ISSN: 2661-6009

# Prosecution Journal

VOLUME 5 | YEAR 2022


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ISSN 26616009

**Office of the Attorney General**
Nepal

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**Office of the Attorney General**
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## INTRODUCTORY

# OFFICE OF THE ATTORNEY GENERAL, NEPAL[1]

### Historical Background

The Government of Nepal Act, 2004 B.S., which was considered as the first written constitution of Nepal, under Article 12 (b) provided for a chief legal advisor of the government, appointed by the *Shree 3* (Prime Minister). This arrangement is considered to be the first formal arrangement regarding Attorney General in Nepal, even though the constitution did not come into force.

The Interim Government Act, 2007 B.S. that was promulgated and came into force had no such provision regarding Attorney General but realizing the need for a chief legal advisor of the government, in 2008 B.S., Kali Prasad Upadhyaya was appointed as the first Attorney General of Nepal by the Government under an executive order. Moreover, detailed provision regarding the duties and conditions of the Attorney General was provided in the *PradhanNyayalaya* Act, 2008 (first amendment) under Section 49 (1).

The Supreme Court Act, 2013, that repealed the *Pradhan Nyayalaya* Act, 2008 also had no provision regarding the Attorney General. Later, the Home Ministry invoking the power provided under Section 29 of the Supreme Court Act, 2013, publishing a notice in the Nepal Gazette made provision regarding Government Advocate. According to the same Gazette, Shambhu Prasad Gyawali was appointed as the Government Advocate. Later, with the promulgation of Constitution of Kingdom of Nepal, 2015, which had no provision regarding Attorney General as its predecessors, Shambhu Prasad Gyawali was continued as the Government Advocate as per the same notice of 2013 published in Nepal Gazette.

Before 2017, Nepal used to practice its own type of inquisitorial criminal justice system, which was then shifted to an adversarial mode under the enactment of Government Cases Act, 2017 B.S. Under this Act, investigation and prosecution of criminal cases was to be carried out jointly by the Police and Government Attorney (Public Prosecutor), along with the responsibility of defending the state cases before the court and providing legal advice to the government and its subordinate offices. The same Act under Section 2(a) also defined a "Government Attorney", including Attorney General under the definition institutionalizing the Office of Attorney General.

Eventually in 2019 B.S., the Constitution of Nepal, 2019, recognized Attorney General as a constitutional body and mandated to provide legal advice to His Majesty's Government. The administration of Government Attorney, while till 2020 was under

1 Contributed by: Shishi rLamichhane, Assistant Government attorney at Office of the Attorney General

taken by the Attorney General, during the years 2020 to 2027 shifted in the hands of Zonal Heads and District Offices to the Ministry of Law and Justice. Later in 2027 B.S., the administration of Government Attorney came into the ambit of Office of Attorney General and arrangement for its separate office was also done. With this arrangement, the Office work of building the office of Attorney General started in 2027 that completed in 2029, giving permanency to the institution of Office of Attorney General in Nepal.

The Constitution of Kingdom of Nepal, 2047, that came with restoring the multi-party democracy in Nepal, provided for the Office of Attorney General as a constitutional body. It provided the Attorney General as the chief legal advisor of the government and the chief prosecuting authority, with the final authority to prosecute any offenses before the Court of law on behalf of Government of Nepal.

To implement these arrangements of the Constitution, Government Cases Act, 2049 was introduced replacing the then prevailing Government Cases Act, 2017. The new arrangements changed the joint role of Police and Government Attorney in investigation and prosecution and made a provision to the Government Attorney to give necessary directives to the investigation officer for the proper investigation of the criminal offenses. The Interim Constitution of Nepal, 2063 continued similar provision of the preceding Constitution of 2047 as to the role of Attorney General. The Constitution of Nepal (2072) is providing similar role and responsibilities, as prescribed in previous constitution. Moreover, fashioned in a federal structure, the prevailing constitution envisages Chief Attorney in the provincial level to be the chief legal advisor of the provincial government and Attorney General as the chief legal advisor of the Federal Government. Furthermore, the prevailing constitution very explicitly provides that the Chief Attorney shall be subordinate to the Attorney General.

## Prevailing Constitutional Provisions in relation to Attorney General

The Attorney General (AG) is a constitutional position provided under Part 12 (Article 157-161) of the Constitution of Nepal. Article 157 of the Constitution provides that "[t]here shall be an Attorney General of Nepal" and the AG shall be appointed by the President on the recommendation of the Prime Minister.

Moreover, as an eligibility clause, Article 157(3) provides that a person who is qualified to be appointed as a Justice of the Supreme Court shall be eligible to be appointed as the Attorney General.

Article 158 of the Constitution further provides major functions, duties and powers of the Attorney General. The major functions and duties of the AG as provided in the constitution are:

I. Chief Legal Adviser of the Government of Nepal
II. Represent the Government of Nepal in lawsuits where the rights and interests of the Government of Nepal are involved
III. Make final decision whether to institute a legal proceeding on behalf of the Government of Nepal before a judicial body or authority
IV. Appear and Express his or her opinion on any legal and constitutional matters before the Federal Parliament and/or its Committees

V. Right to appear before any court or judicial body while discharging his or her duties

VI. Power to delegate his or her functions, power and duties to subordinate Government Attorneys

Furthermore, the Attorney General, under Article 158(6) has the following powers while discharging his or her duties:

I. To defend the Government of Nepal in any lawsuit where Government of Nepal is a party

II. To monitor or cause to be monitored the implementation of principles laid down by the Supreme Court of Nepal

III. To give necessary directions to the concerned authority if any complaint or information is received whether any prisoner in custody is being treated in human and not given to consult lawyer or meet with his/her relatives.

The Attorney General is mandated under the Constitution as the Chief Prosecutor and Chief Legal Advisor of the Government of Nepal. He/She is mandated as the human rights protector of the person who is in custody and imprisonment as well.

Additionally, the Attorney General, under the Constitution and other prevailing laws presides as the ex officio Chair/President of different eminent Boards/Committees/Councils. Some of the major Committees/Boards/Councils presided upon by the Attorney General ar

| Name of Committee / Board / Council | Role |
|---|---|
| Nepal Bar Council[2] | Chairperson |
| Federal Probation and Parole Board[3] | Chairperson |
| Victim Protection Advisory Committee[4] | Coordinator |
| Sentence Recommendation Committee[5] | Chairperson |
| Notary Public[6] | Chairperson |
| Coordination Committee[7] | Chairperson |
| Judicial Service Commission[8] | Member |

Table 1.1 Role of the Attorney General in Some Major Bodies under Constitution and Prevailing Law

The institution of AG has been therefore established under the Constitution of Nepal and other prevailing laws as an indispensable institution of the legal system, whereby

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2 Nepal Bar Council Act, 1993, § 4(2). This Act has been enacted to provide for more accountable legal service to the society and secure the interest of the Legal Practitioners.

3 Criminal Offense (Sentencing and Execution) Act, 2017, § 38(1).

4 Crime Victim Protection Act, 2018, § 44 (the committee has been formed to give advice to the Government of Nepal in relation to the protection of interest and rights of the crime victims)

5 Criminal Offense (Sentencing and Execution) Act, 2017, § 46.

6 Notary Public Act, 2007, § 5(1). This Act has been enacted to confirm real persons in preparing documents and putting signature on the document and to control fraud and fraudulent activities and to provide for simple and easy way in translating document and to maintain the interest of the general public,

7 Criminal Procedure Code, 2074 B.S., § 194.

8 CONST. OF NEPAL, 2015, Art.154(2). In appointing, transferring or promoting gazetted officers of the Federal Judicial Service or taking departmental action concerning such officers in accordance with law, the Government of Nepal shall act on recommendation of the Judicial Service Commission.

the AG not only acts as the guardian of the Government Attorneys but it also overlooks the field of private legal practitioners, while also working in determining the path of the criminal justice system in Nepal.

## Office of the Attorney General

Office of the Attorney General is headed by the Attorney General. To discharge his/her constitutional responsibility, the Office of the Attorney General has four departments, which is headed by the Deputy Attorney General. Office of the Attorney General has 77 District Level Attorney Offices and 18 High Attorney Office. There is a one Special Attorney Office as well. Unlike the AG, who is a political appointee, the DAGs are career government attorneys and are appointed on the basis of seniority and merit.

For effectively performing the functions of the Office of the Attorney General, Nepal and its subordinate Attorney Offices, several Departments, Divisions and Sections have been established under the regulation of Government Attorney.

The four DAGs work as the chief of four Departments of the Office of the Attorney General. These four departments are illustrated in the figure below:

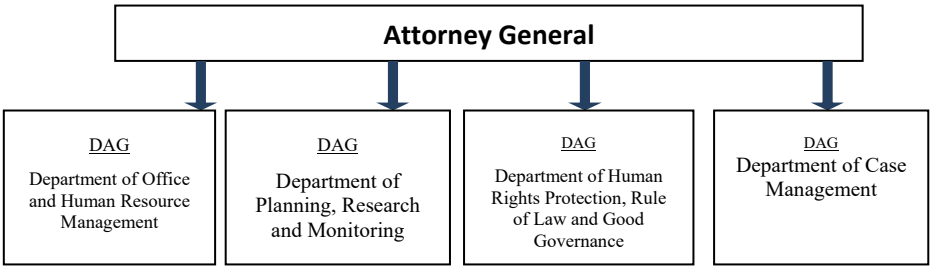


Fig. 1.1 Division of Responsibilities in OAG

Under the four Departments, there are Divisions and Sections headed by Joint-Government Attorneys and other officials as may be assigned. Divisions and Sections under the respective Departments are:

I. Department of Office and Human Resources Management
   a) Human Resource Division
   b) International Relations Division
II. Department of Planning, Research and Monitoring
   a) Planning, Research and Monitoring Division
   b) Information Technology (IT) Division
III. Department of Human Rights Protection, Rule of Law and Good Governance
   a) Legal Opinion Division
   b) Human Rights Division
IV. Department of Case Management
   a) Case Management Division

### Organizational Structure of the OAG and its Subordinate Attorney Offices

The structure of the OAG and its subordinate offices has been shaped in a hierarchical structure in line with the structure of Judiciary. The OAG, functioning as the central-

apex body, corresponds to that of the Supreme Court, whereby the OAG represents and defends the Government of Nepal in cases before the Supreme Court where the Government of Nepal is a party and/or the interest of the Government of Nepal is involved. The four Deputy Attorney Generals are seated at the OAG, who head the four Departments at the OAG. The Attorney General of Nepal has his office at the OAG.

The Special Attorney Office (SAO), functioning as the special body, corresponds to that of the Special Court and other Tribunals (Revenue Tribunal, Foreign Employment Tribunal, Administrative Tribunal, etc.), whereby the SAO represents and defends the Government of Nepal in cases before the Special Court and other Tribunals where the Government of Nepal is a party and/or the interest of the Government of Nepal is involved. The SAO is headed by a Joint-Government Attorney.

The High Attorney Office (HAO), functioning as the appellate body, corresponds to that of the High Court, whereby the HAO represents and defends the Government of Nepal in cases before the High Court where the Government of Nepal is a party and/or the interest of the Government of Nepal is involved. The HAO is headed by a Joint-Government Attorney.

The District Attorney Office (DAO), functioning as the trial body, corresponds to that of the District Court and Quasi-Judicial Bodies, whereby the DAO represents and defends the Government of Nepal in cases before the District Court where the Government of Nepal is a party and/or the interest of the Government of Nepal is involved. The DAO is headed by Deputy Government Attorney, except for DAO (Kathmandu), where the office is headed by a Joint-Government Attorney.

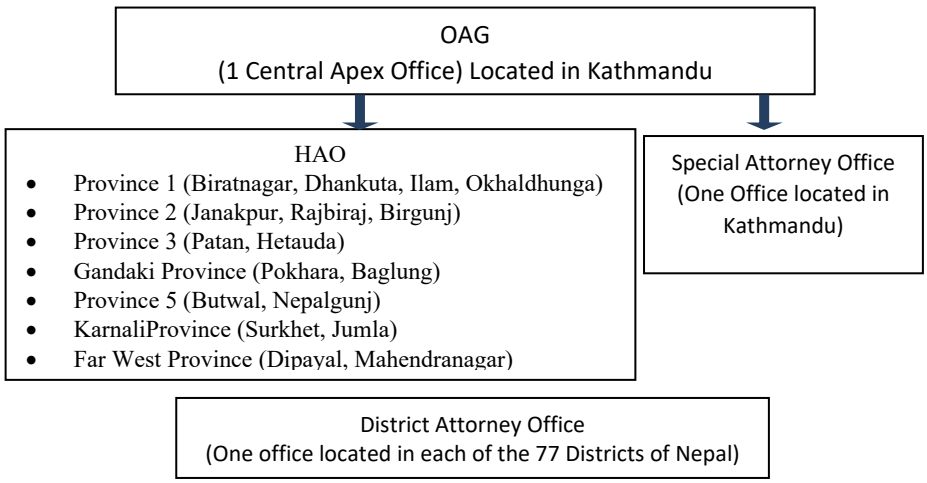


Table 1.2. Organizational Structure of the OAG and its Subordinate Offices

## The Government Attorneys

Government Attorneys in Nepal are permanent public officials governed by the Civil Services Act, 2049. Government Attorneys, like any other public official in Nepal, are recruited by an independent examination conducted by the Public Service Commission (PSC), which is a constitutional body under the Constitution of Nepal. The career of a Government Attorney begins at the rank of Section Officer, which is a Gazetted 3rd Class level.

The hierarchy of officials under the Prosecution Service moves up in the order of Section Officer, Deputy-Government Attorney, Joint-Government Attorney, and Deputy Attorney General. The rank of Deputy Government Attorney, Joint-Government Attorney and Deputy Attorney General is similar to that of Under Secretary, Joint-Secretary and Secretary of the Government of Nepal respectively.

The statistics of Human Resources under the ambit of the Office of the Attorney General is provided below:

| Institution | Attorney General | Deputy Attorney General | Joint-Government Attorney | Deputy-Government Attorney | Section Officers | Total |
|---|---|---|---|---|---|---|
| **Office of the AG** | 1 | 4 | 14 | 24 | 16 | 59 |
| **Chief Attorney Office** | | | | 7 | 21 | 28 |
| **High Government Attorney Office** | | | 18 | 32 | 61 | 111 |
| **Special Government Attorney Office** | | | 1 | 14 | 5 | 20 |
| **District Government Attorney Office** | | | 1 | 86 | 171 | 258 |
| **Deputed in other Offices** | | | 4 | 11 | 29 | 44 |
| **Total** | 1 | 4 | 38 | 174 | 303 | 520 |

Table 1.2. Statistics of Human Resource under the OAG

## Attorney General and the Delegation of Powers and Authorities

All the attorneys working under the OAG and its subordinate offices exercise the powers and authorities delegated by the Attorney General, the provision of which is provided under Article 158(7) of the Constitution of Nepal. Other powers and authorities of the Government Attorneys are according to the prevailing laws of Nepal.

However, in exercising the delegated powers and authorities, the Government Attorneys possess complete prosecutorial independence and professional autonomy subject to the conditions given under the delegated scheme.

## Core Functions of the Government Attorneys

In general, the core functions of the Government Attorneys, as per the Constitution, delegated scheme and prevailing laws of Nepal are as follows:

I. To oversee the process of investigation of criminal offences and give direction to the investigating authorities
II. To decide whether to initiate a criminal proceeding on behalf of the Government of Nepal in any court
III. To prepare and file the charge sheet on behalf of the Government of Nepal

IV. To render legal opinion and advise to the Federal Government and its bodies
V. To defend and represent the rights, interests or concern of Government of Nepal before judicial and other quasi-judicial bodies on behalf of Government of Nepal
VI. To defend the criminal/civil cases in which Government of Nepal is party, before the Court.

Besides these seemingly core functions of the Government Attorneys, the Constitution and prevailing laws mandates other additional functions and duties to the Government Attorneys. They include (in general):

**I.** To protect the interest of the Community
- By means of probation, parole and community service
- By means of non-prosecution and diversion of minor offences

**II.** To protect the interest of the victims
- By representing victims before the judicial bodies
- By highlighting the interests of victims before the court (compensation and restitution for instance)

**III.** To protect the interest of the defendants and offenders
- By ensuring the guarantee of fair trial
- By ensuring the guarantee of due process rights of the defendants
- By ensuring humane treatment towards offenders and defendants in custody and prison

## The Strategic Plan of the OAG

Currently, the OAG is implementing the Third Five Year Strategic Plan. Goals of the Third Strategic Plan include:

I. To ensure objective and scientific prosecution
II. To make effective representation of government cases before judicial bodies
III. To perform legal and constitutional duties and responsibility effectively
IV. To develop professionalism in the Government Attorneys
V. Institutional strengthening of the OAG and its subordinate offices

## Reform Initiatives Carried Out by the OAG

Various reforms initiatives have been carried out by the Office of the Attorney General, Nepal. Some of them are as follows:

I. Specialization training of Government Attorneys (areas include Constitutional Law, Cyber Crime, Crimes relating to Corruption, Gender and Juvenile Justice, Law of Taxation, Organized Crime, Law relating to Public Property, Banking Law, Law relating to Service)
II. The implementation of E-Attorney Program
- Case Management System (Digitization of Cases)
- Case Tracking System (Digital Tracking of Cases)
- Asset Management System (Digital Management of Assets of the Office)

- Establishment of Intranet in 23 District Government Attorney Offices across Nepal

III. The implementation of Model Government Attorney Office in all the provinces of Nepal
   - Model Government Attorney Offices have been established in Province 1 (Sunsari and Jhapa), Province 2 (Dhanusha and Bara), Bagmati Province (Lalitpur and Dhading), Gandaki Province (Kaski and Tanahu), Province 5 (Banke and Rupandehi), Karnali Province (Surkhet and Jumla) and Far Western Province (Kanchanpur and Darchula).

IV. Membership of the International Association of Prosecutors (IAP), which is the only global umbrella organization of Attorney General Offices / Prosecuting Offices of the world

V. Establishment of Child Care Centre at the Office of the Attorney General

VI. Establishment of Victim Friendly Rooms in 69 District Government Attorney Offices

VII. Conducting of "Government Attorney in Community Program", in collaboration with Nepal Police (legal awareness program)

Implementation of the Hello Sakshi (Hello Witness) Program, whereby the respective District Government Attorney Offices telephones the witnesses and informs them about their upcoming

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VOLUME 5, ISSUE 1, YEAR 2022

# DECOLONIZATION OF JURISPRUDENCE WITH EMPHASIS ON SOCIAL JUSTICE PRINCIPLES

**Yubaraj Sangroula, Ph.D.**[1]

## ABSTRACT

*The article aims is to evaluate the interests, preparedness, and competence of the modern system of administering justice to focus and address issues of injustice, generally produced by systemic failures of state's socio-economic policies and institutions, which is, to the larger extent, driven by the legalist-centralist approach of positivism. This approach generally ignores the need to interpret laws contextually or pragmatically —instead, this approach relies on the textual approach. It advertently ignores the fact that laws a small group of elites in society holding the state power conceives, formulates, and enacts laws. Thus, the paper extensively discusses the realization of social justice as the end of the administration of formal justice. Pragmatic socio-economic development model building the individual capability is one of the prominent approaches to achieve the social justice. Exploring the interface of social justice and social reality with the objective truth is the utmost necessity in decolonization of the jurisprudence ensuring the social justice. Thus, the contemporary jurisprudence seeks to search for an appropriate paradigm of social justice.*

## INTRODUCTION

The main purpose of this article is to evaluate the interests, preparedness, and competence of the modern system of administering justice to focus and address issues of injustice, generally produced by systemic failures of State's socio-economic policies and institutions, which is, to the larger extent, driven by the legalist-centralist approach of positivism. This approach generally ignores the need to interpret laws contextually or pragmatically —instead, this approach relies on the textual approach. It advertently ignores the fact that laws a small group of elites in society holding the State power conceives, formulates, and enacts laws. According to Adam Smith, these people are self-portrayed masters of humankind, motivated by a vile maxim of 'everything

[1] Professor of Jurisprudence and International Law at Kathmandu School of Law. He is a Former Attorney General of Nepal. Recipient of the 2012 SAARC Law Scholar Award and Grand Forum of the Best Jurist Renmin University of China Law School, 2013

others is ours.'[2] Consequently, a state of sheer injustice prevails. Elites in capitalist societies have forcefully institutionalized this injustice by holding an unlimited power to make and interpret laws at their hands.

In capitalist societies (so-called liberal democracies), elites control the society subjecting the masses of general people to a chronic state of the economically divided and socially unfair structure. Such a society protects the monopoly of a few people in the capital means of income, and resources. This kind of society subjects the masses of general people to the chronic state of exploitative consumerism; the rich are untaxed, and the poor are left at the mercy of an unregulated market. Poor people are taxed excruciatingly. In such societies, the administration of justice is only favorable to elites, and its administration functions to benefit the rich. Hence, it is simply natural that the justice system in such societies overlooks the interests of the poor people, including their basic needs. The special emphasis given to separating 'commercial cases' for speedy disposal is a glaring example. In Nepal, for instance, many people are languishing in jails due to lengthy staggering trials. The final hearing of the criminal cases awaits longer due to the overload of cases, whereas special commercial benches try commercial cases speedily. This practice truly characterizes an old saying, 'the legal system torments poor and protects rich' *(GariblaaiAinDhanilaai Chain*).

The constituents of the judicial system, such as judges, lawyers, and governmental institutions, are concerned mainly with commerce and trade, and organizations of the merchants, industrialists, bankers, and other financiers protect this disparity in the justice system advertently or willfully. The 'court fee' system to be paid in advance by the complainant is an example of an effort to protect the interests of the rich against the poor. Consequently, a poor has to rescind approaching the court to enforce rights simply due to poverty. Similarly, a poor person has to endure imprisonment for inability to pay a monetary sentence, which generally involves a disproportionately larger amount, thus rendering the poor convict unable to pay and languish in incarceration. The administration of justice in an adversarial system criminalizes poverty this way. Hence, this article attempts to probe the standard of social justice in the prevailing structure of law and judicial process influenced by the practices of colonial rule in the past, focusing attention on Nepal's system of justice. The fundamental purpose is to evaluate the competence, prospect, or possibility of the state's prevailing formal system of justice to protect the interests and rights of the deprived population, particularly in those societies that claim themselves as liberal democratic societies. Therefore, the article intends to probe a question: Are deprived and poor people, in a so-called liberal democratic society like Nepal, capable of enjoying the process of prevailing justice to protect their interests and rights? The article examines this question in the light of the principle of capability building as a tool of ensuring social justice and focuses on the existing structure of the administration of justice in Nepal as an example.

In doing so, it attempts to reflect on the necessity of connecting the concept of democracy and social justice as the foundation of fair justice. An analytical reflection

[2] For more detail in this regard, See, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nation,* published by *W. Strahan and T. Cadell,* London, 1776, edited by R. H Campbell and A. S. Skinner,1982

guides and attempts to answer the above question and shows that the performance of democracy is essential to foster the application of social justice in the process of administration of justice by emphasizing the need to apply the principle of capability building. The article follows an assumption that 'the state lacks a separate goal of its own than the collective of the goal of people.' People are the master of the nation. Being master of the nation means that the State ought to work only for the socio-economic wellbeing and advantages of the people and security of the society.' The state has an unavoidable obligation to ensure equal protection and security to the people.

This assumption holds that the concept of social justice is an essential tool for fostering a society of equals. In fact, State, as a protector and service provider to people, has to avail itself to the amendatory obligation of guaranteeing and securing the implementation of social justice principle, with an added emphasis on the principle of building the capability of people to perform the functions as competent human persons socially, economically and politically. The assumption takes socio-economic and political equality as a salient feature of functional democracy; hence, the democracy cannot ignore the vitality of social justice. In 1848, in the perspective of the gruesome situation posed by Nazism and the consequence of World War II, the Universal Declaration of Human Rights (UDHR) had been was adopted as one of the pillars of the new, pro-people and democratic system of governance founded on the bedrock of social justice. The UDHR integrated civil and political rights, economic, social, and solidarity rights as a composite social justice system. It elevated the economic, social, and solidarity rights to fundamental rights. Hoverer, the Western former colonial powers consistently refuse to accept the significance of the economic, social, and solidarity rights to address the ever-increasing inequality between rich and poor. They used human rights as a tool of building liberal democratic influence across the world against socialism. Thus, they destroyed the concept of social justice unduly and arrogantly, thus perpetuating the impacts of colonialism and class-divided society. Looking from this logical premise, the article intends to argue and establish the relevance of social justice. It is an indispensable and mandatory philosophical tool for the judiciary to drive the administration of justice fairly and impartially for the benefit of the common masses.

We are fully aware that Western legal scholarship monopolizes the principles of jurisprudence that deal with the concept of rights, justice, and law. These principles evolved out of overriding colonial perspectives and domination over the two hundred years before the First World War. The Western classical jurisprudence drew mainly from the concept of sovereignty, defining the element of *power* as a key foundation for the legitimacy and legality of the law. The development of sovereignty as a core element of Western jurisprudence marched side by side with the rise of European colonial subjugation and imperialism. Several key principles of the modern Western jurisprudence have roots in the unfair and forcefully implemented doctrines of the 'discovery, *dominium*, *lessaize faire,* the power to dominate indigenous or native

people, the monopoly capitalism, sovereignty, and colonialism.[3]Even today, the laws and judicial principles of the former colonial countries, including the USA, validate the *Doctrine of Discovery* as a source of the rights of colonizing countries. Even during the decolonization era, several judgments of the courts of such countries have meticulously sustained the rights of colonization and have held the acts of the appropriation of lands, territories, and resources and subjugation of people in colonies were duly appropriate. The colonial powers forcefully employed the *Discovery Doctrine* to legitimate control over the colonized people and their assets. They occupied and extracted virtually unlimited resources from the colonized territories with the help of this doctrine, thus unleashing a state of utter dispossession of the rights of colonized or indigenous people over their resources and properties, which caused severe impoverishment of such people. The doctrine of discovery provided a basis for the ruthless exploitation of the colonized territories, which has been identified as a key reason for the current poverty of masses of people in the former colonies—the situation of tribal indigenous people is grotesque.[4]

The early modern European jurists Francis Vitoria, and his contemporaries, played a key role in generating the political legitimacy of colonialism. For this purpose, they invented the peculiar political concept known as 'the concept of sovereignty.' Vitoria's purpose behind this concept was to provide a secular foundation for colonialism, formerly based on religious justification of 'converting heretics into Christianity.' Christianity believed in the 'One God' principle, so that the clergies thought that it was right of Christian nations to invade barbarian countries to fulfill the so-called wish of God to rescue their people by conversion. The sovereignty could replace this religious justification of colonialism with the 'concept of sovereignty.'[5] The concept of sovereignty was linked with the concept of the nation-state and held that only European states possessed the attributes of nation-states. With this concept placed in front, European colonizers held that 'Asian, African, and Latin American nations could be legally colonized. The so-called Law of the Nations was invented to legitimize colonialism.

In the views of Vitoria, the kings or princes as the legitimate authority of their kingdoms could possess the power of discovering the territories as *res nullius*. They could maintain effective legal control over such territories. Nations failing to stand as the nation-state were then defined as *res nullius*. His public lectures provided the concept of sovereignty as a new secular measure to legalize and regulate the relationship between the colonizing power and the people inhabiting the colonized territories.[6] The classical European jurisprudence (Greco-Roman tradition) defined the concept of property as *dominium*: the term allegedly derived from the Sanskrit term *dominus*—he who subdues. The term *dominus*was the root of the term *dominium* and

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[3] See, Tonya GonellaFrichner, "Preliminary Study: Impact on Indigenous People of International Legal Construct known as the Doctrine of Discovery, which served as the Foundation of Violation of Their Human Rights;" UN Economic and Social Council, E/C.19/2010/13, 2010, 1-10

[4] See 'The State of the World's Indigenous Peoples," 2009, United Nations Publication', ST/ESA/328, <http: //www .un.org/ esa/socdev/unpfii/en/sowip.html>accessed 25 November 2021

[5] For more detail, See, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law,* Cambridge University Press, Cambridge, 2004, Chapter I

[6] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law;* Cambridge: Cambridge University Press, 2004, Chapter I.

was adopted as the straight translation of the term *dominus.* The term bears the same meaning in Latin, i.e., the 'thing which some have subdued.' It signifies a 'master, or possessor, or lord, proprietor, or owner.' *Dominium* takes from the term *dominus*a sense or meaning of 'absolute ownership' from which sprouts the legal connotation of the 'ownership of the property.'[7] The term d*ominium'*s meaning extends into 'rule, domination. It also extends into an odious secondary meaning of *unrestricted power, absolute dominium, lordship, tyranny, and despotism.* This way, the political power of colonization (later known as sovereignty) grew from the property right concept of *dominium*, which necessarily implied a form of domination.[8]Thus, the Discovery Doctrine, dominium, and sovereignty are essential attributes of colonialism and collectively constitute the Colonial Framework of Dominance doctrin*e*. The colonial regimes employed this doctrine and practiced it to take the colonized people under absolute control, including their lands.

The doctrine of Dominance Framework achieved the desired result by ensuring strict legal measures without any limitations of suppression and coercion, as mentioned below.

Since early, the colonial regimes transplanted the colonial legal and justice system indiscriminately and stringently. The colonial architects had a deeply rooted belief in their minds that the indigenous system of law would fail to unleash a desired fear or apprehension among the colonized populations, thus making the enforcement of the indigenous law ineffective to obtain the goal of absolute domination. These regimes wanted to enforce a statutory legal system that would prevail with a stringent punishment system to gain strict control over the population. For instance, an Indian public intellectual, ShashiTharoor, confirms this assertion by saying that "Bringing the British law to the natives was arguably one of the most important constituent elements of this mission."[9]With the help of the colonial legal system, the British raj subordinated the Indian society legally, but absolutely.

The British colonial rulers introduced the Penal Code in India, which was surely prompted by this mission. A British lawyer Babington Macaulay had drafted this code, which is infamously known in India as a man to destroy the indigenous education system of South Asia. He had spent three years in drafting this code, in Tharoor's words, 'behind the high walls, completely disconnected from the people he was ostensibly working for.'[10] Among many other things, this code willfully protected the interest and purpose of the colonial regimes—the interests and advantages of the Indian people were fully ignored, if not suppressed totally. "The British both laid down the law and derived legitimacy, in their own eyes and those of the world, from doing so," Tharoor noted. The code introduced a harsh and discriminatory system of punishment—the harsh punishment and sentencing policy purported to use coercion and cruelty for subduing the indigenous population. Indeed, the colonial regime was

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7 See, Lewis and Short, A Latin Dictionary, 1969 ed

8 See, William Brandon, *New Worlds For Old,* 1986, 121 cited in Tonya GonellaFrichner, 'Preliminary Study: Impact on Indigenous People of International Legal Construct known as the Doctrine of Discovery, which served as the Foundation of Violation of Their Human Rights;' UN Economic and Social Council, E/C.19/2010/13, 2010,1-10

9 SashiTharoor, *An Era of Darkness*: *The British Empire in India,* Aleph Book Company, New Delhi, 2016,105

10 Ibid, 106

implemented with the help of the law designed by the rulers. The authority to make laws and conduct judicial system was exercised under the British system of common law, which eventually destroyed the historically evolved judicial practices and indigenous jurisprudence, which manifested attributes of highly developed systems.

Besides having their legal systems enforced, the colonial regimes introduced their practices and principles of trial procedures in all territories they occupied. The European continental and common law systems, fully unknown and alien to the indigenous masses, had been enforced in colonies, to the fullest disregard of the native law system, justice, and legal culture. Particularly, the British colonial regime introduced its jury system in its colonies, with total disregard of the local contexts. For the colonial rulers, the British principles of justice formed uncontestable universal values of fairness and impartiality. Nevertheless, the so-called fairness was neither fair nor impartial in letters and spirits; in fact, the rule of law they argued was a rule by coercive law. [11] It was structurally so because the British colonial rulers meant "the conquest and control of the people, people's lands and goods," writes Loomba.[12]The sole colonial motive was to plunder native peoples and expand brutal empires. Something they lacked was a sense of justice to the common people. They did not treat ordinary folks differently than slaves.

The British Government established a direct rule in India after 1857[13]—after the first outbreak of the Indian Independence movement that is generally and prejudicially described by the British historians as the Indian Sepoy Mutiny. The British Government abolished the native judicial system in 1861, Right after the promulgation of the Indian Penal Code. The colonial regime removed three-quarters of the native judges.[14]The British government introduced its jurisprudence, the administration of justice, and the structure of the judiciary. Hence, the justice in the colonial era, in the words of Tharoor, 'was far from blind: it was highly attentive to the skin color of the defendant.'[15] Crimes committed by colonial officials, white people or Europeans, against natives meted only minimal sentences. However, the reverse situation would be harsh—the Indians committing crimes against whites would be tormenting.

The system practiced discrimination phenomenally. An Englishman murdering an Indian servant would be punished by six months imprisonment only.[16]But an Indian attempting to commit rape against an Englishwoman would serve twenty years of rigorous imprisonment.[17] Native judges were not allowed to try cases that involved whites.[18]Neither native judge could try natives committing an offense against the British regime and whites. The famous sedition trial against BalGangadharTilak is one of the glaring examples. In that case, he was convicted by nine white judges. The Ibert

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11 See, D.A. Washbrook, '*Ethnicity and Racialism in Colonial Indian Society'* in R. Ross ed, *Racism and Colonialism,* MartinusNijhoff Publishers, The Hague, 1982, Ch.9

12. Loomba, *Colonialism and Post colonialism;* Route ledge, London, 1998, 2

13 L. Lyer, 'Direct vs. Indirect Colonial Rule in India,' [2010] (94), The Review of Economics and Statistics,694

14 Ibid

15 SashiTharoor, *An Era of Darkness*: *The British Empire in India,* Aleph Book Company, New Delhi, 2016,106

16 SashiTharoor, *An Era of Darkness*: *The British Empire in India,* Aleph Book Company, New Delhi, 2016,106

17 Ibid

18 See, RahiGaikwad, 'Race and Colonial Court,' *The Hindu,* July 11, 2015

Bill barred from entering clubs where white people enjoyed times.[19] The Vice-Roy Lord Ripon attempted to allow, through the Ibert Bill, the Indian judges to try British subjects and play a stronger role in municipal matters in vain. His subordinates protested and boycotted Ripon in a racist outcry.[20]Besides, as noted by Tharoor, the disinclination of British judges in India to find any Englishman guilty of murdering any Indians was rife. Thus, the impartiality in the trial was largely a hoax.

The colonial rulers showed no interest in adopting policies for the welfare and social security of the Indian people. The so-called rule of law worked only for the benefit of white settlers, traders, and officials. The discrimination based on race was manifestly considered legal. On the one hand, the private clubs and hotels were barred for the entry of Indians, and, on the other, the native population had been coerced to pay high taxes, royalties, and fees. Most clubs and hotels in Indian cities displayed signs saying 'Indians and dogs not allowed.'[21] Taxation (often labeled as theft by common people) was one of the most favored ways of extortion. Peasants were coerced to pay taxes; the extortion was carried out so that farmers fled and committed suicide. Will Durant writes, "[Tax] defaulters were confined in cages, and exposed to the burning sun; fathers sold their children to meet the rising tax.''[22]

According to Tharoor, the British colonial rulers introduced the concept of landless peasants, who had been deprived of their traditional sources of sustenance for the first time in India.[23]Many farmers, due to extortion of taxes, turned landless. The continual suppression of the people ultimately led to several events of famine, the 1943 Bengal famine being the worse one, which took the lives of over 4 million people.[24]The British officials were involved in rampant corruption; the corruption situation was abjectly phenomenal that it led to the impeachment prosecution of Governor-General Warren Hastings in 1788. Since the purpose of British rule was to turn India into a subservient, the question of people's welfare and social security was not even a matter of little attention. The system of French colonies in Africa and Southeast Asia was hardly better than the British *raj* in India. The people of colonies had been forced to bleed relentlessly.

The description shows that the doctrine of dominance imposed was ruthless and has had roots in the European racism and monopoly capitalism, which, in the words of Adam Smith, employed the *vile maxim* of 'All for us and nothing for others.' In his seminal book Wealth of Nations, Adam Smith pensively described the vile attitudes of colonial merchants who wanted to take control of the world for their sole benefit. As he described, they relentlessly claim the right of "All for ourselves, and nothing for

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19 Ilbert Act is a highly controversial measure proposed by the colonial regime to allow senior Indian magistrates to preside over cases involving British subjects in India. The bill, was enacted by the Indian Legislative Council on Jan. 25, 1884. The bitter controversy surrounding the measure deepened antagonism between British and Indians. Besides many wrongs, this law proposed prohibiting the Indians in elite clubs. For detail, SeeFali.S. Narman, *Before Memory Fades Away…* An Autobiography, Hay House India, Delhi, 2010.

20 SashiTharoor, *An Era of Darkness*: *The British Empire in India,* Aleph Book Company, New Delhi, 2016,107

21 Ibid, 111

22 See, Will Durant, *The Case for India,* Simon & Schuster, New York, 1930 reissued by Strand Book Stall Mumbai, 2015 cited in Tharoor, 2016, 11

23 SashiTharoor, *An Era of Darkness*: *The British Empire in India,* Aleph Book Company, New Delhi, 2016,12

24 See, MadhushreeMukerjee, *Churchill's Secret War: The British Empire and the Ravaging of India during World War II,* Basic Books, New York, 2011

others" in every age of the world. Smith described this attitude of monopolist capitalists as the vile maxim.[25] The colonial powers employed this *vile maxim* to loot the colonized people, thus pushing them to the extreme of starvation. The *vile maxim* was based on the doctrine of discovery, dominium, and sovereignty, known as the 'framework of dominance.' The doctrine of dominance starkly refutes the significance and legitimacy of the doctrine of social justice. Unfortunately, most former colonized territories continue even today to practice the system of governance and legal and judicial system stemming from the 'Framework of Dominance.'

The discussion above helps us conclude that the jurisprudence, which discards or ignores the significance of social justice in developing societies, is largely colonial both in setting and essence. Several gruesome problems and challenges facing the legal and justice system in developing societies even in the 21st century are the products of the congenital disabilities of colonial rule. The jurisprudence and the system of law in practice in former colonies are congenitally wrong. But, the government institutions in most former colonies suffer from an ailment of historical amnesia that blurs the vision of academics, politicians, professionals, and even historians about these congenital wrongs of the colonial system. Understandably, most former colonies' justice system is beset by those principles and values that are fully alien to non-European societies. The following encapsulations of a few such principles and values will make the problems of justice in developing countries manifested:

a. Asian societies tend to rely philosophically on the principle of binary unison, contrary to the principle of the *binary opposite*. The Asian social structures or settings have, for centuries, relied on values of collective integrity of human persons (individuality is least emphasized), social cohesion and family and community against individualism, and the harmony among members of the society. The Buddhist philosophy has long preached for 'the doctrine of *sarvajanahitayasarvajanasukhaya*.'[26] The Vedic philosophy of life preaches for the doctrine of '*sarvebhavantusukhinasarvesantuniramamaya*'.[27] Chinese Confucianism advocates for *Tianxia,* literally meaning that 'we all live under the same heaven" (sky).[28]None of these philosophical doctrines, including Jainism, Sikhism, Mohism, and Islam, believe and practice the doctrine of the *binary opposite,* which holds a principle that 'one of the binary elements is a *logo (*core or central) and another is peripheral.' So that both elements do have the same significance, the principle of 'white is the *logo*' came from this philosophical premise. Hence, whites and blacks are disintegrated and opposite to each other.

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25 See, Adam Smith, *Wealth of Nations,* West Strahan and T. Cadell, London, 1776

26 This doctrine of Buddhism is based on three cardinal principles: (a) dhamamsaranamgachhami (let us go to the shrine of wisdom— philosophy and rules of ethics for good conducts); (b) sangamsaranamgachhami (let us be associated and live together); and (c) buddhamsaranamgachhami (let us keep ourselves subject to the domain of wisdom—logic, science and learning perpetually by experience). Individual life has been recognized but isolation sit individualism is discouraged.

27 This Vedic doctrine calls for welfare and security of human beings as one cosmopolitan society. Individual is a part of the whole, but not a disintegrated member of the whole. According to this doctrine, individual identity of one is determined by existence of other, so that his/her welfare and security is contingent on another.

28 For more detail in regard of these doctrines see, YubarajSangroula, *Right to Have Rights,* Lex and Juris Publication, Bhakatapur, 2018, Ch.4

b. As the main instrument or measure of the dispute settlement, the litigation concept is rooted in the philosophical premise of binary opposite theory, which is fully alien to the Asian thought and mechanism of dispute settlement. According to the litigation mechanism, the parties in the disputes are 'opponents to each other' as disintegrated or personally separate individuals of the society. A third party is considered neutral and fair to judge on others' issues or claims. The term judgment itself is subjective, intuitive, and directive. It connotes to opinions of someone. However, Asian societies believe that an (issue of) dispute is a part of the society and, as such, it affects the parties and the entire society. As a matter of fact, it is not the judgment, but the transformation of the issue is necessary for the settlement of the dispute. The judicial system in countries like Nepal and India is thus, manifestly beset by a set of alien principles of jurisprudence; they are neither contextual nor relevant to the social structure or episteme. The absence of context and relevance of the prevailing justice system is a major hurdle in delivering a fair and impartial justice system.
c. Most former colonies are still obsessively administering the transplanted colonial laws, and they practice the colonial structure of the judicial system. For instance, India, Bangladesh, and Pakistan continue to enforce Penal Codes the colonial government introduced in 1861. These codes are the primary legal instrument for administering the criminal justice system in their societies. The prevailing law and justice system suffer some serious problems, thus failing to deliver fair and impartial justice. They include acute problems of procedural formalism, the rhetoric-driven interpretation of law ending at laying down the abstract case law, the use of the people-unfriendly and vague language used in the laws and courts' judgments, and excessive traditional and stereotyped setting of the judicial institutions that render entire judicial system incomprehensible and inconceivable to common people. These congenital problems manifestly obscure the objectivity of justice. The colonial law and justice system in former colonies are also affected by the European system of jurisprudence that is alien to Asian societies. First, the Euro-centric jurisprudence tends to detach law from morality and ethics irreconcilably. Of course, the larger body of Eurocentric jurisprudence consists of dichotomous discourses on law and morality largely irrelevant to the Asian societies. Second, the Euro-centric jurisprudence is a product of the history of conflict between Church and State, which is unknown and irrelevant to Asian societies. In Asian societies, religious mechanisms and institutions never enjoyed political power, and the state and religion never fought. Most importantly, there is a difference between the English term religion and the Sanskrit term *Dharma*. European scholars are unknown to the insights of the term *dharma.*
d. Asian societies have a practice of valuing the significance of jurisprudence, which respects public opinions. In Asian societies, jurists stress theorization and encapsulation of popular wills or opinions in the principles of jurisprudence. The state's role in formulating principles of jurisprudence is limited in Asian societies—the State's role in making law is to formulate legal precepts or rules based on the principles of jurisprudence developed by jurists. The priority to or overindulgence in the centrality of legalism is out of practice in Asian societies.

The primary goal of justice in these societies is to protect persons' integrity within the defined framework of social cohesion or integration. The social-moral values count tremendously both as the source of legality and effectiveness of the law's implementation. The legalist centralist approach of positivism, which is certainly introduced in the Asian societies by the colonial regimes to achieve the goal of sustaining 'the framework of dominance,' forms a major cause of the failure in functions of the law and justice Asian liberal-democratic societies.

e. Unfortunately, most Asian societies are still ignorant of this fact. They are obsessively indulged in appreciating the Euro-centric principles of jurisprudence as if such principles are socially originated in their unique settings. The culture of carrying out inquiry or investigation on the social effects of the Euro-centric principles of jurisprudence is minimal. Hence, the knowledge about invigorating the function of the legal and judicial system is developing. The academic culture of probing the significance of transplanted is nascent either. Lack of that culture is another hurdle in promoting social justice by our judiciaries, particularly in South Asian societies. Judiciaries in South Asia are keen to pronounce rhetoric of Eurocentric jurisprudence in their judgment than inquiring into the causes leading to the rise of the legal disputes.

f. In those perspectives, the general people doubt the fairness and impartiality of justice delivered by South Asian judiciaries. A few problems facing Nepal's judiciary can provide a sketch of the problem. (i) The system of justice and the juridical apparatus in Nepal are usually manipulated by wrong peoples, including powerful elites, through the help of powerful lawyers, corrupt and politically biased judges, and politicians. A recent report of the inquiry, headed by Supreme Judge Hari Krishna Karki, accepts that even judges are indulged in the irregularity of justice and fuming the practice of corruption.[29](ii) The segment of poor people, including minority and socially marginalized communities, is unprotected by the justice system.[30] (iii) The judiciary and judicial apparatuses have become a paradise of lawyers—because, for them, formalism counts much than social justice. (iv) The social impacts of the courts' judgments are unaccounted for—the impunity for wrong judgment is destroying the entire sanctity of the judiciary as an institution to defend the rights of people. (v) Judgeship has been seen as an office of making money—the nexus of unethical lawyers, fixers, and judges is causing the loss of confidence of the general people in the system of justice and the institution of judiciary. These problems collectively pose a serious threat to the independence of the judiciary. The judiciary is described or portrayed in most sectors in Nepal as an incompetent institution now.[31]The influence of political parties, NGOs, and INGOs are vital for maligning the fairness and impartiality of

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[29] For detail, see, Supreme Court of Nepal, Report on 'न्यायपालिकामा हुन सक्ने विकृति, विसंगति, अनियमितता वा भ्रस्टाचार एवम विचौलियाहरु र त्यसको रोकथामको लागि चाल्नु पर्ने उपायहरुको सम्बन्धमा पेश गरेको प्रतिवेदन' (Report on prevailing irregularities, abuse of rules and corrupt practices and activities of persons engaged in corrupting justice and prevention thereof),' Kathmandu, 2077

[30] Lead International, 'Strengthening the Poor and Marginalized Communities' Access to Justice and Security in Nepal,'Kathmandu, August, 2019, <www.sfcg.org/wp-contents/uploads/2019/08/Final-Evaluation_ PAHUNCH> Accessed on 16July 2021

[31] See, "Judiciary most corrupt sector says Report," The Himalayan Times, May 24, 2007; "Nepal Bar Association calls for a Mechanism to control corruption in the Judiciary, The Kathmandu Post, August 10, 2020

justice in Nepal.[32]These factors are formidable hurdles to avert the judicial role in fostering the principles of social justice.

Conceivably, this article aims at exploring the problem of fairness, impartiality, and objectivity due to the lack of attention and regard to the concept of social justice. It moves with an idea of exploring ways to transform the formal justice system of developing countries into a fair system of justice that protects the rights of the poor, deprived, and vulnerable to development. This way, the formal justice system can help elevate the economic, social, and development rights to fundamental rights.

## *REALIZATION OF SOCIAL JUSTICE IS THE END OF THE ADMINISTRATION OF FORMAL JUSTICE*

Realizing social justice in people's daily lives is the key criterion for ensuring fairness, impartiality, and objectivity of the formal administration of justice. The history of human evolution manifests that all human lives have the potential to grow competent in doing perfect human functions. Human innovations are tremendous factors of changing their lives from an awkward situation to a peaceful and comfortable one. The actuality in practice is, however, grotesquely different. Looming facts of human lives across the globe present a grotesque condition of disparity and wealth distribution and advantages. Many human beings in developing countries still suffer from the tragedy of excruciating inequality in wealth and deprivation of basic human rights; the biggest global population in developing countries is economically poor, exploited and abused, and socially stratified culturally humiliated. Reportedly, the aggregate global wealth increased to 360 trillion in 1019, growing annually by an average rate of 2.6 percent. Still, an unimaginably larger part of this wealth went to the pocket of those who hardly represent one percent of the global population. The situation is thus grotesque. The richest 10 percent owns all global wealth, and the mere topmost one percent has seized 45 percent of the total global wealth. This situation has been a gift of monopoly capitalism in the past two centuries—elites control the 21st century either.[33] This unjust system is primarily responsible for killing millions of children, mothers, and adults before they reach the age of 40 years. Most judiciaries around the globe are obsessive about protecting the rights of these elites, thus overlooking the deplorable situation of the poor. The *Golaknath*[34] *and Keshavananda*[35]cases of India are two glaring examples.

The poor people of the globe lack access to resources and opportunities necessary for building capabilities to break the above described *regressive status quo* of life. An overwhelming number of lives in the least and developing countries are painfully difficult. Unequal social and political circumstances are mainly responsible for the continuity of the *regressive status quo*. The unequal social and political circumstances continue oozing disparity in living conditions among people of different socio-

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32 Nepal Bar Association calls for a Mechanism to control corruption in the Judiciary, The Kathmandu Post, August 10, 2020

33 AthonyShorrocks et.al, Global Wealth 2019: The Year in Review, Editorial, Credit Suisse Research Institute,<https://www.google.com/search?q=Athony+Shorrocks+et+al%2C+Global+Wealth>Accesse on 16July 2021

34 Golaknath v State Of Punjab [1967] AIR 1643

35 KeshavanandaBharati v State of Kerala, [1973]

economic capability layers. [36] The looming socio-economic subordination deprives the masses of poor people in all least developed and developing countries of adequate nourishment, basic health care and sanitation, and access to education. These deprivations subject millions of people to die early. The state of socio-economic subordination and natural calamities, conflicts, and other forms of violence threatens the survival of poor people as a perennial problem. The rich and multinationals abuse and exploit poor people, forcing them to live under unhygienic and inhuman conditions of life. The rich people and multinationals extort their land resources and habitats, causing unending displacement and resultant misery and deaths. The state of subordination becomes grotesquely abject and inhuman in such circumstances. Women are doubly jeopardized in such a condition because, in the words of Martha Nussbaum, 'in many nations, women are not full equals under the law: they do not have the same property rights as men, the same rights to make a contract, the same rights of association, mobility and religious liberty.'[37]

A further worse situation occurs when women and children belong to the socially deprived community, e.g., the community Dalit in Nepal.[38] They are economically poor, socially ostracized, and domestically violated.[39] These circumstances ooze a vicious circle of the *Regressive Status Quo* and the deprived socio-economic vector of living conditions. This vicious circle then breeds further division based on class and caste distinction among people. In this adverse situation confronted by the masses of poor and deprived people, the vicious circle benefits the small group of elites to enjoy and benefit from unlimited and privileged access to economic resources. This human-made socio-economic structure of the society, in turn, becomes a bulwark for the institutionalization of a socio-political system in the society distributing unequal capabilities in members of society. [40] In addition, the distribution of unequal capability among people perpetuates obstacles hindering the process of change in the adverse vector of life. This state is defined as the state of *regressive status quo.*

The factors and circumstances spawning unequal capabilities in human beings are, therefore, systemic and systematic; the resulting condition is socially, economically, and politically defined as the condition of subordination,[41]which is marked by facts of societal hierarchy, legal discrimination, social exclusion, economic deprivation and denial of access to fair justice. The language social justice jurisprudence defines this situation as a state of injustice, which is empirically ascertainable fact, consisting of the elements of the composite form of socio-economic deprivations. Therefore, the principle of social justice holds that only closer and empirical observation of facts that

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36 Cited by Martha Nussbaum, 'Capability and social justice,' 14(2), International Studies Review (International Reality and the new Equality), Sumer 2005,123, 135

37 Martha Nussbaum, "Religion and Women's Human Rights," in Paul Whiteman (d) Religion and Contemporary Liberalism, Notre Dame, Ind: University of Notre Dame Press, 1997, 93-137

38 The term dalit refers a community in South Asia that has been traditionally outcaste and considered as bottom line people in terms of socio-religious structure. The degradation of their human identity emerged as inhuman problem during the British colonial regime in India when the regime defied them, through a statute called the Criminal Tribe Act in 1911, as the criminal tribes and prohibited their mobility from one place to another. The British colonial regime was fully responsible to legally institutionalize as well as criminalize the identity of the so-called dalit population. See, SashiTharoor, An Era of Darkness: The British Empire in India: New Delhi: Aleph Book Company, 2016, p. 111.

39 For more information see, YubarajSangroula, Jurisprudence: The Philosophy of Law, Lokuitur Publication, New Delhi, 2015

40 Martha Nussbaum, 'Capability and social justice,' (2005), 14(2), International Studies Review, 123

41 For more elaboration see, YubarajSangroula, Right to Have Rights, Lex and Juris Publications, Bhaktapur, 2019

yield injustice makes it possible to perceive or understand the concept of justice. Categorically speaking, the act of addressing the underlying factors or causes and underlying dynamics of injustice is called justice. No judgment of the court that consists of a set of subjective rhetoric can establish justice without an empirical inquiry of facts, causes, or underlying dynamics that play roles in yielding the state of injustice. Jurisprudentially speaking, injustice is a state of inequality or deprivation, known as the state of subordination and violation of rights by one causing tangible harms to another.[42]

As indicated before, the influence of formalism, if not anachronism, beset Nepal's prevailing justice system, apparently and harmfully. Therefore, the judicial system in Nepal functions grossly traditionally. Consequently, it conceals the objective identity of an individual. It defines individual seeking redemption from injustice as a 'party to the case,' which is a derogatory abstraction of the objective individuality of a person. This judicial tradition is not a necessity; rather, it is a judicial obsession yielded by the practice of an unlimited form of formalism, which forms a primary notion or approach of the prevailing system of justice in the most decolonized countries. This formalism reduces an individual to a non-biological entity first and treats him/her as a conglomeration of rights. This approach is a product of the Euro-centric jurisprudence, which adopts the formalist approach as a fundamental tool of ensuring equality before the eyes of the law. The concept of equality emanates from the concept of personality, a total of rights, which is considered one of the most cherished accomplishments of European jurisprudence.

Is a party to the case or an individual entitled to seek help from the judicial process? Does the court or judicial institution deliver justice to the party to a case or individual? Is the process of justice a need of a human individual or an abstract entity, called a party to the case? These questions find no attention for deliberation under the formal system of justice or the discourse of the so-called judicial jurisprudence. The main reason that the formalist judicial process reduces the concept of justice into a mechanism of 'judgment' on the issue of debate. This process brings two generally unequal persons through abstraction into 'so-called equality before the eyes of the law,' treating them as parties detached from the social reality—the facts of being a part of the society and its phenomena. This process of justice is more an institutional melodrama than a process of focusing on facts of issue—the causes, factors, or characters of the event or set of events producing a situation of injustice.

However, how far are people in the social setting empirically equal to enjoy the rights, privileges, and advantages? Is an individual equally competent to enjoy equality? Of course not. In society, people are unequal, particularly due to their respective differences in performing human functions. Some people lag educationally, thus lacking the required potential for perfection and innovation. Some are fully incapable, and others are less capable of effecting changes in their lives than others. The diversity of potentials among persons in society is bigger. Hence, though they are free like others, many people cannot enjoy the same benefits as others. The prevailing formal

[42] Ibid, 197-228

system of justice is beset by this difference tremendously. It is largely driven by the theories, principles, doctrines, and values employed by the ruling segment of the society. Therefore, it is fully inaccessible, discriminatory, and biased to the poor and deprived people. It tends to serve the interests of the powerful segment of the society, who generally hold control of the nation's economy. These elites, supposing the masters of humankind in the words of Adam Smith, are greedy of state power and wealth. They possess control of the state's institutions, including the judiciary. Many scientific observations manifest that the institution of the judiciary known as an independent organ of the state is neither independent nor fair to the vast majority of the population. Barry Friedman and Jeffrey Rosen have presented their categorical opinions in this regard. They opine that the American Supreme Court cares about elites but not the common people. In most countries, the courts have failed to protect common people against authoritarian actions of the other branches of the government, which the elitist groups of the society generally control. Courts are neither sensible nor responsible to the common people. Consequently, they fail to deliver justice empirically, ensuring fair and impartial justice. They are often potentially dehumanizing individuals who have less capability or are forced to live in a state of subordination and cannot enjoy human potentials.

It is an undeniable fact that individual lives are biological as well as social. Every individual grows biologically as well as socially. His/her relation with biological and social reality is indispensable and inherent. The socio-economic conditions play a vital role in the smooth physical and mental growth of every individual, thus making the biological reality of the individual essentially connected with the socio-economic reality. The factor of socio-economic reality is, therefore, an unavoidable dynamic of human development. Hazardous and adverse socio-economic conditions push individuals to the risk of mistreatment by their fellow individuals, social institutions, and the state. Against this perspective, the concept of social justice is vital to free individuals from their adverse conditions. It requires the formal justice structure to carefully examine the factual conditions of individuals responsible for squeezing individuals within the vicious cycle of the state of *regressive status quo* and socio-economic deprivation or subordination. No delivery of fair and objective justice is possible without a thorough inquiry of facts involved in yielding a state of injustice, e.g., the condition of socio-economic deprivation or subordination. The condition of socio-economic deprivation or subordination occurs mainly due to the violation of the equitable distribution of resources and the protection of individual human dignity. The primary preoccupation of the justice system is to protect the rights of every individual to enjoy a dignified life socially, economically, and politically. The justice system cannot meet this goal without a thorough empirical inquiry of facts negatively affecting or likely to affect an individual's potentials who are suffering from socio-economic deprivation or injustice. However, courts often fail to pay attention to this aspect of justice, known as social justice.

Understandably, the concept of social justice demands that the formal or state's justice system must focus empirically on factors responsible for generating the state of injustice. The concept of social justice is mandatory for courts to transform the

mechanical process of justice into a fair and objective process of justice. This way, courts will be competent to impart impartial justice. Hence, they must abandon the formalist practice of seeking impartial justice by wrestling for so-called justice clouded by abstract notions and idealism. A true justice, that eliminates the state of injustice, stresses the empirical *Modus Operandi* in the process of justice. The empirical *modus Operandi* of the justice process examine the issue of dispute or conflict within society's socio-economic and political contexts. It examines the causes of dispute or conflict as a product of the socio-economic dynamics of the social structure. The dispute or conflict occurs when the social structure fails to accommodate the diverse interests of individuals. It is equally true that the dispute or conflict occurs due to the failure of society to accommodate the demands generated by the change. A person commits fraud in tax because he/she obtains no return for what he/she pays. A person commits a crime because the system of security fails to protect the life of the deceased. A person takes another's property because society fails to enforce moral rules, and the state's law enforcement is weaker. Hence, if courts fail to see the bigger picture of society cannot locate the true picture of the problem. The concept of social justice argues that the dispute or conflict between persons or the state of deprivation faced by one or more people is an outcome of the ill function or failure of the social structure. Understandably, the concept of social justice stresses the cause of the dispute rather than its outcome. The concept of social justice provides a torch light for courts to search the truth from facts. Only relying on this type of *modus operandi,* the judicial apparatus of the society can ensure achieving objective justice—securing justice by addressing the state of injustice. Following the process of locating and addressing the causes and dynamics of injustice is an appropriate way for securing fair and impartial justice, thereby securing social justice. At this very point, the principle of capability plays a vital help in the system of justice achieving the goal of social justice. Many people suffer injustice because they are incapable of invoking the help of the state to redeem their sufferings.

## *PRAGMATIC SOCIO-ECONOMIC DEVELOPMENT MODEL FOR BUILDING INDIVIDUALS' CAPABILITY*

Before jumping to seek answers on how the interface works and a pragmatic socio-economic development model can be built, it would be worthy of reflecting on some issues or problems facing the prevailing systems of governance and development paradigm in developing societies. The findings of many surveys have revealed that the problem of inequality of wealth, incomes, and employment opportunities is becoming more and wider among the people. Poverty across the world still poses one of the gravest problems. Many people live even today in a state of cruelty, structural violence, and several forms of discrimination. The so-called democracy has abjectly failed to answer the crisis of inequality. Hence, it is the right time for jurists and development economists to ponder seriously upon the consequence yielded by the monopoly capitalism practiced by the so-called liberal democracy. Particularly, the failure of the post-1980s neo-liberal economic model is far-reaching. A considerably larger population has gone further poorer in the wake of the unregulated market economy. It affected an enormously large majority of human populations grotesquely. One of the

major causes of the grotesque failure of the neo-liberalist development model is its mechanical framework of functioning; its overarching technocratic policy framework employed to alleviate the three crucial deprivations, namely the deprivation of entitlements and social exclusion, and lack of access to economic resources and life opportunities. This failure resulted in devastating implications on marginalized peoples' lives that constitute most of the world population. The accountability to this devastating consequence primarily goes to the hegemony of developed countries in trade and the corrupt state bureaucracy of developing countries, particularly those countries that have inherited the colonizers' political systems and institutions.

A group of economists obsessed and beset by econometrics or calculus magic principles is the main culprit to producing this situation. They ignore the rights of poor people and throw the dust on the eyes of all by generating fake statistics showing that the size of the poor population is rapidly reducing. They distribute rich people's wealth on paper to all and shamelessly declare that 'everybody poverty is alleviating.' The reality is different, however; rich people are becoming richer and poor the poorer. The share of international organizations and donor agencies is equally bigger. Doggedly inspired by the rent-seeking attitude, they extract wealth from developing countries by extorting their scarce resources.

Similarly, the pro-establishment intellectuals from developed countries are equally responsible for causing the disastrous situation to the poor global population. It plays a strong role in validating the exploitative policies of the developed countries' governments injudiciously. The betrayal of the international organization, the government of the capitalist developed countries, and their parroting intellectuals is mainly responsible for widening the inequality between developed and developing countries and rich and poor populations.

In the opinion of Joseph Stieglitz, an American novel prize laureate, this responsibility of this anti-human, exploitative, and anti-poor economic development model primarily goes to the international organizations established to implement Washington Consensus. The failure to achieve a just and rational world order was caused by, in words Stieglitz, 'a betrayal of international organizations like the International Monetary Fund and World Bank as well as the developed countries.'[43] This betrayal was committed to develop countries as well their poor population. In the preface of his seminal book, *Globalization and its Discontents,* he has confessed: "Inside the Clinton Administration, I enjoyed the political debate, winning some battles, losing others… I knew that ideas mattered but so did politics, and my job was to persuade others not just that what I advocated was good economics but also that it was good politics. But as I moved to the international arena, I discovered that neither dominated the formulation of policy, especially at the International Monetary Fund."[44] In the past several decades, the world has witnessed that the IMF prescribed outmoded, inappropriate standards without considering the effects on the people of developing countries. It provided a single prescription for all problems.[45]It was nothing but '*Neoliberalism*' that sought

[43] For detail description See, Joseph Stieglitz, Globalization and Its Discontents, Penguine Books India Pvt. Ltd. 2002
[44] Joseph Stieglitz, Globalization and Its Discontents, Penguine Books India Pvt. Ltd., New Delhi, 2002, xiii
[45] Ibid

unconstrained free-market policies and rejected any forms of regulations. Stieglitz recalls, "Open, frank discussion was discouraged –there was no room for it. Ideology guided policy prescription, and countries were expected to follow the IMF guidelines without debate."[46]

After 1992, Nepal, for instance, fell into a deadly trap of IMF and World Bank's structural reform policies. In the words of Stieglitz, these policies arguably designed 'to help a country adjust to crises as well as more persistent to imbalances' were never meant to encourage and help developing countries stir their economic rise. IMF and World Bank's goal was to obtain eternal control over the economic policies of the powerless, poor, and politically unstable developing countries. These policies led to the economic disaster in Nepal, as most people know about it, which ultimately resulted in a political quandary.[47]The most fateful consequence was that Nepal's burgeoning industrialization suffered badly in the name of a structural policies-led privatization drive. The Structural Adjustment Policies continue to grip Nepal's economy even during the 2020s, though the Communist party had an overwhelming majority in the Parliament. The political and psychological bullying used by international organizations and donor agencies was pervasive.[48] Even international law has been used as a tool of fear—a tool of massively legitimizing neoliberalism. The ultimate goal is to transform political power in the hands of corporatist masters. Thus the prospect of building a regime based on socio-economic justice would be eliminated forever. The impact of neoliberalism is tremendous in Nepal's judiciary. It is self-evident by the emphasis on justice in commercial cases. A separate commercial bench resulted from a strategy to institutionalize neo-liberalist influence on the judicial system.

The injudicious situation of inequalities – of wealth, income, and status– underlie three forms of socio-economic deprivation mentioned earlier. One of the worse impacts of the failure to foster and institutionalize the principle of social justice, the network of elite political patronage in power, and corruption within the bureaucracy controls all levels of governance in developing countries, particularly in those countries that have endorsed Western liberal democracy. In most of these countries, the political system has turned into a system of '*Mobocracy*,' thus fully undermining the process of people's socio-economic transformation. The agreement between a corrupt leader and voters results in a model of 'induced development.' Political leaders approach voters with the promise of development projects. People agree to vote for the leader who possesses more power to influence the government for their benefit. This kind of 'induced development model' destroys the morality and ideology of politics.

The concept of social justice faces a deadly blow, consequently. The enjoyment by general people of basic in such countries has been an unfulfilled aspiration for a long time. In Nepal, the so-called liberal democracy has been in function for three decades since 1990. Before that, it had a system also called democracy—*Panchayat Democracy*

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46 Ibid

47 For elaborate discussion in this regard See, YubarajSangroula, Right to Have Rights, Lex and Juris Publication, Bhaktapur, 2019

48 Joseph Stieglitz, Globalization and Its Discontents, Penguine Books India Pvt. Ltd., New Delhi, 2002, 42

for 30 years. In these two thirty years, the rich became richer, and the population of the poor increased.[49] More Nepalese people have become jobless, deprived, and unequal. The economically top-ranked ten percent populations has privileged access to higher education, though the quality is poor. The higher education offered does not generate skills and knowledge for employment and production. It is good only for some kind of degree. Since innovation is a serious problem in this education system, graduates look for jobs in government institutions. Since the overwhelming majority of youths benefiting from this type of higher education come from the top-ten percent, it has the privilege to enjoy employment in government policymaking and enforcement agencies. Seemingly, the education system itself is a major factor for, or contributing to, the increasing class division of the population in the future.[50]The access to and participation of the marginalized population in higher education is dismal.[51]

The net consequence of these problems and challenges in social justice is a grotesque failure. Deprivations among the larger population persist, thus making people within this group incapable of performing perfect human functions. They are pushed back and forced to live in an adverse situation. Their protected sphere is vulnerable and the vector of life poor. In that condition of life, they must accept all forms of injustice fallen on them. The so-called independent judiciary is available for no kind of help. It is costly and formalist. This kind of judiciary least appreciates the social justice jurisprudence. A deprived or poor person cannot access this judiciary for three main reasons. First, he/she cannot afford to hire legal professionals by paying a costly fee. Second, he/she cannot afford to pay court fees and other incidental expenses that occur in every procedure step. Third, corruption in court is rife. The saying goes like 'you have to buy justice.'[52]The current conflict between the Bar and the Chief Justice is an example, ruining court. The report of a panel of the Supreme Court's judges confirmed that the corruption in the judiciary is rife.[53] Corruption destroys all prospects of social justice. When corruption prevails, the justice process turns into varied forms of mockery.

Like many other developing countries, the people of Nepal have cherished aspirations to have safeguarded their physical integrity, personal autonomy, the freedom of employment and right to development, basic needs (such as health and social security), and economic participation. However, these aspirations are merely dreams, never fulfilled. The vast majority of people in Nepal are struggling to survive, with a type of life that cannot perform human functions. They have to survive with meager means of subsistence in extremely obliterated conditions. Political leaders behave like

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49 For more detail information and statistics', YubarajSangroula, Right To Have Rights, Lex and Juris Publication, Bhaktapur, 2019, 208-228

50 See Report of the Higher Education Taskforce for the Establishment and Management of Universities in Bagmati Province, 2021, Ministry of Social Development, Bagmati Province, Hetauda

51 Ibid

52 "The Supreme Court panel commissioned by Chief Justice of Nepal, CholendraRana, has revealed startling findings of the national judiciary. The panel found the corruption is virulent in the judiciary. Right from the selection to the appointment, the judiciary was found to be accepting bribes. Justice Hari Krishna Karki, who headed the panel, submitted the disturbing report to CJ Rana on Thursday." See, Nepali Supreme Court Panel Finds Judiciary Corrupted, Kathmandu, Nepali Sansar Online, 25th August, 2021 at <https://www.nepalisansar.com /government/nepal-supreme-court-panel-finds-judiciary-corrupted/> Accessed on 6 October 2021

53 Ibid

lairs and clowns—they are never tired of telling lies to grab power and involve themselves in myriads of policy corruption. They plunder and pillage the national resources at the cost of general people's hardships. Only the judiciary can stand as a guardian of the common people in these extremely adverse political conditions by enforcing justice based on social justice. The country's highest court can require the legislative body to adopt policies and laws guaranteeing people's rights to development. It can oblige the executive government to prioritize the development endeavors to benefit the poor and general people. However, if the independence and efficiency of the judiciary deteriorate, the entire system of democracy faces a danger of collapse. Judiciary's role and image in Nepal have been sharply deteriorating over the last three years, beyond imagination, after the present Chief Justice Rana took office. The Chief Justice's persistent refusal to recues himself from the review of the petitions against appointments of various Commissions 'officials is the most glaring example of the deteriorating image of the judiciary.[54] In these petitions, the chief justice is a member of the body making recommendations for appointments. He is a party to the case in these petitions. Despite such a naked fact, it is unusual for the chief justice to preside over the Constitutional Bench and dispose of the petitions. The conflict of interests is apparent. The situation manifests a deplorable situation for the realization of social justice through the administration of justice.

## *THE CONCEPT OF SOCIAL JUSTICE AND HUMAN CAPABILITY: INTERPLAY*

The concept of social justice inherently underlies the enforcement of the right to development as a fundamental right. No social justice flourishes without protecting development rights, which materializes by enforcing several economic and social rights. At this point, we need to demystify the term development and, for that, we have to think about the basic notion of human life. Human life is the potential of progressive transformation. The importance of human life stems from the concept or idea of humanity, which represents a sum-total or an abstraction of all general tendencies of the lives of human beings across the globe since the early days of their civilization development. These tendencies are nurtured and refined consistently over thousands of years. The following piece of Karl Marx's writing, *Economic and Philosophical Manuscript* 1844, is quite worth recalling to understand the tendencies of human life and humanity. He says: "It is obvious that human eyes gratify themselves in a way different from the crude non-human eyes…The sense caught up in the crude practical need has only a restricted sense. It is not the human form of food that exists for the starving man, but only its abstract being as food; it could just as well be there in its crudest form, and it would be impossible to say wherein this feeding activity differs from animals."[55]

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[54] UN, 'Nepal: New Appointments Undermine Rights Oversight Body, UN Experts Warn,' UN News, 27 April 2021, Available at <https://news.un.org/en/story/2021/04/1090692>, Accessed on 6 October 2021

[55] Cited by Martha Nussbaum, 'Capability and social justice,' 14(2), International Studies Review (International Reality and the new Equality), Sumer 2005, 123, 135

Marx is adequately instructive about certain human functions vital to differentiate human beings from other animals. What he insightfully means is that when human beings eat, they use their sense also. It means that every act of human beings has a sense of reasoning. Unlike animals, human beings perform something with clear reason or sense. A normal human being has the centrality of *using sense* when he/she is doing something, like eating, falling in love, and maintaining harmony with fellow humans. He/she does not do anything just in a way, as animals do. According to Marx, a normal human way of doing functions infuses *reasoning and sociability*. Sensibility and responsibility are inherently involved elements of human action. However, the situation of starving human beings is quite different; it would simply be not possible to infuse these two qualities of a normal person's action. Some important conclusions follow from this statement. As opined by Nussbaum,[56] (a) "like a starving man, who has very little sense of *Reasoning And Sociability* in eating, all human beings do not automatically have the opportunity to perform their human functions humanly. (b)There are some conditions in which people are forced or habituated to live in. The conditions of starvation and deprivation of knowledge or information are examples. In such conditions, an individual has to live in a situation of complete lacking, as animals have to live in. Like animals, individuals in such conditions have to live in want, and it becomes a habit. As animals cannot change their lives, the ignorant, deprived, and suppressed peoples live without change—a *State of Regressive Status Quo*. The difference is that human beings can change the condition to acquire, develop, or possess the capability necessary to bring about changes. Understandably, the state of human life without sensibility and responsibility cannot change the existing condition of life due to a lack of necessary capability.

Hence, deprivation or subordination is a condition that cannot have a progressive change in life. This condition occurs economically, socially and politically, when some people monopolize the power of the society and state. Therefore, deprivation is an outcome of imposed conditions of life by one over another. Someone is poor because another has unjustly accumulated a huge amount of wealth. This condition implies a state of injustice. Social justice is an antithesis to correct the situation. Fair distribution of advantage is justice because it is fair. This explanation tells us that the concept of social justice provides a ground for the socio-economic justification for State-administered justice. It is fair because it fosters social justice.

Unfortunately, however, the larger part of the human population in the world even today is living under extremely adverse circumstances. This life is hardly different from that of animals. Even today, millions of people worldwide lack the capability to perform human functions, as Marx noted. They are unable to transform their lives into perfect human life. They are so because they lack the opportunity to construct their capability to perform what a capable person can do. This opportunity relates to information and knowledge, including skills of performing functions. The condition is an example of injustice. The modern judiciary has the role of rescuing such people by

[56] Ibid

obliging the state to provide the opportunity for information, knowledge, and skills to construct their capability. The role of courts in this goal is insignificant, though. In Nepal, the situation is deplorable truly. This institution is affected cancerously by politics and corruption.

The above arguments help us conclude that the so-called poverty, as econometrists keep explaining, does not exist as an independent fact. In fact, it is a concept constructed to explain the facts signifying the condition of social exclusion, economic deprivation, and the lack of access to resources and development opportunities. These conditions form the state of deprivation or subordination. Figuratively, but wrongly, the term poverty is used to describe the state of deprivation or subordination. Marx has defined it as exploitation by means of class division in which a smaller number of people exploit to its benefits the labor of mass of people.

Consequently, the larger mass of people in society lacks the opportunities necessary for constructing capabilities. These adverse conditions confronted by the masses are not the results of misdoings, wrongdoings, or not-doings of the people themselves, living in an abject condition. The object or subordinated conditions of the lives of masses result from inherently exploitative policies of the State. These conditions result from the state-controlled human agencies' failures to build the capability of people living in abject conditions. In modern progressive society, jurisprudence or the science of law finds a tremendous role of courts to effect corrections in these socio-economic maladies. However, the formalist stereotypes of courts prevent them from performing their role. The concept of social justice is an instrument to break the *Regressive Status Quo* of the judicial process.

As long as the condition of deprivations persists, it will hinder the prospect of constructing the capability necessary to acquire reasoning and sociability—sensibility and responsibility—according to Marx. Until people are informed to make claims for social justice, the human-controlled state agencies keep directing their policies, plans for the exclusive benefit of a selected few in the society and ignore those who constitute the majority of society. According to ideas invented by modern progressive jurisprudence, the judiciary may play a vital role in altering this situation by applying the concept of social justice. It can employ several tools for ensuring the application of the concept of social justice. A few of them, for instance, is the constructive judicial review; the *Suo-Moto* information of corruption and abuse of authority; the social interest litigation; the pragmatic or communitarian construction of Constitution; the impact analysis or audit of the administration of justice; the investigation of the judiciousness of the laws enacted by the legislative body; and constant review of the judicial process. Judiciary can ensure implementation of these tools by engaging academics for help as expert *Amicus Curia*, the auditors of the impacts of laws and judicial processes, and researchers.

Lack of capability in human beings to change socio-economic conditions and address the emerging needs of meaningfully productive life no person may be able to perform a human function. Such lacking in human life forms a vicious circle of the ignorance of

idea or intellect, the absence of innovation or creativity, and the absence of resources. These elements of the vicious circle pose a deadly bar for individuals to learn creativity in producing essential ideas or goods or commodities. These three elements constantly spiral and push individuals into an invincible trap of incompetency. Poverty in this sense is nothing but an outcome produced by the vicious circle of the three lacking in life. AmartyaSen, a novel prize laureate development economist, characterizes the given situation as a state of life with the lack of capability to identify or recognize life's preference and make the right choice to transform it towards a better state. Let us examine his following assertion:

> *"A person's preference over comprehensive outcomes (including choice process) has to be distinguished from the conditional preferences over culmination given the acts of choice. The responsibility associated with choice can sway our ranking of the narrowly-defined-outcomes (such as commodity vectors possessed), and choice functions and preference relations may be parametrically influenced by specific features of the act of choice (including the identity of the chooser, the menu over which choice is being made, and the relation of the particular to behavioral, social norms that constrain particular social actions).*[57]

Nussbaum has termed a choice as something that is governed at a certain level intuitively. She argues that every individual has the intuition to acquire the capability essential to perform human functions better.[58]Following Nussbaum's analysis, a person's preference (which is volitional) for the comprehensive outcome is different from conditional preference (non-volitional) because his/her need guides the person's preference. The choice of an individual can determine his/her ranking of the outcome. Specific features of the act of choice may influence the relationship between a person's choice and preference parametrically. Therefore, a person's better capability leads to an informed choice; therefore, the preference is governed by the informed choice. Behaviorally, in the words of Nussbaum, every individual prefers to maximize the outcome of his choice.[59]However, one fails to do so because of the lack of capability. As explained by Marx' aforementioned, observing from the lenses of Nussbaum's idea that human persons have salient of preferring intuitively better, lead us to conclude that every human individual is endowed with an innate potential of fostering capability, thus flourishing ability to carry out human functions with perfection. He/she can enhance such capability by having better information through education and access to resources. His/her access to information and resources can be fostered, enhanced, or strengthened by establishing a system of justice that protects his/her fundamental claims for equality in wealth, income, jobs, and institutional protection against discrimination and deprivations.

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57 AmartyaSen, 'Maximization and the Act of Choice', Econometrica, 65(4), July 1997, 745-779

58 Martha Nussbaum, 'Capability and social justice,' 14(2), International Studies Review (International Reality and the new Equality), Sumer 2005, 123, 135

59 Ibid

The jurisprudence focuses on a person's capability as one of his/her fundamental claims. Doing so relies on a principle that holds that injustice is perpetrated by either fellow humans or the state institutions. As a pillar of social justice, the UDHR, in 1948, recognized the right to equality as an absolute right. The Convention on Civil and Political Rights, 1966, established the enforceable measures to empower individuals enjoying the freedoms to choose the profession and enhance capabilities necessary for the adequate vector of life. Individuals' freedom for acquiring knowledge and, thus, creating a condition to have a dignified life has been guaranteed without any ambiguities. The constitutions of most countries have incorporated these provisions of international human rights instruments as fundamental rights of citizens. However, the conservative tendencies shower judiciaries in the world, thus hindering them from emerging as pro-people and pro-poor institutions. They are highly dogmatists and pro-elitist in their thoughts as well as functions. Judiciaries in most developing countries unreasonably emphasize the significance of civil and political rights alone. These rights are underscored as the derivatives of civil and political liberties, whereas individuals' rights to socio-economic development are overlooked. In line with principles adopted by Western liberal democracies, judges of the developing countries tend to approach the realm of justice in utter exclusion of the social justice principles. Consequently, they give very limited scope for access for people seeking the enforcement of the development rights; the concept of social justice is the least preferred agenda of judiciaries.

What Sen's thesis overlooks is to consider the impact of the surroundings in making a person's choice of preference? *Vector of commodity*—a special quality standard of commodity[60]—has two key attributes. One is its essence, and another is a given value. The primary and secondary qualities of the commodity vector (such as earning to support life) are these two attributes. The primary quality is unchangeable, but the secondary quality is perceptual, relatively. Take for a salary of twenty thousand rupees as an example. The essence of ten thousand is the same for all. However, the value of ten thousand differs as per the given circumstance. It might be enough for the substance of a family with five members for a month. It would be far short to meet the requirement of a family with ten members, however. Conceivably, the value of a commodity also influences a person's choice of preference. If a boy has to choose between Sen's book on *Poverty and Famine* and a football, his preference will go to the football. In this sense, the three objective conditions of poverty may maximize or lower the quality and quantity of outcomes. These three objective conditions are the lack of an individual's capability to enjoy basic rights to socio-economic development, the lack of capability to make an informed choice, and the lack of capability to alter the existing circumstance. Primarily speaking, the lack of capability in individuals is an

[60] AmartyaSen refers to, while discussing on his theory of Maximization And Act Of Choice, Pierre De Fermat's communication to Rene Descartes, where Fermat talks of externalvalues. The external values take maximum or comprehensive value as core values, whereas negativeor weaker derivatives vanish. This theory has been metaphorically drawn from wise saying, "When day matures, the quality of darkness disappears."Mid-day may, therefore, may be taken as an opportunity for the maximization of the brightness. See, AmartyaSen, Maximization and the Act of Choice, Econometrica, Vol.65, No.4(July 1997), 745-779.

outcome of the lack of capacity to make an informed choice. Many people face deprivation or subordination due to the lack of capability to make an informed choice, resulting from the lack of capability to do so. However, the systems of justice, governance, and social service lack interventions constructing capability in persons. The formal structure of the justice system may do a lot in this respect if it properly understands the role of promoting social justice. Nevertheless, the judges' centralist-legalist orientation in so-called liberal democracy, particularly in the former colonies, is a serious obstacle in this regard.

The formalist system of justice is an aggravating factor. It stresses the practice of litigation unendingly as a principal rule of the administration of justice; the formalist model of justice regards litigation as an unavoidable instrument for dispensing justice. The political elites in capitalist democracy appreciate and approve litigation as the only reliable mechanism of justice. The main reason is that it protects their interests. The *Golaknath and Keshavananda*cases of India are two illustrious examples by which the capitalists in India succeeded in blocking the government policies of an egalitarian society.[61]

Of course, the design behind the formalist system is to secure elites' control over statecraft and societal affairs, including resources. Litigation provides a better opportunity for these purposes. Parties to disputes for subordinated or marginalized class lacks required information about procedures and methods applied by the litigation process. Hence, this model of the administration of justice works as an effective tool for elites to subordinate people's general masses.[62]For instance, the *Keshavananda Bharati case* in India defined property rights as fundamental rights. It prevented the Parliament to amend the Part III of the Indian Constitution, saying that these rights form the basic structure of the Constitution.[63]

Regarding the formal structure of justice, Omri Ben-Shahar, an American legal scholar, says, "[It] often fails to meet its egalitarian aspirations, because groups that are not the intended targets of the intervention deploy access and its benefits disproportionately." He claims that it benefits various elites in the expense of taxes paid by taxpayers, indirectly by weaker groups."[64]The formal structure not driven by social justice in motion fails to ensure that everyone has the fundamental right to legal identity for seeking equal treatment. Consequently, the poor cannot stand in competition or legal battles between the parties. One reason is that many laws fail to hold the rights,

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61 For how lawyers attacks against the Government's policies and laws to abolish Zamindari system and nationalization of Banks, Generally See, Fali S. Fali. S. Nariman, Before Memories Fades… an Autobiography, Hay House India, New Delhi, 2010

62 See, Robert W. Gordon, 'Lawyers, the Legal Profession and Access to Justice in the United States: A Brief History,' Daedalus, A Publication of the American Academy Arts and Science, 2019, doi:10.1162/DAED_a_00551 availablea<https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Gordon.pdf> Accessed on 7 October 2021

63 For how lawyers attacks against the Government's policies and laws to abolish Zamindari system and nationalization of Banks, Generally See, Fali S. Fali. S. Nariman, Before Memories Fades… an Autobiography, Hay House India, New Delhi, 2010

64 Omri Ben-Shahar, 'The Paradox of Access Justice, and Its Application to Mandatory Arbitration,' (83:1755), The University of Chicago Law Review, 2016, Available at<https://chicagounbound.uchicago.edu/cgi/ viewcontent.cgi?article=12700&context=journal_articles>, Accessed on 7 October 2021

interests, and livelihoods of poor people equally as they do for the rich. The system is mechanical in *Modus Operandi* and disregards the significance of relevant public institutions and legal culture with which the poor are already familiar. It distances courts from the poor and often shows biasness to people's forum of dispute resolution.[65]

Under the prevalent judicial structure, the Anglo-American setting, in particular, legal professional representation is mandatory. It follows limitless procedural formalism and professional niceties. Judges view themselves as umpires and bear the status of *Lordship*. Lawyers are called *Learned Persons*. For the protection of lawyers and judges, contempt of court proceedings exists as a special measure of safeguard. The Courts take judicial decorum and formalities as significant tools for the fairness of justice. Courts and lawyers honor these formalities' *celebre*rituals. In addition, judges and lawyers apply the legalist-centralist doctrine to guide the entire process of justice. Conceivably, procedural formalism outweighs the necessity of probing reality objectively. The poor parties to cases cannot grasp the 'majestic significance of such formality and sophistication.' Neither can they afford to hire the service of lawyers. Ultimately, the so-called majestic adversarial judicial system becomes a paradise of elites.

The premise of the Anglo-American model of the judicial system lies, though contrary in practice, on the principle of equality, arguing that rich and poor enjoy the same equal protection of the law. The reality of capitalist societies, including developing countries that have borrowed the Anglo-American adversarial model, is implausibly different. The access to justice in such societies depends on how much a person can pay to the lawyer and the system itself. Of course, the marginalized and poor people encounter systematically worse treatment from the adversarial judicial model. The poor people have to face incarceration before the trial because they cannot afford to pay security for bailment, thus resulting in a higher conviction rate of poor accused persons.[66] Individuals who cannot afford to pay the penalty have to face additional incarceration. These counterproductive policies, existing as prevailing Anglo-American formal judicial structure, worsen the endless cycle of deprivation and marginalization of masses of people.

Nevertheless, the judges and lawyers remain unconcerned with the objectively worse conditions of general peoples; rather, they profess legality and justiciability of laws enacted by the parliament that is already dominated by elites. The larger segment of the judiciary also comes from elites. Understandably, the social justice principle that pays attention to the objective reality of poor people's lives stands immaterial and irrelevant to the contemporary system that administers justice—it is marked by adversarial nature.

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[65] Commission on Legal Empowerment of the Poor, 'Making the Law Work for Everyone: Report' I, CLEP and UNDP, 2009, New York, 6-7, Available at <https://www.un.org/ruleoflaw/files/Making_the _Law_Work_ for_Everyone.pdf> , Accessed on 7 October 2021

[66] See the Report "The Legal System has failed its Promise to Equal Justice, Equal Justice Under Law, at <https: //equaljusticeunderlaw.org/overview>, Accessed on 7 October 2021

### *The necessity of searching objective truth and the interface of social justice with social reality*

The objective social facts inspire and drive the concept of social justice as a component of protecting poor and marginalized people from deprivation and subordination. Conspicuously, the concept of social justice stresses the need for a scientific method to dig out the problem of injustice. Hence, social justice relies on the truth extracted from facts, thus avoiding rhetoric in the name of logic. Since the adversarial judicial structure depends on a legal battle between the two, it meticulously fails to probe the objective truth of the legal problem or issue. As a prototype of the justice system in most former colonies, the Anglo-American adversarial judicial system believes in the effectiveness and rationality of a theory of justice that relies in inference (conclusion mostly derived from interpretation suffering myriads of fallacies) an essential tool of drawing logic. This prototype functions by the application of laws and procedures transplanted from the colonizers' systems. Understandably, it ignores the principle that the *truth* is existential, not a conjecture or interpretative idea. The empirical or existential truth relies on the principle that stresses the significance of observation, probe, and drawing truth from facts—'seeing leads to belief.' It means that only objective facts do establish an empirical truth. The lives of people in slums and ghettos are an objective reality derived from facts. The concept of social justice orients the system of justice from rhetoric to objective truth.

Suppose one applies this fundamental principle of empirical justice in practice. In that case, one may be attracted to the deplorable conditions of lives faced by millions of people forced to survive in ghettos, extended slums, and socio-economic deprivations caused by the lack of productive means and support to enhance the vector of life. Inequality in wealth, income, and distribution of jobs or employment is an observable and testable fact. As we all know, millions of people in South Asian cities live in the inhuman condition of slum life. The problem of millions of people living in far-flung countries is no better, either. Millions of people have to survive in a gruesome condition of the lack of housing, employment opportunities, foods, medicines, schools, and other essential commodities. Their basic minimum needs of a dignified life are absent. Many people are forced to die in the absence of access to medical help. Many women die because of mal-pregnancy or reproductive complications. Many children are deprived of education because they lack access to schools. Unfortunately, neither legal professionals nor judges have been attracted to observe these facts—the facts of injustice. The problems of ethics among lawyers, integrity among lawyers, capacity to make good laws among legislators, and ideological commitment among politicians are serious in Nepal, like other South Asian countries.

Among these deprived peoples are physically disabled, bartered, sexually exploited, and socio-economically subordinated women, socially ostracized peoples, and persons suffering from health-hazardous. Women in brothels and low-paid exploited workers are forced to live in gruesome health hazards. Among them, unnatural or premature deaths are common. Many such deaths occur due to starvation and lack of basic health

care. In these deprived peoples, millions are children who cannot afford to go to school, ending in child labor exploitation.

Moreover, thousands of prisoners survive in the inhuman condition of life; most were forced to commit crimes for food and medicines. Social exclusion forms the main factor to turn them into criminals. These categorically objective facts are the truth of the lives of millions, not to be inferred by applying principles and theories. They require no interpretation and inference. The population of prisoners is subjected to hatred, without sociological and economic analysis of their lives. Their poverty is criminalized, and the hatred follows subsequently. In the formal justice system, judges tend to belittle their humanity and treat them as somebody rather than human beings.[67]

These facts are existential and empirical truths. However, these existential and empirical truths matter hardly to the developing countries' prototype justice. The systems of some countries bear a heavy burden of colonial legacy. The South Asian countries are typical examples of this burden. Consequently, the South Asian system of the administration of justice has turned into a game of 'lawyers and judges.' The Constitutions of most South Asian countries have enshrined 'directive principles' stressing the significance of a socialist system of governance. Still, the justice system in South Asian nations hardly pays attention to the constitutional commitment to socialism because elites hold all state apparatuses. The legal professionals and judges believe in 'so-called common law adversarial system and pay no attention to transforming societies into egalitarian models. The Preamble to the Constitution of India and Nepal, for instance, categorically affirms and asserts the socialist obligation of the State, focusing on the state's role and responsibility to ensure security and welfare to people. For administering social justice by implementing labor policies humanly, industrial or business social responsibilities and wider mechanisms of social security services have widely been advocated by their directive principles in the Constitutions. These directive principles envisage certain key assumptions for the working of the economy and society; in fact, these assumptions are supposed to lay down the foundations for social justice and welfare system-driven governance. To look back, the principles of social justice occupied a prominent place in economic and social discourse before the 1990s, particularly until the era of neoliberal globalization usurped. South Asian countries adopted several laws guaranteeing opportunities of subsidies, technical support, financial aids, and tax exemptions to economically and socially disenfranchised populations, such as farmers, low-income workers, and the unemployed. These principles sought to confer a system of security against socio-economic inequality and dignity of life.

However, the advent of neoliberal market policies viewed the welfare system, in words V.R. Krishna Iyer, a noted Indian Supreme Court judge, 'as a symbol of

[67] Global Prision Trend" 2020, A Report of the Penal Reform International, London, May 2020 at <https: //cdn.penalreform.org/wp-content/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf>, Accessed on 23 November 2021

society's distrust of market in protecting basic human rights of the working people."[68] Hence, the neoliberalism drive withdrew the special importance to the protection of socio-economic rights. In that wake, a special judicial, administrative approach emerged to protect the interests of individual property rights than social interests. The *KeshavanandaBharati case* is an example.

Still, the Supreme Court of India somehow urged the government to enforce economic and social rights expeditiously and meaningfully before the 1990s. As a part of this judicial mission, the concept of social or class action litigation emerged as an important aspect of jurisprudence in India,[69]which Nepal also followed expeditiously. However, after the 1990s, this judicial mission reflecting on social justice was obliterated badly. After the 1990s, the Western foreign non-government organizations and donor agencies, along with international organizations such as IMF and World Bank, embarked with their ruinous and deceptive neo-liberal policies that conceptualized into Structural Governance Reforms—the structural adjustment policies. Under the rubric of structural adjustment policies, the flood of Western neoliberals decimated the rising jurisprudence of social justice in Nepal and India. The transplantation of Western commercial laws, jurisprudence, and judicial approach emphasized privatization and the open market drives in an inundated fashion.[70]

Nepal suffered heavily from this unwanted movement, which derailed the evolving process of judicial reform and took the judiciary fully into its control. After the 1990s, the Nepalese judicial system witnessed an unprecedented drive of neo-liberal approaches focusing on service to the business or elite classes in the administration of justice. This movement gave rise to the massive corruption in the judiciary, the influence of INGOs[71] in the judicial process, and the orientation, the syndicalism of powerful politically motivated and organized lawyers, and political interference in the process of justice and functions the Bar Associations. The concept of social justice lost its newly emerging momentum.[72]

In his revolutionary writings, the Chinese communist leader Mao Zedong says, "The truth ought to be drawn from fact."[73] Truths about society impregnate social facts. They manifest realities facing the given society. Every truth of society is thus lying in the facts the society is carrying on. The concept of justice cannot be separated from this social reality, either. It means that no judicial system or other apparatuses of dispensing justice can deliver justice in the disregard of prevailing social realities. The administration of justice becomes a futile exercise if it fails to attach itself to prevailing

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68 See, SarathBabu and RashmiShetty, Social Justice and Labour Jurisprudence—Justice V.R. Krishna Iyer's Contributions, Sage Publications, New Delhi, 2007 Cited in Debi S. Saini, Book Review, The Journal of Business Perspective, 11(4) (October–December), 2007

69 See, Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India Third World Legal Studies, 4, Article 6, 1985

70 See, Yubaraj Sangroula, Right to Have Rights, Lex and Juris Publications, Bhaktapur, 2018

71 See, Chandra D. Bhatta, 'The Interface between the State and Civil Society in Nepal,' Dhaulagiri Journal of Sociology and Anthropology, 10, 2016/67

72 Yubaraj Sangroula, Right to Have Rights, Lex and Juris Publications, Bhaktapur, 2018

73 Li Junru, What Do You Know about the Communist Party of China , Beijing, Foreign Language Press, 2011, 6

social realities. A justice system detached from the prevailing social necessity or reality is bound to become an unnecessary burden on the people's shoulders. Therefore, in the absence of adequate empirical landing, the administration of justice can manipulate social reality and pose a risk of fabricating rhetoric into reality in the name of principles, which may give rise to a divided society instead of balancing the diverse interests within society. In the absence of its attachment to the social reality, the judiciary becomes a desired institution of elites, thus helping them legitimate the enjoyment of special prerogatives at the cost of general peoples' marginalization and exploitation. Presently, the Nepalese judiciary bears this typical character. It has lost its significance and honor in the eyes of the people.[74]

Judges in the Nepalese judiciary come from, metaphorically speaking, the pockets of political leaders, the houses of businesspersons, the families of powerful judges, the non-governmental organizations supported by the foreign NGOs and donor agencies of powerful foreign countries, and the individuals from the community of lawyers with the ability to buy positions of judges. [75]These vices have turned the entire judicial system and judiciary into an 'utterly mocked system and institution.' The people's distrust of the judicial system and judiciary is rife. The lack of socially accountable attitude among judges is rapidly growing, thus pushing the administration system into a vicious cycle of corruption, politicization, and loss of independence. It has increasingly become anti-poor and unworthy. Inefficiency in works and lack of quality in the verdict are plaguing the entire system.[76]The ultimate consequence that ensues from this state of problems is that 'the poor are further victimized in the name of justice.' The prospect of social justice in this circumstance is truly grim.

## *SEARCH FOR AN APPROPRIATE PARADIGM OF SOCIAL JUSTICE*

The socio-economic deprivation faced by 60 percent of the global population is a fact, not a conjecture. Deepening and widening inequality in wealth and income is also a fact; it exists, and anyone can see it naked eyes. Not only does it exist, but also it is increasing alarmingly. As Joseph Stieglitz opines, mounting concern about the increase in inequality and the lack of opportunity doubts the credibility of democratic politics. The mounting inequality of wealth and lack of opportunities, as twin trends, are changing economics and democratic politics towards worse, and are affecting the very structure of societies."[77]In brief, these situations pose a doubt on liberal democratic values as well as economic principles. One has adequate evidence to argue that neo-liberalism pushed millions of people into a condition of economic deprivation and destroyed the social justice structure generated during the decolonization and post-Second World War era.

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[74] David Pimentel, Judicial Independence at the Crossroads: Grappling with Ideology and History in the New Nepali Constitution, IND. INT'L & COMP. L. 21(2), 2011, 207-227

[75] See, Post Reporter, Nepal Bar Association calls for a mechanism to control corruption in the judiciary, The Kathmandu Post, August 11, 2020, Available at <https://kathmandupost.com/national/2020/08/10/nepal-bar-association-calls-for-a-mechanism-to-control-corruption-in-the-judiciary>, Accessed on 13 September 2020

[76] Himalayan News Service, 'Judiciary most corrupt sector, says Report,' The Himalayan Times, Kathmandu, May 25, 2007, Available at <https://thehimalayantimes.com/nepal/judiciary-most-corrupt-sector-says-report/>, Accessed on 13 September 2020

[77] Joseph E. Stieglitz, The Price of Inequality, Penguin Books, London, 2012

In the wake of the destruction of social justice structure, as a dire instance of moral deprivation of the Western inhuman corporatist capitalism, rich peoples and corporations are swallowing all income without creating jobs but benefiting from the increasing services of the state power. [78]The governments in the capitalist world have categorically failed to provide people with knowledge and skills to make them more productive to earn an adequate living.[79]'Much about poverty is obvious enough,' writes Amartya Sen. He adds, "One does not need to elaborate criteria, cunning measurement, or probing analysis to recognize raw poverty and to understand its antecedents. It would be natural to be impatient with long-winded academic studies on *poor naked wretches with houseless heads and unfed sides and looped and windowed raggedness.*"[80]

Poverty is a state of the absolute want of capability to perform human functions, thus leading to animals' lives. It is a state of crude life, lacking reasoning and sociability. In South Asian societies, poverty symbolizes the life that deprives five cardinal freedoms making every individual's life dignified. The significance of these five freedoms in generating the capacity to use reasoning and sociability is immense and indispensable. These freedoms are *Ahimsa* (freedom against violence), *Aryogyata*(freedom against diseases), *Asteya*(freedom against absence or want—preventing immoral acts like theft), *Aparigraha*(freedom against exploitation), and *Amaratwa*(freedom against early or unnatural death). Various scriptures, including *Rig Veda*, have enormously expounded these freedoms' significance in human lives.[81]

Looking from the vantage point of those five freedoms, the state of poverty embodies violence, diseases, want, exploitation, and unnatural death.[82]Deprivation is the composite and factual outcome of these five unwanted conditions of life. Social justice is a realm of governance that makes every person capable of asserting means, resources, and knowledge to address those unwanted conditions of life, thus addressing the deprivation of these five freedoms. Like the South Asian system, the traditional Chinese culture evolved of the concepts of (i) *Xiaogang* (moderate prosperity), (ii) *Datong* (great harmony), (iii) *Fengyizushi* (having ample food and clothing), and (iv) *Anjuleye* (living and working in peace and contentment).[83] For Chinese society, the concept of social justice meant endeavors to attain these conditions. The judiciaries in South Asia fully forget these Asian values of meaningful lives.

## *THE INTERFACE OF DEMOCRACY AND SOCIAL JUSTICE*

Is there any role of democracy in the failure of social justice in South Asia and other developing? To ponder deeply upon this question, David Miller suggests examining certain principles that political scientists and economists use to evaluate democracy. In his view, we need to think about a question: Do social and political institutions

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78 Ibid, p. xxviii

79 Ibid, p. xxi

80 AmartyaSen, Poverty and Famines: An Essay on Entitlement and Deprivation, Oxford University Press, sixth impression, 2011

81 Yubaraj Sangroula, Concept and Evolution of Human Rights, Kathmandu School of Law Publications, Bhktapur, 2005, pp.26-27

82 For more detail See, YubarajSangroula, Right to Have Rights, Lex and Juris Publications, Bhaktapur, 2019

83 See, The State Council Information Office of the People's Republic of China, The Right to Development: China's Philosophy, Practice and Contribution, Foreign Language Press, Beijing, 2016

maintain affinities for one another? In his views, they do certainly. He says, "Principle of freedom, for instance, holds the corresponding principle of authority and equality."[84] N his opinion, individual freedom is an inherent social attribute, but the political authority regulates individual freedom, without a doubt.

On the other hand, equality is an attribute of coherence to maintain safety and peace in society. However, in the words of Miller, 'both authority and freedom essentially entail inequality—the right to equality is not absolute, therefore. The connection, according to Miller, seems indispensable.[85] How do democracy and social justice interact with each other, then? Is one dependent on another? Alternatively, is one's existence and function essentially influenced by another? These are some questions needing to be responded to empirically and pragmatically rather than normatively.

In the opinion of Miller, an act of separating social and political institutions as unrelated attributes characterizes the modern liberal state, though wrongly. The act of separating these two attributes of democracy is a major reason behind ever-increasing inequality among people in so-called liberal democracies. In his view, "[It] allows us to make analytical distinctions between questions about the distribution of political power and questions about the distribution of property, income and other benefits of society."[86] However, Miller fails to justify that act of separation. The act of separation implies that the principle of social justice should not necessarily affect the 'distribution of political power.' It then means that 'the issue of social security guaranteed or not for the benefit of poor people is not essentially associated with a specific type of political structure of the State.'

This statement may be too theoretical. The type of political structure mentioned above is truly demarcated as democratic in rhetoric only. The attribute of democracy concerning the State's responsibility to the social security of people is ignored. A true democracy, in practical significance, attaches the social security of people as a primary element. For instance, having had no system of social security guaranteed to people, the United States did witness a bizarre situation in dealing with the crisis of the Covid-19 pandemic.

In contrast, China and Southeast Asian countries tackled the crisis pragmatically, without facing disruptive chaos. China and the Southeast Asian countries' functionally workable social security system helped their political systems function more effectively. Hence, the Western narrative that country like China, Singapore, Thailand, and Malaysia lack democracy seems fallacious. In China and South Asia, politics and economics have adopted social security as a common governance agenda. However, the Western countries separated the 'social security of people as a goal of politics. Hence, democracy points the finger to the West, not to China and South East Asia. This brief discourse encourages us to argue that 'social justice is a yardstick of democracy.' A nation without social justice guaranteed to people cannot prove that it is a democratic nation.

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84 David Miller, 'Democracy and Social Justice,' British Journal of Social Science, 8(1), January 1978, 1-19
85 David Miller, 'Democracy and Social Justice,' British Journal of Social Science, 8(1), January 1978, 1-19
86 Ibid

At this point, a relevant question occurs: How can democracy make people's lives worthy by building their capability? Without dispute, we can opine that the political system and its institutions consider human dignity a key governance issue. We can now argue that the realization of equality should be one of the core purposes of democracy if it holds a principle that democracy is a system of people, by people and for people. In the opinion of Nussbaum, it is profoundly wrong to subordinate the ends of some individuals to the benefits of those others.[87]For Marx, that is at the core of what exploitation is, so that to treat a person as a mere object for the use of others is exploitation, and so it is an act of inhumanity either.[88]No system can claim as a democracy without ending a socio-economic structure, in the words of Nussbaum, 'that subordinates the ends of some individuals to the benefits of those others.' The problem of the U.S. corporatist system is obvious, thus.

The state's responsibility to treat citizens equally is an absolute political goal, and no system of governance can ignore this responsibility. However, some people with liberalist influence tend to argue that the political significance of liberal democracy, in the words of Miller, 'gets blurred when the term democracy is used to refer to social arrangements like equality of opportunity or public ownership of means of production.'[89] This argument is typically wrong and discriminatory because it fails to notice capitalism's negative or wrong influence. A true democracy, as argued above, cannot deny affinity with social justice. However, the liberal democracy, due to the influence of monopoly capitalism, wrongly deemphasizes the significance of social justice as a key goal of politics. Conceivably, no democracy can serve its political values of defending individual freedom without guaranteeing equal access and opportunities to socio-economic development. This situation led the UDHR to integrate civil and political rights, economic and social rights, and solidarity rights as indivisible fundamental rights.

If democracy fails to ensure social justice to people, it will simply be a political appendage to the state system. In capitalist countries, such a democracy will turn into a 'corporate body' working only on for-profit values, disregarding the public welfare or wellbeing of people. Democracy only emphasizing the importance of private property and political freedom of markets will ultimately end at neo-liberalism. It has nothing to do with the public well-being of people. In the view of neo-liberalists, the role of the State has to be limited in protecting society from external aggression and internal conflict.[90]This theory is inherently wrong and generates a society that is divided based on classes. [91]As pointed out by Keynes, classical liberalism that believes in developmental economics and the state's role in social development rejects this neoliberal theory of democracy.[92]

A few facts demand more attention at this point. The scale of world poverty fundamentally grew after the 1980s, when the doctrines of the neoliberal economy

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87 Martha Nussbaum, 'Capability and social justice,' 14(2), International Studies Review (International Reality and the new Equality), Sumer 2005,123, 135

88 Ibid

89 David Miller, Democracy and Social Justice, British Journal of Social Science, 8(1), January 1978, 1-19

90 See, Milton Freedman, Capitalism and Freedom, Chacago University Press, Chicago, 1962

91 Klein, Naomi, The Shock Doctrine: The Rise of Disaster Capitalism, Picador, New York, 2008

92 Ibid

commanded the world's development approaches. They called for absolute elimination of the State's control over markets and the economic affairs of the society. The principles, emphasizing the market deregulation, the privatization, and liquidation of social security and the control of corporate bodies over state institutions, had been adopted by neoliberals, thus giving full control over State, in Adam Smith's words, to the masters of the world—the manufacturers and business people. According to Oxfam's 2019 report on wealth inequality, a group of 250 billionaires is far richer than the 60 percent population of the world.[93]

The situation is particularly unfortunate concerning the role of the traditional formal justice system. The prevailing formal justice system based on the litigation model, as a core element of liberal democracies, abjectly fails to pay attention to the gross inequality among people. Hence, it betrays the common people as a tool of the neoliberal economic model. The judiciary's significance in promoting people's prosperity in countries like Nepal is none. It consumes a huge amount of resources yielding nothing in favor of the common people. It has been an institution to do politics and enjoy stately positions to some people known as judges. If one observes the judiciary's role from the standpoint of the interests of common people, it has hardly any significance to notice. In two ways, the traditional formal justice system has failed notionally by offering it aligned with the neoliberal doctrines. First, it has accepted the doctrines of deregulation, privatization, and the abolition of the social security system as the cardinal rules of economic development and social transformation of people. Hence, it unscrupulously adopts the free market as an appropriate economic development model against the directive principles laid down in the constitutions of Nepal and India. The so-called democracies in these countries become a hoax, indeed.

In that detrimental perspective, the traditional justice system bears no concerns with the masses of poor people. The privatization of the education, health system, and demolition of subsidies given to poor people, along with many different forms of welfare schemes, divide the society between rich and poor, thus downplaying the significance of state to respect and work for the basic needs of common people. Particularly, education is vital to enhance the capability to foster dignified human life. The privatization of education has meticulously ended the state's obligation to transform its citizens' lives into informed and technically competent masses. It means that the state has no responsibility for building and enhancing the capabilities of citizens. As already stated above, the core reason behind the perpetuity, poverty of the masses in Nepal lies in this fact. The justice system could change this situation had the judiciary been responsible for fostering social justice. Second, the traditional justice system has permitted the state to be controlled by a handful of rich persons who are persistently and immorally indulged in profits for private gains. Nepal's Supreme Court's controversial judgments are a typical example. [94]The cruelest impact of this

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93 Oxfam Report, 'World billionaire have more wealth than 4.6 billion peoples,' Oxfam International, Available at <https://www.oxfam.org/en/press-releases/worlds-billionaires-have-more-wealth-46-billion-people>, Accessed on 15 September 2020.

94 Prithvi Man Shrestha, 'What Ncell tax dispute is all about,' The Kathmandu Post, December 26, 2019, Available at <https://kathmandupost.com/money/2019/12/26/what-ncell-tax-dispute-is-all-about>,Accessed on 13 September 2020. Full bench hearing Ncell tax case, Setopati, Tuesday, Jestha 21, 2076, at <https://en.setopati .com/market/147587>, Accessed on 13 October 2020

surrender of the justice system occurred on 'social security' mechanisms leaving the masses of people helpless. This situation is pathetically surfaced during the Covid-19 pandemic.

The failure of the neoliberal structure of the State, specifically the judicial system, is seen unprecedentedly grim in developing countries, in Nepal particular. In most developing countries, Eurocentric liberalism is bitterly abused by ruling elites. Even today, an unbelievably large segment of the population in such countries lives without a minimum supply of basic human needs and the protection of basic rights, such as access to food, and suffers from starvation. Incidents of death caused by hunger are common even yet. The mother's poverty ensues with diseases, malnutrition, and deformities on the child at the very time of birth. Millions of people worldwide are forced to live in savage conditions slums, ghettos, and shantytowns. Equally, bigger numbers of people live without basic minimum access to health services in the rural countryside. Approximately fifty thousand people die annually only because of poverty, of which thirty-four thousand are children below the age of five years. Unfortunately, these figures are relentless and are rising instead of being reduced.[95]The lives of about 250 million people ended because of starvation and preventable diseases even after the Cold War; a significantly larger number of such people were children.[96] The advent of neoliberalism widened the wealth and income distribution gap and led to grotesque violations of basic human rights.

The South Asian subcontinent had been reduced to a miserable society beset by the scarcity of food and the frequency of famine. The colonial rule over two centuries had been the main culprit for this situation. The British Empire conducted an unlimited monopoly of trade in South and East Asia and fully controlled the socio-economic lives of people. Eventually, entire Asia was plundered, and the people here were forced to live in a state of hell; darkness, backwardness, and poverty besetting the lives of entire masses of Asian people. The situation of Africa and Latin America was no different either.[97] The present state of poverty in developing countries is thus rooted in colonial rule. In most former colonies, the liberal politics and institutions introduced by the colonial rules continue without transforming people's lives. These independent former colonies have democracy nothing more than the distorted *adult franchise*, which gradually transformed their political systems into an electoral contest backed by *Three Gs*—gangsters, gold (money), and guns.

The essence of this democracy, as the colonizers left it, was turned into an evil game of *majoritarianism*—in which the victorious minority ruled the scattered larger majority. This system divided people culturally, religiously as well as regionally. The colonizers' perennial crisis of political instability caused an utter partisan division of people and massive corruption. For instance, Nepal experienced 24 governments in the two decades from 1990. India's situation until the early 21st century had been no different at all. Pakistan, Bangladesh, and SriLanka are not an exception either. The liberal

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95 Thomas Pogge , World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform, Cambridge, Polity 2002, 2

96 Thomas Pogge , World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform, Cambridge, Polity 2002, 2

97 Edward S. Herman and Noam Chomsky , Manufacturing Consent, New York, Pantheon Books, 1988

democracy in all these countries has been characterized by traits and stigmas of political corruption, criminalization of politics, and government instability. The problems of the criminalization of politics emerged as a big challenge in India, in particular. This situation is evident from the rising number of Parliament Members having had a serious criminal background.

According to some researches of the Association of Democratic Rights (ADR) and National Election Watch (NEW), the LokSabha (Lower House of the Indian Parliament) had 162 out of 543 members with a criminal record in the 2014 elections. This figure represented 30 percent of the total lawmakers. Of them, 14 percent of members had been having serious criminal charges against them. The total number of members comprising all State Legislatures (the provincial Assemblies) is 4032. Of them, 1258 have criminal charges against them. This number represents 31 percent of the total legislators.[98] The role of the judicial system to prevent this state of political deterioration is dismal. Three apparent reasons played roles in this dismal performance of the judicial system: first, the judicial procedures and institutions persistently relied on the principles of the Eurocentric legal and justice system as universal values of 'justice;' second, the notion of justice was mainly driven by the whims of lawyers (advocates and judges) rather than needs of common people; and third, the Eurocentric principles had little relevance on socio-economic contexts of decolonized nations. The Eurocentric legal and judicial systems were inherently discriminatory against native populations; the measures were adopted to punish the natives and immune European populations stringently. As rightly pointed out by ShashiTharoor, a prominent Indian writer, and a political leader, the justice system adopted by the colonizers in India was not blind; it was un-blind and recognized the social origins of the people. [99]

These problems reduced liberal democracy to democracy in the *technical sense*. The biggest lacuna of the perverted form of democracy is the lack of respect for the egalitarian development of society. In this form of democracy, social justice is a matter of talk but not practice. It functions divisively and discriminatorily. The fragmentation of the population into classes and social and religious origins is rife and exploited as a tool of politics—for the vote banks in the election. The division is created in multi-faceted forms; the common people are first divided into parties and then into castes and religion, and so on. Regionalism is another ground of the division of people. Anyway, this kind of division process is ever going and overarching in this form of democracy, appropriately defined as electoral democracy.

Likewise, the electoral democracy meticulously recognizes a class-based society favoring a smaller segment of the elites holding state institutions. Thus, common people have always been classified based on their status-based identity.

Paradoxically, resource-rich South Asia has the largest poorest population in the world. Both democracy and poverty in South Asia have been the gifts of colonialism. The formalist or legally centralist judicial system is another gift that plummets the justice

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98 'Criminalization of Politics: Nature, Causes and Recent Developments' available at <http://www.yourarticlelibrary .com/essay/politics-essay/criminalization-of-politics-naturecauses-and-recent-developments /63464>, Accessed on 30 March 2018

99 ShashiTharoor, An Empire of Darkness: The British Empire in India, Aleph Book Company, New Delhi, 2016, 110-118

system's very fabric. Together, they have posed a serious hindrance to the smooth transition of societies in this region. ShashiTharoor rightly says, “Far from crediting Britain for India’s unity and enduring parliamentary democracy, the facts point clearly to the policies that undermined it— the dismantling of existing political institutions, the fomenting of communal division and systematic political discrimination to prolong the British domination.”[100] The so-called democracy and the common law system have contributed immensely to *the regressive status quo* in South Asia. The current political and judicial situations in Nepal are the best examples of the *regressive status quo.*

The prevailing situation of South Asia and most other parts of the developing world is victimized by its prolonged state of *regressive status quo*, which classifies people into castes and religious groups and imposes a system of hierarchical order in the society as a ground of interpersonal relations. The concept of social justice is, thus, limited in documents; in practice, it has been a fiasco—a hoax. The lack of social justice concept has been well manifested in the unbelievable chasm between rich and poor in South Asia, particularly India. The gap also consists of the disparity between urban and rural populations. In Nepal, for instance, the uppermost 20 percent population has access to 57 percent of GDP. The gap is increasing rapidly, thus widening the chasm of class division. The system of justice is fully ignorant of this reality, however. Many poor people have languished in jails. However, the rich can easily bribe judges and escape punishment. The Bar Association’s agitation against the Chief Justice recently is evidence of this fact.

In contrast, the 40 percent bottom-line population is forced to live in access only below 10 percent of the national GDP.[101] This situation represents a pernicious state of social injustice in Nepal in itself. The prevailing judicial system is vanguard to preserve exclusive privileges of the economically upper class of the population. While Nepal is fully or partly ruled by communists, over the last 20 years, their performance in reforms of the judicial system is bleak; rather, the judiciary has become a desired platform for some leftist lawyers to enjoy the state’s privileges instead of promoting social justice. Many have obtained appointments in courts, but their attitude, performance, and record have not been pro-social justice or socialist; they are also not free from allegations of corruption, politicizing the judiciary, and defending partisan interests of party leaders. The situation of the non-leftist lawyers—those holding liberal democracy as a political idealism also grotesque in terms of corruption, inefficiency, and partisan interests.[102]

The discussion above refutes an assertion of those who believe that democracy and social justice have no inevitable affinity. In reality, democracy ceases to be a democracy in the absence or disregard of social justice. A democracy in affinity with social justice does address the problem relating to people’s lack of capabilities. It transforms their conditions from worse to well off because the concept of social justice

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[100] ShashiTharoor, Inglorious Empire: India strikes back, The Irish Times, 10 March 2017, <available at https: // www.irishtimes.com/culture/books/inglorious-empire-india-strikesback-1.3004235>, Accessed on 4 April 2018

[101] For additional information see, YubarajSangroula, South Asia-China Geo-economics, Lex and Juris Publications, Bhaktapur, 2018, 290-295

[102] Himalayan News Service, Judiciary most corrupt sector, says Report, The Himalayan Times, May 25, 2007, Available at <https://thehimalayantimes.com/nepal/judiciary-most-corrupt-sector-says-report/>, Accessed on 13 September 2020

engrains a policy of scientific development model in which human rights are taken as the essential yardsticks of functional democracy, playing a vital role to remove the *Regressive Status Quo*.

The state of deprivations consists of a lack of subsistence, housing, clothing, health, sanitation, and many other basic human needs. The state of social exclusion and lack of access to resources are also essential elements contributing to the formation and continuity of the *Regressive Status Quo*. As an integral component of democracy, the principle of social justice calls for liquidation of the state of *Regressive Status Quo*; it calls for the promotion of several initiatives to the functionally *Objective Development* model, which stresses ensuring equality among people. This model is one of the reasons behind China's rapid success in lifting a larger number of poor people in a brief period.

The government of China pursued the model as an indispensable tool of empowering people to enjoy rights to socio-economically dignified life, which included (i) the state's support for people to get rid of their incapability through access to life-skill education and development of industrial enterprises with local features, under which scheme the State launched many development plans and policies to provide economic in the rural regions;[103] (ii) measures for increasing productivity and incomes of industries with 'Local Features' as outlined by the Development Plan' for Economic Forests (2013-2020)—this plan provided a good layout for the development of agriculture, forestry, and animal husbandry in contiguous poverty-stricken areas; and (iii) emphasis on the Regional Layout of Agricultural Products with Local Features (2013-2020), which covers 96 agricultural products with local characteristics in poverty-stricken areas for unified planning. These development plans comprised consolidated activities and have been consciously targeted rescuing poor people from poverty, particularly through enhancing their capacity to make larger incomes. Building linkage between the production of knowledge and skills, availability of road networks and market and industrialization of agriculture, animal husbandry, on the one hand, and forestry sectors, on the other, was the main thrust of this development model, which hugely paid off.[104] Thus, the entire development strategy focused on the concept of social justice.

The following three essential development components played a crucial role in removing poverty in China: infrastructure development, agriculture production, and the availability of the market networks. These three components have been implemented in a coordinated manner. The road network is vital for connecting people with the market, and improving agriculture products is necessary to gain the enlarged income of poor people. The connectivity of people as both *sellers and buyer*s is an essential component of the planned socialist market economy. Road networks enhance these two essential capabilities of people, thus providing people with added production capability. This simple development model is called the *objectively functional development model,* regarded as a basic social justice tool in China. With that conscious strategy, China was

[103] The State Council Information Office of the PRC, 'China's Progress in Poverty Reduction and Human Rights', Beijing, Foreign Language Press, 1st edition, 2016, 8-9

[104] The State Council Information Office of the PRC, 'China's Progress in Poverty Reduction and Human Rights', Beijing, Foreign Language Press, 1st edition, 2016, 7-9

abundantly successful in getting rid of massive rural poverty. However, Nepal and India's development modalities are experiencing a serious problem. Without focused priority of boosting the agricultural production sector and industry along with transportation development need, the development endeavors of these countries are marred by several inconsistencies and wrongs.

Consequently, an unimaginably larger part of the population in these countries is still grotesquely poor; the development endeavors are unyielding. The reason is simple. None of the countries have targeted their development initiatives to materialize the principle of social justice. India has emphasized the development of its service sector, and Nepal's development is stolen by political instability. Multinationals have controlled India's service sectors, and they have produced immense environmental hazards.[105]Both in Nepal and India, the economic development policies are largely un-pragmatic and common people unfriendly. In India, giving poor people employment of 100 days is an easy development strategy to raise vote-banks. Nepal is learning the same strategy as a populist election agenda.

The discussion now follows that the principle of democracy and social justice essentially correspond to each other, without failure. No democracy properly flourishes to democratically represent people without having due attention to their socio-economic development. The example of South Asia has shown this. It is now safe to argue that social justice is vital for bringing state institutions fully accountable to the people. In the absence of stronger social justice mechanisms, democracy may turn to be dysfunctional or mockery virtually; it becomes a tool of fooling people and exploiting them. India in South Asia, for instance, is the largest economy with a promising growth rate over the last 20 years. However, it is facing a serious problem of ever-widening income disparity. It means that its democracy is detached from principles of social justice, thus failing to yield rational prosperity of the total population.

According to an Oxfam, survey in 2018 has shown that India's richest 1 percent population has been privileged to hold 73 percent of the country's total wealth, which is higher than the global figure of average 50 percent.[106]This grotesque income disparity rose diametrically high from 58 percent in the past few years. This ever-increasing gap is explicit evidence of an acute lacking in the state's accountability to the masses of poor people. As reported by *Business Today*, the wealth of the one percent elite group increased over by RS. 20.9 billion, close to the total expenditure estimated in the Union budget of 2017.[107] It leads us to conclude that India is an economically unjust and discriminatory nation if we gauze the situation from the vantage point of the principle of social justice. The billionaire boom in the economy is

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[105] See, Chandra, Chandra Mahesh 'Environmental Concerns in India: Problems and Solutions,' Journal of International Business and Law, 15(1), Article 1, Avaliable at, <http://scholarlycommons.law.hofstra. edu/jibl/vol15/iss1/1> Accessed on 24 November 2021, Also See, MahsaHosseiniMoghaddam and Ali Zare, 'Reposnibilities of Multinational Companies on Environmental Issues,' Journal of Politics and Law, 10 (5), 78, Available at <https://www.researchgate.net/publication/321394731_Responsibilities_ of_Multinational_ Corporations on_Environmental_Issues>, Accessed on 24 November 2021

[106] Income inequality gets worse; India's top 1% bag 73% of the Country's wealth, says Oxfam', Business Today, January 23, 2018, Available at https://www.businesstoady.in/ current/economypolitics-Oxfam-india-wealth-report-income-inequality-richests-poor/story/268541.html, Accessed on 8 April 2018

[107] Ibid

allegedly not a sign of a thriving economy, but a symptom of a failing economy, said *Business Toad*y.[108] In this dire negative perspective, when masses of people are deprived of basic needs and rights, what should be the judiciary's role to fix the problem? The judicial system that believes in principles of legalist-centralist positivism cannot promote the principle of social justice. Hence, as a popular saying goes, the judiciary in such societies exists as a white elephant kept by a poverty-stricken family.

## *CONCEPT OF SOCIAL JUSTICE AND ITS ROLE IN PROMOTING FIRST RIGHTS PERSONS*

The first rights are essential or inevitable preconditions for enjoying rights under the constitution and human rights conventions. The *first right*s build the capability of individuals to exercise other rights that guarantee security and dignity of their lives, i.e., adequate vector of life. The adequate vector of life comprises all rights of individuals within two conceptual frameworks, namely the (a) vector of adequate living standard and (b) the protected sphere of liberties. These two conceptual frameworks ensure access to every individual to the institutional and resource means of social justice. The first rights generate obligations on the part of the State to ensure the security and dignity of each life within a constitutionally defined democratic framework; the constitutionally defined democratic framework ensures that every citizen has the right to enjoy opportunities for socio-economic development and protection of liberty. Therefore, the principle of the first rights calls for the classification of the concept of justice into *corrective or remedial justice* and *justice in principles*, which is *normative justice* in essence. The first rights constitute a *development threshold*, consisting of five basic rights that are jurisprudentially conceptualized as the development threshold rights. These rights are defined as the first rights for two basic reasons: first, they are essential or basic minimum claims of each individual for his/her security and dignity as a human person; and second, they are essential priorities of the system of justice that takes care and protect individual's security and dignity. However, the judicial system of developing countries like Nepal and India lacks their orientation and understanding of this jurisprudence due to their overarching belief in centralist-legalist positivism.[109]

The theory of first *Rights*, thus, constitutes a core foundation for the operation of social justice within the state's democratic structure. This theory believes in the principle that an individual's socio-economic well-being can be achieved only through the state's obligation or actions to materialize the socio-economic well-being of people. This principle brings a duty on the part of the judicial system to oversee judicially that the laws and policies of the state follow the principle of social justice. The judiciary must sincerely attempt to interpret the law given the directive policies of the Constitution. Understandably, the social justice theory rejects the significance of the theory that holds that directive principles are non-justifiable.

Failing to do so would render the function of the judiciary merely an appendage to formalism. This doctrine argues that the legitimacy of the State's development

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[108] Ibid

[109] For details of five first rights, See, YubarajSangroula, Right to Have Rights, Lex and Juris Publications, Bhaktapur, 2019

functions comes from its respect to the principle of social justice. While doing so, the principle demands the judiciary to be sincere and proactive in defining issues of discrimination and subordination from two different approaches besides the state being democratic and accountable. Furthermore, this theory demands that the judiciary restrain itself from working against State's development endeavors to promote peoples' well-being. The judiciary should be conscious of abiding by the principle that policy decisions regarding development affairs are peoples' prerogatives. Hence, they should not be tarnished by so-called by the abstract judicial process. The court should address any discrepancy from the government's side without being influenced by its orthodox rules and values of formalism.[110] The state's obligation to work through development initiatives to build people's enhanced capability is called the '*objectively functional development theory,* 'which the judiciary must unfailingly be guided by. Hence, since the objective of this theory is to empower people's access to resources and development opportunities of life, it is jurisprudentially defined as *justice in principle.*

The concept of *justice in principle* may be called, vaguely, *normative justice theory* for its apparent reference to applying the principle of equity as a moral justification to the need for development endeavors to build people's capability. Since this theory recognizes and protects peoples' claims on increased entitlements to basic need commodities and happiness, *justice in principle* is normatively relying on social justice. Hence, the state's obligation to abide by implementing development laws and policies bears both moral and legal characters. Thus, the principle of social justice requires the institutions of justice to refrain from applying Austinian dogmas requiring strict division between moral and legal precepts.

Any person's death, for instance, from starvation or preventable disease and unsafe roads, is a violation of both moral and legal obligation by the state. Given that the interface of rights and development is unavoidable, it can safely be inferred that development initiatives fostering the social well-being of peoples cannot be defined as prerogatives of the State; neither judiciary has the authority to disturb such development affairs in the name of its prerogative to interpret laws and constitution. This theory implies that 'no judiciary can claim supremacy over the people.' The Indian Supreme Court's judgment in the *KeshavanandaBharati case* is unjust, therefore. The principle of social justice holds people as the 'masters of the nation.' Therefore, the system of justice and its institutions or actors are obligated to abide by the following normative principles strictly:

(a) All human beings, irrespective of their perceived differences, are equal and, thus, deserve equal protection of the laws in the matter of access to resources available in the country and opportunities for development. To protect such rights is an inherent duty of the state. Hence, an individual's rights to socio-economic development are equally enforceable, like civil and political rights. The judiciaries in the former colonized or influenced countries are wrongly influenced in this regard. They often resist protecting citizens against the state's duty to

[110]See, YubarajSangroula, Right to have Rights, Lex and Juris Publications, Bhaktapur, 2019

work for and protect the socio-economic interests and claims of the general people.

(b) The principle of equity is a basis for the distribution of wealth and income and the opportunities for the development of life. The system of justice, thus, refrains from recognizing special privileges for some people based on their perceived higher or superior status. The special allowance for ministers, judges, and other officials for medical treatment, for instance, can be taken as a violation of common people's rights to socio-economic well-being. Social security policies should also regulate such protection for State officials, but not by the principle of exceptional privilege to the State's officials.

(c) The recognition and protection of the freedom of choice in profession, faiths, and culture is a basic prerequisite for the growth of an individual's capacity to produce and interact with social and economic markets. But the markets cannot be controlled by some people for their private gains. The absolute deregulation of markets thus violates the principle of equality driven by the need for social justice. The principle of neoliberalism is undemocratic, thus.

(d) The system of laws instituting differences among individuals based on status or assigned social positions, thereby creating stratified identities, are unjust and illegal. They establish an immoral basis for the differential treatment between one and another person by the State. The justice system cannot, under any circumstances, give effect to the laws to legalize such differential treatment. In Nepal, providing grants for politicians and bureaucrats for special medical treatment is illegal and wrong, both legally and morally.

(e) The development policies and programs protecting the individual's security and dignity is a right of people, so the people have the liberty to accept or reject development initiatives of the state based on their effectiveness to protect the principle of social justice.

These normative principles underpin an integral relationship between law and development and democracy and social justice principles. Therefore, they seek respect and initiatives from all state institutions, including the judiciary, for their mutual reinforcement, thus fostering an ambiance for the better socio-economic well-being of people. The role of normative principles of justice is vital in building an adequate *vector of every individual's life.* These normative principles are in that way taken as the *antithesis* to the *regressive status quo*. At this point, we may reargue that the justice system fails to follow the principle of social justice if it keeps sticking on the legalist-centralist theories of legal positivism.

It becomes now clear to us from the discussion above that poverty, which is obsessively defined as the crisis of food and other basic need-based deficit, is something more than that; it is a fact representing the absence of human security and dignity. Poverty is undeniably a state of subordination that results from deprivations of both the *source or foundation rights* and *output or advanced rights*.[111] This approach of

[111] For elaboration of the concepts see, YubarajSangroula, Right to Have Rights, Lex and Juris Publication, Bhaktapur, 2019

dealing with individual's deprivations, focusing on social justice point of view, leads us to argue that the state of so-called poverty represents a condition of lacking essential or inevitable entitlements of individuals to commodities, thus giving rise to the state of inequality in the distribution of wealth, income and jobs or works. These consequences are bound to occur when individuals are deprived of their rights to social inclusion and access to resources. However, these deprivations are left undressed or unaccounted for by the prevailing system of formal justice—hence, it has to reorient itself in developing countries. Mere copying principles from developed countries' socio-economic and political settings will lead the system of justice institutions to lose their confidence and credibility from the general people. And, this is a dire reality of Nepal at present.

Therefore, the disputes in society should not merely be considered as someone's acts of transgressing the rules enacted by the state. An Individual's state of deprivations, caused by the lack of social justice, might have objectively pushed parties to the dispute or in a situation of conflict with laws. Conceivably, the punishment is not a sole form of justice in a progressive or social justice motivated system of justice. However, the prevailing system in Nepal and other countries, with the colonial structure of the administration of justice, is very far from the actual reality. The prevailing justice system often ignores the critical problems of socio-economic deprivations faced by peoples in societies; it has been driven by the so-called cardinal principles of fairness and due process of laws in the dogmatic facet. The prison population in developing countries, for instance, comes overwhelmingly from people living in a state of socio-economic deprivation. Hence, the prevailing justice system, for instance in Nepal, is tantamount to criminalizing poverty in sheer ignorance of the need for social justice. The deprivations create a vicious trap of the acute deficit of the means of survival and worth of a human person. This vicious trap is, however, not a matter of concern for judges, particularly in Nepal. Persons in such a situation are excluded from all realms of social and political lives; consequently, they are being pushed to the state of acute marginality of development and victims of social exclusion leading to the state of criminality.[112]Conditions of economic deprivation and social exclusion do viciously bolster each other until such persons are categorically subordinated. In such a condition, persons cannot enjoy the *source and output rights*; as a matter of fact, their security and dignity are fully obliterated. This state injustice is thus, defined as the 'condition of gross injustice.'

## *DEPRIVATIONS AS BARRIER FOR CHANGE IN VECTOR OF LIFE VIS-À-VIS SOCIAL INJUSTICE PRINCIPLE*

The discourse above plainly shows that the state of socio-economic deprivations is not a natural phenomenon but a society-made injustice, which poses barriers in persons' capability changes in their lives. These deprivations are imposed by the

[112] State of marginality may be defined as a condition of an individual living below the standard of development threshold or living without protection of the first rights. Conceptually, a life subject to the state of survive below the condition of development threshold may be defined as a state of gross injustice, which implies absolute depletion of the first rights (also referred to the five development threshold rights). Poverty seen as a state of subordination or a state of gross injustice is an outcome of the violation of those essential rights, which are indispensable to render individuals capable of asserting other rights related to security and dignity. For more explanation, See, YubarajSangroula, Right to have Rights, Sahakarya Publications, Bhaktapur, 2018, Ch.6

circumstances—a lacking in the commitment of the state to comply with the principles of social justice. The judicial institutions are also primary components for generating this injustice. Individuals lacking the capability fail to perform human functions, thereby causing them to suffer from the inadequate vector of life. In such a state, individuals are just left to mimic habits they have adopted. Leaving people in such conditions is a gross violation of justice. Life in a deprived state violates the threshold rights of an individual's human being. [113] The justice system fails in Nepal and other countries to pay attention to this inhuman state of life. Theoretically, looking from the lenses of social justice, the deprivation of socio-economic well-being or capability of effecting progressive change in the existing life can be viewed as an outcome of some unwanted circumstances and acts of some other people than the deprived individuals themselves. [114] This argument suggests that an individual's state of deprivation is an induced result of someone responsible for pushing other persons into a trap of multiple deprivations.[115] For example, persons living in Dolpa (a district in the underdeveloped Karnali region of Nepal), for instance, are suffering from acute socio-economic deprivation not because they lack the potential of learning skills to make their lives better. They are forced to suffer such a life because of political apathy and corruption. They raise yaks and goats and possess a great potential of transforming themselves into artisans of making leather goods if they are given skills of processing or tanning animal hides. However, their right to education is grotesquely deprived because of the Government's inactions and omissions to provide essential skills. The denial of social justice is a plain example here that constitutes a root cause of the socio-economic deprivations of the people of Dolpa. The lack of social justice is responsible for yielding an induced state of deprivations. The judiciary of South Asia must develop the capacity to address this gross injustice by stressing the principle of social justice.

Ever-increasing interdependence (in the sense of autonomy)[116] between needs for human life capable of performing human functions and social justice is the only way to

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[113] Concept of personality together with associated rights of individual human beings form matter of the study of philosophy about natural rights. Hegel and Kant took personality as an essence of human being and dealt extensively with the philosophy of natural rights accordingly. Hegel and Kant, in their books, Philosophy of Rights and The Metaphysics of Morals, respectively, presented personality as a capacity of persons making them able to interact with each other. It explicably implies that equality of individual is ultimately laid on the element, which is called personality. Personality abstracts from the doctrinal framework of rights and duties. It embodies a notion of correlativity of right and duty. It means that all human interactions are governed, on the one hand, by the theory of personality and, on the other, by the theory of correlativity of rights and duties. Together, personality and correlativity theory are interlocking foundations of a theory of state's liability. For fuller account in this regard See; Ernest J. Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice', Theoretical Inquiries in Law, 2(1), January 2001

[114] The concept of right and duty, within the correlativity framework, shares the characteristics of one's actual behavior, which is generally called an 'active act.' Within this framework, right and duty describe an act where the law forbids, permits or requires physical action or inaction. Ibid. p.7

[115] This state can be better illustrated by an example. In Nepal, schools are located at far distance and generally due to ruggedness of mountains. As a matter of fact, students with disabilities find it difficult to access education. The right to education of most disabled children is thus, apparently violated. Inadequate and wrongly informed policies of the Government and acting upon such policies (which constitutes an 'active act' here) is a cause of deprivation of right to education of the disabled children. Denial of right to education constitutes a cause of incapability to improve in the given Vector of Life. Hence, in this situation, deprivation, generally called so, is nothing but a denial of the right to education. An inadequate and misguided policy of the government is, thus, a denial of the right to education.

[116] Autonomy in most general sense refers to 'being of a thing in its own nature.' Loss of autonomy decimates the identity of an entity. Autonomy, as defined by the Stanford Encyclopedia of Philosophy (2009), is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons, motives that are taken as one's own and not the product of manipulative or distorting external forces. The term autonomy comes from Latin terms auto (self) and nomos (law). Together, these two words are understood as one who gives oneself his/her own law. It is the capacity of rational individuals to make voluntary decisions.

address people's deprivations. In jurisprudence, the absence of political and judicial will to break the deprivation trap is defined as a gross injustice. It is accountable to deprive the following rights: (a) the right to physical integrity; (b) the right to personhood, (c) the right to freedom of choice of faith, ideology, legitimate profession, lifestyle, emotional belonging, and pursuit of knowledge, etc.; (d) the right to education, including other essential services; and (e) the right to participate in economic enterprises with access to resources. These are the first five rights forming the threshold of development. The ultimate goal of the administration of justice is to ensure the full protection of these rights. By ensuring the protection and enforcement of these rights, the judiciary will fulfill the responsibility t promote social justice. In this sense, the primary goal of social justice is to address the problem of gross injustice.

Injustice is a fact, not rhetoric. Hence, the justice system should be concerned with exploring facts and redeeming them in the right ways. The prevailing system of justice is far short of meeting this goal. The prevailing justice system has been an enterprise of producing or amassing volumes of judgments but not a system of redeeming injustice. Every day, courts in South Asia decide thousands of cases, but they are rarely concerned with how their judgments yield impact in societies. In the majority of cases, the poor people gain nothing after years of litigation. Indeed, they lose everything. Therefore, the current judicial system is one of the several instruments of sustaining a class-divided society.

The key role of the State's justice system against that perspective is to protect individuals from having these rights violated by their fellow citizens and institutions of the State. This responsibility in practice is not discharged. The reform of the judiciary and judicial process in favor of social justice is the key responsibility of the government. The government must enact laws empowering the judiciary to probe the legality and constitutionality of its development policies. The judiciary must be competent to empirically probe a situation forcing people to live in circumstances of gross injustice. The justice system must be able to prohibit a situation due to failure of the Government's accountability and corruption. Therefore, the mechanisms or institutions of the administration of justice must concentrate on interpreting laws and constitutions to protect the first five rights in all circumstances and spheres, including the system of criminal justice. The pro-activism of the justice system to recognize and protect these rights, as a precondition of securing a dignified life, constitutes the threshold of development in human life. The failure to recognize and protect these first rights pushes the *vector of individual life* below the development threshold, thus rendering the justice system complicit in the state of injustice. Therefore, the justice system to fulfill its responsibility to promote the enforcement of the principle of social justice is guided by the principle of equity, i.e., the natural resources owned by all people equally as these resources are given by nature equally to every individual.

The state of gross injustice is a public wrong and, as such, unacceptable to any civilized society. The state's responsibility to redeem this public wrong is explicit and absolute. As an essential apparatus of civilized society, the justice system derives its legitimacy from its promptness and pro-activism in addressing the public wrong. This

promptness or activism is where the authority of judicial institutions emanates from guiding the executive and legislative institutions in matters of the rule of law. Any judicial system that is blind to seeing and redeeming public wrongs is only an appendage of the unjust or tyrannical state, though it might have been called democratic. Analysis of law and policies to combat deprivations requires applying the principle of equity-based justice, which is philosophically guided by instruments or indicators of human rights in the recent era. The equity-based principle of justice demands all justice mechanisms comply with the following requirements in mandatory terms: (a) any law that pushes a person below the development threshold condition or overlooks the responsibility of protecting individuals' first five rights amounts to be an illegitimate law. The system of justice must ban or disqualify such laws promptly and strictly. Letting such laws function will impair the State's responsibility of protecting and enhancing the principles of social justice. No court judgment that fails to take cognizance of such laws can be defined as justice; in fact, such a judgment would be nothing but an appendage of the *regressive status quo*. In developing countries, the judiciaries have countless such judgments that reinforce the state of *regressive status quo*. The central reason behind this fault line is that the judges in developing countries are appointed as 'employees of the state in the regular sense,' or 'their commitment to social engineering is neither examined nor evaluated.' Most judges in developing countries are obsessively indulged in formalist or procedural fairness requirements in utter ignorance of the principle of social justice, requiring judicial measures to redress injustice. (b) State policies responsible for creating inequality reinforcing the *regressive status quo* should promptly be banned or disqualified employing all available judicial measures. Let us take some examples of policies adopted by the government of Nepal in the past, pushing certain populations of Nepal into a trap of socio-economic deprivation. First, the government has indiscriminately been allowing imports of vegetables from India, which the government of India heavily subsidizes. Consequently, the Nepalese farmers are forced to throw their products out of markets. The government of Nepal allows privatization of education, thus creating an advantaged position for those who can afford costly education and depriving the poor sections of the population of opportunities to enter the state's services. Both these policies are depriving the poor populations of Nepal of development opportunities of life. In Nepal, however, the judicial system has prioritized services to commercial cases, but not to issues that severely violate the first rights of deprived individuals. Consequently, both law and policy are jeopardizing the *first rights* of people without any intervention of the judicial system.

The social justice friendly judicial mechanisms do regard deprivation of the development threshold rights or the first five rights as a state of gross injustice, and, thereby, recognize that (a) every piece of law must pay attention to the development threshold rights as the core elements of social justice and should pay due care to protect them from any form of impairment; (b) every individual while enjoying his/her rights under law must be careful of not impairing the public goods that are implemented for the benefits of those who are forced to be languishing in

deprivations;[117] (c) the State has no innate goals of its own independent of people;[118](d) the State's arbitrary control of natural resources, by unnecessary, false or hierarchal regulations, results in unproductive exploitation or wastage or misuse of wealth, thus pushing common people to the state of want and destitution;[119] (e) that the natural resources are not created by human beings—the principle of absolute ownership over natural resources by someone, therefore, excludes others and pushes them to the state want and deprivation;[120] and (f) the deprivation is an outcome of denial rights to equitable and rational enjoyment of natural resources.

As one of the cardinal measures of social justice, the principle of equity-based justice deprives the first five rights or development threshold rights as a manifestation of gross injustice. This theory requires the formal justice mechanisms to address the state of gross injustice by effectively overseeing the natural resource distribution policies of the government, thus ensuring equitable distribution of natural resources. The justice mechanisms must ensure dispensation of justice to end the discrimination of any kind invoked by the law and policies.[121] The principle of equity-based justice theory is based on, concerning the allocation of natural resources or distribution of opportunities for life development, or guided by the normative values that (a) the natural resources being common heritage does exclude the concept of absolute private ownership over such l resources,[122] (b) hence, the injustice can be addressed by recognizing the inherence of the theory of *justice in principle;* that the natural recourses can be held in a spirit and scheme of cooperative collectivization, (c) the right to hold and use natural resources, therefore, should be determined by the skills and knowledge of possessors but not by the inheritance or social status of the person, and (d) the exclusion of individuals from natural resources should be prohibited in all costs.

These principles are considered guiding principles and should be adopted by the justice mechanisms as cardinal guidance while interpreting the laws and policies of the State. The prime goal of applying these normative values in interpretation is to enable individuals to enjoy the development threshold rights. Taking the example of Nepal, the disparity in this regard is severe. For example, a poor farmer is taxed on lands that yield hardly enough to survive for a period of half a year. On the other hand, a privilege for government employees of the huge slave of the un-taxable amount is declared. Thus, poor farmers are taxed to survive. The road tax for luxury-private cars and public transportation is hardly different. Numerous such policies and laws make the poor pay more taxes in Nepal. For instance, an educational institution and a profit-

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117 Immanuel Kant, in his treatise called Foundations of the Metaphysics of Morals (1785), requires individuals to pay respect for responsibility of exercising his/her autonomy (freedom) solely for the sake of good of all independently of other incentives. Kant argues that individual autonomy within moral framework is an ability to impose objective moral imperatives on oneself. (See, Immanuel Kant on Autonomy in Moral and Political Philosophy—Identity and Conceptions of the Self, at https://plato.stanford.edu/entries/autonomy-moral . Accessed on 02/07/2020

118 Kautilya' Arthasastra teaches us that rulers have duty to serve the people. They do not hold powers, otherwise.

119 See John M. Cobin, 'Allodialism as Economic Policy' June, 1998, Available at <http://papers.ssrn.com /sol3 /papers /cfm?abstract_id=186934>, Accessed on 2 July 2020

120 See John M. Cobin, 'Allodialism as Economic Policy' June, 1998, Available at <http://papers.ssrn.com /sol3 /papers /cfm?abstract_id=186934>, Accessed on 2 July 2020

121 Ibid

122 Ibid

making hotel pay electricity charges without any distinction. The zero situation of a progressive tax is another dire example of the absence of social justice.

## *SOCIAL JUSTICE INITIATIVES TO ENHANCE CAPABILITY PRE SUPPOSE RECOGNITION AND PROTECTION FIRST RIGHTS BY THE FORMAL JUSTICE MECHANISMS AS CORE HUMAN RIGHTS*

Deprivation from the *equity-based distribution of resources* is an unashamed violation of the principle of social justice. For instance, in most developing countries, the land resources have unjustly been occupied by a smaller section of people, and the rest are excluded. This unjust privilege enjoyed by rich people has been a major cause of the economic and social deprivation of the larger mass of people in developing countries. Over the last some years, the practice of grabbing public land by political-parties supported land *Mafia* has been severe. Arable lands are encroached and converted into housing projects. These people were allegedly involved in bribing courts for judgments in their favor. The rising corruption in the court almost ended the significance of social-class litigation practice, which is supposed to play a vital role in fostering social justice within a formal system of justice.

The land parcels are being used with low productivity, despite being held by a smaller group. On the one hand, the products—the grains and other commodities—are having absolute monopoly markets, thus abjectly exploiting the smaller farmers. These two wrong policies protected by the laws are accounted for pushing a larger number of peoples to the state of multiple deprivations. These facts drive us to conclude that the state of multiple deprivations suffered by most people is unleashing an increasingly chronic problem of gross injustice—such as slum living. This unwanted situation can be addressed only by effectively recognizing and protecting social justice policies, both by the executive government and the judiciary. Such policies and laws should necessarily be guided by the jurisprudence of the development threshold rights.

The responsibility, including jurisdiction, of justice mechanisms and institutions regarding enforcement of the principles of social justice, flows from fundamental international law norms, founded UN Charter recognizing and urging member states to eliminate circumstances of disparity among people. According to the Charter's preamble, the disparity results due to the system of ill distribution of resources. In most developing countries, some people have perpetrated over-accumulation of resources in deprivation of others, forcing them to live in an extreme scarcity of resources. On the other hand, some developed and rich nations, who have had a brutal past of colonizing other countries, have amassed a disproportionate amount of wealth, thus forcing such nations to relentless struggle against the critical level of want. In some least developed or developing countries, people die due to the absence of food, whereas food is wasted abundantly in developed countries. The disparity or inequality is pervasive internationally. While the Universal Declaration of Human Rights guarantees dignity to all human persons, poverty across the world does not allow billions of people to

survive with dignity.[123] The International Covenant on Civil and Political Rights grants every individual the right to a dignified life.[124] The International Covenant on Economic Social and Cultural Rights guarantees the right to an adequate living standard.

Similarly, the Convention for Elimination of All Discriminations against Women (CEDAW) emphasizes the importance of the same rights to women. The Convention on Elimination of Racial Discriminations (CERD) guarantees these rights to indigenous people. However, these rights are not encouragingly enforced by nations for two main reasons: First is the rent-seeking attitudes of developed countries, and the second is the chronic problem of corruption in some developing countries. States' laws on property rights fail to adopt relevant and adequate measures to end the discriminatory social structures and disparity in income and wealth. Therefore, the lack of equity-based distribution of resources is a major cause of multiple deprivations among larger numbers of people across the globe. Understandably, there are countless laws enacted in developing countries, but they are neither morally justifiable nor rational. The state of deprivation requires dedicated, pragmatic policies and approaches to addressing the problems. The restructuring of the socio-economic structure s crucial for progressive interventions to redeem the problems. And, this is possible only by the preparedness of the State to take a bold reformatory and equity-based rational policies.[125]

In this context, the judiciary's role in developing countries should be pro-active and guided by a pro-poor human rights approach. On the contrary, the judiciaries in most developing countries are influenced by the popular agenda of INGOs and donor agencies. They have their agenda of building leverage in civil societies, policymakers, and state institutions. The concerns of INGOs and donor agencies are superficial and propagandists; they promote the interest of some groups rather than masses of poor people. Over some years, the Nepalese judiciary had been beset by INGOs and donor agencies' open interventions. Allegedly, they were able to influence the contents of judgments.

Moreover, they played roles to popularize the politics of the Western developed nations on human rights issues. They negated the significance of local values, arguing, though implicitly, those Western political values are universal. Western jurisprudence's overarching or predominant influence over the legal and judicial systems in developing countries caused serious harm to the indigenous initiatives and process of reforms and modernization. The principle that the directive principles are unenforceable by courts

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[123] The Universal Declaration of Human Rights in its Preamble (UDHR) asserts unequivocally that the dignity and worth of person are inviolable, under any circumstances, as freedom, justice and peace constitute the basis of human civilization, and the violation of dignity and worth of person will decimate the basis of freedom, justice and peace. A state of poverty is thus a cause of violation of freedom, justice and peace as it deprives a human being of his/her inherent dignity and worth of person. International Covenant on Civil and Political Rights (1966) reiterates the UDHR's preamble. It declares that 'every individual has inherent dignity as a human being' and it is inviolable. Article 3 of the UDHR asserts that right to life, liberty and security is inviolable. No excuse can be entertained, even the status of poverty.

[124] Article 1 of ICCPR guarantees everyone the right to freely determine their political status, and freely pursue their economic, social and cultural development. This provision implies that no State can pose constraints by any means to disable an individual from exercising these freedoms.

[125] See Sergio J. Campos, 'Subordination and the Fortuity of Our Circumstances', University of Michigan Journal of Law Reform, 41(3), Spring 2008

jeopardized the prospect of social justice in countries like Nepal gravely. The role of the judiciary in developing countries to address the problem of socio-economic injustice stood stagnated.[126] In a few instances, the judiciaries in the developing countries showed eagerness to intervene, but the principles of social justice had in no way to drive their approaches and interventions; they had been driven merely by policies of popularizing the civil and political liberties. This approach is engrained in the politics of INGOs and donor agencies and is a factor to tarnish the image of the judiciary among the general people. [127]

## *THE USEFULNESS OF THE ANTI-SUBORDINATION PRINCIPLE TO PROMOTE SOCIAL JUSTICE*

The judiciaries in developing countries can address the above weaknesses by evolving a new jurisprudence stressing the principle of social justice, which, as widely discussed above, stands with three pillars, i.e., the principle of equity-based distribution of resources, the principle of anti-subordination development threshold rights, and the principle of the importance of the person's first rights to enhance the entitlements to commodities, the resources, and advantages. Collectively, these three principles rescue persons from the trap of the *regressive status quo* that prevents changes. Deprivation is not possible to address without intervening against the state of *regressive status quo.*

The regressive status quo recognizes the 'given status' of the persona as a basis of enjoying rights and disregards the potentials attached to a person's individuality. The status-based identity prevents persons from breaking circumstances preventing access to development. The deprivation of *Dalit,* women, and other marginalized peoples is the glaring example. Sometimes, in the pretext of change in the status, there is a danger of the status-based identity becoming further reinforced. The Constitutionalization of *Dalit* rights in Nepal is an example. It is guided by the principle of equal but separate doctrine that reinforces the *status quo.* Breaking the *regressive status quo* is a preliminary step for intervening against multiple forms of deprivations. This intervention demands the application of the anti-subordination development threshold rights principle as a measure for change.

The application of this principle enables persons to enjoy the first five rights that enhance the capability to assert entitlements to commodities. Applying these principles deal with deprivation by separating the state of discrimination from the state of subordination. According to the social justice principle, legal measures would be applied to deal with the problem of discrimination. In contrast, several policy measures are necessary to address the problem of subordination. The typical problem of the formal justice system is associated with this distinction. Traditionally, the formal justice institutions, mainly driven by the jurisprudence applied by the Western

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[126] Reporter, "Nepal Bar Association calls for a mechanism to control corruption in the judiciary, The Kathmandu Post, August 11, 2020.

[127] See, Sunil Sapkota, "Muluki Codes drafting influenced by donors, INGOs: Experts," My Republica, September 2, 2018 at <https://myrepublica.nagariknetwork.com/news/muluki-codes-drafting-influenced-by-donors-ingos-experts/>, Accessed on 14 September 2020 Also See, Anand M. Bhattarai and KishorUprety, 'Institutional Framework for Legal and Judicial Training in South Asia,' Law and Development Working Paper Series, N. 2 World Bank, Available at <http://documents1.worldbank.org/curated/en/57822146799825299.pdf>, Accessed on 14 September 2020 .

developed countries, apply an approach, namely the legalist-centralist approach, which stresses the application of law by courts. According to this approach, courts of law should exclusively rely on the percepts of laws and avoid policies as grounds for their decisions. This obsessive inclination of courts on percepts renders them stick to the positivist approach and prevents them from considering social justice issues, largely carried out by policy measures. It means that the issue of subordination can never be a matter of concern for the judiciary. By maintaining restrain from reviewing the legality, rationality, and constitutionality of state's policy, a modern court cannot function as a protector of the rights of people.[128]

As rightly pointed out by Sergio Campos, the anti-subordination principle takes structural perspectives for dealing as opposed to the transactional perspective of the anti-discrimination principle.[129] The state of discrimination focuses merely on the conduct of states towards their people and, thus, ignores the problems and crises of the people themselves. The issue of discrimination is considered an outcome of the wrong conduct of the state towards an individual needing to be corrected by the principle of equal protection of the law. In contrast, the problem of subordination is a condition either imposed by the social structure or by the wrong policies of the state.

Since the judicial system has traditionally been declining to intervene on issues of subordination, the wrong policies of the state are left unaddressed. For this reason, the anti-subordination development threshold rights principle inspires and promotes initiatives of courts to correct or redeem harms caused by the wrong policies of the state. The principle thereby provides a tool for correcting the problem of subordination facing people. Implicitly, the principle of anti-subordination development threshold rights draws legitimacy from an individual's claims for equality in the person of individuals. It holds that individual personhood can neither be discriminated against nor subordinated under. Hence, it claims that nature has provided resources equal to all persons irrespective of their biological, social, and environmental differences.

The principle of natural rights or inherent human rights suggests that a person is free to assert his/her position in a society based on his/her ability or necessity. Persons' position in society is not determined by rules or values imposed on them through imposed identity. A person's life in extreme conditions of *ghettos* can be taken as an example. Of course, this state of life is in no way chosen by persons willingly or by informed choice; it is certainly imposed or assigned on them by the state as an outcome of its wrong policies. This state of life is typically a state of subordination because the reasonable options or choices for a dignified life cease to exist here. The harms arising from discrimination and subordination are thus apparently different in degrees and as consequences. It can be argued that the harm sustained by a person in a state of subordination is purely an outcome of an ill-structured society. Therefore, the state of

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[128] This issue has been elaborately discussed by the author in YubarajSangroula, Right to Have Rights, Lex and Juris Publication, Bhaktapur, 2019

[129] See Sergio J. Campos, 'Subordination and the Fortuity of Our Circumstances', University of Michigan Journal of Law Reform, 41(3), Spring 2008

subordination is a matter of social justice.[130] The role of the judiciary in dealing with this issue is bleak, however.

## *CONCLUSIONS: DECOLONIZATION OF JURISPRUDENCE BY FOSTERING SOCIAL JUSTICE*

Fostering social justice, the formal system of justice is in need to accept the following principles as preconditions to rationalize its substance, contents, and procedures as well as goals:

The legal and judicial systems in developing countries are, particularly those with a past colonial rule or influence of Eurocentric thoughts, essentially marked by formalist and elitist models and functioning both. They adopt strict demarcation between statutory laws and moral values. This development is influenced by their history of conflict between Church and State powers. However, jurisprudence in Asia placed moral values and percepts in balance; both derived legitimacy and authority from righteousness. In Europe, the violent conflict between Church and State finally gave way to the supremacy of statutory law, which is defined as an epitome or prototype of political will. Therefore, for European societies, State institutions are formal or sovereign tools of administering justice—they are tools of 'judging' by someone else in issues of people regarded as subordinates or subjects. The administration of justice in this paradigm is a tool of the state to control people by administering 'judgments' in private disputes of people. Thus, it is an effective means of subordinating the masses of common people. It suggests an understanding that 'the Eurocentric jurisprudence of justice' has nothing to do with the welfare or well-being of people; it is confined to the goals of maintaining peace in society through control of private disputes, thus enforcing the rules of disciplining subjects—the citizens.

This Euro centric model of the formal justice system became entrenched in most developing countries during colonial domination. This model showed no concerns with the socio-economic development of common people. In contrast, in Asian Societies, the concept of social justice obliges state institutions to concentrate dutifully on the welfare and security of the general people. The concept of social justice, founded on the three pillars discussed above, is the primary approach and model of justice that focuses on socio-economic development as the core or fundamental goal of the state because people are the masters of the country. This principle finds articulation in the *Sanskrit* term '*Ganatantra*' (system of rule by people for people). The term refers to a 'system in which 'a ruler does not rule it serves.'

In the modern era, the concept of social justice is founded on norms and principles of inherent and inalienable human rights. These norms and principles of human rights suggest that any form of subordination is a condition of injustice and thus unacceptable for a civilized society. In this sense, persons' aspirations and right to development call for rectification or redemption of injustice. Injustice occurs as an outcome of the regressive status quo and multiple forms of deprivation. The concept of justice consists

[130] See Sergio J. Campos, 'Subordination and the Fortuity of Our Circumstances', University of Michigan Journal of Law Reform, 41(3), Spring 2008

of principles, procedures, and goals that render the state accountable for its citizens' welfare and security. It is meant that the concept of social justice is an instrument of addressing socio-economic deprivation through recognizing, protecting, and enforcing the right to development by judicial pro-activism. The principle of social justice emphatically obligates the state to work for *linking the development schemata of endeavors with the basic needs and rights of people's socio-economic development*. Given the situation forcing many people in conditions of acute socio-economic deprivation, human rights protection is poor in some developing countries, such as Nepal. The widespread socio-economic deprivation shows 'looming disrespect to an individual's right of development and state's reluctance to abide by duty to secure the security and dignity of its citizen.' The existing form and essence of the 'formal justice system' is not only indifferent to the state's obligation of protecting and securing an individual's right to development but also antagonistic, to some extent. The Eurocentric formal structure of justice is transplanted as a colonial tool in many developing countries, as an instrument of settling private disputes. It believes that enforcement of socio-economic welfare and development rights are matters of state policy but not judicial innervations.

Consequently, it rescinds to subscribe to a view that the violation of socio-economic rights can be empirically ascertained by upholding the development threshold rights as primary enforceable rights. The Eurocentric jurisprudence has the least faith in a principle that holds that development rights are enforceable claims falling within the *co-relativity of rights and duties*. Hence, the judicial institutions in the former colonies and countries resist complying with the principle that calls for recognition and protection of the right of development as a claim corresponding to the state's duty to ensure the adequate living standard of every individual. Therefore, the existing justice structure in former colonies or countries functions in fiasco, particularly for justice to poor peoples. It is a severe deficit of the justice system in countries like Nepal to protect the *five first rights* of the people is in grotesque conditions. Though Nepal did not face colonialism, the justice system is influenced immensely by what British colonialism planted in India.

*Respect to and enforcement of the first rights constitutes indicators of justice*: The realm of governance in a just and fair society is supposed to follow pre-established normative legal guidelines, i.e., a well-articulated system of laws, which in conformity with human rights conventions, protects interests and welfare of the common people. Therefore, the State's development initiatives are expected to conform to these normative legal guidelines. Hence, the subordination of individuals as the state of gross injustice requires compliance with normative guidelines established by the laws. These normative guidelines derive legitimacy from the *first five rights* in which each individual's socio-economic development goals are articulated. As stated above, the violation of these guidelines establishes the state of injustice. The fundamental goal of judicial institutions in developing countries is to recognize and protect the *first five rights* of peoples as development threshold rights. The system of law and the interpretation thereof ought to be guided by the *first five rights* of development threshold. The primary function of the judicial institutions in this sense is to subject the

apparatus of the state to judicial probe for ensuring enforcement of the *first five rights* of peoples. Hence, the judicial model in a country like Nepal must stripe of Eurocentric dogmas; it should hold social justice as a primary purpose of justice.

*Protecting and promoting human dignity and security is an objective of both development affairs and law and justice:* Development initiatives, laws and mechanisms, and institutions of justice form an interface and mutually provide legitimacy and sanctity to each other. The state of subordination or gross injustice occurs when this interface of rights and development is broken. By promoting the concept of social justice, the realm of jurisprudence can be improved and rationalized as per the indigenous needs and requirements. Therefore, orienting the judicial system to meet social justice goals is an essential part of the development initiatives themselves. The situation of the justice system in former colonies and countries influenced by Eurocentric dogmas, like Nepal, is currently bleak. Decolonization of jurisprudence in such countries to emphasize the goals of social justice is thus inevitable.

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VOLUME 5, ISSUE 1, YEAR 2022

# VICTIMS AND WITNESS PROTECTION IN HUMAN TRAFFICKING CASES: AN ANALYSIS OF THE LEGAL PROVISION AND ITS IMPLEMENTATION

**Krishna Jeevi Ghimire**[1]

## ABSTRACT

*Criminal justice system is supposed to reduce the effects of crime in society whether preventively or curatively. Looking towards criminal justice system through victims' perspective is mostly the curative way. Considering criminal justice through victims' perspective includes protection of victims, compensation and rehabilitation of victim as well. For all these, criminal justice system of a nation should consider all the concerns of victims. If we look at Nepalese legal system, there are lots of legal provisions addressing crime victims. However, the lack of proper implementation of the laws and lack of infrastructure have caused problem in victim protection. We need to address maximum concerns of crime victims through the proper use of laws.*

## 1. INTRODUCTION

In many parts of the world, victims are considered as an important component of the criminal justice system. There has been a recurrent consensus in the opinion that without crime victims, there can be no effective prosecution. Therefore, it is understood that the social welfare state should at least offer adequate victim-related laws to protect victims' dignity in an exploitative society.[2] However, the protection of the victim/affected person (the word "victim" has been used hereinafter and it connotes both the victim and affected person) and the protection of witnesses, and also other rights of victims such as the right to get information about the investigation and proceedings of a case which have been often neglected as the justice system is generally crime-offender-centered. Even in the Nepalese criminal justice system, victims are merely regarded as an indicator or witness of the incident or crime.

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[2] K.L.Vibhte,*Criminal Justice* (Eastern Book Company 2004) 369

Although, the Nepalese Constitution provides that the victim of crime shall have the right to justice including social rehabilitation and compensation, the said provision has not been implemented effectively.

Traditionally, the accused has been given privilege with various constitutional and legal rights and safeguards, especially those related to the fair trial, whereas the role of the victim is very minimal. Despite the enactment of the lawsrelated to the rights of the victims of crimes, the victims have not been able to acquire ample protection and easy access to justice. Based on the crime committed against the victim and the information provided by the victim, investigation of any crime commences and action is taken against the accused thereof.Victims are regarded as the major sources of evidence for the prosecution of the accused but they are often deprived of their rights and security. Reflecting the fact that the state and the concerned bodies are not sensitive towards the victim. In this article, the definition of the victim, the purpose and necessity of the victim and witness protection, the areas of protection, the basic principles of victim justice, nexus between the victim and human rights, the constitutional and legal system of Nepal, the problems and solutions regarding the victim and witness protection has been presented.

## 2. WHO IS 'VICTIM'?

There exist a number of definitions of the term crime victim, some of which are quite broad while others are more limited. From a legal viewpoint, the group of victims is limited primarily to those exposed to a criminal act as defined by law, while a sociological definition can be seen as broader, including even animals, the environment, the society and states which were exposed to something that is defined or interpreted as a crime. A psychological definition is concerned with the individual's experiences and interpretations of the criminal act.[3]

In the general sense, a person who has suffered physical, mental or financial pain or damage from any criminal act is a victim. "Victim" means a person who has suffered a collective or individual physical or mental injury, emotional distress, financial loss or substantial loss of basic human rights as a result of an act or offense committed in violation of criminal law. The United Nations (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 defines Victims as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.[4] The declaration further states that a person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the

[3] L. Magnus andNikolić-Ristanović V., *Crime Victims: International and Serbian Perspective* (OSCE 2011) 20

[4] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985) art 1

immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[5] Hence, a victim is a person who has suffered physical or psychological damage, economic loss or a noticeable deterioration of fundamental rights through actions or negligence contrary to a nation's criminal legislation. This is indeed an extended definition of a victim.

In the Nepalese context, there are several statutory definitions of the victims, which are generally based on the nature of a particular statute. For instance, the Domestic Violence (Crime and Punishment) Act, 2066 (2009) defines 'Victim (Aggrieved person)' as any person who is, or has been, in a domestic relationship with the defendant and who alleges to have been subjected to an act of domestic violence by the perpetrator.[6] According to Human Trafficking and Transportation (Control) Act, 2064 (2008) "Victim" means a person who is sold, transported or put into prostitution.[7]Crime Victim Protection Act, 2075 (2018 ) provides a comprehensive definition of victim, as it defines "Victim" means an individual who is the victim of first grade, a victim of second grade, and a family victim.[8]The Act, in order to clarify the concept, has defined two types of victims - i.e. victim of first grade and victim of second grade. "Victim of first grade" means a person who has died or has sustained damage as a direct result of an offense that has been committed against the victim, irrespective of whether the perpetrator does not have to bear criminal liability on the ground of his or her age, mental unsoundness, diplomatic immunity or position or whether the identity of the perpetrator remains untraced or whether a charge has not been made against the perpetrator or whether the case related to the offense has been withdrawn or whether the sentence imposed on the offender is pardoned or whether the perpetrator has not been convicted of the offense or irrespective of the family relation of the perpetrator with the victim, and this phrase also includes a person who has not been involved in the offense but has died or sustained damage in any of the following circumstances:

(1) While preventing the person who is committing the offense from committing it,

(2) While extending reasonable support and rescuing with the purpose of saving any person where an offense is being committed against such a person,

(3) While trying to arrest the person who is committing or has committed the offense or extending support to the competent authority in the course of arresting the suspect, accused or offender.[9]

Furthermore, "Victim of second grade" means a person who has not been involved in the offense that has been committed or is being committed against the victim of first grade but who has to bear damage because of being an eyewitness of such offense, and

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5 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985) art 2

6 Domestic Violence (Offence and Punishment) Act 2066, s 2(g)

7 Human Trafficking and Transportation (Control) Act 2064, s 2(c)

8 The Crime Victim Protection Act 2075, s 2(j)

9 The Crime Victim Protection Act 2075, s 2(h)

this expression also includes the guardian of the minor victim of first grade who has not been involved in the offense but who has to bear damage because of having information about or being an eyewitness of the offense, and any of the following persons who have to bear damage because of having knowledge as to the offence committed against the victim of first grade:

(1) Guardian of the victim of first grade,

(2) Where the victim of first grade is a minor, and

(3) Where the person who has to bear such damage is not involved in the offence.

Rule 2 (c) of the Gender-Based Violence Prevention Fund (Operations) Rules, 2067 BS considers a victim as a person who has been victimized or affected by gender-based violence. Compensation Relating to Torture Act[10]provides that "victim" means the person who died or suffered harm in the form of physical, mental or sexual violation or incurred financial loss and damage or detainee and his/her family as a result of the gross violation of human rights in the course of armed conflict, and this term also includes the community which sustained severe adverse impact humanely, socially or communally as a result of the gross violation of human rights.[11]

## 3. OBJECTIVE AND IMPORTANCE OF VICTIM AND WITNESS PROTECTION

Although the protection of crime victims and witnesses is an important aspect of the criminal justice system, it has not been much prioritized in the Nepalese criminal justice system. Significant assistance and coordination of affected persons/victims and witnesses are required in order to obtain accurate information about the crime, to gather evidence and identify the perpetrator and to bring such persons under the purview of law and punish them on the basis of evidence. The inability of witnesses and victims to appear before the court has a profound effect on the proceedings and decision of the case. Because of perceived or actual intimidation or threats against themselves or members of their family, victims and witnesses may be hesitant to provide information and evidence. On the other hand, flaws in criminal justice systems may prevent victims from receiving the services that they are entitled to, and they may even be re-victimized by the system.

Section 10 of the Evidence Act, 2031 regards the statements and facts expressed by the victims and witnesses as important evidence in deciding the case. It is the responsibility of the state to respect, assist and protect the rights of such victims and witnesses, given that this is an important component of justice delivery, access to justice, and has an important evidential value. The duty of the state is not only to control and prevent crime but also to protect victims and witnesses. Ensuring victims' access to justice, providing compensation and rehabilitation, respectful treatment and recognition within the legal system, protecting them from possible pressure,

[10] Compensation Relating to Torture Act 2053, s 2(b)
[11] The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071, s 2(h)

intimidation and threats from the accused, and helping them to reduce their pain and stress caused by crime are some of the major concerns of the victims. Addressing these needs is the purpose of victim protection.

The apex court noted that the state has to ensure justice to the victim. The Constitution of Nepal and Nepalese legislation have adopted international legal standards for compensation. Therefore, the state and state agencies should be sensitive in their implementation.[12] In another instance, it has noted that the victim cannot be deprived of the right to justice, including compensation on the grounds that the detainee has died and the culprit has been acquitted due to a weak investigation.

## 4. NEXUS BETWEEN THE VICTIMS AND HUMAN RIGHTS

Human trafficking is a felony as well as a serious violation of human rights. Traffickers treat victims like commodities, infringing on their fundamental rights to make their own decisions, move freely, and work for whom and where they want. When it comes to human trafficking, taking a human rights perspective is critical to restoring the victim's dignity and well-being.

Human Rights based approach is a conceptual framework for dealing with a phenomenon such as trafficking that is normatively based on international human rights standards and that is operationally directed to promoting and protecting human rights. Such an approach requires analysis of the ways in which human rights violations arise throughout the trafficking cycle, as well as of States' obligations under international human rights law. It seeks to both identify and redress the discriminatory practices and unjust distribution of power that underlie trafficking, that maintain impunity for traffickers and that deny justice to their victims.[13]

## 5. AREAS OF REFORM

Protection of the rights of victims/affected person and witnesses, respectful behavior and language to the victims and witnesses, a guarantee of protection of victims and witnesses and their belongings, information of proceedings, a guarantee of confidentiality of victim and witness, continuous monitoring of victim and witness situation, the victim and witness-friendly environment at every stage of the proceedings are some subject matter that fall within the concept of victim and witness protection. The concepts of victim and witness protection include, but are not limited to physical protection, family protection, resettlement, rehabilitation, financial assistance compensation, medical treatment, social rehabilitation, counseling, facilitation in judicial proceedings, and travel expenses.[14]

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12 *Nepal Government v. Shanti BK*[NKP 2074] DN 9868, Vol 8

13 Office of the High Commissioner for Human Rights.(2014). Human Rights and Human Trafficking. New York: UN, 2014.

14 National Judicial Academy, *Guidelines for the Protection of Crime Victims Women, Children and Witnesses* (National Judicial Academy 2065) 4

## 6. NEPALESE CONSTITUTIONAL AND LEGAL PROVISIONS

The Constitution of Nepal provides for the right to life with dignity, the right to liberty, the right to equality, the right against untouchability and caste discrimination, the right to justice, the right of women, the right of children, the right to information, the right to privacy and the right to constitutional remedy. Furthermore, Nepal is the only country in the world to have included the rights of crime victims as a fundamental right in its constitution, as it has ensured that the victim of crime shall have the right to be informed about the investigation and proceedings of the case regarding his/her victimization, and he/she has the right to social rehabilitation and justice with compensation as provided for by law.[15]

### 6.1. Crime Victim Protection Act, 2075

The preamble of the Act suggests that the Act has been enacted for the protection of the rights and interests of the victims, by making provisions also for compensation to the victims for damage sustained as a result of an offence, and reducing adverse effects caused to the victims of crimes, for getting information related to the investigation and proceedings of the cases in which they have been victimized, for getting justice along with social rehabilitation and compensation pursuant to law, while ensuring the right of crime victims to justice conferred by the Constitution of Nepal, which remains as an integral part of the process of offender justice.

The Act defines the relevant terms such as Offence, Offender, Victim - with a distinction between the Victim of first grade and Victim of second grade, Victim Relief Fund, etc.

Chapter 2 of this Act relates to the rights and duties of victims in the criminal justice process, the right to fair treatment, the right to privacy, the right to information on investigations, the right to information on prosecution, the right to information on judicial proceedings, the right to be protected, and the right to keep legal practitioners. The right to information, the right to compensation and the right to social rehabilitation are provided in Chapter 4. Provision related to the Compensation Levy is provided in Chapter 5, Victim Protection Suggestion Committee is constituted as per Chapter 6. These provisions are important provisions regarding victim and witness protection, however, their effectiveness is yet to be tested.

### 6.2. The National Criminal Procedure Code, 2074

This Code has incorporated several important provisions for the protection of victims and witnesses. If it is not possible to produce before the court because of the witness being physically infirm or a child or for security reasons, the concerned party may setting out that matter, make a petition to the court for the examination of such witness through video conference.[16]. The Government of Nepal should provide security and daily and travel allowance to the witnesses appearing in the court on behalf of the

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15 Constitution of Nepal, art 21

16 The National Criminal Procedure Code 2074, s 109

Government of Nepal.[17]If any person who is a witness thinks that there is a threat to his or her security while appearing before the court or after making deposition in the court, he or she may make a petition, setting out the reason for the same, to the court for making security arrangement. The court may order the concerned body to make arrangements for the security of such witness and it shall be the duty of such body to make arrangements for such security. Furthermore, no question shall be raised in any court about any measure followed pursuant to the order made by the court for the protection of the witness.[18] The court shall conduct in-camera trials in certain types of cases such as human trafficking.[19]If the investigation authority thinks that the disclosure of the identity of a person who is a victim or witness of any particular offense may be prejudicial to the social prestige or honor of such person or witness or may result in undue fear, terror or fright by the accused or other party or be prejudicial to his or her body or life, the authority may make a request to the court, through the government attorney, that the name, surname, address of such person or witness or the name of his or her father or any other description which may disclose his or her identity be kept secret, whereas, at the time of hearing of the concerned case or publishing details pertaining thereto, such disclosure shall be made under pseudo name, surname, address or father's name, pursuant to the order of the court.[20]The investigating authority may, in certain circumstances, record, or cause to be recorded, the deposition, document or deed of a victim of an offense, informant or witness through any audio-visual means, in the presence of the government attorney.[21]

### 6.3. Human Trafficking and Transportation (Control) Act, 2064

This Act has been enacted to control the act of human trafficking and to make legal arrangements for the protection and rehabilitation of the victims under this Act. According to this Act, if the statement of the victim is certified in the court, it can take the certified statement as evidence even if the victim does not appear in the court in the course of the further court proceeding.[22]The victim shall have the right to keep a separate Law Practitioner.[23]The victim may have an interpreter or translator and the costs incurred shall be borne by the Government of Nepal.[24] Government of Nepal shall establish necessary rehabilitation centers for physical and mental treatment, social rehabilitation, and family reconciliation of the victim.[25] Government of Nepal shall set up a Rehabilitation Fund for the operation of the rehabilitation center.[26]

A court shall issue an order to provide compensation to the victim which shall not be less than half of the fine levied as punishment to the offender. If the victim dies before receiving the compensation, it shall be provided to the children of victims, and if the victim does not have any children, the dependant parents shall receive the

17 Id., s 113
18 Id., s 114
19 Id., s 129
20 Id., s 183
21 Id., s 194
22 Human Trafficking and Transportation (Control) Act 2064, s 6
23 Id., s 10
24 Id., s 11
25 Id., s 13
26 Id., s 14

compensation.[27]The Act ensures the confidentiality of the informant.[28]It has prohibited disseminating confidential information without the consent of the victim.[29]

If aninformant requests security, the following protection measures may be provided to him/her[30]:

(a) To provide security during traveling in the course of attending case proceeding in the court,

(b) To keep or cause to keep under police protection for a certain period,

(c) To keep at rehabilitation center.

Furthermore, court proceedings and hearing of an offense under this Act shall be conducted in In-Camera.[31]

Previously the Act was not clear about the compensation to the victim when the offender did not have property. However, the amendment of 2072 B.S. has incorporated a provision whereby the court can order to pay reasonable compensation from the rehabilitation fund when the offender did not have property.[32]Also, for this purpose, Section 14(1) of the Act was amended, and also the rehabilitation fund was expanded for the establishment and operation of the rehabilitation centers established under sub-section (1) of section 13, with an aim to provide compensation to the victim with low financial status as per section 17(1a). It has also provisioned that the government will set up a rehabilitation fund for this purpose.[33] A positive provision has been made for the payment to the victim from the rehabilitation fund established as per Section 14 in case the court has ordered to pay reasonable compensation for the reason of the weak financial status of the offender.

In this regard, the Supreme Court in the case of *LokBahadurSarki vs. Government of Nepal*[34], Section 17 of the Human Trafficking and Transportation (Control) Act, 2064, has been interpreted, which states that "the court shall issue an order to provide compensation to the victim which shall not be less than half of the fine levied as punishment to the offender" and thereby recognized that it is a legal right of a victim to acquire the compensation from the perpetrator. In this context, while providing compensation to the victim, the nature of the pain suffered by the victim or the severity or cruelty of the pain should be the basis for determining the compensation. The financial status or ability of the offender should not be the basis of the compensation. Otherwise, due to the factors like lack of identification of the offenders, when the offender is fugitive, or when the offender has a poor financial condition or is under aged, the victim's right to compensation will be jeopardized or curtailed. If such a

27 Id., s 17
28 Id., s 20
29 Id., s 25
30 Id., s 26
31 Id., s 27
32 Nepal Gazette, Part 64, Additional 15D, Date 2072/06/14
33 Id.
34 [NKP 2072] DN 9346, Vol 2

situation arises, the victims will be deprived of their right to life and they will be deprived of access to justice.

Nepal has not been able to formulate a clear judicial approach on compensating the victims of crime at the earliest, determining the actual amount or form of compensation and facilitating the livelihood of the victims through compensation. Even in the present scenario, the victims have not been able to acquire the compensation as prescribed by the court and orders related to compensation have not been executed. According to a study by the Supreme Court, only two victims have so far received the compensation. It is also the responsibility of the state to compensate the victims of crime. Accordingly, the victim should get immediate compensation. In cases where there is a lack of identification of the offenders, when the offender is fugitive or when the offender has a poor financial condition or is under aged, it is the duty of the state to provide compensation to the crime victim, as the state is regarded as the guardian of the citizen.

Therefore, the apex court stressed that the purpose of providing victims with compensation after the crime is to maintain their livelihoods as it was before the offense or to aid in their rehabilitation. Merely formulating laws concerning compensation is not sufficient. In order to provide actual compensation to the victim, these laws should be appropriate and effectively implemented. It further observed that the Government of Nepal must establish a separate fund and immediately provide compensation pursuant to the final decision made by the court and the offender must be responsible for funding the compensation. Therefore, it is necessary for the Government of Nepal and other sectors to develop the necessary and appropriate infrastructure.

Therefore, the compensation amount should be provided immediately by the Government of Nepal and the amount should be recovered from the offenders. Also, the government should construct the necessary and suitable arrangements as soon as possible to make arrangements for the recovery of the amount from the perpetrators.

In a writ filed by FWLD, the Supreme Court of Nepal has ordered to create a separate compensation fund as early as possible managing necessary allocation of the amount in the budget of the fiscal year 2070/071 for payment of compensation to the victims of such crime, after a judgment by the court, pursuant to Section 17 of the Human Trafficking and Transportation (Control)Act, 2064 and also to take and cause to take necessary measures by the concerned police office to pay compensation to such victim. [35]

Although the Act was amended in 2072 BS for the purpose of the implementation of the aforesaid directive order of the Supreme Court, it seems that the amendment has been made to ensure that the victim could be paid from the rehabilitation fund only because of the weak financial status of the offender rather than providing compensation through the fund regardless of any conditions. The prevailing laws do not include

[35] *MeeraDhungana v Office of the Prime Ministers and others* [NKP 2070] DN 8973, Vol 3

compensation for the victim if the offender is not arrested or if there is a lack of the offender's identity or if the perpetrator is acquitted. The Act provides that a victim shall be given compensation of at least one-half of the amount fined to the offender. The legislative intention is to provide a minimum threshold of 50 percentage, however, in several instances, only 50 percent of the money has been compensation. Therefore, victims end up without compensation.[36]

From the point of view of the interpretation of the legal provision related to compensation, the Supreme Court interpreted the Human Trafficking and Transportation (Control) Act, 2064 considering that the sub-section 1 (f) of section 15 of the Act provides one year to two years of imprisonment for taking a person from one place to another place within the country, and two years to five years of prison for taking out of the country for the purpose of exploitation under Clause (b) of Sub-section (2) of Section 4, whereas Section 15(1)(f) provides that except otherwise written in clause (e) and (f), seven years to ten years of prison for a person committing an offense under clause (b) of Sub-section (2) of Section 4. In the majority of the cases pertaining to Clause (b) of Sub-section (2) of Section, the victims have been compensated, and reasons for not providing the compensation have not been elaborated. The reason for it may be attributed to Section 17 of the Act which provides that a victim shall be given compensation of at least one-half of the amount fined to the offender, and therefore the compensation is determined according to the fine. Due to the linguistic setting, even if the offender is punished for the offense under the said provision, no interpretation has been made in regard to providing compensation to the victim.

MulukiAin, 2020 had provisioned regarding the payment of compensation to the rape victim, including the provision of property withholding, and also the amendment of 2072/6/14 provided that in case of non-receipt of compensation by the offender, the court may order the concerned Women and Children's Office to pay the appropriate amount as compensation to the victim and if such order is made, the amount of compensation should be provided to the victim immediately. However, such clear provision is lacking in the existing Human Trafficking and Smuggling (Control) Act, 2064, which makes it one of the major weaknesses of the Act.

### 6.4. Gender-Based Violence Prevention Fund (Operation) Rules, 2067

There is a provision of interim compensation whereby the victims receive relief and financial assistance for immediate relief. The regulation provides a fund called Gender-Based Violence Prevention Fund to provide immediate relief, medical treatment, relief and financial assistance, legal aid, psychological treatment and psychotherapy, seed capital for any business (seed money), rehabilitation and perform other work as prescribed by the Board of Directors prioritizing the victims, children and adolescents who have been subjected to sexual violence or adolescents affected by sexual violence

[36] FWLD.(2074).*Research Report on Compensation and Access to Compensation in Human Trafficking and Transportation Cases.*Kathmandu: Forum for Women, Law and Development, pg. 138

or drug addicts or those who have come on the streets.[37] A steering committee has been formed at the center to provide relief and financial assistance to the victims.[38]

Similarly, there is a relief committee in each district to provide relief and financial assistance to the victims.[39] According to this regulation, the basis and amount of providing relief and financial assistance to the victim are specified in the regulation.[40]The regulation has internalized that if the rescue, medical treatment, rehabilitation or relief and financial assistance are not provided to the victim immediately, it will have a serious impact on life, and thus have provisioned for compensation up to fifty thousand.[41] Provision has also been made for this fund to remain as a revolving fund.[42]Although the wording of the regulations suggests that provision has been made to provide relief and financial assistance to the victims in the form of interim compensation. However, it is not clear about the remedy if relief and financial assistance are not provided.

Lack of ample laws and weak implementation of the prevailing laws are some of the barriers to ensure that the victims are not re-victimized, and for the protection and security of the victims and witnesses. It has been observed that effective arrangements have been made for compensation, reimbursement, rehabilitation of victims, treatment of victims, goodwill, a guarantee of fair treatment, effective rehabilitation justice, etc. Although there are some important provisions regarding crime control and protection of victims, especially in human trafficking crimes, the situation of protection of victims and witnesses from crime in overall crime does not look good.

## 7. UNTIP PROTOCOL AND IT'S ADDITIONAL OBLIGATION

Nepal acceded the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime on 16 June 2020. The purpose of this Protocol is to protect and assist the victims of such trafficking, with full respect for their human rights.[43]Its relevance to Nepal was highlighted in several instances, including the Report on Mid Term Review of National Plan of Action on Combating Trafficking in Persons Especially on Women and Children, as the authors made the recommendation for the expediting the ratification of UN TIP Protocol.

In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification, accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese law.[44] Therefore, now it is high time to focus on implementing the

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37 Gender-Based Violence Prevention Fund (Operation) Rules 2067, rule 2
38 Id., rule 5
39 Id., rule 10
40 Id., rule 11
41 Id., rule 13
42 Id., rule 14A
43 Id., rule 18
44 Nepal Treaty Act 2047, s 9(1)

following provisions related to the Protocol. Nepal needs to adhere to the following provisions at the earliest:

- Ensuring that victims of trafficking are protected from deportation or return where there are reasonable grounds to suspect that such return would represent a significant security risk to the trafficked person or their family. Considering temporary or permanent residence in countries of transit or destination for trafficking victims in exchange for testimony against alleged traffickers, or on humanitarian and compassionate grounds as provided by Article 7 of the TIP Protocol.

- The definitions of trafficking should reflect the need for special safeguards and care for children, including appropriate legal protection, as provided by Article 6(5) of the TIP Protocol.

- Article 9 of the Protocol addresses mandatory prevention measures, specifically citing mass media information campaigns, close cooperation with NGOs, and the creation of social and economic incentives. Examples of such incentives include microcredit lending programs, social advancement of women, job training, or tax incentives to start small businesses. In short, such incentives are measures that help alleviate the economic and social pressures that can make people vulnerable to traffickers.[45] Therefore, this provision should also be internalized.

## 8. PRACTICAL PROBLEMS AND CHALLENGES

While analyzing the Nepalese laws and practice regarding victim and witness protection, the following problems and challenges have been observed:

- Lack of immediate rescue, safety and protection of victims of crime,
- Lack of assurance of security and protection, in spite of the suspicions regarding the safety of the victims,
- The state machinery seems to be inactive in regard to the threats and importance of victims and witnesses.
- Victims and witnesses are not guaranteed with the right to security, protection, and respect during the course of the investigation, prosecution, and adjudication.
- Victims have not been able to acquire free, respectful, fair, fast, accessible, and low-cost justice.
- Lack of guarantee of women and child-friendly environment.
- Lack of assurance of victims' right to safety and protection even after court proceedings and judgment.
- Although there is provision for continuous hearing in the District Court Rules for the purpose of protection of witnesses, it has not been implemented effectively.
- In cases of crime of serious nature, if the court finds that the presence of the defendant can influence the case, there is a provision whereby the defendant is

[45] Hyland, Kelly E. "*The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*" Human Rights Brief 8, no. 2 30-31, 38 (2001)

presented indirectly and under the guidance of the legal practitioner. However, this provision has not been implemented in practice.

- Lack of formulation of victim and witness protection policy.
- Lack of short-term and long-term plans, polices, laws and institutional mechanisms for the protection of the witness.
- In recent times, there have been allegations of delays in the implementation of new and appropriate laws regarding victim and witness protection. There is a challenge for the state machinery to create an atmosphere of trust.
- Nepal is now party to the UN TIP but it has not been able to internalize the extended provisions related to victims.

## 9. SUGGESTIONS FOR THE REFORM

The highlighted suggestions are provided to curb the above-mentioned problems and challenges:

- Immediate rescue, security and protection, if women and children are the victims of crime.
- The right to safety and protection to the victims or those who are vulnerable of being a victim should be ensured.
- The scope of the protection of the victim's family members, close relatives, and dependents should be widened.
- The right of the victim to ensure their protection and respect during the investigation, prosecution and adjudication process should be guaranteed.
- Justice should be guaranteed to the victims in a free, respectful, fair, speed, accessible and low-cost manner.
- Priority should be given to a victim-friendly environment and training should be provided to ensure victim-friendly behavior.
- In the case of women and children victims, confidentiality and in-camera hearing should be ensured. Furthermore, the statement of such victims should be taken only after providing prior notice and approval to the judge.
- The right of victims to protection and protection after court proceedings and judgment should be ensured.
- Adequate and effective implementation of the system of continuous hearings for the purpose of witness protection.
- Adequate implementation of statement recording system on serious cases through video conferencing.
- Infrastructures should be ensured to provide long-term rehabilitation services to the victims of trafficking.
- Formulation of new unified law on the protection of victims and witnesses.
- Create and implement integrated services and assistance including legal aid, psychosocial counseling, health examination, housing, and child care to the victims under a one-step center.
- Awareness programs for the reduction of violence against women should be conducted continuously.

- Arrangement of short and long-term plans, along with legal, institutional and procedural arrangements for witness protection. Appropriate laws should be enacted by considering the good practices adopted in the contemporary world for the protection of witnesses and victims.
- Information on crime should be provided to the relevant local body for the proper identification of crime and victims. However, the confidentiality of such information should be maintained.
- Nepal is now party to the UN TIP, therefore it should internalize the extended provisions related to victims.

## 10. CONCLUSION

It has been observed that we have not been able to address the issue of protection of victims and witnesses in Nepal and to ensure them a sense of security. This is reflected by the fact that in almost half of all human trafficking and trafficking cases, victims and witnesses have not received adequate assistance. Several international legal instruments have highlighted the issue of protection of victims and witnesses significantly. Nepal is part of such instruments and has obligations thereof. This issue is more pertinent as Nepal is now party to the UN TIP Protocol. At present, there is no proper integrated and effective legal system for the protection of victims and witnesses. In the issues of rescue, rehabilitation, relief, compensation, access to justice, and participation of victims of crime are areas of victim protection, the state must pay adequate investment and attention for the purpose of a larger justice. Since the establishment of a just society is the absolute priority of the state, the area of protection of victims and witnesses should be taken with utmost priority. Therefore, it seems necessary to pay special attention to the issues of the protection of victims and witnesses of human trafficking and ensure the basic values related to their justice.

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# DIGITAL EVIDENCE AND ITS ADMISSIBILITY IN CRIMINAL PROSECUTION OF NEPAL

**Sanjeeb Raj Regmi**[1]

## ABSTRACT

*The world now is facing different new models of crimes. In this age of information technology, the crime sector is also not far from the influence of novelty of information technology. This situation has created many challenges in the field of investigation and prosecution. Still the actors of criminal justice have to face the challenges and find out the way of solving the problem. Mainly, the collection of evidence is very tough as the advancement of technological fraud is very much unpredictable and also the technological development is much rapid. Due to the influence of information technology in crime, the criminal nexus has reached to the international level too. In this situation, international coordination and cooperation has become very much necessary to combat the threat of crime. Evidence collection procedure, admissibility of the evidences in front of the court and also the court procedure in handling them are different in the national laws of the related countries. Taking all these things in mind, the actors of criminal justice system has to make the policies. However, different countries in the world have made some effort has been made to solve the problems regarding the issue. This article tries to explore all these things.*

## 1. INTRODUCTION

The evolution of information and communication technology has changed the world tremendously. Over the past two decades there has been a significant increase in electronic contracts and communications. Communication between parties, across the globe, has become simpler than ever before. As technology has become more portable, large amounts of information is created, stored, and accessed in a variety of devices.[2] With increasing reliance on electronic contracts, communication and exchange of documents through electronic means, electronic evidence has assumed great significance. Further, with the increasing impact of technology in every sphere, production of electronic evidence has become vital to prove the liability of an accused or a defendant. Moreover, collection and analysis of digital evidence has become important for solving crimes and preparing court cases. There is a clear benefit to

[1] Joint Attorney, Office of the Attorney General

[2] Shabber Ahamed and others, *The Supreme Court's Attempt to Clarify a History of Judicial Uncertainty*(2021)

having ample information to obtain important evidences for prosecutions of criminal offences. So the importance of digital records has been realized in many jurisdictions for proving any cases including criminal offences.India has incorporated the provisions on the appreciation of digital evidence in 2000.[3]

In Nepal, the Second amendment of Evidence Act, 2077 has recognized digital records as admissible evidence in court of law.[4]Though the law has accepted digital records as evidence in criminal prosecution, the law enforcement and other criminal justice officials need to balance the recovery and admissibility of digital evidence and the privacy concerns as well because there has been a tremendous increase of its misuse. Theauthenticity of e-documents has always been debatable, considering how prone they are to be tampered with. Investigation agencies are also increasingly facing issues with regard to obtaining and the admissibility of such electronic evidence. Anyway the application of electronic evidence is accepted in prosecution and judicial proceedings of criminal offences in many countries. This article has attempted to discuss about application of electronic evidences, its legal validity and use in criminal prosecution of Nepal.

## 2. DIGITAL EVIDENCE AND ITS NATURE

Digital evidence is the information stored or transmitted in binary form that may be relied in court of law. It is known as any information or data that is stored on, received by, or transmitted by an electronic device. It is commonly associated with electronic crime, such as child pornography or credit card fraud. However, digital evidence is now used to prosecute all types of crimes like organized crime, extortion, financial crime, Money laundering etc. Suspects' e-mail or mobile phone might contain critical evidence regarding their intent, their whereabouts at the time of offence and their relationship with other suspects and victims as well. So those digital records relevant to offence could be evidence to prove or disprove the involvement of suspects. Text messages, emails, pictures and videos, and internet searches are some of the most common types of digital evidence used very effectively as evidence in respective criminal offences.

The nature of digital evidence is conceptually the same as any other evidence. However, digital evidence has a wider scope, can be more personally sensitive and different than other physical evidence. The U.S. Supreme Court recently noted three characteristics to understand how digital evidence differs from traditional physical records and evidence. The Court observed that Digital evidence has a wider Scope; it deals with both physically and personally sensitive information. So the warrant is required to search a mobile phone. The Court further held that warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional.[5]

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3 The Indian evidence Act1872, s 65A; s 65B
4 Evidence Act 2031,s 13A
5 *Riley v California* 573 U.S. 373(2014)

## 3. ADMISSIBILITY OF ELECTRONIC RECORDS IN COMPARATIVE JURISDICTIONS

Digital records are used in court as evidence but it is admissible under legal scrutiny. First it must be recognized by law, collected by legal authority comply the procedure and establishes a fact of matter asserted in the case. Second, it remained unaltered during the digital forensics process, and the results of the examination are valid and reliable. The admissibility depends on the legal provisions of the country and the court practices as well.

### 3.1. India

The concept of electronic evidence has been introduced in India through the Information Technology Act, 2000 and the related amendments in the Evidence Act, 1872. According to Section 2(1)(t) of the Information Technology Act, the term electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro-film or computer-generated micro fiche. The Act expressly recognizes the validity and use of electronic records in place of ordinary paper-based records.[6]

Evidence Act of India provides that the contents of electronic records may be proved in accordance with the legal provisions.[7] Thus, any documentary evidence by way of an electronic record can be proved only in accordance with the procedure prescribed under Section 65b. of the Evidence Act. Evidence Act provides that any information contained in an electronic record, whether it be the contents of a document or communication printed on a paper, or stored, recorded, copied in optical or magnetic media produced by a computer, it is deemed to be a document and is admissible in evidence.[8]

The Evidence Act was amended by virtue of Section 92 of the IT Act and the term evidence was amended to include electronic record, thereby allowing for admissibility of the digital evidence. Evidence Act signifies the clear and explicit legislative intention to recognize electronic record as admissible evidence under certain technical and non technical conditions. Those technical conditions are as follows:

a) At the time of the creation of the electronic record, the computer that produced it must have been in regular use,

b) The kind of information contained in the electronic record must have been regularly and ordinarily fed into the computer,

c) The computer was operating properly; and

d) The duplicate copy must be a reproduction of the original electronic record.

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6 The Information Technology Act 2000, s 4
7 The Indian evidence Act1872, s 65B
8 Ibid.

The important thing is that there has been no unauthorized use of the data; the device was functioning properly, ensuring accuracy and genuineness of the reproduced data.

The non-technical condition is the certificate of authenticity under Section 65B (4) of the Indian Evidence Act are as follows:

a) There must be a certificate which identifies the electronic record containing the statement.

b) The certificate must describe the manner in which the electronic record was produced.

c) The certificate must furnish the particulars of the device involved in the production of that record.

d) The certificate must deal with the applicable conditions mentioned under Section 65b.(2) of the Evidence Act,

e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

The certificate is to be signed by a person occupying a responsible position in relation to the device through which the data has been produced. The certificate must identify the electronic record containing the statement, describe the manner in which it was produced and also give such particulars of any device involved in the production of the electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer. The idea behind the certificate is also to ensure the integrity of the source and authenticity of the data, so that the Court may be able to place reliance on it. This is critical since electronic data is more prone to tampering and alteration. The Supreme Court of India held conclusively that documentary evidence in the form of an electronic record can be proved only in accordance with the procedure set out under section 65B of the Evidence Act.

The Supreme Court interpreted that the fulfillment of the requirements of section 65B is essential for the admissibility of the electronic evidence.[9]*The Supreme court in ShafiMohhamad case, observed that the certificate under Section 65B(4) is merely a procedural requirement and it will only apply to the person who has control over the device and hence in a position to provide with the said certificate. Therefore in certain circumstances, the certificate under 65B(4) is not mandatory and it is merely a procedural law.*[10]

The reliability of digital evidence is one of the biggest challenges that courts have to deal with while adjudicating upon the admissibility of the electronic evidence. It becomes important for the court to ensure that the records were not manipulated, altered or damaged, between the time they were actually created and put forward in Court. Enactment of the IT Act and the subsequent Amendments in the Evidence Act, the use of electronics records in judicial proceedings has gone a long way. The court

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[9] *Anwar PV v PK Basheer and Others* (2014) 10 SCC 473

[10] *Shafi Mohammad v The State of Himachal Pradesh (2018) 2 SCC 801*

has to promote certainty in the use of such electronic records while taking into account all practical aspects. Electronic evidence should be free from any kind of distortion or manual edit or manipulation, it must be the authentic and trustworthy information, which may get admitted as evidence in the court of law.

### 3.2. USA

Many courts in the United States have applied the Federal Rules of Evidence to digital evidence in a similar way to traditional documents, although important differences such as the lack of established standards and procedures have been noted. In addition, digital evidence tends to be more voluminous, more difficult to destroy, easily modified, easily duplicated, potentially more expressive, and more readily available. As such, some courts have sometimes treated digital evidence differently for purposes of authentication, hearsay, the best evidence rule, and privilege. In December 2006, strict new rules were enacted within the Federal Rules of Civil Procedure requiring the preservation and disclosure of electronically stored evidence. Digital evidence is often attacked for its authenticity due to the ease with which it can be modified, although courts are beginning to reject this argument without proof of tampering.

### 3.3. Britain

In Britain, the Police and Criminal Evidence Act, 1984 stipulates that electronic evidence to be certain and the data must be accurate and properly issued by the computer. The Act reads that document produced by a computer shall be admissible as evidence in any fact if there are reasonable grounds for believing that the statement is accurate because of proper use of computer and operating properly.[11]

## 4. ELECTRONIC OR DIGITAL EVIDENCE IN NEPALESE LEGAL FRAMEWORK

Digital Evidence is recognized by the Evidence law of Nepal. Evidence (Second Amendment) Act, 2077, which came into force on 2077/2/20, recognized the validity of digital records as evidence. This Act provides that any digital or electronic forms are considered as public document and any information contained in an electronic record for the purpose of any act or profession is deemed to be a document and is admissible as evidence.[12] It is considered to be an important evidence in criminal investigation and prosecution of Nepal and very well admissible in the court. As digital evidence helps in making an objective evaluation of the case, there is an increasing trend to collect all possible digital evidences in criminal cases in Nepal.

### 4.1. Evidence Act, 2031

Evidence Act, 2031 has acknowledged digital record in any electronic devices as documentary evidence.[13] It also provides for certain presumptions in order to facilitate the use of electronic record. The court shall presume that any agreement or document concluded through the use of electronic transactions be considered as correctly

[11] Police and Criminal Evidence Act 1984, s 69
[12] Evidence Act 2031,s 2(a), s 14
[13] Evidence Act 2031, s 14, s 35

recorded. It also says that the court shall presume every electronic transaction concluded with by affixing the electronic signature be considered correctly signed by the parties.[14] Similarly, Section 13a. of the Act allows that the digital records documented through video conferencing is of evidential value and section 18 permits the Court to consider digital evidence as prima-facie evidence in course of bail hearing in criminal offences. After the second amendment of Evidence Act, 2077, digital evidence is given validity as admissible evidence in criminal offences and civil matters as well. So the investigator and prosecutor have to pay attention to search and obtain electronic evidences and use in criminal procedures.

### 4.2 Electronic Transaction Act, 2063

This Act gives a legal Recognition of Electronic Records. It reads that where the prevailing law requires any information, documents, records or any other matters to be kept inwritten or printed type written form, then, if such information, document, record or the matter is maintained in an electronic form by fulfilling the procedures asstipulated in this Act or the Rules made hereunder, such electronic record shall also have legal validity.

This act also recognized digital signature. It provides that where the prevailing law requires any information, document, record or any other matters to be certified byaffixing signature or any document to be signed by any person; then, if such information, documents, records or matters are certified by the digital signatureafter fulfilling the procedures as stipulated in this Act or the Rules made hereunder, such digital signature shall also have legal validity.

### 4.3. Penal code and Criminal Procedure Code, 2074

Penal code provides that creation of a false electronic record or partial electronic record with an intention to harm or damage others and benefit oneself shall be considered as an offence of forgery.[15]Criminal Procedure code, 2074 provides that any digital records or electronic forms of matter related to offence can be obtained and send for examination if the investigating authority thinks that there is a possibility of acquiring evidences. [16] This provision admits the validity of electronic evidence under certain conditions. Similarly, investigating authority may record the statement of victim and witnesses of an offence through any audio-visual means, in the presence of the government attorney if there is possibility of being hostile. The court may admit in evidence the audio-video means recorded pursuant to above cause.[17] Since the legal provisions accepted the digital records could be evidence and admissible in criminal case also, those records must be authentic and obtained by applying the procedure prescribed by law. The court only accepts it as admissible evidence if it is obtained properly and without tampering.

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14 Evidence Act 2031, s 6
15 The National Criminal Penal code 2074, s 276(2)
16 The National Criminal Procedure Code 2074, s 21
17 The National Criminal Procedure Code 2074, s 184

### 4.2. Judicial Response on the admissibility of digital evidence

The Supreme Court of Nepal recognized the digital records as evidence before the second amendment of Evidence Act. In the case of *Bam BahadurBasnet,* the Court held that Photos, CDs, Audio and Videos are digital documents. Their evidential value cannot be ignored by the court if they are produced by the prosecution side as evidences and not objected by defense party.[18]

In the case of obtaining call detail record of alleged person from service providers, the Supreme Court held that without legal authority and legal procedure the investigating authority cannot ask and obtain the data from service providers. There should be proper balance between investigation and individual right to privacy. The court further ordered the Nepal Government to make legal arrangement for obtaining telephone call details for the purpose of crime investigation. The Court held that unless the legal arrangement regarding to obtain the call details is not made, the District Court is the authority for giving such permission.[19]The Privacy Act, 2018 Guarantees that every person shall have the right to maintain privacy of the matter relating to personal information and data that remained in electronic means. Now the investigating officer has the responsibility to receive the prior permission of district court for acquiring CDR from service providers for criminal investigation. Chain of custody of evidence must be satisfied not only in relation to digital evidence but in all evidences.

In the case of *Subbagaun*, the Supreme Court accepted the voice record of alleged person recorded in mobile as digital evidence. The Court held that if the sample voice of the alleged person and the voice recorded in his or her mobile phone are matched, it could be considered as evidence.[20] The Court accepted the voice recorded in electronic device as admissible digital evidence if the expert examined it.

In *KedarAryal* case[21] the Court held that any digital matters recorded in CD or any other electronic means could be considered as admissible evidence. The court further observed that development of new dimensions in the field of IT could not be ignored by the court.

In *ShyamAdhikari* case [22] the court held that the voice record should be of accused and it should not be tampered. It must be examined by the expert through scientific methods for its admissibility.

On the basis of the interpretation of Supreme Court, the admissibility of digital evidence depends on some conditions. First, the electronic evidence must be legally obtained by the competent investigation authorities. Second, it must be verified as valid by computer science and information technology experts. Third, it should not be manipulated or tampered. If those conditions are not met, the evidence is invalid.

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18 [NKP 2070]DN 9022,Vol 6
19 *Baburam Aryal v Nepal Government* [NKP 2074] DN 9740, Vol 1
20 *Subba Gaun v Nepal Government* [NKP 2074] DN 9811,Vol 5
21 *Kedar Aryal v Nepal Government* [NKP 2074] DN 9880,Vol 5
22 *Shyam Adhikari v Nepal Government* [NKP 2076] DN 10323, Vol 8

## 5. RULES FOR ADMISSIBILITY OF DIGITAL EVIDENCE

Digital evidence must be authentic for the court. The admissibility depends on how the evidence was obtained, its handling methods, documentation, chain of custody and its presentation in the court.It is often ruled inadmissible by the courts because it was obtained without authorization. In most jurisdictions a warrant is required to seize and investigate digital devices. In a digital investigation this can present problems where, for example, evidence of other crimes is identified while investigating another. It must be produced without any human intervention and manipulation. The sensitivity of these evidences places them under strict observation by the court to ensure originality. Time and again the courts have reiterated that evidences gained by new techniques and devices cannot be refused as evidence, provided that their accuracy can be proved. Relevance of electronic records is specific to the facts and circumstances of each case. The reliability of digital evidence is one of the biggest challenges that courts have to deal with while adjudicating upon the admissibility of the electronic evidence. Therefore, it becomes important for the investigator and prosecutor to obtain the digital records lawfully and maintain the chain of custody. The Court ensures that the digital records and contents would not be manipulated, altered or tempted.

## 6. CONCLUSION

Electronic evidence is any evidential information stored electronically on any type of electronic device that can be used as evidence in a lawsuit. Admissibility and evidentiary value of electronic records have been recognized by evidence law of many jurisdictions and used for criminal prosecution. As digital devices such as computers, cell phones, and GPS devices become ubiquitous, analysis of digital evidence is becoming important to the investigation and prosecution of criminal offences. It can reveal information about crimes committed movement of suspects, and criminal associates as well. Evidence law and criminal procedure law of Nepal have accepted the electronic records as admissible evidence in criminal proceedings. The Supreme Court through its judgments made it clear about the manner in which the electronic records shall be admissible and their evidentiary value in the trial of criminal and other judicial proceedings. It is now crystal clear that any electronic evidences obtained lawfully by investigator complying the provision of Procedure established by law and relevant with fact in issue are admissible in court of law. It shall be authentic and accurate. If the digital records are manipulated and tampered, the court rejects its admissibility. So the electronic devices can play a very crucial role in the investigation but the value of that electronic evidence is dependent on its compliance with provisions of the evidence law. The investigator and prosecutor should pay attention in the evidential value of digital records and its technicalities. It demands a complete understanding for law enforcement officials including prosecutors regarding the digital evidence, its sources, admissibility, evidence law provisions, privacy and human rights law, electronic data protection and preservation policies and international co-operation. Since the analysis of digital evidence is becoming an important tool for prosecution and preparing court cases, the court on the one hand accepts the development of new

technologies and on the other hand cautiously scrutinizes the digital records as prosecution evidence.

Obtaining evidence from information technology system raises many difficulties for investigators for several reasons. Electronic tools may be used to commit crimes; they are thus evidence of these crimes. Additionally, there is ease of quickly erasing or manipulating digital evidence.The investigator cannot apply traditional evidence procedures. So the investigators need specialized technical expertise and training to search for evidence, such as examining hard drives and other electronic tools and systems.

Most criminal investigations often commence from an analysis of the call records of the accused. Such call records are often useful for investigation and prosecution as a starting point. The investigating agency has no access to ask the service provider to provide the CDR. The court permission is required and it sometimes takes long time for acquiring CDR. It demands the review of the provision of compulsory permission from the court. Obtaining digital records easily from internet service providers is another challenge. There are many service providers located in other countries. It would be quite difficult to ask the ISP for receiving digital records. Mutual legal assistance and direct contact between law enforcement agencies is important tools for receiving digital records.

# A REVIEW OF NEPALESE PUNISHMENT SYSTEM

**Som Kanta Bhandari**[1]

**Prabhat Chhetri**[2]

## ABSTRACT

*All sanctions are predicated on the same premise that the offender must be punished. The penalty is inflicted for two basic reasons. One is the notion that punishing offender is both right and just, while the other is the view that punishing offender deters others from committing offense. Recently reformative approach - i.e. the goal of punishment should be to reform the criminal using the individualization process, which is based on the humanistic premise that an offender does not cease to be a human being just because he commits a crime - is popular. Nepal has its long history of punishment. A review of the literature suggest that the Nepalese punishment system was previously based on retributive theory and was unequal. However, it has been gradually accepting various modern ideas of the punishment system. With the enforcement of Criminal Offenses (Sentencing and Execution) Act, 2074 (2017 A.D.), The national Criminal Penal Code, 2074 (2017 A.D.) and The National Criminal Procedure Code, 2074 (2017 A.D.), the Nepalese punishment system has titled to the reformative and punitive approach of the punishment. However, all the provisions have not been materialized yet and its impact is yet to be seen. It is pertinent to note that the Nepalese judiciary has been an important source of punishment policy, apart from playing the role in setting standards, and executing the punishment policy, although it was traditionally understood that the punishment system falls under the domain of the legislature.*

## 1. INTRODUCTION

### 1.1 Brief History

Before the enactment of MulukiAin, 2020 (1963 A.D.), deriving its source from the religious texts and king's orders, various forms of punishments were practiced, such as capital punishment, corporal punishment, fines, imprisonment, rigorous imprisonment with hard labor, banishment, degradation, denunciation, enslavement, personal revenge, etc.[3] Those punishments were based on the caste, status, gender, and religious status of the accused. However, MulukiAin, 2020 (1963 A.D.), being the first

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secular criminal statute, abolished the discriminatory punishment system. It modified the punishment system by introducing punishments such as life imprisonment, confiscation of property, imprisonment, fines, and compensation.[4] Although the MulukiAin, 2020 (1963 A.D.) had provisioned for the death penalty, it was abolished with the enactment of the Constitution of the Kingdom of Nepal, 2047. In 2018, six laws were enforced, splitting the MulukiAin into five separate laws. Among the five laws, the National Criminal Penal Code, 2074 (2017 A.D.) and National Criminal Procedure Code, 2074 (2017 A.D.) deals with defining crimes and fixing sentences against those convicted of those crimes. While the Criminal Offenses (Sentencing and Execution) Act, 2074 (2017 A.D.) has provisioned methods and criteria to determine and pronounce sentences on offenses. In this light, this article attempts to analyze the existing punishment system in the new law.

### 1.2 Concept

Punishment under the law is*the authorized imposition of deprivations — of freedom or privacy or other goods to which the person otherwise has a right or the imposition of special burdens — because the person has been found guilty of some criminal violation, typically (though not invariably) involving harm to the innocent.*[5]Punishment is first and foremost an imposition of a burden or hardship. Usually, it is experienced as unpleasant, often as painful -- though we are nowadays more likely to conceive of it as a deprivation (of certain rights) than as the infliction of pain.[6]

Punishment is a socio-legal concept. It derives its goals and purpose from a sociological perspective and gains its legitimate recognition and enforceability through a legal framework. In any given society, there are a set of norms conceived through the social set up which are later recognized by laws and converted into statutory laws which require an institution of regulation to protect the compliance of these socio-legally established norms.[7]

In the earlier times, few punishments exhibited extreme brutality and were later condemned as they transgressed humanitarian grounds. Earlier death as a punishment was allowed for even minor offenses, but gradually other forms of punishments such as imprisonment, community work, and fines were considered apt for achieving the purposes of punishment with specific emphasis that it should fit the wrong committed.[8]

Throughout history, society has devised a variety of methods for punishing criminals while still preserving the public's protection. Criminal punishment has evolved into five basic theories: incapacitation, deterrent, retribution, rehabilitation, and restoration, according to those who examine sorts of crimes and their punishments.

Around the world, regulation has rapidly developed since the turn of the twentieth century, reversing the nineteenth century's brief rule of laissez-faire. The state now

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4 Bibek Kumar Poudel, 'Development of Written Criminal Law in Nepal'[2014] Nepal Law Review171

5 Stephen Farrallet al., *Justice and Penal Reform: Re-shaping the Penal Landscape* (Routledge 2016) 47

6 John Kleinig, *Ethics and Criminal Justice: An Introduction* (1st ed., Cambridge University Press) 196

7 Cassia Spohn, *How do judges decide? The search for fairness and justice in punishment* (2nd ed., Thousand Oaks 2009)

8 David Skuy, *Macaulay and the Indian Penal Code of 1862: The myth of the inherent superiority and modernity of the English legal system compared to India's legal system in the nineteenth century* (Cambridge University Press 1988) 513-557

regulates 'discrimination' against the specific minority, collusive business agreements, 'jaywalking,' travel, construction materials, and thousands of other activities, in addition to protecting people and property from murder, rape, and burglary. The limited activities are not only numerous, but also diversified, impacting people with a wide range of interests, social backgrounds, educational levels, ages, races, and so on. Furthermore, the chances of an offender being caught and convicted, as well as the type and severity of sanctions, vary widely from person to person and activity to activity.[9]

Accordingly, the following are the major importance of the punishment:[10]

i. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
ii. to afford adequate deterrence to criminal conduct;
iii. to protect the public from further crimes of the defendant; and
iv. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

### 1.3 Theories of Punishment

Not every country in the world has the same punishment system. The reason for the uniform punishment system may be attributed to the context, time and place of the crime. Also, different penal systems may operate in the same country. With the change in the administration of criminal justice, the nature of punishment varies. Accordingly, the major theories of the punishment are as follows.

#### 1.3.1 Retributive Theory

This older conception of punishment is sharply distinguished from mere social hygiene: it does not make primary, as modern thought does, the reduction of crime or the protection of society from the criminal; instead, it makes primary the meting out to a responsible wrongdoer of his just deserts.[11] The fundamental goal of this idea is to dissuade (prevent) criminals from doing the same or similar crimes in the future. According to this view, the criminal is subjected to harsh punishments in order to deter him/her from committing a crime in the future, as well as to teach other members of society about the repercussions of committing a crime. Critics claim that it is not considered appropriate to apply this principle in the administration of criminal justice stating that it is against human rights and is regarded inhumane. This principle is not accepted in our prevailing criminal law.

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9 Gary S. Becker, *The Economic Dimensions of Crime* (Springer 2000) 13-68

10 United States Senate Committee on the Judiciary, *Reform of the Federal Criminal Laws: Hearings, Ninety-second Congress, First Session [Ninety-seventh Congress, First Session]* (BiblioLife 2015)

11 H.L.A. Hart, *Punishment and the Elimination of Responsibility* (Athlone Press 1962) 1

### 1.3.2 Deterrence Theory

According to Salmond, the purpose of punishment is to protect society by discouraging potential future criminals from committing crimes, preventing real criminals from committing further crimes, and reforming them into law-abiding citizens.[12] Under this theory, the court shall determine the sentence by taking into account all or any of the following purposes to deter the offender or other persons from committing the offense.[13]

### 1.3.3 Reformative Theory

According to this theory to commit a crime is a disease and to cure it reformation serves as medicine. In this, the offender is cured morally as well as it is aimed at changing their physical habits. As far as this theory is concerned the aim is to make the offender so mentally strong that the offender could stop their temptation of committing a crime.[14] Nepalese law has now adhered to this principle by making legal provisions related to community service, suspension of imprisonment, correctional facility, open prison, parole and probation, and socialization, primarily by Criminal Offenses (Sentencing and Execution) Act, 2074 (2017 A.D.).

### 1.3.4 Preventive Theory

If the deterrent punishment would not solve the sole purpose of punishment the other mode is the preventive method of punishment. By prevention, the criminal is prevented from committing the crime either by putting him into imprisonment, by inflicting the death penalty, or by ending the modes by which he used to commit the crime.[15]

For instance, Section 67 of the Muluki Criminal Procedure Code, 2074 (2017 AD), provides that the accused involved in serious and heinous offenses will be kept in custody during the hearing of the case and the case will be tried. Similarly, the prevailing criminal law including the Code provides for imprisonment for various offenses according to the severity of the offense.

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12 P. J. Fitzerald, *Salmond on Jurisprudence* (Sweet & Maxwell 1985) 94
13 The Criminal Offences (Sentencing and Execution) Act 2074,s 13(a)
14 Sagar Shelke andJyoti Dharma, 'Theories of Punishment: Changing Trends in Penology' (2019) IJEAT1299
15 Ibid, 1300

## 2. Existing Punishment System of Nepal

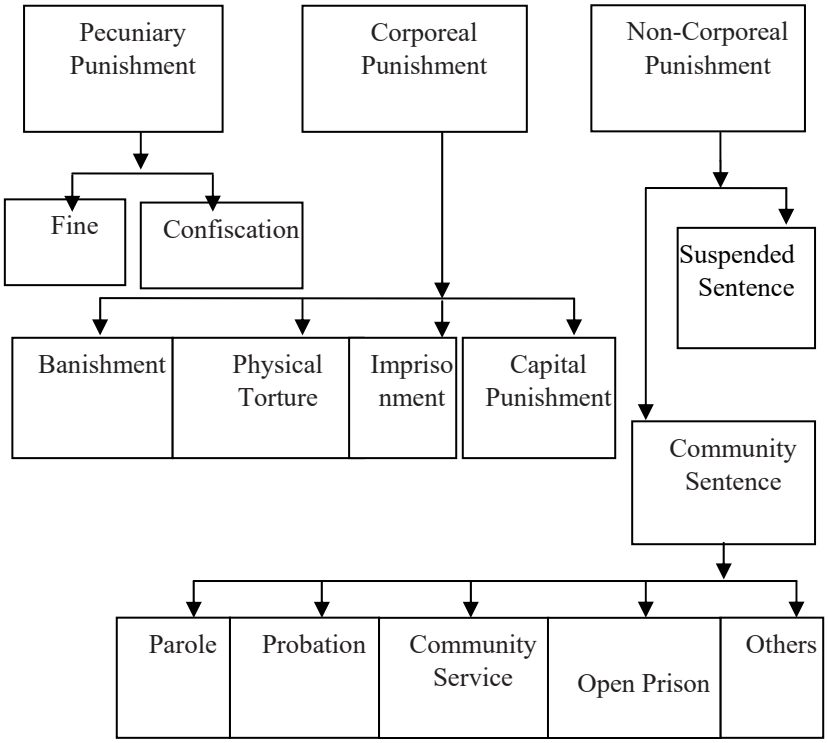


Figure: Types of Punishments in General

There are several methods of punishments. It must be noted that certain types of punishment such as banishment,[16] physical torture,[17] and capital punishment[18] have been prohibited by the constitution itself. Nevertheless, the following punishment has been observed in Nepal:

The National Criminal Penal Codehas provisioned the following types of punishments[19]:

(a) Imprisonment for life,

(b) Imprisonment,

(c) Fine,

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16 Constitution of Nepal, art45 provides that no citizen shall be exiled.

17 Constitution of Nepal, art 22(1) provides that no person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment

18 Constitution of Nepal, art16 provides that no law shall be made providing for the death penalty to anyone.

19 The National Criminal Penal Code 2074, s 40

(d) Imprisonment and fine,

(e) Compensation,

(f) Imprisonment for the failure to pay a fine or compensation,

(g) Community service in lieu of imprisonment.

In this light, some of the major types of punishments are discussed below:

### 2.1 Fine & Confiscation

Fine and the confiscation of certain property is determined by the crime and the relevant law. A fine may be imposed as an alternative or as an addition to imprisonment. The amount of a fine can be determined on a case-by-case basis, but it is often announced in advance.[20] Any offender who is unable to pay a fine imposed on him or her may be subjected to imprisonment.[21] The Supreme Court of Nepal has well elaborated the concept and noted that if the accused bears no responsibility for failing to pay the fine imposed by law for committing a crime, it will obstruct the administration of criminal justice, which will likely lead to anarchy, and the person who committed the crime will be able to get away with it. Such behavior is incompatible with the spirit and purpose of the criminal justice administration, which is to maintain peace and order by protecting society from crime and criminals.[22]

Regarding confiscation, in Nepal, it is a general practice that the property used in the crime is confiscated. Section 11 of the Offence related to Assets and Goods (Freezing and Confiscation) Act, 2070 (2014 A.D) provides that the property or instrument obtained or used in any offense shall be confiscated. Such provision has been incorporated in several specific offenses too. For instance, Section 18 of Narcotic Drugs (Control) Act, 2033 (1976 A.D) provides that all narcotic drugs connected with any offence punishable under the Act and all materials and equipment used in the manufacture or production of such narcotic drugs shall be confiscated and any vehicle used for the transportation of such narcotic drugs, other than railway train and aeroplane, shall also be confiscated.

### 2.2 Imprisonment

In recent years, imprisonment has become a more common method of punishment. All across the world, people are imprisoned with or without work. Penalties include both periodic and life imprisonment. The convicted perpetrator is sentenced to prison for a set period of time. Based on the prisoner's record of behavior while incarcerated, he or she may be freed early.

The National Criminal Penal Codeprovides that the offender shall be subjected to imprisonment for the whole of his or her natural life:[23]

(a) Murder with cruelty, torture or inhumane conduct,

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[20] Samuel L. Bray, 'Announcing Remedies'(2012) Cornell Law Review 97
[21] The National Criminal Penal Code 2074, s 46
[22] *Aarti Shrestha v. Office of the Prime Minister and Council of Ministers et al*., [2066] DN 8215, Vol. 51
[23] The National Criminal Penal code 2074, s 41

(b) Murder by hijacking or exploding an aircraft,

(c) Murder by kidnapping or taking hostage,

(d) Murder by poisoning publicly consumable beverages or food,

(e) Genocide (destroying the identity of any caste, race or group) or offence committed with the objective of committing genocide,

(f) Murder with rape.

Code provides that except in the that circumstance referred to in Section 41 of Criminal Code, the sentence of imprisonment for life shall be so computed that its term is twenty-five years.[24] Also, the other types of imprisonment may vary with the offense.

### 2.3 Non-Corporeal Punishment

Punishment of the nature of direct punishment to the offender without causing physical or monetary damage is called Non-Corporeal Punishment. It seeks alternatives to imprisonment and fines. Not all crimes are the same, as crime differs on different factors. Crime can be reduced by various factors such as necessity, impulse, circumstance, pressure, compulsion, negligence, and carelessness. People who commit crimes may also be mentally ill or self-inflicted. Crime sequences are not created in the same way, which makes a difference in the seriousness of the crime.

Alternatives to jail are frequently more effective than imprisonment at attaining essential public safety objectives, such as increased population security. They may infringe less on human rights while costing less in the short and/or long term if properly planned and implemented.[25] The Tokyo Rules deal with the objective of sentencing in general terms only. Rule 3.2 provides: "The selection of non-custodial measures shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, the background of the offender, the purposes of sentencing and the rights of victims." Therefore, Nepal has recently adopted the following as the non-corporeal punishment:

#### 2.2.1 Pardon, Remission, Suspension, Alteration or Reduction of the sentence

A person who is sentenced by a court judgment to punishment for an offence may make a petition to the President, through the Ministry of Home Affairs, for the pardon, suspension, alteration or reduction of that sentence.[26] No action may be taken to pardon, suspend, alter or reduce the sentence imposed on the offender of any of the following offences:

(a) Corruption,

(b) Torture,

(c) Rape,

(d) Murder in a cruel and inhumane way or by taking control,

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[24] The National Criminal Penal code 2074, s 42

[25] UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (UNODC, 2007)

[26] The National Criminal Procedure Code 2074, s 159(1)

(e) Genocide,

(f) Explosives

(g) Kidnapping, hostage-taking or enforced disappearance,

(h) Human trafficking and transportation,

(i) Money laundering, and

(j) Narcotic drugs trafficking or transaction punishable by a sentence of imprisonment for a term exceeding three years

Furthermore, if an offender, except offenders of certain nature, has served three-fourth of the sentence of imprisonment and has reformed his or her conduct while in prison, the prison may make remission.[27]

### 2.4 Alternative to Traditional Punishment: A New Legal Regime That Awaits Enforcement

#### 2.4.1 Payment of money in lieu of imprisonment:

Courts can implement the use of alternatives in a manner that meets these multiple sentencing objectives, at least to some extent. This is particularly true where a non-custodial sentence has an arguably equivalent punitive effect to what the judge would otherwise seek to achieve with a prison sentence.[28]

Nepalese law has provisioned that if, in view of the age of the offender who is convicted, at the first instance, of any offense punishable by a sentence of imprisonment for a term of one year or less, the gravity of the offense, manner of commission of the offense and his or her conduct, as well, the court does not consider it appropriate to confine the offender in prison and is of the view that there will be no threat to the public peace, law, and order if he or she is released, and the court, for the reasons to be recorded, considers it appropriate to dispense with the requirement of undergoing imprisonment upon payment of a fine in lieu of imprisonment, the court may order that the offender be not liable to undergo imprisonment if he or she makes payment of money in lieu of imprisonment.[29]

#### 2.4.2 Parole

Generally, parole (or conditional release) is the release of an offender on conditions that are set prior to release and that remain in force, unless altered, until the full term of the sentence has expired. It can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served, or it can be discretionary when a decision has to be made to release a prisoner conditionally.[30]Nepalese law has defined "parole" as a permission for a prisoner who has served two-thirds of the term of the sentence of imprisonment imposed on him or her to serve the remaining term by spending life in the society, subject to the

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27 The Criminal Offences (Sentencing and Execution) Act 2074, s 37

28 UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (UNODC 2007), 41

29 The National Criminal Procedure code 2074, s 155

30 UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (UNODC, 2007), 49

compliance with the specified terms and conditions, under the supervision of the parole officer.[31]

The judge of the District Court may, on the recommendation of the concerned District Probation and Parole Board, make an order to place on parole an offender who, upon being sentenced to imprisonment for more than one year, has served two-thirds of the sentence and has good conduct. Provided that the following offender may not be placed on parole:[32]

(a) One who has been sentenced to life imprisonment,

(b) One who has been sentenced for the offence of corruption,

(c) One who has been sentenced for the offence of rape,

(d) One who has been sentenced for the offence of human trafficking and transportation,

(e) One who has been sentenced for the offence of organized crime,

(f) One who has been sentenced for the offence of money laundering,

(g) One who has been sentenced for an offence related to torture or cruel, inhumane or degrading treatment,

(h) One who has been sentenced for the offence of crime against humanity,

(i) One who has been sentenced for an offence relating to the crime against the state.

### 2.4.3. Probation

Probation is a sentence disposition in the criminal justice system where offenders are supervised in the community by probation officers. In some cases, probation also includes the supervision of those on parole who have been conditionally released from prison. A person on probation is required to observe specific court-imposed terms and is frequently supervised by a probation officer. If an offender is found disobeying the rules set by the court or probation officer while on probation, he or she faces incarceration.[33]

Under the Nepalese law, in cases where an offender on whom a sentence of imprisonment for less than one year has been imposed has committed the offence for the first time and, having regard to the offence committed by the offender, the age, the conduct of the offender, the circumstances and the manner of the commission of the offence, it appears to the court that it is not appropriate to imprison the offender, the court may, without implementing the sentence of imprisonment imposed on such offender, suspend such imprisonment.[34]

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31 The Criminal Offences (Sentencing and Execution) Act 2074, s 29(1)
32 The Criminal Offences (Sentencing and Execution) Act 2074, s 29
33 Jennifer Eno Louden et al., *The Encyclopedia of Clinical Psychology* (Wiley 2015)
34 The Criminal Offences (Sentencing and Execution) Act 2074, s 24

### 2.4.4. Community Service

Community service, also known as community restitution, is a form of punishment intended to benefit the community that's been harmed by an offender's crime. Community service can be used as a pretrial diversion, as a condition of probation or parole, or as an option to work off a fine by an impoverished offender. Very often, it is itself a stand-alone sentence, but it can also be used in addition to other sentences. [35]

Under the Nepalese laws, if, in relation of an offender who is sentenced to imprisonment for a term not exceeding six months, having regard also to the offence committed by the offender, the age, conduct of the offender, the circumstances and the manner of the commission of the offence, it appears to the court that it is not appropriate to imprison the offender, the court may order the offender to do the community service or to do the community service for the remaining period after the offender has served the sentence of imprisonment for such period as the court deems appropriate in relation to such offence.[36]

### 2.4.5 Open Prison

An open jail is any criminal institution where inmates serve their sentences with limited monitoring and perimeter security, rather than being locked up in prison cells. The philosophy on the basis of which the open prison exists is reflected in the two dictums of Sir Alexander Paterson. First, a man is sent to prison as punishment and not for punishment. Second, one cannot train a man for freedom unless conditions of his captivity and restraints are considerably relaxed.[37] Nepalese law has defined "open prison" as any place specified by the Government of Nepal in a manner that a prisoner may work during the specified time even outside of the place where he or her is held.[38] The judge of the concerned District Court may, on recommendation of the chief of Prison Office, make an order to hold in open prison an offender who has served two-thirds of the term of imprisonment and has good conduct.[39]

## 2.5 Some Reforms in the Punishment System

### 2.5.1 Consideration of the aggravating and mitigating factors of offenses

Although the length of an offender's sentence is normally fixed within sentencing guidelines, aggravating and mitigating circumstances function to either increase, or decrease, sentence severity.[40] Nepalese law provides that the court shall determine a sentence to any person for any offense only after such person is convicted of such offense by the court in accordance with the law. The range of punishment shall be

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35 R. J. Harris, 'Community Service: Its Use in Criminal Justice'[2002] International Journal of Offender Therapy and Comparative Criminology 427–444

36 The Criminal Offences (Sentencing and Execution) Act 2074, s 22

37 N.V.Paranjape, *Criminology and Penology* (Central Law Publications 2001)

38 The Criminal Offences (Sentencing and Execution) Act 2074, s 28(1)

39 The Criminal Offences (Sentencing and Execution) Act 2074,s 28(1)

40 Amirault, "The Impact of Aggravating and *Mitigating* Factors on the Sentence Severity of Sex Offenders: An Exploration and Comparison of Differences Between Offending Groups," *Criminal Justice Policy Review*, 25(1) (2014), 79.

determined based on aggravating and mitigating factors of offences.[41] A sentence shall be determined for an offender pursuant to Section 8 by conducting a separate hearing[42]

### 2.5.2 Fine in Accordance to the Imprisonment

Previously the provision related to the fine was uneven. Along with the limitation of the terms of the maximum fine that may be imposed, the Muluki Criminal Code, 2074 (2017) has also ensured that the quantum of such fine reflects the objective seriousness of the offence i.e. quantum of the punishment. For instance, regarding the offense of the cheating, the National Criminal Penal Code, 2074 (2017 A.D.) has provisioned that in regard sentence of imprisonment for a term not exceeding ten years and a fine not exceeding one hundred thousand rupees, in the case of cheating the Government of Nepal or any body under full or majority ownership or control of the Government of Nepal, except in cases of corruption; a sentence of imprisonment for a term not exceeding five years and a fine not exceeding fifty thousand rupees, in the case of cheating by lying one's name, designation, title, qualification; whereas a sentence of imprisonment for a term not exceeding seven years and a fine not exceeding seventy thousand rupees in the cases of any other kind of cheating.[43] However, the repelled MulukiAin, 2020 had a provision that if the amount of cheating can be determined, such an amount shall be realizable by the victim from the cheater and the cheater shall be punished with a fine equal to the amount so cheated, and if the amount so cheated cannot be determined, the cheater shall be punished with a fine of up to Five Thousand Rupees and imprisonment for a term not exceeding Five years.[44]

### 2.5.3 Pre-sentence Report

Section 12(1) of the Criminal Offences (Sentencing and Execution) Act, 2074 (2017 AD) provides that before determining the sentence for an offense liable to imprisonment exceeding three years or a fine exceeding thirty thousand rupees, the court may, if it considers it necessary, order a probation officer or social activist to prepare a pre-sentence report in respect of the offender. Section 12 (2) further mentions that the report should comprise: personal, social, and cultural background of the offender, circumstances of the commission of the offense, offender's conduct before the commission of the crime, offender's age, and other matters considered necessary by probation or parole officer. This report serves to apply the principle of individualization of punishment in the process of sentencing.

### 2.5.4 Non-Prosecution of Minor Crime

According to Section 34 of the Criminal Procedure Code, 2074 (2017 AD), if it is not practicable to file a case on any minor offense of any specific type or it does not substantially affect public interest government attorney may, with the approvable of the Attorney general decide not to file a case.

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41 The Criminal Offences (Sentencing and Execution) Act 2074,s 8
42 The Criminal Offences (Sentencing and Execution) Act 2074,s 9
43 The National Criminal Penal Code 2074, s 249
44 MulukiAin 2020, Chapter on Cheating, No. 4

### 2.5.6 Remission of Sentence

The National Criminal Code, 2074 (2017 A.D.) has provisioned that where any offender, upon having confessed the offense committed by him or her, has assisted in the collection of evidence, apprehension of other accused person or gang or accomplice thereof, in relation to such offense or assisted the investigating or prosecuting authority or the court, a maximum of fifty percent of the sentence imposable under the law for such offence may be remitted.[45]

Provision of remission of sentence has been incorporated in several specific statutes, such as Section 18(c) of Narcotic Drug Control Act, 2033 has provided that if the defendant helps in investigation, he/she shall be granted a release or lesser punishment. Section 55 of the Prevention of Corruption Act, 2059 and Section 26 of the Banking offence and punishment Act, 2064, has provided provision of remission of sentence for those who help or assist in investigation and can provide full or partial rebate in the sentence.[46]

### 2.5.7 Sentence to be determined after conviction

Criminal Offences (Sentencing and Execution) Act, 2074 (2017 AD)provides that thecourt determines a sentence to any person for any offense only after such person is convicted of such offence by the court in accordance with law.[47] Accordingly, sentence is determined for an offender by conducting a separate hearing for determining sentence for an offender of an offense punishable by sentence of imprisonment for up to three years or fine of up to thirty thousand rupees.[48] In addition to prior criminal activities, the extent to which legal and extra-legal factors (or aggravating and mitigating circumstances) contribute to sentence severity, or to a judge's decision to incarcerate, have been explored for general and violent offending populations. A myriad of factors, including social context, geographic locations (urban vs. rural), judge's discretion, offender characteristics, the offender's relationship to the victim etc. may impact the sentencing.[49] During the sentencing, the court will assess such things. This provision highlights that convictions and sentencing are two different things, and thus calls for special mechanism accordingly.

### 2.5.8 Departure of Confiscation of Entire Property Provision

Previously, *MulukiAin*, 2020 had adopted an ancient penal system of confiscating the entire property. In some serious cases, the entire property of the culprit was deposited in the state treasury.[50] In response to the writ filed by *Achyut Prasad Kharel,* Supreme

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45 The National Criminal Penal Code 2074, s 47(1)

46 Organized Crime Prevention Act 2070, s 21; Human Trafficking and Transportation (Control) Act2064,s 21

47 The Criminal Offences (Sentencing and Execution) Act 2074,s 8

48 The Criminal Offences (Sentencing and Execution) Act 2074,s 9

49 J. Amirault, "The Impact of Aggravating and Mitigating Factors on the Sentence Severity of Sex Offenders: An Exploration and Comparison of Differences Between Offending Groups," *Criminal Justice Policy Review*, 25(1) (2014), 80

50 MulukiAin 2020, Chapter on Homicide, For instance: Punishment of imprisonment for lifetime with forfeiture of entire property for the crime of serious homicide cases

Court issued an order to review the said provision.[51] Accordingly, the legal provision regarding the confiscation of the whole property of the offenders is not enforced now.

## 5. PUNISHMENT SYSTEM & JUDICIARY

Although, generally it is understood that punishment system falls under the domain of the legislature, however, in the Nepalese practice, the judiciary has played the following roles in regard to the punishment system:

### 5.1 Setting Standards

Supreme Court has been playing pivotal role in setting up several standards for the penal policy. Today several penal policy are the by-product of Supreme Court's guidelines and directives. For instance in Achyut Prasad Kharel vs. Office of the Prime Minister & Council of Ministers, the apex court observed that it is common to observe the variation in punishment according to the nature and impact of criminal offenses. Punishment policy is based on the principle that punishment varies according to the nature of the offense. The belief that all the offenders of a crime should be punished regardless of their involvement or role in the crime is mechanized mechanism curtailing the judicial discretion. If the punishment is discriminatory based on the status irrespective of offense of similar nature, then such punishment will be discriminatory.[52] In another case, court observed that in determining the punishment, both the nature of the punishment and the extent of the punishment should be determined.[53]

### 5.2 Emphasis on Execution of Punishment Policy

Supreme Court has on several occasions stressed on the necessity of the execution of the punishment policy. Recently, in the case of *GopalSiwakoti (Chintan) et al. vs. Office of the Prime Minister & Council of Ministers et al.*, the apex court observed that, at the present context, the world has recognized that detainees and prisoners of high-risk group and has accepted that "prison health is public health" due to the COVID-19 pandemic. Therefore, it is imperative to protect the lives of detainees and prisoners by ensuring their access to healthcare and treatment without discrimination, which will help prevent further spread of COVID-19 in overcrowded prisons. Thus, in today's situation of high-risk, in the backdrop of various orders and decisions being issued by the Government of Nepal, a directive order has been issued pursuant to Section 2 of the Infectious Disease Act, 1964, to grant immediately release or reduce the sentence or to take any other appropriate special decisions to immediately reduce overcrowding in prisons to protect the lives of prisoners and detainees. This should be one while carefully identifying children in critical conditions, pregnant women, breastfeeding women and inmates with complex health issues on a priority basis, while balancing the vulnerability of detainees and prisoners with public safety.[54] It is interesting to note

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51 *Achyut Prasad Kharel v Office of the Prime Minister and Council of Ministers et al.*,[2061] WN 111, Decision Date 2063/5/29 (14 September 2006)

52 *Achyut Prasad Kharel v Office of the Prime Minister & Council of Ministers* [2070] DN 8987, Vol. 55

53 *Shanti B.K Vs His Majesty's Government* [2061] DN 7399,Vol. 43

54 *Gopal Siwakoti (Chintan) et al. vs. Office of the Prime Minister & Council of Ministers et al.*, WN 076-WO-0939, Order Date 2077/04/03 (3 August 2020)

that in the judgment the apex court has cited the Annual Report of the Office of the Attorney General, Nepal 2018/19 and the Detention and Prison Monitoring Report, 2020 with reference to COVID-19 which has suggested that the priority of sentence exemptions should be given to senior citizen prisoners that qualify.{?????}

### 5.3 As a Source of Punishment Policy

The Supreme Court has noted that the matter related to criminalization and penalization falls under the domain of legislative wisdom and thus court does not interfere on it. The judgment has further elaborated that if the prevailing punishment is against the constitutional principles, fundamental rights, principles of criminology and if it promote the crime instead of discouraging it, the court has an obligation to hear the matters related to the punishment policy, and it could not refrain hearing it merely by citing that the matter falls under the domain of the legislature.[55] Accordingly the court has reviewed several punishment and has issued necessary orders thereof. For instance, No. 6 of *MulukiAin,* 2020 (1963 A.D.), Chapter on Homicide, which provided that in cases where a person engaged in taking care of or educating another person beats that other person or does any other act for the benefit of the deceased and an accidental homicide occurs as a result of such act, the person shall be liable to a fine of up to Fifty Rupees, was invalidated by the Supreme Court, deeming it to be against the rights of children and Convention on the Rights of the Child.[56] After this order, the accused was punished for homicide.

## 6. CONCLUSION & SUGGESTION

The reformative theory of justice proposes that a criminal's harmful degeneracy be removed and that they are given the opportunity to start over and live an honest life. This ensures basic human dignity, which is a vital constitutional and human right. The current penal system's major focus on punitive and retributive punishments is unsuitable for protecting human dignity.

Justice both to society and to the individual frequently requires that the punishment shall be the same in cases where the crime is exactly the same. However, all the nature and impact of all the crimes are not the same, calling for distinct punishment regime.

In Nepal, over the last few decades, penal reforms have resulted in a significant shift in public perceptions of criminals. Old ideas about crime, criminals, and convicts have shifted dramatically. The focus has shifted away from deterrence and toward offender reform. Discriminatory and severe punishments of the past have no place in today's criminal justice system. Nepal had a unique punishment system in the past. Those, on the other hand, have placed a premium on punitive measures. The recent Anglo-American prison reforms have had a significant impact on Nepal's penal system.

Although the new laws have drastically adopted the Non-Corporeal Punishment regime, there is gap in its implementation. There is a pressing need for a variety of reforms to translate those legal provisions. An understanding of parole, probation,

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55 *Jeet Kumari Pangeni (Neupane) et. al. v Office of the Prime Minister and Council of Ministers*, [2065] DN 7973, Vol 6

56 *Raju Prasad Chapagain v Office of the Prime Minister and Council of Ministers*, [2065] DN 8019, Vol 10

community service, open prisons is sought, and their advantages over more traditional forms of incarceration in achieving both the societal aim of a criminal sentence and the human rights goal of successful reintegration of prisoners after their release should be realized. There are also few practical difficulties in the implementation of those provisions. For instance: if an offender who has been sentenced to imprisonment for life has served three-fourth of the sentence of imprisonment and has reformed his or her conduct while in prison, then the prison cannot make remission for such offender as it falls in the negative list. Consideration to the aggravating and mitigating factors of offences, Pre-sentence Report, Non-Prosecution of Minor Crime, and Remission of Sentence are also some of the new features of the new Nepalese Penal System, which has to be enforced.

Recently a provision related to Federal Probation and Parole Board has been introduced, where the Attorney General will be the chairperson. It is supposed to render assistance in the social rehabilitation and integration of the offenders sentenced to imprisonment. Also, the government attorney's role in considering the aggravating and mitigating factors of offenses, and their specific role in Pre-sentence Report, Non-Prosecution of Minor Crime, and Remission of Sentence has called for the pivotal role of the government attorneys in punishment regime.

# PROSECUTING THE OFFENCE OF ILLICIT ENRICHMENT

**Pradeep Kumar Shrestha**[1]

## ABSTRACT

*Corruption undermines the effectiveness and efficiency of public institutions and erodes public trust in government. In particular, corruption affects the ability of governments to realize their objectives of social and economic development for vulnerable and marginalized groups of the society. Therefore, in order to reduce the risk that corruption poses to society, it is important to take measures such as criminalizing and prosecuting illicit enrichment as it is one of the simplest tools for holding corrupt public officials accountable.*

## BACKGROUND

Corruption can also be defined as a process in which at least two persons, through an illegal exchange conducted with purpose of getting certain personal benefits, do something contrary to public interest and, by breaching moral and legal norms, threaten the fundamentals of democratic society and the rule of law.

The concept of illegal enrichment made its way, albeit as an optional provision, in article 20 of the United Nations Convention against Corruption (UNCAC)[2] "Subject 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." This is not an obligatory provision, so the state party may decide whether to make of illegal enrichment a separate criminal offence or not. The majority of European states, as well as the United States of America, are still reluctant to criminalize illegal enrichment as a separate criminal offence. Apart from other considerations, the main reason for that is the following: does this criminal offence violate some principles of criminal law, first of all, the presumption of innocence and privilege against self-incrimination? The shifting of the burden of proof from the prosecutor onto the defendant has been known in some

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[2] United Nations Convention against corruption, UNGA Res 58/422 (31 October 2003) UN Doc A/RES/58/422 art 20; Article 4(1)(g) of the African Union Convention and Article IX(1) of the OAS Convention.

very important international conventions, domestic law and the European Court of Human Rights jurisprudence. For instance, according to the article 12 of the United Nations Convention against Transnational Organized Crime "States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings." Similar provision can be found in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The European Court of Human Rights has ruled that the burden of proof does not always rely on the prosecution. There are three cases when the burden of proof is not on the prosecution:

a) In strict liability offences,
b) In confiscation of pecuniary gain acquired by a criminal offence and
c) In criminal offences in which the burden of proof has been shifted to the defendant.

The justifications for the need to have an independent offence of illicit enrichment are provided. The lower standard of proof and its implication for basic principles of human rights will be analyzed. Advantages and drawbacks of having an independent offence of illicit enrichment with regard to recovering assets situated in foreign jurisdictions and related issues will be examined. In this discourse, special emphasis will be given to the Nepal law of illicit enrichment.

## JUSTIFICATIONS FOR CRIMINALIZING ILLICIT ENRICHMENT

The crime of corruption by its nature is committed in secret, which creates difficulties for its detection and investigation. However, property in the hands of public officials and their families that are manifestly in excess of their legitimate income would be relatively easy to detect, investigate and prosecute. The extreme difficulties in obtaining evidence to prove bribery and other related acts of corruption demand a consideration of the criminalization of a significant increase in the property of public officials. The inclusion of the offence of illicit enrichment in the list of crimes of corruption is perceived to be an effective way of combating corruption.

The offence of illicit enrichment has been criminalized in various international and regional anti-corruption instruments.[3] These instruments give the definition of illicit enrichment. UNCAC defines it to mean 'a significant increase of the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income'.[4] While the scope of UNCAC seems restricted to the wealth of the public official, the AU Convention transcends such limitation by including the term 'any other person'. This term was incorporated because assets can be transferred easily to third parties who are affiliated with public officials in one way or another.

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[3] United Nations Convention against corruption, UNGA Res 58/422 (31 October 2003) UN Doc A/RES/58/422 art 20; Article IX (1) of the Organizations of American States (OAS) Convention and Article 8(1) of the African Union Convention.

[4] United Nations Convention against corruption, UNGA Res58/422(31October 2003)UN Doc A/RES/58/422 art 20

## THE ADVANTAGES AND DISADVANTAGES OF CRIMINALIZING ILLICIT ENRICHMENT

The advantages of criminalizing illicit enrichment are associated with the standard of proof required for conviction. In prosecuting illicit enrichment as a crime of corruption, the prosecutor should prove beyond a reasonable doubt the disproportionate assets in the hands of the accused in relation to his legitimate income. In this respect, the prosecutor is not required to prove the fact that the accused has received a bribe or committed any other form of corruption.[5] Wealth that is not proportionate to the legitimate income of a public official is presumed to have originated from corruption unless the contrary is proved. In such circumstance, the burden of proof is eased and the prosecutor is not required to prove corruption as a source of the wealth in question.

However, because of the human rights debates raised by illicit enrichment, many countries are hesitant to criminalize it as an independent corruption crime. The impact of this response upon the anti-corruption effort will be discussed below.

### 1 ADVANTAGES OF CRIMINALIZING ILLICIT ENRICHMENT

The advantages of establishing an independent crime of illicit enrichment will be discussed in the following sub-sections. Criminalizing illicit enrichment mainly solves the problems associated with gathering evidence for the prosecution of corruption offences. Further, the investigation and prosecution of corruption offences require resources and skilled personnel. Hence, criminalizing illicit enrichment is important, especially for underdeveloped countries which often lack such resources and personnel.

#### 1.1 Overcoming Hurdles Associated with Collecting Evidence

The greatest obstacle for investigating and prosecuting the crime of corruption is linked to the gathering of evidence. One of the unique features of the crime of corruption is that it is a secret offence. Most of the time, the persons who can be major witnesses are involved in the commission of the crime. Hence, it remains confidential among the parties who are involved in the crime and there would be no single individual victim to disclose and report it to the appropriate authorities.

Further, corrupt public officials in power have the ability to intimidate potential witnesses not to testify against them or to distort documentary evidence. Additionally, witnesses may die or leave. These situations problematize the detection, investigation and prosecution of corruption cases and make it hard to obtain direct evidence to prove corruption offences.

Accordingly, the importance of criminalizing illicit enrichment and easing the burden of proof to prosecute the offence has been growing considerably. In this regard, the offence of illicit enrichment is considered to be an effective tool for combating corruption. However, despite its usefulness for the anti-corruption campaign, none of

[5] Ibid.

the international or national anti-corruption instruments imposes an obligation on states to criminalize it.[6]

Further, states have different options with regard to the standard of proof required in illicit enrichment cases. Either they can require the prosecution to prove beyond a reasonable doubt only the property that is manifestly disproportionate to the legitimate income or both the disproportionate property and the unlawful source of the property.[7] However, requiring the prosecutor only to establish beyond a reasonable doubt the luxurious and disproportionate property as compared to the accuser's official income eases the burden of proof and assists in overcoming the challenges associated with obtaining evidence. It also facilitates the successful prosecution of corrupt public officials.

### 1.2 Promotion and Protection of Human Rights

There is a direct link between fighting corruption and the protection and promotion of human rights. According to the UN Human Rights Council, 'the fight against corruption at all levels plays an important role in the promotion and protection of human rights and in the process of creating an environment conducive to their full enjoyment'.[8]

It has been established that where corruption is rampant in a society, there usually is a high level of human rights violations.[9] Corrupt public officials discriminate among citizens on the basis of economic status, social and family backgrounds or any other grounds. Nepotism and other corrupt practices erode the principles of equality and non-discrimination based on social origin, color, language, religious or political opinion, sex, property or other status as enshrined in international human rights instruments[10] and domestic constitutions.[11]

Further, public officials divert public resources allocated for economic and social development for their private gain, thereby retarding the overall development that has been recognized as a right by international human rights regimes[12] and domestic laws. It is agreed generally that combating corruption through effective anti-corruption tools, such as criminalizing and prosecuting illicit enrichment, has positive implications for the protection and promotion of human rights.[13] Combating corruption through the criminalization of illicit enrichment also assists states in breaking the cycles of impunity.

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6 United Nations Convention against corruption, UNGA Res 58/422 (31 October 2003) UN Doc A/RES/58/422 art 20, Article 8(1) of the African Union Convention and Article IX(1) of the OAS Convention.

7 Ibid.

8 UN Human Rights Council Res 7/11.

9 Transparency International, 2008, p.1.

10 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 2(1);Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 2;African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 2

11 Constitution of Nepal, art 18

12 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR) art 2(1)

13 Stolen Asset Recovery Initiative, the World Bank and United Nations office for Drug and crime (UNODC), 2011, p.7 and Transparency International, 2008, p. 2.

Moreover, states parties to international human rights instruments and anti-corruption conventions have obligations to implement the provisions of the instruments. In this respect, criminalizing and prosecuting illicit enrichment allows states to fulfill the obligations they have undertaken under international human rights and anti-corruption regimes.

It is important to note that the criminalization of illicit enrichment can have a prominent impact on the anti-corruption campaigns of developing and transitioning states. Anti-corruption agencies in developing countries suffer from inadequate resources both in terms of skilled human resources and financial and material resources. These countries do not have the required capacity to detect and prosecute complex crimes of corruption.

Inadequate capacity could render the anti-corruption efforts of developing countries ineffective. This scenario also affects adversely the obligation of states to 'respect, promote and fulfill human rights values'.[14] It is in this context that the offence of illicit enrichment can be used as an effective anti-corruption tool in underdeveloped countries and thereby promote and protect their citizens' fundamental human rights.

### 1.3 Building Public Confidence in the Government

Corruption undermines the effectiveness and efficiency of public institutions and erodes public trust in government.[15] In particular, corruption affects the ability of governments to realize their objectives of social and economic development for vulnerable and marginalized groups of the society.[16] Therefore, in order to reduce the risk that corruption poses to society, it is important to take measures such as criminalizing and prosecuting illicit enrichment as it is one of the simplest tools for holding corrupt public officials accountable.[17]

## 2 CHALLENGES OF CRIMINALIZING AND PROSECUTING ILLICIT ENRICHMENT

The challenges associated with the criminalization of illicit enrichment will be discussed in the following sub-sections. Particularly, the weights given to illicit enrichment by international and regional anti-corruption instruments will be explored. Additional challenges in the area of asset recovery will be considered also.

14 Stolen Asset Recovery Initiative, the World Bank and UNODC (2011: 9).
15 Stolen Asset Recovery Initiative, the World Bank and UNODC (2011: 8).
16 Ibid.
17 Ibid.

### 2.1 The Status of Illicit Enrichment in International and Regional Anti-Corruption Instruments

The international and regional anti-corruption instruments do not bind states parties to take legislative and other measures to criminalize illicit enrichment. Criminalization is not mandatory either under UNCAC or the AU Convention. These instruments require the criminalization of illicit enrichment to be compatible with the constitution and fundamental principles of the domestic law of states parties.[18] These conventions and other regional anti-corruption instruments have made optional the criminalization of illicit enrichment. They particularly employ a 'safeguarding clause' that exempts states parties from the obligation of criminalizing illicit enrichment if it conflicts with their constitutions and fundamental principles of their legal system.[19] Thus, the criminalization of the offence of illicit enrichment is possible only to the extent that the legal principles of the domestic law of states parties allow.

The non-mandatory nature of the provisions on illicit enrichment in the various international anti-corruption legal frameworks emanates from the concern that creating an independent offence of illicit enrichment could undermine basic human rights conferred upon the accused. In particular, the criminalization of illicit enrichment has been considered as an infringement of the presumption of innocence. However, the non-obligatory nature of the provisions regarding illicit enrichment in international and regional anti-corruption instruments creates a risk of failure to develop common standards for the full implementation of the conventions.

### 2.2 The Offence of Illicit Enrichment and Asset Recovery

Asset recovery is a core constituent of international as well as regional anti-corruption instruments.[20] It has been shown that the provisions of asset recovery embedded in the anti-corruption conventions, especially in UNCAC, encouraged ratification by many developing countries as a large amount of their wealth has been stolen by corruption.

The fact that UNCAC and the other regional anti-corruption instruments do not oblige states to criminalize illicit enrichment in their domestic law may pose a challenge in relation to recovering assets located in countries which have not criminalized illicit enrichment.[21] However, UNCAC provides for international co-operation for effective implementation and enforcement of its provisions.[22] With respect to international co-operation regarding asset recovery, UNCAC firmly requires each state party 'to afford one another the widest measure of co-operation and assistance'.[23] Where dual criminality is required in international co-operation, UNCAC further states that dual criminality 'shall be deemed satisfied irrespective of whether the laws of the requested

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18 United Nations Convention against corruption, UNGA Res 58/422 (31 October 2003) UN Doc A/RES/58/422 art 20 and Article 8(1) of the African Union Convention.

19 United Nations Convention against corruption, UNGA Res 58/422 (31 October 2003) UN Doc A/RES/58/422 art 20; Article 8(1) of the African Union Convention and Article IX (1) of the OAS Convention.

20 United Nations Convention against corruption, UNGA Res 58/422 (31 October 2003) UN Doc A/RES/58/422 Chapter 5; Article 16 of the African Union Convention.

21 Transparency International (2011: 2).

22 United Nations Convention against corruption, UNGA Res 58/422 (31 October 2003) UN Doc A/RES/58/422,Chapter IV

23 United Nations Convention against corruption, UNGA Res 58/422 (31 October 2003) UN Doc A/RES/58/422 art51.

state party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting state party'.[24] Accordingly, the state's parties that have not criminalized illicit enrichment under their domestic law may not refuse to co-operate in returning corruptly acquired assets to the countries of origin. In this respect, UNCAC has closed the legal loopholes that could have been created by the dual criminality requirement to recover proceeds of the offence of illicit enrichment across different jurisdictions. In addition, the AU Convention encourages states parties that have not criminalized illicit enrichment to provide assistance and co-operation to the requesting states insofar as their law permits.[25]

The different approaches that exist in different jurisdictions in regard to the standard of proof in illicit enrichment are creating a challenge in the recovery of corruptly acquired assets that are located in other jurisdictions.[26] In this respect, the UN Secretary-General report to the General Assembly stated that:

'Obstacles are created by the diversity of approaches taken by different legal systems, in particular between common and civil law, with respect to matters such as jurisdiction, evidential requirements, the relationship between criminal prosecution and recovering proceeds and whether civil proceedings could be used. Countries seeking the return of assets often face severe challenges. High evidential and procedural standards required by the laws of developed countries where substantial proceeds of corruption are more likely to be concealed often pose a challenge. Obtaining domestic freezing and confiscation orders that can form the basis for the transnational request and enforcement of such request, in particular depends upon high evidential and procedural standard requirements of the requested states.'[27]

Further, asset recovery becomes more difficult where the proceeds of two or more crimes are intermingled. In addition, it may involve two or more states claiming the recovery of the assets, making the process even more complicated.[28]It has been established also that asset recovery is a costly, complicated and time-consuming process. A successful asset recovery exercise requires expertise, resources and commitment for tracing, freezing and confiscating.[29]

In Nepal, there has been as yet no case of asset recovery from a foreign jurisdiction on the basis of an illicit enrichment prosecution.[30] However, in the embezzlement case of the former Deputy Prime Minister and others, the Federal Supreme Court of Ethiopia convicted the accused for a criminal transaction involving 1000 tons of coffee that belonged to the government.[31] The court, in addition to imposing 18 years' imprisonment, ordered the defendants to return the proceeds of their corrupt activity. Following this judgement, the federal government filed a civil action against the defendants to collect expenses related to the transportation of and custom tax and

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24 Ibid, Article 43(2).
25 Article 8(3) of the African Union Convention
26 UN Secretary-General Report (2006: 9).
27 Ibid.
28 Ibid.
29 Ibid.
30 CIAA Annual Report, 2015.
31 *Prosecutor v Tamerat Layne et al*, (The Federal Supreme Court, File Number 1/89), judgement given on 14 March 2000, page 56.

excise tax on the coffee, plus interest associated with it.[32] The Federal High Court decided the case in favor of the state by ordering the respondents to pay ETB 52 million, which is equivalent to USD 5.2 million, and the Federal Supreme Court Cassation Bench confirmed the judgement.[33]

The process of recovering the proceeds of the crime started in June 2000, but the government could not recover the whole amount. This was partly because the proceeds were transferred to foreign banks such as Swiss Bank in Switzerland and Banque Indo-Suez Mer Rough in Djibouti. To recover the assets in a foreign jurisdiction there was a need to have resources and professional expertise. Unfortunately, these were lacking.

## 3. ILLICIT ENRICHMENT AND HUMAN RIGHTS PRINCIPLES

In addition to its recognition by international and regional anti-corruption instruments, different countries have criminalized illicit enrichment in their domestic laws. As mentioned earlier, the criminalization of illicit enrichment is important because often it is challenging or impossible for the prosecutor to establish that a public official has accepted a bribe or an undue advantage or committed any other form of corruption. Therefore, the criminalization of illicit enrichment is important in that the property or pecuniary possession that is disproportionate to the legitimate income of public officials can create a *prima facie* case that a public official has been corrupted.[34]

However, it was argued during the drafting of UNCAC that the criminalization of illicit enrichment would be in violation of the presumption of innocence. Further, some delegations to the discussions prior to the Convention expressed their concern as to the implementation of the provision on illicit enrichment, fearing that it would face constitutional challenges. They believed that constitutional difficulties could arise as the provision would include a reversal of the burden of proof.[35]

Hence, some delegates suggested that the criminalization of illicit enrichment should be non-binding upon states parties and moved to the chapter dealing with prevention in order to allow states to adopt administrative measures that encompass the concept.[36]

It was argued also that the criminalization of illicit enrichment does not necessarily include a reversal of the burden of proof *per se*. Rather, the onus upon the prosecutor to prove his case beyond a reasonable doubt is confined to the disproportionate assets of the accused.[37] In such circumstances, it would be convenient for the court to convict the accused if the prosecutor can prove beyond a reasonable doubt that the luxurious life which the accused is living is disproportionate to his legitimate income. As agreed

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32 *Ministry of Justice v ShadiaNadim et al* (TheFederal High Court Civil Case, File Number 11986).*Sheik Mohamed Hussein al-Amoudi v ShadiaNadim et.al.*(The Federal Supreme Court, File Number 10797), judgement given on 2 January 2005, page 95. The respondents were found guilty of corruption along with the former Deputy Prime Minister Tamerat Layne in File Number 1/89. Accordingly, in the latter case, the court ordered the applicant to pay the government after he collects the money from the respondents.

33 Lemlem 'Ministry of Justice Requests Judgement Execution' The Reporter 29 October 2011.

34 Organization for security and co-operation in Europe (OSCE) (2004: 138).

35 United Nations office for Drug and crime (UNODC) (2010: 196).

36 Ibid.

37 Ibid, 196.

in the discussions preceding the adoption of UNCAC, the inclusion of such provision is important for the effective prosecution of crimes of corruption.[38]

### 3.1 The Presumption of Innocence

Countries that have a strong constitutional tradition, such as the United States and some European countries are still reluctant to establish the offence of illicit enrichment as an independent crime of corruption. These countries are concerned about the presumption of innocence enshrined in their constitutions. In addition, the right to be presumed innocent as a requirement of the due process of law has a firm grounding, especially in the common law legal systems.

The International Convention on Civil and Political Rights (ICCPR) provides that: 'Every one charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law'.[39] The principle of the presumption of innocence encompasses, among other elements, the burden of proof being upon the prosecution, the accused being protected against self-incrimination and the accused having the right to remain silent.

According to some commentators, criminalizing illicit enrichment contradicts these human rights principles recognized by the ICCPR and other international and regional human rights instruments.[40]Wilsher observes that the criminalization of illicit enrichment would exempt the prosecutor from having to prove the charge against the accused beyond a reasonable doubt as the prosecutor is not required to produce direct evidence that can establish the commission of corruption by the accused. He argues further that in the prosecution of illicit enrichment, the prosecutor should prove beyond a reasonable doubt the fact that the public official has received bribes or has committed any other form of corruption.[41]

But, this line of argumentation overlooks the fact that corruption is a clandestine offence and that certain corrupt acts are naturally difficult to detect and it is hardly possible to discover evidence of their commission.[42] Hence, to prove the offence of illicit enrichment to the extent of establishing the fact that the accused has received a bribe or other undue advantage would undermine the anti-corruption campaign significantly.

As accepted in the discussions leading to the adoption of UNCAC, the possession of wealth that is manifestly disproportionate to the legitimate income of the accused constitutes a *prima facie* ground that the public official is corrupt.[43] Thus, the prosecutor is required to present evidence only as to the wealth and lifestyle that exceeded the legitimate earnings of the accused.

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38 Ibid,198.

39 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(2)

40 Article 11(1) of UDHR and Article 7(1) of the African Charter on Human and Peoples' Rights.

41 MesayTregayeMeskele, *(n100)*, p.41

42 UNODC (2002: 29).

43 Organization of security and co-operation in Europe (OSCE) (2004: 138).

### 3.2 The Burden of Proof in the Prosecution of Illicit Enrichment

In any lawsuit, including civil litigation, the party who brings the action or claim bears the burden of proving that the claim has both legal and evidential substance. In criminal litigation, the prosecutor is the one who initiates the litigation and thus carries the burden to prove every element of the crime. This is sometimes called 'the legal onus or burden of proof'.[44]

In the case of illicit enrichment, the prosecutor has the legal duty to produce evidence to prove the property in the possession of the public official is quite disproportionate to his or her lawful income. The fact in issue that needs to be proved by the prosecutor is the accumulation of wealth by a public official that he or she cannot explain legitimately. In other words, in an illicit enrichment prosecution, it is the accumulation of wealth that is manifestly high as compared to the public official's lawful income that needs proof beyond a reasonable doubt.[45] This would give rise to the presumption that the accused has acquired the property through corruption or in some other illegal way. It is important to note here that this is a rebuttable presumption that requires the accused to give a reasonable explanation as to the lawful sources of the assets.[46] This burden of producing evidence is sometimes known as the 'evidential burden'.[47]

As mentioned, the presumption of innocence does not prohibit a presumption of fact or law against the accused insofar the accused is given the chance to rebut it.[48] In other words, the legislation creating illicit enrichment as an offence of corruption places an evidential burden upon the accused to provide reasonable evidence for the significant increase in his or her assets.[49] It has been recognized that placing an evidential burden on the accused to rebut the presumption of corruption does not infringe the presumption of innocence.[50] It is important to note that creating an evidential burden does not mean that there is presumption of guilt as the burden of proof remains upon the prosecution.[51]

Therefore, it is possible to conclude that criminalizing and prosecuting illicit enrichment does not shift the burden of proof to the accused and if there is a presumption of corruption, this presumption is a permissive presumption that can be rebutted upon contrary evidence being produced by the accused. The presumption of fact which an accused is required to rebut is not necessarily contrary to the accuser's fundamental right to be presumed innocent.[52]

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44 De Speville (1997), the Role of Parliament in Curbing Corruption, Pub. World bank, Jan.1 2006 p. 4.

45 United Nations office for Drugs and crime (UNODC) (2002: 29).

46 Ibid, (2006: 104).

47 De Speville (1997), the Role of Parliament in Curbing Corruption, Pub. World bank, Jan.1 2006 p. 5.

48 Ibid.

49 United Nations office for Drugs and crime (UNODC), (2006: 104).

50 *Salabiaku v France* (European Court of Human Rights, Application Number 10519/83), judgement given on 7 October 1988, paragraph 26.

51 De Speville (1997), *the Role of Parliament in Curbing Corruption*, Pub. World Bank, Jan.1 2006 p. 12.

52 Ibid.

### 3.3 Alternative Approach: The Proportionality Test

In some jurisdictions, creating illicit enrichment as an independent offence of corruption is regarded as contrary to the right to be presumed innocent.

However, if creating an evidential burden to rebut an allegation infringes the presumption of innocence at all, this right, like many other rights, is not absolute.[53] In combating corruption, two competing interests must be considered. These are: the threats corruption is posing to the overall socio-economic and political developments of society or the public interest, on one hand, and the protection of the presumption of innocence, on the other hand.

In these circumstances, the risks and damages posed by corruption against the public interest are very high. Here, 'the test of proportionality'[54] is applicable, requiring the accused to produce evidence as to the lawful sources of his wealth after the prosecutor has established that the assets in the hands of the accused could not have come reasonably from his or her legitimate income. In the proportionality test, the seriousness of the corruption would justify the deviation from the protection given to the presumption of innocence.

Therefore, if restriction of and the encroachment on the presumption of innocence in cases of prosecution of illicit enrichment exist at all, an effective anti-corruption campaign to protect the broader public interest justifies it.

## 4. ILLICIT ENRICHMENT IN NEPAL ANTI-CORRUPTION LAW

This section will deal specifically with the criminalization and prosecution of illicit enrichment under Nepal anti-corruption law. The legal provision pertaining to this offence is found in Article 29kha of the CIAA Act, 2048 and Article 20 of Prevention of Corruption Act, 2059 of Nepal;

The offence of illicit enrichment contained in Article 20 of UNCAC has been incorporated into Article 20 of the Prevention of Corruption Act, 2059 of Nepal. The provision that governs the offence of illicit enrichment in the Act is termed 'Possession of Unexplained Property'.[55] It reads as follows:

1) Article 29kh of CIAA Act, 2048;

   Any public official who earns property illegally according to this law or any Nepal Law or the other property which is earned by illicit enrichment or if it is proved such property is transferred to others name will be seized.

   If such property's ownership was already transferred to other, then the money will be returned back to such property buyer.

2) Article 20 of Prevention of Corruption Act, 2059;
   a) According to this law, any public official who submit their property description according to the law which is not suitable or disproportionate to

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53 Richard L. Lippke, *Taming the Presumption of Innocence*, pub. Oxford University Press,2016, ed.1st, pp.1-4.
54 De Speville (1997), *the Role of Parliament in Curbing Corruption*, Pub. World Bank, Jan.1 2006 p. 13.
55 Article 20 of Prevention of Corruption Act, 2059.

their income from his past and present employment or without any reason he spend unsuitable or disproportionate life style or if it is evidenced that he give donation or charity, gift, Loan, tribute and gratuity, he must prove legal source of such property and if he is failed to prove then it is taking consideration that such property is come from illegal source.

b) If it is proved that such property is come from illegal source then he will be fined as according to amount of such property and imprisonment up to two years and the property will be confiscated.

It means;

(1) Any public servant, being or having been in a public office, who:

a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or

b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means, 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 came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.

(2) Where the Court, during proceedings under sub-article (20), is satisfied that there is reason to believe that any person, owing to his closeness to the accused or other circumstances, was holding pecuniary resource or property in trust for or otherwise on behalf of the accused, such resources, or property shall, in the absence of evidence to the contrary, be presumed to have been under the control of the accused.'[56]

The article is applicable to public officials. The article employs the wording adopted in UNCAC, but also goes beyond it. In this respect, the offence of illicit enrichment in the Law encompasses any property or pecuniary resource that is manifestly disproportionate to the legitimate income either in the hands of a public official or any other person on behalf of the public official.[57]Here, the offence of illicit enrichment in the Law corresponds with the AU Convention.[58] The AU Convention defines the crime of illicit enrichment as 'the significant increase of assets of a public official or any other person that he or she cannot reasonably explain in relation to his or her legitimate income'.[59]

As mentioned, Article 20 of the Prevention of Corruption Act, 2059 explicitly extends to property that is possessed by another person on behalf of the public official. A further distinct feature of the offence of illicit enrichment in the Law is that the

[56] HMG v Iswar Prasad Pokharel, NKP. 2066, part 8, ni. no. 8200, p. 1235.
[57] Article 20 of Prevention of Corruption Act, 2059.
[58] Article 1(6) of the AU Convention.
[59] Ibid.

unexplained property in the hands of a public official or a third party related to him must pertain to his or her present or past employment. The time element in article 20 is similar to the provision on illicit enrichment contained in the Inter-American Convention against Corruption.[60]

### 4.1 Easing the Burden of Proof and the Presumption of Innocence in Nepal Law

The presumption of innocence is a fundamental principle of human rights and criminal justice in Nepal, as in other legal systems. The presumption of innocence imposes on the prosecutor the burden to prove the charge against the accused beyond a reasonable doubt. [61]

The right to be presumed innocent is provided for under Article 20(5) (7) of the Nepal Constitution, 2015 which states that: 'During proceedings accused persons have the right to be presumed innocent until proven guilty according to law and not to be compelled to testify against them'.[62] This article of the Constitution does not provide for how and when the presumption of innocence could be subject to restriction.

The objective of the law, as stated, 'is to ensure order, peace and the security of the state, its people and inhabitants for the public good'.[63] Further, the Criminal Code emanates from the Constitution and serves to pursue the goals sought to be achieved by the Constitution.

The burden of proof required for the prosecution of illicit enrichment in Nepal anti-corruption law is that of producing evidence to demonstrate that the accused is in possession of property or maintains a standard of living that is manifestly disproportionate to his lawful income. The prosecutor still retains the legal burden to prove beyond a reasonable doubt the significant increase in the wealth and the standard of living above that which is commensurate with the lawful income of the accused. This is evident from the cases of *Elizabeth Welde Gebriel et al* and *Mekonnen Workeneh Welde Semayat* which will be discussed below.

However, the provision in the Law dealing with the offence of illicit enrichment creates an evidential burden for the accused. It requires the accused to give a reasonable explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resource or property came under his control.

In this respect, the Prevention of Corruption Act, 2059 eases the burden of proof for the prosecutor but requires him to prove beyond a reasonable doubt the disproportionate assets and the standard of living of the public official. Further, the law requires the accused to produce evidence to prove the legitimate sources of the assets in question. The evidential burden imposed upon the accused in illicit enrichment cases does not necessarily violate the presumption of innocence under Article 20(5) of the Constitution, since the accused is given the opportunity to produce the evidence that can refute the allegation brought against him.

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60 Article IX(1) of the OAS Convention.
61 UN Human Rights Committee (2007: 3).
62 Article 20(5)(7) of Nepal Constitution, 2015.
63 Preamble of Prevention of Corruption Act, 2059.

Therefore, the offence of illicit enrichment in the Nepal Corruption Alleviation Law does not involve a shift of the burden of proof to the accused *per se,* and thus does not violate the constitutional right to be presumed innocent.

### 4.2 Investigation, Prosecution & Adjudication of Offences of Illicit Enrichment in Nepal.

#### A Investigation

CIAA is responsible for investigation and prosecution regarding public sector corruption at large extent. However, CIAA jurisdiction of investigation and prosecution of judges and army is excluded and other mechanisms are established. The complaints lodged with CIAA are settled in accordance with the procedures laid down in the CIAA Working Procedure, 2001. The investigation process is divided into two stages: (i) Preliminary Inquiry; (ii) Detailed Investigation. During the preliminary inquiry, the complaints are analyzed with regard to their merit and the firsthand available evidence. At this stage, the designated Investigation Division of the CIAA Secretariat works with to collect most of the possible evidence. If at this stage CIAA finds a prima facie case, it appoints an Investigation Officer for detailed investigation. While carrying out a detailed investigation, the Investigation Officer collects evidence, makes all necessary inquiries and analyses the findings. Upon the completion of the specified procedures, the Investigation Officer submits a report of his findings before the Commission.

Such report shall be reviewed by the Commission and a decision to this effect shall be taken. The CIAA has power to investigate on the basis of written, verbal, telephone and online complaints, media sources, its own intelligence, or information from any source. The CIAA is empowered to take statements of the suspect or any person deemed necessary; to search and seize as needed; to access bank accounts and other financial transactions; to withhold transactions in accounts, or the property of a suspect; to seize the passport of the suspect and also order area restriction against a suspect.

#### B Prosecution

The CIAA is empowered to prosecute corruption offences. Based on the findings of its investigation, the Commission may prosecute cases against persons alleged to have committed corruption in the Special Court.

#### C Adjudication

The Special Court is empowered to adjudicate corruption cases filed by CIAA in trial level. The Special court is established under the Special Court Act and it follows the special procedure laid down in the Special Court Act. The Special Court has the status of the appellate court so appeal jurisdiction of corruption cases goes to the Supreme Court.

### 4.3 Success Indicators[64]

The Interim Constitution, 2007 has mandated the CIAA to fight corruption and improper conduct only in the public sector. The Government of Nepal is considering expanding the jurisdiction of the CIAA to include corruption in the private sector and non-governmental organizations. In case the jurisdiction of the CIAA is expanded, we may need to edit the phrase "in the public sector" to accommodate the new situation. In addition to above global measures, the following indicators will be used to measure the progress on mission statement. Similar to vision statement, there are no fixed target indicators to be achieved but these indicators will be used to monitor the progress of this strategy implementation.

| S.N. | **Possible Indicators and maximum score** | **Baseline values** | **2014-2016** | **2016- 2019** | **Data Source** |
|---|---|---|---|---|---|
| 1. | Increase in government revenue | Rs. 289 bill (2011-12) | | | Economic Survey Report, MoF |
| 2. | Decrease in government leakages | Rs.204 billion (068-69 B.S.) | | | Annual Audit Report, OAG |
| 3. | Increase in FDI Rs | Rs. 714 mil (2011-12) | | | Economic Survey, MoF |
| 4. | Decrease in capital flights | Average Illicit Financial Flows $805 mil (2002- 2012) | | | Global Financial Integrity Reports |

**Table: Sample of the CIAA high Profile cases**

| **S. No.** | **Corruption cases** | **Settlement duration (Year)** | **Original Charge (Rs. in mil.)** | **Final conviction (Rs. in mil.)** | **Final conviction (%)** |
|---|---|---|---|---|---|
| 1. | Mr. ChiranjibiWagle | 11 | 33.0 | 20.3 | 61.52 |
| 2. | Mr. RmagyaChaturbedi | 9 | 77.1 | 13.9 | 18.02 |
| 3. | Mr. J.P. Gupta | 10 | 20.8 | 8.41 | 40.43 |
| 4. | Mr. MotilalBohara(Under review at SC) | 8 | 23.8 | 2.68 | 11.26 |
| 5. | Mr. Govinda Raj Joshi (under review at SC) | 9 | 39.4 | 21.6 | 54.82 |
| 6. | Mr. KhumBahadurKhadka | 9 | 23.7 | 9.47 | 39.96 |
| | Average | 9.33 | 36.3 | 12.73 | 37.67 |

64 CIAA, Strategic Plan, 2014-2019, p.25.

**Table 2: Total case of illicit enrichment in CIAA.**[65]

| S.N. | Date | Description of case | Number of case |
|---|---|---|---|
| 1. | 2013/014 | Illegal acquisition of property | 2 |
| 2. | 2062/063 | " | 2 |
| 3. | 2063/064 | " | 6 |
| 4. | 2070/071 | " | 2 |
| 5. | 2071/072 | " | 2 |
| 6. | 2072/073 | " | 2 |
| | Total | | 16 |

**Table3: Institution to be given Prominence to counter Corruption Role:**

| *Particular* | *Number* | *Percent* |
|---|---|---|
| *CIAA* | *156* | *72* |
| *Coordination between CIAA Public Account, Committee and Auditor General* | *36* | *17* |
| *Establishment of Separate Institution* | *40* | *19* |
| *Others* | *4* | *2* |

***Table 4: Exclusion of Members of Constitutional Bodies from CIAA Jurisdiction:***

| *Particular* | *Number* | *Percent* |
|---|---|---|
| *Proper* | *20* | *9* |
| *Improper* | *196* | *91* |

Interestingly enough, 91% of respondents express view against the present provision of the article 98(1), which allows exclusion of the officials of constitutional bodies from the jurisdiction.

## 5 ANALYSIS OF THE CASE DECIDED BY THE SUPREME COURT OF NEPAL

### 5.2. Plaintiff: HMG with Report of CIAA vs. RamagyaChaturbedi.[66]

**Case: <u>Corruption by acquiring illegal property</u>**

**Complaint:** The investigation is initiated with the information available from different source in different dates about the then General Manager of N.C.C.N RamagyaChaturbedi, who has acquired huge property apart from his capacity. The property was being acquired from illegal means and that property is being concealed and made an artificial source, so, if his property is not searched and is initiated action, there is no chance of getting the property later.

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65 CIAA Annual Report, 2013/014, 2062/063, 2063/064, 2070/071, 2071/072.
66 *NG v Ramagya Chaturbedi* [2068] DN 8630

**Investigation:** ***Collection of Physical/Documentary Evidences:***

The following evidences are collected by CIAA:

a. File of the record of land
b. Documents related with the insurance
c. Tamsuk of NRs. 7 (seven) Lakhs
d. Documents related with the ownership of vehicle (private car) and Diaries
e. 'Cheque Book' and 'Pass Book' of different Banks
f. Rubber Stamp of Nepal Oil Corporation
g. Rubber Stamp of Kamala Carpet Industries
h. Search and Seizure Report of the Ornaments and Jewelry and also the quantity of jewelry
i. Family description of Accused RamagyaChaturbedi
j. Description of Service
k. Movable and Immovable physical assets of Accused RamagyaChaturbedi

***Statement of Accused:*** Accused is denial to the fact of indictment. Accused states, 'no bank accounts in Foreign and amount in Nepal Rastra Bank is deposited from Insurance claim and is expensed on education of children. Credit card was made as per the facility of RNAC, but it is not being used by me. Account of Nepal Bank Limited was created from the income generated by my wife's business. Amount from the Bank account was sent to the daughter in foreign for her study and other expenses. Amount invested were generated through the agricultural products. Tuition fees for son in USA were sent through the income generated from me and my wife's sources. House construction, Loan Investment, etc. were also legally acquired. The land was given to me by will paper who are the near person to me.

***Report of Investigation Officer:*** Analysis of the property of the accused RamagyaChaturbedi gives a clear picture that the lifestyle he is living is not possible from the legal source of his property. It is not possible to send the three children to foreign for higher studies in own expenses. The lands that accused has acquired is not cultivating any cash crops but only food crops. Accused has acquired many lands, houses in different cities of the country, similarly, with contrary to the existing law, he has transacted foreign exchange more than 60 (sixty) Lakhs IC (Indian Currency) in India. Share purchase, Deposition of high amount in Banks in a single day i.e., NRs. 68, 50, 000, purchase of land, proves that accused has a lifestyle that does not match with his legal income.

**Prosecution:** The difference in between the lifestyle and legal source of income do not match each other. Similarly, the property which is said to be acquired from the will paper is not trust worthy unless such will paper has any reason and basis, which is interpreted by Supreme Court of Nepal in *Sharada Devi Tharuni V. Shital Devi Tharuni, 2052.* Therefore, unless the property is proved with the valid source, such property acquired shall be deemed as property without source under the current law. Bank Balance, Expenses of the education for son in foreign country and other movable

and immovable physical assets prove that amount NRs. 6, 91, 82, 535.79 is unlawful property.

Accused RamagyaChaturbedi has committed presumed offence defined by section 15 of Prevention of Corruption Act (PCA), 2017 and illegal possession of property under section 20(1) of PCA, 2017. The presumed offence is continued by section 20 (1) of PCA, 2059 so, he is demanded the punishment under section 7(2) and 15 of PCA, 2017 and section 20(2) of the PCA, 2059. Accused also being a designated as defined by section 14.A of PCA, 2017 and section 24 of PCA, 2059 is demanded for additional punishment. Similarly, the property remained with the family members of the Accused is demanded for the confiscation under section 47 of PCA, 2059 and section 29(b) of CIAAA, 2048.

**Examination of Evidences by Court:**

***Statement of the Accused:*** Accused is denial to the fact. The property is extended through the lawful sources. My service, the investment, loan investment and also from agricultural products and inheritance is the source of property.

***Statement of Witness:*** Court didn't mention the analysis of the expression of the witness. The relevancy of the testimony of witness and what is expressed there in witness report is not mentioned in the decision of the court. However, the names of the witnesses who testified themselves in the court is mentioned in the decision.

***Documentary/Physical Evidences:*** All documents and physical evidences submitted by the Investigator are submitted and court has analyzed them in decision.

**Verdict:**

***Ratio Decidendi:*** Following questions are to be settled from the plea of the Accused and the plea of the Plaintiff. The legal questions are:

a. Whether the question of the presumed offence against any Public Official is applicable to his/her non-official family members while identifying any source of the property which is said to be acquired through dowry, will paper and gifts?

b. Whether the section 7(2), 15, 16(c) shall be applicable against Accused RamagyaChaturbedi and whether section 20(1), 20(2) of PCA, 2059 shall be applicable against any property owned before the enactment of the PCA, 2059?

c. Whether the Prosecution is within the Limitations of Law or not?

d. Whether the additional punishment against Accused RamagyaChaturbedi can be demanded or administered?

***About the question of will paper, dowry and gifts (a):*** It is necessary to examine the status, relationship, amount of the value of property given by will paper and also reasonable grounds to believe that the property was given from will paper is genuine. Hence, it is not against the law to apply the principle of presumption against the non-official family members while identifying any source of the property which is said to be acquired through dowry, will paper and gifts.

***About the application of law of presumed offence against Accused (b):*** In *Sajjan Singh V. State of Punjab (AIR 1964 page 464)*, it is stated that the "any property acquired illegally before the enactment of any law can be applicable even after the enactment of Act", similarly, in the case of ChiranjibiWagle, this court has also interpreted and applied the same principle. Hence, the provision of section 20(1) of PCA, 2059 to ask about the source of any property shall not be deemed to have retrospective effect. Similarly, the provision of law to ask the source of property acquired by any public official and the presumption of having illegal property when in failure to show the source of property shall not be understood as having retrospective law.

***About the limitations of law (c):*** Since it is not an offence related with particular incident, the offence of having illegal property is related with the indefinite time period when any public official was in his/her post. It is not related with the particular activities as legal or illegal, but the possession of irrelevant and inappropriate property in comparison to the lawful source of property. Hence, the charge against Accused under section 20(1) of PCA, 2059 should be understood to be within the time limitations under section 13(2) of CIAAA, 2048.

***About the additional punishment against the Accused (d):*** The condition in law is very clear and the plea of Accused that the additional punishment is applicable only to the political post but not to the civil servant is irrelevant. So, the additional punishment should be administered against Accused.

In total, Accused is subject to restituted NRs. 1, 11, 25,361.60 to government. Also, he is fined NRs. 90, 71,094.40 and is subject to 2 years imprisonment.

### 5.4 HMG with Report of CIAA vs.ChiranjibiWagle

**Case: Corruption by acquiring illegal property[67]**

**Complaint:** The complaint was received from various sources at different times in different dates about Former Minister ChiranjibiWagle, who was complained with the corruption and acquisition of illicit property by abusing the authority that he had. He was also complained with the description that the property acquired by corruption was given for investment to the son DevendraWagle for operation of Travel Agency and trying to legitimize the unlawful money.

**Investigation:**

**Collection of Physical/Documentary Evidences:**

- Details of property: Land and house in Gorkha with evaluation
- Orchards, Garden and Cultivable Lands in Gorkha
- Jewelry of Family

[67] [2067] DN 8519, Vol 12

- Property details submitted to PPJC: Movable and Immovable Assets/Share in Finance, Business Company, College etc.
- Bank Accounts of Accused and his Family
- Vehicle, Investment and other properties along with inherited property and other owned property, evaluation of movable and immovable property

**Prosecution:**

**Law and Charge with punishment:** The difference in between the amount of property that the Accused had before entering into the post of Minister and after having retired from the post of Minister is too high. The analysis of the property and the evaluation of the lawful source of the property it can be stated that property acquired by Accused Wagle is from the corruption.

The offence is as defined by current law in following ways, which must be punishable under the following legal provisions:

- The offence should be punished under section 7(1), 15, 16.c of PCA, 2017 and section 20(1) and 20(2) of PCA, 2059, where the amount to be confiscated and fined is NRs. 3, 29, 55,072.32 and imprisonment should be 2 years and Accused being designated by HM King should be additionally liable with 3 years' imprisonment under section 14.A of PCA, 2017 and section 24 of PCA, 2059.

Similarly, the son of Accused DevendraWagle is seen to be proved as first degree Accomplice of the offence. Hence, he should be punished with 2 years' imprisonment as Accused under section 16.A of PCA, 2017 and proviso of section 22 of PCA, 2059, where he property without lawful source should be confiscated i.e. amount NRs. 3,29,55,072.32 under section 16.c of PCA, 2017, section 47 of PCA, 2059 and section 29(b) of CIAA, 2048 with the action under section 30 of the same Act. All the property remained with the other members of family of Accused should be confiscated under section 16.c of PCA, 2017, section 47 of PCA, 2059 and section 29(b) of CIAAA, 2048 with the action under section 30.

**Examination of Evidence by the court:**

**Statement of Accused:** Accused was denial to the fact of case. The property acquired according to law and investment in business by son. The loan investment, share in various companies and parental property are the sources of my current movable and immovable assets.

**Statement of witness:** No statement of witness is expressed, but the name of the witness is mentioned in the decision.

**Documentary/Physical Evidences:** All documents and physical evidences collected during investigation are examined by the court.

**Verdict:**

***Ratio Decidendi:*** With the reference from the *Maxwell on Interpretation of Statutes, 12th Edition, P. St. J. Langan in page 217* it is expressed, "it is not called retrospective statute because part of the requisites for its action is drawn from time antecedent of its

passing". So, with this ground, it cannot be compelled that the application of past basis to prove any fact of present condition the law cannot be said as to be retrospective. So, the current provision of section 20(1) of PCA, 2017 about the intention of law to find out the source of property in relation to the presumed offence about the unlawful property cannot be said as retrospective. Similarly, the provision of the section 20(1) of the Act is also not related with any particular incident or offence, rather it is related with the entire accumulation of property during the period where any public official is in his/her post.

When the property vested with the Accused cannot be identified with the source of the property, it should be identified with the judicial reasoning. About the provision of Accomplice charged against the son of Accused ChiranjibiWagle, there is no any provision in PCA, 2017 and PCA, 2059 about such word. Hence, about the charge against DevendraWagle about Accomplice, the plea of plaintiff cannot sustain on the current legal grounds.

Now, about the charge against ChiranjibiWagle, all movable and immovable properties and physical assets of amount NRs. 2, 72, 58,927.81 is declared without lawful source, hence, under section 20(1) of PCA, 2059, main Accused ChiranjibiWagle is subject to fine worth NRs. 2, 72, 58,927.81 and is subject to 1 years and 6 months imprisonment with additional 1 year imprisonment under section 24 of PCA, 2059.

### 5.6 HMG with Report of CIAA vs. Achyut Krishna Kharelet. *al.*[68]

**Case: <u>Corruption by acquiring illegal property</u>**

**Complaint:** Complaint received with the description that former IGP Achyut Krishna Kharel registered the land in the names of relatives, and among the properties of him, properties of worth NRs. 50, 51,303.60 was proved to be without lawful source according to the report of PPJC.

**Investigation:**

**Collection of Physical/Documentary Evidences:**

- Family Description
- Description of work done in public post
- Description of Movable and Immovable property: *Aungsa*, Land and House
- Description of property owned during public post
- Description of property sold
- Balance of Bank, Share purchase description
- Purchase of Vehicle and description about separate expenses

[68] [2068] DN 8667

**Prosecution:**

**Law and Charge with punishment:**

- Analysis of the property acquired before public service, during public service and after public service.
- Analysis of high standard of living
- Amount worth NRs. 1, 63, 36,130.44 of Movable and Immovable property and physical assets is proved to illicit and acquired through the unlawful source.
- In comparison to his lawful source of income, the property possessed by Accused is too high, so, this possession of property is illegal
- Accused Kharel has committed the offence under section 3, 7(1), 10 and 15 of PCA, 2017 which is continued by section 20(1) of PCA, 2059
- Hence, Accused Kharel should be punished under section 3, 7(1), 10, 15 and 29 of PCA, 2017 and section 20(1) and 20(2) of CIAA, 2059. Similarly, Amount NRs. 1,63,36,130.44 should be confiscated under section 16.c, 29 of PCA, 2017 and section 20(2) and 47 of CIAA, 2059 and section 29.b of CIAAA, 2048. Similarly, Accused Kharel being an officer of special class should be additionally punished under section 14.a of PCA, 2017 and section 24 of PCA, 2059.

**Examination of Evidences by Court:**

**Statement of Accused:** Denial to the fact of the case

**Statement of Witness:** Both parties testified their witnesses.

**Documentary/Physical Evidences:** All documents and physical evidences collected during investigation were also examined by the court.

**Verdict:**

***Ratio Decidendi*:** Two questions of law were raised by the court as follows:

a. In order to punish Accused Achyut Krishna Kharel under PCA, 2017 by section 15, whether is it necessary to be charged under another offence or without being charged under another offence also he can be charged under section 20(1) of PCA, 2059?

b. Whether the charge sheet submitted against Accused Achyut Krishna Kharel is under the limitations set by law of Nepal?

***About first question (a):*** It will be against the article 14(1) of Constitution of the Kingdom of Nepal, 2047 to interpret the section 20(1) of PCA, 2059 in the line that the Accused can be charged even after being retired from the public post at which time the law governing the Accused during his tenure is already repealed. Since it is not seen from the charge sheet that the compulsion of PCA, 2017 to produce another charge against Accused where the charge of section 15 is also levied against the Accused, the plea of punishment against the Accused under section 20(1) of CIAA, 2059 cannot be said as lawful. Also the precedent of Supreme Court about the retrospective effect is

expressed in *Dwij Raj Bhatta V. Chakra Bahadur Singh, 2047*, where the interpretation of the Supreme Court has restricted upon the application of retrospective clause of law in older activities.

***About second question (b):*** Since it is seen from the study of law i.e. section 29 of CIAAA, 2048 that the Indictment against Accused Achyut Krishna Kharel is produced after crossing the limitations set by the law, it is not lawful to judge be entering into the fact of the case from the given charge sheet. In the case of *Tanka Bahadur V. His Majesty's Government (N.K.P. 2044, P.834)*, Supreme Court has held that there is no special right of the party to bring a law suit for unlimited time, hence, the charge sheet brought after the long period of cross of the limitation cannot be sustained. Similarly, in the case of *GanapatTharu V. JhabbuTharu (N.K.P. 2049, P.233)*, Supreme Court has held that the crossing of limitations of law cannot get right to file a case. In *Deepak Gurung V. Bishnu Raj Ghimire (N.K.P. 2048, P.797)*, Supreme Court held that it would be inappropriate to interpret as per the Act of Interpretation of Statute for giving chance to file a case after the amendments of law for past events. The same principle is also expressed in the case of *Hari Prasad Kharel V. Bhadra Prasad Kharel (N.K.P. 2062, No.1, De. No. 7480).*

### 5.7. HMG with Report of CIAA vs. KhumBahadurKhadkaet. *al.*

**Case: Corruption by acquiring illegal property[69]**

**Complaint:** Complaint was received from Former Minister KhumBahadurKhadka about the incident that he has collected various properties during his period of Minister by abusing the authority and has acquired lands, houses and other properties illegally. He has also transferred various properties to his relative during his period as Minister.

**Investigation:**

**Collection of Physical/Documentary Evidences:**

- Family Description of Former Minister KhumBahadurKhadka
- Description of Former Minister Khadka of his service in different Ministries at different level and different period
- Financial status of Former Minister Khadka before being Minister of various Ministries and after his retirement.
- The record of the inappropriate living standard he is living

**Prosecution:**

**Law and Charge with punishment:** The property acquired by Accused Khum Bahadur Khadka is contrasting in comparison to the lawful source of property. Such higher lifestyle is defined as "presumed offence" under section 15 of PCA, 2017 and has provided the conditions of confiscation under section 16.c and conditions for punishment under section 20(2) and also has provided to be confiscation under section

[69] [2069] DN 8832

47 of current PCA, 2059. Accused KhumBahadurKhadka was in public post from 2048-02-15 to 2059-06-18. So, the proportion of property acquired and the period of public post is totally distinct, hence, such property acquired without legal source is deemed to have acquired by corruption. All movable and immovable property and physical assets of Amount NRs. 2,36,87,624.24 is proved to be acquired under section 20(2) of PCA, 2059, which is also the offence under section 7(1) and section 15 of PCA, 2017, which is continued by section 20(1) of PCA, 2059.

Hence, Accused Khum Bahadur Khadka should be punished with imprisonment and fines equal to the amount to be confiscated i.e. NRs. 2,36,87,624.24 under section 7(1), 15 and 16.c of PCA, 2017 and section 20(1), 20(2) of PCA, 2059.

The property vested with the family members of Accused Khadka should be confiscated under section 15 and 16.c of PCA, 2017 and section 47 of PCA, 2059 and section 29 of CIAAA, 2048.

**Examination of Evidence by the Court:**

**Statement of Accused:** Accused is denial to the fact of case in the court.

**Statement of Witness:** Both the parties of the cases testified their witnesses.

**Documentary/Physical Evidences:** Analysis of the property acquired and lawful sources of property are submitted. Similarly, the period of public post and the ownership of property in that period is analyzed by the court. Bank balance, inherited property, Investment from one's family members and other sources are examined by the court.

**Verdict:**

***Ratio Decidendi*:** Among all the properties acquired by Accused Khadka, only 8.31 percent of the property is seen to be exceeding from the lawful source. There is not any compulsion from law to maintain Account of personal Income and expenses. Hence, it is unpractical to expect the update Account of personal Income and Expenses from Accused. Background and family history of Accused shows that his family status is prosperous and is with lots of land. Although burden to prove the source of property rests upon Accused, it is not appropriate to find the exact statistical record of the property acquired from long duration and it is also not appropriate to convict the Accused under section 20(1) of PCA, 2059. Indian Supreme Court, in *KrishnanandaAgnihotri V. State of M.P.* has interpreted that the 10 % difference in the source of property cannot be interpreted as disproportionate property. This precedent is persuasive to us, where our legal systems are similar with each other.

Hence, it is hereby acquitted that the property acquired by Accused Khadka shall not be interpreted as to be illegally acquired. The Indictment against Accused Khadka is not sustained, but overruled, so, the Accused is not convicted and hence acquitted on above mentioned legal grounds, evidence and facts.

### 5.8. HMG vs. Ishwor Prasad Pokharel[70]

**Case: Corruption by acquiring illegal property**

**Complaint:** The investigation is initiated with the information available from different source in different dates with the application of RamkrishanKathayat including national lover people from Mangalbazar about the deputy joint secretary Ishwor Prasad Pokharel, who has acquired huge property apart from his capacity. The property was being acquired from illegal means and that property is being concealed and made an artificial source, so, if his property is not searched and is initiated action, there is no chance of getting the property later.

**Investigation:**

***Collection of Physical/Documentary Evidences:*** The following evidences are collected by CIAA:

1. File of the record of land of different places of Nepal.
2. Documents related with the search and seized material from the accused house.
3. The statement of the accused.
4. The internal decoration material in the house of accused.
5. The Motorcycle, car.
6. The document of life and accidental insurance paper.
7. The bank statement paper about to Rs. 20 lakhs.
8. The source of income.
9. Documents related with the ownership of vehicle (private car) and Diaries.
10. 'Cheque Book' and 'Pass Book' of different Banks.
11. Search and Seizure Report of the Ornaments and Jewelry and also the quantity of jewelry.
12. Family description of Accused Ishwor Prasad Pokharel
13. Description of Service.
14. Movable and Immovable physical assets of Accused Ishwor Prasad Pokharel.

***Report of Investigation Officer:*** Analysis of the property of the accused Ishwor Prasad Pokharel gives a clear picture that the lifestyle he is living is not possible from the legal source of his property. By the comparison with the source full and in source full property, the land, house, bank balance, saving card, shares and decoration material in his house is not matching with his legal source of income. So the total property which the accused claimed that he acquires legally about to Rs.1, 75, 98,068.67, only the Rs. 52, 94,373.50 is the property of legal source and rest of the property Rs. 1, 23, 03,695.17 is acquiring from illegal source as according to the section 20(1) of Prevention of Corruption Act, 2059 and Article 14(1) of the Constitution of Nepal, 2047 and section 15 of the Prevention of Corruption Act, 2017. He is liable for acquiring illegal property through corruption, so he is liable for punishment up to maximum imprisonment and fine as the amount of his total property Rs. 1,23,03,

[70] [2066] DN 8200, Vol 8

695.17 and the property should be confiscated as according to the section of 29(Kha) and 30 of CIAA Act, 2049.

**Prosecution:** The difference in between the lifestyle and legal source of income do not match each other. Similarly, the property which is said to be acquired from different source is not proved and trusts worthy. Therefore, unless the property is proved with the valid source, such property acquired shall be deemed as property without source under the current law. Bank Balance, Expenses of the education of his children and daily uses and other movable and immovable physical assets prove that amount NRs. 1, 23, 03, 695.17 is unlawful property.

Accused Ishwor Prasad Pokharel has committed presumed offence defined by section 20(1) of Prevention of Corruption Act, 2059 related with the Article 14(1) of Constitution of Nepal, 2047 and section 15 of Prevention of Corruption Act, 2059. So the property in the name of his wife UshaPokharel, son KiranPokharel and PrabinPokharel, keeping in mind with the section 7(1) and 16(c) the accused Ishwor Prasad Pokharel is liable for fine up to Rs. 1, 23,03,6957 as according to the section 20(2) of Prevention of Corruption Act, 2059 and maximum imprisonment and confiscation the said property. The above mention property is illegal property, so these properties should be confiscated as according to the section 47 of Prevention of Corruption Act, 2059 and the section 29(b) and 30 of CIAA Act, 2048.

**Examination of Evidences by Court:**

***Statement of the Accused:*** Accused is denial to the fact. The property is extended through the lawful sources. My service, the investment, loan investment and also from agricultural products and inheritance is the source of property.

***Statement of Witness:*** Court didn't mention the analysis of the expression of the witness. The relevancy of the testimony of witness and what is expressed there in witness report is not mentioned in the decision of the court. However, the names of the witnesses who testified themselves in the court is mentioned in the decision.

***Documentary/Physical Evidences:*** All documents and physical evidences submitted by the Investigator are submitted and court has analyzed them in decision.

**Verdict:**

***Ratio Decidendi:*** Following questions are to be settled from the plea of the Accused and the plea of the Plaintiff. The legal questions are:

a. Whether the provision of section 15 of Prevention of Corruption Act, 2017 and section 20(1) of Prevention of Corruption Act, 2059 is a same nature(equal footing) is or not? Is it the section 20(1) of CA Act, 2059 continuity of section 15 of CA Act, 2017?
b. Is it compulsion to mention the source of income if it is already declared the income by them through VDIS program?

***About the question of equal footing and continuity of Law (a):*** Section 15 of Prevention of Corruption Act, 2017 mentioned about the presumed offence and section 20 of Prevention of Corruption Act, 2059 mention about the offence of illicit

enrichment. These two provisions are related with the illegal property which is not suitable with the legal income and daily expenses of the government officers. The Supreme Court gave decision that the both provision is the same offence, but only in the first law there were no provision of punishment for the offence and the second law has the provision of punishment for the offence. So, it is not suitable to think that the lack of the provision of punishment is not a means of forgiveness (omission). These two provisions is the equal footing offence and it is the continuity of previous law. So, such kind of offence is a matter of punishment within the present law.

The Supreme Court had given decision that the VDIS system is only for tax collection from the public official and the people also. It doesn't say that the people or public official do not show the legal source of income. Those who declare their unseen property through VDIS, they must show their legal source of income to the related authority.

***About the application of law of presumed offence against Accused (b):*** In *Sajjan Singh V. State of Punjab (AIR 1964 page 464)*, it is stated that the "any property acquired illegally before the enactment of any law can be applicable even after the enactment of Act", similarly, in the case of ChiranjibiWagle, this court has also interpreted and applied the same principle. Hence, the provision of section 20(1) of PCA, 2059 to ask about the source of any property shall not be deemed to have retrospective effect. Similarly, the provision of law to ask the source of property acquired by any public official and the presumption of having illegal property when in failure to show the source of property shall not be understood as having retrospective law.

***About the limitations of law (c):*** Since it is not an offence related with particular incident, the offence of having illegal property is related with the indefinite time period when any public official was in his/her post. It is not related with the particular activities as legal or illegal, but the possession of irrelevant and inappropriate property in comparison to the lawful source of property. Hence, the charge against Accused under section 20(1) of PCA, 2059 should be understood to be within the time limitations under section 13(2) of CIAA, 2048.

***About the additional punishment against the Accused (d):*** The condition in law is very clear and the plea of Accused that the additional punishment is applicable only to the political post but not to the civil servant is irrelevant. So, the additional punishment should be administered against Accused.

In total, Accused is subject to restituted NRs. 26,684487.59 and the property which is increase due to this property to government. Also, he is fined NRs. 28,35,751.79 and is subject to 1 year imprisonment.

### 5.9 HMG with Report of CIAA v. Defendant: Jaya Prakash Prasad Gupta[71]

**C. Case: Corruption by acquiring illegal property**

**Complaint:** Investigation was initiated with the complaint received from Reg. No. 2252 on 2059-05-24 with the information that Jaya Prakash Prasad Gupta has collected properties by corruption during his tenure as Minister.

**Investigation:**

**Collection of Physical/Documentary Evidences:**

- Family Description
- Description during public post
- Immovable and Movable properties and physical assets
- Vehicles, Bank Accounts etc. - Lands, Parental/Inherited Properties

**Prosecution:**

**Law and Charge with punishment:**Accused Gupta has illicitly acquired property. There is vast difference between his lawful property possessed before he was Minister and after being Minister. Accused Minister is living with high standard than his lawful source of income.

All Movable and Immovable Properties and Physical Assets acquired illegally is of worth NRs. 2, 08, 08,046.38. The offence of Accused is under section 20(1) of PCA, 2059, which is also offence under section 7(1) and 15 under PCA, 2017 and that is continued under section 20(1) of PCA, 2059. Accused Gupta should be punished under section 7(1), 15 and 16.c of PCA, 2017 and section 20(1) and 20(2) of PCA, 2059.

Accused being Minister of Nepal from time to time, should be punished additionally under section 14.a of PCA, 2017 and section 24 of PCA, 2059. Property remained with the family should be confiscated under section 15 and section 16.c of PCA, 2017 and section 47 of PCA, 2059 and section 29.b and 30 of CIAAA, 2048.

**Examination of evidence by Court:**

**Statement of Accused:** Accused was denial to the fact of the case and gave statement in the same line as in the Investigation.

**Statement of Witness**: Both the parties gave the testimony of witness.

**Documentary/Physical Evidences**: All the documents collected during Investigation are examined by the court.

**Verdict:**

***Ratio Decidendi:*** Among all the properties acquired by Accused Khadka, only 7 percent of the property is seen to be exceeding from the lawful source i.e., NRs. 7, 06,139. In order to prove the lawful source of income, the family background, financial status and other transactions and businesses should be investigated. So, here in the given case, with the description from the past profession, responsibilities and other source of income, only the minimal amount is not seen as to be the amount with source

[71] [2068] DN 8722

of income, which is not inappropriate in itself. Hence, in the lack of strong evidence, the offence against Accused Gupta cannot sustain.

## CONCLUSION

The assertions above boil down to the ultimate question of whether the society's need to fight corruption through illicit enrichment is justified despite the limitations that the crime allegedly poses to due process rights as discussed above. The World Bank's findings indicate that corruption is the greatest obstacle to economic and social development. For instance, in the African continent, it was estimated in 2004 by the African Union (AU) that the continent loses an estimated 148 billion USD annually. This amount is a representation of 25% of the continent's Gross Domestic Product (GDP). This is a clear indication that the need to fight corruption is a priority because its effects are reverberated to the social, economic and legal life of a state. This research observes that in-roads can be and have been be made in order to ensure effective prosecution of the crime of illicit enrichment.

In as much as the crime of illicit enrichment is effective in fighting corruption, various other ways must be invoked to complement it. So, the points are important for consideration to fight with the offence of illicit enrichment;

- Enforcement of asset declaration provisions and the penalization of false declarations.
- In Rem forfeiture actions against stolen property such as is the case in South Africa and the United States.
- Enforcement of money laundering provisions to ensure that illicitly acquitted wealth does not become difficult to trace.
- Alternative ways of deterrence such as the institution of civil suits. A civil action can also be instituted under the offence of unjustified enrichment, but only for as long as the pre-requisites for such a suit have been met. A good basis of such a suit could be where one proves loss suffered as a result of ultra-virus demands of public authorities.

Corruption is an age-old phenomenon in Nepalese Society. Gift-giving to public officials in order to get matters done long has been a tradition. In the past, bribery and nepotism were not regarded as corruption. Such traditional gift-giving practices were transformed gradually into an open exercise during the Imperial regimes. Corrupt practices, such as embezzlement of public funds and abuse of power for personal gain, escalated during the Rana regime and have continued after its fall. It was also difficult to carry out routine business without involving some form of gift-giving. This situation gave rise to the attitude among public officials and civil servants that corruption was a normal and unofficial source of income. Hence, it is possible to say that corruption in Nepal is rooted in the country's social cultural, political and bureaucratic traditions.

Studies by international and regional organizations show that corruption is becoming a serious problem in Nepal.[72] The first comprehensive survey carried out in 2001 by the Commission of Investigation and abuse of authority, revealed that corruption is one of the main challenges hampering the development of the country.[73] According to the latest Nepal corruption perception survey conducted in 2012, corruption is the country's seventh most serious socio-economic problem.[74]

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72 Transparency International (2010: 178). Global Financial Integrity Report (2011).
73 Federal Ethics and Anti-Corruption Commission (FEACC) (2012: 22).
74 Ibid, (2012: 106-107).

Motivated by the widespread prevalence of corruption in the country, the current government took the initiative by establishing the CIAA, a body dedicated to fighting corruption. The Nepalese government, in its efforts to promote anti-corruption, ratified UNCAC, UNCTOC and SAARC.

Further, the money laundering act was introduced in 2008 and criminalized the money laundering and illicit enrichment and other corruption and corruption-related conducts. This research paper, in line with the international and regional anti-corruption instruments and domestic legislation, examined the usefulness of criminalizing illicit enrichment in combating corruption. The clandestine nature of corruption creates difficulties in finding evidence to prosecute corrupt public officials and end impunity. The complex and sophisticated nature of corruption makes the investigation expensive in terms resources and expertise. Prosecuting public officials for disproportionate increase of assets after careful investigation will assist in the fight against corruption. Further, it is important to note that criminalizing illicit enrichment assists in implementing and enforcing UNCAC and other regional anti-corruption instruments fully and effectively. In addition, the prosecution of the offence of illicit enrichment has been recognized as an effective anti-corruption tool in many developing countries.

The case analysis that has been done in regard to the Nepalese law of unexplained property demonstrates the advantages associated with criminalizing illicit enrichment. In addition, the analysis that has been made of the embezzlement case of *KhumBahadurKhadka*shows the challenges, such as the lack of resources and expertise related to asset recovery, inherent in corruption cases in general.

However, because of certain human rights concerns, such as the presumption of innocence and the right against self-incrimination invoked against it, many countries, especially developed countries, remain reluctant to criminalize illicit enrichment. Comparative analyses of the Hong Kong and Singapore legislative frameworks reveal the weakness and lacunae that exist in Nepalese anti-corruption laws. Despite their categorization as ‘strong’ and comprehensive, the analysis made in relation to the international anti-corruption instruments reveals that the anti-corruption laws of Nepal do not regulate corruption in the private sector. Civil asset forfeiture in the absence of a criminal conviction is another area where the anti-corruption legal framework falls short. Further, the analysis of the law shows that to enforce multilateral international or regional agreements on matters of international co-operation, the domestic law, especially the Criminal Code, is weak and does not cover all aspects of international co-operation.

A well-crafted and comprehensive law cannot by itself curb corruption. Of course, the failure to control corruption in most countries, including Nepal, is attributed partly to the fact that the laws are not enforced properly. It is important to have in place an appropriate law enforcement mechanism to curb corruption.

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# ORGANIZED CRIME INVESTIGATION: TOOLS, CHALLENGES AND THEIR REMEDIES

**Mona Singh**[1]

## ABSTRACT

*Conventional policing is primarily reactive, meaning that police action generally responds to crimes after they have been committed and reported. Successful investigation of organized crime requires proactive approaches, which are generally based on criminal intelligence analysis. Technological development and the new opportunities provided by the globalization of financial markets and communications are key factors for the development of organized crime. Organized crime is a transnational problem of human society all over the world. Therefore collaborative effort of international community is necessary for combating this global problem. As Nepal has ratified the UN convention on Transnational Organized Crime and UN convention against corruption and some other regional conventions, it has enacted the separate special laws and established some institutional mechanism to combat the organized crime; however they seems very insufficient and traditional depending on the serious, complex and sophisticated nature of Organized Crime.*

## 1. INTRODUCTION TO ORGANIZED CRIME

Ever since the end of Cold War, a new problem, in the form of organized crime has taken shaped due to the failure of global governance to keep pace with economic globalization. The rise of free and open market, finance, travel and communication has created economic growth and well-being, it has also given rise to immense prospects for criminals to make their enterprises thrive. Organized crime has expanded, gone universal and reached macro-economic proportions: illegal goods are sourced from one continent, trafficked across another, and sold in the third. Gangs and mafias are today truly a global problem: a threat to security and prosperity, especially in poor and conflict-ridden countries which has been driving corruption, colluding business and politics, and hindering development.

La Cosa Nostra, the mafia, the mob, gangster, the outfit, the state within a state, the invisible government are some of the name used for organized criminals; similarly Montreal mafia: Rizzutos, the Crips, Turkish Mafia, the Nigerian cartels, the numbers

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gang, Sinaloa cartel, Yamaguchi gumi, SolntsevskayaBratva, Yakuza groups, Chinese Triads, Laskar Bali, Taliban, D-company, ChhotaRajan, Lashkar-e-Taiba and Harakat-ul-Mujahideen etc. are some of the prominent organized criminals of the world.[2]

The crimes which are organized are real dangers to society. The criminals act in an organized manner and then try to gain economic and political advantage. The loss caused to the society by such organization may be inestimable. Organized crimes are of two kinds: predatory (robbery, theft, rape, burglary, counterfeiting of coins etc.) & service crimes or racketeering (sale of adulterated commodities and drugs, illicit liquor, trafficking, gambling, smuggling, pornography, and prostitution etc.)[3]

### 1.1 Definition of Organized Crime

There are multiple definitions of organized crime, which have been interpreted by different scholars and multinational organizations.

No unanimous definitions of organized crime can be found in criminal science. In simple sense, organized crime is meant that two or more than two persons involved in performing criminal activities in a planned or organized way.[4] There are two approaches to define the concept of organized crime;

i) The law enforcement perspectives: It views the organized crime as an organization of thousands of criminals with complex organizational structure which operate in a rigid and strictly enforced rules for the goal of money and power. This approach to analyze organized crime is associated most frequently with the work of late Donald Cressey.
ii) The social and economic perspectives: This approach views organized crime as an integral part of nation's social, political and economic life as one of the major social ills, such as poverty or racism that grew with urban living in America.

According to United Nations Office on Drugs and Crime, organized crime has been defined as, “Organized crime is a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand. Its continuing existence is maintained through corruption of public officials and the use of intimidation, threats or force to protect its operations.”

According to United Nations Convention against Transnational Organized Crime, under article 2a, an "organized criminal group" is defined using four criteria:

i) A structured group of three or more persons;
ii) The group exists for a period of time;
iii) It acts in concert with the aim of committing at least one serious crime;
iv) To obtain, directly or indirectly, a financial or other material benefit.

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2 See: https://matadornetwork.com/, Accessed on 15th August 2021
3 Dr. S.S. Shrivastava, *Criminology, Penology & Victimology* (4th ed.), Central law agency, Allahabad, India at. 67, (2012)
4 Prof. Dr. Rajit Bhakta Pradhananga & Balaram Prasad Raut, *Nepalese experience of Organized Crime: An appraisal*, Nepal Law Review, vol.23, number 1&2, year 36, at 7, (2011)

Similarly, The FBI defines organized crime as any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities.

The Nepalese organized crime prevention act, 2070 is the comprehensive legal provision to combat organized crime. The preamble of the act states its objectives as maintaining law and order, the protection of life, liberty & property of the general people by preventing the organized crime, conducting investigation by adopting special technology in such crime and protecting the victim and witness of such crime.[5] The Organized Crime Prevention Act, 2070 has not defined the organized crime but defines the organized criminal group as; Sec. 2(d) "criminal group" means and organized and unorganized group of three or more than three persons within or outside Nepal with the objective for committing or assisting to commit one or more serious crime for any kind of benefit or satisfaction directly or indirectly to commit organized crime as mentioned in chapter (2).[6] The Organized Crime Prevention Act, 2070 in Sec. 3(2) has defined organized crime in the following words: " It shall be deemed the person has committed the organized crime if the person for the benefit of the crime group or in the instruction of the crime groups or on behalf of the organized group or in association with the organized groups or a member of the organized groups committing serious crime. Sec 3(3) For the purpose of this section, (a) serious crime means the crime punishable at least three years of imprisonment. (b) The offences under chapter-3 (formation of criminal group, obstruction to justice, destructive acts & criminal extortion), (c) the offence of corruption, money laundering and terrorist financing. Sec. (4) the act has criminalized the acts of being accomplice to such acts or preparation, attempt, conspiracy, instigation and being an accomplice to such offences.[7]

All in all, we can conclude by asserting that organized crime is a category of international, domestic, or local groupings of highly centralized enterprises run by criminals to engage in illegal activity, mostly for profit.

### 1.2 Characteristics of Organized Crime

According to Gomes &Cervini (1997), in order to warrant the definition of Organized Crime, the organization must fulfill all the prerequisites of a gang or mob plus at least three of the following: a) objective of accumulating wealth; b) structured hierarchy; c) "businesslike" planning; d) sophisticated technology; e) functional division of activities; f) structural connection with public authorities; g) offer of social services; h) territorial division of illegal activities; i) serious power of intimidation; j) diffuse capacity to defraud; k) local or international connections with other organizations.

The Federal Bureau of Investigation (FBI) defines organized crime as any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of

5 Organized Crime Prevention Act, 2070
6 Ibid
7 Ibid 5

actual or threatened violence, corrupt public officials, graft, or extortion. The Brazilian National Federal Police Academy, on the other hand, lists the following 10 characteristics: 1) Businesslike planning; 2) anti-juridicality; 3) diverse scope of activity; 4) longevity of membership; 5) chain of command; 6) large number of agents; 7) compartmentalization; 8) code of honor; 9) territorial control; 10) pursuit of profit.

Mingardin (1996,p.69) identifies fifteen characteristics of organized crime: 1) practice of illicit activities; 2) clandestine activities; 3) organizational hierarchy; 4) pursuit of profit; 5) division of labor; 6) use of violence; 7) symbiosis with the State; 8) illicit merchandise; 9) corporate planning; 10) use of intimidation; 11) sale of illicit services; 12) cronyism; 13) law of silence; 14) monopoly of violence; 15) territorial control

One way or another, the fact remains that of all the above mentioned traits, there can be no doubt that connection with public authorities is the hallmark of truly organized criminality, followed by capacity to carry out diverse types of fraud, a high degree of operationality and constant mutation.

### 1.3. Model of Organized Crime

A model is an effort to capture the essence of a phenomenon to understand it more clearly. For instance, we model the solar system, child development, the aging process, and many other concepts to understand them. The patterns or models of organized criminal groups can be grouped into three general types: groups with hierarchical or organizational structure; groups based on local cultural or ethnic connections; and groups relying on economic business-type relationships.

i) Hierarchical model of organized criminal groups

The hierarchical model defines organized crime as a group of interdependent actors in which there is a clear ranking among participants that distinguishes leaders from other members in the criminal enterprise. This structure has been termed the "bureaucratic," "corporate," or "organizational" model of organized crime. This description of organized criminal groups sees it as a government-like or military-like structure, in which illegal activities are organized and approved by superiors and carried out by lower-level operatives who are part of the group (Albanese, 2015; von Lampe, 2016).

ii) Local, cultural model of organized crime

Beginning in the 1970s and extending to the present day, many empirical studies and analyses of the operations and structure of organized criminal groups have occurred in different locations around the world. A significant number of these studies found that cultural or ethnic ties, rather than hierarchy, connected organized criminals together, and that many groups are local in nature without significant connections to larger groups or distant locations.

The local, cultural model of organized crime structure highlights the importance of heritage (i.e., racial, ethnic, national, or other cultural ties) as the basis for trust, which is fundamental to establish working relationships in illegal activities (Smith and Papa

Christos, 2016; von Lampe and Johansen, 2004). These groups are often smaller, operate in neighborhoods, or smaller regions or territories, and control some portion of the illicit activity there. Studies also found that some organized criminal groups operate with relatively little direction or supervision in their day-to-day activities. The difference from the hierarchical model lies in how relationships within the group are structured, because the types of criminal activities are similar among groups, as they all exploit illicit markets for products and services.

iii) Enterprise or business model of organized crime

The enterprise model of organized crime grew from the realization that the regulatory framework and economic factors were the primary determinants behind the formation of organized criminal groups. Organized criminal groups were found to structure their illicit activities around the demands of customers e.g., for illicit drugs, firearms, or stolen property. The groups find ways to supply those goods and services while navigating among the risks posed by law enforcement, as well as legal and illegal competitors (e.g., other illicit products and groups). Their ultimate objective is to make a profit out of these activities.

The enterprise model of organized crime focuses on how economic considerations lie at the heart of the formation and success of organized criminal groups, more importantly than hierarchical or cultural considerations, The enterprise model labels economic concerns as the primary cause of organized criminal behavior. In a study of drug markets, for example, it was found that groups consisted of "individual entrepreneurs and small organizations rather than massive, centralized bureaucracies," which were "competitive" rather than "monopolistic" in nature (Adler, 1985).

## 2. INTERNATIONAL AND DOMESTIC LEGISLATIONS ON ORGANIZED CRIME

Organized crime is not a domestic issue as it transcends above international borders, hence giving its transnational nature. The need for international legislation to address these issues is of paramount importance as the organized criminal groups can simply move their operation from one place to another as they see fit. For this reason, organized crime is also regarded as cross border crime. The requirement for manpower and resources to curb these types of crime cannot be managed by a single entity. Hence there is a necessity for an international convention to unite and gather resources to curb organized crime.

### 2.1 International Legislations

The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. The Convention is further supplemented by three Protocols, which target specific areas

and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Countries must become parties to the Convention itself before they can become parties to any of the Protocols.

The Convention represents a major step forward in the fight against transnational organized crime and signifies the recognition by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.

In addition to the above, other conventions like, BIMSTEC Convention on Cooperation in Combating International Terrorism, Transnational Organized Crime and Illicit Drug Trafficking, United Nations Convention against Corruption 2003, Global Action Plan against Organized Transnational Crime 1998, Child Right Convention 1989, SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution 2002, play a vital role in curbing organized crime worldwide.

### 2.2 Domestic Legislations

Organized Crime Prevention Act 2070 of Nepal is the main instrument to combat organized crime. Sec (31) of National Penal Code, 2074, has made a provision that, if two or more than two commits an offence, all the members of that group will be punishable for that offence. Sec 38: The conditions to increase punishment; 38 (V) has made a special provision to increase the punishment in the offence committed in a planned and organized way.[8] Sec (12) of National Penal Procedure (Code) Act, 2074, has a provision to formulate a special investigation team depending on the gravity of the offence.[9] In addition to the act there are some other legal provision related to organized crime in Nepalese law which are: Ancient monument Preservation Act 2013, Country Code 2020 (Chapters on theft/stealing, counterfeiting, Kidnapping/Abduction and Hostage Taking and Human trafficking), Human trafficking control act 2064, Narcotic Drug Control Act, 2033, Medicine Act, 2035, Arms and ammunition act 2019, Explosive substance act, 2018, Corruption control act 2059, Cyber act, 2061, Foreign exchange regulation act, 2019, Nepal Rastra Bank Act, 2058, , Children Act, 2048, Commission for investigation of abuse of authority Act 2049, Revenue leakage

[8] National Penal Code 2074
[9] National Penal Procedure Code, 2074

Act, 2052, The Asset (Money) Laundering Prevention Act, 2063, The Mutual Legal Assistance Act, 2070, The Extradition Act, 2070, The Prevention of Corruption Act, 2059, The National Parks and Wildlife Conservation Act, 2030, The Banking Offence and Punishment Act, 2064, The Foreign Employment Act, 2064, The Electronic Transactions Act, etc.

## 3. INVESTIGATIVE TOOLS IN ORGANIZED CRIME

### 3.1 Investigation Tools in International Convention

Article 1 of the Organized Crime Convention, 2000 states its purpose in a single sentence: "The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively." The objective includes the prevention and response to transnational organized crime, so it is aimed at improving the effectiveness of existing interventions against transnational organized crime activities through cooperation.

Once appropriate laws on criminalization and other related measures are enacted, prohibiting activities related to and supportive of organized crime, a large responsibility falls to law enforcement agencies. The enforcement of laws is not an easy task. Some of the legal frameworks addressing organized crime are insufficient or so recent that more awareness and specialized knowledge seems to be necessary. Moreover, investigating inherently secretive and transnational criminal activities requires investigative tools suited to the purpose.[10]

#### 3.1.1 Issue of Jurisdiction

One of the major issues in dealing with transnational organized crime is the issue of jurisdiction. Offenders frequently commit crimes in territories of more than one State and try to evade law enforcement by moving between States. Therefore, particularly when dealing with transnational organized crime, a major concern is that serious crimes do not go unpunished, even if offences are committed in different jurisdictions. In order to reach this goal, it is necessary to reduce or eliminate jurisdictional gaps that enable fugitives to find safe havens. Jurisdiction describes a defined legal authority to administer justice over a certain geographical area, certain individuals or certain function / subject matter.

The Organized Crime Convention addresses the issue of jurisdiction. In cases where an organized criminal group is active in several States that may have jurisdiction over the conduct of the group, the international community seeks to ensure that there is a mechanism available for those States to coordinate their efforts. The jurisdiction to prosecute and punish such crimes is addressed in article 15 of the Convention.

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[10] See: https://www.unodc.org/e4j/en/organized-crime/module-8/introduction-learning-outcomes.html, Accessed on 20th August 2021

### 3.1.2 Investigation methods of organized crime

The enforcement of domestic laws against organized crime is not standardized. Some jurisdictions have specialized enforcement units to investigate only organized crime cases, whereas others have no distinct organized crime enforcement unit(s). In any case, as organized crime cases can be complex and require some degree of specialization, there is a need for multiagency task forces to focus on specific crimes or organized criminal groups of concern for crimes such as human trafficking, drug trafficking, wildlife crime, falsification of medical products, financial crimes and cybercrime.

The practical problems of investigative cooperation at the international level are significant. Many countries have multiple agencies with enforcement authority (e.g., national police agency, customs services, local police agencies, specialized organized crime agencies), so jurisdictional issues and communication are crucial considerations. There are also logistical problems with disparate information technology, language barriers, differential access to resources and specialized equipment, and procedures for obtaining approvals for information access and use of special investigative techniques.

Law enforcement agencies from different countries have thus expanded the scope of their activities abroad. Law enforcement liaison officers assigned to another country are often affiliated either with the embassy of the country they represent, or an investigative unit or task force. Liaison officers are usually responsible for establishing a communications channel between their agency and its counterpart in a foreign country, acting as the "human interface" between different organizations.[11]

Some of the methods that are in practice are as follows:

a) **Controlled Delivery:** Controlled delivery is an investigative tool that helps to accomplish this objective, particularly in cases where illicit products trafficking is identified or intercepted in source or transit and then delivered under surveillance in order to identify the intended recipients. It is also used to monitor and gather evidence on subsequent distribution within an organized criminal group or in the illegal supply chain. In some cases, it is possible to substitute the illicit consignments with licit or fake material in order to prevent the risk of losing the illicit consignments during the course of delivery. Article 2(i) of the Organized Crime Convention describes controlled delivery as the technique for allowing suspicious shipments or cargo to leave, pass through or enter a jurisdiction with the knowledge and supervision of authorities. Already the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) recommended the use of controlled delivery to combat trafficking in drugs.
   Some key questions for controlled deliveries include the following (UNODC, 2016):

[11] https://www.unodc.org/e4j/en/organized-crime/module-8/key-issues/investigators-of-organized-crime.html, Accessed on 21st August 2021

i) Do national legislation or regulations allow for the substituting (in whole or in part) of detected contraband before an actual controlled delivery is conducted? If yes, can such records be accepted for the purpose of evidence in court?
ii) Which agency takes the lead with regard to controlled deliveries?
iii) What are the preconditions for the use of controlled delivery?
iv) Is authorization from a judicial or other independent source required?
v) What are the limits and conditions for controlled delivery orders?
vi) Have standard operating procedures been developed to support swift and efficient controlled deliveries?

b) **Physical and electronic surveillance:** Physical surveillance is one of the oldest law enforcement investigative tools. If authorities suspect someone is engaging in illicit activities, the easiest path might be to follow them. This remains a widely used investigative tool, although most countries have placed limits on surveillance. A right to privacy in one's own home, for example, has near universal recognition, so countries place restrictions on such intrusion. The threshold on when government authorities can enter private spaces depends on the jurisdiction and may include probable cause, reasonable suspicion, reasonable and probable grounds, and it generally requires prior judicial authorization.

Electronic surveillance performs a similar function to undercover operations, but allows for the collection of a broader range of evidence. It is a preferred investigative method when an organized criminal group cannot be penetrated by an outsider, or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or to the safety of investigators. Given its intrusiveness, electronic surveillance is subject to strict judicial control and legal safeguards to prevent abuse and limit the invasion of privacy (UNODC, 2009).

The forms of electric surveillance are showcased in the table below (Source: UNDOC, 2009):

| Audio surveillance | Visual surveillance | Tracking surveillance | Data surveillance |
|---|---|---|---|
| • Phone tapping<br>• Voice over Internet protocol (VOIP)<br>• Listen devices (room bugging) | • Hidden video surveillance devices<br>• In-car video systems<br>• Body-worn video devices<br>• Thermal imaging/forward-looking infrared<br>• CCTV | • Global positioning systems (GPS)/ transponders<br>• Mobile phones<br>• Radio frequency identification devices (RFID)<br>• Biometric info technology(retina scans) | • Computer/Internet (spyware/cookies)<br>• Mobile phones<br>• Keystroke monitoring |

**c) Undercover Operations**

Undercover operations are the third special investigative tool included in the Organized Crime Convention. Undercover operations occur where investigators

infiltrate criminal networks or pose as offenders to uncover organized crime activity. These operations occur in many countries with different types of oversight. Major issues faced by jurisdictions are listed below:

i) In what kind of cases and in which format are undercover operations allowed?
ii) Are there limits on the type of undercover operations permitted?
iii) What are the preconditions for conducting undercover operations?
iv) Is authorization from a judicial or other independent source required?
v) Are there guidelines for the appropriate use of undercover officers?

Undercover investigations are used less often than is commonly believed, due to the extended length of time required to gain access to criminal organizations, and the danger to the undercover officer if his or her identity is discovered.

Sting operations are deceptive law enforcement operations designed to catch a person committing a crime. They involve more officers, and they are generally long-term and expensive investigations. They involve deceptive "fronts" for criminal activity such as a stolen property dealer, arms dealer, or money launderer designed to catch those committing crimes. Sting operations are usually designed to infiltrate criminal markets, but these require multiple undercover officers over an extended period of time. A successful sting operation can disrupt an entire criminal market.

d) **Financial Analysis**

Financial analysis involves an assessment of personal or business income, expenditures, and net worth to determine the presence of unexplained income. It is a tool used by crime analysts when looking for discrepancies between legal income and expenditures as a potential indicator of illegal income produced from organized crime activity.

Three methods are used for financial analysis, all of which are designed to determine total wealth or expenditures to compare with reported income. First, the net worth method analyses a person's net financial worth over time and examines all sources of known income, bank accounts, and other assets. If a person cannot document the reasons for major changes in their net worth, this unreported income becomes the basis for investigation.

A second method of financial analysis is the expenditures method, which analyses the flow of funds during the year. Weekly or monthly reported income are compared to expenditures of the person (through cash purchases, credit cards, or other means). Major discrepancies between reported income and the level of expenditures suggest unlawful income.

A third method is the bank deposits method. This method of financial analysis attempts to reconcile the flow of money, which in many countries, for people and businesses, involves the use of bank accounts for receipt of income and in

making expenditures. The money flow through a person's or business known bank accounts are examined to look for discrepancies.

Close scrutiny of financial records can reveal organized criminal activity, including fictitious companies to launder funds, overpayment of employees, overpayment of subcontractors for kickbacks, or other fraudulent schemes to conceal unlawful income. in and out of banks can provide the basis to suspect unreported or unlawful income.

e) **Informants**

Informants are used often in organized crime cases. There are four types of informant: a member of the public, a victim of a crime, a member of an organized criminal group or police officers themselves. Informants are also referred to as "justice collaborators" or they may be known as "cooperating witnesses" (UNODC, 2008).

Most informants are criminals who cooperate with the police in exchange for a reduced charge, sentence, or immunity from prosecution, depending on the judicial system. In some cases, however, honest citizens simply wish to report wrongdoings. Whatever the case, informants often desire to remain anonymous. Many courts have held that the identity of an informant can be kept confidential, but this not universal. In some jurisdictions, if the defendant can demonstrate that it is relevant to the case, the informant's identity may be revealed.

Informants are cost-effective because they involve little expense. In most cases, they are cooperating for leniency in their own pending case. Because informants often have inside information, they can be helpful in building cases that would otherwise require months of investigation.

### 3. 2 Investigative Tools of Organized Crime in Nepal

It hasn’t been that long for the existence of provisions that prescribe investigative procedures in organized crime. Organized crime groups have been causing a lot of disturbances in the country’s peaceful nature and its path for development. In order to curb these kinds of activities, Nepal has adopted the Organized Crime Prevention Act, 2070.

Under Section 11, Chapter 4 of this act, has mentioned that other than corruption or money laundering, the investigations related to organized crime shall be conducted by police designated as at least officer level.

Section 12 of Chapter 4 states that the government of Nepal may form the special team with the involvement of the specialist of given subject matter for the investigation of organized crime if so is deemed necessary in the recommendation and coordination of Attorney General and Inspector General of Police.

Section 13 of Chapter 4 mentions about special investigative techniques, where it says that, in force control delivery or undercover operation and other similar investigation technique may be adopted while investigating organized crime.

Section 15 of Chapter 4 talks about freezing of the suspects property, where it has mentioned that, if there is sufficient reason that the property acquired from crime or proceed of crime may be transferred or sold or hid or transformed by alleged offender of organized crime investigating authority may file the application to court to issue directives to concerned entity or institution in order to prevent the transfer, bail or mortgage or sale such property.

Section 16 of Chapter 4, talks about the procedures relating to information of transactions. It states that if there is any account or transaction in bank and financial institution in the name of alleged offender or its family member or its suspects involved in it investigating authority may acquire the information of such transaction or account or freeze the account with the permission of the court.

Similarly, Section 17 provides grounds for seizure of passport. Section 18 talks about the acquirement of telephone and communication details while Section 19 talks about censorship of the acquired communication media.

Chapter 5 of the Act, entitled Special Provision on recording of communication, states about various provisions relating to acquired communication media. Section 23 talks about maintenance of acquired recordings. It states that Investigation authority, Superintendent of Police or Senior officer than such designation may record the communication of any person in accordance with this Chapter in the investigation procedure of organized crime.

Chapter 6 of the Act, entitled Special Provision on Evidence talks about special provisions on evidence. Section 33 talks about using video conferencing to produce alleged court.

Section 35 of the same chapter talks about using factious name during investigation. It mentions that:

(1) In case of the intelligence, complainer or witness desires to make statement without mentioning their name or in imaginary or code name court shall have to take statement in such imaginary or code name without mentioning the real name of such person.

(2) If statement or examination in accordance with Subsection (1) is taken same name shall have to be mentioned in file, order or verdict.

Section 39 talks about another special provision on evidence. It states that, evidence or information collected or examined by the court or competent authority of foreign country in the case of organized crime may be accepted by court as evidence.

Alongside this act, Prosecution Policy and Guidelines, 2077 published by the Office of Attorney General has prescribed guidelines relating to investigation of organized

crime. It has prescribed guidelines for the public prosecutor to follow. It starts by asking to investigate if the reported crimes falls under the category of organized crime or not. If it does, then it provides guidelines to carry out the investigation which involves the examination of evidence, freezing of property, witness protection, plea bargaining.

## 4. ORGANIZED CRIME INVESTIGATION IN NEPAL; CHALLENGES AND THEIR WAY OUT

In Nepal, it hasn't been that long since the enforcement of legislations related to organized crime, especially, the Organized Crime Prevention Act, 2070. During the implementation of this act, there were a lot of problems related to investigation, prosecution and adjudication of offenses related to organized crime. From the above study, there are a few suggestions that can be implemented to improve the shortcomings faced while dealing with organized crime.

i. Nepal must take an example from its foreign allies when it comes to dealing with organized crime, especially in areas, related to organized crime investigation. It must also make amendments similar to that of international convention to make law enforcement much stronger.
ii. Before undertaking an investigation related to organized crime, the investigating group must examine the nature of the crime and the characteristics of the criminal group, for ex: if there are more than three people involved, if they have a monetary goal in mind or not, etc. Only after the establishment of the above characteristics, one must categorize it as organized crime. This problem is mainly seen due to lack of resources, proper training, equipment and specialized personnel. Hence, in order to address these issues, there must be training for the investigative officers, especially in the field of organized crime.
iii. For the proper implementation of Organized Crime Prevention Act, 2070, the provisions related to organized crime mention under Extradition Act, 2079 Witness Protection Act, 2075 and Mutual Legal Assistance Act, 2070, should be utilized and implemented in a smooth manner.
iv. There must be coordination and cooperation among law enforcement agencies to curb organized crime. There should be free flow of information among various levels of law enforcement agencies at national and international level.
v. The tools of investigation of organized crime such as controlled delivery, surveillance systems, undercover agents, informants must be implemented in a systematic manner and be provided with ample resources. Moreover, these techniques or tools must be utilized in the investigation of organized crime in order to have more success rate in closing of cases.

## CONCLUSION

The investigation of organized crime requires strategies and techniques quite different from conventional crimes. The special investigative techniques described in this Module have been widely used in organized crime investigations. These tools involve more planning, organization, and time-intensive effort than more traditional law enforcement tools, but they are necessary to investigate criminal behavior that is generally better planned and organized than in traditional crimes. Each investigative technique was shown to have both strengths and weaknesses, and their use needs to balance the competing interests of ensuring public safety through apprehension of criminals with the need to ensure the rights of individuals. Further challenge to investigating organized crime is posed by the vulnerability of victims and witnesses to such crimes.

VOLUME 5, ISSUE 1, YEAR 2022

# IMPLEMENTATION OF TORTURE LAW IN NEPAL: CASE STUDIES

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## ABSTRACT

*The numbers of torture cases are decreasing from conflict to post conflict period, rates are still significant. The reason of decreasing the number of torture incidents may be enactment of Muluki Penal Code criminalizing torture. However, the implementation of the law falls short to impartially investigate acts of torture, and provide victims the right to reparation. In Nepal, the use of torture by state agencies has become a phenomenal situation. In recent days also, several incidents of torture were committed in the police custody due to that the accused or suspects lost their life which can easily be imagined from the case studies analyzed in this article. This Article highlights issues of torture in Nepal and discusses situation and nature of tortures in Nepal. The article also includes discussion on the development of legal framework related to torture in Nepal. The author has highlighted the constitutional and legal provisions and perception prevailing about torture in that particular period. To explain the constitutional and legal development, it has been classified into four periods or stages of development. It also critically analyzes implementation of torture law, challenges previaling in implementing the torture laws and jurisprudence of Supreme Court of Nepal. The author has proposed some steps to be taken to implement the law of torture properly and effectively so that human rights of the victims will not be violated.*

## 1. INTRODUCTION

Torture is a heinous crime. It is crime against humanity. It is violation of human rights. All together it is violation of right to live with dignity. The use of torture in crime investigation goes back to the earliest human civilizations and remains systematic in some way or the other around the world. While a small number of countries have made significant progress in preventing torture, the rest of the world has still been committing serious form of human rights violation under the guise of national security or in the name of maintaining peace and security or law and order. A review of Nepal's progress in ending torture paints a bleak picture when it comes to the state's actual prevention of torture and commitment to the justice of those responsible for inflicting physical, mental or psychological suffering on someone.[2]

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® I would like to extend my acknowledgement to the Terai Human Rights Defenders Alliance (THRDA) for allowing me to use the case studies related to torture published in the research report Torture In Terai 2020, Torture Is A Crime: The State Continues To Commit, Terai Human Rights Defenders Alliance. I was also part of this research. I also would like to thank to Advocate Mohan Karna and Praveen Kumar Yadav for supporting me in doing research of case studies.

In Nepali criminal justice administration, torture is a main tool for the Nepali security forces to create evidence in the process of investigation of crime or to get the confession of the accused. Therefore, in Nepal, there is a very infamous proverb or statement which gives notoriety and ironic symbolic meaning of Nepali criminal jurisprudence, *Pahile kutnus ani bujhanus* (in English, first beat, then ask). This gives a kind legacy to torture in Nepal. It also helps us to understand that, in Nepal, the use of torture by state agencies has become a phenomenal situation. In recent days also, several incidents of torture were committed in the police custody due to that the accused or suspects lost their life[3] which can easily be imagined from the case studies analyzed in this article.[4]

To minimize and prevent the number of torture in Nepal, several efforts have been taking place. After the restoration of democracy in 1990, the Constitution of Kingdom of Nepal, 1990 prohibited the torture, but did not criminalize it.[5] Nepal ratified the United Nations Convention against Torture (CAT), 1984 for ensuring the right against torture. The Compensation Relating to Torture Act (CRT), 1996 was also enacted to fulfill the obligation taken under the CAT. However, the Act did not declare torture as punishable offense by law, but it shows the commitment of the Government of Nepal. The Interim Constitution of Nepal, 2007 and the Constitution of Nepal prohibited the torture and provided the right against torture as fundamental right and made it punishable offense.[6] To implement the constitutional provisions, the Muluki Penal Code, 2074 (2017) provides the statutory provisions and has defined the torture. It has also criminalized the torture and made punishable offense in tune of the constitutional provisions.[7]

However, constitutional and statutory provisions have not deterred the perpetrators. The case studies analyzed and explained in this article have shown that human rights violations and instances of torture are still taking place in Nepal and their perpetrators still enjoy impunity. The legal avenues available for survivors of torture are still weak and systemic issues still plague Nepali judiciary, making justice, compensation and dignity for survivors hard to achieve. Despite the positive measure of criminalization of torture, it has failed to have a real effect on curbing torture.[8] Therefore, the main objective of this paper is to find the answer of questions, why the number of custodial death is increasing? Why the existing legislative measures are not sufficient to curb the torture? Who can be blamed? What can be the possible ways to prevent the torture? How to end the impunity and punish the perpetrators? To address all these questions, I have divided my paper into five parts. Part I is the introductory part which highlights

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2 Nepal: Make Torture a Crime in 2001, Amnesty International. See also Torture InTerai 2020, Torture Is A Crime: The State Continues To Commit, Terai Human Rights Defenders Alliance.

3 Death of Bijay Ram in Police Custody due to torture, Date 2077/05/13.Available at https:// www.onlinekhabar .com/2020/09/893305. See also the case of SambuSada. On 10 June 2020, SambhuSadaMusahar, aged 23, of Sabaila Municipality Ward Number 12, Dhanusha district, died in police custody. Available at https://english.onlinekhabar.com/dhanusha-man-was-found-hanged-in-police-custody-was-it-murder-or-suicide.html and https://thewire.in/south-asia/deaths-in-custody-impunity-nepal-police.

4 See Part IV of this Article.

5 Article 14 (4).

6 Article 22 of the Interim Constitution of Nepal, 2007 and Article 22 of the Constitution of Nepal.

7 The National Criminal Penal Code 2074(2017), s 167

8 Nepal: Make Torture a Crime in 2001, Amnesty International. See also Torture InTerai 2020, Torture Is A Crime: The State Continues To Commit, Terai Human Rights Defenders Alliance.

issues of torture in Nepal. Part II analyzes and discusses situation of situation and nature of tortures in Nepal. Part III includes discussion on the development of legal framework related to torture in Nepal. In this part I have highlighted the constitutional and legal provisions and perception prevailing about torture in that particular period. To explain the constitutional and legal development, it has been classified into four periods or stages of development. Part IV is the main part of this article. This part critically analyzes implementation of torture law, challenges prevailing in implementing the torture laws and jurisprudence of Supreme Court of Nepal. Part V is the conclusion and recommendation where I have proposed some steps to be taken to implement the law of torture properly and effectively so that human rights of the victims will not be violated.

## 2. SITUATION AND NATURE OF TORTURE IN NEPAL

The numbers of torture cases are decreasing from conflict to post conflict period, rates are still significant. The reason of decreasing the number of torture incidents may be enactment of Muluki Penal Code criminalizing torture. However, the implementation of the law falls short to impartially investigate acts of torture, and provide victims the right to reparation. However, it remains the same or has increased in the Tarai districts. In 2016, THRDA found that 167 (24.74%) detainees out of 674 interviewed in various detention centers of 19 districts were found tortured by Nepal Police. Among those tortured were 9.79% (66) women and 8% (154) juveniles below the age of 18. Likewise in 2017, THRDA found that 118 out of 882 detainees complained of torture including a case of custodial death in Siraha district. The reports of the human rights organizations and the UN consistently exposed that torture continues in police detention facilities of Nepal.

Evidences show that the modus operandi of torture is diverse and they can be difficult to track. THRDA's monitoring and documentation consisted of both physical and mental torture. Kicking by boots, beating with plastic pipe, bamboo sticks and wooden sticks, butt of rifles, slapping, punching, making jump upside down and forcing the person to do push-ups, pulling hair, burning with cigarettes, keeping in detention without food and water among others were methods of physical torture. Likewise, the major forms of mental torture included threats to put under strong charge, death threats, spitting in food, vulgar words and racial slurs and humiliating words relating to the ethnicity of Madhesi and Tharus. In 2017, some cases have been reported where other co-detainees have been ordered to beat the detainee in the detention centres. The detainees are receiving threats of being indicted with serious crimes and detained for longer periods.

In its 2001 report, Amnesty International reviewed the practice of torture in Nepal. The report stated that torture as a punishment was still widely perceived as acceptable. Police and local authorities continued the historical tradition of torture and humiliation of detainees despite political changes over the last ten years. Amnesty's report mentions:

Sometimes very gruesome forms of torture are reported. They include falanga (beatings on the soles of the feet) with bamboo sticks, iron or PVC pipes; belana

(rolling a weighted bamboo stick or other round object along the prisoner's thighs, resulting in muscle damage); telephono (simultaneous boxing on the ears), rape, electric shock and beatings with sisnu (a plant which causes painful swellings on the skin). The latter method of torture is often inflicted on women, more particularly on their private parts.[9]

The UN Special Rapporteur, who visited Nepal in September 2005, concluded in the report submitted to the UN in 2006 that torture and ill-treatment are systematically practiced in Nepal. The Special Rapporteur's report states:

Torture and ill-treatment are systematically practiced in Nepal by the police, armed police and the RNA primarily to extract confessions and to obtain intelligence in relation to the conflict. That the Government urgently needs to send a clear and unambiguous message condemning torture and ill-treatment was made dramatically clear to the Special Rapporteur when he received repeated and disturbingly frank admissions by senior police and military officials that torture was acceptable in some instances, and was indeed systematically practiced.

The UN Office of the High Commissioner for Human Rights (OHCHR), which established a large field presence in Nepal in May 2005, was also involved in carrying out monitoring and reporting of torture. In the report to the UN Human Rights Council on 18 February 2008, OHCHR-Nepal cited three different important issues:

i. detainees who died in detention due to torture;

ii. detainees were reportedly hidden prior to OHCHR visits, and

iii. the pattern of torture and certain practices of torture common during the conflict occasionally reappeared, mostly in connection with detained individuals accused of belonging to armed groups.

In 2008, Advocacy Forum assessed the impact of Nepal's Torture Compensation Act 1996 (CRT) over its first 12 years (1996-2008) of enactment. The findings show that only 208 cases of torture compensation were filed in 12 years, only 52 victims were given compensations, and of those who got compensation, only seven victims (13.46 percent) received monetary compensation. None of perpetrators involved in these cases were brought to justice, as per the report 'Hope and Frustration: Assessing the Impact of Nepal's Torture Compensation Act 1996'. Inefficient state machinery, lack of accountability, lack of activism and entrenched impunity have all contributed to dismal implementation of torture-related court decisions under CRT.

Unlike the conflict era, the period (2007-2017) marks substantial efforts to prevent torture. Despite the efforts, the practice of torture continued widespread and systematic. During its Universal Periodic Review in 2015, Nepal received criticism from 73 countries for Nepal's poor human rights record, including the continuation of practice of torture. Acknowledging such shortcomings, the state accepted the need for the criminalization and impartial investigation of the acts of torture.[10]

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9 Nepal: Make Torture a Crime in 2001, Amnesty International, 2.

10 Torture In Terai 2020, Torture Is A Crime: The State Continues To Commit, Terai Human Rights Defenders Alliance.

## 3. DEVELOPMENT OF LAW RELATING TO TORTURE

Historically, it is very difficult to locate the timeline about how torture used to be taken in Nepal. However, for describing the incidents, nature and development of torture from political, constitutional and legal perspectives, this section has classified the development of torture laws into four periods.

### 3.1 Period Before 1990

This section covers the history of torture law before 1990. Before 1990 there was no constitutional and legal provisions relating to torture and torture was not used to be taken as serious crime as in the sense of present time. Nepalese legal system was based on religious scriptures, *Manusmriti, Naradsmritis, Hindu Dharmashastra, rukkas, sanad, sawal.* Punishment system was based on caste system. The gravity of punishment was based on whether the accused was upper caste or lower caste, women or men. Punishment used to be inflicted on the basis of castes. Punishment was torturous, barbaric and inhumane. Degradation from caste (patiya system), expelling from the villages, forcing the accused to eat excreta, putting the fire on the hands, drowning in ponds were the modes of crime investigation and punishment which was torturous and inhumane. Historically, looking back to the different dynasties of Kirat, Lichhavi, Malla, Shah and the Ranas, the practice of torture was a political recrimination. The historical literatures find that the physical and mental torture was inflicted on the accused during interrogation and to extract confession or information.[11]

MulukiAin of 1854 was also based on religious scriptures. MulukiAin of 1963 was known as Secular Ain, but it was also not free from legacy of Hindu Dharmashastra. Several provisions of this Ainwas also inconsistent with the modern principles of human rights, rule of law and established general principles of criminal law. This Ain was silent about the regulation of torture; however, the situation of torture was rampant in the process of crime investigation.[12]

### 3.2 Period From 1990-2006

Notably, Nepal set forth its journey of preventing torture after a major political upheaval in 1990. During the Panchayat (party-less) system, many political leaders were the victims of torture. Those politicians coming to power in 1990 pledged their commitment to end torture. Consequently, with the restoration of multi-party democracy regime, the Constitution of the Kingdom of Nepal 1990 outlawed torture for the first time in the history. The 1990 constitution stipulated freedom from torture as a fundamental right. Its Article 14 (4) prohibited "physical or mental torture" and "cruel, inhuman or degrading treatment." It also assured that the person tortured would be compensated "in the manner determined by the law".

Meanwhile in 1990s, Nepal also ratified the United Nations' anti-torture conventions such as International Covenant on Civil and Political Rights (ICCPR) and its two optional protocols, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture (CAT) among others.

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[11] Tulsi Ram Vaidya and Tri RatnaManandhar, *Crime and Punishment in Nepal: A Historical Perspective*, 1985.

[12] Ibid.

As required by the 1990 constitution and CAT, the Compensation Relating to Torture Act, (CRT) 1996 was enacted. This was the first ever torture-related law aiming to compensate to the victims of torture. However, the law fell short of criminalization in line with the CAT. The human rights community, including the UN, criticized the domestic law for a number of flaws. For instance, in accordance with the CAT, the government attorney used to plead on behalf of alleged perpetrators and the state used to provide compensation to the victim.

Although no legal developments took place in the decade, the occurrence of torture had increased dramatically. Both the security forces and the Maoist rebel forces used torture to intimidate, suppress, control and punish victims. The Comprehensive Peace Accord was signed by the then mainstream political parties and the then Nepal Communist (Maoist) Party in 2006. They agreed to investigate and punish the perpetrator who was involved in the torture during the conflict era. However, the victim is waiting to see the perpetrator to be punished, but such day never come. Over the decade, CRT remained the only legal recourse for torture victims. Even within the existing laws, when torture-related cases are filed at the courts, those responsible for torture are rarely brought to justice. As a result, thousands of victims of torture from conflict era suffered from injustice.

### 3.3 Period from 2007 to 2016

The third stage of development includes the period of 2007 to 2014. After the agreement of Comprehensive Peace Accord of 2006, the Communist Party (Maoist) of Nepal became the part of main stream of political parties. The Interim Constitution of Nepal, 2007 was promulgated. The 2007 Constitution provided 'right against torture' as fundamental rights and criminalized the torture. It also provided compensation for victim of torture. However, first half of this period was no better than earlier period. However, the second half of this period created a milestone development in the history of torture from constitutional and legal perspectives. Nepal's two constitutions -Interim Constitution of Nepal, 2007 and Constitution of Nepal (2015) - guaranteed the right against torture and stated that torture will be "punishable by law," and "any person so treated shall be provided with such compensation as determined by the law".[13] If we compare Article 22 of 2007 Constitution with Article 22 of the Constitution of Nepal, then we do not find substantial difference except the additional term 'victim' is added in Article 22 of the Constitution of Nepal.[14]

### 3.4 Period from 2017 to 2020

The fourth stage includes the period of 2017-2020. The major development of this period is the enactment of the Muluki Penal Code, 2017 which outlined the provisions of torture and criminalized and provides punishment for the perpetrator of torture. It

[13] Article 26 of the Interim Constitution of Nepal, 2007 provided 'Right against Torture' as follows: (1) No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment.(2) Any act referred to in Clause (1) shall be punishable by law, and any person so treated shall be provided with such compensation as may be determined by law.

[14] Article 22 of the Constitution of Nepal provides 'Right against Torture' as follows: (1) No person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment. (2) Any act mentioned in clause (1) shall be punishable by law, and any person who is the victim of such treatment shall have the right to obtain compensation in accordance with law.

also provides compensation to the victim of torture. Muluki Penal Code, 2017 provides the legal provisions in line with the 2007 and 2015 Constitutions. It did not only criminalize the torture, it also made individually responsible to the investigating officer if found his involvement in torture. From the legal point of view it was a progressive change in criminal law. [15] The Muluki Penal Code which came into force from 17 August 2018 has, for the first time, defined torture as a serious crime with the provision of punishment with five years of imprisonment or a fine of Rs 50,000 or both. It has made the special provision for medical examination of torture victims. Unlike the previous law, the new law has provision for the perpetrators to pay the compensation. It has also ensured protection of the victims and witnesses. The cases of torture cannot be withdrawn once they are registered at the courts. These developments are expected to go a long way in ensuring justice to the victims of torture. However, the limitation to register first information report has minimized the substantial value and application of statutory provisions of this Code.[16]

## 4. CHALLENGES IN IMPLEMENTING THE MULUKI PENAL CODE, 2017

The Code came into force on 17 August 2018. Two years has already passed. However, it is surprising that no perpetrator violating the Code has been booked for torture since torture was declared as crime. Several challenges are being experienced by the victim of torture and perpetrators are creating number of hurdles to implement the Code properly and effectively. The challenges in implementing the Code are discussed as follows:

### 4.1 Refusal of First Information Reports (FIR)

The human rights community applauded the criminalization of torture when the Code defined torture as a punishable offense. It was hope of the victims of torture that the incidents of torture and inhuman or degrading treatment will be investigated and prosecuted by the state. However, Tarai Human Rights Defender's Alliance's (hereinafter THRDA) monitoring and documentation found that there has not been any progress in the implementation of the new anti- torture law. This is evident from the refusal of the first information reports by the police officers, for example, some case studies have been mentioned here.

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[15] Section 167 of Muluki Penal Code provides 'Not to torture' as: (1) The officials authorized in accordance with prevailing law to investigate the offence, to prosecute, to implement the law, to control as per law, to imprison or detain shall not torture another person physically or mentally or commit cruel, inhuman or degrading treatment to such person. Explanation: For the purpose of this section, any person arrested, controlled or is in custody, detained, imprisoned or is in preventive detention or in the security of himself or because of such person any other person, because of the following purpose, if with intention physical or mental pain or torture or cruel or inhuman or degrading treatment or punishment is inflicted, then it shall be deemed as torture or cruel, inhuman or degrading treatment has been inflicted on such person. (a) to get the information on subjects, (b) to get confession for any offense, (c) to punish for any act, (d) to coerce or create threat, or (e) any act in violation of law. (2) Any person commits offence pursuant to sub-section (1), shall be punished, on the basis of gravity of such offence, with an imprisonment for a term up to five years or a fine up to fifty thousand or with both. (3) The person who commanded to commit the offense as per sub-section (1) or accomplice assisted to commit the offense as per this section shall be punished as the principal offender. (4)Any person committed the offense as per sub-section (1) shall not claim that such offense has been committed due to command of the senior and he/she shall not be exempted from the punishment for committing such offense.

[16] Section 170 (2) provides as: The complaint shall not be taken after the lapse of six months of the concerned arrested, controlled or detained or imprisoned or person detained in preventive detention is released as provided in section 167 and in other offenses when it was committed or known.

On 30 June 2019, Police Post of Mangalapur, Rupandehi refused to register FIR of the alleged torture victim SanjeevShrestha (41 years old), resident of Butwal. On 2 June 2019, Shrestha was arrested for violating traffic rules and he was beaten up in the detention center.

On 27 October 2019, Chai, a resident from Mayadevi Rural Municipality in Rupandehi, was arrested after police found him involved in a dispute with a person. He said he was tortured by the police in police custody. THRDA reported this case to NHRC Butwal office on 17 November 2019. On 29 October 2019, Area Police Office, Lumbini refused to register FIR of Om Prakash Chai (aka Chinak Chai, 46) who was allegedly tortured in police custody. Police refused to register the FIR claiming that no torture was inflicted on Chai.

On 23 June 2019, District Police Office, Rajbiraj refused to register an FIR filed by Jasodhya Devi Yadav (50) and her daughter Saraswati Devi Yadav (30), residents of Dakneshwori Municipality Ward number 9 in Saptari district. They were reportedly beaten up by their neighbor, who is a police constable. The reason for the refusal is that the police decided that the FIR is not qualified for the registration. The police constable bit her alleging her of practicing witchcraft.

On 29 August 2019, Sushil Kumar Karn, an activist from Janakpur was beaten up by police after he was called by the police. He had earlier video-graphed when police were beating a street vendor in Janakpur. Earlier, the victim was ready to file the case to the district police office of Dhanusha but the chief of police informed the activist that the office already took a departmental action against the accused police personnel. Thereafter, he refused to file the case. According to DSP SekharKhanal, the accused police personnel was transferred to Kathmandu.

On 23 July 2019, District Police Office (DPO) of Rupandehi refused to register an FIR filed by three juveniles - UmeshPatharkat (10 years old), PawanPatharkot (12 years old) and Shiv Kumar Loth (11 years old) - residents of Chhapiya village, Shiyari Rural Municipality Ward number 4. The accused of the alleged torture and ill-treatment were the police personnel from Area Police Office of Chhapiya. Police tortured the boys accusing them of stealing a mobile phone on 18 July 2019. Initially, the DPO kept the FIR without formally registering it and told applicants that they would seek explanation from the alleged police personnel and take action. Following the event, THRDA monitor and lawyers made frequent visits to the DPO to inquire about police's action and progress on the FIR. In response, they said that they are still looking into the matter. The police have not registered the boys' FIR yet. THRDA monitor and lawyer have continued their follow-ups. Meanwhile, the case was registered with the office of National Human Rights Commission, Province 5 Butwal on 21 July 2019.

From the above cases, it is found that the fellow police officers are not cooperating with the victims. They are reluctant to register FIRs lodged by the victims of torture. Investigation into the incidents of the torture can proceed only when police register victims FIRs. It is also found from the above case studies that many victims of torture were hesitant to file cases of torture against police officers in the same police office for fear of appraisal by the accused police officer. Likewise, THRDA human rights

defenders and lawyers found that police officers received the FIRs without formally registering them. Instead of registering them, they told the applicants that they would seek explanations from the alleged police personnel and take action against them. Despite frequent attempts, they did not register the FIRs.

The above challenges are in line with the THRDA's similar experience in extrajudicial killings (EJK) cases. In the past, police had refused to register FIRs filed by families of those people who were killed in fake encounters. In some cases families of EJK victims had approached the court seeking to register their FIRs and the court had also ordered the police to register the victims' FIRs but even after the court orders, the concerned police offices had refused to register the FIRs in one or the other pretext.[17]

### 4.2 Procedural hurdles

Section 5 of Muluki Criminal Procedure Code, 2017 has incorporated provision whereby victims of police brutality could be registered through FIRs against their perpetrators. As per the provision, if a concerned police office refuses to register an FIR then the FIR can be filed to the public prosecutor or the higher police office. The public prosecutor and higher police office shall send the FIR to the concerned police office for the necessary action. Even if the public prosecutor or the higher police office refuses to register the victims' FIR, then the victim can file FIRs in the concerned District Administration Office also. In case the District Administration Office refuses to register the FIR, the person can file it at the Ministry of Home Affairs too.[18] This long process of FIR registration has created administrative hurdles delaying justice for the victims. Compared to the Muluki Criminal Procedure Code, it is found that seeking remedy under CRT was easier and hassle free for the victims as they were able to file the cases to the courts directly as private case.

### 4.3 Withdrawal of FIRs still continues

Before the Muluki Penal Code came into force, it was found that the victims were withdrawing their FIRs when they used to receive threat by their perpetrators or offer of monetary help. There was hope that the non-withdrawal provision introduced in the Muluki Criminal Procedure Code, 2017 would have a positive impact. Section 116 of the Code does not allow offences mentioned under Schedules 1 and 2 to be withdrawn

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17 Continuing Extrajudicial Executions In The Terai, THRD Alliance, March 2014 .

18 Section 5 of the Code provides as: Complaint against refusal to register first information report or information:(1)If the concerned police office refuses to register a first information report or information made or given pursuant to sub-section (1) of Section 4, the person making or giving such report or information may make a complaint, setting out the matter, and accompanied by the first information report or information of the offense, to the concerned District Attorney Office or to the police office higher in level than the police office required to register such first information report or information. (2)If a complaint referred to in sub-section (1) is received, such Government Attorney Office or police office shall maintain records thereof and send such information report or information to the concerned police office for necessary action. (3)The concerned police office shall register the first information report or information received pursuant to sub-section (2) and take action pursuant to sub-section (3) of Section 4. (4)If the office or authority referred to in sub-section (7) of Section 4 refuses to register any information referred to in that sub-section, the informant may make a complaint, setting out the matter, and accompanied by the information of offense, to the chief district officer of the concerned district. Provided that if the chief district officer himself or herself has been designated as the investigating authority and refuses to register such information, such a complaint may be made to the concerned Regional Administrator or Ministry of Home Affairs. (5) If a complaint is received pursuant to sub-section (4), the concerned chief district office, Regional Administrator or Ministry of Home Affairs shall make decision to or not to register the information within three days and give direction to the concerned office to do or cause to be done accordingly. (6) Upon receipt of a direction as referred to in sub-section (5), the concerned office or authority shall take action in accordance with the direction.

once it is registered in the court. However, here, the case is that the when the victim goes to the police office to register the FIR, first, they are not ready to accept and register the FIR. Even if they accept, then the police do not register. If they register, then they force or coerce or threat the victim to withdraw the FIR. In some cases, police often take the FIRs without registering them and put pressure on the victims threatening them that if they did not withdraw their complaint then they would frame criminal cases against them. The alleged police uses to offer the victims monetary incentives if they withdraw their complaint. The withdrawal of the FIR continues in one or the other way. Due to these reasons the cases of torture do not go in the process of prosecution of charge-sheet and trial process. A case study related to withdrawal of FIR has been mentioned below.

On 11 May 2019, Mohammad Nazir Khan, 57, of Narayanpur Rural Municipality- 1 was beaten up by APF Inspector Puran GC and Assistant Sub Inspector of Nepal Police DirghBahadurSahi for allegedly bringing woods from nearby forest. His left hand was broken after the police officials thrashed him severely. He also had bruises on different parts of his body. On 16 May 2019, Nazir visited the office of THRD Alliance in Nepalgunj, requesting for support. Next day, the victim, with the help of the organization, filed an FIR at the district police office, Banke, accusing the police officials of torture. However, the DPO did not register the FIR saying it contained the names of its officials. On 17 May 2019, Nazir, under pressure by police, and local political leaders, agreed to make a compromise with the police and later decided to withdraw the complaint after the police agreed to provide him medical expenses. A political representative said on condition of anonymity, the man withdrew the case as the police threatened to indict him in the criminal case that could land him in jail for 20 years.

### 4.4 No legal provision for mental health check-up

The past problems with medical examinations of victim of torture have continued even though the Criminal Procedure Code has come up with new provisions related to medical examinations. Section 22 of the said Code provides for the examination of wounds of victims. It has special provision for the medical examination of torture victims. Sub-section 2 and 5 of Section 22 of the Code has special reference to torture victims. Sub section 2 provides that a victim or a third person on behalf of the victim can file an application to the court seeking physical examination of a torture victim and the court can order to do the physical examination of such person from a doctor or a medical professional prescribed by the government. Sub section 5 provides that the court shall order the alleged perpetrator to bear the cost of medical examination of the torture victim and also provides interim relief to the victim if the court finds that the victim is tortured or beaten up in the detention center.[19] However, police personnel

[19] Section 22 of the Code provides: Examination of injury: (1) If any person sustains any injury, bruise, abrasion etc. on his or her body in an incident that happened because of battery and the investigating authority makes a request for the examination of injury, the government doctor or health worker shall examine injury, bruise, abrasion etc. sustained by that person and execute a deed of such examination in the form set forth in Schedule-16. (2)If, in addition to that mentioned in sub-section (1), a person who is held in detention in the course of investigation or any other person on his or her behalf makes an application, accompanied by the reasonable ground, stating that evidence may be found, upon the examination of his or her body, that he or she has been battered, subjected to torture or another offence has been committed against him or her, the court may order to cause such physical examination of such person to be conducted

have continued to use the format of medical examination, known as Injury Examination Report, which fails to ensure a thorough examination of torture victims. On top of that format there is no examination of the detainees' mental condition simply because there is no legal provision for mental examination in this clause. Although Section 167 of the Muluki Penal Code has prohibited both physical and mental torture, a thorough medical report for torture cannot be prepared without an expert's examination of mental condition of torture victims. The irony is that the medical examination clauses included in the Criminal Procedure Code specifically mentions "physical examination" alone. This has failed to stipulate provisions on examining huge impact or damage caused by torture upon one's mental condition. The lack of mental health examination of detainees had led to the incidents of suicides committed by the detainees in police custody. Suicide is one among various forms of custodial deaths in Nepal. In lack of mental check-up, police fails to analyze if any detainee should be under suicide watch to prevent such incidents in the detention centers. It is the duty of police authorities to protect the rights of detainees as guaranteed by the constitution. It is found that the police did not do enough to protect the life of the detainees. The following case study shows the situation of mental torture in detention center.

On 10 June 2020, SambhuSadaMusahar, aged 23, of Sabaila Municipality Ward Number 12, Dhanusha district, died in police custody at around 2 am. He had been in detention since 26 May 2020. On 26 May 2020, he surrendered himself to the Area Police Office (APO), Dhanushadham. The next day (on 25 May 2020), the APO Dhanushadham had transferred him to the APO of Sabaila since the incident had taken place within the latter's jurisdiction. On 25 May 2020, the tractor that he was driving hit two persons. Among the injured, a woman died on the way to hospital. The detainee was found dead in the wee hours on 10 June 2020, and the facial crime scene is of suicide, according to police. ChandrabhusanYadav, in-charge of Sabaila APO told that the detainee hanged himself to death in the bathroom with the help of his dress (t-shirt).

However, the family members of the detainee did not trust the police's claim. Three days before the incident took place, his mother and mother-in-law had met Sambhu in the detention center of APO Sabaila. According to them, the detainee looked scared and worried. He had told them that he might be killed if he was not released instantly.

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by a government medical doctor or a doctor or health worker as specified by the Government of Nepal. (3) Even in conducting such physical examination pursuant to sub-section (2), injury examination referred to in sub-section (1) shall be conducted. (4) The concerned medical doctor, expert or laboratory shall make available the post mortem and other report of examination conducted pursuant to Sections 20, 21 and this Section to the concerned office or investigating authority no later than three days after the date of such examination, excluding the time required for journey. (5) If it appears that the person held in detention pursuant to sub-section (2) has been battered or subjected to torture, the court shall order the concerned police office to have medical treatment of the person so battered or tortured and provide interim relief to such a person and to take departmental action, in accordance with law, against the person who has so battered or tortured. (6)If the investigating authority does not ask the government doctor or health worker to examine injury pursuant to sub-section (1), the concerned person may make an application to the court, setting out the matter; and if such an application is made, the court may ask the government doctor or health worker for the examination of injury.

### 4.5 No proper implementation of law

Over the past two years since the Muluki Penal Code was enforced, no perpetrator has been fined and imprisoned under this law. The Code provides that the perpetrators of torture will be punished with five years' imprisonment or a fine of fifty thousand rupees or both. Refusal of FIRs and lack of an independent investigation has shown that this provision of fine and imprisonment for the perpetrator has no impact in the incidents of torture perpetrators. The main reason is that this provision of the Code is not implemented properly. Once this provision of the Code is implemented properly, it will help to curb the long-standing impunity. Hope is still in horizon because two police personnel have been jailed for killing a person in Baitadi.

On 13 May 2019, a team of five police personnel led by Sub-Inspector Ashok Bahadur Pal from Nepal Police reached the house of Kamalakant Panta, 74, in Bhakuda, situated in Ward number 6 of Patan municipality, Baitadi at around 11 pm. The police, following a complaint by his neighbourDevaki, went to Kamalakant's house to arrest Lavadev Panta. Lavadev Pant had consumed alcohol at Devaki's house. A verbal duel and scuffle ensued between Devaki and Lavadev when he refused to pay NPR 160 as demanded by Devaki. Devaki's daughter Shanti got injured during the scuffle. Devaki called the police. The police handcuffed Lavadev and started beating him with a stick when his father, Kamalkant, was sleeping in his room. He came out of his bedroom and requested the police to take his son to the Area Police Office, but not to beat him up. He informed the police that he would discuss the issue at the police office the next day. Police personnel felt that Kamalkant was lecturing them and therefore, they shouted at him. Police personnel started beating the elderly man with their sticks as well. The elderly man fell on the ground and he died.

### 4.6 Justice denied due to statute of limitation

The statute of limitation to file a case of torture has been increased upto six months. In past it was only 35 days provided by the CRT. Section 170 (2) of the Muluki Penal Code provides that a victim of torture can file a complaint within six months of either the date of incident or the date of release of the person from the detention or prison. However, this extension of statute of limitation is not sufficient for the torture victims whose aftereffects were seen after six months. This provision of the Code contradicts with the international principle of human rights and CAT itself. Nepal is party of the CAT. It is an obligation for her to respect, protect and fulfill the obligation taken under this Convention. How does the law of limitation affect the victim of torture can be realized from the following case study?

On 7 April 2011, three police officers from the Rupandehi District Police Office arbitrarily arrested Mr. Pandey without giving any reasons or arrest warrant. He was brought to Lumbini Zonal Police Office and subjected to repeated interrogations, torture and severe ill-treatment, in order to extract from him a confession on his alleged involvement in the planning and execution of a bomb-explosion perpetrated on 27 March 2011, in which he always denied having any type of involvement. He was repeatedly beaten, kept constantly blindfolded and handcuffed, insulted and threatened. He was even forced to urinate on an electric heater, that made him bleeding and

fainting, but never received any medical treatment or attention. Exhausted and prostrated Mr. Pandey signed a confession extorted through torture on 13 April 2011. Today, as a consequence of the severe torture endured, Mr. Pandey still suffers of a grave form of depression and sexual dysfunctions. Between 7 and 11 April 2011, he was held incommunicado. While his mother was struggling to determine his fate and whereabouts, Nepalese authorities denied having knowledge of his deprivation of liberty and deliberately concealed his whereabouts. He was allowed to communicate to the outside world only when signed in confession paper. Newspaper articles were published and he was labeled as a terrorist and a murderer.

On 23 January 2013, the victim register a writ in the Supreme Court for seeking relief and requesting to order the Rupandehi district court that the 35-day statute of limitation provided in CRT is not applied in his case. However, the Supreme Court withheld the judgment of Rupandehi district court stating that the victim filed a case after expiring the date of limitation. It took 6 years for the Supreme Court to give the verdict. However, on 30 October 2018, the Human Rights Committee issued its conclusions following the complaint submitted by TRIAL International on behalf of Mr. Prashanta Kumar Pandey. The Human Rights Committee considers Nepal responsible for the violation of Mr. Pandey's right to liberty and security, as well as his right to a fair trial. In addition, Nepal is held responsible for his detention in inhuman conditions. The UN body calls on Nepal to investigate the facts and prosecute those responsible for these acts. The Human Rights Committee calls for psychological support, public acknowledgement of the suffering endured (e.g. public apology) and reparation measures.[20]

In another case, the Supreme Court of Nepal interpreted the statute of limitation quiet differently than the decision of the case of Prashant Pandey. In the case of *Om Prakash*, the Supreme Court gives a message that statute of limitation cannot be inconsistent of the constitutional provisions which narrows down the scope of the constitutional provisions to get remedy and violates human rights principles. In this case, the issue was whether section 10 (5) of National Human Rights Commission Act, 2068 are inconsistent with Article 132 (2) of the Interim Constitution of Nepal, 2067 or not. Section 10 (5) had provisioned that 'Complaints regarding the incidents of human rights violation or its abetment shall have to be lodged at the Commission within Six months from the date on which the incident took place or within Six months from the date on which a person, under control of someone else, got released and became public.' The Supreme Court held that this limitation of Section 10 (5) is in contravention of Article 132 (2) of the Interim Constitution of Nepal and other clauses of Section 10. Therefore, Section 10 (5) is ultra vires of Article 132 (2).[21] Now, there is the situation of wait and see how this interpretation of the Supreme Court will be taken by the implementing agencies and the Government of Nepal.

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[20] <https://trialinternational.org/latest-post/torture-and-enforced-disppearance-of-prashanta-pandey-v-nepal-in-april-2011/>

[21] *Advocate Om Prakash Aryal and others vs. National Human Rights Commission and others,* NKP (2070), Vol. 7. DN 9029.

### 4.7 Impunity prevails

Prashant Pandey gave his statements in the court that he was tortured. His statements were not taken seriously by the court and no order of investigation for perpetrated tortured was issued. However, he had also disclosed the identity of the officers responsible. But the perpetrators were never prosecuted and punished. Mr. Pandey was kept in jail for hearing period where he endured inhumane conditions of detention. On 13 June 2012, the Rupandehi District Court held that there was no evidence against Mr. Pandey's involvement in the placement of the bomb. He was however declared responsible for the preparation of the attack and sentenced to one year's imprisonment, which he had already spent during the trial and was thus released. The confession obtained through torture was considered as valid evidence. His attempts to obtain justice and redress for the harm suffered were frustrated, as Nepalese authorities refused to register his claims because he did not report the torture within 35 days from having suffered such treatment (which would have been concretely impossible for him). Due to this limitation of CRT, he could not get compensation which he suffered due to torture and no perpetrator was made responsible of his torture. The Supreme Court's decision also contradicts with the conclusion of the Human Rights Committee in response to the submission of Mr. Pandey's complaint, which was facilitated by TRIAL International.

## 5. CONCLUSION AND RECOMMENDATION

### 5.1 Conclusion

Torture is one of the heinous forms of national as well international crime. It is also a form of crime against humanity. Therefore, United Nations has adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The CAT has criminalized this crime and made punishable. Most of the members of the United Nations have also criminalized the torture. Nepal is also member of CAT. Nepal has taken the obligation under the CAT and all the obligation arisen under this Convention should be ensured by Nepal as Member State. She enacted Muluki Penal Code, 2017, Muluki Criminal Procedure, 2017 and Criminal Offence (Determination of Punishment and Implementation) Act, 2017 in 2017 to respect, protect and fulfill the obligation taken under international human rights laws.

However, despite these positive steps, the statute of limitations is one of the major causes of torture, given the physical and psychological challenges for victims of torture to report such incidents. This makes it very hard to do so in time. Moreover there have been many cases documented of failure to provide compensation after conviction. The lack of restitution for such cases is worrying. Another worry is that Nepali law does not allow to apply retrospectively in case of torture.

The progress of implementing the new law over the past two years shows that torture is yet to be realized as a criminal offence. Amid challenges, human rights community is still advocating for passing a separate anti-torture law complaint with the international standards. The bill for the same has been pending in the parliament since 2014 and HRDs have demanded that the bill be passed without any further delay. There is a need of law having with some retroactive provisions so as to punish those that were responsible for torturing people during Maoist insurgency. Likewise, ratification of Optional Protocol on Convention against Torture (OPCAT) and

establishing national monitoring mechanism for the detention centers are equally significant in the context wherein torture is a criminal offence provisioned in the Muluki Penal Code.

Torture in the Tarai is ethnically disproportionate. While this subject lack empirically valid and theoretically informed research, nevertheless, media and human rights communities, including the National Human Rights Commission and the United Nations Office of High Commission for Human Rights have widely reported and documented the issues of torture and other cruel, inhuman or degrading treatment. Police often resort to excessive use of force against Madhesi and Tharus. This is evident from the fact that whenever there is unrest and agitation in Madhes, police force deployed in the name of maintaining law and order use excessive force causing death and serious injuries.

The long process of FIR registration has created administrative hurdles delaying justice for the victims.In some cases, police often take the FIRs without registering them and put pressure on the victims threatening them that if they did not withdraw their complaint then they would frame police case against them. The alleged police officer use to offer the victims monetary incentives if they withdraw their claims. Over the past two years since the Muluki Penal Code was enforced, no perpetrator has been fined and imprisoned under this Code.

Compared to the CRT, the statute of limitation to file a case of torture has been increased. Section 170 (2) mentions that a victim of torture can file a complaint within six months of either the date of incident or the date of release of the person from the detention or prison. However, this provision obstructed justice for the torture victims whose aftereffects were seen after six months. This provision also contradicts with the international principle of human rights and decision of the Supreme Court of Nepal.

### 5.2 Recommendation

Based upon the finding of this research, I would like to propose the following recommendation to the concerned authorities to implement the torture law. Hope it will help to maintain law and order and peace and prosperity of the country.

- Criminalization of torture is a positive step, yet there remains a long way to go before torture is completely prohibited. Laws that are enacted need to be properly implemented throughout the country.
- Repeal the statute of limitation related to torture.
- Set up an independent investigative body to investigate the case of torture to effectively implement the provisions of Muluki Penal Code. Such a mechanism is necessary to prosecute for acts of torture and to prevent such acts from occurring again.
- Make the anti-torture legal provisions fully compliant with the international human rights conventions, that is, enact a separate anti-torture law in compliance with international human rights standards.

- It is urged to the NHRC, National Human Rights Unit of Police as well as the Office of the Attorney General to collaborate with Human Rights NGOs for effective and transparent monitoring of detention centres.
- HRDs should be allowed to free access to detainees and respect their right to fair trial and ensure they are kept in clean, sanitary healthy conditions, in line with international prison standards.
- The Government of Nepal should investigate all allegations of torture and implement the decisions of NHRC as well as Courts and to provide justice and reparations, to the victims in a timely manner.
- Form a National Monitoring Mechanism for all detention centres to strengthen legal provisions against torture.
- Ratify Optional Protocol on CAT (OPCAT).

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# DISPUTE SETTLEMENT MECHANISM UNDER WIPO WITH REFERENCE TO DISPUTE RELATED TO CYBERSPACE

**Kedar Ghimire**[1]

## ABSTRACT

*The rapid use of information and communication technologies basically the internet not only increases the process of globalization but also caused the growing issues related to the global network. Nowadays it is very hard to find out a sector which is not influenced by the internet. These days the one of the most important issue is the legal aspect of the domain names. The issue related to the domain names is the issue related to the internet addresses. Domain name disputes can be synonymously known as cybersquatting, domain name piracy, domain name grabbing, domain warehousing and domain squatting too and are infringement of the law in the cyberspace. In this background the article tries to deal with the disputes related to the domain names basically the cybersquatting. The world intellectual Property Organization Arbitration and Mediation Centre which handles the issues related to the domain names based on the WIPO Expedited Arbitration Rules for Domain Names Dispute Resolutions. This article also focuses on different alternative dispute settlement mechanism used by World Intellectual Property Organization Arbitration and Mediation Centre to deal with the cybersquatting cases with example.*

## 1. BACKGROUND

The World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, was established after the WIPO Convention in 1967 with its initial mission to act as a secretariat for international treaties concerning Intellectual Property (IP). Since that time, WIPO's mission has evolved as "to promote through international cooperation the creation, dissemination, use and protection of works of the human mind for the economic, cultural and social progress of all mankind"[2]. WIPO still administers international treaties relating to IP law, its work also includes education of and awareness about IP, and the administration of international registration systems for particular forms of IP interests, thereby further promoting the

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[2] WIPO, *Intellectual Property Handbook: Policy, Law and Use* (WIPO 2004) <http://www.wipo.int;aboutip/en/iprm/index.htm>retrieved on 28 March 2021

principles of international co-operation and harmony. Currently, WIPO administers 26 treaties including the WIPO Convention[3]. Mission of the WIPO is to lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all. WIPO's membership comprises 191 member states including India, USA and Nepal. India became member of WIPO in 1st May, 1975 while Nepal has joined WIPO in 1997.

WIPO carries out a wide variety of tasks related to the protection of IP rights. These include assisting governments and organizations to develop the policies, structures and skills needed to harness the potential of IP for economic development; working with Member States to develop international IP law; administering treaties; running global registration systems for trademarks, industrial designs and appellations of origin and a filing system for patents; delivering dispute resolution services; and providing a forum for informed debate and for the exchange of expertise[4].

Basically the Convention Establishing the World Intellectual Property Organization (WIPO), concluded about categorization that intellectual property shall include rights relating to:

- literary, artistic and scientific works,
- performances of performing artists, phonograms and broadcasts,
- inventions in all fields of human endeavor,
- scientific discoveries,
- industrial designs,
- trademarks, service marks and commercial names and designations,
- protection against unfair competition,

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields[5].

The areas mentioned as literary, artistic and scientific works belong to the copyright branch of intellectual property. The areas mentioned as performances of performing artists, phonograms and broadcasts are usually called "related rights," that is, rights related to copyright. The areas mentioned as inventions, industrial designs, trademarks, service marks and commercial names and designations constitute the industrial property branch of intellectual property. The area mentioned as protection against unfair competition may also be considered as belonging to the same branch i.e. industrial property branch.

Nepal became member of WIPO in 4th February, 1997. Nepal is an active member and participant in WIPO. Nepal has recognized the importance of prioritizing the development of robust IP protection and enforcement systems. As a result, in 2017,

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3 (WIPO) <https://www.wipo.int/portal/en/index.html>retrieved on 28 March 2021
4 Shiva SahaiSingh,*The law of intellectual property rights*(Deep and Deep Publication) 114
5 WIPO (n 3)

the Government of Nepal formulated its IP policy with the objective to make IP a national priority, emphasizing the valuable role IP plays in global socio-economic development.[6] Under the existing IPR regime, the Ministry of Industry, Commerce, & Supplies, Department of Industry looks after patent and trademark issues while the Ministry of Culture, Tourism, and Civil Aviation oversees copyright issues. Nepal has a consolidated Act on IP – The Patent, Design and Trademark Act that provides protection for industrial property including patents, designs, and trademarks. Patent protection is afforded to inventions; principles and formulae; and design protection including physical shape and appearance. Trademark protections include the word, sign, picture, or combination thereof to differentiate the product from others in the market. Similarly, the Copyright Act of 2002 covers most modern forms of authorship and provides for adequate periods of protection.

The framework for the national IP system also depends on the strength of different institutions related to science and technology, innovation, education, health, agriculture as well as law enforcement agencies, custom authorities and judiciary. The objectives set up by different socio-economic policy of Nepal likewise the National Health policy, 1991; National Agricultural Policy, 2004; Industrial Policy, 2011; Biotechnology Policy, 2006; with implementing acts related to them, related institutions may benefits or otherwise be influenced by Intellectual Property Rights.[7] A combination of policies related to science, technology, innovation, education, agriculture, health, trade and investment, taxation and government procurement all can play vital role in incentivizing innovation and building the technological base in Nepal.

### 1.2 Functions of WIPO

The main functions of WIPO are:

a. assisting campaigns development to improve IP protection all over the world and to harmonize national legislations in this field;
b. signing international agreements on IP protection;
c. applying the administrative functions of the Paris and Berne Unions;
d. rendering technical and legal assistance in the field of IP;
e. collecting and disseminating the information, conducting researches and publishing their results;
f. ensuring the work of the services facilitating the international IP protection;
g. applying any other appropriate actions.

The prime and most important WIPO function is administering multilateral international conventions, i.e. depositing treaties, states' instruments of accession, **conflicts and dispute settlement**, ensuring treaties review, etc.

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[6] Protecting intellectual property(International Trade Administration, <https://www.trade.gov/country-commercial-guides/nepal-protecting-intellectual-property>retrieved on 29 March 2021 (Last Published Date)

[7] *Development Dimension on Intellectual property in Nepal: Transfer of technology, access to medicine, genetic resource and traditional knowledge*, United Nations Conference on Trade and Development, (United Nations, 2015)<https://unctad.org/system/files/official-document/diaepcb2015d7_en.pdf>

Since 1998, the WIPO Worldwide Academy has been preparing human resources in the field of IP protection. The Academy has a Distance Learning Centre helping obtain knowledge via Internet. Particular highlight is WIPO net-project, the IP global network ensuring on-line connection with business processes of national agencies. Settlement of IP-related commercial conflicts is a perspective direction of the WIPO activities. In 1994, the WIPO Arbitration and Mediation Centre was created. It renders assistance in settling such conflicts[8].

## 2. DISPUTE SETTLEMENT MECHANISM UNDER WIPO

For the dispute settlement mechanism the "WIPO Arbitration and Mediation Center" is a neutral, international and non-profit dispute resolution provider that offers time and cost-efficient alternative dispute resolution (ADR) options. WIPO mediation, arbitration, expedited arbitration, and expert determination enable private parties to efficiently settle their domestic or cross-border IP and technology disputes out of court. The WIPO Center is also the global leader in the provision of domain name dispute resolution services. The short descriptions about the common dispute settlement mechanism of WIPO can be given as follows[9].

### 2.1 Mediation

An informal consensual process in which a neutral intermediary, the mediator, assists the parties in reaching a settlement based on the parties' interests. While the mediator cannot impose a settlement, any settlement agreement has force of contract. Mediation does not preclude any subsequent court or arbitration options.

### 2.2 Arbitration

A consensual procedure in which the parties submit their dispute to one or more arbitrators of their choice for a binding and final decision (an "award") based on the respective rights and obligations of the parties and enforceable under arbitral law. Arbitration normally rule out any subsequent court options.

### 2.3 Expedited Arbitration

A procedure that normally involves a sole arbitrator and which is carried out in a shorter time frame and at reduced cost. Expedited arbitration is especially suited to less complex cases involving lower disputed amounts and where speedy resolution is needed.

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[8] <http://mfa.gov.by/en/organizations/membership/list/de8e52a750f138ec.html> retrieved on 28th March, 2021.

[9] <https://www.wipo.int/wipo_magazine/en/2016/si/article_0010.html.Retrieved on 28th March, 2021.

### 2.4 Expert Determination

A consensual procedure in which the parties submit a specific matter, such as a technical question, to one or more experts who make a determination on the matter. The parties can agree for the determination to be legally binding.

WIPO Arbitration and Mediation Centre is based in Geneva, Switzerland, with a further office in Singapore. The WIPO Arbitration and Mediation Center was established in 1994 to offer Alternative Dispute Resolution (ADR) options for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the arbitration, mediation and expert determination procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property.

An increasing number of cases are being filed with the Center under the WIPO Arbitration, Expedited Arbitration, Mediation and Expert Determination Rules. The subject matter of these proceedings includes both contractual disputes (e.g. patent and software licenses, trademark coexistence agreements, distribution agreements for pharmaceutical products and research and development agreements) and non-contractual disputes (e.g. patent infringement).

WIPO disputes have involved parties based in different jurisdictions including Austria, China, France, Germany, Hungary, India, Ireland, Israel, Italy, Japan, the Netherlands, Panama, Spain, Switzerland, the United Kingdom and the United States of America. The Center makes available a general overview of its caseload as well as descriptive examples of mediation and arbitration cases.

The Center believes that the quality and commitment of the neutrals are crucial to the satisfactory resolution of each case. The Center assists parties in the selection of mediators, arbitrators and experts from the Center's database of over 1,500 neutrals with experience in dispute resolution and specialized knowledge in intellectual property disputes. Where necessary in individual cases, the Center will use its worldwide contacts to identify additional candidates with the required background. After appointment also, the Center monitors its cases in terms of their time and cost effectiveness.

The Center conducts a number of workshops focused on its procedures in Geneva during the course of the year which are frequented especially by intellectual property professionals including prospective WIPO neutrals. There is also available an online course on arbitration and mediation under the WIPO Rules.

## 3. MAIN FEATURES OF ADR

Which dispute resolution option parties select will depend on the circumstances of the case as well as their needs and expectations. The main features of ADR mechanism are as below[10].

- **A single procedure**

Parties can use ADR to settle disputes involving several jurisdictions in a single forum, thereby avoiding the expense and complexity of multi-jurisdictional litigation and the risk of inconsistent results.

- **Expertise**

The parties can appoint arbitrators, mediators or experts (known as neutrals) with specific knowledge of and experience in the relevant legal, technical or business area. This helps achieve high-quality outcomes while limiting the time and cost of the proceedings as compared to court proceedings.

- **Party autonomy**

Unlike court litigation, the private nature of ADR means that parties can exercise greater control over the way their dispute is resolved. The parties themselves can select the most suitable neutral to facilitate the settlement of their dispute. Parties may also choose the place and language of the proceedings and the applicable law.

- **Neutrality**

ADR can be neutral to the law and language of the parties, preventing any home court advantage that one of the parties may enjoy in court-based litigation.

- **Cost and time efficiency**

Cost-effective and speedy dispute resolution is essential in IP and related commercial disputes. Compared to multi-jurisdictional proceedings, ADR methods generate significant cost savings and entail short timelines which the parties can further adapt. Specific fast-track methods, such as expedited arbitration, are also available.

- **Confidentiality**

ADR proceedings and outcomes are confidential, allowing the parties to sidestep concerns about the dispute's public impact. This is particularly relevant where commercial reputations and trade secrets are involved.

- **Preserving long-term relationships**

By using ADR mechanisms, in particular mediation, business interests can be taken into account and viable long-term solutions can be developed in a less confrontational forum, allowing parties to preserve business relationships.

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[10] Helfer, Laurence, R. International Dispute Settelment at the Trademark-Domain Name Interface. Retrieved form https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2641&context=faculty_scholarship on 7th April, 2021.

- **Finality and international enforceability of arbitral awards**

When parties refer their disputes to arbitration, they benefit from the finality of arbitration awards. Unlike court decisions, arbitral awards are normally final and binding. They are not subject to appeal.

## 4. WIPO, DISPUTE SETTLEMENT AND CYBERSPACE

The field of copyright and related rights has expanded enormously with the technological progress of the last several decades, which has brought new ways of spreading creations by such forms of worldwide communication as satellite broadcast and compact discs. Dissemination of works via the internet is but the latest development which raises new questions concerning copyright. In 1996 WIPO passed two treaties collectively known as the “Internet Treaties” in response to the demands of intellectual property holders worried about infringement in cyberspace. The organization administers the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (known together as the "Internet Treaties"), which set down international norms aimed at preventing unauthorized access to and use of creative works on the Internet or other digital networks[11].

The WIPO Copyright Treaty (WCT) deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs; whereas the WIPO Performance and Phonogram Treaty (WPPT) deals with protection for authors rights of performers and producers of phonograms. The purpose of the two treaties is to update and supplement the major existing WIPO treaties on copyright and related rights, primarily in order to respond to developments in technology and in the marketplace.

Since the Berne Convention and the Rome Convention were adopted or lastly revised more than a quarter century ago, new types of works, new markets, and new methods of use and dissemination have evolved. Among other things, both the WCT and the WPPT address the challenges posed by today's digital technologies, in particular the dissemination of protected material over digital networks such as the Internet. For this reason, they are often referred to as the "Internet Treaties."

### 4.1 UDRP and WIPO's Dispute Resolution Service and Process

The WIPO Arbitration and Mediation Center received the first domain name complaint filed under the UDRP, and some six weeks later, a panelist appointed by the WIPO Center decided that the domain name at issue, "worldwrestlingfederation.com", was to be transferred to the complainant, the World Wrestling Federation Entertainment, Inc.

[11] Ibid.

In the first year since that case was filed, a remarkable 1500 additional complaints have been filed with the WIPO Center, nearly half of which have already been resolved[12].

In keeping with the recommendations of the WIPO Domain Name Process, the UDRP is limited to cases of bad-faith registration and use. Cases between parties alleging competing legitimate rights to name are therefore excluded. For a complaint to succeed, the complainant must establish that the following three cumulative criteria are satisfied[13]:

a. the domain name is identical or confusingly similar to a trademark or service mark held by the complainant;
b. the registrant of the domain name has no rights or legitimate interests in respect of the domain name; and
c. the domain name has been registered and is being used in bad faith.

The UDRP lists several examples of bad faith, such as indications that the domain name has been registered for the purposes of selling it to the trademark owner, disrupting the business of a competitor, or attracting visitors to the registrant's site by creating a likelihood of confusion with a third party's trademark.

Once a case has been initiated by the filing of a complaint, the domain name holder referred to as the respondent under the procedure has 20 days to file a response. Following receipt of the response, a decision should be issued two weeks later, absent exceptional circumstances, by an independent one or three-member panel appointed by the WIPO Center. The procedure maintains its simplicity because the sole remedies available are restricted to

(i) transferring the domain name registration,
(ii) canceling the domain name registration, or
(iii) rejecting the complainant's claim, in which case the domain name registration remains with the respondent.

Monetary damages, particularly, are excluded under the UDRP, as is the award of any costs associated with the procedure[14].

Once a UDRP decision is notified by the dispute resolution service provider to the ICANN-accredited registrar that handled the registration of the domain name in dispute, that registrar is obliged to implement the decision. This required enforcement, for instance, to transfer the domain name registration in question from the respondent to the complainant, must take place ten days after the panel decision is so notified,

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12 Gibson, Christopher, Digital dispute resolution: Internet domain names and WIPO's role, Computer Law Review International, vol.1, 2001. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103113 on 28th March, 2021.
13 Ibid.
14 Ibid.

unless the losing domain name registrant files a court case against the complainant within that ten day period and provides a copy of the court complaint to the registrar[15].

### 4.2 Domain Name Dispute Resolution

The WIPO Arbitration and Mediation Center provides time and cost efficient mechanisms to resolve internet domain name disputes, without the need for court litigation. This service includes the WIPO initiated Uniform Domain Name Dispute Resolution Policy (UDRP), under which the WIPO Center has processed over 50,000 cases[16]. The Uniform Domain-Name Dispute-Resolution Policy (UDRP) is a process established by the Internet Corporation for Assigned Names and Numbers (ICANN) for the resolution of disputes regarding the registration of internet domain names.

In December 1999, the WIPO Arbitration and Mediation Center began offering domain name dispute resolution services under the Uniform Domain Name Dispute Resolution Policy (UDRP). The Center's services include administering second-level domain name disputes for generic Top-Level Domains (gTLDs) to which the UDRP applies. The Center is the leading provider of dispute resolution services under the WIPO-initiated, ICANN-mandated UDRP[17].

#### 4.2.1 Domain Names

Each computers connected to the network is given a unique electronic address which is known as Internet Protocol (IP) address and that is used to rout the data from one host computer to another. IP addresses are numerical, resembling telephone numbers, identifying particular computer in the internet. IP addresses are not easy to remember and prone to mistakes being made. So, a word based, easily remembered, Domain Name System(DNS) was introduced. Each domain name is mapped to and underlying IP address, which is turned attached to the data thus identified. The conversion of domain names into IP address is achieved by a distributed DNS database. The Internet Corporation for Assigned Numbers and Names (ICANN) controls the database, accredits domain name registries and manage the DNS. The database is held on hierarchical system. Any domain name consists of two components, namely the top level domain name (TLD) and a second level domain name. For example in njanepal.org the .org is top level domain while NJA nepal is second level domain. Currently, there are two categories of domain names: generic top level domain names(gTLDs) and country code top level domains(ccTLDs).[18] The generic top level domain name includes .org, .com, .edu, .int, .info etc. Initially, the norm was that commercial organization registered in the .com domain while others such as .org, .net, .edu were assigned to non commercial organizations, network providers and educational institutions respectively. The internet domain name can be registered with

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15 Ibid.
16 https://www.wipo.int/amc/en/domains/gtld/ Retrieved on 28th March, 2021.
17 Ibid.
18 Froomkin, MA, ICANN's "Uniform Dispute Resolution Policy": Cause and Cures, Brooklyn Law Review, p 605.

any of over 150 Registrars worldwide. Government authorizes and license companies as registrars to sell domain names to individuals. Most registrars offer purchasing plans as well as additional services such as web hosting, bulk registration, transfer services and corporate services. Both generic and country code top level domains are available for registration.

### 4.2.2 Domain Name Disputes

Domain names themselves are not usually considered forms of intellectual property; however, they serve as important identifiers and addresses for any presence in the internet. Registering an appropriate domain name is an important step for any business and it is natural for a business to register a name by which it is already recognize.[19] It looks like similar but there are two significant differences between trademarks and domain names. Trademark are confined to particular classes of business or 'field of action' so that two businesses operating in different spheres may hold the same name without causing customer confusion such as Penguin Books and Penguin Biscuits as example. But the domain names by contrast, must be unique. Once registered the domain name is not tied to its registrant's field of business in the way that a mark is.[20] That can only be one 'penguin.com', although there can also be 'penguin.biz', penguin.co.uk, and so on. Dispute is arises when everyone targeted for the standard one i.e. penguin.com. Secondly, trademark only confer national or at most regional protection while a domain name has global application.

As registration is on a 'first come first serve' basis, however, trademark owners have no prior rights to a domain name incorporating their mark and disputes between mark owners and registrants arise. This is particularly happen when the commercial value of .com address is realized, just as trademarks are often valued on company balance sheets as asset.[21] The rules for the registration of a domain name are a matter of contract between the applicant and the registry.

### 4.2.3 Cyber Squatting

The dispute related to domain names can be categorized as cyber squatting or reverse domain name hijacking. So-called cybersquatters have attempted to register others' (usually well known) marks in order to sell them back to the mark owner, often at vary inflated prices. Cybersquatters commonly register large numbers of domain names. So, Cyber Squatting is the suspicious practice of registering or trafficking famous brands names as internet domain names with the explicit intention of later selling them to the appropriate owner at an inflated rate[22]. The person who registers the name often has got nothing to do with the domain name he registered with. Known as cyber squatter,

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19 Black, W., The domain name system in law and internet: a framework for electronic commerce, Hart Publishing, Oxford, 2002.

20 Colston, Catherine and Jonathan Galloway, Modern Intellectual Property Law, Routledge, London, 2017, pp. 714-716.

21 Ibid, p. 715.

22 Kumar, G. Ram, 2010. Cyber Crime: a primer on internet threats and email abuses, Viva Books, New Delhi, p. 80.

he is a profiteer who makes huge and easy money by selling the domain name to the business. So Cyber-squatting refers to the bad faith registration of a domain name containing another person's brand or trademark in a domain name. It can be defined as registering, trafficking in, or using a domain name with bad-faith i.e. mala fide intent to make profit from the goodwill of a trademark belonging to someone else. The cyber squatter then offers to sell the domain to the person or company who owns a trademark contained within the name at an inflated price. With the domain prices falling and more top level domains (.biz, .cn, .mob and lately .in) getting accredited, cyber squatters are in business fulltime[23]. Sometime, there might be confusion between cybersquatting and Domain Investing. Domain investors buy domains with random dictionary words or popular names with the hope to sell them in the future at a higher rate. They "guess" what type of domain names people are going to need in the future. They keep an eye on the latest industry trends and news to predict future business trends and buy the domains accordingly.[24] Domain investing may not technically be considered cybersquatting taken it as a legal. However, you fall into the realm of cybersquatting if you buy a domain name that resembles a brand or person who's already famous; they already have a registered trademark on their name, and you have a goal to defraud people or to make money in the future by coercing the original business to buy it at a premium price. For example, if you buy a domain name like biitcoin.com, btcoin.org, bitcoin.cm, etc., to deceive people who want to visit bitcoin.org (original bitcoin mining site), it falls within the realm of cybersquatting. Other conflicts may arise where a trademark owner seek to recover domain name from an individual who has registered a mark as a name. This is known as 'reverse domain name hijacking'. The registration may have been made in ignorance of any conflicting interest, because the name is common to both concerns, or may be deliberate with the intention of benefiting from another concern's reputation.

WIPO has, since 1999, provided an arbitration system wherein a trademark holder can attempt to claim a squatted site. In 2006, there were 1823 complaints filed with WIPO, which was a 25% increase over the 2005 rate. In 2007 it was stated that 84% of claims made since 1999 were decided in the complaining party's favor[25]. In 2018 almost 6000 cases related to cyber squatting are filed in WIPO which are steeled out through UDRP.

### 4.2.4 Cyber Squatting Cases and WIPO

As it is mentioned above about the increasing number of cyber squatting cases in WIPO, it is very important to discuss here the different cyber squatting cases during the COVID-19 Pandemic which were settled down by WIPO. In December 2019, the

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[23] Mehta, Sanchita, Cyber Squatting And Its Legal Position. Retrieved from https://www.manupatrafast.in/pers/Personalized.aspx on 7th April, 2021.

[24] https://sectigostore.com/blog/cybersquatting-examples/ Retrieved on 9th April, 2021.

[25] Mehta, Sanchita, Cyber Squatting andIts Legal Position. Retrieved from https://www.manupatrafast.in/pers/Personalized.aspx on 7th April, 2021.

novel corona virus was first identified in China.By September 2020, over 160,000 COVID-19-related domain names had been registered.[26] The hackers used the COVID-19 related terms to lure Internet users, many also incorporate trademarks to boost the credibility of the domain names and lure consumers to these fraudulent sites. Government agencies, the healthcare and medical goods industry and technology companies have been especially targeted by this new vector of cyber threats. [27] One of the most popular cases is of Verizon Company. The domain names myverizonwireless COVID19.com and verizonwireless COVID19.net, which resolved to sites imitating Verizon's legitimate site. Verizon filed a complaint with the World Intellectual Property Organization, which provides domain name dispute resolution services through its Arbitration and Mediation Center. Citing a lack of legitimate rights and the clear bad faith on the part of the registrant, WIPO ordered the transfer of the domain names to Verizon.[28]

Similarly, some companies have defensively registered COVID-19 related domain names incorporating their existing marks. For example, Facebook registered over 500 domain names incorporating COVID-related terms and their Facebook and Instagram trademarks (e.g., facebook-coronavirus-info.com and instagram COVID19.tld).[29] Similarly, Apple too, has registered the domain name AppleCoronavirus.com.

Similarly, the case of Instagram is also settled by the WIPO in 2018. In 2014 a Korean individual registered the domain name instagram.com.ph and two years later she also registered the domain name instagram.ph. These domain names led to pages displaying links to other websites, including 'Log InInstagram' and 'Create Instagram' or 'Create an Instagram Account' and 'Free Download Instagram APP'. The domain name instagram.com.ph was previously offered for sale on a broker's website for USD 5000 while the disputed domain name instagram.ph was displayed on another broker's website with the message 'This domain is for sale' and a system was provided for submitting an offer. Instagram decided to file a complaint with the Arbitration and Mediation Center of the World Intellectual Property Organization in 2018 and two months later the Administrative Panel assigned the domain names to Instagram.[30]

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[26] Hold Integrity, Domain Registration Data, holdintegrity.com, https://bit.ly/383Lulz (last updated Sep. 9, 2020). Hold Integrity, a Wisconsin-based domain name monitoring service provider, publishes a running list of COVID-19 related domain names.

[27] By David J. Steele, Esq., and Helena M. Guye, Esq., *Tucker Ellis LLP,* COVID-related cybersquatting underscores importance of vigilant trademark policing, Thomson Returne, 2020. Retrieved from https://www.tuckerellis.com/webfiles/COVID-Related%20Cybersquatting_Steele%20and%20GuyeNovember%202020.pdf on 25th December, 2021.

[28] *Verizon Trademark Services LLC v. Walker*, No. D2020-0960, 2020 WL 2836417 (WIPO Arb.May. 26, 2020) (Respondent used myverizonwirelesscovid19.com and verizonwireless-covid-19.net to impersonate the complainant and perpetrate a phishing scheme).

[29] Andrew Allemann, "Facebook registers over 500 Covid-19 related domain names," DomainName Wire (Apr. 2, 2020), https://bit.ly/2GnpNBp.

[30] Instagram, LLC v. Jiwon Song, Case No. DPH2018-0002, Administrative Panel Decision, WIPO Arbitration and Mediation Centre, 2018.

## 5. CONCLUSION

Hence we can finally say that the WIPO is very successful in the dispute settlement especially through the Alternative Dispute Settlement mechanism. "WIPO Arbitration and Mediation Centre" is working as a neutral, reliable centre for the dispute settlement related to intellectual property. This centre not limited only to the dispute settlement of the traditional types of intellectual property, it is showing it's active role for the dispute settlements of conflict related to intellectual property on the cyber space such as conflict related to websites, domain name disputes, cyber squatting and other novel areas of the intellectual properties. Mediation, arbitration, expedited mediation, and expert determination are the major ways of dispute settlement of the centre. So, parties related to the dispute of the intellectual property belief that the WIPO Arbitration and Mediation Centre is reliable and neutral body to see the conflict related to intellectual property including the IP cases related to cyber space too. Moreover, cybercriminals will continue to exploit the COVID-19 pandemic to engage in various types of cybercrime, especially attacks that utilize trademarks in domain names. So, the contribution of WIPO Arbitration and Mediation Centre should be praise and expecting more contribution in such situation and in the generic time too.

# 'YES MEANS YES': TOWARDS THE AFFIRMATIVE STANDARD OF CONSENT IN RAPE LAW DISPUTE SETTLEMENT

**Dipika Gajurel**[1]

## ABSTRACT

*The offence of rape, though being as old as human civilization, wasn't originated to protect the bodily integrity and sexual autonomy of the victim but was devised as a rule to protect the property of men where women were considered as their chattels. The offence of rape entails the penetration or intercourse which is sexual in nature and the element of consent differentiates such sexual penetration or intercourse as consensual or non-consensual. The traditional rape law required the central element of force and resistance to constitute the offence of rape. However, with the development of consent in nexus of offence of rape it is required that the sexual intercourse or penetration that was perpetrated against the victim was against the consent of such victim. With this the no means no approach was practiced which puts the onus of proof on the victim to prove that the victim didn't consent to such act. To cope up with the flaws that were associated with no means no approach, yes means yes approach was originated which requires that the consent must be obtained in affirmative term and thus, shifts the burden of proof on the part of the accused to prove that the accused obtained the free consent from the victim. Affirmative consent standard is also a shift in the way that the society and the courts perceived the process of consenting to sexual intercourse. It also dilutes the irrelevant matters such as past sexual history of the victim while examining the element of consent during the trial. Thus, affirmative consent is a step towards the acknowledging and respecting the sexual autonomy of every individual.Rape- consent- no means no- affirmative consent- yes means yes- burden of proof- sexual autonomy*

## MEANING AND DEFINITION OF OFFENCE OF RAPE

The offence of rape is considered as one of the heinous crime that is committed not only against the victim but against entire society. It is existent in every society since time immemorial and is regarded to be an act against the human conscience. The offence of rape is *malum in se* meaning it is considered crime regardless of any

[1] Assistant Government Attorney

jurisdiction. Rape, as an act of sexual violence is the seditious behavior on the part of perpetrator that results in the physical and mental harm of the victim. The act of any kind of violence is defined as a physical force to cause injury, damage or destroy as an unjust and callous use of force or power against other's right with impacts. (Webster's New World Dictionary and Thesaurus)[2].

Susan Brownmiller describes rape as ―sexual invasion of the body by force, an incursion into the private, personal inner sense without consent, in short an internal assault from one of the several avenues and by one of the several methods. It constitutes a deliberate violation of emotional, physical and rational integrity and is a hostile degrading act of violence.[3]

Federal Bureau of Investigation (FBI) defines rape as- "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[4]

Defining rape is complex. It has multitude of definitions and can be defined in legal and clinical terms. Each jurisdiction has its own definition of rape which is stated in its penal code or statute. For example, Section 219 [5] of Muluki Criminal Code, 2074 has defined the offence of rape in Nepal while it is specifically dealt by Sexual Offence Act, 2003[6] in England. Though there is linguistic differences in legal definition of offence of rape in each jurisdiction but the underpinning spirit of law remains the same as the offence of rape is regarded as a form of sexual assault which involves sexual intercourse or other forms of sexual penetration perpetrated against a person in absence of consent of such person.

Clinically, offence of rape is defined in terms of physical, mental and emotional suffering that a victim undergoes. Clinical approach towards the definition of rape take into account the mental, physical, emotional and psychological state of victim. According to Groth, a treatment-oriented definition should focus on the perceptions of the victim and the impact of offense behavior, rather than the intent of the offender: . . . from a clinical rather than a legal point of view, it makes more sense to regard rape as

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2 Dr. Yubaraj Sangroula, *Jurisprudence The philosophy of Law*, *Oriental Perspective with special reference to Nepal* (1st Ed, Kathmandu School of Law 2010) 395

3 Ajay Kumar Thakrar, *An analytical study of the rape law and impact of the law* (Saurashtra University2018) 9-10

4 'Crime in the United States' (*FBI*, 2013) <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/rape> accessed 15 July 2021

5 The National Criminal Penal Code 2074(2017), s 219
Prohibition of committing rape: (1) No one shall commit rape. (2) Where a man has sexual intercourse with a woman without her consent or with a girl child below eighteen years of age even with her consent, the man shall be considered to commit rape on such woman or girl child. Explanation: For the purposes of this Chapter,-
(a) Consent obtained by way of coercion, undue influence, intimidation, threat, misrepresentation, or kidnapping or taking of hostage shall not be considered to be consent,
(b) Consent obtained at the time of being of unsoundness of mind shall not be considered to be consent,
(c) The penetration of penis into anus or mouth, penetration of penis, to any extent, into anus, mouth or vagina, insertion of any object other than penis into vagina shall also be considered to be rape.

6 Sexual Offences Act 2003, s (1) A person (A) commits an offence if—
(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
(b) B does not consent to the penetration, and
(c) A does not reasonably believe that B consents.
(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

any form of forcible sexual assault, whether the assailant intends to effect intercourse or some other type of sexual act. The defining element in rape is lack of consent.[7]

Thus, it is established that the offence of rape is an act of penetration of sexual nature which is perpetrated against the consent of the victim. In this milieu, the three cumulative elements must suffice to constitute the offence of rape and they are actusreus, mensrea and absence of consent. The prosecutor must prove beyond the reasonable doubt that the offender had a sexual intercourse (actusreus) with the victim without the consent of the victim (absence of consent) either intentionally, recklessly or negligently (mensrea).

## REQUIREMENT OF "CONSENT" IN RAPE LAWS

The offence of rape is characterized as a sexual penetration against the consent of victim. In this sense, the element of consent is the determining factor that differentiates between voluntary sexual intercourse from the offence of rape. The absence or present of consent has been the most debated and discussed issue in the offence of rape. Except in cases of statutory rape, the trial revolves around the element of consent.

"The term 'consent' has been derived from the Latin verb 'consentire', meaning to share physically, emotionally or intellectually." It reflects the communication of a voluntary agreement on part of a person.[8] Consent" in classical liberal theory refers to the expression of autonomy and free will by competent and rational individuals who are free from coercion and pressure.[9] The concept of consent embodies what it means to be an autonomous moral agent. Therefore: "[i]f autonomy resides in the ability to will the alteration of moral rights and duties, and if consent is normatively significant precisely because it constitutes an expression of autonomy, then it must be the case that to consent is to exercise the will.[10] In this milieu, the term consent in sexual offence refers to the sexual autonomy of the victim.

The term 'consent' has no universal standard or definition. The complexity of defining 'consent' is partly due to the fact it entails wide range of interpretation and encompasses a broad range of normative judgments. However, for the legal convenience some jurisdiction has devised some legal definition of the term consent.

Explanation 2 of Section 375 of Indian Penal Code, 1865, defines consent as- "Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act, Provided that a woman who does not physically resist to the

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7 John O. Savino and Brent E. Turvey, 'Defining Rape and Sexual Assault' in John O. Savino and Brent E. Turvey (ed), Rape Investigation Handbook (2nd edition, Elsevier 2011) 7

8 Dhruv Duggal, 'Yes Means Yes : Study of Indian Rape Laws From the Lens of Affirmative Consent Standard,' (Degree of L.L.M, National Law University, 2019) 17

9 Anupriya Dhonchak, 'Standard of Consent in Rape Law in India: Towards an Affirmative Standard' (2019) 34(1) Berkeley Journal of Gender, Law & Justice 29, 30 <https://lawcat.berkeley.edu/record/1128891?ln=en> accessed 1 August 2021

10 Maria Eriksson, 'Defining Rape Emerging Obligations for States under International Law?'(*Orebro University*, 2010) 48 <https://www.diva-portal.org/smash/get/diva2:317541/FULLTEXT02> accessed 15 July 2021

act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity".

Similarly, Sexual Offence Act, 2003 in its section 74 provides that-" a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

In context of Nepal, Muluki Criminal Code, 2074 has not explicitly defined the term "consent" in relation to the offence of rape. However, the Code has listed out the conditionality where the consent is not recognized and accepted as consent. Section 219, subsection 2 Explanation provides that the consent obtained by way of coercion, undue influence, intimidation, threat, misrepresentation, or kidnapping or taking of hostage and consent obtained at the time of being of unsoundness of mind shall not be considered to be consent. [11]

In *Udayvs State Of Karnataka*[12], Supreme Court of India cited Words and Phrases Permanent Edition Volume 8A, page 205- where it was stated that-" adult female's understanding of nature and consequences of sexual act must be intelligent understanding to constitute 'consent'. Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. Legal consent, which will be held sufficient in a prosecution for rape, assumes a capacity to the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable or natural consequences which may attend it.

Thus, consent entails the deliberate decision made by a person regarding to assent or resist the sexual penetration perpetrated by another person. It is an act accompanied by a reason after analyzing the legal and moral consequences of such act.

## SHIFT FROM AGAINST THE WILL TO AGAINST THE CONSENT

The offence of rape was not evolved as crime against person but as crime against property. It was devised to protect the economic interest of men. It is evident in Roman law that women were considered to be chattel of men and the offence of rape was regarded as devaluation of property of such men under whose possession these women were.

Susan Brownmiller in her book 'Against Our Will: Men, Women, and Rape (1975) writes-

“Women are wholly owned subsidiaries and not independent beings. Rape could not be envisioned as a matter of female consent or refusal… Rape entered the law through back door, as it were, as a property crime of man against man. Woman, of course, was viewed as the property."[13]

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11 The National Criminal Code Penal 2074(2017),s 219
12 *Uday v State Of Karnataka*,AIR 2003 SC 1639
13 Duggal (n 8) 1

Since women were considered as the property of men and the laws related to rape were considered as law of transfer of property, if a woman was raped, compensation was thus paid to the appropriate male in charge, i.e. the woman's father or husband, with the sum depending on the woman's economic position and other determinative factors, with rape classified as a crime of theft.[14] The said concept is also evident in Chapter 22 of Deuteronomy [15] where it is stated that-

*"22:28- If a man find a damsel that is a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found;*

*22:29 Then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days.* "[16]

Even the etymological meaning of rape was derived from law of *"raptus"*, meaning to snatch. Thus, the offence of rape was offence of theft against the victim's father or husband. It was only during 12th century, victims were recognized as an independent person without reference to her social rank or guardian and rape was defined as a crime against the person rather than against property.[17]

In Seventeenth-century, English law defined rape as "the carnal knowledge of any woman above the age of ten years against her will . . ."[18] The then law defined rape in three major elements as; i) sexual intercourse ii) use of force iii) lack of will of the victim. Since then, the concept of force and will have be deeply integrated in the concept of rape. The requirement of will in the offence of rape was regarded as objective standard to which the force and resistance was taken as the indicators. The concept that rape must include use of force and be against a woman's will lead to the idea that the man must have used overpowering force to overcome the victim's resistance and further, that the woman must resist using all means at her disposal or must be in dread or fear of death. [19]With this concept, myths like a man cannot rape a healthy adult women without her will, there must be signs of struggle or genital injuries in case of rape and so on were established as a standard. The same concepts were also reflected in the judgments such as in case of *HMG v. Narayan Shrestha*[20] where the Supreme Court of Nepal held that - there must be signs of struggles in case of sexual penetration of an adult women which was perpetrated against her will.

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14 Eriksson (n 10) 48

15 Deuteronomy is the fifth book of the Hebrew Bible. It is said to be the words that Moses spoke to all Israel beyond the Jordan."

16 Gary H. Everett, *The Book of Deuteronomy* (2018)<https://www.academia.edu/17238058/The_Book_of_Deuteronomy_2018_edition >accessed 15 July 2021

17 Eriksson (n 10), 51

18 Sally Gold & Martha Wyatt, 'The Rape System: Old Roles and New Times' (1978) 2(4) Catholic University Law Review 695, 699 <https://scholarship.law.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2391&context=lawreview>accessed 16 July 2021

19 'Introduction to rape and sexual assault' (Jones & Bartlett Learning, LL.C.)<http://samples.jbpub.com/9781449648695/48695_CH01_Chancellor.pdf> accessed 16 July 2021

20 *HMG v Narayan Shrestha* [NKP 2029]DN 673,Vol.1

Similarly, in case of *ThagaChaudary v HMG*[21] Supreme Court of Nepal, reaffirmed that there must be signs of struggle in case of offence of rape.

With passage of time, the expression will was diluted and the expression consent became the defining element of offence of rape. The term 'will' and 'consent' holds entirely different meaning. In *State of U.P. v. Chhoteylal*[22], Supreme Court of India analyzed between 'will' and 'consent'. The court cited Dictionary of English Law (Second Edition), Volume 1 (1977) page 422, where the word `consent' has been explained as-

"*An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things--a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind*."

While the court explains will in following words- "Will is defined as wish, desire, pleasure, inclination, choice, the faculty of conscious, and especially of deliberate, action. It is purely and solely a mental process to be ascertained, in a prosecution for rape, by what the prosecuting witness may have said or done. It being a mental process there is no other manner by which her will can be ascertained, and it must be left to the jury to determine that will by her acts and statements, as disclosed by the evidence. It is but natural, therefore, that in charging the jury upon the subject of rape, or assault with intent to commit rape, the courts should have almost universally, and, in many cases, exclusively, discussed "consent" and resistance. There can be no better evidence of willingness is a condition or state of mind no better evidence of unwillingness than resistance.

It has rightly been stated in *State v. Schwab* (143 N.E. 29, 109 Ohio St. 532) that, “No lexicographer recognizes “consent” as a synonym of willingness, and it is apparent that they are not synonymous.” There may be a woman who may be willing to have sexual intercourse, but that by itself does not mean that she gave consent. And there may be another woman who gave consent for sexual intercourse, but that does not necessarily mean that she must be willing. There can be a valid consent even if unwillingly given.[23] The same concept was also explained in *Holman vs. The Queen*[24] wherein it was held that "there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is consent' ".

Thus, the expression 'will' makes the force and resistance as a prerequisite of a crime and narrows the meaning and scope of the offence. While the expression 'consent' goes

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21 *Thaga Chaudary v HMG* [NKP 2063] DN 7664, Vol.3

22 *State of U.P. v Chhoteylal* (2011) 2 SCC 550

23 P. H. Pendharkar, 'Consent under Section 375 IPC: Stripping the Myths' (2019) ILI Law Review 98, 103< https://ili.ac.in/pdf/php.pdf> accessed 16 July 2021

24 *Holman v The Queen* [1970] W.A.R. 2

beyond the requirement of force and resistance and includes wide range of situation of penetration which constitutes the offence of rape. It is required that the given consent must be free and valid. For consent to be free and valid two cumulative criteria of choice and capacity must be sufficed.

## HISTORICAL UNDERPINNING OF AFFIRMATIVE STANDARD OF CONSENT

The concept of affirmative consent is of recent origin. To understand the concept and meaning of affirmative standard of consent it is necessary to address its origin. As mentioned earlier, the offence of rape was evolved in such a manner that the element of force and resistance was inevitable characteristics of the offence. The element of consent evolved as a response to the inherent limitations that were attached with the common law-force centric definition of rape. The common law required a showing of both lack of consent and force. Force could be proved by actual evidence of physical harm, or constructively through either the proof of a threat of force that would reasonably induce fear, or the victim's resistance or fear that would overcome a victim's reasonable attempts to resist. The force standard placed the burden of proof on the victim, rather than the alleged perpetrator, which the court would use an objective standard to evaluate.[25]

With this the 'No Means No' standard of consent was devised. The standard means that, if an individual verbally rejects sexual advances, that person must be seen as withdrawing consent to sexual contact.[26] It requires that the person must make a clear and unequivocal communication of rejection. Although the 'no means no' model had consent at its heart, but in situations where the defense could establish ambiguity in the communication of the no, it would lead to negative impact on the claims of the survivor.[27]

No means no allowed for criminalization only when a victim had expressed refusal. Although the no means no standard turned on consent, any ambiguity in communicating such a refusal weighed against the victim. Affirmative consent, by contrast, is a way to alleviate the problem of miscommunication and supplies a clear directive: anything less than "yes" does not qualify as consent. [28] An affirmative consent standard requires that, for sex to be considered consensual, it must have been consented to by the woman in advance. In short, if the instigator of a sexual interaction wishes to do anything, he or she must inquire whether his or her partner wishes that to

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[25] Noah Hilgert, 'The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault laws' (2016) 58(8) Arizona Law Review 867, 872 <https://arizonalawreview.org/pdf/58-3/58arizlrev867.pdf, p.872> accessed 30 July 2021

[26] Nicholas J. Little, 'From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law' (2019) 58(4) Vanderbilt Law Review 1321, 1322<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1648&context=vlr> accessed 30 July 2021

[27] Duggal (n 8) 26

[28] Hilgert (n 25) 874

be done, and that partner must receive freely given consent to continue. In the absence of such consent, the activity cannot be seen as voluntary for both parties.[29]

Affirmative consent model was first devised and adopted by a private institution named Antioch University in 1991 where the University enacted their "Sexual offence policy." The Sexual offence policy provided:

1. For the purpose of this policy, "consent" shall be defined as follows: the act of willingly and verbally agreeing to engage in specific sexual contact or conduct.

2. If sexual contact and/or conduct is not mutually and simultaneously initiated, then the person who initiates sexual contact/conduct is responsible for getting the verbal consent of the other individual(s) involved.

3. Obtaining consent is an on-going process in any sexual interaction. Verbal consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction, regardless of who initiates it. Asking "Do you want to have sex with me?" is not enough. The request for consent must be specific to each act.

4. The person with whom sexual contact/conduct is initiated is responsible to express verbally and/or physically her/his willingness or lack of willingness when reasonably possible.

5. If someone has initially consented but then stops consenting during a sexual interaction, she/he should communicate withdrawal verbally and/or through physical resistance. The other individual(s) must stop immediately.

6. To knowingly take advantage of someone who is under the influence of alcohol, drugs and/or prescribed medication is not acceptable behavior in the Antioch community.

7. If someone verbally agrees to engage in specific contact or conduct, but it is not of her/his own free will due to any of the circumstances stated in (a) through (d) below, then the person initiating shall be considered in violation of this policy if:

    a) the person submitting is under the influence of alcohol or other substances supplied to her/him by the person initiating;

    b) the person submitting is incapacitated by alcohol, drugs, and/or prescribed medication;

    c) the person submitting is asleep or unconscious;

    d) the person initiating has forced, threatened, coerced, or intimidated the other individual(s) into engaging in sexual contact and/or sexual conduct.”

[29] Little (n 26) 13, 45

The Sexual offence policy defined obtaining consent as an on-going process and required that the person must obtain specific consent for the specific act. Further it placed a burden on the part of a person who initiated sexual conduct to get the verbal consent from the other person so involved. The fact that the policy emphasized on the strict and rigid condition of obtaining the verbal consent lead to the huge backlash and public outcry. The policy required that there must be clear and distinct verbal consent which negated the scope of implied consent.

In 1992, in the case of *State of New Jersey in the interest of M.T.S*[30]. Supreme Court of New Jersey accepted and recognized the affirmative approach of consent and held that-

"The fact[-]finder must decide whether the defendant's act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration. Such permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely given authorization for the specific act of sexual penetration."

Following the Antioch's policy, legislation in California and New York marked the first instances of state or federal legislatures codifying affirmative consent, even if only for the limited purpose of university tribunals.[31] Section 67386 of the California Education Code provides:

An affirmative consent standard is the determination of whether consent was given by both parties to sexual activity. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

While Section 6441(1) of New York's Education Law provides:

Every institution shall adopt the following definition of affirmative consent as part of its code of conduct: "Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

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30 State of New Jersey in the interest of M.T.S,129 N.J. 422 (1992)

31 Hilgert (n 25) 879

The basic difference in plain reading of these two provisions is the incorporation of word "actions" in New York's Education Law which is more permissive towards implied consent than the California Education Code. Further, inclusion of terms knowing, voluntary, and mutual decision while defining affirmative consent it is more flexible and relaxed to the reasonable- belief defense than the California Education Code .

## FROM 'NO MEANS NO' TO 'YES MEANS YES': TOWARDS THE AFFIRMATIVE CONSENT STANDARD

Since historically, the offence of rape emerged as ravishment of virgins, the court and the judges emphasized on the 'purity' and 'virginity' of women. The past sexual history of victim was so scrutinized in the trial courts that it was on the part of a victim to prove that she was actually victimized by the offence. Further, the flaw associated with the traditional understanding of the element of consent additionally burdened the victim to prove that the particular act of penetration or sexual intercourse was nonconsensual. It placed the responsibility on the part of the victim that the victim had effectively express his/her non-consent. All these flaws made the victim undergo a trial rather than the accused. The no means no standard further victimized the victim and thus there was a need for standard of a consent that actually obliges the defendant to prove that the consent was obtained legally and in a valid way.

Affirmative consent on the other hand leads to “the acknowledgment of specific, rather than generalized consent that would prompt courts to engage in a more explicit dialogue attempting to articulate and define such distinctions. An affirmative standard in this context protects women from unwanted sex by reducing the room for ambiguity in sexual encounters whereas the “no means no standard” is susceptible to manifestations of rape culture.[32]

One of the common flaws being that when we adhere to the ‘no means no’ standard, we again place the burden of proof on the survivor, where she is the one who should be able to establish that she had communicated a clear and unambiguous ‘no’. Additionally the ‘no means no’ standard meant that conviction could take place for only such circumstances where the potential rape victim had categorically refused to engage in sexual intercourse.[33] Further, the no means no standard leaves behind the wrong assumption that a failure to communicate 'no' as a refusal to involve in sexual intercourse means 'yes' for such sexual intercourse. The no means no standard also gives a scope to questions such as: Does a feeble no can mean yes, how much strength does the 'no' requires to be considered as a rejection or refusal for sexual intercourse and so on.

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[32] Dhonchak (n 9) 36

[33] Duggal (n 8) 26

The failure of no means no standard is also evident in cases of acquaintance rape. This is observed in the case of *Mahmood Farooquivs State (Govt of NctOf Delhi*)[34] the Delhi High Court acquitted the defendant on the ground that the victim couldn't establish that she didn't consented to the act thus, the defendant is benefited from reasonable doubt. The court in its decision elaborated what does a consent mean and stated that-"Instances of woman behavior are not unknown that a feeble "no" may mean a "yes". If the parties are strangers, the same theory may not be applied. If the parties are in some kind of prohibited relationship, then also it would be difficult to lay down a general principle that an emphatic "no" would only communicate the intention of the other party. If one of the parties to the act is a conservative person and is not exposed to the various ways and systems of the world, mere reluctance would also amount to negation of any consent. But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/ academically proficient, and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble "no", was actually a denial of consent. This case depicts how the no means no standard fails to negate the implied yes in case of the feeble no when it comes to consent.

Adoption of affirmative consent model ensures that there is no scope left for the 'miscommunication' of the consent. Affirmative standard requires the advance communication of a 'clear' consent which negates the possibility of misinterpretation and miscommunication. It safeguards against excusing rapists due to miscommunication by making communication clearer and ensures that that the absence of a "no" is not treated as a "yes.[35] The affirmative consent model also reduces the conversion of the passive silence as 'yes' to the sexual activity. The affirmative standard of consent on the other side is different from the no means no approach as unlike 'no means no' standard, where there is presumption of consent, and where the onus is on the victim to prove that she did not consent, the 'yes means yes' approach focuses on the affirmation, and puts the onus on the culprit to prove that he had obtained the consent of the victim.[36] Even in cases where the defendant take a plea that the victim impliedly consented for such sexual intercourse or penetration it is upon the defendant to prove that the victim actually consented. . An affirmative standard reduces the room for such "misunderstandings" about what constitutes rape and draws the link between undesired sex and rape in explicit terms. The presence of consent under this standard is not presumed, instead there exists a burden to prove whether it was obtained.[37] Affirmative consent thus shifts the burden to the defendant to prove that all necessary steps were taken to obtain consent from their partner and disburden victim from unnecessary and irrelevant presumptions. . Affirmative consent thus, reduces the subjectivity by negating the presumption of consent and requiring the objective responsibility of the defendant to obtain consent from the victim.

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34 Criminal Law Appeal 944/2016 (Delhi High Court, 2017)
35 Dhonchak (n 9) 69
36 Duggal (n 8)30
37 Dhonchak (n 9) 60

Affirmative consent standard is a step towards dismantling the myths and misconception that are associated with the offence of rape. In the society where raping a women who were engaged in prostitution was not considered as rape and to get acquittal every attempts were made to prove that the victim was a prostitute, the past sexual history of victim is taken with great concern. With this mindset, the victims have to undergo through thorough questioning and judgments where her character, chastity and sexual autonomy is questioned now and again. The past sexual history and the character of the victim is scrutinized in such a manner that the victim instead of the defendant seems to be facing the trial. The no means no approach in no way protects the victim from this scrutiny as the victim oneself has the burden to prove that the act was against the consent of the victim while the affirmative consent approach helps to break the chain and free the judgment from unnecessary biasness and misconceptions such as virginity and past sexual history of the victim, the degree of resistance offered by the victim to express the non-consent and so on. Rather the affirmative consent is focused only on two core elements that the victim consented for the sexual intercourse or penetration and the consent was affirmatively expressed or communicated. Thus, the affirmative standard shifts the focus from extraneous and irrelevant factors such as the victim's conduct to the responsibility of the man to affirmatively seek consent.[38]

What affirmative consent represents, then, is a shift in the way society, and in particular the courts, look at the process of consenting to sexual intercourse. Society views sex as something men desire, and something to which women concede with varying degrees of willingness and for varying reasons. Affirmative consent instead views sex as an act that should be entered into willingly by both parties. It announces to women that their opinion of whether sex should occur is equally valid in the eyes of the legal system as the man's.[39] Even to this day, sex is taken as taboo in some society and is regarded as an act where a male initiates it and the female submits herself to the male. The equation of male and female is never equal as women are considered only to be a passive receptor. However, affirmative consent firmly stands by the sexual autonomy of women. It places women in equal footing and ensures her choice and right to choose with whom, when and under what circumstances she engage herself in sexual activities.

Affirmative consent standard also acts as a mental deterrent to men by clarifying to them the gravity and criminal nature of their actions.[40] It also sends a clear message to every man that when he has sex with a woman who willingly states her consent, he is not raping her; when he has sex with a woman who has verbally expressed her unwillingness, he is violating her rights, raping her, and breaking the law. If she has expressed neither consent nor non consent, he has an obligation to inquire into the situation further before proceeding.[41]

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38 Dhonchak (n 9) 55
39 Little (n 26) 1342
40 Dhonchak (n 9) 60
41 Hilgert (n 25) 874

Thus, affirmative consent is victim centric, where a victim doesn't have to undergo the trial based on baseless questions of the past sexual history and character of the victim. The affirmative consent shifts the burden of proof to the defendant when the question of consent is raised. Affirmative consent not only untangle the law from shackles of biased judgments but also establishes the regime where the sexual autonomy of the victim is also considered. Affirmative consent standard thus, visualizes every person as equal partner instead of initiator and passive receptor in sexual intercourse.

## CRITIQUES OF AFFIRMATIVE CONSENT

Despite the benefits of affirmative consent model, affirmative consent is criticized. The critiques break down into two apparent groups-those who see it as a license for unfounded allegations of rape by vindictive women and those who view it as unrealistic and destructive of both romance and spontaneity in the sexual relationship.[42]

The major criticism associated with affirmative consent is that it allows for increasing number of false accusation of rape. This criticism is based on the fact that the onus of proof regarding consent is shifted from victim to the defendant in affirmative standard of consent. The critiques argue that this shift of onus of proof converts the relative liability offence of rape into strict liability.

However, affirmative consent standard in no way or manner converts offence of rape into strict liability offence other than in statutory rape offence. The onus of proof still lies upon the prosecutor and the State to show that the victim didn't consent for the sexual intercourse or penetration. Only when the defendant claims that the consent was obtained through legal and free means then it is upon the defendant to prove that the consent was granted by the victim in free and legal manner. There are no procedural changes that are brought into effect by the adoption of affirmative consent standard. It only creates a situation where presumption of consent does not exist, and where the absence of resistance, or injuries should not be implied as consent by the courts[43]

In regards to increasing number of false accusation, it is pertinent to note that the all FIR (First information report) doesn't end up being a case. It is only when the investigation shows enough evidences and ground to prosecute the accused then, the prosecutor files the charge sheet. Thus, prosecutors can be seen as screening mechanism where such false cases are scrutinized.

The second criticism that the affirmative consent approach destroys the intimacy between the partners. Those who claim that affirmative consent will destroy sexual relations between men and women also have little evidence with which to support their charges. While it is true that an affirmative consent standard would likely cause a significant change in present sexual behavior, it is by no means apparent that such a

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42 Little (n 26) 1357
43 Duggal (n 8) 36

change would result in less intimacy.[44] Thus, the criticism made against affirmative consent is baseless.

## CONCLUSION

Affirmative consent is a shift from the traditional mindset of society and stakeholders regarding the offence of rape and its requirement. It came as a response to the drawbacks and flaws of no means no approach towards the consent element of the offence of rape. Though affirmative consent standard was originated as University's sexual policy it is evident from the cases that the court has realized the dire need of adoption of affirmative consent standard in rape cases. Affirmative standard of consent is a step towards changing the lens through which the offence of rape and victims are perceived. It most notably, equalizes victim who are mostly women and safeguards their sexual autonomy. Affirmative consent also prevents courts from reading meaning into a victim's actions, especially in a culture which largely holds victims' behavior, attire, and character responsible for what happens to them.[45]

Affirmative standard of consent, in conclusion, is an approach and model towards evaluating the consent element of the offence of rape. It emphasizes on the fact that there must be a clear communication between the partners in affirmative term prior to every sexual activity such that the consent element is not presumed. Further, it place the onus of proof on the part of defendant when such defendant claims that the sexual activity was conducted after obtaining free consent from the victim. In short, the affirmative consent standard gives a clear cut message that the sexual intercourse with consent of both partners except in statutory rape is a consensual sex while in absence of consent which was affirmatively expressed the sexual intercourse is none other than the offence of rape. Thus, the initiator is under the obligation to acquire a clear affirmatively expressed consent from the partner before engaging in any sexual activity and such consent should be specific to the act.

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[44] Little (n 26) 1320
[45] Dhonchak (n 9) 67

# AUTOPSY IN NEPAL: CRITICAL STUDY OF LAWS AND JUDICIAL VIEWS

**Dr. Ramesh Parajuli**[1]

## ABSTRACT

*In Nepal there is trend to avoid or skip autopsy of so called high profile dead bodies. This is a wrong trend. Autopsy is a neutral scientific examination that helps to discover real fact and truth about the manner, time and cause of death. Sudden and unexplained deaths and mysterious and suspicious deaths should be reported to the concerned legal authority. Autopsy report is helpful even in resolving civil disputes such as medical negligence remedy cases filed under tort for compensation by victim. Autopsy helps to discover whether death was due to negligence of doctor, nurse, pharmacist, hospital management or not. But, it is a shame, Nepalese law does not require negligently killed patient in hospital bed, to be forwarded for getting autopsy examination done for identifying the exact cause, manner and time of death. Till date, we are blindly relying on and trusting oral announcement of commercially established private hospitals' words regarding cause of patient's death in their bed.*

## A. BACKGROUND

> *"Estimating the time of death is one of the most difficult and inaccurate techniques in forensic pathology*."- Milton Helpern[2].

Autopsy is a surgical procedure that consists of a thorough examination of a corpse by dissection to determine the cause, mode, and manner of death (called forensic autopsy or medico-legal autopsy) or to evaluate any disease or injury that may be present for research or educational purposes (clinical or academic autopsy). For the purpose of this book forensic jurisprudence, we are concerned only with forensic autopsy here. Autopsy is also called necropsy.

The term *autopsy* comes from Greek word *autopsia*, meaning "to see with one's own eyes."[3]The word autopsy has been used since around the 17th century, it refers to the

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1 PhD in Medical Negligence Law (2013); Asst. Prof. Faculty of Law, TU; Life Member, Nepal PhD Association

2 In his book "Autopsy - The Memoirs of Milton Helpern, the World's greatest medical detective", published by St. Martin's Press, New York, 1977, on page 116.

3 Rothenberg, Kelly (2008). "The Autopsy Through History". In AynEmbar-seddon, Allan D. Pass (ed.). Forensic Science.Salem Press.p. 100. ISBN 978-1-58765-423-7.

examination of inside the dead human body to discover diseases and cause of death.[4] Autopsy is used interchangeably with the term post-mortem. The term "post-mortem" is derived from Latin term post meaning "after" and mortem meaning "death". It was first recorded from 1850. Latin phrase ante mortem meaning "before death" is attested in English by 1823.[5]Autopsy is often called 'post mortem examination'.

All deaths of unnatural (homicide, suicide, accident) manner, suspicious deaths, and unexpected deaths require a legal investigation, of which autopsy is a part. Autopsy is followed by instructions from the concerned legal authority responsible for the medico-legal investigation of sudden, unexpected, suspicious, mysterious, unwitnessed, obscure, unexplained, or litigious deaths, criminal deaths, industrial deaths, and deaths associated with medical or surgical treatment where medical negligence is alleged or anesthetic deaths.[6]Autopsy investigates deaths demanding further explanation.

## B. WHY AUTOPSY?

Broadly, the sole objective of medico legal autopsy is to discover substantive and scientific evidence that exists within the corpse so as to help the court in the process of administration of justice. In observing and discovering such evidences, the examiner applies his technical medical knowledge.

The purpose of forensic autopsy differs from one case to another and may be specific for a particular case. Nevertheless, in general, there are four major objectives of conducting a forensic autopsy. They are:

a) To establish identity of the dead: Establishing identity of deceased is of paramount importance while conducting a forensic autopsy on an unknown body. At times, confirming the identity of the deceased also matters.
b) To determine cause of death: Major cause of unnatural death occurs due to asphyxia. Hanging, drowning, poisoning, severe blood hemorrhage, strangulation, injury, electrocution, blunt force injury on head, sharp force injury etc. are frequent causes or manners of death.
c) To determine manner of death: It may assist in confirming or refuting the alleged manner of death. The way how death is caused is called manner of death, and it could be either natural or unnatural. For instance, if a head injury is the cause of death broadly, then how the head injury occurred can be accidental or suicidal or homicidal. Death from a head injury can result from an accidental fall from a height, or a suicidal jump from the top of a building, or a deliberate push from the roof terrace, in which case the manner of death is considered homicidal. To be more precise, let us consider subarachnoid hemorrhage as the cause of death. Subarachnoid hemorrhage can result from a spontaneous rupture

4 Clark MJ (2005). "Historical Keyword "autopsy"". The Lancet. 366 (9499): 1767.
5 https://www.etymonline.com/search?q=post-mortem%7Cwebsite=
6 Ritesh G. Menezes; Francis N. Monteiro; Forensic Autopsy, StatPearls Publishing LLC. (2020) {https://www.ncbi.nlm.nih.gov/books/NBK539901/ Retrived: September 13, 2020}

of a berry aneurysm (natural mannered death) or can be secondary to blunt force impact to the head (unnatural mannered death).

d) To estimate time of death: It is helpful to find time since death or postmortem interval.

The purpose of a fetal autopsy or an autopsy of a neonate has three specific medico-legal objectives: First, to determine the intra-uterine/gestational age of the fetus, ultimately aiming to know whether the fetus was viable or not (to assess the viability of the fetus). Second, if viable, to determine whether it was born alive (live birth) or dead (dead birth/stillbirth).Third, if born alive, to determine the period of survival after birth, the cause, and manner of death.

In case of a body taken out of water, one of the specific medico-legal objectives of conducting autopsy is to find out whether the cause of death was drowning or whether the person died by some other means and then the body was disposed in the water to conceal the crime.

Similar concern is in cases of simulated hanging where perpetrators of a homicide present it as a suicide.

In a building conflagration case, specific medico-legal objectives of conducting autopsy are to determine whether the person died of burns or otherwise (for example fall of masonry while in a building on fire or inhalation of irrespirable gases) and to differentiate ante-mortem burns from postmortem burns. Autopsy finding of the presence of soot particles in the distal airways and autopsy ancillary investigation finding of the presence of carboxyhemoglobin (COHb) in blood do not necessarily prove that the body surface burns are antemortem in nature, but that the victim was alive when the fire was in progress,[7] which is not the same conclusion.

A dead body recovered from a fire may present with cutaneous burns sustained before death or after death or at both times. Continued application of fire to skin after death vs. skin burnt before death usually puzzle the antemortem features of burns and poses a challenge to the forensic pathologist in determining the nature of burns. Such a situation may arise even in air-crash incidents where there is a fire.[8]

Professor Stephen Cordner rightly points- it isn't always straightforward to opine the cause of death in forensic practice. In his words, "Substantial delay between injury and death, non-fatal injury precipitating death in a relatively short time from natural causes, a peculiarity of the victim rendering a survivable injury fatal" are realities often encountered in forensic autopsies.[9] Autopsy surgeons also commonly encounter cases where the pathological evidence of injury or disease are obliterated by advanced postmortem changes and occasionally cases where the opinion regarding the cause of death is entirely dependent on the interpretation of circumstantial

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7 Hirsch CS, Adelson L. Absence of carboxyhemoglobin in flash fire victims. JAMA. 1969 Dec 22;210(12):2279-80

8 Ritesh G. Menezes; Francis N. Monteiro; Forensic Autopsy, StatPearls Publishing LLC. (2020) {https://www.ncbi.nlm.nih.gov/books/NBK539901/ Retrived: September 13, 2020}

9 Cordner SM. Deciding the cause of death after necropsy. Lancet. 1993 Jun 05; 341(8858):1458-60.

evidence.[10] Moreover, they often see cases with multiple competing potential causes of death in autopsy practice.[11]

## C. QUALITIES OF AN AUTOPSY SURGEON/FORENSIC PATHOLOGIST:

The significance of the powers of observation and interpretation of autopsy findings, awareness of different possibilities, and a flexible and open mind, of the autopsy surgeon, is always stressed.[12] The failure to maintain a high standard of care of postmortem examination due to a low level of competency in forensic pathology can lead to mistakes in opinions concluded by the autopsy surgeon causing errors and ultimately injustice.[13] The literature reports forensic autopsy cases with erroneous opinions related to the cause of death, that further emphasizes the requirement of adequate training of the autopsy surgeon.[14]

## D. WHAT SHOULD BE CARED IN AUTOPSY?

In addition to a complete and meticulous dissection of the dead body, care should also be taken to: (a) obtain photographs and video films for future evidential use in the court of law. (b) Retain samples (body viscera and fluids) for chemical/toxicological analysis, histopathological/microscopic examination, and/or other ancillary investigations, (c) Restore autopsied body to the best possible cosmetic condition before handing over to the concerned legal authority, (d) Provide a detailed written postmortem examination report of the autopsy findings, and their inferences concluded based on scientific reasoning.[15] Other ancillary investigations (not an inclusive list) include the examination of: Blood for grouping; viscera and blood for microbiological culture; body fluids for postmortem chemistry (thanatochemistry);[16] vaginal swabs, anal swabs, swabs from bite marks, etc.; stains on the skin or fabric/clothing; and material for DNA typing.

## E. ARTIFACTS:

The autopsy surgeon should be aware of artifacts (resuscitation artifacts, agonal artifacts, and postmortem artifacts) that may be present during an autopsy. A postmortem artifact is regarded as any change produced in the body or any feature introduced into the body, after death, that often leads to much confusion about its nature and causation, and often results in misinterpretation of medico-legally significant ante-mortem findings or is itself wrongly considered as a significant ante-

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10 Cordner SM. Deciding the cause of death after necropsy. Lancet. 1993 Jun 05;341(8858):1458-60.

11 Pollanen MS. Deciding the cause of death after autopsy-revisited. J Clin Forensic Med. 2005 Jun;12(3):113-21.

12 Simpson K. The Investigation of Obscure Deaths. Can Med Assoc J. 1964 Oct 17;91:845-50.

13 Simpson K. The Investigation of Obscure Deaths. Can Med Assoc J. 1964 Oct 17;91:845-50.

14 Banwari M. An erroneous opinion on a cause of death in a forensic autopsy: a case report. Afr Health Sci. 2017 Dec;17(4):1246-1249.

15 Ritesh G. Menezes; Francis N. Monteiro; Forensic Autopsy, StatPearls Publishing LLC. (2020) {https:// www.ncbi.nlm.nih.gov/books/NBK539901/ Retrived: September 13, 2020}

16 For example, evaluation of the potassium levels in the vitreous humor is useful in estimating the time since death during an autopsy in the early postmortem period.

mortem finding.[17] The changes that occur during the agonal period and the injuries introduced during resuscitative measures may also pose interpretative difficulties to the autopsy surgeon.[18]

## F. TYPES OF AUTOPSY:

Autopsy is called 'Negative Autopsy' if no positive finding could be found regarding cause of death despite gross, microscopic, toxicological, and other necessary ancillary investigations.

Autopsy is called 'Obscure Autopsy' if it fails to serve the purpose of ascertaining the cause of death, despite the presence of trivial/unclear/obscure findings. An ill-informed opinion often turns out to be worse than no opinion at all. Absent an opinion, the legal authority investigating the death will be at least aware of the lacunae in his/her evidence/investigation, rather than deceived by the speculative or orchestrated statements made by the autopsy surgeon/forensic pathologist.

In general, a negative or obscure autopsy is one where the cause of death remains unascertained despite a complete, meticulous autopsy including ancillary laboratory tests. Such autopsies where the cause of death remains undermined despite a meticulous work-up of the cases are not uncommon in forensic practice.19 With advanced laboratory investigation techniques, the cause of death in otherwise obscure autopsies is determined.20 Nevertheless, forensic autopsies may conclude as either negative or obscure even in recent times.

An autopsy is called ' second autopsy' if it is the one that follows the first autopsy on the same body. Some of the circumstances for a second autopsy include a repatriated body and exhumation of a previously autopsied body.[21] Second autopsy is usual in society where there is tradition of corpse burial as funeral culture, unlike cremation adopted widely in Nepal.

## G. DEATH AND AUTOPSY

General understanding of death refers cessation of life from human being. This general understanding does not confer precise implementation of law. Death of a person is important in law because criminal liability and other constitutional, civil and legal rights and duties of person cease to exist after his or death. Accordingly, legal issues such as cremation, transfer of heirship, inheritance etc. come to surface after death of a person. Medical science classifies death of person in different categories because different organs of the body die at different point of time. Advancement in successful

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17 Kanchan T, Menezes RG, Manipady S. Haemorrhoids leading to post-mortem bleeding artefact. J Clin Forensic Med. 2006 Jul;13(5):277-9.

18 Edston E. Evaluation of agonal artifacts in the myocardium using a combination of histological stains and immunohisto chemistry. Am J Forensic Med Pathol. 1997 Jun;18(2):163-7. [Also: Ram P, Menezes RG, Sirinvaravong N, Luis SA, Hussain SA, Madadin M, Lasrado S, Eiger G. Breaking your heart-A review on CPR-related injuries. Am J Emerg Med. 2018 May;36(5):838-842.]

19 Knight B. The obscure autopsy. Forensic Sci. Int. 1980 Nov-Dec;16(3):237-40.

20 Lowe JW. The obscure autopsy and neuroleptic malignant syndrome. Med Sci Law. 1997 Jan;37(1):79-81.

21 Williams EJ, Davison A. Autopsy findings in bodies repatriated to the UK. Med Sci Law. 2014 Jul;54(3):139-50.

practice of human organ transplantation has added new gamut in medical science. Human organ, which is not damaged and has not died naturally, could be transplanted to another needy human being. Therefore, extraction of living organs and tissue from dead person requires exact fixation of time of death of person for the purpose of organ transplantation. Application of artificial devices to keep person alive is another important factor contributing to realize this realm of medical science as beneficiary to humankind.

Law requires more than cessation of three primary functions i.e. respiratory, sensation and pulsation, to declare a person as dead. Person may stop respiration for some moment voluntarily. Cessation of sensation of particular body organ may not lead the person to death, immediately. Irreversible cessation of these three systems of the living person in required. However, brain may die earlier than respiratory function. Thus, it is disputable question that when a person dies exactly- either brain death or after complete cessation of three primary functions of the body.

Definitions of death provided in medical literatures are relevant discussing:

a) "Death is an irreversible cessation of life and is classified as somatic and molecular. A 'deceased person' means a person in whom permanent disappearance of all the evidence of life occurs, due to a brain-stem death or in cardio-pulmonary sense, at any time, after live birth has taken place."[22]Modi has focused on permanent cessation of life meaning that a person shall not be considered as dead until there is fair possibility of reverse of life to a human body. The definition of Modi has clearly excluded death of stillbirth child. Further, he says that brain stem death or cessation of cardio-pulmonary sense leads permanent disappearance of life from a person. He took brain stem death as a step to lead permanent death of a person.

b) "Death is permanent and irreversible cessation of functions of the three interlinked vital systems of the body (the tripod of life), namely, the nervous, circulatory and respiratory system."[23]Nandy has provided this meaning of death as convenient to cover medico legal criteria of death. He proposed this view with a presumption that the microscopic classification of death of different organs of the body is useful to carry out necessary function required for organ transplantation and research of medical science. The permanent cessation of three primary functions of human body provides strong presumption that the person never awake again. His approach might undermine the role to be played by brain stem death in further process of death. However, he did not forget that brain stem death and categorization of death of different organs and tissue is important in medical science. This purposefully serves the humankind by prolonging life of other person through transplantation of fresh, healthy organ of dying person to needy person.

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22 P. Jaising Modi, Modi's Medical Jurisprudence and Toxicology 207 (B V Subramanyameds, 22nd ed. 1999).
23 Apurba Nandy, Principles of Forensic Science 134 (2nd ed. 2003).

c) Dr. K.S. Narayan Reddy has attempted to provide precise medico social practice in understanding of death. He viewed that death is the complete and irreversible stoppage of the circulation, respiration and brain functions, but there is no legal definition of death. Historically, the concept of death was that of 'heart and respiration death', i.e. stoppage of spontaneous heart and breathing functions. Heart-lungs bypass machines, mechanical respirators, and other devices, however have changed this medically in favour of new concept "brain death", that is irreversible loss of cerebral function.[24] Dr. Reddy has provided the glimpse of changing perception regarding death with advancement of medical science.

d) "A person is dead if the brain has stopped functioning. Brain death is ascertained by absence of functions of brainstem (Midbrain, Pons and Medulla)."[25] Sharma has simplified the meaning of death by providing criteria for death i.e. stoppage of brain functioning.

Observation of abovementioned definitions given by the eminent medico legal scholars has lead us to know that understanding of death of a person has been changed along with advancement in medical technologies and medical practices. Determination of death of a human being only through cessation of respiration, pulsation and sensation may not lead us in clear demarcation of existence of life and death. In this scenario, brain stem death has been getting valuable position in medical science. Therefore, it is convenient to understand death of a human being as brain death along with permanent cessation of three primary functions of the body i.e. respiration, pulsation and sensation. It is noteworthy that death occurs in living person after birth not in stillbirth case. There is no meaning of life in stillbirth because neither the brain nor other primary functions of stillbirth plays any role here.

Though it can be summarized that the process of death could be initiated through failure of three vital systems of body- (a) nervous system, (b) respiratory system, (c) circulatory system; the ultimate and modern definition for death lies on 'brain death'. Nepalese law[26] defines 'brain death' as: "*irreversible loss of the receptive and responsive activity of brain due to death of brain stem.*" The Act has defined brain stem as Midbrain, Pons and Medulla Oblongata connecting cerebrum and spinal cord at subsequent clarification.

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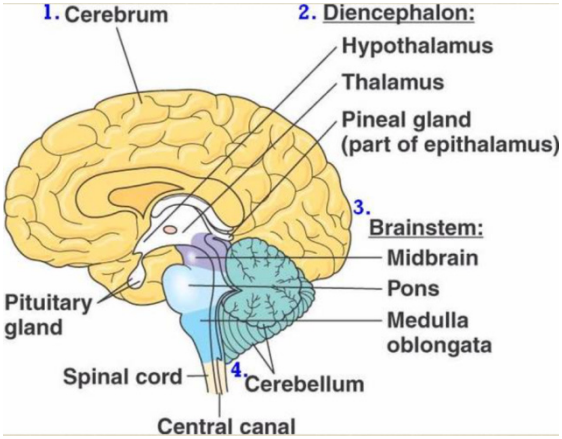
[24] Dr. K.S. Narayan Reddy, The Essentials of Forensic Science and Toxicology 112 (21st ed. 2002).
[25] Prof. R.K. Sharma, Fundamentals of Forensic Science and Toxicology (Medical Jurisprudence) 64.
[26] Human Organs Transplantation (Regulation and Prohibition) Act, 2055, sec 2(a1) (including first amendment on 2072/11/13).




**Human Brain Anatomy**[27]

## H. DECLARATION & CERTIFICATION OF DEATHS

Doctor or medical expert is expected to issue true, verified and genuine medico-legal reports, certificates and statements in their professional capacity. Taking gratuity, commissions, bonuses to issue fraudulent and misleading declarations or certifications, including negligent certification are gross professional misconducts that attract serious liability both under existing statute and Code of ethics for medical professionals.

Organ transplantation law of Nepal has also provisions relating to examination, declaration and certification of brain death.[28] It has mentioned the provisions relating to examination of brain death and declaration of death of patient. It directs a doctor to conduct preliminary health examination of the patient and determine whether his/her brain stem is permanently loosed along with presence of certain conditions on patient: (i) Irreversible loss; (ii) No reaction in stem of the mind; and (iii) There is absence of natural respiration on the body of patient.

When a preliminary test result affirms to death then the patient should be retested in order to ascertain brain death. If second health examination of the patient confirms brain death then doctor should declare the death of the patient. The time for death of the patient is to be deemed after doctor's declaration of death. Brain death related examination of the patient is required to be conducted by the group of qualified doctors comprising a doctors involved in treatment of the patient including at least one anesthesiologist or intensivist.

A medical doctor declares a person is dead after medical examination. The doctor could estimate the time since dead of deceased after physical examination. Medical doctors, board of medical doctor issues death certificate to a person after examination and finding no recovery of life is possible in future. The medical examiner should take

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27 https://cnsresource.weebly.com/regions-and-organization.html
28 Human Organs Transplantation (Regulation and Prohibition) Act, 2055, Chapter 3A

numbers of factor in consideration before declaring a patient is dead. Before certifying, he must satisfy himself that the respiratory, circulation and nervous systems have ceased permanently and irreversibly. Development of artificial machinery for prolonging respiratory system of the patient has directed the medical examiner to take other necessary inspection to assure himself that dying process of the patient is completed or rigor mortis has already begin. Accordingly, position and loss of receptive and responsive activity of brain stem should be taken into consideration. Further, beginning of cooling process and staining will provide strong basis for declaring a person dead.

Nepalese law fails to clearly specify what exact liability should a forensic autopsy expert or a medical doctor conducting autopsy has to face in case of: (a) negligent autopsy report, (ii) reckless autopsy report, and (c) deliberately issuing false autopsy report taking unlawful financial benefit. Though existing NMC code of ethics broadly prohibits gratuity and commissions in 'doctor-patient relationship' in course of treatment, it is silent in case of 'autopsy examiner-dead body relationship. Issuing false report intentionally, negligently, and recklessly are yet to be criminalized. This legal vacuum can be addressed by amending chapter-4 (offences against public justice) in *Muluki* Criminal Code, 2074 B.S.

The current NMC Code of Ethics and Professional Conduct for Doctors, 2017 is too vague as it on one hand duty-bounds medical practitioners to issue only true and verified reports and certificates but on other hand simply says such actions are liable for disciplinary action. What exact disciplinary action is not clarified in its text rather this has been left to the discretion of council authorities.[29]

There is a need to enlist ethical violations & malpractices along with liabilities attached to each, clearly for a medical expert or doctor who commit such specified ethical violations in course of professional service delivery. The current NMC Code of Ethics and Professional Conduct for Doctors, 2017 is too vague[30] as it handover blank cheque to the Ethical Committee to reward with soft action against complaint over members of professional fraternity by abusing discretion. This uncertainty in Code of ethics is a fertile ground for doctors to use political influence and other power for escaping liability, risking politically neutral and genuine doctors who are under the target of so called medical mafia.

Negligent reporting by pathology labs in case of diagnostic tests is regulated under Section 238 of the *Muluki* Criminal Code, 2074 B.S. which criminalizes issuing false or wrong or altered laboratory's pathological test reports related to human blood, urine, spit and so on as an offence punishable with up to 3 years imprisonment and up to fine

[29] It simply states in Code No. 9 that "According to the seriousness of the violation of Code of Medical Ethics, medical practitioners shall receive punishment ranging from a notice of attention, warning, probation (not to be allowed to work independently/should work under supervision), suspension and/or permanent removal from Council's registration.

[30] It simply states in Code No. 12 that "Nepal Medical Council holds right to erase the name of medical practitioners depending upon the gravity and frequency of the violation of code of ethics or medical negligence…". The similar ambiguity and loophole existed in previous Code- NMC Code of Ethics for doctors, 2002 as well.

of Rs 30,000/- If on the basis of such report, any person dies or suffers grievous hurt as a result of: (a) consumption of drugs prescribed based on such report, or (b) surgery committed based on such report, or (c) treatment performed based on such report; the report giver is liable for murder or grievous hurt respectively as well as obliged to compensate victim (or heir if death) for loss.

It is necessary to inject the sense of justice in the minds of experts that the small holes and errors made by them during investigation and providing opinion may lead to gross injustice. Here is one critical issue to be confirmed and alert. Any expert if found intentionally giving false or misleading opinion to the court must be taken serious action by the concerned accountable institution. For example, if a doctor is by due process of law proved to have given false opinion to the court intentionally then the Medical Council Nepal has to take immediate action against such so-called expert such as disqualifying the expert from medical profession throughout the life. Thus only those who can remain highly ethical can be experts and not simply by holding academic degrees or under blessings of power centre.

A classical example[31] of medical negligence in regard to post mortem examination is worth mentioning. A section of the post mortem report of a beheaded body prepared a few years back by a doctor of a hospital in a Terai district of Janakpur zone read like this:

Condition of eyes - open
Condition of pupils - dilated
Condition of mouth - open
Condition of tongue - not protruded and bitten by teeth and saliva dribbling from the angle of the mouth.

The doctor had performed the ritual of filling the format of post mortem report without bothering to have even a look at the dead body which was without head. Such an attitude needs to be condemned ought-right as an instance of culpable professional irresponsibility. Similarly this case[32] is also an example of expert's gross malpractice (intentional, by mistake or by negligence) which is to be condemned by court and Nepal Medical Council.

Another case example[33] of false certification by doctor that was held medical negligence by District Compensation Committee (DCC) is worth discussing. In this case, plaintiff (P) went to Israel after she was certified medically healthy and fit for foreign employment by defendant doctor (D1) in Nepal International Clinic Pvt. Ltd (D2). She was re-examined medically in Israel where P was declared unfit for work because of asthma and had to return Nepal. DCC on awarded Rs 6 Lakhs (3 lakhs from D1 and 3 lakhs from D2) as compensation for negligence due to error in diagnosis. However, from appeal, the case file was forwarded back to re-decide by quashing the

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31 Hari Bansh Tripathi, 'Forensic Science and Admissibility of Scientific Evidence: Practice and Expectations' (1998) p.7
32 Bijaya Lodhetal. V. H.M.G. N.K.P. 2040 B.S.; p. 739.
33 Kiran Basnet v. Dr. Buddha Basnet; DCC Kathmandu; DD: 2009/05/28.

decision[34]. The court pointed- in a small country like Nepal and even smaller medical professionals' community, the likelihood of not giving fair expert opinion to jeopardize the another doctor remains higher and it becomes duty of justice providers to see two aspects while making decision: a) warn experts about the personal liability for giving wrong opinion, and b) evaluate the medical standards, protocols and Guidelines to determine if there was negligence in treatment or not.

As the report of a Forensic Scientist may affect the life, liberty or reputation of a citizen, he must conduct the laboratory examination as minutely, thoroughly and objectively as possible so as to be certain that the finding will ascertain the truth, irrespective of the fact whether it favors the prosecution or the defense. As Justice Humphrey has said, an expert must always remember that he is not a witness of the prosecution nor for the defense but essentially of the court.

## I. TYPES OF DEATH FOR MEDICO-LEGAL AUTOPSY

Medical science has classified death into different types. It can be classified on the basis of nature or manner of death and the process of death of different organs of body. Medical practitioner has trend to classify death[35] as somatic and molecular for the pure purpose of medical science.

a. Somatic death: Permanent cessation of three primary functions of body i.e. respiration, pulsation and sensation in known as somatic death. Somatic death leads stoppage of blood circulation system inside the body. This type of death is also known as clinical or systemic death. Somatic Death refers to the death of the tissue, system or body and is clinical death, as a whole. It coincides with the death of the brain stem. Diagnosis of Somatic Death involves: 1. Permanent and complete cessation of function of brain---flat E.E.G 2. Permanent and complete cessation of function of heart---flat E.C.G 3. Permanent and complete cessation of function of the lungs---negative Winslow‟s Test, Mirror Test, Feather Test etc.

b. Molecular death: The somatic death of a person leads to molecular death. Human body is an integral part of different organs formed through tissues and cells. Stoppage of oxygen supply leads absence of oxygen to these cells and death starts from cellular level. Therefore, death of individual cell is known as molecular death. In absence of oxygen supply to body, cells begin to die and the timing for cell death is different in accordance to the location of cells in body parts. For instance, cells present in brain of the person die first, after stoppage of oxygen supply to them. Molecular Death is the death of all individual cells within the body. It follows 2-3 hrs after somatic death. Diagnosis of Molecular

[34] The decision of DCC was quashed on following grounds: (a) Violation of the principle of "one cannot be judge in one's own case" because one of the complainants had filed the case to DCC on behalf of DCC and Decision of DCC was made in the presence and involvement of a member of DCC. (b) On which factual basis and evidential basis had DCC made such decision is not reflected in its decision and hence a reasoned decision is required.

[35] Dr. Ranjeeta Singh Deo and Prafulla; Death and Its Medico-Legal Aspects, wjpmr, 2018,4(4), 127 -131 (https://www.wjpmr.com/download/article/33032018/1522479038.pdf)

Death 1. Muscle does not respond to strong stimuli. 2. Pupil does not respond to stimuli and drug. 3. It is associated with early and late sign of death. Medico-Legal Aspect of Stages of Death From legal aspect 1. A person is dead when somatic death has occurred hence a death certificate can be issued for the disposal of the body. 2. The organs for transplantation must be removed from the deceased before the onset of molecular death (Supravita period): Liver-within 15 mins, kidney-within 45 mins, heart-within 1 hr, and cornea-within 3 hrs.

Besides this pure medical classification, death could be classified in accordance with the manner of death.Natural death is more common and do not generate any criminal suspicion. Major cause of unnatural death occurs due to asphyxia. Hanging, drowning, poisoning, severe blood hemorrhage, strangulation, injury, electrocution etc. are other causes or manners of death.

Highlighting importance of autopsy, and differentiating dead body examination inventory (*laasprakirtimuchulka*) with autopsy, Supreme Court in *Ashwin Kumar Sthapit* case,[36] laid- "Numerous injuries and scars that cannot normally be visible through ordinary external observation, can be detected through autopsy. This is because, autopsy involves minute expert examination of all external and internal parts of corpse as a special study and research based examination, capable of discovering all ante-mortem and post-mortem signs. Simply because minute findings detected by autopsy were not identified during dead body examination inventory, does not mean these two evidences contradict with each other." *Laasprakirtimuchulka*involves only the picturization of normal external observation by non experts.

Where there is absence of direct eyewitness in any criminal offence, autopsy findings are strong and reliable evidences, if corroborated with other circumstantial evidence. This way, autopsy in crimes of suspicious death, is important to prevent impunity.

## J. LEGAL PROVISIONS & PROCEDURE FOR AUTOPSY EXAMINATION IN NEPAL

According to Dr. A. Jay Chapman, autopsy is not simply the removal and dissection of the organs of the body but it also includes all the additional testing and studies that may be necessary to reach a final conclusion concerning the death. This view indicates, dissection of body is just a party of autopsy. The autopsy examiner should conduct additional testing of body tissues or viscera in order to find out the clear results. Mere dissection of organs is not an essential aim of autopsy. Thus, an experienced autopsy practitioner may provide valuable direction to lead the test for finding exact cause of crime. However, some specific guidelines could be appropriate to any forensic medicine practitioner to focus attention on specific area and examination of which could provide cause of death.

[36] GoN v. Ashwin Kumar Sthapit; Homicide, NKP 2066, V 2, FB, D.N. 8069.

Autopsy of entire body and organs is very lengthy. A minor mistake or negligence during post mortem examination by autopsy practitioner could lead to loss of vital evidence related to death or alleged offence. Different body organs may have vital evidence depending upon the nature of offence or death. This means, which particular organ to focus attention for discovering substantial evidence differs from one case to another. For instance, in hanging, examination of neck is more important than other body parts. Accordingly, examination of viscera is more important in case of poisoning. This rule of autopsy enables examiner to stay focus examination on presence or absence of relevant evidential clue and minutely observe important body organs.

In *Devi Prasad Adhikari*case,[37] Supreme Court of Nepal held- once an individual comes with First Information Report (FIR), it is the duty of Police Office to register the FIR, collect evidences, prepare inventory *(muchulka)*, send the dead body for autopsy examination, and to do all necessary duties required for investigation.

*Muluki* Criminal Procedure Code, 2074 B.S. in section 20 duty bounds investigating authority to send corpse for autopsy to a government medical doctor or to an expert designated in that behalf by the Government of Nepal or a licensed medical doctor, at government expenses, has been introduced in Section 20. What matters are to be investigated during autopsy are legally stipulated in format of Autopsy Report provided in Schedule-15 of *Muluki* Criminal Procedure Code, 2074 B.S. If autopsy could not be possible due to decay, investigator has to execute a deed setting out that matter in the presence of local distinguished persons. But, if, in spite of corpse being decayed, there is possibility to find cause of death by any other scientific examination, it is to be performed. Post mortem could also be conducted by a team of experts in order to find out cause of death. Previously, laws before the Code had neither the provision for such scientific examination in case of decayed corpse nor law was clear about whether even team of experts could be involved in such examination.

It is a general rule that an autopsy must be done by a medical doctor or a well experienced and trained person authorized to do. A doctor should not delegate authority or allow conducting autopsy to assistants, nurses, medical interns or practicing students.

## K. RULES REGARDING AUTOPSY

The rules and procedures regarding autopsy examination are intended to avoid any possibility of loss of vital evidence relating to the death due to numerous factors including mistake or poor skill of examiner. The autopsy must be complete and thorough. All body cavities should be opened because evidence may be found in more than one organ. A complete autopsy is necessary to substantiate the truth of eyewitness. A poor autopsy is more dangerous than no autopsy at all because it is likely to cause injustice. Besides, the rules of legal autopsy could be seen as follows:

[37] Devi Prasad Adhikari v. District Police Office Jhapa et.al. 2071 D.N. 9216)

a) The autopsy should be conducted in a mortuary (department of hospital where dead bodies are kept) and never in a private room as far as possible.
b) The medical officer should first read the inquest report (case history prepared by police) carefully and carry out the examination so that attention can easily be focused on significant issues of exploration such as- hanging, drowning, medical negligence, toxicology, microbiology, virology, radiology etc. Lack of such information may result in loss or underestimation or non-recording of vital evidence.
c) The examination should be conducted in day light as far as possible, because colour changes, such as jaundice, changes in bruises, changes in post mortem staining etc. cannot be appreciated in artificial light.
d) Name of those who identify the body must be recorded. In unidentified bodies, the marks of identification, photographs and fingerprints should be taken.
e) No unauthorized person should be present while autopsy except the investigating police officer.
f) As the autopsy is conducted, details of examination should be noted verbatim (exactly as spoken or written) by assistant.
g) If it is required to collect and preserve any tissue, part of body organs or viscera of the deceased for additional investigation or examination, such should be collected and mentioned properly.
h) Even if the body is decomposed, autopsy should be performed as certain important lesions (wounds or harmful changes in tissue or body organs caused by injury or disease) or evidences may still be found.
i) The doctor after completing all formalities and filling up of the report must send it back to the police station within 24 hours, excluding travel time.

   Forensic pathologist Dr. Stephen J. Cina says that autopsies are best if performed within 24 hours of death, before organs deteriorate, and ideally before embalming, which can interfere with toxicology and blood cultures. But autopsies performed on decomposed or even exhumed bodies can still provide vital new information, depending on the extent of decomposition. Autopsies usually take two to four hours to perform. Preliminary results can be released within 24 hours, but the full results of an autopsy may take up to six weeks to prepare.[38]

j) The detail guidelines and procedures provided in Schedule 15 of the *Muluki* Criminal Procedure Code, 2074 B.S. is to be complied strictly while conducting autopsy by an expert.

## L. External & Internal Examination of Dead Body

Autopsy examination is the final service that a medical practitioner can render to a patient. Purpose of it is not just to establish medical diagnosis but also to provide facts

[38] https://www.pbs.org/wgbh/pages/frontline/post-mortem/things-to-know/autopsy-101.html(Retrieved: September 17, 2020)

in the service of judicial process and the public interest. Law has attempted to guide a medical practitioner in autopsy by providing the list of examination that needs to be performed in order to help establish cause of death, manner of death, time of death, and connect the victim with criminal.

The law provides chain of custody should be maintained in entire procedure of autopsy such as from the time of sending the corpus to the hospital to return of corpus either to family members or police office. Law requires both external and internal examination of corpus during autopsy.[39]

### 1. External examination:

External examination is carried out upon discovery of a corpse. It is also known as general observation of the dead body. In this examination, the body should be checked for visible signs of injury and those injuries that are most likely to have caused afterwards. The skin and surface of the body is examined for any irregular signs, scars or lesions and these are noted. As per Nepalese law, following things have to be examined and recorded minutely under external examination:[40]

a. Height
b. Weight
c. Physique
d. Hairs
e. Clothes and conditions
f. Post mortem changes present
    i. Rigor mortis
    ii. Livor mortis
    iii. Algor mortis /cooling
    iv. Different signs of decomposition
    g. Natural orifices (condition of eyes, mouth, vagina / penis, nose, ears, anus and urethra)
    h. Injuries along with their name, size and site (Ante mortem/ post mortem/old/fresh).

### 2. Internal examination

Internal examination is the description of each organ system inside the body. All body cavities should be opened and examined in internal examination of corpse. Viscera may be stored especially for toxicology examination. In Nepal, the schedule provides following things are to be examined under internal examination:[41]

1. Head and neck:
    - Scalp, skull
    - Brain and vessels

[39] Schedule 15 of Muluki Criminal Procedure Code, 2074 B.S.
[40] Ibid.
[41] Id.

- Orbital, nasal and aural cavities
- Mouth, tongue
- Neck (larynx, thyroid, and other neck structures
- Other relevant details

2. Chest (Thorax)
   - Ribs and chest wall
   - Diaphragm
   - Oesophagus
   - Trachea and bronchi
   - Pleural cavities
   - Lungs
   - Heart and pericardial sac (any content pericardial sac, condition of three coronary arteries, valves and chambers and myocardium must be observed)
3. Abdomen
   - Peritoneal and pelvic cavity
   - Stomach and content
   - Small intestine
   - Large intestine
   - Liver, gall bladder, pancreas
   - Spleen
   - Kidney, renal pelvis
   - Genital organs
   - Urinary bladder and urethra
4. Spinal column
5. Specimen collected for Analysis (Mention preservative also)
6. Toxicology
   - Stomach with contents
   - Part of liver
   - Kidney
   - Blood
   - Others, if any

Besides external and internal examination, the format requires to conduct 'Special Examination'. It deals with- procedures like neck dissection, pelvis dissection, floating test of lungs etc. must be done in relevant cases and findings should be documented. Likewise, what items were handed to whom and when need to be recorded in case of: (a) Autopsy report, (b) Viscera and other samples, (c) clothes and other articles. Opinion on Cause of death, both in Nepali and English is to be mentioned. Opinion on time since death is to be mentioned. Opinion on probable type of objects or weapon causing injuries is to be mentioned. Opinion on live birth or still birth is to be provided. Other opinion, if any is also to be mentioned. Signature of three medical experts along with their Special Qualification, training & experience; date; name; NMC Reg. No.; and hospital seal are to be mentioned and affixed in the report. Autopsy is to be

conducted by expert of forensic subject as far as possible or by trained physician. Report has to be prepared by examining expert or physician. The report is to be prepared in computer typed format as far as possible or in clearly understandable manner.

## Medico Legal Importance of External and Internal Examination of Dead Body

In absence of autopsy, the exact cause of death becomes only speculative (i.e. based only upon the testimony of eyewitness and not other evidences) or subjective and less reliable whereas autopsy examination gives objective evidence. The corpse is a silent witness who never lies.

Importance of autopsy has been expressed by Supreme Court in *Mankumari Nepali* case[42] where it laid- "The greatest evidence in homicide offence is dead body itself because its autopsy helps to identify ante-mortem injuries and post-mortem injuries and conclude about cause of death scientifically. In absence of dead body, court cannot convict defendant simply on the basis of assumption or hearsay evidence. Dead body may not be available in cases like thrown into flowing river or burnt down to ashes. Even in such cases, it is the onus of prosecutor to establish death by proof of evidence. Release of 9 offenders is tolerable but the purpose of justice gets defeated if even a single innocent gets convicted. Investigator and prosecutor should know that mere confession unsupported by independent evidence caries no evidential value. If court convicts defendant for homicide simply on the basis of FIR and allegation just because someone disappeared, but the person returns later, overall justice will get contaminated (*kalankit*)."

Supreme Court in *Min Bahadur Darji* case[43] held "Dead body examination by an expert and expert opinion provided thereupon carries evidential weightage. Presence of *mensrea* is not to be ascertained under assumption, suspicion, and possibility; but has to be seen clearly by evidences, and to show it is the onus of plaintiff."

## Estimation of Time of Death

Time of death is estimated during autopsy by observing post mortem changes in dead body. It helps in reasonable fixation of exact time of death through examination of post mortem changes. Post mortem changes that occur after death can be classified as follows: (1) Algor mortis, (2) Livor mortis, (3) Rigor mortis, (4) Decomposition, (5) Adipocere, and (6) Mummification.

### 1. Algor Mortis (Cooling of the body)

The normal body temperature varies from 36-37.2 0 C. Normal rectal temperature is typically 0.27° to 0.38°C (0.5° to 0.7°F) greater than oral temperature.[44]When a person

[42] GoN v. Mankumari Nepali; Homicide, NKP 2068, V 12, DB, D.N. 8726
[43] GoN v. Min Bahadur Darji 2065 D.N. 7928
[44] https://www.ncbi.nlm.nih.gov/books/NBK331/

dies his normal body temperature begins to fall down until reaches equivalent to temperature of surrounding environment. Cessation of energy production and heat results in fall of body temperature. Temperature of surrounding environment differs with environment and ecology. It does not occur at the same time throughout the body. The body cools rapidly on the surface and slowly in the interior in about 30 minutes to one hour after the death, the rectal temperature falls little or not at all.

The cooling rate is relatively uniform as per the temperature of air. Body heat is lost by conduction, convection, radiation or evaporation. The speed of reduction of temperature depends on several factors like amount of cloth in body, nature of environment (ice/water/morning/mid-day/winter/summer). Thus, it is estimation and not determination. Rectal temperature is measured with the help of thermometer. Estimation of time of death is important to frame defense of alibi as well. The reading should be made at intervals in order to obtain the rate of fall of temperature. The rough idea of approximate time in hours of death is obtained by formula.[45] Number of hours after death = "(normal temp.) 98.4°F' - rectal temp.at time of examination"; divided by "the generalised rate of temperature fall per hour."

**Features affecting rate of cooling:**

- Difference in temperature between body and medium.
- Fat is bad conductor of heat. Fat body cools slowly and lean body cools rapidly.
- Body kept in well-ventilated room cools rapidly than one kept in closed room.
- Body buried in earth cools rapidly than those in air, but cools more slowly than those in water.
- Clothed body, as clothes are bad conductor of heat, cools slowly than nude dead body.
- The rectal temperature of an average sized naked body reaches that of environment in 20 hours. If the body is exposed to a source of heat for a few hours shortly after death, its temperature will rise.
- A body in zero weather may undergo freeze and become stony hard due to formation of ice in cavities and blood vessels. The ice inside skull may expand and cause separation of sutures.

## 2. Livor Mortis (Post Mortem Lividity)

Post Mortem, lividity refers the process of collection and fixation of blood at the lower side of body. After death, a person's blood circulation stops and is coagulated (settled) in lower part of body due to gravity of earth. It is caused by stoppage of circulation and the stagnation of blood in blood vessels and its tendency to sink by force of gravity. Sink of blood from these vessels produce a bluish purple color to the adjacent skin. The blood of upper portion of body drains and becomes pale. Post mortem lividity begins shortly after death, but it may not be visible till for about half to one hour in normal

[45] G. S. W. De Saram, G. Webster, N. Kathirgamatamby; Post-Mortem Temperature and the Time of Death, Journal of Criminal Law and Criminology, V 46, I 4, No. 12 (https://scholarlycommons.law.northwestern.edu /cgi/viewcontent.cgi?article=4412&context=jclcRetrived: Sept.16, 2020)

individual, and for one to four hours for anaemic person. It is usually well developed within four hours and reaches a maximum between six to twelve hours. It is present in all bodies but is more clearly seen in bodies of fair skinny people than in those of dark. Distribution of clot depends on the position of the body. In a body lying on back, it first appears in the neck and spreads over the entire back with the exception of the parts directly pressed on. When coagulation or accumulation in capillaries takes place, the stains become permanent and this is known as fixation of post mortem stains.

Livor mortis starts to form after 1 hour of death and is completed within 5-6 hours. Then, hard blood clot is formed within next 5-6 hours and thus, after this time, the position of livor mortis remains permanent and unchanged even if dead body's position is moved elsewhere. The colour of post mortem lividity is purple (bluish/reddish) and more clearly visible in white skin body.

The hypostatic areas have distinct color in certain cases of poisoning:[46] (a) Cherry-red in case of carbon monoxide poisoning, (b) Bright red in case of hydrocyanic acid poisoning and sometimes in burn, (c) Red brown or brown in case of poisoning by Nitrites, potassium chlorate, potassium bicarbonate, Nitrobenzene and aniline, and (d) Dark brown in case of poisoning by phosphorus.

There are some factors influencing the formation of post mortem lividity. They are as follows:

a) Post mortem lividity requires fixed, undisturbed position of dead body for same hours after death. With frequent changes in the position of body, coagulation could not be formed or its volume may be distributed.
b) In case of serious laceration, blood hemorrhage due to incised wound or injury, body lacks blood due to drain out. It may impair the process of formation of post mortem staining.
c) It may not be prominently seen in deceased having dark skin colour.
d) It would find in well-formed condition in case of death due to asphyxia.
e) Generally, staining is well formed on front and side of the neck.

**Medico Legal Importance**

- It is a clear sign of death.
- The extent of coagulation helps in estimating the time of death. Formation of staining, size, its extension and fixation conveys time since death.
- It indicates the posture of body at the time of death.
- It may indicate moving of body to another position, sometimes after death.
- The colour of bloodstain may indicate the cause of death in case of poisoning.

## 3. Rigor Mortis (stiffening of dead body)

It is a state of stiffening or hardening of body muscles with slight shortening of the fibers after death. Voluntary muscles consist of long fibers made up of two proteins i.e.

[46] http://glennhefley.blogspot.com/2015/05/forensic-blunders-001-bleeding-corpse.html

Actin and Myosin. During life, the separation of actin and myosin filaments and the energy needed for contract depend on Adinosine Triphosphate (ATP), which is responsible for elasticity and plasticity (alteration) of the muscles. After death, the ATP is progressively and irreversibly destroyed forming Lactic Acids. When Lactic Acids concentration reaches a level of 0.3%, muscles go into an irreversible state of hardness known as rigor mortis.[47]

At first it appears in involuntary muscles, the myocardium (heart) becomes rigid in one hour of death. It begins in the eye lids, lower jaw and neck, and passes upward to the muscles of the face and downwards to the muscles of the chest, upper limbs, abdomen, lower limbs and lastly to the finger and toes.

Rigor mortis is a physio-chemical process, which after development, the whole body is stiffened and the whole body become shorter and harder. Post mortem emission of semen may occur agonally (in extreme pain) or later due to rigor mortis in the dartus (muscles in the scrotum). Fetus may get expelled in pregnant woman's death due to contraction of uterus muscles followed by rigor mortis.

In hot areas, usually rigor mortis lasts 24-48 hours in winter and 18 to 36 hours in summer, it lasts for 2-3 days in temperate regions. These times are variable because of many extrinsic and intrinsic factors such as age, nature of death, muscular state, atmospheric conditions etc.

Stiffening of a body occurs due to contraction of Actin and Myosin muscles i.e. due to formation of ATP (Adenosine Tri Phosphate). Rigor mortis starts from jaws and then gradually shifts to neck to thorax (chest) to abdomen to legs.

The rigor mortis shows some features. They are as follows:

a) Rigor mortis constricts heart muscles at first. The heart muscles become rigid and heart chambers become empty.
b) Pupils are constricted.
c) Post mortem ejaculation of seminal fluid in male would be occurred,
d) Rarely, if the uterus is in labour at the time of death, the rigor mortis may cause the uterus to contract and expel the fetus.
e) Rigor mortis is not formed in a child who is below 7 months.
f) It develops fast in thin person than fat person.

**Medico Legal Importance**

- It is a sign of death.
- Its extent helps in estimating the time of death.
- It indicates the position of body at the time of death.

## Difference between Rigor Mortis and Cadaveric Spasm

Cadaveric spasm is also known as instantaneous rigor or instantaneous rigidity. Generally, it refers the condition of cadaver in which the muscles of body remain in

[47] Apurba Nandy, Principles of Forensic Medicine Including Toxicology, 256.

continued condition of contraction, which occur suddenly and just immediately before death. The position of the body before the death will not be changed and the body does not pass through general relaxation process. Muscles are in position of contraction of cadaveric spasm in which one group of muscles in body involve. This sort of hardness due to contraction of body prevents its normal relaxation and often it makes confusion with rigor mortis.

This occurs in cases where death has occurred at the time when the body was in great muscular exertion and mental excitement. It is common in situations such as that in the battle field, drowning, strangulation, suicide, etc. The exact reason of cadaveric spasm is not known but excess neuronal discharge into particular group of muscles before death is cited as one of the reasons. Medico-legally, cadaveric spasm has great values as presence of weapon, hair, weeds, pieces of clothes, etc. found grasped in hands may indicate towards the cause of death. Cadaveric spasm is an ante-mortem phenomenon and cannot be created after death. Weapon held in a hand where cadaveric spasm is present can be removed only with great difficulty.[48]

Cadaveric spasm could reflect the torture or extreme suffered by the deceased before victim. It is an ante-mortem phenomena that begins at the time of death and continues after death. Presence of cadaveric spasm helps to figure out the last act done by the deceased, cause of death and manner of death. For instance a body recovered from lake could grip some grass, flora, mud etc in clinched palm. This fact helps to deduce that the deceased was alive before being thrown into or before jumping in the lake and had struggled to save his life. It is a clear sign of death caused by drowning.

Differences in between rigor mortis and cadaveric spasm are as follows:

| **Basis** | **Rigor Mortis** | **Cadaveric Spasm** |
|---|---|---|
| Beginning | Starts from few hours of death | Instantaneous with death (ante mortem) |
| Involvement of muscles | Both Voluntary and involuntary Muscle. Heart is the first to be involved. Small muscle of digits develop it last | Local Voluntary Muscle eg. Hand with knife in suicide |
| Area | Spread all over the body | Present only to the contracted muscles |
| Duration of presence | 12-18 hours in summer and 1-2 days in winter | Until replaced by rigor mortis, in same case continually present with rigor mortis |
| Predisposing factor | Nil | Excitement, fear etc along with contraction of muscles during death |
| Body temperature | Low | Comparatively high (because it could be noticed in the stage of Algor Mortis) |
| Degree of stiffness | Moderate. Moderate force required to break it | High. Great force required to break it. |

[48] https://www.moscmm.org/pdf/%5bRK_Sharma%5d_Concise_Textbook_of_Forensic_Medicine.pdf

| | | |
|---|---|---|
| Mechanism of formation | Known. Breakdown of ATP muscle | Still Obscure |
| Medico legal importance | Mostly sign of death and helps to estimate time of death | Mostly helps to enumerate cause of death and manner of death. |

## 4. DECOMPOSITION/PUTREFACTION

It is the final stage following death. Decomposition is caused by saprophytic micro-organism such as bacterial enzymes, mostly anaerobic (not using oxygen) organisms derived from the bowel (two intestines), and fungi, such as penicillium and aspergillus and sometimes from insects, mature or in larval stage. They cause marked haemolysis, liquefaction of post mortem clots and of thrombi, disintegration of tissue and gas formation in blood vessels and tissue spaces. Bacteria produce a large variety of enzymes and these breakdown the various tissues of the body.

It begins immediately after death at the cellular level, which is not evident grossly. There is progressive softening of soft tissues and the alterations of their proteins, carbohydrates and fats. Organisms enter the tissue shortly after death, mainly from the alimentary (food) canal, and less often through respiratory tract or thorough an external skin wound. Fall in the oxygen concentration in the tissue and rise in hydrogen ion after death favor bacterial growth and spread throughout the body. The characteristics of putrefaction are:-

- Changes in the colour of tissues: At early stage of putrefaction, hemoglobin diffuses through the vessels and stains become red and reddish-brown color. Various derivatives of hemoglobin form in tissues and the colour of tissues gradually changes to greenish black then greenish discolouration of skin. The colour appears 12 to 18 hours in summer and in 1-2 days in winter. Green colouration is more clearly seen on a fair skin than on a dark one.
- Evolution of gases in the tissue: The complicated structure proteins and carbohydrates split into simpler composition of amino acid, ammonia, carbon monoxide, carbon dioxide, hydrogen sulphate, propagated hydrogen methane and mercaptans. Gases collect in the intestine in 6 to 12 hours in summer and the abdomen becomes tense and distended. Swelling due to gases is the most marked in the face, genitalia and abdomen.
- Liquefaction of tissues: Liquefaction of tissues begins from 5 to 10 days or more after death. The tissues become soft, loose and are converted into the thick, semi-fluid, black mass and are separated from the bones and fall off.

Decomposition is a process of breaking down of complex particles into simple. In other words, when a dead body is subjected to wear and tear, decomposition starts when rigor mortis ends. Various microorganisms are responsible for decomposition. Decomposition leads discolouration of body and swelling of body. Emission of foul smelling gas gradually indicates process of the destruction of whole body.

Decomposition starts from abdomen. In summer it starts within 8-24 hours after rigor mortis. Similarly, 1-3 days is estimated in winter environment. Decomposition spreads gradually to all over the body. Then within 24-30 hours of initiation of decomposition

foul smelling gas accumulates in abdomen. Within 30-48 hours abdomen gets swollen, breasts in female and penis in male gets swollen. Within 48 to 72 hours face gets completely swollen, person cannot be identified and hair and nails become loose. Within 3 to 5 days abdomen bursts, foul smelled gas comes out, teeth becomes loose.

### 5. ADIPOCERE FORMATION

It is modification of putrefaction where fatty tissues of the body change into a substance similar to soaps known as adipocere. The whole fat of the body is converted into palmitic, oletic, stearic and hydroxy stearic acids and a mixture of these substances form adipocere. The adipocere is inflammable and burns with a faint yellow flame, it floats in water and dissolves in alcohol and ether. In temperate countries, the shortest time for its formation is about three weeks in summer. Thus, it is a process of transformation of body fats into white waxy like, cheese like substance underneath the body.

### 6. MUMMIFICATION

It is a modification of putrefaction in which dehydration or drying and shriveling of the cadavers occurs from the evaporation of water but the natural appearances and features of the body are preserved. The mummified tissues are dry, leathery and brown in colour. The entire body looses weight; becomes thin, stiff and brittle. Failure in protection of mummified body will lead it into breakdown and gradually will become powdery and disintegrate. On the other hand if it is protected, could be preserved for years. The mummified body is practically order less. The time required for a complete mummification of body varies from 3 months to a year and is influenced by size of body, atmospheric condition and the place of disposal. It is the process of dying of dead body due to loss of water. The internal organs lose weight and size.

## M. DETERMINATION OF CAUSE & MANNER OF DEATH

Medico legal autopsy examiners determine the cause and manner of death of the deceased after complete examination of the dead body. All findings from the dead body shall be examinedand tested for formation of opinion regarding to cause and manner of death. Cause and manner of death differ in accordance to types of death and types of incident suffered.

## N. EXAMINATION OF MUTILATED BODY

A mutilated body is a disfigured dead body by losing its identity marks that can be found in the whole body. Mutilated body exists in cases of explosion, mass destruction, complete piecing of body parts or beheaded etc. In mutilation, the investigator could find different fragmented parts of the body such as head, limbs, legs, abdomen, small piece of flesh or tissues etc. Mutilated body contains soft tissue of body such as flesh, muscles, skin or blood. Whereas, in skeleton only bones are remain and no muscles are attached. Thus, mutilated body and skeletal are two different things in forensic science.

### Objectives of examination of mutilated body parts and fragments:

1) To detect the source whether it is human organ or animal: The primary objective of examination of mutilated body parts is to identify whether it is of human or animal origin. Some parts of the flesh or soft tissue are sent to forensic laboratory for precipitin test. Moreover, specific test is done by Antiglobulin Test. In addition, if medical college is near, it is send to department of human anatomy.
2) If primary test confirms it is human tissue or flesh, next examination is directed to determine whether all the parts belong to same person. In mass explosion, the different parts are to be fit together by investigator. If they resemble then the investigator determines it as of same individual. For e.g. in Rajiv Gandi's Bomb Explosion case, his fragmented parts were identified also on the basis of clothes that he had worn.
3) To determine personal identification of victim such as age, sex, height etc.
4) To determine cause of death etc.

The DNA examination of all body tissue or flesh is a reliable method to identify different parts of the body of same person because DNA of a person is constant. If the nucleotide arrangement (genetic code) of DNA shows difference, it provides the information that the body parts are not of same person and informs that more than one person were mutilated.

## O. CONCLUSION

In Nepal there is trend to avoid or skip autopsy of so called high profile dead bodies. This is a wrong trend. Autopsy is a neutral scientific examination that helps to discover real fact and truth about the manner, time and cause of death. Legal provision that requires mandatory autopsy in suspicious deaths has to be implemented equally to all. Law has to recognize right of pubic people to know the truth about death of people who claim that they work for serve to public. Being informed about cause of death of people living in the society that we share together is a matter of public interest and concern. This information is very significant for government to adopt needy future strategy for protection, security, and maintenance of peace and order in society. Had autopsy been allowed to be done in case of 10 peoples death of Nepal's royal massacre[49] dated 1 June, 2001; and in case of unexpected sudden death of PrakashDahal, son of former PM Pushpa Kamal Dahal dated November 2017, justice system would know the truth what exactly had happened.

Sudden and unexplained deaths and mysterious and suspicious deaths should be reported to the concerned legal authority. In such circumstances, there should be no issue of a death certificate (cause of death certificate) without a formal medico-legal

[49] Dr. Harihar Wasti Interview on Suman Sanga in Kantipur TV HD, September 19, 2019 https://www.youtube.com/watch?v=DkdxQTsJ9Mw

death investigation by the legal authority. Deaths that appear to be non-criminal deaths at first can turn out to be criminal-deaths on further investigation.[50]

Autopsy report is helpful even in resolving civil disputes such as medical negligence remedy cases filed under tort for compensation by victim. Autopsy helps to discover whether death was due to negligence of doctor, nurse, pharmacist, hospital management or not. But, it is a shame, Nepalese law does not require negligently killed patient in hospital bed, to be forwarded for getting autopsy examination done for identifying the exact cause, manner and time of death. Till date, we are blindly relying on and trusting oral announcement of commercially established private hospitals' words regarding cause of patient's death in their bed. Who, how, when, what manner of negligence inflicted loss to patient or caused death of patient is to be confirmed through medico-legal examination and autopsy examination of the injured and dead patient respectively. But, the culture of performing autopsy examination of a patient's corpse who suspiciously died in hospital during treatment is yet to be institutionalized.

Usually the remedy for medical negligence is civil under tort against negligent health care provider, where patient suffering loss claims compensation under Consumer Protection Act, 2075 B.S. Simply because patient died in hospital or simply because treatment could not be successful is not an indicator of medical negligence so long as doctor applied reasonable care and effort towards saving life and making treatment success. Only in rare cases of maliciously intended harm or serious disregard to life of patient, negligent physician/nurse/surgeon gets prosecuted for criminal negligence under section 231 and section 232 of *Muluki* Criminal Code, 2074 B.S.

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[50] Ritesh G. Menezes; Francis N. Monteiro; Forensic Autopsy, StatPearls Publishing LLC. (2020) {https://www.ncbi.nlm.nih.gov/books/NBK539901/ Retrived: September 13, 2020}

# EUTHANASIA DEBATE: CONCEPT AND PRACTICE

**Subash Acharya**[1]

## ABSTRACT

*Euthanasia has been a widely discussed 'discourse' in criminal law since the Netherlands legalized it in 2001. Whether euthanasia be legalized or be criminalized? What does it mean? What is the practice in the world on euthanasia? And, what about Nepal? There are so many queries about euthanasia among the scholars interested in criminal law. This article will try to light upon definition, controversies and court practices in the issue of euthanasia.*

## 1. DEFINITION

Euthanasia is commonly known as mercy killing. The term 'euthanasia' is derived from Greek word *euthanatos*. It consists of prefix *'eu'* meaning 'good' and *'thanatos'* meaning 'death. So, euthanasia literally means 'good death'. It is an act of putting death painlessly, in order to release the person from incurable suffering.

Euthanasia is sometimes mistakenly understood as 'physician assisted suicide'. Though euthanasia and physician-assisted suicide both refer to deliberate action taken with the intention of ending a life, in order to relieve persistent suffering. They are different. In euthanasia, a doctor is allowed by law to end a person's life by a painless means, as long as the patient and their family agree. And, in physician assisted suicide, a doctor assists a patient to commit suicide if they request it. Assisted suicide is an intentionally helping a person commit suicide by providing drugs for self-administration, at that person's voluntary and competent request.[2]

Euthanasia simply means a termination of life by a doctor at the express request of the patient. However, euthanasia in a broad sense encompasses decisions of doctors or others intended to hasten or to bring about the death of a 'terminally ill person'[3]- by act

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[2] Yvette Brazier, 'What are euthanasia and assisted suicide?' (*Medical News Today*, 17 December 2018) <https://www.medicalnewstoday.com/articles/182951#euthanasia-and-assisted-suicide>accessed 7 May 2021

[3] A terminal condition is an incurable or irreversible condition which even with the administration of life-sustaining treatment will result in death in the foreseeable future. A persistently unconscious condition is an irreversible condition, in which thought and awareness of self and environment are absent. An end-stage condition is a condition caused by injury, disease or illness which results in severe and permanent deterioration indicated by incompetency and complete

or omission- in order to prevent or to limit the suffering of that person- whether or not on his or her request. So, euthanasia is 'the intentional killing by act or omission of a person, whose life is no longer felt to be worth living'[4].It is defined in the following literatures as below:

According to Black's Law Dictionary[5], euthanasia means "The act or practice of killing or bringing about the death of a person who suffers from an incurable disease or condition, esp. a painful one, for reasons of mercy. Euthanasia is sometimes regarded by the law as second-degree murder, manslaughter, or criminally negligent homicide. In 2001, the Netherlands became the first nation to legalize euthanasia. Also termed mercy killing."[6]

It elucidates five types of euthanasia:

(a) Active euthanasia. Euthanasia performed by a facilitator (such as a healthcare practitioner) who not only provides the means of death but also carries out the final death-causing act.
(b) Involuntary euthanasia. Euthanasia of a competent, non consenting person.
(c) Non-voluntary euthanasia. Euthanasia of an incompetent, and therefore non-consenting, person.
(d) Passive euthanasia. The act of allowing a terminally ill person to die by either withholding or withdrawing life-sustaining support such as a respirator or feeding tube.
(e) Voluntary euthanasia. Euthanasia performed with the terminally ill person's consent.[7]

Advanced Law Lexicon[8] defines euthanasia in very precise way as "The causing or hastening of death, particularly of incurable or terminally ill patients, and at their own request"[9].

***Common Cause (A Registered Society) v UOI*[10]:** In this case, Supreme Court of India has opined that "Euthanasia as the meaning of word suggests is an act which leads to a good death. Some positive act is necessary to characterize the action as Euthanasia. Euthanasia is also commonly called 'assisted suicide' due to the above reasons"[11].

This case also presents the five categories of euthanasia, as below:

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physical dependency for which treatment of the irreversible condition would be medically ineffective. *Common Cause (A Registered Society) v Union of India* (2018)(2018) 5 SCC 1 (para 109)

4 Dharmender Kumar Nehra, Pradeep Kumar and Sheetal Nehra, 'Euthanasia: an understanding' (Global Vision Publishing House 2013)<https://www.researchgate.net/publication/252626984_Euthanasia_An_Understanding> accessed 1st Jan 2021

5 Bryan A. Garner (ed), Black's Law Dictionary(8th ed., South Asian Edition, Thomson Reuters 2015)

6 ibid 594

7 ibid

8 P Ramanatha Aiyar, Advanced Law Lexicon, The Encyclopedic Law Dictionary with Words & Phrases Legal Maxims and Latin Terms. Vol. 2 (D-I), (6th ed., LexisNexis 2019)

9 ibid 1988-1989

10 (2018) 5 SCC 1

11 Ibid para 629.6

(a) Active euthanasia refers to a positive contribution to the acceleration of death;
(b) Involuntary euthanasia refers to the termination of life against the will of the person killed;
(c) Nonvoluntary euthanasia refers to the termination of life without the consent or opposition of the person killed;
(d) Passive euthanasia refers to the omission of steps which might otherwise sustain life;
(e) Voluntary euthanasia refers to termination of life at the request of the person killed.[12]

## 2. TYPES OF EUTHANASIA

We can categorize euthanasia in two broad sense: (a) based on mode of operation- procedural type, and (b) based on the will of terminally ill person- substantive type. Based on mode of operation, euthanasia are of two types: (i) active euthanasia, and (ii) passive euthanasia. Based on will of terminally ill person, euthanasia are of three types: (iii) involuntary euthanasia, (iv) nonvoluntary euthanasia, and (v) voluntary euthanasia. Thus, all together there are five types of euthanasia, as below:

**a)** **Active euthanasia**. Active euthanasia is when someone uses lethal substances or forces to end a patient's life. It is a 'positive' contribution to the acceleration of death; performed by a physician who 'directly' takes an action for the purpose of causing or hastening death. These measures may include a lethal injection or an overdose medicine. It is more controversial form of euthanasia.-- **(by commission)**

**b)** **Passive euthanasia.** Passive euthanasia is when life-sustaining treatments are withheld. It is an 'indirect' way of mercy killing performed by an omission in supply of life supporting measures that lets a terminally ill person to die. These measures may include withholding or withdrawing life-sustaining support including medicine, food, water or oxygenation. **-(by omission)**

**c)** **Involuntary euthanasia.** When euthanasia is performed on a person who would be able to provide informed consent, but does not, either because he does not want to die, or because he was not asked. It is a euthanasia of a competent, nonconsenting person. It refers to the termination of life against the will of the person killed. It is committed on a subject against his expressed wishes. -- **(without consent)**

**d)** **Non-voluntary euthanasia.** When euthanasia is conducted on a person who is unable to consent due to his current health condition. It is a euthanasia of an incompetent, and therefore nonconsenting, person. It refers to the termination of life without the consent or refusal of the person killed. It is committed when the

[12] Ibid para 384

subject is unconscious or otherwise cannot give consent. Permission may be granted by a court or by family members, or euthanasia may be performed at the discretion of the attending health care professional or caretaker. **-- (cannot consent)**

**e)** **Voluntary euthanasia.** It is performed with the terminally ill person's consent, at the request of the person killed, who voluntarily- free from direct or indirect pressure from others- pleas for mercy killing. Voluntary euthanasia is legal in some countries including the Netherlands, Belgium, Luxembourg, Switzerland, and the states of Oregon and Washington in the U.S. **- (with consent)**

## 3. LEGISLATION OF EUTHANASIA OR PHYSICIAN ASSISTED DEATH[13]

**The Netherlands** was the first country to permit euthanasia, regulated by the "Termination of Life on Request and Assisted Suicide (Review Procedures) Act", 2002.[14] It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. These criteria concern the patient's request, the patient's suffering (unbearable and hopeless), the information provided to the patient, the presence of reasonable alternatives, consultation of another physician and the applied method of ending life. To demonstrate their compliance, the Act requires physicians to report euthanasia to a review committee.[15]

The law allows a medical review board to suspend prosecution of doctors who performed euthanasia when each of the following conditions is fulfilled:

a) the patient's suffering is unbearable with no prospect of improvement

b) the patient's request for euthanasia must be voluntary and persist over time (the request cannot be granted when under the influence of others, psychological illness, or drugs)

c) the patient must be fully aware of his/her condition, prospects and options

d) there must be consultation with at least one other independent doctor who needs to confirm the conditions mentioned above

e) the death must be carried out in a medically appropriate fashion by the doctor or patient, in which case the doctor must be present

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13 Most of these countries legislation on euthanasia has been explained in *ArunaRamchandraShanbug v Union of India* (2011) AIR 2011 SC 1290 too.

14 The Parliament of the Netherlands approved euthanasia on April 10, 2001.

15 The legal debate concerning euthanasia in the Netherlands took off with the Postma case15 in 1973, concerning a physician who had facilitated the death of her mother following repeated explicit requests for euthanasia. While the physician was convicted, the court's judgment set out criteria when a doctor would not be required to keep a patient alive contrary to his will. This set of criteria was formalized in the course of a number of court cases during the 1980s. Termination of Life on Request and Assisted Suicide (Review Procedures) Act took effect on April 1, 2002. It legalized euthanasia and physician assisted suicide in very specific cases, under very specific circumstances. The law was proposed by ElsBorst, the Minister of Health. The procedures codified in the law had been a convention of the Dutch medical community for over twenty years.

f) the patient is at least 12 years old (patients between 12 and 16 years of age require the consent of their parents)

**Belgium** became the second country in Europe to legalize the practice of euthanasia in September 2002.[16] Patients wishing to end their own lives must be conscious when the demand is made and repeat their request for euthanasia. They have to be under 'constant and unbearable physical or psychological pain' resulting from an accident or incurable illness. The law gives patients the right to receive ongoing treatment with painkillers.[17]

**Luxemburg,** in February 2008, the Luxembourg Chamber of Deputies adopted the Law on the Right to Die with Dignity. The Law covers both euthanasia and physician-assisted suicides. A physician who performs euthanasia or assists in a suicide must ensure that:

a) the patient is legally competent at the time of his request;

b) the patient has the authorization of his parents or legal guardian if he is between the ages of 16 and 18;

c) the request is voluntary, thought through, and repeated and does not result from external pressure;

d) the patient suffers from an incurable condition and is constantly in unbearable physical or mental pain; and

e) the patient respects all the conditions and procedures prescribed by the Law.

The physician is also required to inform the patient of his state of health and life expectancy and to discuss all other therapeutic possibilities still available and their consequences, including palliative care. He must arrive at the conclusion that in the eyes of the patient, there is no other solution. He must also ensure through several meetings with his patient that the physical or psychological suffering is persistent and that there have been repeated requests to die. He must consult with another physician to confirm that the patient's condition is incurable. The request to die must be in writing. Euthanasia may also be requested in a living will.[18]

**Switzerland** has a unique system, assisted suicide is legally permitted and can be performed by non-physicians; however, euthanasia is illegal. The difference between assisted suicide and euthanasia being that while in the former the patient administers the lethal injection himself, in the latter a doctor or some other person administers it.

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16 The Parliament of Belgium approved euthanasia on May 16, 2002.

17 The Belgian law, unlike the Dutch legislation, sets out that minors cannot seek assistance to die. In the case of someone who is not in the terminal stages of illness, a third medical opinion must be sought. Every mercy killing case will have to be filed at a special commission to decide if the doctors in charge are following the regulations.

18 The Law establishes a National Commission of Control and Evaluation to assess the implementation of the Law. A physician who performs euthanasia must, within four days, remit an official declaration to the Commission. Finally, the Law provides that no physician is obliged to perform euthanasia or assist in a suicide. According to the parliamentary rules of procedure, a second reading of the Law is necessary before it can take effect (the law will not go into effect until additional procedures are completed).

Article 115 of the Swiss Penal Code, 1937 considers assisting suicide a crime only if the motive is selfish.[19]

The code does not give physicians a special status in assisting suicide; although, they are most likely to have access to suitable drugs. Ethical guidelines have cautioned physicians against prescribing deadly drugs. Switzerland seems to be the only country in which the law limits the circumstances in which assisted suicide is a crime, thereby decriminalizing it in other cases, without requiring the involvement of a physician. Consequently, non-physicians have participated in assisted suicide.[20]

**United States of America** has duel practice. Active Euthanasia is illegal in all states in U.S.A., but as of November 2016, the states of Oregon, Washington, Montana, Vermont, California, and Colorado have legalized physician assisted dying. Oregon was the first state in U.S.A. to legalize physician assisted death. As already pointed out above, the difference between euthanasia and physician assisted suicide lies in who administers the lethal medication. In the former, the physician or someone else administers it, while in the latter the patient himself does so, though on the advice of the doctor.[21]

**Australia.** The Australian state of Victoria passed voluntary euthanasia laws in November 2017 after 20 years and 50 failed attempts. To qualify for legal approval, a person must have an adult with decision-making capacity, and must be a resident of Victoria, and have intolerable suffering due to an illness with life expectancy of less than six months, or 12 months of suffering from a neuro-degenerative illness.

In August 2019 the Voluntary Assisted Dying Bill 2019 was introduced into the Western Australian Parliament. On 10 December 2019 the Bill completed passage through Parliament and received Royal Assent on 19 December 2019. Part 1 of the Act (other than divisions 2 to 4) commenced on Royal Assent and the rest of the Act will commence upon proclamation which is scheduled for mid-2021.[22]

**Canada.** The decision of the Canadian Supreme Court (CSC) in *Sue Rodriguez v. British Columbia(Attorney General)*[23] is worth reading to understand the mind-set in the past.[24]

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19 The code was approved in 1937, and came into effect in 1942. It shows that Switzerland has a longer experience of the legal practice of assisted suicide than any other country.

20 The Swiss law is unique because (1) the recipient need not be a Swiss national, and (2) a physician need not be involved. Many persons from other countries, especially Germany, go to Switzerland to undergo euthanasia.

21 Lawmaking strategies in these states are markedly different. Oregon, Washington, and Colorado relied on voter approved initiatives; in Vermont and California, state legislatures took center stage; and in Montana, state judges fashioned policy. California legalized PAD in 2015.

22 Government of Western Australia, Department of Health (Voluntary assisted dying (health.wa.gov.au)

23 (1993) 3 SCR 519

24 Rodriguez, a woman of 42, was diagnosed with amyotrophic lateral sclerosis, and requested the CSC to allow someone to aid her in ending her life. Her condition was deteriorating rapidly, and the doctors told her that she would soon lose the ability to swallow, speak, walk, and move her body without assistance. Thereafter she would lose her capacity to breathe without a respirator, to eat without a gastrotomy, and would eventually be confined to bed. Her life expectancy was 2 to 14 months. Her plea was rejected by a 5-4 majority. Justice Sopinka, speaking for the majority observed that 'sanctity of life has been understood historically as excluding freedom of choice in the self-infliction of death, and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in

In June 2016, Medical Assistance in Dying (MAID) became legal in Canada. Health Canada released the First Annual Report on Medical Assistance in Dying in Canada (2019) in July 2020, which was the first report using data collected under the *Regulations for the Monitoring of Medical Assistance in Dying*.[25]

- Since June 2016, there have been more than 13,000 reported medically assisted deaths in Canada. This figure is based on voluntarily reported data from the provinces and territories prior to November 1, 2018, and data collected under the new monitoring regime after that date.
- MAID deaths as a percentage of all deaths in Canada remains consistent with other international assisted-dying regimes.
- Cancer is the most frequently cited underlying medical condition, followed by respiratory, neurological and cardiovascular conditions.
- The majority of individuals receiving MAID (82.1%) were reported to have received palliative care services.

The Council of Canadian Academies completed reviews in three areas where MAID was not allowed under the 2016 legislation: requests by mature minors, advance requests, and requests where a mental disorder is the sole underlying medical condition.[26]

In October 2020, the Minister of Justice and Attorney General of Canada introduced Bill C-7: *An Act to amend the Criminal Code (medical assistance in dying)* in Parliament, which proposes changes to Canada's law on medical assistance in dying. And, on 17 March 2021, the Government of Canada announced that changes to Canada's medical assistance in dying (MAID) law are officially in force.[27] The new law includes changes to eligibility, procedural safeguards, and the framework for the federal government's data collection and reporting regime.[28]

**Spain** legalized euthanasia and assisted suicide on 18 March 2021 making Spain the fifth country in the European Union to take the step.[29] The Spanish parliament's lower house voted 202 in favor, 140 against and 2 abstentions on the final passage of the euthanasia bill.[30] The law, applicable for adults having serious and incurable or

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society opposing the right of the State to regulate the involvement of others in exercising power over individuals ending their lives.' The minority consisted of Chief Justice Lamer and other three judges, who dissented.

25 'New medical assistance in dying legislation become law' <https://www.canada.ca/en/department-justice/news/2021/03/new-medical-assistance-in-dying-legislation-becomes-law.html>accessed 12 August 2021

26 ibid

27 'Medical assistance in dying' <https://www.canada.ca/en/health-canada/services/medical-assistance-dying.html> accessed 12 August 2021

28 Those who can provide MAID are physicians and nurse practitioners (in provinces where this is allowed). Those who can help provide MAID include: pharmacists and pharmacy technicians/assistants, family members or other people that you ask to help, and health care providers who help physicians or nurse practitioners.

29 The Netherlands, Belgium and Luxembourg have already legalized euthanasia, and Switzerland has legalized assisted suicide.

30 MPs from Spain's left-wing governing coalition and other parties supported it, while conservative and far-right lawmakers voted against the legislation, vowing to overturn it in the future.

debilitating diseases with legal residence in Spain, was vehemently condemned comparing euthanasia to 'a form of homicide' by the Spanish Catholic Church.[31]

Besides these, **Colombia** has also accepted euthanasia. Resolutions 1216 of 2015 and 825 of 2018 regulate the technical and administrative procedure that must be required to carry out the euthanasia of an adult and of a child or adolescent.[32] The first country to approve euthanasia in the world was in Holland, and in Latin America it is Colombia, they are the same countries that have accepted euthanasia for minors.[33]

## 4. ISSUES IN EUTHANASIA

There are lots of controversies regarding euthanasia. Few major questions are: Who is terminally ill person or is in a persistent vegetative state (PVC)? Is the knowledge of a doctor an end of knowledge? Whether a person assisting in the process be held criminally liable for causing death? Is a man free to end his life? Does the right to live also includes right to die? Does right to die mean 'a natural death' or 'an unnatural death'? To comprehend how these issues are responded, a few representative cases are dealt below:

### *Gian Kaur v The State of Punjab (1996)*[34]

**Fact:**

GianKaur and her husband Harbans Singh had committed the offence of abetment to suicide of their daughter-in-law, Kulwant Kaur. For their action, the Trial Court convicted them both for 6 years imprisonment under s 306, IPC. The High Court reduced the sentence of Gian Kaur alone to 3 years imprisonment. They took the case to the Supreme Court. Their contention was that s 306, IPC must be held constitutionally invalid with reference to the case of *P.Rathinam v Union of India*[35], which declared s 309 (attempt to commit suicide), IPC as unconstitutional as it is violative of Article 21 of the Indian Constitution.

**Judgment:**

A five member Constitutional Bench of Supreme Court overruled *P.Rathinam v Union of India*. Supreme Court held s 306 constitutional, and held that 'right to life' under Article 21 of Indian Constitution does not include 'right to be killed'. Therefore, an attempt to commit suicide under s 309 or even an abetment of suicide under s 306 are well within the constitutional parameters, and are not *ultra vires.* 'Right to die with

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31 'Spain legalises euthanasia and assisted suicide despite conservative opposition' <https://www.euronews.com/2021/03/18/spain-legalises-euthanasia-and-assisted-suicide-despite-conservative-opposition> accessed 12 August 2021

32 In Colombia it wass legalized since 1997, but it did not have norms to regulate.

33 Lynda Lynda López Benavides, 'The Right to Die with Dignity in Colombia'(2018) 6(6) Forensic Research & Criminology International Journal 429

34 1996 SCC (2) 648

35 1994 SCC (3) 394, AIR 1994 SC 1844. In this case, Supreme Court of India declared s 309, IPC ultra vires with Article 21 of the Indian Constitution. The Court said a person who attempts to commit suicide does not deserve prosecution because he has failed. There can be no justification to prosecute sacrifices of their lives. For instance, students who jump into the well after having failed in examination but survive; girls and boys who resent arranged marriage and prefer to die, but ultimately fail, do not deserve punishment; rather soft words, wise counseling of a psychiatrist and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor.

dignity' at the end of an individual's life must not be misunderstood with the 'right to die in an unnatural manner of death'. It was mentioned that accelerating the process of natural death of an individual which by god's creation are imminent in nature, under such circumstances permitting termination of life is not available for interpretation under Article 21.

The Court further affirmed that assisted attempt to commit suicide and assisted suicide are made punishable for cogent reasons in the interest of society. The objective of such a provision is to prevent the inherent danger in the absence of such a penal provision. Abetment of suicide is a distinct offence that is found enacted even in the law of countries where attempted suicide is not made punishable. Section 306 enacts a distinct offence that can survive independent of Section 309 of IPC. As of which, the Court makes it clear that the arguments made to support the plea for not punishing the person who attempts to commit suicide do not avail for the benefit of another person assisting in the commission of suicide or in the attempt of it. Thus, the decision made in the ruling of *P.Rathinam v Union of India* was struck down, making Section 306 and Section 309 of Indian Penal Code constitutionally valid and making the accused punishable for abetment of suicide.

***Aruna Ramchandra Shanbug v Union of India (2011)***[36]

**Fact:**

Aruna Ramachandra Shanbaug was a staff Nurse working in King Edward Memorial Hospital, Mumbai. On the evening of 27th November, 1973 she was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomized her. To immobilize her during this act he twisted the chain around her neck. The next day on 28th November, 1973 at 7.45 a.m. a cleaner found her lying on the floor with blood all over in an unconscious condition. It is alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. It is alleged that the Neurologist in the Hospital found that she had plantars' extensor, which indicates damage to the cortex or some other part of the brain. She also had brain stem contusion injury with associated cervical cord injury. It is alleged at page 11 of the petition that 36 years have expired since the incident and now Aruna Ramachandra Shanbaug is about 60 years of age. She is featherweight, and her brittle bones could break if her hand or leg are awkwardly caught, even accidentally, under her lighter body. She has stopped menstruating and her skin is now like papiermache' stretched over a skeleton. She is prone to bed sores. Her wrists are twisted inwards. Her teeth had decayed causing her immense pain. She can only be given mashed food, on which she survives. It is alleged that Aruna Ramachandra Shanbaug is in a persistent vegetative state (p.v.s.) and virtually a dead person and has no state of awareness, and her brain is virtually dead. She can neither see, nor hear anything nor can she express herself or communicate, in any manner whatsoever. Mashed food is put in her mouth,

[36] AIR 2011 SC 1290

she is not able to chew or taste any food. She is not even aware that food has been put in her mouth. She is not able to swallow any liquid food, which shows that the food goes down on its own and not because of any effort on her part. The process of digestion goes on in this way as the mashed food passes through her system. However, Aruna is virtually a skeleton. Her excreta and the urine is discharged on the bed itself. Once in a while she is cleaned up but in a short while again she goes back into the same sub-human condition. Judged by any parameter, Aruna cannot be said to be a living person and it is only on account of mashed food which is put into her mouth that there is a facade of life which is totally devoid of any human element. It is alleged that there is not the slightest possibility of any improvement in her condition and her body lies on the bed in the Hospital like a dead animal, and this has been the position for the last 36 years. The prayer of the petitioner is that the respondents be directed to stop feeding Aruna, and let her die peacefully.

**Findings of the Experts:**

The court appointed a team of three eminent doctors to investigate and report on the exact physical and mental conditions of ArunaShanbaug. They studied ArunaShanbaug's medical history in detail and opined that she is not brain dead. She reacts to certain situations in her own way. For example, she likes light, devotional music and prefers fish soups. She is uncomfortable if a lot of people are in the room and she gets distraught. She is calm when there are fewer people around her. The staff of KEM Hospital was taking sufficient care of her. She was kept clean all the time. Also, they did not find any suggestion from the body language of Aruna as to the willingness to terminate her life. Further, the nursing staff at KEM Hospital was more than willing to take care of her. Thus, the doctors opined that euthanasia in the instant matter is not necessary.

**Issues Raised:**

When a person is in a permanent vegetative state (PVS), should withholding or withdrawal of life sustaining therapies be permissible or `not unlawful'?

a) If the patient has previously expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his/ her wishes be respected when the situation arises?

b) In case a person has not previously expressed such a wish, if his family or next of kin makes a request to withhold or withdraw futile life-sustaining treatments, should their wishes be respected?

**Judgment:** Supreme Court discussed plenty enough about the euthanasia with reference to various decisions. Its core concepts, as written in decision are as below:

a) There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to

take a decision in this connection. We agree with Mr. Andhyarujina that passive euthanasia should be permitted in our country in certain situations, and we disagree with the learned Attorney General that it should never be permitted. Hence, following the technique used in Vishakha's case[37], we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject.[38]

(i) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

In the present case, we have already noted that Aruna Shanbaug's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault on her. As already noted above, it is the KEM hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and not Ms. Pinky Virani who has only visited her on few occasions and written a book on her. Hence it is for the KEM hospital staff to take that decision. The KEM hospital staff have clearly expressed their wish that Aruna Shanbaug should be allowed to live.

Mr. Pallav Shisodia, learned senior counsel, appearing for the Dean, KEM Hospital, Mumbai, submitted that Ms. Pinky Virani has no locus standi in this case. In our opinion it is not necessary for us to go into this question since we are of the opinion that it is the KEM Hospital staff who is really the next friend of Aruna Shanbaug.

We do not mean to decry or disparage what Ms. Pinky Virani has done. Rather, we wish to express our appreciation of the splendid social spirit she has shown. We have seen on the internet that she has been espousing many social causes, and we hold her in high esteem. All that we wish to say is that however much her interest in Aruna Shanbaug may be it cannot match the involvement of the KEM hospital staff who have been taking care of Aruna day and night for 38 years.

However, assuming that the KEM hospital staff at some future time changes its mind, in our opinion in such a situation the KEM hospital would have to apply to the Bombay High Court for approval of the decision to withdraw life support.[39]

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37 *Vishaka & Ors v State of Rajasthan & Ors* (1997) 6 SCC 241
38 Para 126
39 ibid

(ii) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in Airedale's case.[40]

b) No doubt, the ordinary practice in our High Courts since the time of framing of the Constitution in 1950 is that petitions filed under Article 226 of the Constitution pray for a writ of the kind referred to in the provision. However, from the very language of the Article 226, and as explained by the above decisions, a petition can also be made to the High Court under Article 226 of the Constitution praying for an order or direction, and not for any writ. Hence, in our opinion, Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support to an incompetent person of the kind above mentioned.[41]

c) With these observations, this petition is dismissed.[42]

***Common Cause (A Registered Society) v Union of India (2018)*[43]**

**Fact:** In 2005, an NGO, Common Cause sued a Writ petition in the Supreme Court under Article 32. In the writ petition, it has made the following prayers:

a) Declare 'right to die with dignity' as a fundamental right within the fold of Right to Live with dignity guaranteed under Article 21 of the Constitution of India;
b) Issue direction to the Respondent, to adopt suitable procedures, in consultation with State Governments where necessary, to ensure that persons of deteriorated health or terminally ill should be able to execute a document titled "MY LIVING WILL & ATTORNEY AUTHORISATION" which can be presented to hospital for appropriate action in event of the executant being admitted to the hospital with serious illness which may threaten termination of life of the executants or in the alternative, issue appropriate guidelines to this effect;
c) Appoint an expert committee of experts including doctors, social scientists and lawyers to study into the aspect of issuing guidelines as to the Living Wills;
d) Pass such other and further order/s as this Hon'ble Court may deem fit and proper on the facts and in the circumstances of the case.

**Issue:** a) Whether the 'right to life with dignity' includes 'right to die with dignity' under Article 21 of the Constitution?

b) Whether an individual has any right to refuse medical treatment including withdrawal from life saving devices? Whether passive euthanasia should be permitted on the living will of patient?

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40 ibid
41 Para 137
42 Para 143
43 (2018) 5 SCC 1

**Judgment:** On the 9th March, 2018, the Supreme Court gave a verdict making the way for passive euthanasia. The Court reiterated that the 'right to die with dignity' is a fundamental right as 'right to life with dignity' under Art.21 of the Indian Constitution - as already held by its constitutional bench in *GianKaur* case earlier- and 'right to die with dignity' permits refusal or removal of life-supporting systems for the terminally ill person. Court declared that an adult human being, having mental capacity, to take an informed decision, has right to refuse medical treatment including withdrawal from life saving devices. This ruling thus permits the removal of life-support systems for the terminally ill or those in incurable comas. The Court further laid down certain propositions regarding the procedure for execution of Advance Directives and provided the guidelines thereof to give effect to passive euthanasia.[44]

The contentions were demanded to declare the 'right to die with dignity' within the ambit of 'right to live with dignity' which is guaranteed under Article 21 of the Constitution of India. While determining the question upon the subject of the right to die with dignity within the ambit of Article 21, the constitutional bench came on the conclusion of inclusion of 'right to die with dignity' as part of Article 21 of the Constitution of India. The ruling permitted the removal of life-support systems in those cases where the patient is in a permanent coma or is terminally-ill and also laid down guidelines where the patient cannot speak for themselves or are not in the condition to express their will. Liberty was also granted by the Supreme Court to decide on the matter of artificial life-saving machines in the living will of the patient. The court disregarded certain excerpts of *ArunaShanbaug* judgment that stated 'the euthanasia can only be legalized by the legislature'. The court came up with certain principles governing the directives. The court in the exercise of the power under Article 142 of the Constitution and the law stated in *Vishaka and Others v. State of Rajasthan and Others (1997) 6 SCC 241* directed that the directives and guidelines laid down shall remain in force till the Parliament brings legislation in the field.

The bench thereby laying down a distinct line of difference between the active and passive euthanasia held the active euthanasia as illegal and unconstitutional. Additionally, specific guidelines were provided for implementing passive euthanasia in cases where there is no existing valid living will. The pressing need for the right balance of prolonged life along with the quality of life was sought from the matter since either one is totally meaningless without the other one.

### Airedale case: *Airedale NHS Trust v. Bland (1993)*[45]

**Fact:** Anthony Bland aged about 17 went to the Hillsborough Ground on 15th April 1989 to support the Liverpool Football Club. In the course of the disaster which occurred on that day, his lungs were crushed and punctured and the supply to his brain

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[44] The 538 page judgment was delivered by the five-judges' constitutional bench comprising the Chief Justice of India, Mr. Justice DipakMishra, Mr. Justice, A.K. Sikri, Mr. Justice A.M. Khanwilkar, Mr. Justice D.Y. Chandrachud and Mr. Justice Ashok Bhushan.

[45] [1993] 1 All ER 821 (UKHL).<https://www.globalhealthrights.org/wp-content/uploads/2013/01/HL-1993-Airedale-NHS-Trust-v.-Bland.pdf>accessed 1 August 2021

was interrupted. As a result, he suffered catastrophic and irreversible damage to the higher centers of the brain. For three years, he was in persistent vegetative state (PVS). This state arises from the destruction of the cerebral cortex on account of prolonged deprivation of oxygen, and the cerebral cortex of Anthony had resolved into a watery mass.[46] Anthony Bland could not see, hear or feel anything. He could not communicate in any way. His consciousness, which is an essential feature of an individual personality, had departed forever. However, his brain-stem, which controls the reflective functions of the body, in particular the heartbeat, breathing and digestion, continued to operate. He was in persistent vegetative state (PVS) which is a recognized medical condition quite distinct from other conditions sometimes known as 'irreversible coma', 'the Guillain-Barre syndrome', 'the locked-in syndrome' and 'brain death'.

The distinguishing characteristic of PVS is that the brain stem remains alive and functioning while the cortex has lost its function and activity. Thus the PVS patient continues to breathe unaided and his digestion continues to function. But although his eyes are open, he cannot see. He cannot hear. Although capable of reflex movement, particularly in response to painful stimuli, the patient is incapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in any way. He has no cognitive function and thus can feel no emotion, whether pleasure or distress. The absence of cerebral function is not a matter of surmise; it can be scientifically demonstrated. The space which the brain should occupy is full of watery fluid.

In order to maintain Mr. Bland in his condition, feeding and hydration were achieved by artificial means of a nasogastric tube while the excretory functions were regulated by a catheter and enemas. According to eminent medical opinion, there was no prospect whatsoever that he would ever make a recovery from his condition, but there was every likelihood that he would maintain this state of existence for many years to come provided the artificial means of medical care was continued.

In this state of affairs the medical men in charge of Anthony Bland case took the view, which was supported by his parents that no useful purpose would be served by continuing medical care, and that artificial feeding and other measures aimed at prolonging his existence should be stopped. Since however, there was a doubt as to whether this course might constitute a criminal offence, the hospital authorities sought a declaration from the Court to resolve these doubts.[47]

**Issue:** Can life support ever be withdrawn from a patient who cannot give informed consent about the matter?

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[46] The cortex is that part of the brain which is the seat of cognitive function and sensory capacity.

[47] The declaration was granted by the Family Division Court on 19.11.1992 and that judgment was affirmed by the Court of Appeal on 9.12.1992. A further appeal was made by official solicitor to the House of Lords in which House of Lords dismissed the appeal and affirmed the decision of Court of Appeal.

**Judgment:** The House of Lords unanimously awarded the declaration that the doctors could lawfully withdraw artificial treatment from Mr. Bland. Lords held that the withdrawal of treatment by medical professionals is to be viewed in law as an omission. They re-iterated that an omission can amount to the *actusreus* of murder in situations where the defendant is under a duty to act to save the victim. However, they held that there was no such duty where continued medical treatment was not in the best interests of the patient. In the case of Mr. Bland, there was nothing that could be done to improve his condition and therefore continued treatment was not in his best interests. This meant that the artificial feeding tube could be removed with no criminal liability for the medical professionals.

**Lord Keith** noted that If a person, due to accident or some other cause becomes unconscious and is thus not able to give or withhold consent to medical treatment, in that situation it is lawful for medical men to apply such treatment as in their informed opinion is in the best interests of the unconscious patient. A medical practitioner is under no duty to continue to treat such a patient where a large body of informed and responsible medical opinion is to the effect that no benefit at all would be conferred by continuance of the treatment. Existence in a vegetative state with no prospect of recovery is by that opinion regarded as not being of benefit to the patient.[48]

**Lord Goff** observed that discontinuance of artificial feeding in such cases is not equivalent to cutting a mountaineer's rope, or severing the air pipe of a deep sea diver. The true question is not whether the doctor should take a course in which he will actively kill his patient, but rather whether he should continue to provide his patient with medical treatment or care which, if continued, will prolong his life. Lord Goff noted that in cases where life-sustaining treatment has ceased to be in the best interests of the patient, it may *'and indeed ultimately should,'* be withdrawn: "I agree that the doctor's conduct in discontinuing life support can properly be categorized as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end. But discontinuation of life support is, for present purposes, no different from not initiating life support in the first place. In each case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition: and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient…"[49]

**Lord Browne-Wilkinson** was of the view that removing the nasogastric tube in the case of Anthony Bland cannot be regarded as a positive act causing the death. The tube itself, without the food being supplied through it, does nothing. Its non-removal itself does not cause the death since by itself, it does not sustain life. Hence removal of the tube would not constitute the *actusreus* of murder, since such an act would not cause

[48] ibid 43-44
[49] ibid 49-50

the death. Lord Browne-Wilkinson said: “it is perfectly reasonable for the responsible doctors to conclude that there is no affirmative benefit to Anthony Bland in continuing the invasive medical procedures necessary to sustain his life. Having so concluded, they are neither entitled nor under a duty to continue such medical care. Therefore, they will not be guilty of murder if they discontinue such care.”[50]

**Lord Mustill** observed: "Threaded through the technical arguments addressed to the House were the strands of a much wider position that it is in the best interests of the community at large that Anthony Bland's life should now end. The doctors have done all they can. Nothing will be gained by going on and much will be lost. The distress of the family will get steadily worse. The strain on the devotion of a medical staff charged with the care of a patient whose condition will never improve, who may live for years and who does not even recognize that he is being cared for, will continue to mount. The large resources of skill, labour and money now being devoted to Anthony Bland might in the opinion of many be more fruitfully employed in improving the condition of other patients, who if treated may have useful, healthy and enjoyable lives for years to come."[51]

Thus all the Judges of the House of Lords were agreed that Anthony Bland should be allowed to die.[52]

### *Pretty v UK (2002)*[53], European Court of Human Rights

**The Circumstances of the Case:** The applicant is a 43-year-old woman. The applicant suffers from motor neuron disease (MND). This is a progressive neuro-degenerative disease of motor cells within the central nervous system. The disease is associated with progressive muscle weakness affecting the voluntary muscles of the body. As a result of the progression of the disease, severe weakness of the arms and legs and the muscles involved in the control of breathing are affected. Death usually occurs as a result of weakness of the breathing muscles, in association with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and pneumonia. No treatment can prevent the progression of the disease.

The applicant's condition has deteriorated rapidly since MND was diagnosed in November 1999. The disease is now at an advanced stage. She is essentially paralyzed from the neck down, has virtually no decipherable speech and is fed through a tube. Her life expectancy is very poor, measurable only in weeks or months. However, her intellect and capacity to make decisions are unimpaired. The final stages of the disease are exceedingly distressing and undignified. As she is frightened and distressed at the suffering and indignity that she will endure if the disease runs its course, she very

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50 ibid 67

51 ibid 78

52 The Law Lords, in particular Lord Goff, also distinguished the omission of withdrawal of treatment from euthanasia, which is a criminal offence. The difference is that euthanasia involves medical professionals actively bringing about a patient’s death.

53 Application no. 2346/02; Date of Decision: 29 April 2002<https://www.asylumla wdatabase.eu/sites/default/files/aldfiles/Pretty%20v%20UK.pdf> accessed 1 August 2021

strongly wishes to be able to control how and when she dies and thereby be spared that suffering and indignity.

Although it is not a crime to commit suicide under English law, the applicant is prevented by her disease from taking such a step without assistance. It is however a crime to assist another to commit suicide (section 2(1) of the Suicide Act 1961).

**DPP and Divisional Court:** Intending that she might commit suicide with the assistance of her husband, the applicant's solicitor asked the Director of Public Prosecutions (DPP), in a letter dated 27 July 2001 written on her behalf, to give an undertaking not to prosecute the applicant's husband should he assist her to commit suicide in accordance with her wishes.

In a letter dated 8 August 2001, the DPP refused to give the undertaking:

"Successive Directors – and Attorneys General – have explained that they will not grant immunities that condone, require, or purport to authorize or permit the future commission of any criminal offence, no matter how exceptional the circumstances. ..."[54]

On 20 August 2001 the applicant applied for judicial review of the DPP's decision. On 17 October 2001 the Divisional Court refused the application, holding that the DPP did not have the power to give the undertaking not to prosecute and that section 2(1) of the Suicide Act 1961 was not incompatible with the Convention.

**House of Lords:** The applicant appealed to the House of Lords. They dismissed her appeal on 29 November 2001 and upheld the judgment of the Divisional Court. In giving the leading judgment Lord Bingham held:

No one of ordinary sensitivity could be unmoved by the frightening ordeal which faces Mrs Dianne Pretty, the appellant. She suffers from motor neuron disease, a progressive degenerative illness from which she has no hope of recovery. She has only a short time to live and faces the prospect of a humiliating and distressing death. She is mentally alert and would like to be able to take steps to bring her life to a peaceful end at a time of her choosing. But her physical incapacity is now such that she can no longer, without help, take her own life. With the support of her family, she wishes to enlist the help of her husband to that end. He himself is willing to give such help, but only if he can be sure that he will not be prosecuted under section 2(1) of the Suicide Act 1961 for aiding and abetting her suicide. Asked to undertake that he would not under section 2(4) of the Act consent to the prosecution of Mr Pretty under section 2(1) if Mr Pretty were to assist his wife to commit suicide, the Director of Public Prosecutions has refused to give such an undertaking. On Mrs Pretty's application for judicial review of that refusal, the Queen's Bench Divisional Court upheld the Director's decision and refused relief. Mrs Pretty claims that she has a right to her husband's assistance in committing suicide and that section 2 of the 1961 Act, if it prohibits his helping and

[54] ibid 3

prevents the Director undertaking not to prosecute if he does, is incompatible with the European Convention on Human Rights. It is on the Convention, brought into force in this country by the Human Rights Act 1998 that Mrs. Pretty's claim to relief depends. It is accepted by her counsel on her behalf that under the common law of England she could not have hoped to succeed.[55]

There is no Convention authority to support Mrs. Pretty's argument. To the extent that there is any relevant authority it is adverse to her. In *Osman v. United Kingdom* (1998) 29 EHRR 245 the applicants complained of a failure by the United Kingdom to protect the right to life of the second applicant and his deceased father.[56]

**European Court of Human Rights' Assessment:** The Court determined that the facts of the case fell within the ambit of Article 8, which was examined in conjunction with Article 14, focusing on the claim that she was prevented from exercising a right enjoyed by others who could end their lives without assistance because they were not prevented from doing so by any disability. The Court emphasized that under the Convention, discrimination may entail equal treatment of those in different conditions, but also reiterated that member states have a margin of appreciation in their application of the convention. In this case, the Court found the Government had reasonable justification for not creating different legal regimes concerning assisted suicide for those physically able and those physically unable due to the risk of abuse and undermining of the protection of life safeguarded by the 1961 Suicide Act. For these reasons, the Court unanimously found no violation of Article 14 of the Convention, and no violation of Articles 2, 3, 8 and 9.[57]

***Adv.Uttam Prasad Rijal et al. v Prime Minister and Office of Council of Ministers etal.***[58]

**Fact:** The context of this writ was set during the time when the Constituent Assembly was promulgating new Constitution in Nepal; but, the decision was delivered after the Constitution was promulgated.

Adv. Uttam Prasad Rijal and Adv. TankhariDahal sued a writ petition in the Supreme Court of Nepal under Article 32 and Article 107(2) of Interim Constitution of Nepal, 2063. The petitioners prayed that Article 12(1) of the Interim Constitution has guaranteed right to life, and it covers the concept of right to die as within. A person should have control over his body, and should be allowed, by law, with right to die. As the Constituent Assembly is going to pass the new Constitution, hence, pray for a mandamus to include 'right to die' in the same part as 'right to life' as fundamental right in the upcoming Constitution, or to allow to make the law permitting right to die. The petitioners also asked for directives from the court unless the law is promulgated.

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55 ibid 3-4
56 ibid 5
57 ibid 41-42
58 Division Bench of Justice Dipak Kumar Karki and Justice Dr. Anand Mohan Bhattarai[071-WO-1055] Date of Decision: 2074.05.07

**Issue:** a) Whether the 'right to life with dignity' includes 'right to die with dignity' under Article 21 of the Constitution?

b) Whether an individual has any right to refuse medical treatment including withdrawal from life saving devices? Whether passive euthanasia should be permitted on the living will of patient?

**Judgment:** In Nepal- may be because of State's economic, social and cultural reasons- the issue of 'right to die' has not been seriously upraised and discussed. Theoretically, the 'right to life' includes the 'right to wilful death'. But, where the people are struggling for basic rights of hands to mouth, shelter, education, health, security and survival, the concern of the State right now should be focused on saving the lives and assuring those basic rights.[59]

The issue of 'right to die' is very serious issue. To some extent, in the will of the terminally ill person it may be considered positively to allow it much cautiously under limited conditions; but, the dangerous situation that it may call into, cannot be ignored. We must think in depth whether we can handle that adverse menace or not. In addition, there are so many moral questions in it.[60]

When we comparatively look into other's practice; we find that the refusal of medical treatment including withdrawal from life saving devices for a terminally ill person- in assistance of physician, parents or next kin- is allowed. We do also have examples where the patients willfully refuse to undertake the medication. Accepting them under such compulsion is one thing, but allowing it as a right is another thing. Under the situations, where, there is no adequate access to the people into the basic health facilities, and they are- due to poverty, illiteracy and other hurdles- deprived of timely health care services, it is worthless to declare 'will to die' as a right even from the perspectives of human rights.[61]

With these observations, the writ petition is dismissed.

## 5. CONCLUDING COMMENTS

Supporters of euthanasia typically argue that killing the terminally ill person is not worse than letting them die every moment. Patients who are in persistent vegetative states with no prospect of recovery, they need to have choice to end the life because it prevents them from further suffering. Physician assisting a terminally ill patient is merely helping the patient who wishes to die with dignity.They put the argument that it can relieve unbearable suffering of the patients, relieve burdens from the relatives, and patient has right to die with dignity.

- In the study by van der Maas et al. in the Netherlands in 1990, it was demonstrated that patients made the request for euthanasia for the following

[59] Para 21
[60] Para 22
[61] Para 23

reasons: loss of dignity mentioned in 57 %, pain in 46%, unworthy dying in 46%, being dependent on others in 33% and being tired of life in 23% of the causes.[62]

- The data of USA in 1950 and 1991 also indicates that the public support for legislation of euthanasia and physician-assisted suicide has been increasing over time. In 1950 only 34 % of citizens agreed that physicians should be allowed to hasten the lives of patients with incurable diseases. By 1991, the figure increased to 63%.[63]

On the other hand, critics of the euthanasia typically argue that killing is always wrong. It violates the right to life. Killing in either form is a part of homicide. Thus, the attempt to legalize euthanasia has been failed in several countries. For example, in January 2011 the French Senate defeated by a 170-142 vote a bill seeking to legalize euthanasia. Once again, in April 2021, MP Olivier Farloni submitted the bill to legalize euthanasia; however, it was again blocked in the French parliament, largely by five opposition party MPs.[64] In England, a bill allowing physician assisted suicide, was blocked in May 2006, and could not become law.[65]

Based on these references, the question 'whether euthanasia should be legalized or not in Nepal?' has to be answered. This question requires the survey of public perspectives, assessment of the risk of medical negligence, and an analysis of hurt in cultural values. Without any empirical data, no authentic declaration can be drawn. Thus, only perspectives can be presented.

To author's view, euthanasia should not be legalized in Nepal at least for the following reasons:

a) Nepalese cultural values, rites and rituals are inseparably attached in every legislation, and laws posited against the underlying values have been defaulted by the people.[66]The patient's faith on god still remains alive even after the doctor's declaration as terminally ill patient.

b) A terminally ill person may approve euthanasia under pressure. When an ill person thinks himself a burden to the family, and family members also think in the same way, the approval for euthanasia can never be said as absolute voluntary; rather, it falls under the category of 'relatives' pressure'.

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62 Van der Maas PJ, van Delden JJM, Pijnenborg L et al. *Euthanasia and Other Medical Decisions Concerning the End of Life* (Lancet 1991)669-674 Cited from:DVK Chao, NY Chan and WY Chan,*Euthanasia RevisitedFamily Practice* 19(2)(Oxford University Press 2002) 132

63 R J Blendon, U S Szalay and R A. Knox 'Should Physicians Aid Their Patients in Dying? The Public Perspectives'[1992]JAMA2658-2662 Cited from: ibid.

64 Bill to legalise euthanasia goes before divided French parliament, <https://www.france24.com/en/france/20210408-bill-to-legalise-euthanasia-goes-before-divided-french-parliament>accessed 16 August 2021

65 'Assisted-dying legislation in the UK' (*BBC*, 2014) <https://www.bbc.co.uk/ethics/euthanasia/overview/asstdyingbill_1.shtml#h2>accessed 17 August 2021

66 An example of it can be traced to Social Practices (Reform) Act 2033(1976) and hugely its 2066(2010) amendment.

c) The cause of approval for euthanasia might not be always as hypothesized- being terminally ill patient. Patients with major depression, for example, may also approve for the same. It may escalate medical negligence. For instance, Breitbart et al. found that 'the desire for hastened death in a group of terminally ill patients with cancer was significantly associated with a clinical diagnosis of depression'.[67]

d) Patient may change his mind in the course of time because of various reasons. It might be due to some hope in life, due to some care to/by relatives, due to some duty to accomplish etc. For example, van der Maas et al. found that only one-third were finally adhered to the requests for euthanasia and assisted suicide. In most cases, alternatives were found that made life bearable again.[68]

e) Above all, euthanasia is not a natural death, and is against the sanctity of life.

After all, if euthanasia is allowed for terminally ill person, why not for chronically ill one? The extension may go far and beyond to socially unproductive and unwanted, and it places the risk of 'abuse of legality' of euthanasia- which is beyond the boundary of measurement, in such time and context of our society where rule of law and democracy, in true sense, are still to achieve.

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[67] Breitbart W, Rosenfeld B, Pessin H et al. 'Depression, Hopelessness and Desire for Hastened Death in Terminally Ill Patients with Cancer'[2000]JAMA 2907-2911 Cited from:Chao (n 62)

[68] ibid

# BATTERED WOMAN SYNDROME IN NEPAL: LENS OF FORENSIC PSYCHOLOGY

**Laxmi Bakhadyo**[1]

## ABSTRACT

*Domestic violence against woman is considered as very old phenomenon in Nepalese society. As a result of cyclic domestic violence; women face various psychological problem resulting with mental health problem. Because of adverse mental health problems and psychological state like PTSD women end up killing their own intimate partner or husband to protect herself and her children from probable risk of being victim of further violence. This type of situation is named as "Battered woman syndrome". Women who killed their husband because of violence; she had faced for several years end up in prison. Cases of homicide where women killed their husbands are not new in Nepal. Judiciary has raised the issue of battered woman syndrome but legislation has not addressed the issue in particular. It is a matter of medico legal psychology. Psychology has ever been cross cutting issue in criminal cases and specifically to cases relating to battered woman syndrome. Forensic psychologist could have traced the situation of Battered woman syndrome, because women who killed their husband might not have battered woman syndrome and might have killed them with criminal intent as well.*

## 1. INTRODUCTION

Domestic violence, particularly wife abuse[2] is a pervasive problem. It is common in all levels of society from the economically disadvantaged to the rich, professional classes.[3] Nepalese society is not exception to other societies with patriarchy. Violence against women is regarded to be natural phenomenon and it is tallied with the fate of woman. Obviously, any form of violence against woman has been criminalized by the legislature but yet there are numbers of domestic violence in Nepalese society. Victoria Mikesell Mather, in her article *The Skeleton in the Closet: The Battered woman syndrome, self-defense, and expert testimony* mentioned that "if society accepts wife beating as normal or permissible behavior, nothing will be done to

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[1] Assistant Professor, Kathmandu School of law

[2] R. Cipparone, 'The Defense of Battered Women Who Kill' (1987)University of Pennsylvania Law Review

[3] *Dr. SudhansuKoirala vs. SindhaMainali*, [NKP 2077] DN 10482, In this case, Sindha is dentist and Sudhansu is medical doctor.

stop it, when society's attitude changes, the criminal justice system will also change". Because of Domestic violence woman are resulting with different kinds of mental health problem and even they end up with committing homicide.

> *"Radhika Shrestha had love marriage with Sagar Shrestha and begot two daughters as well. Their conjugal relation turned into problem after begetting daughters and she was frequently assaulted and abused by her husband. Her husband in addition was drunkard, whereas, they were dependent on labor work for their day to day livelihood. On 2068/01/19, Sagar was back to home at around 11:00pm and he was drunk. He started to quarrel with Radhika and beat her. On the very night when Sagar fell asleep on the floor, Radhika pour kerosene around her and burnt him. She also locked him from outside and ran away from the room. Sagar was rescued by his neighbor and took him for treatment but as 65% of his body was burnt he died. Case was filed against Radhika, she confessed and was convicted of homicide. District Court punished her with whole life imprisonment with forfeiture of property. Appeal Court and Supreme Court mitigate her punishment to 10 years imprisonment by application of Abam 188 (discretionary power)."*[4]

Radhika killed her husband, as a result of intense anger and rage but this *actus reus* was not amounted to be result to provocation. This act was not response to immediate anger without intention. It was explosion of piles of anger, frustration, pain, hatred, feeling of insecurity, hopelessness which remained as residue in her mind from long time and this type of situation is defined as Battered Woman Syndrome as mentioned by Dr. Lenore Walker. Walker defined battered woman as "one who is subjected repeatedly to coercive behavior (physical, sexual and/or psychological) by a man attempting to force her to do what he wants and who as a member of couple, has experienced at least two acute battering incidents." Radhika's case is representative case which ended to Supreme Court of Nepal.

*Mens rea* has ever been an essential element to prove crime and criminality of the perpetrator beyond the act of strict liability. Why a person committed crime with what motive is always the thrust of investigation. In this context, battered woman having "Battered woman syndrome" has some time pleaded as a sort of insanity, whereas in some context it has been pleaded as self-defense. In these context author of this article tends to relate the battered woman syndrome with 'forensic psychology'. In this article, the author is trying to trace when and why this particular syndrome can be taken as matter of mitigating punishment or even evidence for acquittal from punishment. This, which is divided into six parts, only focuses on the Nepalese legal context. First part is introduction, second part deals with the notion of battered woman syndrome, third part deals with psychological impact on battered woman, fourth part deals with some of homicide cases decided by supreme court of Nepal and considered essence of battered woman syndrome, fifth part deals with forensic psychological knowledge concerning battered woman syndrome and in this part, forensic psychological part of self-defense

[4] *NG vs. Radhika Shrestha*, [NKP 2071] DN 9242,Vol 9

and insanity defense, role of forensic psychologist in cases relating to battered woman syndrome has been discussed and finally sixth part deals with conclusion of paper with some recommendations.

## 2. BATTERED WOMAN SYNDROME (BWS)

Female's relationship with the criminal justice system as victims of crime has arguably received more attention than their involvement in other areas of the Criminal Justice System.[5] It is noteworthy that females are regarded to be victims of crime than perpetrators. Like: if a woman commits the offense of infanticide then she is regarded to be the victim of social stigma, when she commits an offense of homicide against her husband she is regarded to be a victim of family or domestic relationships and with the excuse of battered woman syndrome she is provided with mitigated punishment. Here questions arise are "*If a woman who had committed crime is victim?*" "*If she is to be punished as per criminal justice system*" Or"*Are there some hidden facts or issues to be considered before stating her as perpetrator or victim?*" Psychological factor behind committing act prohibited by law has always been cross cutting factor to determine the criminality and severity of crime. So, if any woman had committed any crime then it is to be assessed if she had committed crime as a result to battered woman syndrome, which is also known as victimization syndrome.

When a woman is being victim of abusive relationship with her intimate partner or husband for a long time, she develops a psychological trauma. This psychological condition developed as a result of those long term abusive relation is said to be battered woman syndrome. Early research focused on characteristics of women who were battered and initially battered women were seen as causing their own suffering.[6] It meant to say that, woman who suffer from different kinds of abuse were blamed for their own suffering and it is not exception in Nepalese context as well. For instance: Male partner is regarded to be house head, bread winner of the family and woman partner is regarded to depend on him for her every needs so she is supposed to be suppressed by her partner. If she does not, then she could be abused by her partner and it is accepted by society. There are numbers of local sayings like "ढोलक र स्वास्नीलाई जति पिट्यो त्यति राम्रो बज्छ ।" "पोथीबासेको ठिक होइन ।" which portrait that men are superior to women.

The concept of battered woman syndrome was developed by psychotherapist Lenore Walker in late 1970s. She wanted to describe the unique pattern of behavior and emotions that can develop when a person experiences abuse and as they try to find ways to survive the situation. Walker noted that the patterns of behavior that result from abuse often resemble those of post-traumatic stress disorder (PTSD). She described it as a subtype of PTSD.[7] Dictionary of Psychology defined Battered Woman

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5 Tina L. Freiburgerand *Catherine D. Marcum,Women in the Criminal Justice System, Tracking the Journey of Female and Crime* (CRC Press. 2016) xvi

6 Maureen C. McHugh and Tammy A.R. Bartoszek, 'Intimate Violence' <http://ndl.ethernet.edu.et/bitstream/123456789/54834/1/224.pdf> accessed 1 August 2021

7 ZawnVillines, 'Battered woman syndrome and intimate partner violence' (2018)<https://www.medicalnewstoday.com/articles/320747#what-is-it> accessed 25 June 2021

Syndrome as "the psychological effects of being physically abused by a spouse or domestic partner. The syndrome includes learned helplessness in relation to the abusive spouse, as well as symptoms of past traumatic stress. Incidence of domestic violence toward women played a role in the origins of this term; however, it is now understood that men may be the victim of violence by a domestic partner and may also exhibit the effects of this syndrome."[8]

Dr. Walker described battered woman syndrome using following four characteristics:[9]

1. The woman is convinced it's all her fault
2. The woman is unable to transfer responsibility for the violence on someone else
3. The woman is concerned for her life and that of her children
4. The woman believes that the tyrant is omniscient and omnipresent

Further in her book "*The Battered Woman*", published in 1979, Dr. Walker expressed why a woman being battered by her partner still lives with him or still maintains the relation with the abusive partner. She mentioned that battering relationships have cycle of violence consisting of three phases and that women in these relationships often suffered from "learned helplessness".[10] Those three phases of cycle of violence are described as follows:

**a. The tension building phase**

This is preliminary phase when abusive behavior will start. This phase is also known as the escalation or build-up phase. In this phase victim is subjected with abuse of minor nature like slapping, using abusive words, psychological abuses, blaming and arguing etc. and victim tries to pacify the partner by using her kindness. During this phase batterer may increase in verbal and minor physical abuse in front of others. Batterers will frequent put down victim and victims' family members in front of others. Victims are frightened so she feels if she would pacify the situation and make the situation normal. She also tries to avoid her abuser but it will not give positive result.

**b. Active battering phase**

After the end of "tension building phase", active battering phase tends to start. In this phase battering which was started with verbal abuse and minor battering will evolve into acute incidents of battering like assaults resulting to grievous hurt, even to homicide of victim. In this phase, batterer keeps his victim on immense threat and control her every activity. She will not be able to make any decision even "what to wear?", "when to go out and be back?", "what to eat and what not?" In this phase, victim's techniques to pacify batterer by using kindness, ignoring will be of no use.

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8 *APA Dictionary of Psychology*(American Psychological Association)<https://dictionary.apa.org/battered-woman-syndrome> accessed 25 June 2021

9 LudmilaĆírtková, '*Forensic psychological knowledge concerning domestic violence*'<https://ja-sr.sk/files/Cirtkova_Forensic_psychological_knowledge_concerning_domestic_violence.pdf> accessed 25 June 2021

10 Indira Silwal, 'Battered Woman Syndrome as mitigating Factor of homicide in Nepal' (2017)*NJA Law Journal*154

c. **Honeymoon phase**

Honeymoon phase is clam phase after active battering phase. This phase is also known as calm loving respite phase. In this phase batterer apologizes with victim, promise not to repeat such acts. Batterer may deny violence and may blame it on drinking alcohol or tense situation. They may apologize and buy gifts for victims assuring that he will not repeat such act. The victim is least likely to comply with opinion of others who suggest her to leave him or go for legal action. Victims believe that batterer had really changes.

They seem to be in loving phase but this phase is most psychologically victimizing phase because batterer fool victim. Victim believes that the batterer has changed but it does not exist for long time because again the cycle of battering will continue.

If any woman has been accused of killing her intimate partner and while observing her if it was found that she had gone through any of two phases mentioned in cycle above, then she is considered to be battered woman. Walker defined the phases of cycle of violence but in her second book she demonstrated that most battering relationships do not actually comply with the above cycle. So, many scholars have criticized the definition given by Walker and have rather attempted to give a general understanding of 'battered women' as 'the women who have been abused physically/ psychologically by their partner without any concern for her personhood or rights.'[11]

## 3. DOMESTIC VIOLENCE AND ITS PSYCHOLOGICAL IMPACT ON BATTERED WOMAN

Domestic violence is not new matter in our society. It has been in practice from very long time. Especially domestic violence against women has always been practiced; it was even praised and taken as proof of masculinity and power in the society. According to US Department of Justice "*Domestic violence is a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic Violence can be physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person; this includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone*"[12]

Domestic violence has devastating consequences on both the physical and mental health of victimized women and their children. Despite the fact that the physical consequences of violence are most visible, the most serious are undoubtedly the psychological ones.[13] Domestic violence has been criminalized in Nepal. Feminist movement, ratification of CEDAW, Beijing Declaration and Platform for Action, 1995 and other national- international movements had played immense role to criminalize

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[11] Dibya Shrestha and Nisha Bhandari, 'Battered Women Syndrome: Need for Judicial Objectivity' [2018] KSL 152

[12] 'Domestic Violence' <https://sites.google.com/site/consultingservicesinfo/topics/domestic-violence> accessed 2 August 2021

[13] Mauro Paulino, *Forensic psychology of spousal violence* (Elsevier 2016)46

domestic violence. Domestic Violence (Crime and Punishment) Act 2066(2009) defined it as any form of physical, mental, sexual and economic harm perpetrated by person to a person with whom he/she has a family relationship and this word also includes any acts of reprimand or emotional harm. Perpetrator of domestic violence is entitled with punishment up to 6-month imprisonment or Rs.3000/- to Rs.25000/- fine or both.[14] But still data reveals that number of such violence inside home has not been decreased. Police record shows that in fiscal year 2070/071, 6835 cases of domestic violence were registered, whereas in 2071/072, 8268 cases, in fiscal year 2072/073, 9398 cases, in fiscal year 2073/074, 11629 cases, in fiscal year 2074/075, 12225 cases, in fiscal year 2075/076, 14774 cases, in fiscal year 2076/077, 11738 cases were registered.

Lots of researches have been done with regard to domestic violence. We can find huge amount of literature related to it, but we are far away from establishing a unified theory of causative factor of domestic violence. Why some men commit violence against his partner and why not other?[15] Sociocultural explanation argues that domestic violence is a product of patriarchal society, where women are treated as house keeper, she is regarded as décor of house; nothing more. In such society women are allowed to be assaulted by her husband and raising voice against such husband is against norms of so called *sanskari*(well behaved)daughter in-law or wife. Similarly, interpersonal explanations tend to situate the problem within family interactions, and cite factors such as stress and generally problematic family interactions.[16] Intrapersonal or individual explanations mentioned that there are various factors which are linked with domestic violence. For instance, social learning theory, notion of modeling, attitude and cognitive style of individuals vary from person to person.

There are different causative factors and types of domestic violence that also vary. As per Domestic Violence Act 2066 (2009), domestic violence has been categorized as physical violence, psychological violence, economic violence and sexual violence. Among these violence, psychological violence (compared to physical and sexual violence) is estimated to be the most common form of intimate partner violence.[17]LudmilaCirtkova in her writing *Forensic psychological knowledge concerning domestic violence* named domestic violence as intimate terrorism, mental torment, dysphoric domestic violence, coercive control violence and common couple violence. As per Ms. Cirtkova, other than Common Couple Violence, the victims of such violence develop battered woman syndrome.

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14 Domestic Violence (Offence and Punishment) Act 2066(2009), s 13(1A)

15 "he" has been used as number of violence committed by men is higher in comparison to females.

16 Gilchrist, Mark Kebbell and Elizabeth L, 'Domestic Violence: Current issues in definitions and interventions with perpetrators in the UK' in Joanaa R. Adler (ed), *Forensic Psychology Concepts, debates and practice* (Routledge 2004)226

17 Sarah Dokkedahl, Robin Niels Kok, Siobhan Murphy, Trine Rønde Kristensen, Ditte Bech-Hansen and Ask Elklit 'The psychological subtype of intimate partner violence and its effect on mental health: protocol for a systematic review and meta-analysis'(2019)<https://systematicreviewsjournal.biomedcentral.com/track/pdf/10.1186/s 13643-019-1118-1.pdf> accessed 2 August 2021

Researchers had mentioned that due to domestic violence, women are traumatized and also develop different kind of psychological problem. Bruises are seen in body but along with the physical impact, they face lots of psychological problems. Physical and emotional abuse is not only distressing, it's psychologically damaging and increases women's risk of developing a mental illness.[18] Women, who have experienced domestic violence or abuse, are at a significantly higher risk of experiencing a range of mental health conditions including post-traumatic stress disorder (PTSD), depression, anxiety, substance abuse, and thoughts of suicide.[19] Fact sheet of Australia, also mentioned that women who had faced domestic violence by intimate partner are being more prone to suicidal thoughts and even attempt. It was found suicidal tendency rates of up to 77% among women who experienced violence by a partner.[20] Similarly a research done in Nepal, it was found that woman facing intimate partner violence develops depressive state of mind.[21]

Several characteristics are common among women who have been subjected to repeated physical and psychological abuse by their mates.[22]A person living with domestic violence may feel isolated, anxious, depressed, and helpless. She may be emotionally withdrawn; she may feel embarrassed and afraid for judgments of others. She may excuse the abuser, she may still love the batterer and believe that abuser will change, she may think that she is wrong so why abuser is abusing her. She might think that she should not react against the abuser as per the moral and religious values. A battered woman facing domestic violence commonly experiences feeling low self-esteem and they often blame themselves for the batterer's behavior. Not only this, she often believes that no one, including herself, will be able to resolve her predicament.[23] Feeling helplessness will make her to stick with the same partner bearing same type of violence cycle. As the abuse continues, the person may develop:[24]

- sleep problems, including nightmares and insomnia
- sudden intrusive feelings about the abuse
- an aversion to talking about the abuse
- feelings of anger, sadness, hopelessness and worthlessness
- intense feelings of fear
- panic attacks or flashbacks to the abuse

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18 Rhian Parker, 'How domestic violence affects women's mental health' (2019)<https://theconversation.com/how-domestic-violence-affects-womens-mental-health-104926> accessed 2 August 2021

19 Ibid

20 Rochelle Braaf and Isobelle Barrett Meyering, 'Domestic Violence and Mental Health' (Australian Domestic & Family Violence Clearing House, 2013)<https://www.nifvs.org.au/wp-content/uploads/2015/01/Domestic-Violence-and-Mental-Health.pdf> accessed 25 June 2021

21 Cari Jo Clark a, Yuk Fai Cheong, Jhumka Gupta, Gemma Ferguson , BinitaShrestha, PrabinNanichaShrestha, Kathryn M. Yount, 'Intimate partner violence in Nepal: Latent patterns and association with depressive symptoms'(Elsevier 2019)<https://www.sciencedirect.com/science/article/pii/S2352827318302507> accessed 20 June 2021

22 Cipparone (n 2)

23 Cipparone (n 2)

24 Kristen Jordan Shamus, 'What is Battered Woman Syndrome? And can it be a defense for murder?'(*Detroit Free Press*, 19 December 2018) <https://www.freep.com/story/news/local/michigan/2018/12/19/battered-women-syndrome-defense-domestic-violence/2273630002/> accessed 20 June 2021

The person may also behave in ways that can be difficult for someone outside the relationship to understand, such as:

- refusing to leave the relationship
- believing that the abuser is powerful or knows everything
- idealizing the person who carried out the abuse when things are calm believing they deserve the abuse

Above mentioned description in this part shows that battered woman being unable to escape from the abusive relationship ends with having different kind of mental health problem. PTSD, Depression, Anxiety are few examples of those mental health problem which are being faced by victim of domestic violence.

## 4. PRACTICE IN NEPALESE JUDICIARY

There is no separate provision in Nepalese legal system to address battered women syndrome in particular but it is worthy to praise steps taken by Nepalese judiciary. Domestic violence especially intimate partner violence is closely related with battered woman syndrome. When a woman faces a long time violence from her partner then to save herself, her children or to escape from such violent situation she suddenly decides to kill her husband. If judiciary found such situation, then judiciary by using its discretionary power had mitigated the punishment; few examples are explained below:

### i. *DomaLameni v HMG,* NKP 2046, DN 3716

In this case, judiciary did not use the term Battered Woman Syndrome, but courts other than Solukhumbu District Court had mitigated punishment by considering the situation of DomaLameni. Fact showed that victim Rinji Lama used to assault her and she had lived her life on threat of being assaulted. Her husband used to beat their children as well and he frequent use alcohol. Judiciary stated that fact did not show that there was ill intention against the husband and there were no any other reasons to kill him. So, her punishment was mitigated to 10 years imprisonment by application of *Abam* 188.

### ii. *Laxima Badi v HMG*, NKP 2060, DN 7246

Perpetrator LaximaBadi was mother of 8 kids. Her family was dependent on begging for their livelihood and her husband took no responsibility of family. He used to drink alcohol and time and again assaulted Laxima and children. So, on the day of incident she killed her husband by using sickle and carried the death body away with help of her son. She confessed everything.

In this case, judiciary did not use the term “battered woman syndrome” but it was found that judiciary had explained the essence of it. In this case, three tiers of court had given two different judgements. District court convicted the perpetrator and sentenced with 12 years imprisonment by using *Abam 188*, Appellate court upheld the decision of district court and supreme court sentenced with 7 years by using *Abam 188.* Supreme Court stated that because of inhumane behavior to Laxima and the children, the hatred

toward him increased and this created imbalance in her psychology and made her to decide kill her husband.

**iii. *Jok Kumari v Nepal Government,* NKP 2066, DN 8223**

In this case, JokKumari killed her husband by using axe and also hide the death body. If we see the fact of the case, then Jokkumari was being victim of domestic violence from next year of her marriage. She begot two children but still she was being victimized. On the day of incident, her husband was back to home in drunken state and started to beat her. She could not tolerate the situation and hit on his head with axe and he died. She with help of her son buried the deceased body but after 10 days, body was found by dog. She confessed before the police and also before the court. District court convicted her and punished with 10 years imprisonment by using *Abam 188,* Appeal Court increased the punishment to 15 years and Supreme Court upheld the decision of lower court by sentencing her with 10 years imprisonment.

This case for the first time in Nepalese judiciary recognized the concept of Battered woman syndrome and used the term "Battered Woman Syndrome". But yet, psychological test of the perpetrator was not found to be done. Her mental status was not assessed.

**iv. *Radhika Shrestha v. Nepal Government*, NKP 2071, DN 9242**

In this case Radhika was married to Sagar. They had love marriage and they also begot 2 daughters and they were dependent on labor work for their livelihood. Their marital relation turned bad after birth of daughters. Sagar used to be back home in drunkard situation and used to beat Radhika. On the day of incident, Sagarwas is in drunken state and he assaulted Radhika. Radhika managed him to lay on the floor and when she found him asleep; she poured kerosene around and burnt him alive. Further, she also locked him from outside and ran away from the place. Sagar was rescued by his neighbor and took him to hospital but he died. Radhika was charged of homicide. She confessed before the police and court. She was punished with life imprisonment with forfeiture of property as per the decision of District Court. Appeal Court decrease the imprisonment to 10 years by applying *Abam* 188 and Supreme Court upheld the decision of Appeal court.

In this case, supreme court had clearly mentioned that the causative factor of the incident was continuous violence against Radhika. BWS has been elaborated in this case. Judiciary also explains that act committed by Radhika is not prevocational. In provocation, act is committed in sudden anger and rage without intention but in BWS the main reason for the incident would be the victim himself or herself. In the situation of BWS, there can be sudden rage as in prevocational but she may also kill her intimate partner after lapse of time of such rage and violence. Nature of crime committed as a result of BWS does not fit on the traditional definition of prevocational homicide. Women who continuously face domestic violence from her intimate partner, may kill him for protecting herself and her children. The only reason for killing such partner is

rage, hatred, anger, fear and threat from partner. In foreign land, if woman claim for BWS then she is accessed through psychological method and as per expert's testimony on BWS, she may get mitigated punishment or sometime she may be acquitted from the charge as well. But in context of Nepal, neither law has addressed this issue nor there is practice of testing the perpetrator.

Judiciary clearly mentioned that application of *Abam* 188, and issue of BWS are not same. It has been in practice to use *Abam* 188 to mitigate punishment, but gravity of BWS, suffering faced by woman is not limited to the use of discretionary power by application of *Abam* 188. Judiciary in this case raised the question to Nepal government and requested to address the issue by making clear law, but it has yet not been addressed.

## 5. FORENSIC PSYCHOLOGICAL KNOWLEDGE CONERNING BATTERED WOMAN SYNDROME

### a. Forensic psychology

A field of psychology that relates to the law or legal system is forensic psychology. Forensic psychology is the study of the integration of psychology and the law. It is a new blend of two old professions: *Psychology*, which is the study of human behavior, and the *Law*, which is study of how people rule themselves in social situations.[25] Psychologists generally use the scientific method of induction to understand human behavior while lawyers use reason or the deductive method of inquiry to understand legal issues. Each discipline uses different methods to interpret and solve problems.[26]

Blackburn (1996) define forensic psychology as "...the provision of psychological information for the purpose of facilitating a legal decision."[27] In the same way, British Psychological Society (BPS) explains forensic psychology as "*Forensic psychology is devoted to psychological aspects of legal process in courts. The term is also often used to refer to investigative and criminological psychology: applying psychological theory to criminal investigation, understanding psychological problems associated with criminal behavior and the treatment of those who have committed offences."*[28]

... forensic psychologists (and forensic psychiatrists) will assessa person's competency to stand trial, assess the state of mind of a defendant, act as consultants onchild custody cases, consult on sentencing and treatment recommendations, and advise on issues such aseyewitness testimony and children's testimony (American Board of Forensic Psychology, 2014).[29]

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25 Lenore E.A Walker andDaivd L. Shapiro, *Introduction to Forensic Psychology Clinical and Social Psychological Perspective* (Springer Science Business Media LLC 2003) 3

26 Ibid

27 Sandie Taylor, *Forensic Psychology the basics* (Routledge Taylor & Francis Group 2015)2

28 Ibid

29 <https://learn.saylor.org/pluginfile.php/40708/mod_resource/content/1/OpenStax-Psychology.pdf> accessed 18 Jan 2018

Forensic psychologists are called upon the court for judicial process as experts. As expert, forensic psychologists ought to have a goodunderstanding of the law and provide information in the context of the legal system rather than just withinthe realm of psychology. ...They may also be involved in providing psychological treatment within the criminal justicesystem. Criminal profilers are a relatively small proportion of psychologists that act as consultants to lawenforcement.[30]Psychologists trained in forensic psychology provide a variety of services. For example, in the judicial system, they evaluate and assess the psychological functioning and capacity of individuals suspected or convicted of committing a crime. Within law enforcement, they provide psychological profiling and interviewing of offenders. They often work in correctional settings, conduct screenings and assessments of inmates in prison administering evaluations and provide mental health treatment on an individual basis or group therapy format with a focus on anger management, substance abuse treatment, and relapse prevention.[31]

**b. Battered women syndrome and self defense**

Self-defense is usually a justification for a crime, not merely excuse. If the defendant can prove the elements of self-defense, then the defendant is completely exonerated.[32] Basically a person will be justified in using a reasonable amount of force to protect herself from an attack if she reasonably believes that:

i. She is in immediate danger of bodily harm
ii. The force is necessary to avoid danger
iii. She is not aggressor

In many situations, the circumstances under which a battered woman killed her batterer will have been such that she will have little difficulty to satisfy the traditionally set standard of self-defense. Since, there may not be immediate danger against her life and force she used may not be reasonable. Traditionally, weapons or forced used should be proportionate. In other words, it can be said that there should be reciprocity of force. It meant to said that the use of deadly force against non-deadly force was per se unreasonable. In case of BWS, if she is proven to be victim of cyclical nature of battering relationship and she was found to be injured previously which reinforces the reasonableness of her belief that such harm would again be inflicted upon her during the particular time of crime then she could have claim for self-defense.

The element of imminent or immediate danger is a more fundamental problem with a battered woman's plea of self-defense. If typical definition of self-defense is observed, then it is noted that there should be imminent threat; so to get rid of it s/he can take action against and if the person died then s/he will not be alleged for the offence. But, in case of BWS, women were found to kill her sleeping spouse who is not an

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30 Ibid

31 'What is forensic Psychology?'<https://thethreeseas.com.au/forensic-psychology/"What is forensic psychology ?"> accessed 20 Jan 2020

32 Victoria Mikesell Mather, 'The skeleton in the closet: the battered women syndrome, self-defense and Expert Testimony' (1988)39(2) Mercer Law Review<https://commons.stmarytx.edu/facarticles/108/> accessed 24 Jan 2021

immediate threat. If we rely on objective explanation of self-defense, then BWS does not fit it. But judiciaries have adjusted BWS in self-defense by use of subjective explanation. For instance, *State vs. Gallegos, 1986* in which defendant shot the victim while he was lying on the bed. Fact shows that on the day of incident, she was sexually abused and threaten her to kill and struck their child in the face with belt buckle. In this case, New Mexico Court of Appeals adopted a hybrid standard for the fear of immediate danger element of self-defense. Judiciary also mentioned that "the fact finder must consider defendant's perceptions of immediate threat of harm and whether a reasonable person, in similar circumstances, would also act in self-defense."[33]

As per National Criminal Penal Code sec. 24 states "any act done in the exercise of right of private defense shall not be considered to be an offence. Every person has right to defend the body, life or property of his or her own or of any other person against any illegal harm. The right of private defense under this section shall be exercised only when there is a reasonable apprehension or reasonable cause to believe that the body, life or property of his or her own or of any other person cannot be defended against any illegal harm unless any act is done immediately." Sec. 26 states that while exercising the right of private defense, no one shall have the right to cause person's death. But sec. 26(2) states the situation when there is death of person but will not be considered as offence. These conditions are:

a) Where there is reasonable cause to believe that an assault on oneself or another person would cause the death of or serious injury or grievous hurt to oneself or another person unless instant defense is exercised against such assault.

b) Where any act is instantly done by the victim having reasonable cause to believe that the assault is made with the intention of committing rape or at the time of or after the commission of rape.

c) Where hostage-taking or kidnapping is committed with the intention of causing death, taking ransom for hostage-taking or kidnapping, committing rape, causing grievous hurt.

d) Where attempt is made to cause mischief by seizing, using a deadly weapon setting fire to or using explosive substance on, any building, tent which is used for human dwelling or as the place for worship or pray or the custody of property or a means of transport,

e) Where it is necessary to defend against robbery

f) Where the circumstance requires an instant retaliation by some security personnel deputed by order of the competent authority for the personal security of a person or security of a property of the government of Nepal, state government or local level or a body corporate under full or majority ownership or control of the government of Nepal, State Government of Local Level or public property in order to prevent an assault made on such person or property.

[33] Ibid

As mentioned above, Nepalese law in precise does not deal with the notion of self-defense when it comes with the issue of BWS. Situation of BWS does not fit with the traditional self-defense notion, because women having BWS might kill her partner even when there is no probable threat just like in the case of Jok Kumari[34] or in the case of Radhika Shrestha.[35] Similarly judiciary by application of *Abam* 188, had mitigated the amount of punishment, but if it could have been tested in the standard of self-defense then numbers of those women like Laxima[36], Jok Kumari[37], Radhika[38] would have been acquitted from the charge of homicide. And for the purpose, there should be mechanism of testing the mental status of such women and access if the act was done due to BWS or not.

Dr. Diane R. Follingstad in her writing *"Forensic evaluations of battered women defendants: Relevant data to be applied to elements of self-defense"* mentioned that there has been no model of the relevant information that forensic experts should collect from battered women defendants for testifying in court in support of self-defense claims. Many killings of partners by battered women should be considered appropriate for self-defense claims, even when the fact situations do not appear to fit "classic" of "traditional" self-defense criteria. Forensic experts have an important role in bringing jurors to an understanding of how many battered women's actions resulting in the death of a partner actually fit self-defense laws by explaining the fit between the facts of the case and the typical criteria of self-defense.[39]

### c. Battered women syndrome and insanity defense

Plea of insanity is an excusatory defense. *Mens rea*is essential element of crime and it is assumed that insane person does not have capacity to create *Mens rea*to commit crime. Insanity is the mental condition which eliminates culpability that would otherwise be liable. Even when an actor's conduct is not justified, because of a peculiarity of actor or situation in which s/he finds him/herself, s/he may be non-culpable.[40] While considering plea of temporary insanity defense with regards to killing of spouse because of BWS, it also does not fit in the classical definition of insanity plea. M-Naughten test (Right-wrong test), The Irresistible Impulse Test, The Durham Product Test and The Substantial Capacity Test have given certain demarcation and standards to provide defense of legal insanity and if women with BWS tried fit on it then most probably it may not fit with these criteria. In the meantime, it should not be forgotten that BWS is not listed as mental disease or disorder by DSM V, but yet BWS is considered to be form of PTSD. In previous part of this article "Domestic Violence and its psychological impact on battered woman",

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34 *Jok Kumari v Nepal Government* [2066] DN8223, Vol 9
35 Radhika Shrestha(n 4)
36 *Laxima v Nepal Government* [2060] DN 7246, Vol 7
37 Jok Kumari (n 34)
38 Radhika Shrestha (n 4)
39 Diane R.Follingstad, 'Forensic evaluations of battered women defendants: Relevant data to be applied to elements of self-defense'(Elsevier 1996)<https://www.sciencedirect.com/science/article/abs/pii/S0962184996800096> accessed 20 June 2021
40 Dr. Rajit Bhakta Pradhananga and Rewati Raj Tripathee, 'Defence of Mental Disorder: An overview of some supreme Court Judgements'[2016] NJALJ3

we have already discussed about the psychological impact on battered woman, thus while considering plea of temporary insanity, Rocco C. Cipparone, in his article "*The defense of Battered Woman who kill"* states that "circumstances in which a claim of self-defense is likely to be unsuccessful, a battered woman who has killed her batterer should consider seeking an acquittal by reason of temporary insanity".

Psychological effects of the battering relationship upon battered woman are numerous and often more devastating than physical abuse inflicted upon her. As Dr. Walker mentioned, the cycle of violence continues, though, battered woman tries her best to calm the situation. Ultimately, a battered woman's judgment is adversely affected by the constant failure of her attempts to improve her relationship with the batterer. Her impaired judgement provides the foundation for a temporary insanity defense. The basic premise of such defense would be that the defendant at the time of killing, suffered from severe stress and an impaired mental state as a result of the battering relationship and that this impaired mental state caused her to kill the batterer. The causal link between the woman's impaired mental state and the killing can be established by showing that the woman viewed her predicament from a psychologically distorted perspective and thus was unable to perceive her options accurately, or by showing that "woman was driven to the breaking point by the circumstances of her situation" and therefore was substantially unable to conform her conduct to the requirement of law.[41]

Muluki Criminal Code 2074(2017) sec. 14, states "No act done by a person who, **at the time of doing it,** by reason of unsoundness of mind, is incapable of knowing the nature, characteristics, fault or consequence of such act, shall be considered to be an offence." In the same way, sec. 39 states the factors mitigating the gravity of offence and among numbers of factors "**diminished capacity of offender caused due to physical, mental ability or disability** (sec. 39(h))" is one. Furthermore, sec. 15 of Sentencing Policy Act 2074(2017) states about the factors to be considered while sentencing and those factors are:

a) Gravity of offence and role of perpetrator
b) Situation and circumstances at the time of commission of crime
c) Mitigating and aggravating factors
d) Nature and behavior of perpetrator and past records

These provisions demonstrate that if an alleged perpetrator is legally insane then s/he could be acquitted from charge or will have mitigated punishment. But if we see the judicial trend of Nepal, none of defendants have claimed for the temporary insanity and none of those defendants were tested for the purpose.

Application of forensic psychology in investigation of the case along in the process of trial phase would have brought better judgment. Justice is something is not only the

41 Cipporane (n 2)

decision provided by judiciary. Justice ought to felt and for the purpose abundance study of perpetrator and victim is to be done.

### d. Role of forensic psychologist in cases relating to BWS

Dr. Eric Mart stated that "*forensic psychology is specialty area of applied psychology. Forensic psychologists work at the intersection of the legal world and clinical psychology. They provide assessments and expert testimony in a variety of types of cases and some also provide court order treatment in clinics and prisons*"[42] Dr. Eric also stated that much of his practice as forensic psychologist involves evaluating persons accused of criminal offenses to see if they are competent to stand trial, evaluating defendants to see if they are legally insane and evaluating sexual offenders to see if they are eligible for commitment as sexually violent predators.

Forensic psychologist will not be gathering or examining physical evidence from a crime scene. Instead, they may be evaluating victims, witnesses, an alleged perpetrator.[43] Forensic psychologists perform variety of roles. Their involvement in the case starts from the phase of investigation (which is not in practice in Nepalese system). They may use different kinds of techniques for determining the mental status of the person. While performing their roles, they most often use two fundamental skills i.e. assessment and therapeutic intervention.

Observation is regarded to be one of the major techniques for the psychologists. Sometime a person may speak lie but his/her behavior does not so observation technique is used by psychologists, either they are clinical psychologists or forensic psychologists. But forensic psychologists cannot totally rely on observation to determine the statement given by alleged victim or perpetrator. Generally in clinical psychology, it is assumed that "statement given by client is true", but just in contrary in forensic psychology "statements given by witness/victim/perpetrator" is to be tested and seen with doubt[44], because there are many people who can present themselves well and may be they are good liars, and somebody may be speaking truth but can be seen weird as they may lack of confidence, they may be too upset or nervous while testifying them. Thus, forensic psychologists would need to conduct a thorough psychological evaluation and review of any information relevant to specific case that is available.

Assessment of perpetrator is very vital and essential in any criminal cases. In case of Nepal, there is practice of assessing juveniles via child psychologist which is remarkable step in juvenile justice system. This mechanism ought not to be limited only in the juvenile justice system. It ought to be used in other cases as well. With regards to cases relating to BWS, bench of Justice ShusilaKarki in the case Radhika

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42 Sandie Taylor, *Forensic Psychology the basics* (Routledge 2015)1

43 Balke Pinto, 'What role does forensic psychology play in a sexual assault case?' (Updates May 2, 2021)<https://www.thechicagoschool.edu/insight/psychology/forensic-psychology-sexual-assault/What role does forensic psychology play in a sexual assault case?> accessed 8 August 2021

44 'Law Talk today with Dr. Gianni Pirelli' (Feb. episode 2015)<https://www.youtube.com/watch?v=c0-GzP1BVXY> accessed 10 August 2021

Shrestha vs. NG[45], very evidently stated that there is no such mechanism of assessing woman who had harmed her own intimate partner, hence it is to be done to justify the claim of BWS. It is true that woman with BWS harm her partner for her and her children safeguard because of violence she faced from long time but every woman who kill her partner may not be suffering from BWS. Hence there would have been significant and substantial role of forensic psychologist in these cases.

Now, dealing with role of forensic psychologists in the case relating to BWS, following can be role played by them:

- Access whether the accused woman is capable to undergo the trial, access if she is able to understand the nature and the meaning of the proceeding
- Access whether the accused woman is feigning BWS to avoid responsibility for the crime she had committed
- Evaluate the accused and help court to decide whether the person undergoing trial should be treated as adult or as a juvenile, as per her mental and emotional development, at the time of committing the crime, or at the time of trail
- Evaluate and access if the accused has any kinds of drugs addiction or some such records
- Evaluate personality style, and coping mechanism, emotional reactions, assessment of fabrication and malingering, intellectual testing and also memory testing. Forensic psychologist can test the memory of alleged perpetrator as well as that of witness (if any)
- Forensic psychologists by using open ended questions can trace the actual scenario, scene of crime and tally with the situation.
- Forensic psychologist can play a role of therapist to address the emotional reaction of being alleged accused. They also can find if the alleged perpetrator actually has feeling of regret or not.
- Forensic psychologist remains objective while giving expert testimony. Their observation and test result can be of huge importance while adjudicating the cases. The expert witness, also known as fact witness is called upon by court to explore the issues in the question.
- Forensic psychologist can assist judiciary by explaining the psychological status of the alleged accused.

[45] Radhika Shrestha (n 4)

## 6. CONCLUSION AND RECOMMENDATIONS

BWS is no longer a new term in Nepalese legal system. It has been used by judiciary since JokKumari Case, 2066, but yet has not been addressed in Legislation. As discussed above, BWS has been some time associated with plea of insanity whereas some time with plea of self-defense. But in both of these arena BWS does not fits because of its traditional essentials required to fit on it. Crime is an act prohibited by law and society, it is for sure against peace and prosperity of any society. While considering crime as antisocial activity, it is to be noted the causative factor of such crime as well. Involvement of woman in crime as perpetrator is another area of study emerging these days as number of female perpetrator is being increased but we cannot deny the fact that woman who had killed her spouse or partner and become criminal were victim of abuses from those partners. Battered women sometimes use physical force, including the use of weapons, in response to their batterers' violent behavior toward them and other family members. These women may be charged with a criminal offense. In such cases, the legal defense of self-defense is often introduced but of course, not all women who use violence against an intimate partner do so in self-defense. Hence, it is to be identified if the act was done as a result of BWS or not and for the purpose there is requirement of application of forensic psychology from the very begin of investigation to decision making.

Judiciary is there to provide justice, whereas investigation authority is there to do impartial, fair, independent and objective investigation of the case. Sometime such situation arise which vividly and vehemently shows that crime has been committed and s/he is supposed to be convicted and punished but yet judiciary is provided with discretionary power to make a final decision of conviction, acquittal and mitigation of punishment. Mr. Dilli Ram Gautam in his book "*PurbiyaSocha and Shrot, Part 2*" while describing eastern philosophy of law mentioned that "Act done with criminal intent and act done without criminal intent is to be separated to deliver justice. Judges while deciding the case should consider all situation of crime commission, judge has to consider if the crime has been outcome of criminal intent or ignorance or compulsion is to be considered before making decision.[46]" His statements in this book show that application of psychological perspective and evaluation of criminal intent was there in practice from oriental time. He further also mentions that even witness of crime are to be tested before taking their statement and considering those statements as of evidentiary value[47].

Case of Radhika Shrestha was decided on 2071(2014), and judiciary in this case had clearly requested government and legislature to address the issue of BWS as distinct issue but even Muluki Criminal Code 2074 (2017) does not address the condition of

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46 नारदस्मृतिकि तु राज्ञा विशेषेण स्वधर्ममनुरक्षा । मनुष्यचितवैचित्र्यात् परीक्ष्य साध्वसाधुता ।

47 नारदस्मृति पुरुषाः सन्ति ये लोभात् प्रवृयुः साक्ष्यमन्ययासन्तिचान्ये दुरात्मानः कुट लेख्याकृतो जनःअतः परीक्ष्यमुभयमेतद्राज्ञा विशेषतः । लेख्याचारेण लिखितं साक्ष्याचारेण साक्षिणा

BWS. Muluki Criminal Code 2074(2017) mentions about the self-defense, defense of insanity, mitigating and aggravating factors of severity of crime and Sentencing policy Act 2074 (2017) mentions about the discretionary power to be used by judiciary while sentencing the cases with life imprisonment punishment[48] but BWS has not been addressed in particular. As described in body part of this article, BWS could have been evidence to acquit the perpetrator from the charge, if it is included as self-defense or defense of temporary insanity but it has not been done so.

BWS is a psychological matter. Though it has not been listed as mental disorder in DSM 5 but yet it is classified as subcategory of PTSD. Legal attorneys are expert of law, they may not be acquainting with psychological phenomenon and problems so to address psychological matter expert with knowledge about it are to be there for proper adjudication of such cases.

Some recommendations are as mentioned below:

- Psychological status of perpetrator of homicide cases are to be assessed from the very beginning of investigation. So, it could be identified if the alleged perpetrator is with battered woman syndrome or not.
- Separate legal provision should be made to address the issue of BWS. For instance: Addition of term BWS in sec. 24 and 26 of Muluki Criminal Code, while defining the situation where self-defense can be claim.
- Mechanism of psychologist assessment, evaluation and counseling of perpetrator to find if s/he is facing any kind of mental health problem is to be promulgated. People with insanity might be possible to be identified by judges, public prosecutors and investigation authority but people with mental disorder like PTSD, depression, anxiety might not be easily identified by them, as people with mental health problem are not different than normal people.
- It would be better to have psychologist in both phases of case adjudication i.e. during investigation and during trial of case.

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[48] The Criminal Offences (Sentencing and Execution) Act 2074, s 17(a)

# THE ECONOMIC LAW AND RELATIONS WITH COMPETITION MARKET: THE NEED FOR LOGICAL INTERPRETATION OF COMPETITION LAWS OF NEPAL

**Kasturi Jaiswal, and Wang Yan (Prof)**[1]

## ABSTRACT

*The concept of economic analysis of law is deeply rooted in trade law and is further connected with the competition law of the respective nation. The economic analysis of law studies two fundamental jurisprudential questions, first, how far an economic perspective can be applied to study legal phenomena of certain activities and secondly, the extent of the possibilities of convergence and divergence of economy and law. Largely, the economic analysis of law is done in the Marxist or communist school of jurisprudence where the economy is considered as the base structure of the overall development of law, policies, rules, trade, commerce, and others. Nepal opens her economy to the world community in the 1980s under the direct influence of the world trade organization, the adoption of a liberal economy and privatization of the market was the greatest move supportive to interrelation between law and economy in Nepal. The joining of WTO in 2004 was another significant move for establishing the relationship between law and economics in Nepal. The competition law or anti-trust law is considered a green field for establishing the law and economics in commercial sectors in Nepal. A similar move is also seen in PRC in regards to competition and monopoly law, PRC has enacted AML to preserve and protect the national industry for proper growth and development of the country.*

## INTRODUCTION

Fair trade practice[2] is a prime need of this commercial era. It is a trade relationship looking for equity and connecting disadvantaged groups in commercial set up. Despite many more efforts, unfair trade practices have not been eradicated yet rather it has been deep-rooted throughout the world. Economic power has become a dominant power in our daily life, as a result, it has equally become a challenge to the

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[2] 'Explanatory Document for The Fairtrade Standard for Small Producer Organizations'<available at https://files.fairtrade.net/standards/2014-01-15_EN_SPO_Explan_Doc.pdf>

contemporary decision-makers to restrict the monopolistic trade practices and to maintain fair trade practices to guarantee consumer rights. The concept of competition law is a result of all such thinking and practices to make a welfare state. Equal protection of law or equals before the law is also another philosophy behind the rationality of the emergence of competition law as well. The cause-effect relationship between the producers and consumers has become a must in our life. The competition law regulates or promotes the fair market. In today's global economy, as corporate activities become more international, conduct taking place in one country may have grave effects on markets elsewhere.[3]

Almost all of the states and persons are focusing their entire strength on wealth maximization. Without any doubt, economic activities cover all aspects of our daily business. We all are living in an industrial society is also known as a commercial society. Buying and selling are part of our way of life. Hence, the desire to create an efficient economy is universal. Various paths can be pursued to bring this desire into fruition, and the operation of the market economy with fair competition. *John F. Kennedy,* President of America, focused on the needs of new directions in consumer philosophy. His consumer message to the Congress on March 15, 1962, focuses on the four radical rights of human beings as being a consumer is- the right to safety, the right to be informed, the right to choose, and the right to be heard[4].

Similarly, the United Nations General Assembly adopted guidelines for consumer protection by consensus on 9 April 1985. The guidelines provide a framework for governments to use in elaborating and strengthening consumer protection policies and legislation and to encourage international co-operation in these fields. It includes the right to safety, the right to be informed, the right to choose, the right to be heard, the right to redress, the right to consumer education, the right to a healthy environment, and the right to basic needs. Similarly, in Nepal, Consumer Protection Act, 2054 section 6 states the right to a healthy environment and right to basic needs.

Competition is a key concept for survival in any market. Where markets operate freely and effectively, competition can be expected to bring benefits (i.e., encouraging firms to improve productivity, reduce prices, and to innovate, while rewarding consumers with lower prices, higher quality, and enlargement of choices). However, when the market fails competition policy and laws are often using as the tools to bring about the efficient workings of markets and alleviate market failures.

Buying and selling of goods and services have been continuing for centuries in the world. Due to the advancement in science and technology market mechanism has also become strong and dynamic. It has a great impact on the economy, society, and the entire life of the people. In due course of time, economic policies have been changing from state-controlled to market-led itself i.e. *Lassie Faire* type of scenario, and are

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[3] 'International Economic Activities and Competition Laws'<https://www.meti.go.jp/english/report/data/2017WTO/pdf/02_22.pdf>

[4] J.Baniya, (2064). *Consumer Protection Law and its status SAWTEE, available at* <http://www.sawtee.org/sawtee-in-media/aid-for-trade-can-do-nothing-about-our-governance-problem.html>

expecting to continue in the forthcoming time, as well. In Nepal, the shift of economic and trade policies from state-controlled to market-led liberal form started by the mid of 1980s only. Since the role of government also shifted from goods and service provider to facilitator and regulator for the market functioning. Market is the combination of goods and service producers, distributors, and sellers. Market runs through a clear and transparent regulatory mechanism that protects the rights and welfare of all the stakeholders, particularly the consumers. Therefore, in several laws, provisions of competition have been incorporating to foster fair competition and control unfair trade practices.

An open economy is also having fortune and misfortune both. If properly and adequately managed, open or market-led growth and development can be a great asset. In this course, Nepal has developed some rules and regulations to achieve a fair and competitive economic environment in the country. It is one of the pre-conditions of the development and survival of the Nepalese economy in the most competitive and changing economic scenario of the world. The history of MRTP dates back to the 1860s and 1970s in the United State of America where there was a big trust of corporate houses which were symbols of big monopolies. To bust the trust the United States of America enacted the Sherman Act in 1890[5] and after that Claton Act in 1914.[6] After the Treaty of Rome in 1957 to the formation of the European Union, there was a harmonization process of directives of the European Union among the member countries. In this contest, the United Kingdom enacted the Fair-Trading Act in 1973, and in India MRTP Act, 1969 was enacted, and later the act is repelled by competition Law, 2002. Nepal also has been a member of the World Trade Organization on 23 April 2004. As a member of WTO, she has to make its legal provisions consistent with the provisions of international standards. As society, changes faster than law so, to cope with the changed time, laws need to be made or amended to address the emerging issues and forms of competition as the demands of society.

In Nepal, before Competition Promotion and Market Protection Act, 2006 (CPMPA) there was not any specific law to prohibit any unfair competition in the market. However, we can find some legal provisions in scattered forms in different statutes here and there. The CPMPA and Public Purchase Act, 2006 has been enacted to curb tied selling, price-fixing cartel, monopoly, collusive bidding, misleading advertisement, syndicate system. Still, we are also facing various types of unfair trade practices. For instance, a syndicate system in transportation tied selling in educations and health sector along with many more ways of artificial scarcity, black marketing, etc.

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5 The Sherman Antitrust Act of 1890 was the first measure passed by the U.S. Congress to prohibit trusts. It was named for Senator John Sherman of Ohio, who was a chairman of the Senate finance committee and the Secretary of the Treasury under President Hayes. Several states had passed similar laws, but they were limited to intrastate businesses. The Sherman Antitrust Act was based on the constitutional power of Congress to regulate interstate commerce. <https://www.ourdocuments.gov/doc.php?flash=false&doc=51>

6 The Clayton Antitrust Act of 1914, was a part of United State antitrush law with the goal of adding further substance to the U.S. antitrust law regime; the Clayton Act sought to prevent anticompetitive practices in their incipiency, For more detail, see https://corporatefinanceinstitute.com/resources/knowledge/finance/clayton-antitrust-act

## Basic Principle of Competition Law

Competition law has certain accepted principles. They include as follows -

- Foster competitive neutrality between public and private sector enterprises
- Ensure access to essential facilities
- Facilitate easy moment of goods, services, and Capital
- Separate policymaking regulation and operating functions
- Ensure free and fair market
- Balancing competition and IPRs
- Ensure transparent, predictable, and participatory regulatory intent
- Notify the public and justify deviation from competition principles
- Respect for international obligation.

## Concept of Competition and Competition Law

A company is a legal person incorporated with the primary aim of profit. It is established in society for the betterment of the living standard of people. It provides goods and services and promotes its shareholders through the profit interests. It cannot exist in a vacuum because it is a product of society. In business or enterprises, there are two philosophies in existence. The *first is the economic philosophy* of business that believes in *profit maximization* and the *second is a social philosophy* that emphasizes *social service, consumerism, and protection of the environment along with the development of society*. In the present day, social issues and business activities are so inter-woven. We cannot separate them. It is almost impossible for good corporate status without orienting to solve social problems. Therefore, nowadays the concept of corporate social responsibility (CSR) is an emerging concept in the corporate sector.

According to the CSR principle, companies should be responsible for their internal or external stakeholder. Such as investors, workers, consumers, community, environment, state, and the universe as a whole. So, the social corporate responsibility of the company towards the consumer is directly concerned with Monopolistic Restrictive Trade Practices which are mostly dealt with by *competition law*. Competition markets provide choices. They help to ensure efficient allocation of resources and maximization of the production of goods, freedom of business, free access to market, freedom of contract, etc. Transparency in the market and the capacity of consumers are the basic conditions for the competitive market. Fair competition in trade is an essential practice that benefits the consumers along with traders involved in the trade of goods and services.

Customers make and break the business. If they feel to be victimized they will go ahead crossing any hurdles to fulfill their interests. Higher competition always provides bad impacts on both sides. Generally, Monopolies and Restrictive Trade Practices

(MRTP), and unfair trade practices denote any corporate acts contrary to honest practices. It is a market scenario where it is dominated and controlled by certain persons; groups of persons or entitled by one or few institutions in the production, distribution, and selling of goods and services.

As a result, other persons or institutions are restricted to produce, distribution, and selling the same kind of goods and services. Monopoly, group monopoly, syndicate, cartel, and trust are the characteristics of a monopoly that may abuse the competitive market. Protecting from those ill matters of the market is the primary need of present society by effective competition law. Competition law should have aims of protecting consumer sovereignty, providing quality in goods and services. Controlling unfair competition and to restrict trade business and collusive bidding and high pricing. Only such law will be a good law, in other words, a just law.

Monopolies and Restrictive Trade Practice is not only an individual problem. It relates all over the world. Well-developed countries in corporate sectors are facing this problem from the very beginning. To tackle with it; we can find in the UK- *Law Relating to Fair Trading Act 1973,* France- *French civil code Act 1362*, USA - *The Sherman Act 1890 to the Federal Trade Commission Act 1914,* in India -*The MRTP Act 1969 to The Competition Act 2002 and In Nepal- Competition Act 2063*.

Society changes faster than law. As a result, every law related to this issue cannot meet the pace of time. Law always deserves dynamism and amends accordingly. Court's role in this regard is also highly remarkable. Many issues are found in these challenging areas, especially, in the heterogeneous nature of society. Nepal, after a long waiting, enacted a new *Competition Act, 2063*. To enforce competition, there are some procedural criteria to be fulfilled. Its practical implementation and positive response from the corporate sector is necessary to be shown. We have few other scattered legal provisions in different Acts which are oriented to social welfare and consumerism. Among them a few are *The Consumer Protection Act 2054, The Essential Goods Control (Authority) Act 2017, The Black Marketing and some other social offenses punishment Act 2032, medicine Act 2035, Food Act 2023, The Essential Material protection act 2012, Copy Right Act 2059. The Companies Act 2063, Traffic and Transport Management Act 2049, etc*.

Scattered legal provisions included in these acts have not mentioned the provision that can curb the real problems of MRTP issues. Legal provisions of scattered laws and new acts somewhere look overlapping and insufficient. The enforcement mechanism and the adjudication portion seems passive. New Competition Act, 2063's provisions are also not complete one to tackle the problem. Due to the globalization of the market and the emergence of WTO, various types of new issues are emerging.

Now we have faced various problems in the trade of goods and services. Such as services of bus, electricity, oil supply nursing home, medicine, and another type of markets and services. Similarly Black marketing, price Fixing cartel, Market sharing cartel, Monopoly, syndicate system, Predatory pricing, collusive bidding. Moreover,

*merger, amalgamation and take over* are such problems regarding it which are not unknown to Nepalese people.

There may be various causes like not to able to tackle these problems may be due to the ineffective competition law, negative attitudes of corporate sectors, lack of enforcement mechanism, the weak role of the judiciary, unaware consumers towards their rights and other social and economic factors.

While introducing new law we should not forget to be consistent with the issues relating to WTO standards. Fixing standards for service providers, demarcating civil and criminal remedy are few discussable issues at this moment. Despite these legal provisions; why unfair trade is taking place in practices? What are the crux causes? What are the weak points in law or other sectors? How corporate sectors along with people at large view this issue? Existing legal provisions along with the newly introduced competition Act 2063 are sufficient, effective, or not? What are lacking in them with a comparison of WTO standards?

It is difficult to define the term ‘competition’ as this word is used in different fields in different forms. Competition in the economy can be gauged at different levels. At the national level, the absence of policy-induced entry and exit barriers in different sectors of the economy can be an indicator of competition. At the firm level, competition is based on increasing production efficiency and creating consumer value rather than anti-competitive practices. Similarly, at the consumer level, the availability of choices and opportunity to maximize their utility can be taken as an indicator of competition.

The Black’s Law Dictionary defines competition as the effort or action of two or more commercial interests to obtain the same business from third parties. According to the World Bank, competition is a situation in a market in which firms or sellers independently strive for the buyer's patronage to achieve a particular business objective[7].

Competition increases economic efficiency and consumer welfare. Thus, the state needs to take care of the anti-competitive practices designed to restrict the free play of competition in the market. Also, the state has to take care of any unfair means adopted by firms to extract the maximum possible surplus. The state’s role is thus to maintain and promote the competitive environment in the market.

To run economic activities on a free and fair basis, competition law serves as an instrument for the government. Therefore, competition law is of paramount importance for several reasons. Firstly, to guarantee equal treatment to every business and run the national economy openly and liberally. Secondly, to develop, expand, and promote the independent market, both industrial and commercial sectors, to build an economic structure strong and more competitive. Thirdly, protect consumer’s rights and benefits by providing quality goods and services at reasonable prices. Competition law is the

7 'A Framework for the Design and Implementation of Competition Law and Policy' (World Bank 1999)

basic tool to promote efficiency in the national economy and to get an advantage from the global economic dividend as well.

The competition policy, on the other hand, has a much broader domain. It comprises the set of measures and instruments used by governments that determine the "conditions of competition" that reign on their markets. Antitrust or competition law is a component of competition policy. Other components can include actions to privatize state-owned enterprises, deregulate activities, cut firm-specific subsidy programs, and reduce the extent of policies that discriminate against products or producers.[8] A key distinction between competition law and policy is that the latter pertains to both private and government actions, whereas antitrust rules pertain to the behavior of private entities (firms)[9].

Fundamentally, competition policy should aim to limit the power of corporations to wield undue influence over a particular market and use that influence to exploit that market for their gains. Competition law shall be enacted with this goal uppermost in the minds of the formulators of the law. Any other consideration, be it "overall welfare", "economic efficiency" or wider social goals, should be placed, if at all, on a secondary rung to this consideration[10].Competition policy is more of a proactive policy that attempts to promote consumer interest in the market place. Consumer protection puts forward mainly a reactive agenda such as protecting the interest of consumers and providing access to redress against abuses. These two different policies complement each other because the ultimate objective of both is consumer welfare. In many countries, such as unfair and restrictive trading practices are covered by both Consumer Protection and Competition Acts. Some countries such as Australia and Peru have only one institution to deal with both consumer protection and competition issues.

The main objectives of competition policy and law are to promote competitive markets by prohibiting anti-competitive practices, to protect and promote consumer welfare by making the market environment favorable for the consumer, to enable producers of goods and services to survive in the open market by creating an environment for the protection of consumers. These policies also provide the consumers with the best possible choices at the lowest price.

**Consumer and Consumerism**

A consumer is an individual who purchases goods and services from the sellers. It covers the person who makes use of services provided by public sector bodies like railways, water authorities, electricity companies, gas suppliers, and so on. Therefore, the term consumer signifies individuals who purchase, use, maintain, and dispose of products and services.

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8 (http// worldtradeview.com) visited on 10th July 2012
9 Ibid
10 Ibid

According to the Oxford English Dictionary, a consumer is a person who buys or uses goods or services[11]. A consumer may be an individual, association, company, institution, etc. that buys or use goods or services for not any commercial purpose. According to *Ralph Nader*, the term 'Consumer' should be equated with the word 'citizen' and that consumer protection law should be regarded as an aspect of the protection of civic rights[12].

Consumerism as the term is campaigning for the protection of consumer interest. Ralph Nader is considered the father of the consumer movement because he started the concept of consumerism. According to *Professor Philip Kotler*, consumerism is a social movement seeking to augment the rights and powers of the buyers about sellers[13].

A review of available literature indicates that there have been few studies done so far the subject is concerned. It is found that there are different laws and their presumption of effectiveness in creating and maintaining competitiveness in the market. Competitiveness in the market could help the national economy to prosper and protect people from exploitation. Therefore, an effort is made herewith to review and analyze the existence and effectiveness of different laws in fostering competition including Competition Promotion and Market Protection Act, 2063 (CPMPA). Based on the findings some suggestions will be recommended for further improvement and reform of laws to foster competition in the market. Some of the practical experiences of both competitive and anticompetitive practices in Nepal are also discussed to present the gaps between policies and practices.

**Importance of Competition in the Market-Economy**

Competition in the Market economy has been considered important because of various reasons. Firstly, it helps to increase the efficiency of the producer of goods and services and provides choices to the consumer. Secondly, it helps to provide quality goods ata reasonable price and encourage the producer to use the available limited resources efficiently. It also helps to increase investment opportunities and employment along with generating revenue and enhanced economic activities. A competitive market environment helps to provide goods and services at cheaper and constant prices, raise government revenue, and create an investment climate. Finally, it opens the environment to invest multinational companies that helps to develop an open, liberal, and market-based national economy.

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11 *Oxford Advanced Learner's Dictionary* (Oxford University Press1996).

12 Ram Krishna Timalsena, *Consumer Law* (2007)

13 Ibid

Nepal has becomea 147th member of the World Trade Organization (WTO) on 23 April 2004 and entered into globalization. However, Nepal had started its economic liberalization program in early 1992, so the WTO accession was not a surprise. The word globalization just breaks the man-made lines in the geography. A small, landlocked, poor, and donor-dependent country like Nepal the membership to the WTO is not a matter of choice. Membership of WTO was necessary, whether consequences are positive or negative. Therefore, the only choice Nepal has to mitigate the negative consequences and try to maximize potential benefits. While the benefits are only potentialities, in the end, many risks, pitfalls, and costs associated with the new globalization trend are bitter realities facing most Least Developed Countries (LDCs).

The three major agreements of WTO are General Agreement on Tariffs and Trade (GATT 1994), General Agreement on trade in services, (GATS), and agreement on trade-related aspects of Intellectual property Rights (TRIPS). WTO is a rule-based trading system that rests on some basic principles that are as the following[14].

***Reciprocity*** **-** It reflects both a desire to limit the scope of free-riding that may arise because of the MFN rule and a desire to obtain better access to foreign markets. A related point is that for a nation to negotiate, it is necessary that the gain from doing so be greater than the gain available from unilateral liberalization; reciprocal concessions intend to ensure that such gains will materialize.

***Nondiscrimination*** **-** It has two major components- the Most Favored Nation (MFN) rule, and the national treatment policy. Both are embedded in the main WTO rules on goods, services, and intellectual property. The MFN rule requires that a product of one member country be treated in a similar way to the goods that originated in any other country. Grant someone a special favor and you have to do the same for all other WTO members. According to national treatment, imported and locally-produced goods should be treated equally at least after the foreign goods have entered the market. National treatment ensures that liberalization commitments are not offset through the imposition of domestic taxes and similar measures.

***Binding and enforceable commitments*** **-** The tariff commitments made by WTO members in a multilateral trade negotiation and on accession are enumerated in a schedule of concessions. may invoke the WTO dispute settlement procedures. The dispute settlement system of the WTO is considered one of the most innovative systems in the entire history of the settlement of disputes concerning public international law. The WTO Depute Settlement Body, however, compels the potentially non-compliant members to comply with its ruling through the threat of sanction.

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[14] <http//worldtradeview.com>

***Transparency*** **-** The WTO system work to improve predictability and stability, discouraging the use of quotas and other measures used to set limits on quantities of imports. So the WTO members are required to publish their trade regulations, to respond to requests for information by other members, and to notify changes in trade policies to the WTO Secretariat, which is required to notify such changes to other countries. These internal transparency requirements such as supplemented and facilitated by periodic country-specific reports through the Trade Policy Review Mechanism.

***Safety valves*** **-** In specific circumstances, governments can restrict trade. There are three types of provisions in this direction: articles allowing for the use of trade measures to attain non-economical objectives; articles aimed at ensuring "fair competition"; and provisions permitting intervention in trade for economic reasons.

***Special and Differential Treatment (S&DT)*** **-** Equal should be treated equally and unequal unequally. Applying the same rules to all countries may not be feasible due to the different levels of economic development in the member countries. There is no fully develop mechanism to help displaced people and communities for re-adjustment, they have been provided S & DT. Provisions relating to such arrangements are inscribed in the *Marrakesh Agreement* of the WTO. They can be divided into these five categories- For Least Developed Countries (LDCs) Lower Level of commitment e.g. for reduction of tariff in agriculture goods.; Higher transition period; providing technical assistance; providing preferential market access; taking the interest of developing countries and LDCs while instituting and imposing standards.

Thus, WTO principles prefer for fair competition and competitive practices by the member states but it has not any compulsory provisions regarding competition laws. Any member countries can voluntarily commit to enacting competition law while signing the WTO treaty. Other efforts made for the enforcement of competition law on the international level. However, competition law has already been substantially internationalize these schedules establish "ceiling bindings": a country can change its bindings, but only after negotiating with its trading partners. If satisfaction is not obtained, the complaining country

Nepal became a member of the WTO on 23rd April 2004. During its accession negotiations, along with general pro-competition commitments, Nepal also made a voluntary commitment to enact a competition law. WTO membership is not the only reason for Nepal to enact a competition law. Economic liberalization in Nepal started in the early eighties. With the gradual liberalization of the economy, the role of the government has shifted from producer and provider of goods and services to that of a regulator and facilitator. The government cannot and should not monitor and regulate economic actors in a vacuum without adequate and appropriate laws and institutions. Competition law and an independent body to implement it are one of the many mechanisms to help the government perform its new role effectively and efficiently.

## Anti-Monopoly Law in China

The Anti-Monopoly Law (AML) of China in a wider sense refers only to the Anti-Monopoly Law of the People's Republic of China, passed by the National People's Congress on 30 August 2007, and implemented as of 1st August 2008. In a broad sense, it refers to the anti-monopoly legal system of China, including not only the AML, the post-AML ancillary legislative and legal documents to enforce the AML, but also all pre-AML legislative and administrative documents with an anti-monopoly nature, as well as regulatory or administrative enforcement, private enforcement, and judicial procedures.

## Analysis of Monopoly Marketing under the rules of AML

The "per se illegal" and "rule of reason" principles need to be understood to better examine and understand the position of AML. Per se illegal refers to a restraint of trade that is explicitly anti-competitive such as an agreement controlling the price of goods. These practices by their nature are not pro-competitive and thus a court of law to which these facts are proved will not accept any justification for such activities as they are naked restraints of trade.

Rule of reason applies to a restraint that is not deemed a naked restraint, for instance, Under Section 1 of the Sherman Act 1890, every contract, combination, or conspiracy is illegal if it constitutes an undue or unreasonable restraint of trade [9]. The test of reasonableness concerns whether the challenged contracts or acts unreasonably restrict competitive conditions in the market or industry.

## "Illegal per Se Rule" and "Rule of Reason" in the AML of China

The doctrines of "illegal per se rule" ("per se rule") and the "rule of reason" are two landmark and the most important legal theories in the history of anti- monopolistic law and development of the anti-trust law not only in its country of origin but also in many other countries and jurisdictions all over the world. The doctrines make a clear and straightforward definition in legal theory and can be efficiently and effectively implemented in practical enforcement.

The doctrines of "per se rule" and the "rule of reason" can be found in the AML context as well as in the Supreme Court Judicial Opinion of China as well as in several court judgments.

During the processes of the AML legislation, the AML drafting team had not only studied and referenced to the greatest extent the statues of the EU competition law, legislation as a result the basic structure and contents of the AML are as close and similar as the EU competition law. The team has further studied the US antitrust legal theory and cases and consulted the US antitrust legal experts. As such, the spirit of the doctrines of "per se rule" and the "rule of reason" indeed exists or influences the creation of the AML.

In the legislation, as far as the literal provisions of the AML is concerned, it is found that horizontal agreement, vertical Agreement and abuse of dominant market position as one category using the literal word "prohibit" without any pre -condition, while there is a condition of "reasonable cause" for the "prohibition" in abuse of dominant market position without justifiable cause as another category, as a result making literal difference that there should be different legislative purposes and intents as well as different legal meanings in the AML between the above two categories: with regard to the unconditional prohibition in the first category on one hand, any agreement or conduct breaching unconditional prohibition will then constitute a violation of law without regard to the result or effect caused by the violation, as such these unconditional prohibitions can be treated or argued to have the nature or character of "illegal per se" and accordingly it is an alternative expression of "illegal per se rule" in the AML; with regard to Articles 17(2) to (6), on the other hand, the literal words "reasonable cause", given its obvious literal meaning, will then be an alternative expression of the "rule of reason".

In the Supreme Court Judicial Opinions on Several Issues Concerning the Application of Law in Proceeding Anti-Monopoly Civil Dispute Cases (Soliciting Comment Version) Circulated by the China Supreme Court on 25 April 2011 (hereinafter the "SCJO SCV"), unlike in the literal provisions of the AML, it seems to not distinguish as between Articles 13, 14 and 17(1) as one category Articles 17(2) to (6) as another category as initially drafted as in Article 8 of the SCJO: "The victims of the monopoly agreements shall have the burden of proof against the alleged monopoly agreements for the effects of the exclusion or restriction of competition. The victims shall not have the burden of proof against such monopoly agreements for the effects of the exclusion or restriction of competition if the monopoly agreements fall within the scope of Articles 13(1) to (5) or Articles 14(1) and (2), except for if the alleged undertakings to the said monopoly agreements can prove otherwise by the contrary evidence." which could be read as that both Articles 13(1) to (5) or Articles 14(1) and (2) are subject to effect examination (rule of reason).

Nonetheless the above, however, in the administrative enforcement, it appears that the NDRC is rather apt to apply the doctrine of "illegal per se rule" directly to the first category (i.e., AML Articles 13, 14 and 17(1)) because of the low difficulty and costs and easy proceeding to apply the "per se rule" in the administrative enforcement of the AML. This is evidenced by several cases that NDRC announced from January to August 2013 because neither examination nor analysis of the "reason" or "reasonable cause" had ever been made to the effects of restriction or exclusion of competition by the alleged monopolistic conducts. Albeit this has been questioned, NDRC appears to follow and carry on the strategy and tactics that were adopted in the US in the early stage of the enforcement of the Sherman Act at the turn of the 19th and 20th centuries to put a direct "*illegal per se*" effect to the AML Articles 13 and 14. This makes very important sense because it is drawing a boundary line between the "*illegal per se*" conducts and agreement and those conducts an agreement with "reasonable cause".

## CONCLUSION

Nepal has enactedthe Competition Promotion and Market Protection Act (CPMPA, 2006) to prohibit unfair trade practices. However, some scattered provisions in some statutes deal with the control of anti-competitive behaviour. Even though these legal provisions have been promoted competition and prohibited anti-competitive practices in the market, the implementation part of these laws is very weak. There are several provisions in CPMPA, which are the backbones of the law, such as the formation of Market Promotion and Protection Board, provision of Market Protection Officers in Districts, Commercial Bench, and so on. However, these provisions are not activated so far. Also, Competition Promotion and Market Protection Rule have not been enacted under the CPMPA. Therefore, having CPMPA, and other competition-related legal provisions in different sectorial laws; these provisions are not effectively implemented in real practice in the market place.

The basic structure and framework of the anti-monopoly law of China include legislation and the implementing legal documents such as the post-AML ancillary legal documents, the pre- AML laws and legal documents which are still in force, and those laws and legal documents that are still in the processes of either drafting or soliciting opinion.

During the processes of the AML legislation, the AML drafting team had studied and referenced the statues of the EU competition law legislation. Consequently, the basic structure and contents of the AML largely similar to the EU competition law. Furthermore, the drafting team had studied the US antitrust legal theory and cases and consulted the US antitrust law experts. However, until the Supreme Court interprets this important issue by further judicial opinions or rulings, whether or not the unconditional prohibition in Articles 13 and 14 would equally have similar nature of "illegal per se" and how to distinguish Articles 13 and 14 them from the "reasonable cause" in Articles 17(2) to (6), remain as an interesting topic in the anti-monopoly legal system in China.