Quid pro quo* harassment involves the conditioning of concrete employment benefit on sexual favor. This is behavior that typically includes the promise of employment advantage for the tolerance, as well as the threatening of employment disadvantage on the rejection of sexual acts'. For example, *quip pro quo* harassment would include the situation where an employer demand sex from an employee, threatening the loss of the employee's job. In *quid pro quo* harassment, tangible employment benefit, such as salary, promotions or evaluations are based on sexual submission or refusal. These types of sexual harassment involve making conditions of employment (hiring, firing, promotion, retention etc.) contingent on the victim providing sexual favors. Such an action must prove that[24]
- The employee was subjected to unwelcome sexual advance or requests for sexual favors; and
- The reaction to the harassment, rejection or submission, as the case may be, affected tangible aspects of the employee's compensation, terms, condition, promotion, access to training opportunities and any other privileges of employment.

8. Hostile Work Environment Harassment

Sexual harassment of this type creates a hostile, abusive, intimidating or humiliating work environment for the victim. Hostile work environment harassment is unwelcome conduct that is so severe or pervasive as to change the condition of the claimant's employment and create an intimidating, hostile or offensive work environment. In the landmark case of *Meritor Savings Bank v. Vinson*[25] US Supreme Court found that a hostile work environment amounts to unlawful sex discrimination even in the absence of the loss of a tangible job benefit. First described by the US Supreme Court in Vinson Case, the definition of hostile work environment sexual harassment was elaborated by the court in *Harris* v. *Forklift Systems, Inc.*[26] In this case the court stated that the conduct contributing to a hostile work environment must be 'severe' and 'pervasive', but exactly what conduct that is can only be

[23] EEOC Guidelines 01604. 11(a)
[24] IWRAW Asia Pacific Occasional Papers Series No. 7, p. 8
[25] 477 US, 106S ct. 2399 (1986)
[26] 510 US 17 114 S. Ct. 367 (1993)

determined by looking at the circumstances. The US Supreme Court further stated that a dual objective and subjective standard should be used to determine whether harassing conduct constitutes a hostile work environment. The conduct must be 'severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive. Thus, reasonable person test, used in many other areas of law, is also used as the standard to define hostile work environment.[27] To do this, one must look at all of the circumstances, such as 'frequency of discriminatory conduct; it's severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[28]

The second subjective component of the test hinges on the victim's impression of the experience. The victim must 'subjectively perceive the environment to be abusive.[29] This means that a theoretical 'tough victim" does not meet the legal requirements of a claim if she does not believe that her work environment is abusive or hostile, even if a reasonable person would believe that it is.

Alternatively, the theoretical 'oversensitive victim' who perceives her work environment as abusive or hostile would not meet the requirements of a claim unless a reasonable person would also perceive her work environment to be abusive and hostile.[30] Thus, to meet the legal claim of hostile work environment leading to sexual harassment, the plaintiff must have both parts: the work environment must be objectively hostile or abusive and the victim must perceive the environment as hostile or abusive.

9. Employer Liability

The issue of employer liability is an important one in sexual harassment cases. Because employer may be held liable for the sexual harassment of their employees, sexual harassment is an important organizational issue. An internal mechanism is the most efficient and sustainable way of regulating sexual harassment at the workplace. It is a part of the employer's responsibility under law, to censure sex discrimination and guarantee security and dignity to employees in the workplace. Some of the essential features of an internal regulatory mechanism require employers to publicize a Code of Conduct for the workplace.[31] This could be a part of the employment contract entered into with each employee. It can also be made known through posters and notices, which should contain clear information on what constitutes sexual harassment.

- Introduce sexual harassment as a form of employment misconduct that constitutes grounds for dismissal in employment contracts;
- Set up a accessible and confidential complaints and redress mechanism for sexual harassment and publicize this widely; and
- Treat cases that arise promptly, strictly and efficiently with the objective of addressing the problem rather than keeping the case quit.

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27 *Ellison* v. *Brady* 924 F. 2nd 872. 9th cir. 1991
28 *Id,* p. 302-303
29 *Id,* p. 37
30 Mial Cahill, *The Social Construction of Sexual Harassment Law* 29, (Ashgate, 2001)
31 IWRAW Asia Pacific Occasional Papers Series 7 p. 16-17

In USA, employer liability is much more complex. Courts treat employer liability differently, depending on the type of sexual harassment, the status of harasser and whether the victim experience 'tangible' damage.[32] The employing firm is directly responsible for *quid pro quo* harassment, if it is found to have occurred and threats are carried out.[33] For *quid pro quo* harassment, and in case where supervisor creates a hostile environment that includes tangible employment action, such as 'discharge, demotion or undesirable reassignment 'employers are vicariously liable for the action of their supervisors.[34]

In all but the most clear cut *quid pro quo* cases with tangible employment consequences, US court are reluctant to hold employers liable if the employers have attempted to prevent sexual harassment or if the plaintiff has not given the employers an opportunity to address sexual harassment dispute. When the hostile environment sexual harassment is created by co-workers, rather than supervisor, employers are only liable for sexual harassment under the broader negligence standard when they know of the harassment and fail to take remedial measure addressing the harassment. When supervisor are involved in creating the hostile environment, the US law is more complex. In 1999,the Supreme Court of US ruled that, when the hostile environment is created by supervisors, but there is no tangible employment action, the employers is still vicariously liable for the action of its supervisors, but the employers can assert and affirmatively defend. The affirmative defense has two components. First, employers must show that they exercise reasonable care to prevent and correct promptly any sexually harassing behavior. This generally means that they develop and disseminate a policy against sexual harassment as well as providing an internal mechanism for claiming sexual harassment.[35]

In many jurisdictions, the state is the largest employers. So in such situation it has been held 'doubly liable.' Accountability rests on the state in its capacity as the 'employer', and as the 'state' which bears the constitutional obligation to ensure protection, enforcement and implementation of human rights.[36]

10. Judicial Responses

Even in the absence of the comprehensive law on sexual harassment at the workplaces, the judiciaries in India and Nepal have attempted to provide justice to the victims. The Indian Supreme Court's decision in *Vishaka and Others* v. *State of Rajasthan and Others*[37] stands out not only because it is the first comprehensive decision on sexual harassment, but also because of its unique style of judicial craftsmanship and activism. The judgment is a landmark for many reasons. Not only was sexual harassment at workplace recognized under the Indian jurisprudence as a crucial problem faced by women workers. It also set out detailed guidelines for presentation and redressal of this malaise. In doing so the Supreme Court did not merely confine itself in interpreting the law but went into legislative exercise

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32 Supra note 30, p. 28
33 *Burlington Industries, Inc* v. *Kimberly Ellerth* 1998 US Lexis 4217 (1998)
34 *Faragher* v. *City of Boca Raton,* 1998 US LEXIS 4216, 2320
35 *Id.*
36 *DK Basu* v. *State of West Bengal,* 1997 SCC 416
37 AIR (1997) SC 241

of law making. The Court traveled beyond it's traditional confines of being the interpretative organ of laws and went in to the terrain of law making which it had historically shied away from.

The immediate cause for filling the PIL was the alleged brutal gang rape of a social worker of Rajasthan. The court in absence of any enacted law has provided for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment and laid down the following guidelines.[38]

Complaints Mechanism

- All workplaces should have an appropriate complaints mechanism with a complaints committee, special counselor or other support services.
- A woman must head the complaints committee and no less than half of its members should be women.
- The committee should include an NGO/individual familiar with the issue of sexual harassment.
- The complaints procedure must be time-bound.
- Confidentiality must be maintained.
- Complainants/witnesses should not experience victimization/discrimination during the process.

Preventive Steps

- Sexual harassment should be affirmatively discussed at workers' meetings, employer-employee meetings, etc.
- Guidelines should be prominently displayed to create awareness about the rights of female employees.
- The employer should assist persons affected in cases of sexual harassment by outsiders.
- Central and state governments must adopt measures, including legislation, to ensure that private employers also observe the guidelines.
- Names and contact numbers of members of the complaints committee must be prominently displayed**.**

Employers' Responsibilities

- Recognize sexual harassment as a serious offence.
- Recognize the responsibility of the company/factory/workplace to prevent and deal with sexual harassment at the workplace.
- Recognize the liability of the company, etc, for sexual harassment by the employees or management. Employers are not necessarily insulated from that liability because they were not aware of sexual harassment by their staff.
- Formulate an anti-sexual harassment policy.

Vishaka guidelines apply to both organized and unorganized work sectors and to all women whether working part time, on contract or in voluntary/honorary capacity. The guidelines are a broad framework which put a lot of emphasis on prevention and within

[38] *Id.*

which all appropriate preventive measures can be adapted. One very important preventive measure is to adopt a sexual harassment policy, which expressly prohibits sexual harassment at work place and provides effective grievance procedure, which has provisions clearly laid down for prevention and for training the personnel at all levels of employment.

Soon after the judgment of the Supreme Court in *Vishaka,* in *AK Chopra case,*[39] the Indian Supreme Court applied the law laid down in *Vishaka case* and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexual harassment of a subordinate female employee at the work place on the ground that it violated her fundamental rights guaranteed by Article 21 of the Indian Constitution. In this case, the High Court had set aside the conviction on the ground that physical contact had not been established. The other aspect was related to the power of enquiry committee. The High Court had held that as the offence was under section 354 IPC, for an attempt to "outrage the modesty" of a women (an offence that can be brought regardless of whether the conduct takes place within an employment context) it necessitates the establishment of physical contact.

The Supreme Court reversed the High Court judgment and reinstated the sentence imposed by the lower courts, holding that sexual harassment does not necessarily involve physical contact. Where a superior has harassed and made unwelcome sexual advance to his clerk, reduction of sentence merely because the superior made no physical contact is inappropriate when there is no factual dispute. In the Court's words, the superior's conduct "did not cease to be outrageous for want of an actual assault or touch" it matters whether the conduct is "unwanted". While the conduct must be assessed from the victim's standpoint, in the Indian context there is a danger of under protection when determining whether a certain conduct was" unwanted" as a victim's past sexual history and conduct may be introduced as relevant evidence to erode her credibility. In the present case, for instance, the clerk's ignorance of sexual matters and the fact that she was unmarried, although irrelevant, helped to establish that the conduct of her superior was "unwanted"

While the *Vishaka* guidelines constitute a step in the right direction, there is still room for improvement in the area of protection to employees against sexual harassment. The guidelines require the establishment of a sexual harassment committee by the employer, a body that then supplies a report to the employer. In practice, although nearly every government department and many public sector organizations in India have established such committees, very few firms in the private and unorganized sector have done so.[40] Around the same time many women who were being sexually harassed breaking their silence started demanding action from the employers. In fact a number of these were from University and collage campuses. The responses of the employers by and large were to sweep the matter under the carpet and at times even to victimize women. But one could still see an increasing protest. The media also started giving important space and time to this issue.

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[39] *Apparel Export Promotion Council* v. *AK Chopra* AIR (1999) SC 759

[40] *Landmark Judgments on Violence against Women and Children from South Asia,* (SARIQ, India 2005), p. 350

11. Nepal

The ruling of the Supreme Court of Nepal in *Sarmila Parajuli and Others* v. *HMG\Nepal*[41] case has been hailed as landmark judgment all over the country by almost all women's rights organizations and media. This is a remarkable judicial effort made in our country to address the issue of grave social concern. The judgment is welcome because it will boost the confidence and courage of all working women. Referring to the right to equality guaranteed under the Constitution of the Kingdom of Nepal, 1990 and provision in Article 2 of the CEDAW, the Supreme Court held that any type of sexual abuses is a violence against woman and that state parties are obliged to take legislative and other measures to eliminate such discrimination. The Court issued a directive order in the name of the government to take necessary initiatives to make an appropriate law relating to sexual harassment.

The Court rightly held that it is mandatory for the state to take affirmative measure for creating such environment where women may, in equal footing with men, secure right to equal protection of law, practically exercise the grantee to the freedom to carry on any profession, employment, industry and trade. Sexual harassment tends to impede an uninterrupted exercise by women of the constitutional right to equality and the right to freedom. Without complete prevention of sexual harassment, the constitutionally protected rights to equality and freedom would not be meaningful.[42]

Though the Supreme Court refused to issue a judicial directive until the law on sexual harassment is made, its acceptance that no law on sexual harassment exists and the directive order to make a law is a new judicial initiative to eliminate violence and discrimination against women.

Rajendra Thapalia v. *Royal Casino*[43] is the first case relating to sexual harassment at the workplace in Nepal. The learned presiding officer of the Labor Court has very deftly analyzed the fact, interpreted the constitution, and applied international instruments on human rights including the CEDAW, to conclude that the appellant had actually harassed his co-workers. He has also pointed out the lacunae in the Labor Act and drawn the attention of the authorities including Parliament to make necessary amendment to the Act.

The Court held that women generally do not like to come to limelight by bringing such matter into public when someone tries to offend their dignity, unless they are compelled to fight to impose penalty on the culprit by taking exemplary action. The Court specifically mentioned that "in our country as attempts have just begun to encourage women to take up outdoor works, and as priority is being given to encourage them to economic and professional activities, in order therefore to prevent women from being dissuaded due to sexual harassment by colleagues and bosses in workplace, it is necessary to be sensitive and sympathetic for providing legal remedies to them against such acts. The court should also look into these types of cases with sympathy and sensitivity.

The Court had made further ruling that studies have shown that sexual harassment has adversely affected the physical and mental health of women, caused frustration in work, and situations may arise where they are compelled to leave their jobs

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41 NKP 1312 (SC 2061 BS)
42 *Id.*
43 Appeal No. 93\125 of the year 2058

for this reason. Therefore, the court mentioned that it may pollute the environment of the work relation of the institution. It was the opinion of the Court that provision relating to sexual harassment should be incorporated in the Act itself, and in view of the gravity of the offence, the degree of punishment should also be increased.

12. Conclusion

Patriarchal attitudes and values are the biggest challenge in the implementation of any law concerning women in our society. Combating these attitudes of men and women and the personnel involved/responsible for implementation of laws is most crucial in prevention of unwanted sexual behavior. Preventing and avoiding sexual harassment involves all levels of employees/persons in any organization-employees and colleagues, management and bodies like trade unions. Most importantly, it requires for the employer to act before a problem occurs.

In Nepal, the Interim Constitution of Nepal, 2063 provides safeguards against all forms of discrimination. The Supreme Court of Nepal has given a land-mark ruling in *Sarmila Parajuli's case* in which court directed the government to make the law to prevent sexual harassment at workplace. Feminist lawyers and women's group have begun lobbying with the government and parliamentarian to get the law passed. In a patriarchal society most cases of sexual harassment remain unreported. Women are reluctant to complain and prefer silence due to lack of sensitivity on the part of the society. Therefore, there is a need to sensitize our society on gender perspectives so that the victims do not feel guilty and are encouraged to report any form of harassment.

All the same, the victim's privacy must be protected. The judiciary, police, employer and other law enforcement agencies also need to be gender sensitized. There should be speedy redressal system of sexual harassment cases. The concept and definition of sexual harassment should be clearly laid down, and redressal mechanism made known to women in each and every sector of the economy.

Failure of Child Marriage Law and Recent Interventions of the Supreme Court

– Sapana Pradhan Malla*

As mentioned by the author, the immediate purpose of writing this short note is to examine and analyze the two Supreme Court decisions on public interest cases relating to child marriage where it seems that the court has ordered directives to the government. But as the author moves on, she draws upon international human rights law, the emergent constitutional values of gender equality and analyses the weak links of domestic law and their impact on minors especially the girl child who faces enormous suffering due to early marriage. The author forcefully argues that the Nepali law on marriage is too insufficient, too archaic and too discriminatory. The author has also given a roadmap for legal reform and possible collaboration of the state and the non-state sector to raise awareness, prevent and combat the crime of child marriage and to protect the hapless victims who are forced to such marriage by the family and the larger eco-social, cultural and religious environment. She also argues that the directives of the court, where it has called upon the government to reform law and launch initiatives to prevent child marriage, should be taken as positive guidelines because by issuing such directives the court is only discharging its constitutional duty.

1. Introduction

This article refers to the recent Supreme Court's intervention in two cases – one filed by FWLD[1] and the other by Pro-Public.[2] These cases have succeeded in raising critical issues of State failure to curb child marriage even after recognizing that the child marriage is a crime against the State. Supreme Court has, very well, recognized in both the cases the need for effective enforcement of law besides emphasizing on law reform. This article attempts to further analyze additional challenges in order to eliminate child marriage from Nepal. It also attempts to raise questions on elements that need to be taken into consideration in reforming law and discusses if public interest litigation and positive interpretation by the court alone can bring necessary mechanism for the prevention, protection and prosecution of this crime.

2. Background of the Case and Court Observations for the Protection against Child Marriage

Child marriage is a traditionally practiced marriage in Nepal. This country ranks 10th in the world where child marriage is very high.[3] As per the census conducted by Central Bureau of Statistics (CBS) there are more girls than boys who get married before they reach the age

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1 Writ No. 98 of the year 2062 (SC. 29/03/2063 BS) (2006 AD)

2 Writ No. 128 of the year 2063 (SC 12/10/2063 BS) (2007 AD), the detail text of the decision is yet to be written.

3 *Early Marriage - A Harmful Traditional Practices: Statistical Exploration,* UNICEF, 2005, p. 1

of 19 years. For example, out of the total married population belonging to the age group below 19, about 55.5 percent are girls. Early marriage of girl child is traditionally extolled as one pious activity by many Hindu parents. Among various causes of child marriage, religion and culture are the main suspect which are deeply-rooted in society. Besides, factors such as low education, illiteracy, economic burden, lack of mandatory marriage registration and lack of knowledge of the same have contributed to this menace. It is further forced by conflict and poverty.[4]

The impact of child marriage is severe. Lack of education seems to be one of the important factors contributing to child marriage.[5] Girls who get married early in their teens have a higher probability of getting pregnant and having more children. This opens them up to risks related to reproductive health and makes them more vulnerable to sexually transmitted diseases. Teenage girls are more susceptible than mature women to sexually transmitted infections including HIV.[6] Those under the age 15 are five times as likely to die as women in their twenties. The main causes are hemorrhage, sepsis, pre-eclampsia/eclampsia and obstructed labour.[7] The negative health impact included uterus prolepses, maternity death, miscarriage, sexual disease, infanticide and infertility.

The compulsion to early forced sex, mostly with men much older than the girls leads to pregnancy in an immature stage of physical development, lack of education and awareness, loss of freedom and access to good and nutritious food and enduring burden of heavy household chores force them to live a risky and very unhappy life. According to the law on rape, having sexual intercourse with girls below 16 years, even with her consent, is defined as a statutory rape. Therefore, child marriage also violates the provision of criminal law on rape.[8]

Even though there is a law to criminalize child marriage, it is still rampant.[9] The data availed by CBS on child marriage indicates the prevalence of child marriage. The law provides that the age of man and woman getting married must be 18 years in case the marriage is solemnized with the consent of the guardians, and 20 years in case of marriage solemnized without the consent of the guardians.[10] The Marriage Registration Act, 1971 provides that the man must attain the age of 22 years and the woman must attain the age of 18 years to be eligible for having their marriage registered. FWLD filed a case challenging the constitutionality of this particular provision for being discriminatory on the basis of sex as different age was fixed for girl and boy. Secondly, under the National Code 18 year for girl is fixed only with parental consent. She has to reach 20 years if it is without parental consent, whereas in court marriage eligibility was fixed for 18, which contradicts to the provision of the National Code.[11] Further, non-enforcement of law was also an issue strongly raised in the petition. In this case, Supreme Court issued a directive order to bring an appropriate amendment to adjust the difference in marriageable age. Accordingly, the law has been amended to increase the age to 20 years. The stereotyped concept that a girl has

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4 Sapana Pradhan Malla, *Report on the Study of Child Marriage*, 9-13 (2006) (unpublished UNIFEM/FWLD, Nepal)
5 www.unicef.org/girlseducation/index.html (May 25th 2007)
6 Innocenti Digest No. 7 March 2001 – Early Marriage- Child Spouses/UNICEF
7 *Id.*
8 No. 1 of the Chapter on Rape, National Code (*Muluki Ain*), 2020 (1963 AD)
9 *CEDAW and CRC Periodical Reports and Shadow Reports,* Population Census Report of Government of Nepal
10 No. 2 of the Chapter on Marriage, National Code (*Muluki Ain*), 2020 (1963 AD).
11 *Supra* note 1

to be younger than the boy has also been amended. In this case, court has also observed that the existence of law is not enough unless it is enforced in practice. Though government has recognized it as a crime against the state, it can not be said that it has been effectively enforced.

In another case filed by Pro-Public, petitioners claimed that the child marriage should be declared void on the ground that the element of free consent, which is the basis for marital relationships, is lacking in child marriage. Presently, the law considered child marriage only voidable. This, in other words, could mean that the marriage could be validated even if it is solemnized without full and free consent. The Court has issued directive order for the awareness program for the prevention and also for necessary law reform which would prescribe severe punishment.

3. Nepal's Obligation to Combat Child Marriage under International Instruments

By ratifying and acceding to 21 human rights instruments, Nepal has made commitment to the international community that it will eliminate child marriage in all its forms. Child marriage is defined as any marriage that occurs before the age of 18 unless under the law applicable to the child, majority is attained earlier.[12] Bearing in mind the provisions of the Vienna Declaration, the Committee on the Rights of Child considers that the minimum age for marriage must be 18 years for both man and woman. The standard is reinforced by a general consensus among various international conventions and human rights agreements that outlaw child marriage or betrothal of young girls before the age of puberty.

It has been emphasized in some of the instruments that marriage must be entered into with the free consent of the intending spouse.[13] And as per the legal practice, eligibility of free consent is based on the age determined by the state legislation. In the case of dissolution of marriage, the Convention requires for necessary protection of children.[14] The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1962 requires the state parties to take legislative action to specify a minimum age for marriage and stipulates that no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to the age, for serious reasons, in the interest of the intending spouses. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962 calls upon parties to eliminate the marriage of girls under the age of puberty and requires the states to stipulate the minimum age of marriage.[15]

The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices, 1956 equates any marriage that is forced upon a girl or woman by her family or guardians as similar to slavery[16] and requires the state party to eliminate it.

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12 Convention on the Rights of the Child, 1989, art. 1

13 International Convention on Civil and Political Rights, 1966, art. 23(3); International Convention on Economic, Social and Cultural Rights, 1966, art. 10(1); Universal Declaration of Human Rights, 1948, art. 16(1); Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1962, art. 1(1); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices, 1956, art. 2

14 International Covenant on Civil and Political Rights, 1966, art. 23(4).

15 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964, art. 1.

16 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices, 1956 art. 1(c)(i)

The CEDAW Convention also provides that the betrothal and marriage of a child shall have no legal effect and all necessary action, including legislation, must be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.[17] The CEDAW Committee has, in its general recommendation, provided that a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries, which, on the basis of custom, religious beliefs or ethnic origin of particular groups of people, permit forced marriages or re-marriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others, women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based, for example, on a woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced by law.[18]

The International Conference on Population and Development calls countries to create a socio-economic environment that is conducive to the elimination of all child marriages and other unions as a matter of urgency and discourage early marriage.[19] The Beijing Declaration and Platform of Action require the governments to give priority to both formal and informal educational programs including awareness against the practice of child marriage.[20]

The Committee on the Rights of the Child has expressed its concern over the widespread practice of custom of early marriage especially in certain ethnic and religious communities, and the situation that girls, once married, are not afforded the protection for the enjoyment of their rights as children as enshrined in the Convention, including the right to education. The Committee has recommended the State party to strengthen its enforcement of the existing legislation to prevent early marriages and to develop sensitization programs, involving community and religious leaders and society at large, including children themselves, to curb the practice of early marriage. It has also recommended the State party to take measures to ensure that when underage girls are married, they continue fully enjoying their rights as set out in the Convention, including the right to education.[21]

The CEDAW Committee has expressed its concern about traditional customs and practices detrimental to women and girls, such as child marriage, dowry and polygamy. The Committee has also expressed its concern about high incidence of girl children being taken across the border for the purpose of child marriage.[22] In its concluding comments on second and third periodic report of Nepal, the Committee again expressed its concern over continued existence of child marriage and required the state party to enforce its marriage

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17 CEDAW Convention, 1979, art. 16(2)
18 General Recommendation 21 of the CEDAW Committee, para. 16
19 Para 6.11 of the Report of the International Conference on Population and Development (Cairo, 5-13 September 1994)
20 Strategic Object No. C 2 [Strengthen preventive programs that promote women's health actions to be taken (108. By Governments, in cooperation with non-governmental organizations, the mass media, the private sector and relevant international organizations, including United Nations bodies)] of the Beijing Declaration and Platform of Action.
21 Concluding Observations of the Committee on the Rights of the Child: NEPAL, CRC/C/15/Add.261, June 2005.
22 CEDAW/C/SR.434 and 439; 1999

laws, particularly as they related to the prohibition of child marriage in light of General Recommendation 21 on equality in marriage and family relations.[23]

4. Nepali Law and Issues Related to Child Marriage

Interim Constitution of Nepal, 2007[24] and the Peace Accord 2007 provides not only the right to non-discrimination and equality,[25] but also several other rights. Separate articles are enacted for the protection the rights of children and women such as the right against physical, mental or other forms of exploitation,[26] the right against violence, reproductive health rights and equal rights in the parental property including non-discrimination to such property on the basis of sex. The Interim Constitution also guarantees right against exploitation based on tradition, culture and practices. The child marriage is a form of discrimination against girls based on sex, tradition, culture and other practices. Most of the victims of child marriage are girls.

The National Code, more particularly its chapter on Marriage, is the main law in Nepal to govern matters relating to marriage. The other legislation includes the Marriage Registration Act, 1971 and the Birth, Death and Other Personal Events (Registration) Act, 1977. Even if Nepal is a multi-religious and multi-ethnic country, the uniform pattern of marriage law is applicable to all religious and ethnic communities irrespective of their culture and religion. Though the law has recognized the tribal or clan traditions with regard to incestuous marriage,[27] this recognition is not legally applicable in the matters of child marriage. In this context, there are many elements to be taken into considerations in the legal framework for the effective enforcement of law for combating child marriage.

4.1 Age of Consent, Consistency of Age and Authority for the Consent

Though the case filed by FWLD raised the age criteria as an issue, the other important issue is consent. Marriage is one form of contract. So the rule of consent referred to in the law of contract needs to be taken into account. The Contract Act, 1999 declares a minor to be ineligible for entering into a contract.[28] However, Nepali law on consent for marriage incorporates the dual idea of parental consent and consent of the partners which has not been raised in both the cases. Under the Nepali law parental consent is required for any one getting married between the ages of 18 and 20 years. Going by this standard boys and girls become mature for any other purpose except for the marriage. Why is an eighteen years old girl eligible if there is a parental consent and not if such consent is absent; this question also needs to be analyzed. Why do adult need the approval of the parent for getting marriage? Is marriage for the family or for marrying couple? Arguably, the concept of parental consent is a threat for many inter-caste and inter-class marriages. Though consent of parent is not required legally if the girl is above 20, in practice parental consent is still a must in any marriage in Nepal. Thus, more than the choice of marrying partner,

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23 Committee on the Elimination of Discrimination against Women
Thirtieth Session, 12-30 January 2004; Concluding Comments: Nepal CEDAW/C/SR.630 and 631
24 The Constitution is an outcome of Peoples' Movement II
25 Interim Constitution of Nepal, 2063 (2007 AD), art. 14(1) and 14(3).
26 Interim Constitution of Nepal, 2063 (2007 AD), art. 23(3)
27 No. 10a of the Chapter on Incest, National Code *(Muluki Ain),* 2020 (1963 AD).
28 Contract Act, 2056 (1999 AD), Ss 2 & 13(j).

marriage is the outcome of family arrangement. It is a cultural legacy which Nepali society is yet to dissociate with.

The consent of the marrying couple is one of the basic elements on which marital relationship acquires validity. The law in Nepal gives complete freedom to the consensual relationship except in case of incest and same sex relationship.[29] However, in certain caste and ethnicity exemption has been provided for incest marriage based on customary practices. Even here the law does not exempt child marriage. The marriage without consent of the marrying man and woman is invalid (void) marriage.[30] The law does not suppose anyone not attaining the age of majority to be capable of giving consent for getting married. The reason behind this legal supposition is that a person below certain age cannot judge where his/her best interests lie. One who causes a marriage to be solemnized without consent is liable to a punishment of imprisonment up to two years.[31] However, in many cases the family and social pressure takes over consent, and children often do not have the confidence of reporting that they had not given consent. Research has shown that many individuals are forced to give consent for family interest and poverty.[32]

4. 2 Child Marriage: Void or Voidable?

There is an ongoing debate whether child marriage should be void or voidable. At present under the law on child marriage in Nepal, it is not void *ipso facto* rather it is voidable where some conditions are fulfilled. The National Code provides that in case any boy or girl is married without attaining the age of 18 years, s/he may opt to invalidate such a marriage after attaining the age of 18 years.[33] This is the major issue being raised in the case filed by Pro-Public. But this question needs to be seriously discussed. In a majority of cases a child marriage happens where the husband is a major and the wife a minor. If such marriages are declared *ipso facto* void the marriage would come to an end and it would be difficult for the girl to re-marry due to prevailing social and cultural practices and beliefs. And if there are children in marriage, mother need to have the right to decide whether to declare such marriage invalid or not. In this sense, declaring the marriage *ipso facto* void would create a situation of double victimization of the girl child. Therefore, it is very important that such implication should be seriously considered in view of the right of children. It is also necessary to ensure that girl children are not exploited further. In a recent concluding comment of CEDAW on Government of India,[34] CEDAW Committee has shown concern about the law that penalizes the offender but does not render the marriage void, purportedly to avoid illegitimacy of any offspring of such union, which stands in contradiction to the purpose of the Act and is a violation of the rights of the married child.[35] But the law of Nepal is different in the sense that it gives choice to the minor for declaring void rather than making *ipso facto* void. However, CEDAW calls state parties to have no legal effect of child marriage. Some people take the view that unless child marriage is null and void such

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29 No. 1 of the Chapter on Marriage, the National Code (*Muluki Ain*), 2020 (1963 AD)
30 No. 7 of the Chapter on Marriage, the National Code (*Muluki Ain*), 2020 (1963 AD)
31 *Id.*
32 Sapana Pradhan Malla, *Report on the Study of Child Marriage*, (2006) (unpublished UNIFEM/FWLD, Nepal)
33 No. 9.2 of the Chapter on Marriage, National Code *(Muluki Ain),* 2020 (1963 AD)
34 Concluding Comments on 2nd & 3rd Periodical Report, 2007
35 CEDAW/C/IND/CO/3

marriage will not end. As after the marriage, it is legally validated, mere punishment will not effectively combat the crime. Child marriage should not even be registered. But some others take the view that socio-cultural context and it's implication has to be taken into consideration. Hence, it should only be voidable giving choice to the affected person.

4. 3 Sentencing Policies

The degree of punishment fixed on child marriage is also based on the age of the child, lesser the age more severe the punishment.[36] But the question is: are we not acknowledging that in certain age crime is less severe even among the children? The law criminalizes persons attaining the age of majority who are engaged to solemnize or causing to be solemnized child marriage liable for the punishment as mentioned above.[37] Those who are abettors or associates to the offence are liable for imprisonment up to one month or a fine up to one thousand rupees. The law also makes the main protagonist, who takes the final decision as to child marriage liable for a fine up to five hundred rupees even in the situation where the marriage is yet to be solemnized.[38] But the major problem is that no one files the case against the family as it is always seen as a personal/private matter. When a crime is committed against children, how can it be a personal matter?

With the increase in the age of the girl, the punishment decreases. Such low punishment could hardly create a deterrent effect against the offence of child marriage. The punishment is also discriminatory on the ground of sex as the child marriage of boy attaches lower punishment. Low punishment is often attributed to be one of the major factors responsible for ineffective enforcement of the law against women. Lower punishment helps creating an impression that child marriage cases are less serious in comparison to other cases. The low punishment is further weakened by very wide discretionary sentencing powers of the courts.[39] There is no mention of aggravating factors given by the law so that the wide discretion may be rationalized according to the degree of culpability.[40] Such wide discretion entails that child marriage is not a serious offence, nor does such situation create deterrent effect. It may even give rise to the situation of irregularity and corruption. The decision given by the Supreme Court in HM*G/Nepal* v. *Kaluman Rai*, the only case reported in the law journal,[41] speaks a lot about the prevailing situation. In this case, the father of a 13 years old girl married her off. In the court he not only confessed the marriage of his minor daughter but also tried to defend himself on the basis of cultural practices. The Supreme Court upheld the decision of the lower court which had awarded a punishment of three days of imprisonment and a fine of just Rs. 25. It is submitted that such lenient approach of the court in child marriage cases only encourages

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[36] No 2 (n) of Chapter on Child Marriage, National Code *(Muluki Ain),* 2020 (1963 AD) provides in case of a child marriage involving a girl below the age of ten years and it is imprisonment from six months to three years and a fine from one thousand to ten thousand rupees, from three months to one year of imprisonment and a fine up to five thousand rupees if she is of 10 years to 14 years; imprisonment up to six months or a fine up to five thousand rupees or both in case she is above 14 years to 18 years and imprisonment up to six months or a fine up to ten thousand rupees or both in case she is above 18 years to 20 years. In case of child marriage involving a boy below the age of 20 years, the punishment is an imprisonment up to six months or a fine up to ten thousand rupees or both.

[37] *Id.*

[38] *Id.*

[39] For example, in case of marriage of a girl between the ages of 10 to 14 years, the punishment is an imprisonment up to six months or a fine up to five thousands rupees or both.

[40] In case of child marriage involving a boy below the age of 20 years, the punishment is an imprisonment up to six months or a fine up to ten thousand rupees or both.

[41] *HMG* v. *Kaluman Rai,* Cri. Appeal No. 57 of the year 2057 (2000 AD)

the commission of the offence than to deter it. However, in this case effective implementation of child marriage law has not been raised strongly, nor has the court made any intervention for making stringent prosecution policy.

4. 4 Crime Combating v. Victim Justice

Though Nepali legal system broadly takes a crime combating approach, recent change in child marriage law provides compensation based on the amount of fine imposed on the perpetrator. However, the maximum degree of such fine amount is Rs. 10,000. This amount is not only extremely low, but also difficult to obtain. The maximum amount of fine is not usually imposed on the perpetrators because of wide discretionary power. The National Code requires that the fine collected from the perpetrator of child marriage should be given to the affected child. In case of failure to pay fine by perpetrator, partition share of that person can be confiscated and given to the affected child.[42] This provision has made the scheme of compensation totally dependent on the financial capacity of the perpetrator in the sense that if he has no property, the child cannot be compensated. There is no mechanism to make state responsible when perpetrator does not have property. The law, therefore, needs to be reformed from victim justice perspective.

5. Challenges in the Implementation of Law

Due to religious, cultural and social practices, parents have a tendency to marrying off their daughters at an early age and feel "relieved" afterwards. Clichés like " *chori ta pahuna hun* – daughters are guests", as girls go older it is difficult to find a groom for them, getting daughters married before they reach puberty being an act of salvation for parents. Among others are malpractices in the name of religious and social values which encourage parents to get their daughters married off as early as possible. Due to cultural belief, "the best interest of the child" is not taken into account. The parents and society as a whole do not see child marriage or any other matter relating to children from child rights perspective. Most of the matters falling under family affairs, including child marriage, are thought to be personal matters irrespective of issues of exploitation or other form of child rights violation.

One of the major reasons for poor enforcement of laws is the lack of awareness about the impact of child marriage on the mother and the newborn as well as on the entire society and the nation. People simply regard the health problems arising out of the child marriage as health problem of general nature and do not go beyond to identify the real causes. As a result, they do have an opportunity to be familiar with the risk factors associated with child marriage. Moreover, the increase in public health expenses due to health complications arising out of child marriage is not taken into account.

It is found that child marriage has traumatic effects on the victims. Especially the girls face higher risks of maternal mortality, poor physical as well as mental health, discontinuation of education and career building, still birth or poor health of the child and violation of series of fundamental human rights including reproductive health rights.

[42] No.2 (8) of Chapter on Marriage of National Code *(Muluki Ain),* 2020 (1963 AD)

Though child marriage leads to violation and deprivation of child right for both sexes, it is more so with regard to girls, as it also leads to their sexual abuses and exploitation. The law enforcement agencies have not taken seriously public health costs that account for child marriage and the resulting health complication. They only perceive child marriage to be a personal case inviting small amount of punishment. Police, which is primarily responsible for taking preventive as well as protection measure, does not take proactive initiative to fight the crime of child marriage.

The law against child marriage is found to be very weak in terms of degree of punishment and wide discretionary power vested in adjudicating officers. The compensation clause is also weak as it is based on the amount of fine imposed on the offences, which is very low. There is no provision of counselling and interim relief. The legal framework, therefore, needs to address many critical elements in the law reform process as discussed above.

There is no punishment if the marriage is solemnized without knowing that the boy/girl is below the statutory limits. It means that absence of knowledge as to the age of the girl or boy is a ground to escape punishment. Here, the law does not bother to see whether or not reasonable effort has been made to ascertain the age. This provision is problematic in the Nepalese context where vital record system is poorly maintained.

The limitation to file the case of child marriage and other offences under this Chapter is three months. This limitation is very short in the Nepali context, where late reporting of cases is widespread owing to reasons of poor means of communication, transport and societal attitudes.

The proactive judgment by Supreme Court in public interest litigation has had some positive impact on law reform especially as discriminatory provisions are declared void. However, in reality, it has still not been able to make much difference in the life of women. Again when the court is asking the government through directive order for launching the programs like awareness, there is a resistance from the government to do so. It is more critical when government gives directions for effective enforcement, especially by launching massive awareness programs and other necessary initiatives for the prevention and protection from child marriage. Therefore the challenge is: how to create a system of communication and make the Government Attorney Office more accountable to disseminate this to all concerned agencies. However, many times, due to the lack of proper communication of the judgment given, or due to an inappropriate monitoring mechanism, the government is not efficient in disseminating the law as per the new decisions.

6. Way Forward

We all live in cultural and religious diversity. If it is discriminatory culture, universality of human rights standard should be applicable. Society is changing, so are the values, expectations and practices of women and girls. Unpacking of culture has already begun where stereotyping of the role of women is frontally attacked. The underlying causes of discrimination need to be addressed. Legal rights of every child should be recognized.[43]

[43] Kathmandu Post, 2006

Being a multidimensional problem, child marriage needs multi-sectoral response for its prevention. Government authorities such as lawmakers, police and courts and all other relevant stakeholders such as NGOs, parents, *pundits* and religious leaders must come together against this social malpractice. The institutional mechanism to respond to the issues of child marriage includes the governmental and non-governmental organizations engaged in its prevention and enforcement of laws. However, although legal sanctions are in place the political and social commitment to implement sanctions against child marriage is lacking. Therefore, despite criminalization for years, child marriage is a harsh reality in Nepal.

Being a party to a host of international human rights instruments Nepal has an international and national obligation to eliminate child marriage. It is also a constitutional and legal duty of the state to protect the rights and "the best interests of children." However, in practice, not only the laws are absent or incomplete, their implementation is also very weak. It is necessary to ensure that laws are in place and are effectively implemented to eliminate the practice of child marriage. There is a need to have laws to restrict child marriage fixing minimum age of marriage irrespective of religion or ethnicity of the parties concerned. Adequate sanction with compensation needs to be provided in case such crimes are committed. There is a need to create infrastructure so that people can freely exercise the rights. And, if rights are violated, mechanism is created to redress violence. The law reform agenda must include important points like shifting the burden of proof on the accused implicated on child marriage, increasing penalties both in terms of imprisonment and fines, rationalizing judicial discretion in imposing punishment by prescribing minimum and maximum limits of punishment maintaining confidentiality of informer, and requiring the judges' to take note of aggravating and mitigating factors.

Major challenges in child marriage cases are associated with social norms and values of the community. Therefore, there must be a common goal and minimum understanding amongst civil society organizations and government agencies towards making this social menace an unacceptable and intolerable practice both in case of girls and boys. Awareness campaign needs to be launched with an aim of changing the mindset and values of the general public based on religious beliefs and cultural practices. This is perhaps the spirit of the Interim Constitution which prescribes exploitation based on tradition, custom and practices.

Adequate budget needs to be allocated for implementation of law. A scheme of rewarding those who report cases of child marriage could play a motivational role to bring the perpetrators to justice. Activities like establishing flying squads within the Women and Children Service Centers in every police office especially to look after the child abuses, including child marriage; paying compensation and interim relief to the victims even when the case is pending in the court and creating emergency relief fund in each district to assist the victims, should be initiated as soon as possible.

It is found that there is a lack of reliable data on actual number of child marriage happening in the society. An effort must be made to collect true marriage data from local government bodies. One of the main activities in this regard is to make birth and marriage registration compulsory. However, it has to go in tandem with massive awareness

campaign and creation of facilities and backup to ensure registration of birth and marriage. Effective monitoring mechanism should also be put in place.

Special attention should be given to causes that make children vulnerable to child marriage. The concerned authorities should take radical steps to make provisions for free education. At the same time, incentives should also be provided to families for continuing the education of girls. A daughter is entitled to equal right to inheritance with the amendment through 'Gender Equality Law 2006.' Even after marriage, property inherited by her, does not have to be returned. This is a great achievement with regard to recognition of woman as an independent citizen. There is a need that the message is disseminated for the purpose of ensuring equal position of girls within the family.

Preventive measures need to be taken with the formation of inspection and protection group, coordination has to be made for providing other support system such as shelter, psychological counseling and, legal representations. Developing capacity of officials engaged in law enforcement agencies such as the line ministry, police, government attorneys and courts is highly required for effective enforcement of laws. Para-legal groups and NGOs working in different parts of the country are increasingly becoming social agents for change. They must also be encouraged to developing networks at district and regional levels for sharing information and establishing better coordination for preventing child marriage.

It is necessary to ratify the Convention on Consent to Marriage, Minimum Age to Marriage and Registration of Marriages, 1962. To take proactive measures to effectively implement the Anti-child marriage law and eradicate child marriage, it is necessary to have special legislation which takes comprehensive, effective and stringent measures to deter of those engaged in child marriage. This will go a long way in the protection of the human rights of the girl child.

Much has been achieved by filing several Public Interest Litigations and getting proactive decisions from the Supreme Court. But, it is not enough. Until and unless such decisions are disseminated, laws are changed, and budgets are allocated to address the problems, these decisions will remain just parchment of papers. Therefore, it is critical for the court to have a monitoring and follow-up mechanism. The protection of children from violence should be the prime obligation of governments. The government agencies should not say it is a separation of power issue. As constitution has given this role to the court to make government accountable in discharging its obligation, the directives of the court should be taken as positive guidelines.

Holistic Approach to Delivery of Legal Aid Services: Beginning from Community Responsive Legal Education and Professionalism

– Dr. Yubaraj Sangroula*

Legal aid service which basically springs form the right to justice and the right to fair trial is an obligation of the state. In Nepal it is being undertaken by different agencies without much benefit to the people who can not afford to pay for the service of a lawyer. In this article the author examines the problem of legal aid service in the context of legal professionalism and education, where he challenges the illusion in law schools and the wrong notions prevailing in the profession. The author argues that the problem rather lies with legal education itself. He also presents the highlights of the academic exercises being undertaken at the Kathmandu School of Law for making legal education socially relevant. In the background he also discusses the clinical legal education initiatives taken by the Nepal Law Campus which was unfortunately discarded later. He then discusses the challenges the innovative clinical programs might face and gives his views on how they could be addressed. The author argues, collaboration between law schools and the Bar is instrumental in transforming the existing traditional legal education and eventually transforming legal profession from 'idealized and insulated professionalism to community responsive one'. He calls law schools to review their policies in order to ensure the entrance of larger number of commoners in the legal profession and to secure widespread participation of law students in social issues.

1. Introduction

Legal profession, which was once considered a noble obligation, is now guided by monetized and elitist concerns where there is almost no space for the marginalized and the indigents. The legal aid which is so vital in promoting access to justice and ensuring fair trial, instead of being considered as basic human rights, is taken as a philanthropic initiative of the Bar. The Bar is not even aware about the rights of the client as consumer of its service. While stereotyped attitudes discourage the new entrants to the Bar, in the absence of contextualization of legal education to social reality the Bar is perpetuating socially obsolete values. What has gone wrong, how can we correct the prevailing parochialism; these are basic concerns of this article. Here, I try to examine the problem of legal aid service in the context of legal professionalism and education, where I try to rub up illusion prevailing in law schools and the profession, make a quick visit of the legal aid delivery service currently being undertaken by the Bar and other agencies and explain fundamental problems of legal education and resultant effects in legal aid delivery service. Following this, I argue why legal aid should be considered a right so connected to access to justice and fair trial. Following this, I present highlights of how the Kathmandu School of

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Law has tried to socially contextualize legal education. In the background a brief discussion is also made about the clinical legal education which was a good initiative taken by the Nepal Law Campus, but later discarded. I then discuss the challenges the innovative clinical programs might face and give my views how they could be addressed.

2. Problems of Legal Aid Service in the Context of Legal Professionalism and Education

2.1 Fundamental Misconception

Affairs concerning delivery of effective and efficient legal aid services to people with conditions of disenfranchisement and deprivation of rights and freedoms are largely determined by and dependent on the 'system of legal education and legal professionalism'. The stereotypical approach that often looked 'legal aid service delivery to people' oblivious of the 'methods and approaches adopted by the legal education and profession' is still pervasive among individuals, organizations and States' departments. Legal aid service is never a 'privilege' of the State, but an indispensable right of the people. In Nepal, for instance, during 1990, the legal professionals, including judges, and State's officials considered 'legal aid as a mercy of the providers'. A few expensive lawyers-turned legal aid counsels took legal aid as 'a philanthropic' work- a job done for old-age satisfaction of life. This notion or philosophy adopted a 'nasty appearance' in the 1997 Legal Aid Act' that granted power to 'legal aid committee to declare some crimes as not eligible for legal aid'. Subsequently, the Regulations adopted by the said committee declared the crimes of 'terrorism, trafficking of persons and narcotic drugs, rape etc' as not eligible for delivery of legal aid services.[1] Observations in South Asian and East Asian countries present the existence of the notion phenomenal, which can be taken as one of the serious 'drawbacks to fair trial as well as impartiality in the civil and tort litigation'. This notion is thus considered as important factors for 'continuous exclusion of disenfranchised and deprived groups from supply and welfare system of the State'.

2.2 Elusion in Law Schools and Professionalism

The conventional or stereotypical notion of legal aid service, the free legal aid as right in particular, is not addressed by the legal education in many countries, whereas many of them have ratified all important human rights instruments that unequivocally recognize legal aid as the human right of persons. While the 'professionalism' operates in the center stage of the curriculum of the legal educational, the development of a concept of legal aid as a fundamental right is it hardly, for many law schools, a goal to achieve. For many law schools, it hardly makes sense to talk about 'the right to legal aid.' Professionalism is widely articulated within the legal community as a 'skill and art' of lawyers for representing the client who has contracted him/her. The obligation of providing free legal aid to needy has never been recognized as an intrinsic value of the 'legal professionalism'. As a matter of fact, writers and commentators from the academy, the judiciary, and the practicing bar make no

[1] CeLLRd/KSL *Laws of Nepal: Incompatible with Fair Trial Standards*, (Kathmandu, Nepal - 2005).

hard attempt to define professionalism from the perspective of rights of persons to obtain adequate and efficient 'legal aid services'.[2] This notion of legal profession is serious factors to hinder the 'institutionalization of the legal aid service delivery' as a core 'concern' of the legal education, which ultimately affects the quality of 'professionalism' itself.

Law students are worse affected by this 'elusiveness' in definition of legal professionalism. Often they are encouraged to define professionalism in very broad and abstract concept that encompasses various professional ideals and qualities, including good judgment, civility, maturity, competence, zealous advocacy, intelligence, honesty, and integrity. This notion completely ignores the 'right of people to obtain legal aid service as a right, and especially the 'free legal aid to poor'. In this paradigm, the more one attempts to define the term, the more diluted and inadequate the definition becomes. Students then find nothing but a vigorous, ongoing debate over the meaning of professionalism.[3] The delusion students are subjected to face concerning the definition of the profession is not only a 'matter of disenchantment' but also a factor to push them into 'a danger of anarchy in belief, disorganized in pursuit of practice and visionless in development of career. It is an undeniable fact that legal professionalism is an elastic concept; and poses difficulty to have universally acceptable definition. Nevertheless, one can come to right conclusion if he/she 'pragmatic approach to see it to suit the need of people rather than the 'idealism'.[4]

Of course, the legal profession comprises some indispensable fundamentals that constitute its foundation. They embrace the realm of ethics, but also reach far beyond. They also encompass principles of 'appropriate attorney conducts and inspirational ideals for an effective and efficient representation'. These qualities are 'essential prerequisites' of a legal aid lawyer. However, the 'effective and efficient representation of poor, disenfranchised, and deprived persons' is not merely a 'professionalism but a mission' of lawyers. The protection from adverse conditions and advocacy of rights to dignified life 'becomes prime concern' for lawyers engaged in 'legal aid services'. At this point, the human rights focusing on 'dignity of persons, humanity and protection of certain basic rights' constitute fundamental ideals of 'legal aid service professionalism', which the law schools must seriously take into account.

In the context of less developed and less literate society where vast majority of people are marginalized, the legal profession also possesses 'responsibility or accountability' to

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[2] Melissa L. Breger, et.al , *Teaching Professionalism in Context: Insights From Students, Clients, Adversaries and Judges, 55 S.C.L. Rev (South Carolina Law Review) 303 (2004)* Lawyers, law teachers, judge and public in general take "professionalism" in law in different tone. For lawyers, it means generally a technical mastery on law practice, whereas for law teachers it means more a 'code of conducts' required by the profession of law practice. Judges view it more in terms of 'lawyers' personality'. The community, on the other hand, takes it as 'legal wisdom or knowledge of law'. While there are a variety of opinions on the meaning of 'professionalism of law practice, there is a world wide consensus that there is perceived decline in professionalism in recent decades. Interestingly enough, legal education is supposed to have diversified and technologically become better than in the past, the assumption of 'decline in legal professionalism' pose a challenge to the

[3] There are myriad of definitions provided for professionalism. For instance, Jerome J. Shestak, President of American Bar Association in 1998, stated that "(a) professional lawyer is an expert in law pursuing a learned art in the service to clients and in the spirit of public service, and engaging in these pursuits as a part of a common calling to promote justice and public well". American Bar Association, *Foreword to* PROMOTING PROFESSIONALIM; ABA PROGRAMS, PLANS AND STRATEGIES 3 919980 Professionalism has also been defined as 'the set of norms, traditions, and practices that lawyers have constructed to establish and maintain their identities as professionals and their jurisdiction over legal work. Robert L. Nelson and David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession, in* LAWYERS' IDEALS/LAWYERS' PRACTICE: Transformations in the American Legal Profession 1, 5 (Robert L. Nelson et. al. eds., 1992). Definition also denotes self-regulation o professional membership and conduct.

[4] "... *In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism,* Report of the Commission on Professionalism to the Board of Governors and the House Delegates of the American Bar Association (August 1986).

protect and preserve general public from subordination to, and subjection by, rulers or elite class. The legal profession in countries like Nepal thus must stand in forefront of 'social and restorative justice'. The fundamental objective of 'legal aid in this context is not only to provide legal representation in institutions but to 'devise strategies to empower capacity of general people to entertain rights to access to justice'. As a matter of fact, to ensure 'access to justice' is the prime goal of legal aid which law schools are expected to address. However, there is a terrible gap in this regard. The following weaknesses, or gaps or lacunae are widely experienced:

1. Curriculum of law schools are not sensitive to 'rights of people to access to justice', and the 'right to legal aid has been considered only as an 'element of due process of law' during the trial or litigation.
2. Bars are not enthusiastic to 'accept legal aid' as mission of legal profession. In contrast, in countries like Nepal, for instance, law practitioners oppose legal aid programs as 'thieves of their fortune'.[5]
3. State and donor agencies are not pro-actively inclined to support reforms in legal education. In Nepal, for instance, neither State nor donor agencies have channeled fund for development of 'strategic legal aid programs', nor 'reforms in legal education'.
4. NGOs often decline to work with Law Schools; rather they prefer to hire people as paralegals from outside of law schools.

The legal education is, therefore, confined to become a 'education of law' not the education of 'justice'. Unfortunately, the dynamics and dimensions of the legal education in the paradigm of 'justice education' are hardly matters of concern for States, Universities and Funding Agencies, particularly in the South Asia region. The discussion on issues of 'professionalism' with its changed context or people's right-based approach hardly concerns them. Any meaningful scheme of legal education should, therefore, make an attempt to teach students about the contextual nature of professionalism.

3. Problems in Legal Education in Nepal in the Context of Legal Aid Service Delivery

Experiences of teaching law over the years in a directly or indirectly government controlled law school have helped the writer to identify the following problems that seriously hamper legal education with regard to the needs of community and qualitative service to the needy.[6]

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[5] CeLRRd had encountered this experience recently. A unit of Nepal Bar Association in Biratnager condemned CeLRRd and some other organizations for their legal aid service, and there was demand from lawyers through their general assembly that 'all legal aid organizations must get out of city'. This statement was released in a press statement.

[6] Kathmandu School of Law, in a students and teachers participatory research, has revealed a series of problems facing the justice system of Nepal. A case study, for instance, reveals the following scenario in relation to 'fair trial'. The Article 14 of the Constitution of the Kingdom of Nepal guarantees 'right legal counsel' as fundamental rights of persons. However, the detainees under police custody are hardly allowed to enjoy this right. Incidents of illegal and arbitrary detention are phenomenal in Nepal. Persons arrested by the police are neither given the 'cause and grounds of arrest' nor the notice of detention. Although the State Cases Act 1993 prohibits extension of remand beyond 25 days, incidents of submission of the charge sheet along the detainee on expiry of the remand limitation are frequent. Nevertheless, in none of the cases petition against such practice is moved to the court. Violation of procedural safeguards of detainees is simply ignored by the defense lawyers. They are found not inclined to 'challenge the legality of the detention', which is a serious violation of the right to fair trial. CeLRRd, *Trail Court System of Nepal*, 2002. Kathmandu.

3.1 Teaching of Substantive Law to Develop Students Knowledge of Legal Principles and Theories:

Law schools are assumed to take charge of teaching professionalism to law students. However, law schools in Nepal are criticized for failing to teach professionalism adequately, if not meagerly. To adequately equip students with 'fundamentals of professionalism', the teaching needs to be carried out by law professors along with practicing lawyers, which is popularly known as clinical legal education method. This method made no appearance in the legal education in Nepal till early 1990s. Obliviously, the scope of teaching law meant nothing but doctrinal instructions of professors on substantive law, the principal objective being to develop students' awareness or knowledge on fundamental concepts and principles of law. This method even failed to address basic requirements of 'developing students' skill in legal analysis, reasoning, and oral advocacy.[7] In its improved form, the doctrinal course emphasizes the ability to "think like a lawyer" and "to make legal arguments, clarify legal issues by adversarial process and choose from among judicial precedents the one most relevant to a particular question of legal interpretation. Thus, students, particularly in their early years of law schools, tended to equate 'legal professionalism' with ability to 'think like a lawyer', and a lawyer was necessarily portrayed as a person who vomited fire when he/she argued ruthlessly in the court rooms.[8] The prospect of 'pro-community legal education' with view to develop capacity of students 'to alternative lawyers, or rights advocates was fully ignored'. This weakness in the legal education 'distanced lawyers from community's need of empowerment' to access to justice.

3.2 Indoctrination of Professors Idealism and Views about Professionalism

As a common phenomenon, law students absorb messages of what it means to be a professional from law professors and cultural influences. How professors behave in class rooms is absorbed as proper professional behavior by students. Law professors, thus, can transmit the wrong message through their manner and conduct both inside and outside the classroom. In Nepal, many law professors believe on 'elitist character of legal professionalism'. What is often taught by them through behavior, joke and regular conversation is that 'legal profession is not fit for women, so-called lower caste people and those who have no 'loud and horrific' speech. Thus, the 'communitarian' character of the legal profession is often ignored or discouraged.[9] His culture of teaching does not

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[7] Mark Neal Aronson in his article *Thinking like a Fox: Four Overlapping Domains of Good Lawyering,* 9 CLINICAL L. REV. 1, 1-2 (2000), puts: "The traditional law school curriculum emphasizes thinking about what the law is and should be". What seriously lacks in traditional methods or curriculum is the emphasis on 'critical and empirical' understanding of the function of law and lawyers' roles in rendering the profession of law practice responsive to community's need.

[8] Lawyers' personality or identity in Nepal, might be similar in other South Asian countries, is portrayed as a 'clever and professionally lie teller'. A genuine, shy, and hard working student is supposed to be unfit for legal education. A lawyer who is soft-spoken and gentle person is not viewed 'proper to be appointed as a legal counsel' by litigant in his/her case. A lawyer is adjudged best one if he/she is 'overwhelmingly' or implausibly strong 'manipulator'. In June 2002, a woman visited me at my office to enquire if her son could apply for LL.B. program. She was extremely interested to get her son 'admitted in legal education', the reason for that being neither his personal interest nor her prudent decision. The sole reason she intended to get her son in legal education was that he was over smart in dealing with people and often engaged in arguments with family members and friends. His quality of "argumentativeness and interest in public dealings" was considered fit for legal profession.

[9] A proverb that 'a horse can not make a compromise with fodder' is popularly used in the classroom. Similarly, it is also popularly said that 'a new entrant in the legal profession should work hard without expectation of remuneration of fees, so he only works but no money. An established lawyer has work and the money both. A senior lawyer has only money but no need of hard work. These kinds of wrong messages passed on to students in the classrooms have seriously affected professional responsibility of lawyers. In Nepal, senior or established lawyers are neither interested in pro-bono service nor appearance in lower level courts fro argument. Hence, in majority of trial level cases the junior lawyers appears with a great risk of miscarriage of justice.

recognize the 'importance of empowered community'. The legal aid service in this context is bound to terribly suffer.

The classroom-insulated traditional legal education is, therefore, responsible for the following pervasive anti-access to justice culture in Nepal:

- Lawyers view that they are in superior or dominant position in attorney-client relation. This condition makes them capable to dictate their clients of the remedy and process to follow for. This is especially true when the client is poor and cannot pay fees, or he/she under free legal aid scheme.
- The relation between lawyers and client is absolutely 'hierarchical'- often lawyers address their clients using derogative and low-status reflective communication. This detrimental for marginalized community to approach lawyers, who largely belong to 'elitist class'.
- Lawyers are not sensitive to the emotional or psychological stress the client is subjected to. The socio-economic and financial impacts of the disputes are generally not the matter of concern for lawyers. Lawyers do not tend to be good friends of people, rather they expect unlimited respect from the community.
- Lawyers are engaged into dealing with clients through their juniors, but charge high fees irrespective of who is directly involved in dealing. If it is a free legal aid case, the senior lawyers do not attend clients.
- Legal profession is viewed as 'elitist' rather than communitarian, so that the tendency of excluding lawyers involved in strategic advocacy of community's interest or rights as legal professional is phenomenal.

These problems of profession negatively affect the community's trust and confidence on legal profession as a 'pro-people and democratic profession'. These wrong traits of lawyers' are directly accountable for 'deeply rooted formalism[10] or dogmatism' taught in universities, and they hinder the process of justice which obviously:

- obstruct unrestricted and easy access to justice for common people, and
- avoid pragmatic approach in making justice.

One can therefore conclude that the sub-standard behavioural pattern facing the legal profession is an outcome of the elitist and formalistic approach to legal education.[11]

3.3 Teaching Law in Idealized Controlled and Insulated Settings:

In Nepal, none of the universities consider linking legal education with development need and rights of the people. The State's longstanding view in our society that investment in justice sector is unproductive severely influences the 'education policy makers', thus

[10] Amy R. Mashburn in *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy, 28* VAL. U.L. Rev. 657-70 (1994) has rightly stated that affluent business lawyers in America had an aristocratic vision; their mission was to establish lawyers as an intellectual elite in the eyes of the public. This trend also equally applies to lawyers practicing public laws like constitution involving political issues. This section through its close political association with politicians is not only keen to form a disguised political 'elite' class of lawyers, but also vulnerable to foster systematic abuse of power by defending vested interests of those in powers. The influence of affluent business lawyers and politically vulnerable lawyers in legal professionalism is a legacy inherited from the west is emerging strongly in legal profession of the developing countries. The legal education in our society is so far largely unheeded to address this problem.

[11] The utility and consequence of the syllabus and teaching methods are hardly considered as a regular part of the academic activities. Law schools are reluctant to conduct social audit of legal education. Demands of consumers of law schools products are not considered at all. Most importantly, law schools are hesitant to take role and responsibility, along with actors of justice system, fostering justice and thus become an indispensable actor the justice system.

pushing the legal education in 'back corner'. Consequently, legal education courses are sparsely reviewed and updated. For instance, the empowerment of women and marginalized groups has been enshrined as a directive principle of the State by the Constitution. Yet, universities' legal education curriculum still fail to include rights to development, adequate standard of living, education, and work as essential components of their legal education curricula. Democracies in our regions talk of 'rule of law and due process'. The fair trial and access to justice are taken as ideals of the governance system. However, law schools seem to be less concerned to orient students in these regards.

Purpose and process of curricula development is governed by "thoughts" of professor's ideologies about society rather than social needs established by empirical lists. Interestingly, in our region the empirical test of the need and impact of the legal education is largely an ignored phenomenon. Law professors' perceived ideas about the 'values and ideologies of law and justice' pre-dominantly influence the purpose and process of curriculum development and teaching methodologies. As such the legal education in our region is controlled by professors' ideologies instead of societal requirements.

Students are insulted within the law schools and hardly have chance to learn more than what professors teaches. The empiricism which promotes 'learning by experience in real or actual work' is deceptively discarded. Some schools making 'innovative way ahead to empiricism through intensified clinical education system' are baselessly criticized for 'westernizing legal education'.[12]

4. Fundamental Problems of Legal Education and Results in Legal Aid Delivery Service:

Based on experience of Nepal, the legal education system manifests (a) lacking of a desire among legal educators and policy makers to develop empiricist and pragmatic approach of teaching focusing on rights to access to justice of people; (b) ignorance, if not apathy, among university policy makers to understand its vocational qualities and special need of special service to marginalized and disenfranchised people; (c) predominance of thoughts that directly or indirectly deny that efficient and meaningful legal education is a pre-requisite to access to justice and foundation of fair impartial and effective justice system; and (d) the absence of motivation and zeal among law teachers to 'popularize or deelitize' the legal education. These manifestations are directly responsible for rendering the legal profession alienated from community. For its lacking of 'community responsiveness' the legal profession is largely idealized and insulated. Interest of people from marginalized groups is less in legal education, but the mission of wider access to justice can not be achieved without bringing more people in legal profession from marginalized groups. The disinclination of Bar Associations to address the widespread need of 'legal aid' is thus an outcome of the legal education which is neither community responsive nor pragmatic.

[12] Those who criticize 'clinical settings of law teaching fail to understand that it provides law students with rich and varied views of professionalism due to the pedagogical structure and wide-ranging practice areas of clinical education. Clinical experiences allow students to explore and discuss theoretical ideals of professionalism in the classroom and then test these ideals in the courtroom as students employ professional behavior with actual cases. One should understand that law schools' teaching should include the subjectivity and contextual nature of professionalism. See, *Supra* note 1.

As a preliminary effort, the problem of 'legal profession's alienation from the community' can be addressed by introducing the 'community responsive' legal education, of which methods and approaches are founded on clinical and community outreach settings of the curricula. To rescue the legal education from present idealized, controlled and insulated condition is the 'first step towards building and institutionalization of the sustainable legal aid program'. By rescuing the legal education from the present condition, law schools can play vital roles in deconstructing the Bar's 'traditional ideals' or 'values concerning the legal professionalism'. Just like the haphazard medical education posing a threat to peoples' life; an inefficient and visionless legal education may seriously affect the prospect of rule of law, access to justice and preservation of human dignity.

5. Recognition of Right to Legal Aid and Access to Justice as Indispensable Right

One can very much see that the legal profession along with the judicial system in Nepal, which might be a truth in other countries in the region, too, is predominantly elitist and influenced by 'hierarchical societal structure'. Legal profession is considered to be an appropriate profession only for the elite class. This deep rooted misconception has seriously affected the process of induction of 'commoners' into the legal profession. Since the profession is 'romanticized' as an indicative of 'high class' status, its concern with access to justice for all and prevention from deprivation of common people is often suspected. Of course, the Bar Associations in the region are found highly sensitive of the 'civil and political rights', which ultimately is a requirement of the 'elite' class. No Bar Association can have meaning of its existence in absence of democracy. The larger community's concern, however, is the economic and social rights or justice in absence of which the civil and political rights have no meaning. The legal aid for elite controlled Bar is thus a 'romanticized' phenomenon too. It has been a taken by lawyers as their benevolence or greatness. Obviously, legal aid has never been taken as ' Bar's obligation to common people.

Community responsive legal education is a right approach to break the 'misconceptions' looming large in the legal professions. Kathmandu School of Law has made attempt to respond to this problem in two ways:

5.1 Access for Deprived or Marginalized Groups of Students to Legal Education

As a mandatory rule of the school, quotas have been offered for students from indigenous/ethnic groups, *dalit,* and tribal community. Students from these communities are provided full scholarship- fee exemption and subsistence allowance. Currently, over a dozen of such students are undertaking on courses at the KSL.[13] All these students come from remote areas of the country. In order to help them successfully and comfortably compete with other students, the school has offered special tuition support in areas like language and other fundamental subjects. As per the agreement between the school and

[13] For detail, see Prospectus 2002.

them these students have to work, at last five years, in their home districts or town. This approach has been assisting the mission of widening the scope of 'strategic legal aid service delivery'. This includes both the service of 'legal awareness and representation, including counseling'.

5.2 Community Outreach of Students

Both the LL.B. and LL.M. courses require students to compulsorily participate in the following community outreach programs:

- **First Year**: Three weeks' field research program introduces students with socio-legal problems of the rural community, e.g. the "witchcraft, untouchability, etc. In this research, students have to make an intensive presentation at the school, and ideas are developed to help devising interventions to address such anti-social problems. Based on such studies, legal literacy activities are implemented by students. Recently, students have been involved in educating marginalized groups of people like Chepang, Mushar, Jiral, Surel, Sattar, Mache, Koche, and so on. They are extremely backward tribal people with no representation at all in any institutions of the government. Many people in such groups have no 'citizenship credentials', and that hinders their participation in public affairs. So students have been mobilized to 'provide legal aid to obtain citizen credentials'.
- **Second Year:** Three weeks' community work, in which students work with various grassroots NGOs for raising legal awareness. These students basically involve in 'campaign against violence against women' in rural villages. As such they are the source information for 'victims of violence' to obtain service from the 'Women Victims of Violence Clinic at the college'. This clinic involves students in research of case and collection of evidence.
- **Third Year:** Students have to undertake human-rights issue based research, e.g. exploitation of girls in brick kiln industries. This year students investigated an issue of 'starvation of mothers' of infant child. It was revealed that in some communities, there was a practice of 'denying food for mothers' for five days after delivery of baby. It was also found many mothers were denied hospital service for delivery simply because they would be given food there. Such practices violate the right to life of both the mother and child. Students are thus engaged in creating atmosphere to 'involve larger number of civil society in the areas to educate people to avoid such anti-human practices'.
- **Fourth Year:** Students work in Prisoners Legal Aid and Women Victims' Legal Aid Programs. This year, students do not visit courts. They work as assistant to legal aid lawyers in the clinic. As such, they visit jails frequently and engage in counseling of clients.
- **Fifth Year:** Students work in the clinic as support lawyers to the Legal Aid Lawyers. They have to visit courts and argue in the court along with their seniors.

These approaches are found effective to develop "community responsiveness" in the legal education structurally. These approaches ensure both the induction of marginalized community into the legal profession and expose students to the larger community interest of justice. KSL, together with CeLRRd, Pro-Public and pro-community

members of Bar Association, takes these approaches as foundation for consolidation and sustainability of "pro-bono" or free-legal aid scheme in a society like Nepal, where State hardly funds legal aid programs.

5.3 Training and Continuous Legal Education for Lawyers

This is another approach to strengthen free-legal aid scheme by lawyers. KSL is cooperating with Bar Council in this regard. The latter has initiated a program to train fresh group of lawyers by KSL. As per the Bar Council Act, a law graduate has to pass the "bar exam' to join the legal profession. Once they obtain practicing license, the incumbents must undergo a training program. KSL has been doing this training every year after the new induction takes place in the Bar. This training is a good opportunity to inculcate the ideas of 'societal and ethical responsibilities of lawyers.' KSL has effectively utilized the platform to sensitize young lawyers' interest to embark into *pro-bono* lawyering as a part of their regular profession. A negotiation with many lower court units of Nepal Bar Association is currently going in order to introduce a continuous legal education for senior lawyers. All these activities target to 'reorient the legal professionalism contextually with emphasis on empowerment of deprived people to access to justice'.

Implementation of Clinical Legal Education Program has been a 'sound basis for strengthening of the community responsive legal professionalism'. In Nepal, a group of young law teachers during early 1990s raised voice to immediately initiate efforts to update legal education system. It was their efforts that helped the process of transformation of traditional teaching methods initiated towards clinical settings. This, on the other hand, encouraged students to become 'reflective practitioners', conscious of the human impact of their works. Opportunity to work in actual conditions of life would expose students to understand the problems of the society, individuals and state and their interrelations. This method would then help students to 'contextualize and humanize' their profession.

Clinical Legal Education Program was introduced in Tribhuvan University Law Campus in 1991. The enthusiasm of the younger generation of teachers to revamp legal education through clinical setting was, however, one of the less desirable events among many senior teachers and college administrators[14].

As early as 1970s, Nepal Law Campus, the government funded law college in Nepal, made an attempt to introduce some elements of clinical legal education system. Author of this article was the last group of students to benefit from it. But for lack of university and State's cooperation, the program collapsed in few years. In late 1990s, a group of law teachers in Tribhuvan University reinstated the program. But it too failed in few years. Thanks to the collective efforts and commitment of the group, establishment of

[14] The program had to face the dislike of senior teachers from the day of its inception. Senior law teacher's cynicism to change the traditional paradigm was one of the most frustrating experiences. Many of them took it a threat to their 'self-esteemed credibility' and entrenched practice of hierarchical relations between teachers and teachers and students. Few excuses put forward were that the method was financially not-sustainable; academically less adept; and managerially not feasible. These excuses were, however, mere reflection of cynicism to move for change. It can also be said as 'entrenched love to status quo'. The cynicism was also a reflection of the contradiction between "idealism vs. pragmatism" and "status quo vs. change". The team involved in the program, effectively resisted challenges, which provided enormous source of inspiration to go ahead. However, the environment did not remain congenial for a long time for continuation of the program. In 1995, the program virtually collapsed.

Kathmandu School of Law has been a dream materialized, which offers a changed environment for learning through 'convergence of classroom-learned knowledge into actual practice'. A few characteristic interventions of curriculum are:

5.3.1 Reflecting Upon Professionalism

This paradigm provides lively interactions of students with clients, adversaries, judges, bar members and clinical teachers, and such interactions in turn allow students to come face-to-face with the impact of their work, providing valuable opportunities to reflect upon professionalism issues.

5.3.2 Interrelationship between Professionalism and Skills

Students have opportunity to learn fundamental lawyering skills and values. Students thus obtain skills about advocacy, communication, interviewing and negotiation. Related component in this regard is the teaching professional ethics which address issues of professional zeal, loyalty, accountability, civility, etc.

5.3.3 Exposure to the Contextuality and Core Values of the Professionalism

Students are taught about contextual nature of professionalism. They are motivated and encourage to use their zeal, loyalty, judgment, expertise, excellence, dedication, competence and civility (core values listed) for the development and strengthening of 'young democracy, rule of law, human rights culture, accessibility of justice and protection of marginalized groups through group actions", which constitute the 'core contexts' of the Nepalese society. Through this aspect of teaching, students are inspired to be 'Good Persons" not "only Good Lawyers". Involvement in "legal aid service" and "lawyers' activism" in protection of human rights, environment and defending democracy are highlighted.

6. Challenges and Innovative Clinical Programs

As outlined above, a series of research activities over a decade has identified the following problems in the context of legal profession and its contribution towards strengthening of access to justice, fairness and impartiality of justice and promotion of human rights culture:

- Conservative attitude looms large in the judiciary to apply activism in protection and promotion of human rights. A study shows that over 50% of criminal trials still go unrepresented by legal counsel,[15] and representation of poor in the judicial process in civil cases is out-balanced.[16] Courts are still very much reluctant to recognize the 'lacking of compulsory representation of legal counsel' a violation of due process of law. Legal aid is thus still only a 'great dream' in Nepal. The reluctance of the judges to depart from 'traditional formalism' is a serious obstacle to achieve an unrestricted opportunity of legal aid.
- Lawyers are less inclined to *'pro-bono'* legal aid, especially senior lawyers' have very little time to offer such service. Senior lawyers are more inclined to 'political

[15] CeLRRd, "Reform and Analysis of Criminal Justice System of Nepal", 1999. p. 90.
[16] Nepal Law Society, "The Judiciary in Nepal: A National Survey of Public Opinion". November 2002.

opportunity' than the 'legal aid service to poor'. Many activities of the Bar concerning legal aid in the past have failed to produce desired results due to less sensitivity concerning 'pro-bono' service to the people.

- Ethical standards of legal professionals are often seriously questioned by the civil society.
- Legal aid support generally encompasses the "areas or issues of civil and political rights and overshadows the representation of the issues of economic, social and cultural rights.
- Bar association's concern to 'update legal education so that contextual professionalism' could be developed is less obvious. It is more concerned with interests of lawyers than strengthening of the Bar through involvement of 'youth potentials'.

These problems are largely the outcome of the 'system of education'. Failure to train lawyers aware of 'societal or national context of legal professionalism' in law schools is indispensably bound to generate problems discussed above. Kathmandu School of Law (KSL), being aware of these challenges or problems' has been playing a crucial role in following interventions:

a) Networking of Legal Aid Lawyers:

With Center for Legal Research and Resource Development (CeLRRd) and Danish Institute for Human Rights (DIHR), KSL has embarked into an action of 'developing a national network of legal aid lawyers', which may maintain a 'working relation with Nepal Bar Associations in order to cooperate with the latter for institutionalizing the national legal aid program. A significant number of members of the network come from various units of the Bar itself. KSL has been an active partner of the network, which is known as "National Legal Aid Network" (NaLAN).[17]

b) KSL's Clinical Programs:

KSL runs the "Prisoners Legal Aid Clinic", which currently provides service to over 600 indigent prisoners from and around the Kathmandu Valley. The service is available to 5 prisons, comprising about 2500 inmates. In KSL Prisoners' Legal Aid Clinic, four full time lawyers with 3 part-time lawyers operate the daily business, where students are involved to assist lawyers. Major roles of students include visit of jails along with lawyers to interview clients and to brief the current development of the court process; to prepare memorandum and conduct research of the case; and assist lawyers in representation of cases at court.

c) Service for Women Victims of Violence and Trafficking:

In 2001, in tiny financial support of the UNESCO, CeLRRd introduced a Hotline and Legal Aid Service to the women victims of violence and trafficking at KSL. This program now, in 2004, has fully taken over by KSL, which is fully managed by LL.M.

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[17] KSL with network plays vital role in offering training skills and values of legal aid. The training offered by KSL includes, *inter alia*, components:

- Use of international human rights instruments in courts for defending rights of people
- Special responsibilities and code of conducts of legal aid lawyers, with focus on public defense system
- Special skills of legal aid lawyers
- Managerial skills implementing legal aid scheme

students, mostly women students. This clinic functions as a part of the Women Studies and Development Center of KSL.[18]

7. Conclusion

It is viewed that 'the development of a community based strategic legal aid scheme' is dependent on teaching approach taken by law schools to train lawyers. The 'meaning and dimensions' of the legal professionalism taught by law schools are largely the determinants of the 'success or failure' of the legal aid service delivery scheme. It is obvious that government in a country like Nepal is hardly interested to put money on enlarged and widespread legal aid programs. Obviously, most of the legal aid programs are funded by foreign donors, and thus are at risk of collapse once the funding stops. The legal aid program implemented by Nepal Bar Association is an example, which could not become sustainable even after 12 years of funding by Norwegian Bar Association.

It is an entrenched fact that the law schools have largely failed to view the instrumentality of the legal aid to ensure 'access to justice'. No legal aid scheme is thus possible to be sustainable without addressing the 'contextuality' of the legal profession. The 'romantic objectives and paradigms' of the legal education system in our region are an obstacle for 'communitarian legal professionalism'. However, the failure to see this aspect of problem by funding agencies and NGOs is also equally responsible for this problem.

Preparation of young generation of lawyers to take the 'socially responsive' legal professionalism is a 'beginning to build a plausible edifice of the community based-legal aid'. This approach necessarily calls for definition of 'legal aid' as a basic human rights related to access to justice. The new generation of lawyers, therefore, needs to be trained along these lines, and they need to be linked up with national legal aid network as the focal organization.

The collaboration between Law Schools and Bar Associations is instrumental in transforming the existing traditional legal education into a pragmatic setting and eventually transforming the legal profession from 'idealized and insulated professionalism to community responsive one'. Law schools for building "typical contextual legal professionalism in the South Asian region' have to review their polices and programs in order to ensure increasingly larger number of 'commoners' in the legal profession and to secure widespread participation of law students in social issues.

[18] The clinic locates in the down town as well as college premise. The service provided by the clinic is called "critical legal aid service", beneficiary, by telephone or personally, approach the attendant student lawyer for primary counseling. Most part of the works carried out by this clinic is related with immediate legal problems. For instance, women visit this clinic if or when there are legal problems. The husband, for instance, is engaged with extra marital relation. The wife approaches the clinic for counseling. She is then properly advised concerning the legal solution or steps to be followed. This clinic works in close relation of Women Police Cell. Whenever, the Police support is required, the service is immediately obtained. This helps to 'effectiveness of the service'. Obviously, this program is highly popular. LL.B. students are not engaged in this program considering the nature of 'professional expertise required and the issue privacy involved'.

Legal Practitioners in Australia and Their Duties: An Overview

– Shamser Singh Thapa[N]

More than a personal story of the lawyer who has rich experience of practicing in two different jurisdictions, the note presents a kaleidoscopic view of the obligations of legal professionals and their duties to the clients, courts, colleagues and society. It deals with matters such as conflict of interest, court etiquette, legal professional's privilege, explains in details various provisions of the Legal Professionals Act of New South Wales of Australia where numerous issues which are foreign to the Nepali legal profession such as the client's right against the lawyers for overcharging, their right to know in advance how a solicitor or barrister would charge for the costs, the obligation to disclose the basis of the cost of legal service, and provisions for reimbursement of the unwarranted cost that the client had to unjustly bear through various founds such as Solicitor's Fidelity Fund, Solicitors Mutual Indemnity Fund are explained.

1. Introduction

In developing countries like ours the legal profession is basically unregulated where the lawyers charge any amount they like to the client. The attorney-client relation is undefined due to which an asymmetrical relation exists. Even serious complaints against the lawyers remain lingered for years. How is this profession regulated in other jurisdictions is a common concern of many lawyers and clients groups in Nepal. Having had the rare distinction of practicing in two jurisdictions, I present here how the legal profession is regulated in Australia and what duty lawyers have to their clients, and what strategies the professional groups have made to pay for the cost that lawyers owe to client. The New South Wales law on the subject is brought for discussion with the belief that it will give food for thought for those concerned with regulating legal profession in Nepal.

2. Personal Experience in Nepal

When I was admitted to practice law as an Advocate in the Supreme Court of Nepal in 1991, I was under the impression that I was fully trained to practice law. I was involved in legal practice until October 1995 when I left Nepal for further studies. At all times, I believed that I was providing professional services to my clients.

[N] BL (TU) GDLP (Sydney), LLM (UWSN) Solicitor, Barrister and Migration Agent.

3. Personal Experience in Australia

As I had enrolled myself for LL.M studies, I began work for a Law Firm in Sydney on part time basis in November 1995. I was welcomed by my employer into the legal community. However, even after completing LL.M the Law Society required me to complete certain academic subjects and practical training.

While I was confident to undertake the tasks assigned to me, I was lagging behind to comply with the ethical part of the practice, albeit I was not involved in any unethical act. In saying so, I must clarify that I had never been trained in Nepal as to the obligations of the legal professionals and their duties to the clients, courts, colleagues and society. I had never heard of a Trust Account. In Nepal I would collect monies from my clients even without issuing proper receipts. I did not know about indemnity insurance and liability of the legal practitioners under negligence or torts etc.

After meeting the Academic Requirements, I was compelled to undertake a Graduate Diploma in Legal Practice, which was run by the Law Society, to obtain admission as a legal practitioner in New South Wales (henceforth NSW) and Australia. The course involved training in maintaining Trust accounts, Office Account, and Controlled Money etc. The course also dealt with ethical concerns such as conflict of interest, court etiquette, legal professional privilege and so on.

4. Introduction to Legal Ethics: An Australian Perspective

A legal practitioner is bound by the general principles of professional conduct. In Australia, each practitioner must:

- Act in accordance with the general principles of professional conduct.
- Fulfill obligations in relation to the administration of justice.
- Supply legal services of the highest standard, unaffected by personal interest.

Legal practitioners have to balance duties to the law, the court and the client.

4.1 Duty to the Law

Legal practitioners are part of the administration of the legal system. They may not agree with some of it, and are entitled to lobby for its reform, but they must obey the existing laws.

4.2 Duty to the Court

Legal practitioners must act with honesty, integrity and candor and must discharge all duties owed to a court or tribunal, including undertakings.

4.3 Duty to the Client

Legal practitioners must act with due skill and diligence, reasonable promptness and courtesy, while maintaining a client's confidences and avoiding conflicts of interest. Sometimes it is hard to fit these obligations together. Boundaries become blurred and

ethical dilemmas surface. Duties are also owed to other practitioners, to third parties and the wider society.

5. NSW Legal Profession Act: How Does it Regulate the Legal Profession?

Legal Profession Act 1987 of NSW has clear provisions to regulate the legal profession and practitioners are expected to maintain the highest standards of integrity, honesty and fairness. The following are some of the provisions:

- Duty to the court is paramount and superior to the duty to client. Counsel must be honest at all times with the court, even if it is to the detriment of his or her client;
- There is also a duty not to strive for a conviction at all costs;
- Duty to aid in the attainment of justice;
- Duty to avoid prejudice arising in the minds of the jury;
- Duty to provide material which is relevant to the prosecution of the accused; and
- Legal Professionals must not argue a proposition which he does not believe will contribute to a finding of guilt or carries weight.

5.1 Practitioner's Obligations to a Client in Relation to Charging of Fees and Disbursements

Clients have a host of rights under Legal Profession Act against client of a barrister or solicitor. For instance:

- The client is to be given information about how a barrister or solicitor will charge for costs for legal services and an estimate of the likely cost of legal services.
- The client need not pay the barrister's or solicitor's bill until it has been assessed by a costs assessor if the client is not given the information about how costs will be charged.
- The client is not liable to pay interest on unpaid costs unless notice that interest will be charged is set out in the bill of costs.
- Proceedings against the client for the recovery of costs cannot be brought unless a bill of costs in the proper form has been given to the client and at least 30 days have passed.

5.2 Obligation to Disclose

Disclosure in writing of the information specified in the Act is mandatory. The information relating to legal practitioners costs which a practitioner is required to disclose to a client is as follows:

1. A barrister or solicitor must disclose to a client the basis of the costs of legal services to be provided to the client by him/her.
2. The following matters are to be disclosed to the client:
    - The amount of the costs, if known,
    - If the amount of the costs is not known, the basis of calculating the costs,
    - The billing arrangements,
    - The client's rights in relation to a review of costs,
    - The client's rights to receive a bill of costs,

- Any other matter required to be disclosed by the regulations.

3. The disclosure to a client is not required to be made by a barrister or solicitor who is retained on behalf of the client by another barrister or solicitor. However, the disclosure to the client needs to include the costs of the barrister or solicitor so retained.

Also, the Act requires that, in any event, the practitioner must disclose an estimate o the likely amount of costs of legal services for that matter. Under very limited circumstances, disclosure is not required when it would not be reasonable for the practitioner to be required to do so.

5.3 Rate of and Approach to Charging

It has been explained by Ipp J: "the client's position is fraught with uncertainty; he is susceptible, to a large degree, to the subjective decision of the solicitors, and he is dependant on the exigencies of the practice of the solicitors- something about which he knows nothing"[1]

In NSW the criteria of fairness and reasonableness have been replaced with the criterion "unjust". In determining whether a term of a costs agreement is unjust, a costs assessor is directed to have regard to the public interest and to all the circumstances of the case. In making the determination, the legislation provides a list of factors to which the assessor may have regard.

First, the assessor may inquire into the relative bargaining position, economic circumstances, educational background and literacy of the client to the practitioner. Such inquires may include whether:

- It was reasonably practicable for the applicant to negotiate the provisions of the agreement;
- The agreement was the result of unfair pressure, undue influence or unfair tactics; and
- Any party to the agreement was reasonably able to protect her/his interests by reason of age, or physical or mental condition.

The consequences of non-compliance with the agreement may also be considered.

Secondly, the assessor may examine the terms of the agreement to determine whether those terms impose conditions that are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of the client. In this context the form of the agreement and the intelligibility of its language may also be relevant considerations.

Thirdly, there is the matter of disclosure, namely, the extent to which the legal and practical effect of the agreement was accurately explained to the applicant, coupled with the applicants understanding thereof.

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[1] *D'Alessandro* v *Legal Practitioners Complaints Committee* (1995) 15 WAR 198 at 214.

5.4 Preconditions for Suing the Client for the Recovery of Unpaid Legal Costs

Where a practitioner fails to make the disclosure required by the Act, the client need not pay the costs of the legal services and the practitioner cannot maintain proceedings for the recovery of costs, unless the costs have been ascertained by assessment. A failure to disclose estimated costs pursuant to *the Act* is capable of being unsatisfactory professional conduct or professional misconduct.

Legislation in all Australian jurisdictions prohibits a practitioner from commencing any proceedings for the recovery of costs due to her or him until there has been delivered to the client a bill of costs therefore. Similarly, a practitioner cannot commence proceedings within 30 days of the delivery of the bill of costs. In NSW practitioners are required to inform clients of the right to receive a detailed bill of costs; and to seek revision of the bill.

5.5 Recourse Against a Solicitor's Bill of Costs

The Act provides the basis of entitlement of a person who is the "client" of a legal practitioner to apply for the assessment of a bill of costs received from the practitioner.

The right to apply for assessment of a bill of costs is limited, by *the Act,* to a client who is given a bill of costs.

The Act defines, for this purpose, the word "client" to include any person who is a party to a costs agreement relating to legal services for which the bill of costs is given, other than a barrister of solicitor who gave the bill or provided services.

A cost agreement, as defined by the act, is an agreement as to the costs of the provision of legal services "made with a client" by the legal practitioner, retained directly by the client, or the barrister or solicitor, retained on behalf of the client, by another practitioner.

The Act provides that a client who has been given a bill of costs may apply to the proper officer of the Supreme Court for an assessment of the whole, or any part, of the costs.

5.6 Overcharging

The charging of extortionate or grossly excessive costs by a lawyer may amount to professional misconduct.[2] The Act provides that "the deliberate charging of grossly excessive amounts of costs and deliberate misrepresentations as to costs are each declared to be professional misconduct. The Act casts a duty upon costs assessors who consider that there is a case of charging "grossly excessive amounts of costs" to refer the matter to the legal service commissioner. In every case the relevant inquiry is whether the lawyer has charged fees grossly in excess of those which would be charged by lawyers of good reputation and competency.[3] What the court or tribunal will do is hear evidence or otherwise inform itself about what would be an approximate reasonable fee or range of fees for the work in question, compare that with the actual charge, and then decide whether the difference is so gross as to amount to misconduct.[4]

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2 *D'Alessandro* v *Legal Practitioners Complaints Committee* (1995) 15 WAR 198 at 214 per Ipp J.
3 *Re Melvey* (1966) 85 WN (Pt1) (NSW) 289.
4 *De Pardo* v *Legal Complaints Committee* (2000) 170 ALR 709 at 738 per Carr J.

5.7 Duty of Confidentiality

Inherent in the relationship between lawyer and client is the duty of the lawyer to maintain inviolate the confidences of clients[5]. This duty is designed to encourage full and frank disclosure between client and lawyer, in that clients can seek and obtain legal advise without the apprehension of being prejudiced by its subsequent disclosure[6]. Allied to this is the resulting public confidence in legal presentation and the legal system. Confidentiality also serves to insulate lawyers from the temptation of profiting from information provided by clients. Moreover, the duty of confidentiality has a heuristic value as a reminder to lawyers of the loyalty they owe to their clients.[7]

The duty of confidence is based in an amalgam of contract and equity stemming from the peculiar relationship of lawyer and client. Regarding the former, it is accepted that the duty of confidentiality is an implied term of the retainer agreement[8]. The obligation of confidence also stems from the fiduciary relation between lawyer and client[9]. The relevant fiduciary responsibilities proscribe the lawyer from using the confidence for her or his own benefit ("no profit" rule) or for the benefit of another client ("no conflict" rule).[10] The fiduciary duty, to the extent that it relates to the use of confidential information, survives the termination of the lawyer-client relationship[11] and the death of the client[12].

The equitable doctrine of confidential information, which casts on confidants the duty not to disclose or use confidential information for a purpose inconsistent with the purpose for its communication, also underlies the lawyers duty of confidence. In its application to the lawyer-client communications, it is presumed that all such communications are confidential.[13]

5.7.1 Information Obtained Through Impromptu Legal Advice

The professional practice and procedure impose on solicitors a requirement, consistent with the principles of the general law, not to disclose, during or after the termination of the solicitor's retainer, information confidential to a client acquired during the currency of the retainer.[14]

Whether or not this extends to legal advice obtained at a social function through impromptu legal advice. Generally the answer is no. In a scenario where the advice was given without the "fellow guest" entering into a retainer with the solicitor pursuant to the general law and the professional practice & procedure rules, it is highly likely that the information would not be considered confidential.[15]

The moral issue here is that only information of the client is ever treated confidentiality, and people such as the "fellow guest", are not given the protection of the client-lawyer relationship.

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5 *Baker* v *Campbell* (1983) 153 CLR 52 at 65 per Gibbs CJ.
6 *Fruehauf Finance Corporation Pty Ltd* v *Feez Ruthning* [1991] 1 Qd R at 558 per Lee J.
7 Dal Pont. G, Legal Professional Responsibility, (2001) LBC, Sydney at 263.
8 *Unioil International Pty Ltd* v *Deloitte Touche Tohmatsu* (1997) 17 WAR 98 at 108 per Ipp J.
9 Marriage of Griffis (1991) 14 Fam LR 782 at 785 per Mullane J.
10 *Australian Rugby Union Ltd* v *Hospitality Group Pty Ltd* (1999) 165 ALR 253 at 264 per Sackville J.
11 *Allinson v General Council of Medical Education and* Registration [1984] 1 QB 750 per Mullane J at pg 786
12 *Gartside* v *Sheffield, Young and Ellis* [1983] NZLR 37 at 49 per Richardson J.
13 Marriage of Griffis (1991) 14 Fam LR 782 at 785 per Mullane J.
14 Of course there are exceptions to this rule.
15 Riley (ed.), Trust Money and Controlled Money Solicitor's Fidelity Fund, at p. 344.

5.7.2 Information obtained in an initial lawyer/client interview

Generally speaking, it is imperative that the lawyer is retained in order for confidentiality to be afforded to the client[16]. The duty of maintain confidential information only extends if a retainer is entered into.

5.7.3 Communications between a Lawyer and a Third Party

An exception to the rule that lawyers should keep confidential all personal information received from clients is if a client waives their right to disclosure[17]. However, if the client does not waive their right to disclosure, then information must still be keep confidential.

For example, merely because privileged communications take place in presence of non-clients (i.e. the 'third party') does not mean there was any loss of confidentiality if the disclosure was limited to those present and non-clients were under an implied obligation to respect their confidentiality[18].

5.7.4 Advice given in Non-litigious Matter

The confidentiality rule would still extend to non-litigious matters as long the information was acquired during the currency of the retainer[19].

5.7.5 Information Obtained From a Client

As to the information obtained from a client for her case which is relevant to the clients refusal to pay her legal fees the issue is whether confidential information obtained by a client (i.e. lawyer was retained) can be used for the lawyers own interests i.e. to have the client pay her legal fees.

Lawyers have an ethical obligation not to take advantage over their clients. Thus lawyers should not use privileged or unprivileged information to the disadvantage of their client or for their own selfish ends[20]. To this extent, confidential information of the client would be considered to be protected by the confidential rule.

However, an exception to this rule is when lawyers have to defend themselves against a charge or compliant of criminal or professional misconduct, usually instigated by a client[21]. So if the client in this circumstance did not pay her legal fees and court proceedings were instigated (i.e. the client felt the charges were grossly excessive) then the confidential information relating to the legal fees could be revealed (this is strictly limited to the subject matter[22]).

5.7.6 Upon the Death of the Client?

The duty to maintain confidences survives the termination of the lawyer-client relationship[23] and the death of the client[24].

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16 Professional Practice and Procedure Rules 2.1.
17 *R* v *Bathgate;* Bar Rule 63
18 *Australian Rugby Union Ltd* v *Hospitality Group Pty Ltd* (1999) 165 ALR 253 at 263 per Sackville J.
19 *R* v *Bathgate;* Bar Rule 63
20 Supra note 16, at 10.1.2.
21 Supra not 16, at 2.1.2.
22 *Lillicrap* v *Nalder and Sons* [1993] 1 WLR 94.
23 *Allinson v General Council of Medical Education and* Registration [1984] 1 QB 750 per Lopez LJ at pg 786
24 *Gartside* v *Sheffield, Young and Ellis* [1983] NZLR 37 at 49 per Richardson J.

5.7.7 Circumstances for Breaking Confidentiality

The attorney may disclose confidential information if the client authorizes disclosure[25], the solicitor is permitted or compelled by law to disclose[26], or unless disclosure is necessary to avoid the probable commission or concealment of a felony.[27]

Another exception is where confidential information becomes public knowledge and, therefore, it is not necessary to maintain the protection. For example, if a client chooses to communicate with her or his solicitor in public, there are grounds for concluding that the client does not intend the conversation to be confidential[28].

6. Money Matters

6.1. Contingency Fee

A contingency fee arrangement is an agreement pursuant to which the payment of a lawyer's fee is contingent on a specified event, usually the success of the litigation.[29] There are three types of contingency fee agreements;

- Speculative (or conditional), a lawyer takes her or his usual fee only in the event that the action is successful;
- Uplift (or success) fee arrangement entitles a lawyer to receive, in addition to usual fee, an agreed flat amount or percentage uplift of the usual fee; and
- Percentage fee, a lawyer receives as fees an amount calculated as a percentage of the amount won.

6.2 Trust Money

Under the Legal Profession Act, "trust money" is money received by a solicitor on behalf of another person[30] which is not the subject of a contrary direction from that person of the kind described in the Act must be paid by the solicitor, within the time prescribed by the regulations, into a general trust account in New South Wales at an approved financial institution.

Any amount received by the lawyer from the client should be deposited into Trust Account. The lawyer can transfer his or her fees into their office account upon receiving clients' authority after issuing tax invoice to the client.

6.3 Controlled Money

Under the Legal Profession Act, "controlled money" means money required to be dealt with while under the direct or indirect control of the solicitor by whom or on whose behalf it is received, is for the time being held otherwise than in a general trust account at an approved financial institution[31].

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25 Supra note 16, at 2.1.1.
26 Supra note 16, at 2.1.2.
27 Supra note 16, at 2.1.3.
28 *Gotha City* v *Sotheby's* [1998] 1 WLR 114 at 119 per Staughton LJ.
29 Dal Pont. G, Legal Professional Responsibility, (2001) LBC, Sydney at 263.
30 Legal Profession Act, 1987 (NSW) S. 61(1)(9).
31 For this topic see Mackey. W, *"Some thought on a more humanistic and equitable legal education,* ALR, Vol 33 No 4 (1995)

The Act provides that if a person on whose behalf he/she receives money directs that money should be paid as directed otherwise than into a general trust account or to a third party, the money must be paid as directed.

6.4 Records to be kept in Respect to Client's Moneys and Investments

As to what records must be kept in respect to client moneys and investments held by the firm, the Act provides that monies received by or for clients, must be held in trust for the client. These include normal accounting, Trust account records, Invoices and Receipts.

6.5 Solicitor's Fidelity Fund

The Solicitors Fidelity Fund protects the public from incompetent or dishonest practitioners and provides an obvious public benefit. The fund consists of the annual contributions or levies paid by solicitors; the contributions of locally registered foreign lawyers; income accruing from investment of the fund's money; payments from the Public Purpose Fund and any other money lawfully paid into the fund[32].

6.5.1 Establishment and Administration of the Fund

The Act contains the provisions for the establishment, maintenance and administration of the Solicitors Fidelity Fund. The Act declares the fund to be the property of the Law Society to be administrated by the Law Society Council and applied in accordance with the provisions of the Act.

All solicitors, who apply for an annual practicing certificate in New South Wales[33], are required to pay a contribution to the Fidelity Fund for the year ending on 30 June during the practicing certificate is to be in force. The purpose for which the Fidelity Fund is to be held and applied by the Law Society is to compensate persons "who suffer pecuniary loss because of a failure to account or a dishonest default[34]".

6.6 Solicitors Mutual Indemnity Fund

The Solicitors Mutual Indemnity Fund was established in 1987 as a mutual fund because of difficulties encountered by solicitors in obtaining professional indemnity insurance. It has considerable reserves, which are beneficially owned by members of the Law Society.

6.6.1 Establishment and Administration

Both solicitors and barristers are required to hold a professional indemnity insurance policy which has been approved by the Attorney General[35]. The insurer is not specified by the Law Society or the Bar Council. However, all solicitors are required to contribute to the Solicitors' Mutual Indemnity Fund (SMIF)[36]. The purpose of the SMIF is to pay the difference between an indemnity provided by an insurer to an individual solicitor and the amount of a claim made against the solicitor[37].

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32 Riley (ed.), *Trust Money and Controlled Money Solicitor's Fidelity Fund*, p. 344.
33 For exceptions, See Legal Profession Act, 1987 (NSW) S. 76(5) and Legal Profession Regulation, 1994 cl. (20).
34 Supra note 30, S. 80(1). See also Supra note 32, p. 344.
35 *Id,* S. 41 and 38 R.
36 *Id,* S. 40.
37 *Id,* S. 44.

6.6.2 Principal Causes of Claims against the Fund

A claim against the fund is principally for the purpose of compensating persons who suffer pecuniary loss from a failure to account or are dishonest default.[38]

6.6.3 Complaints about Solicitors and Barristers

The most common complaints of the clients relate to the dealing with the handling of trust account. Fees are the most common complaint.[39]

6.6.4 Processes adopted by the Legal Services Commissioner to deal with complaints:

The Legal Services Commissioner (LSC) deals with the following types of complaints.

- 'consumer' type issues
- professional conduct

The office of the LSC co-operates with the Bar association and the Law society in the investigation of the complaints.

Those which are consumer related are dealt with in conjunction with the information and mediation services.[40]

Those which involve serious misconduct by practitioners are dealt with in disciplinary proceedings by the Legal Services Division of the Administrative Decisions Tribunal under the Act.[41]

7. Professional Misconduct

Professional misconduct at common law is defined as behaviour on the part of a practitioner which would reasonably be regarded as disgraceful or dishonorable by her or his professional brethren of good repute and competency.[42] .

The statutory professional misconduct includes conduct that involves substantial and consistent failure to reach reasonable standards of competence and diligence[43], or conduct (act or omission) that would justify finding that a legal practitioner is not of good fame and character or is not fit and proper person to remain on the roll of legal practitioner[44], or conduct declared to be professional misconduct by any provision of the Legal Profession Act 1987[45].

7.1 Difference with Unprofessional Conduct or Unsatisfactory Professional Conduct

Professional misconduct concerns serious allegations of professional misconduct and is determined by the disciplinary tribunal. Unprofessional conduct falling short of serious

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38 Supra note 32, p. 344.
39 Note extract by The Legal Services Tribunal, Graph 8, p. 351 of materials.
40 Supra note 30, S. 143-147.
41 *Id,* at S. 155.
42 Re Veron (1966) 84 WN (Pt1) (NSW) 136 at 143 (CA).
43 Supra note 30, S. 127 (1)(a).
44 *Id* at 127 (1)(b).
45 *Id,* S. 127 (1)(c).

professional misconduct i.e. complaints of delay, negligence and other matters, are determined by the Professional standard board (Law society).

7.2 Professional Negligence

Lawyers owe a duty of care to their client in respect of professional work which prima facie transcends to that contained in the express or implied terms of contract between them and includes the ordinary duty of care arising under the common law of negligence[46].

Professional negligence, therefore, has the distinction of giving rise to civil action under the common law of negligence. The conduct of the lawyer could also concurrently fall under professional misconduct or unsatisfactory professional conduct.

8. Conclusion

In various sections I dwelt on matters relating to professional conduct of solicitors and barristers in Australia. The parameters of legal professions are well laid down in Australia as they are in any common law jurisdiction in the West. Any authority which issues practicing certificates to the legal practitioners must ensure that they are well trained and well versed with the pros' and cons' of this profession. They should be made aware of continuing legal education. Unless they are well educated and trained, they would not be able to serve the community as social engineers.

If the clients' rights are to be protected in Nepal they need to be protected by enacting laws that which enable them to sue the practitioners for breaching their duties or negligence. Lawyers are held accountable for their actions to ensure the highest of quality standards and maintain trust in the profession. Conversely, client should be prevented from making frivolous and vexatious claims. As Nepali legal system has a close proximity to the common law system, reference might be made to the Australian experiences in regulating legal profession.

[46] *Hawkins* v *Clayton* (1988) 164 CLR 539 at 574.

Research and National Judicial Academy: A Short Note

– Shreekrishna Mulmi*

Judicial education and research have been the recent concerns for the change and development of the modern judiciary for which National Judicial Academy (NJA, henceforth) was established in Nepal in 2004. The author looks back to the past reform initiatives of the judiciary. He also gives a brief highlight of the research and publication activities undertaken at the NJA. During the course of discussion, he also presents a short account of the on-going research and publication activities. At the end of the note, the author presents issues and challenges for strengthening and institutionalizing research initiatives at the NJA.

1. Introduction

The intellectuals are always inclined to probe facts of the empirical world, confirm truth and further investigate by accepting or correcting the existing theories. Even though justice is nothing but a search of truth, investigation in academic sense is a very recent phenomenon in the Nepali judiciary. It is partly because the Nepali judiciary, which evolved overtime as an important organ of the state, was not carefully planned. The laws and institutional structures were created to suit the interest of the prevailing political forces.[1] As we see today, even the law reform initiatives have been essentially a patch work. It is only recently that research and systematic studies began to be attached importance. The creation of the National Judicial Academy has now ushered a new era of systematic research in the judiciary.

In this short note, I will make a quick snapshot of the various studies undertaken in the past for judicial reform, highlight the objective behind the creation of the NJA, and present a short account of the research and publication activities undertaken at the NJA, and finally, present views on how research should be further intensified so as to make it an important component of overall reform of the judiciary as well as capacity enhancement of its human resources, which is the immediate objective with which the NJA was established.

2. Past Studies for Judicial Reform

For a long time the justice system in Nepal carried within it the feudal legacy dispensing justice based on caste, creed and values of Hindu religion. The court and tribunals applied their jurisdiction only to people who did not belong to the ruling class. This got a serious blow during the peoples' movement of 1950. However, a serious study of the existing

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1 Take an example of establishment of Court of Appeal after the restoration of the democracy in 1990 in Nepal which can not be justified the need in all different regions but constituted to fulfill the political interest of some parliamentarians. *See* also, Strategic Plan of Nepali Judiciary (2004 - 2008), Supreme Court of Nepal, Kathmandu, p. 36.

corpus juris - the Muluki Ain (National Code) took several years. It was in 1962 that the National Code was seriously reviewed which finally did away with the caste based justice system, and also abolished untouchability.[2] Following this, in 1970 a High Powered Judicial Commission[3] was established to make concrete recommendations for providing speedy and effective justice. One among the notable outcomes of the Commission was the enactment of the Summary Procedure Act, 1971. The Committee also recommended for the establishment of High Courts in different regions which resulted in the creation of a four tiered judicial structure with one additional tier in the middle- "the Regional Courts."

Another study worth mention is the report of the Royal Judicial Reform Commission 1983.[4] This Commission commenced its work by following research methodology in collecting data from primary source by circulating questionnaire to different stakeholders and conducting consultation meetings in the field. The response received were then tabulated and analyzed. It proposed several reform measures on substantive and procedural areas of justice including institutional reforms. Securing the independence of the judiciary was one of the prime concerns of the Commission. Therefore, it recommended for setting up of Judicial Council, a body responsible for appointment and disciplining of judges which was later taken up by framers in the 1990 Constitution. Other recommendations of this Commission were taken up by successive governments at later stages.

Despite these study reports and periodic reform efforts, however, the judiciary performed in a lackluster manner up to 1990.[5] Research and reform were not generally taken as important areas even though capacity enhancement of judges and other officials associated with the judiciary overtime became a prioritized issue. This can be said from the minutes of the Conference of Judges of Supreme Court and Chief Judges of Court of Appeal which unanimously passed resolutions highlighting the need to make a systematic effort on reform. The Court Management Committee which was constituted in 1997 under the leadership of Justice Keshav Prasad Upadhyay, the then judge at the Supreme Court, to look into the issue of reform and give suggestions for the reform of the judiciary.[6] The Committee suggested for the improvement in court management. It also recommended for the amendment in court rules, formation of civil and criminal bench in some of the district courts as pilot project, abolition of daily raffling and, assignment of the case to a judge right after the filing. The introduction of calendar of operation system, in-camera hearing in certain cases, court related mediation, establishment of the National Judicial Academy to impart training related to the job of judges and court staffs and undertake legal and judicial research are also recommended in the report.[7] Beside these initiatives, Court Strengthening

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2 Mr. Sambhu Prasad Gyawali headed the Review Team to revise the National Code, 1963. During this time, several things in the Chapter on Court Arrangement were also done away to ensure human rights and equality justice.

3 The Commission was headed by Justice Ratna Bahadur Bista, the then Judge of the Supreme Court. *See,* the Report on High Powered Judicial Commission, 1970.

4 This Commission was headed by Justice Ishwari Raj Mishra, the then Judge of the Supreme Court. *See,* the Report of the Royal Judicial Reform Commission, 1983, HMG Press, Kathmandu.

5 Ananda M Bhattarai and Kishor Uprety, *Institutional Framework for Legal and Judicial Training in South Asia (with particular Reference to Bangladesh and Nepal,* **Law and Development: Working Paper Series No. 2,** The World Bank 2006, at. 7.

6 Bishal Khanal, *"New Concepts of Court Management"*, REPORT ON THE PROGRAM OF CAPACITY BUILDING, Prakash Kumar Dhungana et.al. (eds.), 49, (Judicial Council Secretariat, Kathmandu, Nepal, 2062)

7 Hon. Judge Keshari Raj Pandit, Case flow Management, presented at the NJA in the Training Program for the Court Officers in 2007.

Recommendation Report also made some contributions to overhaul our ailing justice delivery system.[8]

A concerted effort for reform in the judiciary was made through the Strategic Plan in the Nepali Judiciary (2004 - 2008). It is a unique exercise, first of its kind in South Asia. The Plan was prepared after conducting a SWOT analysis[9] and after holding wide consultation with the justice sector and other actors. It, for the first time, worked out the Mission, Vision and Values of the Judiciary and weaved the Plan around them in the form of core functions and strategic interventions. The core functions related to everyday activities of the court while the sixteen areas of strategic intervention pertained to issues where reform was necessary to enhance the efficiency of the judiciary to the satisfaction of its consumers. The Plan has created a ripple within and without the judiciary. Currently a mid-term review of the Strategic Plan of the Nepali judiciary is being undertaken and, fortunately this responsibility has been given to the NJA.

3. Establishment of National Judicial Academy

As mentioned already, the establishment of the NJA was a concern of judges and other policy makers within the judiciary. As for instance, the Full Court of the Supreme Court in 1995 had recommended for its establishment. Similarly in 1998, the report of the Court Management Reform Committee also emphasized the need to establish a judicial academy to provide judicial education that would orient judges to emerging ideas of law and justice and enhance their professional competence.[10] However, because of some technical barriers, the efforts could not materialize till a few years down the line.[11] The preliminary work for its establishment commenced in 2002 with the signing of Corporate and Financial Governance (CFG) Project Agreement with the Asian Development Bank.[12] However, it was only in 2004 that the National Judicial Academy (NJA) established by an Ordinance of the government. This is now replaced by the National Judicial Academy Act, 2006.

The NJA was established to 'promote an equitable, just and efficient justice system through training, professional development, research and publication programs which address the respective needs of judges, judicial officers, government attorneys, private law practitioners and others who are directly involved in the administration of justice.[13] The twin objectives set out in the NJA Act are:

- Enhancement of knowledge and professional skills of judges, judicial officers, government attorneys and private law practitioners and bring about the attitudinal change that enhance competence.
- Undertake research in the field of law and justice.

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8 Strategic Plan of Nepali Judiciary (2004 - 2008), Supreme Court of Nepal, Kathmandu, p. 23.

9 SWOT analysis is a research strategy generally used in social science where it stands for strengths, weaknesses, opportunities and threats and, are assessed and analyzed before suggesting any concrete steps for reform.

10 *Supra* note 5, at 12.

11 *See,* National Judicial Academy, *Annual Report,* 2004/05, p. 2

12 The NJA was established under a component under CFG Project- Improving Legal Enforcement Mechanism and Judicial Capacity. The UniQuest Pty Ltd. Australia was entrusted to undertake the program which had the responsibilities of construction of the NJA Building and Physical Infrastructure Development, Training Capacity Enhancement, Establishment of Commercial Bench including the establishment of the NJA.

13 This is spelt out as the vision of the NJA. *See*, Strategy Plan of the National Judicial Academy (unpublished) (NJA, Kathmandu - 2006).

The NJA is an autonomous body that works under the broad policy guidelines of the sixteen member Governing Council headed by the Chief Justice of Nepal. This body is assisted by an Executive Board representing all major client institutions, the Supreme Court, the Judicial Council, the Office of the Attorney General, Nepal Bar and the Ministry of Law Justice and Parliamentary Affairs. The Board is headed by the Executive Director of the NJA who runs the day-to-day administration of the NJA.

4. Research and Publication Activities at the NJA

The research activities at the NJA basically serve two purposes: providing support and enhancement of the quality of trainings and other academic exercises; and introducing reforms in legal and institutional aspects of the judiciary. The NJA being a reform vehicle of the judiciary it takes both types of research for realizing the vision set for the institution.

4.1 Training Need Analysis and Training Plan

The basic difference of the NJA with other academic institutions is its focus on the training needs of the clientele group. The training need analysis (TNA) is the foundation based on which the NJA launches its activities. The TNA focuses on aspects such as individual training needs of the human resource in the target community and the capacity building needs of the target institutions.

The first TNA for the NJA was conducted by the UniQuest Pty Ltd in 2003. However, the response in that TNA survey was very low and as TNA is an on going process to be renewed in certain interval, the NJA conducted another fresh training need survey in 2006 with the support of the USAID/ARD Rule of Law program. The following were the objectives of the TNA:

- Consider what skills and knowledge partner organizations will need to deliver high quality services to their clients.
- Assess the opportunities for training that the NJA can organize
- Cross-reference to other policy documents such as strategic plan, human resource development plan, and other business plans.
- Consider types of training programs and prioritize them in terms of importance and urgency.
- Identify who will be trained.
- Consult stakeholders and potential partner organizations for future collaboration.
- Identify how training will be delivered, monitored and evaluated.

Based on the response of the prospective trainees and client institutions, the TNA Report has recommended the design and execution of short-term and long-term trainings covering areas where knowledge and skill enhancement and attitudinal change is required. These trainings are to be executed between 2006/7 and 2007/08.

4.2 Strategy Plan

The Strategy Plan was also prepared in 2006 with the support of the USAID/ARD rule of the law program. It has first made a situation analysis based on the SWOT analysis, carved out the Mission, Vision, Values of the NJA and also discussed strategic issues and concerns of the stakeholders. It has also set out three strategic goals and yet another three strategic operational goals. The plan covers fiscal year 2063/63 to 2067/68 B.S.

4.3 Gender Justice

From the beginning, the NJA has given focus, among others, on gender justice and combating trafficking in human through the programs such as effective implementation of laws and institutional mechanism to combat trafficking of women and children in Nepal. The NJA has done some commendable work in carrying out some research support activities such as publishing resource materials in the area of gender justice and anti-trafficking in human for its targeted stakeholders.

a) Cases and Materials on Gender Justice

NJA carried out a publication on Cases and Materials on Gender Justice. It included gender issue related case laws of the Apex Court of the regions such as Nepal, India, Bangladesh and Sri Lanka. Similarly, international instruments relating to human rights and gender justice, and some glossary on gender and women's human rights and website addresses are other attractions of the publication. It is hoped that the publication will be helpful in guiding and extending education on gender equality to all those involved in Nepali legal system. This publication was carried out with the support of the Mainstreaming Gender Equity Program (UNDP) in 2006.

b) Publication on Anti-Trafficking

The NJA has carried out another publication titled "Judges' Workshop on Combating Trafficking of Women and Children in 2006." It is a report of proceeding of regional and national anti-trafficking workshops organized by the NJA. The publication contains papers presented in the workshops and also papers on country perspective on combating human trafficking at the regional workshop. This has been considered as practical resource material to enhance knowledge and skills for the implementation of anti-trafficking laws in Nepal and in the region. The NJA also published booklet on anti-trafficking laws and process that would be helpful during the prosecution. These activities were undertaken with the support of UNIFEM.

4.4 Status of the Directive Orders of the Supreme Court

The NJA has been able to undertake a few research programs within a short span of time. Within this period, the NJA has undertaken a major research on the status of directives issued by the Supreme Court. As implementation of directive orders issued by the Supreme Court seems challenging and largely not implemented, this has been an initiative to recommend the judiciary necessary measures that it needs to take. The research, covered

1994 to 2006, has revealed the existing situations of the directives issued by the Supreme Court as follows:[14]

- Fully implemented 13
- Partially implemented 6
- In implementing stage 22
- Not implemented 11
- Not finding the status of the implementation 11

The research has covered 67 cases filed in the Supreme Court in the form of public interest litigation. The research report has stated the problems faced by the judiciary and gave 25 suggestions for the implementation of such directives.

This research has been undertaken after holding wider individual consultation with the human resources within and without judiciary. The research report was published in 2006 by the NJA and has disseminated at a program participated by Chief Justice, Justices and the Attorney General and others.

4.5 Execution of Judgment

The delay enforcement of judgment has been a problem of the judiciary. This has created more problems to the down-trodden people. Keeping in mind, the persisting problem of execution of judgment, the NJA undertook a research to examine existing situations and identify areas of improvements for speedy execution of judgment. The research team has made an in-depth study of ten districts, conducted regional consultation in Mahendranagar, Bhairahawa, Biratnagar and Kathmandu and has prepared the draft report. The NJA hopes to complete the work in a couple of months.

4.6 Case Flow Study at the Supreme Court

The Strategic Plan of the Nepali Judiciary (2004 - 2008) had designed to dispose off the pending arrears in different courts by 15 percent every year. Realizing this, the NJA conducted a research on delay reduction and case flow management. The research studied more than 1000 cases pending at the Supreme Court. The data has revealed some disturbing sluggish trends in the judicial process. The research work is in progress.

4.7 Mid Term Review of the Strategic Plan

Supreme Court entrusted the NJA for the mid-term review of the Strategic Plan of the Nepali judiciary. The NJA has been organizing consultation programs to receive the feedbacks on stocktaking of the core functions and strategic interventions. The NJA recently conducted regional consultation workshops in Pokhara, Hetaunda, Biratnagar, Nepaljunj including in-house presentation in Kathmandu. A couple of consultations are going to be held soon in Kathmandu valley. Based on the feedbacks received by it, the Strategic Plan of Nepali Judiciary (2004 - 2008) will be reviewed. It is hoped that the reviewed Plan will further streamline and strengthen the reform activities in the judiciary.

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[14] *See,* Shyam K Bhattarai and Umesh Koirala (Researchers), *A Research Report on the Status of Implementation of Directives by the Supreme Court,* (National Judicial Academy Kathmandu - 2006)

4.8 Juvenile Justice

Juvenile justice is another focused area of the NJA. In the past the NJA undertook a number of trainings for judges, government attorneys, police officers, and judicial officers with the support of the Center of Child Welfare Board of the Nepal Government. In order to further strengthen the program, two research activities are currently being undertaken at the NJA. The first is the compilation and publication of the "Juvenile Justice Resource Book" and the other is the "Compilation of the Case Laws on Juvenile Justice." It is hoped that these two publications will strengthen the trainings on juvenile justice.

4.9 Public Private Partnership

Public Private Partnership (PPP, henceforth) is a new area of contract law which adopts a versatile method in the implementation of development projects. The judiciary, being one institution engaged in the dispensation of justice, needs to be conversant with the concepts, practices and issues relating to PPP. Precisely for this reason the NJA has developed a curriculum on PPP which is being executed this year. Besides, it has also conducted a baseline survey of contract related cases and more specifically PPP related cases filed in large courts in the metropolitan areas such as Kathmandu, Lalitpur and Bhaktapur district court within the Kathmandu valley and Morang, Parsa, Kaski, and Rupendehi district courts in the *moufossils*. The Case law will be used for the training and other reform initiatives within the judiciary.

5. Issues and Challenges

With regard to systematizing and strengthening research at the NJA there seem to be a couple of challenges that it should address. The first among them is the human resource issue. The NJA is an infant organization mostly dependant on human resources drawn from different agencies on deputation. It is only this year that it has begun to recruit its own staff on permanent roll.

The NJA also does not have a separate department for research and consultancy though a select of individuals are currently engaged in research on an *ad-hoc* basis. The NJA needs to set up a separate department headed by a director and a couple of research officers. These staffs should be provided training and exposed to research activities in other countries.[15]

A corollary issue is the strengthening of the library with more books, periodicals and journals. Currently there is a modest library facility at the NJA which needs to be developed and made well equipped. The purchase of electronic resources such as the *lexis nexis* and the *west law* will help the NJA and its client group in accessing quality resources available in electronic form. This is also important for the distance learning course that the NJA wants to introduce in near future.

Another vital issue is the development of research policy which is yet to be developed. Obviously the research policy will be guided by the overall mandate of the NJA

[15] *Supra* note 11, p. 17

Act. However, in the absence of a firm research policy *ad-hocism* might prevail. This might even lead to misuse of scarce resources. The research policy will create a broad area within which the NJA will concentrate. It may also facilitate the coalition building and partnership with other state and civil society actors.

The NJA currently works from the modest facility availed to it by the Supreme Court. Given the fast expansion of the NJA, it requires its own physical infrastructure including facility for guests and visitors.[16] It is only then we can build partnership with other research institutions and universities, invite professors, trainers and researchers and also create facilities for in-terns at the NJA.

6. Conclusion

In the previous section, I presented a small highlight of the research and training activities of the NJA where the focus was especially on research and publication. I also briefly discussed a couple of challenges that the NJA is facing. Even though the NJA is still an infant organization it has made a name as a premier research and training institute of the justice sector. Given that the judiciary is facing a number of policy and management related problems, the NJA as its reform vehicle, needs to move fast and support its parent organization by intensive research and capacity building exercise. And for this the NJA needs to address the challenges it is currently facing build coalition, pool resources and expert support and facilitate reform in the judiciary.

[16] *Id*, p. 17

ANNEX:
JUDGMENTS

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Supreme Court Special Bench

Hon'ble Justice Kedar Prasad Giri

Hon'ble Justice Meen Bahadur Rayamajhee

Hon'ble Justice Ram Nagina Singh

Hon'ble Justice Anup Raj Sharma

Hon'ble Justice Ram Prasad Shrestha

Order

Writ No. 118 of the year 2062 B.S. (2005 AD)

Sub: **Praying For Issuance of Appropriate Order, or Directive including Writs of *Habeas Corpus*, *Quo Warranto* etc. Pursuant to Articles 23 and 88 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990**

On behalf of Rajeev Parajuli, aged 47, a former Minister and central member of Rastriya Prajatantra Party and resident of Birgunj Sub-Metropolitan city, Ward No. 4, currently held in detention in District Police Office Lalitpur by the order of the Royal Commission on Corruption Control, Sanjeev Parajuli, aged 42 – Petitioner

v.

Royal Commission on Corruption Control, Harihar Bhavan, Lalitpur 1
Bhakta Bahadur Koirala, Chairperson of the above-mentioned Commission.....1
Shambhu Prasad Khanal, a member of the above-mentioned Commission.... 1
Hari Babu Chaudhary, a member of the above mentioned Commission..... 1
Raghuchandra Bahadur Singh, a member of the above-mentioned Commission..... 1
Prem Bahadur Khati, a member of the above-mentioned Commission 1
Shambhu Bahadur Khadka, member-Secretary of the above-mentioned Commission..... 1 – Respondents
Office of the Prime Minister and the Council of Ministers of His Majesty's Government, Singh Durbar, Kathmandu..... 1
Ministry of Home Affairs, HMG 1
Attorney General, Office of Attorney General of the Kingdom of Nepal, Ramshahpath, Kathmandu 1
District Police Office Kathmandu 1

Meen Bahadur Rayamajhee J. The details of the present writ petition filed under Articles 23 and 88 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990 and the verdict thereupon are as follows:

After my elder brother Rajeev Parajuli, who had become a Minister for five times and assumed the responsibility of various Ministries, was relieved of his office, the Commission for the Investigation of Abuse of Authority (CIAA, henceforth) constituted in

accordance with the Constitution, raising doubts about the legality of the assets owned by my elder brother and his joint family members, conducted investigation into those assets and their sources and, having concluded that it warranted no further action, the CIAA decided to close the case-file on Baisakh 23, 2061 B.S. (May 05, 2004) as per Section 35 of the CIAA Act, 2048 B.S. (1991) and informed him about that decision through a letter dated Jyestha 1, 2061 (May 14, 2004). The respondent Royal Commission restarted investigation into a subject on which the case-file had been already closed and delivered a letter dated Baisakh 28, 2061 (May 10, 2004) to my elder brother asking him to appear before the Commission within 24 hours of the receipt of the letter for giving his statement. When, in response to that letter, my elder brother appeared before the Commission on Bhadra 13, 2061 (August 29, 2004) for giving his statement the process of taking his statement was initiated the same day and, as his statement could not be completed he was placed in detention whereupon he has been kept in illegal detention eversince in Lalitpur District Police Office. Since the notification regarding the establishment of the Commission is likely to be quashed as per Article 88 (1) of the Constitution, the Commission is not entitled to initiate any proceedings and, therefore, as the detention of the detenue was in contravention of Articles 11(1), 12(2)(d), (e) and 14(1) (2) of the Constitution of the Kingdom of Nepal, 1990, I have lodged this petition under Articles 23 and 88 (1) and (2) for his release from the illegal detention.

Investigation into the legality of the property and its sources about which the respondent Commission has issued the letter and recorded the statement of my elder brother has been already conducted as per the prevalent Nepal Law by the CIAA which is empowered by Article 97 of the Constitution of the Kingdom of Nepal, 1990 and Section 2(b) of the CIAA Act, 2048 (1991). After such an investigation it was held that no property had been acquired illegally and since all the property was found to be legal it was decided not to take any action in respect of that property and the sources thereof. Article 14 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990 has imposed complete prohibition on subjecting any person to punishment greater than that prescribed by the law in force at the time of the commission of the offence, and also on prosecuting and punishing any person for the same offence more than once. This right of a citizen has been enshrined in the Constitution as a fundamental right. This fundamental constitutional right of a citizen cannot be altered or controlled. The act of investigation into an issue relating to the property kept in the name of my detained elder brother and members of our joint family which has been already investigated into and held lawful by the CIAA which is legally and constitutionally competent, and the detention ordered on the basis of such an investigation are violative of Section 14 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990. Section 19 of the Judicial Administration Act, 2048 (1995) has provided that a decision made by a competent body shall remain valid and binding on all organs and bodies until held void in accordance with the law. No Prevalent Nepal law has granted jurisdiction to the respondent Commission to hear appeal on any decision made by the CIAA or to invalidate or void such a decision.

Article 84 of the Constitution of the Kingdom of Nepal, 1990 has provided that the powers relating to justice in the Kingdom of Nepal shall be exercised by the courts and

other judicial institutions in accordance with this Constitution, the laws and the recognized principles of justice. A study of the composition of the aforesaid constitutional provision clearly establishes the fact that, as intended and provided by the Constitution, it was the intention of the framers of the Constitution to allow the exercise of the judicial power only by the courts and other judicial institutions constituted and established in accordance with the Constitution and the laws. Since the Royal Commission on Corruption Control (RCCC, henceforth) has not been constituted in accordance with the Constitution and the prevalent laws as provided and envisioned by Article 84 of the Constitution, such a Commission cannot exercise the judicial powers in any circumstances. It is indisputable that the court must immediately declare the establishment of such a Commission void by issuing an appropriate order. The Constitution has also provided for the appointment of qualified persons having specific qualifications, experience and competence as judges in accordance with the provisions of the Constitution and the prevalent Nepal Law for carrying out the function of judicial adjudication. As the qualifications for the Chairperson and other members of the Commission have not been prescribed, it appears that any body can be appointed to those posts. Since discharging the function of judicial adjudication by such persons who do not possess the basic qualifications, experience and competence prescribed by the Constitution and the laws issued under the Constitution is also contrary to judicial norm as well as the Preamble of the Constitution the Commission is obviously without jurisdiction. The Commission seems to have been set up under an order issued pursuant to Article 115 (7) of the Constitution. The exercise of Art. 115 (7) may remain effective only so long as an order issued pursuant to Article 115 (1) remained effective. Article 115 is such an Article which cannot be exercised on a long term basis for attaining a long term objective. It may be rather exercised for a shorter period in order to take into control an immediately arisen grave emergency. It is absolutely contrary to the constitutional values and norms to establish and keep active, by exercising an Article meant for application for a completely shorter period, a Commission which can exist for an indefinite period and exercise unlimited powers. When the order relating to the declaration of the state of Emergency has already lapsed the continuity of such a Commission cannot remain effective by virtue of an order issued pursuant to Article 127. The RCCC also seems to have the powers to carry out investigation and enquiry into the matters which have been specified to be investigated by the CIAA as provided by Article 98 of the Constitution as well as the powers to carry out investigation, registration and adjudication of also such cases which should be tried and decided by the law courts as per Article 85 of the Constitution. Thus, by granting parallel jurisdiction to the Royal Commission in regard to the matters which should be investigated and inquired by the CIAA established as per the provisions of the Constitution and also the powers of the courts to entertain complaints and petitions and conduct trial and disposal of cases, an encroachment has been committed upon the jurisdiction of the CIAA and the concerned law courts. Theoretically it is not proper to set up any organ having parallel jurisdiction for similar objectives. Since the jurisdiction created by the Constitution itself cannot be circumscribed or controlled by any other means, the establishment of the Commission is in contravention of Articles 98 and 95 of the Constitution. Articles 115 and 127 cannot be mingled and activated equally for a similar

objective. The objectives and the conditions of activation of these Articles are absolutely different. The application of one Article cannot be made as complementary to the application of another Article. After the withdrawal and inactivation of the order relating to the application of Art.115 it cannot be revived by the application of Art. 127. Moreover, as Art. 127 is concerned only with resolving any difficulty arising in connection with the implementation of the Constitution, this Article cannot be resorted to in regard to any matter falling outside the Constitution. Article 1 of the Constitution has provided for declaring any law inconsistent with the Constitution as void. All types of orders, directives etc. having the force of law automatically become included within it. Since the order relating to the formation of the Commission is tantamount to the Nepal law, it is indisputable that this order can be subjected to judicial review under Article 88 (1) and (2). The Rule of law does not envisage a state of absence of remedy. The right to remedy is always guaranteed. The Constitution of the Kingdom of Nepal, 1990 also does not envisage a state of absence of remedy. Under this provision, any person adversely affected by any order issued by His Majesty the King may also challenge such an order. Moreover, the legality of any act not authorized by Article 35 (2) and performed in the capacity of the executive must be established. The orders issued by His Majesty the King, exercising the powers of the Executive, shall become extra-judicial, unlawful and void if they fail to prove such legality. Under Art 88 this court has got the jurisdiction to decide, as per the Constitution, an issue relating to whether or not a right has been adversely affected. Hence, it is indisputable that the present issue shall be judicially resolved by this court. The present Constitution does not accept the system of someone starting the case as a plaintiff, conducting the investigation and filing the charge-sheet and also deciding himself whether or not punishment should be awarded according to the charge-sheet. No country imbibing the concept of the Rule of Law envisioned by the Constitution shall allow such a legal system. Such a provision is also contrary to the incontrovertible principle of Natural Justice. Because the Commission has been entrusted with all the powers of initiating a case, carrying out the investigation, proposing the punishment and filing the charge-sheet and also deciding about whether or not to award punishment as demanded by the charge-sheet, the Commission is obviously contrary to the incontrovertible principle of Natural Justice and, hence, it is void *'ab initio'*. Article 127 should not be exercised in such a way that it affects the provisions made by other Articles. This Article may be exercised only with a view to providing an outlet by maintaining constitutional control in regard to the matters not addressed by other Articles. In view of the fact that Article 84 has provided for judicial institutions including Special Courts and empowered them to exercise judicial powers, Article 127 cannot be resorted to for making other provisions in regard to the matters which have been already provided for. Therefore, the Commission is *'ultra vires'*. Section 6(2) of the Commission Formation Order has provided for filing appeal in this court on a decision made by the Commission. No prevalent Nepal law including the Constitution, the Supreme Court Act and the Judicial Administration Act has specified this court to entertain appeals on the decisions made by such a Commission and dispose those appeals. This court, entrusted with the jurisdiction of being the final arbiter of the Constitution, is not bound to implement an extra-constitutional Notification. Thus, when the Constitution and the laws

made under the Constitution have not conferred upon this apex court the jurisdiction of hearing appeal the order and the Notification regarding the powers of hearing appeal, which are devoid of constitutional and legal capacity, are obviously in contravention of Articles 84, 85 and 86 of the Constitution and Section 9 of the Judicial Administration Act, 2048 (1991). Art. 110 of the Constitution has provided that the State cases shall be filed through the office of Attorney General and its subordinate Offices and also empowered them to decide whether or not to proceed further with those cases in the law courts. Section 23 of the State Cases Act, 2049 (1992) has provided that the State shall be a plaintiff in cases falling under schedules 1 and 2, and Section 17 has provided that such cases shall be filed in the law courts only through the Office of the Attorney General and its subordinate Offices. The so called Commission has not been conferred this power. The order regarding the setting up of the Commission also does not make any mention about this. While filing the charge-sheet and deciding the case His Majesty's Government has been mentioned as the plaintiff. Thus when there is no mention about this in the said schedules and neither the Constitution nor any prevalent Nepal law has conferred any power to initiate legal proceedings on behalf of His Majesty's Government the act of creating powers in a self declared manner and the Commission are contrary to the above-mentioned constitutional and legal provisions. Therefore, since the notice concerning the setting up of the respondent Commission is likely to be voided as per Article 88 (1) and the act of keeping the detenu in detention is contrary to Articles 11(1), 12 (2) (d) & (e), 14(1) & (2) of the Constitution of the Kingdom of Nepal, 1990, I have petitioned this court under Articles 23 and 88 (1) & (2) of the Constitution to seek his release from the illegal detention. I, therefore, request this court to declare the formation of the respondent Commission as void as per Article 88 (1) and immediately free the detenu from detention by allowing the writ of habeas corpus as none of the respondents are qualified to act in the capacity of judges, and also to issue necessary and appropriate orders, with a view to providing full justice as per Article 88 (2) of the Constitution, including the writ of *quo-warranto* restraining anyone from acting as a judge in contravention of the Constitution of the Kingdom of Nepal 1990, besides passing strictures in the name of the respondents Prime Minster and the Office of the Council of Ministers for the knowledge of the general public. As the detention made by a body devoid of legal capacity cannot get continuity, this apex court is also hereby requested to issue a writ of habeas corpus to immediately set free the detenu from detention and also to issue an interim order as per Rule 41 of the Supreme Court Rules, 2049 (1992) restraining the unauthorized body from taking any statement from the detenu, filing and entertaining any charge-sheet and performing other functions including passing any orders pending the disposal of this writ petition.

A Single Bench Judge issued an order on Bhadra 16, 2062 (2005) asking the respondents to explain the facts of the case and reply why an order as requested by the petitioner ought not to be issued. As the petition was scheduled for hearing on Bhadra 23, 2062 (2005), the Bench also issued an order to send notices to the respondent including the RCCC along with a copy of the petition asking them to file their written reply before that date through the Office of the Attorney General along with the concerned case-file and to also include a copy of the same for reference of the Office of the Attorney General. As

regards the request for the issuance of interim order, the Bench opined that there did not exist any ground for issuance of interim order presently in view of the fact that the legal practitioners appearing on behalf of the petitioner have themselves admitted that the act of recording the statement of the petitioner was already in progress. Considering, the gravity of the constitutional and legal questions the Bench further ordered to grant priority to the present petition as per the rule and thus to schedule it for hearing on Bhadra 23, 2062 (September 8, 2005).

The respondents the Royal Commission and its Chairperson and members, in their joint written reply, contended that as regards the first plea that Article 127 cannot be exercised to give continuity to the Commission constituted under Act 115 (7), during the activation of Art. 115 His Majesty the King, taking into consideration the then prevailing circumstances of the country, declared a state of Emergency in respect of the whole of the Kingdom of Nepal as per Article 115(1) and also constituted this Commission as per Art. 115 (7) on Falgun 5, 2061 (February 16, 2005) which started functioning thereafter from Falgun 10, 2061 (February 21, 2005). In the meantime, while the Commission was continuing with its regular functions such as entertaining complaints, carrying out investigation and enquiries and conducting trial under its specified jurisdiction, His Majesty the King withdrew the order relating to the declaration of Emergency through another order issued on Baisakh 16, 2062 (April 29, 2005) as per Art. 115(11). Realizing that there had arisen some difficulty in the implementation of the Constitution in regard to the continuity of the acts born out the activation of Art. 115 due to the withdrawal of the order relating to the declaration of the state of Emergency, His Majesty the King issued an order under Art. 127 in order to remove that difficulty prevailing at that time as a result of which this Commission has acquired continuity. As the petitioner was a person who had held public office and as a complaint had been filed that he had committed an offence of Corruption under the Corruption Control Act, he had been served with summons on Chaitra 18, 2062 (May 31, 2006) under the jurisdiction specified by Section 2 of the Order relating to the Constitution of the Commission in pursuance of which the acts like taking his statement, causing him to submit the particulars etc. were initiated by the investigation officer. In the initial stage of the investigation, accepting the legality of the Commission he had also cooperated with the Commission in regard to the investigation. After he was produced before the court along with the charge-sheet by the Investigation officer on Bhadra 13, 2062 (August 29, 2005) the act of taking his statement started and he was sent for detention as per the law since the act of recording his statement could not be finished. Following the completion of recording of his statement, while passing the bail order, he was asked to deposit Rs. 51,00,000 .- as security pursuant to Section 7 (d) of the Special Court Act, 2059 (2002) which he failed to produce leading to his remand to judicial custody as per the authority granted by the law. Therefore, judicial detention made under an order passed by an authorized Commission under the authority of the law cannot be dubbed as illegal detention. As the petitioner Rajeev Parajuli did not make any counteraction in time in regard to the proceedings undertaken during the period ranging from Chaitra 18, 2061 (March 31, 2005) to Bhadra 13, 2062 (August 19, 2005) and thereby accepted those proceedings and approached the apex court on Bhadra 14, 2062 (August 30, 2005) only

after he had been placed under detention, the Doctrine of Election now restrains him from at once accepting and rejecting the same proceedings.

Article 14(1) of the Constitution provides that no person shall be punished for an act which was not punishable by law when the act was committed, and Art. 14(2) provides that no person shall be prosecuted and punished for the same offence in a court of law more than once. Section 2 of the Order relating to the Formation of this Commission has prescribed the functions, duties and powers of the Commission and the jurisdiction of the Commission has been also determined by the same Order. The Commission has been empowered to investigate and prosecute offences under the Corruption Prevention Act and also decide such cases. The investigation and prosecution made on the basis of six complaints received by this Commission against Rajeev Parajuli on various dates cannot be described as violative of Article 14(2) of the Constitution. Article 14(2) has basically prevented the act of prosecuting and punishing any person twice for the same offence. The petitioner has not shown that any charge-sheet has been filed against Rajeev Parajuli anywhere and the case has been duly disposed. The provisions of Section 35 of the Corruption Prevention Act, 2059 (2002) do not seem to eradicate the offence of corruption.

His Majesty the King constituted this Commission on Falgun 5, 2061 (February 16, 2005) and prescribed its functions, duties and powers in accordance with the declaration made by him to undertake immediately effective measures, not contravening the principles of justice, for prevention of corruption in order to fulfill the wishes of the people and the needs of good governance because, as declared in the Royal Proclamation made His Majesty to the nation on Magh 19, 2061 (February 1, 2005), the ever flourishing corruption has polluted the administration and obstructed the steps of the nation which should have moved towards development and thus given a jolt to the belief of the common man in the law.

As regards the plea raised by the petitioner regarding the qualifications and competence of the officials of the Commission, His Majesty the King, while issuing the order on Falgun 5, 2061 (February 16, 2005), appointed those officials as per Section 1 of the Order relating to Formation of the Commission believing that they were qualified and competent to conduct the trial and disposal of the offences falling under the Corruption Prevention Act. So the petitioner does not seem to have any *'locus standi'* to raise any question about the qualifications and competence of the officials of the Commission appointed in the discretion of His Majesty the King. As a provision in the Order relating to the Formation of the Commission provides that any person not satisfied with any order or decision made by the officials of the Commission he may move an application or appeal before this honorable court and as this court is competent to review such an order or decision, the plea of the petitioner is not lawful. Since the Commission is competent to exercise the powers of the Special Court conferred on it by the Special Court Act, 2059 (2002) as per Section 2(4) of the Order relating to the Formation of the Commission, it is obvious that the Commission is functioning under the concept of a Tribunal which has been imbibed by Article 85 of the Constitution. Therefore, there is no question at all of the Commission violating the recognized principles of the Constitution, the laws and justice. In case there occurs any error in course of the exercise of judicial power by the Commission, there is a provision regarding this apex court dispensing justice exercising the appellate

jurisdiction granted by Section 6(2) of the Order relating to the Formation of the Commission, it cannot be contended that the formation of the Commission is contrary to the spirit of the Constitution and its Article 84.

Likewise, the contention of the petitioner describing the Commission's act of both filing the charge-sheet and also conducting the trial and disposing the case as being contrary to the Constitution is also not based on the facts. As shown by the provisions made in the Customs Act, 2019, the National Park and Wildlife Conservation Act, 2029 and the Forest Act, 2049, since the legal system of Nepal seems to have already accepted such a procedure, the contention of the petitioner is not lawful. As there is a provision empowering the Commission to lay down its own procedure as per Section 12 of the Order relating to Formation of the Commission, according to the provisions of the Procedure, 2061 (2004) issued by the Commission on Chaitra 1, 2061 (March 14, 2005) the Commission is empowered to appoint an Investigation Officer, and the Investigation Officer can file the charge-sheet as per Section 10 of the Procedure before the Bench of the Commission if the investigation shows that any offence has been committed. So as only after deciding whether an offence of corruption has been committed further proceedings are undertaken by the Umbrella body, it cannot be called as violative of the principles of Natural Justice. The above-mentioned contention of the petitioner is also negated by the judicial principle enunciated by the apex court in the writ of certiorari, *Advocate Jyoti Baniya* v. *the House of Representatives* (Nepal Kanoon Patrika 2056 (1999), No. 1, p. 23). As regards the contention of the petitioner that if the authorization under Article 35 (2) is not established in regard to an order issued by His Majesty the King exercising the executive powers, such an order is subject to judicial review under Article 88(1) and (2) and the aggrieved person may obtain relief. First of all, while issuing an order under Article 127 of the Constitution on Baisakh 16, 2062 (April 29, 2005) granting continuity to this Commission, His Majesty the King issued such an order not by exercising the executive powers but by exercising the discretionary power vested in him in accordance with the constitutional practices and customs of Nepal. Since such an order should be treated as an integral part of the Constitution pursuant to Article 127 of the Constitution it cannot become a subject of judicial review like the review of a legislative Act. Thus it is automatically proved that the act of specifying the functions, duties and powers of the Commission under an order issued in the discretion of His Majesty the King cannot fall under the confines of judicial review. Hence, since the act of giving continuity to this Commission along with its officials under Article 127 of the Constitution of the Kingdom of Nepal, 1990 in the discretion of His Majesty the King is in accordance with the Constitution, and as Article 31 of the Constitution has clearly provided that no question shall be raised in any court about any act performed by His Majesty, and because the business conducted by the Commission by exercising the functions, and powers and by observing the duties specified by the Order regarding the Formation of the Commission, is constitutional and lawful, the act of keeping Rajeev Parajuli, the brother of the petitioner, in judicial custody as per the order of this Commission under the authority granted by the law cannot be described as illegal detention and, therefore, the writ petition must be rejected.

The Office of the Prime Minster and the Council of Ministers, in its written reply, contended that as the petitioner had framed it as a respondent without explaining how and by which act of this Commission the rights of the petitioner have been infringed and because the person mentioned in the petition has been placed in detention by the concerned body as per the law, the writ petition must be rejected.

The Ministry of Home Affairs, in its written reply, contended that since Rajeev Parajuli has been placed in detention as per the law in connection with an offence of corruption by the RCCC, the writ petition must be quashed.

The Office of the Attorney General of Nepal, in its written reply contended that a cursory perusal of the writ petition shows that, except framing the Attorney General of Nepal as a respondent in the petition, the petitioner could not mention in the petition what type of acts of the Attorney General was directed against the petitioner and which acts of the Attorney General of Nepal infringed the rights of the petitioner and how those acts were violative of the Constitution. A writ cannot be issued only because of mentioning someone's name as a respondent. As the issue raised by the petitioner did not belong to the area of the functions, duties and powers of the Attorney General as specified by the Constitution nor was it related with the functions discharged by the Office of the Attorney General, the writ petition deserved to be rejected.

The District Police Office Lalitpur, in its written reply, praying for the rejection of the writ petition, contended that the petitioner Rajeev Parajuli was produced before that Office along with a letter of the RCCC having dispatch No.352 and dated Bhadra 13, 2062 (August 29, 2005) for keeping him in detention as the act of taking his statement in connection with the charge of corruption relating to acquisition of illegal property could not be completed for want of time and so the act of taking the petitioner to the Commission and bringing him back to that Office was performed as per the order of the Commission. And as Rajeev Parajuli was produced before that Office along with a letter of the RCCC having dispatch No. 385 and dated Bhadra 15, 2062 (August 31, 2005) asking it to keep him for safe custody as he had failed to produce the bail amount slapped on him in *His Majesty Government* v. *Rajeev Parajuli and Others* in connection with the case of corruption relating to acquisition of illegal property, the petitioner had been kept in detention not illegally but as per the law according to the order of the Commission.

A five member Special Bench of the apex court ordered for scheduling the case for hearing on Bhadra 28, 2062 (September 6, 2005) and producing the detenu Rajeev Parajuli before the Bench on that date along with the related writ petition numbered 57 and the petition numbered 745 for a simultaneous hearing.

Observing that since the CIAA had decided on Baisakh 23, 2061 (May 5, 2004) to close the proceedings regarding the investigation about the assets of Rajeev Parajuli whose sources were not accounted for as per Section 35 of the Corruption Prevention Act, 2059 and as the submissions to be made by the counsels were yet not complete, a five member Special Bench issued an order to release the prisoner Rajeev Parajuli pending disposal of the petition as per Rule 33(a) of the Supreme Court Rules, 2049 on the personal security of attendance given by his counsel Advocate Shambhu Thapa on the condition of

producing him before the court on the date scheduled for the hearing of that petition, and also to notify the RCCC in this regard.

The petitioner and thirty nine learned legal practitioners appearing on behalf of the petitioner and the respondents including the legal practitioners getting involved in the case as per rule 42 of the Supreme Court Rules, 2049 made their submissions as follows in the present writ petition and the writ petition No. 57 filed by petitioner Santosh Mahato in which a similar issue was involved and which had been simultaneously produced for hearing on various dates starting from Bhadra 23, 2062 (September 5, 2005) and continued on Bhadra 28 and 30, 2062 (September 13 and 15, 2005), Ashwin 6 and 12, 2062 (September 22 and 28, 2005), Kartik 27 and 29, 2062 (November 13 and 25, 2005) and Manshir 6, 7, 12, 13, 21, 23 and 29, 2062 (November 21, 22, 27, 28 and December 6 , 8 and 14, 2005).

The Learned Counsels Appearing on behalf of the Petitioner

1. Advocate Shambhu Thapa (in both cases)

The learned Advocate Shambhu Thapa pleaded that Article 12 of the Constitution of the Kingdom of Nepal, 1990 stipulated that no person shall be deprived of his personal liberty save in accordance with law. Section 2(m) of Nepal Law Interpretation Act, 2010 (1953) has defined law and, as that definition is also applicable in the case of the Constitution, the order issued on the basis of Article 127 must be reviewed whether or not it is a law according to that interpretation. There is no scope for the continuity of the order issued under Article 115 of the Constitution. As Art. 115 is in itself an independent Article, an order issued under this Article may suspend some Articles of the Constitution but it cannot usurp the powers granted by the Constitution to other organs and delegate them to others. The Constitution is an instrument which keeps all persons including the Head of the State as well as the citizens in the same system. An order can be issued for dealing with the state of Emergency declared under Art. 115 and after withdrawal of the state of Emergency or after expiration of the declaration of the state of Emergency, the order issued under Art. 115 also becomes automatically inactive. An order issued under Art. 115 cannot be given continuity by exercising Art. 127. Following the issuance of an order under Art.127 for removing any difficulty in connection with the implementation of the Constitution, all the constitutional processes should be operated after the removal of such a difficulty. The constitutional deadlock which has arisen must be pointed out. How did a difficulty arise in regard to the establishment of the RCCC? There is also a provision regarding removal of similar difficulties in the implementation of the Constitution in India in Article 392 of the Indian Constitution. When questions were raised against an order issued by the President of India in the law court, the Indian Supreme Court had held that such an order intended for the removal of difficulties could be subjected to judicial review. The law court of England has also held that the powers regarding arresting any person, taking his statement, putting him into detention etc. did not come under the powers of the Crown. When the opinion of this apex court was sought by His Majesty the King in the dispute relating to Dasdhunga accident about the conditions regarding removal of difficulties as per Article 127, Article 127 has been interpreted in that opinion. Even though that was given in the form of an

opinion, actions were taken by His Majesty the King and the Government according to that opinion and, therefore, there shall be no difficulty in applying that opinion even in this case. As regards the written reply with the plea that since the order had been issued by His Majesty the King, no question could be raised in a law court as per the provision of Article 31. Because ours is a written Constitution it cannot be accepted that there is a provision of prerogative power as in the English Constitution. A decision has been already made regarding Article 31 in the case of the Dissolution of the House of Representatives by P.M. Manmohan Adhikari. Article 31 must be viewed in relation to Article 56. The powers of His Majesty, Parliament and the court --- all the three Organs have been provided by the Constitution and none of them can encroach upon the powers of the others. But if any dispute arises among these three Organs or bodies it can be decided only by the court. The petitioner has come to the court pleading that his liberty is being usurped. As every citizen has been granted by the Constitution the right to protect his personal liberty, if someone enters the court on that issue, it cannot be argued that a question cannot be raised in this regard. The provision of Article 88 does not preclude from judicial review the matters other than those relating to His Majesty the King and the status of Parliament. The context of the decision made in the writ petition of Jyoti Baniya mentioned in the written reply cannot be applicable to the present case. The Forest Act, the Local Administration Act, the Custom Act etc. are the matters falling under the law made by Parliament. The respondent Commission has not been constituted under the law. The qualifications of the officials of the Commission are not clear. Actions have been undertaken against the spirit of Articles 84 and 85. When a petition has been filed raising questions about the qualifications of the officials of the Commission there does arise an obligation to prove the qualifications. Any questions raised about the qualifications cannot be brushed aside. The Constitution is the fundamental law of the land. When the fundamental law itself has set up the CIAA under Art. 98 for the prevention of corruption and also when the Constitution has provided for the investigation of the cases falling under the Corruption Prevention Act and made specific provision for a court for hearing such cases it is not proper to set up a parallel body. The cases prosecuted by the Commission also fall under the purview of the Corruption Prevention Act and His Majesty's Government is the plaintiff of the cases to be filed under that Act. Article 110 has provided that the Attorney General of the Kingdom of Nepal and his subordinate government counsels have got the powers to make the final decision as to whether or not to initiate the proceeding in any case on behalf of His Majesty's Government. That provision has also been infringed by the formation and the activities of the Royal Commission. A decision of the Commission cannot be subjected to appeal in this court. The appellate jurisdiction of this court can be determined by the provisions made in Art. 88 (3) of the Constitution. Since an order issued by His Majesty is not a law it cannot be said that appeal can be filed as per that order even though it has provided for filing appeal. What is law has been interpreted by a Division Bench in the Reservation case. An order can be subject to judicial review provided that it was treated as the law. If an order is not the law it must be automatically inoperative. No law can be made without resorting to the procedure mentioned in Article 71 and 72 of the Constitution. Such a Commission has no power to slap punishment on the citizens. The judicial principle enunciated in the case of Iman Singh

Gurung also substantiates this point. The Indian Supreme Court has discussed the jurisdiction of the Supreme Court in AIR 2001 SC 180.

2. Advocate Subhash Nemwang (in both cases)

Advocate Subhash Nemwang submitted that as regards the contention made in the written reply that the Commission has been set up by His Majesty in his discretion by exercising the State authority vested in him and as per the customs and usages of Nepal, the Constitution of the Kingdom of Nepal, 1990 does not provide for, as in the Constitution of Nepal, 1962, vesting of the State authority in His Majesty the King. That is proved by the Preamble of the Constitution itself. His Majesty has promulgated the Constitution accepting Constitutional Monarchy in Nepal in the Preamble itself. That the interpretation of the Constitution must be based on the Preamble, too, has been already expressed by this court in Manmohan Adhikari's case relating to the Dissolution of the House of Representatives. No order can be issued affecting the basic principles of the Constitution. Nowhere does the Constitution talk about doing anything in accordance with the practices and customs. That the State authority and the sovereign powers shall be exercised in accordance with the provisions of the Constitution is a declaration made by His Majesty the King. Article 3 of the Constitution has mentioned that sovereignty is vested in the Nepalese people. The provision of Article 31 of the Constitution of the Kingdom of Nepal is based on the assumption that the King does no wrong. On the basis of the assumption of the King doing no wrong the powers conferred on the British Crown have been granted to HM the King by our Constitution. Our Constitution has not made any provision about any inherent or residuary power. The Constitution has not given even any hint about the likelihood of the formation of such a Commission. The Constitution has not provided for treating an order under Article 127 as a part of the Constitution. Even though the Constitution of India made a provision for removing any difficulty in Article 392, that provision was made for removing any difficulty while moving forward from the Government of India Act, 1935 to the Constitution of India, and it was also provided that such an order shall cease to be effective after the beginning of the first parliament. In Nepal, too, after the composition of Parliament Article 127 may be exercised in an extremely exceptional manner. As Parliament possesses the power to amend the Constitution, the issue of removing any difficulty is also concerned with Parliament. The Supreme Court has the power to make judicial review of even an Amendment of the Constitution. As Article 127 of the present Constitution has not made any provision, similar to Article 90A of the Constitution of Nepal, 1962, to treat the disputed order as a part of the Constitution, the contention made in the written reply that the order is a part of the Constitution is not constitutionally valid. The power under Art. 127 is not discretionary. With regard to the functions discharged by His Majesty or His Majesty alone or in the discretion of His Majesty, an interpretation has been made by this court in Advocate Radheshyam Adhikari's case. Also in the opinion given by the court in connection with the Dasdhunga accident it has been explained that in the changed circumstances no Commission can be set up by issuing an order relating to the formation of a Royal commission as was done in 2036 BS (1979). Of course, the Constitution does not preclude from imposing restrictions on the fundamental rights by making law but it is not proper to negate fundamental right by issuing

such an order. In the same opinion, it has been also explained that Art. 127 could be applied only in the circumstances when there is no alternative arrangement. Even if some one wants to restrict something, he cannot be allowed to restrict it by taking recourse to a wrong way. Such works should be done by abiding by the Constitution and not fatally hurting the accepted principles of law and justice. In the Dasdhunga case also, it has been held that if need be to interfere with the rights of the citizens, it can be done only through the law made by Parliament. When an organ visualized and provided by Articles 97 and 98 in connection with the prevention of corruption has been set up and is already functioning, the disputed Commission established under the assumption as if there was no alternative arrangement, was not constitutionally valid. The written reply does not clarify what kind of reason cropped up which called for the removal of difficulty. If Article 127 is allowed to be exercised in this way, it will give the impression that other parallel constitutional organs can be also created by resorting to the same Article. That is, however, not the intention of Article 127. An order issued in this manner has virtually acquired the form of amendment of the Constitution. But the Constitution cannot be amended in this manner. Even an amendment of the Constitution cannot be allowed to adversely affect the independent judiciary. An order under Art.127 cannot displace an already existing constitutional organ. To effect such a displacement an amendment must be introduced. As the formation of the RCCC has led to undertaking two types of investigation in a case of similar nature, it has resulted in unequal treatment among citizens of equal status. This has acted against the principle of equality regarding equal protection of the law for all citizens in an equal situation. Since the provision of appointing anybody whatsoever in the Commission is based on arbitrariness, this is also an unequal treatment. There is no question of the incompetence of the court to review a subject which belongs to the Constitution. Since our Constitution has accepted the principle of Constitutional Supremacy, it is not proper to say that it cannot be examined whether or not the impugned order is violative of the Constitution. It cannot be said that the Supreme Court cannot examine an issue raised in a complaint alleging the violation of the Preamble of the Constitution. In the case of Sampat Kumar, the Indian Supreme Court has agreed that the power of judicial review is one of the basic features of the Constitution. The written reply intends to restrict the powers of the Supreme Court. What Advocate Shambhu Thapa has said while throwing light on Article 31 also shows that the impugned order is subject to judicial review. As the Commission has been constituted also against the principle of "No one should be a judge in his own case", the writ should be issued as prayed for.

3. Advocate Yagya Murti Banjade (on behalf of petitioner Rajeev Parajuli)

It has been contended in the written reply that, as the order has been issued by His Majesty the King, it cannot be reviewed. But since it has been already decided by this court in the writ petitions filed by Rabi Raj Bhandari and Hari Prasad Nepal, in connection with the dissolution of the House of Representatives that an order issued by His Majesty the King can be subjected to judicial review, there is no need of getting confused about this issue. As required by the provision made in Article 27(3) of the Constitution, His Majesty, too, must uphold the Constitution. His Majesty does not have any power to transgress the constitutional limits. Lord Denning has observed in the context of the British Crown that the

King, too, must remain under the law. If an order issued by His Majesty is not treated as the law, it cannot be resorted to punish any person. If it is the law, it can be subject to judicial review under Article 88 (1) of the Constitution. The respondents must first clarify this matter. If judicial review is not allowed, the Constitution can be viewed as almost non-existent. The Commission has been formed by an order issued as per Art. 115(7). There is no provision in Article 115 to declare the state of Emergency on the ground of increase in corruption. The formation of the Royal Commission is not in consonance with Art. 115(7). Since an order issued under Art. 115(7) is as good as the law, it can be also subject to judicial review. If the order issued under Art. 115(7) for the prevention of the state of Emergency is given continuity even after the withdrawal of the order of the declaration of the state of Emergency that is tantamount to committing a fraud upon the Constitution. After His Majesty himself has agreed to act according to the Constitution, it is not justifiable to do any work in the name of custom and practices. In England, too, it has been admitted that the Royal Prerogative cannot grant any new thing. It is a recognized principle of justice that the act of justice dispensation must be done by those who possess the knowledge of law. It is believed that the recognized principle of law and justice are applied only in the justice delivered by independent and impartial judges. It has been admitted in **the Basic Principles on the Independence of the Judiciary** adopted by the UNO in 1985 that the act of justice dispensation must be done by a person who has got knowledge of law and justice. Even though a question has been raised about the qualifications of the members of the respondent Commission entrusted with the responsibility of justice dispensation, none of them have clarified about their qualifications. The Commission has been formed in contravention of the above mentioned principles adopted by the UNO. An order issued under Article 127 is not of permanent nature. In case there is no provision in the Constitution but it is promptly required for the time being only then an order can be issued under Article 127 to serve the purpose. Its relevance is over after the purpose has been served. The formation of the Commission and the functions assigned to it have adversely affected the recognized principles of law and justice such as the principles of Natural Justice relating to fair trial. All the issues raised can be resolved even by a writ petition of *habeas corpus*. That an appropriate order can be issued even through a writ petition of *habeas corpus* has been admitted in a 2027 (1970) case in which I was myself the writ petitioner and also in the case of petitioner *Omkar Shrestha* v. *Office of Bagmati Zonal Commissioner.*

4. Senior Advocate Shree Hari Aryal (in both cases)

The present Constitution has outlined the form and structure of democracy and has bound everyone together. Article 1 of the Constitution has specified the compliance with the Constitution as everybody's duty. Article 14 has guaranteed that no person shall be punished except according to the law. The Constitution has constituted a Commission in regard to the prevention of corruption. It has also prescribed what should be the qualifications of every constitutional organ. As it has been also mentioned in the declaration of Magh 19, 2061 (February 1, 2005) to constitute the Commission not contravening the recognized principles of justice, it does not seem to stake a claim to make

a declaration going beyond the constitutional limits. The formation of the Royal Commission, being violative of this declaration, is contradictory to the declaration. As a constitutional dispute has been raised, it should be resolved taking into consideration all the matters related with the Constitution. It has been held in the decision published in the Supreme Court Bulletin (Year 11 No. 8 Full No. 242 P.7) that the Explanatory Comments prepared in course of making of the Constitution may be also relied on. Only the courts and other judicial institutions falling under Article 84 may follow the recognized principles of law and justice. Although a provision has been made for filing appeal on the decisions made by the Royal Commission, there is, however, no provision for its supervision and control by the Supreme Court as in the case of the District Courts, the Appellate Courts, the Special Court and other quasi-judicial institutions. Therefore, the formation of the Royal Commission is not constitutional. The provision of Art 35(2) does not permit the issuance of such an order by His Majesty in his discretion. The interpretation of the Constitution must be made in such a way as to preserve the Constitution. The Royal Commission, which is violative of the Constitution, cannot be allowed to continue.

5. Advocate Harihar Dahal (in both cases)

The order constituting the Royal Commission was not issued along with the declaration of the state of Emergency. The order issued in regard to the formation of the Commission under Article 127 is concerned with an unrelated issue and hence it is not constitutionally valid. The order issued under Art. 127, meant for removing difficulty, has been issued to give continuity to such an unconstitutional Commission. Article 127 cannot be exercised to create any institution. Article 127 does not provide any authority to give birth to such a Commission. It has been held in the opinion given by this court in regard to the Dasdhunga accident that Article 127 can be exercised only in a case where there is an absence of any alternative. No order can circumscribe or extend the jurisdiction of the Supreme Court. The Order relating to the Formation of the Royal Commission has violated the provisions of the Constitution. The jurisdiction of the Supreme Court can be extended only through the law made by Parliament. An order issued under Art. 127 cannot get the protection under Article 31. Art. 127 has been applied in a way that affects the basic structure of the Constitution. The protection under Art. 31 is based on the principle that "the King can do no wrong". This constitutional protection has been granted because the King himself does not do anything. Even His Majesty cannot transgress the confines of the Constitution. It cannot be held that the functions discharged by His Majesty in the capacity of the Chief of the Executive can be granted protection by Art. 31. If the Supreme Court is not allowed to make judicial review of such an order, the very soul of the Constitution will be taken away. Art. 31 cannot shrink the power of the Supreme Court to make judicial review. Art. 27(3) has provided protection only for the acts done in accordance with the spirit and intention of the Constitution. This is a positive matter. But in the present dispute, there is a state of violation of the Constitution. Protection is meant for positive things. The courts other than those mentioned in Art. 85, are not entitled to conduct hearing of cases. Since the Commission has been formed going beyond the orbit of Art. 85, such an act is not entitled to get any protection.

6. Advocate Kumar Regmi (on behalf of only Rajeev Parajuli)

In the present dispute there is the need for discussion about four matters including *quo-warranto, certiorari*, seeking invalidity of a law and *habeas corpus*. As the petitioner has, exercising his right under *quo-warranto*, raised a question regarding the qualifications of the officials of the Commission, such a question must be answered by the persons to whom it has been addressed. *Quo-warranto* is not a matter to be asked to the appointing authority. It is concerned with the person who has been appointed. He is asked to show by which authority he is occupying the chair. Since such a question is asked in the case of a person holding a post of public accountability, he cannot be allowed to refuse to give reply. It does not suffice to say that he is occupying the office because he has been appointed by His Majesty. He must answer what are his qualifications for occupying that post. Since an order issued under Art .127 is required to be presented before Parliament Art. 127 cannot be exercised in a situation when there are no Parliament and no Council of Ministers. There is a need for interpretation to find out the place where His Majesty has been placed by the Constitution. In *B.K. Kapoor* v. *State of Tamil Nadu* (AIR 2001 SC 3435) the Indian Supreme Court has decided about *quo-warranto* and the protection or immunity granted to the Head of the State. That may be relevant also in the present context. There has been a principle that five methods should be adopted in regard to the interpretation of the Constitution. The first among this says that the interpretation of a Constitution should be made on the basis of the books on Constitution. Thereafter, a Constitution should be interpretated on the basis of its original intention, structural reasoning, moral reasoning i.e., liberal interpretation and earlier court practices or precedents. Articles 31 and 127 must be interpretated in the context of the orbit of this principle of interpretation. Article 31 is related to Art. 35. Art. 31 is an Article independent in itself. Art. 31 acquires perfection only from Art. 35(2). Viewing Art. 31 in isolation creates confusion. Art. 35(2) makes it clear what type of work can be done by His Majesty and what are his acts which cannot be questioned. Since ours is a written Constitution, even His Majesty cannot go beyond the Constitution. In the *State of Rajsthan* v. *Union of India* it has been held that although the Indian Supreme Court cannot look into what type of recommendation has been made to the President, the order of the President can be subject to judicial review. Also, the interpretation made in the case of S. R. Bomai is relevant for the interpretation of Art. 35(6) of our Constitution. It has been decided in this case that it may fall under the orbit of judicial review as to what kind of recommendation was made by the Council of Ministers for the sake of public interest. If the order issued presently had been issued by His Majesty as per Article 35(2), on the recommendation of the Council of Ministers, no question could have been raised as per Art. 31 about the function discharged by His Majesty. If we omit Article 35(2) and then look at the Constitution there would be nothing left in it. Therefore, any claim for the immunity must be constitutionally valid.

7. Advocate Madhav Kumar Basnet (in both cases)

The courts are granted final authority to decide disputes in accordance with the inherent character of the written Constitution. Whether or not the declaration of the state of Emergency is justified is not examined. If it is argued that this court has no power to review the matters involved in the present dispute, then who shall resolve the inner conflicts

occurred among various organs of the Constitution or who should clarify the ambiguity present in the Constitution. It is the court which resolves all these issues. In the United States whatever the nine justices opine in regard to even the law made by the American people is made to prevail. These things are accepted on the basis of the fact that in the law court there are persons who are well versed in the concerned subjects. It is the court which has the power to decide whether or not there has arisen a situation to resolve any difficulty. The grounds put forward against raising any question are not clear. If it is so due to political reasons the case of Rabi Raj has already resolved many issues. Since an order issued under Art.115 (7) is to remain effective till the continuation of the state of Emergency, it automatically ceases to operate once the state of Emergency is withdrawn by His Majesty. It cannot be given continuity. If it is argued that the same can be given continuity that could be tantamount to committing a fraud against the Constitution. Article 127 can be exercised only if any difficulty arises in connection with the implementation of the Constitution and not in the event of any difficulty arising in connection with the implementation of any order. If it is believed that the order issued under Art.115 (7) is active then it will show that the state of Emergency is still operative. Even if it is treated as an order issued under Art.115 (7) that order is equivalent to the law and it cannot be viewed as a part of the Constitution. Since the Constitution has provided for vesting sovereignty in the people, it cannot be accepted that the state authority is still vested in His Majesty. The provision for His Majesty exercising his discretion has been made in Articles 28 and 121. Except that His Majesty can do any other thing only on the recommendation of the council of Ministers pursuant to Article 35 (2).

8. Advocate Badri Bahadur Karki (in both cases)

We are ruled by a written Constitution. The Constitution has not only prescribed the jurisdiction of all the organs of the State rather it has also specified how to use those organs. This is the Constitution also applicable to the respondents. Presently, the executive powers provided by the Constitution also need to be interpreted and analyzed. It has been held by the Pakistani Supreme Court in the case of Dissolution of the Pakistan Parliament that, while interpreting the Constitution, basically a particular Article must be interpreted also in the context of all the provisions of the Constitution and the relevant precedents. The provisions of the Constitution of the Philippines as well as those of ours are similar to a great extent. While making interpretation of the Constitution in the case relating to the oath taking of the President of Philippines Astarda, it was decided to use the rule of construction and it was also held that the interpretation should be made in the context of all the provisions of the Constitution. The court is described as the faithful guardian of the Constitution. If a dispute arises that some organ enjoined to work under the Constitution has not done accordingly, the power and responsibility to resolve such a dispute lies in none other than the Supreme Court. Article 127 has not obstructed the power of this court to make decisions by making interpretation under Article 88. Judicial review of matters under Article 116 in not precluded. Likewise, it can be said that an order issued under Article 127 cannot be reviewed. The powers relating to justice cannot be given to others in contravention of the sprit and intention of the Constitution. That although Art. 28(3) has

granted powers only to His Majesty to make law relating to succession to the throne, the issues relating to that law can also be subject to judicial review has been substantiated also by the case of petitioner *Krishna Prasad Shiwakoti* v. *the Secretariat of the Council of Ministers* published in Nepal Kanoon Patrika, 2054(1997) P. 295. In such a situation it cannot be said that the impugned formation of the Commission cannot be subjected to review. Since all the Statutes, Rules and orders issued by His Majesty are published in the Nepal Gazette, it cannot be said that their judicial review is not possible. Article 27 of the Constitution has provided immunity on the basis of the principle that in Constitutional Monarchy, all the actions are performed on the recommendation of others and no action is performed in one's discretion. Written Constitution means not giving recognition to customs and usages. As a Constitution is enforced to preclude the possibility of occurrence of matters relating to customs and usages, the respondents should have presented their written reply agreeing to abide by the decision to be made by the Supreme Court. But since they have pleaded in stead that no question can be raised in this regard, an organ of the State cannot get immunity by making such pleas. Since all the Articles of our Constitution came into force on the same date of Kartik 23, 2047 (1990), in fact the provision of removing difficulty enshrined in Article 127 should not have existed. Such a provision is not needed at all after the Constitution has become active. Even if such a provision exists it cannot be used to usurp the functions of one organ and to give it to another. An order issued under Art. 127 is of a legislative nature. It is for this reason that such an order is required to be placed before Parliament. Only because it is a matter to be presented before Parliament, it cannot be argued that its judicial review is not possible under the powers granted by Article 88(1). Since the provision enshrined in Article 115 is to be enforced on the recommendation of the Council of Ministers, His Majesty cannot claim immunity in regard to such an order. The impugned Order relating to the Formation of the Commission has granted powers to the Commission at par with those granted to the law courts including the powers of arresting a person, taking his statement etc. But this is contrary to the opinion given by this court in regard to the Dasdhunga accident that such an order cannot be issued under Art. 127. If any act done by His Majesty results in causing infringement to or interference in the rights of any citizen, he cannot be debarred from coming to this court for safeguarding his right as per the provisions made in the Constitution itself. Thus, it cannot be argued that the court cannot look into the matter after a case is filed claiming infringement of one's right.

9. Petitioner Santosh Mahato

As the Royal Commission has been entrusted with the authority to exercise legal powers and to award punishment, the Order Constituting the Commission is a law. The issue relating to Article 31 has been already resolved while issuing the order relating to the registration of the petition. It cannot be allowed to raise this issue again. Article 31 must be interpreted in consonance with Art. 35(2). No question can be raised in regard to the functions discharged by His Majesty in his discretion. Besides that, in case of actions related to the rights of the people it is not proper to say that no questions can be raised. Because the impugned order is not issued in the discretion of His Majesty it cannot be

deemed as having the immunity provisioned in Art. 31. Article 137 was exercised for the first time on the recommendation of the Prime Minister. Where the difficulty has arisen and how it is intended to resolve must be mentioned in the same order. The Order relating to the Formation of the Royal Commission does not point out the Article which has been faced with difficulty in its implementation. The order issued on Ashwin 18, 2059 (October 4, 2002) makes it clear that the order was issued following difficulty in the implementation of the Constitution. As the order issued on Magh 25, 2061 (February 7, 2005) is equivalent to the law, it can be said that some difficulty has arisen in the implementation of such a law. If there is any difficulty in the implementation of the law it should be implemented either by amending the concerned Statute or by repealing it. As Parliament is presently not in operation the writ petition cannot be rejected holding that it lies under the jurisdiction of Parliament.

10. Advocate Arun Gyawali (on behalf of Rajeev Parajuli)

A previous decision of this court published in Nepal Kanoon Patrika, (Decision No. 6205, P. 450) has held that the Commission for the Investigation of the Abuse of Authority has been established as a powerful and effective body. As the nature of the work of the Commission for the Prevention of Abuse of Authority established under the Constitution of Nepal, 1962 to undertake both investigation as well as disposal of cases was considered as contrary to the principle of Natural Justice, the present Constitution has set up separate bodies to conduct investigation and trial of the cases. Therefore, the formation of the Royal Commission is not in consonance with the Constitution.

11. Advocate Hari Prasad Upreti (on behalf of Rajeev Parajuli)

The responsibility specified by Art.27 (3) can materialize only after the fulfillment of the condition laid down in Art.35 (2). As it has been mentioned in the Preamble of the Constitution that the State power shall be exercised in accordance with the provisions of this Constitution, it cannot be exercised without acting according to Art.35 (2). As there is no provision in Art.127 permitting the issuance of an order by His Majesty alone or in his discretion, Art.127 cannot be exercised without acting in accordance with Art.35 (2). There is no legal basis in the order issued under Art.127. Because the formation and jurisdiction of the Commission are not specified by law the Commission is not empowered to take any action. The order under Art.127 is an executive order. If Articles 27, 35 and 127 are read together then there shall be more clarity. Placing (an order) before Parliament is possible only in the event of the presence of Parliament. Also, because the order has not acquired a legal status the order must be voided even according to Art 88 (2).

12. Advocate Hari Krishna Karki (on behalf of petitioner Rajeev Parajuli)

The issue to be resolved in the present dispute is not a political one. The Constitution is in itself a political document. There is a need for resolution of a constitutional issue. Article 31(3) has been interpreted in Rabi Raj Bhandari's House of Representatives Dissolution case. Since the reference to corruption has not been made in the order relating to the declaration of the state of Emergency, after the execution of the work according to Art. 127

there is no meaning of placing or not placing the order issued under Art. 115(7) before Parliament. In the event of emergence of a question regarding unconstitutionality, it cannot be said that the issue cannot be examined by the court.

13. Advocate Prakash Raut (on behalf of petitioner Santosh Mahato)

In order to exercise Art.127 there must arise any difficulty in the implementation of the Constitution. It has not been mentioned in the Notification which provision of the Constitution is faced with difficulty in its implementation. An order cannot be issued advancing a false plea regarding emergence of some difficulty. At the time of constitutional review the constitutionality must be proved. Art.127 is not Article which can be invoked by His Majesty in his discretion. Even if there is discretion, it cannot be unlimited or unrestrained. The Constitution has not visualized such a Royal Commission. Only because Art.127 has been exercised several times cannot be a ground to grant recognition to such a Commission. Also, according to the provision of the Law Interpretation Act, 2010 (1953) an order may be equivalent to the law but it cannot become a part of the Constitution. A provision allowing both investigation and trial of the case by one and the same body cannot help to conduct impartial hearing and impartial disposal of the case. There is no constitutional provision to grant continuity to an order issued under Art.115 (7). It has, therefore, harmed the Constitutional Supremacy and the Rule of Law.

14. Senior Advocate Basudev Prasad Dhungana (in both cases)

In order to issue an order under Article 127 one must show the difficulty caused in the implementation of the Constitution. The existence of that condition must be shown objectively. Deprivation of the rights of the citizens cannot be allowed by exercising that Article in the absence of such a condition. When Article 127 was exercised for the first time in the year 2051 BS (1994) for the purpose of extending the date of elections, that act did not infringe the rights of the citizens. The impugned order could not show the existence of the precondition of emergence of any difficulty. In order to conduct business by forming a body outside the confines of the Constitution Article 127 cannot be exercised by taking the plea that there has arisen a difficulty in the implementation of the Constitution. The provision made in Art. 88(5) allowing His Majesty to seek opinion of the Supreme Court makes it clear that the powers of His Majesty are limited. Final interpretation of the law cannot be made by others except the Supreme Court. In the case of Bed Krishna Shrestha (1952), too, a judicial principle was laid down that even though His Majesty is not made a respondent in regard to any act done by His Majesty such an act could be declared void if that accomplished work appeared to be unlawful and unconstitutional. His Majesty cannot be made a respondent also on the basis of the principle "the King can do no wrong". Whatever executive functions are discharged by His Majesty are all done on the recommendation of the Council of Ministers. Therefore, there is no obstacle to proceed with the hearing of the writ petition.

Submissions made by the Legal Practitioners Appearing on behalf of the Respondents

1. Attorney General Pawan Kumar Ojha (on behalf of the respondent Royal Commission)

The investigation about petitioner Rajeev Parajuli had been started by the Commission formed by the first Royal order issued on Falgun 6, 2061 (February 17, 2005). After the petitioner, appearing before the Commission, gave his statement and participated in the bail proceedings and after having been placed in detention for failing to produce the bail amount he filed this petition long after the completion of the investigation. He should have petitioned the court immediately after the action had been initiated. Both the petitioners have accepted the order issued during the period of the state of Emergency in their writ petitions. The Government of elected representatives of the people could not be formed because the elections to Parliament did not take place. Had the elections been conducted the Constitution could have come to its original place. The present problem has been created due to the dissolution of Parliament. As presently, there is no Government made under Articles 36 and 42 of the Constitution of the Kingdom of Nepal, 1990, following the elections to Parliament, all the executive and legislative powers except the judicial powers have become vested in His Majesty. Even when those powers were vested in others the responsibility to uphold and protect the Constitution is vested in His Majesty as per Article 27(3) and Article 43 of the Constitution. Article 27(3) has granted the authority to His Majesty to take appropriate steps in the best interest of and for the progress of the people of the Kingdom of Nepal. The act done in the best interest of the people is the law. His Majesty has got this power even when a Council of Ministers having the executive power has been formed. These are Articles 72 and 127 which are said to remain operative in the event of the failure to conduct the elections to Parliament. The State affairs are being conducted by exercising these two Articles. In the Royal Proclamation of Magh 19, 2061 (February 1, 2005) it has been mentioned that there is need to prevent corruption due to factors like wide spreading corruption and obstacles caused to the development of the nation. The Council of Ministers mentioned in Article 35(2) is a Council of Ministers which is comprised of the elected representatives. But at present there is no such situation. Because the present Council of Ministers has been constituted under Art. 127, the decisions to be made by His Majesty are not to be made on any one's recommendation. It has to be made by His Majesty himself. As the executive powers are vested in His Majesty himself, there is no meaning of the plea that, while exercising Art. 127, there must be a recommendation made by the Council of Ministers as per Art. 35(2). The present state of Nepal is of a special nature. His Majesty has not formed a caretaker government. The situation of His Majesty himself conducting the State affairs is something of a special nature. Action has been taken to rectify the spoiled works. The provision for His Majesty has been made by Art. 27 of the Constitution. Because Article 27(1) has enjoined that His Majesty must be a follower of the Hindu religion a consideration of the Eastern tradition and customary practices also suggest that His Majesty is required to undertake the responsibility. It has been the tradition and position of the King to be patron of the Hindu religion and culture and to be guided by that. According to the Vedic tradition, he is supposed to take into consideration every pain and pleasure of the people. The present

state of affairs has cropped up only due to increase in corruption and lack of good governance. The situation of conflict caused also due to the factor of corruption has led to the declaration of the state of Emergency. The report prepared by the Committee constituted under the convenorship of the then member of the National Assembly Mahadev Prasad Yadav has also proved that corruption is deeply rooted and has spread perversion in the country. One of the reasons why the country has reached the present state is also the factor of corruption. Monarchy is today the only institution which can take the responsibility for effectively curbing and controlling corruption. Every work is to be done in accordance with the satisfaction of His Majesty. No question can be raised in the law court in regard to the acts done in accordance with the satisfaction of His Majesty under Article 115(7). It has been also mentioned in the Proclamation of Magh 19, 2061 (February 1, 2005) to form such a Commission. Only because no condition other than the one relating to preventing the state of Emergency has been specified in Article 115 (7), it is erroneous to say that such a Commission cannot be formed. There is a provision that an order issued under that Article can be effective as the law. But this is not equivalent to the law. This is equivalent to the Constitution. As the Constitution is also the law that order is also a part of the Constitution. As it has been held by the court in the petition filed by Jhank Kandel and Others that the Constitution should also be treated as the law this order is also a part of the Constitution. As the Commission was formed under Art. 115(7) and the functions including investigation of complaints, registration and disposal of cases etc. were started and as His Majesty had withdrawn the state of Emergency since Baisakh 5, 2062 (April 18, 2005) while those works were still under consideration and as there was no provision to transfer the cases under consideration of the Commission to other bodies, a difficulty has arisen to conduct those affairs and activities. Therefore, His Majesty has issued an order under Article 127 to give continuity to the acts of the Commission. The Government of Nepal Act, 1948 and the Constitutions of 1959 and 1962 had granted powers to His Majesty in regard to removing difficulty in the implementation of the Constitution. The 1962 Constitution had declared that such an order shall be a part of the Constitution. But as such provision is missing from Art. 127 of the present Constitution, there is a need for interpretation in this regard. Because such an order removing the difficulty in the implementation of the Constitution gives momentum to the implementation of the Constitution, such an order must be treated as included under the Constitution. Also because an order issued to remove some difficulty of a statute is regarded as a part of that statute, an order issued with a view to removing difficulty in the implementation of the Constitution must be treated as a part of the Constitution. That the provision regarding removal of difficulty is a wider provision has been also accepted by the Indian Courts. So it cannot be said that only this can be done or only in this way it can be done. As the order issued under Art.115 (7), being equivalent to the law, is a part of the Constitution, an order has been issued under Art. 127 to give continuity to the acts initiated by the former. It has been an accepted principle that a Constitution should be interpreted in a harmonious way as much as possible. Art. 98 has given power to the CIAA to conduct investigation and make prosecution only in case of the persons holding any public office. But as the Royal Commission has been granted authority to investigate, prosecute and try other persons as well such as private individuals working

in the public organization, banks and financial institutions and also offences concerning contract and lease, revenue cheating, smuggling etc., there is no duplication of composition of two institutions for the same work. The powers granted to the Commission as per Section 2 of the Order relating to the Formation of the Commission, and the basis of composition of the CIAA under Art. 98 are separate. The Royal Commission has been formed also to lessen the burden of work of the CIAA. Although the activities and powers of both these bodies appear similar to some extent, since their activities have been conducted in separate ways and also because the CIAA has not complained about any adverse effect on its jurisdiction, the formation of the Royal Commission must be declared constitutional through harmonious interpretation of the Constitution. It has not been mentioned that the present Constitution has accepted only the Adversarial system out of the two systems of criminal justice. The provisions made in the Forest Act, the Customs Act and the Local Administration Act have also accepted the Inquisitorial system. And as this court has accepted this system as constitutional, the remark that the powers granted to the Commission in regard to investigation, prosecution as well as disposal of cases is contrary to the recognized principles of justice and the principle of Natural Justice, is not constitutionally and legally valid. Moreover, as the cases are tried by the Commission only after the officers deputed by the Office of Attorney General have conducted the investigation in the capacity of Investigation Officers and file the charge sheet, it is not correct to say that all the works have been done by one and the same body. Those willing to defend have been also granted appropriate time. There is provision for dispensation of clean and impartial justice. As there is also provision for filing appeal on the decisions made by the Commission in the Supreme Court, the Supreme Court can exercise control in case any decision has been made by the Commission contrary to the recognized principles of law and justice. There are persons having long administrative experience in the Commission. They are also equipped with qualifications and competence. Even though it is not in the form of a law court. the Commission has been formed on the pattern adopted by quasi-judicial bodies. Its activities are almost similar to those of judicial bodies. As there is a provision requiring the placement of the order issued under Article 127 before Parliament, this question first of all needs to be viewed from the political angle. It is the responsibility of Parliament to examine this order. Article 31 does not allow the filing of a case in respect of any act performed by His Majesty. As an Ordinance promulgated under Art. 72 falls under the legislative powers, it may be subjected to judicial review. However, judicial review of an order issued under Art. 127 cannot be made. The petitioners have not presented any decisions resembling our present situation and related official documents. Since such an order has been issued as an attempt to prevent corruption prevailing in the country, there is no place for issuance of the order prayed for by the petitioners.

2. Deputy Attorney General Drona Raj Regmi (on behalf of also the Royal Commission)

The present situation has evolved in course of constitutional practice. As mentioned in Section 12 of the Royal Proclamation of Magh 19, 2061 (February 1, 2005) emphasizing the need for control of corruption, His Majesty has promulgated the formation of the RCCC. As it has been also mentioned in the Royal Proclamation to further equip the CIAA with

means and resources, it is clear that the Royal Commission has not been formed to interfere in the functions of that Commission. In the petition of Santosh Mahato the first order issued on Falgun 5, 2061 (February 16, 2005) has been accorded recognition. The Royal Commission has been formed in order to prevent corruption which is prevalent as a national crime. After the withdrawal of the state of Emergency by His Majesty, it is obvious that difficulty has arisen in respect of the functioning and proceedings of the Commission formed by the order issued under Art.115 (7). As there has arisen a condition asking for giving continuity to the Royal Commission in view of the requirement of the State, the order has been issued in accordance with Art. 127. If it is held that the order issued under Art. 115(7) cannot be given continuity it will be virtually tantamount to exercising control over Art. 127. No preconditions have laid down which need to be fulfilled before issuing an order under Art 127. An order issued under this Article is a kind of order which ought to be placed before Parliament and which can be resolved by political discussion. If this court enters into consideration in this regard that will be tantamount to interference in the powers of Parliament. In the writ petition of Purna Man Shakya, the jurisdiction of Parliament has been analytically discussed. The nature of the Commission which has acquired continuity in accordance with Art.127 is constitutional. In the order issued by the court in the petition filed by Jhanka Kandel and Upendra Nandan Timalsena, this court has admitted that an order issued under Art.127 shall also have the immunity contained in Art.31. As the Commission has been constituted taking recourse to a constitutional provision, it cannot be questioned as being unconstitutional. Because a provision has been made for filing appeal in the Supreme Court, even if the Commission delivers any decision in contravention of the recognized principles of justice that can be controlled by this court through judicial review of that decision. The proceedings of the Commission have been conducted in accordance with the judicial system. Because the decisions of the Commission have been subjected to appeal in this court, and the appeals have been already disposed by this court, the Commission cannot be dubbed as unconstitutional. Article 127 has been exercised in the form of a constitutional practice. This process has come as a source of the Constitution. As the impugned order is a part of the Constitution, it cannot be subjected to judicial review.

3. Deputy Attorney General Narendra Pathak (also on behalf of the Respondent Royal Commission)

To resolve the present dispute Articles 115 (7) and 127, Articles 84 and 85 and Articles 35 (2) and 27 need to be interpretated. The justification for constituting the Royal Commission has been already mentioned in the Royal Proclamation of Magh 19, 2061 (February 1, 2005). It has been conferred powers to determine the nature of the offence and conduct investigation, file charge sheet and decide the case. An order issued under Article 115(7) has been described as equivalent to the law and as the Constitution is also the law, this order is a part of the Constitution. Only because of a difficulty arising in the functioning of the Commission which is already working after its constitution, continuity has been granted to the activities of the Commission by removing the difficulty. Irrespective of whether or not Parliament is in Session, the power to exercise Art. 127 has been entrusted only to His Majesty by the Constitution. This much is the difference

between the provision concerning removal of difficulty contained in Article 392 of the Indian Constitution and that of our system. Other provisions are similar. How to interpret the Constitution in an abnormal situation has been already discussed by this court in the writ petition filed by Santosh Mahato against Speaker Tara Nath Ranabhat. Our Constitution has provided for the Executive and the Legislature along with His Majesty. As other Articles of the Constitution are implemented through an order issued under Article 127, such an order issued under this Article is a part of the Constitution. That an order issued under Article 127 is a part of the Constitution is also proved by the fact that the Constitution was activated by removing the difficulty in the formation of the Constitutional Council for the appointment of the Chief Justice. Article 127 is an Article which can be exercised similarly as other Articles. This Article has been exercised in accordance with the Doctrine of Necessity on the basis of the needs of the State. It has been held by a Special Bench of this court in the writ petition of Binod Karki (Nepal Kanoon Patrika, 2051, p. 553) that an Ordinance shall be promulgated on the basis of the needs of the State and that old laws shall get recognition. There has been a practice of justice dispensation by three types of courts. General Courts, Special Court established for hearing special type of cases and judicial institutions fall under this. Under this there are also institutions functioning as Tribunals which dispense justice but which do not appear to be of the nature of general or Special Court but which discharge functions similar to those of the law courts. Such Tribunals are also accommodated under the recognized principles of law. However, the functions discharged by them must be open and reasonable. The decision made in the case of Iman Singh Gurung does not resemble in this context. It cannot be rightly said that justice cannot be done only because one and the same institution carries out the investigation and conducts hearing of that case. There is greater credibility in the evidences collected at one's own initiative in comparison to those collected by other institutions. Disputes regarding judicial functions or system have entered this court even before. In the decision made on Jyestha 5, 2058 (May 18, 2001) in writ No. 3264 (published in Nepal Kanoon Patrika, p. 23), Special Court and quasi-judicial institutions have been declared constitutionally valid also in the context of Articles 84 and 85 of the Constitution. As there has been made a provision for presenting one's version right from the time the Commission starts investigation, for making arguments and submissions before the Commission and also for filing appeal on the decisions made by the Commission it cannot be said that the formation and the functions of the Commission are violative of the recognized principles of justice. It is a policy matter of the Executive to decide what types of courts or institutions should be established and what types of cases should be entrusted to them for hearing. Section 65 of the Corruption Prevention Act, 2059 (2002) has accepted that the cases falling under this Act may be heard by other institutions. Decision has been also made that investigation may be conducted by general courts, too. It does not suffice only to allege that some work has been done in a *mala fide* way or with evil intention, it must also be proved. It has been already decided that an order issued by His Majesty under Art. 127 cannot be reviewed. Also, in the opinion given by this court in respect of the Citizenship Bill, Article 27 (3) has been discussed and analyzed. It has been held by a Special Bench of this court in the writ petition of Chandra Kant Gyawali that in

order to exercise the powers of this court under Art. 88 (1) the provisions of any law must be inconsistent with the Constitution and that the issue of the provisions of the Constitution being inconsistent with one another may not be reviewed under Art. 88 (1). Also, on account of the previous decisions made by this court, propounding the principle that the courts do not decide about hypothetical issues, the present writ petition cannot be entertained.

4. Acting Deputy Attorney General Puspa Raj Koirala (also on behalf of the respondent Royal Commission)

His Majesty has constituted the Royal commission. The court has already accepted the exercise of Article 127 in the writ petition filed in connection with the appointment of the Prime Minister by His Majesty by exercising Art 127. The provision of upholding and preserving the Constitution has been already accepted in a conventional manner. The order issued by His Majesty by exercising Article 127 is the Supreme law. This has not come under any law, rule or byelaw. Therefore, it cannot come under the orbit of Art 88 Article 98 has not provided that no institution other than the CIAA shall be established in respect of prevention of corruption. As the proceedings are being conducted adopting the procedure prescribed by the Special Court Act, 2059 (2002) it can not be said that the Commission has been constituted in contravention of Articles 84 and 85. The order issued under Art.127 is only an order aimed at removing the difficulty. The Constitution has not been amended by it. In the present Nepal law still the Inquisitorial system has been adopted. This fact is substantiated also by the provision made in the Trafficking in Human Beings (Prevention) Act, 2043 which provides that no case shall be initiated without the permission of the court. There is also a provision which empowers the CIAA to not only investigate but also to make decisions. There is no provision which restrains from establishing another institution of a parallel form by exercising in Art.127. The words used in Art. 127 must be interpreted accordingly.

5. Joint Government Attorney Tika Bahadur Hamal (on behalf of the respondent Royal Commission)

In the writ petition of the petitioner Rajeev Parajuli it has not mentioned which the order (specifying its date) has been sought to be declared void. How the order is contradictory has also not been clearly explained. In the writ petition of Santosh Mahato only the order dated Baisakh 16, 2062 (April 29, 2005) has been sought to be voided, thereby giving recognition to the order dated Falgun 5, 2061 (February 16, 2005). On Baisakh 16, 2062 (April 29, 2005) the order was issued to give continuity to the order dated Falgun 5, 2061(February 16, 2005). The person having power to issue an order also possesses the power to issue an order for the sake of giving continuity. The provision contained in Section 21 of the Law Interpretation Act, 2010 (1952) establishes this matter. As no clear plea has been taken in the writ petition of Rajeev Parajuli, the petition cannot be entertained according to the judicial principle propounded in decision No. 2346 published in Nepal Kanoon Patrika, 2046 (1989). Art. 31 (3) denotes the acts discharged by His Majesty. No question can be raised in that regard. Article 27 (3) is an Article to be exercised in the

discretion of His Majesty. Except the provisions of Articles 28, 43 and 121 there has been a provision in practice for long time for His Majesty discharging the functions by exercising the State authority inherent in him and in accordance with the customs. This is established also by the fact that His Majesty had sought the opinion of this court in respect of the recommendation for the dissolution of the House of Representatives and the citizenship Bill. In the opinion submitted by this court in connection with the Dasdhunga accident it has been mentioned that Article 127 can be exercised to resolve the immediate problems if there emerges a situation in which any institution fails to discharge its functions. In the writ petition of Hari Prasad Nepal also the court has held that His Majesty has got constitutional immunity. In the case of Ved Krishna Shrestha published in Nepal Kanoon Patriaka 2016 (1959) it was held that the King can do no wrong. The issues raised by the petitioner are of political nature. Taking into consideration the best interests of the people the order has been issued also on the basis of Article 27 (3) and, therefore, the order is constitutionally valid. Article 14 (2) does not say that investigation cannot be made twice. That it is permissible to take action under separate laws in connection with the same dispute has been held in the writ petition filed by Kishor Shrestha (writ No. 2845 of the year 2059). The Indian Supreme Court has also decided that the Head of the State is vested with the inherent powers to take any step whatsoever in the best interest of the people. When there is no existence of a government elected by the people, it is not proper to say that a recommendation under Art 35 (2) is essential.

6. Senior Advocate Kunja Bihari Prasad Singh (on behalf of the respondent Royal Commission)

The provisions made by the Constitution of the Kingdom of Nepal, 1990 are extremely good. Had there been no provision of Article 127 in the Constitution for removing any difficulty in the implementation of the Constitution no, organ would have functioned in the nation at present. As a result of some difficulty arising in the implementation of Article 53 (4) of the Constitution, His Majesty has made the Royal Proclamation by invoking Article 127. In the writ petition of Jhank Kandel and others, this court has already interpreted Article 31 (3) and held that no writ petition can be entertained against the Council of Ministers constituted by His Majesty by exercising Article 127. Against the backdrop of the failure to hold the elections following the dissolution of Parliament His Majesty the King, upholding and protecting the constitution as per Article 27 (3), made the Royal Proclamation of Magh 19, 2061 (February 1, 2005) to declare the state of Emergency, and established the RCCC on Falgun 11, 2061 (February 22, 2005) by issuing an order as per the constitutional provision of Art 115 (7) in order to prevent corruption which is ever increasing, as mentioned in that Proclamation, in the country. As the order issued under Art. 115 (7) was to remain effective till the continuation of the state of Emergency, after the withdrawal of the state of Emergency by His Majesty on Baisakh 16, 2062 (April 29, 2005) there arose some difficulty in conducting the proceedings of the Royal Commission constituted in accordance with the order issued on Falgun 5, 2061 (February 16, 2005). And, therefore, the Royal Commission was granted continuity in order to investigate the complaints and dispose off the cases pending in the Commission. Petitioner Santosh Mahato has failed to

point out in his petition the reasons which could explain why the order is violative of the Constitution. The court has to remain confined to the request of the petitioner. If the Council of Ministers can be constituted by exercising Art. 127, how come the Royal Commission which is just a small part of the Executive cannot be formed. There is no request for interpretation of Art.27 in the petition. There is no dispute that the impugned order has been issued by His Majesty. As this act has not been done by any employee of His Majesty's Government nor is His Majesty's Government, a respondent in the case, there is no question why the immunity under Art.31 cannot be available in this dispute. So far as the question of the opinion given in the Dasdhunga accident is concerned, that cannot be treated as a precedent because it is merely an opinion which has not come from any decision made in the course of disposal a case. The constitutionality of an order issued under Art.127 can be examined by the court only after it has been presented first in Parliament. As this writ petition has been filed without presentation of the impugned order in Parliament the writ petition cannot be considered as mature. The order directing the registration of the petition is not lawful. No full hearing of the writ petition can be made by this Bench because all the respondents have not been asked to submit their written reply. Therefore, first the petition must be forwarded to a Single Bench to complete that formality.

7. Advocate Prem Bahadur Bista (on behalf of the Chairperson of the Royal Commission Bhakta Bahadur Koirala)

There is a situation of recognizing the Council of Ministers constituted under Art.127 because of the absence of an elected Prime Minister. The Royal Commission has been established as mentioned in the Proclamation of Magh 19, 2061 (February 1, 2005). Since the qualifications, functions and powers of the Commission have been specified in the Order relating to the Formation of the Commission, the Commission cannot be viewed as an institution parallel to the CIAA. The petition has been filed challenging only the continuity granted to the Commission without challenging the establishment of the Commission under Art.115 (7). The Royal Proclamation has been made by His Majesty within the orbit of Art.27 (3) and the Commission has also been established accordingly. It has also been substantiated by the written reply that as it has been accepted by the Preamble of the Constitution that the State power is vested in His Majesty the Commission has been established on that very basis. As no previous charge-sheet has been filed in the case of Rajeev Parajuli in a law court, it cannot be said that he has been placed into double jeopardy. Only because the trial of a graft case in a general court shall consume more time, this type of Commission has been formed. This Commission is of temporary nature. Thus, the problem shall be automatically solved after the formation of Parliament.

8. Advocate Krishna Ram Shrestha (on behalf of the Chairperson of the respondent Royal Commission Bhakta Bahadur Koirala)

As the Commission has been formed by exercising Art.127 of the Constitution of the Kingdom of Nepal, 1990 it is not proper to say that it has been formed by His Majesty by exercising the state authority or in his discretion. Notwithstanding the fact that Article 127 has been kept towards later part end of the Constitution, this Article is significant and

powerful. This Article may also contract or control other Articles of the Constitution. As the recommendation for extending the date for holding elections to Parliament, which must be held not exceeding six months as provisioned in Article 53, has been made in accordance with Article 127, it should be considered to have contracted the provision contained in Article 53. As the Council of Ministers is also constituted by exercising this Article, when there is absence of an elected government, this Article seems capable of making additions to or detractions from other provisions of the Constitution in regard to the formation of the government. An order issued under Article 127 is a part of the Constitution. The Royal Commission seems to have been established probably because the CIAA failed to fulfill the objective of the formation of the latter. As mention has been also made about the prevention of corruption in the Royal message and the twenty one program of the Government, the Commission has been established for the prevention of corruption caused by economic disarray. The order under Article 127 has been issued in order to give continuity to the Commission which is already functioning after its formation. Nothing can prevent the act of giving continuity to the Commission. The opinion given in the Dasdhunga accident by the apex court cannot be treated as a precedent within the meaning of Article 96 as it has come out of the internal discussion of the court. The order issued under Article 127 cannot be constitutionally tested under Article 88 (1) because it a part of the Constitution as it can contract or extend the other provisions of the Constitution. The qualifications of an official can be looked into only if the provision under which he has been appointed has prescribed any qualifications. If nothing has been mentioned in that order, or if that order has not imposed any restrictions, there is no obstacle in appointing any person to the post. As the order has also provided that the Supreme Court may scrutinize whether or not the proceedings of the Commission are lawful, the apex court may cause the observance of the recognized principles of justice if the proceedings of the Commission are inconsistent with them. The Commission is an organ subordinate to the Supreme Court. It cannot be described that all the functions have been discharged by only one institution because the Rules have provided for separate investigation and disposal while addressing the issue how the Commission shall perform its work. As the formation of the Commission has been guided by the objective of benefiting the nation and the citizens by preventing corruption, it cannot be described that it has amended the Constitution.

9. Advocate Ganesh Bahadur Dhungaana (on behalf of Prem Bahadur Khati, a member of the respondent Royal Commission)

There are persons in the Commission who fulfill the qualifications and are competent. The Commission has been set up under pressure from the people as the nation has reached a state of failure due to widespread corruption in the country. The Commission has been formed by exercising the special powers inherent in His Majesty following the transfer of the powers of Art.35 (2) and Parliament to His Majesty. Therefore, the formation of the Commission is constitutional.

10. Advocate Kaushal Kishor Dwivedi (on behalf of Hari Babu Chaudhary, a member of the respondent Royal Commission)

Our constitutional provisions are quite adequate for the resolution of the issues raised by the petitioner. There is no need for the reference to alien provisions. The Constitution cannot be activated at a time when the nation is engulfed in an abnormal situation. It had become urgent to undertake some appropriate measures from the viewpoint of the law and order situation prevailing in the country. The system of Monarchy in the foreign countries is different from that of ours. The American as well as the Indian constitutional systems also do not resemble our constitutional system. Our Constitution has not placed His Majesty in a situation where he has to sit silently, no matter a situation whatsoever may arise. His Majesty had to undertake the step of Magh 19, 2061 (February 1, 2005) due to impediments caused to the functioning of the system of governance of the country. The reasons and the objectives have been already mentioned in the proclamation. The order has been issued under Art.127 in order to give continuity to the order issued during the state of Emergency which was declared following the Royal Proclamation. As Rajeev Parajuli has not been prosecuted and punished for the same offence prior to the investigation made by the Royal Commission in that connection and only because the CIAA had closed the case-file after making investigation and enquiry, it is not proper to say that he has been prosecuted twice for the same offence in contravention of Article 14 of the Constitution. The Constitution has not imposed any restriction establishing another institution in connection with prevention of corruption. The commission has been established to expedite the proceedings regarding the offences related to corruption. Article 127 is itself clear. There is no need for interpretation. An order issued under this Article does not fall under the purview of judicial review. The facts of the opinion given by this court in the Dasdhunga accident and those of the present dispute are entirely different; there is no resemblance between the two. The acts performed under Art.27 (3) have been performed in accordance with the responsibilities entrusted by that Article. The members of the Royal Commission have not been appointed in the capacity of judges. They have been appointed as the members of the Commission taking into consideration their skills and competence. This matter cannot be an issue of judicial review.

11. Advocate Mithilesh Kumar Singh (on behalf of Hari Babu Chaudhary, a member of the respondent Royal Commission)

It is a constitutional provision that the orders issued under Art.127 must be first approved by Parliament like an Ordinance promulgated under Art.72. A judicial principle has been enunciated in the decision No. 4852 published in Nepal Kanoon Patrika of the year 2051 (1991) stating that the interpretation of the Constitution should be made in a harmonious manner and not according to its letters. Because currently the country is faced with a state of conflict there has arisen a need requiring His Majesty to make some sort of arrangement. In a similar situation important arrangements have been made by the Head of the state in all the South Asian countries. The Constitutions of 1959, 1962 and 1990 have accepted that the State authority vests in His Majesty. When the 1990 Constitution was promulgated it was so done by exercising the State authority. Corruption is a disease which has spread

in the society like plague. The Royal Commission has been established to prevent such a disease. Neither the CIAA nor the National Vigilance Centre has entered the court with a petition claiming interference in their jurisdiction by the formation of the Royal Commission. Even though the Commission has been established through an order dated Falgun 5, 2061 (February 16, 2005) that has not been challenged by the petitioner. All the three Constitutions of 1959, 1962, and 1990 have made a provision in respect of removing any difficulty in the implementation of the Constitution, and in all of them, a provision has been made for the issuance of order by His Majesty. The petition filed by Santosh Mahato does not explain which law contravenes which provisions of the Constitution and how. The order cannot be invalid as it is of a temporary nature. The order issued on Baisakh 16, 2061 (April 28, 2004) is a new one and it has not given continuity to the earlier order. The later order is different from the earlier order. According to the new composition, there could have been changes also in regard to the Chairperson and the members. It has not been mentioned in the petition as to which right has been deprived of by the impugned order. For this reason the petition can be neither registered under Art.88 (1) nor can it be scrutinized by this court. His Majesty used to form Commission of different types also under the earlier Constitutions. Since various Commissions have been formed by His Majesty from time to time since the year 2007 (BS) (1951), it is not proper to say that only this very Commission cannot be formed by him. Such types of orders are passed from time to time in a Monarchical country. The order issued by His Majesty cannot be scrutinized by this court under Article 31 (3) also according to the recognized principle that "the King can do no wrong".

12. Advocate Jukti Jung Lamichhane (on behalf of Raghuchandra Bahadur Singh, a member of the respondent Royal Commission)

The present writ petition is about a serious and complex matter. It needs to be decided on the basis of the customs, the laws and the Rules. The petitioner has entered the court with the petition after the proceedings have already reached the mid stage, and he has not taken the plea that the formation of the Commission is unconstitutional. The petitioner does not have the right to raise questions about the members of the Commission. Had he been adversely affected, he should have approached the court in time. The petitioner has not entered the court with a clean hand. The writ petition filed after the lapse of time related to the order issued under Art.115 (7) has been clearly responded through the written reply. There does not exist a situation as pointed out by the petitioner. The Royal Commission not a court; it is a Tribunal. That a Tribunal can be constituted is a provision of the Constitution. As our system is one which also comprises Monarchy, the Eastern Philosophy related to the Kingship should be also taken into consideration. It cannot be viewed from the angle of the Western principles and decisions. While dealing with the present dispute it is not suffice to consider only the foreign constitutional and legal systems. The Vedas, the Upanishads and the Smrits should be also looked into. The provision of Art 27 (3) means that all the powers are vested in His Majesty. The term "in the best interests and welfare of the people" does not mean that the Constitution must be literally complied with. If the best interests of the people are not served, His Majesty may undertake any step whatsoever. Article 127 has

not been exercised directly by His Majesty. It was exercised on the recommendation of the then Prime Minister. Article 127 is not conditional. Article 115 (7) is a minor Article. If His Majesty can exercise a minor Article, it cannot be held that he is not capable of exercising a major Art.127 in his own discretion.

13. Advocate Krishna Kumar Thapa (on behalf of Raghuchandra Bahadur Singh, a member of the respondent Royal Commission)

The Royal Commission was formed on account of an abnormal situation engulfing the country caused by corruption. By exercising Art.127 His Majesty has preserved the honor and dignity of the Nepali people. The orbit of Article 127 is pervasive. The process of the composition of the Commission and its jurisdiction are entirely different from that of the CIAA. The CIAA is of a permanent nature whereas this Commission is of a temporary nature. The Royal Commission has been formed to deal with the works which the CIAA could not find out, which it could not see and what it could not do. It is Parliament which can look into an order issued for removing any difficulty. The court is not empowered to examine its need and justification.

14. Advocate Trilochan Gautam (on behalf of Shambhu Prasad Khanal, a member of the respondent Royal Commission)

The formation of the Commission has not affected the basic structure of the Constitution. The commission has been formed with a view to securing the objective of social justice provisioned in Article 25. The fundamental rights may be restrained if any action is initiated in accordance with the Directive Principles of the State. The Constitution is not an absolute document. The major responsibility of the State lies in fulfilling the positive obligation. The duty of fulfilling the positive obligation in an abnormal situation lies in the Crown in a Monarchical country. There is a relation between Article 27 (3) and Article 127 of the Constitution. An order issued under Art.127 cannot attain maturity unless it is placed before Parliament. So long as Parliament does not come into existence, it shall remain valid like Article 90A of the Constitution of Nepal, 1962 and, thus, as a part of the Constitution. Our Constitution has not accepted that an interpretation ought to be made in the way it has been written in the Constitution. If the opinion given by the court in the Dasdhunga accident was not acceptable to the party which sought that opinion, how could it be acceptable to the court? Articles 84 and 85 have not accepted that the powers relating to justice dispensation can be exercised only by the law courts. Our Constitution has not made any provision similar to the provision of the American Constitution- "Total judicial power vested to the Supreme Court". It is also proved by the fact that our Constitution has granted the authority to the Legislature to decide how the powers relating to justice shall be exercised. If the powers given by Articles 27 (3) and 127 are controlled powers, it is the Constitution which should exercise that control. The court cannot exercise that control. The order relating to the formation of the Royal Commission is not violative of Article 98. The very name of the Commission has reflected the difference. The Royal Commission has been conferred powers to take action against not only public domain but also private domain.

15. Advocate Bal Krishna Neupane (on behalf of the Chairperson of the respondent Royal Commission Bhakta Bahadur Koirala)

As the provision of presenting an order issued under Art.127 before a joint session of both Houses of Parliament is a provision relating to the procedure of conducting the joint session of Parliament, the order issued under Art.127 remains on a higher level than Art.115 (7). If His Majesty so desires, an order relating to the amendment of the Constitution may be also issued under Article 127. Such an order cannot be a subject of judicial review under Article 88 (1). As the Constitution has also given continuity to the Citizenship Act, 2020 (1963) and as an order issued under Art.115 (7) is also equivalent to the law and as the Constitution is also the law, continuity can be given to an order issued under Art.115 (7) by exercising Article 127. The country is being governed through the exercise of Art.127. Article 127 has been exercised several times. So far as the merits and demerits are concerned, the responsibility for them should be borne by one who has constituted it. If any changes are to be introduced in the Constitution, or if any institution is to be established, it can be done only through the exercise of Article 127. But that should be done not permanently but only for some time. The matters not covered by an Ordinance can also come through the exercise of Art. 127. The order issued under Art.127 can be looked into by the elected representatives. The present order has not been placed before Parliament. It has remained in the form of a kind of Bill. Although the court may make judicial review of a constitutional Amendment the decision has been made under Art 88 (1). It is not proper to say that an institution can be established under Art.115 (7) but not under Art.127. The orbit of Article 127 must be expanded; it is not proper to contract it. The necessity does not look for the law. A decision should not be made by looking at the face of the Commission. If the CIAA did not work effectively why should another Commission not be constituted? Article 98 does not restrain from constituting another Commission. The Corruption Prevention Act, 2059 (2002) has also accepted that another institution for taking action under that law may be created. It cannot be described as a violation of the principle of Natural Justice only because of a provision made by the law empowering any institution to conduct both the investigation as well as the trial of cases.

16. Advocate Hari Gautam (on behalf of Hari Babu Chaudhary, a member of the respondent Commission)

The present dispute is not a legal dispute, it is simply political. It is not a matter to be resolved by the court. Our country cannot avoid looking at the Eastern culture. To say that there is no need of the Royal Commission is tantamount to saying that corrupts should not be punished. Upholding the Constitution is the duty of His Majesty. The Commission has been formed in the interest of the country and the countrymen. The formation of the Commission is constitutional.

17. Advocate Laxman Prasad Pokharel (on behalf of Hari-Babu Chaudhary, a member of the respondent Royal Commission)

As the CIAA had closed the case-file of Rajeev Parajuli after having only conducted the investigation, it cannot be described as prosecuting him twice. Proceedings can be reopened in respect of a file which had been closed earlier. The request for also quashing the order issued under Art.115 (7) which has been already withdrawn is not justifiable. All the Constitutions of Nepal have been granted by His Majesty. His Majesty, who is equipped with the State authority of promulgating the Constitution, cannot be considered as incapable of issuing other orders.

18. Advocate Kamakhya Lal Karna (on behalf of Raghu Chandra Bahadur Singh, a member of the respondent Royal Commission)

All the Constitutions of Nepal have been granted by His Majesty. That all the authority is vested in His Majesty also on the basis of customs is established by Art.20 of the Constitution of Nepal, 1962. The present constitution has provided that sovereignty granted to the people shall be exercised as mentioned in the Constitution. Articles 28, 72, 115 and 121 have conferred on His Majesty all powerful authority. The acts performed by His Majesty are treated as acceptable to all. Even if there is any difficulty in the implementation of the order issued under Art.115 (7). Article 127 may be exercised. Article 88 (1) is applicable only in connection with the laws made by Parliament. It is only Article 127 which is competent to remove all types of difficulties. As economic disarray is still prevailing in the country, the act of giving continuity to the commission is constitutionally correct.

19. Advocate Raj Kumar Thapa (on behalf of Prem Bahadur Khati, a member of the respondent Royal Commission)

If the court status examining the matters related to Art.127 it shall result in the amendment to several Articles. The Constitution has itself provided that the State authority shall be vested in His Majesty. All the Executive, Legislative and Judicial powers are vested in His Majesty. The State authority is the official power of the Head of the State. The state authority and the sovereign powers are the two sides of the same coin. The judicial power is also vested in His Majesty by virtue of the provision contained in Art.122. The exercise of Article 127 has been made since 2051 (1994).

20. Advocate Mohan Prasad Acharya (on behalf of Prem Bahadur Khati, a member of the respondent Royal Commission)

Law should be always directed towards the good of the society. Even at present such an interpretation should be made. At present there is prevailing a state of immunity from punishment in the country. The Royal Commission has been set up due to extreme explosion of corruption resulting in gradual emptying of the State coffer. As the Commission has been given continuity on the basis of Article 127 remaining within the constitution it cannot be termed as unconstitutional. As it has been a tradition that orders are issued or promulgated by His Majesty, such an order cannot be described as extra-constitutional

also for this reason. The provision for removing difficulties is made aiming at the action which may happen in the future. As there is such a provision in the constitution it may be used for any action or purpose whatsoever. The importance of the king has been recognized by the history and every work done by us. The constitution of 1962 has not yet been replaced. Full powers are vested in His Majesty. Prof. Dicey has opined that in the time of abnormal situation confronted by the nation the British Crown may also undertake any action whatsoever. The order issued under Article 115 (7) may be granted continuity by exercising Art 127. His Majesty has got powers to perform special acts. Article 27 (3) of the present Constitution has accepted that constitutionally those powers are vested in His Majesty. It has been explained in the contempt of the court case of Kusum Shrestha that the principle of Natural Justice is not attracted in a matter for which provision has been made by the law. The order is constitutional from every angle. The fundamental rights of the petitioner have not been infringed.

21. Advocate Awadhesh Kumar Singh (on behalf of the Chairperson of the respondent Royal Commission Bhakta Bahadur Koirala)

Article 127 has been exercised time and again. It has been decided in Rabi Raj Bhandari's case of dissolution of Parliament that an act performed by His Majesty in his discretion cannot be subjected to judicial review. As the Commission has been given continuity by exercising Article 127 with the satisfaction and in the discretion of His Majesty, it cannot be subjected to judicial review.

22. Senior Advocate Laxmi Bahadur Nirala (on behalf of the Chairperson of the respondent Royal Commission Bhakta Bahadur Koirala)

A dispute is resolved through the interpretation of the Constitution. An interpretation is not mathematical; it depends on the needs. Interpretation must be moved forward in accordance with time and circumstances. Anything should be interpreted according to the circumstances prevailing in the country. Because a constitutional void had been created following the recommendation made for postponing the elections, Article 127 has been exercised in order to activate Article 35 (2). His Majesty has taken this step in compulsion due to the provision made in Art.27 (3). It has been already ruled in the petition of Upendra Nandan that as per Article 31 no question can be raised in regard to the measures taken by His Majesty. Article 35 (2) is currently inactive. As it is an order issued directly by His Majesty, it has got the immunity under Art.31 (3). Because there is a provision for the review of the laws an ordinance can be reviewed. But as an order issued under Art.127 is not equivalent to an Ordinance, it cannot be forcefully interpreted as being similar to an Ordinance. Whether or not His Majesty can govern the country is a political question. The court cannot look into this matter either directly or indirectly. Article 127 is clear. It is not proper to interpret it through other means. It is not that a parallel institution has been created. The Royal Commission and the CIAA are obviously different by their names, functions and jurisdiction. The Preamble of the Constitution has not provided that from now onwards the State authority shall cease to vest in His Majesty. Where corruption is rampant the rule of law cannot survive. Section 85 of the chapter on the Court Procedures in the

National Civil Code cannot be applicable to an action taken in course of investigation. In India CBI conducts reinvestigation even after ten agencies had conducted investigation earlier. Since the impugned order cannot be reviewed there is no place for considering the request for quo-warrant in that regard.

On behalf of the Legal Practitioners Appearing in the Proceedings under Rule 42 of the Supreme Court Rules, 2049 (1992)

1. Advocate Basudev Sharma

The legal interpretation of Article 127 could not be made clearly by both the parties. An order to be issued under Art.127 is an executive order. As it has to be presented before Parliament it cannot attain maturity without examination by Parliament. Article 127 is meant for application for removing any difficulty or obstacle. The difficulty or obstacle must have been caused in a legal way. It cannot be contended that some difficulty or obstacle has arisen under Art.127 in order to fulfill any political objective. Whereas the Constitution of 1959 had provided that the provision for removing any difficulty ought to be considered as included in the Constitution itself, there is no such provision in the present Constitution. In order to exercise Article 127, first of all it must be ascertained that any difficulty has cropped up. Art.127 cannot be exercised simply because it has been alleged that there is widespread corruption in the country. There is no ground for Parliament to accept the formation of the Royal Commission. The Royal Commission is not constitutional. The nature of the order issued for giving continuity to the Royal Commission and of an order issued for some other purpose are different. Article 127 cannot be exercised in anyway. The order issued on Ashwin 18, 2059 (October 4, 2002) has come to fulfill a constitutional lacuna. While interpreting any Article of the Constitution all the Articles and sub-Articles must be taken into consideration. As the order issued under Article 127 has been issued for Parliament it must be presented before Parliament and Parliament must look into it. The constitutional provision regarding removal of any difficulty cannot be treated as the one relating to the law. As it is concerned with the infringement of the fundamental rights of an individual, it cannot be argued that because the order issued under Article 127 is a matter to be presented before Parliament, it cannot be scrutinized by the court. There is no obstacle in granting relief under Article 88 (1). There must be judicial settlement of the issued raised by the petitioner along with the proper remedies in view of the fact that the order issued under Article 127 has to be presented before Parliament.

2. Advocate Dharma Raj Regmi

How the act of giving continuity to the formation of the Royal Commission is incongruous with the Preamble and Article 127 of the Constitution has not been explained in the writ petition. There is a clear provision about presenting the order issued under Article 127 before Parliament. That order is a law. It shall amount to encroachment upon the powers of Parliament, if the court gives its opinion in this regard prior to its presentation before Parliament.

In the present writ petition scheduled for today for the sake of delivering judgment a perusal of the pleas and contention of the writ petitioner, written replies

submitted by the respondents and the submissions made by the learned Counsels representing both the parties and the written briefs submitted by them shows that the following issues need to be decided:

1. *What are the provisions made by the Constitution of the Kingdom of Nepal, 1990 in regard to the exercise of the State authority?*
2. *Can questions be raised in a law court in respect of the acts performed by His Majesty and whether or not such acts can be subjected to constitutional review?*
3. *What is the nature of the present dispute- political or constitutional?*
4. *Whether or not the acts of constituting the RCCC and giving it continuity constitutionally valid?*
5. *Should or shouldn't an order requested by the petitioner be issued?*

So far the first question is concerned, it has been contended in the written reply presented by the Royal Commission that His Majesty has promulgated the order pursuant to Article 127 in accordance with the constitutional practices, customs and usages of Nepal, and by exercising the discretionary powers used to be exercised by His Majesty since the long past. Besides, the learned Counsels appearing on behalf of the Royal Commission and its members have raised in their submissions various issues, such as, His Majesty is a Hindu King; the King is required to discharge his duties in accordance with the Hindu religion; the Constitution cannot exercise control over the King; as the State authority is vested in His Majesty, the King can perform the acts which serve the interests of the people; as the Constitution of Nepal, 1962 has not yet been replaced, the sovereign power still resides in His Majesty. In this context it becomes essential for this Bench to look into what type of provision was present in respect of the exercise of the State authority before the enforcement of the Constitution of the Kingdom of Nepal, 1990 and what has been the provision in this regard after the promulgation of the present Constitution. Article 68 of the Constitution of the Kingdom of Nepal, 1959 had made a clear-cut provision in respect of the State authority by declaring that all other State powers except those provided in the Constitution and the prevalent laws vested in His Majesty. As per Article 20 (2) of the Constitution of Nepal, 1962 the sovereignty of Nepal resides in His Majesty. Besides providing that all the executive, legislative and judicial powers emanated from His Majesty, Article 90 also provided that all the inherent powers of His Majesty except those described in the Constitution or the prevalent laws are vested in him. This clearly shows that all the residuary powers relating to the State authority including the executive, legislative and judicial powers, which emanate from His Majesty as per Article 20(2), appear to be apparently inherent in His Majesty.

While going through the Preamble of the present Constitution to find out what kind of provisions have been made regarding the State authority and the sovereign powers in the Constitution of the Kingdom of Nepal, 1990, which was promulgated after the revocation of the Constitution of Nepal, 1962, it is found that, having been convinced that the source of State authority of independent and sovereign Nepal is inherent in the Nepali people and as from time to time a determination has been expressed to conduct the State administration in consonance with the popular will and as the Nepali people had expressed some time back their desire to bring about constitutional changes, the Constitution of the

Kingdom of Nepal, 1990 has been prepared with the objective of securing to the Nepali people social, political and economic justice long into the future.

It is clear from the aforesaid matters mentioned in the Preamble that the Nepalese people have been recognized as the source of the State authority and that the need for the Constitution of the Kingdom of Nepal, 1990 arose from the main reason of the Nepali people's desire for introducing changes, expressed through the people's movement, in the constitutional system introduced by the Constitution of Nepal, 1962. In the second paragraph of the Preamble describing what should be the form of the system of governance in the Kingdom of Nepal, the Constitution has laid down the objectives of achieving the goal of safeguarding the basic human rights of every Nepali citizen, maintaining fraternity and unity among the Nepali people on the basis of liberty and equality, consolidating adult franchise, Parliamentary System of Government, Constitutional Monarchy and multi-party democracy and transforming the concept of the rule of law into a living reality by making arrangements for an independent and effective justice system. In the third paragraph of the Preamble, providing that after the promulgation of the present Constitution according to the wishes of the Nepali people, the State authority and sovereignty of the Kingdom of Nepal shall be exercised in accordance with the provisions of this Constitution, it has been mentioned that the Constitution has been promulgated and enforced with the advice and consent of the Council of Ministers by His Majesty by exercising the State authority hitherto exercised by him. It has been provided in Article 3 of the Constitution that the sovereignty of the Kingdom of Nepal shall reside in the Nepali people which shall be exercised in accordance with the provisions made in this Constitution. Likewise, the present Constitution has also adopted the Doctrine of Separation of Powers by distributing the executive, legislative and judicial powers relating to the system of governance among the three major organs of the State.

It has been clearly expressed in the Preamble of the present Constitution that after the beginning of this Constitution according to the desire of the Nepali people the State authority and the sovereign powers shall be exercised in accordance with the provisions of this Constitution. As the State authority and the sovereignty shall be exercised in accordance with the Constitution of the Kingdom of Nepal, 1990, it is not proper to believe that the sovereignty of Nepal is vested in His Majesty and that all the executive, legislative and judicial powers emanate from His Majesty as had been provided in the Constitution of Nepal, 1962 which was in force prior to the introduction of the Constitution of the Kingdom of Nepal, 1990. In the present context of these clear-cut constitutional provisions, which stated that after the constitutional change the State authority and sovereignty of the Kingdom of Nepal shall be exercised only as provided by the Constitution of the Kingdom of Nepal, 1990, it shall be contrary to the constitutional basis and provisions to raise dispute about the State authority and to put forward arguments as if the Constitution of Nepal, 1962 had not been repealed. The Constitution occupies the position of a fundamental and powerful law. In the countries having written Constitutions matters such as the principle and system of governance, its functions, distributions of the State authority among various Organs of the State etc. are decided by the Constitution itself. It is contrary to the Constitution to violate the provisions made by

the Constitution and the subject matters determined by it. As the violation of the system and the subject matter determined by the Constitution shall result in the creation of constitutional problems, it is in the best interest of the State to take precaution against the prospective emergence of such a situation or to avoid it.

As regards the second question, the learned Counsels appearing on behalf of the respondents have argued that as the Constitution does not provide for raising any question in the law court in regard to any act performed by His Majesty, the issue of formation of the RCCC cannot be brought before the court. In the writ petition of Certiorari, *Hari Prasad Nepal and Others* v. *Prime Minister Girija Prasad Koirala and Others* (Nepal Kanoon Patrika, Golden Jubilee Birthday Celebration Issue 2052 p. 88), an eleven member Special Bench of this court has, in regard to Art. 31 of the Constitution of the Kingdom of Nepal, 1990, observed that the responsibility for the act performed by His Majesty on the advice and recommendation of the Council of Ministers or any other official or body shall have to be borne by the concerned official or body who had given that advice. Likewise, in the writ petition of Certiorari, *Rabi Raj Bhandari* v. *Prime Minister Man Mohan Adhikari and Others* (Nepal Kanoon Patrika, Golden Jubilee Birthday Celebration Issue 2052, p. 1), an eleven member Special Bench of this court has opined that the nature and extent of the acts to be performed by His Majesty in his discretion, in accordance with the spirit and ideal of the system of Constitutional Monarchy, have been delineated by the Constitution itself. As those types of acts are generally of political nature, the provision of Article 31 in respect of the acts performed by His Majesty in his discretion according to the Constitution is undoubtedly worthy of consideration. It has been further held that if the acts to be performed or already performed by His Majesty on the advice or recommendation of other constitutional organs, bodies or officials in accordance with the Constitution are also kept out of the purview of judicial review on the basis of Article 31, in that case there shall be no meaning of the concepts adopted by the Constitution such as written constitution, limited government, accountable system of governance, the rule of law etc.

The concept that "the King can do no wrong" was developed in course of the constitutional development in the United Kingdom due to the customary practices like the King conducting the system of governance and exercising the State authority only on the recommendation or advice of the Council of Ministers or responsible officials. In fact, when any act is performed by the King only on the recommendation or advice of somebody, there is no question of the King doing any wrong. In case there occurred any mistake, the responsibility for such an act goes to the official who had given the advice or made the recommendation. This very principle has been also adopted by Article 31 of the Constitution of the Kingdom of Nepal, 1990. In order to recognize the scope of Article 31 of the present Constitution, the nature of the acts to be performed by His Majesty needs to be analyzed. For this purpose the provisions made in the Constitution in respect of the acts to be performed by His Majesty, particularly the provision of Article 35 (2), need to be specially discussed. There is no scope of the interpretation of Article 31 by excluding Article 35 (2) of the Constitution.

Article 35 (2) of the present Constitution seems to have classified the acts to be performed by His Majesty in three categories. Firstly, the acts to be performed by His

Majesty or in his discretion; secondly, the acts to be performed specifically on the recommendation of any institution or official; and thirdly, the acts to be performed with the advice and consent of the Council of Ministers. It is but natural that sometimes serious questions may arise about the constitutionality of the acts performed by His Majesty alone or in his discretion in accordance with the Constitution. It does not seem appropriate to raise any question in the law courts about matters other than the serious issue of the constitutionality of the acts performed by His Majesty alone or in his discretion in accordance with the Constitution. The Constitution of the Kingdom of Nepal, 1990 has accepted the provisions of the present Constitution as a cornerstone of the social, political and economic affluence of Nepal and has, thus, assimilated the concept of constitutional supremacy. As it has been provided in Art.27 (3) of the Constitution that His Majesty shall uphold and preserve the Constitution keeping in view the best interests and welfare of the Nepali people, such best interests of the Nepali people will be served only through the Constitutional provisions. Therefore, the Constitution has entrusted His Majesty with the duty of upholding and preserving the Constitution keeping in view the best interests and welfare of the Nepali people. As it has been a resolution of the Constitution that the constitutional provisions are the cornerstone of the overall development of the Nepali people and as the concept of constitutional supremacy has been recognized, if the Supreme Court refuses to resolve a constitutional question placed before it regarding an allegation involving a constitutional dispute that the State authority has been exercised in contravention of the constitutional provisions, disturbance may be caused to the constitutional foundation of peace and development of the Nepali people. Constitutional disputes should not remain unresolved. If such disputes are not resolved through suitable means, it may result in the emergence of a difficult and abnormal situation, and the State system may be engulfed by such an abnormal situation. As the Supreme Court has been entrusted with the responsibility, under Article 88 of the Constitution, for the enforcement of the rights of the people guaranteed by the Constitution and the laws or for the judicial resolution of any constitutional dispute, it shall be contrary to the Constitution if the Supreme Court is not allowed to enter into a question of constitutionality.

The provision contained in Article 87 of the Constitution of Nepal, 1962 looks very similar to Article 31 of the Constitution of the Kingdom of Nepal, 1990. According to Article 21(2) of that Constitution of 1962 the powers of making, amending or repealing the law relating to succession to the throne vested only in His Majesty. His Majesty has enacted the Succession to the Throne Act, 2044 (1987) by exercising those powers. In the writ petition of *Krishna Prasad Shiwakoti* v. *Secretariat of the Council of Ministers & Others,* the provision of Section 13 of the Succession to the Throne Act, 2044 (1987) relating to capital punishment was challenged and a request was made by the petitioner to declare the impugned law void as it was violative of the Constitution (Nepal Kanoon Patrika 2054, Decision No. 6387 p. 295). That legal provision was subjected to constitutional scrutiny and it was held that, as the proviso to Article 131 of the present Constitution provided that the laws inconsistent with this Constitution shall 'ipso facto' cease to operate one year after the commencement of this Constitution, although not void and invalid, such laws cannot remain active. As this constitutional question was subjected to constitutional scrutiny and the constitutional

dispute was also resolved, this showed that this court has already examined a constitutional question relating to the provision of a law made by His Majesty exercising the powers vested in His majesty alone. Thus it cannot be argued that no question can be raised in the Supreme Court in regard to a constitutional dispute which has arisen in connection with the Emergency powers enshrined in Art. 115 and the power to remove any difficulty provided in Art. 127 of the Constitution of the Kingdom of Nepal, 1990.

It is essential for judges to remain committed to the principle they have propounded or their earlier concepts. Nevertheless, in the changed circumstances there may arise such situations when it may not be appropriate for a judge to remain committed to his earlier concept. If a judge is confronted with such a situation requiring him to dispense justice in contradiction to the principle he had himself propounded earlier or his earlier concepts or stand, the judge must clearly explain the grounds and reasons why his earlier conception was erroneous or not appropriate in the changed circumstances. The learned counsels appearing on behalf of the respondents have argued that, as in *Advocate Upendra Nandan Timalsena v. HMG & Others* (writ No. 3130 of the year 2059 BS) a Single Bench Judge has ruled on Manshir 17, 2059 (December 3, 2002) that Article 31 of the Constitution shall be attracted in regard to the exercise of Article 127 by His Majesty in order to remove any difficulty in the implementation of the Constitution, in view of that ruling it is not proper for this court to raise any question, as per Article 31, also in connection with the present dispute. As the responsibility for directing, controlling and conducting the system of governance of the country in a general way is vested in the Council of Ministers pursuant to Article 35(3) of the Constitution, the above mentioned petition seems to be concerned with the formation of the Council of Ministers by His Majesty by exercising Article 127 in order to activate that provision contained in Article 35(3). Unlike in the present petition, that petition does not seem to involve a dispute regarding formation of a separate institution by exercising Article 127 of the Constitution. It is, therefore, not possible to agree to the plea made by the learned counsels of the respondents that this court is not competent to look into the matter raised in the present writ petition as per Article 31 of the Constitution on the basis of an order passed by a Single Bench Judge on Manshir 17, 2059 (December 3, 2002) in a dispute which is entirely different from the present dispute.

Learned senior Advocate Kunj Bihari Prasad Singh and others appearing on behalf of the respondent RCCC have submitted that the order issued by a Single Bench Judge of this Court on Bhadra 19, 2059 (September 4, 2002) asking for the submission of written reply in the writ petition filed by Advocate Santosh Kumar Mahato (Writ No. 57) is unconstitutional and unlawful. The extra-ordinary jurisdiction of this court provided by Article 88 of the Constitution of the Kingdom of Nepal, 1990 is of equitable and discretionary nature. Under this jurisdiction, on the basis of the nature of the dispute, this court is competent to issue appropriate orders including the order for the submission of written reply. In this context it has been provided in Rule 40(4) of the Supreme Court Rules, 2049 that in course of initial hearing of a petition filed under Article 88(1) and (2) of the Constitution, if the contention of the petitioner appears just and lawful, the court must issue an order in the name of the respondent to be present before the court on a specified

date with a written reply provided that there was any reason justifying denial of the issuance of an order as prayed for by the petitioner. In writ petition No. 57 questions have been raised against the constitutionality of the respondent Royal Commission citing various Articles of the Constitution on the ground that the Order relating to the Formation of the RCCC was issued on Falgun 5, 2061 (February 16, 2005) as per Article 115(7) of the Constitution and the act of giving continuity to the Royal Commission by exercising Article 127 after the withdrawal of the proclamation of the state of Emergency as per Article 115(11) on Baisakh 16, 2062 (April 29, 2005) was contrary to Article 127 of the Constitution. And as basically a similar type of dispute seems to be involved in writ petition No. 118 relating to Habeas Corpus filed by Sanjeev Parajuli on behalf of Rajeev Parajuli, and also taking into consideration the order already issued for presenting that writ petition on Bhadra 23, 2062 (September 8, 2005) for hearing, and as it shall also be proper from the viewpoint of judicial administration to conduct simultaneous hearing of both the writ petitions involving issues relating to similar disputes, the order instructing for scheduling both the writ petitions for simultaneous hearing cannot be treated as contrary to the Constitution and the law. Besides, in response to the order issued by a Single Bench Judge on Bhadra 19, 2062 (September 4, 2005) instructing the respondent Royal Commission to file a written reply the latter has already submitted the written reply in this court as per that order. In that order no plea has been taken in respect of the order issued by this court. As the written reply has been already submitted in compliance with the order issued by this court and as the concerned party has not raised any plea in that regard, the contention made by the learned counsels appearing on behalf of that party raising objections to an issue which has not been originally raised in the written reply and calling it illegal and unconstitutional cannot be treated as lawful.

As regards the third question, there is a need to decide whether or not the dispute presented before the court falls under 'the judicially manageable standard'. There is no denying the fact that the court must not enter into a political question which does not involve a constitutional or legal question and which is not fit for judicial resolution. No dispute shall become political simply because it has been described as a political one. It is necessary to understand the nature or character of such a dispute in order to find out whether or not the subject matter of the dispute is political. The policy matters relating to the State and the system of governance not falling under the constitutional, legal or judicial resolution standard as well as the political disputes which can be effectively resolved by the Executive, the Legislature or other organs instead of the Judiciary ought to be treated as political disputes. It is the contention of the respondents that as the order issued by His Majesty on Baisakh 16, 2062 (April 29, 2005) under Article 127 of the Constitution giving continuity to the formation of the RCCC constituted by His Majesty as per Article 115(7) was an act carried out by His Majesty in accordance with the Royal Proclamation made on Magh 19, 2061 (February 1, 2005) in the interest of the general public by exercising the State authority vested in His Majesty, it is a subject matter involving a political question. In view of the fact that the Constitution of the Kingdom of Nepal, 1990 has been proclaimed by His Majesty providing that the State authority and sovereignty of Nepal shall be exercised in accordance with this Constitution and since the constitutional dispute of the

formation of the RCCC needs to be decided also on the basis of the provisions relating to the exercise of the State authority as determined by the Constitution, it is not proper to call such an indisputably constitutional matter a political dispute.

As regards the fourth question whether or not the act of the establishment of the RCCC and that of giving continuity to its formation are constitutional, the writ petition, the submission made by the learned counsels of the petitioner and the written briefs submitted by them maintain that the formation of the Royal Commission was not related with the purpose of the prevention of the state of Emergency as mentioned in the Proclamation of the State of Emergency; no such Commission can be established under Article 115(7) of the Constitution of the Kingdom of Nepal, 1990; such a Commission can be neither constituted under Article 127 nor such a Commission constituted under Art. 127 can be given continuity under Art. 115 (7); the activities and proceedings of the Commission are not in accordance with the principle of Natural Justice and are also contrary to the provision contained in Art. 98 of the Constitution of the Kingdom of Nepal, 1990. On the other hand, the written reply of the respondents and the submissions made by the learned counsels including the learned Attorney General and the written briefs submitted by them contend that due to the emergence of a situation of conflict caused by widespread corruption in the country, the State felt the need for its prevention for which it constituted the RCCC. As the jurisdictions of the Royal Commission and that of the CIAA are different, the Royal Commission has not been constituted in contravention of Article 98. Although Article 127 has provided for presenting an order issued under that Article before Parliament, that procedure has not been complied with as yet. Also, the court is not competent to look into a matter which has been given continuity under Article 127 in the satisfaction of His Majesty.

As regards the plea made by the respondents that no question can be raised in a law court regarding the Order relating to the Formation of the RCCC since it had been issued by His Majesty, in view of the conclusion arrived at on the basis of the analysis of Articles 27(3) and 31(3) in question No. 2 and the mention made in paragraph 6 page 4 of the written reply received from the Office of Attorney General to the effect that "the matter to be examined by the honourable court through judicial review is only whether or not the order relating to the Royal Commission is constitutional", it is not proper to say that the impugned order cannot be looked into.

It has been contended in the written submission produced by the office of the Attorney General that the Royal Commission has been formed under the Doctrine of State Necessity in the context of taking effective action against the culprits for preventing wide spread corruption in the country and the need for making the procedure for taking such action expeditious and simple. The establishment of the Commission is constitutionally valid also on the basis of the decision made by this court on Jyestha 27, 2062 (June 9, 2005) in Writ No. 29 of the year 2061 (2004) in which it was held that the State was competent to undertake appropriate measures on the basis of State Necessity or the Doctrine of Necessity. Moreover, as it has also been mentioned in the written reply and the written submission produced by the respondents that the Commission has been formed as per the provision empowering His Majesty to constitute such a Commission by issuing an

order in accordance with Article 115(7) during the proclamation of the state of Emergency under Article 115(1), at this point here, it has also become essential to undertake a minute study of the various provisions of Article 115 of the Constitution of the Kingdom of Nepal, 1990 and the order relating to the proclamation of the state of Emergency by His Majesty. The Notification issued by the Chief Secretariat of His Majesty and published in the Nepal Gazette of Magh 19, 2061 (February 1, 2005) (Additional Issue 47 (B) Part 4, Section 54, Kathmandu) is as follows:

"On account of occurrence of serious threat to the sovereignty, integrity and security of the Kingdom of Nepal, His Majesty the King has proclaimed, in accordance with Article 115(1) of the Constitution of the Kingdom of Nepal, 1990, the order of the State of Emergency to be effective with immediate effect throughout the Kingdom of Nepal and, in accordance with clause (8) of the same Article, has suspended parts (a), (b), (c) and (d) of clause (2) of Article 12, Section (1) of Article 13 and Articles 15, 16, 17, 22 and 23 (except the remedial right to habeas corpus)".

There are several clauses of Article 115 of the Constitution of the Kingdom of Nepal, 1990. Of them the following provisions are there in clause (1), clause (7) and clause (11) of that Article.

"Article 115 (1): In the event of occurrence of a serious threat to the sovereignty and integrity of the Kingdom of Nepal or security of any part thereof on account of war, external aggression, armed rebellion or extreme economic disarray, His Majesty may proclaim or issue an order of the state of Emergency to be effective throughout the Kingdom of Nepal or in any specific part thereof."

"**Article 115 (7):** In the event of the proclamation or issuance of the order of the State of Emergency pursuant to clause (1) His Majesty may issue appropriate orders for the prevention of such a state. An order thus issued shall remain in force as law during the continuation of the state of Emergency."

"Article 115 (11): The Proclamation or order of state of Emergency issued pursuant to clause (1) may be revoked by His Majesty at any time during its continuation."

It is necessary to mention in the Proclamation or the order of the declaration of the state of Emergency why the threat had emerged, in contravention of the constitutional provisions, to the sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof whether by war, external aggression, armed rebellion or extreme economic disarray. If the Proclamation or the order relating to the State of Emergency has been issued it is to be presumed that the state of Emergency has occurred due to the very reason which has been pointed out in the Proclamation or the order. As there is a provision that after the Proclamation or issuance of the Order of the state of Emergency, His Majesty may issue, pursuant to Section 115(7), such orders as are necessary to meet the exigencies, and such orders shall be operative with the same force and effect as law so long as the state of Emergency is in operation, it seems that His Majesty may issue an order pursuant to Article 115(7) only for addressing the reason which has led to the proclamation of the state of Emergency whether due to threat to sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof or war, external aggression, armed rebellion or extreme economic disarray. There seems to be the absence of a clear constitutional provision permitting the

application of the provision contained in Article 115(7) in respect of any state other than that mentioned in the Proclamation or order relating to the state of Emergency. It has been submitted that corruption has become widespread as it has engulfed the nation leading to extreme economic disarray and, therefore, the RCCC has been constituted for preventing corruption. A study of the Notification issued by the Chief Secretariat of His Majesty, Royal Palace, and published in the Nepal Gazette Additional Issue 47(B) Part 4 on Magh 19, 2061 (February 1, 2005) shows that as a grave emergency has arisen in regard to the sovereignty or integrity or security of the Kingdom of Nepal, His Majesty has, by Proclamation, declared or ordered a state of Emergency pursuant to Article 115(1) in respect of the whole of the Kingdom of Nepal. It is not constitutionally proper to presume that the state of Emergency has been declared on account of the grounds and reasons separate and different from those which have been mentioned in the order proclaiming the state of Emergency to justify such a declaration. In the order proclaiming the state of Emergency issued on Magh 19, 2061 (February 1, 2005), there is no mention of economic disarray as one of the reasons for proclaiming the state of Emergency. Also, His Majesty did not mention the factor of economic disarray in Section 12 of the Royal Proclamation issued on the same date. It has been simply mentioned in the said proclamation that measures for the prevention of corruption shall be undertaken not contravening the principles of justice. Due to these reasons no constitutional ground has been put forward which may justify that the RCCC has been constituted on account of economic disarray as pleaded by the learned counsels of the respondents. As an order pursuant to Article 115(7) may be issued to meet the particular exigency due to which the proclamation or the order of the state of Emergency has been issued, it seems to be a clear constitutional intent that the provision of Article 115(7) cannot be resorted to in respect of a constitutional condition or reason which does not appear in the Proclamation or order of the state of Emergency. Moreover, as the Royal Notification published in the Nepal Gazette of Baisakh 16, 2062 (April 29, 2005) (Additional Issue No. 7, Vol. 55, the Chief Secretariat of His Majesty, the Royal Palace Kathmandu) states that " His Majesty has withdrawn the order of the state of Emergency, proclaimed by him on Magh 19, 2061(February 1, 2005) to become operative throughout the Kingdom of Nepal pursuant to Article 115(1) of the Constitution of the Kingdom of Nepal, 1990, effective from today as per Section 11 of that Article," the constitutional provision very clearly shows that the state of Emergency proclaimed under Article 115(1) and the order issued under Article 115(7) for the purpose of its prevention have automatically become purposeless and void. Thus, when a particular act performed by activating some constitutional provision becomes void by virtue of another act performed in accordance with the provisions of the same Constitution, it shall be viewed as an act performed by the use of force if it is interpreted that in the absence of a clear constitutional provision something which has already become void can be given continuity or is worthy of acquiring continuity. Also, such an act causes an impediment to the course of constitutional evolution.

The Office of the Attorney General, learned Senior Advocate Kunj Bihari Prasad Singh and learned Advocates including Mithilesh Kumar Singh, Awadhesh Kumar Singh and others have also laid special emphasis even in the written submissions made by them that the Royal Commission had to be constituted due to State Necessity. The written

submission presented by the Office of the Attorney General has also advanced the following ground: "That is necessary which cannot be otherwise. Necessity defences or justifies what it compels. Necessity is the law of time and place. Necessity makes the lawful which otherwise is not lawful". Besides, it has also referred to the decisions made by this court in the writ petitions filed by Binod Karki, Krishna Prasad Lamsal and Binod Prasad Adhikari as mentioned above and put forward the grounds in support of its contention.

Since almost all the learned counsels appearing on behalf of the respondents have cited, in their submissions, the interpretation made by this court in respect of the Doctrine of Necessity in the writ petition of Binod Karki, it is appropriate to discuss what type of decision has been made in that writ petition. That writ petition was filed seeking voidance of the economic Ordinances of the fiscal years 2059÷060 B.S. (2002÷2003), 2060÷061 and 2061÷062 promulgated during the state of dissolution of the House of Representatives contending that the ratio of taxation could be subjected to alteration only through the annual Estimate of Revenue and Expenses to be presented only before Parliament and the economic legislation to be presented only before the House of Representatives, thereby requiring that no taxation could be imposed without people's representation. Disposing that writ petition, this court discussed **the Doctrine of Necessity** and observed that "it is highly essential to conduct the State affairs even in an extraordinary and abnormal situation whatsoever in order to protect the nation. Even though the activities undertaken by the government in such a situation are not in accordance with the provisions stipulated for normal condition by the Constitution, such activities tend to acquire justification as per the Doctrine of Necessity provided that they don't contravene the constitutional provisions. In the normal circumstances every activity of the State must be performed in accordance with the letter and spirit of the Constitution, and if it is found to have been performed not in consonance with that manner such an activity cannot be granted constitutional and legal recognition. But in an abnormal situation where there is no alternative the minimal functions discharged by the State while conducting the State affairs in contravention of the basic structure of the fundamental concepts adopted and assimilated by the Constitution shall be deemed as proper on the basis of inevitable necessity even from the viewpoint of judicial propriety except in the condition that such functions do not infringe any clear provision of the Constitution." On the basis of this interpretation the court held that the economic Ordinance promulgated pursuant to Article 72 of the Constitution of the Kingdom of Nepal, 1990 during the period of dissolution of the House of Representatives is not incongruous with the provisions of the Constitution. While disposing that writ petition, as it had not been clearly observed that an activity incongruous with any constitutional provisions shall acquire constitutional recognition on the basis of the Doctrine of Necessity even though, constitutional or legal alternatives are available, the present dispute does not seem to get any support or justification on the basis of the Doctrine of Necessity analyzed in that decision. And the other writ petitions are related with the issues concerning the civil servants and, therefore, the decisions made in those writ petitions do not seem to bear any direct or indirect resemblance to the present dispute. The Doctrine of Necessity does not intend to destroy the prevailing constitutional structure. It simply endeavors to resolve a situation which

requires immediate resolution and which has no alternative to its resolution without contravening the constitutional provisions.

Corruption is a stigma for the country. It destroys the concepts of good governance. It is, therefore, essential to keep corruption under control without allowing it to flourish as it acts as an enemy to the moral values and norms. The Rule of Law has been specified by our Constitution as the basic foundation of governance. Therefore, nothing but a constitutionally reliable and effective legal provision can be a strong basis for the prevention of corruption. If there was a need for an effective legal mechanism for the prevention of corruption, and there was no alternative to such an arrangement, there was no obstacle before the State to make suitable arrangements through the law without contravening the constitutional provisions. But before making such an addition arrangement, it is necessary to look into what type of arrangement the Constitution, which is the fundamental law of the land, has made in this regard, and thus, only the provision which is required constitutionally should be made. As regards the endeavors and the provisions made before the promulgation of the Constitution of the Kingdom of Nepal, 1990 in respect of the prevention of corruption, there is a provision of the CIAA in Part 12 of the 1990 Constitution. Article 98(1) of the Constitution has empowered the CIAA to conduct or cause to conduct investigation or enquiry in accordance with the law in connection with the abuse of authority by a person holding a public office by committing an improper act or corruption. And if a person holding a public office seems to have committed an act which may be treated as corruption according to the law, there is a provision for prosecuting as per the law such a person holding public office and other accomplices to the crime in a competent court. This shows that the CIAA is vested with the authority to conduct investigation in respect of improper act or corruption and to file charge-sheet in a competent court. Since the CIAA is constitutionally a significant mechanism in regard to the prevention of improper acts or corruption, it shall be constitutionally proper to follow the constitutional provision so long as that constitutional provision regarding the responsibility entrusted to the CIAA remains active. The act of directly or indirectly affecting adversely or encroaching upon the functions, duties or powers conferred on any constitutional organ or the act of rendering a constitutional organ ineffective on any pretext whatsoever not only weakens the constitutional foundation rather also disrupts it, and creates obstacles to Constitutionalism and constitutional development as well.

A perusal of the order issued by His Majesty and published in the Additional Issue No. 55 of the Nepal Gazette on Falgun 5, 2061 (February 16, 2005) regarding formation of the RCCC pursuant to Article 115(7) of the Constitution of the Kingdom of Nepal, 1990 shows that, as per Section 2 of the order, the Royal Commission has been entrusted with the functions, duties and powers to conduct investigation and take action if there is 'prima facie' case of smuggling, revenue evasion, involvement in illegal contracts or lease or commission or committing any other act which may be treated as corruption. In addition to that, the Commission has been also conferred upon, as per Section 2(4) of the Order, all the powers to be exercised by the Investigation Officer in accordance with the prevalent law relating to corruption and the powers of the Special Court. As Section 6 has provided that the Commission can punish any person according to the relevant law if he is proved to have

committed any act of corruption defined by the prevalent law on corruption, all the activities related to investigation undertaken by the Commission in the name of the Commission and the punishment slapped and the powers exercised by the Commission seem to be related to corruption. As it is clear from the provisions of Sections 2 and 6 that both the powers of conducting investigation as well as awarding punishment are vested in the RCCC, from the legal viewpoint there is no significance of the contention that it is a separate unit of the Commission which files the prosecution charge-sheet after conducting investigation. It is abundantly clear that both the powers of investigation as well as prosecution are vested in the RCCC. Because Article 98 of the Constitution of the Kingdom of Nepal, 1990 has conferred on the CIAA the functions, duties and powers to file a charge-sheet in a competent court as per the law against a person holding a public office who is found, through investigation, to have committed, by misusing his powers, an improper act or corruption in the eyes of the law. This shows that there is a clear constitutional provision requiring that there must be separate organs for conducting investigation and for hearing the case, and there must not be only one organ for discharging both these functions. In view of the fact that the Constitution of the Kingdom of Nepal, 1990 has provided for the separate entity of an organ investigating corruption cases and an organ conducting trial of such cases, it cannot be proper to say that the act of empowering one and the same organ to conduct both investigation and trial is in consonance with the objective and spirit of the Constitution. The persons entrusted with judicial responsibility following their appointment to the judicial posts, are required to take oath of office prior to assuming their office. The act of taking oath in regard to judicial responsibility remains as an integral part of the legal system. The very use of the word 'oath' is meant to imply a commitment or declaration on the part of the person who is required to make that commitment or declaration in accordance with the law. And it is the moral obligation of the person who takes such an oath to remain committed to the oath taken by him. It is for this reason that there is a special significance of oath. The Supreme Court justices take an oath to remain loyal and sincere to the Constitution of the Kingdom of Nepal, 1990. The Appellate Court, Special Court and Administrative Court judges and the District Court judges are required to take an oath of loyalty and sincerity to the law and the Constitution. Such provisions indicate that any person entrusted with a judicial duty or a duty equivalent to that of a judge is required to take an oath of loyalty and sincerity to the law and the Constitution. But as provided in the Order relating to the Formation of the RCCC the Chairperson and the members of the Commission are required to take the oath of office and secrecy but they are not required to take an oath of loyalty to the law and the Constitution. It is not unnatural to believe that a person who is not required to take an oath of loyalty to the law and the Constitution, and who is required in stead to take an oath relating to other matters, shall be committed to those matters regarding which he has taken the oath.

The Constitution has made it clear that the duration of the promulgation or the order of the state of Emergency pursuant to Article 115 (1) of the Constitution of the Kingdom of Nepal, 1990 is intended to remain in force for a limited period. In the event of the Proclamation or order of the state of Emergency, the Constitution has provided that such a Proclamation or Order shall have to be placed before a meeting of the House of

Representatives for approval within three months from the date of its issuance, and if it is approved by a two-thirds majority of the House of Representatives present at the meeting such Proclamation or Order shall continue in force for a period of six months from the date of issuance, and before the expiration of the period of six months a meeting of the House of Representatives, by a majority of two-thirds of the members present, may extend the period of the Proclamation or Order of the state of Emergency for one other period, not exceeding six months. The Constitution has determined the status of the order, issued pursuant to Article 115(7), to meet the exigencies by providing that His Majesty may issue such orders as are necessary to meet the exigencies which have caused the occurrence of the state of Emergency as mentioned in the Proclamation or Order relating to the declaration of the state of Emergency, and such an order shall be operative with the same force and effect as law so long as the state of Emergency is in operation. In view of the fact that the Constitution has made clear and specific provision that an order issued pursuant to Article 115(7) shall continue to remain in force so long as the state of Emergency is in operation, the act of giving continuity to the order issued for meeting the exigencies during the state of Emergency by resorting to any other Article shall virtually result indirectly into maintaining the state of Emergency. Therefore, it is not constitutionally valid to indulge in an act contrary to what has been clearly provisioned by the Constitution.

Article 98 of the Constitution of the Kingdom of Nepal, 1990 has made a clear provision that if any person holding a public office seems to have committed any act which may be treated as corruption in the eyes of the law the CIAA may file or cause to file charge-sheet against such a person or an accomplice to the crime in a competent court as per the law. Article 84 of the Constitution has provided that the powers relating to justice shall be exercised by the law courts and other judicial institutions in accordance with the Constitution, the laws and the recognized principles of Justice. Likewise, Article 85 has provided that there shall be three tiers of courts including the Supreme Court, the Appellate Courts and the District Courts, and special type of court or judicial institutions may be established to look into special types of cases. Thus, there is a clear cut constitutional provision prohibiting establishment of an institution exercising judicial power except according to the law. As for the provision made in Section 6(2) of the Order relating to the Formation of the Commission permitting a person not satisfied with the decision made by the Commission to file an appeal in the Supreme Court, according to Article 88(3) the Supreme Court is empowered to hear appeal only as provided by the law. In addition to the general courts including the Supreme Courts, the Appellate Courts and the District Courts created by the Constitution, there are also functioning some other courts constituted by the law such as the Administrative Court, the Special Court, the Revenue Court, the Labour Court etc. All these are the courts and judicial institutions constituted by the law, and their functions, duties and powers have been prescribed by the law. The RCCC has not come into existence by virtue of the provision of any Statutory Act or Ordinance. As it has been created by an order issued pursuant to Article 115 (7), such an order cannot remain active and operative as a law after the termination of the state of Emergency according to the same Article 115 (7). After the withdrawal of the state of Emergency, promulgated by His Majesty on Magh 19, 2061 (February 1, 2005), effective from Baisakh 16, 2062 (April 29,

2005) the RCCC seems to have acquired continuity through an Order promulgated under Article 127 by His Majesty. Therefore, what is the scope of Article 127 needs to be examined in view of the constitutional provision contained in this Article which empowers His Majesty to promulgate an order for removing any difficulty which may occur in the implementation of this Constitution and also requires such an order to be placed before Parliament. As regards the nature of a relevant provision contained in the previous Constitutions in respect of removing difficulties in the implementation of the constitution, Article 77 of the Constitution of the Kingdom of Nepal, 1959 provided that the power to remove any difficulty was inherent in His Majesty, and every order issued for removing any difficulty was required to be laid before both Houses of Parliament, and it could be repealed or amended by law, and it had to be treated as included in the Constitution so long as it was not amended or repealed. Likewise, Article 90A of the Constitution of Nepal, 1962 provided that His Majesty may promulgate any order deemed necessary by him in order to remove any difficulty which may occur in the implementation of the Constitution, and such an order shall be deemed as included in the Constitution. Thus, whereas the Constitution of Kingdom of Nepal, 1959 and the Constitution of Nepal, 1962 had made clear provisions regarding the status of the order promulgated by His Majesty to remove any difficulty, Article 127 of the Constitution of the Kingdom of Nepal, 1990 does not seem to make any mention about the status of the order which is issued to remove any difficulty in the implementation of the Constitution and also does not clarify whether it is constitutional or legal. The power relating to the removal of any difficulty needs to be understood in the perspective of the status which the Constitution has bestowed on it. The Constitutions, which were in force prior to the Constitution of the Kingdom of Nepal, 1990, had declared the power concerning the removal of any difficulty as being at par with the Constitution. But since Article 127 of the Constitution of the Kingdom of Nepal, 1990 does not clearly mention that the order relating to the removal of any difficulty shall be equivalent to the Constitution; there is no scope for understanding that such an order shall enjoy the same status as enjoyed by the similar orders in the previous Constitutions.

The purpose and objective of Article 127 of the present Constitution seems to activate the constitutional provision or mechanism by removing any difficulty which may arise in the implementation of any provision of the Constitution. To put it more clearly, it is the spirit and objective of Article 127 to conduct systematically the constitutional provisions by providing nectar (life saving drug) to the existing constitutional provisions if there arises any obstacles to the implementation of the constitutional provisions. As after the dissolution of the House of Representatives on Jyestha 8, 2059 (May 22, 2002) the elections could not be held on account of various reasons and the Council of Ministers could not be constituted as per Article 36 or 42 of the Constitution, it might have been a necessity of the State to resort to the exercise of Article 127 in order to activate Article 35(1) for the sake of constituting the Council of Ministers under the Premiership of Lokendra Bahadur Chand or the Council of Ministers constituted thereafter in order to remove the difficulty regarding the failure of the constitution of the Council of Ministers as per Article 36 or 42. The constitution of the Constitutional Council under the Chairmanship of the then incumbent Chief Justice for the sake of the appointment of the next Chief Justice could be treated as falling within the

objective of Article 127, as it was intended to remove the difficulty caused by the failure of appointment of the Chief Justice due to the constitutional obstacle confronted in the formation of the Constitutional Council in accordance with Article 117. The provision made in the Constitution regarding removal of any difficulty can be exercised to activate the Constitution if any constitutional provision could not be implemented due to any impediment confronted in the process of its implementation. Article 127, therefore, cannot be attracted in case of matters other than those provided by the Constitution. Besides, it cannot be so exercised as to create a situation where the constitutional system becomes inactive or the constitutional mechanism under goes a change.

In the Special Constitutional Directive No. 1 of the year 2050 (1993) submitted to His Majesty pursuant to Article 88(5) of the Constitution of the Kingdom of Nepal, 1990 on Baisakh 18, 2050 (April 30, 1993) a Special Bench of this Court has expressed the following opinion in regard to the exercise of Article 127 of the Constitution: "If there arises a situation obstructing the implementation of any constitutional provision due to the failure to constitute any constitutional organ or institution or if a void or a constitutional stalemate is created due to the failure of any constitutional mechanism to function as provided in the Constitution, the power of removing any obstacle or difficulty may be exercised to prevent such a situation by making suitable and necessary arrangements for its immediate resolution in order to activate the constitutional mechanism. The extra-ordinary power of removing any obstacle or difficulty may be exercised only if there was no other constitutional or legal alternative to end the constitutional stalemate or lacuna which has emerged unexpectedly. But if any obstacle or difficulty can be removed by a law enacted by Parliament or by the promulgation of an Ordinance by His Majesty when there is no Parliament it will not at all be appropriate to resort to the exercise of Article 127 for this purpose by forming a false conception of the failure of the implementation of the Constitution. It is one thing to issue an order pursuant to that Article in order to fill a constitutional void or end a constitutional stalemate; it does not infringe the personal right of any person. But it is entirely another thing to grant powers to perform such acts which infringe the fundamental rights guaranteed by the Constitution, such as, taking someone's statement against his will, administering oath to him, compelling him to be present somewhere, conducting search of some house or place etc. Article 127 cannot be exercised for that purpose. In order to exercise any powers which tend to encroach upon the personal freedom or the right to property guaranteed by the Constitution, such powers must be granted by the law made by Parliament in accordance with the legislative procedure prescribed by the Constitution. The power to remove any obstacle or difficulty provided for activating the constitutional mechanism by ending the constitutional stalemate or lacuna cannot be exercised to encroach upon the personal freedom or any other fundamental right of any person. If any order is issued pursuant to Article 127 resulting in that manner it shall be unconstitutional."

A question has arisen as to how much relevant and important is the opinion submitted to His Majesty by a Special Bench of the Supreme Court in regard to a reference made by His Majesty seeking its opinion pursuant to Article 88(5) of the Constitution in connection with the formation of a Commission for conducting enquiry into the Dasdhunga accident. The respondents have contended that as the opinion given under Article 88(5)

cannot assume the position of Article 96 of the Constitution, the court cannot take into consideration such an opinion. No doubt an opinion sought by His Majesty pursuant to Article 88(5) and submitted by the Supreme Court cannot enjoy the status of a verdict delivered by the Supreme Court for the purpose of Article 96 of the Constitution. Since an opinion and a decision have entirely different status an opinion given pursuant to Article 88(5) and a decision made by the court cannot be compared as being equivalent. The compliance with a decision is mandatory whereas it cannot be said that the compliance with an opinion even by the person who has sought such an opinion is mandatory. Before giving its opinion under Article 88(5) the court forms its opinion in the light of the opinion given by the experts on the subject considered fit for consultation by the court and the submissions made and views expressed by the learned counsels appearing as 'amicus curiae', and only then that opinion is submitted to His Majesty. Although His Majesty is not bound by the opinion given by the court, as the Constitution does not obligate His Majesty to comply with such an opinion, it is an important responsibility of the Supreme Court to report its opinion to His Majesty in case His Majesty wishes to have an opinion of the Supreme Court on any complicated legal question of interpretation of the Constitution or any other law. And, this responsibility must be discharged with utmost care and caution not contravening the Constitution and the laws. And such an opinion leads to the resolution of a constitutional dispute. Ever since the promulgation of the Constitution of the Kingdom of Nepal, 1990, so far there has been no instance when His Majesty rejected the opinion which was sought by him and submitted by the court under Article 88(5), it cannot be said that such an opinion reported by the Supreme Court and not rejected by His Majesty does not have any constitutional significance. In case any act is proceeded with or it is given an outlet on the basis of the opinion reported by the Supreme Court, later on it would not be proper to say from any angle that such an opinion has no constitutional base. It is also not proper to say that the process of constitutional development in regard to Article 127 of the present Constitution did not take place when His Majesty undertook suitable steps on the basis of the following opinion reported to His Majesty by a Special Bench comprising seven Justices, "If there arises a situation obstructing the implementation of any constitutional provision due to the failure to constitute any constitutional organ or institution or if a void or constitutional stalemate is created due to the failure of any constitutional mechanism to function as provided in the Constitution, the power of removing any obstacle or difficulty may be exercised to present such a situation by making suitable and necessary arrangements for its immediate resolution in order to activate the constitutional mechanism. The extra-ordinary power of removing any obstacle or difficulty may be exercised only if there was no constitutional or legal alternative to end the constitutional stalemate or void which has emerged unexpectedly. But if any obstacle or difficulty can be removed by a law enacted by Parliament or by promulgating an Ordinance by His Majesty when there is no Parliament, it will not at all be appropriate to resort to the exercise of Article 127 for this purpose by forming a false conception of the failure of the implementation of the Constitution." According to the provisions of the Constitution there can be no authoritative institution other than the Supreme Court in respect to the interpretation of the Constitution. In the event of His Majesty seeking an opinion of the

Supreme Court pursuant to Article 88(5) on any complicated legal question of interpretation of this Constitution, the opinion reported to His Majesty helps to resolve the question of constitutionality of the issue and, as such, such an opinion plays a significant role in the proper compliance with the Constitution and the process of constitutional development. Therefore, such an opinion carries a special significance in regard to the constitutional development. Therefore, it is not proper to say on the basis of superficial arguments that it does not have any significance.

As regards the plea of the respondents that an order issued under Article 127 needs to be first examined by Parliament, the Constitution does not seem to clarify the nature of the order issued pursuant to Article 127 whether it has got a constitutional or legal or statutory status or that of a by- law. It has been only provided that an order issued pursuant to Article 127 must be placed before Parliament. However, the Constitution has not specified the procedure of its presentation in Parliament. Rule 22 of the Joint Parliamentary Meeting and Joint Committee (Conduct of Proceedings) Rules, 2048 has provided: "The Prime Minister shall present, before the joint meeting, an order promulgated by His Majesty pursuant to Article 127 in order to remove any obstacle or difficulty in the implementation of the Constitution." No other provision seems to have been made in this regard. There is no indication about complying with any procedure such as holding discussion on the Bill in the Joint Committee or adopting the Bill as per Rule 12 or moving amendment to the Bill under Rule 13 or holding discussion or moving amendment in regard to an order issued under Article 127. This shows that the constitutional provision requires an order issued under Article 127 to be ordinarily presented before Parliament only for the purpose of its knowledge. Even though the impugned Order relating to the Formation of the Royal Commission is not of the nature of a Constitution or law or Ordinance, nevertheless the Royal Commission seems to be an institution which has acquired the powers of a court including the Special Court through the impugned Order. Therefore, the contention of the respondents is not acceptable that the impugned Order which is vested with a legal authority does not fall under the purview of Article 88(1) and (2) only because it has not been brought to the knowledge of Parliament.

On account of the grounds and reasons mentioned above the notification of the Chief Secretariat of His Majesty dated Falgun 5, 2061 (February 16, 2005) regarding the establishment of the RCCC and the Notification of the Chief Secretariat of His Majesty dated Baisakh 16, 2062 (April 29, 2005) in regard to giving continuity to that order do not seem to be in consonance with the objectives and spirit of Articles 84, 85, 88 (3), 98, 115 (7) and 127 of the Constitution of the Kingdom of Nepal, 1990.

Now to consider the question whether or not an order should be issued as requested by the petitioner, it appears from the above-mentioned grounds and reasons that the Order issued on Baisakh 16, 2062 (April 29, 2005) for the sake of giving continuity to the RCCC, established by the Order dated Falgun 5, 2061, is inconsistent with the Constitution of the Kingdom of Nepal, 1990 as it is contrary to the objectives and spirit of Articles 84, 85, 88 (3), 98, 115 (7) and 127 of the Constitution. Even though the Order relating to the Formation of the Commission and the Order giving continuity to the same are neither a Statutory Act in accordance with the provision of Article 71 nor a law in

accordance with an Ordinance issued as per Article 72 of the Constitution, the Royal Commission seems to have acquired all the powers exercised by an Investigation Officer in relation to corruption as per the prevalent law, the powers exercised by the Special Court as per the Special Court Act, 2059 and the powers equivalent to those exercised by the law courts in certain matters, and thus the impugned Orders appear to have granted such powers which could be given only by the law.

As the Order dated Falgun 5, 2061 (February 16, 2005) establishing the RCCC has become infructuous due to the withdrawal, pursuant to clause (11) of Article 115, of the Order declaring the state of Emergency on Baisakh 16, 2062 (April 29, 2005) issued earlier pursuant to Article 115 (1) of the Constitution of the Kingdom of Nepal, 1990, there is no need of declaring such an Order which has already become infructuous as 'ultra vires' or *void*'. Therefore, the currently active Order issued on Baisakh 16, 2062 (April 29, 2005) intending to give continuity to the Royal Commission, is hereby declared 'ultra vires' effective from today as per Article 88(1) of the Constitution of the Kingdom of Nepal, 1990.

Since the order issued on Baisakh 16, 2062 (April 29, 2005) to give continuity to the RCCC has been declared 'ultra vires' there is now no place for the continuing existence of the RCCC and, therefore, it is hereby declared annulled effective from today.

As on the basis of the grounds and reasons discussed above, the acts of establishing and subsequently giving continuity to the RCCC are unconstitutional due to their inconsistence with the provisions and objectives of the present Constitution, and as for this reason the Order promulgated on Baisakh 16, 2062 (April 29, 2005) giving continuity to the Order promulgated earlier on Falgun 5, 2061 (February 16, 2005) has been declared 'ultra vires', the act performed by such an unconstitutional commission cannot receive legal recognition. Therefore, the act of asking the petitioner to produce a security deposit to the tune of Rs. 51,00,000 .- as per Section 7(d) of the Special Court Act, 2002 on the basis of the unlawful proceedings conducted by the respondent Commission, and the order and the act of remanding him to judicial custody for his failure to deposit the bail amount, obviously appear to be unlawful and, hence, the writ of 'habeas corpus' is hereby issued. Because the petitioner has been already set free on the guarantee of the President of Nepal Bar Association Advocate Sambhu Thapa as per the order of this court dated Bhadra 28, 2062 (September 13, 2005), there is no need of further doing anything else.

Let the copies of this order be sent to the respondents through the Office of the Attorney General for their knowledge, and let the case file be handed over as per the Rule.

Meen Bahadur Rayamajhee
.....
(Justice)

We concur with the aforesaid opinion.

....
(Justice) **(Justice)** **(Justice)** **(Justice)**

Done on day 1st of the month of Falgun, 2062 (February 13, 2006).

Supreme Court Division Bench

Hon. Justice Khilaraj Regmi

Hon. Justice Kalyan Shrestha

Order

Re: Habeas Corpus

Writ no 3775 registration date 2055/10/7/5 B.S. (Jan 21, 1999 A.D.)

Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal (Advocate) permanent resident of ward no 8 of Harmi V.D.C. and then residing on a rented room at ward no 1 of the Prithwi Narayan Municipality of Gorkha District – Petitioner

v.

Nepal Government, Home Ministry and Others – Respondents

1. The Summary of the Petitions

This petition was heard by the bench along with batches of other petitions such as the one filed by Yek Raj Bhandari on behalf of **Bipin Bhandari**, writ no 100, registered on 2059/3/5/4 B.S.(June 19, 2002); Udaya Bahadur Rai on behalf of **Dil Bahadur Rai**, writ no 104, registered on 2059/3/19/4 B.S. (July 3, 2002); Krishna Kumari Rai on behalf of **Navin Kuman Rai** and **Ishwar Kumar Lama**, writ no 323, registered on 2059/12/5 B.S. (March 19, 2003); Sitasharan Mandal on behalf of **Shree Ram Tharu**, writ no, 500 registered on 2060/3/4/4 B.S. (June 18, 2003); Sitasaran Mandal on behalf of **Jagana Tharu**, writ no 45 registered on 2060/4/26 B.S. (Aug 12, 2003); Sitasaran Mandal on behalf of **Hariram Chaudhari** writ no 41, registered on 2060/4/26 B.S.(Aug 12, 2003); Sitasaran Mandal on behalf of **Tateram Tharu** writ no 155, registered on 2060/8/14 B.S. (Nov 30, 2004); Sitrsaran Mandal on behalf of **Biharilal Godia**, registered on 2060/10/6/3 B.S. (Jan 20, 2004); Sitasaran Mandal on behalf of **Ayodhya Prasad Godia**, writ no 164, registered on 206010/6/3 B.S. (March 22, 2004); Sitasaran Mandal on behalf of **Dhak Bahdrur Basnet**, writ no 167, registered on 2061/6/28/5 B.S. (Oct 14, 2004); Ranju Darnal on behalf of **Ranjit Darnal, Amrit Darnal** and **Rajendra Chaurel**, writ no 97, registered on 2062/4/28 B.S. (Aug 12, 2004); Chandra Kumari Basnet on behalf of **Dhirendra Basnet** and **Pushparaj Basnet** writ no 110 and 111, registered on 2062/5/7/3 B.S. (Aug 23, 2005); Shanta Sedhain on behalf of **Mukunda Sedhain**, writ no 142, registered on 2062/5/27 B.S. (Sept 12, 2005); Manorama Nakarmi on behalf of **Nischhal Nakarmi**, writ no 211, registered on 2062/7/13 B.S. (Oct 30, 2005); Srijana B.K. on behalf of **Amar B.K.**, writ no 250 registered on 2062/8/9/5 (Nov 24, 2005); Chandra Bahadur Dulal on behalf of **Renuka Dulal**, writ no 223, registered on 2062/7/22 B.S. (Nov 8, 2005); Om Prakash Singh on behalf of **Chatur Man Rajbanshi aca Shyam**, writ no 378 registered on 2062/8/22/4 (Dec 7, 2005); Krishna Rai on behalf of **Purna Paudel, Gyanendra Tripathi, Rupam Adhikari, Rajendra Thapa, Ramchandra Kafle, Suchendra Maharjan, Bhim Giri, Rebkala Tiwari, Bhavanath Dhamala, Arjun Maharjan, Kusalya Pokherel, Dipendra Panta, B.K. Shrestha, Lila Pandey,**

Hemnarayan Shrestha, Praksah Lama, Hira Bahadur Roka, Tejman B.K. Jalandhar Bastola, Lila Acharya, Bhim Maharjan, Rajendra Mali, Anuman Shrestha, Deshbhakta Chapagain, Kamala Waiba, Amarraj Bajracharya, Hira Bahadur Sharumagar, Amrit Kandel, Satyanarayan Prajapati, Gangaram Shrestha Babukaji Shrestha, writ no 378 registered on 2062/11/01 (Feb 13, 2006); Debraj Dhungana on behalf of **Chetnath Dhungana**, writ no 418 registered on 2062/11/8/2 (Feb 20, 2006); Krishna Rai on behalf of **Arun Nepali** writ no 485, registered on 2062/12/22 (April 4, 2006); Ramila Lama on behalf of **Bishal Lama**, writ no 617, registered on 2063/2/10 (May 24, 2006); Bimala Katwal on behalf of **Chakra Bahadur Katwal**, writ no 362, registered on 2063/3/19/2 (July 3, 2006); Dharmaraj Mali on behalf of **Baburaja Mali**, writ no 635, registered on 2063/3/32/1 (July 16, 2006); Sirasaran Mandal on behalf of **Hari Prasad Luintel**, wtie no 54 (002), registered on 2063/4/7/1 (July 23, 2006); Gamala Shrestha on behalf of **Arjunlal Shrestha**, writ no 0004, registered on 2063/4/18/5 (Aug 3, 2006). Similarly a Mandamus petition **Lekhnath Neupane, Krishna K.C. Himal Sharma** and **Bina Magar**, writ no 2588/0038 (Mandamus), registered on 2063/4/11 (July 27, 2006) was also heard by the bench.

These petitions were filed on different dates under Art 23 and 88 of the Constitution of the Kingdom of Nepal 1990. The main prayers of the petitioners in these petitions *inter alia* included the release of the petitioners, declaration of their status and legal action against those officers responsible for gross and systematic violation of human rights and for ending the state of impunity.

In these batches of petitions the petitioners claimed that persons they represented were picked up by security forces on different dates between 2055/9/24 B.S. (Jan 8, 1999) and 2061/9/3 B.S. (Dec 19, 2004), (a great majority of them between Nov 2003 to Feb 2004 either from their houses, work places, colleges or from the streets and taken into custody. For instance, Baburaja Mali was picked up from his residence at midnight, Purna Paudel and Ishwar Lama from Kuleswar, Gyanendra Tripathy from Santinagar Gate, Rupak Adhikari from Maharajgunj, Rajendra Thapa and Ramchandra Kafle from their residence, Buddhi Lama, and Surendra Maharjan from the neighborhood of their residence while returning from the college, Bhim Giri from New Baneswar, Rebkala Tiwari from near Chabahil while returning form college, Bhabanath Dhamala from his shop at Chabahil, Arjun Shrestha(Maharjan) from Kirtipur, Kausalya Pokherel from Pulchowk while returning form college, Dipendra Shrestha from Nayabazar while returning from college, B.K. Shrestha from his won shop, Lila Pandey while returning from college, Hemnarayan Shrestha from Basundhara, Prakash Lama from Old Baneswar, Hari Bahadur Rokka from Dhokatol in Lalitpur, Tejman B.K. and Jalandhar Gautam (Bastola) from Chabahil, Lila Acharya from Chabahil while returning from college, Bhim Maharjan from his own residence, Rejendra Mali from his own house in Lalitpur, Anuman Shrestha from his grocery shop, Surendra Khadki from his own house in Lalitpur, Deshbhakta Chapagain from his grocery shop in New Baneswar, Kamala Waiba while returning from college, Amarraj Bajracharya from his own residence in Lalitpur, Renuka Dulal from Chabahil, Chetnath Dhungana from Kalikasthan, Hirabahadur Saru Magar while returning to his rented room from the college, Amrit Kandel from Bagbazar while returning to his rented room from the college, Babukaji Shrestha from his grocery shop in Ward no 35 of Kathmandu Metropolitan City,

Satyanarayan Prajapati from his residence in Samabhanjyang and Gangaram Shrestha from his residence at Sallaghari in Bhaktapur. Similarly Dhirendra Basnet was picked up by the security forces from Kalanki, Pushparaj Basnet from Kalimati, Nabin Kumar Rai and Ishwar Kumar Lama (leaders of the student wing of the Maoists) from their rented room in Kalimati and, Dil Bahadur Rai from Gyaneswar. Similarly Hari Prasad Luintel was woken up and arrested from his house by security forces form Bairani Barrack in Dhading district. Chaturman Rajbanshi was arrested from Tanzing Norgey Bus Park in West Bangal with the assistance of Indian Police and brought to Nepal. Similarly Chetnath Ghimire was initially required to be present at the military battle on (Garuddal Gulma) several times and latter arrested and kept in the barrack. Arun Nepali was arrested from Putali Sadak. Shree Ram Tharu was arrested from his house at Deudakala in Bardia district, Tateram Tharu, Hariram Tharu and Jagana Tharu from their houses at Magaragadhi V.D.C in Bardia by army men from Rambhapur check post. Arjunlal Shrestha was picked up from his maternal uncle's house in Manamaiju by plain cloth armymen who came from No 1 Division, Balaju. Similarly, Dhak Bahadur Basnet was picked up from his house at Narethanti V.D.C, Baglung by Joint Security Force at Hari Chaur. Biharilal Godia, Ayodhya Prasad Godia (a tenth grade student) were arrested by security forces from Joint Security Base Camp, Banke. Bishal Lama was arrested from his factory where he worked as laborer and taken to the Police Post at Tinkune where his family members met him in the presence of ICRC and after a week he was put in a vehicle in the presence of his wife where she was told that he will be taken to the District Police Office, Bhaktapur. Similarly, Ranjit Darnal, Amrit Darnal and Rajendra Chaurel (all tailors) were arrested either from their rented rooms or restaurant where they worked. Amar B.K who lived at a rented room and worked at an utensil shop at Basantapur all of a sudden did not come back for lunch, and after four days his name appeared among those arrested in a daily newspaper called "Samachar Patra." Mukunda Sedhain was arrested from Raju Khaural's tea shop in Bhimsensthan. Later Achyut K.C. one of the detainees who was later released told that he saw Mukunda at a military barrack (Jagadal Gulma) at Chhauni around December 2003 and Jan 2004. Later, he had also sent a letter to his wife from the detention center. Nischal Nakarmi was picked up by the security forces led by Colonel Raju Basnet of the Bhairabnath Gan from Dillibazar where he was sitting with friends. He was also spotted by other detainees at Bhairabnath Gan and once on 2061/8/22 (Dec 7, 2004) he himself called up and informed the family that he was detained.

Chakra Bahadur Katwal has a little different story. He was the chairman of Nepal Teachers Association, Okhaldhunga. After being arrested he was kept at local military barrack called "Ranadal Gulma" and later transferred to the District Police Office where he was allowed to meet his family. After some days he was again transferred to District Police Office, Saptari and then to Central Jail in Kathmandu but family members was not allowed to meet him. Bipin Bhandari, a student was arrested by forced led by D.S.P Bikram Singh Thapa from Baneswar and taken to the police office at Hanuman Dhoka and kept incommunicado. Rajendra Prasad Dhakal, an advocate, was arrested from Khaireni Tar in Tanahun, and was kept incommunicado.

In Wirt no 2588/0038 Lekhnath Neupane and Others, who prayed for an order of mandamus claimed that they were arrested by the security forces after the imposition of emergency on 2058/8/11(Dec 26, 2001) for the reason of their political faith and taken to the military barrack in Maharajgunj. While in the custody they were blind folded and subjected to extreme torture such as immersing in the water and hot water, compelling to urinate on a burning electric heater, penetrating pin in the nails etc by Lieutenant Colonel Raju Basnet, Major Bibek Bista, Captain Indiber Rana and the Chief of Military Intelligence Dilip Rayamajhi on the order of Pyar Junj Thapa. Due to torture a few of their friends Padam Narayan Nakarmi, Khadka Bahadur Gharti Magar and Kiran Rayamajhi succumbed to death. During the same period a number of our other friends such as Rajendra Tripathi, Madhav Adhikari, Dhirendra Basnet, Jalandhar Bastola, Lila Acharya, Rupak Adhikari, Pushpa Basnet, Shantiram Bhattarai, Durga Bisankhe, Tejman Bishwakarma, Deshbhakta Chapagain, Janak K.C., Chandra Kumar Dhakal, Bhawanath Dhamala, Chetnath Dhungana, Renuka Dulal, Bhim Giri, Amrit Kandel, Buddhi Lama, Nima Dorje Lama, Doleswar Limbu, Arjun Maharjan, Rejendra Mali, Nishchal, Gokul Niraula, Lila Pandey, Dipendra Panta, Arjun Pokherel, Kausalya Pokharel, Hira Bahadur Rokka, Hira Bahadur Tharu, Babukaji Shrestha, Rabindra Sheresha, Ashok Sunuwar, Rajendra Thapa, Rebkala Tiwari, Purna Paudel, Bipin Bhandari, Dil Bahadur Rai, Nabin Rai and Astaraj Bajracharya were arrested and brought to the same barrack. They were subjected to extreme torture by the same officers who also said time and again to these detainees that they will be exterminated. On 2060/9/5 (Dec 20, 2003) these people were loaded on a truck and taken away and since then they had not seen them. The petitioners claimed that an order of mandamus should be issued for declaring public the status of the detainees and if necessary constituting a high level inquiry commission and for taking legal action against the officers mentioned above.

2. Show Cause Notice and Responses

Upon being asked to show cause, the respondents in most of the petitions declined that the petitioners were arrested or any of their rights violated. However, in a couple of written submissions, some important facts were disclosed. For instance, in writ no 632 the District Education Office admitted that Chakra Bahadur Katuwal was asked to appear to the District Administration Office vide letter no 505, and after he went to the said office he did not return. Similarly, the District Administration Office admitted that after Mr. Katuwal appeared in the office he was sent to the local military barrack (Ranasingh Dal Gulma) and later transferred to the District Police Office. On 2058/9/2 (Nov 17, 2001) he escaped from the detention by breaking open the window of the toilet. Similarly, in response to the writ no 378 the Ranadal Gan military barrack (Chhauni) stated that among the petitioners Suchendra Maharjan, who was detained at the Inquiry and Research Center at Sundarijal was released from the detention as per the order of the Supreme Court dated 2061/8/16 (Dec 1, 2004). Similarly, Bhairabnath Military Barrack in its reply stated that among the petitioners Anuman Shrestha and Surendra Maharjan after being arrested were handed over to Rajdal Gan military barrack at Lagankhel. Similarly, the Nepal Army Headquarter in its reply stated that Anuman Shrestha and Surendra Khadki were released in the presence of Lalitpur District Court by the Rajdal Gan on 2060/12/30 (April 12, 2004) and entrusted to

Jit Govinda Maharjan and no other persons were arrested. Similarly, in writ no 54 the Nepal Army Headquarter stated that Hariprasad Luintel was arrested by the Number Six Division of the Nepal Army on 2059/4/29 (July 20, 2002) and handed over to District Police Office, Dhading whereupon he was issued an order of preventive detention on 2059/5/4 (Aug 20, 2002) to be valid for 90 days. Upon expiry of the said 90 day period the detention was renewed for another 90 days. On 2059/11/7 (Feb 19, 2003) he was released and entrusted to his elder brother Ram Prasad Luintel and thereafter he was not arrested. Similarly, in the reply to writ no 0015 the Nepal Army Headquarter denied that Chetnath Ghimire was summoned or arrested by the Military barrack, what appeared in the correspondence was only a clerical error.

Similarly, in its reply to writ petition no 418 the National Human Rights Commission (NHRC) stated that on visit to the famous Mahendra Dal Gan military barrack in Gorkha, the NHRC officials met Mr Krishna K.C. who narrated to them that he had met Chetnath Dhungana (C.N. Dhungana) at Youddha Bhairab Military Barrack. This was also corroborated by Ganesh Dhakal who in his statement to NHRC said that he saw C.N. Dhungana at Bhairabnath Gan Military barrack. He also said that on 2060/9/5 (Dec 20, 2003) the said detainee was loaded on a truck and taken to an undisclosed location following which they did not know that he returned. On this basis the NHRC submitted that this gave reasonable ground not to believe that Mr Dhungana was not detained in military detention.

In the reply to writ no 2588 (Mandamus) the respondents denied that the persons mentioned in the petition were arrested or tortured or disappeared but Bhairabnath Gan admitted that among the persons stated in the petition one Khadka Bahadur Gharti Magar died in detention due to disease and not torture.

In order to locate the status of the persons mentioned in various petitions the Supreme Court on different dates issued orders seeking information, requiring reply from the persons alleged to be involved in the arrest but in all the petitions the concerned office or officers denied that the petitioners were arrested or detained.

3. Constitution of Detainee Investigation Team

The court on 2063/5/12 (Aug 20, 2006) constituted a Detainee Investigation Team led by a judge of the appellate court and comprising the representative of the Attorney General's Office and the Bar to inquire into the cases of disappearance which was asked to find out their actual status, identify persons and the office which were involved in the arrest or issued the order of arrest, and their present designation, whether or not any cases were pending against the detainee, till when the status of the detainee was known and since when it became unknown and which institution or the officer was involved in the act and other relevant facts in the context of the habeas corpus.

4. Other Reports and Submissions

Further, with a view to trace the status of the detainees the court took cognizance of at least four reports.

The first was the report of Baman Prasad Neupane, Joint Secretary at the Ministry of Home Affairs which was constituted on 2062/2/11 (May 25, 2005). This committee was asked to inquire into the status of 776 disappeared persons. It traced the status of 174 of them and thus reduced the number of disappeared as 602. According this report, among those whose status was identified were Chetnath Ghimire, who was as per the letter of the Department of the Military Operations in touch with the Nepal Army barrack at Bhorletar, Chandra Kumar Dhakal who was said to have been released on 2059/11/1 (Feb 13, 2003) from the Jail at Jagannath Dabal, Arjun Prasad Neupane who was released from Nakkhu Jail on 2063/2/30 (June 13, 2006) and Bishal Lama, Jalandhar Bastola, Madhav Adhikari and Khadka Bahadur Gharti Magar, who are stated to have died. The status of other writ petitioners is stated as unknown and unidentified.

The second was the report of the OHCHR Kathmandu which had inquired into the allegations of arbitrary detention, torture, and disappearance from the Bhairabnath Gan military barrack of the Nepal Army between 2003 and 2004. In the course of investigation the OHCHR had interviewed more than 50 people including the family members, former detainees and other eye witnesses. On the basis of this and its visit in person of the said barrack and Youdhha Bhairab Military barrack, at listed the names of the people who were kept in secret detention. The office concluded that in the arrest, inquiry and other activities the Bhairabnath Gan Military barrack had played a central role. The report gave the list of 49 people, who according to it got disappeared from the barrack, on whose behalf writ petitions are filed in Supreme Court. The OHCHR, while continuing with the investigation on the case of other disappeared persons also suggested that a reliable, efficient and independent inquiry should be conducted on these cases and those army units responsible for the violation of human rights should be identified and those persons found to be guilty of criminal responsibility should be tried in the civilian court. It further recommended that until such inquiry is made those persons should be suspended and not proposed to be sent to any peace keeping operations under United Nations, that the eye witness and former detainees should be free from any threat or fear, and that the result of such inquiry should be publicly disseminated.

The third is the report of the National Human Rights Commission (NHRC). Upon being asked by this court a number of times as to what did it do with the petitions filed to it by writ petitioners the NHRC stated that by taking interview of the family members, eye witnesses, those released from detention it collected necessary information. In the course of investigation the NHRC had also made a visit to the alleged place of detention and had sought information with the security units involved in the detention. In several petitions it also recommended to the government to take necessary action against officers who are found to have been involved in serious violation of human rights and publicize the status of the detainees.

The fourth is the report of the Detainees Investigation Team (DIT), 2007. After the investigation, the DIT is found to have reached to the conclusion that among those investigated Chakra Bahadur Katuwal was taken into custody by the Army and died on account of the cruel torture given to him. Similarly, it also concluded that among the petitioners Rajendra Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai were arrested by

security forces and caused their disappearance in a planned way. The DIT in its report also recommended that a high level investigation commission should be formed to impartially and independently inquire into the cases of those disappeared during the armed conflict, that retro active laws in matters such as crimes against humanity should be enacted, that appropriate judicial directives should be issued for stopping the repeated arbitrary arrest and detention. Further the DIT also suggested that those involved in the violation of human rights should be tried according to law and that the victim family should be given appropriate compensation.

5. Issues to be Decided by this Court

A consideration upon the statement of the writ petitioners in totality, matters stated by the respondents in their written statement, orders rendered by this court in course of the proceedings of the case and additional facts revealed therefrom, and also including the questions raised by the legal practitioners of the writ petitioners and respondents during their pleadings, this court deems that the following questions are to be decided:

1. On the basis of the facts revealed till date, what is the condition of the persons who are stated in these petitions as arrested by security persons and disappeared?
2. In matters pertaining to disappeared or missing persons, what would be the obligation of the state especially during the condition of conflict? What would be the possibility of judicial remedy to carry out such obligation and what would be the role of the court in the matters concerned thereto?
3. How and what machinery has been applied till date while making efforts in course of inquiry of disappeared persons as well as making their status public? Whether or not these efforts have been effective, what would be appropriate in this regard?
4. What are the prevailing legal provisions with respect to finding out the situation of disappeared citizens through research and inquiry? Whether such legal provisions are sufficient and effective? If not, how and what legal provisions and initiations are necessary?
5. Whether any interim measures are desirable to render immediate relief considering instant pain, the loss and effect to the families of the persons who are said to be disappeared and facilitate the search to them and for the purpose of mitigating the pain and loss to them? If yes, whether such orders can be issued with respect to now prevailing petitions?
6. Whether or not the respondents have fulfilled their legal obligation pursuant to the demand of the petitioner. Whether or not the orders need to be issued as per the demand? What kind of orders are to be issued for appropriate remedy?

Regarding Question No. 1

The statement of all petitions filed in this court claim that the persons stated in the writ petition were arrested by security persons in different dates and places, they were not in contact with their family and their status was unknown till date.

The respondents have basically stated in their written statement that the said persons are not arrested by security persons; and the court, considering the matter

whether the said persons were arrested by the security persons, has inquired different intuitions along with pertinent orders. In course of the order, it seems that the report of the National Human Rights Commission with respect to search of said person was demanded, the Ministry of Home of erstwhile His Majesty's Government was made to inquire the truth and submit the report. The report of the inquiry of the Government of Nepal in this respect (Baman Prashad Neupane Committee) was also demanded and included in the file.

In the same question learned advocates Mr Satish Krishna Kharel, Mr Harikrishna Karki, Mr Kedar Dahal, Mr Milan Kumar Rai and Mr Hari Phuyal appearing on behalf of the petitioners submitted that all persons stated in the petition were arrested by security persons in different dates and places. Various national and international human rights organizations have stated the fact that the said persons were detained in different custodies of police and army. Krishna K. C and Himal Sharma who were together with them in various detentions and later freed have given their statement in the Court of Appeal, Patan that the persons stated in the petition were there kept in the detention. The fact is verified even through a letter written by Krishna K. C. from the detention. The counsels also argued that by virtue of the statement recorded at the National Human Rights Commission by the witness who saw security person arresting the petitioners and the persons who were detained together with them in the custody the fact that their condition is still unknown, it is proved that petitioner were illegally arrested by the security persons and therefore, the state has illegally and forcefully disappeared the persons.

Learned Deputy Government Attorney Mr. Bharat Mani Khanal, who appeared on behalf of the Government of Nepal, submitted that the concerned security agencies have claimed that they have not arrested the petitioners. There is no reason why such written statement should not to be believed. Even by the orders of the court rendered from time to time, and subsequent probes done pursuant to the orders, the fact of the petitioners' arrest has not been proved. During the course of armed conflict many people have gone abroad and in view of the fact that hundreds of thousands of people were found safe, it is not appropriate to conclude without any ground that the petitioners were arrested, he pleaded.

Learned senior advocate Mr. Khem Narayan Dhungana, appearing as amicus curie pursuant to the order of this court, submitted that the facts deliberated therein till date have established that the petitioners were arrested by the security persons. The fact that their whereabouts is still unknown proves that they were disappeared but the responsible persons of the Police and the Army could not disclose information known to them due to organizational discipline and the oath of secrecy taken by them, he pleaded.

Learned advocates duo Mr. Bashudev Bajgain and Mr. Om Prakash Aryal appearing as amicus curie on behalf of the National Human Rights Commission argued that a total of 2032 applications were filed at the Commission as being disappeared by the sate and out of them the whereabouts of 646 was still unknown. Regarding the complaints lodged at the Commission and investigation carried out on the same and subsequent facts established therefrom, the Commission could not conclude that the persons mentioned in the petitions were not disappeared; and the Commission has decided to recommend for legal action against the culprits who were involved in serious violation of human rights, they pleaded.

Considering the facts stated in the petition, written statement and the above mentioned pleading, it is beyond dispute that the persons stated in the petition were not in contact of their families and relatives. Except for the provision of the main body of the writ No. 378 of Harisharan Maharjan and others, in most of the petitions, the date, time and place of the arrest of the petitioners and the manner how they were arrested is expressly stated. Even as the written statement has stated that the petitioners were not arrested, it seems that this court, with respect to many writ petitions including writ No. 3575 has, time to time, ordered a search warrant to furnish with this court the whereabouts of petitioners if they were not arrested. Regarding the writ petition 617 that states about Bisal Lama who was met by his families at the ward police office Tinkune on 9 June 2002 with the cooperation of ICRC; and that he was boarded on a vehicle to get him to Bhaktpur DSP office in the presence of his wife Menuka Lama, and it is mentioned that while being inquired on the same evening the Bhaktpur District Police Office denied knowing anything about the same. As it is seen in this way, the written statement of the respondent stating that the petitioners were not arrested, can not be found to be reliable and trustworthy.

The respondents in their written submission have stated that Mukunda Sedain who is mentioned in writ No.142 was not arrested by them. However, Achyut K.C while giving statement on 20 December 2004 pursuant to the order of this court in connection with habeas corpus writ potion No.193 filed at this court on 15 December 2003 and which remained pending pursuant to the order of this court dated 25 May 2005 has stated that he had met Mukunda Sedai on 2060 Poush [December2004/January 2005] while being detained together with him at Jagdal battalion at Chauni. The letter written by detainee Mukunda Sedai on 16 January 2004 to petitioner Shanta Sedai shows that he was in Chauni. The decision of Nation Human Rights Commission dated 6 May 2006 which is enclosed in the file herewith deems that Mukunda Sedai as stated in the petition was arrested by security force and was kept incommunicado in illegal detention at Jagdal battalion Chauni.

Concerning writ No. 262 of detainee Chaturman Rajbansi, the transcript copies of the letters enclosed in the file which were sent by him to his family from Batukdal barrack 8 April 2003, 15 July 2003 and 5 December 2003 state fact that he was in custody at army barrack. However, the respondents including Batukdal battalion in their written statement stated that he was not arrested. As his family has not been able to establish contact with him till date and as it is formed seems that his where-about remain unknown even after proceedings of this court, the condition of Chaturman Rajbansi is found to be unknown.

While it is the contention of petition of writ No. 111 that detainee Pusparaj Basnet was arrested and detained in Bhairab Nath Battalion, the respondents including Bhairab Nath battalion in the written statement have claimed that he was not arrested. It seems from the transcript copy of report of National Human Rights Commissions that after carrying out an investigation with respect to this detainee, National Human Rights Commission has made the concluding observation that Pusparaj Basnet was arrested by security force and was detained in Bhairav Nath battalion which is under the Nepal Army.

The analysis of facts mentioned here above is just a trend analysis of all cares in totality. As these examples expose and represent similar facts in other cases, it is not

necessary to mention facts in detail of all cases and additional proceedings carried out for the purpose of finding out the condition of detainees.

The report of Baman Prasad Neupane constituted by the Government of Nepal for the purpose of probing and investigation of the disappeared persons and preparing a report that explained their real condition and also to recommend necessary measures that needed to be taken with respect to those whose condition remained unknown, states the name of 602 persons in the list of persons whose condition was still unknown.[1] The fact that most of the persons who have filed writ petition in this court including Amrit Kandel, Arjun Maharjan, Baburaja Mali were listed in the report as being the persons whose whereabouts was still unknown, shows that the whereabouts of the persons stated in the petition was not determined till date.

In the list[2] of the persons whose whereabouts was determined, the same report citing the letter of Karyarathi Department of Nepal Army mentions Chet Nath Ghimire, about whom the petition has been filed to this court as being the person who was in contact with the barrack of Nepal Army at Bhorletor. Taking note of the report as a basis, when this court ordered to present Mr. Ghimire [Dhungana] before it, the court received an answer that the fact stated therein was just a typological error, giving thereby a feeling that the status of the persons mentioned in the petition was getting more complicated. Even though the same report states that petitioner Chandra Kumar Dhakal and Arjun Prasad Neupane were freed on 13 February 2003 and 13 June2 006 respectively from Jagannath Nath Debal branch and Nakhu branch of the prison, it does not mention any specific information and detail regarding their present states and condition in connection to the proceeding of the case filed in this court. A mere reiteration of the correspondence that mentioned about their release does not help in reaching conclusion that their status was known. The same report states that Bisal Lama, Jalandhar Bastola and Madhav Adhikary were killed in cross firing. However, this is not corroborated by the post mortem report or receipt of the corpse by the family or identification of the place where the corpse was dumped. As such things could not be shown in the file, this court only on the basis of the said report can not conclude that they were killed, or if they were killed, without further inquiry as to how they were killed and whether law was duly complied with at that time, reach to a conclusion against undertaking such inquiry.

A report of the investigation carried out by the United Nations Office of the High Commission for Human Rights in Nepal with respect to persons disappeared by security force from custody during the time of conflict has been submitted to the file in writ No. 2588. The report has mentioned the name of 49 persons as being disappeared from the Bhairab Nath battalion of Nepal army; and writ petitions concerning most of them including Madhav Adhikari, Dhirendra Basnet, Desbhatka Chapagain have been filed with this court. The report mentions that it was prepared after the Office had taken interviews of over 50 persons including families of disappeared person, former detainees and witness and after the visit to Bhairab Nath battalion and Uddha Bhairab Nath battalion.

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1 The probe committee to formed to make public the condition of disappeared citizens (Baman Prasad Neupane) report,2063.
2 Id, Annex 3

The erstwhile His Majesty's Government, Ministry of Foreign Affairs and the Office of the High Commissioner for Human Right have signed an agreement on 10 June 2005 with respect to the establishment of the Office of the High Commission for Human Rights in Nepal. The agreement has given a mandate to the Office to monitor the situation of human rights under certain determined standards and thereby make report of the same.[3] As the Office has made the report public even by specifying the methodology therein, this bench has deemed appropriate to take the report in reference as a background material for the purpose of analyzing the facts during the hearing of the case.

As the said report in the course of its investigation also states that 49 persons were disappeared and that additional investigation was being undertaken with respect to the list of other people who were said to be disappeared; it deems that the contention in the written statement and the pleading of the Deputy Government Attorney that the persons were not arrested does not concord with the said report and hence not reliable and trustworthy; the status of those persons is still found to be unknown.

As it seems from the reports submitted in connection of the cases before us that since army barracks were also used to keep the detainees it was further made difficult to determine the condition of the detainees. If the detention was made by officers authorized by law by duly fulfilling the procedures prescribed by the constitution and laws, no such condition would arise to detain persons in the places like Bhirab Nath Gan which is purely an army barrack. An argument may be raised that army barrack was used for safe detention for the purpose of containing terrorism at the time of conflict but this should be preceded by formation of certain policy based on law to use the army places for criminal proceeding of civilian persons.

In the case of persons taken into custody for the purpose of criminal law, several of their rights get affected and these rights are to be enforced while they are in detention. The rights of the detainees such as the rights to meet family members, to consult a law practitioner, the guarantee as to the non-occurrence of mental and physical torture, the right to adequate food, information, access to justice for legal remedy is to be respected.

When detainees are put in army barrack where infrastructures are not developed keeping in mind the human rights, it creates a situation where gross violation of human rights of the detainees might occur. In the present case many problems have generally arisen precisely for the reason that civilian persons were put in army barracks.

Since even for institutions like United Nations Office of the High Commissioner for Human Rights and the National Human Rights Commission access for the inspection of the detainees' room of the Bhairab Nath Battalion was granted only after special initiations, it would not be possible for the kin of detainees to have access or reach to such place of detention. On the basis of the reports received, and from description of the place of detention as mentioned in the statement of the persons who were already detained there, the condition of the detention, physical facility and treatment meted to detainees seems to be far lower than the treatment to be done to a human being and, hence, degrading, objectionable, torturous and terrifying. It is a matter of shame to both government and the

[3] See in detail: Agreement Between the United Nations High Commissioner for Human Rights and the Government of the Kingdom of Nepal Concerning the Establishment of an Office in Nepal held on 10/04/05.

state that such degrading treatment was done to human being just because of being in detention.

Notwithstanding the gravity of offence treatment to human being should be humane and within accepted standards. The physical condition of the place where the detainees are kept and the treatment meted to them expresses overall attitude of the concerned office to them and the difficulties faced by the detainees and treatment to them in the detention further clarifies ground for their disappearance. As detainees are put in such difficult and inadequate place, it might give rise to loss of life and property due to adverse effect on physical and mental health. Further, where the matters like record keeping, dissemination of information etc. do not exist, they indicate a situation where there is possibility of disappearance. As a matter of fact, the policy and practice of putting civilians in army barracks for the purpose of detention is unfortunate. A separate research needs to be carried out by the government as to what was the thinking and policy behind the activities of putting detention in army barracks which have arisen therefrom.

In reality, on the basis of above mentioned reports and information given by the persons who were detained in the Bhairab Nath barrack, it is now beyond dispute that a large number of detainees were detained there. There does not seem any reason for all these reports and persons to make baseless allegation against the army organization. If an agency which is supposed to remain a pure army organization is used for other purposes, the concerned agency and officials should bear the challenges and responsibility to the extent such responsibility and challenge arises therefrom. Whereas such responsibility was to be borne naturally, a defense on the same can not be established through adamant denial of all basic claims stated in the petitions. As is claimed in the petitions, in matters corroborated by the reports pertaining to persons who are seen to have been taken into custody, the responsibility clearly lies with the army and ultimately with the government.

Applications were also filed at the National Human Rights Commission subject to several persons stated in the writ petition and the details of investigation received from the Commission mentions that the Commission had carried out investigation on this matter. As per the information received from the Commission, persons mentioned in the petition including Puspa Raj Basnet and Mukunda Sedain were illegally put in army detention for a long time, and therefore, it seems that the Commission had recommended for legal action by identifying responsible official. The statement recorded at the National Human Rights Commission, by persons freed from the custody of the security force reveal that they had met several persons stated in the petitions in the custody. Those statement, the applications and information furnished by the families of the disappeared person to the National Human Rights Commission and the concluding decision of the Commission on the basis of the investigation and field visits of the potential places where the detainees might be kept; portray that the condition of the persons including those stated in the petition as unknown.

This court had constituted an investigative team from within the machinery of this court itself for the purpose of determining the condition of persons mentioned in writ No. 3575,100,104, 632 from among the several writ petitions filed with it. The investigation undertaken by the Detainees Investigation Team (DIT) reveals that Mr. Chakra Bahadur

Katuwal of writ No. 632 had appeared at the office of Chief District Officer in person on 13 December 2001 and he was put in illegal detention first by the order of the Chief District Officer at the District Police Office and then in the army barrack and he was killed on 16 December 2001 due to cruel torture given by those including army officials.

Besides, with regard to Rajendra Prasad Dhakal who is stated in the writ petition, the report conclusively states that he was arrested on 10 December 1998 by a police team comprising 10 to 12 policemen, deputed under the command of erstwhile Police Inspector Kush Bikram Rana of Area Police Office, Belchautara, Tanahaun at the time when he was taking bath at Jamdi river of Khaireni Village Development Committee of Tanahaun. He then was brought to Area Police Office, Belchautara along banks of Jamdi River which was a round about and lesser used route. [The DIT has] reached the conclusion in that he was systematically disappeared from the same date.

In the report submitted to this court the DIT conclusively states that petitioner Bipin Bhandari and Dil Bahadur Rai were arrested on 2059/3/3 (June 27, 2002) from their rented room at Sukedhara, Kathmandu by a police team under the command of Deputy Police Inspector Vijaya Pratap Shah from Area Police Office, Balaju and they were handed over to the Area Police Office Balaju and as both of them were affiliated to All Nepal National Free Students Union Revolutionary (ANNFSU-R) sister organization of Communist Party Maoist, they were disappeared due to their political faith[4].

In this way, it seems that the present condition of most of the detainees could not be determined even by the investigations of this court and different agencies. It seems that the DIT constituted by this court has concluded that Mr. Chakra Bahadur Katuwal of writ No. 632 was died on16 December2001, Rajendra Prashad Dhakal of writ No. 3575 Bipin Bhandari of writ No. 100 and Dil Bahadur Rai of writ No.104 were forcefully and illegally disappeared by the security forces. Since the investigation was a judicial one carried out by the DIT constituted as per the order of this court, this court has deemed the conclusion of the report of the DIT as the final regarding the condition of the petitioners. Pursuant to the report, the condition of Chakra Bahadur Katuwal, Bipin Bhandari, Rajendra Prasad Dhakal and Dil Bahadur Rai has been determined as stated in the report itself and condition of all other persons stated in the writ petition except these ones could not be determined on the grounds of the facts and thereby seems still unknown and confusing, and therefore, the truth on their condition need to be investigated and determined.

Regarding Question No. 2

From the deliberation on question No. 1 made above, it seems that the persons who were claimed to have been disappeared by security force were basically denied by the respondents of having arrested by them, and thus, the conditions of those persons is found to be fundamentally unknown.

As our judicial practice till date has been that the order of habeas corpus is issued in the situation when the condition of a detainee is determined and he/she is found detained illegally, owing to the situation of conflict a pertinent question has been raised as to what would be the responsibility of the state towards citizens and what would be the role

[4] Supreme Court, Detainees Investigation Task Force, 2063 Report pages 126-127

of the court especially in the condition when a lot of complaints are filed claiming illegal arrest of persons in huge number but the state denies having arrested these persons, and therefore, written notes of pleadings were also demanded from the counsels present on this question.

Appearing on behalf of the petitioners learned advocates Mr Milan Kumar Rai and Mr Kedar Dahal submitted that forceful disappearance is a continuous crime. Article 2 of U.N. Covenant on Civil and Political Rights which is ratified by Nepal entrusts to the state a obligation to carry out investigation on each incident of Human Rights violation including forceful disappearance. If the state does not fulfill this responsibility, the court may; considering the gravity of incident of disappearance, concern of international community, concern and wishes of victim family and also the need of ending impunity; issue on order to find out the real condition of disappeared persons and punish the culprit even by making laws with retrospective effect if so calls for, they pleaded.

Appearing on behalf of petitioners learned advocates Mr Hari Krishna Karki, Mr. Satish Krishna Kharel, and Mr. Hari Phuyal argued that the Constitution of the Kingdom of Nepal, 1990 and the Interim Constitution, 2007 guarantees right to life and personal freedom of every person. Similarly, Human Rights related international instruments ratified by Nepal have also guaranteed the same thing. The state should respect and implement this obligation created by several national and international laws. If the state does not fulfill such obligation, an inherent right is vested in the court itself to consider all possible ways for the protection of the civil liberty, they submitted.

Learned advocates appearing as *amicus curie* argued that the government has the responsibility to find out the condition of the persons who were missing, disappeared or whose status was unknown. The government can not escape from its responsibility just by stating that it has not arrested them. The court may issue appropriate order to clarify the status of such persons, they submitted.

Similarly, appearing on behalf of respondents Joint Government Attorney Mr. Yubaraj Subedi and Deputy Government Attorney Mr. Brajesh Pyakurel argued that solution of such question should, in the changed context, be sought through political consensus. The judicial inquiry to be undertaken by the judiciary at its own initiation may not be practical or result oriented. If the orders of the court are not executed they make the matter more complex. As a consensus has already been made to establish Truth and Reconciliation Commission for the purpose of eradicating the problems evolved during the time of conflict, this aspect should also be considered, they submitted.

Considering the above mentioned facts and submissions made and the context therein, it seems that the cases from among those presented for decision here today, the oldest one is registered on 2055/10/7 (Jan 21, 1999), however, it seems that it is interrelated with the circumstances created prior to it out of the armed rebellion between the government and CPN (Maoist), and therefore, it seems tenable to consider as to what would be the responsibility of the state in such unusual circumstance.

There is no dispute that the first among the duties of the state is to provide security to its frontiers and protect rights of its citizens. Whatever complex or easier circumstances may appear for the conduct of its affairs, a state can not exempt itself from

its responsibility of protecting person and property of its citizen and also addressing the concerns related thereto with responsibility and priority. If a state fails to fulfill such primary responsibility, peace of such state would be disturbed through internal rebellion and eventually the state may face the crisis of its existence. Modern political science has accepted the state as the protector of citizens. The state has special responsibility towards its citizens even during general circumstances and state can not exempt itself from such responsibility howsoever especial or difficult the circumstance might be. From this philosophical stand point also it does not provide a basis and condition to conclude that there would be no responsibility of the state for the circumstances created out of the past conflict.

Several initiatives have been taken at the international level for ensuring the protection of fundamental human rights of persons. The United Nations' Universal Declaration of Human Rights has accepted the right to life and freedom as fundamental human right and thereby made a declaration that the international community should respect and protect the same[5].

As the traditional international law had put the incidents of disappearance during the time of conflict under the category of violation of human rights, this alone could not minimize incidents of disappearance, and therefore, the United Nations deemed incidents of disappearance as crime against humanity and issued a declaration on 18 December 1992 for the purpose of saving all persons from forceful disappearance[6]. In line with the obligation imposed on the state party by the declaration, the General Assembly of the United Nations on 20 December 2006 has issued the International Convention for the Protection of All Persons From Forced Disappearance[7]. Even as the international convention has not come to force till date and Nepal has also not ratified it, this convention has determined a fundamental standard concerning the obligation of the state with respect to security of disappeared persons; and also in the condition that the convention has been accepted by international community, it is expedient to accept the standards of the conventions as the standards of international law and thereby carry out activities by the states pursuant to the same.

As stated in the preamble to the said convention the principles enumerated in Charter of the United Nations, the human rights and basic freedoms indicated by Article 55 of the Charter, the Universal Declaration of Human Rights, the convention is supposed to promote universal respect for, and observance of, human right and fundamental freedoms. From among the principles stated in the Universal Declaration of Human Rights, it seems that the core principles in all conventions, covenant and instruments are directed by friendship, justice and peace on the basis of inherent dignity, respect and inalienable rights of all members of human society. From among them, the Universal Declaration of Human Rights, Covenant of Civil and Political Rights and Convention against Cruel Inhumane and Degrading Treatment or Convention against torture are related to present matter and hence especially related.

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5 Article III, Universal Declaration of Human Rights, 1948, UN.
6 General Assembly Resolution 47/133 United Nations
7 General Assembly Resolution 61/177, United Nations

For the purpose of enforcement of the above mentioned conventions, covenant and instrument, it seems that some rules and code of conduct of law enforcement authorities such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Standard Minimum Rules for the Treatment of Prisoners are used as yardstick.

Since the above mentioned instruments appear to be concerned with the implementation of the human rights conventions signed by Nepal, the Convention for the Protection of Enforced Disappearance passed in 2006 should also be seen in the same footings. This convention has not established separate values other than prevailing international human rights laws rather it has reinforced the values enshrined in the mainstream human rights laws, and therefore, the fact of non-ratification of this convention does not provide any ground to consider that the state responsibility created by mainstream human rights instrument are minimized to any extent. Thus, even as the 2006 convention is yet to be ratified, there are no barriers to take the provisions of the convention principally as embodied guiding elements, rather it is also seen necessary on the basis of the obligation created out of conventions ratified by Nepal together with the principles of prevailing international human rights law for the protection of human rights.

There seem to be no problem in internalizing the principles laid down in the said Convention for the sake of respecting and promoting the life, dignity and freedom of its citizens; and our legal system can also include this as it is useful for us. It is not objectionable in both our law and practice rather it is seen to be essential. It is expected that state should, within its constitutional framework, proceed further as soon as possible to ratify such conventions.

This will demonstrate our sensibility towards our citizens and the feeling of responsibility of the state towards the international community in the process of protection of human rights. Now, let us consider some fundamental provisions of the convention.

Article 2 of the convention considers the act of enforced disappearance as an arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or a person or group of person acting with authorization, support or acquiescence of the state followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law[8].

The convention has prescribed the following obligations to a state party to guarantee that persons would not be disappeared forcefully by state party:

- No body to be disappeared forcefully and kept in secret detention,
- The act of enforced disappearance to be made criminal act through enactment of law, it will not be considered as political offence and in order to ensure the presence of the alleged person arrangement of extradition or rendition will be made,

[8] For the purposes of this Convention, enforced disappearances is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or a persons or groups of person acting with authorization, support or acquiescence of the state followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

- Research on forced disappearance to be carried out and responsible person will be brought to justice,
- Right to effective remedy to be guaranteed to the victims of enforced disappearance,
- An impartial investigation for alleged incidents of disappearance to be ensured,
- Arrangement for the protection of complainant, witness and relatives of victim to be made.

It is found that some states in the American continent have, before the commencement of the convention, issued in 1994 an Inter American Convention on Forced Disappearance of Person and countries such as Colombia, Guatemala, Paraguay, Peru and Venezuela have made separate law in accordance with the convention and thereby have defined such act as criminal act[9].

In the International Covenant on Economic, Social and Cultural Rights, 1966 which is ratified by Nepal and Nepal has become a party to the same, the parties to the Covenant have accepted the responsibility of the state to provide widest possible security and cooperation to establish a family and take care as well as education of children.[10] Similarly, Article 6 of the International Covenant on Civil and Political Rights states that every human being has inherent right to life and this right shall be protected by law.[11] The expression 'right to life' used in this Article has been interpreted by the United Nations Office of the High Commissioner on Human Right as the highest right of person which can not be suspended in any kind of emergencies.[12] The same Covenant has also provided state parties with the responsibility to protect the right of citizens.[13]

- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law
- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- Anyone who is arrested or detained on criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- Anyone who has been the victim of unlawful arrest or detention shall have the an enforceable right to compensation.

While interpreting Article 2 of the Covenant, the Human Right Committee, the Office of the High Commissioner for Human Rights has stated the act of forced

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9 Report submitted by Mr. Manfred Nowak to 58th Session of Commission on Human Rights, Item 11 of the Provisional Agenda at January 2002.

10 Article 10, International Covenant on Economic, Social and Cultural Rights, 1966

11 Every human beings have the inherent right to life. This right shall be protection by law. No one shall be arbitrarily deprived of his life.

12 CCPR General Comment No.14, Office of the High Commissioner for Human rights, Twenty-third Session,1984

13 Article 9 International Covenant on Civil and Political Rights,1966

disappearance would violate Articles 6, 7 and 9 of the Covenant and the act shall also be a crime against humanity.[14]

The state parties to the Covenant have accepted obligation that necessary legislative measures shall be applied to respect and guarantee these rights if the prevailing legislative measures do not appear to be enough; and effective remedy will be ensured even if these rights are violated by the persons who work in official capacity.[15]

Similarly, the Convention against Torture and Cruel, Inhumane and Degrading Treatment, 1984 has also prohibited any kind of inhumane torture to the person in custody or detention.

As Section 9 of Treaty Act, 2047 provides for that the treaties or agreements ratified by Nepal will be applied as Nepal law, there is no ground for the state to get itself absolved from the responsibility determined by these instruments.

While having a look to foreign courts as to how they have practiced in such cases, it is found that the Indian Supreme Court has, in the case of *Rudal Sah V. Union of India*, not only freed Rudal Sah from illegal detention but also ordered monetary compensation from the same petition of *habeas corpus*. The court has taken the decision to compensate not as compensation under ordinary jurisdiction rather viewed it as the compensation for depriving enjoyment of basic fundamental right of the citizen guaranteed by the state; and held that "the refusal of the Supreme Court to pass an order of compensation in favor of the petitioner will be doing mere lip-service to his fundamental rights to liberty which the state government has so grossly violated".[16]

Similarly, in the case of *Sebastian M. Hongray V. Union of India*, where the petitioner had claimed that C. Daniel and C. Paul were arrested and disappeared by security forces and where the respondents had furnished written statement that they had not arrested them, the court however, ordered compensation of one hundred thousand rupees each to the widows of the deceased persons and also issued an order of mandamus to Superintendent of Police to carry out necessary investigation on the incident on the ground that the petitioners had had an unnatural death and the state had not fulfilled its obligation towards the incident.[17]

Regional Courts on Human Rights have also decided on matters pertaining to incidents of enforced disappearance. The Inter- American Court of Human Right has enunciated the principle in the case of *Velasquez Rodriguez V. Honduras* that the responsibility of the state would remain even in situations when full and direct evidence of enforced disappearance by the state is lacking. It was claimed in the case that a student named Manfredo Velasquez was arrested by armed police of Honduras. Even as direct evidence of the same was lacking, the court enunciated on the basis of the circumstantial and presumptive evidence that state has the responsibility to create a machinery for full enjoyment of ruman rights by the citizens[18].

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[14] CCPR General Comment No. 31, Office of the High Commissioner for Human Rights, Eightieth Session, 2004.
[15] Article 2 *Ibid*
[16] 4 SCC(1983) 141
[17] AIR (1984) 3 SCC 83
[18] Velasquez Rodriguez V. Honduras Petition No. 7920/1981, judgment of 29 July 1988

Another case, *Trujillo Oroja V. Bolivia*, filed at the same court in 1999 had claimed that a war victim Jose Carlos Trujillo Oroja was arrested by security forces in 1971 December and was disappeared since February 1972. In the case the Bolivian government on the basis of the report following judicial inquiry accepted that it had caused Jose Carlos Trujillo Oroja disappear, and therefore, begged pardon to the families of the victim, made necessary arrangements to amend the laws to punish the culprit and to ensure non-recurrence of the incidents of forced disappearance and had also proposed US$ 4000 compensation to the families of the victim. Even as the court quashed the case (put in *tameli*) as the Bolivian government had accepted the responsibility towards its citizen, it was, however, declared that the Bolivian government had infringed the obligation of the sate towards its citizens to protect human rights as protected by the Inter American Convention on Human Rights.[19]

Regarding forceful disappearance, the case *Kurt V. Turkey* decided by the European Court of Human Rights, established under the European Convention for the Protection of Human Rights and Fundamental Freedom 1950, is hailed as landmark. The case started after the mother of Uzeyir Kurt filed an application at the European Commission of Human Rights claiming that Kurt was arrested by security authorities of Turkey in 1993 and was disappeared from the detention. The court in the case observed that the government of Turkey had seriously violated its liability under the European Convention for the Protection of Human Rights and Fundamental Freedom, 1950 by putting Kurt's mother in pain and distress by not giving the information about his condition for a long time and for not doing anything substantial on behalf of the government to carry out investigation on his disappearance, and therefore, the court ordered compensation of 10,000 Pound Starling for the pain and distress borne by the petitioner and 15,000 Pound Starling for disappearing her son.[20]

In the above mentioned decisions, the Inter-American Court of Human Rights and European Court of Human Rights have made interpretation of the obligation of state established by regional conventions as determined by the same conventions. Even as Nepal has not become party to a separate regional convention, it has remained an active member of the United Nations, accepted several conventions related to human rights and has repeatedly expressed its commitment towards human rights and freedom of citizen through constitution and other legal provisions. In this context, it seems that this court may take standards and principles established pursuant the above mentioned foreign and human rights related decisions made by the regional courts as **recognized principles of justice** embodied in our constitution. There would be no reason to take them otherwise.

While considering what would be the obligation of the state to its citizens during the time of conflict or normal situation, the preamble to the Constitution of the Kingdom of Nepal, 1990 has made commitment to guarantee basic human rights of the people and thereby transforming the concept of rule of law into living reality. The fundamental rights stated under Part III, Article 12 (1) of the same constitution has the provision that no one shall be deprived of personal liberty save in accordance with law. Similarly, right to criminal

[19] Trujillo Oroja V. Bolivia judgment of 26 January 2000
[20] Kurt V. Turkey, Application No. 24276/94 Judgment of 25 May 1998

justice provided in Article 14 in clause (4) states that anyone who is detained in course of investigation, trail or for any other reason shall not be subjected to any physical or mental torture, nor shall he be treated with any cruel, inhuman and degrading treatment. Clause (5) of the same Article, states that no person who is arrested shall be detained with out being informed, as soon as may be, of the ground of arrest; and Clause (6) of the same Article states that every persons who is arrested and detained in custody shall be produced before a judicial authority within twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such person shall be detained in custody beyond the said period except on the order of such authority.

The basic fundamental rights provided by the 1990 Constitution are made more secure by the Interim Constitution of Nepal, 2063. A full commitment is made to civil liberty, fundamental rights, human rights and the concept of the rule of law has been expressed in the preamble to the Constitution itself.

Clause (1) of Article 12 of the Constitution has in clear terms protected right to life of person and thereby provided every person the right to live with dignity. Regarding the right to justice, Article 24 (1) states that no person shall be detained without giving the information of arrest stating the reason therefor. Clause (2) of the same Article states that a detained person shall be produced before the judicial authority within 24 hours of the arrest excluding the time necessary for the journey from the place of arrest to such authority, also guarantees that the arrested person shall not be put in detention except by the order of the judicial authority. Clause (8) states that each person shall have right to be informed of the proceedings against him and Clause (9) states that each person shall have right to fair trail from competent court or judicial authority.

Similarly, Article 26 of the Constitution which provides for right against torture in Clause (1) states that anyone who is detained in course of investigation, trail or taken into custody or for any other reason shall not be subjected to any physical or mental torture, nor shall he be meted with any cruel, inhuman and degrading treatment. Clause (2) of the same Article makes the act pursuant to Clause (1) punishable by law and also provides that the person treated in that manner shall be entitled to compensation as prescribed by law. Further, the proviso of Clause (7) of Article 143 of the Constitution by providing that such rights can not be suspended even during the period of state of emergency in the country remains constitutionally sensitive to the right to life of the person.

It is beyond dispute that during normal times the liability to protect fundamental rights of persons and their right to live with dignity vests upon the state. As civil liberties would be at greater risk during the time of conflict, the liability of the state would be more sensitive and responsible during such unusual circumstances. The protection of human rights and compliance with international humanitarian law has during the time of conflict remained a challenge even at the international level. A study report has shown that during the year 2003 and 2004 in Nepal the trend of enforced disappearance and illegal detention were found to be highest in the world.[21]

[21] Amnesty International Report, the State of the World's Human Rights,2005, P. 23

It seems that the above mentioned Declarations, Conventions and Covenants have pointed out that the practice of enforced disappearance would seriously violate the right to live with dignity, the right against torture, the right to personal freedom, fair trail, the right to easy access to justice and rights related to family life.

Even as there has not been separate legal provision on forced disappearance in Nepal, some of the provisions of the Interim Constitution, 2007 have accepted existence of such incidents during the time of conflict. The political consensus made in several stages between the seven political parties and CPN (Maoist) in the course of peaceful transformation of conflict which have remained as the background for the formation of this constitution and which are accepted by this constitution as its part as well as the detailed peace agreement entered between the government of Nepal and CPN (Maoist) on 2063/8/5 (Nov 21, 2006) have also expressed commitment to international humanitarian law, principles of basic human rights and standards. It seems that the state has accepted its obligation towards disappeared citizens due to its commitment to the compliance of basic human rights and international humanitarian law as expressed in clause 5.2.3 of the aforementioned peace agreement which has been put as annex 4 of the Constitution, it states that both parties agree to make public the real name, family name and address of home of those who were disappeared and killed during the time of war within 60 days of signing of this agreement and thereby apprise the same to their family also; and clause 5.2.5 states that both parties have agreed to establish a high level Truth and Reconciliation Commission to explore truth on those who violated human rights during the armed conflict and clause (7) by providing that both parties commit to respect human right and international humanitarian law the state seems to have accepted the fact that it has the liability for disappeared persons.

The Interim Constitution, 2007 has also endorsed the commitments expressed through the peace agreement and various other political consensus. Article 33 (L) in Part IV of the Constitution under Directive Principles and Policies, provides that victim families of the disappeared person will be provided relief on the basis of the report of the Inquiry Commission constituted to investigate into disappeared persons during the conflict; Article 33 (N) states about establishing a high level Truth and Reconciliation Commission for exploring truth on those who violated human rights during the armed conflict and those who were involved in crime against humanity, and for creating an environment of reconciliation in society.

Even as Article 36 states that the question relating to the implementation or non implementation of provisions stated under Part IV of the Constitution can not be raised in any court of law, there is no dispute that that provisions in these articles are commitments of the state. The principle enunciated in the case of *Yogi Narahari Nath v Cabinet Secretariat and Others*[22] where this court held that the directive principles and policies of the state are not mere show piece and they can not be overlooked even as they can not be implemented through court, and therefore, the state cannot overlook the matters mentioned in the Directive Principles.

[22] Nepal Law Reporter 2053 Vol. 1 Decision No, 6127, page 33

As the incident of disappearance is taken as the violation of fundamental rights of persons such as the right to life, freedom and justice, and therefore, the legal investigation and proceedings on disappearance are objectively considered as a part of remedy against the breach of fundamental rights, and thus, the process of truth finding can be considered as part of the implementation of the same. The state may take a stand that formation of a Commission with respect to matters pertaining to directive principles and policies are to be done as per its own convenience putting in its own priority. **The state may also contend that the implementation of directive principles of the state is a matter of its own discretion. But the legal investigation, prosecution and remedy to be carried out with respect to a remedial mechanism as a part of fundamental right can not be a matter of second priority and, also can not be a matter outside the jurisdiction of the court.**

In fact, on matters relating to the investigation of truth and giving remedy in respect of disappeared person, no reason can be seen that gives rise to conflict between the jurisdiction of the court and any other organ of the state. Rather, it can be accepted that the obligation of the state with respect to this matter is an obligation to be borne jointly. At the time when, the nation is making a leap forward with great hope and confidence in the direction of democratization, if the present state power does not become serious on matters relating to disappeared person, the rationale of change, and the direction beaconed by the change might wither away. The first step to provide a feeling that conflict management has taken a path of resolution is the assessment and remedy of the loss of life and property that occurred during the time of conflict. For this reason also this matter is seen to be appropriate for judicial resolution from the very point of view of law besides social, economic and political point of view. Thus, this court can and should provide a judicial evaluation as to whether or not the state has complied with its liability.

In the light of the above mentioned constitutional provision there is no dispute as to the fact that the state has the responsibility to situations created by the conflict. Naturally, during the time of armed conflict than during normal times incidents of violations of human rights and humanitarian laws take place more. The state has the responsibility to address the incidents and realities of the degrading situation of human rights and violation of humanitarian law during the time of conflict in a serious and responsible manner for the purpose of peaceful transformation of conflict. The state can not remain silent towards the incidents of infringement of the right to live with dignity and civil liberties of persons during the time of conflict.

It seems that our judicial system has adopted the approach that the court can give necessary directives if state can not demonstrate sensibility and responsibility with regard to the violation of human rights committed during the time of conflict. In the case of petitioner *Bhim Prakash Oli v Prime Minister and Cabinet Secretariat* writ No. 3394 of the year 2061, this court has ordered that it is the responsibility of the state to determine a clear policy concerning the relief to be given to the people who have been victim of disappearance and riddled with the conflict and thereby distribute the relief on the basis of equality without any discrimination.

In the present context, as the condition of the most of the persons as deliberated in above mentioned question No. 1 seems to be unknown, **the state can not** by virtue of the

international legal instruments as mentioned above, foreign and human rights related decisions made by regional courts and our constitutional provision **escape from its responsibility to identify the condition of the disappeared persons and make them public, initiate legal action against those responsible person who appear to be culprit and thereby provide appropriate remedy to the victim party.**

Now, considering on the aspect whether or not the state has taken steps to fulfill its obligation, it is found that the written statement received from the respondent or the Joint Government Attorney who appeared on behalf of the Office of the Attorney General provided no factual situation and details with concrete ground as to what they had carried out as steps to fulfill the same. Even as the state has accepted its responsibility in the peace agreement signed on 2063/8/5 (Nov 21, 2006) between the government and CPN (Maoist) and also in the Interim Constitution, 2007, it does not seem that any concrete steps are taken to fulfill the responsibility. **Life is significant precondition for enjoying all freedoms. Other preconditions, such as capacity for autonomy, and social and economic structure which allow people to choose between realistic options, are valuable only while we continue to enjoy life.**[23] As the forceful disappearance makes the very existence of person unknown and doubtful, there would be no condition for such person to have an access to basic and fundamental human rights guaranteed by national and international law. In the countries with written constitutions, there would be no division of opinion that the primary responsibility rests on the state to guarantee the civic right expressed by the international instruments to which the state or constitution has made commitment. But the Constitution has provided a responsibility to this court as the guardian of the constitution and a watchdog of civil rights, when other organs of the state can not fulfill their responsibility; it seems that this court can issue appropriate order to make them fulfill their responsibilities.

Regarding Question No. 3

Evaluating the outline of the efforts made so far with respect to making public the condition of disappeared persons and sufficiency [of such efforts] and also considering what more steps would be necessary and appropriate in this regard, learned advocates Mr. Hari Krishna Karki and Mr. Hari Phuyal submitted that the fact that the Baman Prashad Neupane Committee could not carry out good probe appropriately is shown from the very limitations stated in the report itself. The formation, function, powers and duties of the Commission to be fromed pursuant to the Commission of Inquiry Act, 2026 rests upon the discretion of the government, and therefore, a Commission constituted pursuant to this Act can not carry out effective investigation in this respect. And thus, it calls for a separate Act that confirms to international standard and a high level Commission should be formed pursuant to the same Act, they argued.

Also appearing on behalf of the petitioners learned advocates Mr Milan Kumar Rai and Mr. Kedar Dahal submitted that the petitions now filed at the court with respect to the disappeared person are just representative ones. A separate high level judicial Commission should be constituted to probe and investigate in this matter and the jurisdiction of such

[23] David Feldman, Civil Liberties and Human Rights in England and Wales 2nd ed, Oxford University.

Commission should not be limited to the cases filed at the court, rather it should be made capable enough to include broadly within its jurisdiction all incidents of forceful disappearance, they pleaded. Advocate Mr Satish Krishna Kahrel further submitted that it is appropriate to entrust the recently formed DIT to determine the facts of all petitions in accordance with the procedure of 'Criteria for Commission of Inquiry on Enforced Disappearance' given by the Office of the High Commissioner for Human Rights.

Appearing as amicus curie learned senior advocate Mr Khem Narayan Dhungana submitted that a Commission constituted pursuant to the Commission of Inquiry Act can not carry out probe to inquire the truth, and therefore, appropriate alternative need to be sought therefor, and advocate Mr. Praksah Raut submitted that High Level Judicial Inquiry Committee could be established for this purpose.

Appearing on behalf of the office of the Attorney General Joint Government Attorney Mr Yubaraj Subedi and Deputy Government Attorney Mr. Bharat Mani Khanal submitted that the government has realized its duty of finding out condition of disappeared persons and thereby making their condition public. As a political consensus has already been reached to establish a high level Truth and Reconciliation Commission, there is no need for this court to issue additional order requiring the formation of a Commission.

From among the petitions filed at this court, the oldest one seems to be the habeas corpus petition of Rajendra Prasad Dhakal filed on 21 January 1999. Then, it seems that habeas corpus petitions were filed on behalf of several persons on several dates and a writ petition was filed on 27 July 2006 demanding the order of mandamus to make public the conditions of detainees and for taking action against the culprits. In all the abovementioned cases, the respondents have furnished written statement that they had not arrested the petitioners, nor, had they put them in custody. The content of the petitions also reveal that they had also filed application at various organizations including National Human Rights Commission. The reports received from these organizations or agencies reveal that they had tried through their own machinery for determining the condition of the detainees.

Even as the respondents furnished the written statement that the petitioners were not arrested, this court not being satisfied with such reply had asked several explanations and supplementary questions. Even as the National Human Rights Commission, in many of the cases, after reaching to the conclusion that detainees were in illegal detention and thereby asked to put the detainees into legal proceedings and take action against those responsible officials who were seen culprit. But those decisions do not seem to have been executed.

This court has used several recourses for finding out the status of detainees. It seems that the eye witness who saw the detainees being arrested, the person who were said to be together in the detention and freed later and several security persons who were said to be responsible for arrest were brought to this court and their statements were recorded. In case of person stated in writ No. 3575 this court had ordered to make an investigation through the level of a joint secretary in the Ministry of Home Affairs and submit a report to determine whether or not the person was arrested. Further, it is also seen in the file that in the same petition, the registrar of the appellate court was made to

furnish a report after seeing the record of the office which had supposed to have arrested together with a field visit to determine whether or not he was arrested and also that if he was arrested, where was he transferred. However, none of these attempts have helped to determine the status of the detainee.

While the aforementioned petitions were sub-judice in this court it is seen that the government constituted a one-member probe committee led by the joint secretary at the Ministry of Home Affairs, Mr. Baman Prashad Neupane to find out the status of the citizens disappeared by the government of Nepal. The Committee has, from various sources, produced a list 776 persons who are said to be disappeared. From among them, the condition of 102 has been determined and the condition of other 602 is said to be unknown. The name of most of the persons mentioned in the writ petitions in this court are found in the list of the persons who are stated as unknown.

The report has accepted that the task of determining the status of disappeared person is challenging as the name, surname, address, date, place and time of arrest, agency to arrest etc. are not clear and in some cases, the security agency replied that the record did not show such arrest by security agencies. It seems that the committee comprised of only one member, the procedure was short and the report was made on the basis of information given by security agencies even without making field visit, investigation and research. Since the report was prepared on the basis of the details provided by those agencies which are alleged to have disappeared the citizens after arresting them, it is found that the report has not been able to disclose the detailed facts pertaining to disappeared persons.

The report has also not given enough evidence to support its views in case of the persons whose status is said to be determined or detail explanation in case of those whose status is said to be unknown. Considering the limitation of the Committee and gravity of the issue, the report has made a recommendation that it would be appropriate[24] to legally summon concerned persons, record their statement, collect evidence and carry out investigation through field visits. But however, no initiations have been taken towards additional investigation by the government for implementing the report.

It is also found that the Office of the High Commissioner for Human Rights in Nepal has also carried out an investigation on the contention that several persons were detained for a long time in Bhairabnath and Uddhabhairab barracks, Maharajgunj and were disappeared therefrom; and made the report of the same public. The report states name of 49 persons as being disappeared and also states that investigation was going on with respect to other persons who were said to be disappeared. The report has recommended for a reliable, competent and independent investigation concerning such persons and for determining the responsibility of the army unit involved in violation of human rights and bringing those who are found to be guilty of criminal liability to civilian court. The report further states that they should be suspended till such investigation is carried out, should not be proposed in peace keeping operations of the United Nations, should ensure that witness and former detainees are free from threat and intimidation and make public the

[24] Recommendation section of the Report, stated in annex 3.

conclusion of the investigation to be undertaken. However, it does not seem that government of Nepal has taken any further action or investigation in this regard.

Besides, it is also seen from the submission of the National Human Rights Commission made to this court that the Commission had found out serious violation of Human Rights taking place with respect to persons stated in the petition and other similar incidence of disappearance, and thereby, recommended the government to take necessary action against concerned responsible officials and also make public the status of the detainees. The Commission has also written to the Government to implement the decision of the Commission. However, it does not seem that any initiative of additional research is undertaken or action taken by the Government for determining the status of persons alleged to have been disappeared.

In course of determining the status of detainees, this court had, through the formation of a DIT, ordered to find out real fact with respect to writ Nos. 3575, 100, 104 and 632 whether or not the persons stated in the petition are arrested and [required the DIT] to submit an opinion as to what would be proper to do with respect to other cases of similar nature; and the DIT has submitted the report after conducting inquiry.

Even as the status of most of the persons stated in the petition has remained unknown and the aforementioned Committee including human rights related institutions and organizations have recommended additional investigation on the same, the responsibility to carry out investigation fundamentally rests on the Executive. In the situation that the Executive had not taken any initiative to carry out such investigation till date, this court carried out investigation of some representative cases at its own initiatives. Owing to reasons including the jurisdiction of the court and limitation of the resources, it is not possible for this court to carry out separate investigation with respect to the all the persons stated in the petitions. It is found, however, on the ground of the conclusion of the report of the investigation carried out on the cases it is necessary that additional investigation should be carried out in totality by establishing a mechanism on matters relating to the persons who are alleged to have been disappeared.

In this way, even as the government of Nepal has taken limited initiation with respect to disappeared persons by constituting the Baman Prashan Neupane Committee, that the report of the Committee itself has concluded on the need of additional research on disappeared person, that National Human Rights Commission and the Office of the High Commissioner for Human Rights have recommended additional investigation in this matter which has not been implemented till date and that it is also not possible for this court to carry out investigation with respect to all cases of disappearance, and therefore, it does not seem that the efforts made till date with this respect on behalf of the government are enough and effective. It is imperative to carry out effective investigation on behalf of the state itself to determine the status of the persons stated in the petition and other citizen who were disappeared in similar manner during the time of conflict.

Regarding Question No. 4

It has been portrayed from the deliberation made in the abovementioned questions that there has not been enough and effective efforts on behalf of the state for the purpose of determining and making public the status of the forcefully disappeared persons. The political will power is certainly necessary for the purpose of determining and making public the status of the forcefully disappeared persons and taking action against the culprit and providing relief to the victims; it is equally necessary to have a legal mechanism in place. The Interim Constitution, 2007 that has come as the product of political consensus in course of transforming the past conflict to peaceful settlement, has rested the responsibility on the state to establish a Probe Commission with respect to the persons disappeared in the past and to provide relief to the families of victim.

In order for the state to put into action the commitments made through political consensus and constitution, effective legal and institutional mechanisms are necessary. Concerning the prove of the disappeared citizens, the Government of Nepal has, through its executive order, constituted a one man Committee of Baman Prasad Neupane and this court constituted DIT, but however, it seems that an Probe Commission to investigate a matter of public importance could be constituted only in accordance with the Commission of Inquiry Act, 1969. It seems in accordance with the Act that the formation, functions, power and duties of the Probe Commission will be as prescribed by the Government of Nepal through a notification in the Nepal Gazette. Even though the Act has laid down grounds for the formation of a Probe Commission it has not expressly mentioned the procedure for the formation of the Commission, nor has it expressly mentioned the grounds for competence and neutrality of the Commission, or provided for necessary jurisdiction, or guaranteed the representation of concerned parties in the formation of the Commission. It has also not guaranteed the security of victim, witness, plaintiff, legal practitioner and investigator.

Given that the act of determining the status of disappeared person is internationally accepted as an act to be continuously pursued, the probe commission constituted under the Commission of Inquiry Act cannot embrace such a norm. By the very nature of the act of disappearance, whereas it is necessary that the families and relatives of the disappeared person are provided with the concluding decision of the probe and it is also imperative that the report is made public, the Commission of Inquiry Act does not seem to be ensuring this.

The task of finding out real situation of the disappeared person during the time conflict is certainly a complex and challenging task. There would be little possibility to get success in such act unless there are clear and effective legal provisions. The Commission of Inquiry Act that we have seems to have been issued only for establishing Probe Commission on the matter of public importance in normal situation. The Act does not seem to have imagined to include within its sweep special types of incidents arising during the time of conflict. This Act was not enacted to include such kinds of events. After studying the Act in totality, it seems to us that there are not reliable grounds to believe that an Inquiry Commission constituted in accordance with this Act to find out the status of disappeared citizens would be capable enough to carry out effective probe.

Even as some limited provisions are found in Civil Liberties Act, 1955 and Torture Compensation Act, 1996 with respect to obtaining remedy by the person who has become victim of state machinery, unless the status of the disappeared person is determined, the victim party can not receive effective remedy pursuant to the aforementioned Acts; and no separate legal mechanism is seen to exist to address matters relating to disappearance.

The act of forceful disappearance deprives of any person the right to equal protection of law. His personal liberties are snatched away and minimum values of humanity are violated. Such act brings all his personal liberties to an end at the very point itself. Therefore, any state which has accepted the obligation for universal respect, compliance and promotion of human rights and fundamental freedom need to be serious and sensitive to such incidents of human rights violation. It is urgent for the state to become additionally vigilant as impunity may flourish during the time of conflict.

In the situation where there is no separate law in Nepal to especially address disappearance as deliberated hereinabove, it seems to us that a special law having all major provisions on disappearance including inquiry into the incidents of forced disappearance, determining the status of disappeared person and making them public, taking action against those who are found guilty and providing relief to the victim is necessary. It is also the responsibility of the state to create an environment of trust and respect by the victims to the justice system of the state and the feeling among state officials who are guilty that they would not enjoy any immunity from the liability that is created out of their action. This is not a separate and special responsibility of the state rather it is a responsibility in concord with the commitment of the state towards basic fundamental rights and human rights. This bench has reached the conclusion that in order to fulfill this responsibility the state needs to make such especial law.

The Interim Constitution of Nepal, 2007 has provided exclusive power to the Legislature-Parliament as to whether a particular law is to be made or not. The Legislature-Parliament is competent enough to make law in this manner and it is expected that highest level of prudence will, for the purpose of fulfilling the responsibility vested in it by the Constitution, be used while making law in this manner. This Bench takes the view that to suggest that such a law on this subject is needed is not to interfere with or encroach upon the jurisdiction of the Legislature-Parliament, rather it should be taken as a legitimate expression of judicial concern to make additionally effective law in view of the internationally established standards for the protection of civil liberties for which the state has made commitment.

Thus, it seems to us that while enacting the law as mentioned above the state should take note of the commitments made concerning disappeared person expressed in the constitution, fundamental rights and freedom of citizens, international instruments ratified by the state concerning human rights and humanitarian law, and take cognizance of several international instruments accepted by international community such as the Charter of the United Nations, the Universal Declaration of Human Rights, Declaration Concerning the Protection of Persons Against Forceful Disappearance, 1992 and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006 as standard, and desirably make law in concordance with the same.

Regarding Question No. 5

The writ of habeas corpus filed at this court on behalf of persons including Bihari Lal Godia with writ No. 162 states that the families of the disappeared persons were dependent on them and they had to bear additional expenses for their search and legal proceedings. As the members of family had to undergo mental torture due to their disappearance, and therefore, [they have] demanded in the petition that their family members including their minor children should be provided with compensation. This court had inquired with the counsels whether or not it is appropriate to order for any **interim relief** in the form of compensation or similar other relief from this very petition which has the main claim of freeing several persons stated in the petitions from illegal detention through the order of habeas corpus.

Appearing on behalf of the petitioner leaned advocate Mr Kedar Dahal submitted that the petitioners have lost member of their family and have borne additional physical, mental and economic costs during their search. The dilatory legal proceeding has further increased the economic expenses of the petitioners whereas the state is spending from the state coffer and defending the culprits who are supposed to be subject to action. Compensation and relief are necessary to mitigate mental and economic grief of the families and also to guarantee easy access to justice, he pleaded.

Appearing on behalf of the petitioners learned advocate Mr Hari Krishna Karki submitted that the Supreme Court of India has, by using the provision of Article 32 of the Indian Constitution that empowers the Supreme Court to render necessary order, ordered compensation in hundreds of such cases. As the Article 88 (2) of the Constitution of the Kingdom of Nepal, 1990 and Article 107 (2) of the Interim Constitution, 2007 state that the Supreme Court may render appropriate order in the cases including habeas corpus to provide full justice, this court can render necessary order to provide compensation pursuant to the same, he pleaded. Appearing on behalf of the petitioner learned advocate Mr Hari Phuyal submitted that it is an established fact that the persons stated in the petition are disappeared. Different regional courts related to human rights have made decisions to provide compensation to the victims of forceful disappearance. This court can take those decisions as examples. As the Convention on Protection of Persons from Enforced Disappearance has provided for provisions of compensation and interim recourses, this court by evaluating emotional attachment of the families, economic expenses, productivity lost due to the time given for search and loss caused to the family and society can order for appropriate compensation, he pleaded.

Appearing on behalf of the respondents Deputy Government Attorney and Joint Government Attorney of the Office of the Attorney General submitted that some of the persons who were said to be disappeared have also come to public. It can not be concluded on the basis of presumption that enforced disappearance has taken place and on the basis of such presumption this court can not order any compensation. The government has realized its duty towards citizens. As the government is active to provide appropriate remedy through its own machinery, there is no need to order compensation, they pleaded.

After listening to the submissions of the aforementioned learned advocates, as we consider whether or not the order of compensation can be issued through these

petitions, we find from the deliberation of abovementioned question No. 4 that there is no separate law existing for probing the status of disappeared persons and providing compensation and other remedies to the victim party, but however, it can not be denied that compensation and relief to the victim party could be taken as one of the aspects of other appropriate remedy to be provided in case of violation of civil liberties.

It has been established from the various questions deliberated heretofore that the act of disappearance violates civil liberties of persons including the right to life as well as several fundamental rights provided by the constitution. Article 88 (2) pursuant to Article 23 of the Constitution of the kingdom of Nepal, 1990 and Article 107 (2) pursuant to Article 32 of the Interim Constitution, 2007 have guaranteed remedy in case of violation of fundamental rights provided by the Constitution. Article 88 (2) of the previous Constitution and Article 107 (2) of the present Constitution states, "The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extra ordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of *habeas corpus*, mandamus, certiorari, prohibition and *quo- warranto*." It seems from the above mentioned provisions of the Constitution that an inherent power is vested in this court to issue, for the purpose of effective protection of basic fundamental rights of the people through aforementioned provisions of the constitution, necessary order to enforce prevailing right of the people. It is also a constitutional responsibility of this court to issue such type of order.

Similarly, Article 100 of the constitution has empowered this court to exercise judicial power pursuant to the constitution, other laws and recognized principles of justice and has also provided that this court shall remain committed to the constitution abiding by the values of independent judiciary and thereby adopting the spirit of democracy and people's movement. As the term "spirit of people's movement" is used in a political sense, it is not easy to derive its legal meaning and consequences. **The present constitution which has been issued on behalf of the people as the expression of the decisions of the important political forces which made a call and participated in the people's movement should, in totality, be considered as embodying the spirit of the people's movement. If the spirit of the people's movement is tried to be understood otherwise than the structure and spirit of this constitution, this would contradict the very fact that the constitution has declared itself as the fundamental law of the land.** The structure of present constitution and the principles enshrined in it can throw enough light on the spirit, values and assumptions of the constitution. **It is not possible for anyone bound with constitutional system to decipher the spirit of the peoples' movement beyond the constitution, and therefore, it is even more impossible for the judiciary. If any agency has carried out any act pursuant to this constitution and laws made hereunder, it can not be concluded in any way whatsoever that the act is against the spirit of the peoples' movement. Therefore, the**

spirit of the peoples' movement should be understood in the relativity of constitutional system and in the context of legal consequences.

Human rights, peace and justice are the foundation of democracy. There had been people's movement in the past for the purpose of peaceful transformation of conflict and establishment of a just society and the constitution issued thereafter has made commitment to the same values and ideals. **It is in fact an act of paying respect to the sprit of the peoples' movement to implement the provisions of the constitution that provide for a proper assessment of the loss of lives and property that occurred during the time of conflict and bring the culprits to justice and provide appropriate remedy including reparation to the victims**. Considering the above mentioned constitutional provisions, it does not seem to us that this court can not order for appropriate remedy and reparation to the petitioners who claim that persons mentioned therein have remained unknown in the course of conflict.

Similar to our constitutional provisions, Article 32(2) of the Indian constitution also empowers the Supreme Court of India to render appropriate remedy for effective protection of fundamental rights provided by the constitution.[25] By applying and interpreting the same provision, it is found that in *Rudal Sah v. Union of India*, discussed above in question no. 2, the Indian Supreme Court decided to provide compensation to Rudal Sah through the petition of habeas corpus as it was found that he was in illegal detention and it was also held that the decision of the Supreme Court to provide compensation would not have any adverse effect on the right of the petitioner to claim compensation under ordinary jurisdiction.

Similarly, it seems in the case of *Smt. Postasangbom Ningol Thokchom and Others v. General Officer Commanding and Others*[26] where three people including the sons of petitioners were arrested by the Police only one of them was released and other two were disappeared, and it seems that a writ of habeas corpus was filed on their behalf. As the respondent furnished written statement claiming that the detainees were freed from the detention, the Supreme Court of India constituted a probe committee led by a judge of the concerned district court to inquire into the case of disappeared persons. The committee had, basing on the statement given by former detainees and other evidence, had submitted the report stating that there was lack of evidence of the release of the detainees. The Supreme Court of India had, basing also on the report, took the view that where private law does not provide for compensation, the Court can order compensation while the proceeding on a case pursuant to Article 32 of the constitution for the purpose of doing full justice. It is found in the case that the court had in addition to ensuring interim resources had also ordered to provide compensation to the victims. In the case of *Nilabati Behera v. Stae of Orissa*[27] which has similar facts, the Supreme Court of India has made interpretation of Article 32 of the Constitution and provided compensation to the victim.

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[25] "The Supreme Court shall have power to issue direction or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part"

[26] WWW.jodis.nic.in/supremecourt/ website visited on 28 May 2007

[27] 2 SCC (1993)746

A reference has already been made, while deliberating on question no 2 above, to the decisions by the Inter-American Court of Human Rights in the case of *Velasquez Rodriguez v. Honduras*, [and] *Trujillo Oroja V. Bolivia* and the decision by the European Court of Human Rights in the case of *Kurt V. Turkey* where the court had ordered for compensation against enforced disappearance.

Article 24(2) of the International Convention for the Protection of all Persons from Enforced Disappearance, 2006 which has been accepted by international community has imposed responsibility on each state party to ensure in its legal system measures for reparation, prompt, fair, and adequate compensation to the victims of enforced disappearance.[28] Similar provision is found in Article 19 of the Declaration to provide protection to all disappeared persons, accepted by the General Assembly of the United Nations through proposal No.47/133 in 18 December 1992.[29] It seems that the UN Working Group on Enforced or Involuntary Disappearance, while interpreting the Article, has recommended that while providing monetary compensation to the victims of enforced disappearance [factors such as] physical or mental loss, lost opportunities, loss of property, loss of income, effect on prestige or dignity and expenditure incurred in hiring expert or legal service should be taken into consideration.

Article 7 of the proposal No. 71 (A) passed by the 60th meeting of the General Assembly of the United Nations,[30]provides that persons who are victim of serious violation of human rights and international humanitarian law should have equal and effective access to justice, for the loss to be born, the victim should get prompt, effective and adequate reparation; and has proposed that the victim should have access to the information of the same; and, as Nepal is also a member of the United Nations, there does not seem a condition for her to remain indifferent towards such commitments.

It seems that the Human Rights Committee of the United Nations while interpreting Article 2 and 9 of the Covenant on Civil and Political Rights to which Nepal is a party, has mentioned that the state should, in addition to other remedies, provide compensation in situation of violation of rights of persons and should also adopt interim measures as immediate steps.[31] It has been accepted that as enforced disappearance during the time of conflict not only affects the disappeared person rather the families and relatives of the disappeared persons would also be victim of the same, and therefore, provision should be made that the relief and compensation to be provided by the state goes to the disappeared person as well as their kith and kin.[32]

In this way, on the basis of the constitutional provision of Nepal, decisions of foreign courts and human rights related regional courts, international instruments related to human rights to which Nepal is a party as well as the documents and proposals issued by the United Nations and international community; it is hereby established that the state

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[28] Each state Party shall ensure in its legal system that the victim of enforced disappearance have the right to obtain reparation and prompt, fair, and adequate compensation.

[29] The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete rehabilitation as possible. In the event of death of the victim as a result of act of enforced disappearance, their depends shall also be entitled top compensation.

[30] WWW.hri.ca/fortherecord1998/vol1/disappearances.htm website visited on 27 May 2007

[31] Resolution No 60/147: Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violation of International Humanitarian Law.

[32] General Comment No. 31(80) The Nature of the General Legal Obligation Imposed on State Parties to the Covenant adopted on 29 March 2004. WWW.unhchr.ch/tbs/doc.nsf Visited on 27 May 2007

has the obligation to provide immediate relief and adequate compensation to the victims of serious violation of civil as well as human rights. On the grounds deliberated here above it is found that the persons stated in the petitions were disappeared during the time of conflict and it has been established that the state has special responsibility towards such persons. It seems, now therefore, appropriate to provide an immediate relief of interim nature to the victims considering the physical and mental torture as well as economic loss that the families of the victim have had to undergo during their search and taking recourse to the process for obtaining justice.

Regarding Question No. 6

It is seen concerning various questions here above that on the basis of the study report commissioned till date by the National Human Rights Commission, Office of the High Commissioner for Human Rights in Nepal, and the report of the investigation team constituted by this court under the co-ordination of the judge of appellate court especially in case of four persons including Rajendra Dhakal and also from the written statement of the respondent regarding the persons, that the status of most of the persons stated in the petitions as disappeared is unknown. **It is conclusively seen from the report of the investigation team constituted by this court concerning Chakra Bahadur Katuwal that he had died in the custody, and concerning others Rajendera Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai that their status up to the point of arrest by the security has been determined, but however, the status then after has not been clarified till date.** It is a general responsibility of the state to protect and keep vigilance on its own citizen. This responsibility of providing security and protection of their right would be further increased in the situation when the arrest is made with the involvement of state's own instrumentalities. Among the petitions of various dates considered under this decision, the first one seems to have been filed in 1999, even after filing the petitions and being asked show cause no serious efforts are found to have been made from the government level such as commissioning search, improving or strengthening the legal system, providing relief and remedy to the victim, managing and making the investigation process effective and systematic etc. with regard to persons who are in the petition stated to have been disappeared. It does not seem that the report and recommendations given by the National Human Rights Commission and the Office of the High Commissioner for Human Rights have also attracted serious attention. It is not found that the decision of this court in the case of Bhim Prakash Oli is considered for solving the problem pursuant to the status of conflict victim. Even as the Ministry of Home has internally conducted a process of probe at the level of joint secretary, it is not found that necessary efforts were made to make the report independent and reliable. It is not found that matters to be done pursuant to the report were completed. Even as different Articles of the present Interim Constitution has made commitment to address this problem even by fixing the date, that is also not done till date. As deliberated here above in this way, the task including the search of disappeared persons, giving protection, providing remedy and ending impunity by terming the act of disappearance as an act of serious violation of human rights remains to be an indivisible responsibility of the state. The matter should have attained first priority in course of solving the conflict. However, this problem has not been prioritized

appropriately. This shows that the state has not exerted a sense of security to the society at the level that is supposed to be done by guaranteeing the security to life and property of the disappeared persons and their families.

Among the persons stated in the petition except for the person whose death is proved, the status of others remains unknown as witnessed from the written statement and probe, and, the questions including whether they are alive or not, if alive in which condition they are etcetera remain unresolved. Continuation of such unresolved situation does not seem to be a defensible matter for the state. As the number of disappeared persons seems to be huge, and as it has remained a serious question, rather than limiting the problem as a matter for the issuance or non-issuance of habeas corpus as claimed by the petitioner, it seems that legal, structural and remedial aspects in various stages need to be holistically considered keeping in mind these petitions and other similar petitions that might come.

While there is no relevance of issuing an order of habeas corpus with respect to Khadga Bahadur Karki who during the discussion of the case was said to be dead as the condition of other petitioners also remains unknown even today, it does not seem to us that the writ of habeas corpus could be issued in respect of them. Petitioners including Lekh Nath Neupane have, among other demanded that a writ of mandamus be issued to make the status of the persons stated in the writ petition public. Further, in the additional submission, interim relief and compensation have also been demanded. A directive order in the name of Government of Nepal has also been sought to improve legal and legislative aspects to probe the case such persons and provide remedy therefor. Considering in the light of the submissions also, subject to the petitioners Chakra Bahadur Katuwal, Rajendra Prasad Dhakal, Dil Bahadur Rai and Bipin Bhandari for whom the investigation team of this court had carried out research as well as those for whom such investigation is yet to be carried out it seems expedient to provide for special measures, and therefore, we hereby decide to issue the following orders in the name of the respondent Government of Nepal to address the same by providing for the following with respect to the demands of the petitioners.

a) Among the persons said to be disappeared, it is seen from the report of the DIT constituted by this court that Chakra Bahadur Katuwal was died in the custody due to torture, and subject to others Rajendera Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai the initial point of the arrest by the security person has been determined as stated here above, but however, the condition then after has not been clarified till date. Thus in case of Chakra Bahadur Katuwal who died in custody in this manner, now as it is necessary that due process of prosecution has to be adopted pursuant to prevalent laws a writ of mandamus is deemed to be issued subject to him in the name of respondent Ministry of Home as well as the Government of Nepal ordering that and any agency, official or employee and any other person who were involved in the process in some way or other be investigated on their crime, and that process of departmental action and punishment subject to concerned office chief and employees be initiated and finalized. This order is also issued to render necessary order to the concerned agency or employees there under that seem to be necessary in course of implementation of the same.

In case of Rajendra Dhakal, Bipin Bhandari and Dil Bahadur Rai also who are identified by the judicial investigation team that they were arrested by security force but their status remained as unknown till date, it is seen that officials or employees involved in the process should be prosecuted on the basis of additional research to be completed subject to them and thereby justice be provided to the victims. But in order to launch immediate prosecution sufficient measures such as defining the crime of disappearance and sanctioning the same and providing compensation should be ensured absent which there is no possibility of obtaining full justice, now therefore, subject to them an order is issued in the name of the respondent that necessary action be taken for prosecuting the erstwhile chief of security agency as well as other employees who were responsible and that concerned person and victims be provided compensation after the law pursuant to section (B). Hereunder is made and also completing additional necessary investigation as suggested by the report of the DIT constituted by this court.

Further, as it has been the conclusion of the DIT that they were arrested by the security force and taken to a certain point and thereafter their status remained to be unknown, as it is not appropriate to let the responsible persons remain in impunity and unaccountable, a writ of mandamus is hereby issued in the name of respondents including Ministry of Home as well as the Government of Nepal to take immediate departmental action against the chief and employees who are identified as responsible by the report of DIT and other necessary probe to done pursuant to the same.

b) This court has taken note of the petitions by Lekhnath Neupane praying for mandamus, and other cases of habeas corpus where additional investigation is yet to be carried out, also similar demands of other prospective petitioners in similar circumstances who may come up with the claim of disappearance and that in case of such persons also the petitioners have prayed for special provisions.

The written statement furnished subject to the persons who are said to be disappeared did not help to determine their status and a formal investigation has not been undertaken from anywhere, in a situation where investigation remains yet to be undertaken it is not easy to make certain opinion on the status of these person. Further, in the situation where legal, structural and remedial measures are not enough to especially address the effects caused to the disappeared persons and their families, it does not seem possible that the prevailing legal structure is enough to address the problems. Therefore, a directive order is hereby issued in the name of the respondent Government of Nepal to address their problems by making the provisions as mentioned hereunder.

i. It is found that there is lack of law in our country with respect to addressing the series of disappearance during the time of conflict and at other times also on matters pertaining to disappearance such as arrest, detention, hostage taking, care to be taken during the time of detention and measures related thereto, the rights of the victims, the remedies available to them and their families, the provisions for effective investigation on matters pertaining to them etcetera. Even though there is an Act for carrying out probe on a matter of public importance, as this Act is not made for the

inquiry on matter pertaining to disappearance, it is seen that in the absence of law, no real, effective and practical investigation can be carried out. Further, under the existing criminal law also no provision is found addressing legal and institutional questions relating to this matter. Therefore, for the purpose of addressing this problem effectively, it is felt necessary to make a law with priority by including the provisions that the act of disappearance should be maintained as offence, defining the act of disappearance pursuant to the definition as stated in the International Convention for the Protection of All Persons from Enforced Disappearance, 2006, incorporating provisions such as the right of detainees, responsibility of those who keep in detention, determination of the place of detention and the relationship and access of the lawyer and families to the detainees, the right of the detainees to be informed of the reason of detention, provision regarding judicial remedy of the detainees, the right to remedy of the detainee who is put in illegal detention or concerned persons and families who have become victim of illegal detention or disappearance including the right to compensation, a flexible provision of limitation that does not adversely affect investigation process, complaint hearing agency and its liability with respect to illegal detention or disappearance, provision for the creation of a formal detention center and the provision for putting only in such detention center while detaining people, provision of humane treatment while in detention, descriptions such as time of the detention while putting him in detention, condition, name, title, address and other relevant details of the person who ordered detention, the liability of making arrangement pursuant to the same while transferring the detainee, the right of the families to know all conditions of the detainee and development of the process to make easy access of the same, provision of the terms that really reflects the condition of being released at the time of being released from the detention, the provisions including the record keeping regarding his/her mental and physical condition. It is also equally important to attract the attention towards the international standard that no pardon can be granted with respect to persons who are prosecuted for allegedly being involved in the act of disappearance and the person who is convicted for the same and for making appropriate provision relating thereto. For this purpose, it is expedient to adopt the International Convention for the Protection of all Persons from Enforced Disappearance as guideline.

ii. For the purpose of implementation of the Act made pursuant to here above, for the purpose of protection of the persons forcefully disappeared, it is also expedient to provide for an arrangement in the same Act or separately for a separate probe commission with respect to such disappeared persons. Given that separate powers, skills and procedures are deemed necessary for probing such kinds of problems, it is expedient to refer to the Criteria for Commission on Enforced Disappearance developed under the auspices of the United Nations Office of the High Commission for Human Rights as guidelines for determining criteria.

Under this, in addition to other matters, it is expedient to include provisions such as that all related incidents are inquired into, that jurisdiction of the Commission is clarified, that the inquiry does not replace the jurisdiction of the court, that the

persons nominated for such commission are appropriate and competent for the work, that provisions for terms of office and conditions of service and facilities are provided for the same, that representation of women or other caste or communities are provided, that the powers, duties and functions of the Commission are prescribed in the Act itself, that considering the nature of the problem probe could be initiated on the basis of the information received from any source. It is necessary to have provisions such as continuous probe until the status is made clear, provision of security to victims, witness, plaintiff, advocate and investigator so as to solicit their continuous assistance in the probe, provision for the right and opportunities to the victims for recording their statements and raising their concerns, and provisions for keeping their statements confidential if so called for, the power of the commission to inspect necessary place, office etc question all persons who it deems necessary to inquire. It is also necessary to ensure the availability of means and resource necessary for such Commission to accomplish its performance. It is expedient to consider all these matters while enacting the law.

It can be expected that while enacting law in a wise manner under legislative power entrusted by sovereign Nepali people if the above mentioned things are given expedient scope the people facing problems will be benefited to a certain extent in one way or other.

c) A directive order is hereby issued in the name of respondents government of Nepal, Ministry of Home Affairs and the Office of the Attorney General to take decisions to enact an Act for the protection of the disappeared person, making provision for Inquiry Commission in the Act for inquiring into the causes of their disappearance, and their status by forming a powerful commission to carry out in-depth and comprehensive inquiry of the said persons and thereby submit the report of the same, and thus accomplish a criminal investigation on the basis of the report and thereby decide to prosecute concerned persons on the basis of the propriety and necessity.

d) It will certainly take a long time to complete the stages as mentioned here above such as making law, constituting probe commission, taking report from the same and launching prosecution on that basis. But, considering the complexities of the problem and the imperative to resolve it at the earliest, the solution of the problem would be facilitated if only the Executive and Legislature put this matter on high priority. As it is the responsibility of all organs of the state to protect the disappeared persons and provide them justice, we therefore, take the view that it is a natural and valid in connection with the case to make expectation and be confident about playing positive role by responsible organs for a work delineated by the constitution. It seems necessary in this connection that the government of Nepal takes special initiation to expedite the process of making law.

As it seems that the persons stated in the petitions and their families can feel the sense of justice only when the above mentioned stages are completed it is imperative to put forward this process with expedient priority.

e) As stated in section (D) here above, whereas the petitioners of this case have been demanding various kinds of remedies from this court for a long time (several since

1999) and waiting for the same, it is likely to take some more time to provide them effective remedy by completing the above mentioned stages. In addition to the effect that the concerned person has to bear due to disappearance, the family members have to continuously face several social, economic and mental suffering due to the disappearance of their own. If factors such as the time spent for the search of disappeared person, labor and expenditure, peace of mind lost in this course and burden borne therefor and the loss of labor productivity and security due to the absence of disappeared person are assessed far reaching social and economic results would surface. In the one hand the state has not been able to make public the status of the persons who are said to be disappeared while on the other the families have been continuously bearing the loss and liability in connection to the same, and as, the pain created out of this will continue until the status of the person who are said to be disappeared becomes decisively final, and hence it seems essential to address this problem in some way or other.

The demands of the petitioners can be appropriately addressed and their final status clarified in the course of implementation after the enforcement of the Act as mentioned here above. In other words, if the status of concerned person is clarified, and the culprit is also determined, he would get the punishment determined by the law and if the petitioner is entitled compensation the petitioner may receive it as per the procedures determined by the same law. However, it does not seem possible for the family members who are searching for their loved ones to travel the long road to justice with their own resources and with a disturbed mind. This bench is confident that immediate relief even if it is partial should be provided in order to save them from discarding the tiring the path of justice owing to frustration, to provide support and cooperation in adopting the legitimate path of searching their loved ones.

Even as it is not possible to provide specific legal remedy like punishment or compensation in the situation when the real condition of detainee is not clarified, **it hereby seems expedient to provide relief as a grant even though in symbolic form in view of the situation at the time of deciding this case, with the limited purpose of assisting the victim family to bear the liability undertaken by them while seeking access to justice on condition that it will not affect the amount and nature of the remedy to be provided as per the law as to be found by the investigation later**.

The incident of violation of right to freedom and security of life is not a matter to be compensated in monetary and economic terms. However, this court has, in view of the responsibility of the state to provide assistance to the victim even in smallest manner though, and that the rights would be meaningless in the absence of effective remedy, and also for respecting the right of victim family to seek remedy has positively considered the need of providing immediate relief of interim nature.

In this connection, this order is hereby issued in the name of the Government of Nepal as well as the Cabinet Secretariat pursuant to Article 100 and 107 (2) of the Interim Constitution, 2007 to provide immediate relief of two hundred thousand rupees subject to the nearest claimant of Chakra Bahadur Shahi who is said to be dead and whose death is verified by the investigation of the DIT constituted by the order of this court and two

hundred thousand rupees each subject to the families of those who are declared dead; one hundred fifty thousand rupees each subject to Rajendra Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai in whose case the probe of the DIT constituted by this court has concluded that they were arrested by security forces and were disappeared; and one hundred thousand rupees each subject to remaining other persons stated in the petition whose status has not been clarified.

Further, a directive order is hereby issued in the name of the government of Nepal to frame and implement appropriate relief package including employment without any adverse effect whatsoever to matters mentioned here above, and considering the status of the victims till date and also the loss and difficulties that might have to be continuously borne due to the cause of disappearance.

Be the notice of this order sent to the government of Nepal and the secretariat of the Council of Minister through the Office of the Attorney General for its implementation.

This bench wishes to extend special thanks to the National Human Rights Commission and the Office of the High Commissioner for Human Rights which have cooperated this court in course of the deciding and proceeding of the cases that are decided today by providing details of the reports of their investigation with respect to the petitions which is decided today, the Supreme Court Detainees Investigation Team and Hon. Lokendra Mallik, Joint Government Attorney Mr. Saroj Gautam and advocate Mr Govinda Bandi who were associated with it as well as Nepal Bar Association and Supreme Court Bar Association which cooperated the court by sending lawyers as *amicus curie*, legal practitioners who were present during the hearing, Assistant Secretaries Mr Prakash Kharel, and Mr Nahakul Subedi of the supreme court who have rendered especial cooperation to this court by conducting research and the agencies and persons who cooperated during the proceeding of the petitions deserve special thanks from this court.

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(Judge Kalyan Shrestha)

I concur the decision.

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(Judge Khilaraj Regmi)

Bench Officer to prepare the decision:
Prakesh Kharel (Gazetted Second class)
Nahakul Subedi (Gazetted Second class)

Computer typing:
Sundar Bahadur Karki, (Non- gazetted First Class)

Date: 1 June 2007

PERI: Introduction and How to Access Full Text Journals?

PERI (Program for the Enhancement of Research Information) is one of the important programs of the INASP (International Network for the Availability of Scientific Publication). After PERI's implementation, Nepali researchers, scientists, students graduates, and other scholars in different fields will have access to Full Text database of world's more than 7000 high quality scientific journals. Likewise they will have full access to contents and, abstracts from 25,000 scientific journals.

PERI is guided by local demands and is coordinated by local organization. It brings together governments, research institute, academia, developmental agencies, commercial and non-commercial publishers, libraries, editors, trainers, and information providers.

What PERI does?

- Delivers information.
- Strengthens national research publications.
- Supports country collaboration and networking.
- Enhances ICT skills.
- Initiates research and development.

The following e-resources are available in Nepal through PERI program which are very useful in the field of Law.

- Blackwell-Synergy
  (URL: www.blackwell-synergy.com)
- Oxford University Press
  (URL: www.oxfordjournals.org)
- Springer (URL: www.springerlink.com)
  This apart different other e-resources are also available through the PERI programs which are useful in the field law.

How to access full text?

There are two ways of establishing access to PERI resources

- by IP address
- by username and password
  In case of NJA we can access some resources through IP address, and others through username and password. The librarian at the NJA will be more than willing to assist the member of its target community in accessing PERI resources.

Yours'
Kedar Ghimire

NJA Team

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The National Judicial Academy (NJA), a member of International Organization for Judicial Training, was established in 2004 to serve training and research needs of the judges, government attorneys, government legal officers, private law practitioners and others who are directly involved in the administration of justice. Originally established by an Ordinance, it is now governed by the NJA Act, 2006. The NJA works under the broad policy guidelines of the Sixteen Members Governing Council headed by the Chief Justice. Executive Director heads the Executive Board.

Vision

To promote an equitable, just and efficient justice system through training, professional development, research and publication programs which address the needs of the judges, government attorneys, government legal officers, private law practitioners and others who are directly involved in the administration of justice.

Objectives

- Enhancement of knowledge and professional skills of judges, judicial officers, government attorneys and private law practitioners and bring about the attitudinal change that enhance competence.
- Undertake research in the field of law and justice and to make available legal literature of scholarly and practical significance to judges, judicial officers and others who are involved in administration of justice.

Partners

- Supreme Court and Subordinate Courts
- Office of the Attorney General
- Ministry of Law, Justice and Parliamentary Affairs
- Nepal Bar Association
- Judicial Council
- Donor Agencies INGOs and NGOs

Training Activities

The NJA believes that training should contribute to overall personality development of the learners. It should facilitate the enhancement of knowledge and skills that positively impact on the promotion of effective, efficient and accessible justice. NJA designs, organizes and conduct trainings seminars, conferences, symposia and related programs for its target communities.

Research and Dissemination of Information

- Carry out research and produce publications, reports and recommendations in respect of reforms to relevant aspects of the law and administration of justice.
- Inform the judiciary and the wider community of new technology and its use in the administration of justice.
- Disseminate web-based information

Promotion and Co-ordination

- Promote training as an integral part of career development for judges, judicial offices and law practitioners.
- Liaise with other judicial training institutions to develop training programs which are of internationally recognized standard.
- Liaise with Government of Nepal and international donor agencies in respect of judicial training programs within the justice sector.