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# PROSECUTION JOURNAL

Volume 4 | Year 2018



**OFFICE OF THE ATTORNEY GENERAL**  
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# **PROSECUTION JOURNAL**

Volume 4 | Year 2018

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# Office of The Attorney General



Ram Shah Path, Kathmandu

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## MESSAGE FROM THE ATTORNEY GENERAL

It gives me immense pleasure to introduce the 4th volume of the Prosecution Journal with special focus on theoretical and practical aspects of the newly introduced criminal laws - National Penal (Code) Act, 2017, National Criminal Procedure (Code) Act, 2017 and the Criminal Offences (Determination and Execution of Sentence) Act, 2017. It is obvious that these new laws would vastly overhaul the criminal justice system of Nepal, based primarily on the centuries old Muluki Ain.

The enactment of these new legislations has created both challenges and opportunities in Nepalese legal system. On one hand, we have begun a departure from the traditional practices of criminal investigation, prosecution and adjudication to a modern, scientific and rational system, in line with internationally accepted principles and standards. This makes urgency for rapid and extensive orientation to the major actors of criminal justice system such as the investigator, prosecutors, judges and defence attorneys as well as the general people as they would be faced with previously unheard rules and regulations. Since ignorance of law cannot be excused, it is up to us to inform to the people about the new provisions of these laws. At this premise, the Office of the Attorney General has conducted training on the implementation of these new laws to all of its government attorneys as well as some key police officials.

On the other hand, the advent of these new laws have opened new vistas of opportunities for reforming the existing criminal justice system of Nepal through victim protection and restitution, protecting the constitutionally guaranteed rights to the accused, categorical methods for execution of court judgments, speedier and simpler court procedure, criminalization of several new misconducts and aspiring for the establishment better society based on the tenets of rule of law.

At this juncture, I express my optimism that this new Volume of Prosecution Journal, one of the flagship publications of this Office, will go a long way in



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educating the law practitioners - government and private, teachers and students of law, as well as the interested general audience in the nitty-gritty of the new laws, as well as in some usual and novel concepts of criminal jurisprudence in general.

Lastly, I would like to thank the contributors of articles, the editorial board and the press for their invaluable efforts in making this Journal a living reality. I am happy that this Journal has given space not only to the persons of repute in law, but also to budding and promising writers in the legal arena. I hope that the articles included in this Journal will further contribute to the prosperity of legal literature in the country and also wish for its continuity in the days to come.

*Agni Prasad Kharel*

Agni Prasad Kharel  
(Attorney General)

## FROM THE EDITORS

It gives us a sense of gratification to introduce the 4th volume of the Prosecution Journal with concentration on the theoretical and practical aspects of the new criminal laws that Nepal has adopted recently - National Penal (Code) Act, 2017, National Criminal Procedure (Code) Act, 2017 and the Criminal Offences (Sentencing and Enforcement) Act, 2017. As we all know, these new criminal laws would vastly overhaul the criminal justice system of Nepal, based primarily on the centuries old Muluki Ain.

We have decided to devote this 4th issue towards the contents and norms of the new criminal laws. As such, a significant portion of the book covers this aspect. But we also have left adequate room for including other articles on the established as well as budding concepts in criminal jurisprudence, with focus on both national and international arrangements.

Due to simultaneous involvement in other office activities, and due to the increased workload attributable to the enactment of new criminal Codes and Acts, we fell a bit behind our schedule in publishing this Journal. However, we took this added time to further refine and rectify its contents, and for arranging the technical matters such as citation.

Altogether 16 articles covering matters of criminal law as diverse as alibi, torture, environmental justice, national security, private prosecution, dishonor of cheques, key features and challenges of new criminal codes, salient provisions of the new Sentencing Act, inchoate crimes, genocide, forensic science, gender justice, culpable homicide, the issues of senior citizens, and plea bargaining have been included in this current version. A majority of articles also touch down on the relevant provisions embodied in the new criminal laws as well as the observations of the Supreme Court of Nepal on those topics.

We are happy that as with the other issues, we have retained an impressive array of articles from both established writers in the legal domain as well as from the new talents. We are humbled by the patronage and attention shown by our valuable contributors, as a continuity of past tradition. When the dissemination of newer provisions in our recent criminal laws has become a top priority for the government agencies, we hope that publication of this issue will certainly meet

that end to a considerable extent. Further, the readers and users of this Journal may also be benefitted by some fresh approaches to a few conventional issues, which we do not find in many resources.

As such, we would like to express our gratitude for the Office of Attorney General for entrusting us with the responsibility of bringing this issue of Journal to daylight. We are also indebted to our valuable contributors who have kindly granted their thoughtful articles for inclusion in this Volume. We hope that their care and support will only grow in the days to come. We are equally thankful to the layout designers, and the press as well. Finally, though we think we have tried our best to alleviate mistakes or errors to the extent possible, we will highly appreciate positive and constructive feedback from our patrons for further improving this scholarly material in the future.

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# **An Analytical Study of Culpable Homicide (*Kartabya Jyan*) under the Muluki Criminal (Code) Act, 2074 BS**

**Rajit Bhakta Pradhananga\***

**Kunshang Lama\*\***

## **ABSTRACT**

Culpable Homicide in the simplest understanding refers to taking the life of the person. The term constitutes of two words: 'culpable' denotes a 'blameworthy state of mind' and 'homicide' refers 'to killing a person' unlawfully. Thus, culpable homicide refers to taking the life of another person, where the act has been done with criminal intent. Culpable homicide is an act that is mala in se. This means that it is behaviour that is legally wrong with it and is objectively and inherently criminal regardless of where it occurs. The main qualifiers for the culpable homicide are causing of death by doing an act with the intention, or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that it was likely to cause death with recklessness and negligence. Without one or other of those elements, an act, though it may be in criminal nature, will not amount to the offence to culpable homicide. An unlawful or culpable homicide may be classified into different categories according to the nature and gravity of the offence and its heinousness in order to attach a suitable punishment for each type.

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## 1. INTRODUCTION

The term 'homicide' refers the act of killing of human being by another. Derived from the Latin *Homo* meaning "a human being" and "*Caedere*" meaning "*to cut*" the word literally means "to cut down or kill a human being."<sup>1</sup> Homicide is a broad term that compresses both lawful and unlawful killings.<sup>1</sup> In criminal jurisprudence, those killings that are justified and excused by law are called lawful or non-culpable homicides. Whereas, the killings that are not excused or justified by law and withhold punishment for causing it is termed as unlawful or culpable homicides.<sup>2</sup> Every jurisdiction in accordance with their law criminalizes the killing of a person in being with intent or with knowledge of consequence as the death of person subject to exceptions.<sup>3</sup>

Culpable Homicide in the simplest understanding refers to taking the life of the person. The term constitutes of two words: '*culpable*' denotes a 'blameworthy state of mind' and '*homicide*' refers 'to killing a person' unlawfully. Thus, culpable homicide refers to taking the life of another person, where the act has been done with criminal intent.<sup>4</sup> Culpable homicide is the serious and heinous form of homicidal offence and is prohibited throughout the world. The loss of human life is irrevocable; it inflicts grief on to those who were close to the victim and is greatly detrimental to the up keep of peace and lawfulness in a society. For that reason, both ancient and modern societies have considered culpable homicide to be the most serious crime, one worthy of the harshest punishments.<sup>5</sup>

In Nepali homicide law, the intentional slaying of another person with malice aforethought is called *Kartabya Jyan*. Derived from the union of two Nepali words, '*Kartabya*' meaning "*blameworthy state of mind*", '*Jyan*' meaning "life of a human being" or *Kartabya Jyan* is the gravest and the most serious of homicidal offences in Nepali homicide law.<sup>6</sup> In addition to the newly enacted laws, Nepal is going through a transitional phase even in the viewpoint of

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<sup>1</sup> Prof. Rajit Bhakta Pradhananga (Dr.), (2058 BS), Homicide law in Nepal, Ratna Pustak Bhandar, Kathmandu. Nepal, p. 30.

<sup>2</sup> Prof. Rajit Bhakta Pradhananga (Dr.) & Kunshang Lama, (2014), "The Concept and Evolution of Intentional Homicide in Nepal", Prosecution Journal, Kathmandu: Office of the Attorney General Nepal, p.1.

<sup>3</sup> Prof. Rajit Bhakta Pradhananga (Dr.) & Kunshang Lama, (2014), "Mitigated Homicide: Concept, History and Judicial Practices in Nepal", Nepal Bar Council Law Journal, Lalitpur: Nepal Bar Council, pp.15-16.

<sup>4</sup> Prithvipal, Culpable Homicide Amounting to Murder and Culpable Homicide Not-Amounting to Murder, Patna: Chanakya National Law University, p.6, available at <https://www.scribd.com/document/241933475/> (Accessed on April 13, 2018).

<sup>5</sup> Supra Note 2.

<sup>6</sup> Supra Note 1, at 31.

codifying criminal law. The Parliament has enacted the Muluki Penal (Code), 2074, the Muluki Criminal Procedure (Code), 2074, and Sentencing Act, 2074 on August 8, 2017, and they will come into force on August 17, 2018. The Muluki Criminal (Code), 2074<sup>7</sup> has continued the concept of culpable homicide law of Nepal and denotes clearly and expressly of the concept of culpable homicide in the history of Nepali criminal law. This short article endeavours to elucidate the concept of culpable homicide and the new provisions of Muluki Criminal (Code), 2074 relating to culpable homicide. It also aims to conduct a comparative study of various jurisdictions in light of the culpable homicide laws in Nepali context.

## 2. THE CONCEPT OF CULPABLE HOMICIDE (KARTABYA JYAN)

Culpable homicide is an act that is *mala in se*. This means that it is behaviour that is legally wrong with itself and is objectively and inherently criminal regardless of where it occurs. The killing of a person by another in a non-legal manner is a violation of "natural law," which Frank Schmalleger defined as "rules of conduct inherent in human nature and in the natural order which is thought to be knowable through intuition, inspiration, and the exercise in reason, without the need for reference to man-made laws".<sup>8</sup> Unlawful homicide means where the killing of another human is not excusable or justified by law. Culpable homicide is regarded as the most serious offence of criminal jurisprudence. The harm imparted by other crimes might be remediable to a certain extent, but the loss of life caused by homicide is final and irrevocable,<sup>9</sup> as the capacity to resurrect is beyond the capacity of human beings. This finality makes homicide as the most serious harm that may be inflicted on another being. Culpable homicide involves the illegal killing of a person either with or without an intention to kill depending upon how a particular jurisdiction has defined the offence. Thus, Culpable Homicide means killing a human being by another human being in a blameworthy or criminal manner. In modern criminal law, homicide is termed culpable, when it cannot be justified or excused by law and implies "a blameworthy state of mind."

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<sup>7</sup> Section 2(A) of the Some Nepal Law Amendment, Unification, Adjustment and Repeal Act, 2074 has named this Code as "Muluki Penal Code".

<sup>8</sup> Frank Schmalleger, (2001), "Criminal Justice Today". Upper Saddle River, NJ: Prentice Hall, p.122.

<sup>9</sup> P. Acharya and R.B. Pradhananga, (1998), Crimes Against Life and Human Body, Ratna Pustak Bhandar, Kathmandu, p.2.

### 3. ESSENTIAL ELEMENTS OF CULPABLE HOMICIDE

The main qualifiers for the culpable homicide are causing of death by doing an act with the intention, or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that it was likely to cause death with recklessness and negligence. Without one or other of those elements, an act, though it may be in criminal nature, will not amount to the offence to culpable homicide. It must be noted that this defines culpable homicide with simplicity. The scheme of the code is that first the genus, “culpable homicide” is defined and then “murder”, which is a species of culpable homicide, is defined.<sup>10</sup> Culpable homicide is genus murder is species. All murders are culpable homicide but all culpable homicides are not murders.<sup>11</sup> What is left out of culpable homicide after the special characteristics of murder has been taken away from it is culpable homicide not amounting to murder?<sup>12</sup> The central elements that constitute a culpable homicide can be distinguished as follows:<sup>13</sup>

#### (a) Causing Death (Acts):

Culpable homicide is the result of a crime and for it to be deemed culpable a physical act that puts to peril someone’s life is an essential element. In most cases, the act involves a high degree of violence against another human being, for instance, the stabbing a person in the vital organs, shooting someone at point blank range, or administering poison<sup>14</sup>. There are exceptions to this rule, for some acts do not involve a high degree of violence against another person, but is still sufficient to cause death. However, it is a widely accepted principle of criminal jurisprudence that “no *actus reus*” or no “guilty act” cannot amount to a crime.<sup>15</sup>

#### (b) Death must be done by:

- a. **Doing an Act With The Intention Of Causing Death (Intention):** For homicide to be considered culpable, a mental element needs to accompany the act of the crime. It implies that a defendant acts with foresightedness and a desire for results. *Mens rea* or “guilty mind” is one

<sup>10</sup> Alistar Anthony Pareira v. State of Maharashtra, AIR 2013 SC 3802.

<sup>11</sup> Rampal Singh v. State of U.P. 2013(1), Crimes407 (SC).

<sup>12</sup> Anand Aishwarya, (2017), “Revisiting the Correlation Between Culpable Homicide & Murder (A Comparative Study of The Judicial Trend in the Light of Recent Cases, 2015-2017. Indian Law Journal on Crime and Criminology, Vol.1, Issue.3, India: Droit Penale, p.2.

<sup>13</sup> Supra Note 2, at 2.

<sup>14</sup> J.W.C. Turner Kenny's, (1952), Outline of Criminal Law, (19th edn) Cambridge: The University Press London, p.102.

<sup>15</sup> Norval Morries and Colin Howard, (1964), Studies in Criminal Law, Oxford Clarendon Press, p.2.

of the necessary elements of culpable homicide. The standard common law test of criminal liability is usually expressed in the Latin phrase *Actus non facit reum nisi mens sit rea*, which means “an act is not culpable unless the mind is guilty.”<sup>16</sup> The death of a human being is caused is not enough, unless one of the mental states mentioned in ingredient is present, an act causing death cannot amount to Culpable Homicide.<sup>17</sup> Thus in criminal jurisprudence, there must be an *actus reus* or “guilty act” accompanied by some level of *mens rea* to constitute a culpable crime.<sup>18</sup>

- b. With The Intention of Causing Such Bodily Injury as is likely to cause death:** The offender intended to cause death, so long as death ensues from the intentional bodily injury or injuries sufficient that the offender intended to cause death, so long as death ensues from the intention. If intention to cause such an injury as is likely to cause death is established, the offence of culpable homicide occurs. Even to cause an injury of a kind that is sufficient to cause death in the ordinary course. Where death is caused by bodily injury, the person that causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.
- c. With the knowledge that he is likely by such act to cause death (Knowledge):** When considering homicides, knowledge and intention do not amount to the same thing. A person may not have the intention of committing an act that kills, but if the person is aware that the act committed will take someone’s life or is likely to cause death, then the crime is still deemed culpable<sup>19</sup>.
- d. With Recklessness:** Culpable homicide with recklessness is the killing of another person by a reckless act. In general, "recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the

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<sup>16</sup> Andrew Ashworth, (1992), Principle of Criminal Law (1<sup>st</sup> edn).Oxford: Clarendon Press London, pp.227-228.

<sup>17</sup> Alister Anthony Pareira v. State of Maharashtra, AIR, 2013, SC. 3802.

<sup>18</sup> Supra Note 2, at 3.

<sup>19</sup> Bryan A. Garner, (2001), "Blacks Law Dictionary" (7th edn). West Publishing Co. USA, p.1038.

standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint. The requirement of "recklessly" is also established if it is shown that the defendant acted intentionally or knowingly.<sup>20</sup> In the context of culpable homicide to commit an act "recklessly" is to commit that act knowing that someone will probably die or suffer really serious injury.

The word "probable" means "likely to happen". It can be contrasted with something that is merely "possible". To have acted recklessly, the accused must actually have known that death or really serious injury would probably result from his or her acts. It is not sufficient for that danger to have been obvious to the reasonable person, but may use the fact that a reasonable person would have appreciated the probability of death or really serious injury to infer that the accused had such awareness. However, "Probable" is not a mathematical term. The accused does not need to have mathematically weighed the probability of death or really serious injury occurring.

- e. **With Negligence:** Homicide with negligence is the killing of another person through gross negligence or without malice. It often includes death that is the result of the negligent operation of a motor vehicle, situation of intoxication etc. It is characterized as a death caused by death by conduct that grossly deviated from ordinary care. Negligent homicide may be charged as a lesser-included offense of mitigated homicide. It is also sometimes referred to as "involuntary manslaughter".<sup>21</sup> Negligent homicide is a much lower intent crime and is used as a charge when one person causes the death of another through criminal negligence. The charge does not involve premeditation, but focuses on what the defendant should have known and the risks associated with what he did know. The elements of negligent homicide: (i) must prove in a negligent homicide case is that the defendant was aware of an unjustifiable risk associated with the events that led to the death of another person; (ii) must prove is an act or omission; and the (iii) must show causation,<sup>22</sup> this is a direct link between the negligent action and death of an individual.

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<sup>20</sup> US Legal. Reckless Homicide Law and Legal Definition. US Legal, Inc., available at <https://definitions.uslegal.com/r/reckless-homicide/> (Accessed on April 24, 2018).

<sup>21</sup> Supra Note 20.

<sup>22</sup> "What is Negligent Homicide?" Available at [https://criminal-law.freeadvice.com/criminal-law/violent\\_crimes/negligent-homicide.htm](https://criminal-law.freeadvice.com/criminal-law/violent_crimes/negligent-homicide.htm) (Accessed on April 24, 2018).

**(c) The absence of valid defense:**

And lastly for a homicide to be considered culpable, the killing cannot be justifiable or excusable by legal provisions. There is a key conceptual difference between these two types of defences. A society encourages or at least sanctions the conduct which amounts to justified homicide whereas the society does not accept or sanction the conduct which amounts to excusable homicide, but merely excuses it.<sup>23</sup>

#### **4. CLASSIFICATION OF CULPABLE HOMICIDE IN COMMON LAW JURISDICTIONS**

Homicide is the killing of a human being by a human being. It is either lawful or unlawful. Culpable Homicide is the first kind of unlawful homicide. In modern criminal law, homicide is deemed culpable, when they are not justified or excused by law. Once it is determined that a previously alive human being is dead, then an inquiry into the cause of death is launched. If the death is not caused by another human being, then from a criminal law point of view the case is not worth pursuing. However, if the death is caused by the act of another human being, then it is labelled as “homicide.”

An unlawful or culpable homicide may be classified into different categories according to the nature and gravity of the offence and its heinousness in order to attach a suitable punishment for each type. Depending on the circumstances of the homicide and the state of mind of the killer, unlawful homicide may be intentional killings or killings by accident or even killing which results from criminal negligence. Criminal homicides can be broadly distinguished from two categories.<sup>24</sup>

- (i) Murder:** Murder is the unjustified, unexcused killing of one human being by another with malice aforethought. These homicides carry a high degree of punishment and include (1) intentional homicide (2) homicide with knowledge; and (3) infanticide.<sup>25</sup> “Culpable homicide” is genus and “Murder” its species wherein all murder is culpable homicide but not vice versa. So the essential elements of murder are: (1) The intention to cause death; (2) Intention to cause such bodily injury knowing that the injury caused is likely to cause death; (3) Intention of causing bodily injury sufficient for the ordinary course of nature to cause death; (4)

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<sup>23</sup> Supra Note 13, at 102.

<sup>24</sup> Supra Note 2, at 5.

<sup>25</sup> Muluki Ain, 2020 BS, Section 13 of the Chapter of Homicide.

Knowledge about the act that it is so imminently dangerous and in all probability it will cause death.<sup>26</sup>

- (i) **Manslaughter:** Manslaughter is a common law legal term of homicide considered by law as less culpable than murder. Manslaughter is the unjustified, unexcused killing of one human being by another without malice aforethought. There are voluntary and involuntary manslaughter. Involuntary manslaughter, the offender had no prior intent to kill and acted in "the moment", under the circumstances that could cause a reasonable person to become mentally concerned. In some jurisdictions, voluntary manslaughter is a lesser included offence to murder. The traditional mitigating factor was a provocation; however, others have been added in various jurisdictions. Involuntary manslaughter is the homicide of a human being without intent, either expressed or implied. It is distinguished from voluntary manslaughter by the absence of intention. It is normally divided into two categories, constructive manslaughter, and criminally negligent manslaughter, both of which involve criminal liability. The terms of manslaughter or these type of homicide are also termed as a mitigated homicide and include (1) reckless homicide (2) negligent homicide (3) accidental homicide; and (4) provocative homicide.<sup>27</sup>

## 5. CULPABLE HOMICIDE IN DIFFERENT JURISDICTION

Every jurisdiction in accordance with their law criminalizes the killing of a person in being with intent or with knowledge of consequence as the death of person subject to exceptions. Culpable homicide is the gravest and most serious homicidal offense among unlawful homicides in each and every jurisdiction. However, culpable homicidal offence uses the terms as a 'murder' and 'manslaughter' in Common Law jurisdiction, culpable homicide amounting to murder' and culpable homicide not amounting to murder' in Indian Law jurisdiction and 'intentional homicide' and other forms of homicide in Canada. Many jurisdictions divide culpable homicide according to degrees of culpability. The most common divisions are first and second-degree of murder. Generally, second-degree murder is common law murder, and first degree is an aggravated form. The aggravating factors of first-degree murder are a specific intent to kill, premeditation and deliberation. In addition, murder committed by

<sup>26</sup> *Indian Penal Code, 1860*, Section 299.

<sup>27</sup> T.R. Vidya and T.R. Manandhar, (1985), *Crime and Punishment in Nepal: A Historical Perspective*. Kathmandu: Vidya and Manandhar, p.32.

acts such as strangulation, poisoning, or lying in wait is also treated as first-degree murder. As with most legal terms, the precise definition of murder varies from jurisdictions to jurisdiction and is usually codified in some form of legislation, which is underneath:

## 5.1 Common Law Jurisdiction

On the common law, murder is considered to be *mal-uhm in say*, which is an act which is a crime within itself. English common law identified murder as a *public wrong*<sup>28</sup> and wrongdoing by its very nature. Some jurisdictions still take a common law view of murder. In such jurisdictions, precedent case law or previous decisions of the courts of law defines what is considered murder. However, although the common law is by nature flexible and adaptable, in the interests both of certainty and of securing convictions, most common law jurisdictions have codified their criminal law and now have statutory definitions of murder. Initially, at common law, all murders have been punished equally: the murderer was executed.<sup>29</sup> Over time, the belief developed that not all homicides should be punished equally. As a result, homicides were divided into (i) murder, and (ii) manslaughter. Manslaughter has been punished by incarceration, not death. Murder, at common law, has been defined as (1) the unlawful killing of a (2) human being with (3) malice aforethought. It was the requirement of malice aforethought that distinguishes murder from manslaughter although malice aforethought has defined differently among the states.

### 5.1.1 England

English law, Homicide Act, 1957, Offences against the Person Act 1861 have categorized the culpable homicide into two general categories 'murder' and 'manslaughter.' Murder requires an intention to kill or an intention to commit grievous bodily harm if the intention is present. Murder has never been statutorily defined, despite being recognized as either the most serious crime, or certainly among them. The mental element is taken to be either an intention to kill or an intention to inflict grievous bodily harm. There are three main forms of manslaughter in English law:

- Voluntary manslaughter,
- Involuntary manslaughter, and

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<sup>28</sup> Blackstone, Book 4, Chapter 14, available at <http://www.yale.edu/lawweb/avalon/blackstone/bk4ch14.htm>. Yale. edu. (Accessed on June 25, 2014)

<sup>29</sup> A. Loewy, (1987), *Criminal Law Nutshell Series*, (2nd edn), St. Paul, West.

- Gross negligence manslaughter.

Voluntary manslaughter, that would otherwise amount to murder but for some legally recognized certain types of mitigating factors. There are three types of voluntary manslaughter: (i) that resulting from loss of self-control; (ii) that resulting from statutorily defined diminished responsibility; and (iii) killing in the perseverance of a suicide pact. (i) loss of control, (ii) diminished responsibility, or (iii) pursuance of a suicide pact. Involuntary manslaughter includes cases of gross negligence, manslaughter and unlawful act manslaughter. There are two types of involuntary manslaughter. Firstly, it may be "constructive" or "unlawful act" manslaughter, where a lesser but inherently criminal and dangerous act has caused the death. Gross negligence manslaughter requires a much greater level of wrongdoing than the civil tort of negligence. It may be caused by gross negligence, where the defendant has broken a duty of care over the victim, where that breach has led to death and is sufficiently gross as to warrant criminalization.

### 5.1.2 America

Under United State of American Federal Law, culpable homicide is the unlawful killing of a human being with malice aforethought. Malice can be expressed (intent to kill) or implied. Implied malice is proven by acts that involve reckless indifference to human life or in a death that occurs during the commission of certain felonies (the felony murder rule).<sup>30</sup> The U.S. Code, 1940 Chapter 51, Homicide, Section 1111(a) defines first-degree murder. Similarly, Model Penal Code, 1962 Section 210(2) defines murder as *(1) criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape. (2) Murder is a felony of the first degree.* Similarly, Sec. 1111(b) of U.S. Code defines second degree murder within the special maritime and territorial jurisdiction of the United States and provides that "Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life; Whoever is guilty of murder in the

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<sup>30</sup> Professor Paul H. Robinson, (2005), Criminal Law: Cases and Controversies, University of Pennsylvania, full discussion beginning on p. 39.

second degree, shall be imprisoned for any term of years or for life.<sup>31</sup> However, States have adopted several different schemes for classifying of murders by degrees. The most common practice is to separate murder into two degrees, and treat voluntary and involuntary manslaughter as separate crimes that do not constitute murder. They are:

- First-degree murder is any murder that is wilful and premeditated. Felony murder is typically firstdegree.
- Second-degree murder is a murder that is not premeditated or planned in advance.

Killing with deliberation and premeditation is called first-degree murder. Murder without deliberation or premeditation is called second-degree murder. The unlawful taking of another life under circumstances that makes the criminal less culpable than someone that commits murder is called manslaughter in United States law. In U.S. law, manslaughter is divided into voluntary and involuntary. Voluntary manslaughter and murder are similar, what makes the former a lesser crime than the latter is the circumstances that lead to the killing. It means there was an adequate provocation by the victim that led to the killing. Such killings usually occur in heat of passion. Involuntary manslaughter is the killing of someone unintentionally. In U.S. law, manslaughter is divided into unlawful acts of manslaughter and criminal negligence. Criminal negligent manslaughter is the unintentional killing of someone because of negligence or recklessness.<sup>32</sup>

### 5.1.3 France

The structure of the French law on intentional killing consists of a basic offence to homicide, called *meurtre*. Despite the similarity with name, this is more narrowly defined than the English crime of murder, because it is limited to homicides carried out with the intention of causing death; and again unlike murder in England, it does not carry a mandatory life sentence. The conduct covered by the offence to *meurtre* (both in its simplicity and its aggravated forms) obviously depends on French law interprets the meaning of intention.<sup>33</sup> In broad terms, the intention in French law bears much the same meaning as intention in the current English case-law on murder. Under the French Criminal Code segregate the following degree of homicidal offence, which are:

<sup>31</sup> Available at <http://www.law.cornell.edu/usCode/uscp.html> (Accessed on March 5, 2018).

<sup>32</sup> Gilbert Manda, (2017), "Difference Between Murder & Culpable Homicide." *Legal Beagle*, Available at <https://legalbeagle.com/8237616-difference-between-murder-culpable-homicide.html>.

<sup>33</sup> J. Pradel, (2002), *Droit pénal général*, (14<sup>th</sup> edn), p. 502.

- **The basic offence to homicide (*meurtre*):-** Article 221(1), French Criminal Code, the wilful causing of the death of another person is murder (*meurtre*). It is punished with thirty years' *reclusion criminelle* (CP);
- **Aggravated forms of homicide:-** Article 221(2) creates an (i) A murder which precedes, accompanies or follows another *crime* is punished by *reclusion criminelle* for life; or (ii) A murder which is intended either to prepare or to facilitate a *délit*, or to assist an escape or to ensure the impunity of the author or accomplice, is punished by *reclusion criminelle* for life. Article 221(3) creates an aggravated version of the offence where there was premeditation. Murder committed with premeditation is assassination. Assassination is punished by *reclusion criminelle* for life. Article 221(4) creates a Further aggravated form of *meurtre*, also punishable with life imprisonment, where it was committed against one of a range of specified victims.
- **Less serious cases of voluntary homicide: death as an aggravating factor in other offences against the person,** CP Article 222(1) creates an offence of “torture or acts of barbarity”. This carries 15 years *reclusion criminelle*. The penalty is higher if any of these lists of aggravating factors is present.

## 5.2. Culpable Homicide in India

Murder and another form of culpable homicidal offences to the Indian Penal Code 1860 is always are a subject of heated debate over Indian criminal law jurisdiction. Section 299 and Section 300 of IPC deal with the definition of culpable homicide and murder respectively. Section 299 defines culpable homicide as the act of causing death;

- *with the intention of causing death or*
- *with the intention of causing such bodily injury as is likely to cause death or*
- *with the knowledge that such act is likely to cause death, commits the offence of culpable homicide.*

This provision provided that a person that causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to

proper remedies and skilful treatment the death might have been prevented. The bare reading of the Section makes it crystal clear that the first and the second Clauses of the Section refer to intention apart from the knowledge and the third Clause refers to knowledge alone and not the intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude, which is of different degrees.<sup>34</sup> The mental element in culpable homicide i.e. mental attitude to the consequences of conduct is one of intention and knowledge. If that is caused in any of the previously mentioned three circumstances, the offence to culpable homicide is said to have been committed. The above provision, it was said that the "intention" that the Section requires must be related, not only to the bodily injury inflicted, but also on the clause beginning of, and "the bodily injury, intended to be inflicted is sufficient in the ordinary course of nature to cause death."

Section 300 of Indian Penal Code deals with murder although there is no clear definition of murder provided in said Section. It has been repeatedly held by this Court that culpable homicide is the genus and murder is species and that all murders are culpable homicide but not vice versa. Murder is, thus, defined in Section 300 of the Indian Penal Code, except in the cases of except, culpable homicide is murder, and those are:

- **Firstly:-** If the act by which the death is caused is done with the intention of causing death; or
- **Secondly:-** If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
- **Thirdly:-** If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- **Fourthly:-** If the person committing the act knows that it is imminently dangerous that it must, in all probability cause death or such bodily injury as is likely to cause death and commits such act, without any excuse for incurring the risk of causing death or such bodily injury as aforesaid.

Section 300 IPC further provides for the exceptions which will constitute culpable homicide not amounting to murder and punishable under Section 304. Those are:

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<sup>34</sup> Shivali, Rawat, *How-is-murder-different-from-culpable-homicide*, available at <http://qna.economicstimes.indiatimes.com/Law-Regulations/Criminal-Law/how-is-murder-different-from-culpable-homicide-518273.html> (Accessed on May 11, 2014).

- **Exception 1:-When culpable homicide is not murder.** Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:-
  - **First:-**That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.
  - **Secondly:-**That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.
  - **Thirdly:-**That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact murder, but merely culpable homicide.

- **Exception 2:-** Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.
- **Exception 3:-** Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.
- **Exception 4:-** Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. It is immaterial in such cases which party offers the provocation or commits the first assault.
- **Exception 5:-** Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

### 5.3. Intentional Homicide (Canadian Jurisdiction)

Under the Canadian Constitution<sup>35</sup>, Criminal Law is a matter of federal legislative competence, and so, unlike the U.S. or Australia, Canada has one uniform system of Criminal Law that applies across Canada<sup>36</sup> The homicide provisions are found in the Part VIII the Criminal Code, 1985<sup>37</sup> Section 229, which defines murder, provides Culpable homicide is murder:<sup>38</sup>

- (a) where the person who causes the death of a human being;
  - (i) means to cause his death, or
  - (ii) means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not;
- (b) where a person meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
- (c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

A conviction for murder under Section 229 carries a mandatory sentence of life imprisonment. In the case of first-degree murder, there is no parole eligibility for 25 years subject to Section 745(6)(1) which permits the possibility of judicial review of the parole ineligibility period after 15 years. In the case of second-degree murders (all murders which are not first degree), the period of parole ineligibility is anywhere from 10 to 25 years.

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<sup>35</sup> *Constitution Act, 1867* (UK), 30 & 21 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No.5, s. 91(27). (formerly *The British North America Act*)

<sup>36</sup> The provinces can create *regulatory* offences and can impose penal consequences, (ibid s. 92) but cannot create “criminal” offences.

<sup>37</sup> Part VIII of the *Criminal Code*, R.S.C. 1985 C. C-46.

<sup>38</sup> Prof. Winifred H. Holland, (2005), “Murder and Related Issues: An Analysis of the Law in Canada.” *Report for the Law Commission*, Canada. p.3.

## 6. BRIEF HISTORICAL EVOLUTION OF HOMICIDE LAW IN NEPAL

From the very beginning of society, some rules of criminal law were accepted and advanced as minimum rule running the society. Historically, Nepali culpable homicide law was governed dominantly by Hindu religious texts, local traditions, and customs on very few occasions by edicts (*Sanad*) of the rulers. The brief historical evolution of *jyanmara* (*intentional homicide*) law including homicide law in Nepal is highlighted the following historical development periods:<sup>39</sup>

### 6.1. Ancient Nepal

- a) ***Kirat Period:*** Culpable homicide law of *Kirat* period was highly influenced by traditions, Socio-cultural values and beliefs of the *Kirat* society as highlighted in the *Kirat* religious text- *Kirat Mundhum*, *Kababum* or *Kiratko Veda*. The culprits responsible for causing the death of another person or murder were given the death punishment for the principleof: "*an eye for an eye, a tooth for a tooth, a life for a life.*" That period murder was considered as a heinous crime as well as a great sin. The offender of murder was awarded capital punishment as well miscreants was forced to take an oath before God so as not to repeat their crime.<sup>40</sup>
- b) ***Lichhavi Period:*** Culpable homicide law of *Lichhavi* period was guided on *Hindu Dharmasastra* and they implemented provisions of various *Smritis* such as *Manu Smriti*, *Yajnavalkya Smriti*, *Brihaspati Smriti*, *Narada Smriti*, *Gautam Smriti* etc.<sup>41</sup> During the *Lichhavi* period, murder was considered as one of *Pancha Aparadha* (Five heinous crimes), which denote five grievous and serious crimes: homicide, theft, adultery, treason, and accomplishment with those criminals. The culprits of *Pancha Aparadha* were severely dealt with heavy punishment for the offender including homicide was the enslavement of the culprit and his family members along with the confiscation of their property. Thus, in *Lichhavi* period, not only the culprit of murder was liable for his crime but also the members of his/her families were liable to punishment. Main while the *Lichhavi* rulers had few revised the traditional Hindu law's and its capital punishment system and introduced enslavement and

<sup>39</sup> Supra Note 2, at 32.

<sup>40</sup> R.R. Khanal, (1977), *Kiratkalin Vijayapurko Samchhiptaltihās*, Darjeeling: Nepali Sahitya Parisad, pp.9-19.

<sup>41</sup> Supra Note 23, at 2.

confiscation of the property. The death penalty was replaced by the enslavement of all the members of the offender's family including the culprit. The punishment system was base of the caste system in the ancient *Lichhavi* period.<sup>42</sup>

## 6.2 Medieval Nepal

In medieval Nepal, justices were regulated on the basis of *Hindu Dharmasastra*. King Sthitiraj Malla in Bikram Era 1436(Nepal Era 500),<sup>43</sup> was formulated law, namely *Nyayabikasini (Manav Nyaya Shastra)*. It was criminalized the intentional homicide with knowledge such as:- (i) to transect the goods like poison and weapons or to kill a human being by the use of poison, weapons and similar items, molesting other's wife and to commit any other act that might cause death is the highest degree of violent acts; (ii) a person who commits perjury (who knowingly answers untruth) shall have the same fate as one who kills a Brahman, father , a cow, mother, a Guru (teacher), a child, or who is an incestuous, or one who breaks the rule made by the majority, or one who kills woman, these violent sinners suffer. In medieval Nepal, there were classified the six categories of intentional homicide: (i) *Brahmhatya* (killing of Brahmin); (ii) *Strihatya* (killing of woman); (iii) *Balhatya* (Infanticide); (iv) *Guruhatya* (killing of teacher); (v) *Gotrahatya* (Killing of kin relative); and (vi) *Gohatya* (cow-slaughter), were considered as great sins (*Mahapap*) or heinous crimes.<sup>44</sup> In general, capital punishment was a mandatory sentence for killing in that period. However, Brahmins and women were exempted from capital punishment. The death sentence for the cases described earlier was carried out either by hanging or chopping off the head. In some kingdoms, the members of the offender's family were also punished along with the culprit. But in *Gorkha* kingdom, such as the system of punishment to family members of the culprit was ended by *King Ram Shah* by introducing a new principle and imposed the punishment only to the culprit.<sup>45</sup>

## 6.3 Modern Nepal

Then modern period was started from the unification of Nepal by King Prithvi Narayan Shaha. The royal *Sanads* (edicts) was issued, to recognize the prevailing customs and traditions before the enactment of the Legal Code

<sup>42</sup> D.B. Bajracharya, (1972), *Lichhivi Kalko Abhilekh*. Kathmandu: Nepal and Asian Studies, TU, pp. 442-43.

<sup>43</sup> Available at [www.lawcommission.gov.np](http://www.lawcommission.gov.np)

<sup>44</sup> *Supra* Note 23, at 62-63.

<sup>45</sup> *Supra* Note 2, at 33-34.

(*Muluki Ain*) of 1854.<sup>46</sup>In the beginning phase of that period, the offenders were not treated equally and punished on the basis of their caste for the intentional homicidal case. However, in this period new concepts and categories of homicide law were developed, which were unknown to earlier periods. In this period homicide was divided into a) Lawful homicide, and b) Unlawful homicide.<sup>47</sup> Furthermore, lawful homicide was divided into : (i) Killing by a person exercising the right of private defence; (ii) Killing of an adulterer by the aggrieved husband; and (iii) Killing by any citizen of an assailant who is trying to kill a cow. Similarly, unlawful homicide was divided:<sup>48</sup>(i) *Jyanmara* or murder; and (ii) *Bhabitabya Hattya* or accidental homicide.<sup>49</sup>

The history of Nepali Culpable homicide law, law itself did not define the term *Jyanmara* but in the judicial practice this term was used to cover heinous type of killing such as patricide, matricide, killing of a women, infanticide, killing of kin relative, killing of teacher, killing of any person by using dangerous weapons, and killing by poisoning etc. In this period, *Jyanmara* was considered as one of *Panchakhat* (Five serious crimes). The term *Panchkhat* was a technical term used in the criminal law of this period to express the assigned penalty as well as the crime. The punishment was charged to the *Jyanmara* mainly dependent on the caste group to which the offender belonged. Generally, capital punishment was a mandatory sentence for *Jyanmara*. The execution of capital punishment was also dependent on the caste group of the culprit. The culprits that belonged to pure or upper caste group were executed by hanging whereas the offender belonging to impure or lower caste group was executed by having their head chopped off by a sword. The *Brahmins and* women were exempted from death penalty.<sup>50</sup>

## 7. EXISTING LEGAL PROVISIONS OF CULPABLE HOMICIDE IN NEPAL

Classifications of culpable homicide in Nepali criminal law are based on the following three criteria (1) the harm done (2) the degree of culpability with which the harm is perpetrated; and (3) the *modus operandi* of causing the said harm. In Nepali criminal law, culpable homicide is viewed as the gravest offence one human being could commit against another. According to existing Nepali homicide law, all form of culpable homicide is broadly divided into the

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<sup>46</sup> R.R. Khanal, (1985). "Historical Perspective of Judicial Tradition in Nepal", in the Legal System of Nepal. LAWS, New Delhi, p.158.

<sup>47</sup> Ibid.

<sup>48</sup> Supra Note 1, at 60-61.

<sup>49</sup> Supra Note 2, at 34-35.

<sup>50</sup> Supra Note 2, at 36.

following categories based on the degree of harm done, the degree of culpability and the modes of killing used while committing the homicide.<sup>51</sup>

(a) **Jyanmara (Murder):** *Jyanmara* or murder is the gravest, unlawful and the most serious form of homicide in Nepali homicide law. The Chapter “Of Homicide” of Legal Code of 1963 (*Mulki Ain 2020 B.S.*) does not clearly define the meaning of murder. Section 13 of the Chapter “On Homicide” of the Legal Code of 1963 concludes that death caused by using dangerous weapons, administering poison or using an ambush amounts to *Jyanmara* or murder<sup>52</sup>. In addition to the Chapter “On Homicide” other provisions regarding murder are scattered in various another chapter of the code. These provisions bring to light the consideration of positive mental elements or explicit mental elements (*mens rea*) in determining whether a homicide amounts to murder or a homicide not amounts to murder. Thus Nepali homicide law deems the following as acts of murder.<sup>53</sup>

- Causing the death of another person while acting with the intention to kill;
- Causing the death of another person by doing an act with intent to cause bodily injury resulting in death;
- Causing the death of another person doing an act with knowledge that the act is likely to cause death;
- Causing death due to arson;
- Causing death due to Illegal Detention.

(b) **Abesprerit Hatya (Homicide under provocation):** *Abes* refers to “provocation” and ‘*prerit*’ refers to “under the influence” in Nepali language. Thus, homicides committed under provocation are termed as *Abesprerit Hatya* and falls under the second category of culpable homicide. Section 14 of the Legal Code of 1963 states that the killing that is not caused with the intention to kill or with murderous enmity or with a dangerous weapon, but with stick, stone, arms or legs due to irresistible provocation by something raised at the spur of a quarrel is considered *Abesprerit Hatya*.<sup>54</sup> Although the Nepali homicide law does not expressly define the act, injudicious practices and legal writings such homicides are

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<sup>51</sup> Supra Note 2, at 6.

<sup>52</sup> Supra Note 1, at 318.

<sup>53</sup> Supra Note 2, at 7.

<sup>54</sup> Muluki Ain, 2020 BS, Section 13 of the Chapter of Homicide.

termed *Abesprerit Hatya*. In Nepali jurisdiction, an offender is said to have committed an *Abesprerit Hatya* if:<sup>55</sup>

- The offender happens to kill another person without the use of dangerous weapons, poison or an ambush.
  - The offender happens to kill another person without the intention to kill or without murderous enmity.
  - The offender happens to kill another person under irresistible provocation caused in the spur of an argument, and such killing takes place at that very point and time by employing simple stick, stone, leg or hand and thereby resulting in the death of the victim immediately or within the time limit provided by law.
- (c) ***Bhabitabya Hatya (Accidental Homicide)***: This is the third category of homicide recognized by Nepali homicide law. In the Nepali language, *Bhabitabya* means ‘accident’ and *Hatya* means ‘homicide.’ Section 5 of the Chapter ‘‘Of Homicide’’ in the Legal Code of 1963 states that the death of a person due to the act of another person which is not likely to cause death and which is done without any murderous enmity or without having the intention to kill is considered as *Bhabitabya Hatya*<sup>56</sup>. Nepali homicide law classifies *Bhabitabya Hatya* into the following categories:<sup>57</sup>
- The act of killing another person without due care or concern
  - The act of killing another person due to carelessness or negligence.
  - The act of killing another person by a guardian in defence of a deceased.
- (d) ***Sajaya Kamhune Hatya (Mitigated Homicide)***: In Nepali homicide law, this category of homicide is not the result of legislation but the judicial development of the Supreme Court of Nepal through the interpretation and implementation of Section 188 of the Chapter ‘‘Of Court Procedures’’ of the Legal Code of 1963. As mentioned before Nepali Legal Code classified *Jyanmara* as the gravest form of homicide that is punishable with a life sentence along with the confiscation of the whole property. However Section 188 of the Chapter ‘‘Of Court Procedures’’ directs that if a judge (of the District or the Appellate Court) perceives that the killing

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<sup>55</sup> Supra Note 2, at 7-8.

<sup>56</sup> Supra Note 1, at 300.

<sup>57</sup> Supra Note 2, at 8.

occurred due to an accident, without premeditation or deliberation and in the presence of mitigating circumstances he or she may decide an appropriate punishment for the accused and refer the decision to a higher judicial authority for review. These cases are called “*Sadak Jaheri Garnu Parne Muddha*.”<sup>58</sup> The Supreme Court of Nepal has recognized and incorporated the following circumstances as mitigating factors of reducing the punishment for homicide:<sup>59</sup>

- Mitigation on the ground of infanticide or killing of a newly born child by his/her own mother.
- Mitigation on the ground of pursuance of a suicide pact.
- Mitigation on the ground of excessive use of the right of private defence.
- Mitigation on the ground of exceeding the limitations determined by Section 14 of Chapter “Of Homicide” (for *Abesprerit Hatya*)
- Mitigation on the ground of intoxication.
- Mitigation on the ground of mistaken identity of the victim or transferred malice.
- Mitigation on the ground of mistake of fact or duress.
- Mitigation on the ground of diminished responsibility; and
- Mitigation on the ground of battered women syndrome and that arising out of social tensions.

## **8. CULPABLE HOMICIDE (*KARTABYA JYAN*) IN MULUKI PENAL (CODE) ACT, 2074**

The codification of the Muluki Criminal (Code) Act, 2074 is the biggest contribution and it is the milestone of modern Nepali criminal legal system. This is the last effort into codification of criminal law in Nepal. This Code was enacted by Legislative Parliament in 2074 on August 8, 2017, and it will come into force on August 17, 2018. Since 1951, Seven Law Reform Commissions was formed into 1953 (1<sup>st</sup>), 1957 (2<sup>nd</sup>), 1960 (3<sup>rd</sup>), 1962 (4<sup>th</sup>), 1972 (5<sup>th</sup>), 1984 (6<sup>th</sup>) and 2008 (7<sup>th</sup>) formed to modernize and reform law including a criminal law in Nepal.<sup>60</sup> Similarly, Nepal has drafted two Draft Penal Codes from 1951 to till now. However, previous Draft Codes were never put forward for discussion on the legislature. although the Draft Codes played a very

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<sup>58</sup> Supra Note 1, at 316.

<sup>59</sup> Supra Note 2, at 8-9.

<sup>60</sup> G. Shrestha, (1993), *Hindu Jurisprudence and Nepali Legal System*, Kathmandu: Pairavi Publication, pp.357-362.

significant role in developing and reforming of the criminal law<sup>61</sup> as well as homicide law. The Muluki Criminal (Code) Act, 2074 codified homicide law constitutes the real attempts and efforts to modernize and codify the Nepali criminal laws in the real sense of the term of the codification.<sup>62</sup>

The Prastabit Nepal Danda Samhita, 1955 was drafted by the first Nepal Law Reform Commission, which was formed into 1953. It was tried to modernize of provisions of penal law's in the changed circumstances and situation of the country. The Draft Nepal Penal Code 1955 has classified unlawful homicide on the basis of the degree of intention, knowledge or negligence, which are: (i) Culpable homicide; (ii) Jyanmara or Murder; and (iii) Homicide by an act of negligence. The Draft Nepal Penal Code 1955 was broadly divided into two categories of culpable homicide: 63 (1) Culpable homicide amounting to murder; and (2) Culpable homicide not amounting to murder.<sup>64</sup>

The Draft Criminal Code, 1973 (Prastabit Aparadh Samhita) was the second Draft Penal Code in the Nepali legal history was drafted by the Fifth Nepal Law Reform Commission. Draft Nepal Criminal Code 1973 was classified the different categories of unlawful homicide on the basis of the degree of intention, knowledge or negligence. It has separated unlawful homicide into (i) Intentional homicide; (ii) homicide with mere knowledge or cognitive homicide; (iii) mitigated homicide; and, (iv) homicide by a negligent act.

The proposed Draft Criminal Code, 2001 (Prastabit Aparadh Samhita 2058) was the third attempt for the codification criminal law of Nepal. It had distinguished the different categories of unlawful homicide on the basis of the degree of intention, knowledge or negligence. According to this code particular homicide is committed with the intention to kill and the probability of death resulting from any act done with the intention to kill is of a high degree (where death is certain). It was classified unlawful homicide into (i) intentional homicide; (ii) homicide with mere knowledge; (iii) mitigated homicide; (iv) homicide by recklessness; and (v) homicide by a negligent act.<sup>65</sup>

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<sup>61</sup> Supra Note 1, at 263-264.

<sup>62</sup> Supra Note 2, at 39-40.

<sup>63</sup> Draft Nepal Penal Code 1955, Section 227.

<sup>64</sup> Supra Note 2, at 41.

<sup>65</sup> Supra Note 2, at 42.

## 9. CATEGORIES OF CULPABLE HOMICIDE IN MULUKI CRIMINAL (CODE) ACT, 2074

Culpable homicide is gravest and most serious offence of Homicide Law. All human societies prohibit the killing of a human being and ensure protection and preservation of human life through criminalizing of all human behaviours causing death. Nepali homicide law has also recognized the sole value of human life. The rationale for the criminalization of homicide is that importance of the life of an individual is necessary for promotion and realization of all other values and social goods. It is a proved fact that the life of an individual person is a unique kind of good because it is a necessary condition for the enjoyment of all other goods. All freedoms and liberties are only for living a meaningful life. The existence and continuation of human life is of supreme importance because if one life is lost, the status quo ante cannot be restored as renewal is away from the capacity of any human being. For these reasons criminal law has prohibited killings of a human being and ensured protection and preservation of human life through criminalized of all such human behaviours or acts, which cause death.

After the promulgation of the new constitution, there are many new legal structures being formulated by the legislature. In this course and after long effort to make single code in the area of substantive and procedural law and even the separate sentencing law, the new codes namely the Muluki Criminal (Code) Act, 2017 (2074 BS), the Muluki Criminal Procedure (Code) Act, 2017 (2074 BS), and the Criminal Offence (Sentencing Determination and Implementation) Act, 2017 (2074 BS) have been passed by the legislative parliament on August 8, 2017, and they come into force on August 17, 2018.

The *Muluki* Criminal (Code) Act, 2074 is the latest effort to make the separate code in the area of criminal law, which is drafted by Criminal Law Reform and Revision Taskforce, 2008.<sup>66</sup> This code is more scientific and comprehensive in comparison to previous draft codes. It has revised and incorporated the provisions of existing law and previous draft codes.<sup>67</sup> The *Muluki* Criminal (Code) Act, 2074 has been tried to define the very specific way and include the specific provision relating to culpable homicide. The Muluki Penal (Code) Act, 2074, Chapter-12 Offence Relating Human Body, is relating to Homicide Sec.177, 178 179, 180, 181, 182 and 184 are related to the culpable homicide.

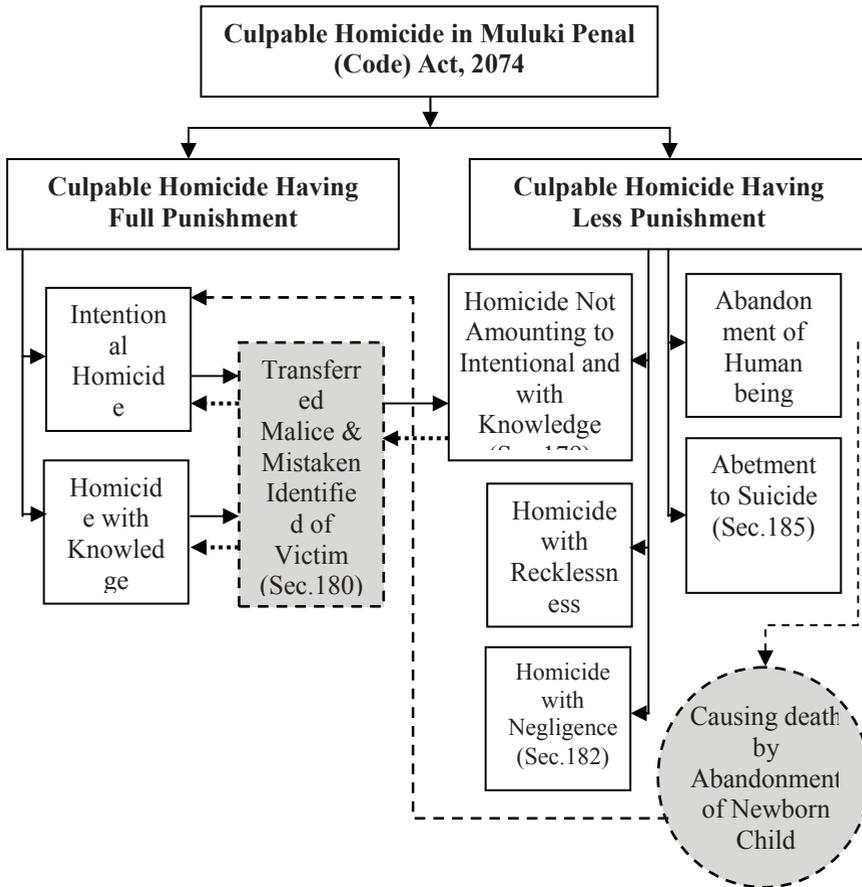
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<sup>66</sup> Proposed Criminal Code, Criminal Procedure Code, and Sentencing Act, 2010, Ministry of Law, Justice and Parliamentary Affairs, Kathmandu, p. 3

<sup>67</sup> *Supra* Note 2, at 44.

Sec.177 has a provision for an intentional part or *mens rea* for the charge of punishment of the accused of murder. Sec.178 has a provision for *actus reas* with knowledge for the charge of murder. Similarly, Sec.180 of the Code has also emphasis the role of *actus reas* and *mens rea* in murder. The provisions of Section 177, 178 and 180 are directly related to culpable homicide amounting to murder. However, Sec.179, 181, 182 and 184 are related to culpable homicide not amounting to murder.

Under Chapter 12 has provided basis upon which some new statutory definition of culpable homicide can be constructed. The *Muluki Criminal (Code) Act, 2074* has classified five kinds of crime related to life i.e. an intentional homicide, homicide with knowledge, culpable homicide, culpable homicide by negligence, and culpable homicide by recklessness. The following chart has shown that the categories of culpable homicide in *Muluki Criminal Code*.



## 9.1 Intentional Homicide

In general, every individual has the capacity and adequate free will to make meaningful choices and he or she should be esteemed and treated as a manager capable of choosing his or her acts or omission. This capacity of choosing his or her acts in an independent approach, also regards him or her as a moral person. It is accepted in modern criminal jurisprudence that at the establishment of criminal liability liable the principle of individual autonomy that each individual should be treated as responsible for his or her own behaviour. Therefore, the spirit of the principle of individual autonomy is that the incidence and degree of criminal liability should be made on the basis of admiration of the choices made by the individual.<sup>68</sup> The explicit or positive mental elements required for *intentional homicide*, it is better to proceed with the common nature of *mens rea* and its role in inferring mental blameworthiness of the accused. The principle of *mens rea* articulates this by standing that defendant should only be held criminally liable for actions or consequences, which they intended or intentionally caused or with intent to risk. As well as only if they were aware of as it is often expressed 'subjectively' aware of the possible consequence of their conduct should they be liable. Consequently, the fundamental nature of the principle of *mens rea* is that criminal liability should be imposed only to the person that is adequately aware of what he or she is doing, and of the consequences, it might have, that the can reasonably be said to have chosen the behaviour and its consequences.<sup>69</sup>

In criminal law, the intention in the sense of purpose possesses this kind of feature of the mental element. In other words, the intention in the sense of proposes denotes the state of mind of a person that not only foresees but also desires the possible consequence of his conduct. In this sense, it is regarded that as a necessary feature of intention the foreseen outcome should also be a preferred consequence. On the other hand, the feature of the mental element when theoretically discussing the categories of *mens rea* such as (i) oblique intention; (ii) knowledge; (iii) recklessness; and (iv) gross negligence. It is accepted in modern criminal jurisprudence that the burden of prove beyond reasonable doubt that the accused not only committed the criminal act (*actus reas* of crime) but also did so with required *mens rea* (Mental elements of the crime) to amount to a crime is upon the hearing. It is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and

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<sup>68</sup> Rajit Bhakta Pradhanga (Dr.), (2000), "Overview of Law of Homicide in Nepal: Modern Context", Annul Survey of Nepali Law, Nepal Bar Council, Kathmandu, Vol.1, pp.83-84.

<sup>69</sup> Supra Note 2, at 48.

therefore, the burden lays on the prosecution to prove the guilty of the accused beyond reasonable doubts. The general burden never shifts and it always rests on the prosecution.<sup>70</sup>

Hence, the Muluki Penal (Code) Act, 2074 does not define the meaning of intentional homicide, but it has provided various provisions relating murder in the different legal instrument. Those provisions are:

**Section 177- Not to act with intention to murder:** (1) No person shall kill anyone intentionally or commit or cause to be committed any act to killing anyone.

**Explanation:** For the purpose of this section, in case anyone has caused grievous physical injury to somebody with the intention that he/she be killed, however, he/she does not die instantly but dies subsequently owing to the reasons for the same injury; even then, the person causing such injury shall be deemed to have committed the murder.

(2) Whoever commits the offence referred to in sub-section (1) shall be liable to a punishment with life imprisonment.

From the analysis of above provisions, it is clear that the Muluki Criminal (Code) Act, 2074 has considered the following positive or explicit mental elements or *mens rea* on the part of the accused as intentional homicide:

- a) Causing the death of another person by doing an act with intent to kill,
- b) Causing the death of another person by doing an act with intent to cause bodily injury resulting in death,

(a) **Causing death by doing an act with intent to kill**

The situation is the first mental element required for intentional homicide or murder. The *Muluki Ain 2020 B.S.* and supplementary Specific Acts is stated that causing the death of another person by doing an act with intent to kill is always regarded as *Jyanmara* (intentional homicide) or murder. The term "intention to kill" of the Legal Code of 1963; Section 161(1) of the Vehicles and Transportation Act of 1993 Section 7(1) of the Railway Act of 1963 have used the term "intention to kill" to indicate the positive mental element required to constitute murder. Conversely, Section 5 and 14 of the Chapter "Of Homicide" of the Legal Code of 1963 which have defined *Bhabitabya Hatya* and *Abeshprerit Hatya* equally have used the term "intention to kill" in a negative sense in order to negate such categories of culpable homicides in the

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<sup>70</sup> R.B. Pradhananga, (1993), A General Introduction to The Nepali Law of Evidence (5<sup>th</sup> edn), Ratna Pustak Bhandar, Kathmandu, p.220.

presence of intention to kill in such killing. In this regard for the killing of both situation *Bhabitabya Hatya* and *Abeshprerit Hatya*, if the intention to kill is present it is automatically converted into *Jyanmara* (intentional homicide) or murder.

In Section 177(1) of Muluki Penal (Code) Act, 2074 has provides that "No person shall commit killing of anyone or commit or cause to be committed any act to killing anyone with intention". Under the same Section explanation that for the purpose of that Section, in case anyone has caused grievous physical injury to somebody with the intention that he/she be killed, however, he/she does not die instantly but dies subsequently owing to the reasons of the same injury; even then the person causing such injury shall be deemed to have committed the intentional homicide. For this reason, the *Muluki* Criminal (Code) Act, 2074 obviously states that "intention to kill" is a mental element required for this category of homicide and if the presence of it is proved in such a situation the killing it is always considered as intentional homicide having the full punishment. As intention to kill a person brings the matter so clearly within the general principle of *mens rea* as to causing no difficulty. Everywhere the intention to kill is present the act amounts to murder. Once the intention to kill is present, the offence is always murder. On the other hand, there is no general agreement among the Nepali jurists as to the meaning of this fundamental expression of criminal jurisprudence. However, they try to give opinions as to the principle of a state of mind, which are probably included within the word "intention".<sup>71</sup>

Nepali homicide law seemed that the term "intention to kill" has been used to denote the probability of the consequence of death itself and also to cover a situation where premeditation or thinking out the plan of killing beforehand is not essentially concerned. A person expects the ordinary consequences of his acts and consequently, it is presented that the equivalent was intended. If a person performing some act expects death to be the consequence thereof, in such case death ensures the intention to kill. Similarly, the Nepali homicide law has used the term intention to kill in broad sense i.e. it includes both direct and oblique intention and any act done by the accused with such intention resulting in death is regarded as "intention to kill".<sup>72</sup>

Theoretically, direct intention relates to an object that the accused want to achieve. It is linked to such situations somewhere the accused intending to do

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<sup>71</sup> Supra Note 2, at 50.

<sup>72</sup> M.P. Acharya, (1983), "The Role of Mental Element in Culpable Homicide", Research Report, Kathmandu: Law Institute, TU., p.17.

something or, aiming to perform, or applying one's mentality to a particular task or directing one's action to achieve a particular aim, end or purpose. The direct intention, it will be relatively clear that an outcome was a direct product of an individual's purpose of most situations. Most of the jurisdiction has provided such broad provisions for the *actus reus* of culpable homicide in the common law world. The common law jurisdiction speaks death caused by doing an act or omission with certain kind of positive mental elements constitute certain categories of culpable homicide. Nevertheless, every act or omission that causes death is automatically not considered as the *actus reus* of *culpable homicide* in Nepal. Merely those act or omissions are considered as the *actus reus* of culpable homicide which is principally mentioned by the law. In this regard the Nepali homicide law, in order to consider an act or omission as the *actus reus* of culpable homicide such an act or the modes of killings is required to be particularly mentioned in the law.

Therefore, the formulations concerning to intentional homicide in Nepali homicide law necessary that there should be not only the intention to kill as a positive mental element but mention has to be made also of the particular modes of killings and death caused within the time limit laid down by the law. Historically these kinds of provisions are rooted in the rule that "*death must be caused within the time limit as laid down by law.*" The law has laid down different time limit within which the death of victim must be caused due to illness of the injury inflicted. If the death of the victim is caused within such specified time limit due to illness of the injury inflicted on the victim such death is considered as *intentional homicide*. If the death of the victim is caused due to other illness or from intervention of third party or without being bedridden or illness or after expiry of such time limit, then such death is not considered as *intentional homicide*, but is considered rather as an attempted murder or even a crime of beating i.e. depending upon the mental element on the ingredient of the accused with which he caused such injury. If such injury was caused with an intention to kill the accused would be liable for only attempted murder, whereas if such injury was caused with an intention to cause bodily injury resulting in death then the accused would only be liable for the crime of beating or hurt. In the Nepali legal history, first time legislatively recognized this kind of traditionally and indigenously developed principle by the Legal Code (*Muluki Ain*) of 1854 and retained by the Legal Code (*Muluki*

*Ain*) of 1935. This rule is somehow the same with rule of "year and a day" of old English common law.<sup>73</sup>

The existing Nepali homicide law has specified the time limit for the following modes of killings:

- a) Killing by stabbing with any weapon resulting in the fracture of amputation of any organ of the body, causing death after whatsoever period before the recovery of illness from such injury,
- b) Killing by stabbing with any weapon or by any means resulting in any kind of injury other than fracture of amputation of any organ of the body thereby causing death as a result of illness suffered from such an injury within 21 days
- c) Killing by causing agony and death caused within 3 days,<sup>74</sup> and
- d) Killing by administrating poison and death caused within 7 days,<sup>75</sup>

However, Section 177(1) of Muluki Criminal (Code) Act, 2074 has not accepted those "year and a day" rule or limitation of the time. It provides that if the death of the victim (he/she) does not die instantly but dies subsequently owing to the reasons of the same injury; even then the person causing such injury shall be deemed to have committed the murder.

The "intention" is one of the essential elements of the offence to a case of *intentional homicide*, wherever, it is always necessary that there should be specific result as to whether the necessary blameworthy intention is present or not and when it is reasonably doubtful upon the evidence of prosecution, whether the intention was present or not, then the accused are entitled to the benefit of reasonable doubt, and must be acquitted of the charge of intentional homicide and if he/she is to be convicted of the charge of mitigated homicide. Where a person fires gunshot at such a close range that it could not have had other than crucial effect or he fires successfully at the victim, there is an obvious indicator of his intention to commit culpable homicide.<sup>76</sup> The intention of an offender is determined in each case and must be decided on its own nature.

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<sup>73</sup> Supra Note 2, p.53.

<sup>74</sup> Muluki Ain, 2020 BS, Section 8 of the Chapter on Homicide.

<sup>75</sup> Ibid, Section 9.

<sup>76</sup> Chitra Bahadur K.C. v. H.M.G., NLR (NKP), (2053 BS), p. 491.

A question on intention is a question about fact, which is to be gathered from the acts of the accused and circumstances of the crime, occurred. Similarly, the judicial practice in Nepal, the Supreme Court has held that the appeal of the accused should not be considered to reduce punishment is the case where the accused had slatted the throat of the deceased with sickle as sharp-edged dangerous weapon and kills the victim on the spot and throws the dead body in the river,<sup>77</sup> also is a case where the accused and deceased went to the jungle for hunting with gun on the day of incident. The accused shoot the deceased by the gun in the jungle and escaped the accused and killed the victim on the spot, there is a clear indication of his intention to commit *intentional homicide*.<sup>78</sup>

As the above stated that in determining the question on intention, the nature of the weapon used, the part of the body on which the blow was made i.e. the force and the number of blows, location of injury, are all factors from which a presumption as to the intention can, as a fact, be drawn. On the other hand, other factors from which intention is identified are the previous enmity, premeditation, nature of the attack, the motive of the accused, the relationship of the accused with the deceased, the position and condition of deceased, the time and place of attack, opportunity to inflict injuries, etc.

The Supreme Court of Nepal has decided several cases regarding the intention to kill. The leading case of *Makhan Singh alias Ser Bahadur Limbu and others Vs. HMG* held that in a homicide case, to consider any killing to be an intentional homicide, there must be the presence of intention to kill may be inferred on the basis of factors such as weapon used and nature of the act itself. The killing caused by using such weapon, which in all certainty resulted in the death of the victim, is considered as caused with the intention to kill.<sup>79</sup> The Supreme Court of Nepal has determined the intention kill on the basis of weapon used such as an ax,<sup>80</sup> knife,<sup>81</sup> sickle,<sup>82</sup> khukuri,<sup>83</sup> and gun<sup>84</sup> etc. thereby causing death was inferred with the intention to kill and such killer is convicted for murder. In the above discussion, the Supreme Court of Nepal clearly held that the intention to kill might be inferred from the nature of wound and nature

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<sup>77</sup> H.M.G. v. Santa Bahadur Tamang, NLR (2057 BS), p. 467.

<sup>78</sup> H.M.G. v. Bharat Bahadur Jimi, NLR (2055 BS), p. 612.

<sup>79</sup> NLR (2037 BS), p.118

<sup>80</sup> H.M.G. v. Man Bahadur Thapa, NLR (2057 BS), p.666.

<sup>81</sup> Uma Bakta Woli and others V. H.M.G., NLR (2060 BS) p.341; H.M.G. v. Bal Bahadur Thami and others, NLR (2058 BS), p.340.

<sup>82</sup> H.M.G., v. Kallu Dhobi, NLR (2060 BS), p.582.

<sup>83</sup> H.M.G. v. Jaya Malla Bohara, NLR (2047 BS), p.34,

<sup>84</sup> Mohan Raj Karki and others v. HMG, NLR (2038 BS), p.1145

of act resulting in the death of the victim<sup>85</sup> and convicted for intentional homicide.

**b) Causing the death of another person by doing an act with intention to cause bodily injury resulting in death:**

Cause and result are needed to co-relation to each other in every crime. In Section 177(1) of Muluki Criminal (Code) Act, 2074, this is the second alternative positive or clear mental element required for intentional homicide. It seems the intention of the legislature is to indicate the act which is done with an intention to cause bodily injury resulting in the death of the victim; such killing is considered as *intentional homicide*. The prosecution must prove the following facts before it can bring a cases under this Section: (i) it most established, quite objectively, that the bodily injury is present; (ii) the nature of the injury must be proved. These are purely objective investigations; (iii) it must be proved that there was an intention to inflict that particularly bodily injury that is to say, it was not accidental or unintentional or that some inquiry proceeds further; and (iv) it must be proved that the injury of the type, just described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature. This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offender. Even if intention of accused was limited to the infliction of the bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death. The offender would be intentional homicide.

The above legal provision shows that Muluki Criminal (Code) Act, 2074 provision and Court practice about murder case has followed two principles: (i) the first principle is related to the doctrine of intention to cause bodily injury resulting in death is to be applied and liability determined accordingly; and (ii) the second principle is related to refusing those "years and a day" rules or time limits and provide that *if the death of the victim (he/she) does not die instantly but dies subsequently owing to the reasons for the same injury; even then the person causing such injury shall be deemed to have committed the murder*. However, existing Muluki Ain, 2020 has provided that the provision of time limits. If the death of the victim occurs after 21 days the death will be considered as intentional homicides per section 8 of the Chapter "Of Homicide" if such death was caused by the used of dangerous weapons such as gun and the death after expiry of 21 days times limit specified by section 10 "Of

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<sup>85</sup> Tanka P. Rijal V.H.M.G., NLR (2049 BS), p.674.

Homicide" is applicable the death will be considered as a *Jyanmara*. Similarly killing by striking by hand blow on joints or on another sensitive part of the body, death caused due to the illness of such injury within 7 days. Killing by shackling, death caused due to the agony of such shackling within 5 days.<sup>86</sup>In above provision has determined that, if the victim dies due to other illness or beating by other, such death is not considered as *intentional homicide*.

## 9.2 Homicide with Knowledge

“Knowledge” is an awareness on the part of the person concerned indicating his/her state of mind. “Reason to believe” is another facet of the state of mind. “Reason to believe” not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reason to believe” is a higher level of state of mind. Likewise “knowledge” will be slightly on higher place than “reason to believe”. A person can be supposed to know where there is a direct appeal to his senses and person is presumed to have a reason to believe if he has sufficient cause to believe the same. A person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned.<sup>87</sup>

Nepali homicide law has accepted that causing death by doing an act with knowledge that the act is likely to cause death is the third alternative mental element required for *homicide with knowledge* in a constructive sense. This mental element is merely interrelated with cognitive aspect of *mens rea*. A questing of knowledge is a question on fact, which is to be established from the acts of the accused and the circumstances of occurrence of death. But in a case of *homicide with knowledge* where knowledge is one of the essential elements of the offence, it is always necessary that there should be a definite finding as to whether the compulsory culpable knowledge is present or not. It determined the question on knowledge, the nature of the weapon, the location of the injury, the force and number of blows, the nature of act etc. are all factors from which presumption may be drowned regarding the knowledge that whether the act was probably to cause death or not. Regarding the presence of knowledge in concerning the consequence of an act has until present relied on the nature of the act of the accused, force and location of the injury inflicted on the victim. In the presence of such knowledge, the killing is considered as a *homicide with knowledge*.

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<sup>86</sup> Muluki Ain, 2020 BS, Section 10 of the Chapter of Homicide.

<sup>87</sup> R.P. Kasturia, (2011), Law of Crimes and Criminology, Exhaustive & Critical Commentary, Indian Penal Code, (3<sup>rd</sup> edn), India: Vinod Publication (P) Ltd., p.1934.

In existing homicide law in Nepal, Chapter "Of Homicide" of the Muluki Ain of 1963, there is no provision as such which directly mentioned this type of mental element required for *intentional homicide*. But the section 5 of the Chapter "Of Homicide" in the definition of accidental homicide, it has been mentioned as a negative mental element. Thus, such killing is considered as a *homicide with knowledge*. It further means that it is not necessary to have an intention of causing death or intention to cause bodily injury to constitute *mens rea* required for *homicide with knowledge* but the knowledge that the act of the accused is likely to cause death is sufficient mental element for *homicide with knowledge* verdict.<sup>88</sup>

Existing Nepali homicide law has two provisions, which are directly related to these mental elements: (i) **Causing death due to Arson:-**This condition is directly related to cognitive aspects of *mens rea* required for murder. This condition is provided by No 2 of the Chapter "Of Arson" of the Muluki Ain, 1963. No 2 of the Chapter reads as "If anyone sets fire to another does houses with the knowledge that someone is in inside the house and if death is caused due to such fire, it is regarded as an intentional homicide. In this regard, if any person setting fire on another's house knowing that a celebrity is in inside the house and in that way resulting in the death of any person is considered as *Jyanmara*."<sup>89</sup> The Supreme Court of Nepal has accepted this provision relating to mental element where the accused had knowingly set fire to house in which the victim was sleeping thereby resulting in the death of the victim due to such a fire. In such type of cases the Supreme Court has punished the defendant with life imprisonment along with the confiscation of the property pursuant to No 13(3) of the Chapter "Of Homicide" of Muluki Ain, 1963.<sup>90</sup> The cognitive aspect of means rea has been recognized by Supreme Court also in decision on the leading case relating to death due to illegal detention.<sup>91</sup>

(i) **Causing death due to illegal detention:-**

This provision is the cognitive aspect of *mens rea* required for intentional homicide or murder. In Nepal, this provision is provided by No 2 of Chapter "Of Illegal Detention", of the Legal Code of 1963. According to this No there are two situations of illegal detention resulting to death. According the first situation, if a serious patient or a minor below the age of Twelve years or a person above the age of Sixty

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<sup>88</sup> Supra Note 2, at 57.

<sup>89</sup> Ibid, pp. 57-58.

<sup>90</sup> H.M.G. v. Ghiu Kumari alias Ghiu Kumari Godar Chetri, NLR (2047 BS), p.649.

<sup>91</sup> Supra Note 2, at 58.

years dies in the detention where he or she was detained for Three days and nights without providing food or drinking water resulting to death. In the second situation, if a person, except as otherwise mentioned above, dies due to the detention, when he or she was detained for more than Seven days resulting to death. In both of these situations, the person who detains him or her shall be considered a murderer.<sup>92</sup>

Hence, the Muluki Criminal (Code) Act, 2074 does not define the meaning of knowledge, but it has prohibited the risk having the knowledge or a reason to believe that such act may normally lead to a person's death. Those provisions of *homicide with knowledge* are:

- **Section 178- Not to act likely to cause death:** (1) No person shall do any act or take an unwanted risk having the knowledge or a reason to believe that such act may normally lead to a person's death.
- (2) In case anyone dies due to the reason referred to in sub-section (1), the offender shall be liable to a punishment with life imprisonment.

Section 178 of the Muluki Criminal (Code) Act, 2074 has provided that the act or taking a risk having the knowledge and cause to the death, the offender shall be liable to punishment with life imprisonment as an intentional homicide. The Supreme Court of Nepal has adopted this concept and it may be presumed that a reasonable man knows that a death of a person may be caused its situation where he is kept under illegal detention continuously for 15 days without food and water. Causing death through such a situation is considered as *Jyanmara*.<sup>93</sup>

### 9.3 Homicide Not Amounting to Intentional and with Knowledge

The situation of grievous incitement provocation of a human being is a set of event that might be sufficient to cause a reasonable person to lose self-control, whereby the act of offenders is less culpable than a deliberate act done out of pure malice (malice aforethought). It affects the quality of the actor's, state of mind as an indicator of moral blameworthiness. Provocation may be a defence by excuse or exculpation alleging a sudden or temporary loss of control (a permanent loss of control is in the realm of insanity) as a response to another's provocative conduct sufficient to justify an acquittal, a mitigated sentence or a conviction for a lesser charge. Provocation can be a relevant factor of a court's assessment of a defendant's *mens rea*, intention, or state of mind, at the time of an act of which the defendant is accused. However, in some common

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<sup>92</sup> Ibid.

<sup>93</sup> Bed Prakash Saxena and Others v. HMG, NLR (2045 BS), p.1156.

law jurisdictions such as the UK, Canada, and several Australian states, the defence of provocation is only available against a charge of murder and only acts to reduce the conviction to manslaughter. This is known as "voluntary manslaughter", which is considered more serious than "involuntary manslaughter". In Indian Penal Code, 1860 provides that this kind of culpable homicide is a form of culpable homicide not amounting to murder. The provisions of Section 299 and 300 of the Indian Penal Code, 1860 provides that the two categories of culpable homicide namely i) Culpable homicide amounted to murder, and, ii) Culpable homicide that does not amount to murder. Section 300 Para (1) has provided that Culpable homicide is not amounting to murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person that gave the provocation or causes the death of any other person by mistake or accident. This Section also provides the three exceptional provisions i.e. i) That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person; ii) That the provocation is not given by anything done in obedience to the Law, or by a public servant in the lawful exercise of the powers of such public servant; and iii) That the provocation is not given by anything done in the lawful exercise in the right of private defence. Similarly, other exceptions are; iv) private defence, v) acts of a public servant, vi) Sudden fight, and, vii) consent. Section 14 of the Chapter "On Homicide" of the Muluki Ain of 1963, states that the killing that is not caused with the intention to kill or with murderous enmity or with a dangerous weapon, but with stick, stone, arms or legs due to irresistible provocation by something raised at the spur of a quarrel is considered *Abesprerit Hatya*.<sup>94</sup> Although the Nepali homicide law does not expressly define the act, in judicious practices and legal writings such homicides are termed *Abesprerit Hatya*.

Section 179 of the Muluki Criminal (Code) Act, 2074 has provided provocation homicide as the third category of culpable homicide and not amounting to intentional homicide and homicide with knowledge (culpable homicide not amounting to murder). The provisions of Section 179 are as follows:

**Section 179 - Not to cause death by grave provocation or fit of anger:** (1) Notwithstanding anything contained in Section 177 or 178, the person who causes homicide in any of the following circumstances shall be liable to a punishment with an imprisonment from ten years to fifteen years and with a fine from one hundred thousand rupees to one hundred fifty thousand rupees:-

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<sup>94</sup> Muluki Ain, 2020 BS, Section 13 of the Chapter of Homicide.

- (a) if anyone has done any act leading to sudden grave provocation and due to this reason, anyone loses the strength of self-restraint and kills the person making such sudden provocation; Provided that this clause shall not be applicable,-
  - (1) If a person is provoked by an act done or about to be done in compliance to a law or in the use of the right to private defence by a person or in the discharge of an official duty by a public official.
  - (2) where the offender himself/herself had provoked a person with the intention of causing harm to that person and the offender, being himself/herself provoked by an act done by such provoked person, has caused the death.
- (b) Except an act committed from the intention of causing more harm than the harm necessary to exercise a private defence, if a death is caused by doing an act in an exercise in good faith of the right to private defence by crossing the limit of that right;
- (c) In case of a death caused instantly in a sudden fight in the heat of passion upon a sudden quarrel, Provided that while acting as referred to in these clauses, the offender must not have gained an undue advantage or acted in an extraordinarily ruthless or cruel manner.
- (2) Notwithstanding anything contained in clauses (b) and (c) of sub-section (1), the provisions referred to in those clauses shall not be applicable in case the homicide is committed out of enmity or with premeditation.

Under the Section 179 of the Muluki Penal (Code) Act, 2074 is an act of killing that would ordinarily be considered as the homicide liable for full punishment but is committed in response to a high level of provocation. Because the killing is committed in response to a provocation, the criminal charges are reduced from culpable homicide having full punishment (amounting to murder) to culpable homicide having less punishment (not amounting to murder). According to Section 179, the killing will only be reduced to culpable homicide having less punishment (not amounting to murder) if three requirements are met. First, if anyone has done any act leading to sudden grave provocation and due to this reason, anyone loses the strength of self-restraint and kills the person making such sudden provocation; Provided that this clause shall not be applicable. Second, Except an act committed from the intention of causing more harm than the harm necessary to exercise a private defence, if a death is caused by doing an act in exercise in good faith of the right to private defence by crossing the limit of that right; and Third, in case of a death caused instantly in a sudden fight in the heat of passion upon a sudden quarrel, Provided that

while acting as referred to in these clauses, the offender must not have gained an undue advantage or acted in an extra-ordinarily ruthless or cruel manner. The above provisions show that the provocation must be one that would have provoked a reasonable person to lose control himself and act naturally. If the provocation was one that would cause a reasonable person to lose control of him, the homicide will be reduced to culpable homicide having less punishment (not amounting to murder/voluntary manslaughter). If the provocation is one that would not cause a reasonable person to lose control of him, the defendant can be charged with culpable homicide having full punishment (amounting to murder) even if he/she was blind with rage when he committed the killing. Although it is sometimes hard to determine what kind of provocations are sufficient to reduce a culpable homicide having full punishment (amounting to murder) charge to culpable homicide having less punishment (not amounting to murder/voluntary manslaughter), the law has established a certain list of provocations which are and are not sufficient. If the defendant intended to kill the person that provoked him but kills somebody else either by accident or because he mistakenly thought the person he killed was the person who provoked him, the death can still be considered manslaughter in some jurisdictions.<sup>95</sup> However, if the defendant killed somebody that he knew was not the one that provoked him; the death will obviously be considered murder. If the provocation was one that would cause a reasonable person to lose control of himself and act spontaneously, the killing will not be reduced to culpable homicide having less punishment (not amounting to murder/voluntary manslaughter) if the defendant himself was not provoked. Moreover, the period of time for the provocation and the killing must not be long enough so that a reasonable person would have calmed down. This is also an objective standard and it is therefore irrelevant whether or not the period of time between the provocation and the killing was enough time for the defendant himself to have calmed down.

#### **9.4 Homicide by Recklessness**

Homicide by recklessness is the killing of another person by a reckless act. Laws governing reckless homicide vary by jurisdiction. In general, "recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of

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<sup>95</sup> State v. Griego, 294 P.2d 282 (N.M. 1956).

care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint. Generally, recklessness refers to the doing of an act with the knowledge of foresight that it is likely to cause to harm.<sup>96</sup> Recklessness denotes actions where a person is aware of, but ignores, a substantial and unjustifiable risk of serious injury to another. The risk must be so great and apparent that to ignore it constitutes a major shift from the standard of care a normal person would exercise under the circumstances. Recklessness can also be established if it is shown that the person acted intentionally or knowingly. Recklessness is commonly charged with motor vehicle accidents, firearms incidents, and acts undertaken while a person is intoxicated or under the influence of drugs.

In Common Law jurisdiction, manslaughter is divided as: i) voluntary manslaughter and ii) involuntary manslaughter. The suicide pact, infanticide, and provocation homicide are included under the voluntary manslaughter. However, homicide by recklessness and negligence are included as a category in involuntary manslaughter. Recklessness is considered as a third degree of mental elements or *mens rea*. People with common understanding take unreasonable or unjustifiable risk knowing the probability of result of their own actions, they are acting recklessly. In criminal law, recklessness is that kind of mental element where the offender has the prior knowledge of the risk but it is not convinced that same result comes out, that he/she does not wish for such result and the doing on the act by taking the obvious risk that resulting from the crime.<sup>97</sup> If the doer justifies his own obvious risk as a lawful, he/she will not be liable. The basis of confirming the obvious risk is dependent on social necessity and utility.<sup>98</sup> Three things are important elements of recklessness as: i) Having the pre-knowledge about the outcomes or result of the offender; ii) does not wish for such results by the offender; iii) doing on the act by the offender to taking the obvious risk that resulting to the crime.<sup>99</sup> In Nepal, Section 181 of the Muluki Criminal (Code) Act, 2074 has, for the first time, made provision on homicide by recklessness as a culpable homicide not amounting to intentional homicide and provocation homicide except Section 177, 178 and 179. The provisions of Section 181 are as follows:

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<sup>96</sup> Stanley Meng Heong Yeo, "Recklessness Under the Indian Penal Code", Journal of the Indian Law Institute, Vol.30:3, India: Indian Law institute, p.1.

<sup>97</sup> Prof. Rajit Bhakta Pradhananga (Dr.) et.al, (2069 BS), "Mental Elements in Proposed Draft Criminal Code, 2067: An Appraisal", Supreme Court Bar Journal, Year.6, Vol.6, Supreme Court Bar Association, Kathmandu, p.15.

<sup>98</sup> Ibid.

<sup>99</sup> K.D. Gaur, (2009), Criminal Law: Cases and Materials, India: Lexis Nexis, p. 19.

- **Section 181-Punishment for a homicide caused recklessness:** (1) No one shall cause the death of any person by doing an act recklessly.
- (2) The person committing the offence referred to in sub-section (1) shall, except in the circumstances referred to in Sections 179, 180 and 181, be liable to a punishment with an imprisonment from three to ten years and with a fine from thirty thousand rupees to one hundred rupees.

From the above provisions, it is clear that the offender is liable to the punishment for the cause death of any person by doing on reckless acts. Before the enactment of Muluki Penal (Code) Act, 2074, recklessness was covered as an accidental homicide or mitigated form of homicide under the Chapter on Homicide of Muluki Ain, 1963. The condition having knowledge of the result of their own act of the offender is similar in homicide with knowledge and homicide by recklessness. The offender does not wish for such results however, he/she is sure of such result is liable of homicide with knowledge. In homicide by recklessness the offender having the knowledge about the probability of such result but he/she does the act by taking the obvious risk resulting to the crime.

### **9.5 Homicide by Negligence**

Negligent homicide is the killing of another person by doing an act through gross negligence or without malice. It often includes a death that is the result of the negligent operation of doing an act. It is characterized as a death caused by conduct that grossly deviated from ordinary care. Negligent homicide may be charged as a lesser-included offence to manslaughter or culpable homicide not amounting to murder. It is also sometimes referred to as "involuntary manslaughter". Negligent homicide is a separate in most state homicide statutes and is usually the lowest category of an offence that results in the death of another person. An individual charged with negligent homicide should understand how a negligent homicide is charged, the range of potential punishments, and the possible defences. Homicide is a general category of charges for situations where one person causes the death of another person. Intent controls how a homicide is charged. If a person wanted another person's death and plotted and eventually caused the death of that individual, that person could be charged with culpable homicide amounting to murder as the highest degrees of homicide. Negligent homicide is a much lower intent crime and is used as a charge when one person causes the death of another through criminal negligence. The charge does not involve premeditation but focuses on what the defendant should have known and the risks associated with what he did know.

Most of the jurisdictions will find grounds from criminal liability to the negligent actions of an individual result from the death of another. Negligent homicide is typically classified as involuntary manslaughter, due to the implied lack of malice and intent. Should the prosecutor or investigators discover malice and/or intent, and then the *mens rea* of the accused will be upgraded from “negligent” to “knowingly” or “purposely” seeking the death of the victim. A death caused by another person’s negligence arises out of the level of a crime if the wrongful conduct greatly or grossly deviated from the duty of a person to exercise ordinary care. The act must also have been unintentional, or the wrongdoer did not intend to harm someone or to cause their death. Negligent homicide is more than just negligence, which is a civil wrong and carries no criminal penalties. In negligence or tort law, an individual has a duty to exercise ordinary care toward other persons while engaging in an activity. Negligent homicide may also be referred to as manslaughter or criminal negligence. The essential elements of negligent homicide are as: i) a failure to act or to act in such a way that significantly deviates from the exercise of ordinary care; ii) the failure to act or the wrongful conduct that led to a death, and iii) the absence of malice. On the basis of culpability, there are two types of negligence i.e. general negligence and gross negligence.

In general negligence can be categorized as i) ordinary negligence and; ii) gross negligence. The standard of ordinary negligence is what type of conduct deviates from the proverbial "reasonable person". By extension, if somebody has been grossly negligent, that means they have fallen so far below the ordinary standard of care that one can expect to warrant the label of being "gross". Gross negligence is the "lack of slight diligence or care" or "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party."<sup>100</sup> In some jurisdictions, a person injured as a result of gross negligence may be able to recover punitive damages to the person that caused the injury or loss. Negligence is the opposite of diligence or being careful. Gross negligence may thus be described as reflecting "the want of even slight or scant care" falling below the level of care that even a careless person would be expected to follow. While some jurisdictions equate the culpability of gross negligence with that of recklessness, most differentiated it from ordinary negligence in its degree.

In Nepal, Section 182 of the Muluki Criminal (Code) Act, 2074 has provided homicide by negligence for the first time as a culpable homicide not amounting to intentional homicide. The provisions of Section 182 are as follows:

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<sup>100</sup> Garner, Bryan, (1999), Black's Law Dictionary (7th edn), St. Paul, Minn: West Group, p. 1057.

- **Section 182- Punishment for a homicide caused negligently:** (1) Except in the case of circumstance referred to in section 179, no one shall cause the death of any person by doing an act recklessly.
- (2) The person committing the offence referred to in sub-section (1) shall be liable to a punishment with an imprisonment not exceeding three years and with a fine not exceeding thirty thousand rupees.
- (3) Except in the case referred to in sub-section (1), in case death of a person is caused accidentally while doing any act where it is less likely that a death may be caused, the person doing such an act shall be liable to a punishment with an imprisonment from six months to two years or with a fine not exceeding twenty thousand rupees or with them both.

There are two terms that are often used in connection with such unreasonable behaviour are "negligence" and "recklessness." They are often used interchangeably, and from a legal standpoint, they do have some similarities. However, negligence and recklessness are in fact two distinct wrongful behaviors and proving that a defendant displayed one or the other in the course of causing a culpable homicide. Negligent behaviour is careless, inattentive, or incompetent. The idea is that the defendant "should have known better. Recklessness is more serious than negligence because recklessness involves a state of mind on the part of the reckless homicide that is more difficult to excuse. To act recklessly, the defendant must actually know of an unreasonable risk of harm to others and cause harm to the plaintiff by acting in knowing disregard of that risk. Recklessness means not that the defendant should have known better, but did know better and went ahead regardless of that knowledge.

The similar mental element in recklessness and negligence homicide is that the offender does not wish for such a result. A negligent person foresees no risk at all and is simple forgetful or careless about an ordinary minor matter. Negligence is not generally considered to be so culpable as to attract criminal liability. It is a fault element of civil liability involving, for example, road accidents and personal injury claims. Whilst recklessness requires foresightedness of an unreasonable risk, a person who lacks foresight but whose standard of conduct is unreasonable by ordinary standards may be negligent.

### **9.6 Homicide by Mistaken Identity of Victim and Transferred of Malice**

In modern criminal jurisprudence, the doctrine of the mistaken identity of the victim and transferred malice are related to the subjective principle of *mens*

*rea*. The subjective principle has been increasing as a fundamental basis of criminal liability in criminal law. Under this principle that a person should not be convicted of an offence unless he brought about the prescribed harm either intentionally, or knowingly or recklessly. The doctrines known as "Mistaken identity of the victim" and "Transferred malice" seems to stand out as an exception to this principle, for their result in criminal liability and for consequences, which would in ordinary language be described as an accident. These doctrines are practical when an injury intended for one falls on another by the mistaken identity of the victim or by accident respectively. The case of mistaken identity of the victim or of transferred malice is singled out for different conduct because the actual harm was inflicted on someone other than the intended victim as it was not the intention of the accused to cause harm of that kind.

In criminal law, the doctrine of transferred malice is distinguished from mistaken identity of the victim. Cases of mistaken identity of the victim are almost identical to nature with cases of transferred malice. However, there is difference. If the accused sets to commit an offence in relation to a particular victim but makes a mistake in identifying the victim and directs his conduct at the wrong victim it is called "Mistaken identity of the victim." The paradigm case of mistaken identity of the victim is where D plans to kill O, and attacks a person that he believes to be O but is in fact P and kills him. However, in the case of transferred malice A shots at B with intention to kill him but misses and kills C. These are two separate concepts of criminal law and apply separate treatment for each of them. Cases of transferred malice should be distinguished from cases of mistaken identity of the victim. The distinction is between an injury intended for one which falls on another by accident, and an injury intended for one which is directed towards another by mistake. Of course, both are results of unintended cases. But in transferred malice the accident derives from the accused's incompetence in executing his intention or from some change or occurrence outside his control (e.g. the intended victim moving, or third party interposing himself, or third party intervention, or extraneous intervention or some such factor), whereas mistaken identity of the victim stems from an error in the accuser's perception of the material circumstances. Cases of mistaken identity raise the question on knowledge of circumstances, whereas cases of transferred malice raise a question about the accused's incompetence in executing his intention.

The simplest argument, which used to bring doctrines of mistaken identity of the victim and transferred malice within the normal principle of criminal

liability, is that law of homicide does not require that the accused must have intended to kill a particular person. Theoretically, it is enough if there is an intention or knowledge to cause the death of a human being. What sought to be punished is the act of causing death, accompanied by the required *mens rea*. It is immaterial whether the intention to kill in fact caused the death of that particular person or any other person. In other words, the accused intended to cause the *actus reus* of a particular crime and did cause the *actus reus* of that same crime. It is sufficient for application of doctrines of mistaken identity. There is no direct statutory provision relating to the doctrine of the mistaken identity of the victim and transferred malice In Muluki Criminal (Code) Act, 2074. However, the general provision of No 1 of the Chapter "On Homicide" of Muluki Ain, 2063 theoretically covers both cases of mistaken identity of the victim and cases of transferred malice. Because it stipulates that, no person shall kill or attempt to kill another person except in accordance with law.

Number 1 of the Chapter "On Homicide" does not require that the accused to have intended to kill a particular person. Theoretically, it is enough if there is an intention or knowledge to cause the death of a human being. However, the interpretation of the court is that there must be an intention to kill a particular person or have murderous enmity towards the victim for first degree murder. In this way, the Supreme Court of Nepal has recognized the doctrine of the mistaken identity of the victim and transferred malice as a ground of mitigation for reducing the charge of intentional homicide to mitigated homicide.

In criminal jurisprudence, there are two approaches regarding the transfer of malice. According to first approaches, the person should be responsible for the killing of the targeted person by mistakenly killing to another person and liable for lesser punishment for the actual deceased, and the less punishment or liable as an attempt for the targeted person. There must have knowledge of result and desire of consequence of the offender and doing on act resulting from the mistaken identity of the victim, transferred malice to kill another person, and victimized non desired person. The Muluki Criminal (Code) Act, 2074 has criminalized the mistaken identity of the victim, transferred malice, and imposed the punishment of such act to the offender. Section 180 of the Muluki Criminal (Code) Act, 2074 has provided homicide by mistaken identity of the victim and transferred of malice for the first time as a culpable homicide in statutory law. The Section 180 reads as:

- **Section 180- Punishment for homicide of anyone other than the intended person:** Notwithstanding anything contained in Section 177,

178 and 179, whoever, while doing an act intending to cause homicide of a person or knowingly or having the reason to believe that homicide may be caused, causes death of another person instead of the person so indented, shall be liable to a punishment as provided for in Sections 177, 178 and 179 as the case may be.

The above provision to homicide by mistaken identity of victim and transferred malice of Muluki Criminal (Code) Act, 2074 imposes the liability to the accused while doing an act intending to cause homicide of a person or knowingly or having the reason to believe that homicide may be caused, causes death of another person instead of the person so indented. In such situation the defendant shall be liable to the punishment as provided for in Sections 177, 178 and 179.

The Supreme Court of Nepal has recognized the doctrine of the mistaken identity of the victim and transferred malice as a ground of mitigation and reducing the charge of intentional homicide to mitigated homicide in HMG v. Harka Bahadur Angdambe and others<sup>101</sup> case and in other cases too. The Supreme Court of Nepal held that the accused persons who had killed the victim mistakenly and without having any murderous enmity towards the deceased the maximum punishment as per the No 13(3) of the Chapter “Of Homicide” of Muluki Ain, 1963 would be heavier in such a situation. Therefore, the punishment of life imprisonment was reduced to 10 years of imprisonment. In this way, the Supreme Court of Nepal, in this case, recognized the doctrine of mistaken identity, transferred malice in homicide law, and considered them as a ground of mitigation for reducing the charge of intentional homicide to mitigated homicide.

### **9.7 Abandonment of Human Being**

Neglect means the failure (whether intentional, careless or due to inadequate experience, training, or skill) to provide basic necessary care or services when agreed to by legal, contractual, or otherwise assumed responsibility when such failure may lead to physical or emotional harm. This includes failure of a person who has a fiduciary responsibility to assure the continuation of necessary care. Abandonment means the desertion or intentional forsaking of a new-born baby, a minor, older adult or person with a disability for any period of time by a person who has assumed responsibility for providing care when that desertion or forsaking would place the adult at serious risk of harm. For adults, age 65 and older, there is a statutory definition of Neglect that leads to physical harm through withholding of services necessary to maintain health and

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<sup>101</sup> NLR (2046 BS) p. 327.

well-being. Abandonment, including desertion or wilful forsaking of an elderly person or the withdrawal or neglect of duties and obligations, owed an elderly person by a caretaker or other person.

A new-born baby, a minor, disabled or elderly patient abandonment occurs when a parent, guardian, or person in charge of a new-born baby, a minor, disabled or elderly patient either desert them without any regard for their physical health, safety or welfare and with the intention of wholly abandoning to them, or in some instances, fails to provide necessary care for a new-born baby, a minor, disabled or elderly patient living under their roof.<sup>102</sup>

Child abandonment laws vary from state to state. Many states include child abandonment within its child abuse laws and vice versa, while some states have laws specifically targeting the act of child abandonment.<sup>103</sup> Not all states define child neglect and abandonment in the same manner, as some states do not even use the terms “neglect” or “abandonment”. A few states include within their definition of “child abuse” or “child endangerment” the concepts of neglect and abandonment. Many states include the definition of abandonment in their neglect laws or vice versa. All states have some form of the statute criminalizing the underlying facets of neglect and abandonment.<sup>104</sup>

Nowadays, many states have criminalized the acts like throwing, abandoning, or neglecting a new-born, minor, disabled patient or an old person by that person who is under a duty to take care of or to provide maintenance to them. The act of abandoning or neglecting are criminalized as a criminal mistreatment such as i) neglect: The failure of a caregiver to provide food, shelter, clothing, medical services, or health care for the person unable to care for himself or herself; or the failure of the person to provide these basic needs for himself or herself when the failure is the result of the person’s mental or physical inability; ii) Abandonment: The desertion or wilful forsaking of an new-born, minor, disabled patient or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and habitually careless or irresponsible.

The Muluki Criminal (Code) Act, 2074 has for the first-time endorsed and criminalized the concept of abandonment or neglect of a new-born, minor, disabled patient or an old person and imposed the punishment for such act.

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<sup>102</sup> Thomson Reuters, (2018), “*Child Abandonment, Find Law*, available at <https://criminal.findlaw.com/criminal-charges/child-abandonment.html> (Accessed on January 5, 2018).

<sup>103</sup> *Ibid.*

<sup>104</sup> “Child Neglect & Abandonment State Statutes”, available at [https://www.ndaa.org/pdf/ncpca\\_statute\\_child\\_neglect\\_abandonment\\_3\\_07.pdf](https://www.ndaa.org/pdf/ncpca_statute_child_neglect_abandonment_3_07.pdf) (Accessed on January 5, 2018).

Section 184 of the Muluki Criminal (Code) Act, 2074 has provisions of abandonment or neglect of a new-born, minor, disabled patient or an old person which for the first time has criminalized such act as a culpable homicide in statutory law. Section 180 of the Code reads as:

- **Section 184-Not to abandon person under one's own guardianship:**
  - (1) The person who is under a duty to take care of or to provide maintenance of a new-born, minor, disabled patient or an old person shall not throw, abandon or neglect so as to cause peril to his/her body or life.
  - (2) The person committing the offense referred to in sub-section (1) shall be liable to a punishment with an imprisonment not exceeding three years and with a fine not exceeding thirty thousand rupees.
  - (3) In case the new-born, minor, disabled patient or an old person is dead because of the offence referred to in sub-section (1), the guilty person shall be liable to a punishment with an imprisonment not exceeding seven years and with a fine not exceeding seventy thousand rupees.

Provided that a new-born is dead because of throwing out, abandoned or neglect, the guilty person shall be liable to the punishment pursuant to section 177.

However, the act of throwing out, abandoning or neglecting a new-born/minor is covered by the No 18 of the Chapter "On Homicide" of Muluki Ain, 1963. According to No 18 of Muluki Ain if the newborn, the minor dies as a result of the throwing out, abandoning, the offender shall be liable of the offence of murder and he/she is liable 4 years imprisonment if the child or minor is not dead. The provision of Section 184(3) of the Muluki Criminal (Code) Act, 2074 has over criminalized such act and made liable to the punishment pursuant to Section 177 i.e. imprisonment for 25 years.

In Nepal, infanticide or killing of a newly born child by their mother has been considered as a heinous kind of killings from ancient time. The Muluki Ain of 1963 has criminalized it as a part of an *intentional homicide or Jyanmara* and there is no separate existence as a category of culpable homicide. In reduction of the punishment from intentional homicide to mitigated homicide, the Supreme Court of Nepal has taken into account of the factors such as marital status of the accused, motive of concealment of the shame of illicit relationship with other person, overwhelming stress from social background by the birth of a baby, cover-up of the humiliation of birth of an illegitimate child.<sup>105</sup> The

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<sup>105</sup> Mani Maya Shrish v. HMG, NLR (2057 BS), p.361.

*Muluki Ain*, 1963 has provision relating to infanticide. Section 18 of the chapter “On Homicide” provides that any person who abandons a newly born live child shall be punished by imprisonment for a term of four years. If the child dies, he shall be punished like a *Jyanmara*. From the above provision, it is clear that any person (including mother) who had abandoned the newly born child, shall be punished with the imprisonment for four years if such abandoned child is found alive by someone and caused death after proper nursing. If the child dies due to abandonment such killing is considered as *Jyanmara*. This Section has provision relating to omission which constitutes *Jyanmara*. Causing the death of a newly born child due to the abandonment is one of the modes of the killing of a newly born child. Besides causing death due to the abandonment there are several modes of the killing of the newly born child which are not covered by Section 18 of the Chapter of “On Homicide”. Theoretically, it is a part of *Jyanmara*. So, every mode of killing which causes the death of a newly born child is considered as *Jyanmara*.<sup>106</sup> But the Supreme Court of Nepal has recognized and accepted it as a ground of reducing the charge of *Jyanmara* to mitigated homicide.

Section 184(3) of the Muluki Criminal (Code) Act, 2074 has provided that Provided that a new-born is dead because of throwing out, abandoned or neglect, the guilty person shall be liable to the punishment pursuant to section 177 that is life imprisonment. This kind of the offence is regarded as a voluntary manslaughter in common law jurisdiction and culpable homicide not amounting to murder in India for which punishment is lenient. But the Muluki Criminal (Code) Act, 2074 has criminalized as a grievous offence and the punishment severe which is equivalent to the punishment for culpable homicide amounting to murder or intentional homicide or homicide with knowledge. From this provision may victimize the large numbers of rural women that are not able to have abortion in time and give born to child from elicit sexual relation.

### 9.8 Abetment to Suicide

The word ‘suicide’ is well known and requires no explanation. ‘Sui’ means ‘self’ and ‘side’ means ‘killing’, thus implying an act of self-killing. Suicide is often carried out as a result of despair, the cause of which is frequently attributed to a mental disorder such as depression, bipolar disorder, schizophrenia, borderline personality disorder, and alcoholism or drug abuse. Stress factors such as financial difficulties or troubles with interpersonal

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<sup>106</sup> HMG v. Ratna Kumari Khadka, NLR (2041 BS), p. 14.

relationships often play a role. While a person who has completed suicide is beyond the reach of the law, as the crime abates with him. However, when a person is unsuccessful in the commission of suicide or if the desired intention of the offender is not met in committing suicide, he is within the ambit of law.

The 'abetment' in its literal sense means, the instigation of a person to do (or not to do) an act in a certain way, or aid given by some person to another either of his own accord or under the provisions governing joint and constructive liability. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing a thing.<sup>107</sup> The main ingredients to constitute the offence of abetment are: i) there must be an abetment; ii) the abetment must be an offence or an act which would be an offence, if committed by a person capable in law of committing the offence with same intention or knowledge as that of the abettor; iii) *mens rea* or the guilty mind is a very important element in abetting of an offence. The requirement of *mens rea* is considered as a pre-condition for liability of the offence of abetment.

The word "instigate" means to goad or urge forward or to provoke, incite, urge or encourage doing an act prohibited by the law. A person is said to instigate another, when he actively suggests or estimates him to do an unlawful act by any means or language, direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragements. The 'instigation' to suicide may be inferred from a series of acts on the part of accused that led to the creation of such circumstances where the deceased had no other option left with him or her than committing suicide.<sup>108</sup> This series of acts may include the use of force, words, conduct, wilful omission or deeds or for that matter even silence of accused in order to annoy or irritate the deceased which resultantly caused the latter to take steps to put an end to one's life. This overt act has to necessarily couple with a concomitant element called the *mens rea* to encourage the deceased to commit suicide. The word 'instigation' need not be confused with 'intimidation.' Intimidation may, as a result, frighten the person on the receiving end which may cause him or her to retaliate whereas statements as a result of instigation may provoke or encourage the deceased to cause his death. In absence of any one of the elements either the mental process

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<sup>107</sup> Rishabh Shrivastava, International Journal of Law and Legal Jurisprudence Studies, ISSN:2348-8212:Volume 4, Issue 1. available at [http://ijlljs.in/wpcontent/uploads/2017/03/ABETMENT\\_OF\\_SUICIDE.pdf](http://ijlljs.in/wpcontent/uploads/2017/03/ABETMENT_OF_SUICIDE.pdf) (Accessed on January 5, 2018).

<sup>108</sup> Ramesh Kumar v. State of Chhattisgarh, 2001 (9) SCC 618.

of intentional aiding or an overt act to cause this instigation to commit suicide, the conviction will not be successfully sustained.<sup>109</sup>

Abetment of suicide involves a mental process of instigating a person or intentionally aiding a person in committing suicide. Without a positive act on the part of the accused to instigate or aid in committing suicide, a conviction cannot sustain. It is clear that in order to convict a person under abetment of suicide charge, there has to be a clear *mens rea* to commit the offence. It also requires an active act or a direct act, which let the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide. No strait-jacket formula can lie down to find out as to whether in a particular case there has been instigation which forces the person to commit suicide. In such a case, an inference has to be drawn from the circumstances and it is to be determined whether circumstances had been such which in fact had created the situation that a person committed suicide.<sup>110</sup>

Indian law has criminalized the instigation to commit the Suicide under the Penal Code, 1860. According to Section 306 of the Penal Code, 1860, *if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine under Section 309*. Before a person is convicted of abetting the suicide of any other person, it must be established that such other person committed suicide. In certain other jurisdictions, even though the attempt to commit suicide is not a penal offence yet the abettor is liable to punishment. The provision there prescribes punishment for abetment to suicide as well as abetment of an attempt to commit suicide. Thus even where the punishment for an attempt to commit suicide is not considered desirable, its abetment is made a penal offence. In other words, assisted suicide and assisted attempt to commit suicide are made punishable for cogent reasons in the interest of society. Such a provision is considered desirable to also prevent the danger inherent in the absence of such a penal provision.<sup>111</sup>

The Muluki Criminal (Code) Act, 2074 has for the first-time endorsed this concept and criminalized the act of abetment to suicide. Section 185 of the Muluki Criminal (Code) Act, 2074 has criminalized the act of abetment to

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<sup>109</sup> M. Mohan v. State, Represented by Deputy Superintendent of Police, (2011) 3SCC 626; Amalendu Pal v. State of West Bengal, (2010) 1 SCC 707.

<sup>110</sup> Supra Note 64.

<sup>111</sup> Ibid.

suicide for the first time as a culpable homicide in statutory law. Section 185 reads as:

**Section 185-Not to abet to commit suicide:** (1) No person shall abet a person to commit suicide or create such circumstances, by way of abetment, that may lead him/her to the extent of committing such an act.

(2) The person committing the offence referred to in sub-section (1) shall be liable to a punishment with an imprisonment not exceeding five years and with a fine not exceeding fifty thousand rupees.

The existing criminal law of Nepal has not criminalized the act of abetment to commit suicide and create circumstances for committing suicide by way of abetment. The above-mentioned provisions of Muluki Criminal (Code) Act, 2074 has covered for the first time under the definition of crime as an abetment of suicide. Article 185 prohibits the act of abetment to a commit suicide or creates such circumstances, by way of abetment, that may lead him/her to the extent of committing such an act. This provision has defined direct abetment or creates such circumstance or indirect abetment for committing suicide.

However, Muluki Criminal (Code) Act, 2074 has not covered the concept of a suicide pact. A suicide pact, in modern criminal law, is a term, which means an agreement between two or more persons where the object of such agreement is death to all of them, whether or not each is to take his own life. In other words, a suicide pact exists where two or more persons each having settled the intention of dying, reach an agreement which has as its object as death to all.<sup>112</sup> G. Williams has suggested for a use of the new term “death pact” as equivalent to traditional term “suicide pact” and classified suicide pact (death pact) into two categories: (I) The killing suicide pact; and (II) the double suicide pact.<sup>113</sup> According to G. Williams, the first category of a Suicide pact is an agreement between A and B that A shall first kill B and then commit suicide. If A performs the first part of the agreement and then fails to complete the second one, his responsibility is reduced from murder to manslaughter. The double suicide pact, in view of G. Williams, is, where each party agree to kill himself without the help of another, is in legal theory a case of mutual abetment of suicide. The responsibility of the survivor, therefore, rests on the Suicide Act (for abetting suicide) and not on Homicide Act (for killing).

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<sup>112</sup> Supra Note 16, at 240-244.

<sup>113</sup> G. Williams, (1983), A Text book of Criminal Law, (2nd edn), London: Stevens & Sons, p. 581.

From the above classification of suicide pact or death pact, it is clearly exposed that from the conceptual point of view each type represents a separate concept of criminal law and separate law determines the responsibility of the survivor, in both kinds. In the first category of a suicide pact, parties to the pact have agreed to die and according to their pact, the survivor who had consented to kill the other person completes the first part but he fails to complete the second part of agreement i.e. to commit suicide himself. In this category of a suicide pact, an element of homicide appears first then it turns into suicide. Hence, his responsibility rests on the homicide law for the killing of the deceased person and reduces his liability for killing from murder to manslaughter. In the second category of suicide pact in which each party agrees to kill him without any help from another. There is an element of suicide only. Therefore, theoretically, it is only a case of mutual abetment of suicide. The criminal liability of the survivor, therefore, rests on the law of suicide for abetting to commit suicide by the deceased person, not on the homicide law for killing, because there is an absence of the element of homicide. This type of suicide pact is considered as a separate statutory offence, governed by the law of suicide in modern criminal law.

The rationality behind the doctrine of suicide pact as a ground of mitigating murder to manslaughter is that in homicide law, a person cannot consent to his own death. Because of a man's life is not only valuable to himself, but also to his family, society and the state at large. This concept is relatively connected with the philosophy of the sanctity of life and principle of the unique value of human life. A man is, therefore not entitled to give life up by consent, though consent to kill has unquestionably the effect of mitigating the crime. It can never acquit the offender because in the case of suicide pact there are two adjoining relevant factors relating to the concept of homicide and suicide. As said above, in suicide pact the deceased person intended to die and consented to be killed by another party of the pact also intended to die himself after killing the deceased person, but he fails to commit suicide. This is why most jurisdictions of criminal law have included and recognized it as a kind of mitigating circumstances to reduce the charge of murder to that of manslaughter.

### **9.9 Provisions of Compensation**

While we've all heard the saying "crime doesn't pay," adding up victims' expenses proves that it definitely costs. In the criminal justice system, there are two main mechanisms for crime victims to obtain compensation for the costs

caused by a criminal act: restitution and crime victim compensation statutes. Restitution involves the court, as part of a sentence in a criminal case, ordering a defendant to compensate the victim for losses suffered as a result of the crime.<sup>114</sup> There is a concept of restitution vs. fine. Although restitution and fines are both financial costs that can be imposed on a defendant as part of a criminal sentence, fines are specific, predetermined penalties that are paid to the court. Their purpose is to punish. Restitution, on the other hand, is intended to repay the victims for their losses.

The case of culpable homicide, the emotional pain of losing a loved one, the family members of homicide victims (e.g., surviving spouses, parents, children, or siblings of the deceased) often face financial difficulties. In many cases, the loss of the decedent's income, on top of medical bills and funeral/burial costs, may be impossible for some families to handle.<sup>115</sup> Restitution is included as part of a sentence in a criminal case when: i) the court considers it necessary for rehabilitation; ii) it's needed to make the victim "whole," and; iii) the victim's financial losses are directly related to the defendant's crime.<sup>116</sup> According to the principle of strict liability, the state is responsible for the safety and well-being of its citizens, and thus, any harm to them is a failure on the part of the state and indicates that the state has broken the implied social contract with the citizens, wherein the state collects tax in exchange for providing protection to body and property. Hence, the victims of crime and their families or dependents are entitled to claim compensation, similar to the civil law circumstances where a party can claim remedies for violation of a contract. The provision for monetary compensation is essential to the establishment of restorative justice in the criminal justice system of the country and, hence, should be considered carefully.<sup>117</sup>

Courts must take certain legal elements into consideration in determining the amount of restitution ordered in a particular case. These include: i) losses suffered by the victim; ii) the seriousness and gravity of the offence and the circumstances of its commission; iii) the economic gain derived by the offender; iv) the financial burden placed on the victim, the government, and

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<sup>114</sup> Sherilyn Streicker, (2018), *Restitution Law for Victims of Crime*, available at <https://www.nolo.com/legal-encyclopedia/restitution-law-victims-crime.html> (Accessed on March 5, 2018).

<sup>115</sup> Edwards Pottinger LLC, (2015), *Understanding Homicide Victims Compensation in Florida*, available at <https://www.epllc.com/understanding-homicide-victims-compensation-in-florida/> (Accessed on March 5, 2018).

<sup>116</sup> *Supra Note 172*.

<sup>117</sup> "Crime and Compensation", (2018), available at <https://www.thedailystar.net/opinion/perspective/crime-and-compensation-1472062> (Accessed on March 5, 2018).

others injured as a result of the crime; v) the current financial resources of the defendant, and; vi) the defendant's future ability to pay.<sup>118</sup> Although some states require judges to order defendants to pay restitution regardless of their ability to pay, as a general rule, ability to pay is an element to be considered in determining the amount of restitution and the schedule of payments.<sup>119</sup>

The Muluki Criminal (Code) Act, 2074 has for the first time endorsed the concept of compensation for the crime victims from the offender. Section 186 of the Muluki Penal (Code) Act, 2074 has the provision of compensation payable to the crime victims from the offender for the first time in statutory law. The Section 186 reads as:

**Section 186-Compensation to be paid:** In case any harm or loss is caused to anyone's life, person or property from commission of an offence under this chapter, compensation shall be paid from the offender to the victim or in his/her absence, to his/her successor.

One of the areas of criticism to the existing Nepali criminal justice system is that it has paid less attention to the crime-victim from the beginning. In the viewpoint of victimology, it is necessary to give sufficient attention toward the crime-victim in the existing criminal law and it is high time to address this issue. In this context, the code has made the provisions of compensation as an integral part of the administration of criminal justice. It has made the provision to cause the offender to pay compensation to the victim and also the provision of interim compensation. However, the provision of compensation is not a new concept in the Nepali criminal justice system since there are some provisions of compensation in the offence of rape, hostage taking or abduction, human trafficking, domestic violence and alike its insufficiencies become an issue to be reformed. Additionally, it is also provided that if a victim of an offence claims for compensation from the offender, the court has to determine the amount of compensation at the very time of deciding the case.

In the criminal law of Nepal, there are no any provisions about harm or loss of life, person, or property from the commission of culpable homicide before the Muluki Criminal (Code) Act, 2074. The above-mentioned provisions of Muluki Criminal (Code) Act, 2074 has covered compensation to the family members of the victim of culpable homicide from the offender for harm or loss of life, person, or property. This provision is related to the establishment of restorative justice in the criminal justice system. However, compensation is either

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<sup>118</sup> *Supra* Note 172.

<sup>119</sup> *Ibid.*

monitory or others is not clear under the provision this Section. Similarly, this Section only covers the harm or loss of life, person, or property, but not cover the psychological, emotional or moral damage of the victims or families, dependent persons of the deceased. On the other hand, this provision has not covered an alternative to monetary reparation for moral damages. Hens, it is believed that this provision may provide some satisfaction or sense of justice to the victims of culpable homicide.

## **10. BASIC CHANGES BROUGHT BY THE MULUKI CRIMINAL CODE REGARDING THE CULPABLE HOMICIDE**

This new legal framework namely Muluki Criminal (Code) Act, 2074 has also made some concept or new provisions relating to culpable homicide and criminal justice system. This Code is more scientific and comprehensive in comparison to previous codes. This code has tried to revise all the provisions of previous codes. At the same time, this Code has made an endeavour to make it compatible it with the international instruments and to comprise contemporary conceptual standards developed in the criminal jurisprudence. However, there are some rooms for reform in it, from the viewpoint of theoretical and practical aspects. Thus, it can be taken as a big achievement towards the effort of codification of criminal law in the history of Nepali Legal System. The basic and significant features of the basic changes brought by the Muluki Criminal (Code) Act, 2074 regarding the culpable homicide can mention are follows:

Basically, the code has continued all the areas of criminalization, particularly the traditional crimes unless it becomes irrelevant with contemporary context. Some undesirable conduct that is injurious to society and country, and some conducts need to criminalize pursuant to the obligation of international instruments in which Nepal is a party, have been identified to criminalization. The Code has modernized, elaborated and explicated the homicide law under the Chapter “On Homicide” of the Muluki Ain, 1963 and also widened the scope of the law of homicide. This Code has separated homicide and abortion by providing in different paragraphs. The new areas of criminalization as identified by the code can be illustrated as genocide, abetment of suicide, homicide by recklessness, homicide by negligence, transferred malice, mistaken of identifying of victims and provided the punishment for such act. On the other hand, this Code has also criminalized the act of throwing of child, minors, disable, and elder individuals by their guardians or parents, who are having the responsibility to take care of them. Similarly, Section 52 of the Code has made crime of genocide as a grievous and provided the punishment

of imprisonment for life (imprisonment till death) under Section 41 of the Code.

The Code has further categorized the culpable homicide (intentional/with knowledge, recklessness, negligence), and has provided punishments as per the culpability. Despite the different opinion of the modern criminal law, regarding the accidental act is a crime or not? Nevertheless, this Code has continued to the traditional concept of accidental crime and provided such punishment for those act. Section 177 of the Code has provided that in case anyone has caused grievous physical injury to somebody with the intention that he/she be killed, however, he/she does not die instantly but dies subsequently owing to the reasons of the same injury; even then the person causing such injury shall be deemed to have committed the murder. The offender, in such case, shall be liable to a punishment with life imprisonment. The Code does not specify a time limitation from the incident to death of the victims like a provision of Muluki Ain, 1963.

Similarly, Section 179 has specified the circumstances of the provocation and incitement to culpable homicides and provided the less punishment as a culpable homicide under the Section 179 of the Code. The provisions of Section 177(1) of the Muluki Criminal (Code) Act, 2074, has kept in the category of voluntary manslaughter into the Common law jurisdiction and kept in the category of culpable homicide not amounting to murder in Section 299 of the Indian Penal Code. In this category, the offender has made provocation or incitement form such acts of the victims and suddenly offended has done such act, resulting in the death of the victim. It does not have to be any time limits between such act by the victims to create a provocation or incitement circumstances for defendant and resulting in the death of the victim. Similarly, it has also provided under the Section 177(1)(b) that the same categories of culpable homicide that if the defendant has to cross the limitation of the provisions from Section 24 to 26 regarding the self-defence. According to Section 177(1)(c), that provision has applied only the anger of the offender by the circumstances from sudden fight and provocation from those circumstances to the offenders, and doing such act by her/him, resulting to the death such person.

Likewise, the Code has prohibited the throwing, abandoning, or neglecting a newborn, minor, disabled, patient or an old person by the person who is under a duty to take care of or to provide maintenance of those persons. The Code has provided the punishment to the person who throws, abandons or neglects a

newborn, minor, disabled patient or an old person and as to cause peril to his/her body or life. The provision of commission and omission such as throwing, abandonment or neglect to the disabled patient or an old person has been criminalized for first time in the Nepali legal history.

The Code has categorized the culpable homicide on the basis of the degree of *mens rea* such as intentional homicide, homicide with knowledge, homicide caused by recklessness, and homicide with negligence. The burden of proof about existence of those mental elements in such acts of the offender is necessary to be proved by the plaintiff without any reasonable doubt. This provision is related to the burden of proof as provided by the Section 25 of the Evidence Act, 2031. According to existing homicide law homicide is culpable only when it crosses the circumstances of provocation, accidental, and law full homicide and there is existence of positive mental elements. However, the Muluki Criminal (Code) Act, 2074, has classified the culpable homicide only on the basis of existence of positive mental elements.

Generally, in most of the criminal justice system, homicide is classified into intentional homicide and homicide with knowledge as a form of murder. The Muluki Ain 1963 also classifies as a form of *Jyanma a (intentional homicide)*. However, the Muluki Criminal (Code) Act, 2074 has classified separately into intentional homicide and homicide with knowledge based on the ranking of mental elements and based on the seriousness of the crime. In connection with killing intentionally to such person, Section 41 of Muluki Penal (Code) Act, 2074 has provided for the punishment of life imprisonment (until death). In addition to the situation mentioned in Section 41, in accordance with Section 42, only life imprisonment (25 years imprisonment) has been prescribed. This Code has made that for the purpose of fractional punishment, life imprisonment shall be computed as 25 years imprisonment and imprisonment until death has been provided for heinous crimes. In accordance with Section 42, the person shall be liable for a life imprisonment (25 years imprisonment) for the homicide with knowledge.

The Code has made different forms of punishment for different offences on the bases of the principle of proportion that the punishment should be based on the gravity of offence and offender's culpability. In addition, the other forms of culpable homicide except for intentional homicide and homicide with knowledge, the punishment of imprisonment with fine has been prescribed. It has removed the legal provisions regarding the confiscation of the whole property of the offenders. In order of punishment for the culpable homicide

except for accidental and prevocational homicide, only the lower limit of imprisonment and fine has been prescribed. Pursuant to these provisions, the court has absolute discretion to determine the suitable punishment to the accused. Similarly, there is a provision of criminal conspiracy, incitement, supporter or secondary offender, not provided the punishment by the Chapter on Homicide but also arranged the punishment according to Section 33, 35 and 36. According to the provisions of those Sections, there is a provision of punishing the offender on the basis of the perpetrator's role and degree of the crime, to same punishment like the principal offender, half of the punishment imposed for the principal offender, optimum to half punishment. The court has given the discretionary power for the determination of reasonable compensation amount and assures the compensation right of the victims. This arrangement has made by the Code, because why the damage to the victim from criminal acts can be different and quantitatively different from time to time and case to case.

The Muluki Criminal Code, 2017 while classifying the crime of homicide has not included some type of homicide like 'Culpable Homicide not Amounting to Murder' as defined by Indian Penal Code, 1886 and Voluntary Manslaughter as defined in common law. Likewise, the Code has not given space to suicide pact, homicide committed in mutual consent, infanticide and battered women syndrome,<sup>120</sup> which are classed under homicide not amount to murder under Indian Criminal law.

Section 184 of the Code has provided that if the death of minor, disabled patient or an old person by the throw, abandon, or negligent act of the offenders, who is under a duty to take care of or to provide maintenance of those persons, shall be liable up to seventy thousand rupees fine and up to seven years imprisonment. However, in case of death of an infant by the act of similar type, the offender shall be punished under the Section 177 of the code as a culpable homicide amounting to murder. These provisions have made difference in punishment for the same types of offence which is not justifiable because the value of human life is equal whether the victim is minor, disabled patient, an old person or an infant. On the other hand provisions of No 188 of the Chapter on Court Procedure of Muluki Ain relating to reduction of punishment from intentional homicide or *Jyanmara* to mitigated homicide in mitigating circumstance has not been continued by the Muluki Penal (Code) Act, 2074. In this context, absence of the provision of mitigating punishment from life imprisonment to lesser term of imprisonment in certain circumstances

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<sup>120</sup> Government of Nepal v. Radhika Shrestha. NLR (2071 BS), Vol.9, p.1417.

will have direct impact rural, helpless, poor, and illiterate women who cannot adopt the lawful measures to end their pregnancy caused from illicit relationship. .

In explanation of the Section 177 (1) it is provided that '*in case anyone has caused grievous physical injury to somebody with the intention that he/she be killed, however, he/she does not die instantly but dies subsequently owing to the reasons for the same injury; even then the person causing such injury shall be deemed to have committed the murder.*' It has raised the question what happens in cases under Section 178, 179, 181 and 182 of the Code. This provision is in contradiction with the concept of "year and a day" rule of the Common Legal system. In fact, this clarification should have been made to be applicable in cases under Sections 178, 179, 181, and 182. This clarification is designed to make the person liable for death where there is a direct nexus between the act of the accused and death of the victim however the deceased dies at any time as a consequence of the act of the defendant. It has tried to end the unscientific, irrational and impracticable provision of No.8, 9, 10, 11 and 12 of the Chapter on Homicide of Muluki Ain regarding to the time limitation after the lapse of which it would be conclusively presumed that the act or omission has not caused a person's death. Nevertheless, the clarification of Section 177 has not been able to address the change sought to be brought in direct causal nexus between the act of the defendant and death of the victim.

On the other hand, Some Nepali Law Amendment, Unification, Integration, Adjustment and Repeal Act, 2074, which was passed by the legislature in the same day with the Muluki Criminal (Code) Act, 2074 has continued the provisions of the existing laws, that the time limitation or deadline under the Section 161(1) and (2) of Motor Vehicle and Transportation (Management) Act, 2049. According to the Section 161(1) and (2), that Act if the victim dies within the 21 days from the incident, the offender shall liable as a vehicular homicide. It is contrary to the principle of the doctrine of causation as provided by the clarification of the Section 177 of the Muluki Criminal (Code) Act, 2074. Therefore, there has a contradictory provision between the amendment of the Transportation Management Act, 2049 and Muluki Criminal (Code) Act, 2074.

Section 186 of the Muluki Criminal (Code) Act, 2074 has made a legal provision to recover the compensation to the victims of the crime related to life. Thus, there is no clear legal provision regarding the compensation, such as what should be the basis of the assessment of compensation? How to recover

the amount and from whom? Therefore, the provisions of Code relating to compensation are not clear. The provisions regarding the recovery of compensation to the victim of a crime of human life or culpable homicide must be clearer.

## 11. CONCLUSION

The Muluki Criminal (Code) Act, 2017 has reformed, codified, modernized and made the criminal law clearer. The code has, inter alia, modernized and clarified the Nepali law relating to homicide. It has incorporated modern concepts developed in criminal jurisprudence and classified offences accordingly. It has also criminalized new offences, made clearer inter alia inwards at in the earlier discussed and as well to provide put-of suggestions with a view of making research findings more meaningful in the legal development arena. The suggestions, it is hoped that will be valuable in reforming and modernizing the homicide law of Nepal and brings it in line with innovative trends in the further countries.

The main area of reform made by the code is the law relating to homicide. Culpable homicide is gravest and most serious offence in Homicide Law. Muluki Criminal (Code) Act, 2074 has also recognized the sole value of human life. However, Nepali homicide law has persisted traditional nature. The term of 'culpable homicide amounting to murder' and 'culpable homicide not amounting to murder' has not been defined till yet by the Nepali homicide law even in Muluki Criminal (Code) Act, 2074. Muluki Criminal (Code) Act, 2074 is also silent on the basic conceptual part of murder as it has not differentiated murder from manslaughter. Similarly, there is lack of clear definitions of core concepts of homicide such as intention to kill, recklessness, murderous enmity, the knowledge that an act is likely to cause death, etc. Although most of the concept of homicide law incorporated in the Code is influenced from Indian and English homicide law, it has failed to define homicide in clear term. The homicide law of Nepal is mainly a product of indigenous society and has grown traditionally. However, Muluki Penal (Code) Act, 2074 has tried to modernize the criminal law, based on many modern notions of criminal jurisprudence. In this regard, Nepali homicide law still very complex and complicated. That's why this papers conclusion are that Muluki Penal (Code) Act, 2074 has tried to incorporate many concepts of criminal jurisprudence, but it has many rooms for reform to make it more scientific and flexible.

The Muluki Penal (Code) Act, 2074 has revised, integrated, modernized the whole criminal law of Nepal. It has classified crime based on the newly

developed concept of criminal law and provided appropriate punishment according to the gravity of the offence. It has reformed the system of imprisonment for culpable homicide, and has provided imprisonment until death. According to Section 42 while computing terms of life imprisonment, it shall be computed as equivalent to imprisonment for Twenty Five years' imprisonment. Similarly, the Code has made the provision of providing compensation to the victims. Likewise, this Code has criminalized the abetment to commit suicide, homicide by recklessness, homicide by negligence, transfer malice, mistaken of identity of victims and provided the punishment for such act. On the other hand, this Code also criminalized the act of throwing child, minors, disabled, and adult individuals by their guardians or parents, who are having the responsibility to take care of such persons. Similarly, the Code has made genocide as grievous crime.

However, some provisions of this Code may create a problem. The offence of the death of minor, disabled patient or an old person by the throwing, abandonments, or neglect by a person, who is under a duty to take care of or to provide maintenance of those persons, shall be liable up to seventy thousand rupees fine and up to seven years imprisonment. However, due to the death of the new-born baby due to such act of throwing or abandonment, the offender shall be liable to punishment under the Section on 177 of the code as a culpable homicide amounting to murder. These provisions made a different punishment for the same offense in other cases. It is unnatural and unjustifiable because the value of human life is equal whether it is minor, disabled patient and an old person or the new-born baby. Nepali judiciary has developed the concept of mitigated homicide through interpretation taking into consideration of various factors. Supreme Court has developed the concept of mitigated homicide in the course of interpreting and implementing its discretionary power of the No 188 "On Court Procedure" of Muluki Ain, 1963. On the other hand provisions of Section 188 of Muluki Ain, 1963 relating to the reduction the punishment from intentional homicide or Jyanmara to mitigated homicide. The mitigating circumstance developed by the Supreme Court has not been incorporated by the Muluki Criminal (Code) Act, 2074. There are no any legal provisions relating with a suicide pact, murder by mutual consent, infanticide (murder of new born child) and homicide committed by battered women. From the traditional and rigid formulation of Nepali law, recognition of the above-mentioned circumstances, as a ground for mitigations is a liberal and humane trend. In Common law countries, these categories are recognized and considered as a general defence. The existing Nepali homicide law has to be revised in order to incorporate mitigated homicide as a separate category of

culpable homicide and include all mitigating circumstances, which are recognized by modern criminal jurisprudence. Nepali criminal law should give recognition to mitigating circumstances.

Thus, Muluki Criminal (Code) Act, 2074 should be revised by clearly defining culpable homicide, murder, culpable homicide amounting to murder, culpable homicide not amounting to murder. The terms intention, knowledge, and recklessness, negligence have to be clearly elaborated as they are included in the meaning of positive mental elements requiring for culpable homicide amounting to murder. In Nepal, the category, specific elements of culpable homicide have not been precisely defined as in other common law countries. The present provisions relating to culpable homicide should be revised and the category of culpable homicide must be defined in terms of explicit or positive mental elements or the absence of it.





# **Situation of Torture in Nepal: An Encouraging Trend of Reduction Leading to Elimination: An Example Setting Progress in South Asian Context**

**Yubaraj Sangroula\***

## **ABSTRACT**

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT) is an international human rights treaty that purports to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment across the globe. Nepal became the first country in South Asia to accede to the Convention in 1991. Torture seems to have its existence as early as the dawn of police and administration. In the context of the rising trend of human rights culture in the world, an act of torture is recognized universally as an extreme form of human rights violation, and international law proscribes torture through treaties and customary international law. Regardless of the stage of development, today's world still continues to witness torture taking place with impunity. Nepal has in place several legal and institutional measures to curb the malpractice of torture and the effort is now bearing fruits.

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## 1. GENERAL BACKGROUND

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT)<sup>1</sup> is an international human rights treaty that aims at preventing torture and other acts of cruel, inhuman, or degrading treatment or punishment across the globe. The Convention requires State Parties partaking by having effective legislative, administrative, judicial or other measures to prevent acts of torture in their respective jurisdiction. As per the Convention, neither any exceptional circumstances including a state of emergency, nor an order from a superior officer or a public authority may be invoked as a justification of torture. The State Parties also have an international obligation to ensure that all acts of torture are offences under their criminal laws and make these offences punishable by appropriate laws.

Nepal became the first country in South Asia to accede to the Convention in 1991. As a result of this ratification, a number of awareness activities began to take place with a view to preventing torture and other ill-treatments on individuals by law enforcement agencies, thereby improving the situation. This followed a sustained enthusiasm and activism. Research activities by many research organizations constituted an essential part of this activism, most of which concentrated on looking into factors that allegedly contributed in occurrence of torture and other ill-treatments.<sup>2</sup> This article is the summary of the survey conducted by Kathmandu School of Law in collaboration with the University of Sydney for mapping the actual situation of torture in Nepal.<sup>3</sup>

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<sup>1</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, Vol. 1465, p. 85.

<sup>2</sup> Some important research included (1) ACHR, *Torture in Nepal, a Case for Investigation by CAT: A shadow report to the un committee against torture*, 1998; (2) AHRC, *Consultation on Effective Ways to Prevent Torture and Establish the Rule of Law* (a, 4-8 April 2004, Kathmandu Nepal) Hong Kong: 2004; (3) ALRC, *An Edited Text of Supplementary Document Prepared by the 35th Session of the UN Committee Against Torture, Inconsideration of Nepal*, November 2005; (4) HRTMCC, *Alternative Report to Second, Third and Fourth Periodic Review (Combined) State Report of Nepal, Submitted to UN Committee Against Torture*, Covered Period 1992-2004; (5) CVICT, *Concluding Observation of the Committee Against Torture, Nepal, 12/06/94, Report of Prison Visit*, Kathmandu; 2000; (6) INSEC, *Three Day Training Cum-Workshop on UN Mechanisms and Convention Against Torture*, 9-11 August 2004, Kathmandu, Nepal; (7) Nepal Law Society, *A Report on South Asia Seminar on the Prevention of Torture*, held on September 8-9, 2000, Kathmandu 2001; (8) NHRC, *A Report on Training Workshop on UN Human Rights Reporting Under Convention Against Torture*, Held on 24-28 March, 2003, Kathmandu.

<sup>3</sup> With the objective of mapping the actual situation, a pilot study<sup>3</sup> (Kathmandu School of Law et. al., *Human Rights in the Nepali Law Enforcement and Security Sector*, a report produced under the project Enhancing Human Rights Protections in the Security Sector in the Asia Pacific (EHRP) in collaboration with the University of Sydney, Colombo Centre for the Study of Human Rights and Kathmandu School of Law, 2014.) was conducted by Kathmandu School of Law (KSL) in collaboration with the University of Sydney. The study (2012-2014) focused on prevalence of torture and the improper use of force in six sample districts within jurisdiction of the NP and the APF. The study was conducted through an empirical survey by a group of researchers in partnership with officers from these two organizations,

## 2. A BRIEF GLANCE AT THE HISTORY OF TORTURE

The article, in this part, basically tries to explore the main factors that have contributed to the worsening situation of torture across the world. It has seen and analyzed on factors such as colonial powers playing role in universalizing the practice of torture. Similarly, reference is also made on some leading Asian countries, South Asian countries to some extent and Nepal in particular with regard to their practices of torture in the past.

### 2.1 Europe

As we know, the Anglo-American tradition of torture has a deplorable place in the European history. England, as an island detached from the continent of Europe, is ruled by common law system, and, in theology, it has had powerful presence of *Huguenots*, the Protestants ruled church system with its domination over Catholicism, which often suppressed the Catholic faith-holders. The history of the practice of torture is, therefore, generally attached to its 'theological practice which essentially relates with clashes and conflicts between dominant Protestants and minority Catholics'.<sup>4</sup> Professor James Simpson of Harvard University said that 80 cases of torture in early modern England were found recorded in the Privy Council registers.<sup>5</sup> Obviously, it flows from the reference that the relevance of torture with religion was massively big and the minority religious group suffered heavily.

The European nations used torture extensively and frequently justified its use as a valid means to protect society from the criminal ruffians and heretics. Extracting confession was the major purpose behind the act of inflicting horrible torture. In *Les Miserable*, a widely read classic reflecting on the 18<sup>th</sup> century justice system of France, Victor Hugo's description of torture is heart-touching. The similar descriptions can also be found in another story, namely the Joan of Arc. In those days,' in Europe, acts of torture constituted both physical and psychological inflictions to the extent of what victims could possibly tolerate at its last stage. Many died, indeed. The 'Crime and Punishment' by Feodor Dostoevsky bears testimony to this. In this novel, the principal character, who had murdered a clown woman, even attempted to

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who had officially been assigned to assist the researchers. The main sources of the information were the officers and personnel from the NP and the APF. The *key informants* representing government employees, civil society and victims were another category of information providers. Six pilot districts selected out of 75 were Kathmandu, Lalitpur, Bhaktapur, Chitwan, Sunsari and Parsa. The principal data collection techniques employed consisted of observation, interviews and focused-group discussions.

<sup>4</sup> See generally, James Simpson 'No-Brainer: The Early Modern Tragedy of Torture,' *Journal on Religion & Literature*, Vol. 43, No. 3 (The University of Notre Dame: autumn 2011), pp. 263-265,

<sup>5</sup> *Ibid.*

commit suicide for being unable to tolerate psychological torture inflicted on him. One of the underlying beliefs behind such cruelty was that ‘torture could transform wrongdoers into moral regime’. This was the early modern criminological belief of the European societies.

No intellectuals or scholars dared to raise any voice against the use of torture in those days because such voice itself would be taken as a crime against the State. Perceivably, the voices against torture were not only unheard and rejected in those days, but also suppressed explicitly and meticulously by use of the police force of the State. For instance, Pietro Verri, an Italian (Milanese) intellectual and as aristocrat, wrote a comprehensive treatise in 1764 with regard to prohibition of torture. In this work, he presented a scathing picture of phenomenal use of torture for extracting confession. However, he dared not publish his work because such an account of torture would have humiliated his father, a respected senator who uncompromisingly defended the traditional practices including the use of torture to extract confession.<sup>6</sup>

James Ross, the senior legal advisor of the Human Rights Watch, has provided a brief but explicit account in this regard. He mentions: “So Verri, along with his brother Alessandro, a prison administrator, sought help from the Society of Fists, a reformist group whose name derived not from the punch it carried but from the fisticuffs that invariably ended meetings. They found it in a brilliant but indolent twenty-five-year-old marquis named Cesare Beccaria. With Verri’s prodding and editing, Beccaria wrote on Crimes and Punishments.”<sup>7</sup> The history of Europe is, therefore, not so handsome and beautiful as many uninformed lawyers and judges as well as sociologists in other parts of the world tend to consider and regard.

Annals in ancient European history invariably establish that practices and methods of torture were commonly used lawfully as a means of extracting confession. The ancient Greeks, for instance, accepted torture as a lawful means of extracting confession from slaves and foreigners, while the free citizens were spared from being subjected to it.<sup>8</sup> The sense of racial discrimination essentially embedded into the practice of torture. The Roman Empire also largely followed the Greek practice of subjecting slaves to torture legally.<sup>9</sup> During the sixth Century (AD), the Justinian Code, a collection of imperial constitutions, was promulgated. This Code along with *Digest*, a

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<sup>6</sup> Kenneth Roth et.al (ed), (2005), *Torture: Human Rights Perspective*, New Press, p. 4.

<sup>7</sup> *Ibid*, p. 4.

<sup>8</sup> *Ibid*, p. 5.

<sup>9</sup> *Ibid*.

collection of the opinions of jurists, was another major source of law in the Roman Empire, which provided a legal basis for the institution of torture. Particularly, the Chapter 18 of the 'Book Forty Eight' of the Digest "*De Quaestionibus*" (on torture) provided a clear or expressed basis for the legitimacy of torture as a means of judicial practice to obtain evidence.<sup>10</sup>

In continental Europe, the practice of torture took a monstrous shape when Roman Catholics enforced what is called the '*infamous Roman Inquisition*' in 1178, which is also known as the first Crusade. The community of *Cather* race or group was the primary victim of this Crusade. They were collected *en masse* and tortured by applying incredibly several types of means of torture. They were not painful but sheer examples of savagery and inhumanity. Captives were burned alive and mutilated for volunteering to confess. Indeed, most of the torture techniques and means were developed in this period with a view of inflicting sufferings on *Cather community* that opposed the religious practices and superstitions adopted by the Roman Catholics.

## 2.2 Ancient Asia

The Ancient **China** was reputed for its legally sanctioned use of torture. George Ryley Scott, who had deeper knowledge about the ancient Chinese history, describes, "China has perhaps acquired a reputation for being the one place in which torture is more universal and takes stranger, crueller, and more revolting forms than it does in any other part of the civilized and uncivilized globe".<sup>11</sup> According to him, torture was practiced for both the purpose of extracting confession and as a form of taking revenge on the crime. According to Semedo, the compression of fingers or ankles was a favorite practice for forcing reluctant witnesses to speak or criminals to confess.<sup>12</sup> It was by no means, however, curler and extensive than the European society of the same time.

In medieval **Japan**, like Europe, confession was considered indispensable for convicting the accused, and torture could be used in cases where circumstantial evidence indicated probable guilt but the accused refused to confess.<sup>13</sup> Courts in Japan, like in China, recognized torture as a legitimate means of eliciting truth from offenders. The torture was not limited only to the accused, it was equally applied to the witnesses who declined or showed reluctance to speak

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<sup>10</sup> *Ibid*, p. 6.

<sup>11</sup> George Ryley Scott, (1959), *The History of Torture Through the Ages*, (7th edn), London: Luxor Press, p. 102.

<sup>12</sup> F. Alvarez Semedo, (1655), *History of China*, London, p.143.

<sup>13</sup> Peters, E., (1966), *Torture: Expanded Edition*, Philadelphia: University of Pennsylvania Press, pp. 93-94.

out or tell the truth in the courts.<sup>14</sup> From 1652 to the mid-nineteenth century, Japan was ruled by an infamous regime that goes by the name of *Tokugawa regime*. The severity of torture during this period was unusually notorious, cruel and inhuman.<sup>15</sup> According to Longford, the methods of torture used in Japan that time were also in use in Korea and Formosa, the present Taiwan.<sup>16</sup> It is said that every method used by the Roman Catholics against Protestants, Jews and Muslims were allegedly used in Japan against Christians. The system of punishment consisted of all forms of cruelty, therefore.

**India** was not an exception in use of cruel forms of torture, traditionally. The cruelty and barbarity were added particularly by the *Moughals* and British colonialists. Mutilations were common forms of torture practiced in *Moughal* as well as British India. There are instances of a person's tongue being cut off for the crime of blasphemy.<sup>17</sup> However, there are no conclusive proofs to confirm the existence of such a practice. In the case of women, few instances have been cited, particularly in the Malabar Coast, about their breast being cut off for the crime of blasphemy.<sup>18</sup> As described by Forbes, ordeals of fire, water, poison, the balance, and the boiling oil were in use for different kinds of crimes.<sup>19</sup> Dipping hands into the boiling oil or hot waters, the use of *bastinado*, the starvation and similar other tormenting means, which were abundantly in use in England, were widely used also in India during the colonial period. For example, in 1854, the House of Commons was rocked by allegations of torture committed by the officials of the East India Company in India. The debate in the House was primarily about torture that was frequently employed by officers of Madras to compel the people to pay the demands of Government.<sup>20</sup> Torture was a best means of colonial rulers to loot the native people of India.

The legacy of torture using a variety of techniques which was introduced and made widespread by the colonial rulers continues in India with the blame being deceptively placed on native culture. Through several studies, the government commissioned-taskforce and the 2002 *Malimath Committee* report (the most comprehensive one) have consistently demonstrated that torture poses as a serious problem in India inherited from the British colonial rule. The Sashi Tharoor's book entitled '*Inglorious Empire*' has in fact nakedly exposed the

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<sup>14</sup> George Ryley Scott, above no. 17.

<sup>15</sup> Joseph H. Longford, 1926, *A History of Japan*, (revised edition of James Murdoch) Vol. III, Kegan Paul, p. 338.

<sup>16</sup> *Ibid.*

<sup>17</sup> George Ryley Scott, above no. 17, p.111.

<sup>18</sup> See, James Forbes, (1813), *Oriental Memoirs*, London.

<sup>19</sup> *Ibid.*

<sup>20</sup> Anandswarup Gupta, (1974), *Crime and Police in India (up to 1861)*, Agra: Sahitya Bhawan, p. 310.

reality of torture during the colonial regime, which also includes the discrimination of justice between white people and native population. The practice of taking people into custody without following the standard procedures and extra-judicially executing detainees is not uncommon in India since the British rule. Such killings are then invariably converted into a story of fake encounters.<sup>21</sup>

Today's India still witnesses serious violations of human rights including 'custodial killing' on a regular basis. As reported by the India Country Report 2016, prepared by *Bertelsmann Stiftung* transformation index,<sup>22</sup> the custodial killings and police abuses, including rapes, are regularly committed. The report notes that the unprivileged groups remain particularly affected by the limited enforcement of protection laws and by the extremely slow functioning of the judicial system. According to a report of the Asian Centre for Human Rights (ACHR) entitled "Torture in India 2011", the custodial death assumes a feature of grotesque problem in India. The report claims that the custodial deaths stood at 14,231 persons from 2001 to 2010, on average over one thousand persons being killed every year in the custody.<sup>23</sup> This figure constitutes 4.33 percent of the total people facing criminal charges within this period. Of those dying in the custody, 1,504 died in the police custody after some time of their arrest. The rest died during the judicial custody. As claimed by the ACHR, 99.99 % of these deaths were result of torture in the police custody. The situation seems shocking and alarming.

**Bangladesh** shared the British colonial rule with India as it constituted part under British rule. In the post-colonial Bangladesh, the practice of torture is a regular feature either. The ratification of the UN Convention against Torture by Bangladesh in 1998 has hardly any impact on the continuation of torture practice. The 'Operation Clean Heart', a crackdown launched to eliminate criminals in October 2002, is generally characterized by the excessive use of force and torture, accompanied by random beatings and coercive interrogations.<sup>24</sup> Deaths in custody, as a direct consequence of torture, continue to be a frequent occurrence in Bangladesh.<sup>25</sup> The law enforcement agencies in Bangladesh are reportedly the main perpetrators of torture. As reported by

<sup>21</sup> Human Rights Watch, (2009), *Broken System: Dysfunction, Abuse and Impunity in the Indian Police*, (Study Report), p. 4.

<sup>22</sup> This Report is a part of Bertelsmann Transformation Index (BTI), 2016. This covers the period from 1 February 2013 to 31 January 2015. BTI assesses the transformation toward democracy and market economy as well as the quality of political management in 129 countries. More information is available at [www.bti-project.org](http://www.bti-project.org).

<sup>23</sup> ACHR (2011), *Torture in India*.

<sup>24</sup> REDRESS, (Aug. 2004), *Torture in Bangladesh*, p. 9.

<sup>25</sup> See, Reports of the SRT, UN Doc. E/CN.4/2000/9, February, 2000, Paras 116-126.

Redress, the commonly used methods of torture in Bangladesh include slapping and kicking with sticks, iron rods, rifle butts, and/or bottle with hot water; hanging by the hands; pushing needles into nails; crushing fingers with pliers; rape; electric shock; and water treatment, which consist of fixing hose pipes into each nostril and turning the water taps with full force. In the present context of criminal justice system, suspects from poor families are worst hit by the practice of torture and torture is a routine feature of crime investigation.

The primary objective of torture in the context of criminal justice is to extract confession from suspects. With regard to custodial deaths, while the prime minister expressed commitment to zero tolerance on extrajudicial killings, the government has shown no interest in investigating the alleged incidents of extrajudicial killings or custodial deaths. According to *Odhikar*, a Dhaka-based human rights organization, at least 1,600 people have been victims of extrajudicial killings since 2004. The same organization also claims that at least 12 people died in custody due to police torture in 2011.<sup>26</sup>

In case of *Nepal*, historians agree that ancient Nepal was ruled by the Kirant dynasty. According to Baburam Acharya, a noted historian, the Kirant period lasted 800 years from 550 BC to 250 BC.<sup>27</sup> Another prominent author Dr. Dilli Raman Regmi claims that the early sixth century BC is considered as the beginning of Kirant rule in Nepal.<sup>28</sup> With the help of Kiranti religious text, *Mundhum*, they ruled Kathmandu valley until the second century AD.<sup>29</sup> During the Kirant period, violence was considered as a sin and a person engaged in acts of violence was subjected to the harsh punishment. The punishment was based on the principle of 'eye for an eye and tooth for a tooth'.<sup>30</sup> When the Valley came under the control of Hindu rulers by the medieval period, Nepal was generally administered with the help of 'a set of classical scriptures', typically known as *dharmasuttra*<sup>31</sup>. Under the system, no one was legally deprived of his/her liberty in connection with the criminal justice system.

<sup>26</sup> "Human Rights Watch", available at [www.hrw.org/world-report/2012/country-chapters/bangladesh](http://www.hrw.org/world-report/2012/country-chapters/bangladesh).

<sup>27</sup> Baburam Acharya, (2060 BS), *Nepal in Ancient Period* (Nepali), Reproduced by Shri Krishna Acharya, Kathmandu, p. 49.

<sup>28</sup> D. R. Regmi, (2007), *Ancient Nepal*, New Delhi: Rupa and Co., p. 55.

<sup>29</sup> Iman Singh Chemjong, (2059 BS), *Kirat Mundhum (Kirat Ko Veda)*, Kathmandu: Kirat Yakthung Chumlung.

<sup>30</sup> *Ibid*, p. 104.

<sup>31</sup> *Dharmasutra* classified the population into four fousl occupational CLASSES: (a) *Brahmin*, with occupation responsibility of teaching, (b) *Chettri*, with responsibility of defending the frontiers and maintaining law and order, (c) *Vaishya*, with responsibility of carrying out trade and production, and (d) *Suddra*, with responsibility of general labor with a view to support other classes in their respective works.

Unlike in the contemporary Roman society, torture was not legally allowed against any group of the population in Nepal.<sup>32</sup>

The *Manab Nyaysastra* (the Code of Human Justice), the very first Code of law in Nepal, introduced a comprehensive system of law in 1380 AD. According to this Code, only the voluntary confessions were admissible as evidence. However, it provided an incentive for voluntary confession as it offered a reduction in punishment by half, provided that the suspect agreed to confess. The torture was, however, prohibited. Rather, the varying systems of 'ordeal' were found in common practice.<sup>33</sup> A new Code of Law, namely *Muluki Ain* (Law of the Land) was introduced by Prime Minister Junga Bahadur Rana in 1854. This Code, for the first time, expressly introduced the system of torture to extract confession from suspects. The common forms of torture were flogging or whipping. Daniel Hodgson, a British traveler in the nineteenth century has provided an account of torture prevalent in Nepal at that time. Mr. Hodgson says in his own words: "A suspect is brought to the court and inquired about the alleged crime. If he/she confesses the crime, he/she is sentenced in accordance with the law.

If one declines to confess the crime, the witnesses are called into give the testimony. If the witnesses accuse the suspect, then he/she is subjected to a rigorous interrogation. If he/she persists to decline giving confession, he/she is flogged or whipped until he surrenders to confess."<sup>34</sup> The Ranas ruled until 1950. They became instrumental in institutionalizing different cruel and barbarous techniques of torture, particularly in the post-conviction stage. The closer contact of the Ranas with British rulers and their criminal justice system in India has a bigger influence in Nepal's system at that time, and torture to obtain confession probably was made popular in Nepal by the Ranas through learning from the practice of British rulers in India.

The practice of torture got worst during the party-less *Panchayat* system, an undemocratic system of governance that does not tolerate the existence of political parties. Under the polity, all political parties were banned and the monarch held absolute authority. Studies have shown that the *Panchayat* period was characterized not only by its suppression of any democratic political expression, but also by other human rights violations including torture of

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<sup>32</sup> *Rigveda* recites, 'Nothing which causes pain and suffering should be allowed to take place. The permissible act is that offers good to all, hence no act can be permissible that causes harm to someone (*Sarvamewa samastu na* -19/9/14).

<sup>33</sup> Prakash Osti, (2007), *Hamra Kanooni Ithihash ka Jhakiharu* (Manifestations of Our Legal History), Pairavi Book House, pp. 1-23.

<sup>34</sup> As cited above no. 33 in p. 39.

political opponents and others considered to be sponsored by the State.<sup>35</sup> Between 1962 and 1990, the officials tortured thousands of people in order to suppress the political movement geared for democratic change. When Panchayat regime was overthrown and a new democratic Constitution was promulgated in 1990, the new Constitution prohibited the use of torture. However, studies have shown that the practice of torture continued by the police as an essential coercive means of extracting confession.<sup>36</sup>

As regards the methods of torture, whipping or flogging suspects for the purpose of extracting confession was common. The inhuman cruelty was thus largely prohibited by the administration of justice during ancient and medieval periods. The techniques such as beating, electrocution, starvation, exposure to heat and cold, flagellation, and so on were gradually imported into Nepal during the latter part of the Rana regime and the party-less *Panchayat* regime. Nepal entered into the common law system in 1952, and thus the system of administration of justice practiced by the colonial India was also fully borrowed into the country, along with its system of evidence collection and trial procedures. The Nepal Police was established in 1956, and the police personnel were trained by the police officers from India, who were, as amply described above in relation to the 1855 Commission of Madras by the report of Human Rights Watch, used to practice different techniques for torturing people. The establishment of the police organization in Nepal was modelled on the colonial structure of the Indian police. This is one of the major reasons behind the institutionalization of torture in Nepal. The first ever baseline survey on the criminal justice system in Nepal conducted by CeLRRd revealed that the practice of torture inflicted on suspects particularly for extracting confessions was widespread in Nepal until the 1990s. As high as 68 percent of detainees interviewed during the survey expressed that they were subjected to torture.<sup>37</sup>

From 1996 onwards, Nepal witnessed a decade-long armed conflict, a short period of King's direct rule, and a peace agreement with the insurgents. As claimed by rights activists, within this period, acts of torture and extrajudicial killings including enforced disappearance became widespread. At present, however, Nepal has taken a brief respite that no such incidents have taken place over the last five years.<sup>38</sup> The latest survey jointly conducted by Attorney

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<sup>35</sup> Redress, *Country Report: NEPAL*, p. 3, available at: <http://www.redress.org/downloads/country-reports/Nepal.pdf> (Accessed on January 28, 2017).

<sup>36</sup> See generally CeLRRd, (1999), *Analysis and Reform of the Criminal Justice System in Nepal*, Kathmandu.

<sup>37</sup> Above no. 36, and also CeLRRd/OAG, (2012), *The Baseline Survey of the Criminal Justice System of Nepal*, Kathmandu, Nepal.

<sup>38</sup> *Ibid.*

General Office and CeLRRd, in 2012, reveals that the proportion of torture, which excludes systematic methods, means and types, has gone down to 18 percent, and the same finding is confirmed by the study of a NGO called Advocacy Forum.

### 3. GENERAL SCENARIO IN TODAY'S WORLD

Regardless of the stage of development, today's world still continues to witness torture taking place with impunity. Whereas the international laws explicitly prohibit the practice of torture and other forms of ill-treatments, the violation of obligations by State Parties continues in many ways, and such violation is not exceptional even in those countries which are considered to be developed and are supposed to be committed to fostering human rights as a universal culture of human beings. The US Department of Justice, for instance, as reported by the *New York Times* in October 2007, had issued a legal opinion in 2005, which remains as classified information, authorizing the CIA to use harsh interrogation techniques against alleged terrorists, including head-slapping, simulated drowning (waterboarding), and exposure to frigid temperatures.<sup>39</sup> Interestingly, but unfortunately enough, the Congress later that year, as reported by Michael John Garcia,<sup>40</sup> a legislative lawyer at the US Congress, considered another similar classified instrument which was reportedly issued by the Department of Justice declaring that such techniques would not be barred, at least when employed against terrorist suspects with crucial information regarding future terrorist attack. The techniques used in interrogation are, however, not described.

In 2005, the Rehabilitation and Research Center (RCT) conducted a desk study review of the literature on politically motivated torture.<sup>41</sup> The report revealed a broadening worldwide context of torture which included many aspects of organized violence, often occurring during the war. The *Abu-Gharib* prison abuses and acts of torture allegedly perpetrated by the coalition forces in Iraq did particularly attract the world attention towards the increased tendency of torture and other forms of ill-treatment being used by the forces of western developed countries. This fuelled an intense discussion about what methods constitute torture. Another study conducted by De Jong and others, the random selection from a national sample in four countries showed a torture prevalence

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<sup>39</sup> Scott Shane, et.al, (Oct, 2007), "Secret U.S. Endorsement of Severe Interrogations", *New Yorks Times*, at AI.

<sup>40</sup> Michael John Garcia, (USA, 2009), *U.N. Convention against Torture (CAT): Overview and Application to Interrogation Techniques*, CRS Report for Congress, Congressional Research Service, p. 14.

<sup>41</sup> Jose Quiroga and James M. Jaranson, (2005), *Politically Motivated Torture and its Survivors*, Rehabilitation and Research Center (RCT), p. 4.

of 8% in Algeria; 9% in Cambodia; 15% in Gaza, Palestine; and 26% in Ethiopia.<sup>42</sup> According to a Study conducted by Parker, 85 percent prisoners in the Turkish prison reported that they had been tortured.<sup>43</sup>

According to a study, refugees are one of the vulnerable groups for torture. A random sample selection of 3,000 persons from the 10,000 asylum seekers who arrived in Denmark in 1986 showed a 20 percent prevalence of torture.<sup>44</sup> According to the United Nations High Commissioner for Refugees (UNHCR), 2,331 Bhutanese refugees out of 85,078 in total in Refugee Camp in the southern Nepal were torture survivors as recorded in 1994. In 2004, 36 percent Somali and 55% Oromo refugees settling in Minnesota, USA, were found subjected to torture. The highest rate of 100% prevalence was found among the groups of Chilean refugees living in the United States.<sup>45</sup>

According to a 2012 regional conference report on “Torture in Europe: The Law and Practice”, acts of torture and other forms of ill-treatment are matters of a major concern particularly in 15 countries of the region.<sup>46</sup> The study shows that the use of excessive force by police is a recurring practice in most of these countries. And, conditions in prison and other detention facilities are reportedly so poor that they may amount to cruel, inhuman, or degrading treatment, as evidenced in a number of European Court of Human Rights judgments.<sup>47</sup>

#### 4. EMERGENCE AND GROWTH OF INTERNATIONAL LAWS PROHIBITING TORTURE

The power of modern States over individuals is now strictly limited under international laws. Both physical and psychological integrity of a person are considered equally sacrosanct. The violation of any of these laws is considered to be an act that constitutes a crime by the international laws. International human rights law defines the limits of States’ power over individuals, and imposes obligations on States to unfailingly respect, protect and promote

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<sup>42</sup> De Jong, et.al. (2001), *Lifetime Events and Posttraumatic Stress Disorder in Four Post-conflict Setting*, JAMA, p.286.

<sup>43</sup> M. Parker, et.al., (1992), "Psychological Effects of Torture: An Empirical Study of Tortured and Non-tortured Non-political Prisoners" in M. Basuglu (ed.) *Torture and Its Consequences: Current Treatment Approaches*, Cambridge University Press, pp. 72-82.

<sup>44</sup> S. Jepsen, (1980), ‘The General Health of Asylum Seekers: The Danish Experience’ in D. Miserez (ed.) *Refugees: the Trauma of Exile: the Humanitarian Role of the Red Cross and Red Crescent*, Martinus Nihoff Publishers, pp.80-6.

<sup>45</sup> Jose Quiroga and James M. Jaranson, (2005), *Politically Motivated Torture and its Survivors*, Rehabilitation and Research Center (RCT), p.6.

<sup>46</sup> Armenia, Belgium, Croatia, Cyprus, France, Germany, Greece, Hungary, Poland, Romania, Russia, Spain, Ukraine, Turkey, and the United Kingdom.

<sup>47</sup> European Center for Constitutional and Human Rights, (Sept, 20012), *Torture in Europe: The Law and Practice*, Regional Conference Report.

human rights of individuals in general, and the inviolability of human integrity in particular.<sup>48</sup> The most significant development of international law in this regard is that the behavior of any State towards its citizens at home is now open to outside scrutiny. No state can now escape the global attention when it comes to violation of human rights, the practice of torture and other ill-treatment.

The development of jurisprudence regarding torture and any other forms of ill-treatment has noticed a dynamic phenomenal process in the recent past. In the context of the rising trend of human rights culture in the world, an act of torture is recognized universally as an extreme form of human rights violation, and international law proscribes torture through treaties and customary international law.

## 5. PROHIBITION IN INTERNATIONAL LAW

The process of consolidating international law to prohibit torture and other ill-treatment began remarkably swiftly after the declaration of the ‘Universal Declaration of Human Rights’ (UDHR) in 1948. Article 5 of the UDHR reads “*No one shall be subjected to torture or to degrading treatment or punishment.*” The article has commonly been regarded as an articulation of the customary international law concerning prevention of torture. While the practice of torture and similar acts were widely used by States, the concerns of individuals, organizations, societies and similar bodies were largely reflected in many different forms of declarations, resolutions and recommendations for longer period of time in the past. The cruelties against human beings were condemned by literatures, philosophies, declarations and resolutions.

The spirit of UDHR regarding torture was further consolidated in Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>49</sup>, Article 5 of the African Charter on Human and Peoples’ Rights<sup>50</sup>, Article 5 of the American Convention on Human Rights<sup>51</sup>, and Article 99 of the 1949 Geneva Convention dealing with the protection of the prisoners of war.<sup>52</sup>

The Amnesty International’s early monitoring of torture on a worldwide basis provided the forum of interest articulation, pressure, and support for

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<sup>48</sup> Association for the Prevention of Torture (APT) Geneva, and Center for Justice and International Law (CEJIL), (Washington: 2008), *Torture in International Law: A Guide to Jurisprudence*, p. 2.

<sup>49</sup> See *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950*, 213 U.N.T.S. 222.

<sup>50</sup> *African Charter on Human and Peoples’ Rights*, 1981, O.A.U. Doc. CAB/LEG/67/3.

<sup>51</sup> *American Convention on Human Rights*, 1969, 1144 U.N.T.S. 123.

<sup>52</sup> *Geneva Convention Relative to the Treatment of Prisoners of War*, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

governmental initiatives (especially in Sweden and Denmark) that enabled the adoption of the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by the General Assembly in 1975.<sup>53</sup> The SRT Nigel S. Rodley, (1993-2001) and first legal advisor of the Amnesty International (AI), has noted, “From the earliest days of the AI’s first international campaign against torture (which began in 1973), we were aware that torture happened to people when they were held at the sole mercy of their captors and interrogators (*incommunicado* detention). The longer they were denied access to and from the outside world (i.e. family, lawyers, doctors, and courts), the more they were vulnerable to abuse by those wishing to obtain information or confessions from them.”<sup>54</sup>

## 6. ADOPTION OF EXCLUSIVE INTERNATIONAL LAWS ON TORTURE

The Declaration against Torture became the main basis for drafting a new international convention and initiatives to this effect were taken by the U.N. Commission on Human Rights in 1978,<sup>55</sup> and the document was adopted by the General Assembly in 1984 as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This convention became the major international law in the form of U.N. treaty for controlling, regulating, and prohibiting torture and related practices in international level.

As mentioned above, UDHR Article 5 constitutes a milestone in prohibiting the enduring practice of torture which has been regarded as the codification of customary international law against torture or any other forms of ill-treatment. It constitutes a prelude to the United Nations for expediting efforts to obligate States to prevent and criminalize the practice of torture through a number of international treaties,<sup>56</sup> which are legally binding on those States that have ratified them. And, CAT is the major international law that requires the signatory parties to take measures to end torture within their jurisdictions and to criminalize all acts of torture by their domestic laws.

The international human rights bodies have been playing a significant role in providing an independent oversight of the places of detention, and taking

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<sup>53</sup> Winston P. Nagan & Lucie Atkins, (2001), *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 Harv. Hum. Rts. J. 87, p. 96, available at <http://scholarship.law.u.edu/facultypub/615>.

<sup>54</sup> Nigel S. Rodley, *Reflections on Working for the Prevention of Torture*, available at: <https://www.Reflections+on+Working+for+the+Prevention+of+Torture> (Accessed on June 9, 2016).

<sup>55</sup> G.A. Res. 32/62, U.N. GAOR, 32d Sess., Supp. No. 45, U.N. Doc. A/32/355 (1977).

<sup>56</sup> UN Framework of International Law prohibits torture includes: Article 7 of the ICCPR; CAT; Article 37 of CRC; Article 10 of ICPMW; Article 15 CRPD; and Article 5 of the ICERD..

measures to monitor violation of human rights. Over the last few decades, the national systems of monitoring including those designated under the Optional Protocol to the CAT are emerging as an effective mechanism of overseeing the State's obligations under international law with a view to prohibiting torture and taking effective judicial measures to protect the victims.

With these developments in place, the international law preventing acts of torture or any other forms of ill-treatment as well as protecting victims from them including specific compensation in case of occurrence of such acts, has taken on a definite shape with the following concrete features:

- a. The extent of all States' obligations to prevent torture is extensive and specific under international treaties and the jurisprudence established by the international and regional bodies that interpret such treaties. Internationally, the UN Human Rights Committee and the Committee against Torture interpret State obligations under the ICCPR and the CAT respectively.<sup>57</sup>
- b. These bodies may consider complaints from individuals against a State. This has made the issue of torture a matter of international concern, and has thus ended the parochial notion that a national is under the exclusive jurisdiction of his or her nation.
- c. The Committees are not courts, meaning that their decisions are not directly legally enforceable. However, the decisions of the Committees are important for two counts. Firstly, such decisions interpret treaties and give them expression contextually with regard to States' obligations to prevent torture. Secondly, such decisions establish a concrete moral basis or sanction for States to strictly abide by the obligation of preventing torture or any other forms of ill-treatment.
- d. The Inter-American and African regional systems have adopted a two-body mechanism, consisting of a Commission, which is quasi-judicial body with the power to issue decisions and recommendations, and a court with the power to issue legally enforceable judgments. The European system eliminated the European Commission of Human Rights. The European Court on Human Rights is its sole body to interpret treaties and issue judgments.
- e. While international treaties have specifically defined 'torture', the belief that the definition of torture should not be made static and confined is

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<sup>57</sup> CEJIL, above no. 54.

increasing. As pointed out in the ICRC Commentary on the Geneva Conventions, a strict definition listing every prohibited act would simply test the apparently endless ingenuity of torturers rather than providing effective protection to their victims.<sup>58</sup> It is therefore necessary to let the definition evolve constantly reflecting the context of time.

- f. In line with the Conventions, the increasing number of State Parties has criminalized acts of torture and other ill-treatments.
- g. We should not rely only on the judicial mechanism to prevent torture. Additionally, non-judicial mechanisms are to be progressively devised to ensure that the States do not resort or tolerate torture. States must be pressed or encouraged to comply with their obligations to detect violations and to provide effective and speedy treatment, including compensation to victims.

Additionally, the communication or jurisprudence established by the UN Human Rights Committee and the Committee against Torture also constitute an important part of the ‘anti-torture’ international law. These committees have the mandate to monitor whether the States have complied with their obligations under these treaties. For this purpose, the Committees issue general comments or recommendations which provide detailed interpretation of specific aspects of the given treaty. Some treaty bodies also adjudicate individual cases, provided that the State in question has made a declaration recognizing the Committee’s competence in this regard.<sup>59</sup>

## 7. NEPAL’S OBLIGATION UNDER INTERNATIONAL LAWS

In 1991, Nepal ratified ICCPR and its Optional Protocol on individual communication. The same year, Nepal became a state party to the CAT. Under Article 22 of the CAT, a state party to CAT may at any time declare that it recognizes the competence of the CAT to receive and consider communications from or on behalf of individuals who claim to be victims of a violation by the state party. Nepal is yet to make such declaration and recognize the competence of the CAT to receive and consider communications from individuals who claim to be victims of violations.

In 1994, the Medical Association of Nepal organized a conference which concluded with a draft manual for torture prevention and treatment. This was the first ever attempt to understand the physical and mental intensity of torture

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<sup>58</sup> ICRC *Commentary on the Geneva Conventions, IV Convention*, (Geneva, 1958, reprinted 1994), pp.38-39.

<sup>59</sup> CEJIL, above no. 54, p.6.

and its overall implications in the life of victims.<sup>60</sup> The manual reflected on multiple issues of torture, including an understanding of the definition based on CAT. The next development that took place in Nepal was the enactment of the ‘Compensation Relating to Torture Act, 1996, which fall far too short of meeting its international obligations.

Finally, Under the Rome Statute, the International Criminal Court (ICC) functions as a judicial body in order to respond to impunity. It enjoys jurisdiction to prosecute crimes, *inter alia*, against *jus cogens* and humanity. The Rome Statute lists genocide, crimes against humanity, and war crimes as crime prosecutable under it. Under the Statute, an act of torture is a crime against *jus cogens* and a crime against humanity. The countries that are unwilling or unable to prosecute such crimes are brought under the ICC jurisdiction. As a *jus-cogens* norm of international law, the prohibition of torture is a matter of prime concern for ICC. The Rome Statute defines torture as “*an intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused...*” This definition conforms to the international human rights standard. Two major crimes, namely crimes against humanity and crimes against war are prosecutable under ICC. The latter applies the Geneva Conventions.<sup>61</sup> Nepal is not a party to the Rome Statute yet.

## **8. DEFINING HUMAN RIGHTS, TORTURE AND IMPROPER USE OF FORCE**

### **8.1 Human Rights**

The UN Code of Conduct for Law Enforcement Officials (the Code) reads, “In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”<sup>62</sup> This provision envisage that all law enforcement officials, the Nepal Police, the Armed Police Force and the officials under the Ministry of Forest and Soil Conservation, are aware of what the term ‘human rights’ mean.

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<sup>60</sup> Nirakar Man Shresta and Bhogendra Sharma, (1994), *Torture and Torture Victims: A Manual for Medical Professionals*, Kathmandu, CVICT, Preface.

<sup>61</sup> The Geneva Conventions adopted in 1949 comprises of four treaties: the first Geneva Convention protects wounded and sick soldiers on land during war; the second Geneva Convention protects wounded, sick and shipwrecked military personnel at sea during war; the third Geneva Convention applies to prisoners of war; and the Fourth Geneva Convention protects civilians, including those in occupied territory.

<sup>62</sup> Art. 2, the Code of Conduct was adopted by General Assembly resolution 34/169 as of 17 December 17, 1979.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) defines human rights as rights inherent to all human beings, regardless of nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. All human beings are equally entitled to human rights without discrimination. All these rights are interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by laws in the forms of treaties, customary international law, general principles and other sources of international law. International law lays down obligations of the governments to act in certain ways or to refrain from certain acts to promote and protect human rights and fundamental freedoms of individuals or groups.<sup>63</sup>

The following points are the main contents of human rights the security forces may take as a reference in our context while maintaining law and order in the society.<sup>64</sup>

- Every human being has the inherent right to life.
- Everyone has the right against torture or other ill-treatment.
- Everyone has the right against slavery;
- Everyone has the right to liberty and security of person. For example no one could be arbitrarily arrested or kept under detention including by police authority.
- All persons deprived of their liberty shall be treated with humanity and with respect;
- Everyone has the right to liberty of movement and freedom to choose his or her residence.
- All persons shall be equal before the courts and tribunals.
- Everyone has the right to freedom of thought, conscience and religion.
- Everyone has the right to hold opinions without interference.
- Everyone has the right to peaceful assembly.
- Everyone has the right to freedom of association with others.
- Every citizen has the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives;
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

As per the Code, no law enforcement official may inflict, instigate or tolerate any act of torture or other ill-treatment, nor may any law enforcement official

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<sup>63</sup> OHCHR, Available at: <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (Accessed on January 28, 2017).

<sup>64</sup> See generally the Part III of ICCPR.

invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or ill-treatment.

### **8.2 Torture and Other Cruel Inhuman or Degrading Treatment or Punishment**

In 1948, the UDHR declared that no one be subjected to torture or CIDT. Almost after two decades, the ICCPR further reiterated the same provision making it a major international hard law on this issue. The ICCPR not only prohibited torture, inhuman, cruel or degrading treatment or punishment, but also made the prohibition non-derogable even during the state of emergency.<sup>65</sup> It means no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.<sup>66</sup> The CAT has been a distinct international law solely addressing the issue of torture. A number of previous international conventions and declarations condemned and/or prohibited torture, inhuman and degrading treatment, but none of them defined the terms. The CAT became the first international instrument to define the term ‘torture’ and give a comprehensive definition of what constitutes torture. The Convention, however, does not define the terms inhumane and degrading treatment.

### **8.3 Torture**

As per the CAT, “torture” is understood to mean any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It, however, does not include pain or suffering inherent in, or incidental to, lawful sanctions.

This definition of torture consists of four major components:

- (i) Inflicting severe physical or mental pain or suffering,
- (ii) Intentionally inflicted,

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<sup>65</sup> See generally, Arts. 4 & 7 of ICCPR.

<sup>66</sup> CAT, Art. 2.

- (iii) By or with the consent or acquiescence of State authorities, and
- (iv) For a specific purpose such as obtaining information or confession, or punishing for an act or intimidating or coercing that person.

In 1969, the European Commission in a *Greek Case* tried to define torture under Article 3, as an “inhuman” and “degrading treatment”.<sup>67</sup> In the judgment of the case, the Commission stated that all acts of torture must be treated as inhuman and degrading, and inhuman treatment also means degrading. It further stated that the notion of inhuman treatment covers at least such treatment which will cause deliberate severe suffering, mental or physical, which, in a given situation, is unjustifiable.

#### **8.4 Cruel, Inhuman or Degrading Treatment or Punishment (CIDT)**

CIDT— like torture — is prohibited in international law. The term CIDT used in the CAT at times creates confusion that they may be interchangeably used or the term ‘torture’ may cover other CIDT. Article 1 of CAT defines only ‘torture’ but not “other cruel, inhuman and degrading treatment or punishment.” Nor do any other international instruments have defined these terms. Given Article 16 of the CAT, it becomes clear that an act of torture and acts of CIDT are interrelated terms representing two different situations, especially in terms of degree or intensity of the suffering or pain inflicted. The major difference is that the acts of CIDT do not amount to torture as defined in Article 1. The United Nations declared that ‘torture constitutes an aggravated and deliberate form of CIDT.’<sup>68</sup> This means the CIDT could be an initial stage for torture. Depending on further actions to be taken it may amount to torture or just remain at the stage of CIDT.

The UN Committee against Torture has laid down that inhuman and degrading treatment consists of two elements:<sup>69</sup>

- Intentional exposure to significant mental or physical pain or suffering
- By or with the consent or acquiescence of the State administration.

Therefore, inhuman and degrading treatment is generally defined separately from torture. It includes acts that inflict mental or physical suffering, anguish, humiliation, fear or debasement, but that fall short of being torture.<sup>70</sup> And, as in relation to the torture, the acts will be regarded as amounting to CIDT in the

<sup>67</sup> Year Book of the *European Convention on Human Rights-The Greek Case*, 1969, p. 21.

<sup>68</sup> GA, A/RES/30/3452, December 9, 1975

<sup>69</sup> CAT, *General Comment No. 2*, CA T/C/GC/2 January 24, 2008.

<sup>70</sup> Columbia Center for New Media Teaching and Learning, available at: [http://ccnmtl.columbia.edu/projects/mmt/udhr/article\\_5/meaning.html](http://ccnmtl.columbia.edu/projects/mmt/udhr/article_5/meaning.html) (Accessed on January 28, 2017).

sense of CAT when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>71</sup>

As compared to torture, inhumane and degrading treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. If the pain is least severe, it may be considered as mistreatment. If the severity increases, it may amount to CIDT while the most severe pain may resort to torture as depicted in the graph below:

Mistreatment → CIDT → torture  
*Least severe* → *more severe* → *most severe*

The CAT has also emphasized that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.

The European Court of Human Rights has also tried to draw a distinction between torture and inhuman or degrading treatment stating, “In the Court’s view, this distinction is derived principally from a difference in the intensity of the suffering inflicted.”<sup>72</sup> The Court has also discussed legal police methods and degrading treatment and drawing of a line between the two is at times difficult. The Court defines degrading treatment as: “Treatment that humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance.”<sup>73</sup> The Court has also highlighted that in respect of a person who is deprived of his or her liberty, or, more generally, is confronted with police and law-enforcement officers, any recourse to physical force which has not been made *strictly necessary by his own conduct* diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3 (the prohibition of torture, inhumane and degrading treatment) in the European Convention of Human Rights. Therefore, it is the police only who is allowed to use force if it is strictly necessary due to the conduct of the person.<sup>74</sup>

For example, if a mother, for interrogation, is separated from her suckling baby by keeping them apart in adjoining rooms and the baby, on account of hunger, starts yelling for hours within the hearing of the mother and she is not allowed

<sup>71</sup> See generally Art. 16 of CAT.

<sup>72</sup> *Ireland V. The United Kingdom*, (Application no. 5310/71), January 18, 1978.

<sup>73</sup> See e.g. European Court of Human Rights, *Bouyid v. Belgium*, September 28, 2015, Para. 87.

<sup>74</sup> *Ibid*, Para. 88.

to attend her baby, both the mother and the baby have been subjected to inhuman treatment, the mother by being agonized and the baby by being deprived of the urgent attention of the mother. Neither the mother nor the child has been assaulted.<sup>75</sup>

Article 2 (2) of the CAT reads: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’ This article obviously excludes the terms ‘CIDT’ giving a misimpression that exceptional circumstances including emergency could be invoked to justify CIDT. This question must be addressed in reference to Article 4 of ICCPR under which the provision regarding rights against torture or CIDT enshrined in Article 7 is non-derogable even during the state of emergency. The prohibition in Article 7 is complemented by the positive requirements of Article 10, paragraph 1, of the Covenant, which stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>76</sup>

The prevailing Nepalese legal system does not provide any such definition. However, Section 2 (f) of the newly proposed Bill<sup>77</sup> tries to define cruel, inhuman or degrading treatment as: “Any act or treatment other than an act of torture to any other person that is against his human dignity, honor and reputation deliberately inflicted by a person holding a public office or by any other person under his instigation or consent.” However, this definition was criticized for its ambiguity and it failed to provide required guidance to a range of officials in meeting their duties under the law.<sup>78</sup>

As emphasized by the UN Committee against Torture, serious discrepancies between the definition contained in the Convention and the one incorporated into domestic law create actual or potential loopholes for impunity.<sup>79</sup>

### 8.5 Improper Use of Force

One of the leading human rights activists observed that in most Asian countries the practice of using force directly on the body of the alleged culprit is common. Thus, the improper use of force and violence by the agents of the

<sup>75</sup> *Ibid*, Separate Opinion of Judge Zekia, p. 69.

<sup>76</sup> See, UN Human Right Committee, *General Comment 20*, 44th session, 1992.

<sup>77</sup> Government of Nepal, *The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, 2014*.

<sup>78</sup> For Example see: International Commission of Jurists, (June 2106), *The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, 2014: A Briefing Paper*, p. 12.

<sup>79</sup> CAT, *General Comment No. 2*, CA T/C/GC/2, January 24, 2008, Para. 9.

State on alleged culprits follows the old model used in Europe, making the sufferings inflicted on the body of a person a spectacle for all to see.<sup>80</sup>

The UN accords a top priority to the life and safety of law enforcement officials. It regards a threat to their life and safety as a threat to the stability of society as a whole. It is also because the law enforcement officials have a vital role to play in protecting the right to life, liberty and security of the person, as guaranteed in international laws.<sup>81</sup> Therefore, the law enforcement officials are allowed to use force and firearms but only if other means remain ineffective. However, the officials, in carrying out their duty, are required to, as far as possible; apply non-violent means before resorting to the use of force and firearms. And, such use of force and firearms should be commensurate with due respect for human rights.<sup>82</sup>

The UN Basic Principles prohibits<sup>83</sup> the use of firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

The UN Code of Conduct for Law Enforcement Officials reads: “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”<sup>84</sup> This provision permits law enforcement officials including the NP, the APF and officials under the MFSC including forest guards to use force strictly on the condition that the use of force is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.<sup>85</sup> The commentary of the Code states that in no case should this provision be interpreted as authorizing the use of force which is disproportionate to the legitimate objective to be achieved. The Code<sup>86</sup> says firearms could be used only when a suspected

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<sup>80</sup> Basil Fernando, *An Examination of the Effectiveness of Human Rights Strategies for the Prevention of the Improper Use of Force and Violence*, in *Torture: Asian and Global Perspectives*, online posted on April 25, 2014, available at: <http://torturemag.org/preventing-the-improper-use-of-force-violence/> (Accessed on February 2, 2014).

<sup>81</sup> *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Preamble, adopted by the Eighth UN Congress, Havana, Cuba, August 27 to September 7, 1990.

<sup>82</sup> *Ibid.*, Art. 4 & Preamble.

<sup>83</sup> *Ibid.*, Art. 9.

<sup>84</sup> *Code of Conduct for Law Enforcement Officials*, Art. 3, adopted by the UN General Assembly Resolution 34/169 of December 17, 1979

<sup>85</sup> *Ibid.*, Commentary of Art. 3.

<sup>86</sup> *Ibid.*

offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.

Similarly, law enforcement officials, in terms of the persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the organization, or when personal safety is threatened; and shall not use firearms, except in self-defense or in the defense of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the defined danger.<sup>87</sup>

Sometimes a little tricky question arises - What is actually meant by the terms “reasonable” and “necessary”? Since there is no universally applicable answer to it, the terms must be understood in a subjective manner. It means a particular situation determines whether or not it is reasonable or necessary to use force. The US Department of Justice tried to interpret these in a different way. It states that the most important point is having an understanding of the term “improper” use of force which can be divided into two parts: “unnecessary” and “excessive.” The unnecessary use of force would be the application of force where there is no justification for its use, while an excessive use of force would be the application of more force than required where use of force is necessary.<sup>88</sup>

Neither the Basic Principles nor the Code has mentioned about the phrase ‘improper use of force’. The other associated terms could be ‘inappropriate use of force’ which is seen in various literatures. Both of these terms are subjective as well and could be understood in relation to the particular situation when the force was used. However, the use of force in situation not permitted by international laws or the Basic Principles is clearly understood as ‘improper’ or ‘inappropriate’ use of force. As described in Section 5.2.b. above, it is also established by the international human rights bodies that police and law-enforcement officials only can resort to physical force when it is strictly necessary due to the conduct of the person e.g. a person that the police wants to arrest and detain.

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<sup>87</sup> *Ibid*, Arts. 15 & 16.

<sup>88</sup> US Department of Justice, *Community Oriented Policing Service (COPS)*, available at <https://cops.usdoj.gov/default.asp?Item=1374> (Accessed on January 31, 2017).

## 9. SITUATION OF TORTURE IN NEPAL

Despite having the Compensation Relating to Torture Act, 1996 (CRTA), Nepal does not have any legislation to criminalize torture and other ill-treatments, and, therefore, failed to provide any meaningful legislative measure to redress victims concerned. Furthermore, it has not yet ratified the Rome Statute and the Optional Protocol to CAT. These facts, in principle, suggest that the grave violations of human rights under CAT and Geneva Conventions including a *jus-cogens* norm regarding torture under customary international law go unpunished in Nepal.

This section has tried to look into the situation of torture in Nepal after the advent of democracy in 1990. The discussions here will also focus on the major factors contributing to torture, measures taken by the State to improve the situation and their effectiveness.

### 9.1 Situation of Torture in Nepal before the Maoist Insurgency

In 1990, Nepalese people successfully restored the multi-party democracy. The Constitution of the Kingdom of Nepal, 1990 was promulgated in the wake of the democratic change which prohibited the use of torture. After the end of the *Panchayat* regime and promulgation of the 1990 Constitution torture became much less common.<sup>89</sup> Nevertheless, in practice, torture continued to be practiced by the police as an essential coercive means of extracting confession.<sup>90</sup> In 1994, the US State Department produced a report with certain data about the incidents of torture in Nepal. It states, although the Constitution prohibited torture, physical abuse by police is reported to be a common means of punishing or extracting confessions from those suspected of wrongdoing. The government rarely conducted investigations into allegations of police brutality and punished police officers responsible for abuses.<sup>91</sup> Taking a reference of the local and international human rights context, the report provides some additional data, “In one case, seven men and one woman were taken into custody on October 29, 1992 in connection with a murder in Sindhuli district.

The police tortured six of them in an attempt to force confessions; three were beaten into unconscious state, while two were threatened with death if they did not sign confessions. Another incident took place in Kathmandu on October

<sup>89</sup> Redress, *Country Report: NEPAL*, p. 3. available at: <http://www.redress.org/downloads/country-reports/Nepal.pdf> (Accessed on January 28, 2017)

<sup>90</sup> See generally CeLRRd, (1999), *Analysis and Reform of the Criminal Justice System in Nepal*, Kathmandu.

<sup>91</sup> US Department of State, (Jan 1994), *Nepal Human Rights Practices, 1993*.

30, 1992 after five persons were charged with bank fraud and police inflicted torture on them. On November 1, 1992, five persons were arrested on suspicion of theft in Gorkha district and severely beaten. The doctors verified that all five received wounds consistent with torture. One victim died after six days. On November 23, 1992, five persons in Pokhara were arrested after a demonstration to protest the dismissal of a school's principal and were severely beaten by police. On January 13, 1993, a Deputy Superintendent of Police in Kaski district was discharged because of the incident. But no criminal proceedings are known to have been brought against him, and he has not been disqualified from future government service".<sup>92</sup>

Nepal has a tradition of police and local authorities torturing and humiliating criminals. Despite the political change over the past decade and the prohibition of torture in the 1990 Constitution, torture as a punishment is still widely perceived as acceptable. Sometimes very gruesome forms of torture are reported.<sup>93</sup>

## 9.2 During the Maoist Insurgency

The outbreak of the "People's War" in 1996 led to the situation where torture was practiced on a massive scale, primarily as part of the counter-insurgency operations.<sup>94</sup> As provided by the records of CVICT, the figure of people tortured doubled each year since the beginning of the insurgency in 1996. It is claimed that over 1,800 cases were reported each year. Some 17,000 people had been subjected to torture.<sup>95</sup> The proportion of torture during the insurgency was, as reported by the NHRC, around 67 per cent.<sup>96</sup> In 1999, the CeLRRd reported the 67 per cent of torture prevalence in Nepal. Of the incidents of torture, 50% of detainees reported about physical abuses.<sup>97</sup>

From 1992 to 2000, at least 23 people reportedly died as a result of torture and more than 200 persons disappeared between 1997 and 2002.<sup>98</sup> The main perpetrators of torture reportedly were *police personnel*, including the *Anti-*

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<sup>92</sup> *Ibid.*

<sup>93</sup> Amnesty International, *NEPAL Make Torture a Crime*, AI Index: ASA 31/002/2001, p. 2 available at <https://www.amnesty.org/en/documents/asa31/002/2001/en/> (Accessed on January 31, 2017).

<sup>94</sup> Redress, *Country Report: NEPAL*, p. 3. available at: <http://www.redress.org/downloads/country-reports/Nepal.pdf> (Accessed on January 28, 2017)

<sup>95</sup> Quoted in Shambhu P. Khanal, *Right against Torture in International Law: A Case Study of Nepal*, (2012), Ph.D. Thesis submitted at the Faculty of Law, Tribhuvan University Nepal, p. 124.

<sup>96</sup> NHRC, (2013), *Study on the Insurgency Related Torture and Disability*, p. 18.

<sup>97</sup> CeLRRd, (1999), *Analysis and Reform of the Criminal Justice System in Nepal*, Kathmandu, pp. 131 - 205; Also See, CeLRRd, (2002), *Baseline Survey on Criminal Justice System of Nepal*, Kathmandu, p. 85.

<sup>98</sup> INSEC *Human Rights Year Book*, cited by Redress, above n. 100, p. 4.

*Terrorist Unit, forest guards, authorized senior prisoners, local administrative officers and as of recently, military personnel and the armed police.*<sup>99</sup>

After 1996 and especially since November 2001, the majority of the torture victims were those who were suspected of supporting or belonging to the Maoist groups. Marginal and poor people including members belonging to ethnic minorities were more victimized than others.<sup>100</sup> On the other hand, the Maoists abducted thousands of people in course of the armed conflict. They inflicted torture on the abductees in most of the cases. Many of them were even killed. According to the information provided by INSEC, the rebels abducted 22,165 persons from 1996 to 2004.<sup>101</sup>

In September 2005, the UN SRT, Mr Manfred Nowak, undertook a visit to Nepal. After visiting a number of detention facilities, and based on various testimonies, he concluded that ‘torture and ill-treatment are systematically practiced in Nepal by the police, APF and the RNA primarily to extract confessions and to obtain intelligence in relation to the conflict.’<sup>102</sup> Finally, the SRT informed the Geneva-based panel that Nepal was the only country out of four he visited (Georgia, Mongolia, Nepal, and China) on fact-finding missions where “torture was inflicted on a systematic way.”<sup>103</sup> In 2005, the CAT expressed its grave concern about an exceedingly large number of consistent and reliable reports concerning the widespread use of torture and ill-treatment by law enforcement officials and, in particular, the RNA, the APF and the NP, and the absence of measures to ensure the effective protection of all members of society.<sup>104</sup>

### 9.3 Post-Maoist Insurgency

The Maoist insurgency came to an end after the signing of the Comprehensive Peace Agreement (CPA) on 21 November 2006. The People’s Movement or *Janaaandolan II* led to the creation of an environment in which the agreement was signed. As a result, the House of Representatives was reinstated on April 24, 2006. The Advocacy Forum (AF) claims that of the 3,908 detainees interviewed, 27.6 per cent were subjected to torture. The Forum has also documented 67 cases of torture, one case of rape and 96 cases of abduction

<sup>99</sup> Redress, above n. 100, p. 4.

<sup>100</sup> Amnesty International, Nepal: *A Spiraling Human Rights Crisis*, p. 26

<sup>101</sup> *CAT Alternative Report to Second, Third and Fourth Periodic (Combined) State Report of Nepal*, (2005), Submitted by the Human Rights Treaty Monitoring Coordination Committee, p. 12

<sup>102</sup> Mission to Nepal, UN Doc. E/CN.4/2006/6/Add.5, January 9, 2006, Para. 17.

<sup>103</sup> UN News Centre, *Torture ‘conducted on systematic basis’ in Nepal: UN Rapporteur*, Posted on May 2, 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=18325&Cr=Nepal&Cr1#WJguKxhh10s> (Accessed on December 20, 2016).

<sup>104</sup> Committee against Torture, CAT/C/NPL/CO/2, April 13, 2007, Para. 13.

committed by the Maoists since the *Janaandolan II* of April 2006.<sup>105</sup> From 2006 to 2010, the AF visited a total of 1108 women in detention and found that 12.3% claimed that they were tortured or subjected to ill-treatment.<sup>106</sup>

In 2011, the State claimed before the international community that ‘Nepal does not tolerate any form of torture. It said there are no incidents of systematic torture in Nepal. There are sufficient constitutional and legal safeguards for the prevention of torture.’<sup>107</sup> However, the Office of Attorney General (OAG) itself found that torture was prevalent in the country. From late 2012 to early 2013, the OAG conducted a study on the treatment of detainees in order to determine the status about compliance of national and international human rights law. Twenty detention centers were visited in ten districts and an enquiry was conducted extensively. The enquiry found that 15 per cent of the detainees had received treatment that amounted to torture, though not systematic in nature. Such treatment included “beating by hands and fists, by sticks on the soles of the feet and kicking by boots but not for enduringly.”<sup>108</sup>

The CeLRRd with the assistance of the OAG conducted the second baseline survey of the criminal justice system of Nepal in 2012-13. The survey analyzed the national ‘statistics’ available from the annual reports of the Supreme Courts, OAG and Central Investigation Bureau of the NP. Moreover, an empirical survey was conducted in 15 districts. An analysis of the statistical information collected from the Court, the government attorney and the Police came up with the following findings:<sup>109</sup>

- 57 percent of detainees interviewed in detention centers and prisons of 15 districts reported that they were treated by investigating officers respectfully and politely.
- 17.67 percent reported impoliteness in the behaviors of investigating officers.
- 18.75 percent detainees complained about torture and other forms of ill-treatment.

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<sup>105</sup> Advocacy Forum, *Torture Still Continues*, A Brief Report on the Practice of Torture in Nepal (2006-2007), p. 2.

<sup>106</sup> Advocacy Forum, (June 2011), *Torture of Women in Detention: Nepal’s Failure to Prevent and Protect*, a published Report, p. 7.

<sup>107</sup> Report of the Working Group on the Universal Periodic Review: Nepal, A/HRC/17/5, March 8, 2011, Para. 101.

<sup>108</sup> Office of the Attorney General (OAG), *Annual Report of the Office of Attorney General, Fiscal Year 2068/69 BS*, Kathmandu, available at <http://attorneygeneral.gov.np/document/Bulletin/Bulletin10/final%20Buletine%202010.pdf> (Accessed on November 11, 2016).

<sup>109</sup> OAG/CeLRRd, (2013), *Nepalko Fauzdari Nyaypranaliko Sarvekshyan (Survey of the Criminal Justice System of Nepal)*, p. 142.

- 71.88 percent detainees reported that they had been arrested with arrest notice.

Compared to the 1999 survey, a sharp improvement in the situation was noticed in 2012.

In 2014, the Advocacy Forum interviewed 1,916 detainees in detention centers across 15 districts of Nepal. Of the total detainees interviewed, 311 (16.2 %) claimed that they had been subjected to torture or other cruel, inhuman or degrading treatment during the detention.<sup>110</sup> The 2015 round of the Universal Periodic Report (UPR) submitted by various INGOs concluded that torture and ill-treatment for the purpose of obtaining confessions is still practiced as a method of criminal investigation.<sup>111</sup> In the same year, however, the Kathmandu Resolution, 2015 recognized that the systematic torture no longer exists in Nepal.<sup>112</sup>

Major trends of this study include:

- Detainees belonging to the Dalit community reported that the act of torture inflicted on members of this community was higher at 29.8 percent;
- The ratio of torture among women was 4.5 percent, which is significantly lower than that of male average;
- Regressively enough, the juvenile detainees reported the higher rate of torture. It was 24.1 percent;
- The study found that the category of the charge makes difference in the rate of torture. 38.8 percent of the detainees arrested for theft reported that they were tortured;
- The study also established that the rate of torture in 2011 was 22.5 percent which was reduced markedly in 2014; and
- The systematic torture no longer exists in Nepal.

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<sup>110</sup> Advocacy Forum, *Torture in Nepal in 2014*.

<sup>111</sup> See, Submission to the United Nations Universal Periodic Review of Nepal (March 22, 2015) by AF, AHRC), REDRESS and OMCT, Geneva, November 3, 2016.

<sup>112</sup> Para 9, *Kathmandu Resolution on Prevention of Torture, 2015*. This Resolution adopted by the National Conference organized by KSL in partnership with DIHR held on December 8– 9, 2015 at Kathmandu, with participation from the Ministry of Home Affairs, the Ministry of Forest and Soil Conservation, the Ministry of Law and Justice, the Office of the Attorney General, the NHRC, Nepal Police, APF, National Forensic Science Laboratory, Forensic Department of the Institute of Medicine, the DIHR, the Danish National Police, academics from Tribhuvan University and KSL, and Civil Society members.

In a most recent case, the Amnesty International found that all 19 detainees interviewed, except an old man, in the Dhangadhi jail (Far-Western Terai) alleged that they had been tortured while being held by police.<sup>113</sup> This report, however, came at a time when seven police officers from the Nepal Police and the Armed Police Force, including one Senior Superintendent of Police (SSP), were brutally lynched by the protesters roaming the streets with conventional weapons on 24 August 2015. Therefore, it can be fair to say that the situation presented by the Amnesty International could be true but does not necessarily represent the general situation. But since the AI fails to take notice of violence committed by the mob, resulting in brutal killing of unarmed police personnel, its report seems unfair and biased.

But the alleged act of torture might have been perpetrated apparently in retaliation for the killings of those officers. The existing situation of torture obviously presents that the systematic torture is now eradicated in Nepal. The reduction of the incidents of torture as reported by the respondents to around 16-18 percent is a significant achievement in human rights protection and with this Nepal has occupied comparatively better position in South Asia. Furthermore, the prosecution success rate, as established by the analysis of the national statistics, has gone up 69 percent and this has been a great success in view of below 30 percent in India and around 10 percent in Pakistan and Bangladesh.

## **10. CONTRIBUTING FACTORS IN EXTANT OF TORTURE AND OTHER ILL-TREATMENTS**

The government has been criticized for cases of torture and other ill-treatments. It has been provided with pages after pages of recommendations for improvement of the situation by the international community including the UPR system, Special Procedures and the Treaty Bodies. The national and international communities, including I/NGOs have been working hard to bring this internationally unacceptable practice to an end. However, the State has expressed its commitment to abide by its international obligations. Despite this, the above study clearly shows the fact that torture and other forms of inhuman and degrading treatment and punishment still exist in Nepal. The following points, as established by the pilot study conducted by KSL and Sydney University, are found as contributing factors:

### **10.1 Failure of Enacting Anti Torture Legislation**

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<sup>113</sup> Amnesty International, (July, 2016), *NEPAL: Torture And Coerced Confessions, Human Rights Violations of Indigenous Tharus After the August 2015 Police Killings in Kailali*, p. 10.

All three Nepali constitutions promulgated after the establishment of the democratic system protected the right against torture. However, no legislation criminalizing an act of torture has been enacted yet. The only legislation enacted to address this issue is the Compensation Relating to Torture Act, 1996, which has failed to hold perpetrators accountable to torture which has been the major concern of UN and international community. The absence of law criminalizing such acts let the practice of torture go still continued, though in substantially reduced form.

### 10.2 Lack of Judicial Oversight & Admissibility of Evidence

Failure of trial judges to maintain proper oversight over the propriety of investigation fairness and vulnerability of ill-treatment and torture during detention has been attributed by most studies as the main cause behind the torture prevalence in Nepal. An empirical study presents that most judges in Nepal do not consider that it is their duty to be vigilant over the treatment of police officers to detainees during police custody.<sup>114</sup> The International Commission of Jurists (ICJ) found that there is a lack of willingness on the part of judges to pro-actively give effect to the international treaties and conventions to which Nepal is a party.<sup>115</sup> Further, it mentions that the trial judges are generally not inclined to intervene in matters of detention and this is largely inconsistent with the standards required by the human rights instruments. In 2010, the SRT expressed his concerns that the judicial process was not that functional or respected because some suspects did not have a proper medical examination, or had to confess in the absence of their lawyer.<sup>116</sup>

Though trial judges in Nepal agree to the common belief that confession is extracted by deceptive or coercive means, the same is accepted by courts as admissible evidence.<sup>117</sup> Lack of mandatory medical check-ups of suspects in a larger number of cases confirms the allegation that such confessions are accepted by courts as admissible evidence without their judicial scrutiny.<sup>118</sup> The ground reality rejects the judges' claim that the tainted confession is not used as an independent evidence for conviction. Such confessions are generally

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<sup>114</sup> Yubaraj Sangroula, (2007), *Criminal Justice System of Nepal: Legal Framework and Practices of Interrogation, Extrajudicial Confession and State of Fair Trial*, a Ph.D. Thesis, submitted at Faculty of Law, University of Delhi.

<sup>115</sup> International Commission of Jurist (ICJ), *Human Rights and Administration of Justice: Unfulfilled Obligations*, a Report on Fact Finding Mission, as cited by Sangroula Y, above no. 114.

<sup>116</sup> A/HRC/13/39/Add.6, February 26, 2010, Para. 55.

<sup>117</sup> Kathmandu School of Law, above no. 9.

<sup>118</sup> The survey of 50 cases showed that 'beating was commonly used to coerce the confession'. Moreover, observation of the interrogation of 26 suspects in two police offices noticed infliction of torture as a common phenomenon. All suspects interrogated had ended up with confession. However, none of them had been medically checked up while they were produced at the court. See, Sangroula Y, above no. 114.

obtained by a protracted interrogation sessions accompanied by the use of various forms of force, including torture. Further, the courts are not pro-active in taking prompt action for medical check-ups and actions against torture by perpetrators.

### **10.3 Lack of Resources and Required Capacity:**

The Pilot Study<sup>119</sup>, found that the working environment is characterized by a lack of basic equipment and tools required to collect evidences such as finger print lifting powder, measuring tapes and special cameras to lift picture of tiny objects. This was identified as the main reason that compelled the police to extract confessions from the suspects using torture. Police engaged in crime investigation have not only been deprived of the opportunity to specialize in this field but also are deployed to undertake any other duty as demanded. Suspects may, therefore, be interrogated by police who lack proper training experiences. This also leads to torture and other ill-treatment.

### **10.4 Stressful Over-hours of Work and Lack of Vacation**

The Police Act stipulates that every police employee should be on a constant duty, that is, 24 hours a day and 365 days a year.<sup>120</sup> Ordinarily, except on holidays, police are required to be on duty all seven days a week and work up to 20 hours by shifts. Consequently, police do not have enough time left to be together with their families or attend to their personal needs. The pilot study found that on top of the long hours, the police employees get only two meals a day. When on the streets, they have to work without access to basic amenities like drinking water and toilets. The situation of junior employees is even worse and many of them are treated very rudely or abusively by their seniors. This further worsens their frustration and dissatisfaction. In addition to this, the monthly salary they receive is inadequate to support their families and basic personal needs.

### **10.5 Dissatisfaction about Career Opportunities**

The pilot study also found that promotions to higher positions of service are based largely on subjective evaluation of work performance by their superiors. Most of the low ranking police employees see no possibility of promotions for themselves. Political influence and interference in the promotion and transfer of the employees as well as in criminal investigation were widely reported.

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<sup>119</sup> *Supra Note 117.*

<sup>120</sup> Section 12 of the Police Act, 1955 reads: For the purposes of this Act, every police employee shall be deemed to be on constant duty, and a police employee may be deputed at any time to any part of the country.

### **10.6 Defective Prosecutorial System**

The pilot study found that the police officers do not always resort to using force to obtain confession only because of its need. The presence of traditionalism and anachronism in the prosecution system and the judiciary also indirectly encourage the use of torture because they frequently expect confessions to convict the accused. The prosecutors do not make enough efforts to employ scientific approach in dealing with cases. The culture of doing scientific analysis of evidences is almost zero in prosecutorial system. The tendency to extract confession as primary evidence will only negatively encourage the police investigators to use torture as a means for such purpose.

### **10.7 Punitive Social Norms**

The pilot study also observed that the social perception that violence used for disciplining and achieving what is viewed by the community as a just cause makes the definition of improper use of force murky. 'A few slaps' or verbal abuses by police officers are not viewed as a human rights violation by the civilian or even victims. In fact, the parents of drug abusers reportedly approach the police officers asking them to put their children into custody and discipline them even if it means using some kind of torture or force. They believe that such actions will deter them from wrongdoing. Responses from the interviewed people also confirmed that the police work under pressure from the society that wishes to see criminals punished quickly and coercively and has very little regard for whether or not arrest, detention and questioning procedures are followed.

## **11. POLICIES TO PREVENT AND ELIMINATE TORTURE**

This part of the article is dedicated to explore information on polices, plans and strategies made by the government and State institutions related to protection of human rights and prevention of improper use of force, torture and cruel, inhumane and degrading treatment.

A clear national policy that expresses the intent of decision-makers to prevent and eradicate torture and other forms of ill-treatment or improper use of force is mandatory under the international law. Such policy should reflect a firm political will to bring about change in the prevailing situation. The State obligations to prevent and criminalize torture are absolute. The State cannot invoke any excuses for violation or non-fulfillment of those obligations under any circumstances including during the emergency.<sup>121</sup> Representing 'P' part of

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<sup>121</sup> CAT, Art. 2,

the PRIME concept, the discussion will focus on various policies developed by the State and other relevant institutions regarding the improvement of human rights situation including prevention of torture. The government has formulated a number of long-term and short-term plans and polices to protect and promote human rights, and to create a human rights-friendly atmosphere within various State institutions.

## 11.1 Long Term Plans and Policies

### 11.1.1 Fourth National Plan of Actions on Human Rights (2014-2018)

The Fourth National Plan of Action is adopted by the government of Nepal<sup>122</sup> with the objective of ensuring the fulfillment of the human rights obligations under various international conventions and treaties. Formulation of adequate legislative measures, by enacting new laws or through appropriate amendments to the existing ones, has been considered as a major agenda to materialize this goal.

Strengthening the national institutions by making them capable of protecting human rights has been the major policy initiative. Out of eighteen thematic areas identified in the plan of action, the following thematic areas and concerned objectives and programmes could be relevant to mention here:

#### 1 Thematic Area Legal reformation and judicial administrative

Objectives: To enact new laws on human rights and ensure revision of the existing laws.

Intervention: - Review of existing laws as required;

- Inclusion of provisions that define torture as criminal offense and penalize offenders.

#### 2 Thematic Area Nepal's international obligations

Objectives:- To enact new laws relating to human rights and review of existing laws.

- To implement the provisions relating to the Compensation Relating to Torture Act, 1996

Intervention: -Enactment of a new Act to criminalize torture.

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<sup>122</sup> Government of Nepal, (2014), *Fourth National Plan of Actions on Human Rights 2014-2018*, Kathmandu.

- Establishment of a torture compensation fund at the central level to provide immediate compensation as provisioned by the Act.

### 3. Thematic Area Human rights education

Intervention: - To develop human resources in the security sector for the protection and promotion of human rights by continuously organizing trainings on human rights issues.

- To provide trainings on human rights to civil service employees as well as the security personnel.
- To enhance knowledge and skills of the NP personnel on implementation situation of human rights laws in Nepal.
- To make personnel of security agencies participate in advanced trainings on IHRL and IHL
- To review and update training curricula of different institutions on a regular basis.
- To conduct ‘Training of Trainers’ programs to generate adequate human rights trainers in order to expand training activities on human rights, and to enhance human rights knowledge of employees of security agencies.
- To raise awareness of employees of the law enforcement agencies, judicial administration, academic institutions, and other offices of the Government of Nepal on the rights guaranteed by the Constitution of Nepal and international treaties on human rights and humanitarian laws.
- To enhance knowledge and skills on implementation of human rights laws in the NP.
- To develop human rights sensitive budget.
- To conduct trainings on human rights and principle of justice for the human resources at the quasi-judicial bodies under the MFSC.

#### **Activities:**

- Holding of training activities on different areas of human rights.
- Holding of symposiums, meetings and conferences on human rights issues.
- Incorporation of the subject of human rights into the training manuals of security forces.

- Incorporation of topics related to human rights law into training programs.
- Participation in national and international trainings related to human rights and humanitarian laws.
- Building information about topics related to international treaties and agreements on human rights.
- Holding of training programs on human rights and execution of judgments to the district forest officers, assistant forest officers, chief protection officers and protection officers.
- Conducting training programs on execution of judgements to the investigation officers at quasi-judicial agencies.
- Conducting training programs on basic human rights and fundamental rights.
- Conducting training programs on general principles of Justice.
- Conducting trainings for the ministry staff on human rights approaches to development.
- Conducting training programs for human resources working for the budget planning on relationship between human rights and development.
- Conducting monitoring and evaluation of the approved action plans of the Ministry of Home Affairs, NP, APF and Prison Management Department.
- Conducting a review of all training curricula of NP from the perspective of law and human rights.
- Conducting awareness-raising programs on duty of Police in implementation of law and human rights at schools and colleges.
- Holding of interaction programs on activities of Police at national and local level
- Conducting training to staff of security agencies in coordination with the human right organizations.
- Incorporation of human rights issues into training curricula.

#### *11.1.2 National Human Rights Commission Strategic Plan (2015-2020)*

The National Human Rights Commission during the first strategic plan of 2001-2003, as well as the second, third and fourth of 2004-2008, 2008-2011 and 2011-2014 respectively had prioritized the civil and political rights issues

such as killings, disappearance, abduction, torture and extrajudicial arrests. The NHRC has drafted the six-year Fifth Strategic Plan of 2015-2020, giving priority to the issues of civil and political rights such as transitional justice, social inclusion, consumers' rights, non-discrimination, human rights issues of the deprived, backward and marginalized communities in order to end the culture of impunity and make contributions to the establishment of sustainable peace. Similarly, economic, social and cultural rights were also prioritized in the changed socio-political context of the country.<sup>123</sup> The strategic plans of actions were developed with the following four strategic objectives in mind:

- To investigate the cases of human rights violation and monitor human rights situation
- To strengthen human rights promotion
- To ensure the rights of the deprived, marginalized and backward communities.
- To expand access, strengthen effectiveness, and ensure institutional development of NHRC.

In order to achieve some of the objectives, the following activities, among others, were envisaged:

- To monitor the status of the implementation of international human rights treaties and instruments to which Nepal is a party
- To regularly monitor the prisons and detention centers across the country and make recommendations to the government based on the report of the monitoring
- To organize educational trainings and seminars on human rights for the representatives of the law enforcement agencies

## **11.2 Short Term Plans and Policies**

### *11.2.1 Policies and Programs of the Government of Nepal for Fiscal Year 2014/15*

Under this, the Nepal government aimed to introduce policies and programs for maintaining constitutional supremacy, the rule of law and the protection and promotion of human rights. With regard to the security agencies, the government aimed to introduce 'Police Service with Smile'. The government

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<sup>123</sup> NHRC, *Strategic Plan 2015-2020*, p. 1.

also planned to present a bill in the legislature parliament to replace the existing Police Act, 1955.

### 11.2.2 *National Budget 2015/16*

Paragraph No. 206 of the National Budget 2015/2016 stated that law would be effectively enforced in such a way that general people will have a feeling of good governance, promote transparency, accountability and end impunity in the public offices. To increase the investigation capacity of the Nepal police, central forensic lab would be upgraded and gradually expanded in the regional offices. A budget of Rs. 160 million was allocated to enhance the investigative capacity of the NP. In total, the government of Nepal had allocated Rs. 38.36 billion for NP and the APF.

### 11.2.3 *Thirteenth Plan (2013/14-2015/16), National Planning Commission*

The thirteenth national plan had focused on two main goals regarding protection of human rights. Firstly, it intended to generally ameliorate the situation of human rights in the country. Secondly, it intended to achieve control over the problem of human trafficking and transportation. The plan, in the long term, aspired to create a positive socio-political and economic atmosphere in which rights guaranteed by the Constitution of Nepal and Human Rights Conventions and Treaties are fully protected and promoted. To address those goals, the Plan had, among others, the following objectives:

- To promote human rights education,
- To compulsorily include human rights components into the training programs for police and other service providers,
- To make mandatory arrangement for the protection of human rights of people in prison or in detention,
- To end impunity and establish the rule of law,
- To amend the existing laws or to make new laws in order to implement the fundamental rights guaranteed by the Constitution, and protect and promote human rights under the international human rights conventions and treaties.

While the plan referred to end impunity, it did not categorically refer to the issues of torture. Given the conclusion and recommendations of UPR, the pressure being put on the government by the international community for ratification of Optional Protocol of CAT (OP-CAT) appears to be

tremendous.<sup>124</sup> The government has to develop a very clear position in this regard or must have a justification to deny the ratification. A concrete and specific planning in this regard was missing in the 13th Plan.

## 12. LEGAL MEASURES

### 12.1 The Constitution of Nepal

The new Constitution of Nepal (2015) has explicitly protected the right against torture under Fundamental Rights and Duties and dedicated a whole Article addressing this issue. Article 22(1) reads:

“No person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment.”

The subsequent Clause reads:

“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.”

This is, however, not the exhaustive provision that relates to torture. Other provisions such as rights relating to justice, rights of victims of crime, and right against preventive detention are indirectly related to protecting a person from an act of physical or mental torture or to cruel, inhuman or degrading treatment.<sup>125</sup> The constitutional provision under Article 22 does not protect a person from ‘cruel, inhuman and degrading punishment’ as provided for in Article 1 of CAT. However, Article 20(3) on rights relating to justice states that any person who is arrested shall be produced before the adjudicating authority within a period of 24 hours of such arrest,<sup>126</sup> and Clause (4) guarantees that no person shall be liable for punishment for an act which was not punishable by the law in force when the act was committed nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence.

From this description, it can be said that the protection provided by the Constitution is in line with the CAT convention ratified by Nepal. However, there is a technical problem involved if looked at from the implementation point of view, that is, no law exists in Nepal that criminalizes an act of torture and imposes punishment as guaranteed by Article 22(2). The newly introduced

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<sup>124</sup> UNHRC, *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review*, A/HRC/17/5, March 8, 2011, Paras. 106 - 116.

<sup>125</sup> *Constitution of Nepal* (2015), Arts. 20, 21 & 23.

<sup>126</sup> *Ibid.*, Art. 20(3).

torture bill could be understood as a State's effort towards fulfilling this legal gap. And, for now, the Bill has received the parliamentary approval. The last recourse one can take now would be knocking the doors of the Supreme Court by invoking another provision of the constitutional remedy.<sup>127</sup>

Regarding the question of derogation, the Constitution prescribed Article 22 as non-derogable Article even during the state of emergency.<sup>128</sup> The constitutional provision establishing and determining the functions, duties and powers of the NHRC is another significant provision regarding the protection of human rights.<sup>129</sup> As per the constitutional provision, the NHRC has a duty to respect, protect and promote human rights and ensure their effective implementation. While discharging these duties, it may take actions including conducting inquiries and investigation, and making recommendations for actions against human rights violators. The Constitution has further strengthened the Commission by empowering it even to exercise all such powers as of a court in respect of summoning and enforcing the attendance of any person before the Commission and seeking and recording his or her statement or information or examining evidence, and ordering the production of any physical proof.

Under the Directive Principles and Policies, the Constitution specifically provides guidance to the State about the 'policies about justice and penal systems'. The State has to pursue a policy of rendering the justice system accountable to the common people, and has to ensure that justice is delivered effectively in a speedy, impartial and easily available manner. The Constitution has adopted a policy of keeping the system of justice free from all kinds of vices of corruption and irregularities.<sup>130</sup>

## 12.2 Legislation related to Torture

Nepalese legislations are scattered in form of various Acts and therefore the issue related to torture as well could be found in different legislations. The only legislations which are considered as having a direct relation to the issue of torture are discussed here.

### *12.2.1 Compensation Relating to Torture Act, 1996 (CRTA)*

This legislation has sought to define the term 'Torture'. As per the definition provided, "Torture means physical or mental torture inflicted upon a person in detention in the course of investigation, inquiry or trial or for any other reason

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<sup>127</sup> *Ibid*, Art. 46.

<sup>128</sup> *Ibid*, Part-30, Emergency Powers.

<sup>129</sup> *Ibid*, Part-25, National Human Rights Commission.

<sup>130</sup> *Ibid*, Art.51, K1 & K2.

and include any cruel, inhuman or degrading treatment given to him/her.”<sup>131</sup> This definition, however, is far from satisfying the requirements enshrined in the CAT. The major conceptual flaws carried by this definition is that cruel, inhuman or degrading treatment of a person detained in the course of an inquiry or trial or for any other reason also comes under the definition of torture.<sup>132</sup> The definition, in fact, doesn’t clarify what the term ‘torture’ actually means. The CRTA definition is not only unclear but is also confusing.

The biggest problem with the CRTA is lack of its criminal implication and penal liability. The law prohibits torture by stating: “No person in detention in the course of investigation, inquiry or trial or for any other reason shall be subjected to torture.” But the law indirectly allows the State authority to inflict torture saying: “If any employee of Government of Nepal is held to have inflicted torture upon any person, the victim shall be provided with compensation as referred to in this Act.<sup>133</sup> And, the government of Nepal will pay the compensation on behalf of the perpetrator. The maximum punishment envisaged against the perpetrator is only departmental action which is subject to the court order.<sup>134</sup> These provisions indirectly protect the alleged perpetrator. What is more frustrating is, the government attorney, who has the constitutional mandate of prosecuting the criminal offences has to defend the alleged perpetrator.<sup>135</sup>

The Limitation provision of the CRTA as well is a problem. Here, one must be clear about the objective of this provision. The limitation here is not about filing a case against the perpetrator to punish him, but about making a claim to get mere compensation. And even for that, the victim must lodge a claim within 35 days from the date of such torture. Under the international law, torture should not be subject to any limitation period, and that any limitation period for ill-treatment must be for a significant duration.<sup>136</sup> The Human Rights Committee gave justification that a genuine fear of the authorities, geographical constraint and lack of access to the legal authorities as well as psychological effect of ill-treatment may undermine victims’ capacity to complain on time.<sup>137</sup> Nepal must remove the unreasonably short statutory limitation to comply with ICCPR obligations.<sup>138</sup>

<sup>131</sup> *Compensation Relating to Torture Act, 1996*, Section 2 (a).

<sup>132</sup> *Ibid*, See the Definitions Part.

<sup>133</sup> *CRTA, 1996*, Sections 3 & 4.

<sup>134</sup> *Ibid*, Sections 5 & 7.

<sup>135</sup> *Ibid*, Section 10.

<sup>136</sup> CAT, *General Comment No. 3*, adopted on December 13, 2012, UN Doc. CAT/C/GC/3 Para. 40.

<sup>137</sup> HRC, *Maharjan v Nepal*, Comm. No. 1863/2009, July 19, 2012, CCPR/C/105/D/1863/2009, Para. 5.5; *Mocanu & Ors v Romania* (2013), App. nos. 10865/09, 45886/07 and 32431/08, September 17, 2014, Para. 274.

<sup>138</sup> HRC, *General Comment No. 31*, Para. 18.

### 12.2.2 Evidence Act, 1974

As per Section 9, the court will not accept as evidence if the fact was expressed putting pressure on the accused with torture or with a threat to torture to that person or any other person or putting that person in a condition to express the fact against that person's will. And if the public official with a power and authority to implement the threat or the promise in relation to any charge compels the accused to express any untrue fact, the court will not take as evidence such expression.<sup>139</sup> However, the question here may arise as to how the accused can prove the fact that the evidence or the statement was made under duress because the legislation is silent on this part. Further, Section 28 of the same law provides that the burden of proof as to any particular fact lies on that person, the accused in this context, who wishes the court to believe in its existence.

### 12.2.3 Civil Rights Act, 1955

As per this Act, no accused will be compelled to be a witness against him/herself and no one shall be deprived of one's life or personal liberty. Further, the Act explicitly prohibits the practice of forced labor.<sup>140</sup>

## 12.3 Legislation related to Cruel, Inhuman & Degrading Treatment

The General Code (*Muluki Ain*) has provision that, where a person is arrested and detained, the person has to be given food and water, and if detained otherwise or against this provisions shall be considered to be an offence.<sup>141</sup> According to the Prisons Act, 1964, the detainees and the prisoners must be separated and kept in separate parts as far as possible, and detainee or prisoner should not be fettered or handcuffed in the prison.<sup>142</sup> The Chief District Officer shall take action against any employee of the prison if that person fails to fulfil his or her duties or has fulfilled duties recklessly.<sup>143</sup> The State Cases Act, 1992 obliges the investigating agency to move for a motion of remand within 24 hours of arrest along with objectives and explicit grounds.<sup>144</sup> Similarly, Some Public (Crime and Punishment) Act, 1970 provides that the person arrested must be produced before the adjudicating authority within a period of twenty four hours after such arrest.<sup>145</sup>

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<sup>139</sup> Evidence Act, 1974, Section 9(2).

<sup>140</sup> Civil Rights Act, 1955, Sections 11 to 13.

<sup>141</sup> General Code, 1963 (*Mulki Ain 2020*), No 1 of the Chapter on Unlawful Detention.

<sup>142</sup> Prisons Act, 1963, Sections 6 & 7.

<sup>143</sup> *Ibid*, Section 20.

<sup>144</sup> State Cases Act, 1992, Section 15(2).

<sup>145</sup> Some Public (Crime and Punishment) Act, 1970, Section 3.

The Police Act, 1955 provides that it is the duty of every police employees to refrain from indulging in indecent behavior and undue harassment to any person while conducting a search; and to behave the public decently, and treat women and children with full respect and due politeness.<sup>146</sup>

Under the Forests Act, 1993, if forest employee or police employee involved in the forestry work, impounds any goods or arrests any person, without any proper reason, with an intention to harass, such employee will be punished by fine.<sup>147</sup> The most problematic part of this provision is in implementation. The restrictive clause of the same Section provides that the onus of proving such intention of employee shall lie on the complainant, and given the position of person facing such problem, it is almost impossible to prove such intention.

#### 12.4 Legislations related to the Use of Force

The Government of Nepal has informed the international community with regard to the excessive use of force, the Nepalese laws, particularly the Local Administration Act and other regulations, being in line with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adding that the government has strictly pursued a policy of using force only in accordance with the international principles.<sup>148</sup>

##### 12.4.1 Local Administration Act, 1971

This Act authorizes the Chief District Officer (CDO) to order police to use baton (*lathi charge*), teargas, water cannon, and blank fire depending on necessity if the CDO believes that the procession or agitation is taking a violent or destructive turn.<sup>149</sup> If the CDO reasonably believes that the use of force in that manner is not going to maintain peace and order, then he may issue warning to the crowd, and subsequently, if such warnings deem to have no effect on the crowd, may give order to open fire below the knee. The CDO can even give a verbal order as per necessity.<sup>150</sup> Though, some safeguards including warnings and use of non-lethal force are provided, the legislation does not set out proper measures to make sure that those warnings are received and understood by all parties involved. The genuine risk of abusing this power may be perceived as the legislation does not require a prompt and independent investigation into the cases involving use of force if takes place at all.

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<sup>146</sup> *Police Act, 1955*, Section 15(1)(j)(k)(l)

<sup>147</sup> *Forests Act, 1993*, Section 51.

<sup>148</sup> HRC, *Report of the Working Group on the Universal Periodic Review*, A/HRC/31/9, December 23, 2015, Para. 65.

<sup>149</sup> *Local Administration Act, 1971*, Section 6.

<sup>150</sup> *Ibid.*

#### *12.4.2 Forests Act, 1993*

Section 55 of the Act allows forest guards to take all necessary actions including the use of necessary force for the purpose of preventing offence from taking place if a person is suspected of attempting to commit any offence under this Act or if such offence is being committed. The provision, however, is silent about the meaning of the term ‘necessary force’. There is a risk of this provision being abused. Similarly, if any person opposes or causes obstruction to the District Forest Officer while carrying out any action or while taking possession of any house or land, he or she may carry out action and take possession of the house or land by using necessary force.<sup>151</sup> If an employee deputed to the protection of the forest feels that his or her life is in danger in the course of apprehending the offender, or any person obstructs the arrest of the offender or assists the offender to escape, he or she may shoot that offender below knee.<sup>152</sup> In the absence of proper explanation, this provision poses even more danger to the public making them vulnerable to the abuse of this power. Section 59 further authorizes forest guards to arrest a person without warrant if the guard believes that the person has committed crime and may escape if he or she is not arrested.<sup>153</sup>

#### *12.4.3 National Parks and Wildlife Conservation Act, 1973*

Section 24 authorizes the State authority to arrest without warrant if there are reasonable grounds for that authority to believe that the offender is likely to escape. And, in case any offender, or any accomplices resort to violence in an attempt to free the offender or resists arrest, in case the life of the officer making the arrest appears to be in danger and has no alternative but to resort to the use of arms, then the officer may open fire aiming, as far as possible, below the knee, and if the offender or the accomplice dies as a result of such firing, it shall not be deemed to be an offense. This provision poses a real danger to those who encounter the state authority. The provision doesn’t restrict the authority to shoot below knees, as is in the general case. And, he or she is left totally immune to the criminal charge.

#### *12.4.4 Essential Goods Protection Act, 1955*

In case an offender tries to flee using or without using any force in the course of arrest, and if the situation demands the use of any arm or ammunition, the security personnel in command may issue an order to use weapon or shoot the

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<sup>151</sup> *Ibid*, Section 15.

<sup>152</sup> *Ibid*, Section 56.

<sup>153</sup> *Ibid*, Section 59.

offender below the knee, and arrest such person. Importantly, no government employee shall be punished for any death that occurred in the course of such arrest.<sup>154</sup> This legislation also does not talk about the proportionality of the threat or danger posed by the offender making it clear that the situation is reasonable and necessary for use of force that may cause death. Thus, the use of force or firearms in such manner may violate the UN Basic Principles on the Use of Force and Firearms.

### 13. NEW DEVELOPMENTS

The upcoming anti-torture laws, the Torture Control Act, the Criminal Code, the Criminal Procedure Code and Sentencing Act are expected to improve the situation. As of this writing, the Criminal Code, the Criminal Procedure Code and Sentencing Act have already passed and will come into force from August 17, 2018 and all other bills have been tabled in the Legislature Parliament and are waiting to pass through parliamentary procedures.

#### 13.1 Anti Torture Bill

The UN Human Rights Committee in its comments to the second periodic report of Nepal<sup>155</sup> has recommended Nepal to adopt a legislation defining and prohibiting torture with sanctions and remedies commensurate with the gravity of the crime in accordance with international standards. Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, which was tabled at the Legislative Parliament in November 2014, has defined and criminalized torture, and also provided a list of acts that constitute torture.

Torture has been defined almost in line with the CAT and the draft provides a list of acts constituting torture.<sup>156</sup> The proposed Bill further imposes a positive duty on officers in charge to prevent torture or ill-treatment, and has provided for responsibility of the superior officer to take actions where torture or ill-treatment is committed by those under his or her command; imposes a positive duty on all officials to inform the superior if they have knowledge that torture is likely to be inflicted; and provides for command responsibility and disallows any defense of acting under orders.<sup>157</sup> The Bill also imposes punishment against the perpetrator and compensation to the victim.<sup>158</sup> Other significant provisions are: any confession obtained through torture is inadmissible as evidence in any

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<sup>154</sup> *Essential Goods Protection Act, 1955*, Section 6.

<sup>155</sup> HRC, *Concluding Observations on the Second Periodic Report of Nepal (2014)*, CCPR/C/NPL/CO/2, para. 10.

<sup>156</sup> *Torture and Cruel, Inhumane or Degrading Treatment (Control) Bill, 2014*, Sections 2 & 4.

<sup>157</sup> *Ibid*, Sections 6 - 8.

<sup>158</sup> *Ibid*, Sections 20 & 22.

case; NHRC is recognized as an alternative body to receive complaints and investigate the incidents of torture or cruel, inhuman or degrading treatment; and the government is prohibited from extraditing persons to another State where there are substantial grounds for believing that he or she would be subjected to torture or ill-treatment, the rule of *non-refoulement*.<sup>159</sup>

The Bill, however, doesn't seek to fully implement the provisions of CAT as there are no provisions for rehabilitation of the victims of torture, no preventive mechanisms, and no guarantee of investigation of torture cases. Also, NGOs have criticised<sup>160</sup> that the list of purposes for committing torture included there is not exhaustive and that perpetrators might have acted for any other purpose; that the cruel, inhuman or degrading punishment part is missing; that maximum penalties proposed are not enough and must be increased significantly to make sure that they are commensurate with the gravity of the crime; and that the 90-day statutory limitation is still short and must be either eliminated or be made proportionate to the seriousness of this offence.

### **13.2 Criminal Code, Criminal Procedure Code and the Sentencing Act**

The Criminal Code explicitly prohibits torture and other cruel, inhuman or degrading treatment or punishment by public authorities to any person in custody. The punishment for such crimes may go up to five year imprisonment and a fine of up to Rs. 50,000. The Code further imposes equal liability on the superior who issues such order, and orders from superiors cannot be an excuse to escape the criminal liability. As regards to limitation, the Code has set a period of six months to lodge a complaint from the date of commission of such offence or when the complainant is released from the imprisonment or custody.<sup>161</sup> The Code also recognizes an offence by means of torture, cruel and inhuman or degrading manner, as factor that increases the seriousness of an offence.<sup>162</sup>

The Criminal Procedure Code says that if a person files an application by producing a reasonable ground that he or she was beaten up, inflicted torture or an offence was committed against him or her during his detention in the course of investigation, the court shall cause his or her physical examination to be carried out by a government medical doctor or practitioner.

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<sup>159</sup> *Ibid*, Sections 28, 32 & 33.

<sup>160</sup> TRIAL International et al. *Allegation Letter concerning the "Draft Torture and Cruel, Inhuman or Degrading Treatment (control) Bill", 2014*, See generally Part II.

<sup>161</sup> *A Bill to Amend and Consolidate the Law Relating to Criminal Offences* [Draft Penal Code, 2014], Sections 65 & 66.

<sup>162</sup> *Ibid*, Section 37.

And if such person is found to have been beaten up or given torture during the examination, the court shall give an order to provide treatment and interim relief to such person and a departmental action will be taken against the person who was indulged in beating or torturing that person.<sup>163</sup> According to the Sentencing Bill, an offence of torture is considered as a serious crime for which imprisonment is mandatory.<sup>164</sup>

#### 14. CONCLUDING COMMENTS

The Constitution of Nepal protects the right of any person against an act of torture, and other cruel inhuman and degrading treatment. The above discussion, however, bears testimony to the fact that various legislations prevailing in Nepal have tried to touch the issue of torture but actually fall short of providing necessary protection against such offence as required by the international law and even by the Constitution. No specific law regarding the cruel, inhuman and degrading treatment exists so far. Though the issue has been covered by several legislations scattered in various Acts, this is yet to come in a codified manner, and this does not cover the inhuman and degrading punishment part yet. The new development has produced some positive signs that the new legislation and bills will criminalize an act of torture or other cruel, inhumane and degrading treatment; imposes punishment with imprisonment on the perpetrator; provide compensation to the victims; and the evidences extracted and produced as a result of such torture will not be acceptable.

Similarly, there is no single legislation to address the issue of use of force and firearms by security personnel in Nepal. The provisions relating to this issue as well are scattered in various Acts. The major problems with the available provisions regarding the use of force and firearms in these legislations include: the provisions do not encourage the security personnel to exercise restraint in use of arms in proportion to the seriousness of the offence, to minimize damage and injury, and respect and preserve human life, and to ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment, as provided for in the Basic Principles.

Regarding the question of human rights violations, Nepal has ratified the Optional Protocol to the ICCPR which allows submission of individual communication to the Human Rights Committee. Under the National Human

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<sup>163</sup> *Ibid*, Section 22.

<sup>164</sup> *A Bill framed to determine and execute the sentence in criminal offence* [Sentencing Bill, 2014], Section 15.

Rights Commission Act, the victim or anyone on behalf of the victim, may lodge a complaint at the Commission within six months from the date of the commission of torture or within six months from the date on which a person, under control of someone else, gets released and becomes public.<sup>165</sup> By virtue of the Nepal Treaty Act<sup>166</sup> provisions of any treaty to which Nepal is a party, that is, international human rights laws, prevail over Nepalese laws in case of inconsistency.



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<sup>165</sup> *National Human Rights Commission Act, 2012*, Section 10.

<sup>166</sup> *Nepal Treaty Act, 1990*, Section 9.

# Features and Challenges of the New Criminal Codes in Nepal

**Bishwo Raj Koirala\***

## ABSTRACT

The first commission to draft a comprehensive criminal code was formed in 1955 (2012 BS) Ever since, there have been numerous efforts to draft a consolidated criminal code that would replace the older criminal statutes, but all ended in vain. Finally, National (Muluki) Criminal Code (Act) 2017, National (Muluki) Criminal Procedure (Code) Act 2017 and the Criminal Offences (Sentence Determination and Execution) Act, 2017 came into fruition. These new Codes are more scientific and comprehensive as compared to the previous ones. At the same time, the Codes have made an endeavour to make it compatible with the international instruments and to include contemporary conceptual standards developed within the criminal jurisprudence. As they are new to all of us, it is necessary to train investigation officers, prosecutors, judges and court officers too so that the desired outcomes could be reaped from these new criminal laws.

## 1. BACKGROUND

Different commissions were formed at different periods for the purpose of drafting a comprehensive Criminal Code. While talking about the Code, Nepal Penal Code, 1955 (2012 BS) was the first effort in the codification of criminal law in Nepali legal history. Nepal Law Reform Commission was formed in 1953 and the Commission drafted the complete Code in 1955. It is said that the legal provisions of the draft were highly influenced by the Indian Penal Code, 1860. The purpose of that Code was expedient to consolidate the provisions of the penal law scattered in different Nepali laws and to make

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contemporary provisions for penal law in context of changed circumstances of the country. The Code comprised of 31 different Chapters and 377 Sections.

The Criminal Procedure Code, 1977 contained 15 chapters, 165 Sections and 30 schedules to simplify criminal procedures. It had made the definitions of certain useful terms and mentioned all the procedures along with form and formats. The FIR, investigation, adjudication and judgment execution were covered by the Criminal Procedure Code. Being a foundation of Criminal Procedure Code, it plays momentous role in the field of reforming and consolidating the criminal procedure in the country. Proposed Criminal Code and Criminal Procedure Code, 2001 (2058 BS) was the third attempt made towards the codification of separate criminal Code and Criminal Procedure Code in 2001 (2058 BS). The Commission prepared and submitted Drafts of Criminal Code and Criminal Procedure Code to the Government separately.

After submission of the draft Code, the Government of Nepal formed a 5 member Preparation Committee for Implementation of Draft Criminal Code and Criminal Procedure Code. The committee performed the assigned work and submitted the report to the government within the time.

The Criminal Code, 2001 has adopted the punitive approach contrary to the approach adopted by the previous penal Codes. It means the Code without making definitions of certain crime it has prohibited or criminalized certain human conducts or behaviours as a crime and prescribed punishment for the commission of such acts or conducts including omissions. It has comprised 33 chapters and 274 Sections. The Code along with the previous provisions, the concept of conspiracy, attempt and abetment were introduced for the first time in the Code.

Crimes against the state, crimes relating to mutiny, public tranquillity, corruption, election, against the public justice, counterfeiting of coin, stamps, weights and measurement, public interest, health, safety, conveniences and morals, religion, life and human body, marriage, property, documents, defamation and criminal force etc. were covered by the Code. The Code had adopted the definitive approach i.e. firstly defined the crime and its elements and then prescribed punishment for commission of such crime. The Code had prescribed different forms of punishment including capital punishment, life imprisonment, and rigorous imprisonment with hard labour, simple periodic imprisonment, confiscation, fine and confiscation of the property of the offender. Adopting of definitive approach and first effort to codify a single consolidate Code are the significance of this Code in the history of Nepali

Criminal/Penal Law. This Code has provided a foundation for making further Codes in the future time including the recent one.

New areas like - sexual harassment, sexual abuse of children, offences relating to social discrimination and insulting behaviour, offence relating to privacy and aloneness, offence against the national and public heritage have been criminalized by the Code. It has also comprised the areas like spreading of HIV; water pollution, environment pollution and obstruction in public place etc. This Code for the first time has made the provision for compensation to victim. The Criminal Procedure Code is also significant in the field of codification. The new conceptions and practices are also included in the Code. The Committee submitted a complete report to the Prime Minister on 20 May, 2010.<sup>1</sup>

This draft Code, which has since been made into law, is more scientific and comprehensive as compared to the previous Codes since the Task Force had revised all the provisions of previous Codes. It was the first Code that introduced in the parliament as a bill but unfortunately the parliament was dissolved before passing the Bill. It was truly revised the provisions incorporated in the previous Codes and existing related legal provisions. At the same time, this Code has made an endeavour to make it compatible with the international instruments and to include contemporary conceptual standards developed within the criminal jurisprudence. Though there are some rooms to reform in it in view of theoretical and practical aspects but it can be taken as an achievement towards the effort of codification of criminal law in the history of Nepali legal system.<sup>2</sup>

Nepal has been practicing adversarial model of criminal justice system since 1960. However there were some features resembling to the inquisitorial system until 1992 A. D. Those features came to an end after the commencement of the State Cases Act, 1992. Now the police investigate the crime and the prosecutor makes decision whether or not to initiate the prosecution under the Act.

The Government Attorneys are prosecuting officers who make decision exercising the power delegated by the Attorney General.<sup>3</sup> They have the responsibility to give direction to the investigating authority in regard to investigation. They represent the Government in any court or judicial authority in cases in which the interest or concern of the Government of Nepal is

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<sup>1</sup> Prof. Dr. Rajit Bhakta Pradhananga & Shree Prakash Upreti, (2067 BS), *A Critical Observation of the Proposed Sentencing Act*.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Constitution of Nepal (2015)*, Art.158.

involved.<sup>4</sup> The Government Attorneys or prosecutors are law enforcement officers as they bring the criminal law into action.

After the effort of more than 50 years by different commissions and committees, the parliament of Nepal has passed three important laws i.e. the Muluki Criminal (Code) Act, 2017, Criminal Procedure (Code) Act, 2017 and Criminal Offence (Determination and Execution) of Sentence Act, 2017. These laws will come into practice from 17 August 2017<sup>5</sup>. Those Acts have repealed two important legislations the *Muluki Ain*, 2020 BS and State Cases Act, 2049 BS. The Muluki Ain not only consist substantive criminal law but also the procedure applied both in criminal and civil cases. Those laws have been governing the investigation, prosecution and court proceeding in cases in which the Government is a plaintiff. The new Codes not only replace those laws but also introduce some new concepts as well as procedures in the criminal justice system.

## 2. MAIN FEATURES OF THE NEW PENAL CODE

It is one of the notable features of the Code that it has incorporated the principles and fundamental aspects of criminal jurisprudence. Chapter two of the Code is related to the General principles of the criminal justice. Chapter two Section 6 of the Criminal Code describes about the lawful act. The provision makes clear that any lawful act shall be an offence<sup>6</sup>. Section 7 provides that no punishment shall be imposed except in accordance with law. This Section says No person shall be liable to punishment for doing an act not punished by law nor shall a person be subjected to a punishment which is heavier than the one prescribed by law in force when the offence was committed<sup>7</sup>.

Section 8 provides that an act done by mistake of fact shall not to be offence. There is a principle that *ignorantia facti excusat* which means that "ignorance of a fact is an excuse." According to this principle any act done under a mistaken impression of a material fact is excused. The Code has accepted this principle.<sup>8</sup> However, ignorance of law is no excuse. There is principle that *ignorantia legis non excusat*.<sup>9</sup> There is the provision of excuse for an act committed by a person who has no capacity to know the

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<sup>4</sup> *Ibid.*

<sup>5</sup> *National Penal (Code) Act, 2017*, Section 1(2).

<sup>6</sup> *Ibid*, Section 6.

<sup>7</sup> *Ibid*, Section 7.

<sup>8</sup> *Ibid*, Section 8.

<sup>9</sup> *Ibid.*

nature and consequence of the act. Section 13 of the Criminal Code provides that the act committed by a child below ten years of age shall not be considered to be an offence. Section 14 is related to the 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, characteristic, fault or consequence of such act, shall be considered to be an offence<sup>10</sup>. In this situation it is necessary to prove that the actor must be condition of unsoundness of mind, or incapable of knowing the nature, characteristic, fault or consequence of such Act.

Sections 15, 16, 17 and 18 are related to the acts done by consent not to be offence and Act done for benefit by consent not to be offence. Similarly an act done for benefit of the victim according to the consent of guardian shall not be an offence. Likewise, an act done for benefit of the victim without his/her consent shall not be an offence.<sup>11</sup> These Sections provide that act done in good faith and with due care for the benefit of a person are executable. Therefore, there is a provision that except in cases done for the purpose of preventing death or grievous hurt, whosoever does an act with the knowledge that it is likely to cause death or grievous hurt shall not be free from criminal liability. There is also an explanation in Section 18 which provides "for the purposes of Sections 16 and 17, and of this Section, the term "benefit" does not mean: a pecuniary benefit, and an act done with intention to cause death, or without any reasonable cause, a grievous hurt.<sup>12</sup>It does not means that any act done by the consent of the party or person not to be considered as an offence. Any of those Sections is considered to be another offence under the law; such act shall be considered to be an offence.

Consent may be expressed orally or in writing or by gesture or conduct<sup>13</sup>. Provided that a consent given in the following circumstances shall not be considered to be consent:<sup>14</sup>

- Where the consent is given by a person under a mistake of fact or fear or threat of any kind of injury or harm and the person doing the act in pursuance of such consent knows, or has reason to believe, that the consent was so given,
- where the consent is given by a person who, being of unsoundness of mind due to mental illness, is unable to understand characteristic, fault and

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<sup>10</sup> *Ibid*, Section 14.

<sup>11</sup> *Ibid*, Section 17.

<sup>12</sup> *Ibid*, Section 18.

<sup>13</sup> *Ibid*, Section 20.

<sup>14</sup> *Ibid*.

consequence of the consent given by him or her when he or she was of unsoundness of mind,

- where the consent is given by a child under the age of eighteen years,
- Where the consent is given under undue influence.

Section 21 of the Code is concerned about Harm caused by communication made in good faith not to be offence and Section 22 related to the act compelled by fear, threat not to be offence and there are some exceptions such as in the following circumstances, such act shall be considered to be an offence:<sup>15</sup>

- where death or grievous hurt is caused,
- where rape is committed,
- where an offence against the State is committed,
- Where the person doing such act placed himself or herself in such a situation of fear or threat, of his or her own accord or as a result of anything done by himself or herself.

Section 22(1) of the Code says the person who causes the offence to be committed by exerting fear or threat shall be punished by law as if the offence had been committed by himself or herself. Act done in good faith to prevent others from harm or injury shall not to be deemed as an offence. Similarly any Act done for private defense not considered to be offence and there is some exception of private defense. The right of private defense is not available in the following circumstances or against the following acts:<sup>16</sup>

- where there is time to have or likely to have recourse to the protection of public authorities immediately to defend the body or property of any one against illegal harm, injury at the time causing such harm, injury,
- where harm or injury caused to the body or property of a person was so caused by reason that the harm, injury doer was provoked by such person himself or herself,
- where a public servant does an act in good faith in pursuance of a judgment or order of a court,
- where a public servant does an act in good faith in the exercise of his or her official power

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<sup>15</sup> *Ibid*, Section 22.

<sup>16</sup> *Ibid*, Section 25.

- where any act is done by a person in pursuance of a direction given in good faith by a public servant in the exercise of his or her official power.

Apart from this, there are some other conditions of any Act done for private defence not considered to be offence. Notwithstanding anything written contained in above provision a person shall not be deprived of the right of private defense in the following circumstances:<sup>17</sup>

- where that person does not know or have a reasonable reason to believe that the doer of the act referred to in is a public servant and he or she is doing the act in pursuance of the judgment or order of a court or the doer does not disclose his or her identity or produce the authority under which he or she acts even if so demanded,
- where there is no reasonable reason to know or believe that the doer of the act referred to in is a public servant,
- where there is no reasonable reason to know or believe that the doer of the act referred to in) is doing such act by the direction of a public servant or the doer does not state that authority under which he or she acts or does not produce the authority under which he or she acts even if so demanded.
- While exercising the right of private defense under Section 24 or under this Section, more force than it is reasonably necessary for such defense cannot be used.

No right to cause death in exercising the right of private defense pursuant to this Chapter, no one shall have the right to cause a person's death.<sup>18</sup> Act of criminal conspiracy; attempt to commit offence and abetment of crime and to be accomplice of crime itself has been criminalized by new the Code.<sup>19</sup> Another feature of new Code is it has incorporated the factor aggravating the gravity of offence and factors mitigating the gravity of offence. Following factors, if they do exist, shall be considered as aggravating the gravity of an offence:<sup>20</sup>

- the offence was committed against the President or Head of Government or head of a foreign State,
- the offence was committed in presence of the President or Head of Government or head of a foreign State,

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<sup>17</sup> *Ibid*, Section 25(2).

<sup>18</sup> *Ibid*, Section 26.

<sup>19</sup> *Ibid*, Section 33.

<sup>20</sup> *Ibid*, Section 38.

- the offence was committed by the breach of trust,
- the offence was committed by taking benefit of or abusing a public office,
- the offence was committed with the intention of obstructing a person holding a public office in discharging his or her official duty or to cause such person to commit an illegal act,
- the offence was committed in any government office, public office or religious place,
- the offence was committed by five or more persons affiliated in a group,
- the offence was committed by taking advantage of the disturbance of public peace or landslide, flood, earthquake or natural calamity of similar nature or outbreak of epidemic, starvation or occurrence of any other crisis of similar nature,
- the offence was committed by carrying or using an arm or toxic or explosive substance or supplying electricity or using an electronic device or with the aid of a person carrying an arm, toxic or explosive substance.
- the offence was committed again by an offender already sentenced to imprisonment,
- the offence was committed by being allured of any remuneration or assurance or benefit,
- the offence was committed against a person under one's own protection or control or against the property under one's own custody,
- the offence was committed by subjecting any one to torture, cruel, inhumane or degrading treatment,
- more than one offence were committed in a single transaction/occasion/event,
- the offence was committed against more than one person in a single transaction/occasion,
- the offence was committed by abducting or taking hostage of any one,
- the offence was committed against a person under detention, custody, imprisonment or control,

- the offence was committed by a person who has a duty to provide security to any person against that person,
- the offence was committed with the intention of genocide (with intent to destroy any race, caste, or group),
- the offence was committed with the intention of causing hatred against any race, tribe, religious or cultural community,
- the offence committed was a crime against humanity,
- the offence was committed in a planned or organized manner,
- the offence was committed against an elderly person above the age of seventy five years or a person being of unsound mind by reason of physical or mental illness or a person incapable of defending himself or herself because of disability or a child,
- The offence was committed by a person who was deputed in rescue work in a motor vehicle, aircraft accident or natural calamity while being engaged in such rescue work,
- The offence was another offence committed by the same offender against the person who had already become a victim of an offence.

Similarly following act shall be considered as mitigating the gravity of an offence:<sup>21</sup>

- the offender is below eighteen years or above seventy five years of age,
- the offender had no intention to commit the offence,
- the person against whom the offence was committed had, immediately before the commission of the offence, provoked or given threat to the offender
- the offence was committed instantly as a retaliation against any grave offence committed against the offender or any of his or her close relatives,
- the offender voluntarily confessed the offence or expressed a remorse therefor, the offender surrendered to the concerned authority,
- the offender, having confessed the offence committed by him or her, has already provided or agreed to provide compensation to the victim,

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<sup>21</sup> *Ibid*, Section 49.

- the offender has diminished capacity because of physical or mental ability or disability,
- the extent of loss or harm caused to the victim and the society being insignificant,
- the offender rendered assistance in judicial proceedings by telling the truth in the court,
- the offender has confessed the guilt and committed not to commit any criminal offence in the future,
- the offence was committed under other's instigation or inducement/influence.

### 3. NEW ACTS CRIMINALIZED BY THE CODE

The criminal Code has criminalized some new acts. Chapter 1 of Part 2 under the heading of 'Offences against State' has criminalized the act of match fixing and abatement to the security personal. Part two of criminal offences describe about the offences against state. Section 49 of this chapter criminalized the act of undermining sovereignty, integrity or national unity. This article says No person shall commit, or cause to be committed, any act that gives rise to hatred, enmity or contempt on grounds of class, caste/race/ethnicity, religion, region, community or similar other ground, which is likely to jeopardize the sovereignty or geographical or territorial integrity, nationality or national unity, independence, dignity/honour, or harmonious relations between federal units, of Nepal or attempt to commit, or abet the commission of, or make conspiracy to commit, such act, or undermine or cause to be undermined the cordial relations subsisting among different castes, races or communities<sup>22</sup>.

Section 50 of the Act is related to Sedition. According to this Section, no person shall, with the intention of overthrowing the Government of Nepal or the constitutional structure, create any kind of disorder or form a military or paramilitary organization with arms and ammunitions by demonstrating or using military, paramilitary or criminal force, or make conspiracy or attempt or incitement to commit such an Act. Waging war against Nepal<sup>23</sup> or assisting the army of a State at war with Nepal and Prohibition of waging war or insurrection against friendly State<sup>24</sup> and espionage are also crimes.

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<sup>22</sup> *Ibid*, Section 49(4).

<sup>23</sup> *Ibid*, Section 53.

<sup>24</sup> *Ibid*, Section 54.

Chapter Two describes the crimes against Public Tranquillity. Section 60 prohibits unlawful assembly and Section 61 is related to Prohibition of breach of order issued to prevent or disperse unlawful assembly. Rioting and rioting<sup>25</sup> abetting rioting<sup>26</sup> are also criminal offences. Any type of act obstructing public services,<sup>27</sup> spread rumour, providing house, land or vehicle for breaching peace, holding torch procession in sensitive public area are prohibited by the Code. Offences Relating to Contempt of Authority of Public Servants, Prohibition of omission to produce document, Prohibition of making false<sup>28</sup> statement by person under oath are criminal offences. Offences against Public Justice is also introduced as a criminal offence. This chapter includes fabricating false evidence<sup>29</sup>, making or issuing false certificate, using false evidence or certificate, destroying document<sup>30</sup> concealing evidence of offence, concealment of property or fraudulent claim to property, failure to appear in violation of terms and conditions of bail is also a criminal offence.

New Code has criminalized the act of malicious investigation or prosecution<sup>31</sup>. It hopes investigation and prosecuting officers must be accountable for their official duty. Prohibition of making false complaint, Prohibition of obstruction to apprehension or rescuing from custody is also a criminal offence<sup>32</sup>. The Code criminalized the Offences against Public Interest, Health, Safety, Convenience and Morals too<sup>33</sup>. spreading infectious disease, transmitting human immuno-deficiency virus (HIV positive),<sup>34</sup> violating laws relating to communicable disease, Prohibition of adulteration of food, Prohibition of selling, distributing food by misrepresentation, Prohibition of selling or distributing goods by misrepresentation, Prohibition of hoarding consumable goods intended for sale, Prohibition of fouling water, Prohibition of setting animal free are the new criminal offences.<sup>35</sup>

The Criminal Procedure Code has introduced various new techniques, measures and procedures which are still unknown to the prosecutors, the police

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<sup>25</sup> *Ibid*, Section 63.

<sup>26</sup> *Ibid*, Section 64.

<sup>27</sup> *Ibid*, Section 86.

<sup>28</sup> *Ibid*, Section 89.

<sup>29</sup> *Ibid*, Section 90.

<sup>30</sup> *Ibid*, Section 92.

<sup>31</sup> *Ibid*, Section 99.

<sup>32</sup> *Ibid*, Section 102.

<sup>33</sup> *Ibid*, Section 104.

<sup>34</sup> *Ibid*, Section 105.

<sup>35</sup> *Ibid*, Sections 107-112.

and the court. Working with new concepts and procedure is challenging in itself.

#### 4. FEATURES AND CHALLENGES OF THE CRIMINAL PROCEDURE CODE

The Criminal Procedure Code, 2017 has adopted measures for addressing the problem of refusal to register First Information Report. According to Criminal Procedure Code if the concern police officer refuse to register a first information report by any person concerned district Attorney can forward such first information report or information to the concern police office for necessary action<sup>36</sup>. In the course of investigation into any offence, If Investigation officer<sup>37</sup> satisfied it is necessary to arrest any person immediately an application, along with the reason for such arrest, and the details disclosing the identity of the person to be arrested, as far as practicable, shall be made to the adjudicating authority for permission to issue a warrant of arrest.

If an application is made the reason for arresting appears to be reasonable, the adjudicating authority may, on the same application, give permission to issue a warrant of arrest. The order referred shall not be disclosed until the person to be arrested is arrested. If a person who is not arrested at once or there is a reasonable ground to believe that such person may abscond, escape or destroy the evidence, exhibits or proof, such person shall be arrested immediately upon issuing an urgent warrant of arrest and the matter shall be submitted to the adjudicating authority, along with the person so arrested, for permission<sup>38</sup>.

In this situation, if any person is arrested upon issuing an urgent warrant of arrest no other investigation related proceedings related to such offence may be initiated without obtaining permission from the adjudicating authority. This is a distinctive provision of the procedure Code<sup>39</sup>.

Criminal Procedure Code has permitted public to apprehend the person committing crime and hand him/her over to the police. Section 9 (8) says, if the police is not available for the time being at the time of the commission of any offence, any person who is present at the time of the commission of that offence or who is eye witness thereto may prevent the person committing such

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<sup>36</sup> *Criminal Procedure (Code) Act, 2017*, Section 5(1).

<sup>37</sup> *Ibid*, Sections 1 & 2.

<sup>38</sup> *Ibid*, Section 9(6).

<sup>39</sup> *Ibid*, Section 9(7).

offence from going away or escaping and hand him or her over to the nearby police office.<sup>40</sup>

Section 17 of the Criminal Procedure Code says that the concerned person shall assist in investigation by giving answer to the best of his knowledge to any question asked by the investigating authority in connection with any offence being investigation. Though, no person shall be compelled to give any answer which might be of self-incriminatory nature. Section 30 of the procedure Code has permitted investigating authority to investigate outside the Nepal on the basis of bi-lateral treaty. Similarly, such investigation can be conducted by the competent authority of the country where offences was committed. Section 30(2) two of this Section says investigation conducted by such competent authority of the country where offences was committed the language of papers or documents can be translate into Nepali language.<sup>41</sup>

According to Section 34 if it is not practicable to file a case on any minor offence of any specific type or it does not substantially affect public interests government attorney may, with the approvable of the Attorney general decide not to file a case.<sup>42</sup> Section 35 permits the prosecution to file additional charge sheets and Section 36 is related to alteration in charge sheets and Section 37 give power to issue order to correct minor errors. Section 116 assures that any case field in the court on any offence under schedule 1&2 of penal Code shall not be withdrawn. However, there are some exceptions. The Code itself have negative list of the cases which can't be withdrawn. Similarly, according to Section 117 any case under schedule 3 and schedule 4 may be compromised at any stage with the consent of the parties to the case. Section 118 provides procedure for compromise. There is also a provision of mediation in Section 120.

One of the main features of the Criminal Procedure Code is the provision of pre-trial conference. Section 24 of Criminal Procedure Code provides about pre-trial conference. Where the accused has not confessed the offence the court may order to hold a meeting of the plaintiff and the defendant in order to ascertain the matter to be adjudged in the case.<sup>43</sup> Where an order is made to hold a meeting the plaintiff, defendant and the accused, in respect of a case in which the Government of Nepal is a plaintiff, shall also appear before the court, and if such an accused so wishes, his or her law practitioner may also

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<sup>40</sup> *Ibid*, Section 9(8).

<sup>41</sup> *Ibid*, Section 30(2).

<sup>42</sup> *Ibid*, Section 34.

<sup>43</sup> *Ibid*, Section 24.

appear. In the meeting the plaintiff and the defendant may present claim and defence and evidence relevant there to respectively<sup>44</sup>. The court may ascertain the matter to be adjudged in a court from the claim, defence and evidence submitted by the plaintiff and the defendant.

## **5. FEATURES OF THE CRIMINAL OFFENCES (SENTENCING AND EXECUTION) ACT, 2017**

Sentencing Act is an important achievement and development of criminal justice system of Nepal. This Act has recognized the necessity of separate hearing for determination of sentence after convict. According to the Section 9 of the Code separate hearing to be conducted for determining the sentence<sup>45</sup>. Section 8 says sentence to be determined after conviction. Propose of sentence, matter to be taken into account in determining sentence ,ground for determining sentence, matters to be set out in determining sentence are clearly indicating in the Code . These are really good-looking features of the Code.

## **6. CHALLENGES OF THE CODES**

The new Code has criminalized various acts which have not been taken as a crime until now. It would be serious challenges for stakeholders to inform public about the outer limits of the crime. Enforcement of the legal provision is also a challenge. Criminal Procedure Code has increased the responsibility of Attorney General in investigation of crime. Attorney General has to carry out other different regular duties. Because of additional works he might be overburdened.

Similarly, Attorney General should play vital role for drafting rules for investigation, drafting guidelines for investigation procedure to make clear, simple and manageable.<sup>46</sup> Attorney General has right to constitute investigation team for any specific case. These are some challenges for Attorney General. Attorney General has the responsibility to make guidelines and directives on withdrawal of the case as well as his/her opinion are necessary for withdrawal. Generally Attorney General defends the government's decision and he/she may not go against the government. However, advocating on behalf of the Government decision to withdraw a case which is filed as per the authority delegated by him is itself a challenging task.

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<sup>44</sup> *Ibid*, Section 124.

<sup>45</sup> *Criminal Offences (Sentence Determination and Execution) Act, 2017*, Section 9.

<sup>46</sup> *Criminal Procedure (Code), Act, 2017*, Section 197.

The new Criminal Procedure Code has increased the role, function and duties of the prosecutors. Whether or not to register the First Information Report would be a primary function of the police.<sup>47</sup> According to the provision of the Code, prosecutors may render a decision about it.

The prosecutors have to direct the investigations and make decision regarding prosecution in newly criminalised acts. He also has to be involved in two types of hearing, namely the conviction hearing and sentencing hearing which is new in our context.<sup>48</sup> These acts have created challenges in the functioning of the prosecutors.

At present Prosecutors are filing the charge sheet only under the schedule 1 of state case Act 2049. Other cases are filed by investigating officers of the respective subjects. However, Criminal Procedure Code gives full responsibility of the prosecution to prosecutors in cases where the government is the plaintiff. The officers of the respective government office will be responsible for investigating those offences. Police officers will be responsible for investigating offences in schedule-1 and the respective government office or officer will be responsible for investigating offences listed in schedule-2. But the responsibility for filing the charge sheet lies with the prosecutor. Because of these additional responsibilities added more workload to the prosecutors.

Investigating officers shall face the challenge while arresting the accused. No person shall be detained without the permission from the court or by the judicial authority. At emergency, it will be datable. Though, it would not be possible in some situation to get of prior permission of arrest warrant. Getting prior permission of arrest warrant might be debatable and criminals can be escaped from serious cases.

According to Annual report of the Attorney General 2017, prosecutors are overloaded with work and it has been very difficult for them to fulfil their responsibility effectively.<sup>49</sup> It will also be a challenge of new Criminal Procedure Code. Similarly, there is a provision in the Code for making amendments to the charge sheet by making a formal request to the court, with reasons, after the approval of the Attorney General<sup>50</sup>. This provision is applicable and relevant if additional evidence is found before final hearing of the case. Making amendments to the charge sheet and filing the additional

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<sup>47</sup> *Ibid*, Section 10.

<sup>48</sup> *Ibid*, Section 9.

<sup>49</sup> Office of the Attorney General, *Annual Report of the Attorney General, 2017*, p. 19.

<sup>50</sup> *Criminal Procedure (Code), Act, 2017*, Section 36.

charge sheet will be a challenge for maintaining consistency in work and making the prosecutors work accountable and transparent.

If the prosecutor thinks, after filing the charge that further investigation is necessary; the prosecution may file petition to the court requesting for further investigation. In this situation, investigator and prosecutors should pay more attention for additional investigation and prosecution. It is also an area which may create more confusion and problem in coordination between prosecutors and investigation officer.

Prosecutors have right to decide not initiate petty and tiny offences such as theft of fewer than one thousands rupees, involves first time pick-pocketing, begging, is worth a fine of three thousand rupees or less than one month's imprisonment or both or the case of a first time offender where it is not deemed practical to file a case, and is not damaging to the overall public good. Therefore, if the accused breach the promises he/she may have to initiate prosecution. In this situation, prosecutors shall remain busy and may not be updated about the cases. We can take it as a challenge while executing. Proper implementation of these provisions and maintaining the good relationship between prosecutors and police shall be another challenge.

Prosecutors have initial power on the basis of first information report whether the case shall be prosecuted or closed. Our social value, culture and political situation may affect the decision and it would be more unmanageable. The rate of prosecution is almost 99.9% of the state case. Good understanding and coordination between the police and prosecutors is necessary for smooth functioning of this provision. There will also be a challenge created by the new Code.

Investigating officers have the power to investigate those crimes which are committed outside the country. It will be more challenging because of our existing legal system, practice, technical and international legal knowledge. An international relationship may play a vital role in this matter. Till date, there is not bilateral or any other treaty concluded between Nepal and any other country on MLA.<sup>51</sup> We have not very much familiar the process of mutual legal assistant in a formal way.

Plea bargaining system is also a new system. There are some preconditions and different procedure to bring plea bargaining in practice. There will be confusion whether the bargaining is in charge, bail or sentence.<sup>52</sup> Rebate is one

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<sup>51</sup> *Ibid*, Section 30.

<sup>52</sup> *Ibid*, Section 33.

of the benefits for accused. If the pre-condition is breached by the accused re-prosecution is necessary. The rebate will be removed. It will be more challenging to file the additional charge sheet.

The new Code has introduced the provision for examination of witness through video conference. It is very challenging to conduct testimony of the witness by video conference. According to Evidence Act 1969, there is the provision of examination of witness and defendant can cross-examine the witness.<sup>53</sup> It is not easy to accomplish examination and cross-examination by video conference.

Pleading repeatedly in one case in different types of hearing will increase the workload of the prosecutors. It has already been mentioned that prosecutors have been facing the problem of scarcity of human resource and excessive workload. According to Criminal Procedure Code, the court held hearing on extension of remand, hearing for bail, pre trial meetings, conviction hearing and sentencing hearing create excessive workload to the prosecutors.

Time period of appeal is one of the most challenging issues of new criminal Code. The court shall provide a time period of thirty days while providing the period for appeal in the cases stipulated in Schedule 1 or 2. After the expiry of the time period if the concerned party has made an application to the court with reasonable grounds, the court may provide additional thirty days for appeal. According to the provision of the Procedure Code after expiry of the period of one year of the decision it shall be deemed that the parties of the case have received the notice. Therefore, presence in the court of a lawyer or a party in the fixing date determines the notice. This provision may create problem to the prosecutors. Management of appeal in time will be a great challenge to the organization of the OAG.

Provision of parole and probation shall be another challenge. Our knowledge, skill, limited manpower and scattered responsibilities are divergent to proper functioning. Formulation of the guidelines and procedure of Parole and probation system and management of this without any disagreement is really a challenge.

Making the investigator and prosecutors accountable for malicious investigation and prosecution is also challenging. Maintaining the record properly and regular supervision is necessary for bringing this provision in practice. It needs creating specific unit for supervision and monitoring of

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<sup>53</sup> *Ibid*, Section 38.

investigation and prosecution with necessary infrastructure and human resources.

## 7. CONCLUSION

Police and Prosecutors are the authorities responsible for bringing the new criminal law in practice. The provisions of the Code has also been changed the procedure of the court. It will be new practice for the Judges. Power of the Investigating officers and use of the extra territorial jurisdiction of the courts are new trend. Process of pre-trial meeting should be clear. Similarly fair, impartial, accurate and prompt investigation is main duty of the Police. Use of technical instruments by technical man power to find out the offender is challenging role. It is necessary to make them equipped and organized by enhancing their capacity for the effective implementation of the newly enacted Codes. It is necessary to train investigation officer, prosecutors, judges and court officers too. The training program conducted by Attorney General Office will be very useful for the enhancement of the capacity of the participants. Collective efforts will helpful to meet the goal. Though, there are some conflicting provisions in the Code stakeholders should pay attention for execution.



# A Critical Analysis of the Sentencing Act, 2017

Rewati Raj Tripathee\*

## ABSTRACT

Every sentence comes with two elements: an evaluative element, which determines whether the change in well-being is desirable or undesirable, and a relational element, which determines whether the connection between the change in well-being and the prior act or omission is sufficient or insufficient. The essence of sentencing is the balancing of interests within the framework of law. The interests to be balanced are the community, the accused, the accused's family, the victim, and the victim's family. There may be various aims of criminal justice system including the prevention of crime, the fair treatment of suspects and defendants, due respect for the victims of crime, the fair labeling of offences according to their relative gravity and so on. However, the overall goal of the criminal justice system is 'the maintenance of a peaceful society through fair and just laws and procedures and protecting the human rights of the people in a civilized society.

## 1. INTRODUCTION

Sentencing is one of several stages at which decisions are taken in a criminal process that begins with decisions such as reporting a crime or arresting a suspect, and goes through to decisions to release a prisoner on parole or to revoke a community order.<sup>1</sup> Sentencing is the imposition of a punishment on an offender following conviction for a criminal offense.<sup>2</sup> Punishment is the state's

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<sup>1</sup> Andrew Ashworth, (2005), *Sentencing and Criminal Justice*, (4<sup>th</sup> ed.), Cambridge University Press, Cambridge, p.22.

<sup>2</sup> Dean John Champion, (2007), *Sentencing: A Reference Handbook*, CONTEMPORARY WORLD ISSUES, ABC-CLIO, Santa Barbara, California, p. 2.

imposition of monetary fines, forced incarceration, bodily suffering, and – in extreme cases – death.<sup>3</sup>

Punishment under 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.*<sup>4</sup> 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.<sup>5</sup>

Punishment, in its most general sense, refers to an undesirable change in a person's well-being that is seen to result from or is deliberately imposed as a response to some act or omission committed by that person or by others for whom he is deemed responsible.<sup>6</sup> It accordingly has two elements: an evaluative element, which determines whether the change in well-being is desirable or undesirable, and a relational element, which determines whether the connection between the change in well-being and the prior act or omission is sufficient or insufficient. Both elements are important, for the former tells us whether a particular change in well-being is a burden or a benefit and the latter tells us which burdens count as burdens of punishment and which do not. Only if both elements are satisfied can we properly include a particular change in well-being in our measure of the punitive effect of enforcement.

It is, moreover, deliberately imposed through official decision, generally unpleasant to the convict. Unlike quarantine, which interferes with us only contingently, the interference constituted by punishment is intended as a hardship. A person who pleads guilty to or is convicted of a crime normally faces punishment.<sup>7</sup> Herbart Morris defines punishment as 'the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person's guilty behaviour'.<sup>8</sup> According to Hart, the features of punishment are that:

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<sup>3</sup> David Boonin, (2008), *The Problems of Punishment*, Cambridge University Press, (1<sup>st</sup> edn), p. 3.

<sup>4</sup> *Stanford Encyclopedia of Philosophy*, available at [standford.edu](http://standford.edu).

<sup>5</sup> John Kleinig, (2008), *Ethics and Criminal Justice: An Introduction*, (1<sup>st</sup> ed.), Cambridge University Press, Cambridge, p. 196.

<sup>6</sup> Mark R. Reiff, (2005), *Punishment, Compensation and Law*, (1<sup>st</sup> edn), Cambridge University Press, Cambridge, p. 77.

<sup>7</sup> *Ibid.*

<sup>8</sup> Mirko Bagaric, (2001), *Punishment & Sentencing: A Rational Approach* (1<sup>st</sup> edn), Cavendish Publishing Ltd. London, p.34.

- i. It must involve pain or other consequences normally considered unpleasant<sup>9</sup>;
- ii. It must be for an offence against legal rules;
- iii. It must be an actual or supposed offender for his offence;
- iv. It must be intentionally administered by human beings other than the offender;
- v. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

When we - that is, the state - legally punish, we invoke our authority in order to inflict pain, deprivation, or some other form of suffering.<sup>10</sup> Some think legal punishment is institutionalized revenge, and that we are now above all that; we are now in an age of enlightenment, living according to humanitarian principles, and punishment is a regression to a past we have shed and that is best forgotten.<sup>11</sup> Likewise, Flew argues that punishment, in the sense of a sanction imposed for a criminal offense, consists of five elements:

1. It must involve an unpleasantness to the victim.
2. It must be for an offense, actual or supposed.
3. It must be of an offender, actual or supposed.
4. It must be the work of personal agencies; in other words, it must not be the natural consequence of an action.
5. It must be imposed by an authority or an institution against whose rules the offense has been committed. If this is not the case, then the act is not one of punishment but is simply a hostile act. Similarly, direct action by a person who has no special authority is not properly called punishment, and is more likely to be revenge or an act of hostility.

The criminal law's primary concern is the prevention of harm (sometimes for remote harm) yet still maintains that the actual occurrence of that harm is immaterial, we will begin by exploring ways that harm might be prevented. One way to prevent the harms with which the criminal law is ultimately concerned is to make the causing of harms to others more difficult. There are

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<sup>9</sup> *Ibid*, p. 37.

<sup>10</sup> Mark Tunick, (1992), *Punishment: Theory and Practice*, Berkeley: University of California Press, p. 1 [1992. available at <http://ark.cdlib.org/ark:/13030/ft4q2nb3dn/>].

<sup>11</sup> *Ibid*.

three strategies for doing this. One strategy is to increase the difficulty of causing harm by increasing the effort or natural risk required to cause harm. We put money into safes that are difficult to crack. We put our castle behind a deep moat, perhaps filled with alligators, and build high walls. We put our high-security establishment behind an electrified fence. In all sorts of ways, we try to make harming us difficult by making it impossible, costly or risky.<sup>12</sup>

## 2. THE PURPOSE OF SENTENCING

According to Justice Michael Kirby sentencing involves some of the most important decision made in society, yet even judges themselves have noted how little is written about the "moment of judicial decision" generally.<sup>13</sup> The essence of sentencing is the balancing of interests within the framework of law. The interests to be balanced are the community, the accused, the accused's family, the victim, and the victim's family. The balance is easier said than done. It is constrained by the framework of law- this is the public misconception of the process; it is more difficult than the public thinks.<sup>14</sup> It is the most difficult job that a District Court judge does; it is the complexity for the balancing which emotionally draining.<sup>15</sup>

Sentencing is an attempt to juggle objects of various sizes while walking a tightrope which is being shaken at both ends.<sup>16</sup> Sentencing as being a balancing of different interests, as discussed above, which includes the legislative requirements, principles derived from previous case law, and the interest of the parties involved. The more serious the case the more serious is the job of sentencing.

It is universally recognized that punishment is an integral part of criminal justice. Criminal justice is the field of law concerned with defining crimes, identifying people who have committed crimes, proving criminal charges by applicable legal standards and applying appropriate punishment thereto. Crime is a wrong that confers upon society a duty to punish and to set up institutions to facilitate punishment. Michael S. Moore says that "We are justified in punishing because and only because offenders deserve it."<sup>17</sup> It is this intuition of desert, generated by guilt and moral outrage, Moore says, that makes it not only *permissible* to punish wrongdoers, but that makes it morally required to

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<sup>12</sup> Larry Alexander and Kimberly Kessler Ferzan (2009), *Crime and Culpability Theory of Criminal Law*, (1<sup>st</sup> edn), Cambridge University Press, Cambridge, p. 4.

<sup>13</sup> G Geraldine Mackenzie, (2005), *How Judges Sentence?* (1<sup>st</sup> edn), The Federation Press Sydney, p. 2.

<sup>14</sup> *Ibid.*, p. 13.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 14.

<sup>17</sup> Available at <http://www.naturalism.org/criminal.htm>.

punish them, even if no other desirable outcomes follow from retribution. Punishment is an authorized act, not an incidental or accidental harm.

The purpose of sentencing is different from the purpose of the whole criminal justice system. Sentencing is one segment of the criminal justice system. Andrew Ashworth writes:

*It is important to distinguish the aims of the criminal justice system from the aims of sentencing, which merely relate to one element. The system encompasses a whole series of stages and decisions, from the initial investigation of crime, through the various pre-trial processes, the provisions of the criminal law, the trial, the forms of punishment, and then post-sentence decisions concerned with, for example, supervision, release from custody and recall procedures. It would hardly be possible to formulate a single meaningful 'aim of the criminal justice system' which applied to every stage.<sup>18</sup>*

There may be various aims of criminal justice system including the prevention of crime, the fair treatment of suspects and defendants, due respect for the victims of crime, the fair labeling of offences according to their relative gravity and so on. However, the overall goal of the criminal justice system is 'the maintenance of a peaceful society through fair and just laws and procedures and protecting the human rights of the people in a civilized society. However, goal of sentencing contributes in the achievement of the goal of criminal justice system.

According to John Champion, the goals of sentencing are<sup>19</sup>: (1) to promote respect for the law, (2) to reflect the seriousness of the offense, (3) to provide just punishment for the offense, (4) to deter the defendant from future criminal conduct, (5) to protect the public from the convicted offender, and (6) to provide the convicted offender with educational or vocational training, or other rehabilitative assistance.

In civilized society state has the responsibility to protect people by maintaining law and order in society and protecting their freedoms including the right to live without fear. For this purpose the state makes laws criminalizing harmful acts, provides police, prosecutors, courts and also providing the institutions of punishment. Individual victims may bring civil actions against the perpetrators,

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<sup>18</sup> *Supra* Note 1, at 67.

<sup>19</sup> *Supra* Note 2, at 3.

but it is in principle for the state to prosecute and (on conviction) to provide the institutions of sentencing.<sup>20</sup>

The importance of punishment being in the hands of state institutions rather than victims or other individuals resides in rule-of-law values. Decisions on punishment should be taken by an independent and impartial tribunal, not by individuals with an emotional involvement in the events. The outcome should not be dependent on whether the victim is vengeful or forgiving, but should be dependent on the impartial application of settled principles, notably principles that recognize the offender as a citizen capable of choice and that regard proportionality of sentence to offence as a key value.<sup>21</sup>

According to John Champion the purposes of sentencing are: (1) retribution, (2) deterrence and prevention, (3) just deserts and justice, (4) incapacitation and control, and (5) rehabilitation and reintegration.<sup>22</sup>

Retribution was the foremost purpose of punishment in ancient and medieval period. Retribution is aimed at the offender recognizing that he/she had done something wrong and deserved to be punished. The popular saying 'an eye for an eye' is in fact used to justify the form of retribution; death sentence for the offence of murder, cutting hand of the thief etc. In nineteenth century Emmanuel Kant in his 'The Metaphysical Elements of Justice' wrote about the judicial punishments. He wrote that retribution is only concerned with the offence that was committed and making sure that the punishment that is inflicted is in proportion to the offence.<sup>23</sup> From this viewpoint any sentence imposed for a criminal offense is designed to exact retribution for crimes committed. Perpetrators must be punished in some way in order to comply with criminal law. Punishments include jail or prison time, fines, or both. Proportionality is sought so that the greater the offense, the greater the punishment.

The next purpose of sentencing is deterrence which means teaching the lesson to the offender him/herself and the likeminded people. Deterrence is one of several rationales of punishment which may be described as 'consequentialist', in the sense that it looks to the preventive consequences of sentences. In fact, deterrence is merely one possible method of producing crime prevention through sentencing: it relies on threats and fear, whereas rehabilitation and incapacitation adopt different methods of trying to achieve a similar end, as we

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<sup>20</sup> *Supra* Note 1, at 71.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Supra* Note 2, at 4

<sup>23</sup> Available at <http://www.peterjepson.com/law/LAS-3%20Chang.pdf>.

shall see below.<sup>24</sup> Jeremy Bentham was its chief proponent, and he started from the position that all punishment is pain and should therefore be avoided. However, punishment might be justified if the benefits (in terms of general deterrence) would outweigh the pain inflicted on the offender punished, and if the same benefits could not be achieved by non-punitive methods. Sentences should therefore be calculated to be sufficient to deter others from committing this kind of offence, no more and no less. The assumption is that citizens are rational beings, who will adjust their conduct according to the disincentives provided by sentencing law. When offenders see other offenders punished for their crimes and given harsh sentences, an element of deterrence is introduced wherein potential criminals are deterred from committing crimes because of the penalties they may suffer if caught.

The purpose of sentencing is just deserts which mean that the offender must be punished as he deserves it. The principle of just desert not only requires that the wrongdoer must be punished but also that he must be punished with the sentence which fits him according to his wrongful act. If the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation or private revenge.<sup>25</sup> Judiciary attempt to match sentences imposed to the nature and seriousness of conviction offenses. Citizens are satisfied whenever criminals are punished in ways that equate with the seriousness of their crime. The public is dissatisfied whenever criminals receive lenient sentences that do not seem justified in view of the crime. Prosecutors seek penalties that satisfy the law, both technically and morally.<sup>26</sup>

Another rationale for sentencing is to incapacitate offenders, that is, to deal with them in such a way as to make them incapable of offending. In the past there was the practice of capital punishment of the murderer and chopping the hand of the thief to incapacitate him/her from committing the offense again. Capital punishment and the severing of limbs could be included as incapacitative punishments, but there are formidable humanitarian arguments against such irreversible measures.<sup>27</sup> The debate has usually concerned lengthy periods of imprisonment and of disqualification (e.g. from driving, from working with children, from being a company director).

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<sup>24</sup> *Supra* Note 1, at 75.

<sup>25</sup> *Ibid*, p. 102.

<sup>26</sup> *Supra* Note 24.

<sup>27</sup> *Ibid*, p. 80.

Rehabilitation or reintegration is the recent approach to punishment in the western world; however it was in practice in our eastern philosophy from the very beginning. There was expiatory theory of punishment in Hindu philosophy which believed that crime is a sin and the offender can expiate or repent and thereafter he/she will be accepted and rehabilitated in the society. Like deterrence and incapacitation, the rehabilitative rationale for sentencing (sometimes termed ‘resocialization’) seeks to justify compulsory measures as a means of achieving the prevention of crime, the distinctive method involving the rehabilitation of the offender. This usually requires a range of sentences and facilities designed to offer various programmes of treatment. Sometimes the focus is on the modification of attitudes and of behavioural problems. Sometimes the aim is to provide education or skills, in the belief that these might enable offenders to find occupations other than crime.<sup>28</sup> Corrections programs are supposed to correct the behavior of offenders and make them into law-abiding citizens, respectful of the rights of others.<sup>29</sup>

### 3. TYPES OF PUNISHMENT

The types and forms of punishment change according to the change in the conceptions of society regarding crimes and criminals. In the past there were various types of punishment existing in the society. Those include the capital punishment, banishment, out casting, shaving in four sides of the head, mutilation, fine, cause to eat human excreta, whipping, branding etc. The state of criminal justice – the scope and content of criminal law, the performance of criminal justice officials, public attitudes to crime, and the extent and intensity of the penal system – is often used as a broad index of how ‘civilized’, ‘progressive’, or indeed ‘truly democratic’ a country is.<sup>30</sup> Winston Churchill in his comment in the House of Common has stated<sup>31</sup>:

*The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal – a constant heart-searching by all charged with the duty of punishment – a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing*

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<sup>28</sup> *Ibid.*, p. 82.

<sup>29</sup> *Supra* Note 1, at 6.

<sup>30</sup> Nicola Lacey (2008), *The Prisoner's Dilemma: Political Economy and Punishment in Contemporary Democracies* (1<sup>st</sup> edn.) Cambridge University Press, Cambridge, p. 3.

<sup>31</sup> *Ibid.*

*faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which, in the treatment of crime and criminal, mark and measure the stored-up strength of a nation and sign and proof of the living virtue in it.*

In Nepali society there were various types of punishment including verbal reprimand, banishment, branding, mutilation, shaving of head, fine and capital punishment. In earlier Nepali society there was the practice of inflicting inhumane punishment like taking out eyes and emasculating the offender, suspending by the heels from a tree till death, flaying alive, slaying of convict and forcing him to eat human excreta.<sup>32</sup> Not only in Nepali society but also in medieval England there were various types of punishment including dislocation, branding, brodequins, ducking stool, women stretched on the rack, death by hanging, balls torture, Catherine wheel, pillory, stocks, thumbscrews, water torture etc.<sup>33</sup>

During the last several decades, sentencing practices in most states have undergone transformation. There is disagreement, however, about the number and types of sentencing systems currently used by the states. Furthermore, new sentencing schemes continue to be proposed. The following types of sentencing schemes are used in most jurisdictions: (1) indeterminate sentencing, (2) determinate sentencing, (3) presumptive sentencing, and (4) mandatory sentencing. Beyond those four categories, other hybrid sentencing schemes have been devised.<sup>34</sup>

Indeterminate sentencing involves setting explicit upper and lower limits on the amount of time to be served by the offender, with one's early-release date (from either prison or jail) determined by a parole board. The judge may sentence an offender to "one to ten years," or "not more than five years," and a parole board determines when the offender may be released within the limits of those time intervals based on the inmate's institutional behavior.<sup>35</sup>

Determinate sentencing denotes a fixed term of incarceration that must be served in full, less any "good time" earned while in prison. Good time is a reduction in the time served, amounting to a certain number of days per month for each month served. If inmates obey the rules and stay out of trouble, they accumulate good-time credit that accelerates their release.

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<sup>32</sup> Shesh Raj Siwakoti (ed.), (1990), *Justice*, Vol 1, Gyangun Research Pvt. Ltd., Kathmandu.

<sup>33</sup> Available at [Medieval-life-and-times.info](http://Medieval-life-and-times.info).

<sup>34</sup> *Supra* Note 2, at 6.

<sup>35</sup> *Ibid*, p. 7.

Presumptive or guidelines-based sentencing is a specific sentence, usually expressed as a range of months, for each and every offense or offense class. The sentence must be imposed in all unexceptional cases, but when there are mitigating or aggravating circumstances, judges are permitted some latitude in shortening or lengthening sentences within specific boundaries. Mandatory sentencing is the imposition of an incarcerative sentence of a specified length, for certain crimes or certain categories of offenders, in which the judge has no discretion in regard to determine the term of incarceration.

Nowadays the approaches to punishment have changes leading to the change in the forms and types of punishment. In most of the jurisdictions the judges are provided latitude to determine the sentences based on aggravating and mitigating factors. Generally the following types of punishment are in practice in the world today:

### **3.1 Pecuniary Punishment**

Imposing monetary fine is the most common type of punishment prevailing in the ancient times as well as in the present day world. Pecuniary punishment involves imposition of financial burden to the offender. Law prescribes certain amount of money as punishment for violation of criminal law. Apart from fine there is the practice in some countries of confiscating the property of the accused. There are various provisions in Nepali criminal law imposing fine to the wrongdoer. In various cases the fine accompany with imprisonment in serious cases.

### **3.2 Corporal Punishment**

Corporal punishment means the infliction of pain to the defendant's body. It is the infliction of pain on the body by any device or method as a form of punishment. Such type of was in practice in the ancient times. Different types of corporal punishment were in use in the ancient and medieval times including flogging, branding, or mutilation etc. It was assumed that the injured criminal would be less likely to commit other crimes, but this assumption was never proved, and in fact, one theory holds that severe corporal punishment increases the likelihood of further criminal acts. In the 20th century, corporal punishment fell into disfavor in many countries, including the United States. It was replaced with penal methods that provide correctional goals, such as psychological guidance and vocational training programs in prisons.<sup>36</sup>

#### *a) Physical Torture*

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<sup>36</sup> Microsoft ® Encarta ® 2008, Microsoft Corporation.

Physical Torture is the most ancient form of the corporal punishment. Mutilating or chopping the part of the body, whipping, branding with a heated coin and such cruel punishment are included in this category. Before the great movements of Enlightenment-inspired reform in the eighteenth and early nineteenth centuries, the criminal justice systems of the continent of Europe, like other social institutions, were inherently status-based.<sup>37</sup> As the bulk of punishment was carried out against those of low social status, and was oriented to their further degradation within an intensely hierarchical, nondemocratic social structure, many punishments – think for example of the range of corporal punishments which formed the core of the penal repertoire – were vividly, and deliberately, humiliating. Moreover, there was a clear and elaborate set of distinctions between high- and low-status penalties. By today's standards, of course, punishments for those of higher social status were also brutal.<sup>38</sup>

The key point, however, is that there was a distinction, and that punishment was regarded as an essentially, and justifiably, degrading phenomenon.<sup>39</sup> Torture was widely used as punishment.

But with the turn against the bloody ancient regime associated with modernization, codification and the political culture of the Rechtsstaat, there was a decisive turn away from these degrading forms of punishment, as there also was from practices such as torture. Indeed, aiming for dignity in punishment and rejecting the old practices of degradation became one of the self-conscious marks of the new civilization and its emerging democratic sensibility.<sup>40</sup>

Now, the use of torture is not in existence in democratic world. The penal system which is regarded as strongly accountable to the courts for reaching constitutional and otherwise appropriate standards of respect and treatment: the Rechtsstaat implies that state coercion must have constitutional justification.<sup>41</sup>

#### *b) Imprisonment*

Imprisonment is an older form of punishment in the eastern society. Kansha imprisoned his younger sister Devaki and her husband for a long period. However, until the late 18<sup>th</sup> century it was unusual to imprison guilty people for

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<sup>37</sup> *Supra Note 30*, at 32.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, p. 33.

<sup>41</sup> *Ibid.*

a long time.<sup>42</sup> Hanging and transportation were the main punishments for serious offences. Prisons served as lock-ups for debtors and places where the accused were kept before their trial. However, by the Victorian era, prison had become an acceptable punishment for serious offenders and it was also seen as a means to prevent crime. It had become the main form of punishment for a wide range of offences.<sup>43</sup>

By the 1830s, many areas in Australia were refusing to be the 'dumping-ground' for Britain's criminals. There were more criminals than could be transported. The answer was to reform the police and to build more prisons: 90 prisons were built or added to between 1842 and 1877.<sup>44</sup>

Presently imprisonment has become more popular form of punishment. Imprisonment with or without labour is in practice all over the world. Periodic and life imprisonment may be used as punishment. In this punishment the convicted offender send to jail for specific period time. The prisoner may be released early based on the record of the conduct during imprisonment.

### 3.3 Banishment

The ancient civilization of Babylon, Greece and Rome employed banishment, and England made extensive use of it for centuries. By the mid-nineteenth century, however, the English interest in banishing citizens. "No power on earth, except the authority of parliament, can send a subject of England, not even a criminal, out of the land against his will."<sup>45</sup> Exile of the offender from the country or the society and prevent the society from likely crime was thought to be the primary objective of this penalty. During Rana period there was the practice of banishing the offender from Kathmandu valley as punishment. However, this type of punishment has not been accepted by civilized world.

### 3.4 Capital Punishment

Capital punishment, also called death penalty, execution of an offender sentenced to death after conviction by a court of law of a criminal offense. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law. The term *death penalty* is sometimes used interchangeably with *capital punishment*, though imposition of the penalty

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<sup>42</sup> "19<sup>th</sup> Century Justice", available at <http://vcp.e2bn.org/justice/page11361-types-of-punishment-imprisonment.html>.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Micheal F. Armstrong, (1963), "Banishment: Cruel and Unusual Punishment", *Pennsylvania Law Review*, Vol. 111, p. 758-759, available at [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6847&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6847&context=penn_law_review), (Accessed on October 4, 2014).

is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment.

It is the most serious and optimum form of corporal punishment, which is in practice from the very ancient time to this modern world in some respect. Most of the countries in the world have abolished death penalty. However, Smith writes that the abolition of capital punishment has been debated, but in recent times it has been used mainly in compassionate cases and other instances not related to sentencing policy.<sup>46</sup> In many countries death sentences are not carried out immediately after they are imposed; there is often long periods of uncertainty for the convicted while their cases are appealed. Inmates awaiting execution live on what has been called “death row”; in the United States and Japan, some prisoners have been executed more than 15 years after their convictions.<sup>47</sup> The European Union regards this phenomenon as so inhumane that, on the basis of a binding ruling by the European Court of Human Rights (1989), EU countries may extradite an offender accused of a capital crime to a country that practices capital punishment only if a guarantee is given that the death penalty will not be sought.<sup>48</sup> There was the practice of death penalty in Nepal in the ancient, medieval and modern period in some respect. The Constitution of the Kingdom of Nepal, 1990 abolished the capital punishment. Article 13 of the Interim Constitution of Nepal, 2007 provides that no law shall be made which provides for the death penalty.

### 3.5 Rehabilitative Punishment

One of the important aims of modern sentencing is rehabilitation. Rehabilitation has always been a fundamental goal of sentencing.<sup>49</sup> This approach to sentencing reached its zenith in the 1960s, particularly in certain US jurisdictions. The 1970s are often said to have brought the decline of the rehabilitative ideal, but its adherents remain and the 1990s saw a revival of rehabilitation.<sup>50</sup> Like deterrence and incapacitation, the rehabilitative rationale for sentencing (sometimes termed ‘resocialization’) seeks to justify compulsory measures as a means of achieving the prevention of crime, the distinctive method involving the rehabilitation of the offender.<sup>51</sup>

Persons sentenced to prison may participate in rehabilitative programs including vocational and educational training. All levels of education are

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<sup>46</sup> *Supra Note 1*, at 58.

<sup>47</sup> Available at <http://www.britannica.com/EBchecked/topic/93902/capital-punishment>.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Supra Note 2*, at 4.

<sup>50</sup> *Supra Note 1*, at 82.

<sup>51</sup> *Ibid.*

offered to prisoners. Prisoners have visitation privileges with their families, as well as the right to be outdoors for at least an hour a day.<sup>52</sup>

This includes a range of sentences and facilities designed to offer various programmes of treatment. Sometimes the focus is on the modification of attitudes and of behavioural problems. Sometimes the aim is to provide education or skills, in the belief that these might enable offenders to find occupations other than crime.<sup>53</sup> Therefore the crucial questions for the sentencer concern the perceived needs of the offender, not the gravity of the offence committed.

### 3.6 Suspended Sentences

Suspended sentence means delaying of a defendant service of sentence after she/he has been found guilty of an offence in order that to allow him/her to perform a period of probation. If the defendant does not break the law during that period and fulfils the condition the sentence is dismissed. If the defendant breaks law during that period the original sentence is applied in addition to any other sentence.

Suspended sentences are given to younger or first-time offenders, and fines usually accompany most sentences of imprisonment or sentence suspensions.<sup>54</sup>

It has been useful to alleviate the strain on overcrowded prison and reform the offenders as well.

### 3.7 Non-custodial Sentencing

Non-custodial sentence is the sentence that can be served without staying in prison. Punishment other than prison or jail time involves parole, community sentence referral to attend education or rehabilitation, community service order and good behavior bond etc.. Therefore, this term is used to describe a range of sentences that the offender serves in the community. They should not be seen in any hierarchical structure nor should they be regarded as alternatives to custody. They are punished in their own rights that are to be regarded as restrictions on liberty. There are various forms of community sentences, the punishment may be used in conjunction with one another or with financial penalties.

- i. *Parole*:- Historically, parole is a concept known to military law and denotes release of a prisoner of war on promise to return. Present day

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<sup>52</sup> *Supra Note 2*, at 88.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, p. 88.

parole has become an integral part of the Anglo-American criminal justice system. It is the release from a penal or reformatory institution, of an offender who remains under the control of correctional authorities, in an attempt to find out whether he is fit to live in the free society without supervision. It is the last stage of correctional scheme of which the probation may probably be the first. It is an individualized method of treatment of the offenders and envisages a final stage of the adjustment of the incarcerated prisoners to the community.

- ii. *Probation Order*: - This is one of the oldest forms of community sentence practicing by different societies of the world differently in their own. In this kind of community sentence the offender is placed under the supervision of a probation officer for a specified period of between six months and three years. The order may include various requirements such as that the offender reside at an approved probation hostel or that he attend a specified probation center, or that he undertake psychiatric treatment and so on. Before the court gives the probation order the offender must express his willingness to comply and the court must be satisfied that the order is desirable either in the interests of the rehabilitation of protection the public from him or preventing the commission by him of further offences.
- iii. *Community Services*: - Community service involves unpaid labor to the community performed by offenders for up to 360 hours. Such community service is imposed for crimes punishable by up to one year in prison. Community service punishment may also involve fines.<sup>55</sup>

The offender who has committed an impressionable offence may be ordered to perform unpaid work such as decorating, working with disadvantaged group in society. The offender has to over 16 and has to consent to the order. Such orders are for a specified period of time between 40 and 240 hours of work and have to be completed within 12 months.

#### **4. APPROACHES OF PUNISHMENT**

Thinking about the issue of punishment gives rise to a number of questions, the most fundamental of which is, why should offenders be punished? This question might produce the following responses<sup>56</sup>:

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<sup>55</sup> *Ibid.*

<sup>56</sup> "Ethics and Criminal Justice System", p. 104, available at [http://www.sagepub.com/upm-data/5144\\_Banks\\_II\\_Proof\\_Chapter\\_5.pdf](http://www.sagepub.com/upm-data/5144_Banks_II_Proof_Chapter_5.pdf).

- They deserve to be punished.
- Punishment will stop them from committing further crimes.
- Punishment tells the victim that society disapproves of the harm that he/she has suffered.
- Punishment discourages others from doing the same thing.
- Punishment protects society from dangerous or dishonest people.
- Punishment allows an offender to make amends for the harm he or she has caused.
- Punishment ensures that people understand that laws are there to be obeyed.
- These answers may conflict to each other because some of them are based on the reason that the criminal acts should be prevented however others are based on the idea that the criminals deserve punishment. The approach of society may differ with the change of time. Three different approaches have been developed as a result of changing attitude of society in the area of punishment.<sup>57</sup> The same type of punishment may be applied with different approaches. The approaches of punishment can be discussed as follows:

#### **4.1 The Punitive Approach**

This approach of punishment is the old one and all punitive theories of the punishment are based on it. It generally looks into the past conduct of the offender. The purpose of punishment is to impose moral blame to the offender since he/she has committed wrong. It takes offender as bad and dangerous to society which cannot be reformed. Its objectives are to inflict the punishment for the protection of society. According to this approach punishment is inevitable upon the occurrence of crime. Kershner writes “A person deserves punishment because, and only because, she has performed a culpable wrongdoing”.<sup>58</sup> This approach deals with only past conduct of the criminals and does not consider about the future conduct.

Mark Reiff writes " One is to look at the rights violator, and compare the benefit received or to be received from the rights violation and the burdens

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<sup>57</sup> Ahmad Siddique, (2001), *Criminology, Problems and Perspectives* (5<sup>th</sup> edn), Lalbag, Lucknow: Eastern Book Company, p. 110.

<sup>58</sup> *Supra* Note 3, at 99.

imposed or to be imposed through enforcement. This is a measure of the punitive effect of enforcement, or punishment.<sup>59</sup> The greater the ratio of burden to benefit the more likely a potential violator will prefer to remain in the previolation state of affairs and will regret it if he does not.

This approach believed on retributive and deterrent effects of punishment considers that if the wrongdoer goes unpunished it helps in the increase in the violation of law. The punitive consideration is the pivot of this approach.

Emmanuel Kant in his Feyerabend lectures on Natural Right, has stated that the sovereign “must punish in order to obtain security”, and even while using the law of retribution, “in such a way the best security is obtained”. The state is authorized to use its coercive force to defend freedom against limitations to freedom; more particularly, since right does not entail that citizens must limit their own freedom but only that “freedom is limited” by conditions of right, it is right for another, i.e. the state, to actively limit citizens' freedom in accord with right. The state is authorized to use force to defend property rights. Kant's view, then, is that punishment of a particular individual may serve deterrent functions even when the punishment may not be based solely on deterrence as its justification.<sup>60</sup>

However, this punitive approach to punishment has been vehemently criticized by later scholars. It is also true that we cannot totally ignore the punitive approach to punishment.

#### **4.2 The Therapeutic Approach**

This approach is however modern than the punitive approach and it has universal nature. It focuses in offender rather than the offence itself. It believes in the reform of the offender who can become a useful member of society if he/she is treated properly. It regards the criminal, as a victim of the circumstances, sick person, requires treatment and psycho-social disease. Correction, rehabilitation and reformation are possible and needed for the criminal. Criminal may be re-socialized and rehabilitated as law-abiding people. This approach based on rationalist thinking, natural rights and humanitarian ground. It deals about the prison reform, probation, parole, juvenile justice, other social institutions and crime prevention, community services, open prison system and other concerned rehabilitative or treatment measures for criminals. The basic idea of this approach is not only to inflict pain or suffering to criminal but to reform him/her to make law-abiding citizen.

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<sup>59</sup> *Supra Note 6*, at 76.

<sup>60</sup> Available at <http://plato.stanford.edu/entries/kant-social-political>.

It is known as the rehabilitative or reformatory approach of punishment. However, it has some limitations and it is not applicable to all offenders. It can only be applied to selected offenders.

### **4.3 The Preventive Approach**

The primary purpose of criminal justice is crime prevention. The traditional approach to crime prevention has been to try to identify the psychological and social causes of crime and to attempt to remedy these deficiencies by treating the individual offender and/or designing special educational, recreational and employment services for groups regarded as being at risk.

An alternative is 'situational crime prevention'. It rests on two assumptions: that the criminal is a rational decision maker who only goes ahead with a crime where the benefits outweigh the costs or risks; and that the 'opportunity' to commit a crime must be there. A research finding has identified the following separate categories of crime prevention:

- Corrective prevention attempts to prevent crime by ameliorating social conditions which seem to lead to crime, e.g. by reducing overcrowding, creating viable neighborhoods, rehabilitating slums and providing community health clinics and recreation facilities.
- Punitive prevention uses police to deter crime through lawyers, the police, courts, jail and the legal system.
- Mechanical prevention emphasizes hardware such as locks, doors and grilles.
- Environmental prevention manipulates building design and the relationship between buildings and their environment to reduce opportunities for crime

Among the above categories, the second category relates to the preventive approach to punishment. It tries to prevent the crime rather than refer the punishment or treatment on the crime or criminals. It is also universal in nature and believes to eliminate those conditions, which are responsible for the occurrence of criminal activities. So that it includes the effort to improve the family relations, social solidarity and harmony. Emphasis to promote better adjustment in school, provision of education and recreation designed to produce useful and upright citizens and the use of aids in the fields of social work, medicine and psychiatry.

David Boonin sees problem in punishing the wrongdoer. He writes in his book 'The Problem of Punishment' that<sup>61</sup>

*"First punishment involves drawing a line between two different sets of people and treating the members of one group very differently from the members of the other. Surely, in general, it is wrong to treat two groups of people so differently unless there is a morally relevant difference between them. So, part of the problem is explaining why the difference between those that punishment targets and those that it does not is morally relevant. Second, punishment involves not merely treating the members of one group differently from the members of the other, but harming the members of one group and not those of the other. The fact that an act will harm someone is clearly morally relevant, so part of the problem is explaining why the difference between offender and no offender is important enough to justify acts that will harm the offender. Finally, and perhaps most importantly, punishment involves not merely acts that predictably harm offenders, but acts that are carried out precisely in order to harm them. Since it is considerably more difficult to justify intentionally harming someone than it is to justify merely foresee ably harming her, the problem of punishment is even greater than it might at first seem: we must explain not only why the line between offenders and non-offenders is morally relevant at all but, in particular, how it can be important enough to justify not merely harming those on one side of the line but intentionally harming them.*

## 5. SENTENCING MODELS

There are three major models of sentencing throughout the world namely legislative, judicial and administrative models. In legislative model the legislature sets out the sentence and the judges have no discretion to determine the sentence. In judicial model the judges exercise the discretion in determining the sentence within the range set out by the legislature. In administrative model legislature establishes a wide range of imprisonment for a particular crime, the judge imposes the sentence which is generally indeterminate and the decision to release the inmate is later determined by the administrative agency generally by a parole board.<sup>62</sup>

## 6. THE SENTENCING PROCESS

It has already been discussed above that the importance of punishment being in the hands of state institutions rather than victims or other individuals resides in

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<sup>61</sup> *Supra Note 41*, at 28.

<sup>62</sup> Prof. Dr. Rajit Bhakta Pradhananga and Shreeprakash Upreti, (2010), "An Overview of Concept and Principles of Sentencing Process", *Pokhara Law Review*, Year 1, Vol. 1, p. 9.

rule-of-law values. Therefore, the decisions on punishment should be taken by an independent and impartial tribunal, not by individuals with an emotional involvement in the events.<sup>63</sup> The outcome should not be dependent on whether the victim is vengeful or forgiving, but should be dependent on the impartial application of settled principles, notably principles that recognize the offender as a citizen capable of choice and that regard proportionality of sentence to offence as a key value.<sup>64</sup> Therefore the state has to provide the institutions for an authoritative response to crimes or wrongful acts, which constitute a public valuation of the offender's conduct.

## 7. SENTENCING HEARING

After conviction the judge has to determine the sentence to be imposed to the offender. If there is no room for the judge to use his/her discretion in determining the sentence the judge has to pronounce the sentence prescribed by the law immediately after conviction. If there is room for the judge to apply discretion to fix the sentence, the presiding judge has to take various considerations to determine the sentence.

An important part of the sentencing process is the sentencing hearing, which is the opportunity for judges to weigh any aggravating or mitigating circumstances that might influence the severity of the sentence.<sup>65</sup> The judge pronounces the sentence after hearing argument from the both sides i.e. the offender and prosecution representing the victim. The victims also contribute information about how they were affected which may have important feedback for the judge to determine the sentence in particular case. Sentencing options available to judges differ among jurisdictions. At the judge's discretion, in most cases, sentences may involve either probation with conditions or incarceration in a prison or a jail for a period of months or years, or both.

## 9. DISCRETION AND THE ART OF SENTENCING

When judges are discussing sentencing, one of the most frequent topics is discretion. We cannot deny that sentencers ought to have sufficient discretion to take account of the peculiar facts of individual cases. But does that remove the argument for bringing the rule of law as far into sentencing decisions as possible? The rule of law, in this context, means that judicial decisions should be taken openly and by reference to standards declared in advance.<sup>66</sup>

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<sup>63</sup> *Supra Note 1*, at 71.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Supra Note 2*, at 2.

<sup>66</sup> *Ibid.*, p. 72.

It is one thing to agree that judges should be left with discretion, so they may adjust the sentence to fit the particular combination of facts in an individual case. It is quite another to suggest that judges should be free to choose what rationale of sentencing to adopt in particular cases or types of case.<sup>67</sup> The major source of disparity in sentencing arises from the difference in penal philosophies among judges. There are various purposes of punishment and each of the elements has different significance in different crimes and individual commission of each crime as well. The sentencing judge has to scrutinize each of these elements from various perspectives. The Sentencing Reform Act of 1984 in the United States required the US Sentencing Commission to devise guidelines that reflected proportionality, deterrence, public protection and offenders' treatment needs – aims that were listed without recognition that they conflict, and that priorities must be established.<sup>68</sup>

There are two opposite views regarding to sentencing. One view regards sentencing as a science which could be reduced to a stable set of rules which allowed little or no discretion: many would reject that as unfair in its consequences.<sup>69</sup> According to another view sentencing is an art that and not a science, and that it is essentially an exercise of judgment rather than a question of applying rules or guidelines.

Richard E. Redding writes "Evidence based sentencing is part of a broader pattern in contemporary society that involves the use of scientific research to improve the quality of decision making. As in medicine, psychology, education, management and other fields, science now offers empirically derived practice guidelines for criminal justice which is part of a gradual trend towards the use of evidence based practices in law."<sup>70</sup>

According to another view sentencing is not a science but an art. The sentencing judge has to address the public concern and victim's attitude toward the offender and try to maintain consistency and uniformity in sentencing matters and enhance the integrity of the process. If people think that the sentencing policy is not consistent it may cause erosion in the public confidence toward the criminal justice system as a whole. Therefore, sentencing is an art not a science. One of the Queensland judge commented that

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<sup>67</sup> *Ibid*, p. 73.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Supra Note 1*, at 59.

<sup>70</sup> Richard Redding, "Evidence-Based Sentencing: The Science of Sentencing Policy and Practice", *Chapman Journal of Criminal Justice*, Vol. 1:1, available at [http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201227.pdf/\\$file/NSPI201227.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201227.pdf/$file/NSPI201227.pdf).

"The essence of sentencing is the balancing of interests within the framework of law. The interests to be balanced are the accused, the accused's family, the victim, the victim's family. The balance is easier said than done. It is constrained by the framework of law-this is the public misconception of the process; it is more difficult than the public thinks. It is the most difficult job that a District Court judge does; it is the complexity of the balancing which is emotionally draining.<sup>71</sup> Another judge says "Sentencing is an attempt to juggle objects of various sizes while walking a tightrope which is being shaken at both ends."<sup>72</sup>

Mackenzie writes "Within the metaphors of balancing, there is an underlying conceptualization of sentencing as a process whereby the judge exercises their discretion to make the factors in that individual sentencing process fit in place, so that the appropriate sentence can be given."<sup>73</sup> Mackenzie in his research based analysis presents the view of judges who see sentencing as an art. It is here<sup>74</sup>:

*"I am quick sentencer and I don't reserve judgment as I regard sentencing as an art not a science. I don't tick off all of the criteria, I don't think it is possible. ...If you set out to make sentencing science it wouldn't work. If there are too many rules to apply, then it's trying to make a science out of something which is not a science. It's like keying information into a computer and having the computer spit out the answer. This is not appropriate.*

*The art of sentencing is trying to exercise judicial discretion to come to the right outcome (if you can say that).*

## 10. THE AGGRAVATING AND MITIGATING FACTORS

The legislature has the authority over the sentencing policy however it cannot prescribe a sentence for a particular offender. Sentencing power can be restricted by statute, even to the extent of requiring the imposition of mandatory or mandatory minimum sentences. The court exercises discretionary power within the framework provided by the legislature. There are some considerations which are generally considered by the sentencing courts. These are aggravating and mitigating factors. When there are mitigating or aggravating circumstances, judges are permitted some latitude in shortening or lengthening sentences within specific boundaries.

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<sup>71</sup> *Supra* Note 13, at 13.

<sup>72</sup> *Ibid*, p. 14.

<sup>73</sup> *Ibid*, p. 15.

<sup>74</sup> *Ibid*, p. 16.

Aggravating circumstances are those factors that may increase the severity of punishment. Some of the factors considered by judges to be aggravating include the following:<sup>75</sup>

(1) whether the crime involved death or serious bodily injury to one or more victims, (2) whether the crime was committed while the offender was out on bail facing other criminal charges, (3) whether the offender was on probation, parole, or work release at the time that the crime was committed, (4) whether the offender was a recidivist who had been punished for several previous offenses, (5) whether the offender was the leader in the commission of the offense involving two or more offenders, (6) whether the offense involved more than one victim or was a violent crime, (7) whether the offender treated the victim(s) with extreme cruelty during the commission of the offense, and (8) whether the offender used a dangerous weapon in the commission of the crime and the risk to human life was high.

Likewise, mitigating circumstances are those factors considered by the sentencing judge to reduce the crime's severity. Some of the more frequently cited mitigating factors in the commission of crimes might be the following: (1) the offender did not cause serious bodily injury during the commission of the crime, (2) the convicted defendant did not contemplate that the crime would inflict serious bodily injury, (3) the offender acted under duress or extreme provocation, (4) the offender's conduct was possibly justified under the circumstances, (5) the offender was suffering from mental incapacitation or some physical condition that significantly diminished culpability, (6) the offender cooperated with authorities in apprehending other participants in the crime or in making restitution to the victims for losses suffered, (7) the offender committed the crime out of the need to secure basic necessities, and (8) the offender did not have a previous criminal record.

## 11. SENTENCING CONSIDERATIONS

Sentencing is the culmination of the criminal investigation. Police do the investigating and the offender then comes before the court.<sup>76</sup> The courts after conviction of the defendant, have a responsibility of determining an appropriate sentence. The sentencing process is designed to fix the penalty according to the law and reflect the criminality of the offender's conduct. Here is an interesting

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<sup>75</sup> *Supra* Note 2, at 9.

<sup>76</sup> *Supra* Note 13, at 21.

opinion made by a judge who took part in interview conducted by Mackenzie:  
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*"You are not free to apply any idiosyncratic notions to the sentencing task. There are no preconceived views apart from submissions put, and reading authorities, as to the massive components going into the mix. We all have a framework which we apply, and you know you have to take into account. Within these constraints, I have no preconceived notions."*

Sentencing is the process of determining the quantum of sentence not of determining the type of the sentence. It starts after conviction of the defendant in particular offense. The factors like the motive of the offender; his/her good or bad character and family environment which are not useful for conviction are significant in determining the sentence.<sup>78</sup> The sentence is imposed within the range provided by the law and according to the gravity of the offence. While imposing sentence to the offender judges have to give reason which is called sentencing remarks, which is crucial in the sentencing. Reasons have to be given for guidance of other cases and the appeal court. The reasons must be simple and easy to understand by a lay man that is the victim, his/her relatives, the defendant and his/her relatives.

## 12. SENTENCING PRACTICE IN NEPAL

### 12.1 History of Sentencing in Nepal

The Nepali society for very long period of history was governed according to Hindu religious scriptures and the ancient and medieval criminal justice system was based on Hindu philosophy. The punishment was prescribed by religious scriptures. The counterpart of the word 'punishment' is 'Danda' in Sanskrit which means a stick, staff or rod; a symbol of authority and punishment. It has been justly remarked that it is needed as retribution, restraint and reformation.<sup>79</sup> According to Manu punishment was suggested by the sages in order to cure unrighteousness and to preserve righteousness unhampered. Vishnu has pointed out that a king should show honor to the righteous and inflict punishment on the unrighteous. Yajnavalkya remarks that Danda rules over all the people, it protects them and remains awake when the guardians of law are asleep and it is regarded as Dharma.<sup>80</sup> From this it is not difficult that the objective of the

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<sup>77</sup> *Ibid*, p. 21.

<sup>78</sup> Madhav Prasad Acharya, (2051 BS), *Aparadshastra (Criminology)*, (4<sup>th</sup> edn), Ratna Pustak Bhandar, p. 225.

<sup>79</sup> Sukla Das, (1977), *Crimes and Punishment in Ancient India*, (1st ed.) Abhinav Publications, New Delhi, p. 55.

<sup>80</sup> *Ibid*, p. 56.

punishment in Hindu society was prevention of crime, deterring the potential offender and also to reform thereof. The Hindu jurists also emphasized on just punishment. They said that Danda should neither be too severe nor too mild but be just in accordance with the offences committed and that while its application without afflicting the people led to good fortune, its infliction for oppressing the subjects led to the destruction of a King. The King before inflicting punishment had to consider many aspect instead of arriving at hasty conclusions. According to Narada the nature of offense, its time and place should be carefully considered and ability and motive of the offender should be thoroughly examined before inflicting punishment<sup>81</sup> According to Yajnavalkya there was to be a searching enquiry into the whole case and the punishment would be decided after only.<sup>82</sup>

There were different types of punishment in practice at that time. Manu, Yajnavalkya and Brihaspati referred to four types of punishment like gentle admonition, harsh reproof, fine, corporal punishment and banishment.<sup>83</sup> Corporeal punishment included branding, amputation of limbs and execution. According to Brihaspati a gentle admonition should be administered to a man for light offence, harsh reproof for a crime of first degree, fine for a crime of second or middlemost degree but corporal punishment was to be reserved for graver offences.<sup>84</sup> Discretionary power was given to the authority in determining sentences. Specific punishments were generally prescribed for particular crimes. To start with thief, we find that from nominal fines to death sentences were prescribed by the law givers according to the gravity of the offense However, Brahmans were exempted from capital punishment however banishment was a substitute for it.

The observations above suggest some idea about the sentencing system of the ancient Hindu society. As the ancient Nepali society was governed according to Hindu Dharmashastra the traditional criminal justice system was also based on Hindu scriptures. *Manudev* in his pillar of *Changunarayan* had appreciated his father with the adjectives like good, endowed with *Dharma* (righteousness), *Karma* (outstanding act) and *Yasa*(fame), having knowledge on penology and religion. The inscription of *Handigaun, Narayansthan* makes reference of the Smritis of *Manu, Yama, Brihaspati* and *Usanas-smriti*.<sup>85</sup> Sanskrit names of the

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<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid*, p. 57.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> Shree Ram Goyal, (1973), *Political and Cultural History of Ancient Nepal* (1<sup>st</sup> edn), Bharatiya Vidya Prakashan, p.138.

courts and administrative institutions also prove that their justice system was based on *Hindu Dharmashastra*.

Anyone can find the examples of harsh type of punishment in *Lichhavi* era. Not only the offender of severe crimes like theft, robbery, adultery, murder and treason, but also his family members were subject to punishment. Punishment was fixed according to the gravity of crime and nature and social strata (caste) of the offender. There were three degrees of punishment; *Prathama sahas* (punishment of lowest degree), *Madhyama Sahasa* (punishment of middle degree) and *Uttama sahasa* (punishment of highest degree).

The penal policy was derived from Hindu *Dahrmashastras*, especially the provision of sentencing for heinous crimes were derived from the code of *Manu*.<sup>86</sup> *Bagdanda*, *Dhikdanda*, *Dhandanda* and *Badhdanda* were familiar at that time. By its nature *Bagdanda* seems to be simple form of punishment imposed on smaller crimes and especially to a delinquent. However, the criteria for imposing these different types of punishment are not clear.

Although *Jayasthiti Malla* had always been appreciated for his legal arrangements, the judicial system and organization of court made by *Jayasthiti Malla* is unknown. It is said that during the reign of *Jayasthiti Malla* theft and robbery were diminished as the thieves and robber were given capital punishment.<sup>87</sup> His administration of justice and penal policy was based on *Smrities of Manu*, *Yagyavalkya* and *Narada*.

The thief committing theft repeatedly would be punished by mutilating his finger. Death penalty was in practice for murder however Brahmin, sages and women would not be punished with death. Fine and banishment would be inflicted to the persons who were disqualified for death penalty. Death penalty, branding, banishment after shaving head, fine and deprivation from one's own cast were some of the punishment prevalent at that time.

The period of Prithwi Narayan Shah was the period of transition from medieval to modern age therefore; the legal tradition established during his reign has special historical importance. Some of the expressions of *Prithwi Narayan Shah* show his enthusiasm in this matter.

*Then, justice should be on the top priority of the King. Never allow injustice in the country. Persons, who give and take bribes, in fact, both of them corrupt*

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<sup>86</sup> *Manusmriti*, 129, Chapter-8.

<sup>87</sup> *Ibid*, p.3.

*the justice. It is not considered sin to confiscate all the property and even execute him for such a crime. They are the big enemies of the King.*<sup>88</sup>

Historian *Baburam Acharya* says that *Prithivi Narayan Shah* had drafted a code for his new expanded state but was unable to enforce it during his lifetime. These laws were brought into commencement during reign of his son *Pratap Singh Shah*.<sup>89</sup> Early kings used to preside over the court of justice but, *Prithivi Naryayan Shah* abandoned this tradition totally. He gave the total responsibility of administration of justice to the *Dharmadhikara*.<sup>90</sup>

Rana Bahadur Shah issued royal edict introducing some penal provisions for different crimes. King Rajendra Bikram Shah also issued various orders (Sawal) relating to the power of different authorities and determination of punishment. Capital punishment was prevalent for heinous crimes including treason. Apart from capital punishment, shaving of head, degradation, mutilation etc. were also in practice.

According to Hamilton there were five severe punishments: *1st*, confiscation of the whole estate; *2dly*, banishment of the whole family; *3dly*, degradation of the whole family by delivering the members to the lowest tribes; *4thly*, maiming the limbs; *5thly*, death by cutting the throat. Other types of capital punishments were hanging and flaying alive. Women, as in all Hindu governments were never put to death. They were punished by cutting off their noses.<sup>91</sup>

In 1910 B.S. during the premiership of *Jung Bahadur Rana*, the first codified law popularly known as *Muluki Ain* was promulgated. The preamble of that code says that it became expedient to issue a legal code because there was no uniformity in deciding cases. Similar cases were decided differently. Therefore, a code was promulgated to provide equal punishment for the same crime.<sup>92</sup> But in fact this code was not based on the principle of equality. There were numerous unequal provisions. There was equality among the people of the same caste. There was the practice of Panchakhata which included killing of Brahmin, killing of the person of one's own clan, infanticide and unlawful sexual intercourse. Severe punishment was inflicted for committing such an offence. The punishments were capital punishment, confiscation of the whole property, banishment, degrading of caste, branding, imprisonment, fine, and shaving of the head, feeding human excreta, forcing to leak sole and forcing to

<sup>88</sup> *Ibid*, p. 195.

<sup>89</sup> Babu Ram Acharya, (2022 BS), *Nepalko Sankshipta Britanta Part 1*, Kathmandu., p.133.

<sup>90</sup> *Ibid*, p. 70.

<sup>91</sup> Francis Buchanan Hamilton, *An Account of The Kingdom of Nepal*, The Project Gutenberg eBook, p. 103.

<sup>92</sup> Preamble of the *Ain* published in 1943 BS.

go for pilgrimage. The punishment was based on caste of the offender. Women, Brahmin and hermits were not executed.<sup>93</sup>

## 12.2 Sentencing after the New Muluki Ain

Different types of inhuman punishments were abolished by several amendments in the Muluki Ain. However, discriminatory or caste based system of punishment was brought into end formally after the promulgation of the Muluki Ain, 2020 (1963). The Muluki Ain is the general law of the country which is based on equality. It has provision about both criminal and civil law as well as substantive and procedural law also. The provisions of criminal have been changed through different amendments to tune with the changing context of time. The system of death penalty was in practice before 1990. After the promulgation of the Constitution of the Kingdom of Nepal, 1990 the Death punishment was abolished. Presently the highest form of punishment is the imprisonment for life along with the confiscation of the entire property and lowest form of punishment is the fine of Rs. 5/.<sup>94</sup>

The Constitution of the Kingdom of Nepal, 1990 guaranteed the basic human rights to the people and independence of judiciary. Nepal has become the party of various international human rights conventions and has undertaken the obligation to tune her laws with these human rights instruments. The Interim Constitution of Nepal, 2007 has proclaimed that no law shall be made which provides for the death penalty.<sup>95</sup> Therefore, the most severe punishment in Nepal is imprisonment for life with the confiscation of the entire property.

The Muluki Ain has comprised most of the traditional crimes under part four and set out the general procedural aspects of adjudication and sentencing.<sup>96</sup> No 4 of the Part-1, of the Chapter on Preliminary Matters it is stipulated that:- "The matters set forth in separate laws made in specific subjects shall be governed by such laws and those matters not set forth in such laws shall be governed by this Muluki Ain (General Code).<sup>97</sup> It means the provision of special law prevails over the provision of Muluki Ain in case of conflict between them. The substantive and procedural criminal laws of Nepal are scattered in different statutes. However, the Muluki and some special Acts concerning to crime, punishment and sentencing are significant under the Nepali legal framework to define the crime, determine the form of punishment

<sup>93</sup> Dr. Rajit Bhakta Pradhananga and Shreeprakash Upreti, (2008), "Historical Evolution of Punishment System in Nepal", *Nyayadoot, English Special Issue*, Nepal Bar Association, Kathmandu.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Interim Constitution of Nepal, 2007*, Art. 13(1).

<sup>96</sup> *Supra Note 48*, at 16.

<sup>97</sup> *Muluki Ain, 2020 BS (1963)*, No. 4 of the Chapter on Preliminary Matters.

and sentencing.<sup>98</sup> Imprisonment for life along with confiscation of the entire property, Imprisonment for life, Imprisonment for certain period, Fine and Imprisonment, Fine or Imprisonment or both and Fine are the punishment prescribed by the law. According to Prof. Rajit Bhakta Pradhananga all forms of penalty provisioned under Nepali legal framework can be categorized as follows<sup>99</sup>:

- a) Determinate punishment specified by law
- b) Minimum and maximum limit of punishment specified by law and
- c) Only the maximum limit of the punishment specified by law.

In regard to the determinate punishment specified by law the court has to pronounce the sentence stipulated by law after conviction. The court or the presiding judge has no discretion in determining the sentence. If minimum and maximum limit of punishment has been prescribed or law has provided an option to choose between two or more types of punishment the judge can use the discretion in determining the sentence within that minimum and maximum limit. If only the maximum limit of punishment has been specified the judge can use wide discretionary power in determining the sentence.

### 12.3 Sentencing Policy and Practice at Present

#### *Provisions regarding to Sentencing in Nepal*

There is neither a separate law regarding to sentencing in Nepal nor there is any formal sentencing guideline. There is no formal policy statement regarding to sentencing. Therefore, the objectives, policy and guidelines regarding to sentencing can be traced out from after thorough examination of different statutes and court judgments. However, No 188 of the Court Procedure of the Muluki Ain is the most important provision which enables the judge to exercise wider judicial discretion in sentencing. This provision has been regarded as a beautiful example of the act and scope of exercising judicial discretion by Nepali jurists.<sup>100</sup> The No 188 reads as<sup>101</sup>:

Despite conviction the accused in a case involving punishment of imprisonment for life with confiscation of entire property or of imprisonment for life pursuant to law, where the adjudging chief of office has a ground to

<sup>98</sup> *Supra Note 48*, at 16.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Supra Note 48* at 8; Dr. Hari Bansh Tripathi, (2004), *Annual Survey of Nepalese Law*, Nepal Bar Council, p. 105.

<sup>101</sup> *Muluki Ain, 1963*, No 188 of the Chapter on Court Procedure.

suspect that it might be an accident, or in view of the circumstance of commission of the offense, the punishment as referred to in law will, in his or her view, be so severe if it is imposed on the accused and lesser punishment should be imposed on him or her, then the chief of office shall determine the punishment imposable by law, and explicitly set down in the reference memorandum such opinion as he or she has made, along with the reason for the same, and judgment shall be referred accordingly. Even the authority making final verdict may also determine punishment that is lesser than that specified by law if the authority also holds such opinion.

No 6, 15, 16 and 17 (3) of the Chapter on Homicide has provided wide discretionary power in determining sentence to the offender. Likewise, No. 3 of the Chapter on Rape has provided discretionary power to the judge in imposing punishment to the offender in rape cases ranging from 10 to 15 years, 8 to 12 years, 6 to 10 years, 5 to 8 years and 5 to 7 years. No 4 and 6 of the Chapter on Cheating also provides discretion to the judge to imposing punishment of imprisonment up to Five Years without setting the minimum limit.

Likewise, Section 14, 15 and 16 of the Narcotic Drug (Control) Act, 1976 has also provided discretionary power to the judge. However Section 14 of the Narcotic Drug Act provides that the person acting in violation of the prohibitions lay down in the section 5 according to the gravity of offence. The section also provides guidelines to determine the gravity of the offence. According to the explanation of the section "gravity of offence" shall mean the gravity of offence which shall be determined on the basis of the nature of the narcotic drugs and its quantity, store, purchase and sell, objective of the traffic in or export-import, the organization or gang of the accused, weapons used by the accused or use of force, involvement of minor made in the offence, transaction done through the medium of institution like education, social and cultural organization and the transaction made at the basis of abuse of post by a person holding a public position.<sup>102</sup>

Likewise, "National Parks and Wildlife Conservation Act, 1973 also provides discretion to the judge while imposing sentence to the offender. Section 26 provides varied ranges of punishments to the offender setting minimum and maximum ranges in term of fine and imprisonment from 1 to 10 years and fine ranging from fifty to one hundred thousand rupees.<sup>103</sup> It is so interesting that the cases relating to wildlife are tried by the protection officer as the trial court which is quasi judicial body.

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<sup>102</sup> *Narcotic Drugs (Control) Act, 1976*, Explanation of the Section 14.

<sup>103</sup> *National Parks and Wildlife Conservation Act, 1973*, Section 26.

Likewise, Section 11A (2) of the Chapter on Punishment of Muluki Ain has also provided a wide discretion to the judge for the offence punishable by the imprisonment for up to three years. The provision reads as:

*Notwithstanding anything contained in Number 11 of this Chapter, a person who commits an offense punishable by imprisonment for a term of less than Three years is held liable to the punishment of imprisonment and the office does not consider it appropriate to hold such person in imprisonment owing to the fact that he or she has committed the offence for the first time, the office may specify the amount to be set by Twenty Five Rupees<sup>172</sup> for One day and so pass judgment that such person will not be required to serve the sentence of imprisonment if he or she pays the amount so specified. If the money is so paid by the offender, it shall be received and the record of imprisonment shall be crossed off.<sup>104</sup>*

Likewise Some Public (Offence and Punishment) Act, 1970 has also provided the discretionary power to the adjudicating authority to release the offender who has committed the offense for the first time without imposing penalty causing him/her sign the document which reads that the offender pledge not to commit such offence again from the date onwards.

#### **12.4 Exercise of Sentencing Discretion at Random**

It has already been discussed above that the sentencing judge has to take into account of various aggravating or mitigating factors while making sentencing decision. It means the judge is not free to apply any idiosyncratic notions to the sentencing task. The factors like the circumstance of the crime, the weapon used, the motive of the offender; his/her age, good or bad character and family environment which are generally not useful for conviction are significant in determining the sentence.

However, this power provided by No 188 of the Chapter on Court Procedure has been exercised consistently for years. Dr. Haribans Tripathi writes:

*Over years judges have frequently applied Section 188 in numerous cases where they thought it justifiable to reduce the penal liability of the convict particularly in cases relating to infanticide caused by such unmarried mothers who committed the crime to escape social stigma or censure as the babies born wer the result of their illicit relation. However the exercise of discretionary power granted by Section 188 has always lacked consistency in approach and*

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<sup>104</sup> Muluki Ain, Chapter on Punishment, Section 11A (2).

*seems to be marked by bewildering variations in the quantum of punishment even in similarly situated cases.*<sup>105</sup>

In *Abdul Jawar Musalman v HMG*<sup>106</sup>, the Supreme Court refusing to apply No 14 of the Chapter on Homicide wherein the defendant had killed the deceased using iron rod with pointed end. However, the court mitigated the punishment on the ground that the defendant struck the deceased with the hot iron rod without any earlier enmity but in horror after hearing the tumult that the robbers were coming.

In *Lal Bahadur Kami v. His Majesty's Government of Nepal*, the Supreme Court Division Bench mitigated the sentence of the defendant wherein the deceased was killed by poisoning. The court mitigated the sentence on the ground that the defendant had no earlier enmity with the deceased to kill him by poisoning. The court held that " It has been obvious that the defendant Lal Bahadur had put something in the meat of the deceased taking it out from the pocket of his waist coat and Bir Man died to eating that meat. Since there seems no earlier enmity of the defendant with the deceased Bir Man causing to kill him by poisoning, therefore, the sentence is hereby mitigated and the defendant shall be punished with the imprisonment for eight years."<sup>107</sup>

In *HMG v. Pharasuram Chaudhari*<sup>108</sup> the Supreme Court mitigated the punishment of the defendant using No 188 of the Chapter on Court Procedure wherein the defendant killed the deceased Niyamat Ullah Musalman with an axe witnessing the deceased's illicit relationship with his mother and thereafter killed Lahani Tharuni who came out of the home making hue and cry. In the judgment the court held that it is natural to be angry with the person who has illicit relationship with his own mother. The defendant had no any enmity of Pharasuram with the deceased Lahani Tharuni. Only after he killed Niyamat Ullah Musalman, Lahani Tharuni came out of home making hue and cry and the defendant killed her thinking that he would be arrested due to the cry and for the purpose of fleeing from the crime scene.

In *His Majesty's Government v. Yam Kumari Pande*, the Supreme Court mitigated the punishment on mentioning the ground that it was natural for a helpless widow woman to kill and bury the child born from illicit relationship

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<sup>105</sup> Dr. Hari Bansh Tripathi, (2004), Annual Survey of Nepalese Law, Nepal Bar Council, p. 106.

<sup>106</sup> NLR (NKP) 2035 BS, Vol7, Decision No 1185.

<sup>107</sup> NLR 2038 BS, Vol. 2, Decision No 1440.

<sup>108</sup> NLR, 2041 BS, Vol. 4, Decision No 1965.

with others to save her from social stigma. Therefore, it would be havier to impose her punishment under No 13(3) of the Chapter on Homicide.<sup>109</sup>

In Purnahang Limbu and others v. HMG the Supreme Court mitigated the punishment in regard to the defendant Purnahang Limbu on the ground that he injured the deceased due to immediate provocation without any enmity and cause to kill him but after he saw that his father was being assaulted by the deceased. In this case the court mitigated the punishment of the defendant Purnahang Limbu to 10 years of imprisonment however, upheld the punishment of life imprisonment imposed to other two defendants Ashman Limbu and Lok Bahadur Limbu.<sup>110</sup>

Likewise, in Ammar Bahadur Rai v. HMG<sup>111</sup>, the Supreme Court sustained the opinion of the Regional court to mitigate his term of punishment to 10 according to No 188 of the Chapter on Court Procedure convicting him under 13(3) of the Chapter on Court Procedure. The term of punishment had been mitigated on the ground that there was absence of enmity and he lost his temper after his father was being assaulted by the deceased.

The Supreme Court in HMG v. Hum Nath Dhakal<sup>112</sup> mitigated the punishment using the number 188 of the Chapter on Court Procedure stating that it is not unnatural for a person who earns his living by farming when to become provoked when the harvest is damaged by the cattle. In this case the defendant had struck the deceased with scythe for many times in the different parts of the body including neck.

In homicide case of HMG v. Doma Lamini the Supreme Court has mitigated the punishment imposed to the defendant convicting her under No 13(3) of the Chapter on Homicide who killed her drunkard husband who annoyed her after consuming alcohol by strangulating by using a rope when he was sleeping. The court sustained the judgment of the lower court that referred the case mitigating the punishment to a years of imprisonment pursuant to No 188 of the chapter on Court Procedure on the ground that the defendant used to trouble her drinking alcohol and told her to leave the home and she had no enmity to kill her husband and therefore it would be harsher to punish her with the punishment of life imprisonment with confiscation of the whole property.<sup>113</sup>

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<sup>109</sup> NLR 2042 BS, Vol. 5, Decision No 2371.

<sup>110</sup> NLR 2042 BS, Vol. 12, Decision No 2569.

<sup>111</sup> NLR 2043 BS.

<sup>112</sup> NLR 2044 BS, Vol. 9, Decision No 3216.

<sup>113</sup> NLR 2046 BS, Vol. 1, Decision No 3716.

In *HMG v. Jhushi Damaini*, the Supreme Court mitigated the punishment imposed to the defendant who inserted her hand into the vagina of the deceased for the purpose of aborting the embryo of the deceased conceived from the illicit relationship. The court mitigated the punishment on the ground that the defendant had no enmity with the deceased, and the defendant inserted her hand into the vagina of the deceased with the purpose of aborting the embryo conceived from the illicit relationship. The embryo could not be aborted however the deceased died as a result. The court stated that in such a situation it would be heavier to punish her with imprisonment for life. On these grounds the court imposed the defendant the punishment of imprisonment for five years pursuant to No 188 of the Chapter on Court Procedure.

In *Gyan Bahadur Basnet v. HMG*<sup>114</sup> the Supreme Court imposed the punishment Gyan Bahadur Basnet with imprisonment for 10 years by mitigating the punishment pursuant to No 188 of the Chapter on Court Procedure convicting him for an offence under No 13(4) of the Chapter on Homicide. The court mitigated the punishment taking into account of the absence of enmity of the defendant with the deceased and had no personal interest. The court stated that his father asked him to go to see the gambling to the village and told him about the killing of the deceased only in the midway which he denied. He was involved in the offence only on the incitement of his father who threatened him to kill if he did not obey him. The young boy of 17 years of age who had no enmity with the deceased and had no personal interest and was studying for SLC examination, it would be heavier to impose punishment under No 13(4) of the Chapter on Homicide to such a defendant.

Supreme Court in *Lila Bahadur Raut v. HMG* the Supreme Court mitigated the punishment imposed to the defendant convicting him under No 13(3) of the Chapter on Homicide stating that although the defendant had assaulted the deceased they had not used deadly weapons and had not assaulted him fatally. Therefore, it would be harsher to punish him under No 13(3) of the Chapter on Homicide and the defendant would be punished with imprisonment for 10 years.

In *Chakra Bahadur Pradhan v. HMG*<sup>115</sup> the Supreme Court mitigated the punishment to 10 years of imprisonment pursuant to No 188 of the Chapter on Court Procedure on the ground that the defendants killed the deceased because of his illicit relationship with the defendant Chakra Bahadur's wife. The court stated that it has been obvious from the documents enclosed in the case file that

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<sup>114</sup> NLR, 2046 BS, Vol. 10, Decision No 3979.

<sup>115</sup> NLR, 2048 BS, Vol. 8, Decision No 4377.

the deceased had been killed by homicide due to the illicit relationship of the deceased with the defendant Chakra Bahadur's wife Bishnu Maya. It has been found that Chakra Bahadur killed the deceased taking into account of his social dignity and circumstances. Therefore, it would be harsher to punish him as per the law. In this case the defendants had killed the deceased by premeditated hanging. However, the court mitigated the punishment citing such irrelevant grounds.

In *Chankhe Khadka v. HMG*<sup>116</sup> the Supreme Court mitigated the punishment pursuant to No 188 of the Chapter on Court Procedure convicting the defendants for an offence under No 13(3) of the Chapter on Homicide on the ground that there was no prior enmity of the defendants with the deceased and the defendants had not assaulted him with an intention to kill. The court imposed the punishment of imprisonment for 10 years to the defendants.

In *HMG v. Dan Bahadur Guruchhan Magar*<sup>117</sup> the Supreme Court convicted the defendant under No 13(1) of the Chapter on Homicide and imposed the punishment of imprisonment for 10 years to the defendant who stabbed the deceased with knife taking out it from the ceiling of the house when the deceased provoked him by words and punched him when he was drunk.

The above judgments show that the practice of the court is not consistent in exercising the discretionary power provided by the No 188 of the Chapter on Court Procedure. The court mitigated the sentence for premeditated homicide committed by a group using a deadly weapon. Likewise, this provision has been used in case where homicide has been caused poisoning and hanging the deceased. None of these case show that the court has not provided adequate grounds and justification for awarding the lesser sentence to the defendant. These judgments lack any standard or principle for applying No 188 for mitigating the sentence. However, the Supreme Court has laid down some significant principles regarding sentencing in Homicide case of *HMG v. Shanti B. K.*<sup>118</sup> The court laid down the following principles as guidelines for mitigating the sentence:

- (1) whether or not the murder has been caused in a premeditated manner and with a motive of killing,
- (2) Murder with cruelty and torture,
- (3) Nature and degree of crime,

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<sup>116</sup> NLR 2054 BS, Vol. 8 Decision No 6426.

<sup>117</sup> NLR 2057 BS, Vol. 8/9, Decision No 6941.

<sup>118</sup> NLR 2061 BS, Vol. 6.

- (4) The motive and social background of the offender
- (5) Circumstances around commission of crime,
- (6) The age of the offender,
- (7) Physical, mental, economic and family condition of the offender,
- (8) Opinion and feeling of the victim,
- (9) Damage or loss caused to the victim and society,
- (10) Past criminal record of the offender,
- (11) Whether or not the accused has assisted the judicial process by revealing the truth in the court,
- (12) Whether or not the offender has experienced the feeling of repent after the commission of the offense,
- (13) Whether or not the crime has been committed at the instigation or under the pressure caused by someone else,
- (14) Appropriate factors relating to the particular case,

The Supreme Court in the later days after Shanti B.K has repeatedly indicated the need for giving justification for mitigating the sentence pursuant to No 188 of the Chapter on Court Procedure. Supreme in Jugat Sada v. Government of Nepal, NLR 2063 Vol. 8, decision No 7752 has given extensive guidelines in exercising the discretionary power provided by No 188 of the Chapter on Court Procedure of Muluki Ain. The court held that while diminishing the punishment using No 188 of the Chapter on Court Procedure or imposing the punishment of the upper limit without diminishing it, the court has to mention the reason for diminishing the punishment or the imposing the full term of punishment, ending the traditional system of imposing the sentencing or diminishing it without giving reason. The court has to take into account of different things including the circumstance of the crime, conspiracy, preparation, criminal record of the accused, caution of the accused at the time of committing the offense, the activities of the accused after committing the offence, involvement and relationship of the accused with the criminal group, whether the crime is organized crime or not, the cruelty used in the crime, the weapon and tools used in the crime, age of the accused, the loss incurred to the victim and victim's family, whether the loss was irreparable and punishment has to be determined according to the crime so that the accused would not dare to commit crime again and would not repeat the wrongdoing.

The court in *Government of Nepal v. Nawal Kishore Mandal*<sup>119</sup> also discussed about the ground of mitigation of punishment. The court held that no explanation or logic is acceptable in premeditated crime and crime committed with cruelty.

The court further stated that the No 188 of the chapter on Court Procedure has provided special authority to diminish or mitigate the punishment in the offence liable for harasser punishment of imprisonment for life with confiscation of entire property or imprisonment for life and therefore, its exercise has also to be made in special circumstance. The No 188 of the Chapter on Court Procedure can be applied in cases where the offence has been proved as culpable homicide however from the view of the circumstance of the commission of the offence there is ground to suspect that it might be an accident, or the offence has been occurred spontaneously without plan.

The application of No 188 of the Chapter on Court Procedure can be made to reduce the punishment in the case where the condition of No 5 of the Chapter on Homicide cannot be established however if there is ground to suspect that it might be an accident from the view of sequence of events before the occurrence of offence and circumstances thereof.

The judicial privilege and discretion granted to judge cannot be used for diminishing the punishment of the offender who has committed the crime with extreme cruelty and inhumanely, killed the deceased by cutting the different parts and organs of the body and offenders committing such types of offence.

Likewise, the Supreme Court in *Govinda Bahadur Karki V. GoN* has also recited some of the grounds for mitigating the sentence. The court held the application of No 188 should not be made by looking at the face of the accused who tried by following the due process of law but taking into account of different matters.

The court held that it is not a general rule to set down opinion to mitigate punishment applying the No 188 of the Chapter on Court Procedure and espoused the following matters and conditions while mitigating the punishment:

- (1) Cause, condition and circumstance of the killing
- (2) The preparation, premeditation and earlier enmity between the accused and the deceased and their relationship,

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<sup>119</sup> NLR 2065 BS, Vol. 8, Decision No 7993.

- (3) The number of accused involved,
- (4) Type of the weapon used
- (5) The injuries found in the deceased's body
- (6) The place of killing, crime scene and time,
- (7) The character and criminal record of the accused.

The court enunciated the matters for further consideration which are as follows:

- (1) The criminal record of the deceased,
- (2) The dependant family members of the deceased,
- (3) The family status of the deceased
- (4) The economic condition of the deceased

The court further stated that leniency cannot be shown to the defendant who has been entrusted by the state the responsibility of protecting the nation and the citizen kills unarmed people using the weapon and position given by the state for the protection of the nation and citizen.

Supreme Court in *GoN v. Indra Nyaupane Jaisi*, held that the punishment of every offender cannot be mitigated who confesses the crime before the court by applying No 188 of the Chapter on Court Procedure as the intent of that is not such. The court stated that the No 188 of the Chapter on Court Procedure is not applicable in premeditated crime.

Supreme Court in *Bir Man Lungeli Magar v. GoN*<sup>120</sup> has stated that some of the judicial grounds have to be adopted while applying No 188 of the Chapter on Court Procedure. Otherwise, the discretionary power provided by the law maker with great confidence cannot be cherished.

The view set down by the judge cannot be subjective. First of all, it has to be concluded that whether or not the application of No 188 of the Chapter on Court Procedure can be made after analysis of reasons and grounds. The verdict of the judge is the public property and therefore, it cannot be sufficient to say that the punishment has been mitigated because he/she had such a view.

Through these guidelines the Supreme Court has endeavored to maintain consistency and uniformity in the application of discretionary power in imposing sentence. However, there is no separate sentencing hearing and it is

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<sup>120</sup> NLR 2069 BS, Vol. 6, Decision No. 8853.

not possible to seek opinion from specialist and the view of the victims in the course of imposing punishment. The legal provisions regarding sentencing are scattered in different statutes and they are not systematic. One has to study series of Supreme Court judgments to understand the sentencing practice of the country. Therefore, it has been felt necessity to enact a separate law regarding to sentencing.

### **12.5 The Recent Initiations in Reform of Sentencing and the Proposed Sentencing Act**

As it has been already discussed that sentencing is one of several stages at which decisions are taken in a criminal process that begins with decisions such as reporting a crime or arresting a suspect, and goes through to decisions to release a prisoner on parole or to revoke a community order.<sup>121</sup> It has to be considered that the sentence must fit to the criminal not the crime. It is the human judgment that can decide the appropriate sentence to the individual offender. At the end of the day, the exercise of discretion in sentencing must remain in human hands. You cannot program a computer to register the ‘feel’ of a case, or the impact that a defendant makes upon the sentencer.<sup>122</sup> The White Paper of the British Home Office emphasizing on the just desert asserted that :-<sup>123</sup>

*If the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim’s family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation or private revenge.*

The chapter on Punishment of Muluki Ain has provisioned number of sanction imposing procedure. However, our existing law does not provide for separate sentencing hearing for determination of sentence after a person is convicted. Necessity of separate law regarding sentencing has been felt for a long time. The Taskforce on Reform and Amendment of Criminal law has drafted a separate and general sentencing Act.

The draft Sentencing Act has made the provision of awarding sentence on the basis of gravity of offence and degree of responsibility of offender in committing offense; determining sentence on the basis of aggravating and mitigating factors, separate hearings for declaring guilty and awarding sentence as these two matters are different; maintaining uniformity in determination and

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<sup>121</sup> *Supra Note 1*, at 22.

<sup>122</sup> *Ibid*, p. 48.

<sup>123</sup> *Ibid*, p. 102.

execution of sentence; exercising discretionary power granted to justices for awarding sentence on objective criteria by explaining reason; considering objective of punishment while awarding sentence and also seeking alternatives to punishment of imprisonment.

The Act also provides for principles of punishment. Some of these principles are: sentence not to be inflicted to a person without holding guilty, sentence to be determined based on gravity of offense and degree of responsibility of offender, circumstances of offense and aggravating and mitigating factors of offense. The Act also offers the measures alternative to imprisonment, engaging offender in community service. The Act has adopted the principle of the best interest of child and there will be no imprisonment to a child except in cases where he/she has committed grave offense and committed such offence repeatedly.

The Act has regarded the punishment of imprisonment as the last resort. The Act has proposed not to send for imprisonment if there exists other appropriate alternative sentence. Based on the nature of offense, the age and conduct of the offender, circumstances existing at the time of commission of offence and modus operandi of offence the court may order to carry out a public work for an offender liable to sentence of up to six months of imprisonment. The offender who has been punished for imprisonment of up to one year, to serve imprisonment at the weekend or only in the night of each day; for an offender, except offender of grave offence, having served two third of the sentence of imprisonment and having good conduct, to be kept in an open prison or be released on parole. Likewise, an offender of first time of an offence punished with imprisonment of one year or less can be released from imprisonment upon payment of money for imprisonment period. Apart from the reform in the punishment the Act proposes, for reformation of prisoner, conducting reformatory programs including skill, education and employment oriented, disciplinary, spiritual programs and socialization program before release from prison.

Another special feature of the sentencing act is the provision of compensation to the victim of offence by the offender as an integral part of criminal justice administration. The Act provides that the offender is to be cause to paid compensation to the victim for physical, mental, emotional harm sustained by the victim; compensation should be caused to be paid on the basis also of the economic source and condition of the offender, needs of the victim or his/her dependents; priority to be given to compensation than to fine, compensation may be paid in installment if it cannot be paid immediately; offender may be

fined or imprisoned if he/she fails to pay compensation. Likewise, in order to make available relief to the victim of offense a victim Relief Fund is proposed to be established. There is also the provision of establishing a probation board.

### 13. CONCLUSION

Sentencing is very important in criminal justice system as it help in garnering and maintaining the public confidence in the system. Sentencing is said to be barometer of the overall confidence of the criminal justice system. The public attitude to the way judges impose sentence determines the public confidence in the administration of criminal justice. If people think that there is no consistency in sentencing their confidence toward the whole criminal justice system erodes. If they think that the sentences imposed by the court are too lenient the victim will be dissatisfied with the working of the system and consequently people may think that retaliation is the best way for satisfaction. It means that the criminal justice system has not met the needs and concerns of the victim. Researches in different countries have shown public dissatisfaction with sentencing outcomes. Victims are the centre of criminal justice system whose cooperation is essential not only in reporting the incidents but also providing information in the investigation and participation in prosecution as well trial of the case. If they cease to cooperate in the process of investigation and trial, the criminal justice system loses its legitimacy. Therefore, the sentencing system plays a pivotal role in the criminal justice system.

The sentencing judge has to strike a balance between the victim's concern toward the system and the right to justice of the offender as well fitting the punishment to the offender. For proper working of the system the roles of the stakeholders have to be clearly defined by law. Presently we have no sentencing law and the court has not been able to take proper help from the victim, the prosecution, police and the defendant's family in determining the proper sentence that fits to the offender. The judicial guidelines cannot fulfill the gap of law for a long time. The proposed Sentencing Act has been drafted incorporating the various modern provisions including the principles of sentencing, the aggravating and mitigating factors of punishment, the matters to be taken into account while imposing sentence and separate sentencing hearing. This proposed draft has to be brought into commencement through legislation.





# The Concept of Sentencing and the New Sentencing Act, 2017: An Analytical Observation

Shreeprakash Upreti\*

## ABSTRACT

The term 'punishment' signifies a legal consequence of breaking of norm of criminal law, which is, in most of the cases, unpleasant. It is, theoretically, always prescribed in the statutory legislation. Theoretical legitimacy is significant to the normative and norms implementing structures since it provides validity and rationality to the system. Principles of proportionality, parity, restraint and individualization are the underlying canons of sentencing. Similarly, incapacitation of the offender, retribution, rehabilitation, deterrence, promotion of social solidarity and restitution are the philosophies behind sentencing. The Criminal Offence (Determination and Execution of Sentence) Act, 2017 will come into force with its relevant substantive and procedural laws namely the Muluki Criminal (Code) Act, 2017 and the Muluki Criminal Procedure (Code) Act, 2017 from August 17, 2018, Friday. However, some provisions relating to the reformatory forms of punishment will not come into force on the same day until government of Nepal publishes notice in Nepal Gazette to bring these provisions into practice.

## 1. INTRODUCTION

Punishment is the inherent power of criminal law since its absence ceases the existence and deterrent effects of criminal law. At the same time, the efficacy of punishment is measured through the process of sentencing under the elaborate system of substantive and procedural laws within the criminal justice

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system. The term 'punishment' signifies a legal consequence of breaking of norm of criminal law, which is, in most of the cases, unpleasant. It is, theoretically, always prescribed in the statutory legislation. Punishment refers connection between wrongdoing and state imposed sanction. The primary issue raised by the concept of punishment is the basis upon which the evils administered by the state on offenders can be justified. Sentencing is the system of law through which offenders are punished. The basic issues to be addressed by any sentencing system are the structure of sanctions that are appropriate and the factors that are relevant to fitting the sentence to the criminal. In order to properly decide how and how much, to punish, it must be, firstly, established on what basis punishment is justified and why we are punishing.<sup>1</sup> Therefore, sentencing and punishment are inextricably linked each other.<sup>2</sup> Sentencing connotes a process for determining an appropriate sanction after a finding of criminal responsibility by the competent court.<sup>3</sup>

A sentence is a term of punishment imposed by a court on a convicted offender. Sentencing is one of the most controversial process in criminal justice system. It can be one of the simplest or one of the most complex processes.<sup>4</sup> The basic objectives or function of criminal justice system can be categorized into two folds: The first is to determine the innocence or guilty of the accused person (issue of conviction) and the second function is to determine an appropriate sanction out of the many permitted by law in a particular situation (issue of sentencing). The Constitution of Nepal, under Article 20 has ensured the rights regarding criminal justice, which obviously comprises the rights of an offender in the course of conviction and sentencing process. The process of investigation, prosecution, adjudication and sentencing are the main segments adopted throughout the world within the criminal justice system and the same is equally applicable in Nepalese context. Sentencing is the last and executing segment that imposes the determined quantum of penalty upon an offender and therefore, it is seen in screen by the society. It contributes to make popular satisfaction in the societal level toward the criminal justice system. Again, the sentencing process should be free, fair and credible not only to its subjects (the victim and defendant) but also to the society at large that should be capable to reflect the inherent character of a dissent sentencing system.

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<sup>1</sup> Mirko Bagaric, (2001), *Punishment and Sentencing: A Rational Approach*, London: Cavendish Publishing Limited, p. 4.

<sup>2</sup> Allen Manson, (2001), *The Law of Sentencing*, Toronto: IRWIN Law, p. 3.

<sup>3</sup> *Ibid.*

<sup>4</sup> Sue Titus Reid, (1996), *Criminal Justice*, Chicago City: L. Bevan O' Callaghan, p.283.

Nepal has entered into a new era in the view point of making new normative framework in the criminal justice system. The Muluki Criminal (Code) Act, 2017, The Muluki Criminal Procedure (Code) Act, 2017 and the Criminal Offence (Determination and Execution of Sentence) Act, 2017 have been passed by the Parliament and authenticated by the Rt. Honorable President on 2017 October 16 Monday. These legal structures will come into force from August 17, 2018, Friday<sup>5</sup> and the current Muluki Ain will be replaced. However, some provisions relating to the reformatory forms of punishment will come into force on the date determined by the government of Nepal publishing notice in the Gazette.<sup>6</sup> In this context, the Sentencing Act is particularly new in the Nepalese criminal justice system.

This article has made an effort to analytically evaluate the new Sentencing Act in the light of theoretical aspect of sentencing and its accepted segments. Therefore, this does not cover the prior provisions in this respect and it is basically confined to the area of sentencing.

## 2. THEORETICAL FOUNDATIONS OF SENTENCING

Theoretical legitimacy is significant to the normative and norms implementing structures since it provides validity and rationality to the system. It contributes in the law making, enforcing and interpreting level. The scholarly efforts of generating knowledge, court jurisprudence and the core international human rights instruments have been conjointly contributing to enhance the theoretical aspects in the area of punishment and sentencing. The cardinal principles of criminal justice<sup>7</sup> and theories of punishment are relevant even at the time of sentencing on the basis of relevancy but the principles of sentencing are significant at this stage since it is widely accepted by the Sentencing Act.

There are certain fundamental principles that govern the act of sentencing. These principles provide rationality to the sanction imposed upon an offender.

### 2.1. Principle of Proportionality

Pursuant to this principle, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Actually it is based on the relationship between quantum of punishment and degree and severity of offence. The degree of an offence is based on harm caused by that offence. According to this principle, the gravity of the offence, degree of responsibility of the offender, and proportionality and harm are important. The term harm

<sup>5</sup> *Muluki Criminal (Code) Act, 2017*, Section 1(2).

<sup>6</sup> *Criminal Offences (Sentence Determination and Execution) Act, 2017*, Section 1(2).

<sup>7</sup> *Supra* Note 5, Chapter 2.

comprises the 'harm done', 'loss suffered', 'actual harm' and 'potential harm'. This principle is rooted on the principle 'Let the punishment fit the crime.'

## **2.2. Principle of Parity**

There should be parity among the sentence imposed upon the offenders of similar crime committed in the similar circumstances. It is also a subject to the rule of law to sentencing. It is based on the principle of equality. It is the rationale underlying. This principle is that the offenders who are equally blameworthy ought to receive approximately the same degree of punishment. Generally it is expected to maintain parity in quantum of sentencing to the criminals of same circumstances having same contribution to the crimes occurred. This principle is also rooted on the principle 'Let the punishment fit the crime.'

## **2.3. Principle of Restraint**

Restrain means, in this respect, the presiding judge should restrain him/her to impose imprisonment at the stage of sentencing to the extent of possibility. It means prison should be treated as last resort as a form of punishment. This principle also prefer to the judge to impose the less quantum to the possible extent. In this stage there are many options available for the hearing judge to choose appropriate sentence. These can be stated as: Diversion, Absolute and conditional discharges, Probation, Fines, Restitution, Specific prohibition and Imprisonment.

## **2.4. Principle Individualization of Punishment**

The principle of individualization of punishment refers that the punishment imposed at the stage of sentencing should fit the criminal rather than crime since the system imposes criminal sanction to the criminal not the crime. Significance of the sentencing process is to be appreciated in the context of individualization in the administration of criminal justice. Individualization means instead of fitting the offence, the criminal sanction should fit the offender. Though this principle is rooted on the neo-classical school of criminology<sup>8</sup> but it is advanced in the light of reformatory forms of punishment. This principle is based on the thought 'Let the punishment fit the criminal.'

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<sup>8</sup> N.V. Paranjape, (2008), *Criminology & Penology*, Allahabad: Central Law Publications, p.37.

### 3. THE SEGMENTS OF SENTENCING

The sentencing process involves the determination of the appropriate sanction both in qualitative and quantitative terms.<sup>9</sup> The sentencing process plays significant role for establishing consistency and fairness in the course of imposing penalty upon offenders. Numerous people may be involved during the sentencing process, ranging from the legislators who formulate sentencing laws to probation officer who compile the pre-sentence report that may be used by judges in making decisions. Every component of the criminal justice system can effect or make contribution in the sentencing process. Investigating authorities, prosecutors, prison authorities, parole board and victims can perform their role during the sentencing processes.

The court is formal determiner authority of sentencing. Sentencing process is complicated to understand because it differs significantly from county to country, from state to state, from court to court within a state and even from time to time within any of these jurisdictions.<sup>10</sup> In this context it is important to take into account that the whole sentencing processes should be fair and just in the view point of standards established within the criminal jurisprudence and international instruments.

There is no authoritative, specific and concrete format or shape for the sentencing process but it comprises some important segments, which are primarily concerned with it. *Sue Titus Reid* has mentioned within it as *Sentencing philosophies, Sentencing strategies, Sentencing models, Sentencing hearing, Sentencing decision, Formal sentencing, and Victim participation*.<sup>11</sup> It is important to note that these all segments are not mandatory to every jurisdiction since the concerned law may arrange the necessary segment confirming the minimum standard of justice. The sentencing process encompasses following areas or segments of the criminal justice system.

#### 3.1. The Sentencing Philosophies

Philosophy is the basic determining factor of the punishment; it provides the foundation to choose the punishment for the convicted offender. What is the motto of the punishment? And what sorts of punishment should be imposed? These are guided by the philosophy. There are six philosophies relating with the punishment.

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<sup>9</sup> S.M.A. Quadri, (2009), *Criminology & Penology*, Delhi: Easter Book Company, p. 377.

<sup>10</sup> Sue Titus Reid, (1996), *Criminal Justice*, Chicago City: L. Bevan O' Callaghn, p. 283.

<sup>11</sup> *Ibid*, pp. 283-286.

### **3.1.1. Incapacitation of the offender**

In the past, frequently corporal punishment involved incapacitating the offender by making it impossible for him/her to commit further offences of alike nature. The hands of a thief were cut off; the eyes of a spy were gouged; rapists were castrated; prostitutes were disfigured to make them unattractive. Another form of incapacitation in the earlier days was to brand the offender with a letter indicating the crime. The assumption was that if people knew of this person's criminal activity, they would avoid the criminal. In modern times, incapacitation has been accomplished through incarceration. Incapacitation of the offender is the basic idea of this philosophy.

### **3.1.2. Retribution**

Historically, revenge has been one of the most important justifications for punishment. The philosophy of revenge, or retribution, is the eye-for-an-eye doctrine, which can be traced back to the Bible and even further than biblical times in Persia. Not only was revenge acceptable, it was expected. The victim or the victim's family was expected to avenge the offender. Official Government replaced private revenge, and today the philosophy of retributions is recognized widely as an appropriate reason for punishment. Today, the earlier eye-for-an-eye, tooth-for-a-tooth doctrine has not been recognized legally. Retribution is a natural and intrinsic justification of the punishment. The modifications of this philosophy in the contemporary world is recognized either one or another way. The courts generally hesitated to mention such justification to determine the punishment but sometime choose or invoke such punishment considering the conditions of victims.

### **3.1.3. Rehabilitation**

For years, rehabilitative philosophy dominated the criminal justice system and policies. It is based on the belief that offenders may be changed through proper treatment and care. It treats the criminal, as a victim of the circumstances, sick person; require treatment and psycho-social disease. Correction, rehabilitation and reformation are possible and needed for the criminal. Criminal may be re-socialized and rehabilitated as law-abiding people. This philosophy is based on rationalist thinking, natural rights and humanitarian ground. In the modern liberal society the court wants to be rooted on this philosophy as possible.

### **3.1.4. Protection of Society or Deterrence Theory**

Punishment is imposed to keep people from victimizing others and is based on assumption that it serves this purpose. Embodied in this societal goal is the

philosophy of deterrence, both individual and general. Individual deterrence refers to stopping the apprehended offender from committing criminal acts. Whereas general deterrence assumes that punishing that offender will keep others from engaging in criminal behavior after seeing the punishment imposed on actual offenders.

### **3.1.5. Promotion of Social Solidarity**

Social solidarity is one of the mottos of the justice system. If justice is properly ensured through the court, people being satisfied from the system and consequently, the harmony and solidarity of the society are operating smoothly. Punishment is one of the weapons people use to subdue their own desires that they cannot permit to be expressed. They feel guilty about those desires, so they enjoy punishing others who have been caught expressing them. Punishing the offender not only relieves us of sin, but makes us feel actually virtuous. Thus, punishment may serve to reinforce the morals of society and bind its members closer together in their fight against the offender.

### **3.1.6. Reparation or Restitution**

The reparation or restitution approach to punishment assumes that the victim should be returned to his or her former position. This approach has been used mainly in civil cases but recently has become more acceptable in criminal cases. Although injured persons or family of a deceased individual may not be restored to their former positions by money, a financial contribution from offenders or society eases the burdens caused by the crime. This type of punishment is workable when victims have suffered crimes against property.

## **3.2. The Sentencing Strategies**

The strategies of the sentencing relate to the determination of the amount of punishment to be imposed on a convicted offender. Four main strategies are used for sentencing process as follows:

### ***3.2.1. Indeterminate Sentence***

An indeterminate sentence involves legislative specifications of sentence ranges that permit judges to exercise discretion in determining actual sentences. In its purest form, the indeterminate sentence would be imprisonment from one day to life. Usually it involves legislative specification of a maximum and minimum term for each offense.

### **3.2.2. Determinate Sentence**

In determinate sentence structure, although the legislature specifies a fixed term of incarceration for conviction of a particular offence, the judge may have the option of suspending that sentence or imposing probation rather than a jail or prison term. But once that sentence is imposed, the parole board does not have discretion to reduce the sentence by offering early parole. The determinate sentencing scheme may involve a provision for mandatory parole after a specified portion of the determinate sentence has been served. It may include a provision for sentence reduction based on good-time credits earned by the inmate.

### **3.2.3. Mandatory Sentence**

It may be similar with the determinate sentences. It means that the sentence must be imposed upon conviction. Mandatory sentences are specified by legislature and usually involve a prison term. The mandatory sentence leaves the judge no discretion concerning incarceration. If the sentence indicates a specific prison term, the judge may not impose a different term as an alternative to prison or suspend the sentence.

### **3.2.4. Presumptive Sentence**

In the presumptive sentencing the normal sentence is specified for each offense, but judges are permitted to deviate from that norm. Some jurisdictions require that any deviation from a presumptive sentence be accompanied by written reasons for the deviation. Furthermore, the law may specify which conditions and circumstances may be considered for deviating from the presumptive sentence.

## **3.3. The Sentencing Models**

The models of sentencing are based on its nature and it is not so far from the sentencing strategies. There are three main models of sentencing, namely legislative, judicial and administrative. Most of the systems employ one or more of these types:<sup>12</sup>

### **3.3.1. The Legislative Model**

In the legislative model of sentencing the legislature establishes by statute the length of the sentence for each crime. For example, a conviction of burglary carries a sentence of ten years. Under this model no discretion is allowed the

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<sup>12</sup> *Supra* Note 10, at 517.

judge at the time of sentencing, nor is the prison authorities or parole boards allowed discretion in determining when the inmate will be released. In this model, the legislative body secures the sole determining authorities of punishment to the convicted offender. This type of sentence is called the determinate or flat-time sentence.

### **3.3.2. The Judicial Model**

In the judicial model of sentencing, the judge decides the length of the sentence within a legislatively established range. For example, the legislature determines that for the crime of burglary the sentence will be from five to ten years, and the judge imposes a sentence within that range. No discretion is given to administrative authorities to reduce that term. The judges can use the discretion only within the range permitted by the legislature; no absolute discretion is given to them.

### **3.3.3. The Administrative Model**

In this model, the legislature establishes a wide range of imprisonment for a particular crime, and the judge imposes that sentence. Neither the law nor the court speaks about the quantum of the period of incarceration; they just impose the sentence of imprisonment. The decision to release the inmate is later determined by an administrative agency, usually a parole board. This type of sentence imposed in this model is called the indeterminate sentence. The idea is that the offender should remain incarcerated only as long as necessary for rehabilitation, but neither a legislature nor a judge can tell in advance how long the sentence should be for a particular individual. Determination to release should therefore be made in individual cases by persons trained to decide when the offender is ready to rejoin the society.

There is an ongoing debate over which of the three models of sentencing should be used. Today's trend is away from the administrative model and indeterminate sentencing and toward the legislative model and determinate sentences. Recent trend is emphasizing on the combine model in which the judge has right to deviate from legislative permissions on the ground of certain mitigating circumstances. This approach has been called *presumptive model*.

## **3.4. The Sentencing Hearing**

Sentencing hearing means the separate hearing for determining the sentence after the conviction of the offender. In the less serious offences, which are not tried before the jury, the judge may pronounce sentence immediately upon finding the defendant guilty or upon accepting a guilty plea. Sentencing may be

immediate when the judge has no option but to assess the statutory penalty. In the case of serious offences in which the sentence may be capital sentence to death, life imprisonment or a term of year, the judge sets the separate future date for hearing to determine sentence. Separate sentencing hearing is significant in judicial model since the more elements play role to determine sentence than the elements that constitutes a crime.

### **3.5. The Sentencing Decision**

Sentencing decision is the crucial part of the sentencing process. How much amount of sentence or length of prison term will be imposed to the offender is concerned with it. Generally, judges decide most sentences unless the legislature has removed all judicial discretion, but juries have sentencing power where the jury system is prevailing. The judge is not required to follow the jury's recommendation in all jurisdictions. The judge may take different decision than recommended by the jury in some cases, generally in serious cases. It is a separate decision in relation to the sentence to the particular offender who has been convicted. The principles of sentencing and the special facts and circumstances connecting to the offender as presented in the pre-sentence report are taken onto account in this stage.

### **3.6. The Formal Sentencing**

Formal sentencing is the sentence, which the offender actually serves. If the defendant has been convicted of more than one offense, usually the judge has the authority to determine whether the sentences are to be imposed concurrently or consecutively. *Concurrent sentence* is the term of imprisonment for more than one offense that is served at the same time. If an offender receives a five-year imprisonment term for one offense and ten-years for another offense to be served concurrently then the total sentence is ten years. In this system, small amount of sentence is included within the large amount of sentence. *Consecutive sentence* is the term of imprisonment for more than one offense that must be served one following other. If an offender receives a five-year term of imprisonment for one offense and ten-year for another offense to be served then the total sentence is fifteen years. The consecutive sentence adds up to a total of both sentences.

### **3.7. The Victim Participation**

The study of victims is said to be a new field. Twenty years ago it would have been difficult to have found any criminological agency (official, professional, voluntary or other) or research group working in the field of victims of crime,

or which considered crime victims as having any central relevance to the subject apart from being a sad product of the activity under the study of criminology. To officials the victims were merely a witness in cases in the court, to researchers either the victim was totally ignored or was used as a source of information about crime and criminals. Until very recently there was a striking lack of information about victims, and even now the knowledge is still fairly sketchy, limited to certain crimes and often to certain types of victim.<sup>13</sup>

In the present context, the role of victim also may be important in sentencing process. S/he may be permitted to express his/her concerns and opinions on issues like sentencing. In fact, the state case is the outcome of pain or suffering of the crime-victim; it means that in fact his or her case. Thus, the crime-victims are to be informed of the progress of his/her case. Victim as an aggrieved one should always and properly be informed of the development of the case. It is only then possible when a right to be informed, in that way, shall be embodied in the constitution.<sup>14</sup> The constitution of Nepal has incorporated this right as a fundamental right.<sup>15</sup> *UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985* also mention about the involvement of victim in criminal proceedings under the topic of *Access to justice and fair treatment*. According to this Declaration:

- Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. (Principle-5)
- The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
  - a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have required such information; (Principle-6 a)
  - b) Allowing the views and concerns of victims to be presented and considered at appropriate states of the proceedings where their personal

<sup>13</sup> Katherine S. Williams, (2001), *Textbook on Criminology*, Delhi: Universal Law Publishing Co. Pvt. Ltd., p. 98.

<sup>14</sup> Shankar Kumar Shrestha, (2001), *A Step towards Victim Justice System Nepalese Perspective*, Kathmandu: Pairavi Prakashan, p. 211.

<sup>15</sup> *Constitution of Nepal (2015)*, Art. 21.

- interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (Principle-6 b)
- c) Providing proper assistance to victims throughout the legal process; (Principle-6 c)
  - d) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims. (Principle-6 e)

In the contemporary world, International Instruments and most of the national legal systems have accepted the role of the victims in criminal proceedings and sentencing process.

#### **4. BASIC FEATURES OF THE NEW SENTENCING ACT**

The Criminal Offence (Determination and Execution of Sentence) Act, 2017 will come into force with its relevant substantive and procedural laws namely the Muluki Criminal (Code) Act, 2017 and the Muluki Criminal Procedure (Code) Act, 2017 on the upcoming date of August 17, 2018, Friday.<sup>16</sup> However, some provisions relating to the reformatory forms of punishment will not come into force on the same day until government of Nepal publishes notice in Nepal Gazette to bring these provisions into practice.<sup>17</sup> The full application of both substantive and procedural criminal law become incomplete in absence of this Act, therefore, all of these legal instruments need to be applied concurrently. This Act is basically concerning to determine the appropriate sentence to the offender and execute thereof.<sup>18</sup> It is absolutely new normative framework for this jurisdiction waiting from the long time. Therefore, it is an achievement though it demands high level of competency in the institutional structures for its proper application. The basic features of this Act are as follows:

##### **4.1. Provision of general principles relating to sentencing**

The principles established by the long experiences and the jurisprudence are taken as the general principles and such principles contribute from the stage of law making, enforcing and interpretation. Chapter 2 of the Criminal Code comprises the cardinal principles of criminal justice and chapter 2 of the Sentencing Act comprises the general principles of sentencing. The Sentencing Act has accepted general principles of sentencing including this Act to be

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<sup>16</sup> *Muluki Criminal (Code) Act, 2017, Sec. 1(2).*

<sup>17</sup> *Criminal Offences (Sentence Determination and Execution) Act, 2017, Sec. 1(2).*

<sup>18</sup> *Ibid, Preamble.*

implemented subject to Criminal Code and Criminal Procedure Code,<sup>19</sup> Lesser sentence to be awarded,<sup>20</sup> Sentence to be determined after the conviction,<sup>21</sup> Separate hearing to be conducted,<sup>22</sup> Sentence to be determined by conducting hearing in open bench,<sup>23</sup> Not to be implemented more than one sentence at the time of imposing sentence.<sup>24</sup>

#### **4.2. Changes in the forms of punishment**

The new law has made some changes in the forms of punishment for different offenses on the bases of principle of proportionality that is the punishment should be based on gravity of offense and offender's culpability. Life imprisonment, fixed term of imprisonment, fine, imprisonment and fine, compensation, compensation or imprisonment in failure to pay compensation, and community service instead of imprisonment are included as the forms of punishment.<sup>25</sup> On the basis of severity of offense, life imprisonment is also taken as forms of punishment in some sever crimes including death caused by torture or cruelty, death caused by explosion followed by abduction of aeroplane, death caused by poisoning drinking and foodstuff of public use, death caused by rape.<sup>26</sup> On the basis of current legal provision,<sup>27</sup> life imprisonment is understood as the imprisonment for twenty years. The existing system of reckoning twenty years for the purpose of fractional punishment has been reviewed and new law has made the provision that for the purpose of fractional punishment, life imprisonment shall be computed as 25 years<sup>28</sup> imprisonment and as imprisonment for life in heinous crime. The existing legal provision of confiscation of the whole property, being unjustified and inappropriate in the viewpoint of human rights, has been removed by this new law.

#### **4.3. Consistency between the quantum of imprisonment and fine**

Imprisonment, fine or both are the punishment mostly in use around the world since it satisfies the inherent objectives of all theories of punishment including the reformative one. The same is true in the Nepalese context. However, the existing legal structure fails to maintain consistency between both that how

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<sup>19</sup> *Ibid*, Section 4.

<sup>20</sup> *Ibid*, Section 5.

<sup>21</sup> *Ibid*, Section 8.

<sup>22</sup> *Ibid*, Section 9.

<sup>23</sup> *Ibid*, Section 10.

<sup>24</sup> *Ibid*, Section 11.

<sup>25</sup> *Supra Note* 16, Section 40(1)

<sup>26</sup> *Ibid*, Section 41.

<sup>27</sup> *Muluki Ain, Chapter on Punishment*, No. 6.

<sup>28</sup> *Muluki Criminal (Code) Act, 2017*, Sec. 42.

long imprisonment can be used with or as an alternative to how much amount of fine. This legal structure has made a standard that a ratio of one year imprisonment is using with the fine of ten thousand rupees. This standard may be useful in determining the sentence.

#### **4.4. Imprisonment taken as a last resort**

This Act has recognized an imprisonment as a punishment of last resort mentioning that in case otherwise provided in this Act, the imprisonment shall be imposed if fine and community services are insufficient while imposing punishment to any offender.<sup>29</sup> This provision accepts the principle of retrain in the course of sentencing.

#### **4.5. Provision on aggravating and mitigating factors**

Particularly in the application of judicial model law, the aggravating and mitigating factors of offense play significant role to choose the accurate quantum of sentence. It helps the judges to stand within the length of the sentence objectively taking into account of the principle of proportionality. In case where the statutory law does not mention such aggravating and mitigating circumstances, the court itself needs to set forth such standards. The case of Shanti BK<sup>30</sup> and Govinda Bahadur Karki<sup>31</sup> can be illustrated in this respect. Taking into account of the significance of such guideline, the new law has mentioned the aggravating and mitigating factors of offense.<sup>32</sup> Sentencing is obviously more sensitive than the conviction, in the sense; it requires more factors relating to conduct or fault than those requirements of conviction of an accused.

#### **4.6. Provision of separate hearing**

One of the shifting of paradigm by the new legal structure is to establish judicial model of criminal law from the legislative model. Judicial model of punishment gives discretionary power to the judge to choose appropriate sentence to the convicted offender within the limit set by the legislature. This law, in most of the provisions, follows the judicial model mentioning only the maximum range of punishment so that an appropriate quantum of punishment could be determined on the basis of aggravating and mitigating factors of offences. Whether to fix the minimum range of punishment may be a matter of debate in itself and logic may be put forwarded for and against it. The fixing of

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<sup>29</sup> *Criminal Offences (Sentence Determination and Execution) Act, 2017*, Sec. 23.

<sup>30</sup> *Shanti B.K. v. HMG*, NKP (2061 BS), p. 769.

<sup>31</sup> *Govinda Bahadur Karki v. GoN*, NKP (2065 BS), p. 1369.

<sup>32</sup> *Muluki Criminal (Code) Act, 2017*, Chapter-4.

a minimum punishment to an offender may be severer and injustice and that may induce the judge to orient towards acquitting rather than convicting and punishing the offender.

Therefore, this legal structure, trusting the discretion of judge in relation to choose appropriate quantum of punishment, has preferred to adopt the judicial model of punishment rather than legislative model.<sup>33</sup> The act of choosing appropriate quantum of sentence demands separate hearing on this issue and this issue is also addressed in the Act by making a provision for separate hearing for the purpose of conviction and sentencing. In conviction hearing it will be decided whether the accused is guilty of the offence. Only if the court convicts the defendant next hearing will be conducted within 30 days to determine the appropriate sentence which is called the sentencing hearing.

#### 4.7. Pre-sentencing Report

This is significant in the sentencing process since it comprises various aspects of defendant. Section 12(1) of the Sentencing Act, 2017 provides that before determining sentence for an offence liable to an imprisonment exceeding three years or 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 offender, circumstances of commission of offence, offender's conduct before commission of 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.

#### 4.8. Provision of the bases of sentencing

According to penology, the objective of punishment should be clear and it should be capable to test whether the punishment to be imposed meet the objective or not. The Criminal Offence (Determination and Execution of Sentence) Act, 2017 has clearly mentions about the objective of punishment to be considered,<sup>34</sup> matters to be considered in determining sentence,<sup>35</sup> grounds for determining sentence,<sup>36</sup> matters to be considered in sentencing child,<sup>37</sup>

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<sup>33</sup> Prof. Dr. Rajit Bhakta Pradhanaga and Shreeprakash Upreti (2067 BS), "A Critical Observation of the Proposed Sentencing Act", *Prosecution Journal*, Kathmandu: Office of the Attorney General Nepal, Volume 1, pp. 1-22.

<sup>34</sup> *Criminal Offences (Sentence Determination and Execution) Act, 2017*, Section 13.

<sup>35</sup> *Ibid*, Section 14.

<sup>36</sup> *Ibid*, Section 15.

<sup>37</sup> *Ibid*, Section 16.

grounds of sentencing should be written in the judgment,<sup>38</sup> and basis of determination of fine.<sup>39</sup> These help the judges to consider about the several matters while sentencing and create a solid foundation for making conclusion. Endorsement of such provisions in the legislative law contributes to maintain consistency in sentencing.

#### 4.9. Provision on execution of punishment

The existing sentencing system, in relation to execution of sentence, has adopted the concurrent model as rule and consecutive model as an exception. Until the statutory law expressly speaks the consecutive model; the former comes to an effect *ipso facto* at present. The provisions of Section 11 and Section 36 of the Criminal Offence (Determination and Execution of Sentence) Act, 2017 become relevant in this respect. The provisions of these sections are in conflict to each other and even the provisions of Clause (1) and clause (2) of the section 36 are also inconsistent. In aggregate, it seems that this law intends to carry on the existing provisions however, with more clarity.

#### 4.10. Provision of Compensation

One of the areas of criticism to the existing Nepalese criminal justice system is that it has given less attention towards the crime-victim from the beginning. The Constitution of Nepal also has ensured the rights of crime-victim as a fundamental right.<sup>40</sup> In the same way, this fundamental right has been accepted in the general principles of the criminal justice under the chapter 2 of Muluki Criminal Code.<sup>41</sup> This new legal structure has made one of the major shifts in the criminal justice system in this area. The provision of compensation to the crime-victim is arranged in every chapter of substantive law. Similarly, the bases to determine the amount of compensation and procedures are also prescribed in the Sentencing Act.<sup>42</sup> The offender is responsible to pay the determined compensation immediately but if the offender being unable to pay such compensation immediately furnishes any property as security for such compensation, the court may order him/her to pay compensation up within one year in maximum three installments.<sup>43</sup>

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<sup>38</sup> *Ibid*, Section 17.

<sup>39</sup> *Ibid*, Section 18.

<sup>40</sup> *Constitution of Nepal (2015)*, Art. 21.

<sup>41</sup> *Muluki Criminal (Code) Act, 2017*, Section 32.

<sup>42</sup> *Criminal Offences (Sentence Determination and Execution) Act, 2017*, Chapter-3.

<sup>43</sup> *Ibid*, Section 42(1) & (2).

#### 4.11. Provision on reformatory punishments and programs

It is one of the shift of paradigm in the sentencing system that the sentencing law has apparently accepted the reformatory forms of punishments and such reformatory programs for the first time in Nepal. It can be tabulated as follows:

##### Reformatory Punishments and Programs

| SN | Section | Legal Provisions   | Phase of application | Remarks |
|----|---------|--|----------------------|---------|
| 1  | 22      | Community service  | Initial phase        |         |
| 2  | 24      | Suspension of sentence   | Initial phase        |         |
| 3  | 25      | Send to reform home  | Initial phase        |         |
| 4  | 26      | Send to rehabilitation centre                                  | Initial phase        |         |
| 5  | 27      | Imprisonment may be served in prison on weekend or night basis | Initial phase        |         |
| 6  | 28      | May be kept in open prison                                     | Last phase           |         |
| 7  | 29      | May be paroled   | Last phase           |         |
| 8  | 30      | To make socialization  | Last phase           |         |
| 9  | 31      | Employment into labor for imprisonment                         | During the sentence  |         |
| 10 | 32      | May be allowed to go outside prison                            | During the sentence  |         |
| 11 | 33      | Reformatory programs to be conducted                           | During the sentence  |         |
| 12 | 37      | Remission of imprisonment                                      | Last phase           |         |

#### 4.12. Establishment of victim relief fund

This Act has made a provision to establish a victim relief fund for the purpose of compensating the crime-victim.<sup>44</sup> The Government of Nepal collects into the fund one half the recovered fine imposed by court and one half amount of the money paid by an offender for imprisonment required to be served in prison. In addition to that money, the money provided for by law or

<sup>44</sup> *Ibid*, Section 48.

government or received from other sources shall also be credited to this fund. The classification of victims, grounds for providing relief money to the victim from the fund, limits of the money and procedure for distributing such money are regulated by the rules made by the Government of Nepal.

## **5. ANALYTICAL OBSERVATION**

The enactment of separate sentencing Act along with the substantive and procedural law comprising contemporary modification of previous legal structure and international standards is itself a great achievement in the history of criminal justice system. Actually, this is the culmination of fathomless effort of codification and modernization of the normative framework. Though it is the moment of extreme happiness having complete normative structures that cover the substantive, procedural and sentencing aspects but there are still some rooms to rectify technically and even substantially. The sentencing law can be evaluated in the following way:

### **5.1. Sentencing Philosophy**

The Sentencing Act has mentioned the objectives to be considered during sentencing in Section 13. Pursuant to this section, the objectives of punishment should be any or all of, (a) to deter the offender or other person to commit offence, (b) to protect society or community, (c) to provide justice together with compensation to the victim, (d) to help the offender in his/her rehabilitation in society or to reform the offender, (e) to separate offender from society, (f) to make an offender felt that a harm is caused to the victim or community, by making him/her responsible for the act done by him/her and/or (g) to denounce unlawful conduct. This covers all the philosophical foundation of the punishment since the objectives (c), (f) and (g) are nearer to the retributive theory, objectives (a) and (b) tending to deterrent theory containing both specific and general deterrence. Likewise, Chapter 5 and objective (d) are concerning to rehabilitation and reformatory thought. Objective (e) is drawn from the incapacitation theory. However, there is no sanction to reciprocate the objective (g). Comprising all the philosophical foundation as objectives is itself an indicator of the fact that we were not clear about the objective of sentencing in the past. In aggregate, the forms of punishment arranged in the code signify the tendency toward deterrent rationalization. At the same time admitting the various forms of reformatory punishments or alternatives to prison shows that the system is moving to the direction of reformatory thought to the possible extent.

## 5.2. Sentencing Principles

There are four sentencing principles that serve to choose the appropriate sentences to the offenders. Out of them former three principles are accepted in express way and later one is also accepted indirectly in the Act. Section 14(a), (b) & (d) expressly accept the principle of proportionality. Section 14(c) confirm the principle of parity and section 15(e) and section 23 have expressly adopt the principle of restraint stating that imprisonment should be the last resort in the course of sentencing. The Act has not expressly mentioned about the principle of individualization of punishment like prior principles but the pre-sentencing report in section 12 and provisions relating to community correction under the chapters 4 and 5 have made the room of using this principle in the course of sentencing. Using of these principles collectively or any one may depend on the nature of the cases and circumstances surrounding the offender, though it demands the expected level of competency of the institutional structures.

## 5.3. Sentencing Models

Most of the provisions of punishment under the new normative framework are the evidences of shifting the sentencing to judicial model from the legislative model. The legislature highly trusts the judges in sentencing leaving them a sufficient range of discretion. It is challenging in satisfying the expectation of law and maintains consistency in sentencing on the side of court. Meeting of challenges will show the establishment of justice in the real sense.

## 5.4. Sentencing Hearing

The separate sentencing hearing is particularly significant in the judicial model of legal framework which has largely adopted the new legal structure. Section 9 of the Act has made the provision of separate hearing for sentencing to the offender to the cases entail punishment of more than three years' of incarceration or fine of more than thirty thousand rupees. The same judge need to conduct this hearing within 30 days unless otherwise provided in specific law. It is one of the shifting of paradigm in sentencing segments of Nepalese criminal justice system that may help the judge to determine appropriate sentence to the offenders.

## 5.5. Formal Sentencing

Formal sentencing is a significant segment of sentencing in which the offender actually serves the sentence. There are two basic methods serving sentence in fact namely: the concurrent or consecutive. *Concurrent sentence* is the term of

imprisonment for more than one offense that is served at the same time and *consecutive sentence* is the term of imprisonment for more than one offense that must be served one following other. In the current system, the concurrent sentence is general rule<sup>45</sup> and consecutive sentence is an exception.<sup>46</sup> Sections 11 and 36 of the Act are relating to this matter but the provision of Section 11 is not so clear and it is conflicting with section 36. Again clause (1) and (2) of the section 36 are conflicting to each other. It is necessary to reconcile these provisions with clarity that should be able to confirm the continuation of the current provisions in this respect.

### 5.6. Reformative Sentences and Programs

Introduction of community correction in wide range through the reformative punishments and programs is one of the notable features of this Act, though it is not applicable until the notification of Government. The provisions of Community service, socialization of the inmate, allowing them to go out of the prison, employment into labor for imprisonment, conducting the reformative programs can be taken as reformative programs that may help the prisoners to reform, keeping contact with the society and prepare them for reentry into the society. The suspension of sentence, sending to reform home and rehabilitation centre, facility to serve in prison on weekend or night basis are initial alternatives to the custodial punishment embodied in the Act.

The grounds to provide such alternative are also determined in the Act as: offence, age of offender, conduct, circumstances at the time of commission of offence and *modus operandi* of commission of offence. These all are static ground and there is no provisions of dynamic grounds like commitments of the parent, victims, community, employment providers and alike before the judge. This would also make significant contribution to the judge to choose the appropriate alternatives as per necessity. It is better to introduce in the Act as grounds. Similarly, open prison and parole are measures for using last phase of the incarceration. However, the negative list of 16 cases in section 24(3) and the negative list of section 29(1) limit the potential benefits of such measures. The negative list should be shortened so far as possible.

### 5.7. Participation of the Victim

Participation of the victim may also contribute as a segment of sentencing process. Victim is a person who has suffered the consequence of the offence

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<sup>45</sup> *Muluki Ain, Chapter on Punishment*, No. 41.

<sup>46</sup> *Ibid, Chapter on Abduction and Hostage Taking*, No. 8; *Human Trafficking and Transportation (Control) Act, 2007*, Section 15(2).

and the act of the offender and the state represents on his/her behalf. It is new development in this area of criminal justice for addressing the person who is actually victimized. At present victim participation in sentencing process is not taken as a significant area of attention. They are considered as a witness of government. No their views are taken at the stage of sentencing and even the pardon and withdrawal of cases. Though the constitution has ensured the right of crime victim as a fundamental right and the Criminal Code has also accepted those rights in the general principle part (Sec.32). The constitution has guaranteed to crime-victim only: (i) the right to be informed about the investigation and adjudication, (ii) the right to compensation, and (iii) right to social rehabilitation but not the right to be involved in the course of sentencing, in using of alternatives to incarceration, determination of compensation and fine<sup>47</sup>, and even the withdrawal of criminal cases.<sup>48</sup> This is one of the major lacking in establishing the proper justice to crime-victim in the new legal structure.

### **5.8. Vanishing of the inherent concept of No. 188 of chapter on 'Court Procedure'**

There is a special provision made under No 188 of the Chapter on 'Court Procedure' that the presiding judge may express his/her opinion to reduce the period of incarceration as he decides if his conscience sees that the amount of penalty is heavier than his conduct in the case of at least imposing life sentence. In such case, the endorsement of Supreme Court is necessary. If the Supreme Court does not accept the recommendation of the subordinate court in respect of reduction, it is not applicable. Actually it is very typical and significant provision of Nepalese sentencing process but there are many rooms to criticize it. Using this discretionary power inconsistently, possibility to impose less punishment in the case of intentional killing than non-intentional killing may be illustrated as its weaker aspect.

However, many socially victimized women were getting relief under this provision in the case of killing of newly born child from the illicit sexual relationship. The new legal structure has provided the aggravating and mitigating circumstances<sup>49</sup> and reducing the quantum of punishment up to half if the defendant confesses the alleged offence during investigation as well as the court.<sup>50</sup> Punishment of life imprisonment (25 years of imprisonment) has

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<sup>47</sup> *Criminal Offences (Sentence Determination and Execution) Act, 2017.*

<sup>48</sup> *Muluki Criminal Procedure (Code) Act, 2017, Section 116.*

<sup>49</sup> *Ibid*, Chapter 4.

<sup>50</sup> *Ibid*, Section 47.

been prescribed for the offence of basic intent homicide<sup>51</sup>. In case of killing of newly born child, being a fixed punishment, there is no relevancy of aggravating and mitigating circumstances. Similarly Section 47 is not applicable in the case of denial of charge due to any reason including the denial with the hope of acquittal. In such situation a person has to serve 25 years' incarceration which is against the jurisprudence established by the Supreme Court for a long time. Therefore, there should be proper alternative to enable the court to mitigate the sentence in certain condition like in the case of Shanti BK,<sup>52</sup> Bhimkala Walal,<sup>53</sup> Samjhana Lamichhane Dhakal,<sup>54</sup> Meera Tamang,<sup>55</sup> Makhamali Titung,<sup>56</sup> Kanyamaya Limbu<sup>57</sup> and so on.

## 6. CONCLUDING REMARKS

The introduction of new and complete legal structure incorporating newly developed concept in criminal justice system is itself a great achievement. This piece of legislation is a result of constant effort for more than six decade. It has apparently accepted many reformatory forms of punishment like community service. It has created both challenge and opportunity in criminal justice system. Enhancement of competency and reform in institutional structures along with creation of some new institutions is necessary to implement the reformatory forms of sentences. At the same time, there are some rooms for correlation in law as discussed in earlier section. Therefore, it is necessary to strengthen the capacity of the institutions as well as reform the normative framework to tune with the changing needs of time.



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<sup>51</sup> *Muluki Criminal (Code) Act, 2017*, Section 42.

<sup>52</sup> NLR (NKP) (2061 BS), DN 7399, p. 769.

<sup>53</sup> NLR (2060 BS), DN 7225, p. 445.

<sup>54</sup> NLR (2060 BS), DN 7169, p. 77.

<sup>55</sup> NLR (2060 BS), DN 7277, p. 797.

<sup>56</sup> NLR (2060 BS), DN 7195, p. 240.

<sup>57</sup> NLR (2063 BS), DN 7752, p.1075.

# **Private Prosecution: A Context of Supplementary Action to an Inherently Government Power and Private Enforcement of Criminal Law under the Penal Code, 2074 BS**

**Diwakar Bhatta\***

## **ABSTRACT**

The job of public prosecution rests on the state's primary duty towards the people to ensure peace, order and security. Primarily, the prosecutorial power is considered to be an inherently a governmental function. But now, this notion is constantly evolving. The prosecutor is supposed to initiate legal proceedings should not compromise with the principle of equality of arms between the parties to litigation and protection of the victim. The Government Attorney in Nepal is usually empowered to bring a criminal charge in the court on behalf of the State or the victim. However, if the District Attorneys make a decision not to prosecute the case, then who will represent the interest of victim or his/her families in consideration of the state responsibility to ensure the justice to the victim? This aspect has considerably become disputable in different legal system and varies from time to time.

## **1. INTRODUCTION**

**P**rosecution simply means process of filing a case on behalf of victim or society or state in which there is a need to represent the state or its apparatus in the court. Prosecutor is thus considered an authority established by

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the state to inquire into the criminal conduct of the person as to determine in favor of society whether it is lawful or not, and to authorized to bring a charge-sheet in the court to make the alleged liable for the legal obligation. The prosecutor or the office of the public prosecution is often considered as a branch of the executive, however, its position is comparatively different form other ministries or departments in which there could be control or strict regulation of the government through its policies. In plain language, the position of the public prosecution office is more like a quasi-judicial. So it is emphasized that it should be separate from the police and the judiciary as well.<sup>1</sup> Despite the fact that it cannot be entirely aloof of investigation and adjudication since some sort of professional cooperation and co-ordination is always accepted. Because it functions on behalf of the state or the government by taking care of the criminal proceedings and notably is to decide as to whether a prosecution is required or not against the alleged who is primarily brought by the investigation.<sup>2</sup>

The job of public prosecution rests on the state's primary duty towards the people to ensure peace, order and security. For the sake of fulfilling such bestowed responsibilities, it sets up the necessary state apparatus in which the police, to arrest the offender or to make investigation of offence and the office of the public prosecutor to handle the entire process of criminal proceedings representing the government or society. Besides, not only this, sometimes, the public prosecutor may be directly or indirectly involved in the investigation of case, though the investigation is a very usual function of the police in world. Further, the job of the public prosecutor has significantly been increasing as per the changes in the society. So in this modern and complex world, the role of the public prosecutor is not only to plead or defend cases in favor of state, but is to most importantly give legal aid and advices to the investigation and the government departments and also to supervise the implementation of court decisions. And the public prosecutor must also be committed to the protection of human rights of the accused within a scope of fair trial.<sup>3</sup>

## **2. PROSECUTION IS AN INHERENTLY GOVERNMENT FUNCTION**

Primarily, the prosecutorial power is considered to be an inherently a governmental function, however, it has constantly been emphasized that there should be protection of the right of victim to seek the remedy such as

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<sup>1</sup> *UN Guidelines on the Role of Public Prosecutors, 1990*, Preamble.

<sup>2</sup> *Code of Crown Prosecutors, London*, Articles 3.1 to 3.7.

<sup>3</sup> *Committee of Ministers of the Council of on 6 October 2000*, Recommendation Rec (2000)19.

punishment to the perpetrator, compensation, restitution, reparation, rehabilitation and satisfaction.<sup>4</sup> In criminal justice system, victim is one of the important parts of the criminal proceedings, whose cries, voices and agonies must be rightly addressed both in the formal and informal way, keeping in his/her expectation to get justice from state machineries.

The prosecutor is supposed to initiate legal proceedings should not compromise with the principle of equality of arms between the parties to litigation and protection of the victim. However, the public prosecutor must always rely on the evidence and the interest of the society depending upon the situation. In the same way, the public prosecutor may also pursue pre-trial inquiries and participate in the investigation of a case to find the truth. If an individual or social interest is represented by the public prosecutor and should also be based on the evidential criteria. Not only this, the public prosecutor may apply appeal over the decision for its revision/review in the superior courts in favor of the accusation if the trial court sets aside the case or declaration of acquittal.<sup>5</sup> Thus, the public prosecutor also has a supervisory role to the national, regional or local authorities for the purpose of performing the prosecutorial job independently and transparently and in full sense in accordance with law.<sup>6</sup>

Public prosecution is a part of executive function, however, it is not exactly like a police which entirely depends on the executive order or work under a chain of command. The main difference of the police administration and public prosecution is basically that the former solely works on the chain of command of the superiors authorities in institutional hierarchy whereas the later must be committed to the concerted effort to ensure justice and must also work independently being separate from an executive or judicial organ. The public prosecution, though works in favor of the state together with the investigation officer or police to complete the process of investigation and has power to supervise the investigation process, but he/she should always perform the task of furnishing legal advices or direction as independently as possible being free from internal and external pressure, influences or prejudices.

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<sup>4</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.

<sup>5</sup> European Union, (2012), Recommendation CM/Rec (2012) the Committee of Council of Ministers to Member States on the Role of Public Prosecutors outside the Criminal Justice System, Articles 12, 13, 14 & 15.

<sup>6</sup> *Ibid*, Art. 23.

### 3. CONCEPTUAL FRAMEWORK ON THE PRIVATE PROSECUTION

It is commonly accepted principle that the initiative of the prosecution in criminal proceeding is done by the state or the office of public prosecution established by it and the private party does have minimum role to determine as to decide whether to initiate the case or not in the court. However, the role of victim or the individual affected or the society cannot be ignored because victim has the expectation that he/she shall be compensated, restituted, rehabilitated or resorted and the perpetrator is to be punished for the wrong he/she has committed. Not only this, the state must also take into account of the victim's satisfaction. In this way, the participation of the victim in the criminal proceeding is as much necessary as it is the primary responsibility of the state to initiate the criminal charges. However, it is neither acceptable nor desirable to be a mechanical enforcement of the law because it leaves many rooms for injustice. In other words, the Government Attorney is usually empowered to bring a criminal charge in the court on behalf of the state or the victim. However, if the District Attorneys make a decision not to prosecute the case, then who will represent the interest of victim or his/her families in consideration of the state responsibility to ensure the justice to the victim? This aspect has considerably become disputable in different legal system and varies from time to time. In this article, it is contextual and pertinent to comparatively analyze the issues of private prosecution responding to the question such as what happens if the District Attorney decides not to prosecute the case and denies filing the charge-sheet in the court, then what shall be the fate of the complaint or concern of a victim.

Talking to the practice of England, part of the country was unpoliced until 1856 and there was not publicly funded, professional police force until 1828. Before to have this provision for police, there were private institutions established in English society which used to take the responsibility for the enforcement of law. However, such small scale private law institutions were only functioning when there were small and closely knit communities due to their effectiveness in scalable society.<sup>7</sup> At that time, private prosecution system was rather more informal. And, local magistrates, Justices of the Peace (JPs) and constables, involved themselves in assisting victims in pursuing and apprehending criminals, but, with the exception of crimes against the state such as treason and coining of money, the costs associated with assembling a prosecution were

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<sup>7</sup> Mark Koyama, (2014), "The Law & Economics of Private Prosecutions in Industrial Revolution", *Public Choice*. Vol. 159, No. 1/2, p. 277.

borne by the victim.<sup>8</sup> However, the provision for private enforcement of law became less effective when society entered to urbanization and population scaled up and turned to be modernized in the late eighteen century. The market failures due to non-existence of the government's intervention also gave impetus to have growth of the government in the ninetieth and twentieth century. Gradually, the police, prosecution and judiciary including other organs of the state came with the dominant role in the determination of the individual or firms' activities.<sup>9</sup> Later one in England, the matter of investigation and prosecution of criminal matters became the responsibility of the state before to the recommendation of the Royal Commission was made in 1993 which suggested the role of police to investigate the case and initiate the prosecution by the crown prosecution.<sup>10</sup>

Talking to the practice of the United States, the District Attorneys are empowered to make a decision to prosecute or not to prosecute the case in the court under the state law jurisdiction. In this situation, the US District Attorneys who are appointed through the election shall bear their offices till the time the law determines their tenure. An issue may arise whether is there any provision for the review or revision of the decision not to prosecute the case by the District Attorney of the US? So, most of the American states have realized a need for the private prosecution especially in cases when the District Attorney abuse his or her discretionary power to prosecution or being done with corruption, political ambition, insufficiency of fund, and personnel. Though a decision of not to prosecute a case may also be implemented by other means such as mere inaction, acceptance of a compromise plea or entry of nolle prosequi.<sup>11</sup> In such situation, there have been efforts to judicial supervision of the nolle prosequi and compromise of plea. In many states of the US, judiciary has ordered to replace the District Attorney if the public prosecutor is unavailable or disqualified. This practice has curtailed the abuse of the power of District Attorney's discretion. However, the way of the replacement of a District Attorney with the appointment of private advocate does not sufficiently give remedy to nolle prosequi because no attorney would be ready to take such responsibility to prosecute in which the District Attorney has refused to prosecute the case. Rather supplementing judicial replacement of District Attorney with private prosecution would remedy the deficiencies of those

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<sup>8</sup> *Ibid*, p. 280.

<sup>9</sup> *Ibid*, p. 278.

<sup>10</sup> *Recommendation of the Royal Commission of Criminal Justice, 1993*, London.

<sup>11</sup> "Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction", *The Yale Law Journal*. Vol. 65, No. 2 (1955), p. 209.

restraining techniques and provide a practical method for curtailing abuses of the District Attorneys discretion.

Following this private prosecution plan, the judiciary allows a private citizen or victim to appoint a privately hired attorney for the prosecution of a single case in which a District Attorney has found to be abusing his/her discretion through inaction or improper action.<sup>12</sup> In the US, It is found that several jurisdictions have set the practice of appointing a substitute attorney to prosecute a single case in which the District Attorney has found to abusing his/her discretion for making the prosecution decision. There are also few examples of having declared some state statutes provisioning the substituting attorney in lieu of District Attorneys examining such provision contradicts with the Constitution of the State. The case law reveals that as a general rule the District Attorney will be replaced only when there is a vigorous difference of opinion between court and prosecutor regarding the advisability of prosecution.

The matter does not pose a problem of the constitutionality of the statutes' provisions in the states where the constitution itself provide District Attorney the discretion to prosecute the case since the discretion should be considered to be exercised within certain limitations or boundaries. The excess of boundary or limitation does permit the judge to appoint a replacement attorney by way of legislative justification. However, it becomes disputable when the Constitution does not provide power to the District Attorney to make a prosecutorial decision.<sup>13</sup>

Even then, the replacement plan of the District Attorney is not commonly used for a simple reason that he has not listened to the victim or not prosecuted a case. However, the replacement plan specifically used when "the circumstance imperatively demands to do so because the discretionary power of the public prosecutor is so wide that his/her action are accorded a virtually irrefutable presumption of propriety."<sup>14</sup> Otherwise, courts are unwilling to make a replacement of District Attorneys simply for the reason that the victim has not got proper satisfaction from the relief the prosecution made.

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<sup>12</sup> *Ibid*, p. 215.

<sup>13</sup> For example: we may look at the decisions of the Pennsylvania and South Dakota to this analysis. The Pennsylvania court attorney abused his discretion, stating that establishing the prosecutor's office was a bar South Dakota court invalidated a replacement authorized replacement not only when discretion the opinion of the court the ends of justice Since this statute allowed replacement without District Attorney was acting beyond his it was properly held to conflict with the state constitution. Further see: *Supra Note* 11, p. 217.

<sup>14</sup> *Ibid*, p. 217.

As to the private prosecution in other countries, France and Austria have also put restraint to the prosecutor's discretion. Citizens may privately prosecute minor cases in France. Spain and Pakistan may also allow prosecuting privately certain cases. In Germany private citizen many prosecute many crimes including libel, slander, and assault with deadly weapon, vandalism and unfair competition. In China, settlement traditionally was left primarily in private hands.<sup>15</sup>

#### **4. PRIVATE ENFORCEMENT OF CRIMINAL PROCEEDINGS**

It is commonly said that the state has a prime role on the enforcement of the criminal law; however, it is not always true so. Because, the individual or citizen in the society has also a pivotal role to be play in criminal proceedings right from the moment on the occurrence of crime or subsequent to that and informing to the police or helping the investigation authority in the investigation and prosecution of case. So the victim of a case is also considered as a principal witness or living evidence of a case whose statement significantly helps the investigation and prosecution.

Further, the criminal procedure also requires taking his/her statement with adequate attention and he/she is also given necessary and adequate security, shelter or protection from post-crime victimization. Keeping in views, the witness is to be provided allowances for their travels to the authorities or courts during their testimonies in the court or presence in trial proceedings. Based on the nature and seriousness of case, a victim is required security, shelter and protection which must be the concern of the state. In the same way, a victim may need food, shelter, employment, transfer or security from possible threats to him/her or member(s) of family. So the state needs to give due attention to the cries or stories of victim and to give necessary value to the societies for their support to enforce the criminal law. In this way, the private prosecution might be a part of the societal demand to exert pressure on limiting the abuse of discretionary powers and put the prosecution authority in proper place.

#### **5. SITUATION OF PRIVATE PROSECUTION SYSTEM IN NEPAL**

Talking to the Nepali practice on private prosecution, legal history of Nepal shows that Nepal had practiced in ancient, medieval and Rana regime mostly indigenous practices which were most likely to be inquisitorial practices. During that time, the prosecution of criminal case was made by the individual

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<sup>15</sup> *Ibid*, p. 224.

before the country turned to the new political, legal and social landscape after the end of Rana regime. Nepal had adopted the customary practices before 2007 (2051) which was much based on the Muluki Ain of 1910 (1853) and rooted on orthodox Hindu religious practice. Nomenclature of the crimes and punishments were made on the basis of social practice. The definition of the crime was also in fluid and so also the forms of punishment, many of which were inhuman, cruel and atrocious. At that time, the role of a citizen was very much important especially for the reason that he/she had to file the case privately and also be responsible to prove the accusation against the offender in the court. Not only this, he/she was also responsible to collect the evidence and produce in the court as well. This system remained closure to the private policing as was existed in the United Kingdom till 1828. The system of private prosecution in Nepal remained effective till 2017 (1960), though Nepali legal system had adopted the concept of rule of law, independent of judiciary and protection of fundamental rights etc. However, the criminal law has definitely slow process of getting changes as compared to the politics and economics as it is directly linked to the social taboos. With the enactment of Police Act, 2012 (1956) and the State Cases Act, 2017 and Rules 2018 which provided the provision for a joint investigation and prosecution by the police and government attorney, and the court had a role to prefer either's opinion in case there was a lack of concurrence of opinion.

With this Act, Nepal introduced an adversarial legal system shifting from the inquisitorial one with the enactment of State Cases Act, 2017 (1960) and the role of court remained very limited in the examination of evidence in pre-trial stage. However, this Act made the citizen responsible to submit the first information report, if one sees or comes to know a crime has been occurred or is deemed to have occurred, to the investigation authority. However, role of an individual has just been limited to be a witness of case. He/she has not been allowed to take private initiative in filing a charge-sheet even in the situation the state authorities deny from doing so. There has also not been adequate role of the court to review the decision of the prosecution except for making a final judgment to conviction or acquittal.

By the peoples' movement to restoration of democracy in 1990, Nepal promulgated the Constitution of the Kingdom of Nepal which provisioned for the Attorney General as a chief legal advisor of the Government of Nepal and granted the Attorney General the power to make a decision as to prosecute or not to prosecute the case on behalf of the state or government. In line with Article 110 (5) of the Constitution of the Kingdom of Nepal as a delegated

power of the Attorney General to the Government Attorney as still into existence, the State Cases Act, 2049 (1992) by Section 17(2), the District Government Attorney has been given power to initiate a case in the court after an investigation has been completed on the top of the report of the investigation officer. This Act also does not allow an individual or citizen to make initiation of a case in the court. In another side, Section 27 of the States Cases Act, 1992 provides that in a case filed under this Act in which government is plaintiff, if it deems later on that such case does not fall under Schedule 1 and 2 the Act, the Court may issue an order to the concerned party to appear before the court and if such person agrees to continue the case, the court may convert such person as a party of the case and shall proceed and dispose the case from the same case with in accordance with the prevailing laws.<sup>16</sup>

The legislation has recently been passed in Nepal namely the Penal Code of Nepal, 2074 (2017) for codifying, consolidating and thereby modernizing Nepal's legal system. The new Penal Code of Nepal has notably introduced many good provisions which deem to necessary and urgent for the country. Besides, the Section 42 of the Penal Code has also continued the provision to keep the individual concerned informed if the court decides the case does not fall under the category of a state case. More specifically, Section 34 of Penal Code provides that it shall not be required to initiate the proceedings in court of law in case of minor offences. The Code mentions that Government Attorney shall decide not to file the charge-sheet in minor case; the concerned person shall be furnished the information to that effect. In the same way, sub-section 7 of Section 42 stresses that notwithstanding anything is mentioned anywhere in this Section, in case a victim does not satisfy the decision of the Government Attorney not to prosecute the case, he or she shall file a case in the court on his/her behalf.

This is newly incorporated provision in the penal code but it only applies in case of minor offenses such as pick pocketing involving the amount one thousand rupees committed for first time, the offence concerning the asking for begging for the first time and an offence involving three thousand fine or one month imprisonment or both in maximum.<sup>17</sup>

## CONCLUSION

Nepal's criminal justice system gives due importance to the victim in different stage of criminal proceedings. For examples, lodging the first information

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<sup>16</sup> *State Cases Act, 2049 BS (1992)*, Section 28.

<sup>17</sup> *National Penal (Code) Act, 2074 BS (2017)*, Section 34 (7).

report, witnessing the occurrence of crime and supplying the statement to the investigator and their testimonies in the court really worth much to make a final decision of case. However, the part of private enforcement of law is still not so strong in Nepal. Nepal does not have the provision of replacement plan of District Attorney if there is an abuse of the discretionary power or inaction or improper action as to the exercise of prosecutor power. Even then, the decision of the government attorneys are closely supervised or monitored by the Attorney General or the Department Head. Besides this, the decision of the government attorney may also be under judicial or quasi-judicial scrutiny if it is done maliciously, corruption with impropriety. Besides this, different ways of private enforcement of criminal law also help much to participate the people in the criminal proceeding to collect the support in investigation, prosecution and adjudication. So the concerned authorities must think on to develop the private enforcement plan for criminal law and proceedings to strengthen and to make the criminal justice system effective. This is the need of the present criminal justice system in Nepal.



# Measures for the Protection of Senior Citizens: National Penal (Code) Act, 2074 BS

Durga Khadka\*

## ABSTRACT

Ageing is a process of gradual change in physical appearance and mental situation that cause a person to grow old. World Health Organization defines senior citizens as people 60 years and above. The Senior Citizens Act, 2006 of Nepal also defines the senior citizens as people who are 60 years and above. The older people are not specifically mentioned in the universal treaties and are rarely mentioned in commentary or recommendations made by the Committees established to monitor compliance with the treaties. The Constitution of Nepal, Senior Citizens Act, 2006, Senior Citizens Regulations, 2008 and the newly enacted National Penal (Code) Act, 2017 have made certain provisions for the protection and welfare of the elderly. Similarly, the Supreme Court of Nepal also has issued some useful orders and decisions to this cause. Effective institutional mechanism, policy implementation, formal support system and a rights based approach to senior citizens are necessary to address the concerns of their rights in the near future.

## 1. OVERVIEW

Senior citizens are the treasure for the society. They are a link of past, present and future. The senior citizens are the senior members of the family who know better about the religion, family history, values and related customary practices. They possess better understanding of the family values

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and society and transfer these family values and societal knowledge to the upcoming generations. But nowadays condition and situation of senior citizens are no more similar.<sup>1</sup>

Every living being born, develops, grows old and dies. Ageing is a process of gradual change in physical appearance and mental situation that cause a person to grow old. World Health Organization defines senior citizens as people 60 years and above. The Senior Citizens Act, 2006 of Nepal also defines the senior citizens as people who are 60 years and above. The retirement age for military in Nepal is 45 to 48 years for lower class, for general government service 58 years, and for university teachers and the judiciary services 63 years.<sup>2</sup> The World Population Ageing Report, 2013 of the United Nations explain that the global share of older persons (aged 60 years or over) increased from 9.2 percent in 1990 to 11.7 percent in 2013 and will continue to grow at a proportion of the world population, reaching 21.1 percent by 2050. The issue of aging in the population research, however, has been neglected in the SAARC region as well as in Nepal<sup>3</sup>. The older population of Nepal is increasing both in terms of absolute numbers and as a proportion of the total population. The growth rate of older person in Nepal has increased from 5.4 percent in 1952/54 to 7.1 in 2011<sup>4</sup> which needs special attention for their management and also urgently needs further more programs to respect them and to use their knowledge experience and skills in development of nation.

In Europe, 25 percent of the population is already aged 60 years or over and that proportion is projected to reach 35 percent in 2050 and 36 percent in 2100. Populations in other regions are also projected to age significantly over the next several decades. For Latin America and the Caribbean, the population will go from having just 12 percent of the total at ages 60 and above in 2017 to having 25 percent at these ages in 2050. Similarly, the population aged 60 or over in Asia is expected to shift from being 12 percent of the total in 2017 to 24 percent in 2050, while in North America it will move from 22 to 28 percent, and in Oceania, from 17 to 23 percent over the same period. Africa, which has the youngest age distribution of any region, is also projected to experience a

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<sup>1</sup> Dr. ShashankShekhar, (2016), "Existing Legal Protection Available to Senior Citizens: An Indian Context", *IRA-International Journal of Education & Multidisciplinary Studies*, ISSN 2455–2526; Vol. 03, Issue 03, p. 1

<sup>2</sup> D.R.Khanal, (2012), *Social Security/Social Protection in Nepal: Situation Analysis*, ILO Country office for Nepal.

<sup>3</sup> S.Acharya, (2001), *Population Aging: Some Emerging Issues in the SAARC Region With Reference To Nepal Population and Development in Nepal*, Vol. VIII, Tribhuvan University, Nepal.

<sup>4</sup> Central Bureau of Statistics, Nepal, (2011), *Census Preliminary Report*.

rapid ageing of its population over the coming decades, with the percentage of its population aged 60 or over rising from 5 percent in 2017 to around 9 percent in 2050. Compared to 2017, the number of persons aged 60 or above is expected to more than double by 2050 and more than triple by 2100, rising from 962 million in 2017 to 2.1 billion in 2050 and 3.1 billion in 2100. For this age range, 65 percent of the global increase between 2017 and 2050 will occur in Asia, 14 percent in Africa, 11 percent in Latin America and the Caribbean, and the remaining 10 percent in other areas. The number of persons aged 80 or over is projected to triple by 2050, and by 2100 to increase to nearly seven times its value in 2017. Globally, the number of persons aged 80 or over is projected to increase from 137 million in 2017 to 425 million in 2050, and further to 909 million in 2100. In 2017, 27 percent of all persons aged 80 or over reside in Europe, but that share is expected to decline to 17 percent in 2050 and to 10 percent in 2100 as the populations of other regions continue to increase in size and to grow older themselves.<sup>5</sup>

The Senior Citizens Act, 2063 of Nepal defines the senior citizens as people who are 60 years and above. The population of senior citizens in Nepal has been increasing rapidly due to the positive development in life expectancy rate. The total population of elderly people in Nepal is 6.5 percent of total population which has significantly increased over the years. It is estimated that elderly population is still more likely to increase rapidly in future. This increase in elderly population will have a profound impact on the individuals, families and communities. And it has already started to show the impact in Nepal. The reason behind the increase in number of elderly population is the processes of mortality and fertility reduction which has shown dramatic increase in the proportion of elderly people in the country.

The increase in the population of elderly people, in absolute and relative terms, poses challenges in both developmental and humanitarian areas in terms of promoting and realizing their rights as well as well-being of elderly people by meeting their social, emotional, health, financial and developmental needs. This Article highlights the International framework, Constitutional provision and legal arrangements, especially in the National Penal (Code) Act, 2074, relating to the protection of senior citizens.

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<sup>5</sup> United Nations, Department of Economic and Social Affairs Population Division, (2017), *World Population Prospects, The 2017 Revision*, New York.

## 2. MEANING AND DEFINITION

Senior citizen is a common euphemism for an old person used in American English, and sometimes in British English. It implies that the person being referred to is retired. This in turn usually implies that the person is over the retirement age, which varies according to country. Some dictionaries describe widespread use of "senior citizen" for people over the age of 65.<sup>6</sup> When defined in an official context, senior citizen is often used for legal or policy-related reasons in determining who is eligible for certain benefits available to the age group. It is used in general usage instead of traditional terms, such as old person, old-age pensioner, or elderly as a courtesy and to signify continuing relevance of and respect for this population group as "citizens" of society, of senior rank.<sup>7</sup> "Senior Citizen" means a citizen of Nepal having completed the age of sixty years.<sup>8</sup> Similarly, according to Collins English Dictionary, a senior citizen is an older person who has retired or receives an old age pension.

## 3. INTERNATIONAL FRAMEWORK

There are nine International Human Rights Conventions or treaties. Some are universal, e.g. International Covenant on Civil and Political Rights and the International Covenant on Economic, Social & Cultural Rights and some have been developed to address groups of people who experience particular discrimination or need particular protection, e.g. the Convention on the Rights of the Child and Convention on the Rights of People with Disabilities. However, there is no Convention on the rights of older people. In addition, older people are not specifically mentioned in the universal treaties and are rarely mentioned in commentary or recommendations made by the Committees established to monitor compliance with the treaties.

### 3.1 The Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights directly makes reference to the rights of the elderly in Article 25(1).<sup>9</sup> The reference provides that:

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<sup>6</sup> "Senior Citizen", Longman English Dictionary Online, available at [Ldoceonline.com](http://Ldoceonline.com), (Accessed on April 4, 2016).

<sup>7</sup> Waughfield, Claire G.; Burckhalter, Teresa S., (2002), *Mental Health Concepts*, (5th edn), Clifton Park, NY: Delmar/Thomson Learning, ISBN 9780766838307, p. 64.

<sup>8</sup> *Senior Citizens Act, 2063 BS (2006)*, Art., 2(a).

<sup>9</sup> *Universal Declaration of Human Rights, (1948)*, G.A. Res. 217A, at art.25, U.N.GAOR, 3rd Sess., 183rd Plen.mtg., U.N. Doc.A/801.

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>10</sup>

### 3.2 International Plan of Action on Ageing, 1982

The International Plan of Action on Aging was adopted at the 1982 World Assembly on Aging in Vienna.<sup>11</sup> The Plan focused on ways to assist and protect the elderly and was later implemented through the five principles of independence, participation, care, self-fulfillment, and dignity by the United Nations Principles for Older Persons.<sup>12</sup> Most recently, and in a follow up to the Vienna World Assembly, the International Plan of Action was adopted by 159 countries at the Second World Conference on Ageing in Madrid in 2002.<sup>13</sup> The International Plan of Action calls for "the promotion and protection of all human rights and fundamental freedoms," and includes the need to incorporate aging into the global agenda.<sup>14</sup> The International Plan of Action puts primary responsibility on national governments to put the Plan into action by developing and implementing policies to ensure economic and social protection for older people, promoting and ensuring their good health, and making services and housing available and accessible.<sup>15</sup> In general, the goal of the International Plan of Action is to eliminate neglect, abuse, and violence toward older people.<sup>16</sup>

### 3.3 The International Covenant on Economic, Social, and Cultural rights, 1996 and its General Comment 6

In its preamble, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes that the rights it conveys are derived "from the inherent dignity of the human person."<sup>17</sup> Article 2(1) of the Convention states:

<sup>10</sup> Thomas Hammarberg, (2008), *Aged People Are Too Often Ignored and Denied Their Full Human Rights*, available at [http://www.coe.int/t/commissioner/View\\_points/080428\\_en.asp](http://www.coe.int/t/commissioner/View_points/080428_en.asp) (Accessed on April 2, 2018).

<sup>11</sup> Diego Rodriguez-Pinzun & Claudia Martin, (2003), "The International Human Rights Status of Elderly Persons", *18 AM. U. INT'L L. REV.* 915, 917, p.947.

<sup>12</sup> *Supra Note 11*, at 948.

<sup>13</sup> *Supra Note 11*, at 949.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Supra Note 11*, at 949-50.

<sup>16</sup> *Supra Note 11*, at 950.

<sup>17</sup> *International Covenant on Economic, Social and Cultural Rights, 1966*, Preamble.

"The States Parties to the present Covenant undertake to guarantee that the rights enumerated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>18</sup>

Age is not explicitly referred to as a category protected from discrimination within this Article. However, the Committee on Economic, Social, and Cultural Rights ("CESCR") has stated that "discrimination on the grounds of 'other status' could be interpreted as applying to age."<sup>19</sup>

Part III, Article 12, states:

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Although the elderly are not mentioned specifically in the covenant, they are still human and therefore have inherent dignity and should be entitled to the highest attainable standard of physical and mental health. In order to clarify the extent to which the CESCR applies to the elderly, the CESCR adopted General Comment 6.<sup>20</sup> General Comment 6 is the CESCR's interpretation of the provisions of the Covenant in relation to the elderly.<sup>21</sup> In addition to adopting General Comment 6, the CESCR also took on the responsibility of monitoring the implementation of protections for the elderly, as well as promoting and protecting the economic, social, and cultural rights of the elderly within the member States.<sup>22</sup> In doing so, the CESCR became the first United Nations mechanism to specifically focus on the elderly.<sup>23</sup>

General Comment 6 recommends that when interpreting Article 12 of the ICESCR, State parties should take into account recommendations one to seventeen of the Vienna International Plan on Ageing, which focus on preserving the health of the elderly.<sup>24</sup> The Vienna plan relates four main facets of the right to health. The first is availability, which refers to "the sufficient quantity and sustainable quality of health care facilities, goods, services and

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<sup>18</sup> *Ibid*, Art. 2.

<sup>19</sup> United Nations, Committee on Economic, Social, and Cultural Rights, *The Economic, Social, and Cultural Rights of Older Persons: General Comments 6*, 1 10-11, U.N.Doc. E/C.12/1995/16/Rev. 1, Aug. 12, 1995.

<sup>20</sup> *Supra Note 1*, at 952.

<sup>21</sup> CESCR: General Comment 6.

<sup>22</sup> *Supra Note 11*, at 954.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Supra Note 21*.

programs."<sup>25</sup> The second is accessibility, referring to freedom from discrimination and physical, economical, and informational roadblocks. Third, acceptability incorporates cultural understanding, including the needs of the genders and data confidentiality.<sup>26</sup> Lastly, quality encompasses "the scientifically and medically appropriate production of medical goods, services, facilities, and drugs."<sup>27</sup> Additionally, to ensure that these principles are put into action, "states should maintain adequate and enforceable health standards, by providing access to judicial review or other appropriate remedies to address violations of the right to health."<sup>28</sup>

### **3.4 International Covenant on Civil and Political Rights, 1996**

The International Covenant on Civil and Political Rights (ICCPR) may not seem to provide the elderly with many specific protections; however, its articles can be used for that purpose.<sup>29</sup> The ICCPR has been accepted by the Human Rights Committee to protect the rights of the elderly.<sup>30</sup> Specifically, Article 26 establishes the right to equal protection and has been found to afford the right to social security to the elderly.<sup>31</sup> Furthermore, Article 6 provides that "every human being has an inherent right to life."<sup>32</sup> If the states parties cannot establish enforceable guidelines that create satisfactory nursing home or elderly care centers, residents could end up arbitrarily deprived of their lives. In terms of the misuse of psychiatric drugs and treatments, Article 7 of the ICCPR could be used to bring a claim because it could constitute non-consensual use of medical or scientific experimentation. Article 7 provides that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."

### **3.5 Convention on the Elimination of All Forms of Discrimination against Women, 1979**

Article 11(1) (e) of this convention provides for the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.

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<sup>25</sup> *Supra Note 11*, at 969.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, p. 971.

<sup>29</sup> *Ibid.*, p. 923.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *International Covenant on Civil and Political Rights, 1966*, Art. 6.

### **3.6 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990**

Article 11.1 and 7 of this convention provides for the Prohibition of discrimination based on age.

### **3.7 Convention on the Rights of Persons with Disabilities (CRPD), 2008**

The CRPD specifically addresses age. In its Preamble, concern is expressed about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination, inter alia, on the basis of age. State parties undertake to adopt immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on age, in all areas of life<sup>33</sup>. In relation to access to justice for persons with disabilities, state parties shall provide ‘age-appropriate’ accommodation<sup>34</sup> and to ensure freedom from exploitation, violence and abuse, states shall provide ‘age-sensitive’ assistance and support.<sup>35</sup>

## **4. REGIONAL HUMAN RIGHTS INSTRUMENTS**

Three regional human rights instruments expressly mention older persons as a group in need of special protection. In Article 18(4) of the African Charter, it stipulates that the aged shall have the right to measures of special protection in keeping with their physical or moral needs. The Protocol to the African Charter on the Rights of Women in Africa sets out special protection for elderly women. In the Inter-American system, Article 17 of Protocol San Salvador stipulates that everyone has the right to special protection in old age and calls upon states to progressively provide suitable facilities, food and medical care for elderly persons who lack them; to undertake work programs to enable the elderly to take part in productive activity; and to foster establishment of social organizations aimed at improving the quality of life of the elderly. The Revised European Social Charter sets out the right to social protection for the elderly in Article 23. According to this provision states parties undertake to adopt measures: a) to enable the elderly to remain full members of society for as long as possible by providing adequate resources and information about available services; b) to enable the elderly to choose their life-style freely and live independently for as long as possible by providing adequate housing and services; and c) to guarantee support for older persons living in institutions. In

<sup>33</sup> *Convention on the Rights of Persons with Disabilities, 2008*, Art. 8.

<sup>34</sup> *Ibid*, Art. 13.

<sup>35</sup> *Ibid*, Art. 16.

addition, the Charter on Fundamental Rights of the European Union (2000) prohibits discrimination on the grounds of age<sup>36</sup> and sets out the right to social security for older persons and the rights of the elderly ‘to lead a life of dignity and independence and to participate in social and cultural life’.<sup>37</sup>

## **5. A NEW DRAFTED CONVENTION ON THE RIGHTS OF OLDER PEOPLE<sup>38</sup>**

The UN has been discussing, at the Open Ended Working Group on Ageing (OEWGA), the rights of older people and whether a new International Convention on the Rights of Older People should be drafted. The General Assembly at the UN established the OEWGA in 2010 and it has met once a year since then at the UN in New York.

A new Convention would also articulate how human rights specifically apply to older people and what measures Governments must take to comply with it. This is currently absent from the international human rights infrastructure. Articles in a new Convention could deal with, e.g. Protection from elder abuse, support in care settings, access to social security or pensions, access to age appropriate healthcare, protection from discrimination based on age.

## **6. NATIONAL STANDARDS AND PRACTICES OF DIFFERENT COUNTRIES**

### **6.1 Africa**

Equality and non-discrimination have been reflected in the legal entrenchment of the rights of older persons and state obligations to protect, promote and fulfill rights of older persons in Africa. As a result, a number of constitutions of African countries expressly recognized the principles equality and non-discrimination against older person, albeit in various terms and depth. Studies in Africa have shown that some older persons have been victims of abuse, usually by the communities in which they live; and thus, measures adopted by the governments usually include prevention strategies that are to be implemented in the community environment as well.<sup>39</sup>

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<sup>36</sup> *Charter on Fundamental Rights of the European Union, 2000*, Art. 21.

<sup>37</sup> *Ibid*, Art. 25.

<sup>38</sup> Available at <https://www.ageaction.ie/how-we-can-help/campaigning-policy/human-rights-and-older-people>, (Accessed on April 9, 2018).

<sup>39</sup> "Selection of Reports", available at <http://www.wunrn.com/news/older.htm> and [http://www.services.gov.za/services/content/Home/ServicesFor People/Retirementandoldage/reportabuseofolder\\_](http://www.services.gov.za/services/content/Home/ServicesFor%20People/Retirementandoldage/reportabuseofolder_)

## 6.2 South Africa

The Constitution<sup>40</sup> in Article 9 prohibits direct and indirect discrimination against any person, including based on age. The country's legal framework stems from the Act on Older Persons, No. 13, (2006) that represents the cornerstone of the provision of services to older persons, as well as the implementation of the International Plan of Action on Ageing. The Act promotes the wellbeing and security of older persons in South Africa, and shifts the emphasis from institutional care to community-based care to ensure that older persons remain in their community environment for as long as possible.<sup>41</sup>

## 6.3 Europe

Most European Union member states as well as countries in the Balkans and other parts of Eastern Europe have attempted to entrench at constitutional or legislative levels the principle of non-discrimination based on age, albeit in various forms and thematic laws. The EU member states in particular have followed the principles of the applicable directives that focused on non-discrimination, which has accelerated the process of enactment of legislation against age discrimination as well. The institution of Ombudsman has also been instrumental in addressing the age discrimination. Elder abuse is often addressed by legislation on domestic violence. In some countries, there are laws to impose temporary restraining orders for perpetrators of domestic violence. A number of legislative acts included provisions sensitive to the specific vulnerabilities of older people in various environments where they can be subject to the elder abuse.<sup>42</sup>

## 6.4 United Kingdom

The Human Rights Act, 1998 incorporates the ECHR jurisprudence into UK law and thus provides valuable protection in some contexts against discrimination and acts as a quite effective substitute for a constitutional bill of rights. The courts have also recognized the existence of a general principle of equality and non-discrimination in the common law, when the Employment Equality Regulations became law in 2006. The Employment Equality

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<sup>40</sup> *Constitution of the Republic of South Africa, 1996.*

<sup>41</sup> A. Lombard, Elma Kruger (2009), "Older Persons: the Case of South Africa", *Ageing Int.*, 34:119-135, p. 4.

<sup>42</sup> "Elder Abuse in Europe: Background and Position Paper", 2008, p.27, available at: <http://www.preventelderabuse>.

Regulations outlaw both direct and indirect forms of discrimination in employment against people of all ages.

### 6.5 Japan

According to the Act on the Stabilization of Employment of Older Persons, it is unlawful for companies to stipulate retirement before the age of 60 and according to the Employment Measure Act in recruitment and hiring; firms must deal equitably with all workers - irrespective of age.<sup>43</sup> The Japan Elder Abuse Prevention Centre was set up in 1996 to offer a volunteer-operated telephone counseling service, among other services, to the victims of elder abuse.

### 6.6 China

The Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (1996) was adopted to protect the lawful rights and interests of elderly persons; and Article 4 forbids discrimination against the elderly. The Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly forbids mistreatment of the elderly.<sup>44</sup> The Chinese courts have sentenced a Shanghai based man to 18 months in prison for refusing to care for his 83 year old mother and abandoning her in a public city square in December, 2008.<sup>45</sup> Article 46 of the Act stipulates that whoever insults the elderly in public, using violence or other means, shall be punished in accordance with the relevant provisions of the Regulations on Administrative Penalties for Public Security. If the case constitutes a crime, his criminal responsibility shall be pursued according to law as well.

### 6.7 India

The Indian legislation on elders stipulates that if anyone responsible for a senior citizen abandons him/her, the person shall be punishable with imprisonment for up to three months, or a fine up to five thousand rupees, or both.

## 7. LEGAL FRAMEWORK IN NEPAL

There are number of laws and government policies made for the protection of senior citizens in Nepal.

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<sup>43</sup> Hsiu-chuan, Shih, (May 2007), *Legislature Passes Anti-discrimination Bill*.

<sup>44</sup> Krug, Etienne G., (eds.) (et al.), (2002), *Chapter 5- Abuse of Elderly, World Report On Violence And Health*, WHO, p.137.

<sup>45</sup> Kurtenbach, Elaine, (Dec. 2008), "Shanghai Man Jailed for Abandoning Mother", *Associated Press*.

### **7.1 Constitution of Nepal (2015)**

Constitution of Nepal, under Article 41 has guaranteed fundamental rights of senior citizens:

The senior citizens shall have the right to special protection and social security from the State.<sup>46</sup>

The Constitution also provides for the fundamental right to social security, under Article 43. It states:

The indigent citizens, incapacitated and helpless citizens, helpless single women, citizens with disabilities, children, citizens who cannot take care of themselves and citizens belonging to the tribes on the verge of extinction shall have the right to social security, in accordance with law.<sup>47</sup>

Similarly, Article 51(j) (12) of the Constitution provides for state policies to accord priority to the indigent within all sexes, regions and communities in the provision of social security and social justice.

### **7.2 Senior Citizens Act, 2063 BS**

The Government of Nepal enacted the Senior Citizens Act, 2063 BS (2006) to guarantee the protection of rights of the elderly persons. The purpose of the Act is to protect and provide social security to old age citizens. This Act also ensures the aspects of nourishment and health care of old age; to maintain their dignity; ensuring their right to property; special facilities and exemption of transportation fare for old age.

### **7.3 Senior Citizen Regulations, 2065 BS**

The Senior Citizens Regulations 2065 provides guidelines for the effective implementation of the Senior Citizens Act. It provides the detailed information on how to implement the policy and programs for the socio-economic well-being for elders and the healthy ageing. It also provides the detailed procedures to be fulfilled to establish and run geriatric homes in the country. According to the regulation, specific terms and conditions must be considered to run Old Age Homes, Day Care Centers and Geriatric Centers.

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<sup>46</sup> *Constitution of Nepal*, Art. 41.

<sup>47</sup> *Ibid*, Art. 43.

### 7.4 National Penal (Code) Act, 2074 BS

Number 38 of the National Penal (Code) Act, has provides the Factor aggravating the gravity of offence: For the purposes of this Act, the following factors, if exist, shall be considered as aggravating the gravity of an offence: the offence was committed against an elderly person above the age of seventy five year. Similarly, Number 39 has provides the Factors mitigating the gravity of offence: For the purposes of this Act, the following factors, if exist, shall be considered as mitigating the gravity of an offence: the offender is below eighteen years or above seventy five years of age.

Furthermore, Number 184 provides for Prohibition of throwing out/exposure or abandoning person under one's own guardianship:

- (1) A person, being bound to care or maintain an infant, child, disabled patient or elderly person, shall not so expose/throw, abandon or desert as to cause danger to the body or life of such infant, child, patient or elderly person.
- (2) A person who commits, or causes to be committed, an offence under sub-section (1) shall be liable to a sentence of imprisonment for a term not exceeding three years and a fine not exceeding thirty thousand rupees.
- (3) Where the offence referred to in sub-section (1) causes the death of such child, disabled patient or elderly person, the offender shall be liable to a sentence of imprisonment for a term not exceeding seven years and a fine not exceeding seventy thousand rupees.

Also, Number 187 highlights the Statute of limitation: (1) A complaint may be made any time in relation to any of the offences under sub-section (3) of Section 184.

## 8. SUPREMECOURT VERDICTS ON THE WELFARE OF SENIOR CITIZENS

The Supreme Court of Nepal has given some important verdicts relating to the rights of senior citizens as follows:

- *Nepal KanoonPatrika (Nepal Law Journal), 2074 BS, 7, 9845*:Relating to prison: the government can play vital role in guaranteeing rights of senior citizens.
- *Nepal KanoonPatrika, 2063 BS, 1, 7643*:Every Senior Citizens have rights to demand and claim to State for security of life, it is valid and

judiciable issues. Therefore, Government should make law relating to senior citizen

## 9. CONCLUSION

Senior citizen is generally described as the process of growing old and is an integral part of the life-cycle. It is a multi-dimensional process and affects almost every aspect of human life particularly, when one is in his later stages while crossing the age of 60. By 2050, there will be, for the first time, more number of older persons than children under the age of 15 worldwide. A demographic transformation of such magnitude has far-reaching implications for society at all levels. As the world population continues to age, the human rights dimension of ageing becomes an ever-growing concern. It is essential that the analytical lens is all encompassing and embraces the full set of human rights, economic, social and cultural rights, but also civil and political rights. Senior citizens face a number of particular challenges in the enjoyment of their human rights that need to be addressed urgently. Several good or promising practices in the implementation of existing laws have been reported on issues such as the development of national strategies or action plans on ageing, and in the area of care, the right to work, social protection, equality and non-discrimination, access to justice, violence and abuse, education, training and lifelong learning, the participation of older persons, accessibility and awareness-raising.

None of those areas has however been covered extensively and little or no information has been received on some crucial issues such as legal capacity, quality of care, long-term care, palliative care, assistance to victims of violence and abuse, available remedies, independence and autonomy, or the right to an adequate standard of living, particularly housing. The enhanced institutional mechanism will contribute to an efficient administration of the government support system. Strengthening the formal support system is a prerequisite to ensuring a dignified life of many neglected old persons. Implementation of senior citizen specific policies especially the Senior Citizens Act and National Penal (Code) Act will provide some relief to the excluded older population. Thus, effective institutional mechanism, effective policy implementation, strengthened formal support system and formalization of a rights based approach to senior citizen are necessary to address the concerns of their rights in the near future.



# National Security Offences and the National Penal (Code) Act, 2074 BS

Mahendra Jung Shah\*

## ABSTRACT

National security has two dimensions in constitutional order. The first dimension being the protection of state sovereignty in the crisis becomes the subject of reason of state, and the protection of human rights in normal situation, as the second dimension, becomes the subject of reason of law. The constitution of Nepal has indoors into the national security aspiration. The primordial element for national survival is national unity, where people become proud of their country, culture, tradition and history. The peace treaty of Westphalia ended the thirty years war and created the modern concept of nation-state in 1648. The concept of sovereignty, the right of security and self-determination were established for the existence of independent and autonomous country. The offence against the national security is identified as treason, sedition, sabotage and espionage. Now, the government is tasked to safeguard the nation from domestic and international attacks against the state, government and its citizens.

## 1. INTRODUCTION

The word *security* is a controversial concept. There is not a broad consensus about the meaning of security. The meaning of security gets a different value depending on ideas, culture, perceptions and reality. The term security is defined as national security, common security, collective security, shared security, human security and cooperative security. It makes a description based on the ideology, values and gaining<sup>1</sup>. National security has two dimensions in constitutional order. First dimension being the protection of state sovereignty in

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<sup>1</sup> MICHAEL SHEEHAN, INTERNATIONAL SECURITY: AN ANALYTICAL SURVEY, at2 (2005).

the crisis becomes the subject of reason of state. The protection of human rights in normal situation as the second dimension becomes the subject of reason of law. That is recognized by constitutional order since the begging of the concept of nation-state. Today, terms like sustainable security, hard power, soft power and smart power are central point of national security and constitutional order. For the constitutional order, constitution is doctrine but all doctrines are not equally as basic<sup>2</sup>. The fundamental law of the land and supremacy of the constitution<sup>3</sup> thus requires a line of order. The order has boundary between serious and aggravated forms of disorder and breach of the peace. It is treated on the degree of disorder as minor and major disorder. In minor disorder, the concerns of the public and society are addressed by the police. In major disorders, the concerns of the state become more serious and therefore, they are addressed by armed force differently. The constitution has established certain mechanisms to deal with the violation of constitutional order. This order compels the state to formulate the national security and it becomes as constitutional order.

The concept of national security is distorted and time honored by a reciprocal relationship between the authoritative text of the constitution and other elements of constitutional order. The constitutional text could play a paradoxical role between human security and territorial security. For this, the constitution organizes the structure of traditional national security mechanisms such as military establishment,<sup>4</sup> Security Council<sup>5</sup> and other security agencies including intelligence agencies<sup>6</sup> as basic elements. The aim and role of armed force is the protection of national security. The police force has also important role for public peace and gathering informatio<sup>7</sup> in the law enforcement and counter terrorism context. The constitution always provides common defense for state and people. Basically, the constitution states three responsibilities of the government for the national defense. The first is the national defense as the priority job of the national government. The second is national defense as the only mandatory function of the national government and the third is national defense as exclusively the function of the national government. The constitution of Nepal obtains the ample thorough fare on national security issues with evaluation of other country's constitution.

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<sup>2</sup> JACK M. BALKIN, *LIVING ORIGINALISM*, at 1(2011).

<sup>3</sup> THE CONSTITUTION OF NEPAL, § 1.

<sup>4</sup> *Id.* § 267.

<sup>5</sup> *Id.* § 266.

<sup>6</sup> *Id.* § 268.

<sup>7</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM*, at 220-226 (2004).

The constitution of Nepal has indoors into the national security aspiration. This is proved by the provision of preamble, directive principle of state, establishment of security forces, policy formation issues, role and responsibility of armed force and emergency power in traditional or territorial security. The constitutional order on national security is the implementing exercise of national philosophy, national aim, national decision making and determine courses for national interests. But these are not precise till the date. Anyways, the constitution aims to protect and enhance to the people, institution, sovereignty, territory and integrity of nation in any time. The constitutional purpose of the national security is to identify the strategic priorities to establish the correct balance between *guns*<sup>8</sup> or *butter*<sup>9</sup> for *external* and *internal* defense. For this, the head of government is first and foremost answerable for the management of national security as executive head is responsible for safety and well-being of people. The fundamental mandate of the national security is to serve for national interests. The first national security issue is national territory so that war as an instrument of national policy under president prerogative but in the democracy, some principles are adopted in the state as civilian supremacy over military and concept of a citizen army as volunteers. The constitution declares elements of national security.

The primordial element for national survival is national unity, where people became proud of their country, culture, tradition and history. These are trailing day by day in Nepal. The national security elements basically consider the geo-social aspects of national security at first. The constitution aims to establish social political stability, socio-economic improvement, harmony in religions, ethnic and languages, moral spiritual consensus by the national vision, patriotism, national pride, the advancement of national goals and interests and social contract between people and government. For the purpose of the protection of national security, the criminal law has very important role to criminalize certain behaviors of the people. This is called as national security criminal offences in modern era. In this article, I make an attempt to discuss the national security criminal offences in the context of Criminal Code<sup>10</sup> of Nepal.

## 2. NATIONAL SECURITY

The peace treaty of Westphalia ended the thirty years war and created the modern concept of nation-state in 1648. The concept of sovereignty, the right

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<sup>8</sup> CONSTITUTION, *supra note* 3 §§ 51 (ka), 267 (1).

<sup>9</sup> *Id.* § 51 (Da).

<sup>10</sup> National Penal (Code) Act, (2017); Criminal Procedure (Code) Act, (2017); Criminal Offence (Punishment Determination and Enforcement) Act, (2017).

of security and self-determination were established for the existence of independent and autonomous country. The security and protection of nation converted into the concept of sovereign obligation and sovereignty started to be known as responsibility in criminal law. There lies the heart of the legal doctrine known as the *responsibility to protect*, referred to as the obligations of the government of a sovereign state. It clearly represents a potential infringement on classic Westphalia sovereignty. By contrast, sovereign obligation is about what a country owes to other countries. It stems from a need to expand and adapt the traditional principles of international order for a highly inter-connected world. The sovereign obligation thus retains a respect for borders. Based on it, the idea of national security is as old as the state. It was understood as a threat from internal and external enemies and addressed by military force in preliminary stage. The development of mankind and change in the dimension of understanding, the national security befall spacious in economic, political, crime, diplomacy, electronic, resources, borders, demographics, hazards, energy, media, food and ethnic areas. For the fulfillment of primordial tasks prearranged by the constitution and criminal laws, the Criminal Code specifically defines the offence against national security.

The offence against the national security is identified as treason, sedition, sabotage and espionage. Now, the government is tasked to safeguard the nation from domestic and international attacks on the state, government and its citizens<sup>11</sup>. The criminal statute can encroach on the individual freedom to protest government action. It can also affect privacy interests. These subjects enhance the constitutional scrutiny. The constitutional scrutiny on the national security reviews in offences against the public and offences involving terrorism. It examines on the basis of terrorism and patriot law. The national security forever is based on the patriot law and examined in the criminal law as public and patriot comportment. Unfortunately, there is no patriot law in Nepal till the date.

Under the constitutional guidance, the Criminal Code has affirmed the list of offences against national security with good faith immunity, soldiering and combating immunities, special jurisdiction of special law and special power for armed forces<sup>12</sup>. The state can establish higher standards for searches and seizures than constitutional amendment requires<sup>13</sup>. The soldiering, combating

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<sup>11</sup> Pennsylvania v. Nelson, 350 U.S. 497 (2011).

<sup>12</sup> Indian Armed Forces (Special Powers) Act (1958).

<sup>13</sup> Brendlin v. California, 551 U.S. (2007).

and battle space immunity<sup>14</sup> are recognized in military operation. Many privileges and immunities have been provided to the personnel of armed force under various acts including army act<sup>15</sup>. Similarly, the army act has provided some privileges and immunities for armed force of Nepal<sup>16</sup>. In the broad sense, the national security covers the social, political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, moral spiritual consensus and external peace. They are under the national security, which are traditional security (protection of territory, sovereignty and integrity of the nation) and human security (protection human rights). The concept and context of constitutional order of offence and nature of national security is implemented by national security criminal law.

### 3. NATIONAL SECURITY CRIMINAL LAW

The offence against the national security has been defined in criminal law by criminological and sociological dimensions but political conceptualization is very problematic issue between national security and criminal law. The offence is criminalized differently according to different criminal perceptions, wrongfulness, activities and networks. The national security offence is discussed between political discourse, criminal policy and criminal law. The legal academics have increasingly come under two seemingly contradictory pressures. On the one hand, they are compelled to harmonize, centralize and condense and on the other hand, they are told to offer more highly specialized for niche legal experts over generalists. The national security offence will draw on both legal and criminological concepts to analyze a family of seemingly disparate offences united by their mutual threat to national security. The international criminal law includes three concepts. The first, traditional international criminal law was positioned on the Nuremberg and the international tribunals. The second, newly emerging and rapidly growing transnational criminal law is positioned on the suppression conventions, extradition and border cooperation. The third, national security criminal law is based on the threats against the security of a state and its people as such, whether they come from another state or a transnational or even domestic group.

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<sup>14</sup> Smith and Others v the Ministry of Defense, UKSC 41, (2013).

<sup>15</sup> Pension Act, § 11 (1871); Indian Tolls Act, § 3 (1901); Indian Stamp Act, § 53 (1899); Code of Civil Procedure § 1 (1908); Indian Soldier Litigation Act, § 45 (1925); Rent Control Act, § 14 (1958); Arms Act, §§ 3, 4, 33, 125 (1959); Code of Criminal Procedure, §§ 45, 197, 475 (1973); Army Act, § 28-32 (1950).

<sup>16</sup> The Army Act § 22 (2006).

The national security criminal law is the body of law that would also seem to extend to treason, espionage, disclosure of classified information and sabotage alongside terrorism.<sup>17</sup> It must focus on a relatively small family of offense. It must also import a number of insights from other disciplines in order to provide a more global view of the offence. The unify issues mentioned under the umbrella of national security offence by gleaning insights from the social sciences and from the pragmatic perspective of law enforcement. There is difference between national security criminal law and national security offences. The idea of national security offence will be sufficient to set out the blueprint in law as Criminal Code. The codification of national security offence is new unifying concept in criminal law. The Criminal Code found the engagement in advocacy, investigation, prosecution, commission, policy, implementation and legislative provisions in the area of national security offence. In the developed countries, the national security laws and anti-terrorist laws aim to prevent, detect and prosecute those involved in terrorism, espionage and foreign interference offence. The law recognizes the importance of law enforcement and security agencies having appropriate powers to effectively perform their statutory functions. An ongoing priority for the law is to review national security and criminal law to ensure that they are reasonable, necessary and proportionate to a legitimate purpose. This includes legislative measures relating to control orders, preventive detention orders, pre-charge detention, post-sentencing detention, surveillance, telecommunications interception, data retention, financing in criminal activities, foreign incursions, terrorist organizations, travel documents and citizenship role.

The national security criminal law identified treason, espionage, disclosure of classified information, terrorism, sabotage and trading of weapons and technology as national security offence. It comes most readily to mind when one thinks of national security offence with terrorism. Terrorism is generally thought of as the use of violence against civilian targets when committed with a political motive.<sup>18</sup> Espionage and terrorism are both studied on the organized, professional, white collar national security offence<sup>19</sup> and radical violent national security offence.<sup>20</sup> The offence of sabotage constitutes an entirely distinct class. It destructs things or people, assassinations, attacks on government personnel, facilities, instrumentalities and vital infrastructure. They should be considered a part of typology of sabotage. Assassination and

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<sup>17</sup> JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES*, at 193 (1971).

<sup>18</sup> BENSAL, *DEFINING TERRORISM IN INTERNATIONAL LAW*, at 30 (2008).

<sup>19</sup> KATHERINE L. HERBIG, *CHANGES IN ESPIONAGE BY AMERICANS: 1947-2007* (2008).

<sup>20</sup> JEFFREY IAN ROSS, *POLITICAL TERRORISM: AN INTERDISCIPLINARY APPROACH*, at 77 (2006).

kidnapping strike the country's leadership are some of the foremost sabotage offence.

Assassination of the members of parliament, cabinet, judges of the Supreme Court and the president and presidential staff is regarded as heinous crime. Because of this reason, the prevention<sup>21</sup> and detection may be secret in democratic society<sup>22</sup>. During the times of war, many spies, saboteurs and traitors were tried and sentenced often to death by military commissions<sup>23</sup> because such persons are not entitled to prisoner of war status under the Geneva and Hague Regulations for the conduct of war<sup>24</sup>. It was spy trials during the war<sup>25</sup>, which was justified in World War 11<sup>26</sup>. While a national security offence trial might proceed like any other in many respects, there must be special laws for the protection of classified evidence. In some country, there are separate criminal laws for national security offence but in Nepal, there are some acts, which deal with the matter of national security. In this connection, the newly passed Criminal Code has described the national security offence as offence against the state.<sup>27</sup> The criminal law cannot be sufficient without national security offence because national security is prime responsibility of state and very serious, danger and threat against the existence of the state. In this context, the national security offence needs to be studied in comparative view point.

#### 4. COMPARATIVE STUDY OF NATIONAL SECURITY CRIMINAL LAW

In the Europe, the national security criminal law is found in the principle of reason of law versus the reasons of state.<sup>28</sup> Because of this reason, the national security criminal law is called the criminal law for the enemy within.<sup>29</sup> When we talk about the national security under the country to country, there must be the question of threat and addressing by the law of the nation especially national security criminal law. Brazil's national security is threatening by leftist

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<sup>21</sup> JOBMONKEY, UNDERSTANDING GOVERNMENT SECURITY CLEARANCE ,at 23 (2012).

<sup>22</sup> MATHIEU DEFLEM, THE POLICING OF TERRORISM: ORGANIZATIONAL AND GLOBAL PERSPECTIVES, at 231 (2010).

<sup>23</sup> DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE, at 75-77 (1976).

<sup>24</sup> Convention Respecting the Laws and Customs of War on Land, § 36 (1907).

<sup>25</sup> LOUIS FISHER, MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS, at 16-32 (2004).

<sup>26</sup> *Id.* at 32-59.

<sup>27</sup> National Penal (Code) Act, 2074 BS.

<sup>28</sup> W. HASSEMER, CRÍTICA AL DERECHO PENAL DE HOY, BUENOS AIRES: AD-HOC, at 20 (2003).

<sup>29</sup> CHRIS ALLEN & JOCELYNE CESARI, SECURITIZATION AND RELIGIOUS DIVIDE IN EUROPE, at 65-66 (2006).

ideology, which is prohibited. China, ministry of state security ensures that the security of the state through effective measures against enemy agents, spies, separatist Muslim and counterrevolutionary activities designed to sabotage or overthrow socialist system. In Russia, the global position is the national interest. The national security is described as a means to counter those threats. The United Kingdom has focused on diplomacy, information, military, and economic, political, environmental and legal (DIMEPEL) context. United States under the National Security Act 1947, believes on diplomacy, information, military and economy (DIME) context. So that, important components of national security, such as the department of defense, subordinate military branches, national Security Council and central intelligence agency for strategic approach has been established in pursuit of four enduring national interests such as security, prosperity, values and international order.

United States has Criminal Code, 2015, Foreign Intelligence Surveillance Act 1978, the Homeland Security Act 2002, the Intelligence Reform and Terrorism Prevention Act 2004, the National Emergencies Act 1976, the national security act 1947, the Posse Comitatus Act, 1878, the Uniform Code of Military Justice 1950, the Patriot Act 2001 and the War Powers Resolution 1973. China has adopted the Criminal Codesince 1979 for the protection of national security aspiration<sup>30</sup>. The Codesaid that all crimes mentioned in the Codeare offence against national security. The purpose of National Security Act 1980 of India is to provide for preventive detention in certain cases and for matters connected with national security. The Act extends to the whole of India except the state of Jammu and Kashmir<sup>31</sup> and Jammu and Kashmir has Armed Forces and Special Power Act<sup>32</sup>. The various enactments are dealing with offence against the national security, which are in chapters 6 and 7 of the Penal Code of India, the Foreign Recruiting act, 1874, the Official Secrets Act 1923, the Criminal Law Amendment Act 1961 and the Unlawful Activities (Prevention) Act 1967. The Criminal Code of Mongolia proposes the protection from criminal encroachments of the individual's rights, public and private property, freedoms, national wealth, environment, security of society, legal order, independence, state system, peace and security of the mankind<sup>33</sup>.

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<sup>30</sup> Criminal Law of the People's Republic of China § 2(1989).

<sup>31</sup> National Security Act, (1980).

<sup>32</sup> GANGULY SUMIT, DIAMOND LARRY & PLATTNER MARC F., THE STATE OF INDIA'S DEMOCRACY, at 130 (2007).

<sup>33</sup> Criminal Codeof Mongolia §1 (2004).

Micronesia defines the offence against the national security as treason, armed insurrection, advocating armed insurrection and revealing classified information. The Penal Code of Philippines has mentioned offences against the national security as treason, espionage, provoking war, disloyalty, piracy and mutiny on the high seas. The Canada initiates the pre charge legal advice and commences the procedure to sentence and delay on the issue on national security offence is established by code.<sup>34</sup> The Penal Code of Germany provides<sup>35</sup> that the criminal law is applicable to conduct amounting to high treason or treason against the country, people and her member states as well as felonies of constitutional treason. This principle is also accepted in the Penal Codes of France<sup>36</sup> too. In the Swiss, Federal Penal Code, 1942, it provides that whoever commits in a foreign country any felony or misdemeanor against Switzerland carries on illegal news service establishes an illegal organization or disturbs military security shall be subject to this law. Because of the digital world, the basic subscriber information, interception capability for communications services, encryption and data retention are full as very serious issues for national security in the developed country like United States, United Kingdom, Russia and China. Nepal had separate laws regarding national security criminal law for the definition of national security offence<sup>37</sup> but now, Criminal Code<sup>38</sup> recently passed by the parliament has mentioned and declared certain acts as an offence against state, which can be described as national security offence in Nepal.

In regard to case law, some important national security offences such as treason has significant role in the national security criminal justice in the world. In Canada, Louis Riel was executed for leading the Metis in the North-West Rebellion against Canada's expansion into the west. Kanao Inouye and Kamloops born sergeant in the Imperial Japanese army in World War II were executed for killing eight Canadian prisoners of war captured at the Battle of Hong Kong.<sup>39</sup> In the United Kingdom, the case related with Roger Casement, who was negotiating with Germany to provide arms to Irish revolutionaries during the First World War for use in the Irish Easter 1916 rising is an essential case, where he was hanged in August 1916. William Comstive, Charles Stanfield, Richard Addy, Benjamin Hanson and eighteen others were tried and

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<sup>34</sup> Commission of Inquiry into the Investigation of the Bombing of Air India Flight, at159-182 (2010).

<sup>35</sup> *Id.*

<sup>36</sup> The French Code of Criminal Procedure § 694 (1958).

<sup>37</sup> The Electronic Transactions Act, (2008), Armed Police Force Act, (2001), Army Act, (2006), Crime against State and Punishment Act, (1989), Espionage Act, (1962), Police Act, (1955), Right to Information Act, (2007).

<sup>38</sup> CODE, *Supra Note 27*.

<sup>39</sup> VALODE PHILIPPE, LES GRANDS TRAITRES DE L'HISTOIRE, at45 (2007).

convicted for high treason for revolt in the West Riding of Yorkshire in 1820. William Joyce and his alias were broadcasting Nazi propaganda to the United Kingdom during World War II and they were hanged on 3 January 1946<sup>40</sup>. In the United States, Philip Vigol and John Mitchell were convicted of treason and sentenced to hanging, pardoned by George Washington, which was well-known as whiskey rebellion. John Fries, the leader of Fries' Rebellion was convicted of treason in 1800 along with two accomplices and pardoned the same year by John Adams. Governor Thomas Dorr was convicted of treason against the state of Rhode Island in 1854. John Brown was convicted of treason against the Commonwealth of Virginia in 1859 and executed for attempting to organize armed resistance to slavery. Martin James Monti, United States Army Air Forces pilot, was convicted of treason for defecting to the Waffen SS in 1944 and he was paroled in 1960. Robert Henry Best was convicted of treason on April 16, 1948 and served a life sentence. Tomoya Kawakita was sentenced to death for treason in 1952, but eventually released by President John F. Kennedy to be deported to Japan.<sup>41</sup> By this study, the extreme harmful content must be proved in national security offence. In Nepal, the Offence Against the State and Punishment Act, 2046 was tested by the scrutiny on the basis of retrospective law.<sup>42</sup> Generally, the principle of criminal law prohibits the retrospective law but in this case, the Supreme Court of Nepal recognized the retrospective law in the matter of national security, which is against the general prudence and created new thought in jurisprudence.

## 5. NATIONAL SECURITY OFFENCES IN NEPAL

The Nepalese legal system is much closer to common law framework. The national security law in a common law framework is explained as extensive sagacity.<sup>43</sup> The national security law in common law jurisdiction is in many respects broadly similar. The treason, sedition and official secrets were retained by most common law jurisdictions. Some common law jurisdictions introduced other laws to deal with particular local problems. Not all of the national security laws were so exported or developed may still be regarded as appropriate or consistent with fundamental human rights. Indeed, local additions in some jurisdictions are regarded as the source of abuses of human rights. In other jurisdictions, such as the USA and Canada, constitutional guarantees of human rights override inconsistent national security laws. Relatively few common law jurisdictions have completely updated relevant

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Nepal Government v. Chandra Bijaya Shah 10, 936 (2045 BS).

<sup>43</sup> BOB ALLCOCK, NATIONAL SECURITY LAW IN A COMMON LAW FRAMEWORK §23 (2002).

laws. The law reform reports were produced in England and Canada but were never implemented. The common law declares treason, misprision of treason, secession, subversion, sedition, theft of state secrets and proscription of organizations. The national security offence is defined as constitutional state offence, which is used very seriously in criminal law by the means of action and punishment.<sup>44</sup> The criminal law is one of the valid concerns of states to prohibit undesirable human conducts. It is realized that current criminal law is modernized in a single, comprehensive and consolidated form in Nepal. It is changed from Act to Code to meet such requirement in national and international level and studied by the context of law. It is developed by the assortment of stages. They are offence regarding rebellion, sedition, treason, conspiracy, subversive activities,<sup>45</sup> espionage,<sup>46</sup> and disclosure of classified information and aiding an enemy or levying war.<sup>47</sup> The other espionage offence covers to the unwelcomed people like *persona non grata*. The offence committed by foreign agents and officials in diplomatic relations by use of weapons and illegal exportation of war materials are prohibited and subject of prosecution.<sup>48</sup> The offence committed by foreign agents and officials in diplomatic relations by using technology cover to the economic espionage and the spying by foreign agents on businesses for trade secrets has become more of a national security priority.<sup>49</sup>

The national security offence has very long history in Nepal with the beginning of the nation state. The ancient Nepal, as any state of the contemporary world, was not free from the crime, there were various types of crimes in the ancient Nepal, which including the offence against the king and public justice, offence against human body, offence against property, sexual offences and offences relating to religion. In that period, offences against the king and public justice were taken as state security offences and convicted offenders were awarded capital punishment under, Hindu law. In the period of the Lichchhavi, the patricide of King Mandev led to the revolt of the feudatories in the east and the west against him. Suppression of those feudatories must not have been achieved without punishing them. The case of Bhauma Gupta, Jisnu Gupta was a big episode in the case of state affair. At that time many people were charged

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<sup>44</sup> JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES 193 (1971).

<sup>45</sup> MICHAL R. BLEKNAP, COLD WAR POLITICAL JUSTICE, at 9-34 (1977).

<sup>46</sup> "Security Service", available at <https://www.mi5.gov.uk/output/what-is-espionage.html>. (Accessed on June 9, 2012).

<sup>47</sup> JOHN PRADOS & MARGARET PRATT PORTER, INSIDE THE PENTAGON PAPERS 145 (2005).

<sup>48</sup> United State Department of Justice, Interim Response to FOIA, available at <http://www.judicialwatch.org/files/documents/2009/4802009.pdf>. (Accessed on July 27, 2009).

<sup>49</sup> National Strategy for Counterintelligence (2005), available at <http://www.fbi.gov/page2/may05/ciprimer053105.htm>. (Accessed on May 31, 2018.)

with treason and hostility against the king and convicted to put into death. Sometimes relatives of offenders were also banished.<sup>50</sup> The study of crime and punishment of medieval period of Nepal is quite interesting. The offence against the king was very serious or offence against state. Bhagirath Bhaiya, minister of Srinivas Malla, the king of Lalitpur was charged of humiliating queen and put into death<sup>51</sup>.

In the conspiracy of crown prince poisoning case, all offenders and their families were punished to death except Bansidhar because he was Brahmin<sup>52</sup>. In the case of Gobardhan, Shiva Narayan and Shasi Upadhyaya, they were charged with murdering of prince Mahipatindra and were given torture and died themselves.<sup>53</sup> Foreigners were arrested on suspicion and reduced to slavery during the medieval period<sup>54</sup>. The *Rajakaj Ain* 1825 was declared by king Prithivi Narayan Shah and amended in 1945 with detail provisions. All the provisions of this Act were connected with the state affairs, army and national security. In this context, the national security offences were declared by state in first in trance rather than others. In the case of espionage, king Prithivi Narayan Shah sent two spies of Kantipur and put into death except one Brahmin<sup>55</sup>. In the case of conspiracy done by Shyam Ojha and Gangadhar Ojha, they were only expelled because they were Brahmins and Amarsimha was entrapped whereas Birbhadra Bhaju was killed<sup>56</sup>.

The history of Nepal entered into new era after the unification campaign. In this period, the offence against king and state was very serious and taken as offence against national security. In the case of Jayanta Rana, he was arrested and was flayed alive to death so as to teach a lesson to other persons who joined the enemy state<sup>57</sup>. Similarly, Kasiram Thapa got the capital punishment from King Jaya Prakash Malla.<sup>58</sup> The case of Bhim Sen Thapa put so many people to death after the assassination of Rana Bahadur Shah.<sup>59</sup> During the period of Rana Regime, the concept of modern evidential values and other were modernized by making various law including Country Code 1854. The national security offence, known as offence against the state, was multidimensional, which were defined in many ways. The offence against king

<sup>50</sup> T.R. VAIDYA, THE DEATH OF DHARMADEV, at 30 (1981).

<sup>51</sup> DHANA BAJRA VAJRACHARYA, CHAUTARA BHAGIRATHA BHAIYA, at 30 (2022 BS).

<sup>52</sup> RAMJI TIWARI, CHAUTARA DEVIDAS ATHAVA TRIKUTI, at 13-19 (2021 BS).

<sup>53</sup> DILLI RAMAN REGMI, MEDIEVAL NEPAL VOL. II, at 141 (1966).

<sup>54</sup> SYLVIAN LEVI, LE NEPAL, at 99-100.

<sup>55</sup> DILLI RAMAN REGMI, MEDIEVAL NEPAL, VOL. II, at 23 (1966).

<sup>56</sup> RAMJI TIWARI, AITIHASIK PATRA SANGRAH, VOL II, at 22-24 (2021 BS).

<sup>57</sup> BABU RAM ACHARYA, SHREE PAACH BADAMAHARAJDIRAJ PRITHIVI NARAYAN SHAH KO JIBANI, VOL II, at 254 (2024 BS).

<sup>58</sup> DILLI RAMAN REGMI, MEDIEVAL NEPAL PART II, at 187-88 (1966).

<sup>59</sup> See DR. JAGADISCHANDRA REGMI, LEGAL TRADITION OF NEPAL (2036 BS).

and royal families was supposed to be the chief arena of crime against state. Rana Prime Minister and his successors were also included in this offence. The State Offence Act was promulgated, which clearly mentioned,<sup>60</sup> that any attempt to take the life of the Prime Minister would be taken as an act of treason and culprit would be punished accordingly.

The State Offence Act tried to mention the army discipline in strict way.<sup>61</sup> The case of *Praja Parishad* is very famous in Nepalese history as a national security offence. The judicial interpretation of offence against state began since the establishing of Supreme Court in modern context. The detailed interpretation of offence against state was made by the Supreme Court of Nepal in the beginning stage of Nepalese judiciary.<sup>62</sup> In his case, the court clearly mentioned about the burden of proof, reasonable doubt, admonition, and confection in serious offence against state. In another case, the constitutionality of Treason (Crime and Punishment) Act 2019 was tested by the Supreme Court.<sup>63</sup> In this case, the provision of said Act, organization of court under the Special Court Act, interpretation of terminology of Act such as destructive act, contempt, public peace, etc were interpreted and the court convicted the offender. In the case of pamphlet distribution against the crown. Here, the Supreme Court had tested the constitutionality of the Act.<sup>64</sup> In the similar case, the police report was tested with Evidence Act by Supreme Court<sup>65</sup>.

In the Panchayat era, the Supreme Court had interpreted the State Affairs Act in liberal manner and all cases relating to the state as political cases<sup>66</sup>. The constitutionality of anti-terrorist law was tested various times by Supreme Court of Nepal.<sup>67</sup> The testing of law established by general prudence will not have jurisprudence. All national security offences have been interpreted with the political dye. However, Nepal has made a milestone effort to codify criminal laws into a single code. The first paragraph of preamble of constitution of Nepal clearly mentions that the protection of freedom, sovereignty, territorial integrity, national unity, independence and dignity of Nepal, is parameter of national security offence<sup>68</sup> in Nepal. The national security offence is mentioned in the Criminal Code, which is most and

<sup>60</sup> MAHESH CHANDRA REGMI, THE NATURE OF RANA LAW AND GOVERNMENT, at 12 (1975).

<sup>61</sup> See TULASI RAM VAIDYA AND TRI RATNA MANANDHAR, CRIME AND PUNISHMENT IN NEPAL (1985).

<sup>62</sup> Padma SundarMalla v. Government, 1, 48 (2015 BS).

<sup>63</sup> Dr K I Singh and Keshab Chandra Gautam v. Nepal Government, 3, 56 (2022 BS).

<sup>64</sup> Nepal Government v Udistha Narayan Jha, 3, 407 (2045 BS).

<sup>65</sup> Nepal Government v. Amber Bahadur JC, 12, 1246 (2045 BS).

<sup>66</sup> Nepal Government v. BiswkantaMainali, 1, 125 (2028 BS). Ram Prasad Upadhaya v. Rishicase Shah, 9, 258 (2027 BS); Nepal Government v. PremKaidi, 10, 1071 (2046 BS).

<sup>67</sup> NKP (NLR) 2060 BS, Number 7/8, Decision Number 7243.

<sup>68</sup> CONSTITUTION, *Supra Note 3*, Preamble.

foremost provision. Muluki Criminal (Code) Act, 2017<sup>69</sup> has made provisions for the offenses against the state, which are prohibited undermining sovereignty, integrity or national unity,<sup>70</sup> sedition,<sup>71</sup> prohibition of act against national interest,<sup>72</sup> prohibition of genocide,<sup>73</sup> prohibition on waging war against Nepal or assist the army of a state at war with Nepal,<sup>74</sup> prohibition of waging war or insurrection against friendly state,<sup>75</sup> prohibition in making provocation to army or police,<sup>76</sup> prohibition on espionage,<sup>77</sup> prohibition of assault on president<sup>78</sup> and prohibition on intimidation to president or to parliament.<sup>79</sup>

### **5.1 Prohibition on Undermining Sovereignty, Integrity or National Unity**

Territorial integrity is the subject of international law. The offence against sovereignty, integrity or national unity is constitutional offence and covers the extensive area of offence. The United Nation also laid down the principle of sovereignty, integrity or national unity<sup>80</sup> as well thought of approach. This is very solemn offence as treason and taking as the offence against the nation or state. The Code has prohibited the action, intent and conspiracy against freedom, sovereignty, geographical or territorial integrity or national unity of state. For this purpose, the Code has prohibited the collection of men, arm and ammunitions and establishing an armed military or paramilitary organization or attempt to commit this type of act. The Code says that no person shall commit or cause to be committed in any act that gives rise to hatred, enmity or contempt on grounds of class, caste/race/ethnicity, religion, region, community or similar other ground. It is likely to jeopardize the sovereignty or geographical or territorial integrity, nationality or national unity, independence, dignity, honor or harmonious relations between federal units of Nepal or the attempt to commit or abet the commission or make conspiracy to commit such act or undermine or cause to be undermined the cordial relations subsisting among different castes, races or communities. A person who commits or causes to be committed the acts under this section shall be sentenced to extent the imprisonment for life. The subject of this offence creates the tension between international law and state sovereignty to enforcement and implementation of

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<sup>69</sup> CODE, *Supra Note 27*.

<sup>70</sup> *Id.* § 49.

<sup>71</sup> *Id.* § 50.

<sup>72</sup> *Id.* § 51.

<sup>73</sup> *Id.* § 52.

<sup>74</sup> *Id.* § 53.

<sup>75</sup> *Id.* § 54.

<sup>76</sup> *Id.* § 55.

<sup>77</sup> *Id.* § 56.

<sup>78</sup> *Id.* § 57.

<sup>79</sup> *Id.* § 58.

<sup>80</sup> United Nation Resolution 2625 (1970).

international criminal law<sup>81</sup> from the very beginning. Now, Nigeria is currently confronted with myriads of challenges, which is rapidly stagnating the development and progress of her core productive and sensitive sectors against the national unity and integrity because of the poorer position of government. One of the most piercing problems is that of insecurity. Regarding to the national unity and national integrity, the national flag<sup>82</sup> is the symbol of national unity and integrity but in Nepal, the case against national flag is not under the offence against state.

**Sedition:** In sedition, two or more people conspire to overthrow the government or oppose the legal authority by force. The Code says that no person shall, with the intention of overthrowing the government of Nepal or the constitutional structure, create any kind of disorder or form a military or paramilitary organization with arms and ammunitions by demonstrating or using military, paramilitary or criminal force or make conspiracy or attempt or incitement to commit such an act. In this offence, the offender is punished with imprisonment for a term not exceeding twenty five years. Again, the Code says that no person shall by words either spoken or written or by figure or signs or otherwise showing any baseless or unproved/unsubstantiated matter in relation to the government of Nepal or action of the government of Nepal, bring or attempt to bring into hatred, enmity or contempt towards the government of Nepal. In this offence, healthy or decent criticism of the government of Nepal shall not be considered as an offence. The offender shall be punished with imprisonment for a term not exceeding three years or a fine not exceeding thirty thousand rupees. In a recent case, the former Prime Minister of Bangladesh, Khaleda Zia is charged with the sedition case.<sup>83</sup> The country's freedom fighters were convicted and released on bail in 1898 and in 1909 were prosecuted again for seditious writing in newspaper.<sup>84</sup>

The constitutionality of offence of sedition was tested and clearly differentiated between disloyalty to the country's government and commenting on the measures of the government without inciting public disorder by acts of violence,<sup>85</sup> freedom of speech and offensive acts.<sup>86</sup> This judgment is the court's ruling that a person could not be tried for sedition unless their speech, however

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<sup>81</sup> JENNINGS, SOVEREIGNTY AND INTERNATIONAL LAW: STATE, SOVEREIGNTY AND INTERNATIONAL GOVERNANCE, at 30-32 (2002).

<sup>82</sup> Texas v. Johnson, 491, U.S. 397 (1989).

<sup>83</sup> Available at [economictimes.indiatimes.com/articleshow/50714133.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow/50714133.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

<sup>84</sup> The Queen-Empress v. BalGangadharTilak (1897).

<sup>85</sup> KedarNath Singh v. State of Bihar (1962).

<sup>86</sup> AseemTrivedi v. State of Maharashtra (2012).

unpopular offensive or inappropriate had an established connection with any provocation to violence or disruption in public order.<sup>87</sup> Law has distinguished advocacy from incitement. The sedition law prohibits any acts, speech or publications or writing that were made with seditious intent. This intent is broadly defined as encouraging the violent overthrow of democratic institutions.<sup>88</sup> A range of actions could be considered seditious, if they are conducted with the intention to cause violence, frequently causing hatred or contempt or inciting disaffection against the crown, government, constitution, parliament and justice.<sup>89</sup> The punishment for this offense is up to life imprisonment or fine.<sup>90</sup> The speaking out in opposition to governmental policies could have serious legal repercussions<sup>91</sup> in the sedition case.

### 5.2 Prohibition on Acts against National Interest

The national interest is comparatively a new concept in our context. The term national interest gained currency only with the emergence of the nation state system. In the initial days, it meant the interest of a particular monarch in holding on to his territories and expansion of the state through the conquest of other states. With the emergence of democratic principle, the concept of national interest became popular in political and diplomatic circles. Thus, national interest is the interest of a nation in promoting what is in its best interest. The national interest implies protection of a nation state's physical, cultural and political identity against the encroachment by other nation states. The preservation of physical identity is the protection of territorial integrity and sovereignty of a nation. The preservation of political identity means preserving the existing politico-economic regimes in existence. The preservation of cultural identity implies the maintenance of existing ethnic traditions and precedents of the nation states. The national interest can be broadly classified into various categories which are primary interest, secondary interest, permanent interest, variable interest, general interest, identical interest, specific interest, conflicting interest and complimentary interest. The subject of national interest is important for the nation, which is basically elaborated in the preamble and directive principles of state of policy. In the context, the Code says that no one shall do, or cause to be done, any act against national interest. For the purpose of this provision, where any person does or causes to be done, the certain act, he or she shall be considered to have done an act against

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<sup>87</sup> *ShreyaSinghal v. Union of India* (2012-15).

<sup>88</sup> *R v. Chief Metropolitan Stipendiary*, 1 QB 429 (1991).

<sup>89</sup> Blackstone's Criminal Practice § B18.9 (2010).

<sup>90</sup> *Id.*

<sup>91</sup> MILLER, JOHN C. CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951).

national interest. An act against national interest is (a) to dishonor or degrade or spread hatred or enmity against the freedom, sovereignty, geographical or territorial integrity, nationality, independence, self-esteem of, and or international image of Nepal, (b) to encroach the international boundary of Nepal or remove or dislocate any boundary pillar except in accordance with agreement with a neighboring country or to so change any boundary pillar as to be prejudicial to the geographical or territorial integrity of Nepal.

In this provision, the Code also covers national players. The Codesays that any Nepali player or a group of Nepali players, who is representing Nepal, plays any match in competition with any player or players in Nepal or a foreign country shall not play or cause to be played, such match in connivance with or under the influence of any one in a manner to manipulate a natural result of such match or to make a bet win or lose; and where any match has been so played, it shall be considered to have committed the offence against national interest. The sentence is considering not exceeding five years and fine not exceeding fifty thousand rupees, in the case of the offence and not exceeding three years and fine not exceeding thirty thousand rupees.

The transaction of money, orders, directs, abets, incites or facilitates the commission of the offence and a public office holder or a person representing Nepal, while in a foreign country - are prohibited as acts against the national interest. For the protection of national interestformally recognized of the state secrets privilege and extension of presidential power.<sup>92</sup> The closed material procedure involving a special advocate could be legitimate in the context of the imposition of a control order on a suspected terrorist<sup>93</sup> based on the principle of justice and security<sup>94</sup>.

### **5.3 Prohibition on Waging Assisting War against Nepal or Assisting the Army of a State at War with Nepal**

The force and threat have been old accompanying phenomena to international relations as political and legal theory. They were considered to originate from the sovereignty of states and their limitless right to use all means to protect their interests. The only limits could be found in moral views on just and unjust wars. War was connected with sovereignty as a legal concept and legal institution and originating from the right to wage war was law of war. The development of social consciousness has resulted in gradual limiting and final abolishing of the right to wage war turning into prohibition of any force and

<sup>92</sup> United States v. Reynolds, 345 U.S. 1 (1953).

<sup>93</sup> Secretary of State for the Home Department 3 UKHL 28 (2009).

<sup>94</sup> A v United Kingdom 49 EHRR 29 (2009).

threat in relations among states becoming a supreme norm of international law. The norm of international criminal law, the violence entails international criminal responsibility. It is universally military nature offence against nation and well known as prohibited war by international humanitarian law. The Code says that no person shall wage or declare to wage war against Nepal, by raising arms or attempt or threat to wage such war or collect arms, ammunition or form a military or paramilitary organization with intent to wage war against Nepal.

No person shall in any situation whether a state of war is declared or not, supply any kind of strategic or military information or otherwise render assistance to any foreign army engaged in war with Nepal or attempt to do so. The Code again says that where a declaration is made by the government of Nepal prohibiting the making of relation or transaction with a state engaged in war with Nepal, any citizen or corporate body of such state or the importing or obtaining of any goods or services of such state, no person shall make such relation or transaction with such state, citizen or body or import or obtain such goods or services. For the act against this section, the offender shall be liable to a sentence of imprisonment for life and imprisonment for a term not exceeding twenty five years and a fine not exceeding one hundred thousand rupees. This offence is taken as overt act rather than covert<sup>95</sup> in war law. An overt act in criminal law is an outward act done in pursuance and in manifestation of an intention or design and some physical action done for the purpose of carrying out or affecting the treason.

#### **5.4 Prohibition on Waging War or Insurrection against Friendly States**

Insurrection is a rising or rebellion of citizens against their government, usually manifested by acts of violence. Under law, it is a crime to incite, assist or engage in such conduct against the nation. The Code says that no person shall, using the territory of Nepal, wage or threaten to wage war by raising arms or attempt to wage such war or insurrect or attempt to insurrect against a state having diplomatic relations with Nepal. The offender shall be liable to a sentence of imprisonment for a term not exceeding seven years and a fine not exceeding seventy thousand rupees in this offence. It is already tested<sup>96</sup> that an armed combination to overthrow that government and knowing that the purchaser buys them for that treasonable purpose is himself guilty of treason or

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<sup>95</sup> Cramer v. United States, 325 U.S. 1 (1945).

<sup>96</sup> Carlisle v. United States, 83 U.S. 16 Wall.147 147 (1872).

a misprision thereof insurrection. There are three syllabuses, which are; neutrality, authority and actual war.<sup>97</sup>

### **5.5 Prohibition on Provoking Army or Police**

The offence relating to provoking army or police is offence of security force in nature however, committed by civilian. This provision was in Army Act 2016, which was quashed by Supreme Court of Nepal in the case of *Iman Singh Gurung v. Nepal Government* at 2049. The Code says that no person shall abet or provoke for the desertion of a soldier, police or armed police personnel or officer of their respective force from their service or abet the breach of discipline by such soldier, police or armed police personnel or attempt to seduce such soldier, police or armed police personnel from his or her duty or knowing or having reason to believe that a soldier or police or armed police personnel has so deserted the army or police or force, harbor such deserter. For this offence, the offender shall be liable to punishment with imprisonment for a term not exceeding ten years and a fine not exceeding one hundred thousand rupees.

### **5.6 Prohibition on Espionage**

The offence is regarded as military and political nature that holds the national secret. There can be involved diplomatic reports, publications, statistics, broadcasts and spying working under secret identity to gather classified information on behalf of another entity or nation. In Nepal, the organization that heads most activities dedicated to espionage is the National Investigation Department. The Code says that no person shall, with an intent to undermine the sovereignty, security or geographical or territorial integrity of Nepal or to prejudice/jeopardize the interests of Nepal or with the knowledge that such consequence is likely or being induced by any foreign country or international organization, supply to any one any information relating to the military situation, military strategic arrangement or internal security of Nepal or relating to any matter that must be kept confidential by the government of Nepal from the political, economic or diplomatic viewpoint or confidential document or any matter that is confidential or must be kept confidential pursuant to the law or conspire or attempt to commit or abet the commission of such act or do any other act with intent to supply such information and whoever commits such act shall be considered to have committed espionage.

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<sup>97</sup> Prize Cases, 67 U.S. 2 Black 635 635 (1862).

For this act, the offender shall be liable to punishment of imprisonment for a term not exceeding twenty five years. The Code again says that for the causes to be committed, espionage in relation to any matter that must be kept confidential by the government of Nepal from the political, economic and diplomatic viewpoint or any other confidential document, that has to be kept confidential by government of Nepal from the political, economic and diplomatic viewpoint or any other confidential document, a sentence of imprisonment for a term ranging from five to ten years. For a person who commits or causes to be committed, espionage in relation to any matter other than that, a sentence of imprisonment for a term not exceeding five years and a fine of fifty thousand rupees. In the case of a person who, despite the knowledge that anyone is going to commit espionage, does not give information thereof to the government of Nepal, he shall be liable of a sentence of imprisonment for a term not exceeding one year and a fine of one hundred thousand rupees. It shall be a crime just to obtain information as to places and things specifically listed in law as connected with or related to the national defense<sup>98</sup> and as far as security is concerned. The safeguard available to civil servants under Article 311 is not available to defense personnel.<sup>99</sup>

### **5.7 Prohibition on Assault against President**

The Code says that no person shall assassinate or attempt to assassinate abduct or cause to be abducted and assault or cause to be assaulted, the president of Nepal. For this act, the offender shall be liable to sentence of imprisonment for a term ranging from five to ten years to a sentence of imprisonment for life.

### **5.8 Prohibition on Intimidation of President or Parliament**

The Code says that no person shall intimidate, whether by using any kind of force or not, show fear or terror to or otherwise overawe the president or parliament of Nepal with intent to prevent or restrain the president or parliament of Nepal from performing any of the functions required to be performed pursuant to the constitution or law or compel the president or parliament of Nepal to perform the functions in any specific manner. For this act, the offender shall be liable to punishment with imprisonment for a term not exceeding seven years or a fine not exceeding seventy thousand rupees or both. The Code has explained of this provision on the definition of parliament, which means is federal parliament and the state assembly under the constitution of

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<sup>98</sup> Gorin v. United States, 312 U.S. 19 (1941).

<sup>99</sup> Supreme Court upholds termination of Army Officers in Samba Spying Case, available at <http://www.livelaw.in/supreme-court-upholds-termination-army-officers-samba-spying-case>.

Nepal. This term includes the legislature parliament also. The offense of threatening government official is a felony under law.

Threatening the President of any nation is also a serious crime and punishable with imprisonment. When national boundaries are transcended by such a threat, it is considered a terrorist threat. When a threat is made against a judge, it can be considered obstruction of justice. There are three<sup>100</sup> elements of the offense of making an illegal threat: there must be a transmission in interstate commerce; there must be a communication containing the threat and the threat must be a threat to injure the person of another. Threats can also sometimes be punished under the statutes criminalizing assaulting, resisting or impeding certain officers or employees<sup>101</sup> or assassinating, kidnapping and assaulting government officials.

The Code has mentioned the statute of limitation.<sup>102</sup> There is no limitation to file case relating to the offence of undermining sovereignty, integrity or national unity, sedition, prohibition of act against national interest, prohibition of waging assisting war against Nepal or assist the army of a state at war with Nepal and prohibition of assault on president, that is the case may be filed forever/at any time whatsoever. It is also said that in the case of the offences mentioned under the Chapter of 'Offence against the State' that no complaint shall be entertained after the expiry of two years of the date of knowledge of the commission of the offence. In the national security offence, the *mens rea* is more important than *actus reus*. Sometime, the *actus reus* exposes the minor offence but *mens rea* might have diverse impacts for grave crime.

## 6. CONCLUSION

The condition of national security in Nepal is unidentified after the collapse of Bimsen Thapa. The primary elements of national security such as national philosophy, national interest, national goal and aim are not clearly identified because of the lack of socialization of national security and military sociology. Now, the national security envelops the extensive area such as traditional security and human security in developed country. More importantly, national security protects the life of state and people. The sovereignty, territorial integrity, freedom, development, prosperity, stability, quality of life, environment and stability are constant elements of political life. In addition to this, military, economic, environmental, border, demographic, natural disasters,

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<sup>100</sup> United States v. DeAndino, 958 F.2d 146 (1992).

<sup>101</sup> United States v. Heliczer, 373 F. 2d 241 (1967).

<sup>102</sup> CODE, *Supra Note*27 § 59.

disaster safety, energy, geo-strategic, information, food, health, ethnic, environment and cyber, safety are roofed by national security under the constitutional order. The subject of national security must be determined on the basis of quantitative indicators commonly describing at the level of declaring offence as well as preventive agencies. For the protection of constitutional order, the Penal Code of Nepal has been passed by amending and consolidating of criminal offences in order to maintain morality, decency, etiquette, convenience, maintaining law and order, maintain harmonious relationship and peace among various religious and cultural communities and prevent and control criminal offences.

The Codetries to cover some areas of national security but not all. Some acts are prohibited as offence against state such as prohibition of undermining sovereignty, integrity or national unity, sedition, prohibition of act against national interest, prohibition of genocide, prohibition of waging war against Nepal or assist the army of a state at war with Nepal, prohibition of waging war or insurrection against friendly State, prohibition of giving provocation to army or police, prohibition of espionage, prohibition of assault on president and prohibition of intimidation of president or parliament with statute of limitation. In addition to these offences, the Code deals with others provisions such as lawful act that should not to be offence,<sup>103</sup> shall not be punished except in accordance with law,<sup>104</sup> act done by mistake of fact not to be offence,<sup>105</sup> harm caused by communication made in good faith not to be offence<sup>106</sup> and act compelled by fear, threat not to be offence,<sup>107</sup> which are directly connected with the national security offence. While declaring offence, there is most important provision on national security offence for the procedural matter, which is the factor aggravating the gravity of offence<sup>108</sup> and provision regarding to non-withdrawal of a case.<sup>109</sup> The Code has clearly mentioned the offence relating to the public peace and security<sup>110</sup> which is the subject of reason of law not reason of state.

There is statutory wrong in the Coderegarding to the offence of genocidewhich is not the crime against state but accepted as an offence as per traditional international criminal law. Such offence must be addressed as grave breaches

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<sup>103</sup> *Id.* § 6.

<sup>104</sup> *Id.* § 7.

<sup>105</sup> *Id.* § 8.

<sup>106</sup> *Id.* § 21.

<sup>107</sup> *Id.* § 22.

<sup>108</sup> *Id.* § 38.

<sup>109</sup> The National Criminal Procedure (Code) Act, §116 (2074 BS).

<sup>110</sup> CODE, *supra* note27 §§ 60-74.

of international criminal law by its mechanisms. Unfortunately, some other offence relating to arms and ammunition,<sup>111</sup> explosives,<sup>112</sup> prohibition of dishonoring or destroying national anthem, flag or emblem,<sup>113</sup> not to insult national figures/heroes,<sup>114</sup> prohibition of committing criminal mischief<sup>115</sup> and prohibition of killing or beating cows or oxen<sup>116</sup> should be dealt with under the national security offence not only as offence. The offence against the national anthem, flag and emblem as an act of protest, which is protected under the constitution, but which was once treated as a serious crime. The Code does not address crime against classified intelligence. In the case, the classified intelligence is disclosed to the general public or to a foreign entity, it becomes a serious matter of national security. The offence of terrorism is also not addressed in the Code. In the end, the government should strike the right balance between protecting national security and safeguarding individual rights. There must be cardinal relation between *one country two systems* or *reason of state and reason of law* or *security and justice*.



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<sup>111</sup> *Id.* 50 §§ 129-137.

<sup>112</sup> *Id.* §§ 138-146.

<sup>113</sup> *Id.* § 151.

<sup>114</sup> *Id.* § 152.

<sup>115</sup> *Id.* § 285.

<sup>116</sup> *Id.* § 289.



# **Dishonour of Cheques and Corporate Criminal Liability: With Reference to the National Penal (Code) Act, 2017**

**Awatar Neupane\***

## **ABSTRACT**

All cheques are bills of exchange, but all bills of exchange are not cheques. A cheque must have all the essential requisites of a bill of exchange. It must be signed by the drawer. It must contain sum of money to the order of a specified person or the bearer of the cheques. Nepal Rastra Bank has issued Electronic Cheque Clearing (ECC) Operating Rules, on November, 2011 (undated on July, 2015) for the regulation of cheque clearing. The ECC provides inquiry feature to the members/banks on the replied batches, which are sent from Paying Member/Bank and Financial institution. Today, Banking Offences and Punishment Act, 2064 BS is the leading law to deal with instances of dishonoured cheques, causing the offender to incur criminal liability. Before this Act, the Muluki Ain, 2020 BS (General Code of Nepal, 1963), Chapter on Fraud was invoked for preventing for the banking frauds as well as dishonour of cheques.

## **1. BACKGROUND**

**I**n the banking system, cheques depend upon the honesty of the parties thereto. The cheques are being used in commercial transactions in a big way.

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It is a legal duty arising out of the contract between a banker and his customer to make payment of cheques issued by the customers. Hence, banker should make the payment of the cheques presented by the customers.

When the cheque is presented by the customers for payment and the banker finds the cheques which can't be paid due to the various reasons, it is the dishonor of such cheques. When the banker decides not to honour a cheque, he should return it with a slip including the reason for dishonour.

A Cheque is a bill of exchange drawn on a certain Bank payable on demand<sup>1</sup>. A bill of exchange means an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money to, or to the order of a certain person or to the bearer of the instrument in a certain date or after certain period of time or at the demand<sup>2</sup>. All cheques are bills of exchange, but all bills of exchange are not cheques. A cheque must have all the essential requisites of a bill of exchange. It must be signed by the drawer. It must contain sum of money to the order of a specified person or the bearer of the cheques. All cheques are necessarily and always payable on demand, but a bill of exchange may be made payable either on demand or on a stated future date<sup>3</sup>.

It has been pointed out that a cheque serves two functions. In the relationship between the bank and its customer, it constitutes an instrument to pay a certain amount of money to the payee's order or to the bearer. As between of the cheque, who is the bank's customer, and the payee to a subsequent holder, the cheque constitutes a negotiable instrument<sup>4</sup>.

The modern cheque forms contain printed address and names of the accounts holders. The magnetic ink character recognition (MICR) encoding on the cheque facilitates electronic proceeding of the cheque by collecting and paying banks and financial institutions.

## 2. LEGAL PROVISIONS OF THE DISHONOUR OF CHEQUES

A cheque is always drawn in the form of an order and that order is unconditional in nature. The drawer of a cheque can't direct a banker to make payment to the payee of the cheque subject to a certain condition to be fulfilled

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<sup>1</sup> *Negotiable Instruments Act, 2034 BS*, Section 2 (h).

<sup>2</sup> *Ibid*, Section 2 (g).

<sup>3</sup> M. L. Tannan, *Tannan's Banking Law and Practice in India*, (21<sup>st</sup> edn), p. 780

<sup>4</sup> E.P. Ellinger, et al, *Ellinger's Modern Banking Law*, (4<sup>th</sup> edn), Oxford University Press, p. 364.

by the payee to receive payment. The main characteristics of a cheque are following<sup>5</sup>.

1. A cheque is a negotiable instrument.
2. A cheque is a bill of exchange, but every bill of exchange is not a cheque.
3. A cheque is always drawn upon a specified banker.
4. A cheque is always payable on demand.
5. There are three parties to a cheque:
  - Drawer, - a person who draws the cheque on a bank. Such a person is usually a customer of the bank and financial institution.
  - Drawee of a cheque, - a bank and financial institution on which a cheque is drawn by the drawer.
  - Payee, - a person to whom the payment is to be made by the bank on whom the cheque is drawn.
6. A cheque is an unconditional order from the drawer of a cheque to the drawer bank to make payment of money only.
7. The amount to be paid as indicated in the cheque must be certain and specific.
8. The cheque must contain the name of the person to whom the payment is to be made.
9. The cheque can also be payable to the bearer.

Parties to the cheque are following<sup>6</sup>.

- the maker of a cheque is called the “Drawer”,
- the person thereby directed to pay is called “Drawee”,
- the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the “Payee”,
- the person entitled in his own name to the possession of the cheque and to receive or recover the amount due is called the “Holder” of the cheque,
- the person who for consideration becomes the possessor of a cheque if payable to bearer, or the payee or endorse thereof, if payable to order, before the amount mentioned in it become payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title is called the “Holder in due course”,
- when the maker or holder of a cheque signs his name on the back of the cheque for the purpose of negotiation, he is said to be the “Endorser”.

<sup>5</sup> M. L. Tannan, *Tannan's Banking Law*, (1<sup>st</sup> student edn), Lexis Nexis, p. 312.

<sup>6</sup> S.N. Gupta, *Dishonour of Cheques, Liability- Civil & Criminal*, (6<sup>th</sup> edn), Universal Law Publishing Co., p. 5.

- the endorser who signs his name and directs to pay the amount mentioned in the cheque to, or the order of, a specified person, and the person so specified is called the “Endorsee” of the cheque.

Nepal Rastra Bank has issued Electronic Cheque Clearing (ECC) Operating Rules, on November, 2011 (undated on July, 2015) for the regulation of cheque clearing. The ECC provides inquiry feature to the members/banks on the replied batches, which are sent from Paying Member/Bank and Financial institution. The replied batches information identifies cheques, which are accepted/ returned by the Paying member.

The Presenting Member can send the rejected cheques for repairing to send them again to the ECC after the returned reasons are rectified. The returned cheques contain the main return reason that was specified by the Paying Member and the cheque image.

The Presenting Member should credit the customer account after receiving the advice of the settlement from NRB for the regular session not later than 16:00 of the same business day. In case of the Express Cheque Clearing, the customer account to be credited not more than 20 minutes from the time that the respective express clearing net settlement file settles in the settlement system at the NRB (after receiving the advice of the settlement from NRB)<sup>7</sup>.

The cheque which has been rejected or returned to the Presenting Member from the ECC or the Paying Member shall be returned to the customer attached with the printed “Cheque Return Advise” from the ECC showing the return reason. Cheque Returned Stamping, in case of rejection, the Presenting Member should stamp the cheque with “Rejected/Returned” at the back side of physical cheque (Top Left hand side). In case of re-presenting the cheque, the Presenting Member shall stamp another presentment at the back side of the physical cheque<sup>8</sup>.

The return reasons used by the Paying Member to reply on the rejected cheques. These reasons (technical and financial reasons) are defined by the NRB as follows<sup>9</sup>:

1. Insufficient fund,
2. Payment stopped by court order,
3. Account closed,

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<sup>7</sup> Nepal Rastra Bank, *Electronic Cheque Clearing (ECC) Operating Rules*, November, 2011, Clause 3. 10.

<sup>8</sup> *Ibid*, Clause 3.11.

<sup>9</sup> *Ibid*, S. N. 7.2 (Paying Member Return Reasons).

4. Drawer deceased,
5. Endorsement requires banker's confirmation,
6. Drawer's signature incomplete,
7. Drawer's signature differs,
8. Drawer's signature required,
9. Alteration in date requires full signature,
10. Alteration in figures require full signature,
11. Alteration in words require full signature,
12. Cheque is mutilated,
13. Cheque is post-dated,
14. Cheque is stalled,
15. Amounts in words and figures differ,
16. Incorrect date,
17. No advice of draft,
18. Clearing stamp required,
19. Old clearing stamp to be cancelled,
20. Bank's endorsement to be cancelled,
21. Cheque not drawn on us,
22. Second signature required,
23. Amount in words required,
24. Amount in figures required,
25. Date required technical,
26. Beneficiary name required,
27. Cheque presented with wrong amount,
28. Alteration in beneficiary name requires signature,
29. Figure and amount not in the same language,
30. Account blocked,

31. Image not clear,
32. Image and data mismatch,
33. Non-Standard cheque (old design cheque),
34. Original cheque is required.

The cheques will be dishonour as stated above 34 ground. The paying bank should return dishonoured cheques presented through clearing house pursuant to the ECC Operating Rules, 2011.

### **3. THE PROCESS OF RETURNING THE DISHONoured CHEQUE**

When the cheque is dishonoured, the bank's officials should return the cheque with a slip, giving the reason for the dishonour. The following abbreviations or answers are generally used on the return memo while returning the dishonoured cheques<sup>10</sup>.

1. R.D = "Refer to drawer", - it is generally meant to convey to the holder that he should refer to the drawer for payment, that is, the banker has not sufficient funds at his disposal to honour the cheque.
2. N.S. = "Not sufficient"; N.E. = "Not effects,"; N.F.= "No funds", - these are other abbreviations, used for the same purpose, but the abbreviation R.D. which is less definite than the last three, is generally used.
3. "Insufficient Funds", - Cheque dishonoured for want of funds in respect of all accounts should be returned along with a Memo indicating therein the reason for dishonour as "insufficient funds".
4. E.N.C. = "Effects not cleared", - This means that the drawer has paid in cheque or bills, which are in course of collection, but their proceeds are not available for meeting the cheque.
5. E.A. = "Exceeds arrangement", - Where there is an overdraft arrangement and the cheque presented exceeds the drawing limit allowed to the customer.
6. W. & F.D. = "words and figures differ",- This answer is given when the banker wants to return the cheque on the ground that the amount stated in words differs from that given in figures.
7. E.I. = "Endorsement irregular", - When an endorsement on a cheque is not in order, as is the case when the spelling of the payee's name as

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<sup>10</sup> *Supra Note 3*, at 861.

given on the face of a cheque differs from that in the endorsement, the cheque is returned with the remark.

8. D.D = “ Drawer deceased” ,- when the banker hears of the death of the customer, he should no longer pay cheques drawn by the deceased customer, prior to his demise.
9. D.R.= “Discharge required”.

The dishonoured cheques, in recent times, hold dominant position in bank related crime in the Courts. Nepalese Negotiable Instruments Act, 2034 has stated the provisions of dishonour of cheques. A Promissory Note, bill of exchange or Cheque shall be deemed to be dishonoured by non-payment when the maker of the note, acceptor of the bill or Drawee of the Cheque makes default in payment upon being duly required to pay the same<sup>11</sup>.

Notices of Dishonour of cheques as well as bills of exchange are stated in the Negotiable Instrument Act. When a Bill of Exchange is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice to all other parties related to such instrument, and if any party among them has not been noticed, such party shall not be liable to that instrument. Provided that, nothing in this section renders it necessary to give notice of dishonour to the maker of the Promissory Note, acceptor of the Bill of Exchange or the Drawee<sup>12</sup>.

Notice of dishonour may be given to a person to whom it is required to be given or to his/her duly authorized agent or, where he/she has died, to his/her heir, may be oral or written. While giving written notice, it can be sent by post and may be in any form. In such notice, it must be informed to the party to whom it is given, either in express terms or reasonable intendment that the Negotiable Instrument has been dishonoured and he /she will be held liable thereon and it must be given within reasonable time, at his place of business or residence. If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid<sup>13</sup>.

An intention to deceive being a necessary element or ingredient of fraud, a false representation does not amount to a fraud at law, unless it be made with fraudulent intent<sup>14</sup>.

The notice of dishonour is not necessary in the following conditions<sup>15</sup>:-

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<sup>11</sup> *Negotiable Instruments Act, 2034 BS*, Section 65.

<sup>12</sup> *Ibid*, Section 66

<sup>13</sup> *Ibid*, Section 67.

<sup>14</sup> Denis Lane McDonnell, and John George Monroe, *Kerr on the Law of Fraud and Mistake*, (17<sup>th</sup> edn), Universal Law Publishing Co. Pvt. Ltd., p. 17.

- (a) When it is dispensed with by the party entitled thereto,
- (b) When the Drawer has countermanded payment,
- (c) When the party has not suffered damage for want of notice,
- (d) When the acceptor is also a Drawer,
- (e) In the case of a Promissory Note which is not negotiable.
- (f) When the party entitled to notice cannot after due search be found, or the party bound to give notice, is for any other reason, unable without any fault of his/her own to give it,
- (g) When the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the Negotiable Instrument.

When a Negotiable Instrument has been dishonoured by non-payment or non-acceptance, the Holder may complain such dishonour to the Notary Public within a reasonable time and may cause to be noted the particulars of dishonour by the Notary Public upon the instrument, or upon a paper attached thereto. The date of dishonour and the reason assigned for such dishonour must be specified while causing to note and if the instrument has not been expressly dishonoured, the reason why the Holder treats it as dishonoured also shall have to be expressed clearly<sup>16</sup>.

The protest in relation to dishonour or refusal for additional security must contain the following particulars<sup>17</sup>:-

- (a) The Negotiable Instrument or its duplicate and of everything written or printed thereupon,
- (b) The name of the person for whom and against whom the instrument has been protested,
- (c) A statement that payment or acceptance, or additional security, as the case may be, has been demanded of such person by the Notary Public, the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found,
- (d) When the Negotiable Instrument has been dishonoured, the place and time of dishonour, and when additional security has been refused, the place and time of refusal.

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<sup>15</sup> *Supra Note 11*, Section 70.

<sup>16</sup> *Ibid*, Section 71.

<sup>17</sup> *Ibid*, Section 74.

When a Negotiable Instrument is required by any prevailing law to be protested, notice of such protest must be given instead of notice of dishonour. The notice may be given by the Notary Public also who makes the protest<sup>18</sup>.

All Bills of Exchange drawn payable at some other place than the place mentioned as the residence of the Drawee, and which are dishonoured by non-acceptance, may, without further presentment to the Drawee, be protested for non-payment in the place specified for the payment<sup>19</sup>.

#### 4. BLACKLISTING AT CREDIT INFORMATION BUREAU

Apart from having such legal instruments, Nepal Rastra Bank issued different directives/ circulars for the preventing for the dishonour of cheques. The Nepal Rastra Bank has issued the unified directives to the Bank and Financial Institution for the regulations of the financial sector of the nation. The beneficiary of the cheque also has a right to blacklisting to the drawer at the Credit Information Bureau Ltd. pursuant to the Nepal Rastra Bank's Directives.<sup>20</sup> Where a person, firm, company or organized institutions issue cheques without sufficient balance in the account or where irrespective of sufficient balance in the account the cheque is liable to be dishonoured for other various reasons, the same shall be treated as follows:

- In respect of a cheque returned unpaid for the first time, the payee, by issuing a 7 days' notice for the payment to the drawer (person, firm, company or organized institution), may resubmit the cheque to the concerned bank and financial institution.
- If the cheque is not paid even after such period, the payee may inform the paying bank or financial institution.
- Upon receipt of such written information as per the above stated clause, the concerned bank shall issue notice to the drawer giving up to 7 days for payment. If the payment is not made within that period also, the concerned bank and financial institution shall compulsorily proceed for blacklisting such drawer (person, firm, company or organized institution), within credit information bureau ltd.
- Even where a person, firm, company or organized institution gives cheque to the bank and financial institution, which are no cashable, they shall be blacklisted as per the above stated provision.

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<sup>18</sup> *Ibid*, Section 75.

<sup>19</sup> *Ibid*, Section 76.

<sup>20</sup> *Nepal Rastra Bank Directives, 2074 BS*, Directive no. 12, Clause 12 (2).

## 5. CRIMINAL LIABILITY OF DRAWER ON DISHONOUR OF CHEQUE

The beneficiary of the cheque has right for recovery of the amount under the civil and criminal liability. Under the severe criminal laws of the 17<sup>th</sup> century England, recalls Irving Wallace<sup>21</sup>, a man in debt was liable to arrest and trail. If found guilty, and if his creditors demanded that he be incarcerated in debtor's prison for his insolvency and financial default, he would be taken into custody by the police any day of the week save one-Sunday, the Lord's Day.<sup>22</sup> As a consequence, a man wanted for debt would usually go into hiding six days of the week-but on Sunday, immune from seizure, he would appear proudly in public as safe as any solvent gentleman.

Contrastingly, the laws in India against a defaulting drawer of a cheque were less draconian until the turn of the 20<sup>th</sup> century. The Indian law evolved in a sudden spurt, as it were, when in 1988 the liability of a drawer of a dishonoured cheque was brought under prosecutor measures by the insertion of new Chapter XVII (section 138-142) in the Negotiable Instruments Act, 1881. Section 138 to 142 of Negotiable Instruments Act, 1881 were amended and Section 143-147 of the Negotiable Instruments Act, 2002. The amended provisions of Chapter XVII, Section 138-147 provides the liability of a drawer of a dishonoured cheque<sup>23</sup>.

There is nothing in law to prevent criminal court from taking cognizance of the offence merely because on the same facts the persons concerned might be subjected to civil liabilities. There is a presumption under the Act that the cheque was received in discharge of a liability<sup>24</sup>. The element of mens rea has been excluded in the larger public interest to curb the instances of dishonouring of cheques and to lend greater credibility to the commercial transactions which are vital for trade, business and industry in general as well as for international business transactions<sup>25</sup>.

Intention of the drawer at the time the cheques are issued is very material in order to determine whether intention of the accused was to make the payment or only to use these cheques as a means to have the amount due from him reduced and distinction must be made.<sup>26</sup> In the criminal revision petition of India, about the memo of dishonour of cheque from the bank, that there was no

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<sup>21</sup> The Sunday Gentlemen, *Pocket Book*.

<sup>22</sup> *Supra Note 3*, at 872.

<sup>23</sup> *Ibid*, p. 873.

<sup>24</sup> *Supra Note 6*, at 248.

<sup>25</sup> Dr. Pramod Kumar Singh (2017), *Digest on Dishonour of Cheque*, Vinod Publications (P) Ltd. p. 337.

<sup>26</sup> Sharma & Mago, *Dishonour of Cheques: At-A-Glance*, (2<sup>nd</sup> edn), Kamal Publishers, p. 176.

inflexible rule that the complainant should produce the memo of dishonour from the bank certifying that the reason for dishonour was want of funds<sup>27</sup>.

The special Act also promulgated for the prevention of the dishonour of cheques under the Negotiable Instrument Act, 2034 BS. In Section 107A of the Act is stated the criminal liability of the drawer of the dishonour of cheques. In case any person who deliberately transfers a Cheque by drawing it to somebody that he/she does not bear deposit in the Bank or even if there is a deposit which is not sufficient, and if the Cheque thus transferred is dishonoured due to lack of sufficient deposit when the Cheque is presented to the concerned Bank for the payment, the amount mentioned in the Cheque as well as interest on it shall be caused to be recovered to the Holder from the Drawer and he/she shall be punished with an imprisonment up to 3 months or a fine up to Three Thousand Rupees or both.

Banking Offence and Punishment Act, 2064 BS was promulgated with the objectives of “to provide legal provisions on banking offences and punishments with a view to promoting trust towards banking and financial system thereby mitigating the consequences and the risks that the banking and financial system may suffer on account of the offences may be occurred in course of transactions of bank and financial institutions be it enacted.<sup>28</sup>” Before this Act, the Muluki Ain, 2020 (General Code of Nepal, 1963), Chapter on Fraud was invoked for preventing for the banking frauds as well as dishonour of cheques.

Section 249 of Country Penal (Code) Act, has the provision of cheating which will be relevant with the offence of dishonour of cheque. The Chapter of Cheating of *Muluki Ain*, 2020 is associated with the cheating offences, which is also related with dishonour of cheque as a criminal offence. Number 1<sup>29</sup> of the Chapter on Cheating also related with the offence of dishonour of cheques. If a person takes or gives, or causes to be taken or given, any movable or immovable property (dhanmal) which the person has no right in and belongs to other or the property which is in other’s custody or control, by way of luring or conspiracy, or prepares, gives and submits any fraudulent document regarding the property which the person has no right in or deceives that any matter that is not with him or her is with him or her, or lies something which is not true (Gaflat), or makes fraud, or gives, takes, sells or exchanges some other’s property upon pretending that the property of somebody else belongs to him or

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<sup>27</sup> Avtar Singh, *Negotiable Instruments*, (4<sup>th</sup> edn), Eastern Book Company, p. 491.

<sup>28</sup> *Banking Offences and Punishment Act, 2064 BS*, Preamble.

<sup>29</sup> *Muluki Ain*, Chapter on Fraud, No.1.

her or has come into or her ownership, the person shall be deemed to have committed the offence of cheating.

Number 2 of the Chapter on Cheating of Muluki Ain, 2020 also related with the offence of dishonour of cheques as following:<sup>30</sup>

*"If a person does any act yielding benefits to the person and causing loss to another person by way of deceiving, misrepresenting or misrepresenting or misleading the other person by way of deceiving, misrepresenting or misleading the other person, with mala fide intention or with intention to escape punishment for an offense, or by lying that the name does not belong to him or her but belongs to somebody else and by deceiving upon saying that some other's name is his or her and that the person in question is him or her, and deceives the person or knowingly causes another person to state such matter or by any other means whatsoever, the person shall be deemed to have committed the offence of cheating."*

The Banking Offence and Punishment Act, 2064 includes the 14 headings for the criminalized activities in the Chapter 2<sup>31</sup> and dishonour of cheques are incorporated in the Section 3 (c). Not to open an account or demand cash payment in an unauthorized manner: While opening an account with a bank or financial institution or demanding cash payment, no one shall undertake the following acts: Draw a cheque to obtain or to knowingly from an account where he/she has an apparent knowledge that the account does not have sufficient balance to cover the amount of the cheque drawn<sup>32</sup>.

If it is felt by the management that only disciplinary action is not enough for the fraud committed by the staff members, the matter is reported to Police, who investigates into the matter and the charge sheet is filed as criminal offence under Banking Offence and Punishment Act, 2064. Nepal Government has first amended the Banking Offence and Punishment Act, 2064 in the 2073. The first amendment has incorporated other area of banking offence and has enhanced the punishment. Recently, Supreme Court has decided many cases relevant with banking and financial offences and some landmark decisions of Supreme Court influence the financial sector for the controlling dishonour of cheques.

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<sup>30</sup> *Ibid*, No. 2.

<sup>31</sup> *Banking Offences and Punishment Act, 2064 BS*, Section 3-14B.

<sup>32</sup> *Ibid*, Section 3 (c).

## **6. CORPORATE CRIMINAL LIABILITY AND MULUKI CRIMINAL CODE, 2074 BS**

The Muluki Criminal (Code) Act, 2074 will come into commencement from 1st Bhadra, 2075 repealing *Muluki Ain*, 2020 ( 1963). The provision of the corporate criminal liability has been made in the Section 30 of the Muluki Criminal (Code) Act, 2074.

There are two major challenges in holding a corporate criminal liability. Firstly, an act of company or body corporate cannot be said to have met the elements of crime in the absence of the mens rea. Secondly, punishments arising from criminal liability cannot be imposed on a company since a company can neither be executed nor imprisoned.

The concept of a company's separate personality is that it can be liable for breaches of contract, torts, crimes etc. But for obvious reasons, it can only act through human agents or employees, so that, as a general principle, a company can only be liable either where a principal would be liable for the acts of an agent or an employee liable for the acts of an agent or an employer liable for the acts of an employee.

There is also a principle known as the *alter ego doctrine*, this is the antithesis of the doctrine of separate corporate personality. The doctrine was first laid down by the House of Lords in *Lennards Carrying Co v. Asiatic Petroleum*, (1915)<sup>33</sup> where the major shareholder's negligence in navigating the company's ship was held to be the negligence of the company for the purposes of assessing liability.

This doctrine has been applied in various areas of the law but for some years it remained unclear as to exactly whose acts and intentions could be attributed to the company. A particular focus of the alter ego doctrine centered on the liability of companies for corporate manslaughter (homicide).

The liability of the dishonour of cheque issued by the company or a firm, the chief executive office or proprietor should be responsible of the offence. The Nepalese Companies Act, 2063 and Negotiable Instrument Act, 2034 has not clear provision on this issue. Muluki Criminal (Code) Act, 2074 has clearly stipulated the criminal liability in such the offences. If any person commits an offence as stated in the Code, by the name of any firm, company or body corporate, the person committing such an act shall be responsible for the offence. If the person committing the offence was not identify, in case of firm,

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<sup>33</sup> Stephen Girvin et al, *Charlesworth's Company Law*, (18<sup>th</sup> edn), Sweet & Maxwell, p. 473.

the owner of firm i.e. proprietor and partners shall be liable and punished accordingly. If any person, director, managing director, general manager of the company or body corporate were not identified for committing the offence, the chief executive of the company, who is holding the charge at that time, was responsible for the offence and punished accordingly.

The Companies Act, 2063 of Nepal, has recognized company as a legal person and has attributed it with several rights as well as liability. The Act contains certain provisions laying certain obligations on and also imposing certain penalties in case of non-compliances of the Companies Act. Though the criminal liability of a company is not explicitly mentioned in the Companies Act, Section 160 of the Companies Act has categorized certain acts as punishable with fine not exceeding fifty thousand rupees or with imprisonment for a term not exceeding two years or with both.

Likewise, Section 141 of the Indian Negotiable Instrument Act, 1881 has stated that, if the person committing an offence for dishonour of cheque by the company, every person who, at the time the offence committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The person in charge shall not be liable to punishment if he proves that the offence was committed without his knowledge, or he had exercised all due diligence to prevent the commission of such offence.

## **7. JUDGMENTS OF THE SUPREME COURT OF NEPAL**

Supreme Court of Nepal has decided in the case of Maheshorlal Shrestha v Bishnu Maharjan and other<sup>34</sup> that the suit under the Negotiable Instrument Act, 2034 section 107A is differentiated as a criminal case of a public sue. It also defined the meaning of the “Refer to Drawer” in their ordinary meaning amounted to a statement by the bank- “we are not paying go back to the drawer and ask why” or refer to drawer” means cheque has been returned for want of fund. In this case, Bishnu Maharajan was a director of the company, but he was responsible for the dishonour of cheque of the company. Though, the company is a legal entity, can’t act by itself as acts through the Board of Directors of Directors are liability in the dishonour of the cheque.

In the case of Ajitraj Dhungel v. Nepal Government<sup>35</sup>, Supreme Court has decided in favor cheque’s beneficiary due to the insufficient amount in the

<sup>34</sup> NLJ (NKP) 2070 BS, Issue 1, Decision No. 8950, p. 137.

<sup>35</sup> NKP 2070 BS, Issue 4, Decision No. 8999, p. 570.

bank's account and in the condition of the dishonour of cheque, the related party can file the case under the chapter 3 of cheating of Civil Code. The accused person gives the cheque to another person which did not have sufficient amount in the account, that the cheque was fraud and dishonour, thus he shall be deemed to have committed the offence of cheating.

In another case Supreme Court has decided in *Khamraj Bhata v. Nepal Government*<sup>36</sup> that if the cheque was dishonour due to the insufficient fund in the account, the associated party should be responsible in the banking offence under the Chapter 3 of cheating no 1 & 2 of Civil Code.

In the case of *Madusudan Puri Vs. Nepal Investment Bank Ltd.*<sup>37</sup> the Supreme Court has decided that the main factors of fraud in guilty of mind of the fraudulent. While going through the fact of the case, we can find the banking loophole and bank's official careless for detection of altered the cheques. Cheques are encashment in different banks, but the concerned officials do not know the fraud signature.

The supreme Court has decided the case of *Suresh Chandra Paudel v. Parliament Affairs and others*<sup>38</sup> that the any person issued the cheque to the another party, he has no right to stop payment of the cheque. Once the cheque has been drawn and issued to the payee and the payee has presented the cheque in the bank, thereafter if any instructions are issued to the bank for non-payments and cheque is returned to the payee with such endorsement, such as cheques are dishonour by stopping the payment. The reason of the stopping payment was not reasonable, then payee has right to recover the amount along with the interest from the drawer. In another case *Suresh Chandra Paudel v. Nepal Investment Bank Ltd. et al.*<sup>39</sup> Supreme Court has decided that one time cheque has issued then he has no right to stop the payment of the cheques. If the bank has accepted the stop payment order, such activities were the negative impact in the banking system.

In the case of *Kamarshing Bhandari v. KarnaBahadur Chand*<sup>40</sup> Supreme Court has decided that in case of dishonour of the cheques a case can be filed under Negotiable Instrument Act, 2034. Concern party sued the cased under the Chapter of Cheating no 1 & 2 of Muluki Ain then district count has order that the case will transfer under the Negotiable Instruments Act. Thus, this is a

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<sup>36</sup> Supreme Court Bulletin, Year 19, Part 15, Mangsir 1-15, 2067 BS, p.27.

<sup>37</sup> NKP 2070 BS, Issue 1, Decision No. 8948, p.109. .

<sup>38</sup> NKP 2068 BS, Issue 6, Decision No. 8627, p. 893.

<sup>39</sup> NKP 2067 BS, Issue 7, Decision No. 8425, p. 1249

<sup>40</sup> NKP 2069 BS, Issue 12, Decision No. 8927, p.1778.

landmark decision for the dishonour of the cheques with related to Banking offence.

The dishonor of the cheques is criminal liability under the Nepalese Banking Offence and Punishment Act, 2064.<sup>41</sup> Government of Nepal government is plaintiff of the case filed under the Banking Offence Act, 2064.<sup>42</sup> If we file the case under the Chapter on Cheating of Muluki Ain, then the dishonour of cheques will create criminal liability. The beneficiary of the cheque has right for recovery of the amount under the civil or criminal liability. The beneficiary also has right to blacklisting the drawer at Credit Information bureau pursuant to the Nepal Rastra Bank's Directives<sup>43</sup>.

In the case of Nepal Government v. Durga Karki<sup>44</sup> Supreme Court decided that the dishonor of the cheque means drawee can't get the money from the bank due to the insufficiency of the deposit in the account of drawer. If the account holder has not sufficient amount on his account and fraudulent activities also associated in the banking offence since the both parties were natural person than the activities were under the legal provision of Negotiation Instrument Act, 2034 not as Banking Offence and Punishment Act. This is the landmarked decision interrelated to the dishonor of the cheques.

## 8. CONCLUSION

Growth of different financial institutions within last few decades is the outcome of growing economic liberalization in Nepal. Before liberalization, there were very limited number of financial institutions and most of them were state owned. Different types of financial institutions such as banks, financial institutions, cooperatives, insurance companies and other financial intermediaries with different objectives are established. Increase in the financial institution means the development of the financial activities of the people which resultantly increases the frauds/offences in the financial sector. The prevention of the banking fraud is the main objective of the government as well as regulatory authorities.

When the cheque has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by notary public upon the cheque, or upon paper attached to the cheque. Such note must be paid within the reasonable time after the dishonour. The note should specify the date of

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<sup>41</sup> *Banking Offences and Punishment Act, 2064 BS*, Section 3 (c) . .

<sup>42</sup> *Ibid*, Section 18.

<sup>43</sup> *Supra Note 20*.

<sup>44</sup> NKP 2072 BS, Issue 8, Decision No. 9452.

dishonour, and the reason, if any assigned for such dishonour. The holder of a dishonoured note can also cause such dishonour to be noted and certified by notary public as per the provision of the Negotiable Instruments Act, 2034, but Supreme Court has accept other evidence of dishonour of cheques.

Dishonour of a cheque is an economic, moral, social and legal wrong. The amendment in the Negotiable Instrument Act is necessary to incorporate the provisions of Nepal Rastra Bank's directives, Supreme Court's decision as well as the provision of the Banking Offence and Punishment Act. Muluki Criminal (Code) Act, 2074 has incorporated the corporate criminal liability as offence. The first amendment of the Banking Offence and Punishment Act, has incorporated the issue of the dishonour of cheques as a banking offence, the related party has not right to recovery of the interest of the amount. It is necessary to harmonize the offence of the dishonour of cheques in the Banking Offence and Punishment Act and Negotiable Instrument Act, with the provision of corporate criminal liability of Muluki Criminal (Code) Act, 2074 for fruitful results and curing the disease called the "dishonour of a cheque."





# Forensic Science and Its Historical Development in Nepali Justice Administration

Ramesh Parajuli\*

## ABSTRACT

Relying more on forensic evidences enhances the quality of justice delivery than relying on confession and witness testimony. Confession could be extracted by torture, undue influence; witnesses might be purchased in money or may be influenced by power, status, pressure, loss of memory, kinship etc. but scientific/forensic evidences never tell a tale. Increased use of forensic science enhances quality of investigation, prosecution and adjudication. Forensic science therefore plays a vital role in providing scientific information through the analysis of physical evidences to the investigator, attorneys and the adjudicator. In practice, forensic science draws upon physics, chemistry, biology, and other scientific principles and methods. Forensic science is concerned with the recognition, identification, individualization and evaluation of physical evidence. Forensic scientists present their findings as expert witnesses in the court *of law*.

## 1. CONCEPT OF FORENSIC SCIENCE

**F**orensic science is a discipline where knowledge of various sciences is applied to solving legal disputes. Forensic science contributes in justice administration, both civil and criminal, by supplying forensic evidences or scientific evidences. Identifying a murdered based on confession corroborated with hearsay evidence, is not application of forensic science. But, identifying a murderer and convicting him by relying on two evidences viz - (a) fingerprint

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attached into the handle of stabbed knife, corroborated with (b) deceased's blood stain discovered from the stabbed knife is an example of application of the knowledge of forensic science in criminal justice administration. Opinion of fingerprint expert in first case and opinion of forensic lab expert in second case discussed above, are the examples of forensic evidences. The knowledge/principles of forensic science that 'every person in this world has unique fingerprint' and 'the blood of deceased when examined for DNA, is unique and no two persons in the world can have same DNA' are applied to identify offender in the above scenario respectively.

Relying more on forensic evidences enhances the quality of justice delivery than relying on confession and witness testimony. Confession could be extracted by torture, undue influence; witnesses might be purchased in money or may be influenced by power, status, pressure, loss of memory, kinship etc. but scientific/forensic evidences never tell a tale. The knowledge, principles and ideas of forensic science generates forensic evidences. Thus, forensic evidences carry objectivity and factual basis which make them better than confession and witness testimony. Wider application of forensic science during investigation ensures respect towards right to fair trial and right to dignified life of presumed innocent. In this sense, the more forensic science is relied upon than confession or witness testimony, the quality of justice delivery in any society gets enhanced.

Increased application of forensic science in criminal investigation ensures public trust towards police by protecting pre-trial human rights of detainees. Detainees are at high risk of being tortured by powerful investigators in course of criminal investigation. There is likelihood of abuse of state authority and custodial torture when investigating authorities investigate the criminal case from confession-centric approach. Inalienable right to life, liberty and security of accused creates duty on Government of Nepal to invest now on forensic oriented investigation and march ahead towards *pahila suna ani thuna* (first investigate, then arrest) approach by departing from long practiced traditional *pahila thuna ani suna* (first arrest then investigate) approach. Nepal after ratification of UN Convention Against Torture and other Cruel, Inhumane, Degrading Treatment or Punishment, 1984 on May 14, 1991 is duty bound as a member state party to adopt this fair trial model of "first investigate then arrest" so as to materialize the spirit of Article 22<sup>1</sup> of the fundamental law of the land-Constitution of Nepal, 2072 B.S. Adoption of this model not only ensures

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<sup>1</sup> It prohibits subjecting to physical or mental torture or to cruel, inhuman or degrading treatment to the one who is arrested or detained. Such act is punishable and victim is entitled to compensation as per law.

human rights friendly criminal investigation but even creates a positive environment where the dignity of police institution is enhanced in the eye of public. The public should feel comfortable and willing to co-operate police personnel as a better crime prevention and control strategy instead of widening the gap between police and citizens which results into citizens moving away from police with feelings of frightening and insecurity in a society.

Increased use of forensic science enhances quality of investigation, prosecution and adjudication. Forensic science therefore plays a vital role in providing scientific information through the analysis of physical evidences to the investigator, attorneys and the adjudicator. Nepali Supreme Court also recognized this truth through a precedent established in *Ramesh Parajuli* case<sup>2</sup> where it was held "until arrangements for guarantee of justice by punishing culprit based on truth, objectivity, and scientific investigation are made, there shall be no public faith on Rule of Law and State Mechanism."

The utility and scope of forensic science is much wider as it contributes both in criminal justice system as well as civil justice system. Scientific and biological evidences collected from the victim, accused and the scene of crime such as blood, saliva, semen, weapon, half eaten and thrown foodstuff, fingerprint and other particles of body or cloth are important in criminal justice system. In civil cases such as paternity or maternity disputes, inheritance claim, and relationship establishment disputes, DNA evidence is significant to resolve the fact in issue. Signature or thumbprint identification are significant in resolving disputes relating to household agreements or questioned documents for the purpose of securing justice to all. In all these scenario, collection, examination and scientific analysis of forensic evidences is required.

Scholars have felt difficulty to clearly define exactly what 'Forensic Science' is because of its wide scope. The term 'Forensic' is derived from Latin word '*Forensis*' meaning 'of a forum, place of assembly' or 'public place'. Later, the term is especially used in sense of 'pertaining to legal trials'.<sup>3</sup> Thus, 'Forensic' could be termed as forum or court of law where the legal issues are discussed. It has wider scope and functions. There is absence of universally accepted definition of forensic science capable to cover all aim, nature and functions of the forensic science. However, some attempt made by different authors can be worthwhile to observe.

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<sup>2</sup> Ramesh Parajuli et.al. v. Office of the Prime Minister & Council of Ministers et.al.; NKP (NLR) 2073 BS., Vol. 12, D.N. 9732, pp. 2314-2322.

<sup>3</sup> Available at <https://www.etymonline.com/word/forensic> (Accessed on June 5, 2018).

Richard Saferstein, in his book defines "Forensic Science is the application of sciences to those criminal and civil laws that are enforced by police agencies in a criminal justice system."<sup>4</sup> This definition highlights more on criminal justice system stating as police enforced system. Application of forensic science however, is massive even in civil justice system such as during inheritance claim, paternity disputes and relationship disputes.

B.R. Sharma has defined this discipline as "Forensic science in criminal investigation and trials is mainly concerned with materials and indirectly through materials with men, places and time."<sup>5</sup> It processes, identifies, and compares the materials. This definition provided importance of forensic science at two stages of criminal justice. They are during criminal investigation and during trial of the accused. It focuses on collection, processing, identification and even comparison of physical evidences that could be found on the body of victim or offender and at the scene of crime.

The simplified and wider definition of the forensic science includes the use of any science within the criminal justice system. this discipline can be use to prove elements of crime, verify or discredit victim or suspect statements, identify decedents and suspect, and establish a connection to a crime or crime scene.<sup>6</sup> In practice, forensic science draws upon physics, chemistry, biology, and other scientific principles and methods. Forensic science is concerned with the recognition, identification, individualization and evaluation of physical evidence. Forensic scientists present their findings as expert witnesses in the court of law.<sup>7</sup>

## 2. FIELDS OF FORENSIC SCIENCE

Forensic science is broader term. It includes all fields of science such as physics, chemistry, and biology. Knowledge of these sciences are applied for resolving legal disputes and fact in issue at courts. Application of various fields of forensic science depend upon the individual case been confronted to investigator, forensic analyst, lawyers, and court of law. Some major fields of forensic science are as follows:

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<sup>4</sup> RICHARD SAFERSTEIN, *CRIMINALISTICS: AN INTRODUCTION TO FORENSIC SCIENCE*, at 3-23, 8<sup>th</sup> edn, (2004).

<sup>5</sup> B.R. SHARMA, *FORENSIC SCIENCE AND CRIMINAL INVESTIGATION AND TRIALS*, at 6, 4<sup>th</sup> edn, (2003).

<sup>6</sup> Available at <https://study.com/academy/lesson/what-is-forensic-science-definition-history-types.html> (Accessed on June 5, 2018).

<sup>7</sup> Available at <https://www.all-about-forensic-science.com/definition-of-forensic-science.html> (Accessed on June 5, 2018).

- a) *Forensic Pathology*: Pathology is a branch of medical practice involving study and diagnosis of disease through examination of surgically removed body parts, organs, tissues, body fluids and in some cases entire dead body. Forensic pathology is responsible to estimate the cause of death, manner of death and time of death of a person through autopsy or post mortem examination in sudden death, suspicious death, and traumatic death. Forensic pathologists are also licensed doctors especially trained to examine dead bodies. The forensic pathology examines body, tissue, organs, fluids and human cells from those who died violently or suddenly. The report prepared by the forensic pathology helps to estimate cause and manner of death such as suicide, homicide, natural cause, drowning or severe hemorrhage etc.
- b) *Forensic Toxicology*: Toxicology denotes science of poisons. Forensic toxicology deals with the study of poisonous quality, chemical composition and effects on an organism. Forensic toxicology involves the detection and interpretation of the presence of drugs and other potential toxic compounds in bodily tissues and fluids. Forensic toxicologist assists in criminal investigation through examination of body fluids and tissue samples collected by the investigator. This branch of forensic science helps to investigate poisoning case. Therefore, it deals with sources, characters, properties of poison, the symptoms they produce, their fatal effects and the remedial measures that should be taken to combat their actions.
- c) *Clinical Forensic Science*: This branch of forensic medicine covers the large area of medical specialty that interacts with law, judiciary and the police involving living person or even dead bodies. It includes medico legal examination of offence involving sexual assault, wounds and injuries in case of hurt, level of intoxication, age estimation of a child, assessment of physical disabilities etc. it provides an independent expert opinion through scientific examination of different medical fact involved in delivery of justice.
- d) *Forensic Anthropology*: Forensic anthropology deals with physical and biological concern to legal process. Physical and biological examination of human skull, skeleton, bones and other biological and physical features help in criminal justice administration through personal identification. Estimation of age, determination of sex, stature, ancestry and unique features of a skeleton is important when police authority finds skeleton remain body or unidentified body. Thus, this branch

- assists in the identification of deceased individuals whose remains are decomposed, burned, mutilated or otherwise unrecognizable.
- e) *Forensic Serology*: This branch refers study and application of human body fluids such as blood, semen, saliva, urine, sweat etc. Extraction of cells from human body fluids and using it to assist DNA examination is very much important in criminal justice system. It assists in detection, classification and study of various bodily fluids and their relationship to a crime scene.
  - f) *Forensic Signature and Handwriting Expert*: This field is related to examination of questioned documents or disputed deed such as suicide note kept at scene of crime. Comparison and identification through handwriting is a useful source of evidence. Forensic handwriting experts examine different aspects of handwriting such as base, lining, movement of hand, pressure, uppercase or lower case, front, gap etc. comparison of two different signature or handwriting is important to determine whether the writer of the questioned document is same or not.
  - g) *Forensic Ballistics*: Ballistic weapons are common method of suicide or homicide to those who have easy access of arms and ammunition. Forensic ballistics examines the gunshot injury. A gunshot case requires interpretation of different aspects such as identification of number of weapon used, number of fire opened, distance of firing, direction of fire, types and nature of fire, caliber of gun, identification of weapon involved in the incident etc. Forensic ballistic expert analyzes cartridge, gun power, pattern of bullet etc. Scientific practice of forensic ballistic helps to establish causation of crime through gunshot and establish individuality of victim and perpetrator of the gunshot.
  - h) *Forensic Psychiatry*: This field of forensic science deals with the issues arising in interaction between psychiatry and laws. A forensic psychiatrist examines personality disorder of a person, mental illness of an accused of crime, mental torture inflicted upon a person in custody or to any prisoner in jail. Penal system of each country treats mentally retarded persons and offenders differently. Mental torture inflicted by the state official to any person inside either custody or jail is a criminal offence and the victim is entitled to compensation. Therefore, it is a valuable branch of forensic science.
  - i) *Forensic Medicine*: Forensic Medicine is considered as especial branch of forensic science as branch of application of medical knowledge, principles and established medical fact in solving legal issues. Medical examination of victim and accused is notable fields of medical practice.

Examination of wounds and injuries, effects of drugs, post mortem examination are fall under this branch.

These fields of forensic science might be exercised collectively in criminal investigation of any offence depending on nature of crime. For instance, Forensic Ballistic is not required in investigation of the sexual offence unless there is presence of opening of ballistic at the scene of crime. Accordingly, forensic serology is most common field to be exercised in cases of violent homicide, sexual assault and hurt. Forensic anthropology is notable in case of exhumation and study of skull, skeleton and different bone of human being. These fields of study are collectively oriented to collect evidences relating to identification and individualization persons come in the ambit of the investigation and legal disputes and helps to establish the connection between the crime, scene of crime, victim and the offender.

### **3. INTERRELATIONSHIP BETWEEN FORENSIC MEDICINE AND MEDICAL URISPRUDENCE**

The terms 'Forensic Science', 'Forensic Medicine' and 'Forensic Jurisprudence' seem similar but they are different. Their nature, field of study and functions differentiate them form one another.

Forensic science is much broader term that includes the all sciences applied in investigation and resolution of disputed facts and legal disputes. Forensic science supplies concrete fact based on the scientific evidences which help to prove or disprove the fact in issue presented before the adjudicator. It includes 'forensic medicine' as one of its several components. All forensic medicines are forensic sciences but all forensic sciences are not forensic medicines. The other sciences, components or subjects within forensic science include ballistic science, (where knowledge of physics is applied for justice), chemistry (where knowledge of chemical science is applied to reach justice in toxicology or viscera examination issues) and many more.

Forensic medicine is itself a specialized science. Forensic medicine applies medical knowledge, medical skill and experience in administration of justice. Forensic medicine has limited scope than the forensic medicine because it mostly focuses on the medical sciences than other science. The collection of evidence through medical practice has great importance in identification and individualization of the person connected with both civil and criminal case. This branch of study is more relevant to human pathology and treatment. For example, findings of autopsy examination or medico legal examination of

wounds and injuries in either assault or rape come under the ambit of forensic medicine.

‘Forensic Jurisprudence’ is related with jurisprudential standards, interpretations and principles established by courts and jurists on matters relating to forensic science in course of administration of justice. Forensic jurisprudence studies the judicial interpretation of the court for qualifying the forensic service for production on reliable and strong forensic evidence that ultimately uphold the essence of justice and avoids possibility of miscarries of justice. This branch of study provides quality and standards that need to be followed during the collection, preservation, examination and evaluation of forensic evidences. Mostly it prescribes the activities, which should do or should not do by forensic practitioner. For instance, a forensic practitioner should not prepare medico legal examination report by taking bribe from the parties of case. If a doctor is charged for bribery in issuing medico legal report, such report is inadmissible in justice administration.<sup>8</sup> Accordingly, for the purpose of DNA test, the intimate sample must be taken only from the concerned person.<sup>9</sup>

Even though these three terms differ from each other literally, we still find four similarities and close interrelationship among them. First, ‘achievement of justice’ is the spirit and ultimate purpose of all these three disciplines. Second, in all these three disciplines, neither ‘science’ alone nor ‘law’ alone can help court to identify truth. Combined effort of both science and law is essential to deliver justice. Third, legal stakeholders are the key who apply, interact and get connected with all these three subjects. Fourth, all legal stakeholders, whether police investigators, prosecutors or adjudicators, defense lawyers, they are in mission to resolve fact in issue either by establishing guilt or proving innocence of suspect.

#### **4. IMPORTANCE OF FORENSIC SCIENCE**

The new development and advancement in science and technology has increased the role and importance of forensic science in administration of justice, both civil and criminal. In adversarial justice system, a judge is fact finder who ascertains the facts on the basis of evidences presented by the parties. The judge requires reliable and irrefutable evidence to prove and disprove the fact in issue. Any unduly obtained confession or witness testimony is likely to lead to miscarriage of justice. Such situation promotes injustice and

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<sup>8</sup> Khadgadas Khadgi v. Sanubhai Khadgi et.al. NKP 2023 BS, D.N. 333.

<sup>9</sup> Devi Gurung v. Nita Gurung, NKP 2068 BS, D.N. 8578.

an innocence person has to suffer from loss or deprivation of liberty because of being sentenced.

Forensic science enables investigator to collect physical and biological evidences, which are examined through forensic expert in laboratory and evaluated by applying scientifically proven facts. In brief, forensic science has hereinafter mentioned importance in the administration of justice:

- a) Evidences collected through forensics practice are more reliable, strong and factual in determination of fact in issue.
- b) Forensic evidence when corroborated by other independent circumstantial evidences is comprehensive, concrete and irrefutable in nature.
- c) Confession may be exacted by inflicting torture and witnesses may be purchased in money, may turn bias, may lose memory in course of time, but forensic evidences are scientific, objective, reliable and never tell a tale.
- d) Forensic evidences are more reliable in identification and individualization of victim and offender in any crime. For example, DNA test of the reference blood of accused and bloodstain found at the scene of crime, if match upon comparison at lab, play crucial role in justice administration.
- e) Increased application of forensic science by police makes investigation strong, helps prosecutor to frame charge sheet effectively which eventually facilitates court to establish guilt or innocence objectively beyond reasonable doubt. This will increase success rate of prosecutor in criminal cases.
- f) Practice of forensic oriented investigation instead of traditional confession centric interrogation by investigator secures fundamental human rights of detainees and accused. The more forensic science is applied during investigation, lesser is the need to inflict torture, cruel and degrading treatment to detainees in custody. Thus, ultimately, it ensures human rights of person and reduces investigative malpractices of the law enforcement agency.
- g) A child, through DNA examination gets exact answer to a disputed paternity or maternity or relationship or parental property.
- h) Forensic evidences, by applying principle of exchange, helps to establish link between crime, criminal and victim.

- i) Use of forensic evidences in court helps to establish guilt beyond reasonable doubt. Production of more concrete, certain, comprehensive and reliable evidence is highly desirable in administration of justice. The only one route to lead towards delivery of justice is evidence. In absence of scientific evidences, there is risk to society that courts might turn into 'factory to manufacture decision' rather than being 'temple to deliver justice'. Forensic science provides fruitful and scientifically strong evidence to all judicial stakeholders. Therefore, forensic science is a significant discipline in administration of justice. It does not provide justice by itself, but provides well developed grounds to prove and disprove the issues presented before the judiciary for judicial decision.

## 5. HISTORICAL DEVELOPMENT OF FORENSIC SCIENCE IN NEPAL

There is no long history of practice of forensics science in Nepali justice administration. First notable development of forensic practice in Nepal started through a decision of the Supreme Court of Nepal in *Reshamlal* case<sup>10</sup>. This landmark case of 2017 B.S. is considered as beginning point from where use of forensic science got formally introduced into Nepali judicial system.

In this case, victim was found dead and floating in Ranipokhari pond. Defendant blamed, the victim committed suicide by drowning. Government formed Board of Expert comprising seven medical practitioner for post mortem examination of the corpse to give opinion on the cause of death. The board after conducting autopsy for two times reported, "though the corpse is recovered from pond, the cause of death was not drowning but from asphyxia."

The court convicted defendant for murder followed by financial transaction dispute between them. The *modus operendi* of killing was by gagging deceased through a piece of cloth at the residence of defendant, resulting into death of deceased through obstruction of breathing. With the help of other accomplices, the corpse was carried to and thrown into the pond at night and the body was found floating after 12 hours later, the next day. The defendant to simulate death as suicide, had self- inflicted bodily injuries to oneself with *khukuri* and propagated that the deceased attempted to kill him.

The case is landmark in the historical development of forensic science in Nepal as it established following precedents:

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<sup>10</sup> Reshamlal Makuju Shrestha v. Parelal Marwadi et.al.NKP 2017 BS, Decision Date 2017/09/15 BS, D.N. 100.

- There are certain scientific evidences or sign that indicate death due to drowning. Presence of froth on mouth and nostrils, tightening of fits, sand and mud particles in nails, clenching of any object by fists, water ballooning of stomach, washerwoman's hands and washerwoman's foot are the evidences that indicate death due to drowning. Among all these evidences, presence of froth (might be with some blood mixture) in mouth and air passage is a confirming evidence of death by drowning. The froth even if wiped at mouth and nostril gets reappeared.
- It is the duty of doctor to record the date and time of receipt of dead body for autopsy and the date of and time of post mortem examination of dead body.
- Stomach particles should be preserved during autopsy by the doctor for further chemical test in case it is impossible to identify cause of death during autopsy.
- Suicide is an extraordinary situation committed only in case of serious mental imbalance or grievous bodily injury. No one suicides for ordinary reason.

The court explained that all the relevant information must minutely be recorded and be mentioned in detail by doctors in their report. The court took into judicial notice that many of such information have been missing in the report. Finally, directive order was issued to Ministry of Health that required Ministry to notify all the medical doctors in the country to comply with following instructions while conducting post mortem examination and filling the report:

- (a) Doctors should maintain record of the date and time of receipt of dead body for autopsy and the date and time of post mortem examination in their report.
- (b) In case if it becomes impossible for doctor to identify cause of death during autopsy, the stomach particles should be preserved for further chemical test.
- (c) Every doctor who will be conducting post mortem examinations in future, need to be attentive and clearly mention in what manner the deceased died. In doing so, the doctor must mention and record every minute matters as required under prevailing national laws and relevant literatures of medical jurisprudence.

The Supreme Court of Nepal introduced forensic jurisprudence in administration of justice when it confronted with forensic practice. In *Mega Bahadur* case,<sup>11</sup> noticed that lower courts have been giving decisions blindly without properly understanding the contents of medico legal reports. The court warned subordinate courts to mandatorily understand the technical contents of post mortem examination report first, either by testifying the concerned doctor or through the help of other doctors and then only give final verdict.

The *Muluki Ain*, 2020 B.S.<sup>12</sup> introduced some clear statutory provision relating to forensics in Nepal. It requires the police investigator to get the dead body examined even from doctor of nearby hospital if any hospital exists nearby or from the chief doctor of dispensary if no hospital is located nearby. The investigator should then collect such dead body examination report from doctor.<sup>13</sup>

No. 3 of the Chapter has duty-bound police to stop rushing into scene of crime negligently and immediately without adequate preparation, once police receives information of homicidal or suspicious death. Accordingly, police investigator is required to enter scene of crime slowly and cautiously by noticing, recording and collecting every minute evidences such as hand/leg impressions, marks of dragging/violence on ground, other evidential objects helpful for identification and the condition of dead body needs to be carefully recorded while preparing and documenting Dead Body Examination. It has provided guidelines regarding what sort of information ought to be recorded by police while preparing dead body examination inventory at the scene of crime. What information to be recorded by police while examining and preparing inventory differ from the nature of death. Accordingly:

- a. If dead body is found hanging, information such as whether lips are dry or not, whether pupils are dilated or not, whether tongue is protruded out of oral cavity and pressed under lips or not, whether saliva, blood, any fluid or seminal discharge or faeces have been found discharged from mouth, nostrils, anus and other body openings, whether ligature mark on neck is seen towards knot or not, whether such ligature mark on neck is circular or curvy, color of ligature mark and whether skin at ligature

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<sup>11</sup> *Megh Bahadur Pakha Rai v. Dalbahadur Limbu*, 2018 BS, D.N. 156. Here, D (*Saadhu*) runs after in attempt to catch V (*Jaar*) in a case of adultery with intention to handover V to police for legal action. V accidentally slips down while running and falls down from high hill leading to death. Post mortem examination showed cause of death because of blood mixed water filled inside both lungs of V. Testimony of another expert doctor highlighted that blood mixed water can be filled inside human lungs even from disease like T.B., Pleuriticity and so on. D was acquitted from the charge of murder.)

<sup>12</sup> Authenticated by the then King Mahendra Shah on 2019/12/30 BS (came in to force on 2020/05/01 BS).

<sup>13</sup> *Muluki Ain*, 2020 BS, Chapter on Homicide, No. 2(4).

mark is hard or not, whether hands are clinched or not, whether ground has been touched or caught by hands or legs etc. are to be recorded. Foreseeing the significance of these information to identify the mode, time and cause of death, the law for the first time provided expressed guidelines for the investigator to document these vital evidential information.

- b. If dead body is found drowning, information such as whether hands and foots are wrinkled and stomach is ballooned with water or not while immediately recovering the dead body from water, should be recorded. Blood stain if present around the pond and face of deceased, any injury or blood mark on head, shoulder, body of deceased, whether fist is open, if any object caught inside fist, whether skin at face and body are soft or rough, whether penis is constricted and reduced in size, whether skin of finger tips are peeled, whether mud has entered vagina etc. are to be recorded.
- c. In case of suspicion of snake bite to deceased, information including but not limited to swelling or non-swelling at bitten body parts are to be recorded.
- d. In case of death due to administering of poison, information such as dilation of pupils, loss of consciousness, sleepiness, diarrhea, vomiting, thirst etc. are to be recorded.

Evidence Act, 2031 BS brought major changes as specific statute and declared forensic evidences as admissible in judicial proceedings through Sections 18, 23, 36 (3) and 52.<sup>14</sup> The Act opened door for courts to take opinion of experts from concerned fields prior to issuing judgment and delivering verdict. 'Experts' as defined by the law, are persons having special knowledge in the field of science, art, signature, fingerprints etc., either through (i) special study or (ii) training or (iii) experience. Those experts could be forensic medicine expert, handwriting expert, fingerprint expert, toxicology expert, serology expert, ballistic expert or anyone qualified to be an expert as per Section 23 of the Act. Exactly the same format has been provided by *Muluki Criminal Procedure (Code) Act, 2074 B.S.* which is going to be entered into force from 1<sup>st</sup> *Bhadra* 2075 B.S.<sup>15</sup>

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<sup>14</sup> The Act came into force on 2032/01/01 BS.

<sup>15</sup> The Autopsy Report format has been placed at Schedule 15 of *Muluki Criminal Procedure (Code) Act, 2074 BS.*

The Act provided two exceptional situations in which expert opinions could be considered as direct evidence even if experts do not attend the court to testify opinion. Undisputed Post Mortem Examination Report and opinion expressed in an expert's book or article kept under public sale are these two exceptions. In this way, promulgation of this statute played significant role in the development of forensic jurisprudence.

With the promulgation of State Cases Act, 2049 B.S., the provision requiring mandatory autopsy examination of dead body was introduced. Section 11, 12 and 13 of the Act are the landmark steps towards development of forensics in Nepal. Accordingly, if death seem to have been caused as a result of any crime, or occurred in suspicious circumstance, the concerned police personnel is duty bound to send the corpse for autopsy to the Government Medical Practitioner in Government expense. The investigating police personnel can examine blood, semen, organ or any other thing of arrested person through a Government Medical Practitioner or laboratory if it is deemed that such examination may produce important evidence relating to the crime. The investigator may take an opinion of concerned expert if needed in course of investigation.

Detainee who in course of police interrogation produced before adjudicating authority for remand, if requests for medico legal examination of oneself, the adjudicating authority has to issue order to conduct medico legal examination of such detainee through a doctor to identify custodial torture.<sup>16</sup>

The first amendment to State Cases Rules, 2055 B.S on 2073/04/03, introduced a uniform legal format for Autopsy Report, Injury Examination Report, Medico-legal Examination Report in sexual offence (both male subject and female subject), Age Estimation Report, Report of Drunkenness Examination, Forensic Examination Report and DNA Examination Report. Compliance with these standard legal formats throughout the country is significant to bring uniformity in filling these medico-legal or forensic examination reports. Instructions are given to: (i) conduct these examinations through forensic expert as far as possible or through trained expert, (ii) expert examining sample (or dead body) has to fill the report oneself, (iii) the report is to be prepared in computer typed format as far as possible, (iv) such expert report has to be clearly understandable, and (v) original copy of the report ought to be submitted in the case file.

Protection of any person in custody or detention from physical and mental torture is ensured with the promulgation of Torture Compensation Act, 2053

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<sup>16</sup> *State Cases Act, 2049 BS, Section 15(3).*

B.S. It requires the police personnel to conduct health examination of any person in their custody at the time of arrest and before releasing from the custody. Such examination should be done by the government medical practitioner as far as possible.<sup>17</sup> This provision enables the protection of civil rights of people by refraining investigating authorities from imposition of physical force to person subject to their custody.

Considering the service of a forensic science laboratory as an essential needs of justice delivery system, the Royal Judicial Reform Commission in 1983 recommended for the establishment of a well-equipped and independent forensic science laboratory in country. In the wake of this recommendation, the National Forensic Science Laboratory, *Khumaltar* was established in 2043 B.S. and run under the aegis of the then Royal Nepal Academy of Science and Technology (RONAST) till 2052 B.S. Then after, it went under the Ministry of law and justice until 2057 B.S. Currently, it is functioning under Ministry of Science and Technology.

Initially, Nepal Police Forensic Science Laboratory was established in 2017 BS. Later on, it got merged with National Forensic Science Laboratory in 2045 BS upon the recommendation of Royal Judicial Reform Commission. Through the decision of His Majesty's Government of Nepal dated 2051-10-11 BS, a separate forensic laboratory got established again under Nepal police named - Central Police Forensic Science Laboratory.

Currently, there are two forensic science labs in the country. One is National Forensic Science Laboratory, *Khumaltar* under Ministry of Science and the other is Central Police Forensic Science Laboratory, *Maharajgunj* under Ministry of Home Affairs. There are numerous units within the labs. The former is providing forensic service especially focused on serology, toxicology, questioned documents, wildlife, DNA in paternity dispute etc. The later is more specialized in providing forensic services like use of DNA and fingerprints in criminal investigation, and ballistics besides other general units.

In course of time, statutory measures have been taken as a preventive measure of check potential custodial torture by introducing involvement of forensic experts into legal proceedings. Considering the fragile nature of children, Juvenile Justice (Procedure) Regulation, 2063 B.S. was introduced, which in Rule 4(e)<sup>18</sup> required police officer to conduct physical and mental health

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<sup>17</sup> *Torture Compensation Act, 2053 BS*, Section 3(2).

<sup>18</sup> While inquiring or investigating on juvenile delinquencies the police unit or staff formed pursuant to Rule 3 shall get the physical and the mental health of the child examined in the nearest government hospital or by the doctor.

examination of a child at nearby government hospital or by medical practitioner instantly after their arrest.

Inclusion of forensic science, forensic medicine and medical jurisprudence into the curriculum of various law and medical colleges in Nepal is another significant step towards its development. Purbanchal University, Faculty of Law has been teaching Forensic Science and Medical Jurisprudence at B.A. LL.B. and L.L.M. levels. Forensic science and forensic medicine are taught as separate subjects to graduate level students at Tribhuvan University, Faculty of Law. There are more than a dozen of medical colleges offering graduation in forensic medicine. Institute of Medicine of the Tribhuvan University and its affiliated medical colleges, Kathmandu University School of Medical Science and other medical colleges affiliated to the Kathmandu University have been providing forensic education to medical students. Other independent medical colleges such as B.P. Koirala Institute of Health Sciences, Patan Academy of Health Sciences and National Academy of Medical Sciences also are providing forensic education to medical students as a separate subject. This university education is significant in development of forensic practice in Nepal as they are the source of national product to fulfill the needs of forensic human resources required in Nepali medico-legal field.

Nepal police has been providing forensic training occasionally to its police personnel because of which awareness and necessity of forensic oriented investigation is growing gradually. Thus, the development of forensic jurisprudence in Nepal has widely developed at present as compared to its infancy stage during 2017 B.S. Establishment of different forensic laboratory, production of forensic human resources and increasing use of forensic evidences in resolving legal dispute have increased the value of forensic jurisprudence in administration of justice. However, the current position of scientific investigation and forensic examination of the evidences are not at peak as it ought to be. The centralized establishment of forensic laboratory should be expanded to all state along with facility of advance equipments and technological services. The government should arrange forensic team of investigator in each district for effective investigation of crime scene. Mobile laboratory with advance equipment should be introduced in the country. Medico-legal units of all hospitals and mortuaries for autopsy should be well equipped and priority sector. The medical code of conduct should be effectively implemented as method to ensue integrity of medical practitioners involved in forensic science. However, state's investment in promotion of forensic science is unsatisfactory at present. Investment in forensics in criminal

investigation is not only the demand of today but even inevitable to materialize the spirit of making our justice administration speedy, efficient, widely available, economical, impartial, effective, and accountable to people as determined by Article 51 (k) 1 of the Constitution of Nepal, 2072 B.S.

## 6. ANALYSIS OF EXISTING LAWS ON FORENSIC SCIENCE

Some existing laws have incorporated provisions of forensics. These laws are not comprehensive in nature but provide grounds for forensic practices in administration of justice. These laws are:

- a) *Muluki Ain, 2020 B.S.*: This is the first *Ain* providing statutory provisions relating to forensics in Nepal. It has highlighted the significance of examination of dead body by the doctor or chief of dispensary of the nearby hospital and dispensary.<sup>19</sup> However, later development on legal requirement of autopsy of any death caused by homicide or in suspicion death has rendered this provision ineffective. The *Ain* has attempted to systematize the investigation pattern of investigating authority by providing gradual steps of investigation such as manner of entering at the scene of crime, marking the scene of crime and other observation and recording details. It identifies presence of different features in different forms of death having peculiar character to differentiate various form of death such as hanging, drowning, and poisoning.<sup>20</sup> Later development in investigation pattern and promulgation of new laws providing comprehensive practice has made these provisions inadequate. However, these provisions marked first statutory implication of forensic practice in Nepal.
- b) *Evidence Act, 2031 B.S.*: Evidence Act of Nepal is fundamental governing law for evaluation of evidences presented before the case. The Act recognized the value of forensic reports such as autopsy report in administration of justice. It provides that the undisputed autopsy report shall be taken as evidence even if the autopsy examiner has not presented before the court as witness to support the information provided in the report and is not inconsistent with other circumstantial evidence.<sup>21</sup> Accordingly, it provides the statutory facility of taking expert opinion in any specific matter relating to science, forensic, medicine and so on.<sup>22</sup> It enables the judiciary to reach into conclusion after knowing difficult

<sup>19</sup> *Muluki Ain, 2020 BS*, Chapter on Homicide, No. 2(4).

<sup>20</sup> *Ibid*, Chapter on Homicide, No. 3.

<sup>21</sup> *Evidence Act, 2031 BS*, Section 18.

<sup>22</sup> *Ibid*, Section 23.

subject matter precisely. Opportunity of cross-examination is important in administration of justice. The lawyer of the opposite party shall be provided opportunity of cross-examination if he/she demands.<sup>23</sup> Though the Act is crucial in evidentiary matter, it has not provide any provision relating to advance form of physical evidence such as photographs, video clips, audio recording etc. the supreme court of Nepal has removed this vacuum in law through its judicial interpretation of different nature of documentary evidence.<sup>24</sup>

- c) *State Cases Act, 2049 B.S. & its Rules, 2055 B.S.*: These two laws are primary in collection, examination and evaluation of forensic evidences. It provides the procedure examination of dead body in order to determine whether death is caused by homicide, accident, or accident. It mandates for preparation of dead body inventory (*lash janch muhulka*) with disclosing necessary information and taking photographs as far as possible.<sup>25</sup> It has obliged the police personnel to send the dead body for post mortem examination if he reasonably thinks that the death is caused by any offence or death is in suspicious circumstance. The ground of developing reasonable suspicion is not provided by the Act.

Collection and examination of biological evidences such as blood, semen, saliva, hair and other body parts is important in criminal investigation. For this, the law has authorized the police authority to send such evidence to government hospital for examination. In case of examination of female body parts the law has focused on protection of dignity of women and has required the examination to be done by female medical practitioner as far as possible, if not, then by any female in direction of male medical practitioner.<sup>26</sup> Medico legal examination in the case of sexual assault, hurt and any other cases are done on the ground of this law. The Act has further empowered the investigation authority to take assistance of forensic expert in matter of investigation.<sup>27</sup>

*The State Cases Rules, 2055 B.S.*<sup>28</sup> have provided detailed procedure of implementation of forensics provision incorporated by the Act. The Rules has provided procedure of medico legal examination of forensic evidence. Its uniform formats of Autopsy Report, Injury Examination Report, Medico-legal

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<sup>23</sup> *Ibid*, Section 52.

<sup>24</sup> *Bam Bahadur Basnet v. Government of Nepal, NKP 2070 D.N. 9022.*

<sup>25</sup> *State Cases Act, 2049 BS*, Section 11.

<sup>26</sup> *Ibid*, Section 12.

<sup>27</sup> *Ibid*, Section 13.

<sup>28</sup> Including its first amendment on 2073/04/03 BS.

Examination Report in sexual offence (both male subject and female subject), Age Estimation Report, Report of Drunkenness Examination, Forensic Examination Report and DNA Examination Report are standardized with international standards of information that are required in different medico legal examination. The rules provides collective instruction to (i) conduct these examinations through forensic expert as far as possible or through trained expert, (ii) expert examining sample (or dead body) has to fill the report oneself, (iii) the report is to be prepared in computer typed format as far as possible, (iv) such expert report has to be clearly understandable, and (v) original copy of the report ought to be submitted in the case file. Therefore, these two laws in Nepal govern most of forensic practices. However, these laws are still silent regarding the procedure of collection, packaging, labeling, transportation, preservation and disposition of the samples of evidence. These issues should be introduced through effective amendment of existing laws by enacting new laws.

- d) *Torture Compensation Act, 2053 B.S.*: Protection of human rights and dignity of all people is the duty of state. States should protect fundamental freedoms and autonomy of its citizen at any cost. Any person arrested or taken into custody for the investigation of crime is defendant of the state having full rights against self-incrimination. If, state charge someone by alleging commission of any offence it the responsibility of the state to produce evidence to prove guilt of the accused without harming him physically and mentally. As realization of the duty of state and constitutional safeguard of rights against torture, the Government of Nepal introduced this Act as means to discourage infliction of torture to any person subject to custody of public personnel. It ensured physical and mental health examination of person taken under custody after the arrest and before release from the custody. Such examination should be done by the government medial practitioner as far as possible.<sup>29</sup> The law has entitled compensation to victim of torture. The compensation amount is determined in according to gravity of torture, inability of victim to engage in earning activities, age of the victim and his family responsibility, adjusted cost of treatment etc. the comparison of two reports of physical and mental health examination of victim of torture is ground to determine the gravity of torture.
- e) *Juvenile Justice (Procedure) Regulations, 2063 B.S.*: This law provides special investigation and adjudication of juvenile delinquency. It has recognized children's delicate position and provided more informal

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<sup>29</sup> *Torture Compensation Act, 2053 BS*, Section 3(2).

investigation and adjudication process than applied in formal criminal justice system. it provides that the police unit should conduct physical and mental health examination of any child instantly after taking into control for investigation purpose. The health examination should be done at government hospital or by government medical practitioner.<sup>30</sup>

- f) *Exhumation Guidelines, 2069 B.S.*: The National Human Rights Commission has introduced a soft law in the form of Exhumation Guidelines, 2069 for the purpose of systemizing and regulating exhumation of dead bodies in Nepal.<sup>31</sup> It provides the body authorized by law may exhume suspicious grave of one or more than one person. The guideline has limited scope and applies in exhumation of death bodies that are buried after enforced disappearance and extrajudicial killing having no identity.

## 7. ROLE OF JUDICIARY IN THE DEVELOPMENT OF FORENSIC SCIENCE

In absence of statute, interpretations from Supreme Court have ignited the process of introduction and frequent decisions have shown right path towards further development of forensic science in Nepal. The *Reshamlal* case<sup>32</sup> was the first case in which the Nepali Supreme Court spoke about numerous issues concerned with forensic science and forensic medicine. The court took reference from medical literature for clarification of various forensic facts associated with the case. It interpreted various forensic appearances on deceased that are to be examined in death due to drowning. For this, the court upheld that there are certain scientific evidences or sign that indicate death due to drowning. Presence of froth on mouth and nostrils, tightening of fits, sand and mud particles in nails, clenching of any object by fists, water ballooning of stomach, washerwoman's hands and washerwoman's foot are the evidences that indicate death due to drowning. Among all these evidences, presence of froth (might be with some blood mixture) in mouth and air passage is a confirming evidence of death by drowning. The froth even if wiped at mouth and nostril gets reappeared. This case is also significant in further development of forensic practices in criminal investigation. The court issued directive order in the name of Ministry of health to inform every doctor in the country to follow following instructions:

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<sup>30</sup> *Juvenile Justice (Procedure) Rules, 2063 BS*, Rule 4(e).

<sup>31</sup> The Guideline has been in force since 2069/02/18 BS.

<sup>32</sup> *Reshamlal Makuju Shrestha v. Parelal Marwadi et.al.*NKP 2017 B.S, Decision Date 2017/09/15 BS, D.N. 100

- a. Record of the date and time of receipt of dead body for autopsy and the date and time of post mortem examination should be maintained by doctors in their report.
- b. Stomach particles should be preserved for further chemical test if it becomes impossible for doctor to identify cause of death during autopsy.
- c. Every doctor who will be conducting post mortem examinations in future, need to be attentive and clearly mention in what manner the deceased died. In doing so, the doctor must mention and record every minute matters as required under prevailing national laws and relevant literatures of medical jurisprudence.

Development of forensic practice in Nepal got ignited from these directive orders issued by judiciary. It shows the judicial activism and initiation by court towards digging out the truth and production of scientific and reliable evidence to solve the mystery of crime.

Forensic science is technical field having technical language and standardized terms included in medico legal examination reports. Judges are not expert in forensics practice. They might not be able to understand the technical language written in medico legal reports. Use of such forensic reports without clear understanding may lead to injustices. Thus, in *Mega Bahadur case*,<sup>33</sup> the Supreme Court of Nepal noticed that lower courts have been giving decisions blindly without properly understanding the contents of medico legal reports. Therefore, the apex court warned subordinate courts to mandatorily understand the technical contents of post mortem examination report first, either by testifying the concerned doctor or through the help of other doctors and then only give final verdict. By this case, the court has identified role and need of forensic expert in understanding the forensic report and assisting the adjudicator in administration of justice.

The Supreme Court of Nepal has focused its attention on the credibility of forensic evidence by considering the ethical standard of forensic expert preparing medico legal reports. Forensic expert should be neutral, impartial and should only prepare report by writing facts obtained through scientific test. Any biasness of the expert and his unethical practices in the course of forensic examination renders his report inadmissible in administration of justice. In

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<sup>33</sup> *Megh Bahadur Pakha Rai v. Dalbahadur Limbu*, 2018 BS, D.N. 156 [D (*Saadhu*) runs after in attempt to catch V (*Jaar*) in a case of adultery with intention to handover V to police for legal action. V accidentally slips down while running and falls down from high hill leading to death. Post mortem examination showed cause of death because of blood mixed water filled inside both lungs of V. Testimony of another expert doctor highlighted that blood mixed water can be filled inside human lungs even from disease like T.B., Pleurisy and so on. D was acquitted from the charge of murder.]

*Khadgadash* case,<sup>34</sup> the Supreme Court refused to take autopsy report prepared by the medico legal practitioner as inadmissible if he is charged for preparation of the report by taking bribe. This shows the caution taken by the supreme court of Nepal in admission of forensic evidence. Thus, extreme caution is always taken before admitting forensic report in resolving fact in issue. Character of the medico legal expert is one factor to determine reliability of the reports. Legal provision of cross-examination of the forensic expert is good measure to check malpractice committed by the forensic expert.

The Supreme Court of Nepal identifies importance of DNA report as forensic evidence in both civil and criminal case. It held that DNA report must be taken as admissible evidence if it is proved the intimate sample is collected from concerned person. For admission of DNA report as evidence, only concerned person and expert should enter into laboratory room for the purpose of collection of intimate sample. In *Devi Gurung* case,<sup>35</sup> the court provides following conditions for admission of DNA report in settlement of paternity dispute:

- If there is no dispute on the fact that the intimate sample is collected from the concerned person (*Karani*),
- Only concerned person and the expert should enter into the laboratory room for collection of intimate sample,

Further the court realized absence of statutory laws regulating collection of sample for DNA examination, evidential value of DNA, person authorized to issue order for collection of intimate sample etc. The court felt these legal issues need to be addressed through enactment of statutes. Hence, the court issued directive order to Ministry of Law and Justice for formulating DNA Identification & Evidence Act to regulate evidential value of DNA, its use in paternity test and criminal offence along with solution to issues relating to:

- a) Establishment of DNA Bank,
- b) Objectives and aims of DNA Bank,
- c) Function and duties of DNA Bank,

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<sup>34</sup> *Khadgadas Khadgi v. Sanubhai Khadgi et.al.* 2023 BS, D.N. 333 [D (husband) murdered V (wife) followed by assault after a dispute of extra marital affair by D. autopsy expert opined possibility of suicide. Autopsy expert was charged for corruption and receiving bribe to give such report. The Supreme Court for negligence or dishonesty in investigation, criticized police investigator. D was convicted for murder by Supreme Court taking into consideration other circumstantial evidences.]

<sup>35</sup> *Devi Gurung v. Nita Gurung NKP*, 2068 BS, D.N. 8578 [In this case, plaintiff (p) files relationship establishment (father-son) case alleging that the son she gave birth to belonged to D. District Court upheld the claim of P which the Appellate Court also approved. When Case came to Supreme Court the court refused to admit disputed DNA report on the ground of tampering the procedure by the D.]

- d) Authorized person of DNA Bank,
- e) Person having access to DNA profile,
- f) Provision relating to collection of sample,
- g) Provision on denial to provide sample,
- h) Provision on granting sample voluntarily,
- i) Provision on storage and disposal of sample,
- j) Tampering of DNA sample,
- k) Secrecy of DNA sample,
- l) Evidential value and validity of DNA.

The advancement of science and technology has produced different materials having evidential value in administration of justice. They might be reliable, comprehensive, factual and concrete in administration of justice if not disputed from opposite party of the case. In absence of clear statutory provision governing those evidences the Supreme Court has defined them as evidence and admissible in administration of justice. In *Bam Bahadur* case<sup>36</sup> the Supreme Court of Nepal has established principle that digital material such as photographs, videos, audio, CD etc. are documents. It is judicially incorrect to deny evidential value of these materials. If, either party of a case presents digital copies of photographs, videos, audios, CD etc. as evidence and opposite party does not show any refusal such digital copies are admissible as documentary evidence.

These representative cases highlight the proactive role of Nepali judiciary in development of forensics in Nepal. The court has issued numerous directive orders in the name of Government of Nepal to improve forensic practices in investigation of offence and administration of justice. The judiciary has been providing validity to forensic report prepared by forensic experts during the investigation of a case unless there is any doubt in credibility of the reports.

## 8. CONCLUSION

Forensic science has been playing determining role in administration of justice via facilitating admissible evidences to court, which help an adjudicator to establish the fact presented before it for decision. Forensic practices developed in collection of biological evidences such as blood, semen and semen from the scene of crime and body part of victim and accused is remarkable in

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<sup>36</sup> Bam Bahadur Basnet et.al. v. Government of Nepal NKP 2070 BS, D.N. 9022 [V found hanged at her house having multiple marks of violence on body. A FIR was filed against D in accusation of murder of the V by torturing and homicidal hanging.]

investigation. Accordingly, physical evidences such as fingerprints, footprints, tire marks, paints and fiber are playing good role in construction of an offence committed and connection between the victim and offender of the offence. Advancement of DNA examination and comparison has played remarkable role in determination of paternity dispute and further investigation of criminal offence. These forensics practices are frequently coming before the court of law to support the process of administration of justice. Though progress towards application of forensics in Nepali justice delivery system is marching in turtle speed, it is not satisfactory.

Relying more on forensic evidences enhances the quality of justice delivery than relying on confession and witness testimony. In absence of scientific evidences, there is risk to society that courts might turn into 'factory to manufacture decision' rather than being 'temple to deliver justice'. Massive application of forensic science in our criminal investigation produces more and more scientific evidences. Thus, we need to ensure massive use and application of forensic science in our criminal investigation procedure to expect better quality prosecution and better justice delivery. Establishment of DNA Data Bank and Fingerprint bank is advisable for making our criminal investigation effective, guaranteeing peace order and security in the society.



# An Overview of Inchoate Offence under Muluki Criminal Code, 2074

**Kunshang Lama\***

## ABSTRACT

'Inchoate crimes' refers to acts engaged in toward the commission of a criminal act, or which amount to indirect participation in a criminal act. While such an action may not be a crime in and of itself, it is engaged in the purpose of furthering or advancing a crime. The Muluki Penal (Code), 2074 has criminalized inchoate crimes including Conspiracy, Attempt and Incitement. It has arranged by the inchoate offence based on the new concept of criminal law and it has tried to prescribe appropriate punishment. However, the Code is silent on the basic conceptual part of inchoate offence such as it is not distinct between inchoate offence and complete crime in the matter of punishment for some offences. The Code needs revision in order to make inchoate offence as a separate category of criminal offence incorporating and including all conceptual provisions, which are recognized by modern criminal jurisprudence.

## 1. INTRODUCTION

The term inchoate crime refers to acts engaged in towards the commission of a criminal act or which amounts to indirect participation in a criminal act.<sup>1</sup> The term 'Inchoate' means 'just begun' or 'undeveloped'. Inchoate crimes, which are also referred to as incomplete crimes are acts involving the tendency to commit, or to indirectly participate in a criminal offense.<sup>2</sup> Previously, several inchoate crimes were considered as minor offenses. In the initial phase, the criminal law was formulated to punish only the complete crimes. However, in

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<sup>1</sup> Inchoate Crimes. Retributive from: <https://legaldictionary.net/inchoate-crimes/>. Access date: 5/12/2018.

<sup>2</sup> Disclaimer and License. (2016).Inchoate Crimes, US Legal, Inc. Retributive from <https://criminallaw.uslegal.com/inchoate-crimes/>. Access date: 5/12/2018.

recent times, several inchoate offenses have been categorized as serious crimes, and have shifted from the grade of misdemeanour to law-breaking offences. Inchoate crimes include attempt, conspiracy, and solicitation, which are also known as preliminary crime. Being an accessory or an accomplice to a crime is also an inchoate crime.<sup>3</sup> Attempt to commit a crime, is the inchoate crime, which is considered the closest to actually carrying out the crime. Attempt to commit a crime involves trying to commit the crime but failing to complete the intended actions. Threats and challenges can also be considered as an attempt to commit the crime. Conspiracy to commit a crime involves agreeing to commit a crime by at least two persons. A conspiracy to commit a crime can be charged in addition to the crime itself.<sup>4</sup> Incitement to commit a crime is the crime of asking another person to commit a crime. Even if the person who is abetted does not commit the crime, the person soliciting may be charged with solicitation.

A major feature of inchoate crimes is that they are committed even when the substantive offence is not completed and no harm is occurred. When an attempt fails, a conspiracy comes to nothing and words of incitement is ignored in all the instances, there may however be liability for inchoate crime. Therefore, it is necessary to criminalize inchoate crimes separately than the complete crime. Inchoate offenses allow punishment of an actor even when s/he has not consummated the crime that is the object of his or her efforts. Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime.

Most of the jurisdictions treat inchoate offenses as substantive crimes, distinct and divorced from the completed crimes. The inchoate crimes of attempt, conspiracy, and solicitation have also been criminalized by the Nepalese legal system. The existing Nepalese legal system has defined the attempt of crime as inchoate offence as a separate crime and has prescribed punishment for such act. However, it has not provided the separate definition. In this context, the newly enacted Muluki Criminal (Code) Act, 2074 has endorsed inchoate crimes and includes attempt, conspiracy and solicitation separately under Chapter-3.

Nepal is going through a transitional phase even in the viewpoint of codifying criminal law. The parliament enacted the Muluki Criminal (Code) Act, 2074, the Muluki Criminal Procedure (Code), 2074, and Sentencing Act, 2074 on August 8, 2017, and these have come into force from August 17, 2018. The

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

Muluki Penal (Code), 2074<sup>5</sup> has criminalized inchoate crime (Conspiracy, Attempt and Incitement) under Part- I, Chapter- III and clearly provides the concept of inchoate crime. The Criminal Code clearly and expressly accepted the concept of inchoate in the history of Nepalese criminal law. In this short article, the author endeavours to elucidate the concept of inchoate crime and the new provisions of Muluki Penal (Code), 2074 relating to inchoate crimes. The author also aims to conduct a comparative study of various jurisdictions in light of the inchoate crime in Nepalese context.

## 2. CONCEPT AND DEFINITION OF INCHOATE CRIME

By sixteenth century, when the efficiency of the police in England increased to the point that a doctrinal legal change was required, the Star Chamber Court developed the maxim of *voluntas reputabitur pro facto*<sup>6</sup> (the desire comes for the act, and sometimes even will be regarded as the act itself) and formulated a doctrine that criminalized inchoate offenses. Under that doctrine, a strong desire to harm society may fulfil the *actus reus* requirement for the imposition of criminal liability, the desire being regarded as the act. This was the legal genesis of the modern offenses including attempt, conspiracy, and solicitation, which were later termed as “inchoate offenses.” The Latin terms ‘*inchoātus*’ denotes “to begin work on” or that kinds of work which are directly relating to, a crime, which are consisting of acts that are preliminary, or lead up to a crime.<sup>7</sup> The Oxford Dictionary defines the word ‘**inchoate**’ as describing something which has “just begun and so not fully formed or developed.” Inchoate means “just begun” or “undeveloped”, and it refers to situations where, although a substantial offence has not been committed, the defendant has taken steps to commit it, or encouraged others to do so.<sup>8</sup> When applied to the field of law enforcement, this word refers to a type of offense such as incitement or conspiracy that is, “anticipating a further criminal act.”<sup>9</sup> The term ‘inchoate crimes’ refers to acts engaged in toward the commission of a criminal act, or which amount to indirect participation in a criminal act. While such an action may not be a crime in and of itself, it is engaged in the purpose of furthering or advancing a crime.<sup>10</sup>

<sup>5</sup> Section 2(A) of the Some Nepal Law Amendment, Unification, Adjustment and Repeal Act, 2074 has named this Code as “Muluki Penal Code”.

<sup>6</sup> James Fitzjames Stephen (1883). *A History of The Criminal Law of England*, p.222.

<sup>7</sup> *Supra note 1*.

<sup>8</sup> Herring, Jonathan. (2008). *Criminal Law: Text, Cases and Materials* (3rd ed.). Oxford University Press, p.771.

<sup>9</sup> Inchoate Offenses. (2017). Crime Museum, LLC. Retributive from: <https://www.crimemuseum.org/crime-library/criminal-law/inchoate-offenses/>. Access date: 5/12/2018.

<sup>10</sup> *Supra note 1*.

**Inchoate offenses** are a type of crime that takes a step towards the commitment of another crime and are often related to the planning of a future criminal act. These types of offenses are punishable by law not only to penalize the offenders, but also to prevent future crimes from occurring. Examples of inchoate offenses include attempt, solicitation, and conspiracy.<sup>11</sup> These types of acts are illegal because it is in the public's best interest to deter people from engaging in crime-promoting activity.<sup>12</sup> An inchoate crime can be defined as a criminal act that has just begun, or which is not fully formed or developed. It is unsuccessful commission of crime due to any cause. It is third stage (Intention, preparation, attempt and commission) within the series stages of a complete commission of crime. Technically, inchoate crimes are incomplete crimes, in the sense that they involve such acts as:<sup>13</sup> i) planning and preparing to commit a crime; ii) attempt to commit a crime, even if unsuccessful; iii) conspiracy to commit a crime; iv) aiding and abetting a crime; or, v) solicitation to commit a crime. These situations are generally divided into three categories; attempts, where the defendant has taken steps "towards carrying out a complete crime", incitement, where the defendant has encouraged others to commit a crime, and conspiracy, where the defendant has agreed with others to commit a crime.<sup>14</sup>

Often, an inchoate offense leads directly into the target crime.<sup>15</sup> The target crime is the crime that is intended to result from the inchoate offense. The crime allegedly intended is called the target offense. Except for conspiracy, inchoate offenses merge into the target crime.<sup>16</sup> If the defendant is charged with the target crime, they cannot also be charged with the attempt to commit that crime. Conspiracy remains the exception to this rule, as you can be charged with conspiracy to commit a crime in addition to the crime itself, should it be committed. This means that if the defendant is prosecuted for the target crime, attempt and solicitation cannot be charged as well. However, both conspiracy to commit a crime and the crime itself may be charged. It is important to note, however, that inchoate offenses can be punished regardless of whether or not the crime is actually committed. Inchoate offenses are punishable even if the attempt to commit a crime has not been completed and can even include the possession of certain items (specifically, weapons or large sums of cash) that imply that a crime is going to be committed.<sup>17</sup> Additionally, in most cases, inchoate offenses are charged (and punished) often to the same or very similar

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<sup>11</sup> *Supra* note 9.

<sup>12</sup> *Supra* note 1.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Supra* note 8, p.772.

<sup>15</sup> *Supra* note 9.

<sup>16</sup> [https://www.law.cornell.edu/wex/inchoate\\_offense](https://www.law.cornell.edu/wex/inchoate_offense)

<sup>17</sup> *Supra* note 9.

degree as the crime that they intend to commit.<sup>18</sup> Inchoate offenses often involve the possession of otherwise legal objects as well as a verbal component to them. Prosecutors often run into constitutional defences based on the merits of free speech, search and seizure, and due process, which lead to some complex and difficult questions.

An inchoate offence is an attempt to commit an offence which doesn't come into fruition. In inchoate offences, the defendant is expected to have relatively come closer to the achievement of his criminal objective.<sup>19</sup> Inchoate or anticipatory or relational-crimes allow the judicial system to impose criminal liability on conduct designed to culminate in the commission of a substantive offense. The inchoate offenses of attempt and solicitation, for example, provide the legal basis for courts to punish the actor who has performed every act necessary to affect his criminal design, but has failed to achieve the prohibited result due to an intervening fortuity. More importantly, however, attempt and other inchoate offenses allow law-enforcement officials to prevent the consummation of substantive offenses by permitting intervention once an individual's actions, though not criminal in themselves, have sufficiently manifested intention to commit a criminal act. In each case, the defendant "has not himself performed the actus reus but is sufficiently close to doing so, or persuading others to do so, for the law to find it appropriate to punish him". Like a completed offense, an inchoate offense requires both a mens rea and an actus reus. Unlike the actus reus in a completed offense, however, the proscribed act in an anticipatory crime is not prohibited because of its harmful effect, but because it demonstrates a firm purpose on the part of an individual to act in furtherance of a criminal intent.<sup>20</sup> The famous maxim of English Criminal Law, viz, *actus non facit reum nisi mens sit rea*, according to which "the act itself does not make a man guilty unless his intention were so" occupied a prominent place in modern jurisprudential context. The mens rea for inchoate crimes, therefore, is the specific intent to commit a particular completed offense, or target or object crime.<sup>21</sup> Every inchoate crime or offense must have the mens rea of intent or of recklessness, typically intent. An inchoate offense requires that the defendant have the specific intent to commit the primary crime. For example, for a defendant to be guilty of the inchoate crime of solicitation of murder, he or she must have intended for a person to

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<sup>18</sup> *Ibid.*

<sup>19</sup> K.I. Vibhute & PSA Pillais. (2008). *Criminal Law*, (10<sup>th</sup> edition, 5<sup>th</sup> reprint, 2011), India: LexisNexis Butterworths, p.1.

<sup>20</sup> Ira P Robbins. (1989). *Double Inchoate Crimes*, Harvard Journal on Legislation. Vol. 26:1.pp.6-7. Retributive from: [http://works.bepress.com/ira\\_robbins/45/](http://works.bepress.com/ira_robbins/45/) .Access date: 5/12/2018.

<sup>21</sup> *Ibid*, p.8.

die. Intent maybe distinguished from recklessness and criminal negligence as a higher mens rea. A central premise of Anglo-American criminal jurisprudence is that a court may not punish a bad intent unless it is accompanied by a bad act. Nevertheless, inchoate crimes focus on the mens rea and render ancillary the actus reus to realize the predictive and preventive purposes of the criminal law.<sup>22</sup> The rationale behind punishing inchoate offences is due to the fact that it aids in the protection of life and property.<sup>23</sup> It is a generally held view that these offences should be punishable because anyone who attempts to commit a crime has the mens rea to bring that crime into completion.

In criminal law, there are four stages to the commission of any crime, (i) Formation of mental element or mens rea; (ii) Preparation for the commission of the crime; (iii) Acting on the basis of such preparations; and, (iv) Commission of the act resulting in an event proscribed by law. Different legal systems choose to punish an individual at different stages of the commission of the crime. Such a choice will be made depending upon the emphasis given by the legal system to prevent and discourage crimes. There are sometimes when the individual incites another to commit a crime for him, thus absolving him of any actus reus and thereby any responsibility for the crime.<sup>24</sup> Through the offence of incitement and conspiracy the legal system takes a strong stand against any wrongful act of an individual that leads to the commission of a crime. Such inchoate crimes therefore help reduce the number of crimes that are committed in the society. Thus, the main rationale behind inchoate crimes is to discourage individuals from the commission of a crime not only themselves, but also through the incitement inchoate offences are not the normal kinds of offences that one sees in everyday life.

Inchoate crimes are basically incomplete crimes. They are acts involving the tendency to commit, or to indirectly participate in a criminal offense.<sup>25</sup> Following are general rules regarding inchoate crimes:<sup>26</sup>

- a) A person cannot be charged with an inchoate offense and the actual crime at the same time. For example, a person cannot be charged at the same time with attempted murder as well as murder. The person can only be charged with one or the other at the same time. However, conspiracy is an exception to this common rule. Accordingly, a person

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Supra note 9.*

<sup>24</sup> Pranay Prakash & Nuals Kochi. (2014). Inchoate Offences: A Detailed Analysis. Retributive from: <https://www.lawctopus.com/academike/inchoate-offences-a-detailed-analysis/>. Accessdate: 5/12/2018.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Supra note 2.*

can be charged with murder and conspiracy to commit murder at the same time.

- b) To be convicted of an inchoate crime, it must be proven that the person to be convicted had the specific intent (mens rea) to commit or contribute to the actual crime.
- c) Inchoate crimes must involve some outward action or a substantial step in the completion of the crime. The person to be convicted should have done some act in furtherance of the crime.

Inchoate offences therefore, from the general rule and definition can be seen to be not the similar as the concrete offence. They are of a lesser degree than if the intended offence had actually been committed.

### **3. RATIONAL AND JUSTIFICATION OF CRIMINALIZATION OF THE INCHOATE CRIME**

The rationale and justification of criminalising inchoate crime and imposition of inchoate liability is that substantive offences seek to prevent, through deterrence, specific harms to protected interests. This goal is aided by the existence of inchoate offences. In preventing unwanted conduct or consequences the criminal law sensibly supplements criminalising the actual occurrence of such harmful conduct or consequences with criminalisation of states of affairs that lead up to, or risk, such harm. Conduct preliminary to the completion of criminal harms is a legitimate target for criminalisation as it clearly risks completion of criminal harms.<sup>27</sup> Inchoate offences pursue to punish those who attempt, incite and conspiracy to perform or promote a criminal act. Their main justification lies in their preventative capacity; if harm may arise from someone's actions, it is right for them to be lawfully controlled. Furthermore, the simple fact that actual harm is lost should not prevent legal sanctions for malicious behaviour. Simester and Sullivan refer to "consequentialist" and "retributivist" justifications. The first is a view that society's need to control dangerous people and thereby protect the interests of the innocent from violation justifies inchoate offences. The second argues that if someone tries to harm another, a failure to inflict the harm intended does not mean they should be exempt from charge.<sup>28</sup>

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<sup>27</sup> Duff. (1996). *Criminal Attempts*, Oxford University Press, pp.133-134

<sup>28</sup> What, if any, is the justification for inchoate offences?. Retributive from: <http://www.markedbyteachers.com/university-degree/law/what-if-any-is-the-justification-for-inchoate-offences.html>. Access date: 5/12/2018.

This could be forcefully argued for, because it does not prevent the "early intervention" which justifies the law of conspiracy. Although it could be said that it is desirable to interfere as soon as possible to stop even the idea of crime from growing, an 'overt act' condition would protect those who talk together of committing crimes but never will. This seems particularly desirable as in *Anderson* it was held that, under English law, a defendant could be liable for conspiracy without any intention to commit a crime. While most crimes of conspiracy are covered under the Criminal Law Act, one particular offence (of conspiracy to defraud) exists only at common law. This overall justification stems from the idea that where multiple people commit to a crime, there is greater danger to society than if only individuals commit.<sup>29</sup>

The rationale of attempt most closely matches the rationale of inchoate offences generally. It has been noted that the rationale of conspiracy cannot be explained solely in terms of criminalising conduct leading to crime.<sup>30</sup> Siemester and Sullivan argue, however, that actions can be punished separately if needs be in terms of being an accomplice or providing aid. So, having broken the inchoate offences down and discussed each one, it becomes clear that it is very easy to justify the criminalisation of those who attempt to commit full offences, provided the courts do not sanction actions which are too remote from the actual commission of the offence. Further, the intent of the defendant must be conclusively present, because with attempts the principal element of the offence is the intention. It seems that those who conspire should also be sanctioned, in order to deter organised crime and punish collective guilty minds which are supportive of each other. The crime of incitement is surely justified, because anyone who seeks to promote crime, no matter if they lack success in manipulating others, clearly operates outside the law and intends that others should also commit the crime.<sup>31</sup> It is most readily acceptable that attempting a crime risks that crime being completed and that in striving to prevent that crime should be sought to deter the attempting of the crime whether such an attempt proves to be successful or not. Similarly, it is obvious how the moral culpability of the author of a failed attempt at a crime can be on a par with that of the successful criminal.

The rationale of conspiracy that while attempt instantiates inchoate liability in its simplest form, conspiracy represents inchoate liability at its most

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<sup>29</sup> What, if any, is the justification for inchoate offences?. Retributive from: <http://www.markedbyteachers.com/university-degree/law/what-if-any-is-the-justification-for-inchoate-offences.html>. Access date: 5/12/2018.

<sup>30</sup> Dennis. (1977). *The Rationale of Criminal Conspiracy*. LQR, 39, p.40.

<sup>31</sup> *Supra note 29*.

complicated. The rationale of conspiracy departs significantly from the basic rationale of general inchoate liability. Sophisticated rationalisations of conspiracy have been articulated.<sup>32</sup> Neither can a danger-in-numbers argument on its own explain conspiracy. Rather, the rationale of conspiracy is located in identifying the seriousness of the choice made when one agrees to a criminal endeavour.<sup>33</sup> The two categories of reasons that make conspiracies especially threatening to society are: i) The effectiveness of concerted action compared to lone actors, multiple actors pursuing a criminal enterprise can achieve economies of scale that lone actors cannot. Conspiracies can avail of the efficiencies that come with specialisation and division of labour; ii) The effects of group identity: the group psychology of a conspiracy tends to reinforce commitment to a criminal enterprise by serving to suppress dissuasion and disillusionment and encourage risk-taking.

The justification of incitement is different from that of attempt in important respects. For one, incitement catches conduct more remote from the substantive harm than attempt. Indeed, on one view, incitement, of the three inchoate offences, criminalises at the furthest distance from the central harm. For a conspiracy, so this view has it, is invariably preceded by an incitement. Incitement is remote because it is a highly contingent matter whether the recipient of the incitement will even be influenced by it, not to mention whether they will go on to complete the incited crime.

#### **4. INCHOATE CRIME IN DIFFERENT JURISDICTIONS**

Most jurisdictions prosecute inchoate acts (such as conspiracy and incitation) under their domestic criminal law. At times, the international community has also prosecuted inchoate crimes. The international community has not, however, clearly stated whether or not inchoate crimes such as conspiracy or incitement (solicitation, as American law refers to it) to violate international law should be included in a statement of customary international law. Such inchoate crimes have at times been punished in international court or laid out in the statutes establishing such tribunals.<sup>34</sup> In order to establish custom under

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<sup>32</sup> Dennis. (1977). *The Rationale of Criminal Conspiracy*, 93 LQR 39 & Katyal. (2003). *Conspiracy Theory*, 112 Yale LJ 1307.

<sup>33</sup> Katyal. (2003). *Conspiracy Theory*, 112 Yale LJ 1307.

<sup>34</sup> See, e.g., Charter for the International Military Tribunal (IMT) [hereinafter Nuremberg Charter], Art.6(a) & 6(c), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 available at <http://www1.umn.edu/humanrts/instree/imt1945.htm> (last visited Apr. 4, 2004); Convention on the Prevention and Punishment of the Crime of Genocide, art. 3, Jan. 12, 1951, 78 U.N.T.S. 277, 288 I.L.M. 761 available at <http://www1.umn.edu/humanrts/instree/x1cpcg.htm> (last visited Apr. 4, 2004); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of

international law, one must establish customary practice and *opinio juris*. In most of the nations around the world, criminalization of inchoate crimes under domestic law is essentially universal, sufficient to establish customary practice. International courts have relied on inchoate crimes such that their acceptance should represent *opinio juris*.<sup>35</sup> Both incitation and conspiracy to violate international law can and should be punished under customary international law.

#### 4.1 Inchoate Crimes in Common Law Countries

##### A. England:

There are instances where a substantive offence may not have been completed but nevertheless an offence of a different kind has been committed because of the actions or agreements in preparation for the substantive offence. These are known as inchoate offences in England. Part 2 of the Serious Crime Act 2007 creates, at Sections 44 to 46, three inchoate offences of intentionally encouraging or assisting an offence; encouraging or assisting an offence believing it will be committed; and encouraging or assisting offences believing one or more will be committed. These offences replace the common law offence of incitement for all offences committed after 1 October 2008. They allow people who assist another to commit an offence to be prosecuted regardless of whether the underlying substantive offence is actually committed or attempted.<sup>36</sup> Section 59 of the Serious Crime Act 2007 abolishes the common law offence of incitement with effect from 1 October 2008. For offences committed before that date, incitement occurs when a person seeks to persuade another to commit a criminal offence. Incitement is usually a common law offence but there are some instances where statute has created the offence: e.g., section 19 Misuse of Drugs Act 1971. Where a person has been charged with incitement, the venue for trial is the same as for the offence incited. A person is guilty of attempting to commit an offence under the Criminal Attempts Act 1981 (CAA 1981, Section 1(1)) if s/he does an act which is more than

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International Humanitarian Law Committed in the Territory of the Former Yugoslavia, art. 4, annexed to S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993) reprinted in 32 I.L.M. 1159, 1170 (1993), available at <http://www.un.org/icty/basic/statut/statute.htm> (last visited Apr. 3, 2004); Statute of the International Tribunal for Rwanda, art. 2, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) available at [http://www.ictcr.org/ENGLISH/basicdocs/statute\\_old.html#statute](http://www.ictcr.org/ENGLISH/basicdocs/statute_old.html#statute) (last visited Apr. 3, 2004); Rome Statute of the International Criminal Court, Art. 25(3)(d), July 18, 2002, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], reprinted in 37 I.L.M. 999, available at <http://www.un.org/law/icc/statute/romefra.htm> (last visited Apr. 4, 2004).

<sup>35</sup> Tom Stenson. *Inchoate Crimes and Criminal Responsibility under International Law*. Retributive from: [https://www.law.upenn.edu/journals/jil/jilp/articles/1-1\\_Stenson\\_Thomas.pdf](https://www.law.upenn.edu/journals/jil/jilp/articles/1-1_Stenson_Thomas.pdf). Access date: 5/12/2018.

<sup>36</sup> The Crown Prosecution Service. *Inchoate offences*. Rose Court, 2 Southwark Bridge, London. Retributive from: <https://www.cps.gov.uk/legal-guidance/inchoate-offences>. Access date: 5/12/2018.

preparatory to the commission of the offence with the intention of committing an offence.

The offence consists of both an act (*actus reus*) and a mental state (*mens rea*). In each case, it is a question of fact whether the accused has gone sufficiently far towards the full offence to have committed the *actus reus* of the attempt. If the accused has passed the preparatory stage, the offence of attempt has been committed and it is no defence that s/he then withdrew from committing the completed offence. An attempt is an offence of specific intent. It requires an intention to commit an offence to which section 1(4) Criminal Attempts Act 1981 applies. There are certain offences where recklessness is sufficient *mens rea* for the full offence. However, for an attempt, the prosecution must prove that the defendant had the intent to commit the offence. However, where recklessness as to other circumstances may suffice for the full offence, recklessness may also suffice for the attempt. Under section 1(4) of the CAA 1981, there are a number of criminal offences that cannot be the subject of an attempt. They are conspiracy; aiding and abetting; and assisting an offender or concealing an offence. Although it is not possible to attempt to aid and abet, it is possible to charge the aiding and abetting of an attempt. It is not possible by virtue of section 1(4) to charge an attempt to commit a summary offence, unless the particular statute expressly makes it an offence. A person may fail to carry through the offence because it is not possible for her/him to do so. It is necessary to ascertain why the attempt has not succeeded in order to determine if s/he can still be prosecuted for attempting to commit an offence. Even if it may not be possible to commit the full offence because the factual basis is not present, if the facts had been as the defendant believed them to be, s/he can be charged with attempting to commit the offence in question.<sup>37</sup> The essential element of the crime of conspiracy is the agreement by two or more people to carry out a criminal act. Even if nothing is done in furtherance of the agreement, the offence of conspiracy is complete. The *actus reus* is the agreement. This cannot be a mere mental operation; it must involve spoken or written words or other overt acts. If the defendant repents and withdraws immediately after the agreement has been concluded, s/he is still guilty of the offence. Section 1(1) of the Criminal Law Act 1977 creates and defines the offence of statutory conspiracy.<sup>38</sup> This offence is triable only on indictment, even if the parties agreed to commit a criminal offence triable only summarily.

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<sup>37</sup> *R v Shivpuri* (1986). 2 All ER 334.

<sup>38</sup> *Supra* note 36.

### **B. America:**

The United States has long prosecuted solicitation and conspiracy aggressively. The passage of the RICO statute in the sixties greatly facilitated the prosecution of inchoate crimes, as well as putting racketeering into the jurisdiction of the federal government, rather than just state governments, who prosecute the bulk of crimes. The elements of criminal conspiracy under the major statute for American conspiracy law<sup>39</sup> are (i) an agreement between at least two parties, (ii) to achieve an illegal goal, (iii) the parties know the nature of the conspiracy and participate in it, and (iv) at least one party commits an overt act in furtherance of the conspiracy. One of the recent American innovations is the overt act requirement, also required in many state jurisdictions. Conspiracy and solicitation, though frequently prosecuted, have additional restraints on their prosecution in the United States. The peculiar free speech and free association law under the First Amendment to the US Constitution, as well as an underlying national sentiment against criminalizing simple association, have restricted the scope of inchoate crime prosecution. Many of the great free speech and free association cases have been brought in the context of prosecutions for conspiracy. The proposition that one cannot be convicted for mere membership in a group is well-established in American constitutional law,<sup>40</sup> which may explain the reason why the criminal organization statutes popular in civil law countries have not taken hold in the United States.

### **C. India:**

In Indian Penal Code, 1860 attempt, incitement and conspiracy are the inchoate crime and punishable under Indian Penal Code, 1860. Section 511 explains about “attempts to commit offences.” According to this Section, “Attempt to commit offence is itself an offence.” Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both. Section 120A has definition of ‘criminal conspiracy’, that when two or more persons agree to do, or cause to be done, (1) an illegal act, or (2) an act which is not illegal by illegal means,

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<sup>39</sup> 18 U.S.C. § 371 (2000).

<sup>40</sup> *Supra note 35.*

such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. According to Indian Penal Code the punishment for criminal conspiracy is as follows:

- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.,
- (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both. Chapter V of the IPC talks about 'Incitement' and provides the relevant laws covering the responsibility of all those considered in law to have abetted the commission of offence. Section 107 of IPC which defines incitement generally, defines three kinds of incitement, or as they are referred to 'Ingredients of an amendment' viz.(Sec. 107(1)), i) Incitement by Instigation i.e. by instigating a person to commit an offence; or ii) incitement by conspiracy (Sec. 107(2)) by engaging in a conspiracy to commit an offence; or iii) Incitement by aid (Sec. 107(3)) by intentionally aiding a person to commit an offence. Section 108 of Indian penal code defines who an abettor is. For an act to be regarded as incitement it is not necessary that the offence abetted must occur or an illegal omission of an act even if the abettor was not himself bound to do the act.

## **4.2 Inchoate Crimes in Civil Law Countries**

### **A. France:**

In France, the prosecution of inchoate acts has become common. French complicity law plays a role in the punishment of inchoate crimes. Simple advice will sometimes suffice to establish guilt where the accomplice knows of the criminal purpose of the actor. The French Penal Code also incorporates

incitation into its complicity statute, allowing a finding of complicity where an actor brings about a criminal act by provocation or instruction.<sup>41</sup>

### **B. German:**

The German statutes on inchoate crimes may, in fact, impose more stringent liability than their Anglo-American counterparts. The German Penal Code punishes a failure to report planned crime, provided that the crime was not a serious one and not one abandoned by the conspirators.<sup>42</sup> Essentially, such a penalty is one for conspiracy, even where the defendant did not agree to the conspiracy and merely fails to report it. The Penal Code also allows punishment for praising or rewarding crime after the fact, even where the defendant had no knowledge that the crime would be committed beforehand.<sup>43</sup> Such crimes come closer to defining “thought crimes” by imposing affirmative duties on citizens to thwart crimes in which they have never taken active part beyond simple awareness of the plan, or where they have taken no part in the crime except to applaud it afterwards. German law punishes individuals much less culpable than those that run afoul of Anglo-American laws. Incitement to commit a crime in Germany can be punished; similarly, an unsuccessful attempt to incite can be punished as an attempt.<sup>44</sup> A separate crime is defined for the public incitement to crime.<sup>45</sup>

### **C. Italy:**

Italy has not made substantive offenses out of inchoate criminal acts to the extent of its European neighbours. However, even Italy has recognized the greater danger present in group criminality.

### **D. Japan:**

Japan, like Italy, has not made some of the strides other nations have towards making substantive offenses out of inchoate crimes. However, Article 61(1) of the Japanese criminal law does punish instigators of crime just as the law would punish the principal actor, not by creating a substantive offense of “instigation,” but by allowing that instigation can be one means by which a principal achieves the aim of his crime. Japanese Criminal Code assigns culpability for acts of conspiracy or instigation where the ultimate criminal act is not completed under limited circumstances. The Subversive Activities

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<sup>41</sup> *Supra* note 35.

<sup>42</sup> German Penal Code, 1871, Sec. 138.

<sup>43</sup> *Ibid*, Sec. 140.

<sup>44</sup> *Ibid*, Sec. 26 & 30.

<sup>45</sup> *Ibid*, Sec. 111.

Prevention Law allows prosecution for instigation of a homicide for political reasons, even where no homicide actually occurs. Insurrection, assisting the enemy, inducing a foreign nation to attack the home country, or waging private war are all crimes for which simple incitement or conspiracy to bring them about is sufficient to incur punishment.<sup>46</sup>

## 5. CATEGORIES OF INCHOATE CRIME

As stated previously, inchoate crimes refers to actions that are taken in order to begin or further a crime, there are many acts that qualify as inchoate offence. It is a type of crime completed by taking a punishable step towards the commission of another crime. The basic inchoate offenses are attempt, incitement, and conspiracy.<sup>47</sup> Following are the basic types of inchoate crime:

### 5.1. Attempt to Commit a Crime

Chamber's Twentieth Century Dictionary defines "attempt" as any act that can fairly be described as one of a series, which if uninterrupted, and successful, would constitute a crime. The Black's Law Dictionary has defined the term "attempt" as an overt act that is done with the intent to commit a crime but that falls short of completing the crime. It is the idea that if the attempt had succeeded, the offence charged would have been committed. In other words, attempt is the direct movement towards the commission of an offence after the preparation has been made. In Jowitt's Dictionary of English Law "attempt" has been defined as an endeavour to commit a crime or unlawful act; the doing of some overt act for the purpose of committing some offence; an act done with intent to commit a crime, and forming part of series of acts which would constitute its actual commission if it were not interrupted. The mere intent to commit an offence is not a crime, nor is an act merely preparatory to commission of an offence. Bouvier's Law Dictionary (English Edition) defines "attempt" as endeavour to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. An attempt, in general, is an overt act done in pursuance of intent, to do a specific thing, tending to the end, but falling of complete accomplishment of it.

An attempt to commit a crime involves trying to commit an unlawful act, but failing. Failure might be due to unforeseen circumstances interfering with the attempt, or simply a change of mind. The most necessary element in proving an

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<sup>46</sup> *Supra* note 21.

<sup>47</sup> *Supra* note 16.

attempt to commit a crime is intent.<sup>48</sup> The individual must have had a specific intent to engage in that particular activity, or to commit a certain crime. The individual must have actually taken some type of action in furtherance of the crime. Finally, the actual crime must not have been committed or finalized. Had the individual actually completed the crime, this would not be an example of inchoate crime, as he would be charged with that crime, rather than an attempt to commit a crime.<sup>49</sup> As stated earlier, there are different stages of a crime and different legal systems choose to prosecute individuals at different stages. An act is an attempt to commit a crime where an individual has the requisite mens rea and sets out to commit the offence but falls short of such a commission. For example, if A intends to kill B, he has the requisite mens rea in such a commission of the act. If he loads the gun in order to commit the act but falls short due to either being caught before he could complete the act or because the gun would not fire, he will not be liable for the murder of B but for the attempted murder thereof. Section 511 of the Indian Penal Code, 1860 deals with the attempt to commit an offence. Previously, if the act that might have been committed turns out to be impossibility, then the individual would not be liable to attempt to commit the crime.<sup>50</sup> There has then been a change in the law, which facilitates that even though the act intended is an impossible one, if the individual commits an act in furtherance of the wrongful act, he will be liable for the offence of attempt to commit that crime.

Ordinarily there are four distinct stages of commission of crime. The first stage is described as intention to commit a crime that is an act ordinarily would not become a criminal wrong unless accompanied by a criminal intention. The intention, however, criminal, by itself, without anything more is not punishable. The second stage is described as preparation. It consists in devising or arranging the means or measures necessary for the commission of the offence. Preparation is not punishable save some exceptions. Third stage is an attempt to commit the offence. So, in every crime, there is first, an intention to commit it, secondly preparation to commit it and thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the act. Attempt includes complete, incomplete and impossible attempts. Complete attempts occur when the perpetrator takes every necessary step in the commission of a crime and yet is unable to commit it. An incomplete attempt occurs when the perpetrator takes some steps towards

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<sup>48</sup> *Supra note 1.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Supra note 24.*

committing the crime but is stopped by some intervening force outside of their control before they are able to complete the attempt. An impossible attempt occurs when a perpetrator takes steps towards committing a crime, only to realize that there is something in the way making it impossible for the crime to be completed. This would include something like trying to commit murder when the target is already dead.

The Doctrine of Locus Poenitentiae is a very important doctrine in relation to the law governing attempt. It deals with those cases in which the individual prepared to commit the crime but changes his mind at the end, thereby pulling out at the last instant. Such intentional withdrawal prior to the commission or attempt to commission of the act will be termed as a mere preparation for the commission of the crime and not an attempt or the commission to the commission of the crime and no legal liability will be imposed on him.<sup>51</sup> The context of attempts, the common law adopted a variety of tests for determining whether an actor's conduct had moved from mere preparation to criminal attempt. The tests had in common their focus on how close the actor had come (his or her 'proximity') to completing the offence. Look instead at how far the actor has gone from the start of the offence conduct. Once a 'substantial step' is taken, the actor has shown a willingness to act upon the actor's intention and, therefore, the actor's conduct is deemed adequate for a criminal attempt. In common law, 'substantial step' is sufficient for liability of attempt to crime.<sup>52</sup> The common law is consistent in imposing liability only in the instance where there actually (objectively) exists the danger of the offence harm or evil: by requiring an attempt possible of completion and, in the context of conspiracy, a true agreement between two conspirators, for instance. To determine the liability of an attempt or to separate it from the preparation some theories have been developed. These are following:

#### **A. The Last Stage Theory:**

This refers that the defendant is guilty of an attempt if s/he is at the last stage of committing a complete crime. Only final step remain to perform to achieve the intended result. This theory is useful in the viewpoint of determining punishment to the defendant but is not appropriate to deal every types of crime. The preventive approach does not allow waiting up to eleventh stage committed by the defendant.

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<sup>51</sup> *Supra* note 24.

<sup>52</sup> Paul H. Robinson & John M. Darley. (1998). *Objectivist vs. Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*. University of Pennsylvania Law School, Oxford Journal of Legal Studies, VOL.18, p.412.

**B. The Proximity Theory:**

The Proximity Rule states that the act or a series of acts, in order to be designated as an attempt to commit an offence, must be sufficiently proximate to the accomplishment of the intended substantive offence.<sup>53</sup>

This theory prescribes that if the defendant's act is proximate to the commission of crime, s/he is guilty of attempt. If the defendant's act is sufficient to establish the crime to be committed, s/he is liable for attempt, no need to reach the last stage. This theory is also known as equivocal theory that indicates which must suggest accurately what the defendant is willing to achieve. Proximity to the complete crime plays significant role for liability of an attempt rather than the steps taken by the defendant.

**C. The Substantial Step Theory:**

The substantial step taken by the defendant in relation to commit an offence is significant for attempt rather proximity or final stage to the intended crime based on this theory. Substantial step is determined by the circumstances of the crime committed. It is wider than the proximity and last stage theories for imposing liability in attempted crime. If the step taken is proved as substantial, it is sufficient for attempt.

**D. Attempt and impossibility:**

Even if the commission of crime is impossible, the defendant is guilty for attempt. If there is no crime constituted due to lack of its element then there is no attempt.

There were some remarkable cases in the international arena, such as: i) cases which are merely preparation: the defendant who had an imitation gun, sunglasses and a threatening note in his pocket was in the street outside a post office. Not guilty of attempted robbery (Campbell, 1990); the defendant was found in the boys' lavatory block of a school in possession of a large kitchen knife, some rope and masking tape. He had no right to be in the school. He had not contacted any pupils. Not guilty of attempted false imprisonment. (Geddes, 1996); ii) Cases in which there was an attempt: The defendants were found standing by a door which had the lock and one hinge broken. Guilty of attempted burglary. (Boyle and Boyle, 1987); The defendant had bought a shotgun, shortened the barrel, disguised himself, got into the back of the

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<sup>53</sup> *Supra note 24.*

victim's car and pointed the gun at him. The gun was located but the safety catch was still on.

**a) Actus reus of an Attempt:**

The actus reus of an attempt marks the moment at which the non-criminal planning of an offence turns into a criminal attempt.<sup>54</sup> However, not only does the actus reus of every offence differ, but each offence can be committed in a variety of ways and circumstances. It depends upon what is regarded as the justification for punishing attempts. In *Houghton v Smith*,<sup>55</sup> it was said that it must be left to common sense in each case to determine whether the accused has gone beyond mere preparation. Though an actus reus is necessary, there may be a crime even where the whole of the particular actus reus that was intended has not been consummated.

**b) Mens rea of Attempt:**

The mens rea of an attempt is an intention to commit the offence. Where there is only mens rea, there is no crime. A mere evil intent or designed unaccompanied by any overt act (prohibited act), which is technically called actus reus, in furtherance of such design, is not punishable.<sup>56</sup> As a general rule, there is no criminal liability where mens rea has only been followed by some act that does not no more than manifest mens rea. Liability begins only at the stage when the offender has done some act which not only manifests his mens rea but goes some way towards carrying it out. The mens rea with regard to the offence is intention as to the conduct, and suspicion as to the circumstance. In those circumstances, if the defendant is to proceed with his intended conduct, he would necessarily commit the full concealment offence. He should thus be convicted of an attempt when he takes a more than merely preparatory step towards that end.

## 5.2. Conspiracy to Commit a Crime:

In generally, the terms of a conspiracy in the law, refers to an agreement between two or more people to commit an unlawful act, or to deprive another person of his legal rights. Conspiracy to commit a crime occurs when two or more people work together even if it is only in planning and preparing to

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<sup>54</sup> Jonathan Herring. (2004). *Criminal Law* (5th ed.). Eastern Book Company , p.452.

<sup>55</sup> *Houghton v Smith* (1973) 3 All ER 1109.

<sup>56</sup> Ahmad Sique. *Criminology & Penology* (6<sup>th</sup> ed.). Eastern Book Company, p.36.

commit a crime.<sup>57</sup> It is an inchoate crime when at least two persons involve to commit a crime. A criminal charge of conspiracy does not require that an actual attempt to commit the crime, as it is illegal to conspire together to commit a crime. In fact, an person can be charged with both an actual crime, and conspiracy to commit that crime. What it does require is more than one participant, as a person acting alone cannot be charged with conspiracy with himself. The agreement to commit an act must be moved toward a conclusion, whether or not it is actually accomplished. Plans made by a certain combination of people for unlawful or secret purposes may also be considered a conspiracy.<sup>58</sup> The main ingredients of conspiracy are: i) there should be two or more persons; ii) there should be an agreement between them; and iii) the agreement must be to do either an illegal act or a legal act by illegal means. The major requirement of a criminal conspiracy is an agreement between two or more individuals. It is the sine qua non of every conspiracy.<sup>59</sup> The individual need not be there for the entire conspiracy. He can come in at any time of the conspiracy and leave before the actual act is completed. A conspiracy is an agreement or plan, made between two or more people, to engage in an illegal act, to obtain an unlawful objective, or to deprive another person of his legal rights. A conspiracy may be engaged in to move a plan forward, each person involved aware of his or her part. It is not necessary for each person involved in a conspiracy to engage in or even be aware of each stage or act involved in gaining the objective.<sup>60</sup> The criminal act of conspiracy may be charged if: i) legal means are used to accomplish an illegal result; or, ii) illegal means are used to accomplish a legal result.

The modern concept of conspiracy was introduced in England as a separate substantive crime by the seventeenth-century English courts. The common law defined conspiracy as a combination of two or more persons to perform an unlawful act or a lawful act by unlawful means. Like burglary, the mental element of conspiracy has a dual aspect: (1) an intent to agree to commit an offense; and (2) the added mental element of an intent to commit a specific target crime. Also as with burglary, the common-law does not generally merge the conspiracy into the target offense if both are successfully completed. Rather, both the common and statutory law of conspiracy allow the compounding of penalties for conspiracy and its realized object offense. The common law and many modern statutes require the agreement of two or more

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<sup>57</sup> *Supra* note 1.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Supra* note 24.

<sup>60</sup> *Supra* note 1.

parties to constitute the actus reus of conspiracy.<sup>61</sup> The basic elements of Conspiracy are:

- i) **Agreement:** There must be agreement, regardless of whether it is express or implied;
- ii) **Parties:** There must be at least two parties to an agreement. Both the parties must be competent for the crime for conspiracy. If one party is under age or incompetent, there is no conspiracy; and
- iii) **Criminal propose:** Agreement formed must contain the purpose of crime.

As an inchoate crime, conspiracy allows law-enforcement officials to intervene at a stage far earlier than attempt does. To obtain conviction for an attempt, the prosecutor must prove that the actor performed an act beyond mere preparation or took a substantial step toward committing a completed crime. To obtain conviction in a conspiracy, however, the prosecutor need only to prove that the conspirators agreed to undertake a criminal scheme or, at most, that they took an overt step in pursuance of the conspiracy. Even an insignificant act may suffice.<sup>62</sup> Conspiracy can be classified into three types on the basis of its agreement formation:

- i) **Simple conspiracy:** In simple conspiracy, there needed two or more persons enter into an agreement to commit such offence. Every person involved in the crime knows one another. A, B, C, D and ... come together and enter into an agreement to plan and commit a crime.
- ii) **Spoke or Wheel conspiracy:** If a person enters into an agreement to commit an offence through another person and he does or does not know about the other person involved. The relation between the defendant stand as wheel or spoke. One person operates wheel being contact person and supply necessary information to other relevant participants. All are responsible for conspiracy. Even there is possibility of being participate partially, as ordered by the contact.
- iii) **Chain Conspiracy:** It is conspiracy formed by agreement one and other person respectively as chain. Breaking of chain between the persons involved disconnects the persons involved in the same agreement. All are responsible for conspiracy. Even there is possibility of being participate in different segments.

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<sup>61</sup> *Supra* note 19, pp.25-26.

<sup>62</sup> *Ibid.* pp.28-29.

### 5.3. Incitement to Commit a Crime:

‘Incitement’ is the act of trying to persuade another to commit a crime that the solicitor desires and intends to have committed. Encouraging or instigating another to commit an offence is incitement. The actus reus of this offence is to instigate someone by words or by conduct in the commission of offence. The actus reus of incitement requires proof that the accused by means of encouraging, persuasion, threats, or pressure sought to influence another to commit an offence.<sup>63</sup> The incitement need not be directed towards a specific person, but may be to the entire world and it need be express but may be implied. The mens rea of incitement is a specific intent to have someone commits a completed crime. The mens rea element of this crime is to do the said act with intention that another will commit the crime. The accused must intended that the offence incited be completed and that any consequence in the actus reus result. As in common-law conspiracy, disclosure of the criminal scheme to another party constitutes a part of the actus reus of solicitation. But, while the actus reus of a conspiracy is an agreement with another to commit a specific completed offense, the actus reus of a solicitation includes an attempt to persuade another to commit a specific offense.<sup>64</sup>

Incitement is committed only where the incitement, express or implied, comes to the notice of the person or persons to whom it is intended to provoke. The offence of incitement is complete, when it is communicated to the intended person to influence even though it fails to incite or influence to him to commit the offence abetted. If the offence is committed, the inciter becomes an accessory to that offence and is dealt accordingly. The view that the judicial system should punish one who unsuccessfully solicits another by means of the solicitation itself is a recent development in criminal jurisprudence.<sup>65</sup> Viewed solely as an inchoate offense, solicitation appears to impose criminal liability on an act that presents no significant social danger, and approaches punishing evil intent alone.

The offence of incitement is committed when a person does not commit the crime he wishes to commit, by himself, but urges or persuades another to commit the act. In order for the act committed to be abatement, one must merely provide support, command or order another to commit the act and must not be the one to commit it himself. The rationale stated behind the punishing of incitement is that it helps in the commission of a crime. One may argue that

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<sup>63</sup> *Race Relations Boards v. Applin*, 1973, QB 815.

<sup>64</sup> *Supra* note 20. pp.29-30.

<sup>65</sup> *Ibid.*

the act of incitement does not really have an actus reus and therefore should not constitute an offence as the very essence of every criminal law is that there needs to be a merger of mens rea and actus reus for there to be a crime. In incitement, the statement or command or incitement given from the abettor to the committer of the crime is to be considered as the actus reus in this case and the intention to induce the person to commit the act for one's self is the mens rea in such a case. Therefore, with the merger of actus reus and mens rea, incitement becomes an offence. It is to be noted that the actus reus in case of incitement requires the statement to convey a proper intention on behalf of the author to convince another to commit the criminal act. Therefore, a mere statement in passing is not sufficient to convict a person of incitement. The individual has to have an intention to commit the act which must be seen clearly in his statement to the other individual to convince him to commit the act. In certain strict liability cases wherein there is no need to prove an individual's mental element in the crime. In similar crimes, there is also no need to provide proof of the individual's mens rea in his prosecution for the offence of incitement.<sup>66</sup> There are many way of committing crime by incitement, which are:

**A. Incitement by aid:**

This is a subset of the offence of incitement wherein the individual concerned, incites, insinuates or supports another individual in the commission of the act. The individual will not be liable for incitement with a mere association to the individual who has committed the crime. There needs to be sufficient proof that the individual had wilfully influenced and coerced the individual to commit the crime. In addition, if the person is seen to be just a silent passive spectator and does not actually take part in any of the steps leading to or in the commission of the offence, he or she is not liable under incitement.<sup>67</sup>

**B. Incitement by Instigation:**

The word "instigate" means to goad or urge forward or to provoke, incite or encourage to do an act. A person is said to have instigated another, to an act when he actively suggests or estimates him to the act by any means or language, direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragements. Instigation implies knowledge of the criminality of an act. Instigation by

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Supra note 24.*

wilful concealment takes place where there is some duty cast obliging a person to disclose fact. The mere omission to bring to the notice of the higher authorities, offences committed by other persons does not amount to incitement of those offences. It may form the foundation for disciplinary action against him in a departmental way. Mere failure to prevent the commission of an offence is not by itself an incitement.

**C. Abatement by Conspiracy:**

The concept of conspiracy and abatement to conspiracy are the wider different concepts between the two. Criminal conspiracy has a wider jurisdiction than incitement by conspiracy. An individual is guilty of conspiracy with the mere agreement between a group of people to commit an offence. When the said offence is committed, such people will become guilty of incitement by conspiracy. Therefore, the same individual is guilty of conspiracy prior to the committing of the offence and for abatement by conspiracy after the commission of the offence.<sup>68</sup>

**D. Abatement by Illegal Omission:**

An illegal omission occurs when there is a legal responsibility to do an act which the accused failed to do. For the individual to be guilty of abatement by illegal omission, he must not only have intentionally abetted the crime through his non-interference, but must also have had a legal obligation to intervene, which he failed to do.<sup>69</sup>

**E. Abatement through Assistance:**

There are some cases wherein a person is liable for abatement if he helps another individual procure an item or supplies an item to the individual who facilitates his commission of a crime.<sup>70</sup>

**6. Existing Legal Provisions of Inchoate Crime in Nepal**

In the Nepalese criminal law, the classification of crime and its seriousness is depended on three criteria: (i) the harm done; (ii) degree of culpability; and (iii) the modus operandi. The degree of culpability required is either an intention to cause a particular degree of harm, or knowledge or recklessness whether that degree of harm caused or not. Consequently, a person is held liable only if he either deliberately or wilful cause that degree of harm or be deliberately or knowingly taken an unjustified risk of causing such a degree of harm and did

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

caused it. A major characteristic of inchoate crimes is that they are committed even though the substantive offence is not completed and had no harm outcome. An attempt fails, a conspiracy comes to nothing, and words of incitement overlooked in all these instances, there may be liability for inchoate crime. The Nepalese criminal law has not defined properly regarding the inchoate crime and its classification. However, on the basis of legal provisions and theoretical background, an inchoate crime covers incitement, conspiracy and attempt, those are as follow:

**A. Attempt:**

The Muluki Ain, under the Chapter 4, there are certain provisions relating to attempt to crime. No 1 of the Chapter on 'Homicide' has criminalized also attempt to take the life of a person. No.15 has made a provision of attempted murder. No 15 reads as "In cases where a person opens fires or throws a bomb or cuts with a serious weapon or commits any act of attempt to kill another person to the extent possible, with an intention to kill that other person, then even though the victim does not die due to any reason, the person who commits or causes to be committed or instigates (being present in the crime scene) or helps other in the commission of such an offense, the person shall be liable to the punishment of imprisonment for a term ranging from Five years to Twelve years."

Similarly, No 2 of the Chapter on 'Arson' No 1 of Chapter on 'Counterfeiting', No 1 of Chapter on 'Quadruped' have criminalized the attempt to their respective complete crimes. These provisions have accepted that attempt crime is established even in impossibility of target crime. No 5 of the Chapter on 'Rape' has criminalized attempt to commit rape. The terms attempt is used in No 118 of the Chapter on 'Court Procedure'. Similarly, Chapter on 'Theft', 'Arson', 'Rape' and 'Kidnapping/Abduction and Hostage Taking' have made the provision of half punishment of complete crime for attempt to crime. However, There is no any provision relating to attempt in the Chapter on 'Cheating', 'Illegal Detention' 'Hurt', 'Looting', 'Forgery', 'Incest' etc. On the other hand, some special Acts such as Section 15(1)(h) of Human Trafficking and Transportation (Control) Act, 2064; Section 17 of the Narcotic Drugs (Control) Act, 2033; and others Special Acts have made half punishment for defendant of attempted crime. In Nepalese context, due to the lack of definition of attempt in statues, reliance has to be made on the definitions made by the scholars.

The Supreme Court of Nepal also has propounded some significant principles regarding the attempt to crime. In the case of Government of Nepal Vs Bhim Bahadur, the defendant had administered poison to victims, and he had committed complete crime, fortunately victims did not die. In this case, the Supreme Court imposed the punishment to defendant on the basis of last stage of committing of crime. In this case, defendant was guilty of an attempt for he had committed the last stage of committing of a complete crime through poisoning the victims. Only final step remained to be perform to achieve the intended result.<sup>71</sup> In the case of Mahendraraj Bam Vs. GoN, the Supreme Court defined the attempt to murder. In this case the Supreme court established the principle of third party intervention is mandatory for establishing an attempt to murder. In the offence of attempt, there is common actus reus and mens rea are required and offender has been committing of a complete crime but due to the third party intervention he was unable to the achieved the intended result.<sup>72</sup> Similarly, in Ishori Bohaju Vs. GoN case, the Supreme Court interpreted the provisions of No. 15 of Chapter on 'Homicide'. The court established the principle that to establish the offence of an attempt to murder, it must be proved that there was the presence of mental elements of offender to kill the victim and it should be reflected by physical elements (actus reus) or committing of complete crime. However, due to the any external intervention, the proposed result had not been achieved.<sup>73</sup> In the case of Kusheshwor Gurmauta Vs. GoN, the Supreme Court has established the principle that generally it is necessary to considered the doctrine of third party intervention in the case of attempt to murder. However, the offender had open the gunfire to kill the victim, there is no necessity to concern the third party intervention; opening the gunfire is itself sufficient for amounting attempt to murder.<sup>74</sup> In the case of GoN Vs. Rajendra Singha Singkhada, case the Supreme Court has established the principle regarding the stages of the complete crime. In the intentional crime, there exists intention, preparation, attempt and complete crime. In the phase of preparation, there is no crime because defendant has not done any conduct in this phase. However, offender crosses the phase of preparation and conducts the actus reus, or attempts the crime but when it is not completed yet, that is the crime of attempt. If the offender completes those act, that act

<sup>71</sup> Lavdev Bhatta. (2035). *Decision Summary Collection* (2<sup>nd</sup> Ed.), Kathmandu: Sajha Publication, p.243.

<sup>72</sup> *Mahendraraj Bam Vs. GoN*, NKP (2051), Vol.4, D.N.4890, p.226.

<sup>73</sup> *Ishori Bohaju Vs. GoN*, NKP (2051), Vol.12, D.N.5017, p.945.

<sup>74</sup> *Kusheshwor Gurmauta Vs. GoN*, NKP (2059), Vol.12, D.N.8285, p.2031.

is not attempt but a complete crime.<sup>75</sup> In *GoN Vs. Ashok Sitikhu et.all*, case the Supreme Court held that there is no difference between the case of attempt to murder and murder on the basis of actus reus, mens rea, and absence of valid defence, which are required as basic elements for the establishment of the crime. However, on the viewpoint of result, in the attempt to murder case, there is inability to achieve the intended result. A person who wants to commit crimes, complete the preparation of intended act, to commit intended criminal acts, but the offender has been unable to achieve the intended result due to any reason or situation. If this kind of incomplete crime or inchoate crime is defined and criminalized by the law, the offender should bear the criminal liability accordingly. The presence of the third party intervention is not mandatory for the situation that the victims are not dead. The third party may have interrupted the offenders' criminal acts or may not have interfered, whatever the reason, survival of victims life and being the existence of all the essential elements necessary for the intentional murder, will suffice to establish the attempt to murder.<sup>76</sup>

**B. Incitement:**

Nepalese criminal law, particularly the Muluki Ain is not so clear in respect of criminal liability on incitement. It has not criminalized separately incitement as a crime. However, the 1, 4, 5, 6, 7 and 8 no. of the Chapter on 'Arson'; 1 and 3 no. of Chapter on 'Forgery', 5 no. of Chapter on 'Fraud', 13 and 17 no. of Chapter on 'Homicide' have arranged several provisions relating to incitement, abatement by conspiracy etc. and criminalized those acts. However, the Muluki Ain has not provided the clear definition of the Aiding and Abetting a Crime. The terms of abatement is used in 118 no of the Chapter on 'Court management', and 4 no. of 'Abducting and Hoatage taking'. Such provisions can be found in Chapters on Homicide, Hurt, Rape, and Arson. Chapter on 'Quadruped' no.11 has provide the half punishment (six year) who instigates (gives word) to knowingly kills a cow or bullock and no. 12 provides half punishment (three year) who instigates (give word) to administer such poisoning to a cow or bullock with intention to kill it. No. 1 of the Chapter on 'Kidnapping/Abduction and Hostage Taking' has criminalized the inchoate offence. According to No 1 of the said chapter 'A person, who abets, instigates or orders to commit the offense as referred to in this Chapter or gives consent to commit the

<sup>75</sup> *GoN Vs. Rajendra Singha Singkhada*, NKP (2068), Vol.4, D.N.8599, p.658.

<sup>76</sup> *GoN Vs. Ashok Sitikhu et.all*, NKP (2069), Vol.1, D.N.8761, p.149.

offence prior to the commission of such an offence shall be punished as if he or she had committed the offence himself or herself.’ Chapter on 'Hurt/Battery' no.16 has criminalized that ‘If a person instigates or orders other person to cause hurt to any one else, the person who so instigates or orders shall be liable to the punishment which is equal to the total punishment imposed on all the persons who abide by such an order to cause hurt.’ The provisions of Chapter on 'Quadruped' and Chapter on 'Hurt/Battery' are contradictory in terms of punishment to the instigators for order or instigate the offenders to commit the crime with intentionally or knowingly. Similarly, no.13, 15 and 17 of the Chapter on 'Homicide', has criminalized the incitement and provide the punishment to the instigators for the incitement to the offenders for committing the crime. Chapter on 'Rape' no.6 has criminalized the act of instigating another person to commit a rape and provides half punishment to instigators that is imposed to the offender.

The Supreme Court of Nepal has established some significant principles regarding the incitement to crime. In the case of *Muktiram and others Vs HMG*, where the defendant incited Muktiram and others to kill her mother who has oppressed her. The two persons carry out the plan after 6 months of such instruction. When the one offender was not present in the incident, there relationship was mother-in-law daughter-in-law, due to that give a just to say to kill her, three are held guilty of murder and reduced the punishment un the basis of mitigated circumstance and the offender was imposed the punishment with ten years of imprisonment.<sup>77</sup>

### C. **Conspiracy:**

Conspiracy is not recognized as a general offence in Nepalese existing criminal law. However, a person can be prosecuted under the charge of conspiracy only based on express legal provisions. In existing Nepalese criminal law, there is no general criminalization of conspiracy in criminal offences. The terms of Conspiracy is use in 44, 110, 112, 118 nos. of the Chapter on ‘Court Procedure’ and No.1 of the Chapter On ‘Husband and Wife’, of Muluki Ain. Similarly, Chapter on 'Arson' 1, 7 and 8 no. are provide the different provision and no. 2 has made a provision of conspirator arson that ‘No person shall, knowingly, commit or cause to be committed or attempt to commit arson for causing a loss to anybody else. If any person commits such an act, all the persons involved in that act and the conspirator (Matalabi) shall also be liable to

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<sup>77</sup> *Muktiram Ghimire etal. Vs. HMG*, NKP (2042), Vol.6, D.N.2410, p.602.

punishment.’ There are also provisions, which have criminalized the act of conspiracy i.e. conspiracy to give and submit any fraudulent document according to No.1 of Chapter On ‘Cheating’. No 7 of the Chapter on ‘Counterfeiting’ has criminalized the conspiracy of preparation for the act of counterfeiting (offence under No 4 of the chapter). The punishment for conspirator is half of the punishment imposed to the principle offender. Conspiracy has been criminalized as a separate crime by No 16 of the Chapter on ‘Homicide’. According to No 16 ‘A person who conspires to kill a person or causes other person to kill a person shall be liable to the punishment of imprisonment for a term ranging from Ten years to Fifteen years in cases where such a victim has been killed. If the victim has not been killed, the offender shall be imprisoned for a term ranging from Five years to Twelve years in cases where the victim has not been killed.’ Conspiracy has also been criminalized by some special Acts, such as Section 17 of the Narcotic Drugs (Control) Act, 2033; Section 33(a) of the Police Act, 2012 etc. However, there are no provisions of criminalization of conspiracy in the Chapter on theft, rape, false imprisonment etc. under the Muluki Ain.

The Supreme Court has established several principles in this regard. In the *Bhai Kirat Rai Vs. GoN* case, the Supreme Court has spoken that ‘Since the conspiracy role of the phase of conspiracy, the major conspirator is those person, who play the main conspirator role from the beginning.’<sup>78</sup> In the case of *Kamal Prasad Basyal Vs. GoN*, the Supreme court has defined the provisions of 16 no. of Chapter ‘On Homicide’ and established that ‘it is possible that more than one person can make conspiracy for taking the life of another person. However, before the completion of the conspiracy crime it may be possible to put out any conspirator from the conspirator groups. The person who was out form the conspirator group before the completion of conspiracy crime, those persons are not liable the punishment for conspiracy. Due to different responsibilities of different people within the conspiracy group, there are provisions in No. 16 which imply the play of different roles such as the person who will be able to help or achieve action-related results within such conspiracy. The provision of No 16 has not considered other conspirators other than main conspirators.’<sup>79</sup>

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<sup>78</sup> *Bhai Kirat Rai Vs. GoN*, NKP (2061), Vol.6, D.N.7388, p.662.

<sup>79</sup> *Kamal Prasad Basyal Vs. GoN*, NKP (2060), Vol.9/10, D.N.7286, p.851.

## 7. CATEGORIES OF INCHOATE CRIME IN MULUKI PENAL (CODE) ACT, 2074

After inception of the new constitution, there are many new legal structures being formulated by the legislature of Nepal. As a culmination of long endeavour to formulate a single consolidated code in the area of substantive and procedural criminal law, the new codes, namely the Muluki Criminal (Code) Act, 2017, the Muluki Criminal Procedure (Code) Act, 2017, and the Criminal Offence ( Determination and Implementation of Sentence) Act, 2017 have been promulgated by the legislative-parliament on August 8, 2017. Those instruments have come into force from August 17, 2018. The Muluki Penal (Code) Act, 2074 is the latest effort to make the separate code in the area of criminal law, which was drafted by Criminal Law Reform and Revision Taskforce, 2008.<sup>80</sup> These codes are more scientific and comprehensive in comparison to previous draft codes. Those codes have revised and incorporated the provisions of existing law and previous draft codes.<sup>81</sup> The Muluki Penal (Code) Act, 2074<sup>82</sup> has criminalized inchoate crime (Conspiracy, Attempt and Incitement) under Part- I, Chapter- 3 and has clearly provided the concept of inchoate crime and denoting clearly and expressly of the concept of inchoate crime in the history of Nepalese criminal law. Section 2 of the Muluki Penal (Code) has adopted the extra territorial jurisdiction for the offence under Section-2, offense committed outside Nepal. Such offences committed outside the territory of Nepal are punishable under this Code as if they were committed within the territory of Nepal. Similarly, Section 2(3) has provided the extra territorial jurisdiction for a Nepali citizen who commits an offence outside Nepal against a Nepali citizen that any of the offense which are provide by Sub-section-3, those person shall be punished pursuant to this Code as if the offence were in Nepal. In this category of the crime of murder or attempt thereof, abatement of or conspiracy to commit murder also include under this Sub-section 3 (a). Section 2 of the code has provided the extra territorial jurisdiction in such inchoate offence, which are incorporate in first time in Nepalese criminal law. The following categories of inchoate crimes have arranged under this Act:

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<sup>80</sup> Proposed Criminal Code, Criminal Procedure Code, and Sentencing Act, 2010, Kathmandu: The Ministry of Law and Justice, p. 3

<sup>81</sup> Prof. Rajit Bhakta Pradhananga (Dr.) & Kunshang Lama. (2014). *The Concept and Evolution of Intentional Homicide in Nepal*. Prosecution Journal, Kathmandu: Office of the Attorney General Nepal, p.44.

<sup>82</sup> Section 2(A) of the Some Nepal Law Amendment, Unification, Adjustment and Repeal Act, 2074 has named this Code as "Muluki Penal Code".

### 7.1 Conspiracy:

It has criminalized the criminal conspiracy as a separate offence. Section 33 of the Penal Code has criminalized the criminal conspiracy. Sub-section (1) of this section mentions that 'no person shall make a criminal conspiracy.' Sub-section (2) of this section defines the term conspiracy as 'If two or more people agree to commit or cause to be committed an offence, they shall be deemed to have made criminal conspiracy. The explanation of this section states that for a criminal conspiracy to be established, at least one party to the agreement must have done an act to execute the agreement, even if it is impossible for an offense for which criminal conspiracy was made to be committed, the offense of criminal conspiracy shall be deemed to have been committed and punishment shall be awarded therefore.' Sub-section (3) has made the provisions of punishment for the conspiracy offence. The various offences are incorporate as a conspiracy in the various Section of the Muluki Penal (Code). Those are:

- a) Section 49, under the Chapter of 'Offences against the State' of this Code has prevented the '**assault on sovereignty or integrity.**'<sup>83</sup> Section 49(2) of the Code has criminalized the hatching a conspiracy or cause a conspiracy to be hatched, in association with a government of any foreign state or an organized force that is likely to assault the sovereignty, territorial integrity or national unity of Nepal<sup>84</sup> and Sub-Section(5) (a) of this section has prescribed the punishment of life imprisonment. Similarly, Section 49(4) of the code has criminalized the act that may give rise to hatred, enmity or contempt on grounds of class, caste, religion, region, community or similar other ground, which is likely to jeopardize the sovereignty or territorial integrity of Nepal. Likewise, an attempt or abet to commit so or hatch a conspiracy to commit so or disrupt or cause to be disrupted the good harmonious relationship subsisting among different castes, races or communities.<sup>85</sup> Sub-Section(5) (c) of this section has prescribed the punishment for such offence with an imprisonment not exceeding 5 years and fine not exceeding 50 thousand rupees.
- b) Section 50 of the Code has made a provision on '**Sedition**'. Section 50 (1) states that no person shall, with the intention of overthrowing the Government of Nepal or the constitutional structure of Nepal,

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<sup>83</sup> *Ibid*, Section 49.

<sup>84</sup> *Ibid*, Section 49(2).

<sup>85</sup> *Ibid*, Section 49(4).

demonstrate or use military or paramilitary or criminal force and thereby, create any type of disorder or form a military or paramilitary organization, with arms and ammunition or hatch a conspiracy or attempt or incite to commit such an act. For such crimes, this Section has prescribed the punishment with the imprisonment not exceeding 25 years under the Section 50(2).

- c) Section 52(1) has criminalized ‘**genocide**’ and mentions that to commit or order to commit to racial kill (genocide). This section has further criminalized the criminal act of conspiracy, with an objective to destroy the existence of any race, caste, community or religious group;<sup>86</sup> once or repeatedly, if members of such groups have physical organs or make them physically or mentally embarrassed;<sup>87</sup> prohibited by avoiding the use of water, food, fuel, medicines, or the necessity of living, and to make the members of such groups annoyed;<sup>88</sup> to prevent the birth of infants within such a group should have made forcefully;<sup>89</sup> and to transfer the children born from such groups to another group.<sup>90</sup>
- d) The offence of espionage has been criminalized by Section 56 of the Code. Section 56(1) has criminalized the conspiracy mentioning that ‘assaulting on the sovereignty, security or territorial integrity, seducement of any foreign country, give anyone information about the military status of Nepal, strategic arrangement or matters of internal security or the matters that have to be kept confidential by Government of Nepal from the political, economic or diplomatic viewpoint or confidential document, or commit any act to give such an information.’<sup>91</sup>
- e) Similarly, Section 56(2) has prescribed punishment for offence of that commits espionage as to the matters relating to the military status of Nepal, strategic arrangement or matters of internal security shall be liable to a punishment with exceeding 25 years;<sup>92</sup> espionage as to the matters that have to be kept confidential by Government of Nepal or any other confidential document shall be liable to a punishment with imprisonment of five to ten years;<sup>93</sup> and Whoever commits espionage about the matters other than those referred to in clause (a) or (b) shall be

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<sup>86</sup> *Ibid*, Section 52(2)(a).

<sup>87</sup> *Ibid*, Section 52(2)(b).

<sup>88</sup> Section 52(2)(c) of the Muluki Penal (Code), 2074.

<sup>89</sup> *Ibid*, Section 52(2)(d).

<sup>90</sup> *Ibid*, Section 52(2)(e).

<sup>91</sup> *Ibid*, Section 56(1).

<sup>92</sup> *Ibid*, Section 56(2)(a).

<sup>93</sup> *Ibid*, Section 56(2)(b).

liable to a punishment with imprisonment not exceeding five years and with a up to 50 thousand rupees fine;<sup>94</sup>

- f) Section 206, Chapter on ‘Offenses Relating to Disappearing of Persons’ of this Code has made a provision in relation to the conspiracy on ‘commit act of disappearing persons’. Clause (1) of this Section has criminalized to the conspiracy on that cause to commit the act of disappearing of person; and clause (2) clarified that the means of “act of disappearing of person”. Similarly, Section 206(7)(b) of the Code has prescribed the punishment that the person who attempts or hatches a conspiracy, becomes an accomplice in the acts of disappearing a person shall be liable to half of the punishment to be imposed on the principal in the first degree.
- g) Section 215, Chapter on ‘Offense Relating to Abduction or Taking Hostage’ has made a provision in relation to the punishment for abettor, the person who abets or gives order, attempt, and conspiracy to commit the offense. Sub-Section (2) of this Section has made the provision mentioning that notwithstanding anything contained in sub-section (1), the person who conspiracy to commit or being an accomplice shall be liable to a punishment half of the punishment for the said offence.

This Code comprises many provisions regarding the offence of conspiracy. However, the quantum of punishment is prescribed equally for the conspiracy as inchoate offences like the complete offences. On the other hand, it has many provisions, which can bring the situation of double punishment to the offence of conspiracy.

## 7.2 Attempt:

Section 34 of the Code has made a provision of the punishment to crime of attempt. Subsection (1) of this Section has criminalized attempt mentioning 'No person shall attempt to commit an offence.' Subsection (2) mentions that 'Even if it is impossible for an offence to be committed for which attempt was made, attempt shall be deemed to have been committed.' This provision has provided the punishment for the attempt even when it is impossible to complete the crime. Complete attempts occur when the perpetrator takes every necessary step in the commission of a crime and yet is unable to commit it. In the criminal jurisprudence, the provision of attempt for the impossible to complete crime is debatable and yet to be settled. Some jurisdiction imposed the

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<sup>94</sup> *Ibid*, Section 56(2)(c).

punishment for the attempt crime even when it is impossible to complete crime. Similarly, Subsection (3) mentions that 'Except otherwise provided elsewhere in this Code, a person attempting to commit an offense shall be punished with one half punishment of the punishment provided for such offense.' The attempt to such offence are incorporated in various sections of the Code. Those are as following:

Section 49, Chapter of 'Offences against the State' of this Code has mentioned the provision on '**assault on sovereignty or integrity**'. Section 49(1) of the Code states that no person shall, with the intention of assaulting on the sovereignty, territorial integrity or national unity of Nepal, form a military or paramilitary organization or attempt to commit so or create disorder of any type or attempt or cause to be committed so. Sub-Section (5)(a) of this section has prescribed the punishment life imprisonment. Similarly, Section 49(4) of the code criminalizes the act of 'committing or causing to be committed any act that may give rise to hatred, enmity or contempt on grounds of class, caste, religion, region, community or similar other ground, which is likely to jeopardize the sovereignty or territorial integrity of Nepal. It also criminalizes an attempt or an act of abetting to commit so or hatch a conspiracy to commit so or disrupt or cause to be disrupted the harmonious relationship subsisting among different castes, races or communities.

Similarly, Section 50 of the Code has provided about '**Sedition**'. Section 50(1) has criminalized sedition mentioning that no person shall, with the intention of overthrowing Government of Nepal or the constitutional structure of Nepal, demonstrate or use military or paramilitary or criminal force and thereby create any type of disorder or form a military or paramilitary organization with arms and ammunition or hatch a ...attempt or ...to commit such an act. The punishment prescribed for this crime is the imprisonment not exceeding 25 years under the Section 50(2). On the other hand, Section 50(3) has criminalized attempt to commit any act that raises hatred, enmity or contempt against Government of Nepal by words, either spoken or written, or by figure or signs, or by any other means, with regard to Government of Nepal or any act functions or activities of Government of Nepal having cited a baseless or non-certified matter.

Section 52 has prevented the '**Genocide**' and criminalized the act of committing or order to commit to racial kill (genocide) by Sub-Section (1) of same Section. For the purpose of sub-section (1) the Code has criminalized conspiracy stating that purpose of destroying the existence of any race, caste, community or religious group is to be destroyed either by doing a person or

group members of such group commit suicide at once or more;<sup>95</sup> once or repeatedly, if members of such groups have physical organs or make them physically or mentally embarrassed;<sup>96</sup> prohibited by avoiding the use of water, food, fuel, medicines, or the necessity of living, and to make the members of such groups annoyingly annoyed;<sup>97</sup> to prevent the birth of infants within such a group should force forcefully;<sup>98</sup> and to transfer the children born from such groups to another group.<sup>99</sup> Similarly, Section 52(3) has prescribed the punishment for conspiracy of genocide that life imprisonment as per sub-section (a); due to clause (b) in connection with this Act, punishment for physical injury or injury due to this Act, additional up to 5 years imprisonment and up to 50 thousand rupees fine; and imprisonment for ten years in case of crime under section (c), (d) or (e).

Section 53(2) of this Code has criminalized that ‘wage war against Nepal or assist the army of enemy state’. Clause (2) of this section mentions that ‘no person shall, during any time either declaration or non-declaration of a war, assist any foreign army engaged in war against Nepal by providing strategic or military information of any type or make an attempt thereof.’ The punishment of life imprisonment is prescribed for this offence.

Section 54(1) of this Code has criminalized the ‘wage war or to rebel against a friendly state’ and Clause (1) of this section criminalized that having used the territory of Nepal, wage war, threaten to wage war or attempt to commit it or commit rebellion or attempt to commit rebellion against a state having diplomatic relation with Nepal. The punishment with imprisonment not exceeding seven years and a fine not exceeding seventy thousand rupees has been prescribed for this crime.

Section 55 of the Code has criminalized the crimes relating to ‘provoke soldier or policeman’. Sub-section (1) of this section criminalised the act of abetting to desert or provoke or incite to violate discipline or seduce from duty an incumbent soldier, policeman or armed policeman or officer of the Nepali Army, Nepal Police or Armed Police to desert the Nepali Army, Nepal Police or Armed Police or harbour a deserter from the Army, Police or Force having the knowledge, or having the reasons to believe, that such person is a deserter. Section 52(2) of this Code has prescribed the punishment with an

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<sup>95</sup> Section 52(2)(a) of the Muluki Penal (Code), 2074.

<sup>96</sup> *Ibid*, Section 52(2)(b).

<sup>97</sup> *Ibid*, Section 52(2)(c).

<sup>98</sup> *Ibid*, Section 52(2)(d).

<sup>99</sup> *Ibid*, Section 52(2)(e).

imprisonment not exceeding 10 years and a fine not exceeding one Lakh rupees for this offence.

The offence of espionage has been criminalized by Section 56 of the Code. Section 56(1) has criminalized the attempt mentioning that ‘assaulting on the sovereignty, security or territorial integrity, seducement of any foreign country, give anyone information about the military status of Nepal, strategic arrangement or matters of internal security or the matters that have to be kept confidential by Government of Nepal from the political, economic or diplomatic viewpoint or confidential document, or commit any act to give such an information.’<sup>100</sup> Similarly, Section 56(2) has prescribed the punishment for committing espionage as to the matters relating to the military status of Nepal, strategic arrangement or matters of internal security shall be liable to a punishment with exceeding 25 years;<sup>101</sup> espionage as to the matters that have to be kept confidential by Government of Nepal or any other confidential document shall be liable to a punishment with imprisonment of five to ten years;<sup>102</sup> and Whoever commits espionage about the matters other than those referred to in clause (a) or (b) shall be liable to a punishment with imprisonment not exceeding five years and with a up to 50 thousand rupees fine.<sup>103</sup>

Section 57 of this Code has criminalized that ‘assault on President’. Clause (1) of this Section mentions that ‘No person shall assassinate or attempt to assassinate or cause to be assassinated the President of Nepal.’ Clause (4)(a) of this Section refer the punishment to life imprisonment as for the offence on clause(1) of this Section.

Section 66, Chapter of ‘Offenses against Public Tranquillity’ of this Code has made a provision in relation to the ‘punishment for obstructing public official’. Clause (1) of this Section has mention the provision that ‘no person shall obstruct, resist or make an attempt to obstruct or resist a public official in performing the act of preventing or dispensing an unlawful assembly or suppressing a riot in the course of discharging his/her duty.’ Similarly, Section 66 (2) of the Code has prescribed the punishment that an imprisonment not exceeding one years or a fine not exceeding 10 thousand rupees or with the both for this offence.

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<sup>100</sup> *Ibid*, Section 56(1).

<sup>101</sup> *Ibid*, Section 56(2)(a).

<sup>102</sup> *Ibid*, Section 56(2)(b).

<sup>103</sup> *Ibid*, Section 56(2)(c).

Section 101, Chapter on 'Offenses against Public Justice' has criminalized the act of opposing the arrest or to escape from custody. Clause (1) of this Section has made the provision that 'in case a warrant has been issued as per a law to arrest a person, the person who is about to be arrested or has been arrested as per a law shall not knowingly obstruct or resist to escape from arrest and a person who is detained as per a law shall not escape or attempt to escape from detention.' The punishment for this offence is imprisonment not exceeding 3 years and with a fine not exceeding 30 thousand rupees or with the both.

Section 118, Chapter of 'Offense against Public Interest, Health and Safety, Convenience and Morals' of this Code has made a provision in relation to the attempt to 'Behaving Indecently'. Clause (1) of this Section has criminalized to the attempt mentioning that 'no person shall behave indecently in a public place or having entered into a place where he/she has no legal right to enter or attempt to manhandle or annoy a woman, child or a person with physical disability in a public place'. The punishment prescribed for such act is the imprisonment not exceeding one years and with a fine or exceeding 10 thousand rupees.

The Code has made a provision in relation to 'Religion conversion' under the Section 158, Chapter of 'Offenses Relating to Religion'. Section 158(1) has criminalized the conversion of any person's religion or make an attempt for it or abet anyone therefor and imposed the punishment by the Sub-section (3) of this Section that imprisonment not exceeding 5 years and with a fine not exceeding 50 thousand rupees or with the both.

Section 183, Chapter on 'Offenses Relating to Human Body' of this Code has made a provision in relation to 'attempt to murder'. Clause (1) of this Section has criminalized that no person shall, with the intention of committing murder of anyone, commit an attempt to murder. The punishment of imprisonment not exceeding 10 years and with a fine not exceeding 5 thousand rupees is prescribed for the offence.

The Code has a provision in relation to 'Abortion not to be caused (pregnancy above twenty-five weeks is terminated)' under the Section 188, Chapter of 'Offenses against Protection of Pregnancy'. Section 188(5) has criminalized that 'in case a person commits an attempt to murder a pregnant woman and as a consequence thereof, the woman is not dead but the pregnancy above twenty-five weeks is terminated, the offender shall be liable to a punishment with imprisonment not exceeding five years in addition to the punishment to be imposed under this code or other laws.'

Section 196, Chapter of ‘Offenses Relating to Hurt’ of this Code has made a provision in relation to ‘Not to use Criminal force’. Clause (1) of this section has criminalized that no one shall use criminal force against anyone. Similarly, Section 196(2)(c) of the Code has criminalized that frightening or threatening any one of using of force against him/her or pressurizing against any one with the use of force or attempting to do so in any other manner. Section 196(4) of the Code has prescribed the punishment that if committed such offence along with arms, the offender shall be liable for a punishment with imprisonment not exceeding three years or up to 30 thousand rupees fine or both and if committed without arms, be liable to a punishment with imprisonment not exceeding one year or fine not exceeding ten thousand rupees or the both.

Section 206, Chapter of ‘Offenses Relating to Forced Disappearance of Persons’ of this Code has made a provision in relation to the attempt on ‘committing an act of disappearing persons’. Clause (1) of this Section has criminalized conspiracy on that cause to commit the act of disappearing of person; and clause (2) clarified that the means of “act of disappearing of person.” Similarly, Section 206 (7)(b) of the Code has prescribed the punishment that the person who attempts or hatches a conspiracy, becomes an accomplice in the acts of disappearing a person shall be liable to half of the punishment to be imposed on the principal in the first degree.

Section 215, Chapter of ‘Offense Relating to Abduction or Taking Hostage’ of this Act has made a provision in relation to the attempt, ...to commit the offense. Sub-Section (2) of this Section has made the provision that notwithstanding anything contained in sub-section (1), the person who conspires to commit or being an accomplice shall be liable to a punishment half of the punishment for the said offence.

The Code has provided a provision in relation to ‘Not to adulterate drugs or if adulterated, such drugs not to be sold’ under the Section 235, Chapter of ‘Offense Relating to Medical Treatment’. Section 235(1) has criminalized that ‘no person shall adulterate any drug or sell or distribute such adulterated drug knowingly with the motive of nullifying or minimizing or altering the effect of the drug or making the drug dangerous or to cause someone to consume such drug or to treat someone with such drug.’ Similarly, Sub-section (2)(b) of this Section has prescribed the punishment where there is danger of death due to consumption of such a drug, the punishment equal to that of an attempt to murder.

Section 243, Chapter on ‘Offense Relating to Theft and Robbery’ of this Code has made a provision in relation to ‘Burglary not to be committed’. Clause (1) of this Section has criminalized that no person shall commit or cause to be committed burglary. Similarly, Clause(2) of this Code has clarified that for the purpose of sub-section (1), if the theft is committed by entering into a house, except through the main gate, any way, place, or other means other than or if the exit through the main gate, any way, place, or other means or attempt to exit shall be deemed to be burglary. Section 243(3) has provide the punishment that whoever commits burglary as referred to in sub-section (1) shall be liable to a punishment with an imprisonment from three years to five years and with a fine not thirty thousand rupees to fifty thousand rupees. On the other hand Section 244(2) of this Code has provided that if anyone commits theft in the following manner s/he shall be deemed to have committed robbery:

(a) if the offender causes death of or injures by hurt to or detains a person or attempts thereof or intimidates to cause death instantly or inflict injury by hurt to commit theft or while committing theft or to take the property stolen or to avoid the arrest after committing theft or commits theft having carried dangerous weapon.

Similarly, Sub-Section (3) of this Section has made the provision of punishment with an imprisonment of 7 years to 14 years and with a fine of 70 thousand rupees to 140 thousand rupees. Likewise, Section 245 of this Code has made a provision in relation to ‘Not to move along with tools to be used for theft’. Sub-section (1) of this Section has provided that ‘committing theft or robbery, move round or enter into or attempt to enter into the house of someone else along with tools, objects, weapon, duplicate key, glove, ladder and so on that may be used for theft’<sup>104</sup> and unless otherwise proved, the person who moves, enter into or attempts to enter into shall be deemed to have moved, entered into, attempted to enter into with the intention of committing theft.<sup>105</sup> Similarly, Section 245(3) has prescribed the punishment with imprisonment not exceeding one year or with a fine not exceeding 10 thousand rupees or with the both.

The Code has a provision in relation to ‘Not to counterfeit currency’ under the Section 255, Chapter of ‘Offenses Relating to Currency’. Section 256(1) has criminalized the counterfeit or attempt to counterfeit currency. Sub-section (2) of this Section has prescribed the punishment with imprisonment from five years to ten years and with a fine from fifty thousand rupees to one hundred

<sup>104</sup> Section 245(1) of the Muluki Penal (Code), 2074.

<sup>105</sup> *Ibid*, Section 245(2).

thousand rupees having regard to the quantity and value of the currency counterfeited. Likewise, Section 257 is relating with 'Not to use counterfeit currency'. Sub-section (1) of this section has criminalized that 'no person shall purchase, sell, export, import, transact, or use as genuine or attempt to commit so or retain with himself/herself a knowingly as counterfeit currency with the intention of using it as genuine currency.' Similarly, Sub-Section (2) has prescribed the punishment for using counterfeit currency that with an imprisonment not exceeding 7 years and a fine not exceeding 70 thousand rupees.

Section 267, Chapter of 'Offenses Relating to Stamps' of this Act has made a provision in relation to 'Not to make or use counterfeit stamp'. Sub-Section (1) of this Section criminalized that no person shall, with the intention of using as genuine a counterfeit stamp, make or attempt to make, purchase or sell, take, give or export or import or use as genuine such stamp or attempt to commit so or retain such stamp with him/her. For the proposed of Sub-Section (1), with an imprisonment not exceeding 5 years and a fine not exceeding 50 thousand rupees prescribed by the Sub-Section (2) of this Section. Similarly, Section 269 has made provisions in respect of No to bring into use a re-used stamp. Sub-section (1) of this Section has criminalised the re-use as genuine an used stamp or attempt to do so knowing that it is a stamp already used and sub-section (2) has provide the punishment with an imprisonment not exceeding one year and with a fine not exceeding ten thousand rupees. Likewise, Section 270 of the Act has arranged the provision of the 'No to remove stamp affixed on a public document'. Sub-section (1) of this Section has criminalised the remove or attempt to remove any stamp affixed on any public document, and sub-section (2) has provide the punishment with an imprisonment not exceeding 6 months or with a fine not exceeding 5 thousand or with the both.

Section 284, of the Chapter on 'Offense Relating to Criminal Trespass and Criminal Mischief' of this Code has made provisions relating to 'Not to commit criminal trespass'. Sub-section (1) of this Section has provided that 'no person shall commit or cause to be committed criminal trespass into property of anyone,' and Sub-section (2) of this Section clarify that for the purpose of sub-section (1), whoever, with the intention of committing the following acts in an unauthorized manner, enters into, with or without manhandling, a property under a person's ownership or possession without such person's permission or having entered with due permission, remains there or uses that property with the intention of committing any such act, shall be deemed to have committed a criminal trespass. For the proposed of Section 284(1), punishment for

attempting that offence has been prescribed by the Section 284(3)(a) of this Code.

The Code has provided various provisions even inchoate offences are punishable with similar punishment as complete offences. Similarly, in many provisions there have not clear about the inchoate offence regarding the attempt to crime. On the other hand, it has many provisions from which it can be seen that there will be double punishment if a crime is committed. Even attempting an impossible act is criminalized under the Muluki Penal (Code). In the so many places, there has the confusion regarding the punishment to principal offenders and secondary offenders. This Code have not be incorporate to principles relating to 'substantial act', 'last stage theory' and 'dangerous proximity theory' which are cardinal principle in relation with attempt to crime as while inchoate crimes.

### **7.3 Incitement:**

The Muluki Criminal (Code), 2074 has criminalized the abetting a crime. Section 35 of the code has made a provision of the not to abet a crime. Sub-section (1) has prevent the abet act to commit an offence. Sub-section (2) criminalized the incitement by a person instigates another person to commit an offense, he/she is deemed to have abetted. Similarly, sub-section (3) provided the punishment for an abettor. Sub-section (4) has criminalized and provides the punishment where an abetted person has committed any offense other than the one as abetted and if such offense was committed under the influence of the instigation. The incitement to such offences are incorporated in various Sections of the Muluki Penal (Code). Those are as follows:

Section 49, Chapter on 'Offences against the State' of this Code has mentioned the provision on 'assault on sovereignty or integrity'. Section 49(1) of the Code has criminalized that no person shall, with the intention of assaulting on the sovereignty, territorial integrity or national unity of Nepal, form a military or paramilitary organization or attempt to commit so or create disorder of any type or attempt or cause to be committed so. Sub-Section (5) (a) of this section has prescribed the punishment life imprisonment. Similarly, Section 49(4) of the code has criminalized the 'commit or cause to be committed any act that may give rise to hatred, enmity or contempt on grounds of class, caste, religion, region, community or similar other ground, which is likely to jeopardize the sovereignty or territorial integrity of Nepal or attempt or abet to committing so or hatch a conspiracy to commit so or disrupt or cause to be disrupted the good harmonious relationship subsisting among different castes, races or

communities. The punishment With an imprisonment not exceeding 10 years and fine not exceeding one Lakh rupees has been prescribed for this crime.

Similarly, Section 50 of the Code has the provision on ‘Sedition’. Sub-section (1) of this Section has criminalized that no person shall, with the intention of overthrowing Government of Nepal or the constitutional structure of Nepal, demonstrate or use military or paramilitary or criminal force and thereby create any type of disorder or form a military or paramilitary organization with arms and ammunition or hatch a ...incite to commit such an act. The punishment with the imprisonment not exceeding 25 years has prescribed for this crime.

Section 55 of the Code has criminalized the crimes relating to ‘provoke soldier or policeman’. Sub-section (1) of this section criminalised the attempt on abet to desert or provoke or incite to violate discipline or seduce from duty an incumbent soldier, policeman or armed policeman or officer of the Nepali Army, Nepal Police or Armed Police to desert the Nepali Army, Nepal Police or Armed Police or harbour a deserter from the Army, Police or Force having the knowledge, or having the reasons to believe, that such person is a deserter. Section 52(2) of this Code has prescribed the punishment with an imprisonment not exceeding 10 years and a fine not exceeding one Lakh rupees for the offence of Sub-section (1).

The offence of ‘Commit espionage’ has criminalized by Section 56 of the Code. Section 56(1) has provided that ‘assaulting on the sovereignty, security or territorial integrity, seducement of any foreign country, give anyone information about the military status of Nepal, strategic arrangement or matters of internal security or the matters that have to be kept confidential by Government of Nepal from the political, economic or diplomatic viewpoint or confidential document, or commit any act to give such an information.’<sup>106</sup> Similarly, Section 56(2) has prescribed the such punishment that commits espionage as to the matters relating to the military status of Nepal, strategic arrangement or matters of internal security shall be liable to a punishment with exceeding 25 years;<sup>107</sup> espionage as to the matters that have to be kept confidential by Government of Nepal or any other confidential document shall be liable to a punishment with imprisonment of five to ten years;<sup>108</sup> and Whoever commits espionage about the matters other than those referred to in

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<sup>106</sup> Section 56(1) of the Muluki Penal (Code), 2074.

<sup>107</sup> *Ibid*, Section 56(2)(a).

<sup>108</sup> *Ibid*, Section 56(2)(b).

clause (a) or (b) shall be liable to a punishment with imprisonment not exceeding five years and with a up to 50 thousand rupees fine,<sup>109</sup>

Section 64, Chapter of ‘Offenses against Public Tranquillity’ of this Code has made a provision in relation to the ‘Not to incite commission of riot’. Clause (1) of this Section has mentioned the provision that ‘No person shall, with the intention of committing a riot or with the knowledge that a riot may be committed, incite any person to commit riot.’ The code has prescribed the punishment that an imprisonment not exceeding one years or a fine not exceeding 10 thousand rupees or with the both as per the offence.

Section 126, of Chapter on ‘Offense against Public Interest, Health and Safety, Convenience and Morals’ of this Code has made a provision in relation to the attempt on ‘Not to beg or cause to be begged alms’. Clause (1) of this Section has criminalized to the attempt on that ‘no person shall beg alms in a public place or cause or incite a minor to beg alms in the pretext of singing, dancing, playing or doing any other work. The explanation of the Section excluded the begging carried out by sage, saint, hermit or monk by begging of alms house to house as per the tradition practiced from time immemorial or alms is so donated.<sup>110</sup> "Public place" means any road, street, park, vehicle parking place, Government office or office premise and also includes vehicle in public use.<sup>111</sup>

Section 126(2) of the Code has prescribed the punishment for such offence as follows:

- (a) any person begging for the first time, shall be liable with imprisonment for up to one month and up to one thousand rupees fine, and for the second time, and after that shall be liable with imprisonment for up to one month and up to two thousand rupees fine,
- (b) any person asked or order to begging for the first time, shall be liable with imprisonment for up to one year and up to 10 thousand rupees fine, and for the second time, and after that shall be liable with imprisonment for up to three years month and up to 30 thousand rupees fine. However, this Section not criminalized order or asked to begging by such person but has a punishment for those person by the sub-section (2)(b).

The Code has made a provision in relation to ‘Conversion of Religion’ under the Section 158, Chapter of ‘Offenses Relating to Religion’. Section 158(1) has criminalized the conversion of any person's religion or make an incitement for

<sup>109</sup> *Ibid*, Section 56(2)(c).

<sup>110</sup> Section 126(1)(a) of the Muluki Penal (Code), 2074.

<sup>111</sup> *Ibid*, Section 126(1)(b).

it or abet anyone therefor and imposed the punishment by the Sub-section (3) of this Section that imprisonment not exceeding 5 years and with a fine not exceeding 50 thousand rupees or with the both.

Section 185, Chapter of ‘Offenses Relating to Human Body’ of this Code has made a provision in relation to ‘Not to abet to commit suicide’. Clause (1) of this Section has provided that ‘no person shall abet a person to commit suicide or create such circumstances, by way of incitement, that may lead him/her to the extent of committing such an act’. Similarly, Section 185(2) of the Code has prescribed the punishment that imprisonment not exceeding 5 years and with a fine not exceeding 50 thousand rupees for the offence on Clause (1) of this Section.

Section 215, Chapter on ‘Offense Relating to Abduction or Taking Hostage’ of this Act has made a provision in relation to the incitement to commit the offense. Sub-Section (2) of this Section has made the provision that notwithstanding anything contained in sub-section (1), the person who conspiracy to commit or being an accomplice shall be liable to a punishment half of the punishment for the said offence.

The Muluki Penal (Code) has provided various provisions regarding the offence of incitement. However, in many provisions has not a practicable such as not to beg or cause to be begged alms and its punishment.

#### **7.4 Accomplice:**

Accomplice liability is logically separate from inchoate crimes, but is often considered along with them. The accomplice is guilty of all crimes that he aids or encourages; and all other foreseeable crimes committed along with the aided crime. The mental state of offenders is to intent that the crime be committed. The limitation on accomplice liability are: i) mere presence at the scene of a crime is not enough; accomplice must aid or encourage the principal, ii) mere knowledge that a principal will commit the crime is not enough; iii) victims of crimes cannot be accomplices (minors cannot be convicted of selling alcohol to a minor because they are the victim). The Muluki Criminal (Code), 2074 has criminalized the aiding and abetting a crime. Section 36 of the Code has criminalized the accomplice or aiding and abetting offence. Sub-section (1) has provided that ‘no person shall become an accomplice of an offender.’, Sub-section (2) provides the provisions that ‘A person who, with the intention of committing an offense, provides aid to commit such an offense or other offense or who escapes, hides offender after commission of crime or who provides means or otherwise provides assistance to commit or cause to be committed an

offense shall be deemed to be an accomplice.’ Similarly, Sub-section (3) has provided the punishment to the accomplice or aiding and abetting persons. The sub-section (3)(a) has provide that ‘a person who commits offense with participation in a criminal conspiracy or provides means or place to commit offense or deprives the person against whom the offense is committed of the right to private defence or who orders or advises to commit an offense, shall be punished as if the offense were committed by himself/herself,’ and (b) has provide that ‘for an accomplice other the one referred to in clause (a), punishment not exceeding one half of the punishment provided for commission of such offense according to the degree of his/her involvement in the act of offense.’ The Accomplice's liability to such offence is incorporate in the various Section of the Muluki Penal (Code).

## **8. BASIC CHANGES BROUGHT BY THE MULUKI PENAL CODE REGARDING INCHOATE CRIME**

The Muluki Criminal (Code) Act, 2074 has adopted new concepts or new provisions relating to inchoate crime in Nepalese criminal justice system. The provision of inchoate offence in separate chapter of Code is an important achievement made by the Code. This code is more scientific and comprehensive in comparison to previous codes. This code has tried to revise all the provisions of previous codes. At the same time, this code has made an endeavour to make it compatible it with the international instruments and to comprise contemporary conceptual standards developed in criminal jurisprudence. Nevertheless, there are some rooms for improvement in it, regarding the viewpoint of theoretical and practical aspects. Therefore, it can be taken as a big achievement towards the effort of codification of criminal law in the history of Nepalese Legal System. The basic and significant features of the basic changes brought by the Code regarding the inchoate crime (Conspiracy, Attempt and Incitement) can be mentioned as follows:

Basically, the Code has criminalized inchoate crime (Conspiracy, Attempt and Incitement) under Part- I, Chapter- 3 and has clearly provided the concept of inchoate crime and denotes clearly and expressly of the concept of inchoate crime in the history of Nepalese criminal law. Similarly, the code has continued all the areas of criminalization, particularly the traditional crimes relating with attempt, conspiracy and incitement unless it becomes irrelevant with contemporary context. Various undesirable conduct that is harmful to society and country, and some conducts need to be criminalized pursuant to the obligation under international instruments to which Nepal is a party, have criminalized the inchoate offences.

The Code has codified and consolidates all provisions and modernized, explicit, and implanted by regulating the legal system of the provisions regarding inchoate offence of the Legal Code, 1963. This Code has kept the inchoate offences namely conspiracy, attempt and incitement in a separate paragraph. Similarly, several new areas of criminalization as identified by the code can be illustrated as genocide, incitement of suicide, homicide by recklessness, homicide by negligence, transferred malice, mistaken of identifying of victims and provided the punishment for such act and its inchoate offence.

The Code has adopted the extra territorial jurisdiction i.e. committing any offense outside Nepal is punishable as if they were committed within Nepal. Similarly, this Code has provided the extra territorial jurisdiction for a Nepali citizen who commits outside Nepal against a Nepali citizen that any of the offense, that person shall be punished pursuant to this Code as if the offence were in Nepal. The code has incorporated some new concept of inchoate offences, which are incorporate in first time in Nepalese criminal law.

The Code has categorized the inchoate crime as conspiracy, attempt and incitement. However, in the same chapter it has incorporated the provisions of 'accomplice'. Section 36 of the Code has criminalized the accomplice or aiding and abetting offence. Aiding and abetting of accomplice means or 'no to be accomplice' means to help or hide the person who committed the crime, or facts regarding the crime. This provision is related with the concept of parties to the crime. At early common law, parties to crime were divided into four categories. A principal in the first degree actually committed the crime. A principal in the second degree was present at the scene of the crime and assisted in its commission. An accessory before the fact was not present at the scene of the crime, but helped prepare for its commission. An accessory after the fact helped a party to the crime after its commission by providing comfort, aid, and assistance in escaping or avoiding arrest and prosecution or conviction. In modern times, parties to crime are classified into two categories: principal, and accessories. The criminal actor is referred to as the principal, although all accomplices have equal criminal responsibility as parties to the crime. The Code has provided the principal offenders and secondary offenders have to be defined in provisions governing conspiracy but not in all in terms of prescribed punishment. There for provision of accomplice is not relevant in within the chapter of inchoate offence, so it has shown that this Code may not be conceptually clear regarding the inchoate offence and parties to the crime in modern context.

The Code has made different forms of punishment for different offences on the bases of the principle of proportion that the punishment should be based on the gravity of offence and offender's culpability. In addition, the several forms of inchoate offence have arranged the imprisonment with fine. The Code has provided the several provisions even inchoate offences are punishable with similar punishment as complete offences. It can be effect that there will be double punishment if a crime is committed. It is not clear what will happen if just conspiracy is accomplished and there is no overt act done. Even conspiring and attempting an impossible act is criminalized and imposed the punishment under the Code. The several prescribed punishment which are related with inchoate offence are not scientifically, rationally, and practically sound and justifiable.

The Code has criminalized and imposed the punishment for inchoate offence even in the condition when it is impossible to commit crimes. The offender of inchoate crime or incomplete crime is liable to half of the punishment of the complete offence. However, the code has prescribed full punishment for various inchoate offences, which is inconsistent with the concept of inchoate offence. On the other hand, the Code has prescribed the double punishment in several offences such as the offender conducts conspiracy and other crime simultaneously. If discretionary power were provided to the court, the judge would be able to determine the suitable punishment to the accused. Similarly, there is a provision of punishment for criminal conspiracy, incitement, supporter or secondary offender for which punishment has not been stipulated. There is a provision of punishing the offender according to his/her role and degree of the crime. It is necessary to make demarcation of where a conspiracy ends and attempt begins. The content of 'free will' has been missing in inchoate offences provisions. Principles relating to 'substantial act', 'last stage' and 'dangerous proximity', which are cardinal to inchoate crimes, have not been incorporated in the Code. The Code does not clearly prescribe punishment to accomplice assisting in different stages of commission of crime. The criteria for determining conspiracy also have to be set. Likewise, the punishment prescribed for inciter that is equal to that of the principal offender of the crime does not sound reasonable.

The code has not adopted the scientific system on the determination punishment for inchoate offences. The court has not been convinced that the court is entitled to be punished by the lower or upper corner due to the indecent rights for imposed the punishment for the inchoate offence. The Code also there is lacking of basic principle or fundamental criteria for the use of

discretionary power by the judge in terms of punishing the offenders for inchoate offences. The provisions regarding to offence of incitement have to be made clearer. In some cases, the punishment for inciter is severer than that to the offender himself/herself, for instance, a person committing suicide due to incitement. The code is silent as to the liability of primary and secondary inciter when there are multiple levels of incitation offence. The court has been given the discretionary power for determining reasonable compensation amount and ensures the right to compensation of the victims. The rationale behind this provision is that the damage to the victim from criminal acts can be qualitatively and quantitatively different from time to time and case to case.

According to the Code for arising criminal liability for the offence of conspiracy, it is necessary that a minimum of one person who has approved/consent to the conspiracy should have done any work for the purpose of the implementation of conspiracy. It is not clear whether a person will be liable of not if any person participating in conspiracy and without carrying out any other work disclosed the conspiracy? There is no consistency in the punishment prescribed for conspiracy is usually half of the punishment for principle offence and sometimes it is equal to principal offence.

## 9. CONCLUSION

It is clear that the inchoate crime is not similar to the other crimes as stated under the Muluki Criminal (Code), 2074. These crimes do not look into the merger of the requisite to commit a crime and its subsequent actus reus which is the commission of that crime. Such inchoate offences when committing the act believes that the actus reus will be the same as the mens rea, in the sense that they will both be towards the same act, this belief is considered as enough to prosecute these individuals. In the offence of incitement, the same place true. The mens rea will be the fulfilment of the final goal of the individual whereas the actus reus will be an incitement or an omission or assistance given in the furtherance of the crime to be committed which is the end goal. The code has endorsed and tried to consolidate the concept of inchoate offence. Conceptually still Nepalese criminal law has persisted traditional nature. The term 'inchoate offence' has not been defined till today by the Nepalese criminal law even in the Code. The Code is also silent on the basic conceptual part of inchoate offence such as it is not distinct between inchoate offence and complete crime in the matter of punishment for some offences. Similarly, there is lack of clear definitions of core concepts of conspiracy, attempt and incitement. Indian and English legal definition is clear in this regard. The criminal law of Nepal is mainly a product of indigenous society and has grown

traditionally. However, the Code has tried to modernize the criminal law based on many modern notions of criminal jurisprudence. In this regard, Nepalese criminal law is still very complex and complicated. That is why from the discussion made above in this article it can be concluded that the Code has tried to incorporate the basic concepts of inchoate crime and criminal jurisprudence, but it has many rooms to make more scientific and flexible. It is also necessary to make it more complete and able to face the various challenges that are posed by the emerging criminal offence. The Code has revised, integrating, modernizing, scaling and clearing to the overall criminal laws. In this context, the Code also revised, modernization, scaling and clearing explicitly inchoate crime. It has arranged by the inchoate offence based on the new concept of criminal law and it has tried to prescribe appropriate punishment. Likewise, this Code has criminalized the first time in Nepal that incitement of suicide and provided the punishment for such act. On the other hand, this Code also criminalized the throwing of child, minors, disable, and adult individuals by their guardians or parents, who are having the responsibility to care them. Similarly, the Code has made genocide as grievous crime and prescribed rigorous punishment for it. However, some provisions of this Code may create a problem in the course of implementation. The Code has provided several provisions even inchoate offences are punishable with similar punishment as complete offences. It can be effect that there will be double punishment if a crime is committed. It is not clear what will happen if just conspiracy is accomplished and no overt act has been done. Even conspiring and attempting an impossible act to criminalize and impose the punishment under the Code. The several punishments prescribed by the code are related with inchoate offence are not prescribed scientifically, rationally, and practically sound and therefore are not justifiable. Another issue come into existence in this respect, is separate criminalization attempt of all crimes create a confusion that some crimes are take as actually acted crimes. They have no option of attempt like forgery, cheating and so on. This creates a situation of over criminalization.

The Code needs revision in order to make inchoate offence as a separate category of criminal offence incorporating and including all conceptual provisions, which are recognized by modern criminal jurisprudence. Nepalese criminal law should consider the statutory recognition to inchoate crime or incomplete circumstances. In Nepal, the category, specific elements of inchoate offence have not precisely defined as in other common law countries. The present provisions relating to inchoate offence should be revised and it must be defined in terms of explicit or positive mental elements or absent of its bases on

theory and international practice. At the same time, it is necessary to exclude some crimes from the ambit of chapter 3, which have no room of attempt.



# Concept of Genocide and Relevant Provisions in the New Criminal (Code) Act, 2017 of Nepal

Vijay Prasad Jayshwal\*

## ABSTRACT

War crimes, Crimes against humanity, aggression and genocide are recognized in the international law. None of these crimes except the crime of genocide has able to seek global attention along with international lawyers and states. It has seen that when the allegations of genocide are raised, the world pricks up its ear and it creates a kind of resonance and positive vibes among the international lawyer. The international community's become more active than expected performances and also all non-state actors become alarmed in each outcome and progress of such allegations. Genocide is not doubt as Customary International Law (hereafter CIL) and also Jus Cogens, widely and globally condemned by either Member to UN or non-Member. Genocide is as old as human civilization but has able to have common legal conception in post 1948 only due to its vague and multiplicity in nature.

## 1. INTRODUCTION

An unforgettable moment in human civilization was witnessed during the 20<sup>th</sup> century with huge destruction of physical properties and human conscience under World War I and II. This episode was not stopped rights there but went further acceleration to “cold war” between the West and the Soviet Union or called, 'Capitalist vs. Communist' and their race for influence, which turned to be named as proxy wars in decolonizing and developing countries as

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new nation striving for independent recognition and stability from colonial exploitation and miseries.<sup>1</sup> Such as, from 1915 to 1918 more than one million Armenians, including women and children, were moved from their homeland through death marches and massacres by the Turkish government was widely covered and condemned in the international community forum. As well as, from 1932 to 1933 Stalin starved up to seven million Ukrainians as a part of an 'ideological genocide- undefined terms or called it political genocide' (up to sixty-six million Soviet citizens died from 1917 to 1957).<sup>2</sup> Similarly, another major human induced act was from 1938 to 1945 in the Hitler's regime as 'pure racial theory' was observed.

After that, Winston Churchill called genocide 'the crime without a name witnessing all prior acts'.<sup>3</sup> In 1933 Lemkin made a proposal to the International Conference for Unification of Criminal Law convened in Madrid. He requested the codification of what he called the connected crimes of "barbarity and vandalism" to prohibit the annihilation of racial, ethnic and religious groups. His proposal drew attention to the slaughter of Armenians during World War I and warned the conference of the rise of Hitler. By barbarity *Lemkin* meant "the premeditated destruction of national, racial, religious and social collectivities." Vandalism meant "the destruction of works of art and culture, being the expression of the particular genius of these collectivities."<sup>4</sup> Because the crimes against the Armenians shocked the world, Lemkin proposed that they be repressed universally wherever and whenever they were committed, disregarding state borders and under universal jurisdiction.<sup>5</sup> During the interwar period when many states were looking inward, concerned about their internal affairs, Lemkin's proposal for collective action was considered but not taken seriously.<sup>6</sup>

During World War II as the Nazi horrors predicted by Lemkin became real, he coined genocide to replace "barbarity and vandalism" because the Nazi's crimes further extended the old phenomenon of destroying a particular group. By genocide he meant "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aims

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<sup>1</sup> Kok-Thay Eng, *Redefining Genocide*, available at [http://www.genocidewatch.org/images/AboutGenRedefining\\_Genocide.pdf](http://www.genocidewatch.org/images/AboutGenRedefining_Genocide.pdf). (Accessed on March 3, 2018).

<sup>2</sup> Leo Kuper, (1981), *Genocide: Its Political Use in the Twentieth Century*, New Haven and London: Yale University Press, pp. 96-97.

<sup>3</sup> *Ibid*, p. 12.

<sup>4</sup> Samantha Power (2002), *A Problem from Hell: America and the Age of Genocide*, New York: Basic Books, p. 43.

<sup>5</sup> *Ibid*, p. 29.

<sup>6</sup> *Ibid*, p. 22.

of annihilating the groups themselves.”<sup>7</sup> Lemkin intended to cover the protection of all groups including “physical, biological, political, social, cultural, economic, and religious.”<sup>8</sup> Lemkin considered the destruction of culture a second type of genocide, later known as ethnocide.<sup>9</sup> The first type of genocide was the total or near annihilation of a group and the second was the combination of massacre and eliminating a culture.<sup>10</sup>

The term ‘genocide’ was coined by Raphael Lemkin in his 1944 work, *Axis Rule in Occupied Europe*.<sup>11</sup> This term has become known to all and had such rapid success in both legal and other social science discipline.<sup>12</sup> It was further introduced in the English language,<sup>13</sup> and was used in the indictment of the International Military Tribunal (IMT), and within two years, it became the subject of a United Nations General Assembly Resolution. The 1948 adoption of the Convention on the Prevention and Punishment of the Crime of Genocide was inked with detailed and technical definition as understood a ‘crime against the law of nations’ which was still struggling to have a shape. The preamble of the Convention recognizes ‘that at all periods of history genocide has inflicted great losses on humanity’.<sup>14</sup>

This is not first binding legal documents of universal nature which has outraged any act of ‘genocidal in nature’ rather some inferences were also seen in regards to the protection of national, racial, ethnic and religious groups from persecution during the signing of the Treaty of *Peace of Westphalia of 1648*, which has further extended to provided certain guarantees for religious minorities are supposed to be prone victim of genocidal attack.<sup>15</sup> Similarly some of the other earlier treaties like the protection of Christian minorities

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<sup>7</sup> *Ibid*, p 43.

<sup>8</sup> *Ibid*, p. 40.

<sup>9</sup> Frank, Chalk and Kurt Jonassohn, (1990), *The History and Sociology of Genocide: Analysis and Case Studies*, New Haven and London: Yale University Press, p.43.

<sup>10</sup> *Ibid*.

<sup>11</sup> Raphael Lemkin, (1944), *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace.

<sup>12</sup> Lemkin later wrote that ‘[a]n important factor in the comparatively quick reception of the concept of genocide in international law was the understanding and support of this idea by the press of the United States and other countries’: Raphael Lemkin, ‘Genocide as a Crime in International Law’, (1947) 41 AJIL 145, n. 9, p. 149.

<sup>13</sup> Leo Kuper, *Genocide, Its Political Use in the Twentieth Century*, New Haven: Yale University Press, 1981, p. 12.

<sup>14</sup> *Supra Note 11*.

<sup>15</sup> William A. Schab, (2000), *Genocide in International Law The Crimes of Crimes*, National University of Ireland, Galway, Cambridge University Press, p.14, available at <http://www.javeriana.edu.co/blogs/ildiko/files/Genocide-in-International-Law1.pdf> (Accessed on March 7, 2018).

<sup>16</sup> *Treaty of Peace between Sweden and the Empire*, signed at Osnabruck, 14(24) October 1648; Dumont VI, Part 1, p. 469, arts. 28±30; *Treaty of Peace between France and the Empires*, signed at Munster, 14(24) October 1648, Dumont VI, Part 1, p. 450, Art. 28.

within the Ottoman Empire<sup>16</sup> and of francophone Roman Catholics within British North America were achieved under the genocide literature.<sup>17</sup> The further incidence of genocide after the adoption of legal, binding, universal character of hard law was not stopped. Such as, the incidence of 1975 to 1979 the Khmer Rouge implemented an extreme plan to turn Cambodia into an agricultural utopia, resulting in nearly two million deaths and two to three million Cambodians were forced to evacuate their urban homes and ordered into slave labor in the countryside.<sup>18</sup> Similarly, in Rwanda in 1994 up to eight-hundred-thousand Tutsis and moderate Hutus were hacked to death with machetes in only three months, and from 1992 to 1995<sup>19</sup> two hundred thousand Muslims were killed by the Serbs in the former Yugoslavia. These all conflict had one thing in common like indiscriminate and systematic destruction of the members of a group, they belonged to that group. These concerns with the rights of national, ethnic and religious groups evolved into a doctrine of humanitarian intervention which was invoked to justify military activity on some occasions during the nineteenth century.<sup>20</sup>

One of the main issues related to the prevention of genocide is its definition and understating the term very commonly among all scholar of genocide. Since Raphael Lemkin first coined the term in 1944, genocide has been understood differently by different people reflecting their nature and socio-political underpinnings. The legal definitions of genocide are more specific than the sociological ones. Legal definitions are mainly used to prevent and identify the crime of genocide, whereas sociological definitions seem to be coined more broadly to assist research. The other international legal instruments have also condemned similar act of genocide with their own languages. Such as, the preamble to the Hague Regulations contains the promising '*Martens clause*'<sup>21</sup>,

<sup>16</sup> *Treaty of Peace between Russia and Turkey*, signed at Adrianople, 14 September 1829, BFSP XVI, p. 647, Arts. V and VII.

<sup>17</sup> *Treaty of Peace and Friendship between France and Great Britain*, signed at Utrecht, 11 April 1713, Dumont VIII, Part 1, p. 339, art. 14; *Definitive Treaty of Peace between France, Great Britain and Spain*, signed at Paris, 10 February 1763, BFSP I, pp. 422 and 645, Art. IV.

<sup>18</sup> Kathryn M. Klein, (2006), "Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia", *Northwestern Journal of International Human Rights*, Vol.4, Issues 3, p.1, available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1044&context=njihr> (Accessed on March 7, 2018).

<sup>19</sup> Jolyon Mitchell, *Remembering the Rwandan Genocide: Reconsidering the Role of Local and Global Media*, available at <http://www.globalmediajournal.com/open-access/remembering-the-rwandan-genocide-reconsidering-the-role-of-local-and-global-media.pdf> (Accessed on March 3, 2018).

<sup>20</sup> Michael Reisman, (1973), *Humanitarian Intervention to Protect the Ibos*, in Richard B. Lillich, ed., *Humanitarian Intervention and the United Nations*, Charlottesville, VA: University Press of Virginia, pp. 178-83.

<sup>21</sup> The Martens Clause was introduced into the preamble to the 1899 Hague Convention II – Laws and Customs of War on Land. The clause took its name from a declaration read by Friedrich Martens, the Russian delegate at the Hague Peace Conferences of 1899. It reads as follows: Until a more complete

which states that 'the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'.<sup>22</sup> But aside from sparse references to cultural and religious institutions,<sup>23</sup> nothing in the Regulations suggests any particular focus on vulnerable national or ethnic minorities.<sup>24</sup> The idea of an international war crimes trial had been proposed by *Lord Curzon* at a meeting of the Imperial War Cabinet on 20 November 1918.<sup>25</sup> The British emphasized trying the Kaiser and other leading Germans, and there was little or no interest in accountability for the persecution of innocent minorities such as the Armenians in Turkey.<sup>26</sup> The objective was to punish 'those who were responsible for the War or for atrocious offences against the laws of war'.<sup>27</sup> As *Lloyd George* explained, '[t]here was also a growing feeling that war itself was a crime against humanity'.<sup>28</sup> At the second plenary session of the Paris Peace Conference, on 25 January 1919, a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was created and these historical facts are studied under the subject of genocide literature.<sup>29</sup> Some scholars, however, do not make a distinction. Under the UN Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948<sup>30</sup>, genocide was defined in Article 2 as: ...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience. —  
 □ *Convention with respect to the laws of war on land (Hague II), July 29, 1899.*

<sup>22</sup> *Ibid*, Preamble. The Martens clause first appeared in Convention (II) with respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91BFST 988.

<sup>23</sup> *Ibid*, Art. 56.

<sup>24</sup> In 1914, an international commission of inquiry considered atrocities committed against national minorities during the Balkan wars to be violations of the 1907 Hague Regulations: Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, Washington: Carnegie Endowment for International Peace, 1914, pp. 230±4. The section entitled 'Extermination, Emigration, Assimilation', pp. 148-158, Documents acts that we would now characterize as genocide or crimes against humanity.

<sup>25</sup> David Lloyd George, (1938), "The Truth About the Peace Treaties", London: *Victor Gollanez*, pp. 93-114.

<sup>26</sup> *Ibid*, p. 93-114.

<sup>27</sup> *Ibid*, p. 93.

<sup>28</sup> *Ibid*, p. 96.

<sup>29</sup> Seth P. Tillman, (1961), *Anglo-American Relations at the Paris Peace Conference of 1919*, Princeton: Princeton University Press, p. 312, available at <https://press.princeton.edu/titles/2708.html> (Accessed on Feb 20, 2018).

<sup>30</sup> For more information, see *UN Convention on the Prevention and Punishment of the Crime of Genocide*, adopted in 1948 available at <http://www.refworld.org/docid/3ae6b3ac0.html> (Accessed on March 3, 2018).

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>31</sup>

There are a few shortcomings in this definition. First, as Chalk and Jonassohn suggest, there is a widespread application of the term genocide to a variety of unrelated situations with its own forms and approaches reflected in their customs and practices. Second, ethnocide, which is reflected in (c) and (e), is also a part of the definition that many scholars reject as well known content to constitute offense of genocide. Third, it is generally agreed that Convention's definition includes only four protected groups like a national, ethnical, racial or religious and the political groups ( was not included in definition), which have been the main victims since World War II is not included. It seems the perpetrators of World War II's genocide, as the French delegates correctly predicted,<sup>32</sup> tried to victimize the four protected groups on political grounds.

There are two notable points in Lemkin's principle. First, he intended to protect all groups within a nation. Second, he included ethnocide as a type of genocide. The 1948 Convention was a compromise of his original goals. It included ethnic groups and acts (c) and (e) as a partial measure to protect a culture. At the same time, it listed only four protected groups. In the early 1900s, Lemkin might have been right in valuing a culture because it is unique and takes a long time to establish. But in today's world of fragmentation,<sup>33</sup> in which we witness the fission and fusion of old and new cultures, cultures seem too mutable and unstable to define for protection. Equating their destruction with genocide seems odd. This is not meant to be disrespectful of Lemkin. As some delegates noted, "there was no absolute concept of genocide."<sup>34</sup> It is an evolving concept. The scholar like *Irving Louis Horowitz* defined genocide as "a structural and systematic destruction of innocent people by a state bureaucratic apparatus."<sup>35</sup> Accordingly, it seems that the Turkish, German, Cambodian, Rwandan, Yugoslav and Darfur cultures, not to mention approximately forty

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<sup>31</sup> *Supra* Note 9, at 44.

<sup>32</sup> *Supra* Note 2, at 27.

<sup>33</sup> James Rosenau, (2003), *Distant Proximities: Dynamics beyond Globalization*, Princeton: Princeton University Press.

<sup>34</sup> *Supra* Note 32.

<sup>35</sup> *Supra* Note 10, at 14.

other unofficially recognized instances of other countries' genocides.<sup>36</sup> Similarly, the respected sociologist *Helen Fein* said:

*"Genocide is the calculated murder of a segment or all of a group defined outside of the universe of obligation of the perpetrator by a government, elite, staff or crowd representing the perpetrator in response to a crisis or opportunity perceived to be caused by or impeded by the victim".*<sup>37</sup>

Genocide might not be a new social phenomenon that could be theorized but the methods and targeted or the way of infliction may be new to world community. It could be an old practice of brutal massacres commonly committed in antiquity and the middle Ages. The way is now open for a new definition with new look and values. The Genocidal act can be small (for example, where a small number of victims are systematically massacred over a relatively short period of time) or large and mature (where a large number of victims are killed over an extended period of time) although, the size has nothing to do with the severity and sanction or condemnation of the act. Some of studied as mature genocides include the *Armenian* death march, the *Jewish* Holocaust, the *Cambodian* Killing Fields, and the massacre of *Tutsis* in Rwanda. However, the number of victims does not make the act of genocide more or less barbaric than another which entails condemnation on its all forms globally. One of famous scholar, *Pieter N. Drost*, a Dutch law professor, who defined genocide as "the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivities as such."<sup>38</sup> As similar *Fein's* 1984 definition is differ on the point that *Fein* limited 'genocide' to occurring during a crisis and crisis is a general condition of a conflict. Placing the word "crisis" in a legal definition can be a burden because one has to prove the existence of a crisis in order to prove genocide. It is very less convincing in the legal fraternity and also lacks a proper binding legal, hard law to establish the presence of crisis and also to establish the 'intent of the person or group' for act of genocide.

There are some of terms used in the Convention which needs a strict definition. The controversial and ambiguous phrases in the document include the Reference to "seriously bodily or mental harm" constituting a form of genocide under Article 2 (b) of the Convention is not defined well. This was solved by

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<sup>36</sup> Barbara Harff and Ted Robert Gurr, (1988), "Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases since 1945," *International Studies Quarterly*, No. 32, pp. 359-371; "Genocide, Politicide, and other Mass Murder Since 1945, with Stages in 2005," available at <http://www.genocidewatch.org/genocidetable2005.htm> (Accessed on March 5, 2018).

<sup>37</sup> *Supra* Note 9, at 15.

<sup>38</sup> *Ibid.*, p. 13.

the interpretation in the Israeli trial court decision against Adolf *Eichmann* in 1961, convicting him of the "enslavement, starvation, deportation and presence of ...Jews... their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to....cause them inhumane suffering and torture."

## 2. HISTORICAL DEFINITIONAL EVOLUTION OF GENOCIDE

Although the term genocide is old but has new meaning as time passage in history but still there is in fact no consensus over the definition of what acts are covered, which groups are protected, nor of what causes it.<sup>39</sup> The term genocide has referred differently in the different region considering their local usage and customs along with wider reflection in local socio-cultural assemblages of societies and today it is considered as one of genocide as an "essentially contested concept."<sup>40</sup> These are some widely and commonly used nomenclature to denote genocide. Such as, Churban, Gukurahundi, Holocaust, Holodomor, Itsembabwoko, Lokeli, Medz Yeghern, Naqba, Porrajmos, Sayfo, Shoah and Sokumu and many more similar others. These all terms have a specific historical references and connection with specific nature of offense and crime which is today widely known as Genocide in legal language. Similarly, the term Genocide is further used with other similar "-cides" such as classicide, democide, ecocide, eliticide, gendercide, indigenocide, judeocide, libricide, inguicide, memoricide, omnicide, ethnocide, femicide/femnicide, politicide, poorcide, urbicide and fratricide and others used in both legal and social environment as well as in situation when a act is deemed to be under ambit of genocide.<sup>41</sup>

Despite of multiple languages and more than imagined numbers of terms to refer the crime of genocide, *Helen Fein*-as one of renowned scholar in genocide employ the UNGC definition<sup>42</sup> to maintain a common universe of discourse

<sup>39</sup> Karl Cordell and Stefan Wolff, (2010), *Genocide and Ethnic Conflict*, *Routledge Handbook of Ethnic Conflict*, p.1, available at [http://eprints.lse.ac.uk/26063/1/Genocide\\_and\\_ethnic\\_conflict\\_\(LSERO\\_version\).doc.pdf](http://eprints.lse.ac.uk/26063/1/Genocide_and_ethnic_conflict_(LSERO_version).doc.pdf) (Accessed on March 7, 2018).

<sup>40</sup> Benjamin Meiches, (2017), *Speaking of Genocide: Double Binds and Political Discourse*, *Genocide Studies and Prevention*11, 2, p. 1, available at <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1391&context=gsp> (Accessed on March 7, 2018).

<sup>41</sup> "When to Refer to a Situation as Genocide?" available at <http://www.un.org/en/genocideprevention/documents/publications-and-resources/GuidanceNote-hen%20to%20refer%20to%20a%20situation%20as%20genocide.pdf> (Accessed on Feb 19, 2018).

<sup>42</sup> Under the UN Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948, genocide was defined in Article 2 as: ...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:(a)Killing members of the group;(b)Causing serious bodily or mental harm to members of the group;(c)Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in

among genocide scholars, international lawyers and human rights monitors; to discriminate between victims of genocide and the violations of life integrity; and to recognize related violations in international law such as war crimes and crime against humanity.<sup>43</sup> Some of the key definitions and evolutions of genocide are ;

**Nehemiah Robinson (1960, Interpreting the UN Convention)**<sup>44</sup> – "*Genocide has been committed when acts of homicide are joined with a connecting purpose, i.e., directed against persons with specific characteristics (with intent to destroy the group or a segment thereof).*"

**Jack Nusan Porter (1982)**<sup>45</sup> - "*Genocide is the deliberate destruction in whole or in part by a government or its agents of a racial, sexual, religious, tribal or political minority*".

**Yehuda Bauer (1984)**- "*Genocide is the planned destruction since the mid-nineteenth century, of a racial, national or ethnic group as such by the following means: (a) selective mass murder of elites or parts of the populations; (b) elimination of national (racial, ethnic) culture and religious life with the intent of 'denationalization' (c) enslavement with the same intent...*"<sup>46</sup>

**John L. Thompson and Gail A. Quets (1987)**- Genocide is the extent of destruction of a social collectivity by whatever agents, with whatever intentions by purpose actions which all outside the recognized conventions of legitimate warfare.<sup>47</sup>

**Isidor Wallimann and Michael N. Dobkowski (1987)** "*Genocide is the deliberate organized destruction in whole or in large part of racial or ethnic groups by a government or its agents. It can involve not only mass murder but*

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part;(d)Imposing measures intended to prevent births within the group;(e)Forcibly transferring children of the group to another group.

<sup>43</sup> Rene Lemarchand, (2011), "Introduction, in Lamarchand, ed; *Forgotten Genocides: Oblivion, Denial and Memory*", Philadelphia, PA, University of Pennsylvania Press, p.9, available at <https://www.icermediation.org/wp-content/uploads/2015/09/Ren%C3%A9-Lemarchand.pdf> (Accessed on Feb 19, 2018).

<sup>44</sup> Nehemiah Robinson, (2008), *The Genocide Convention: Its Origins and Interpretation*, 40 Case W. Res. J. Int'l L. 315, Available at: <https://scholarlycommons.law.case.edu/jil/vol40/iss1/19> (Accessed on Feb 19, 2018).

<sup>45</sup> Jack Nusan Porter, (2018), *Defining Genocide*, p.12, available at <https://www.bartleby.com/essay/Defining-Genocide-Jack-Nusan-Porter-FK3AS32C8BRA> (Accessed on March 9, 2018).

<sup>46</sup> "Holocaust and Other Genocides", available at [http://www.un.org/en/holocaustremembrance/EM/partners%20materials/EWG\\_Holocaust\\_and\\_Other\\_Genocides.pdf](http://www.un.org/en/holocaustremembrance/EM/partners%20materials/EWG_Holocaust_and_Other_Genocides.pdf) (Accessed on March 9, 2018).

<sup>47</sup> "Fact Sheet - Definitions of Genocide", available at <http://www.jewishworldwatch.org/wp-content/uploads/2013/12/Genocide-Definitions-Fact-Sheet.pdf> (Accessed on March 9, 2018).

*also forced deportation (ethnic cleansing), systematic rape and economic and biological subjugation.*"<sup>48</sup>

**Henry Huttenbach (1988)** - Genocide is any act that puts the very existence of a group in jeopardy.<sup>49</sup>

**Barbara Harff and Ted Gurr (1988)** – *"By our definition, genocide and politicides are the promotion and execution of policies by a state or its agents which results in the deaths of a substantial portion of a group"<sup>50</sup> ..... In politicides the victim groups are defined primarily in terms of their hierarchical position or political opposition to the regime and dominant groups.*<sup>51</sup>

**Henry Huttenbach (1988)** - Genocide is a series of purposeful actions by perpetrators to destroy a collectivity through mass or selective murders of group members and suppressing the biological and social reproduction of the collectivity.....<sup>52</sup>

**Frank Chalk and Kurt Jonassohn (1990)**- *"Genocide is a form of one sided mass killing in which a state or other authority intends to destroy a group as that group and membership in it are defined by the perpetrator."*<sup>53</sup>

**Helen Fein (1993)**- *"Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim."*<sup>54</sup>

**Steven T. Kartz (1994)**- *"Genocide is the actualization of the intent, however successful carried out to murder in its totality any national, ethnic, racial,*

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<sup>48</sup> Isidor Waimann and Michael N. Dobkowski, *Introduction from Genocide and the Modern Age*, available at <https://surface.syr.edu/books/24/> (Accessed on March 9, 2018).

<sup>49</sup> Adam Jones, (2006), *Genocide: A Comprehensive Introduction* under chapter - *The Origins of Genocide*, 2006, p.17, available at [bhttp://acme.highpoint.edu/~msetzler/IntlSec/NewReadings2add/Genocide%20Jones%20Chapter%201.pdf](http://acme.highpoint.edu/~msetzler/IntlSec/NewReadings2add/Genocide%20Jones%20Chapter%201.pdf) (Accessed on March 9, 2018).

<sup>50</sup> *Supra Note 36*, at 359-371.

<sup>51</sup> *Ibid.*

<sup>52</sup> Henry R. Huttenbach, (1998), "Locating the Holocaust on the Genocide Spectrum: Towards a Methodology of Definition and Categorization" *Holocaust and Genocide Studies*, 3(3), pp.289-303, available at

[https://www.researchgate.net/publication/240581084\\_Locating\\_the\\_Holocaust\\_on\\_the\\_Genocide\\_Spectrum\\_Towards\\_a\\_Methodology\\_of\\_Definition\\_and\\_Categorization](https://www.researchgate.net/publication/240581084_Locating_the_Holocaust_on_the_Genocide_Spectrum_Towards_a_Methodology_of_Definition_and_Categorization) (Accessed on March 9, 2018).

<sup>53</sup> *Supra Note 9*, p.461.

<sup>54</sup> "Fact Sheet - Definitions of Genocide", available at <http://www.jewishworldwatch.org/wp-content/uploads/2013/12/Genocide-Definitions-Fact-Sheet.pdf> (Accessed on March 14, 2018).

*religious, political, social, gender or economic groups as these groups are defined by the perpetrator by whatever means.*"<sup>55</sup>

**Israel W. Charny (1994)**<sup>56</sup>- *"Genocide in the generic sense means the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of a an avowed enemy under conditions of the essential defenselessness of the victim"*.

**Irving Louis Horowitz (1996)**" *Genocide is herein defined as a structural and systematic destruction of innocent people by a state bureaucratic apparatus... Genocide means the physical dismemberment and liquidation of people on large scales, an attempt by those who rue achieving the total elimination of a subject people.*"<sup>57</sup>

**Manus I. Midlarsky (2005)**<sup>58</sup> - *"Genocide is understood to be the state-sponsored systematic mass murder of innocent and helpless mean, women and children denoted by a particular ethno-religious identity, having the purpose of eradicating this group from a particular territory."*

**Mark Levene (2005)**- *"Genocide occur when a state, perceiving the integrity of its agenda to be threatened by an aggregate population-defined by the state as an organic collectivity or series of collectivities- seeks to remedy the situation by the systematic, en mass physical elimination of that aggregate , in toto, or until it is no longer perceived to represent a threat"*<sup>59</sup>.

The same definition is followed (given by CPPCG) by the Rome Statute in defining the Genocide.<sup>60</sup> General Assembly Resolution 96(I) states that,

*"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other*

<sup>55</sup> Steven T. Kartz, available at <http://acme.highpoint.edu/~msetzler/IntlSec /NewReadings2add /Genocide%20Jones%20Chapter%201.pdf> (Accessed on March 14, 2018).

<sup>56</sup> Israel W. Charny, "The Psychological Satisfaction of Denials of the Holocaust or Other Genocides by Non-Extremists or Bigots, and Even by Known Scholars", *A Journal of Social Science*, IDEA, available at <http://www.ideajournal.com/articles.php?id=27> (Accessed on March 14, 2018).

<sup>57</sup> "Education Working Group Paper on the Holocaust and Other Genocides", 2010, available at [http://www.un.org/en/holocaustremembrance/EM/partners%20materials/EWG\\_Holocaust\\_and\\_Other\\_Genocides.pdf](http://www.un.org/en/holocaustremembrance/EM/partners%20materials/EWG_Holocaust_and_Other_Genocides.pdf) (Accessed on March 14, 2018).

<sup>58</sup> Manus I. Midlarsky, (2005), *The Killing Trap: Genocide in the Twentieth Century*, Cambridge University Press, p.463.

<sup>59</sup> Mark Levene, (2005), "Genocide in the Age of the Nation State", *TB Tauris*, London, Vol. 1, p.266.

<sup>60</sup> *Rome Statute of the International Criminal Court*, 2002, Art. 6.

*contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.”<sup>61</sup>*

These all definitions have either followed the harder or softer positions in regards to defining the term genocide. According to Christopher Rudolph:

*“..those who favor hard law in international legal regimes argue that it enhances deterrence and enforcement by signaling credible commitments, constraining self serving auto-interpretation of rules and maximizing ;' compliance pull' through increased legitimacy...”<sup>62</sup>*

Further, these all definitions have common with each others such as all focuses on *agents, victims, goals, scale, strategic* and *intent* in order to amount crime of genocide. The legal scholars have a very definite set of arguments to constitute offense of genocide comparability more stable than the sociologist. Such as in words of *Martin Shaw* in his book entitled, *what is Genocide?*, has given more emphasis on social elements attached to particular acts which are known as social destruction? He defines as:

*"Because groups are social constructions, they can be neither constituted nor destroyed simply through the bodies of their individual members. Destroying groups must involve a lot more than simply killing, although killing and other physical harm are rightly considered important to it. The discussion of group "destruction" is obliged, then, to take seriously...”<sup>63</sup>*

The offense of genocide may involve the various reasons and also may be accomplished through the various methods. The nature and content of crime of genocide differs as the nature of conflict differs in different societies. As psychologist *David Moshman* has written, all genocides involve multiple motives, complex interactions of causal factors, and groups that can be divided and defined in multiple ways.... A purist definition of genocide requiring unmixed motives, singular causes and discrete groups would render the concept irrelevant to the actual social worlds of human beings.<sup>64</sup> According to a Political Instability Task Force estimated that between 1956 and 2016 a total of forty-three genocides took place, causing the death of about 50 million people.

<sup>61</sup> *United Nations General Assembly Resolution 96(I)*, Fifty-Fifth Plenary Meeting, December 11, 1946.

<sup>62</sup> Christopher Rudolph, (2001), *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, p.659, available at [https://www.researchgate.net/publication/4733057\\_Constructing\\_an\\_Atrocities\\_Regime\\_The\\_Politics\\_of\\_War\\_Crimes\\_Tribunals](https://www.researchgate.net/publication/4733057_Constructing_an_Atrocities_Regime_The_Politics_of_War_Crimes_Tribunals) (Accessed on March 13, 2018).

<sup>63</sup> Martin Shaw, (2007), *What is Genocide?* pp.34, 106, 156.

<sup>64</sup> David Moshman, (2008), *Conceptions of Genocide and Perceptions of History*, London: Palgrave Macmillan, 2008, p.86, available at [https://www.researchgate.net/publication/304638128\\_Conceptions\\_of\\_Genocide\\_and\\_Perceptions\\_of\\_History](https://www.researchgate.net/publication/304638128_Conceptions_of_Genocide_and_Perceptions_of_History) (Accessed on March 13, 2018).

The UNHCR estimated that a further 50 million had been displaced by such episodes of violence up to 2008.<sup>65</sup>

## 2. ELEMENTS OF GENOCIDE: CRIME OF INTENT

Generally there are two broadest perspectives in order to define the notion of crime. The Social definitions of crime considered, as act or behavior that violates the norms of society or more simply, anti social behavior (*hereafter ABS*) which in legislative terms, is deemed to be behavior that causes 'harassment, alarm or distress to one of more persons not of the same household.<sup>66</sup> There are underlying three problems with this definition.<sup>67</sup> First, norms vary from group to group within a single society. There is no uniform definition of antisocial behavior. Secondly, norms are always subject to interpretation.<sup>68</sup> Each norm's meaning has a history and thirdly, norms change from time to time and from place to place. This has given notion of lack of any universal social definition of crime. It was also seen in having more than one understanding about the nature and notion of genocide. The sociologists have favored this definition as crime operates as core concept in modern society.<sup>69</sup> The second perspective is Legal definition- crime is an intentional violation of the criminal law or penal code, committed without defense or excuse and penalized by the state.<sup>70</sup> There are three major problems associated with this definition. First, some behaviors prohibited by the criminal law arguably should not be. This is called problem of over-criminalization. Second, some behaviors prohibited by the criminal law, the law are not routinely enforced. This is called problem of non-enforcement and third problem with legal definition is that some behaviors should be prohibited by the criminal law are not. This is called problem of under-criminalization.<sup>71</sup> The offense of genocide is neither over-criminalized nor under-criminalized.

<sup>65</sup> Charles H. Anderton & Jurgen Brauer, (2016), *Economic Aspects of Genocides, other mass Atrocities, And Their Prevention*, Oxford University Press available at <https://global.oup.com/academic/product/economic-aspects-of-genocides-other-mass-atrocities-and-their-preventions-9780199378296?cc=np&lang=en&> (Accessed on March 13, 2018).

<sup>66</sup> Andrew Millie, (2006), *Anti-Social Behavior: Concerns of Minority and Marginalized Londoners*, p.1, available at [https://repository.edgehill.ac.uk/4319/1/Millie\\_-\\_2006\\_-\\_IJC.pdf](https://repository.edgehill.ac.uk/4319/1/Millie_-_2006_-_IJC.pdf) (Accessed on March 1, 2018).

<sup>67</sup> Robert M.Bohm & Keith N. Haley, (2005), *Introduction of Criminal Justice*, (4<sup>th</sup> edn), Mc Graw Hill, p.31.

<sup>68</sup> *Ibid.*

<sup>69</sup> Wayne Morrison, *What is Crime? Contrasting Definitions and Perspectives*, p.3, available at [https://is.muni.cz/el/1423/podzim2015/BSS166/um/Morrison\\_\\_Wayne.\\_2009.\\_What\\_is\\_Crime.pdf](https://is.muni.cz/el/1423/podzim2015/BSS166/um/Morrison__Wayne._2009._What_is_Crime.pdf) (Accessed on March 1, 2018).

<sup>70</sup> Dragan Miovanovic, *Legalistic Definitions of Crime and an Alternative View*, p. 78, available at <http://anali.ius.bg.ac.rs/Annals%202006/Annals%202006%20078-086.pdf> Accessed on March 1, 2018).

<sup>71</sup> Undercriminalization involves the failure of the law to cover acts mala in se, while over-criminalization entails overextension of the law to cover acts that may more effectively be forced through the mores.

Generally, there are seven elements to constitute any act in contravention with penal laws of the country as crime which are either listed in law or are globally condemned. In the language of criminal law, it is called either *mala in se* (wrong in themselves) or *mala prohibita* (offenses illegal due to legal definition). The offense of genocide is under first categories with universal jurisdiction and global condemnation. The elements of crime are as below:

- a) Harm<sup>72</sup>
- b) Legality<sup>73</sup>
- c) Actus reus<sup>74</sup>
- d) Mens rea<sup>75</sup>
- e) Causation<sup>76</sup>
- f) Concurrence<sup>77</sup>
- g) Punishment<sup>78</sup>

It is only in a technical and ideal sense that all seven elements must be present. In practice, a behavior is often considered a crime when one or more of the elements of crime are absent. The offense of genocide requires generally presence of all elements in order to impose criminal liability in totality than partiality. One of most required elements in offense of genocide is "intent" which needs a specific definition. It is found that most scholars and legal jurists agree that intent or guilty state of mind defines exclusively genocide.<sup>79</sup> But it is always puzzled and non solved question, what defines intent and what shall be elements in order to define subject matters of specific intent or genera intent for the offense of genocide.

Many scholars studying substantive criminal law examine the crime in an analytical way to determine the elements of crime, determining these elements as the material or objective element (*actus reus*) and the mental or subjective

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As societies undergo transition from Gemeinschaft (communal, sacred societies) to Gesellschaft (associational, secular societies), they must rely more on for-mal agencies of control. For more information, see at at [https://uk.sagepub.com/sites/default/files/upm-binaries/26083\\_1.pdf](https://uk.sagepub.com/sites/default/files/upm-binaries/26083_1.pdf) (Accessed on March 1, 2018).

<sup>72</sup> There must be external consequences.

<sup>73</sup> The harm must be legally forbidden for a behavior to be crime. A criminal law must not be retroactive in nature. The crime has to be defined. It is also called principle of certainty in order to avoid ambiguity and impose strict sanction to offenders.

<sup>74</sup> Criminal conduct-specifically, intentional or criminally negligent (reckless) action or inaction that cause harm.

<sup>75</sup> Criminal intent or a guilty state of mind.

<sup>76</sup> The causal relationship between the legally forbidden harm and the prohibited conduct.

<sup>77</sup> There must be concurrence between the Actus Reus and Mens Rea.

<sup>78</sup> There must be statutory provision for punishment. No punishment, nor crime.

<sup>79</sup> The International Law Commission, ' which drafts treaties for the UN GA, " analyzed the question of genocidal intent ; " The prohibited acts enumerated in subparagraphs (a) to (e) of the Genocide Convention are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were like to result".."

element (*mens rea*).<sup>80</sup> The elements of the crime of genocide are derived from the definition of Article 2 of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. According to this, the crime of genocide is committing any of the acts enumerated in the Convention with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The mental element of genocide was not mentioned either during the Nuremberg trials or in the Convention. The discussion on the mental element of the crime of genocide or 'genocidal intent' took place within international criminal law for the first time during the trials at international courts for the Former Yugoslavia and Rwanda in order to prove the perpetrators' genocidal intent'.

The concept of genocidal intent developed in this article starts with an analysis of the structural particularities of the crime of genocide whose 'specific intent' refers not only to the consequence(s) of personal conduct, but also to those of collective undertakings. The understanding of 'intent to destroy a protected group as such' as a particular kind of specific intent: formally as intention to achieve a consequence which goes beyond the result that constitutes the *actus reus*. Materially, the proposed degree of intent refers to a two-fold approach which is based on a volitional ('intent') and/or a cognitive ('certain knowledge') element. Every element may be decisive depending on the mental state of the accused: either by virtue of the underlying purpose or by virtue of a certainty standard. While the consequences of the perpetrator's own conduct must be virtually certain, the adequate threshold for the occurrence of the (intended) overall action's result is practical certainty. In practice, such level(s) may be proven by exactly the same kind of circumstantial evidence current case law has relied on.<sup>81</sup> Sometimes, the term *intent* and  *motive* are used interchangeably but there is difference on it. According to *Gellately* and *Keiernan*, in criminal law, including international criminal law, the specific motive is irrelevant. Prosecutors need only to prove that the criminal act was intentional, not accidental. As one of notable legal figure *John Quigley* argues that:

*"In prosecutions for genocide, tribunals have not required proof of a motive... The personal motive of the perpetrator of the crime of genocide*

<sup>80</sup> Devrim Aydin, (2014), *The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts*, available at <http://journals.sagepub.com/doi/abs/10.1350/jcla.2014.78.5.943?journalCode=clja> (Accessed on March 13, 2018).

<sup>81</sup> Hans Vest, (2007), "A Structure-Based Concept of Genocidal Intent", *Journal of International Criminal Justice*, Volume 5, Issue 4, pp. 781–797, available at <https://doi.org/10.1093/jicj/mqm036> (Accessed on March 13, 2018).

*may be for example to obtain personal economic benefits or political advantage or some of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.*"<sup>82</sup>

It is said that the notion of *specific intent (dolus specialis)* "demands that the perpetrator clearly seeks to produce the act charged" (in the words of the International Criminal Tribunal for Rwanda, ICTR) which "in relation to genocide...means the perpetrator commits an act while clearly seeking to destroy the particular groups, in whole or in part. For many scholar and legal specialist, like *Katherine Goldsmith* said that, such specificity is "the only appropriate intent level for the crime of genocide as allowing any lower form of intent would risk situations that result in the destruction of a group with no intent of this destruction taking place, being wrongly seen as genocide."<sup>83</sup> The specific-intent for the legal purpose for the offense of genocide requires "in obtaining actual proof, beyond a reasonable doubt, that the perpetrator's intention was to destroy the group...." It is very much problematic to prove the perpetrator's state of mind without any objectivity of incidence. Goldsmith identifies an emerging trend in offense of genocide trials to incorporate a *knowledge-based* understanding of intent. The Rome Statute of the International Criminal Court (1998) for instance, declares that "a person has intent where...in relation to conduct, that person means to cause that consequences or is aware that it will occur in the ordinary course of events."<sup>84</sup> Similarly, the ICTR in its historic *Akayesu* judgment (1998)<sup>85</sup> stipulated that "*the offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.*"<sup>86</sup> As well as, in the words of the ICTR's *Akayesu* judgment,

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<sup>82</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by Resolution 260 (III) A of the U.N. General Assembly on December 9, 1948, Entry into force: January 12, 1951.

<sup>83</sup> Katherine Goldsmith, (2010), "The Issues of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach," *Genocide Studies and Prevention*, p. 241, available at <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1092&context=gsp> (Accessed on March 13, 2018).

<sup>84</sup> Alexander K.A. Greenwalt, (1999), "Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation," *Columbia Law Review*, p. 269, available at <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1337&context=lawfaculty> (Accessed on March 13, 2018).

<sup>85</sup> *The Prosecutor v. Jean -Paul Akayesu, Case No. ICTR-94-4-T*, Judgment on 2 September 1998 read that, sexual violence, rape was an integral part of the process of destruction, specifically to targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as whole. This judgment has given a new paradigm in order to consider other factors which may come across the physical cleaning to a particular group.

<sup>86</sup> William A Schabas, (2000), *Genocide in International Law*, Cambridge University Press, 2000, p, 212, available at <http://www.javeriana.edu.co/blogs/ildiko/files/Genocide-in-International-Law1.pdf> (Accessed on March 13, 2018).

*"It is possible to deduce the genocidal intent inherent in a particular act.... from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others....."*<sup>87</sup>.

The intent is one of most require elements in order to establish the offense of genocide. The legal definition of Genocide equally describes two part of the act. First, the perpetrator's intent and second, the actions (in letter a-e) that can constitute genocide. The definition requires very specific intent that is the intent to focus on destroying one of the protected groups and not merely the intent to commit one of the genocidal acts.<sup>88</sup> During the court's proceedings, judges often infer the intent from the actual events on the ground, for example from speeches or writings authored by the perpetrator.<sup>89</sup> G.A. Resolution 96 (I) categorized genocide as a "crime under international law" and the Genocide convention reiterates this formulation. As a result of the application of the international rules by the *ICTY* and the *ICTR* and the uncontroversial incorporation of the rule into Article 6 of the *ICC Statute*, it is now beyond question that genocide is a crime under general customary international law.<sup>90</sup> In 1951 the ICJ considered the prohibition of genocide as customary in nature.<sup>91</sup> In 1996, the ICJ supplemented this early determination by attributing to the prohibition an effect *erga omnes*.<sup>92</sup> Finally, the ICJ recognized in 2006 that the prohibition of genocide amounts to *jus cogens*<sup>93</sup> expected to be more elaborative in the oral pleadings stage.<sup>94</sup>

### **Global Responsibility (R2P) Vs National Responsibility: Myriad**

The Crime of genocide is under the universal jurisdiction- that would be applied regardless of the perpetrators' nationality and the site of the crime.<sup>95</sup> Although, this notion was not well discussed and also agreed at the time of

<sup>87</sup> N (80), p. 246.

<sup>88</sup> Martin Mennecke, *The Crime of Genocide and International Law*, p. 151, available at <https://www.niod.nl/sites/niod.nl/files/International%20Law.pdf> (Accessed on March 13, 2018).

<sup>89</sup> *Ibid.*

<sup>90</sup> Payan Akhavan, (2005), "The Crime of Genocide in the ICTR Jurisprudence", *Journal of International Criminal Justice*, Issue 3, p. 900.

<sup>91</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *ICJ Reports 1951*, p.23.

<sup>92</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, *ICJ Reports 1996(II)*, p.616.

<sup>93</sup> Case Concerning Armed Activities on the Territory of Congo, Jurisdiction of the Court and Admissibility of the Application (*Democratic Republic of Congo vs. Rwanda*), judgment of 3 February 2006, Para. 64.

<sup>94</sup> Claus Krieb, *The Crime of Genocide under International law. Pdf*. (Accessed on March 13, 2018).

<sup>95</sup> Mehmet Zulfu Oner, (2016), "The Principle of Universal Jurisdiction in International Criminal Law", *Law and Justice Review*, Year 7, Issues 12, p.1, available at [www.taa.gov.tr/.../the-principle-of-universal-jurisdiction-in-international-criminal-law](http://www.taa.gov.tr/.../the-principle-of-universal-jurisdiction-in-international-criminal-law) (Accessed on March 14, 2018).

draft of the Convention, 1948 but through the *CIL* feature of genocide, the international law allows states to prosecute *genocidaries*<sup>96</sup> even when they stem from other countries and have committed the crime elsewhere.<sup>97</sup> The UN Genocide Convention was adopted by the UNGA on 9 December 1948<sup>98</sup> one day before the Universal Declaration of Human Rights 10 December 1948<sup>99</sup> was passed by the same forum. The Genocide Convention became affective since 12 January 1951. Specific remarks have been made in regards to the Genocide Convention. International Law Professor *Georg Schwarzenberger* commented that the 'whole Convention is based on the assumption of virtuous governments and criminal individuals, a reversal of the truth... Even, the pledge given in the Preamble of the Genocide Convention 'to liberate mankind from such an odious scourge' in order to avoid for the future such 'great losses on humanity; this has not been realized. Instead the period after 1948 saw numerous instances of Genocidal violence turning the 20<sup>th</sup> century into what scholar called, 'century of Genocide'.

Some countries have enacted their domestic establishment to punish genocide regardless of where it has been committed like Netherlands and Germany as read as “universal jurisdiction” integrated into domestic law, allows prosecutors in other countries to pursue individuals believed to be responsible for certain grave international crimes, even though the crimes were committed elsewhere and neither the accused nor the victims are nationals of that country.<sup>100</sup> Under the universal jurisdiction, the state's claim of competence to investigate is not based on the perpetrator's nationality (nationality principle as

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<sup>96</sup> This term is used in the ambit of crime of genocide. It is generally refers as those who either initiates or commits the crime of genocide. It may be either state actors or (state agencies) or non-state actors (NSAs) performing the contravening activities with the Genocide Convention. The term includes wide and whole range of personalities who are either directly participants of genocide activities or either indirectly passive recipient of it. Anyone in contradiction with Article 1 of the Genocide Convention is termed as '*genocidaries*'.

<sup>97</sup> The principle of universal jurisdiction remains widely accepted by states owing to the specific nature of international crimes. In 2002, the International Criminal Court (ICC) came into existence, marking the end of over fifty years of elaborations to create a permanent global court to prosecute particularly heinous crimes of international significance. The crimes within the jurisdiction of the ICC are listed in the Statue of Article 5 thereof: the crime of genocide; crimes against humanity; war crimes; the crime of aggression. The establishment of the ICC has further fuelled the debate and the principle of universal jurisdiction has become a highly controversial topic.

<sup>98</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 entry into force, 12 January 1951, in accordance with article XIII available at <http://www.refworld.org/pdfid/3ae6b3ac0.pdf> accessed on 14th March 2018.

<sup>99</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at <http://www.refworld.org/docid/3ae6b3712c.html> (Accessed on March 14, 2018).

<sup>100</sup> "The Long Arm of Justice, Lesson from Specialized war Crimes Units in France, Germany and The Netherlands", 2014, available at <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and> (Accessed on March 14, 2018).

in contravention with passive personality principle)<sup>101</sup> or the crime site (territorial principle)<sup>102</sup> but the specific universal condemnation of the crime as shocking to all humankind (universality principle).<sup>103</sup> The principle of universal jurisdiction is classically defined as ‘a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim’.<sup>104</sup> This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim which is known as nationality principle.<sup>105</sup> But the rationale behind it is broader: ‘it is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim’.<sup>106</sup> Universal jurisdiction allows for the trial of international crimes<sup>107</sup> committed by

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<sup>101</sup> Under international law, the principle of non-interference prohibits any intervention in the domestic affairs of another state. This principle raises the question whether some assertions of jurisdiction over a crime committed on foreign territory are in breach of international law. In this context, the passive personality principle seems to interfere with the principle of non-interference as where a state establishes jurisdiction over a crime committed on foreign soil on the basis of the nationality of the person affected, this link seems to be a rather insufficient reason to justify interference with another state’s sovereignty. Therefore, the passive personality principle is controversial under international criminal law.

<sup>102</sup> Regula Echle, "The Passive Personality Principle and the General Principle of *Ne Bis In Idem*", *Utrecht Law Review*, Vol. 9, Issue 4, 2013 available at <https://www.utrechtlawreview.org/> accessed on 14th March 2018.

<sup>103</sup> Universal jurisdiction can be asserted in relation to a *limited* number of international crimes including war crimes, torture, crimes against humanity, genocide, piracy, hijacking, acts of terrorism, and attacks on UN personnel. Universal jurisdiction acts as a "safety net" when the territorial state is unable or unwilling to conduct an effective investigation and trial. The application of universal jurisdiction reduces the existence of "safe havens" where a person responsible for grave crimes such as war crimes, crimes against humanity and genocide could enjoy impunity African Union-European Union joint report on universal jurisdiction stresses, "[T]emporal, geographical, personal and subject-matter limitations on the jurisdiction of international criminal courts and tribunals mean that universal jurisdiction remains a vital element in the fight against impunity" (paragraph 28) available at <https://www.africa-eu-partnership.org/en/documents/au-eu-expert-report-principle-universal-jurisdiction> (Accessed on March 14, 2018).

<sup>104</sup> Kenneth C. Randall, (1988), ‘Universal jurisdiction under international law’, *Texas Law Review*, No. 66, pp. 785–788; International Law Association Committee on International Human Rights Law and Practice, (2000), ‘Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences’, p. 2.

<sup>105</sup> Xavier Philippe, (2006), "The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?" *Selected Articles on International Humanitarian Law*, Vol. 88, No. 862, available at [https://www.icrc.org/eng/assets/files/other/irrc\\_862\\_philippe.pdf](https://www.icrc.org/eng/assets/files/other/irrc_862_philippe.pdf) (Accessed on March 14, 2018).

<sup>106</sup> Mary Robinson, ‘Foreword’, *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, Princeton, 2001, p. 16.

<sup>107</sup> International crimes are not precisely defined. There are offences recognized by international law as punishable by any country. Traditionally, piracy on the high seas is regarded as one of the first international crimes, grounded on the violation of international customary law. After the Second World War, the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg set out international crimes issuing from both treaty law and customary law (crimes against peace, war crimes and crimes against humanity).

anybody, anywhere in the world.<sup>108</sup> The Genocide is said to be *jus cogens* status.<sup>109</sup>

The universal jurisdiction principle looks for the global responsibility or responsibility of each state. At the international level, there are two different systems of responsibility as to hold individuals accountable and on the other hand the responsibility of state.<sup>110</sup> The existence of a state genocidal policy must be discarded; the state's international responsibility necessarily requires such a policy<sup>111</sup>. Under the state responsibility, the International Court of Justice (ICJ) - highest judicial body of UN hears the cases to settle inter-state disputes.<sup>112</sup> It's found that on 26 Feb 2007 in a case initiated by Bosnia and Herzegovina against Serbia. Bosnia won the case in that Serbia was held to have violated both the duty to punish and to prevent genocide- but the court also ruled that Serbia had not herself committed genocide in Bosnia and would not need to compensate Bosnia.<sup>113</sup> Thus, despite Serbia becoming the very first state since the adoption of the Genocide Convention to be held in violation of the Treaty, the judgment was not received well in Bosnia.<sup>114</sup>

<sup>108</sup> Geraud de La Pradelle, (2000), 'La competence universelle', in Herve Ascencio, Emmanuel Decaux and Alain Pellet (eds.), *Droit International Penal*, Ed. Pedone, Paris, p. 974.

<sup>109</sup> This is a Latin term meaning 'compelling law'. It refers to a special category of international law norms which are considered to be peremptory so that no state can legally deviate from them. Other norms with a *jus cogens* status include the prohibition slavery and the prohibition of torture. International law does not explicitly regulate, however, what the consequences of a violation of a *jus cogens* norm are.

<sup>110</sup> Michael Feit, (2010), *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1379&context=bjil> (Accessed on March 14, 2018).

<sup>111</sup> Paola Gaeta, (2007), "On What Conditions Can a State Be Held Responsible for Genocide?" *European Journal of International Law*, Vol. 18, Issue 4, pp. 631–648, available at <https://doi.org/10.1093/ejil/chm037> (Accessed on March 14, 2018).

<sup>112</sup> The Court can only hear a dispute when requested to do so by one or more States. This is a fundamental principle governing the settlement of international disputes, States being sovereign and free to choose the methods of resolving their disputes. A State may manifest its consent in three ways: A *special agreement*: two or more States in a dispute on a specific issue may agree to submit it jointly to the Court and conclude an agreement for this purpose; A *clause in a treaty*: over 300 treaties contain clauses (known as compromissory clauses) by which a State party undertakes in advance to accept the jurisdiction of the Court should a dispute arise on the interpretation or application of the treaty with another State party; A *unilateral declaration*: the States parties to the Statute of the Court may opt to make a unilateral declaration recognizing the jurisdiction of the Court as binding with respect to any other State also accepting it as binding. This optional clause system, as it is called, has led to the creation of a group of States each having given the Court jurisdiction to settle any dispute that might arise between them in future. In principle, any State in this group is entitled to bring one or more other States in the group before the Court. Declarations may contain reservations limiting their duration or excluding certain categories of dispute. They are deposited by States with the Secretary-General of the United Nation available at <http://www.icj-cij.org/en/frequently-asked-questions> accessed on 14<sup>th</sup> March 2018.

<sup>113</sup> Eric Rosand, (2000), "The Right to Compensation in Bosnia : An Unfulfilled Promise and a Challenge to International Law", *Cornell International Law Journal*, Vol. 33, Issue 1, p.114, available at <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com.np/&httpsredir=1&article=1459&context=cilj> (Accessed on March 14, 2018).

<sup>114</sup> International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders, case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and*

The state responsibility and responsibility to protect is not yet settled rule in international law and in practices. On the 60<sup>th</sup> anniversary of the UN's, all state leaders proclaimed in UNGA<sup>115</sup> Resolution that each state has a responsibility to protect its population from war crimes, crimes against humanity, ethnic cleansing and Genocide. It also further highlighted that, the international community of states has a responsibility to assist states in exercising the norms of R2P by means of capacity building and other means of aid. It must not be used as a tool for western imperialism or hegemony.<sup>116</sup> State sovereignty<sup>117</sup> has long been regarded as the pivotal structural paradigm of international law.<sup>118</sup> The sovereignty issues have been always confronted among the states from the political and legal perspective. United Nations Charter in Article 2(1) has made it as a fundamental, albeit qualified; principle of the United Nations is only one of many indicators that it has not forfeited its significance.<sup>119</sup> Throughout modern history, in the face of gross and persistent violations of human rights, states have to abate oppression, violence and slaughter.<sup>120</sup> There are various questions which come across the line of development of jurisprudence of Responsibility to protect nation. The evolution away from the discourse of *humanitarian intervention*, which had been so divisive, and toward the embrace of the new concept of *the responsibility to protect* has been a fascinating piece of intellectual history in its own right.<sup>121</sup> The exception of Raphael Lemkin's efforts and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, no idea has moved faster in the international normative arena than "the responsibility to protect" (R2P, or the uglier R2P in current UN

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*Herzegovina v. Yugoslavia*) 1966, available at <http://www.icj-cij.org/files/case-related/91/091-19960711-JUD-01-00-EN.pdf> (Accessed on March 14, 2018).

<sup>115</sup> Charles G. Fenwick, (1971), *International Law*, (3rd edn), published by Meredith Publishing Company, p.31, available at <http://www.jewishvirtuallibrary.org/the-u-n-israel-relationship> (Accessed on March 14, 2018).

<sup>116</sup> R.K. Dixit, *Dynamics of International law in the new Millennium* published by the Indian Society of International Law in association of MANK Publication Pvt. Ltd, (1<sup>st</sup> edn), p. 7.

<sup>117</sup> John Austin is the most well known name connected with the theory and concept of sovereignty. His concept of sovereignty is very classic one though it is clear. Permanence of perpetuity: Sovereignty is as permanent as a state itself. The two are inseparable and both are perpetual means remains without any limitations of time.

<sup>118</sup> Antonio Cassese, (2005), "*International Law*", (2<sup>nd</sup> edn), p.48 .

<sup>119</sup> Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1926901](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926901) (Accessed on March 14, 2018).

<sup>120</sup> Jason Daniel Medinger, *The Holy See, Historicity and Humanitarian Intervention: Using Integrative Jurisprudence to Inform Contemporary Practices*, available at <http://www.tilj.org/content/journal/41/num1/Medinger39.pdf> (Accessed on March 14, 2018).

<sup>121</sup> Gareth Evans, *From Humanitarian Intervention to Responsibility to Protect* available at <http://www.crisisgroup.org/en/publication-type/speeches/2006/from-humanitarian-intervention-to-the-responsibility-to-protect.aspx> (Accessed on March 14, 2018).

parlance), the title of the 2001 report from the International Commission on Intervention and State Sovereignty (ICISS).<sup>122</sup>

According to *Ramesh Thakur*, “the report did not retreat from the necessity for outside military action in some circumstances but it diluted the central defining feature of R2P.”<sup>123</sup> The Secretary-General sought to side step considering the third pillar, the sharp end of the R2P stick of using or threatening to use military force to stop mass atrocities anywhere which can challenge the purpose of UN establishment. As *James Pattison* reminds, “humanitarian intervention is only one part of the doctrine of the responsibility to protect, but... it is part of the responsibility to protect.”<sup>124</sup> That reality became clear once again with R2P’s first unequivocal application to justify the international action in Libya.<sup>125</sup>

The concept of the responsibility to protect constitutes an attempt to change the prefix of the ongoing debate about the legality and legitimacy of humanitarian intervention.<sup>126</sup> At the core of the concept lies a two-dimensional understanding of responsibility: (a) the responsibility of a state to protect its citizens from atrocities, and (b) the responsibility of the international community to prevent and react to massive human rights violations. The responsibility to protect (R2P), first articulated by the International Commission on Intervention and State Sovereignty in 2001 and endorsed unanimously by world leaders in 2005, spoke eloquently to meet the recurrent challenge of military intervention wherever and whenever atrocities are committed either of any nature such as of genocide when state fails to take any reasonable actions. The world’s comfort level is much greater with action under Pillar One (building state capacity) and Pillar Two (international assistance to build state capacity) than Pillar Three

<sup>122</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001); and Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (Ottawa: International Development Research Centre, 2001). For interpretations by commissioners, see Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, DC: Brookings, 2008); and Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2006).

<sup>123</sup> Ramesh Thakur, (2011), *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics*, London: Routledge, p.150.

<sup>124</sup> James Pattison, (2010), *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* Oxford: Oxford University Press, p.250.

<sup>125</sup> Thomas G. Weiss, (2011), “R to P Alive and Well after Libya”, *Ethics & International Affairs*, 25, 3, pp. 1-6.

<sup>126</sup> Int’l Commission on Intervention & State Sovereignty, “The Responsibility to Protect”, 2001, *Report of the International Commission on Intervention and State Sovereignty*, available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (Accessed on March 14, 2018).

(international military intervention). But, to be meaningful, the R2P spectrum of action must include military force as the sharp-edge option of last resort.<sup>127</sup>

Some scholars argue on the basis of Integrative Jurisprudence<sup>128</sup> to analyze the legality of humanitarian Intervention. Although the U.N. Charter may arguably proscribe by legal rule extra –U.N. intervention, fundamental values of justice and human dignity have prompted states to intervene to stop human rights abuses. The positive school condemns resort to unilateral or collective, non-U.N. –sanctioned humanitarian intervention outside of the Article 51’s self-defense exception. Article 2(4) and 2(7)<sup>129</sup> in addition to a host of other international documents; assert the primacy of territorial sovereignty and integrity over all other values. According to this values or model, the all post-Charter interventions were illegal with the exception of Liberia, Somalia, Bosnia, Rwanda, Haiti, Sierra Leone and East Timor which received U.N. Security Council sanction. While the natural law proponents support humanitarian interventions when there is an absence of a minimal moral order in a given state and intervention is undertaken to safeguard universal values. The foundations of the R2P as a guiding principle are reflected in the Report of Responsibility to Protect (2001) for the international community as states lie in:-

- a) Obligations inherent in the concept of sovereignty
- b) The responsibility of the Security Council, under Article 24 of the UN Charter for the maintenance of international peace and security.
- c) Specific legal obligations under human rights and human protection declarations , covenants and treaties, international humanitarian law and national law

There are situation when the time demand the intervention although with absence of Security Council Resolution such as, a report produced by the

<sup>127</sup> *The Responsibility to protect: Challenges & Opportunities in light of the Libyan Intervention, 2011*, available at <http://www.e-ir.info/wp-content/uploads/R2P.pdf> (Accessed on March 14, 2018).

<sup>128</sup> Integrative Jurisprudence is a legal philosophy which posits that what the law “is” cannot be restricted to solely what is written in a statute. Rather, integrative jurisprudence teaches that the legality of an act is measured by the actual language contained in a rule as well as by values and historical practices which inform the legal rule is interpreted and applied. The integrative jurisprudence works on the macro sense. The academic debate surrounding the legality of humanitarian intervention has flattered because of fundamental differences and disagreements about the legitimating sources of law. For the positive who give state as primacy, the humanitarian intervention is violation of state sovereignty not permitted under international law. In contrast to positive ideas, the natural law theorist argue that whenever it is need to intervene in order to protect the human dignity and atrocities, the intervention is permissible.

<sup>129</sup> UN Charter 2(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Independent International Commission on Kosovo, chaired by Richard Goldstone and Carl Tham.<sup>130</sup> Wrestling with the problem of the NATO intervention in 1999 that had not been authorized by the Security Council, the report described the intervention as “unavoidable” because “diplomatic options had been exhausted, and two sides were bent on a conflict which threatened to wreak humanitarian catastrophe.”<sup>131</sup> The commission concluded that “the intervention was legitimate, but not legal”. The Responsibility to Protect Report (2001) came up with five suggestions to solve the problem of “Legality and Legitimacy”. As for the Legitimacy, criteria are as like,

- A. **Just Cause:** Is there “serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind: Large-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action or state neglect, inability to act, or a failed-state situation; or Large-scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror, or rape.”<sup>132</sup>
- B. **Right Intention:** Is the primary purpose of the proposed military action to halt or avert human suffering, whatever other motives may be in play?<sup>133</sup>
- C. **Last Resort:** Has every non-military option for the prevention or peaceful resolution of the crisis been explored, and are there reasonable grounds for believing lesser measures will not succeed?
- D. **Proportional Means:** Is the scale, duration, and intensity of the planned military action the minimum necessary to secure the defined human protection objective?<sup>134</sup>
- E. **Reasonable Prospects:** Is there a reasonable chance of the military action being successful in meeting the threat in question, and are the consequences of action not likely to be worse than the consequences of inaction?<sup>135</sup>

There are three specific responsibilities under the Responsibilities to Protect Notion which has been reflected in the Report of Responsibility to Protect:-

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<sup>130</sup> *Independent International Commission on Kosovo, the Kosovo Report: Conflict, International Response, Lessons Learned, 2000*, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/The%20Kosovo%20Report.pdf> (Accessed on March 14, 2018).

<sup>131</sup> *Ibid.*, p.289.

<sup>132</sup> *Ibid.*, p. XII.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

- a) **The Responsibility to Prevent:-** to address both the root cause and direct cause of internal conflict and other man made crises putting population at risk.
- b) **The Responsibility to react:-** to respond the situations of compelling human need with appropriate measures, which may include coercive measures like, sanction and international prosecution and in extreme cause's military intervention.
- c) **The Responsibility to rebuild:-** to provide particularly after military intervention, full assistance with recovery, reconstruction and reconciliation addressing the causes, of the harm the intervention was designed to halt or arrest.

If a state manifestly fails its responsibility to protect its population, this responsibility passes on the international community which has the responsibility to respond to the crisis through the UNSC. The R2P notion is not merely applied in the case of racial genocide only. The state has responsibility to prosecute the perpetrator of the Genocide. The legal definition has established the specific responsibilities of the state. It also further established the individual accountability of those breaching the prohibition of genocide. Article 1 of the UN Genocide<sup>136</sup> Convention has stated that Member states to the treaty 'undertake to punish genocide' and its responsibilities of all ratifying state under due duty. This Convention has not set up an international tribunal to implement the duty out of Article 1. The Convention has imposed responsibilities to the Member states and their national judicial systems in order to prosecute the perpetrator of genocide. Article 6 of the Convention<sup>137</sup> said that, ' person charged with genocide.....shall be tried by a competent tribunal of the State in the territory of which the act was committed or under the principle of universal jurisdiction under international tribunals. The international community has developed whole range of international, semi-international, hybrid court in order to prosecute the perpetrator of genocide. Even on the non-legal literature, the term '*cultural genocide*'<sup>138</sup> has occupied a

<sup>136</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 entry into force 12 January 1951, in accordance with article XIII, Article 1-The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish, available at <http://www.refworld.org/pdfid/3ae6b3ac0.pdf> (Accessed on March 14, 2018).

<sup>137</sup> *Ibid*, Article 6-Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction, available at <http://www.refworld.org/pdfid/3ae6b3ac0.pdf> (Accessed on March 14, 2018).

<sup>138</sup> It is the forceful suppression of traditional languages and customs can lead to extinction of a given culture- an experienced shared by many indigenous people. However, in the legal discipline, the term has

position. The term 'in part' is also not well defined in the Genocide Convention but through the case law, there is no minimum number of victims to constitute as 'in part' debate. The term 'in part' involves both the qualitative and quantitative considerations. The 'quantitative' part is settled by the case law which requires that the perpetrator must have aimed at a 'substantial' part of the victim group that is a considerable number of individuals while 'qualitative' refers whether the perpetrator has aimed to 'significant part' of the group.

### Nepal's Legal Regime: A Fresh Look

In *Keshavananda Bharati v State of Kerala*<sup>139</sup>, the SC has interpreted and gave wider definition of constitution far from the political spectrum. A constitution can't be regarded as mere legal document and need to be read as a will or an agreement rather has to be considered a written vehicle to drive the life of the nations<sup>140</sup>. Every constitution is constantly undergoing changes of various kinds through the impact of new needs and necessity upon it. But the means by which changes take place differ greatly. Necessity for alternations in the institutional structure of government arises under all systems.<sup>141</sup> The word constitution is ambiguous. It has two senses which are most often mixed up. Constitution is being meaning either a compact written document, comprising paragraphs with rules for the government of the state, or constitution standing for the regime.<sup>142</sup> Nepal's Constitution has always denounced any activities which can be harmful for nation's integrity and sovereignty. There are progressive works in the field of constitutionalism in Nepal in order to protect the different concerns of people. The protection of human rights has become one of issues for the Constitution. There is no any discontent over the perspective of human rights in the Constitution. Quoting the renowned scholar on human rights, *Upendra Baxi* argues that,

*"The predatory hegemonies of the 'west' itself compose, response and even revolve the 'gift'. Of course, neither the 'givers' of the 'gift' not*

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not been recognized as it lacks the 'specific intent to destroy' and focuses on the physical destruction of a group not its culture. This is the new paradigm developed in the literature of genocide. Even, broadly speaking the term physical destruction is not referred in the definition of the genocide so through the extensive interpretation, even the sociologist and cultural anthropologist argues, that there is also something called 'cultural genocide' beyond the legal sphere.

<sup>139</sup> *AIR1973, SC, Para, 1437.*

<sup>140</sup> Surendra Bhandari, (2056 BS), *Constitutional Law*, (3rd edn), Pairavi Prakshan, Kathmandu, p.15.

<sup>141</sup> S.R. Sharma, (2003), *Encyclopedia of Constitutional Law*, Anmol Publications, Pvt. Ltd., New Delhi, p.11.

<sup>142</sup> Kamal Raj Thapa, (2066 BS), *Rule, Constitution and Emerging Issues*, (1st edn), Legal Research and Advocacy Forum Pvt. Ltd, p.23.

*its receivers constitutently homogenous categories, nor is the gift of a single or a singular transaction.*"<sup>143</sup>

If human rights conceptions are of a 'west' or a gift those inclined to preserve these cultural treasures and also concern with the rights of aboriginal peoples who are being larger victims of genocidal incidences and also suppressive regimes were very hard towards them, rightfully reflected in words of *Walter Benjamin's* moving articulation:<sup>144</sup>

*"There is no document of human civilization which is not at the same time a document of barbarism. And just as such a document is not free of barbarism; barbarism also taints the manner in which it was transmitted from one owner to another."*<sup>145</sup>

An American socialist *Michael Hamington* wrote that, the US is what in word of *Paul Samuelson* called a 'cathedard economy' in relation to the third world as known for their human rights protection in the world.<sup>146</sup> Despite, these all good aspects of the Constitution, there is always clash in order to protect and promote the rule of law in the country. The Constitution is an overdeveloping and evolving legal and political document. It needs Court's<sup>147</sup> interpretation in order to bridge the space in letter and changing global context which may be cause for contextual and pragmatic interpretation of Constitutional insertion.

The Constitution of Nepal has guaranteed 'right to live with dignity'<sup>148</sup> - still unsettled definition of dignity in law but has largely accepted a common understanding of term either from sociological landscape or from others. Similarly, the Constitution has further recognized 'right to freedom'<sup>149</sup> under different 'proviso' clause which has prohibited any act for inciting 'communal hatred'<sup>150</sup> or 'any act which may undermine the harmonious relations between various casts, tribes, religions, communities...Generally, through the court judgment, the judges used to draw genocidal 'intent' with these all factors. The Constitution has further banned any publication or use of any communication channels or medium which may threatened the national sovereignty, territorial integrity, nationality of people.....harmonious relations among caste, tribes,

<sup>143</sup> Upendra Baxi, (2006), *The Future of Human Rights*, (2<sup>nd</sup> edn), Oxford University Press, p. xiii.

<sup>144</sup> *Ibid.*

<sup>145</sup> Benjamin Walter, (1986), *Illuminations; Essays and Reflections* edited with an Introduction by Hannah Arend, New York: Harcourt Bruce Jovanovich, p.256.

<sup>146</sup> L.N. Basu, (2013), *Human Rights in a Global Perspective* (1<sup>st</sup> edn), Aaviskar Publishers India, p.158.

<sup>147</sup> H.O. Agarwal (2010), *International Law and Human rights*, (17<sup>th</sup> edn), Central Law Publication, Delhi, pp. 730-731.

<sup>148</sup> *Constitution of Nepal (2015)*, Art. 16.

<sup>149</sup> *Ibid*, Article 17.

<sup>150</sup> *Ibid*, Article 17(3).

religious or any such similar act.<sup>151</sup> There is enough protection in the Constitution in regards to maintain social equality and also harmony among the people of Nepal. The Directive Principles and State Policy (DPSPs) have also provision for banning any activities may jeopardy the essence of 'nepaliness'. The relationship between these two parts are well explained by one of prominent scholar Michelman argues,

*"The fact that social rights make budgetary demands or call for government action and not just forbearance does not in it differentiate them radically from the standpoint of justiciability from constitutionally protected right to equality before the law, right to speech and expression or to so call negative liberties."<sup>152</sup>*

Quoting one of known Indian jurist and pioneer figure of Indian Constitutional history, Ambedkar said that:

*"We have used it because it is our intentions that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these Directives....."<sup>153</sup>*

Quoting one of known Indian Justice Jeevan Reddy once said : *'The Provisions of part III and IV are supplementary and complementary to each other and not exclusionary of each other and that the FRs are but a means to achieve the goal indicated in Part IV.'*<sup>154</sup> This illustration was seen in number of cases of Indian judiciary starting from 1970s *Maneka Gandhi* case where SC said that Article 21 includes whole gamut of social rights.<sup>155</sup> The Constitutional articles must be interpreted in wider range than specificity. This was spoken in the case of *Bandhua Mukti Morcha*<sup>156</sup> that the SC has given new forms of remedies which has crossed 'conventional mode of constitutional remedies' such as giving order for identifying, releasing and rehabilitating bonded labourers, ensuring minimum wage payments, observance of labour laws, providing wholesome drinking water and setting up dust-sucking machines in the stone quarries. Nepal's Constitutional article also must be taken into consideration

<sup>151</sup> *Ibid*, Article 19 (1).

<sup>152</sup> F. Michelman (2003), 'The Constitution, Social Rights and Liberal Political Justification' *International Journal of Constitutional Law* 1 (1), pp. 13-34.

<sup>153</sup> *Constituent Assembly Debates*, p. 495, available at [parliamentofindia.nic.in/ls/debates/vol11p3.htm](http://parliamentofindia.nic.in/ls/debates/vol11p3.htm) (Accessed on March 17, 2018).

<sup>154</sup> *Unnikrishnan J P v. State of A P*, AIR 1993, SC 2178.

<sup>155</sup> *Francis Coralie Mullin v. Union Territory of Delhi*, AIR 1981(1), SCC 608.

<sup>156</sup> *Bandhua Mukti Morcha v. Union of India*, AIR 1984, SC 802.

with greater hope and for future perspectives. (If) there are any inferences of 'genocidal act' then definitely these extended interpretation or '*non-conventional judicial approach*' would be inevitable to solve legal crisis. Both the FRs and DSPSs would be interpreted parallel and much more in supportive dialogue than restrictive ways. It was also explained in the case of *Mohini Jain V State of Karnataka*<sup>157</sup>, the principle of 'interdependence' was established as cited:

*"The DPSPs which are fundamental in the governance of the country cannot be isolated from the FRs guaranteed under Part III. These principles have to be read into the FRs. Both are supplementary to each other...Without making 'right o education' under Article 41 of the Constitution a reality, the FRs under Chapter III shall remain out of reach of a large majority which is illiterate."*<sup>158</sup>

The national competent, tribunal, Court shall have special responsibilities in order to charge and prosecute the acts enumerated in Article 3<sup>159</sup> of the Genocide Convention. So that, if there would be any such inferences in Nepal, then the court must apply the different doctrine like as known as principle of "appropriateness" explained in the case of, *Government of the Republic of South Africa and Others v Grootboom and Others case*<sup>160</sup> illustrates how judicial scrutiny may nevertheless have significant practical implications and the South African Constitutional Court held that the standard of "reasonableness" embodied in the South African Constitution held that:

*'The government has to prioritize the needs of poorer and more vulnerable groups, and to cater for short-term as well as medium- to long-term housing needs. Government food security strategies that do not tackle issues of resource access adequately in contexts where this is the main source of food for the majority of the rural population may be subject to scrutiny along these lines under the "appropriateness".'*

<sup>157</sup> *Mohini Jain v. State of Karnataka*, AIR 1992, SC 1858.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, Article 3- The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

<sup>160</sup> ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), available at <http://www.saflii.org/za/cases/ZACC/2000/19.html> (Accessed on March 17, 2018).

The fact sheet relating to genocidal act has inferred few reasons for it. The most commonly visible reason is struggle over the resources and for power as explained and agreed by all genocide scholars. Nepal has accessed<sup>161</sup> the Genocide Convention on Jan 17, 1969 and since and prior to that also, Nepal has shown strongest condemnation of any such act whether under the legal definition of Article 2<sup>162</sup>, 3 of the Genocide Convention or any other sociological and anthropological disciplines. The Government of Nepal (*GoN*) has inserted specific policies under DPSPs' policies relating to international relations'<sup>163</sup> which respect to principle of non-alignment, principle of *Panchsheel*<sup>164</sup>, international law.....agreements based on equality and mutual interest.<sup>165</sup> Since, Nepal has already accessed the Genocide Convention long ago; it is also responsibilities to observe the norms and essence of the convention. Even, under the foreign policy, the observance to international law is one of indicative feature of Nepal's stand on global forum. This all constitutional mandate and obligation has compelled to enact specific laws which would be attractive to genocide convention and would be easier for preventive actions. As per the Article 9<sup>166</sup> of the Genocide Convention, the

<sup>161</sup> In the international treaties law, United Nations Convention on the Law of Treaties, Signed at Vienna 23 May 1969, and Entry into Force: 27 January 1980, Article 83 - Accession -The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations. The term 'accession' refers an act by which a State signifies its agreement to be legally bound by the terms of a particular treaty. It has the same legal effect as ratification, but is not preceded by an act of signature. The formal procedure for accession varies according to the national legislative requirements of the State. To accede to a human rights treaty, the appropriate national organ of a State – Parliament, Senate, the Crown, Head of State or Government, or a combination of these – follows its domestic approval procedures and makes a formal decision to be a party to the treaty. Then, the instrument of accession, a formal sealed letter referring to the decision and signed by the State's responsible authority, is prepared and deposited with the United Nations Secretary-General in New York available at <https://www.unicef.org/french/crc/files/Definitions.pdf> accessed on 15 the March 2018.

<sup>162</sup> Convention on the Prevention and Punishment of the Crime of Genocide Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group;(b) Causing serious bodily or mental harm to members of the group;(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;(d) Imposing measures intended to prevent births within the group;(e) Forcibly transferring children of the group to another group.

<sup>163</sup> *Constitution of Nepal (2015)*, Art. 51 (m, 1).

<sup>164</sup> The Five Principles of Peaceful Coexistence, known in India as the Panchsheel Treaty (from *Sanskrit*, *panch*: five, *sheel*: virtues), are a set of principles to govern relations between states. Their first formal codification in treaty form was in an agreement between China and India in 1954. They were enunciated in the preamble to the "Agreement (with exchange of notes) on trade and intercourse between Tibet Region of China and India", which was signed at Peking on 29 April 1954. This agreement stated the five principles as: Mutual respect for each other's territorial integrity and sovereignty, Mutual non-aggression, Mutual non-interference in each other's internal affairs, Equality and cooperation for mutual benefit and Peaceful co-existence.

<sup>165</sup> *Constitution of Nepal (2015)*, Art. 51 (m, 2).

<sup>166</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, Article IX: Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention,

state is responsible for the application or fulfillment of the norms of convention as enumerated in Article 3 under the jurisdiction of International Court of Justice (ICJ). Similarly, as per Article 6<sup>167</sup> of the Convention, the state is embodied with the authority to make penal laws in order to prosecute and punish the perpetrator. As per this treaties provision obligation, GoN has enacted a specific section in *Muluki Criminal Code Act 2074B.S.*, for internalizing the norms and essence of Genocide Convention and making, the offense as criminalized in national penal legislation along with appropriate punishment.

### Reflections on Muluki Penal (Code) Act, 2074

GoN has moved from traditional or conventional notion of criminal justice system to modern system through enacting the Criminal Code, Civil code and Sentencing Act for making all practice uniform. The *Muluki Criminal Code Act* (hereafter MCCA, unofficial abbreviation) has criminalized the offense of genocide under *section 52*<sup>168</sup> which has incorporated the wide range of reflection of the convention into the domestic legal systems. Section 52 has six different other sub sections which has enlisted all requirements as per the convention. These are some of reflections on the law:

- Section 52 (1) - This Section has defined the term ' genocide' on the reflection of Article 1 of the Convention. This section has shortcomings or fails to incorporate the term, 'peace or war' situation. The Genocide Convention has comprehensive definition.
- Section 52 (2) (1) - This Section has enlisted wide range of activities which is reflected in Article 2 of the Convention along with the Article 3 of it. The few of them are like attempt to commit, genocide, conspiracy to commit genocide, complicity in genocide and others. This section has also made some of additional provision like, obstruction of water, food, energy, medicines or similar necessities for human survival which can lead to extinct either 'in part' or 'in whole' of group.<sup>169</sup>
- Section 52 (3) has made punishment for the act under Section (a) of 52 (2) (1) (*Ka*) for the life imprisonment. If the act is done as in

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including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

<sup>167</sup> *Ibid*, entry into force: January 12, 1951, Article VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

<sup>168</sup> *Muluki Criminal Code Act 2074, B.S.*, Section 52(1).

<sup>169</sup> *Ibid*, Section 52 (2), (a to e).

contravention with 52 (2) (1) (*Kha*), the perpetrator shall be liable for additional five years of punishment on the act of grievous hurt and if the perpetrator has done in contravention with 52 (2) (1) (*Ga, Gha, and Ang*) shall be liable for the ten years of imprisonment.<sup>170</sup>

- Section 52(4) has reflected on basis of Article 4 of the Convention and this has further incorporated 'organized' or 'unorganized' group and their instructions would be also responsible for the act.<sup>171</sup> This section has not only explained about the state entities or government agencies means the private individuals, groups, public officials<sup>172</sup> and responsible rues are also under the consideration of the section. It means anybody either natural or under common of any such legal entities shall be punished for the act of genocide.
- Section 52(5) has imposed the different layers of punishment as per the degree of participation in the offense. If the act is being conducted either in collective form or by different individuals, everyone shall be equally punishable for it.<sup>173</sup>
- Section 52 (6) has to be considered as one of new insertion in the law where there doctrine of 'command responsibilities' are not favored. No one shall be immune from criminal punishment whether the act was under directions of superior officials or not.<sup>174</sup>
- So the highest form of punishment for the act of genocide is life imprisonment which includes till last respirations. The act is silent about the 'extradition' of the perpetrator but has spoken in Article 7<sup>175</sup> of the Convention. The act of genocide shall not be considered a political crime for the purpose of extradition. It depends on the national laws of the countries seeking or granting the extradition to the perpetrator of genocide.

### CRITICAL CONSIDERATION OF CONVENTION

Nepal accessed the Genocide Convention on Jan 17, 1969 and has not submitted any letter of denunciation. As per Article 14 of the Convention, it shall remain effect for a period of ten years as from the date of its coming into force which was on 12 January 1951. So, literally interpreting, Nepal has not any specific or general obligation out of this Convention but since the

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<sup>170</sup> *Ibid*, Section 52 (3).

<sup>171</sup> *Ibid*, Section 52 (4).

<sup>172</sup> *Supra Note 166*, Articles 4 & 6.

<sup>173</sup> *Muluki Criminal Code Act 2074 B.S.*, Section 52 (5).

<sup>174</sup> *Ibid*, Section 52 (6).

<sup>175</sup> *Supra Note 166*, Article 7.

Genocide has considered 'jus cogens' which do not require any time year specific will impose equal obligations to nation. Because the Genocide Convention is different than nay others and there is no any provision of renewal. Since, the term 'genocide' is also appear in other hard international law instruments, the provision of Article 14 seems not appropriate in practice. It will keep imposing obligation to Member state despite of time factors.

## CONCLUSION

Nepal has more than 103 ethnic groups and settlement patterns are very porous and none of group has absolute majority in numbers in any society. The frequent mobility and peaceful assimilation is defining feature of Nepalese society. This may be one reason; the GoN has ratified all major human rights treaties on good faith in order to show commitment for protecting the human rights of citizens. The conflict is inevitable in society as state do have their inherent nature either to suppress or to accept the demands of conflict. The CPA, 2006 was one of the great successes of the state to end prolonged civil insurgency of Nepal through successful integration of rebellion and forming the civilian government. Nepal has shown very clear intent to protect her racial assets, cultural capitals and maintain social cohesion despite of few numbers of obstructions from different groups.

The national, racial, ethnical or religious confrontation has never understood from genocidal act or none of groups do have either 'specific intent' or 'knowledge based intent' to destroy either 'in part' or 'in whole' to constitute the offense of genocide despite since accessed on Jan 17, 1969. This was one of very far-reaching sights of then government. It is welcoming act that the *Muluki Civil Code Act 2074B.S.* under section 52 has criminalized the acts of genocide and has imposed punishment to perpetrator. This Section lacks the provision in relation to establishment of any competent tribunals or court or will hear the case 'if future occurrence of act' with the similar judicial mechanism. Since, this is now a criminal act, the so far existing system will listen the charges. The GoN has been working very efficiently in order to decrease 'communal hatred' which is seen as one of cause for the world wherever for the incidence of genocide. GoN has provided special but differentiated treatment in order to uplift the causes of inter-racial, social, communal or nationals for making a better social settings based on rule of law and principle of co-existence. There is no any inferences of any nature of genocide witnessed either on its latent or visible forms.

Hence, the insertion of special provision for act of genocide must be observed closely and GoN must work much more than present to avoid any such possible conflict for invoking the Section 52 of the Code.



# The Defense of Alibi in Criminal Cases: A Double Edged Sword?

Narayan Prasad Sharma\*

## ABSTRACT

An alibi is a strong criminal defence which rests on the physical impossibility of a defendant's guilt by placing him or her in a location other than the scene of crime at the given date and time. Alibi entails an exception to the general rule that a defendant cannot usually be compelled to furnish information to the prosecution. The onus to raise alibi falls first on the accused and then this burden shifts to the prosecution for investigate its accuracy. A defendant presenting an alibi defence does not change the need that the prosecutor has to prove the alleged guilt beyond reasonable doubt. The defence also has to prove that the alibi evidence can be believed beyond reasonable doubt. Most criminal statutes require that a defendant inform the prosecution before trial of an alibi defence within a certain time period. Even what seems like a tough alibi defence can become weak in court, particularly when an alibi hinges on witness testimony only.

## 1. CONCEPT OF ALIBI

**A**libi is a Latin word which suggests "elsewhere" It implies that the accused person was not at the scene of incident during its occurrence; whereas the charge against him or her is one which requires a physical presence at the crime scene. An alibi is a strong criminal defence which rests on the physical impossibility of a defendant's guilt by placing him or her in a location other than the scene of crime at the given date and time.

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Under alibi, the defence tries to persuade the court that the accused could not possibly be at the scene of crime but at a place where most probably there could be people who could testify that at the time of the alleged incident, the suspect was seen or met by them in a different location. Naturally, a person cannot be at two places at the same time. So, if successful, a plea of alibi typically absolves the defendant of all guilt. An alibi is different from all of the other defences; it is based upon the premise that the defendant is truly innocent<sup>1</sup>.

Alibi entails an exception to the general rule that a defendant cannot usually be compelled to furnish information to the prosecution. Since alibi involves evidence of innocence rather than guilt, the privilege against self-incrimination does not come into play here.

Suppose that a person X is charged with trafficking drugs into a private college. Here, X can present evidence that he was at a shopping mall at the time of sale and, thus, is not the person who committed the crime. Any person who was with X or saw him at the shopping mall at the time of crime can testify to these facts. Witnesses could include the salesman, the security guard, a taxi driver, a friend who accompanied him to the shopping, etc. In addition to witnesses, the defence can present video footage or photographs taken at the time of the crime that show X picking items at the mall. If X had made payment by means of a credit card, the records of the card swipes also can support his alibi defence.

## 2. ONUS OF PROOF ON ALIBI

The onus to raise alibi falls first on the accused and then this burden shifts to the prosecution for investigate its accuracy. However, the alibi plea should be raised by a suspect during the arrest or interrogation stage so that the truth or falsity of allegation can be established by the police right in time. It is a duty of the defendant to raise his or her defence of alibi at the earliest possible opportunity, in the investigation stage of a case. Moreover, he or she is also supposed to give sufficient details to enable the police carry out adequate inquiry so as to establish or quash that version. An alibi submitted in time affords the prosecution an opportunity to debunk the alibi defence, if it was inherently false.

The prosecution is required to investigate the alibi once raised. Failure in doing so may turn out to be a safe haven for the defendant. It is an established norm

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<sup>1</sup> The Judge Advocate General's School, US Army Charlottesville, Virginia, USA, *Criminal Law Deskbook of Criminal Procedure*, Vol.1,2011/12, available at [https://www.loc.gov/tr/frd/Military\\_Law/pdf/Crim-Law-Deskbook-Winter\\_2011-2012\\_Vol-1.pdf](https://www.loc.gov/tr/frd/Military_Law/pdf/Crim-Law-Deskbook-Winter_2011-2012_Vol-1.pdf) (Accessed on June 1, 2018).

in criminal law that no matter how stupid the alibi defence may look, the court is bound to look at it and the prosecution is also duty bound to investigate the same. Hence, alibi is such a defence that must be raised at the earliest possible time by the suspect, investigated carefully by the prosecution and analyzed properly by the Court.

The defendant's friends and family members may testify on an alibi but the judge may be cautious that these people would lie for the defendant or not want him or her to go behind bars. If X, the drug peddler, was at a park with his girlfriend, visiting his father, or out drinking with his friends, these witnesses can testify the same. But there always is a concern that the courts might question their credibility because they belong to his intimate circle and naturally carry a bias for him. This could weaken the alibi defence although it does not infer that the defence should discard them.

As such, a witness who does not know or is not familiar to the defendant can strengthen an alibi defence many times over. If the salesman at the shopping mall had never met X before that day, the judge would probably see him as having no reason to lie for X and admit his testimony more comfortably.

In this connection, video footage, photos, swipe card records, and phone or GPS records can turn out as formidable alibi evidence, because this evidence does not depend on a witness being credible or believable. However, having this evidence does not ipso facto mean the prosecutor will drop the charges or the defendant will be readily acquitted at trial. The prosecutor may question the veracity of records or the date-stamp on a video and try to present evidence that the alibi is not foolproof.

### **3. ALIBI AND REASONABLE DOUBT**

A defendant presenting an alibi defence does not change the need that the prosecutor has to prove the alleged guilt beyond reasonable doubt. The defence also has to prove that the alibi evidence can be believed beyond reasonable doubt.

Even if the judge dismisses the alibi defence, the prosecution still must prove all elements of the crime. Apart from proving that the defendant was at the scene of the crime, the prosecution is also tasked to show that the defendant actually committed the said criminal act. On the other hand, even if a judge does not buy an alibi plea, still he or she cannot stop there and convict the defendant. The judge still has to consider whether the prosecution has proved

that the defendant X had illegal drugs in his possession and that he exchanged the drugs with college students for money.

When the defence of alibi is promptly and properly tabled, failure on the part of prosecution to investigate it may cast some doubt on the suitability of the case for prosecution. The beauty of adversary procedure is that a suspect of a crime is instantly given a hearing by putting an allegation before him or her; and given an ample opportunity to admit or deny the accusation.

In most jurisdictions, defendants who offer alibi defences do not incur a responsibility for proving the validity of alibi. The burden of proving a defendant guilty - beyond a reasonable doubt - whether an alibi plea is present or not, always stays with the prosecution. In fact, a judge can weigh the integrity of alibi evidence just like any other evidence while deciding on whether the prosecution has met that burden. Likewise, simply moving an alibi plea will not automatically erase a trove of other evidence that conclusively proves that the alibi is faked.

#### 4. PROCESS OF RAISING ALIBI DEFENCE

Most criminal statutes require that a defendant inform the prosecution before trial of an alibi defence within a certain time period. If the defence ignores this requirement, the defendant may not be allowed to present the defence at trial<sup>2</sup>. If a defendant has an alibi, he or she generally must give the prosecutor separate, additional notice of the defence, detailing where he or she was at the time of crime, and what witnesses or evidence he or she will present to confirm the alibi. It is an entrenched principle of criminal law that once an alibi has been raised, the burden shifts on the prosecution to investigate it and confute such evidence in order to prove the case against the defendant.

Based on international experience, the defence may put up any one out of the following 2 pleas under alibi<sup>3</sup>:

- That the defendant was so separated by distance from the scene of the crime that normally he or she could not have travelled from the said location to the scene of crime; or

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<sup>2</sup> Lauren Baldwin, *What is an Alibi Defense and How do I Raise it?* Available at <https://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-defense-case/alibi-defense.htm> (Accessed on June 1, 2018).

<sup>3</sup> Oladimeji Kuforiji, *Defences In Criminal Trials (Self-Defence & Alibi)*, available at <https://www.lawyard.ng/defences-in-criminal-trials-self-defence-alibi-by-oladimeji-kuforiji/> (Accessed on June 1, 2018).

- That though the defendant was within a brief distance to the scene of crime, he or she was physically prevented from reaching the scene of crime by an external force or by ill-health.

Defendants may offer an alibi defence without giving up their constitutional right against self-incrimination (i.e., the right to remain silent)<sup>4</sup>. The defendant may rely on any witness or evidence that demonstrates he or she was at a different location than the crime scene when the incident in question happened.

If a defendant intends to raise an alibi defence, he or she must notify the prosecution in time that they will be using one. The defendant's lawyer then provides the prosecutor with a list of names of the entire witnesses who will be testifying in support of the alibi defence, as well as their contact information. This gives time for prosecution to determine witnesses and make a proper case. In USA, there is a statutory provision that *an attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defence*<sup>5</sup>.

In addition, some jurisdictions require that the defence counsels also identify the place(s) where the defendant claims to have been at the time the crime was allegedly being committed. These statements, together with the list of alibi witnesses, are sent to the prosecutors if they have served a *Demand for Alibi* to the defendant. In response, the prosecutors also have to provide the defence, a list of witnesses who will be testifying against the alibi claim.

## 5. EFFECTIVENESS OF ALIBI

The effectiveness of an alibi defence will depend on the quality of the evidence and testimony the defendant has available to corroborate his or her alibi<sup>6</sup>. For example, a defendant Y may raise an alibi that he was in Pokhara when the alleged crime was committed. However, this verbal statement only will not constitute a strong alibi defence. But, if the same defendant produces his plane tickets showing when he left for Pokhara and when he returned, or if he calls his parents or friends who saw him in Pokhara as witnesses and these individuals confirm that he was in fact in the lake city when the prosecution claims the crime was committed, then we have got a powerful case of alibi. Now, the prosecution will have a hard time to disprove the defendant's alibi by attacking the truthfulness of evidence (showing the plane tickets are faked)

<sup>4</sup> "What is Alibi and How Does It Work?" Available at [ww.hg.org/article.asp?id=31342](http://ww.hg.org/article.asp?id=31342) (Accessed on June 1, 2018).

<sup>5</sup> *Federal Rules of Criminal Procedure (USA)*, Rule 12.1.

<sup>6</sup> "What is an Alibi Defense and How Can I Use It?" Available at <https://www.legalserviceslink.com/articles/viewArticle/what-is-an-alibi-defense-and-how-can-i-use-it> (Accessed on June 2, 2018).

and/or the trustworthiness of witnesses (showing they are deliberately lying to shield the defendant).

An alibi defence is much more powerful than self-defence or any affirmative defence strategy<sup>7</sup>. A successful alibi is strong enough to entirely rule out the defendant as the guilty one. However, often the law sees an alibi as easily made up. Friends or family of the defendant can easily get up on the stand and testify that they were with the defendant at the time proper, even when the truth may be otherwise. If there is no corroborating and concrete evidence to support these assertions, some judges may forbid the alibi from being presented.

Even what seems like a tough alibi defence can become weak in court, particularly when an alibi hinges on witness testimony only. After all, the judges need to believe the testimony of witnesses. When the alibi witness turns out to be a friend or family member of the defendant, then the judges will surely be apprehensive if that person is lying for the defendant. The prosecution also will play its part to create doubts on the credibility of alibi witness in the minds of a judge. Family members of the accused are seen as having the biggest motive to lie for their loved one, followed by friends. Non-friends or strangers usually have the most reliability.

## 6. EVIDENCES AND WITNESSES UNDER ALIBI

From a legal standpoint, an alibi has two components: the alibi claim itself and the evidence offered in support of the claim<sup>8</sup>. The condition under which a defendant gives an alibi fixes the difference between the legal and colloquial definitions. In legal parlance, an alibi is used in a criminal trial, whereas in the colloquial sense it is used in a criminal investigation. A true alibi is one in which an innocent suspect recounts a truthful account of his or her whereabouts at the time of crime.

A false alibi may come in 2 different types: fabricated and mistaken. A fabricated alibi is purposely false because the suspect is guilty or is unwilling to tell the real story. A mistaken alibi is one that is given initially as fact since an innocent suspect believes it to be true, but is later held to be false. In their taxonomy, Elizabeth A. Olson and Gary L. Wells propose that an alibi can be

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<sup>7</sup> New Mexico Criminal Law Offices, *What is an Alibi and When Does It Work?* Available at <https://www.newmexicocriminallaw.com/what-is-an-alibi-and-when-does-it-work> (Accessed on June 2, 2018).

<sup>8</sup> Karen Ryndak, (2014), *Alibi Witnesses: Opinions of Defendants and Willingness to Provide False Alibis*: A Thesis submitted to the Department of Psychology in partial fulfillment of the requirements for the degree of Master of Arts in General Psychology University of North Florida College of Arts and Sciences April, 2014, available at <https://digitalcommons.unf.edu/cgi/viewcontent.cgi?article=1513&context=etd> (Accessed on June 3, 2018).

further classified as either strong or weak<sup>9</sup>. What distinguishes strong from weak alibis is the level of proof that is mustered in support of the alibi.

There are 2 types of evidence that can be presented as confirmation of an alibi. The first type is physical evidence which includes, inter alia, receipts, attendance sheets, surveillance videos, time-stamped photos and other forms of physical records that verify that a person was at a certain place at a given time. The second type is person evidence which encompasses testimony from family, friends, or strangers that can confirm that the person was at a specific place at the time of the crime, and that they have seen or met the defendant there.

However, a mere statement that a defendant was at a particular spot at a given time is likely to be inadequate because there must be evidence to support the claim for an alibi to be considered at all authentic. Olson and Wells have proposed 2 elements that are present in a good alibi<sup>10</sup>. The first element is believability which may be conceived as the strength of the physical or person evidence used to back an alibi. The second element is the perceived ease of fabrication of alibi evidence which may be understood as the evaluator's view of how easily the defendant could manufacture evidence in support of his or her alibi. For example, a defendant may claim he or she was watching a football match in a stadium at the time of crime and support the alibi by describing events of the match.

However, the defendant could have easily taped the game and watched it later or even searched for a match summary over the Internet or TV. Physical evidence is often viewed as the most dependable evidence because it is hard to manufacture. For instance, it would be difficult for a defendant to fabricate a dated and timed security video placing him or her at an ATM outlet. On the other hand, person evidence can be viewed as having varying degrees of perceived ease of fabrication, depending on the affinity that the witnesses share with the accused.

An alibi witness is an individual who testifies on behalf of the defendant in support of his or her alibi defence. There may be several alibi witnesses in a criminal case or only one. An alibi witness usually asserts that he or she saw the witness at a different location at the time, the crime was being committed. There will commonly be opposing witnesses who will testify for the prosecution's case, by discounting the version of alibi witnesses.

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<sup>9</sup> Olson, E. A., & Wells, G. L., "What Makes a Good Alibi? A Proposed Taxonomy", *Law and Human Behavior*, 28(2), 157-176, (2004), available at [https://public.psych.iastate.edu/glwells/alibi\\_taxonomy.pdf](https://public.psych.iastate.edu/glwells/alibi_taxonomy.pdf) (Accessed on June 3, 2018).

<sup>10</sup> *Ibid.*

There are many factors that jurors use in defining what constitutes a good alibi. Olson and Wells have identified 3 different types of alibi corroborators or witnesses<sup>11</sup>. The first are the individuals who may be inclined to speak lies and are familiar with the defendant. These alibi corroborators often share a close relationship with the defendant such as a spouse, child or parent of the defendant. The second type is made up of individuals who are not motivated to speak a lie, but are familiar with the defendant, such a neighbor, friend or colleague. These alibi corroborators are often the most believable because they are not motivated to protect or lie for the defendant. The third type is of strangers who are neither motivated to tell lie nor are familiar with the defendant. The problem with this type of alibi corroborator is he or she could be wronged in correctly identifying the defendant.

The strength of the testimony given by alibi witnesses is paramount for establishing a high-quality alibi. The testimony of an alibi witness can be weakened through several factors such as<sup>12</sup>:

- A faulty relationship with the defendant (i.e. bias or interest in the outcome of trial);
- A failure by the witness to report the alibi to authorities;
- Doubts as to the witness' preparation, and the manner of obtaining information;
- How cooperative the witness was with the prosecution during pre-trial meetings; and
- Existence of evidence or proof that contradicts with the alibi witness' testimony

## 7. ALIBI: AN EXPERIENCE OF SOME JURISDICTIONS

### 7.1 Alibi in Canadian Law

Under Canadian criminal laws, the defence is obligated to disclose an alibi defence with enough time for the authorities to investigate the alibi, and with adequate detailing to allow for a meaningful investigation. Failure to abide by the 2 requirements will result in the court making an adverse inference against the alibi defence, but will not lead to the exclusion of the alibi defence.

In Canada, the giving of a false alibi may be construed by the courts as actual evidence of guilt, provided that certain requirements are met. In particular<sup>13</sup>:

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<sup>11</sup> *Ibid.*

<sup>12</sup> Ki Akhbari, *What is an Alibi Defense?* Available at <https://www.legalmatch.com/law-library/article/alibi-defense-lawyers.html> (Accessed on June 3, 2018).

- The alibi must not be believed;
- There is evidence of an intention to fabricate the alibi that is independent from the evidence used to show the alibi is false; and
- The court must reject all innocent explanations offered that would explain why a false alibi was fabricated.

## 7.2 Alibi in British Law

The relevant British law relating to alibi notices is set out in Sections 5 to 6E of the Criminal Procedure and Investigations Act (CPIA), 1996. Evidence in support of an alibi is defined here as - *evidence tending to show that by reason of the presence of the Defendant at a particular place or, in a particular area at a particular time, she or he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.*<sup>14</sup>

The defendant should, in the defence statement, give the particulars of an alibi on which she or he intends to rely, which should invariably include the following particulars:

- The name, address and date of birth of any witness the defendant believes is able to give evidence in support of the alibi, or as many of those details as are known when the statement is given.
- Any information in the defendant's possession, which might be of material assistance in identifying or finding such witness, where the details above are not known to the Defendant when the statement is given.

If the defendant voluntarily serves a defence statement in advance of a summary trial, such a statement should fulfill the requirements of alibi evidence as provided above. However, even if a defence statement is not served in advance of a summary trial, the duty to notify the Court and the Prosecutor of any witnesses that the defence plans to call at the trial still applies<sup>15</sup>.

There are also specific time limits set for disclosure by the defendant which are 28 days for compulsory disclosure in Crown Court proceedings and 14 days for voluntary disclosure in Magistrates' Court proceedings<sup>16</sup>. The time counts from

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<sup>13</sup> From the case law of *R. v. Hibbert*, [2002] 2 S.C.R. 445 & *R. v. O'Connor*, [2002] 170 C.C.C. (3d) 365 (Ont. C.A.).

<sup>14</sup> CPIA, 1996, Section 6A (3).

<sup>15</sup> CPIA, 1996, Section 6C.

<sup>16</sup> *Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits), Regulations 2011* (UK).

the day on which the prosecutor complies or purports to comply with the initial duty to disclose.

The statutory obligation to provide the details of the witness is led by the defendant's belief that the witness is able to assist. It is not necessary that the witness can give evidence or is willing to do so<sup>17</sup>. Similarly, the sanction for non-compliance is the risk of comment and adverse inferences, under section 11(5) of the CPIA 1996. Sanctions do not include the prohibition of such witnesses being called<sup>18</sup>.

As a matter of procedure, it is appropriate for the Crown to investigate any potential alibi evidence in advance of the trial. When a defence statement containing particulars of an alibi is received, the prosecutors are supposed to<sup>19</sup>:

- Check that the particulars of the alibi included in the statement are sufficient for police investigation. If not, prosecutors should request further information from the defence i.e. where, when and with whom.
- Forward the defence statement to the police and request that they consider interviewing the witnesses and take statements, and
- Request that the police check the witnesses for any previous convictions.

### 7.3 Alibi in Indian Context

The plea of *alibi* is relevant and admissible under Section 11 of the Evidence Act, which prescribes that:

***When facts not otherwise relevant become relevant:***

- (1) *If they are inconsistent with any fact in issue or relevant fact;*
- (2) *If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.*

Similarly the major observations made by the Supreme Court of India in some cases involving the alibi defence may be presented as under:

*7.3.1 The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the*

<sup>17</sup> From the case law of *Re Joseph Hill & Co, Solicitors* [2014] 1 WLR 786.

<sup>18</sup> From the case law of *R (Tinnion) v. Reading Crown Court* [2010] R.T.R. 24, DC.

<sup>19</sup> *Alibi Evidence*, Website of the Crown Prosecution Service, UK, available at <https://www.cps.gov.uk/legal-guidance/alibi-evidence> (Accessed on June 3, 2018).

*place where the crime was committed. The defence witnesses are entitled to equal treatment with those of the prosecution, and that the courts ought to overcome their traditional, instinctive disbelief in defence witnesses; quite often, they tell lies but so do the prosecution witnesses.*

[Dudh Nath Pandey v. State of U.P., (1981) 2 SCC 166]

7.3.2 *The Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.*

*But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.*

*But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.*

[Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283]

7.3.3 *The standard of proof required in regard to a plea of alibi must be the same as the standard applied to the prosecution evidence and in both cases it should be a reasonable standard.*

[Mohinder Singh v. State, AIR 1953 SC 415 : 1953 Cri LJ 1761]

7.3.4 *It is not as if the accused person is required to prove his innocence, in fact, it is for the prosecution to prove his guilt. It is no doubt true that when an alibi is set up, the burden is on the accused to lend credence to the defence put up by him or her. However, the approach of the court should not be such as to pick holes in the case of the accused person. The defence evidence has to be tested like any other testimony, always keeping in mind that a person is presumed innocent until he or she is found guilty.*

[Jumni v. State of Haryana, (2014) 11 SCC 355: 2014 Cri LJ 1936]

7.3.5 *The burden of proving commission of offence by the accused so as to fasten the liability of guilty on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi.*

*If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court.*

[Jayantibhai Bhenkarbhai v. State of Gujarat, (2002) 8 SCC 165]

By the verdicts pronounced above by the Supreme Court of India, we find that firstly the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. But once the prosecution succeeds in discharging this burden, it is incumbent on the defendant, to prove his or her plea of alibi (of being at a place different and separate from the crime scene) with absolute certainty so as to eliminate the possibility of his or her presence at the scene of crime. If the evidence adduced by the defendant is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his or her presence at the scene when the occurrence took place, the accused would be entitled to the benefit of that reasonable doubt<sup>20</sup>.

In fact, the Supreme Court of India tends to give good attention in the alibi pleas raised by the defendants. It also has exonerated several defendants, previously held guilty by the lower courts, by trusting the version of alibi invoked by the accused. The apex court seems to attach alibi supported by hard evidence more weight than the one backed by witnesses' accounts only.

## 8. ALIBI AND THE PRACTICE OF NEPALI COURTS

Similar to Indian rulebook, the Nepali criminal law has not provided for a separate stipulation on alibi. Section 27(1) of the Evidence Act, 2031 BS (1974), holds that:

*In case a defendant raises a plea for the reduction or rebate in punishment or release from punishment as per the prevailing laws, then the onus of proof for that matter rests with that defendant.*

Likewise, Section 28 of the same Act reads that:

*Unless a law of Nepal provides that the onus of proof for a certain matter rests with a certain person, the onus of proving such a matter rests with the person who wants to have the court convinced on the existence of such matter.*

Section 29 of the Act makes a similar provision in that it follows:

*In case a party wants to negate a matter presumed by the matter as per this Act, then the onus of proof shall fall on the same party.*

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<sup>20</sup> Dr. Ashok Dhamija, *Burden and Standard of Proof of Defence of Alibi Taken by the Accused*, available at <http://tilakmarg.com/answers/burden-and-standard-of-proof-of-defence-of-alibi-taken-by-accused> (Accessed on June 4, 2018).

Thus, these Sections may be construed as requiring the defendant to prove the claim of alibi (or any other plea that would benefit him or her) through material evidence or witnesses on his or her own.

In this light, the Supreme Court of Nepal has enunciated numerous precedents in criminal cases which have featured the defendants claiming for acquittal by invoking the defence of alibi. Major of them may be recalled as follows:

*8.1 A person, who claims that he is in a place other than the crime scene, needs to prove by evidence to that end.*

[Govt. of Nepal vs. Basudev Sawad, Case: Rape, Nepal Kanoon Patrika (NKP) 2074 BS, Issue 9, Decision No. 9879]

*8.2 A person who raises the defence of alibi is required to prove such defence by law. Only claiming that one was away from the crime scene - just to secure acquittal from the charges pressed - shall neither be logical nor acceptable.*

[Tika Ram Rai, et. al. vs. Govt. of Nepal, Case: Murder, NKP 2071 BS, Issue 11, Decision No. 9283]

*8.3 The plea of alibi shall be admissible as proof only if corroborated by independent and factual evidence. A person claiming that he was away from the crime scene during the day and time of offence, shall have to attest through irrefutable and undisputed evidence that it is reasonably impossible for him to be present at the crime scene, during the occurrence of incident, owing to the distance between the place where he claims to had been and the place where the incident transpired.*

*The accused needs to prove by evidence, that it is virtually impossible for a person to be present at two places within a single frame of time. In case the plea of alibi could not be backed by irrefutable and undisputed evidence, then that apply shall apply against the defendant itself. As per Section 27(1) of the Evidence Act, 2031 BS, in case a defendant raises a plea for the reduction or rebate in punishment or release from punishment as per the prevailing laws, then the onus of proof for that matter rests with that defendant.*

[Govt. of Nepal vs. Dipak Sapkota et al., Case: Murder, NKP 2071 BS, Issue 4, Decision No. 9144]

*8.4 Pursuant to the recognized principle on alibi in criminal cases, a defendant who claims that he was not in the crime scene on the date of*

*offence, but was somewhere else; himself shall have to prove that defence, and there cannot be a discord to this fact.*

[Govt. of Nepal vs. Syed Miyan, Case: Murder, NKP 2062 BS, Issue 5, Decision No. 7540]

8.5 *In case a defendant raises the plea of alibi by holding that he was away from the crime scene during the occurrence of an offence, he shall have to bear the onus of proof for the same. If such an alibi plea is factual, conclusive and backed by documentary evidence, then only it shall be admissible for the benefit of person who invokes such defence. However, if such a defence could not be established by undisputed and factual evidence, then it shall act as a proof against the person itself who has raised such plea.*

[Charles Gurumukh Shobhraj vs. Govt. of Nepal, Case: Murder, NKP 2067 BS, Issue 5, Decision No. 8378]

8.6 *It cannot be held that the defendant was not at the scene of crime only on the basis of his alibi plea which remains untrustworthy and unsubstantiated. As such, since his plea of alibi has been refuted, the charge against defendant becomes even more solidified.*

[Govt. of Nepal vs. Dipak Tulsi Bakhyo, Case: Rape, NKP 2063 BS, Issue 10, Decision No. 7772]

8.7 *Some defendants of this case, while denying the charges at the court, have invoked the plea of alibi that they were getting treated somewhere else and were not involved in the criminal act at the said time. A person claiming alibi shall have to establish his or her grounds and evidence beyond doubt. Raising an alibi only cannot guarantee acquittal from an indicted charge.*

*It is seen that the defendant Tabarak Miyan has presented proof of medical treatment from Simraungadh Health Post, Sher Mohammed and Sheikh Asaraj from Haripur Health Post of Sarlahi, and Sheikh Amanullah from Chhatauna Health Post of Sarlahi district. Since the health posts only render basic medical treatment, it should be proved that they offer services on par with government hospitals with the required beds.*

[Govt. of Nepal vs. Tahid Miyan Ansari et al., Case: Murder, NKP 2055 BS, Issue 5, Decision No. 6544]

8.8 *In case a defendant fails to prove his claim of alibi, then it shall act as a proof against himself. From the statement given by deceased before the authorized official on the cause of his death and the circumstances of crime, the confession of defendant before the authorized official has been proved beyond doubt. As such, the charges of plaintiff have been attested and in such instance, the plea of alibi cannot be deemed as lawful.*

*In criminal acts, an alibi is proved beyond doubt only when there is a lack of other evidence that could corroborate the indicted offence. Hence in the adequacy of evidence to vindicate the charged crime, a denial without proof can have no existence.*

*Except when Nepali laws have provided that the onus to prove certain matters falls on certain persons, the onus of proof on such matters shall lie with the person who wants the court to be convinced on the existence of such matter.*

[Govt. of Nepal vs. Bilas Mahato Sudi, et.al., Case: Murder, NKP 2045 BS, Issue 10, Decision No. 3613]

8.9 *A person who claims that he is elsewhere during the commission of a crime shall have to prove the same by himself. If it is not so proved, then the alibi claim shall act against the defendant itself.*

[Dukhan Sahani Malah et al., vs. Govt. of Nepal, Case: Murderous Robbery, NKP 2039, Issue 3, Decision No. 1542]

8.10 *Though the defendants have raised alibi by claiming that they were not present in the crime scene, but were somewhere else, they have quoted their statements made before the authorized official even at their deposition before the court. Hence, their statements before the authorized official have been corroborated by other relevant evidence. As they could not prove otherwise their statements made before the authorized official, the details cannot be credibly refuted as utterly false.*

*The defendants have failed to prove by evidence that they were away from the crime scene as the offence happened, but were elsewhere. Hence, it would not be logical to hold that their statements before the authorized official were made involuntarily only by virtue of their denial during court deposition, seeing the absence of other concrete ground and evidence.*

*The defendants are known to have attended a marriage function once they had perpetuated the crime. Though the bride has claimed that she had seen them there, the defendants were not required to stay in a single place, and they had*

*the freedom to leave the marriage venue as and when they wished. The distance between marriage venue and crime scene is also such that one can frequent to and fro for a brief period of time. Thus, it cannot be ascertained that the defendants were present at the marriage function at a particular moment of time as people can meet other people a multiple number of times.*

[Govt. of Nepal vs. Ranjit Rai et al., Case: Murder, NKP 2070 BS, Issue 5, Decision No. 9012]

*8.11 The defendant is not seen to have proved his plea of alibi by any evidence. Hence, the plea of alibi not backed by any reliable and objective ground or evidence cannot be admitted as proof.*

[Govt. of Nepal vs. Tapas Kurmi, Case: Rape, NKP 2063 BS, Issue 9, Decision No. 7762]

*8.12 The defendant Jaharman Limbu has invoked the plea of alibi by claiming that he was a witness to an attorney deed made by Bhadra Maya to Dhan Bahadur and was at Chandragadhi, Jhapa at the time crime transpired. He has further pleaded that the deed has been submitted at the Land Revenue Office, Chandragadhi. However, such an attorney deed is of a nature that it can be well made at home and can be sent by signing in the home as well. Thus, his claim of alibi cannot be upheld only on the basis of his becoming witness to that document.*

[Man Bahadur Limbu et al, vs. Govt. of Nepal, Case: Murder, NKP 2051 BS, Issue 11, Decision No. 4999]

Thus, from the above deliberation, it appears that quite contrary to the trend adopted by the Indian apex court, the Supreme Court of Nepal has viewed the alibi pleas of defendants with skepticism and has set them aside in a majority of instances. Moreover, the Court has also repeatedly noted that if the alibi claims of a defendant cannot be backed by independent, concrete evidence or if the claim turns to be otherwise, then the case against him or her is even more solidified. Thus, the Court has always looked for other material or documentary evidence, in addition to the statements of defendants or witnesses in order for an alibi plea to sustain.

## **9. THE DEFENCE OF ALIBI AND THE INTERNATIONAL CRIMINAL TRIBUNALS**

The observations of ICTY and ICTR as regards the defence of alibi raised by the defendants in 2 cases each have been submitted in this article, as follows:

The International Criminal Tribunal for the former Yugoslavia (ICTY) was a United Nations court of law formed on May 25, 1993 through a unanimously adopted Resolution 827 of the UN Security Council that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s. During its mandate, which lasted from 1993 - 2017, it irreversibly changed the landscape of international humanitarian law by giving the perpetrators of war crimes some exemplary punishments and offering a sense of justice to the countless victims of atrocities.

In the famed case of Vujadin Popovic, the Appeals Chamber of ICTY took note that:

*The Appeals Chamber recalls that an alibi does not constitute a defence in its proper sense. Where an accused raises an alibi he is merely denying that he was in a position to commit the crime with which he was charged. It is settled jurisprudence of both the ICTY and the ICTR that an accused does not bear the burden of proof beyond reasonable doubt in relation to establishing an alibi, but only needs to produce evidence likely to raise a reasonable doubt in the Prosecution's case. If the alibi is reasonably possibly true, it must be accepted. Where the alibi evidence does prima facie account for the accused's activities at the relevant time of the commission of the crime, the onus remains on the Prosecution to eliminate any reasonable possibility that the alibi is true. The Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.*

[Appeal Judgement, 30.01.2015, POPOVIĆ et al. (IT-05-88-A, ICTY)]

In another notable case of Zeznil Delalic, the ICTY once again deliberated that:

*It is a common misuse of the word to describe an alibi as a "defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a defence in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.*

[Appeal Judgement, 20.02.2001, DELALIĆ et al., (IT-96-21-A), ICTY]

Similarly, the UN [Security Council](#) founded the International Criminal Tribunal for Rwanda (ICTR) on November 8, 1994 through Resolution 977 to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between January 1, 1994 and December 31, 1994. The Tribunal was located in Arusha, Tanzania, and had offices in Kigali, Rwanda.

Its Appeals Chamber was located in The Hague, Netherlands. The Tribunal was officially closed on December 31, 2015.

In the widely followed case of Ephrem Setako, the ICTR ruled that:

*Neither the Trial Chamber nor the parties on appeal designated Setako's evidence concerning his whereabouts between 24 April and 11 May 1994 as alibi evidence. However, Setako clearly denies having been in a position to commit the 25 April and 11 May Killings at Mukamira camp because he was not there at the time. This amounts to raising an alibi. The Appeals Chamber recalls that an accused does not bear the burden of proving his alibi beyond reasonable doubt. He must simply produce evidence that is likely to raise a reasonable doubt about the Prosecution's case.[3] Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. Where the alibi evidence does prima facie account for the accused's activities at the time of the commission of the crime, the Prosecution must eliminate the reasonable possibility that the alibi is true.*

[Appeal Judgement - 28.09.2011, SETAKO Ephrem (ICTR-04-81-A)]

In another leading case of Jean De Dieu Kamuhanda, the ICTR felt that:

*The Trial Chamber correctly stated that an alibi "does not constitute a defence in its proper sense". In general, a defence comprises grounds excluding criminal responsibility although the accused has fulfilled the legal elements of a criminal offence. An alibi, however, is nothing more than the denial of the accused's presence during the commission of a criminal act. In that sense, an alibi differs from a defence in the above-mentioned sense in one crucial aspect. In the case of a defence, the criminal conduct has already been established and is not necessarily disputed by the accused who argues that due to specific circumstances he or she is not criminally responsible, e.g. due to a situation of duress or intoxication. In an alibi situation, however, the accused "is denying that he was in a position to commit the crimes with which he is charged because he was elsewhere than at the scene of the crime at the time of its commission". An alibi, in contrast to a defence, is intended to raise reasonable doubt about the presence of the accused at the crime site, this being an element of the prosecution's case, thus the burden of proof is on the prosecution.*

[Appeal Judgement - 19.09.2005, KAMUHANDA, Jean De Dieu (ICTR-99-54A-A)]

Thus, the international tribunals set up for trying the defendants of war crimes, crimes against homicide and genocide seem to have given little importance to the plea of alibi raised by the defendants, both during the trial and appeals phase. They seem to take such stands of defendants only as a pretext to evade liability and punishment. They have set rigorous standards of alibi pleas for the accused persons to meet.

## **10. Conclusion**

In conclusion, the underlying aim of criminal law is to forbid behavior that poses a serious wrong against an individual or a grave threat against some core social values of a society. With the passage of time, in a bid to ensure that every modern trial is supplemented by the sacrosanct principles of due process and fair trial, the defendants are given certain concessions in the form of defences so as to enable them to put their point without fear or favour. And, alibi is one vital type among them.

The claims of alibi are often raised in cases of robberies, murder, rape, grievous hurt or arson which often requires the physical presence of the accused at the scene of crime. An alibi plea is fruitless in white collar crimes such as corruption, fraud, forgery, smuggling, etc. as these acts do not require the physical presence of a defendant to transpire. They may be carried out even from a remote location away from the normal residence of culprit.

If an alibi defence is based on witness testimony only, the reliability of such witness can strengthen or weaken the defence radically. A judge ruling whether the defendant is guilty, needs to believe the witness who is testifying that the defendant was not at the scene of the crime during that fateful moment.

As such, hard and material evidence will go a long way to sustain a plea of alibi. In today's age of ICT, where almost everyone has a cell phone with a camera or video, one is watched almost all the time. Security videos by private citizens, banks, and the police have made tracing and nabbing criminals much easier. By the same note, it has also helped innocent people free themselves from crimes by mounting the defence of an irrefutable alibi.

The exercise of alibi by a defendant may also be understood as him or her using a double-edged sword. If he or she can back the alibi claim through meaningful and tangible evidence, then it will work in their favour. If not, the alibi plea will fall apart or held as false, and then it has the capacity to inflict irreparable damage to the accused. The Supreme Court of Nepal also, in its numerous precedents, has cautioned the litigants that an unverified alibi plea

will act as evidence against the defendant itself who has chosen to raise such claim. The judges may transfer the falsity of an alibi plea to the other statements of a defendant as well.





# A Study on Environmental Justice: Law and Practice

Sabita Sharma\*

## ABSTRACT

The concept of Environmental Justice emerged in the United States during the 1980s. It can be seen from the lens of distributive justice, procedural justice, social justice and corrective justice. The precautionary principle, principle of prevention, polluter pays principle; principle of sustainable development and the public trust doctrine are major of the tenets governing the realm of environmental justice. Most of the international documents on environment issue address to the activities that are related to maintaining the quality of the environment and life of human being. In Nepal, though there is no specific law on environmental justice, there are several provisions in the Constitution, laws and policies to govern the environmental justice. Besides, the Supreme Court is also vigilant on the problem of environmental degradation.

## 1. INTRODUCTION

The concept of Environmental Justice emerged in the United States during the 1980s. The term has two distinct uses describing a social movement that focuses on the fair distribution of environmental benefits and burdens. The other use is an interdisciplinary body of social science that includes theories of the environment and justice, environmental laws and their implementations, environmental policy and planning and governance for development and sustainability.<sup>1</sup>

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<sup>1</sup> Frank Parrez, (2004), Key Concern of Human Rights and Environmental Debate.

Environmental Justice has also been linked with human right issues. The linkage between human rights and environmental concerns embrace at least three dimensions. First the right to a healthy environment is a fundamental part of the right to life and to personal integrity. Second, environmental destruction can result in discrimination and racism. Thus socially, economically disadvantaged groups seem to live more often than other groups do in areas where environmental problems pose a real threat to human health. Third, procedural human rights such as access to information, access to justice and participation in political decision-making are often crucial for ensuring policies that respect environmental concerns.<sup>2</sup> These dimensions demonstrate the linkage between environmental justice and human rights. The environment and human health are interconnected to each other because environmental problems cause the real threat to human health. The people's right to live in healthy environment is challenged due to the environmental damage and degradation. Therefore the courts of several countries deliver justice based on the right to life of human being as a fundamental right.

## 2. CONCEPT OF ENVIRONMENTAL JUSTICE

In generic term 'Environmental Justice' can be defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. It covers the fair treatment of people of all races, cultures, incomes, and educational levels. Fair treatment implies that no population should be forced to bear a disproportionate share of exposure to the negative effects of pollution due to lack of political or economic strength.

Environmental justice explained as 1) It is a basic right of all to live and work in safe, healthful, productive, and aesthetically and culturally pleasing surroundings 2) it is not only an environmental issue but a public health issue 3) it is forward-looking and goal-oriented and 4) it is also inclusive since it is based on the concept of fundamental fairness, which includes the concept of economic prejudices as well as racial prejudices. Environmental justice as referring to those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing, and protective<sup>3</sup>. Bullard has clearly described environmental justice as a framework of five basic characteristics

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<sup>2</sup> Ibid.

<sup>3</sup> Bunyan Bryant, (1995), *Issues and Potential Policies and Solution for Environmental Justice*.

- Protect all persons from environmental degradation
- Adopt a public health prevention of harm approach
- Place the burden of proof on those who seek to pollute
- Obviate the requirement to prove intent to discriminate and
- Redress existing inequities by targeting action and resources.<sup>4</sup>

### **2.1 Environmental Justice as Distributive Justice**

Distributive justice has been defined as the right to equal allocation of goods. In an environmental context, distributive justice involves the equitable distribution of the burdens resulting from environmentally threatening activities or of the environmental benefits of government and private-sector programs.<sup>5</sup> In this context, distributive justice most involves addressing the disproportionate public health and environmental risks borne by people of different color and society. Environmental justice argues that it means equal protection for all and the elimination of environmental hazards. In other words, distributive justice is achieved through a lowering of risks, not a shifting or equalizing of existing risks. Distributive justice also involves the distribution of the benefits of environmental programs and policies, such as parks and beaches, public transportation, safe drinking water, and sewerage and drainage.

### **2.2 Environmental Justice as Procedural Justice**

Procedural justice is the central themes in the justice discourse, relates to such issues as participation in administrative decision-making processes on projects that may harm the environment or in judicial proceedings to challenge administrative decisions.<sup>6</sup> It involves fairness of the decision-making process, rather than on its outcome. Environmental justice has a strong focus on procedure, directing agencies to ensure greater public participation and access to information for minority and low-income populations. The Principles of Environmental Justice demand that public policy be based on mutual respect and justice for all peoples and free from bias or discrimination, affirm the fundamental right to self-determination, and insist on the right to participate as equal partners at every level of decision-making<sup>7</sup>.

### **2.3 Environmental Justice as Corrective Justice**

Corrective justice is also defined as compensatory justice implies that compensation is paid; if an unjust action is acceptable. Corrective justice

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<sup>4</sup> R.B.Bullard, (1993), *Confronting Environmental Racism: Voice from the Grassroots*.

<sup>5</sup> D. Selton, (2009), *International Justice and Environmental Law*.

<sup>6</sup> Rechtschaffen, (2003), *Advancing Environmental Justice*.

<sup>7</sup> *Supra Note 5*.

involves fairness in the punishments for lawbreaking and damages inflict on individuals and communities are addressed. Corrective justice involves not only the administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible. Corrective justice includes many aspects of wrongdoing and injury and includes the concepts of retributive justice, compensatory justice, restorative justice and commutative justice. Environmental justice principles impose responsibility for damages regardless of fault, in a broader sense violators be caught and punished.

#### **2.4 Environmental Justice as Social Justice**

Bullard highlighted aspect of environmental justice as social equity an assessment of the role of sociological factors race, ethnicity, class, culture, lifestyles, political power, and so forth in environmental decision-making. Social justice covered environmental justice as part of larger problems of racial, social, and economic justice. The demands of social justice are the members of every class have enough resources and enough power to live as befit human beings and second that the privileged classes, whoever they are, be accountable to the wider society for their advantages. Social justice influences can work in two ways. The racial, economic, and political factors that are responsible for the environmental threats to the community also likely play a significant role in suffer from other problems like inadequate housing, a lack of employment opportunities, poor schools, etc. In turn, the presence of undesirable land uses that threaten the health and well-being of local residents and provide few direct economic benefits negatively influences the quality of life, development potential, and attitudes of the community and may lead to further social and economic degradation.

### **3. PRINCIPLES GOVERNING TO ENVIRONMENTAL JUSTICE**

The principles governing the environmental justice play central role in the shaping of decisions, formulation of policies and governance in general. These principles are often hard to define and their application frequently varies. Such principles include the precautionary principle; the principle of prevention, the polluter pays principle and the principle of sustainable development. These principles form part of both international and domestic environmental law and policy, albeit to varying degrees. These principles have, over the last 30 years, become an essential part of the environmental lawyer's vocabulary. More recently, the concept of environmental justice has emerged as a basis for questioning established norms of environmental law and policy in general and, in some instances, the environmental principles in particular.

### 3.1 The Precautionary Principle

The precautionary principle can be taken to mean ‘better safe than sorry or prevention is better than cure’.<sup>8</sup> The purpose of this principle is to encourage perhaps even oblige-decision makers to consider the likely harmful effects of their activities on the environment before they pursue those activities.<sup>9</sup> This principle focuses on the actions that should be taken for the prevention of environmental degradation and damages. The main aim of the principle is thus to prevent harm to human health and the environment.

### 3.2 The Principle of Prevention

This principle is closely linked with the precautionary principle of environmental justice. It is closely tied to the obligation of states not to cause harm to the environment of other states, as this has been established by the *Trail Smelter* decision and elaborated in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.<sup>10</sup> The principle of prevention can be seen as giving rise to both conflict and conformity with a concept of environmental justice.

### 3.3 The Polluter Pays Principle

As per the principle, the polluter or user of the environment should be responsible for the payment of the compensation to the society if his/her acts cause the damages. This principle requires that the polluter should bear the expenses of carrying out pollution prevention measures or paying for damage caused by pollution. The polluter pays principle, like the precautionary and preventive principles, gives rise to confrontation as well as reconciliation with a concept of environmental justice. The main problems with the polluter pays principle, from an environmental justice point of view, are the principle’s focus on free-market ideals, which on an ideological level goes against certain aspects of environmental justice, and the ways in which the principle is best implemented – through taxes which have the potential to hit the already hard-done by populations the hardest.<sup>11</sup>

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<sup>8</sup> J. Paterson, (2007), Sustainable Development, Sustainable Decisions and the Precautionary Principle, p. 42; Natural Hazards 515, 517, and D. B. Resnik, (2003), ‘Is the Precautionary Principle Unscientific?’ p. 34.

<sup>9</sup> Andrew Jordan & Timothy o’Riordan, (1994), The Precautionary Principle in UK Environmental Law and Policy, available at <http://www.cserge.ac.uk/sites/default/files/gec-1994-11.pdf>.

<sup>10</sup> *Trail Smelter Arbitration Tribunal (1939)*, 33 AJIL 182; Declaration of the United Nations Conference on the Human Environment (1972) 11 ILM 1416; and *Rio Declaration, 1992*.

<sup>11</sup> Ole W. Pedersen, (2010), Environmental Principles and Environmental Justice.

### 3.4 The Principle of Sustainable Development

The most influential principle and most recognized concept of environmental regulation and policy-making is that of sustainable development. This principle aims to promote the harmony among the human being and nature. It provokes the integration of environmental, social and economic concern into all aspects of decision making. The overall goal of sustainable development is the long term stability of the economy and environment; this is only achievable through the integration and acknowledgement of economic, environmental, and social concerns throughout the decision making process.<sup>12</sup>

### 3.5 The Public Trust Doctrine

The public trust doctrine requires the government to preserve and protect the certain resources that the government holds in trust for the public. It represents the legal tool for the management of natural resources.

## 4. MAJOR INTERNATIONAL INSTRUMENTS ON ENVIRONMENTAL ISSUES

Most of the international documents on environment issue address to the activities that are related to maintaining the quality of the environment and life of human being. This quality in national level can be maintained through adopting various measures into legislation and implementing them. Nepal is also a party to number of international conventions and declarations.

The development of environmental legislation started with the historic **Stockholm Declaration of 1972** which is the first document in international environmental law to recognize the right to a healthy environment. It contains the 26 landmark principles regarding the environmental issue such as safeguard of natural resources, wild life, non renewable resources etc.

The second conference on environment and development was concluded by UN in 1992 in Rio known as **Rio Declaration**. The Declaration adopted two texts: The Declaration on Environment and Development and an action program called agenda 21. The central theme of this declaration is sustainable development that harmonizes the development and environmental protection. Principle 10 of the Rio Declaration has been instrumental for the international debate on public participation in environmental matter. **The Earth Summit** on Sustainable Development was held in South Africa in 2002 to review the accomplishments and outcomes of Rio Declaration. The Summit broadened the understanding of the concept of the Sustainable Development. Likewise, the

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<sup>12</sup> Rachel Emas, The Concept of Sustainable Development: Definition and Defining Principles, available at <https://sustainable.development.un.org/content>.

**Kyoto Protocol** contains the issue of climate change which is also major instrument for environmental protection.

## 5. ENVIRONMENTAL JUSTICE IN SOUTH ASIA

Environmental justice demands that there should be a right to a healthy environment for all; it also demands integration of vulnerable communities in the decision-making processes. In order to strengthen environmental justice, not only is there a need to have a liberal judiciary, strong environmental legislation and explicit constitutional provisions, there should also be public access to decision-making and to information.<sup>13</sup> Principles 10 ensured that every person has access to information, can participate in the decision-making process and has access to justice in environmental matters with the aim of safeguarding the right to a healthy and sustainable environment for present and future generation.<sup>14</sup> It provides ground for minimum standards on access to information, public participation and access to legal review procedures. The Convention perceived access to justice is essentially for a fair review procedure. Anybody have right to challenges decisions, acts and omissions by the public administration.

The right to life is a fundamental constitutional right in India, Nepal, Bangladesh and Pakistan. Environmental issues are common for the all the general public issues.<sup>15</sup> However, right to health has not been recognized fundamental right in all countries. General Public have right to challenge against the decision of government authority. Public interest litigation has been a popular way to challenge the decision of the government authorities.<sup>16</sup> Anybody is allowed to challenge the breach of a constitutional right, environmental regulations or guidelines. These courts can order to form a commission for the fact finding and to investigate the disputed facts and submit a report to the court.

PIL allows local communities to take actions against decisions of public authorities. An individual is not necessary to show any personal damage for the establishment of right. Anybody has right to file the cases at court against the wrongdoer. The judiciaries can apply their discretion to minimize the cost of the petitioner in a PIL, and may also decide to dispense with formal court procedures for the commencement of a PIL. Actions could be initiated by writing a letter to the court, and this would be converted into a formal petition

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<sup>13</sup> Razzaque, (2009), *Participatory Rights in Natural Resource Management: The Role of Communities in South Asia*, p. 118.

<sup>14</sup> Rio Convention, 1992.

<sup>15</sup> *Supra* Note 13, p. 120.

<sup>16</sup> *Ibid.*

and notice issued on the respondent. Bangladesh and Pakistan do not have a very high number of PILs in the courts. The judiciary has taken some important decisions to protect natural resources.<sup>17</sup> In Bangladesh, these cases dealt with the filling of public lakes to construct multi-storied buildings, urban development by hill cutting, the allocation of land to shrimp farmers causing salinity of water, oil and gas exploration and illegal construction around rivers.

Generally, legal procedure is lengthy, expensive and time-consuming in South Asia. There is no clear mechanism for the implementation of PIL ruling and inadequate penalties for contempt of court. For the legal verdict, it can take very long time so that there may be the chances of loss and degradation. In this regard, the Bourbon Declaration 2012 included a promise for an educated judiciary, specialized courts, countries to improve the development, implementation, enforcement of and compliance with environmental laws, as well as to make an action plan to achieve the same; strengthen the existing specialized environmental tribunals, as well as train judges and lawyers on environmental law; and a vow to establish green benches in courts for dispensation of environmental justice and to make necessary amendments or adjustments to the legal and regulatory structures to foster environmental justice in south Asia.<sup>18</sup>

India, Pakistan and Bangladesh are parties to a number of multilateral environmental agreements (MEAs).<sup>19</sup> Most of the MEA encourage community participation in the preparation of national plans to implement MEA obligations. Community consultation at the planning stage could ensure compliance, develop local capacity and assess the impact of measures under MEAs, including environmental effects on local communities.<sup>20</sup> Community participation at the earliest opportunity (through village-level workshops, public hearings and consultation) allowing people can prioritize issues and ownership. Legislations incorporated in India, Pakistan and Bangladesh mention public participation, the exact nature of participation is determined by government agencies at their discretion.

Constitutions of some Asian countries provide a right to information, there is no such provision in India, Pakistan or Bangladesh. All these three countries have an Official Secrets Act that deals with access to information.

There is no specific legislation guaranteeing access to environmental information, and there are very few opportunities for interested parties to obtain

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<sup>17</sup> Ibid.

<sup>18</sup> Asia Development Bank, (2012), Conference Report.

<sup>19</sup> Supra Note 13.

<sup>20</sup> UNEP Guidelines, 2001.

adequate information on projects and policies concerning natural resources.<sup>21</sup> Public agencies have limited power and resources to collect, update or disseminate environmental information. The publication of the official data or informal reports can help the public to gather environmental information. However, accessibility of information and adequate legal and institutional mechanisms need to be in place to make any participation effective.

The Indian Right to Information Act, 2005 guarantees that the public may inspect *all* information held by government agencies. In Pakistan, communities can access information on a development project via the Environment Protection Agency. Moreover, projects funded by multilateral banks often include explicit provisions on the dissemination of information. Any person or organization can apply to the Environment Directorate for the report or statistical data of any studies on water, waste, air or noise. It can be presumed that environmental information falls under the wide definition; however, there is no specific mention of it in the legislation.<sup>22</sup> The water policies of these three countries emphasize the importance of local community participation in the planning and management of these resources. These documents encourage the participation of communities and the private sector in the planning, development and management of water resources projects and call for an enabling environment for active stakeholder consultation in all aspects of the water sector. Similar to the water sector, the forestry sector promotes a participatory management approach, allowing the active participation and involvement of communities in forest conservation and development.

### 5.1 India

As a consequence of the Bhopal tragedy in 1984, India's policies and laws sought to become comprehensive and rigorous. The 'command and control approach' is supplemented by new regulatory techniques such as environment impact assessment and public hearings. However, contradictions and gaps in institutional mechanisms have resulted in ineffective implementation of legislation. Factors such as loose performance by enforcement authorities, multi-layered corruption, political interference and personal gain are the root causes for this failure<sup>23</sup>.

In India, the state has a duty to protect and preserve the environment. This is part of the state policy and does not imply a fundamental right. The Supreme Court of India interpreted the right to life guaranteed by Article 21 of the

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<sup>21</sup> Supra Note 13, p. 125.

<sup>22</sup> Environmental Protection Regulation 1997, Bangladesh, Section 15.

<sup>23</sup> Gill, (2013), Access to Environmental Justice in India, p. 28.

Constitution to include the right to a wholesome environment. RTI act lists out the information to be published by public authorities.<sup>24</sup> The role of India's judiciary in securing the enforcement of rights through Public Interest Litigation (PIL) outside statute law but within the constitutional mandate has promoted new and unique environmental jurisprudence. PIL has revolutionized the judicial procedure by introducing three procedural innovations: namely, expanded standing, non-adversarial procedure and attenuation of rights from remedies as a result of expanded frontiers of fundamental rights, particularly the right to life under Article 21 of the Constitution of India. The right to a healthy environment finds its genesis through the right to life. The state is under a duty to enforce this constitutional right by devising and implementing a coherent and coordinated programme for the well-being of the citizens. The proactive judiciary has also declared and promoted the principles of sustainable development, the precautionary and the polluter pays principles.<sup>25</sup> The court have right for the direction to the government bodies to take action against the breach of fundamental constitutional right, or can order to set up a committee to monitor the situation and report to the court for further action.

Several cases have challenged the legality of large dams and one example of dispute is the construction of the Sardar Sarovar dam. The emphasis of this particular PIL is on the relief and rehabilitation of a landless community living around the area of the Sardar Sarovar dam along with the subsidiary issue of environmental damage. Now the Government of India permits to close down the project which has been under disputes from the last 56 years.. In India, the Kerala panchayat took the Coca-Cola Company to the Supreme Court to stop it from drawing huge quantities of local groundwater for its bottling plant<sup>26</sup> which is big water bottling company. General public claimed that water bottling companies produced the pollution for the public and they are suffering from the crises of water for the agriculture land.

Ministry of Environment and Forest is clear agency for environmental assessment. EIA is to ensure socially acceptable environmental results. In India, the 1994 Environmental Impact Assessment Regulations provide a forum for community groups and local authorities to voice their concerns during public consultation. The constitutional enactment offers an opportunity to promote environmental and resource concerns at the highest and most visible level of the legal order.

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<sup>24</sup> Right to Information Act, 2005, Section 4.

<sup>25</sup> Supra Note 23.

<sup>26</sup> Ibid.

One innovative way the judiciary provides protection to natural resources is by applying the ‘public trust doctrine.’<sup>27</sup> This common law concept, applied mainly in Indian cases, allows the public to question ineffective management of natural resources. In one case Indian Supreme Court decided that certain natural resources like air, sea, water and forests have such great importance to people as a whole that it would be unjustified to make them a subject of private ownership.

## 5.2 Bangladesh

The Constitution of Bangladesh does not explicitly provide for the right to a healthy environment. However, Supreme Court highlighted that the constitutional ‘right to life’ does extend to include the right to a healthy environment and anything that affects life, public health and safety.<sup>28</sup> Environment Conservation Act, 1995 and the Rules of 1997 in Bangladesh have provisions and procedures of EIA. The Department of Environment is responsible for issuing environmental clearances and has the power to penalize anyone for the breach of environmental laws and regulation. The Act of 1995 provided the government authorities to evaluate and review the EIA of various projects and activities as well as the procedure for approval. The EIA procedure should be passed through three tiers in order to optimize the resource required for conducting EIA studies: screening; Initial Environmental Examination (IEE) and detailed EIA.<sup>29</sup> These rules, however, do not mention any requirement for public consultation. Most of the environmental cases are in the form of writ petitions covered by Article 102 of the Constitution and the court extended the meaning of person hurt in a way favorable to people not technically aggrieved.<sup>30</sup> The judiciary applied internationally recognized environmental concepts such as sustainable development, intergenerational equity and precautionary principle in the national court. Though the green bench extended the meaning of fundamental right to life to include right to healthful environment, the threshold of pollution and environmental damage remains undefined. The matter of the cost is not settled if there is no separate fund on environmental insurance scheme. It is suggested that network of environmental lawyers should be created to provide pro bono legal assistance to protect public interest and should be willing to work as *amicus curiae*. In order to contain the number of environmental cases, the pollution laws should

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<sup>27</sup> Supra Note 13, p. 22.

<sup>28</sup> Razzaque, (2000), Access to Environmental Justice: Role of the Judiciary in Bangladesh.

<sup>29</sup> Environmental Protection Act 1995 and Environmental Regulations 1997, Bangladesh.

<sup>30</sup> Supra Note 13.

include incentive mechanisms. Alternative dispute settlement, such as mediation, should be encouraged to create a win-win situation.<sup>31</sup>

### **5.3 Pakistan**

In Pakistan, there are examples of cases dealing with water pollution, mining and forest conservation. Many of these cases are waiting in the courts for hearing due to the lengthy and expensive process in this part of the developing world. Moreover, these litigations highlight a critical and intense relationship between poverty, development and environmental issues.

The Environment Protection Act deals with the EIA requirement, which is mandatory for every major, project having possible an environmental effect. Industrial or infrastructure development activities because adverse effect on the environment will be need to submit an EIA and failure to submit an IEE or an EIA would be punishable with a fine<sup>32</sup>. In the Act, the Environment Protection Agency may itself or through appropriate government agency review the EIA and provide for public participation in the evaluation of an EIA<sup>33</sup>. Any comments from the public during the hearing will be ‘duly considered’ by government agencies before any decision on the EIA. The guidelines for public consultation put emphasis on involving affected communities at the screening stage of the project development. In Pakistan, there are examples of cases dealing with water pollution, mining and forest conservation. Many of these cases are pending in the courts for hearing, and it shows that litigation could be a lengthy and expensive process in this part of the developing world. Moreover, these litigations highlight a critical and intense relationship between poverty, development and environmental issues In Pakistan. Environmental protection agency is liable to provide the information for public.

## **6. NEPALI LEGAL FRAMEWORK ON ENVIRONMENTAL JUSTICE**

Though there is no specific law on environmental justice, there are several provisions in constitution, laws and policies to govern the environmental justice. The laws which are related to the environmental conservation are considered as the laws of environmental justice. In addition, there are several policies, strategies, action plans, period plans etc for the protection, conservation and management of the environment. The major legal provisions are described as bellow:

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<sup>31</sup> Ibid.

<sup>32</sup> Environmental Protection Act 1997 of Pakistan, Section 12.

<sup>33</sup> Ibid.

## 6.1 The Constitution of Nepal

The provisions related with environmental justice in the Constitution of Nepal (2015) are under the fundamental rights, the Directive Principles as well the state policy. As a fundamental right, Article 30(1) provides the right to clean and healthy environment. Under the Directive Principles, Article 50(1) states that the state shall pursue a policy of raising the standard of living of the general public and Article 50(3) provides for mobilization of natural wealth and resources of the country in the useful and beneficial manner on behalf of national interest. Similarly Article 50(4) states that the state shall give priority to the protection of the environment of the country and also to the prevention of the damage due to physical development activities by means of enhancing consciousness of the general public. It also contains the special arrangements for the protection of rare animals species, forest and vegetation of the country.

The Article 279 of the Constitution of Nepal includes the special provisions that guide the government of Nepal that should enter into the agreements with other countries in terms of utilization of the natural resources. Similarly, the Article 279(2) of the constitution makes provisions for institutional arrangements for the protection of the environment, natural resources and other necessary subject matter. Despite the constitutional provision, there are other legal instruments regarding environmental justice.

## 6.2 The Environment Protection Act, 1997 and the Rules

Environment Protection Act, 1997 is primary legislation regarding environment protection. The main objective of the act is to achieve sustainable development through legal provisions to maintain clean and healthy environment. The Government of Nepal has framed Environment Protection Rule, 1997 for carrying out the objectives of the Act. The major provisions of the Act and Rules regarding environmental justice are as follows:

- State the list of the proposals requiring Initial Environmental Examination and Environmental Impact Assessment.<sup>34</sup> (Rule 3 of the Regulation)
- Prevent and control of pollution by prohibiting activities contrary to the prescribed standards and forbidding the use of polluting substances, fuels, tools or devices.<sup>35</sup>
- Protection of national heritage by preparing and maintaining on inventory including the plants and animals.<sup>36</sup>

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<sup>34</sup> Environment Protection Act, 1997, Section 3.

<sup>35</sup> Ibid, Section 7.

<sup>36</sup> Ibid, Section 9.

- Establishment and maintenance of environment protection area containing natural heritage, rare wild life, biological diversity, plants and places of historical and cultural importance.<sup>37</sup>
- Establishment or prescription of required laboratories to implement the provisions related to environmental protection and pollution control<sup>38</sup>
- Establishment and operation of environment protection fund.<sup>39</sup>
- Continuation of environment protection council at national level to provide policy guidance and suggestion to government of Nepal.<sup>40</sup>

The other provisions of the act include the concession and facility may be provided to encourage entity, enterprise, technologies which causes positive impact on environmental protection, necessary committees may be formed consisting of experts of relevant subjects. The Environment Protection Regulation, 1997 provides the procedures for maintaining demarcation and boundaries of objects and sites of conservation area (Rule 27). Rule 28 prohibits causing loss or damaging of the objects, sites, plants incorporated in the inventory.

### **6.3 The Forest Act, 1993 and the Regulations, 1995**

Particularly, the Act and Regulation are enacted to ensure the development, conservation and the proper utilization of the forest resources to create the healthy environment. The major objectives of the act are: to meet the basic needs of the people, to develop social and economic conditions of the people and to create the healthy environment. The act categories the forest into two broad categories: National Forest and Private Forest. The Regulation provides the procedures for the implementation of the provisions of the act. Ministry of Forest, Department of Forest, Department of National Parks are state agencies responsible for the conservation of forest resources.

### **6.4 National Parks and Wildlife Conservation Act, 1973 and Regulations, 1974**

To protect habitat, manage national parks and prohibit hunting of wildlife and birds and protect, conserve and manage properly the places of natural beauty is the main objective of the act. The act makes the provisions for national parks, conservation of the animals and birds, their habitats, it also establishes control for hunting, protection, conservation, development, proper management and

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<sup>37</sup> Ibid, Section 10.

<sup>38</sup> Ibid, Section 11.

<sup>39</sup> Ibid, Section 13.

<sup>40</sup> Ibid, Section 14.

utilization of the sites of special importance and for the maintenance of the good conduct and comfort of the people in general.<sup>41</sup>

The act categorizes the protected areas mainly National Parks, Controlled natural reserves, Wildlife reserves, Hunting reserves, Conservation areas and Buffer zones. The Act has the provision of requirement of license to obtain or hunt the prescribed animals and birds.<sup>42</sup> Section 19 of the Act prohibits the selling, barter or transference of the possession of any trophy to another person or trade in trophy without having the license from a prescribed authority. The National Parks and Wildlife Conservation Rule, 1974 contains the various regulations as to the use of all protected areas: restriction on entry and movement in the national parks, control of hunting and removal of forest products, livestock, grazing etc.

### **6.5 The Vehicle and Transportation Management Act, 1992**

The act particularly has the provisions for controlling the air pollution. The act requires the authority to test the vehicles according to the criteria under the section 23 of the act, whether it is road worthy or not. The certificate of road worthiness is provided after the confirmation as provided by Sec.17<sup>43</sup>.

The Aquatic Life Protection Act, 1961, The Water Resources Act, 1992 and Regulation, 1993, The Consumer Protection Act, 1998 and Regulation, 2000, The Solid Waste Management Act, 2011 etc. are the legislations for the environment protection in Nepal.

### **6.6 Pollution Control Tax**

Government of Nepal introduced pollution control tax in diesel and petrol at the rate of rupees .50 per litre in its import point.<sup>44</sup> Similarly Income Tax Act allowed to deduct pollution control cost occurred by businessman from the taxable income.<sup>45</sup> Fiscal Act, 2074/075 have provision of no vehicle tax on electronic vehicle.<sup>46</sup> For the electric vehicle and vehicle operated from solar and batry, 50 percent rebate on road, building and maintenance tax has been provided.<sup>47</sup> Additional 5 percent per year vehicle tax has been introduced for the 14 years old vehicle.

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<sup>41</sup> National Parks and Wildlife Conservation Act, 1973, Preamble.

<sup>42</sup> Ibid, Section 11.

<sup>43</sup> Vehicle and Transportation Management Act, 1992, Section 17.

<sup>44</sup> Fiscal Act, 2017/18, Section 14.

<sup>45</sup> Income Tax Act, 2002, Section 18.

<sup>46</sup> Fiscal Act 2017/18, Annex 3(4).

<sup>47</sup> Fiscal Act, 2017/18, Annex 3(12).

### **6.7 Provisions of Muluki Penal (Code) Act, 2017**

The Muluki Penal (Code) Act is the amended and consolidated form of the laws in force relating to criminal offences. The major objectives of the code are to maintain morality, decency, etiquette, convenience, economic interest of the general public by maintaining law and order in the country, create the harmonious relationship and peace among various religious and cultural communities and prevent and control the criminal offences. There are various provisions relating to environmental protection.

#### **6.7.1 Prohibition of polluting environment:<sup>48</sup>**

- No person shall generate, transmit or release or stockpile wastages in such a manner as to cause significant adverse impact on the environment.<sup>49</sup>
- No person shall cause pollution in such a manner as to cause injury to public health or danger to body or life of the public, or generate, transmit, emit or stockpile, sound, heat or radioactive wave or hazardous waste, as the case may be, from a mechanical device.<sup>50</sup>
- A person who commits or causes to be committed, the offence under sub-section (1) shall be liable to a sentence of imprisonment for a term not exceeding one year or a fine not exceeding ten thousand rupees or the both sentences.<sup>51</sup>
- A person who commits, or causes to be committed, the offence under sub-section (2) shall be liable to a sentence of imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand rupees or the both sentences.<sup>52</sup>

#### **6.7.2 Prohibition of fouling water:<sup>53</sup>**

No person shall foul the water to be consumed by the public or the water of any public spring so as to render it unfit for drinking or foul the water to be used for any purpose other than drinking so as to render it unfit for that purpose.

#### **6.7.3 Prohibition of adulteration of food:<sup>54</sup>**

- No person shall produce any food or drink to be consumed by the general public by mixing into it any injurious substance that is inedible,

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<sup>48</sup> National Penal (Code) Act, 2017, Section 112.

<sup>49</sup> Ibid, Section 112 (1).

<sup>50</sup> Ibid, Section 112 (2).

<sup>51</sup> National Penal (Code) Act, 2017, Section 112(3).

<sup>52</sup> Ibid, Section 112(4).

<sup>53</sup> Ibid, Section 111.

<sup>54</sup> Ibid, Section 107.

undrinkable or unconsumable or any substance that is edible, drinkable or consumable but substandard or any injurious chemical substance, or sell or distribute it or sell or distribute any food of which expiry date has expired or which is adulterated or sell, distribute, import or offer for sale or distribution any food of standard falling short of the prescribed standard or inedible substance.

#### **6.7.4 Prohibition of encroachment of natural heritages:<sup>55</sup>**

- No person shall, except in accordance with law, encroach or possess, in any way, any natural heritage, or sell or distribute such heritage, or cause any harm, loss or damage to its natural structure or beauty, in any way.

Explanation: For the purposes of this Section, the term “natural heritage” means any of the following heritages:

- (a) national parks, wildlife or hunting reserves designated by the Government of Nepal for the protection of the natural environment, vegetation and wildlife,
  - (b) conservation area designated by the Government of Nepal, river, rivulet, stream, lake, wetland or natural water-fall, snow-peak or any part thereof, higher mountain peak,
  - (c) wildlife, vegetation or landscape protected by the laws in force or the Government of Nepal, State Government or Local Level,
  - (d) habitat of wildlife protected by the Government of Nepal, State Government or Local Level, eco-system, or any medicinal herbs which is prohibited for sale, distribution, export or import.
- A person who commits, or causes to be committed, an offence under sub-section (1) shall be liable to a sentence of imprisonment for a term not exceeding ten years and a fine equal to the amount in controversy if such amount is specified and a fine not exceeding one million rupees if such amount is not specified or the both sentences.

## **7. SUPREME COURT APPROACH ON ENVIRONMENTAL JUSTICE**

The Supreme Court of Nepal has played vital role in context of the environmental justice. The directive order, decisions, procedure passed by Supreme Court promote to environmental justice. Some landmark decisions related to environmental protection and the management are as follows:

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<sup>55</sup> Ibid, Section 149.

### **7.1 Yogi Narhari Nath and other v. Honorable Prime Minister Girija Prasad Koirala and others<sup>56</sup>**

Due to the public interest in the land of the sacred Devghat area surrounded by forests and their religious, biological, cultural and archaeological importance, the Supreme Court quashed the government's decision to lease the land for the stated purpose.

### **7.2 Surya Prasad Dhungel v. Godawari Marble Industries Pvt. Ltd<sup>57</sup>**

Supreme Court of Nepal declared that “the environment is the integral part of human life, if it is degraded human beings as well as animals would suffer from negative impact. Therefore resources like forests should be protected for the maintenance of pollution free environment.”

### **7.3 Rajendra Parajuli and Other v. Shree Distillery Pvt. Ltd. And Others<sup>58</sup>**

Having license for the operation of an industry does not excuse any industries from its obligation to protect the environment. Every industry must adopt measures by which the environment can be preserved and protected. As per the principle of sustainable development every industry has an obligation to run its development activities without creating environmental deterioration. The environment should not be viewed narrowly. It is imperative for any industry to be cautious towards the environment while it is in operation.

### **7.4 Amita Gautam Poudel v. Office of the Prime Minister and Council of Minister and Others<sup>59</sup>**

The Environment should not be affected by development activities. The development should be balanced. To spend the quality life in present, to secure our future life and the life of the future generation, it should be our responsibility to protect environment.

### **7.5 Narayan Devkota and others v. Government of Nepal and Others<sup>60</sup>**

The government should provide approval to any business project involving natural resources only when the particular business does not hamper nearby people, residence, hospital, school and other critical area. In this case the court highlighted the public trust doctrine and held judiciary as the custodian of environment.

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<sup>56</sup> Supreme Court of Nepal, NLR (NKP), 2052 BS.

<sup>57</sup> NLR 2052 BS.

<sup>58</sup> Supreme Court of Nepal, Writ no. 3259.

<sup>59</sup> NLR 2074 BS, Vol. 6, DN 9829.

<sup>60</sup> NLR 2067 BS, DN 8521.

### **7.6 Partner of the Bone Industry, Raj Kumar Shah and Others V. Ministry of Industry and Others<sup>61</sup>**

The Industry should be established without hampering to the human health. If the conditions agreed before the establishment of industry are not fulfilled, it can be informed to close it.

## **8. CONCLUSION**

Environmental justice and human rights are interconnected and interdependent conceptions. In recent years, public awareness has grown unprecedentedly. States are framing legislations for the protection of environment. International community has realized the interdependence of environment and human right and emphasized on inclusive and participatory environment management system.

The contexts of environmental issues are the realizations of economic, social and cultural rights, not limited to individual, company and country. Environmental degradation will have impact on human, animals, plants and the entire living thing that are existed on the earth and will have direct effect on future generation. There is equal voice, debate and discussion that of how to achieve and maintain the balance between development and the environment. These questions raised also equally important for the balancing for social and economic development. Most of the emerging developing countries are facing the challenges balancing between the development and environmental protection.

The court can play important role for solving the environmental disputes but it is really very difficult to solve the disputes in conflicting interest. The court should support development in the context of sustainability as well as protect the environmental degradation. South Asian countries such India, Pakistan and Bangladesh don't have fundamental environmental right but victims are entering into court through the Public Interest litigation (PIL) as fundamental right to life.

In this context, court can enforce international principles and those of good governance by demanding that industries and state agencies strictly should follow regulatory procedures and should not damage the environment to the extent that it does not support people's existence.



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<sup>61</sup> NLR 2072 BS, Vol. 12, DN 9514.



# Plea Bargaining: Concept and Practice in Nepal

Urmila G.C. \*

## ABSTRACT

A plea bargain is a negotiated agreement between a criminal defendant and a prosecutor in which the defendant agrees to plead “guilty” or “no contest” to some crimes, along with possible conditions. William McDonald distinguishes between 2 types of pleas: implicit and explicit. Fact bargaining, charge bargaining, count bargaining, sentence bargaining and judicial bargaining are the typical variants of plea bargaining. The roles of prosecutors, defense counsels and judges are of immense importance in striking a deal of plea bargaining. In plea bargain, the person does in fact voluntarily confess his/her crimes and if found to be true, it can be used for reduction of the sentence and for evidence for further investigation of crimes. As such, the concept of plea bargaining is considered as an exception to the right against self-incrimination.

“The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it is to be encouraged.”<sup>1</sup>

## 1. INTRODUCTION

The aim of criminal justice system is to punish the offenders and provide justice to the victims through effective investigation, prosecution and

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<sup>1</sup> Santobello v. New York, 404 U.S. 257, 260 (1971).

administration of justice. Rather than sentencing criminals to the entirety of their punishments, plea bargaining reduces the sentence and/or penalty. In some form it might encourage the criminals to voluntarily confess and help in criminal investigation, collection of evidence collection and gathering of information about the crime. This not only makes the criminal justice system more effective, but also helps the court to deliver justice to the victim speedily. Getting to the root of any crime is a time and resource consuming process, which can be accelerated by convincing the criminals to voluntarily concede to their crimes. Furthermore, in the case of sensitive and organized crimes, it is difficult to unfold the criminal nexus and litigate only the guilty, by sparing the wrongly accused. Thus, for rapid, effective and frugal justice, plea bargain and its related ideas are adhered to criminal justice administration and these ideas are implemented for the smooth running of the justice system. Since the accused himself/herself confesses to the crime and helps in further investigation and gathering of evidences related to other criminals, the prosecutor and the accused can have an agreement to reduce the sentence partially or completely through negotiation.

## 2. DEFINITION OF PLEA BARGAINING

A plea bargain is a negotiated agreement between a criminal defendant and a prosecutor in which the defendant agrees to plead “guilty” or “no contest” to some crimes, along with possible conditions, such as attending anger management classes, in return for reduction of the severity of the charges, dismissal of some of the charges, or some other benefit to the defendant.<sup>2</sup> It is a process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the accused pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.<sup>3</sup>

Plea bargaining is “a form of negotiation by which the prosecutor and defense counsel enter into an agreement resolving one or more criminal charges against the defendant without a trial.”<sup>4</sup> Plea bargaining exists because it is an effective way to handle cases and it gives an incentive to accused person to cooperate with prosecutors and thus allows for more creativity in resolving criminal cases, which is beneficial to both the state and the accused. When it is successful, the defendant confesses or pleads guilty without a trial. The

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<sup>2</sup> Available at <https://definitions.uslegal.com/p/plea-bargain/> (Accessed on March 12, 2018).

<sup>3</sup> Black's Law Dictionary (2004), (8th edn), West Publishing Company.

<sup>4</sup> Herman Nicholas (2004), *Plea Bargaining*.

prosecutor in return either dismisses the charge or forwards the case to the court with recommendation of favorable sentence. It is the reward to the defendant for his/her voluntary confession. In short it can further be elucidated as:

- (i) Withdrawal of one or more charges against an accused in return for a plea of guilty.
- (ii) Reduction of a charge from a more serious charge to a lesser charge in return for a plea of guilty.
- (iii) Recommendation by the prosecutor to sentencing judges for leniency of sentence in lieu of plea of guilty.

### **3. ORIGIN OF THE CONCEPT OF PLEA BARGAINING**

Plea Bargaining is a concept that originated in the United States and it has evolved over the ages to become a prominent feature of the American Criminal Justice system.<sup>5</sup> Plea bargain was employed as early as the 1970's in property crimes and other offences that do not attract capital punishment. The aim was to save the society from huge expenses involved in litigation and recover the stolen common wealth in property crimes cases. In the case of individual victims of property crimes, it was meant to assist such victims to recover what was stolen rather than merely punish the offender with the victim not regaining his property.<sup>6</sup> In United States of America, plea bargaining came into practice in mid-nineteenth century and more than ninety percent of convictions at the state and federal level resulted from guilty pleas. The countries including Australia, Canada, Nigeria, New Zealand, South Africa, United Kingdom and Brazil use it as a tool for efficient and successful prosecution as crime becomes more sophisticated and transnational.

### **4. FORMS OF PLEA BARGAINING**

From the viewpoint of concession provided to the defendant in sentence William McDonald has described the plea bargaining in two forms. According to him two forms of plea bargaining as follows:<sup>7</sup>

#### **4.1 Implicit Pleas**

Here the defendant himself/herself assumes that the confession of his/her crimes which will result in a decrease in punishments and sentences. The

<sup>5</sup> Reawri Sulabh and Aggarwal Tanya (2006), "Wanna Make a Deal? The Introduction of Plea Bargaining in India".

<sup>6</sup> "A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria", *Global Journal of Politics and Law Research*, Vol.3, No.4, August 2015, pp.31-43.

<sup>7</sup> Voigt Lydia, et al., (1994), *Criminology and Justice*. (1st edn), McGraw Hill, Inc., p. 507.

prosecutor and the defendant do not have a direct negotiation or agreement. Not all bargains are explicit (many jurisdictions have implicit bargaining-going rates for those who plead guilty to certain offenses), nor are all guilty pleas bargained (there are a host of reasons for pleading guilty).<sup>8</sup> Furthermore, not all negotiations involve "bargains" (charges may be reduced because a defense attorney has convinced the prosecutor that the original charges cannot be sustained; many negotiations result in dropping all charges without the quid pro quo normally associated with the term bargaining).<sup>9</sup>

#### **4.2 Explicit Pleas**

In this kind of plea, the defendant, the private lawyer and the court negotiate directly to come into an agreement. In this kind of plea, an agreement between the court and the defendant is a necessity. Generally, explicit pleas are more commonly used in practice.

#### **4.3 Conditions of Plea Bargaining**

The main aspect of plea bargaining is the negotiations that take place between the related parties and the necessary points that they agree upon. All of the following points should be simultaneously fulfilled for plea bargaining:

- The defendant should accept his/her crimes and propose a suitable sentence for himself/herself.
- The prosecutor should agree on the charge.
- The victim should agree on the charge and
- The court should agree on the charge.

### **5. KINDS OF PLEA BARGAINING**

Whatever the name may be the purpose of bargaining is to facilitate the justice system encouraging the defendant to cooperate the investigation in exchange of concession in sentence. In some cases, a prosecutor agrees to reduce a single charge against a defendant to a less serious offense, in other cases it is agreed to reduce the number of charges against a defendant or agrees to recommend a particular sentence to the court. Therefore, the plea bargaining can be classified into fact bargaining, charge bargaining, count bargaining, sentence bargaining and judicial bargaining.

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<sup>8</sup> Malcolm M. Feeley, (1982), "Plea Bargaining and the Structure of the Criminal Process", *Justice System Journal*, Vol. 7, No 3. pp. 338-339.

<sup>9</sup> *Ibid.*

### **5.1 Fact Bargaining**

In fact bargaining, defendants plead guilty pursuant to an agreement in which the prosecutor stipulates to certain facts that will affect how the defendant is punished under the sentencing guidelines. The least used negotiation involves an admission to certain facts stipulating to the truth and existence of provable facts, thereby eliminating the need for the prosecutor to have to prove them in return for an agreement not to introduce certain other facts into evidence.

### **5.2 Charge Bargaining**

A charge bargain involves an agreement through which the prosecutor allows the defendant to plead guilty to a lesser charge, with the dismissal of the original charge upon the court's acceptance of the defendant's guilty plea. For example, a defendant who is charged with burglary may agree to enter a guilty plea to the lesser charge of attempted burglary.<sup>10</sup>

### **5.3 Count Bargaining**

A count bargain occurs when a defendant is charged with more than one offence, and the prosecutor agrees to dismiss one or more offences in exchange for the defendant's guilty pleas to the remaining offence or offences. For example, a defendant who is charged with driving while intoxicated, operating a vehicle with a suspended driver's license, and driving without insurance may agree to plead guilty to the driving while intoxicated charge, with the other charges dismissed at the time of the defendant's guilty plea.<sup>11</sup>

### **5.4 Sentence Bargaining**

A sentence bargain involves an agreement between the defendant and prosecutor in which the defendant will receive a specific sentence in exchange for a guilty plea. Sentence bargaining may help a prosecutor obtain a guilty plea to a very serious charge, when the defendant is concerned that a conviction will result in a very long term of incarceration. A sentence bargain may also benefit a prosecutor who wants to use the current situation to solve a bigger crime.<sup>12</sup>

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<sup>10</sup> Available at [https://www.expertlaw.com/library/criminal/plea\\_bargains.html](https://www.expertlaw.com/library/criminal/plea_bargains.html) (Accessed on April 17, 2018).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

## 5.5 Judicial Bargaining

If the court considers that the prescription of the prosecutor is genuine, then presiding judge can free/acquit the offender without charging him/her with any sentence.

## 6. THE ROLE OF DIFFERENT ACTORS IN BARGAINING

### 6.1 Prosecutors

Plea bargaining is an agreement as a result of negotiation between the prosecution and defense to settle the criminal case, usual in exchange for more lenient punishment. As a representative of state as well the victim, the prosecutors should be careful not to place undue emphasis on factors which favor disposition of case pursuant to a plea agreement.<sup>13</sup> They have enormous discretion in charging and sentencing decisions and shape their role in plea bargaining. Prosecutors should play the role of administrators, advocates, judges and legislators to perform his/her duties. Following five causes should influence the prosecutor's decisions to plea bargaining.<sup>14</sup>

- Seriousness of the offence,
- Defendant past records,
- Strength of the prosecutor's case against offenders,
- Defense counsel reputation, and
- Administrative pressures to dispose of heavy caseloads quickly.

### 6.2 Defense Lawyers

In adversarial trial the parties to a matter designated to be heard under the adversarial system play a pivotal role during the proceedings, while the court's role is a relatively passive one, limited essentially to determining the conflict between them.<sup>15</sup> The parties to a case are autonomous and they have right to self-determination. Therefore, the role of defense lawyers, as a representative of one party of a case, is also significant in plea bargaining process. It is unconstitutional for defense lawyers to plead for clients against their will.<sup>16</sup> Defense lawyers play crucial role in straight or negotiated guilty pleas and thus professional lawyers can save his/her client from disastrous punishments.

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<sup>13</sup> Peter F. Nardulli (ed.), (1979), "Thinking about Plea Bargaining", *The Study of Criminal Court* (Cambridge, Mass: Bellinger, pp. 208, 210, Cited From (n 6), p. 421.

<sup>14</sup> *Ibid*, p. 422.

<sup>15</sup> P.S. Atiyah & Robert S. Summers, (1987), *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*, p. 162.

<sup>16</sup> *Supra* Note 13, at 427.

### 6.3 Judges

In an adversarial procedure the role of judge is passive. The parties to a matter designated to be heard under the adversarial system play a pivotal role during the proceedings, while the court's role is a relatively passive one, limited essentially to determining the conflict between them.<sup>17</sup> Therefore, the role of judge in the process of plea bargaining is debated. There are varied views on if judges can or cannot participate in the Plea bargaining process. In America, different states have different practices regarding the judge's role in Plea bargain. The American Bar Association standards asserted that the trial judge should not participate in plea discussion.<sup>18</sup> Judges can participate on plea bargaining process through two ways; either participate during the negotiation or supervise after bargains are struck, sometimes both.<sup>19</sup> Miller and his associates found six categories of judges on plea bargaining;<sup>20</sup>

- Judges do not participate, neither explicitly nor implicitly in plea negotiation,
- Judges do not participate explicitly but they may implicitly lean on participants or facilitate on the process,
- Judges bargain implicitly only,
- Judges bargain implicitly and strongly 'force' participant for guilty pleas,
- Judges bargain explicitly and make general sentence recommendation, and
- Judges bargain explicitly and make specific sentence recommendation.

The court can sometimes propose changes in the plea bargain according to the situation. If the accused and the court agree upon the terms and conditions, the court will charge him/her with the reduced sentence according to the plea bargain, rather than the original proposed penalty. For the plea bargain to be legitimate, the accused voluntarily waives his/her various rights that may obstruct the investigation and the justice process. Additionally, the crimes which are accepted by the accused should be factually proven by evidence. It is the duty of the court to verify that the confession of the accused tallies with the evidence and then only should the case proceed forward with the consideration

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<sup>17</sup> Gabriel Hallevy, (2009), "The Defense Attorney as Mediator in Plea Bargains", *Pepperdine Dispute Resolution Law Journal*, Vol. 9, Issue. 3, p. 3.

<sup>18</sup> *Supra Note* 13, at 427.

<sup>19</sup> *Ibid*, p. 434.

<sup>20</sup> *Ibid*, pp. 434, 435.

of the plea bargain.<sup>21</sup> Thus, the main essence of the reduction of sentence through plea bargaining is voluntary confession by the defendant.

## **7. RIGHT AGAINST SELF-INCRIMINATION AND PLEA BARGAINING**

Any person who is accused of a crime reserves the right against self-incrimination and this right is considered one of the most important rights in criminal justice and this has evolved from the common law system. This means that no person can be forced to testify against himself/herself with or without any kind of external force. However, if any person voluntarily confesses his/her crimes, then it can be used as evidence against him/her. In plea bargain, the person does in fact voluntarily confess his/her crimes and if found to be true, it can be used for reduction of the sentence and for evidence for further investigation of crimes. That is why, the concept of plea bargaining is considered as an exception to the right against self-incrimination. But to be clear, this does not violate the right against self-incrimination at all because the concept of plea bargain is completely voluntary. In the system of plea bargain, the defendant voluntarily confesses his/her crimes and also helps in further investigation of the crime. Thus, this does not qualify as a violation of the right against self-incrimination.<sup>22</sup>

## **8. PLEA BARGAINING IN SOME JURISDICTIONS**

The concept of Plea bargaining is in some form have been adhered to various criminal justice systems of the world. However, the extent, mode and application of this concept may vary in those justice systems. Plea bargain and its concept in different legal system of the world are as follows:

### **8.1 United States**

More than ninety-five percent of convictions in the federal and state systems are the product of negotiated guilty pleas.<sup>23</sup> By the twentieth century, guilty pleas dominated the majority of criminal cases. Almost every criminal case is now conducted by plea bargaining and today it is often said that the American Criminal Justice would collapse if plea bargaining is removed from it. It is a deal struck between prosecution and defense. Voluntariness and judicial scrutiny are two important aspects of plea bargaining process.

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<sup>21</sup> Available at [www.enotes.com/everyday-law-encyclopedia](http://www.enotes.com/everyday-law-encyclopedia) (Accessed on April 17, 2018).

<sup>22</sup> NLR (NKP) 2051 BS, p. 666

<sup>23</sup> Bureau of Justice Statistics, U.S. Dept of Justice, (2015), *Federal Justice Statistics 2012, Statistical Tables*, Tbl.4.2.

Rule 11 of the Federal Rules of Criminal Procedure governs all federal plea proceedings which permits prosecutors and defendants to enter into several types of plea agreements. It states that in exchange for a plea of guilty or nolocontendere, the prosecutor "will do any of the following."<sup>24</sup>

- (A) Move for dismissal of other charges; or
- (B) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) Agree that a specific sentence is the appropriate disposition of the case."

The courts have been given a very vital role to play and it has to see that the entire thing is voluntary and the accused is given the protection of secrecy and all the parties may participate freely and no one is subjected to any coercion or duress of another.<sup>25</sup> Plea bargaining was held to be constitutionally valid by the US Supreme Court in *Brady v. United States*.<sup>26</sup> In *Padilla v. Kentucky*,<sup>27</sup> *Lafler v. Cooper*,<sup>28</sup> and *Missouri v. Frye*,<sup>29</sup> Supreme Court explicitly held that defendants are constitutionally entitled to the effective assistance of counsel during plea negotiations.

## 8.2 Australia

In Australia, plea bargaining is the informal process by which a prosecuting authority and defense counsel negotiate the charge(s) on which the prosecution will proceed, and/or concessions that may be made by the prosecution in relation to sentencing, including the facts on which sentencing should proceed, with a view to arriving at a mutually acceptable agreement according to which the defendant will plead guilty.<sup>30</sup> It is not a process in which the court has any formal role.<sup>31</sup> Plea negotiations in Australia can be part of a structured case conferencing system managed by a court, but generally they involve informal discussions and correspondence between the prosecution and defense.<sup>32</sup> They

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<sup>24</sup> FRCrP 11(e)(1)(A)-(C).

<sup>25</sup> Santhy K.V.K.. (2013), "Plea Bargaining in US and Indian Criminal Law Confessions for Concessions", *NALSAR Law Review*, Vol. 7: No. 1.

<sup>26</sup> 397 U.S. 742 (1970).

<sup>27</sup> 559 U.S. 356 (2010).

<sup>28</sup> 132 S. Ct. 1376 (2012).

<sup>29</sup> 132 S. Ct. 1399 (2012).

<sup>30</sup> Flynn Asher, (2011), "Fortunately We in Victoria Are Not in That UK Situation: Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform".

<sup>31</sup> Boll Matthias, (2009), "Plea Bargaining and Agreement in the Criminal Process comparison Between Australia, England and Germany".

<sup>32</sup> Waye Vicki & Marcus Paul, (2010), "Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds".

can occur at any time before the trial of the charges brought against a defendant, and even after a trial has commenced. Plea negotiations are encouraged, and sometimes mandated, to occur at an early stage in the management of a case in all Australian jurisdictions.

### 8.3 New Zealand

In New Zealand, plea bargaining is referred as sentence indication and the practice grew up informally. Now it has been incorporated into the Criminal Procedure Act, 2011. There are three major stages to the process. The first stage is generally described as administration, or the steps that are taken to bring a case to a point where it can be considered ready for trial. There are certain timeframes within this administration process; ideally, after a first appearance, the case should be adjourned for either ten or fifteen working days depending upon the type of case and the nature of the disclosure to be made.<sup>33</sup> At a second stage, a plea is required together with an election of jury trial if appropriate.<sup>34</sup> Third stage is the trial itself.

### 8.4 Canada

Plea bargaining is more restricted in Canada. This is because Canadian Judges are not bound by the crown's sentence recommendations. The Crown's prosecutors are however free to make such recommendations on the bias of a plea agreement with the defendant. However, in practice, the crown will usually recommend a punishment to the court higher than what was agreed under a plea bargain while the defense will be urging a sentence far lower than that agreed upon with the crown prosecution when they appear before the judge. The aim is to enable the sentence of the court to fall within the range of that agreed upon in the plea bargain. The Canadian Courts are aware of this practice and tend to encourage it, as a way of checking any above of the plea bargain system. This goes to show that Canada is aware of the possibility of converting the plea bargain procedure into an engine for perpetuating protection fraud.<sup>35</sup>

### 8.5 India

The concept of plea bargaining is not entirely new in India. Indian criminal justice system has already recognized it when it got its constitution in 1950. Article 20(3) of Indian constitution prohibits self-incrimination. Thus, people argued that plea bargaining violated the aforementioned article. But with the

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<sup>33</sup> *Criminal Procedure Rules 2012*, Section 4.1 (N.Z.).

<sup>34</sup> *Criminal Procedure Act 2011*, Section 51.1 (N.Z.).

<sup>35</sup> *Supra* Note 6.

passage of time, Indian court felt the need of Plea bargaining in Indian legal system.<sup>36</sup> Plea bargain was introduced into the India legal system in 2006 by a statute. The statute however made the procedure applicable in criminal proceedings involving only minor offences. However, property offences in the nature of socio-economic crimes such as the looting of the public treasury and offences committed against a woman or a child less than 14 years of age are excluded from the application of the procedure. In *State of Gujarat v. Natwar Harchandji Thakor*, Gujarat High Court recognized the utility of this method. The court held that the very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure and redressal and it shall add a new dimension in the realm of judicial reforms.<sup>37</sup>

## 9. ADVANTAGES OF PLEA BARGAINING

In plea bargain, the accused has a chance to accept his/her crime and confess as this process ensures that the rights of the accused are considered as well. In some countries, it is even considered as an essential component of the criminal justice system. For instance, the supreme court of the United States of America considers it as a crucial part of their criminal justice system. It has the following advantages:

- This process also benefits in making the legal procedure effective, prompt and inexpensive. Since the negotiation is done between the accused and the prosecutor, it is beneficial to both the parties.
- Since the defendant confesses his/her crimes, it is significantly faster than the conventional system as the court does not need more time to prove that the defendant is guilty. This saves a lot of time and resources of the investigators, government attorneys and the court, as well as decreases the sentence of the defendant.
- If the defendant confesses his/her crimes, it decreases the complexity of the justice process and does not trouble people who are not directly involved in the case (such as eyewitnesses). Since the plea bargain involves the court, sentences that are a result of it have legitimacy.

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<sup>36</sup> Available at <https://blog.ipleaders.in/plea-bargaining-practice-india/>.

<sup>37</sup> (2005) Cr.L.J. 2957.

- In cases involving plea bargain, the sentence is decided as a negotiation between the court, the defendant, the prosecutor and the victim and is thus a win-win situation. Since the defendant himself/herself confesses and accepts his/her crimes, it helps in the investigation of the cases and helps in reaching out to other criminals involved in the crime. This is highly useful in the cases involving organized crime.
- Since the reduction of sentence is guaranteed, the defendant is likely to confess voluntarily.
- This is more ethical than forcing the defendant to provide evidences and so guarantees that no right of the defendant is violated. Since, only those confessions which are based on factual evidence are accepted, the process helps to bring out the truths involved in the actual crime.
- It is also respectful to the defendant's human rights and can save them from severe punishments. It may also contribute to the successful prosecution of other more serious offenders.

## 10. NATIONAL LEGAL PROVISIONS

Generally, there is no provision of reduction of sentences in our criminal justice system. Although the provision of plea bargain is present in some of the specific laws in different forms, they are implemented for the sole purpose of investigating crimes and gathering evidences rather than for other purposes such as to decrease the workload of the court, decrease the cost involved, decrease the complexity involved in the processes involving voluntary confession and increase the overall efficacy of the court.

### 10.1. Some Provisions of Nepali Law Resembling Plea Bargaining

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.<sup>38</sup> It is considered as a necessary strategic tool as narcotics drugs crime is complicated and organized. Thus, to prevent such crimes and reach to real criminals, it is very effective.

Narcotics Control Officer (Nepal Police) can free the first time offender who purchases, possess or uses marijuana and/or medicinal opium in small quantity by signing a conditional deed.<sup>39</sup> Section 21 of the Human Trafficking and Transportation (Control) Act, 2008 (2064) has provided that, if a defendant charged of committing an offence under this Act confesses an offence and co-

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<sup>38</sup> *Narcotic Drugs (Control) Act 2033 BS*, Section 18 (c).

<sup>39</sup> *Narcotic Drugs (Control Act), 2033 BS*, Section 19.

operates with the police, public prosecutor or court to collect evidence and arrest of other defendant or abettor, and if he/she has committed the offence for the first time, court can reduce the punishment up to twenty five percent so prescribed for that offences.

As per the section 44 of the Money laundering Prevention Act, 2008, the investigation officer may provide waiver in the claim of punishment, in full or part, to a person extending cooperation in regard to the investigation and inquiry proceedings initiated under the Act. But lawsuit may be re-registered against such person if his/her cooperation could not be established from other evidences or if he/she makes contrary statement before the adjudicating officer which is against the cooperation extended by him/her to the investigation and inquiry officer.

Section 55 of the Prevention of Corruption Act, 2059 and Section 26 of the Banking offence and punishment Act, 2064, has provided provision of plea bargaining for those who help or assist in investigation and can provide full or partial rebate in the sentence. Offenders can be recharged if their support turns out to be baseless and/or if they are hostile in the courtroom.

Section 21 of Organized Crimes Prevention Act, 2070 has provided the Charge bargain if the defendant confesses, assists to collect evidences and assists to detain other defendants, accessories and gang. Prosecutors can file case with demanding concession rebate up to 75% of the punishment but can recharge against the same defendant, if his or her assistance is not supported by the evidence and presents with hostility in the court.<sup>40</sup>

Human Trafficking and Transportation (Control) Act, 2007 has provided that if an accused charged of committing an offence under this Act accepts an offence and co-operates with the police, public prosecutor or court to collect evidence and arrest other accused or abettor, and if he/she has committed the offence for the first time, court can reduce the punishment up to twenty five percent of the prescribed offence.<sup>41</sup> If the assistance is not proved by the evidence or he/she gives statement against the support provided to the police or prosecutor, a case may be registered again notwithstanding anything in the prevailing laws.

However, there shall be no reduction in claimed punishment, pursuant to this section, in the following conditions<sup>42</sup>:

- (a) To provide exemption in punishment to the principal accused,

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<sup>40</sup> *Organized Crimes Prevention Act, 2070 BS*, Section 21.

<sup>41</sup> *Human Trafficking and Transportation (Control) Act, 2064 BS*, Section 21 (1).

<sup>42</sup> *Ibid*, Section 21(2)

- (b) If the case involved is trafficking or transportation of a child,
- (c) If exemption in the punishment has already been provided.

The Chapter on Theft of '*Muluki Ain*' has a provision which resembles the concept of plea bargaining. It is explicitly mentioned that if the offender submits or produces the amount in question prior to the disposal of the case, except in cases where the offender is a government employee or where the owner of stolen property himself or herself has assisted in finding out or seizing the stolen property in the course of search and seizure, the offender shall be liable only to the fine of Ten percent of the amount in question.<sup>43</sup>

Out of the persons who have gone together to commit any type of theft but who has not been involved in the commission of offence of rape or murder or who has not committed such offence, such persons shall be liable to the punishment only for the theft. In cases where, such thief (offender) before accusation against him or her or his or her arrest reports the offence of murder or rape so committed on the spot immediately or where the offender controls and causes the arrest of the co-accused or provides a lead information before accusation or his or her arrest, such an accused who reports or brings or causes to arrest shall not be punished for the offence of theft even though he or she confesses the offence or it is so proved by the evidence; such an offender (who so helps) shall be set free upon realizing the amount which he or she has taken away or used up.<sup>44</sup>

In cases where the offender who commits the offence as referred to in this Chapter surrenders himself or herself before the security personnel in the course of the commission of offence and assists in the investigation, punishment may be reduced in the case of such offender upon considering the circumstance.<sup>45</sup>

It can be seen from that the very first codified and documented law of Nepal, the *Muluki Ain*, 2020 as well as the various special Acts that followed, the importance of reduction of sentences and waiver for certain criminal cases cannot be ignored for effective justice. Although the provisions mentioned in the *Muluki Ain*, 2020 are not plea bargain in the strictest sense, these are strong indications of the necessity of such principles to handle certain cases for an effective administration of criminal justice system.

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<sup>43</sup> *Muluki Ain*, 2020 BS, Chapter on Theft, No. 15.

<sup>44</sup> *Ibid*, No 22.

<sup>45</sup> *Ibid*, Chapter of Abduction and Hostage Taking, No. 10.

In the case of GoN vs. Prithivi Bahadur Khadka, Supreme Court held that although confession in itself is important evidence, it alone cannot be a basis to prove the accusation. Several complications may emerge if confession is taken as the sole basis to prove an accusation. Thus, judicial interpretation should not be done in a way which fosters such possibilities. Court should always be keen on developing an environment for fair trial which eliminates the possibility of facing pressure, influence, threat and warning from other parties. Hence, when declining the statement given in the Court, such actions should be justified by the same party who declines it by presenting a proper basis for it. Our judicial belief and mentality in which a person gets immunity from punishment by falsely confessing and gets punished for truthfully confessing his/her crimes needs to change as this gives the people incentive to falsely testify rather than truthfully confess. Concession should be given to those who accept and regret their crime and help in the process of investigation, which is even accepted by the developed judicial system.<sup>46</sup>

In the case of GoN vs. Pitardin Khatik (Homicide), the Court held that those offenders who confess and help the judicial procedure should be treated differently than those who hide the reality and avoid punishment and thus the imposition of punishment should not be equal to them<sup>47</sup>.

## **10.2. Provision of Plea Bargaining Under Muluki Criminal Codes**

Except few specific laws, existing criminal justice system does not provide any exemption or concession to an offender who, after appearing before the court, voluntarily admits the fact of having committed offence or who surrenders himself/herself before investigation officer. Instead, if the defendant admits his/her crime, it will be used against himself/herself as a proof of the crime. On the contrary, there is a possibility that the person refuses the accusations of offence before the court with the hope of being acquitted. If such anomaly is not corrected, it will be difficult to find a person who will, after appearing before court of law, express true fact or will render assistance in investigation.

The new Criminal Codes promulgated in Nepal is regarded as a paradigm shift in Nepalese criminal justice system and is provisioned to come in effect from August 17, 2018. It has introduced the concept of plea bargaining for the first time in our criminal justice system in all kinds of crimes.

### *10.2.1. The Muluki Criminal (Code) Act, 2074 BS*

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<sup>46</sup> Prithivi Bahadur Khadka v. Government of Nepal, NLR 2067 BS, Vol. 8, Decision No. 8423.

<sup>47</sup> NLR 2067 BS, Vol. 1, Decision No. 8297.

In the Country Penal (Code) Act, 2074, there is a provision where any offender, upon having confessed the offence 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 offence or assisted the investigating or prosecuting authority or the court, a maximum of fifty percent of the sentence imposed under law for such offence may be remitted.<sup>48</sup> Notwithstanding anything contained in sub-section (1), the following offender shall not be entitled to the remission of sentence:<sup>49</sup>

- (a) Who has once obtained remission under sub-section (1),
- (b) Who has not completed three years' period of the service of the sentence of imprisonment for an offence punishable with imprisonment, of which he or she has been convicted,
- (c) Who has once been sentenced for the same nature of offence as in which the remission of sentence is sought.

In granting a remission of punishment pursuant to sub-section (1), regard shall be had to, inter alia, at which stage of investigation or trial the accused has confessed the offence and in what circumstances he or she has made such confession.<sup>50</sup>

#### *10.2.2. The Muluki Criminal Procedure (Code) Act, 2074*

Section 33 of the Muluki Criminal Procedure (Code) Act, 2017 (2074) has provided that, if the accused of any offence assists the investigating authority in the course of conducting investigation into such offence, the investigating authority may recommend to the government attorney for a remission of sentence for such assistance from the sentence that is impossible on such accused under the law. If a recommendation is pursuant to sub-section (2), the Government Attorney may, also having regard to such recommendation, file a charge sheet with conditional claims, with a proposal for a remission of the sentence that can be imposed on the accused.<sup>51</sup> In filing a charge sheet pursuant to sub-section (1), the government attorney may file the charge sheet proposing for the remission of sentence as follows:<sup>52</sup>

- a) if the accused pleads guilty of the offence in whole, before the investigating authority or prosecuting authority, a remission of a

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<sup>48</sup> *The National Penal (Code) Act, 2074 BS*, Section 47 (1).

<sup>49</sup> *Ibid*, Section 47 (2).

<sup>50</sup> *Ibid*, Section 47 (3).

<sup>51</sup> *The National Criminal Procedure (Code) Act, 2074 BS*, Section 33(2).

<sup>52</sup> *Ibid*, Section 33 (3).

- maximum of twenty-five percent of the sentence can be imposed on the accused,
- b) if the accused pleads guilty of the offence in which he or she was involved and assists in revealing detailed facts related to the offence and other offenders or gangs involved in the offence or the principal offender giving direction to commit the offence or in arresting the persons involved in the offence, or, in the case of any organized offence or offence committed in a group, in locating the other persons involved in that offence or the place where criminal conspiracy of such offence was made, in seizing or forfeiting any vehicle, machine, equipment or other object or arms used for the commission of such offence, a remission of a maximum of fifty percent of the sentence can be imposed on the accused.

In order to make a pray for the remission of sentence under sub-section (2), the documents contained in the case file of the concerned case shall clearly demonstrate that such accused has rendered such assistance.<sup>53</sup> Notwithstanding anything contained elsewhere in this Section, a pray cannot be made for the remission of a sentence in the following offence or circumstance:<sup>54</sup>

- a) If the accused has once availed of the facility under this Section,
- b) If the accused was sentenced to imprisonment, a period of three years has not lapsed after the service of such sentence,
- c) If the accused has already been sentenced for the same offence in which he or she is accused of.

If, after the filing of a charge sheet praying for a remission of sentence pursuant to sub-section (2), the accused makes before the court a deposition that is different from the deposition which he or she has made before the investigating authority or the government authority or furnishes hostile evidence or denies committing the offence or does not assist in judicial proceedings, such accused shall not be entitled to get the privilege set forth in this Section.<sup>55</sup> In a case referred to in sub-section (6), the Government Attorney shall revoke the remission of sentence proposed pursuant to sub-section (1) or (2) and make an application to the court praying for additional sentence and such application shall be an integral part of the same charge sheet.<sup>56</sup>

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<sup>53</sup> *Ibid*, Section 33 (4).

<sup>54</sup> *Ibid*, Section 33 (5).

<sup>55</sup> *Ibid*, Section 33 (6).

<sup>56</sup> *Ibid*, Section 33 (7).

## **11. CHALLENGES OF PLEA BARGAINING AND ITS IMPLICATIONS IN OUR CONTEXT**

The biggest challenge of plea bargaining is perhaps the fact that it can be blatantly misused. The defendant can be indirectly pressurized or threatened to confess the offence. The concept of plea bargain requires the defendant to give up his/her right against self-incrimination when he/she voluntarily confesses his/her crimes. This encourages even the innocent to falsely confess. It can be even more challenging in the cases of criminal law because in this provision, there is a provision of potential partial or complete reduction of sentence which a criminal can find as a loophole under a certain case to escape punishment from another case. This system benefits the guilty and hampers the innocent as well. This system of reduction of sentence by the process of plea bargain can discourage the police and investigation officers as it takes a lot of hard work for officers to gather evidences against a criminal and if the criminal can get his/her sentence reduced by merely confessing voluntarily, it might discourage those officers for future cases. The process of plea bargaining is itself complex and difficult. In many cases it might have more negative effects rather than positive. Figuring out whether plea bargaining is suitable for any particular case is in itself a tricky and complex task.

In our criminal law, fairness in investigation and prosecution is in question. Thus, the implementation of plea bargaining system, considering fairness during trial is of utmost importance. For the process of plea bargaining to work properly, both the defense lawyers and the prosecutors will need to have a good knowledge of the system. Training the lawyers and prosecutors in the process of plea bargaining can be challenging as well. Due to the trend of difficulty in accepting and welcoming changes and also improvement in the legal system, the implementation of the plea bargaining can take time to be accepted as a practical approach. The acceptance of the system requires that the citizens be progressive and open in their attitudes. Due to the comparable low literacy rate in our country, it is hard to predict whether the citizens will approve and accept this novel system or not. As the sentence of the criminal can be reduced by the system of plea bargain, the victims may feel that their rights have been disrespected.

## **12. CRITIQUE OF PLEA BARGAINING**

A major criticism of this principle is the unfettered discretion given to the prosecutor. On the other hand innocent defendants may plead guilty simply because they do not want to risk going to trial, be convicted, and receive a

more severe sentence.<sup>57</sup> At the same time, some victims and some members of the public believe that justice may not be served if a defendant is allowed to either plead guilty to a lesser crime or receive a lower sentence, which is seen as a corruption and manipulation of the criminal justice system.<sup>58</sup> It allows presentation of the defendant with unconscionable pressure and can lead to poor case preparation and investigations. One cannot deny that it might be biased to the prosecution party and might charge innocent people guilty.

Once the defendant agrees to the terms of plea bargain, he/she gives up his/her right against self-incrimination because of the provision of complete or partial reduction of sentence. The victim is not present in the negotiation and even when he/she is present, his/her presence would not contribute greatly to the negotiation in the plea bargain system and this might result in the victim feeling that his/her rights have not been protected. A dishonest confession can unnecessarily lengthen a case and waste the time and resources of the court. Thus, this system can induce poorer investigation, as more effort may be directed towards convincing the defendant to plead guilty rather than investigating the crime more effectively.

### 13. CONCLUSION

The plea bargaining has been very successful in the United States of America and is in practice also in the United Kingdom. This idea to some extent has also been implemented in our legal system, especially in cases of drug trafficking, human trafficking, corruption and money laundering where there is a provision of partial or full reduction of sentence. However, since this principle has not been applied to other cases, criminals of such cases do not have any incentives to confess the crime and help in investigation of the cases.

The idea of plea bargaining despite being adhered and implemented in different criminal justice system of different countries, it is not free from criticisms and it possesses some tough challenges as well. On the other hand, careful and scientific analysis, thorough investigation and effective prosecution can help alleviate some of the criticisms from this system. The success rate of criminal cases in Nepal is relatively lower as compared to other Asian countries. Success rate in criminal cases is higher in the countries where the system of plea bargaining has been adopted.

Thus realizing the importance of provision of reduction of sentences for criminals cooperating in the investigation, Muluki Criminal Procedure (code)

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<sup>57</sup> Peter J. Messitte, (2010), "Plea Bargaining in Various Criminal Justice Systems", Montevideo, Uruguay.

<sup>58</sup> *Ibid*, p. 9.

Act, 2074 and Muluki Criminal (Code) Act, 2017 has introduced the system of plea bargaining in all criminal cases. The adoption of the principle of plea bargaining can be taken as a sign of progressive step towards a modern criminal justice system and it can be hoped that it will be helpful in delivering effective and speedy justice to the victims.



# Judicial Initiatives in Strengthening Gender Justice in Nepal

Nagendra Lamsal\*

## ABSTRACT

After the Beijing Conference of 1995, the Ministry of Women and Social Welfare was established and thus Government of Nepal committed itself to ending discrimination against women. **Equality between women and men (gender equality)** refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality is not only women's issue but should concern and fully engage men as well as women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centered development.

## 1. BACKGROUND

**M**en and women are different due to the physical body structure but they are not unequal. Women experience extreme forms of gender discrimination throughout their life and have been disadvantaged throughout the history.<sup>1</sup> Women's rights are part of human rights and gender justice is related to the social justice.

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<sup>1</sup> ShashiRautAdhikary, *Equality and State Obligation*, Nepal Law Review, Vol. 20, Number 1 and 2, 2007-2008, at 172, Nepal Law Campus, Kathmandu, Nepal, (2009).

Nepalese women continue to face social, economic, political, gender, and even legal discriminations in their public and private spheres, directly or indirectly irrespective of the State's number of international *vis-à-vis* national commitments in relation to non-discrimination, gender equality and social justice.<sup>2</sup> The societal structure in Nepal that is deeply rooted with the patriarchal values, norms and mindset, has hindered Nepali women and girls to live free of gender-based discrimination and violence. Discriminatory practices like dowry, *tilak*, *chhaupadi*, *deuki*, *jhooma* and polygamy are still prevalent in various parts of Nepal.<sup>3</sup>

The Constitution of Nepal<sup>4</sup> envisages the right to equality and rights of women as fundamental rights. Article 18 (1) of the Constitution of Nepal guarantees the Right to equality of Nepali Citizens before the law and provides equal protection of law. Article 18(2) of the Constitution of Nepal ensures that no discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds. The Constitution has expanded the scope of non-discrimination thereby recognizing physical conditions, disability, health condition, marital status, pregnancy and economic condition as grounds for differential treatment and positive discrimination. Likewise, Article 38(1) of the Constitution of Nepal recognizes the rights of women that provide among others, every woman shall have 'equal lineage right without gender based discrimination'.

With the restoration of multi-party political system in 1990, Government of Nepal ratified the UN Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 1991 without reservation. After the Beijing Conference in 1995, the Ministry of Women and Social Welfare was established and thus Government of Nepal committed itself to ending discrimination against women.<sup>5</sup>

National Women Commission of Nepal is made a constitutional body with the provision included in constitution of Nepal in Part- 27, Article 252. Hence, this paper endeavors to study the concept of gender equality and role of Supreme

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<sup>2</sup> CIVIL SOCIETY ALTERNATE REPORT ON CEDAW CONVENTION, CEDAW SHADOW REPORT PREPARATION COMMITTEE (SRPC) COORDINATED BY FWLD AND HRTMCC, Kathmandu, Nepal, at 1 (2016) available at <http://fwld.org/wp-content/uploads/2016/07/cedaw-report-2016.pdf> (Accessed on January 10, 2017).

<sup>3</sup> *Ibid.*

<sup>4</sup> The Constitution of Nepal has been adopted on 20 September 2015 (2072/06/03)

<sup>5</sup> AN UPDATE OF DISCRIMINATORY LAWS IN NEPAL AND THEIR IMPACT ON WOMEN, FORUM OF WOMEN, LAW AND DEVELOPMENT (FWLD), Kathmandu, Nepal, at 6, (2006).

Court in promoting gender justice in Nepal, it attempts to highlight the provisions of the Constitutional and legal provisions along with the international human rights instruments.

## 2. CONCEPT OF GENDER EQUALITY

**Gender**<sup>6</sup> refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.

**Equality between women and men (gender equality)**<sup>7</sup> refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same but rather means women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality is not only women's issue but should concern and fully engage men as well as women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centered development.

The phraseology known as "gender equality" refers to the condition of equal rights, responsibilities and opportunities to women and men or girls and boys.<sup>8</sup> Equality does not mean that women and men are or should be same biologically. It means that women and men's rights, responsibilities and opportunities cannot be dependent on a fact that they are males or females.<sup>9</sup>

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<sup>6</sup> Concepts of Gender and Gender Equality available at <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (Accessed on December 2, 2016).

<sup>7</sup> *Ibid.*

<sup>8</sup> Dr. YUBARAJ SANGROULA, JURISPRUDENCE: THE PHILOSOPHY OF LAW ORIENTAL PERSPECTIVE WITH SPECIAL REFERENCE TO NEPAL, 1st Ed., Kathmandu School of Law, Bhaktapur, Nepal, at 389, (2010).

<sup>9</sup> *Ibid.*

Gender equality implies that interests, needs and priorities of both women and men are to be taken as same, to be recognized and protected irrespective of their biological differences.<sup>10</sup>

The term "discrimination against women" means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>11</sup>

Gender equality is achieved when women and men enjoy the same rights and opportunities across all sectors of society, including economic participation and decision-making, and when the different behaviors, aspirations and needs of women and men are equally valued and favored.<sup>12</sup>

### 3. INTERNATIONAL INSTRUMENTS RELATED TO GENDER JUSTICE

After the establishment of The United Nations (UN) on 24 October 1945 A.D.,<sup>13</sup> provision of right to equality became established. Nepal became the member of the United Nations in 14 December 1955.<sup>14</sup>

Nepal is a signatory to 24 international human rights instruments<sup>15</sup> including which supports women rights, gender justice and gender equality. The preamble of the Charter of the United Nations, 1945<sup>16</sup> reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. The brief discussion on international instruments related to the equality and women rights are discussed as follows:

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<sup>10</sup> *Ibid.*

<sup>11</sup> CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979, Art. 1.

<sup>12</sup> Concepts of Gender Equality available at <http://www.genderequality.ie/en/GE/Pages/whatisGE> Date (Accessed on December 2, 2016).

<sup>13</sup> Available at <http://www.un.org/en/sections/history/history-united-nations/index.html> (Accessed on December 27, 2016).

<sup>14</sup> Available at <http://www.un.org/en/member-states/index.html> (Accessed on December 27, 2016).

<sup>15</sup> MANAV ADHIKAR SAMBANDHI ANTARRASTRIYA MAHASANDHIHARU KO SANGALO (THE LIST OF TREATIES RELATED TO THE HUMAN RIGHTS), MINISTRY OF LAW, JUSTICE, CONSTITUENT ASSEMBLY AND PARLIAMENTARY AFFAIRS, Kathmandu, Nepal, [2072 Ashar (2015)].

<sup>16</sup> The Charter of UN was adopted in San Francisco, USA on June 26, 1945.

### **3.1 Universal Declaration of Human Rights (UDHR) 1948<sup>17</sup>**

The Universal Declaration of Human Rights (UDHR) 1948 is the first international legal instruments related to the human right that was adopted by UN General Assembly in December 10, 1948. The Article 2 of the UDHR states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Article 7 states that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. The provision of UDHR is the inevitable basis for the attempt of elimination of discriminatory legal provision for all signatory states.

### **3.2 Convention on the Political Rights of Women, 1952**

The convention was adopted on 20 December 1952. The convention's date of entry into force was 7 July 1954. Convention was accessioned by Nepal on 16 April 1966. Article 1 of the convention provided that "Women shall be entitled to vote in all elections on equal terms with men without any discrimination. Article 2 of the convention provided that "Women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination. Article 3 provided that "Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.

### **3.3 International Convention on the Elimination of All forms of Racial Discrimination (ICERD), 1965**

The convention was adopted on 21 December 1965. The date of entry into force of convention is 4 January 1969. Convention was accessioned by Nepal on 30 January 1971. Nepal has kept reservation on Article 4, 6 and 22 of the convention. Article 1(4) of the convention says that "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial

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<sup>17</sup> The UDHR was adopted and proclaimed by General Assembly of UN Resolution 217A(III) on December 10, 1948.

groups and that they shall not be continued after the objectives for which they were taken have been achieved. Article 2, 3, 4, 5, 6 and 7 of the convention have determined some obligations to the state parties for eradication of racial discrimination on their territory as well as for providing some positive actions to the weaker sections of the society.

### **3.4 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966**

The covenant was adopted on 16 December 1966. The date of entry into force of covenant is 3 January 1976. Covenant was accessioned by Nepal on 14 May 1991. Article 2(2) of Covenant ensures that "The states party to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 3 of Covenant says that "The states parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

### **3.5 International Covenant on Civil and Political Rights (ICCPR), 1966**

The covenant was adopted on 16 December 1966. The date of entry into force of covenant is 23 March 1976. Covenant was accessioned by Nepal on 14 May 1991. Article 2(1) of Covenant ensures that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 of Covenant ensures that "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

### **3.6 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979**

The convention was adopted on 18 December 1979. The date of entry into force of convention is 3 September 1981. Nepal had ratified the convention on 22 April 1991. The preamble of CEDAW stressed that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men,

in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

Article 1 of CEDAW ensures, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

- Article 2 of CEDAW condemn discrimination against women in all its forms by taking all appropriate measures, including legislation, to modify or abolish discriminatory existing laws, regulations, customs and practices against women.
- Article 3 of CEDAW stipulates that States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.
- Article 4(1) ensures that adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention. Article 4(2) says that adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.
- Article 15 (2) ensures that equal rights for women to conclude contract and administer property and shall treat them equally in all stages of procedure in courts and tribunals. Article 16 (1) (h) ensures the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.

### **3.7 The Convention on the Rights of the Child 1989**

The convention was adopted on 20 November 1989. The date of entry into force of convention is 2 September 1990. Nepal ratified the Convention on 14 September 1990. Article 2(1) of Convention ensures that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the

child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Article 2(2) ensures that States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. The convention has determined some obligations to the state parties under Articles 2 to 41 to take positive actions including making a law.

#### 4. Legal Provisions related to Gender Justice in Nepal

The Rana regime introduced the first ever written law, the Country Code (Muluki Ain) was codified in 1853 A.D. (1910 B.S.), which included the concept of positive law. It was applicable to the whole country.<sup>18</sup> The Code was discriminatory in the application of law on the ground of religion, race, sex, caste and tribe. There was difference in punishment for men and women and for the person of “lower caste” and “upper caste.”<sup>19</sup> It was based on *Manusmriti* and believed on the philosophy that a woman is not entitled to independence as the father is supposed to protect her in childhood, husband in her youth and son in old age. Polygamy, child marriage, unmatched marriage was permitted without any precondition. Daughters were excluded of in the matters of property.<sup>20</sup> During the period of King Surendra Bikram Shah and Prime Minister Jung Bahadur Rana Regime first Country Code was codified in 1853 A.D.

There were no expressed legal provisions related to equality in Nepal before the promulgation of first written Constitution in Nepal in 2004 B.S. Government of Nepal Act, 2004 B.S. (1948), where it provided legal equality as a fundamental right in Article 4. The Interim Government of Nepal Act 2007 B.S. (1951) provided and guaranteed equality before law (Article 14), where it provided exclusion on discrimination on grounds of religion, race, cast, sex, etc. (Article 15) and Equality of opportunity for all citizens (Article 16). The Constitution of the Kingdom of Nepal 2015 B.S. (1959) ensured in Article 4 the right to equal protection of laws to all citizens. The Constitution of Nepal 2019 B.S. (1962) in part 3 Fundamental Duties and Rights under Article 10 had ensured Right to Equality. Article 10 under Right to equality stipulated that,

- (1) All citizens shall have the right to equal protection of the laws.

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<sup>18</sup> Supra note 5 at 8.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, at 8-9.

- (2) No discrimination shall be made against any citizen in the application of general laws on ground of religion, race, sex, caste, tribe or any of them.
- (3) There shall be no discrimination against any citizen in respect of appointment to the government service or any other public service only on grounds of religion, race, sex, caste, tribe or any of them.

The *Muluki Ain* of 2020 B. S. (1963) has followed the same philosophy and is largely a replica of the old one. It was only in 1975, on the occasion of the International Women's Year, that certain rights were provided to women. By the Sixth amendment to the Country Code in 1975 (2033/4/28), daughters were entitled to partition share of the parental property, provided that she remained unmarried and was above 35 years of age. Other reforms included divorcee right to maintenance, provision for adoption of daughter and restriction on bigamy.<sup>21</sup>

The Constitution of the Kingdom of Nepal 1990 (2047 B.S.) in Part 3 under Fundamental Rights in Article 11 guaranteed Right to Equality stipulating that No one shall be discriminated on the basis of sex. The provision of Article 11 stipulated that:

- (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.
- (2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion (*dharmā*), race (*varna*), sex (*linga*), caste (*jat*), tribe (*jati*) or ideological conviction (*vaicarik*) or any of these.
- (3) The State shall not discriminate among citizens on grounds of religion, race, sex, caste, tribe, or ideological conviction or any of these. Provided that special provisions may be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.
- (4) No person shall, on the basis of caste, be discriminated against as untouchable, be denied access to any public place, or be deprived of the use of public utilities.

Any contravention of this provision shall be punishable by law.

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<sup>21</sup> *Ibid*, at 11.

- (5) No discrimination in regard to remuneration shall be made between men and women for the same work.

Article 17 under fundamental Rights related to the Right to Property in which 17 (1) includes that "All citizens shall, subject to the existing laws, have the right to acquire, own, sell and otherwise dispose of, property."

Article 25 of the 1990 Constitution envisaged the concept of social justice. It stipulated that social objective of the State shall be to establish and develop, on the foundation of justice and morality, a healthy social life, by eliminating all types of economic and social inequalities and by establishing harmony amongst the various castes, tribes, religions, languages, races and communities.

In the process of change and development, the Constitution promulgated in 1990 brought some drastic changes into the existing judicial system of Nepal, some of which are basic human rights guaranteed as fundamental rights, independence of judiciary and rule of law which form the basic structure of the Constitution; extra-ordinary jurisdiction to the Supreme Court to test the validity of the laws on the touchstone of judicial review, judicial council as an administrative mechanism to run the administration of judges; tenure of service of judges of all levels.<sup>22</sup>

As a result of advocacy and the Supreme Court's intervention in Public Interest litigations, the eleventh amendment to *Muluki Ain* 1963 took place amending some of the discriminatory provisions on property, abortion, sexual offences and laws relating to marriage and family relations.<sup>23</sup>

Though the 11th Amendment to the *Muluki Ain* 1963<sup>24</sup> has brought about few positive changes, many of them are partial and need to be reviewed again. Even after the 11th Amendment, 176 Provisions, two Rules in their entirety, and 103 Schedules in 85 laws are still discriminatory against women.<sup>25</sup> In Nepal, before the 11th amendment of the *Muluki Ain*, abortion was illegal even in a case of rape and suffering from aids too. It was cruel and inhuman provision for women. However, after the Eleventh Amendment of *Muluki Ain*, 2020 B.S changed the homicide provisions of the national code and made liberal than before.

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<sup>22</sup> *Ibid.*

<sup>23</sup> A STUDY ON DISCRIMINATORY LAWS AGAINST WOMEN, DALIT, ETHNIC COMMUNITY, RELIGIOUS MINORITY AND PERSONS WITH DISABILITIES, FWLD, Kathmandu, Nepal, at 2-3, (2009).

<sup>24</sup> The amendment to the National Code (*Muluki Ain*) was passed by the Parliament on March 14, 2002. Its royal seal and publication was done on September 26, 2002 (2059/05/27).

<sup>25</sup> *Supra Note 5*, at 12.

The National Women's Commission (NWC) was established on March 8, 2002 to ensure women's rights by advising the government to effectively implement international human rights instruments and to develop plans and policies specifically aimed at advancing women.<sup>26</sup> National Women Commission of Nepal has been made a constitutional body with the provision included in constitution of Nepal in Part- 27, Article 252.

The Supreme Court of Nepal has once again evaluated the eleventh amendment of the *Muluki Ain* 2020 B.S. (1963). In several writ petitions Supreme Court has directed government to amend the laws which are contradictory to the provisions of Constitution of Nepal 1990, such as equal rights and gender equality provisions.<sup>27</sup> An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2063 (2006)<sup>28</sup> made some amendments in the 56 discriminatory provisions of the various Acts and has incorporated new provisions to ensure women's rights.<sup>29</sup> The following are the changes found in the act:<sup>30</sup>

- Right to dispose her own share of ancestral property without the consent of male members of the family such as her husband, son or father.
- Right of inheritance whether she got married or not
- Law drafted against witchcraft.

The Interim Constitution of Nepal, 2007 (2063 B.S) promulgated on 15 January 2007 (2063 *Magh* 1) has guaranteed the right to equality and equal protection of law was guaranteed as fundamental rights in Article 13 (1). Article 13(3) included special provisions by the law for the protection, empowerment and advancement of women. Article 13 (4) included the provisions that no discrimination in regard to remuneration social security shall be made between men and women for the same work. Article 20 related to the Rights of women is guaranteed as fundamental rights. In Article 20 (1) it was provided that "No discrimination of any kind shall be made against the women by virtue of sex." Article 20 (2) included every woman shall have the right to reproductive health and reproduction. Article 20 (3) included no woman shall be subjected to physical, mental or any other kind of violence; and such act

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<sup>26</sup> *Supra* Note 5, at 8.

<sup>27</sup> Sushila Karki, *Gender Equality and Justice in Nepal: A Bird's Eye View*, NJA Law Journal, Vol. 3, Number 1, at 137, National Judicial Academy Nepal, Lalitpur, Nepal, (2009).

<sup>28</sup> The act was amended on 2063/07/17 (November 3, 2006).

<sup>29</sup> Kalpana Giri, PhD, *Gender reforms in Nepal: Retreat or Predicaments? A review of the politics and practice of women's rights*, Alliance for Social Dialogue and South Asia Institute of Advanced Studies, Kathmandu, Nepal, at 19, (May, 2012).

<sup>30</sup> *Supra* Note 29.

shall be punishable by law. Article 20 (4) included that the Sons and Daughters shall have the equal right to ancestral property. The Interim Constitution of Nepal recognized equal rights of women to property, including the right to reproductive functioning and health. Likewise Article 21 of the Interim Constitution of Nepal related to the Right to Social Justice, where it guaranteed that the economically, socially or educationally backward women shall have the right to take part in the structures of the State on the basis of the principle of proportional inclusion.

The rights of women are made wider in the Constitution of Nepal.<sup>31</sup> Constitution of Nepal envisages the right to equality and rights of women as fundamental rights. Article 18 is related to the Right to Equality. Article 18 (1) of the Constitution of Nepal guarantee the Right to equality of Nepali Citizens before the law and provides equal protection of law. Article 18(2) of the Constitution of Nepal ensures that no discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds. The Constitution has expanded the scope of non-discrimination thereby recognizing physical conditions, disability, health condition, marital status, pregnancy and economic condition as grounds of discrimination. Article 18 (3) ensures that special provisions can be made by law for the protection, empowerment or development of the citizens including the socially or culturally backward women and gender and sexual minorities and others.

Likewise, Article 38 is related to the Rights of Women. Article 38(1) of the Constitution of Nepal recognizes the rights of women that provide among others, every woman shall have 'equal lineage right without gender based discrimination.' Article 38 (2) every woman shall have the right to safe motherhood and reproductive health. Article 38 (3) No woman shall be subjected to physical, mental, sexual, psychological or other form of violence or exploitation on grounds of religion, social, cultural tradition, practice or on any other grounds. Such act shall be punishable by law, and the victim shall have the right to obtain compensation in accordance with law. Article 38 (4) includes Women shall have the right to participate in all bodies of the State on the basis of the principles of proportional inclusion. Article 38(5) included Women shall have the right to obtain special opportunity in education, health, employment and social security, on the basis of positive discrimination. Article 38(6) included the spouse shall have the equal right to property and family

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<sup>31</sup> The Constitution of Nepal has been promulgated on September 20, 2015(2072/06/03).

affairs. The Constitution of Nepal has widened the scope of rights of women compared to the Interim Constitution of Nepal, 2007.

Enactment of the Act of 2072<sup>32</sup> to amend some acts on gender equality and ending of gender violence (the Act of 2072): The Act of 2072 was passed as well as came into force from 1 October 2015 (2072 *Asoj* 14). The Act has repealed various provisions of 31 Acts including Domestic Violence (Crime and Punishment) Act, 2009, Human Trafficking and Transportation (Control) Act, 2007, Police Act 1955 and General Code (*Muluki Ain*) 1963. The Act has made some notable improvements in the existing laws such as:

- Acid attack is made punishable under the chapter of beating of General Code (*Muluki Ain*) 1963.
- The definition of rape has been extended to the oral or anal sex as well as recognizes the use of foreign element. The statute of limitation for reporting rape case has been extended to 6 months from 35 days.

Similarly Criminal (Code) Act 2017, Criminal Procedure (Code) Act, 2017 and Criminal Offence (Punishment and Implementation) Act, 2017 were ratified on October 16, 2017 (2074 *Asoj* 30). The act will come into force from August 17, 2018 (2075 *Bhadra* 1). The Criminal Code, Criminal Procedure Code, Criminal Offence (Determination and Execution of Sentence) Act, is expected to give full justice from the gender perspective.

The Section 118 (1) of Criminal Code 2017 restricted to misbehavior in public places and places restricted by law to entry to any person or in public places to women, children or disabled person will be punishable Under Section 118(2) Person committing or involving in criminal offense under section 118(1) will be punishable for 1 year prison or ten thousand fine or both.

The Section 160 (1) under Criminal Code 2017 has provision that discrimination behavior by government authorities on using legal rights on gender and other perspectives will be punishable. The Section 160(2) has provision that the person committing crime under section (1) will be punishable for 3 year prison or thirty thousand fine or both.

With the introduction of new Criminal Code 2017 under Section 168 (1) the treatment of women accused of practicing witchcraft is crime offense. The person involved in criminal offense under Section 168 (1) would be punished for 5 year prison term and fifty thousand fine provisions are included in Section 168(2). Section 168 (3) includes the traditional social practice of *Chhaupadi*

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<sup>32</sup> *Supra* Note 2, at 4-5.

(exclusion of women from family during menstruation, by taking shelter in shed) would be criminalized. Those forcing woman to take refuge in shed during the period would now be punished with three month's prison term or three thousands fine or both under Section 168 (4). Section 168 (5) states that if government employee will conduct the criminal offense under section 168 then 3 months prison term will be added.

Chapter 18 Section 219 to 229 of Criminal Code Act 2017 is related to the offense regarding rape.

## 5. JUDICIAL INITIATIVES REGARDING GENDER JUSTICE IN NEPAL

The contribution of Supreme Court of Nepal on various public interest cases related to the gender equality and gender justice. The court had played an important role to eliminate gender discriminatory legal provisions as well as reformation of laws through public interest cases for maintaining gender equality and gender justice. The major cases are described below:

### 5.1 Right to Equality

In the case of *Dr. Chanda Bajracharya v. The Secretariat of the Parliament et al*<sup>33</sup> case of 1996 writ petition was related to the inequality provision of *Muluki Ain* (General Code Act) 2020 (1963). The Supreme Court held that regarding the challenges of the petitioner that various provisions of *Muluki Ain* were unconstitutional on the ground that these provisions have made discriminatory treatment to woman at par with man in contrary to Article 11 of the Constitution of the Kingdom of Nepal, the court abstained from declaring the provisions either in consonance with or in contrary to Article 11 of the Constitution of the Kingdom of Nepal. But the court observed that there are differential treatments to man and woman and issued a directive order to the government to introduce a Bill in the House considering those provisions and different aspects of society in a holistic manner after necessary consultation with concerned persons, entity, organizations, federations, sociologists and legal experts. The decision was done on July 18, 1996 (2053 *Shrawan*3). The decision was done by special bench comprising Hon'ble Justice Ombhakta Shrestha, Hon'ble Justice Mohan Prasad Sharma, Hon'ble Justice Kedar Nath Upadhyaya, Hon'ble Justice Krishna Jung Rayamajhi and Hon'ble Justice Narendra Bahadur Neupane.

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<sup>33</sup> Some Land Mark Decisions of the Supreme Court of Nepal, August 2003, at 139-146, Writ No. 2826 of the year 2051 BS.

In the case of *Ms. Rina Bajracharya v. HMG Secretariat of the Council of Ministers and others*<sup>34</sup> case of 2000 writ petition was related to invoke the right to equality provisions guaranteed in Article 11 of the Constitution of the Kingdom of Nepal 1990 as there were discriminatory provisions in the Service Rules of the Royal Nepal Airlines Corporations (RNAC). The Supreme Court examined the concept of gender equality and its application in Nepalese Legal System. The Court held that Service Rules of RNAC 16.1.3 came into operation in 2031 B.S. (1974/1975 AD) while Rule 16.1.1 was amended in 2052 (1995/96 AD), the principle of latches does not apply in questions of constitutionality. The laws inconsistent with the Constitution cease to operate one year after the commencement of the Constitution according to Article 131 of the Constitution. Since it is clarified without any dispute that the male crew members and air hostess are equal employees and thereby deserve equal treatment in respect of working time, remuneration and aforesaid other facilities, and therefore, it is hereby proved that the Rule 16.1.3 of the disputed Regulation is discriminatory in terms of gender respective and against the constitutional provisions. Hence, the said discriminatory Rule 16.1.3 which is against Article 11(2) (3) of the Constitution is hereby declared null and void ab initio.

The decision was done on June 8, 2000 (2057 *Jestha* 26). The decision was done by special bench comprising Hon'ble Justice Laxman Prasad Aryal, Hon'ble Justice Krishna Kumar Verma and Hon'ble Justice Dilip Kumar Poudel.

## 5.2 Marital Rape

In the case of *Ms. Meera Dhungana v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs and Others*<sup>35</sup> case of 2000 related to the marital rape. The Supreme Court declared marital rape as punishable offense and issued a directive order to one of the respondents namely Ministry of Law, Justice and Parliamentary Affairs to make concise and just legal provision to complement the marital rape because the consequence of a crime of rape by husband and any other person differs in respect of collection of evidence, circumstance, quantum of the punishment and its propriety. Legal provisions regarding marital rape should be given a completion considering the special circumstance of marital relation, status of the husband. No 8 of Chapter on "Rape" has envisaged the circumstances caused by the rape from the persons other than husband. Such measures to be made should adopt measures

<sup>34</sup> *Ibid*, at 175-184, Writ No. 2812 of the year 2054 BS.

<sup>35</sup> *Supra Note* 35, at 147-163, Writ no 55 of the year 2058 BS.

to provide immediate relief like provision to live separate or divorce and provision to address rape caused by child marriage. The decision was done on May 2, 2000 (2059 Baishak 19). The decision was done by special bench comprising Hon'ble Justice Laxman Prasad Aryal, Hon'ble Justice Kedar Nath Upadhyaya and Hon'ble Justice Krishna Kumar Verma.

### 5.3 Daughter's Property Right (Right to Property)

In the case of *Meera Kumari Dhungana v. His Majesty's Government Ministry of Law, Justice and Parliamentary Affairs and others*<sup>36</sup>(1995), the court issued a directive order the government to introduce a bill within year by making necessary consultations with the recognized stakeholders and considering the legal provisions in this regard on other countries conferring equal inheritance right to women on ancestral property. The decision was done on August 3, 1995 (2052 Shrawan 18). The decision was done by special bench comprising Rt. Hon'ble Chief Justice Bishwa Nath Upadhyay, Hon'ble Justice Surendra Prasad Singh, Hon'ble Justice Laxman Prasad Aryal, Hon'ble Justice Arabinda Nath Acharya and Hon'ble Justice Udaya Raj Upadhyay.

The bill was later passed as on 11th amendment to the *Muluki Ain* (Country Code 1963) 2020.

### 5.4 Discriminatory Social Practices

In the case of *Reshma Thapa v. Office of the Prime Minister and Cabinet Secretariat and others*<sup>37</sup>(2004),the Supreme Court issued directive order to government for eliminating traditional and superstitious beliefs, ignorance through public awareness in order to preventing and controlling injustice, atrocity, oppression and torture inflicted on women in the name of witch as discriminatory social practice. The decision was done on August 10, 2004 (2061 Shrawan 26).

Likewise, in the case of *Dil Bahadur Bishwokarma, on behalf of Dalit NGO Federation (DNF) et. al. v. Office of the Prime Minister and Council of Ministers*<sup>38</sup> (2005), the most torturing practice of sending women in isolation for more than 7 days without food and clothes during menstruation period is declared crime against humanity which is ended by issuing a writ of mandamus by Supreme Court. The following directive orders issued:

<sup>36</sup> *Supra Note* 35, at 164-174, Writ no 8392 of the year 2050 BS.

<sup>37</sup> Some Land Mark Decisions of the Supreme Court Nepal, Vol. 2, December 2010, at 11-16,NKP (NLR) 2062 BS, Vol. 2, Decision No. 7498, p. 205, Writ no 2891 of the year 2058 BS.

<sup>38</sup> *Ibid*, at 60-66, NKP 2062 BS, Vol. 4, Decision No. 7531, p. 492, Writ no 3303 of the year 2061 BS.

- a) His Majesty Government, Office of the Prime Minister and Council of Ministers, within a month from the date of receipt of this order are obliged to declare that the tradition of sending menstruated women in *Chaupadi* home is a wrong trend.
- b) Ministry of Health shall form a study committee consisting of doctors, inter alia and submit report as early as possible, to the Ministry of Health and Supreme Court, which identifies actions to be taken about health by assessing the possible impacts likely to be occurred the same in future among women and children in places and districts where *Chaupadi* system is prevalent.
- c) Ministry of Local Development is obliged to issue direction to mobilize local bodies in order to raise public awareness against *Chaupadi* system.
- d) His Majesty Government, Ministry of Women Children and Social Welfare shall issue directive and implement or make arrangement for implementing the said directive making a Guideline within three months from the date of receipt of this order in order to prevent all kinds of discriminations against women under the *Chaupadi* system, and inform the matter thereof to Supreme Court, accordingly.

### 5.5 Rights of Third Gender People

Similarly in the case of *Sunil Babu Pant and others v. Government of Nepal and others*<sup>39</sup> (2007), the Supreme Court held that Incorporation of third gender concept and right to choose either sex-marriage is due also in our constitution. The government of Nepal was directed to form the committee and committee is directed to undertake the study on the issues of same sex marriage and marital status of overall LGBTI persons as well as the legal provisions of other countries amongst the issues raised by the petitioners and the Government of Nepal was directed to make the legal provisions after considering recommendation made by the said committee. The decision was comprised by Division Bench of Hon'ble Justice Balaram K.C. and Hon'ble Justice Pawan Kumar Ojha. The decision was made on December 21, 2007 (2064 Poush 6).

### 5.6 Right to Privacy

Likewise in the case of *Annapurna Rana v. Council of Ministers and Others*<sup>40</sup> case petitioner challenged a decision of a Kathmandu district court

<sup>39</sup> *Supra Note 39*, at 387-425, NKP 2065 BS, Vol. 4, Decision No. 7958, P. 485, Writ no 917 of the year 2064 BS.

<sup>40</sup> NKP 2055 BS, Vol.8, Decision No. 6788, p. 476.

order and claimed that a Kathmandu District Court ruling directing a virginity test on her was unconstitutional and against her right to privacy enshrined as a fundamental right under Article 22 of the Constitution. The Supreme Court invalidated the order as a violation of petitioner's constitutional right to privacy, recognizing the right to privacy over one's own body and reproductive organs as an "inviolable" right under the constitution.

### 5.7 Sexual Harassment

In the case of *Sharmila Parajuli v. Council of Ministers and Others*<sup>41</sup>, the court clarified that any type of sexual abuse relates to the crime of sexual harassment. Supreme Court issued a directive order to the government of Nepal to take appropriate initiatives to enact a law against sexual harassment.

### 5.8 Reproductive Rights

*Lakshmi Dhikta and others v. Government of Nepal*<sup>42</sup> is the first case to be decided by a supreme court of Nepal that holds a government accountable for failing to ensure the affordability of abortion services, and instructs the government to take steps to guarantee that no woman is denied an abortion solely on financial grounds. The Supreme Court's decision is monumental in its unequivocal recognition of abortion as a woman's fundamental right and its delineation of states' positive obligations to ensure this right.

## 6. CONCLUSION

Nepal is a signatory to 24 international human rights instruments including right of women and gender equality. The rights of women are made wider in the Constitution of Nepal and Unified Law related to Criminal Offense. The *Muluki* Criminal (Code) Act, 2017, *Muluki* Criminal Procedure (Code) Act, 2017, Criminal Offence (Determination and Execution of Sentence) Act 2017, is expected to give full justice from the gender perspective. Constitution of Nepal envisages the right to equality and rights of women as fundamental rights. Article 18 is related to the Right to Equality. Likewise, Article 38 is related to the Rights of Women. The Supreme Court of Nepal has played a crucial role to promote gender equality and gender justice in Nepal. Supreme Court of Nepal has shown serious concerns on the cases related to women

<sup>41</sup> NKP 2061 BS, Vol.10, Decision No. 7449, p. 1312.

<sup>42</sup> NKP 2067 BS, Decision No. 8464, Poush, p. 1551, Writ No. 0757, Jestha, 2066 (2009) (Supreme Court of Nepal). (Melissa Upreti, Regional Director for Asia at the Center for Reproductive Rights was a co-petitioner in the case.) available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Lakshmi%20Dhikta%20Factsheet%20FINAL.PDF> (Accessed on January 5, 2017).

rights issues. The judicial interpretation on right to equality and gender justice has been satisfactory in the context of Nepal.





# A Report on the OAG Officials' Visit to Strasbourg

## 1. BACKGROUND

With the increasing use of electronic devices, digital technology and computers, cybercrime has come out as a global phenomenon. Cyber issues are cross-border in nature; national perspectives on cybercrime are no longer a solution to cope with its impacts around the globe. The use of new technologies have given rise to new types of cybercrimes like unauthorized access of the computers, data diddling, virus attack, theft of computer system, hacking, internet time theft and web jacking etc. On the other side, protection of data of users, service providers, government institutions, and companies are also equally important. Protection of individual privacy is also important to protect personal information that is being used in different areas in this digital cum cyber age. Thus, adequate legal provisions are needed to protect the data/information and to facilitate the investigation of cybercrimes.

The Convention on Cybercrime commonly known as the Budapest Convention is the only binding international instrument in relation to cybercrimes. This international legal instrument allows member states to cooperate in effective investigation and prosecution of cybercrimes and protection of data and individual privacy. International co-operation and exchange of electronic evidences in cases relating to cybercrimes is essential because the nature and modus operandi of cybercrimes is cross-border in nature. It is therefore, equally important to promote harmonization of national legislations with international standards.

Nepal has promulgated a legislation titled "Electronic Transactions Act, 2006" which criminalizes cybercrimes. However, this legislation does not cover all nature of modern cybercrimes. It is not comprehensive and not compatible to

international standards as well. Hence, it is urgent either to review the existing legislation or to introduce a special legislation on cybercrime and electronic evidences as per the international standards.

Fostering international cooperation and exchanging new ideas and best practices in cybercrime issues, Council of Europe has been organizing Octopus Conference every 12 to 18 months in participation of experts representing different countries across the world, which also includes international organizations, private sector academia etc. Each conference has a specific focus linked to the latest cybercrime issue. In this regard, Council of Europe organized Octopus Conference at Strasbourg, France from 11th to 13th July, 2018.

Nineteen member delegation team of senior officers from Office of the Attorney General, Nepal led by Hon'ble Attorney General of Nepal Mr. Agni Prasad Kharel was invited and accordingly took part in the Conference. Council of Europe, Cyber law Program and GLACY+ Project extended financial support to the delegates.

## **2. INTRODUCTION**

This Report is prepared for the official purpose of the Office of the Attorney General, Nepal. It includes the outcome and observation from the Octopus Conference 2018: Cooperation against Cybercrime & Study Visit to European institutions in Strasbourg, (FR), and judicial authorities in The Hague (NL), Brussels (BE) by the team of Office of the Attorney General led by Hon'ble Attorney General Mr. Agni Prasad Kharel. The Octopus Conference 2018 provided fundamental idea on cybercrime, right to privacy, global network to fight against the cybercrime, strengthening capacity, managing online shopping, preventing manipulation of data, securing government data from hacking, and artificial intelligence. In addition to the Conference, the team conducted several successive meetings with the President of Eurojust, the Head of the European Cybercrime Center (EC3) in Europol, and ICC in The Hague, the Netherlands. Simultaneously, meetings were conducted in the Federal Prosecutor's Office of Belgium, Council of Europe Headquarters on international judicial cooperation in Strasbourg, France and with the President of the Court of First Instance of Antwerp, Mechelen Section Court.

Altogether 360 cybercrime experts representing 95 countries took part in the Conference. Inaugurated by Jan Kleijssen, the Director General, Human Rights and Rule of Law, Council of Europe, the event was held in Strasbourg, France

at the Headquarters of Council of Europe. Moreover, representatives of 8 international and 75 private sector organizations, academia were also present.

After concluding session of the Conference, Nepali delegation held meetings with judicial and law enforcement authorities of the European Union, the Netherlands, Belgium at Strasbourg, France from 16th to 19th July, 2018. The delegation met with judicial authorities and law enforcement officials in European Union in order to facilitate exchange of knowledge and share experiences.

***Detailed Schedule of the visit is presented in Annex 1.***

### **3. OBJECTIVE OF THE VISIT**

The underlying objectives of the visit of Nepali delegation were as follows;

- To participate in the Octopus Conference and exchange the issues and new development of cybercrime in different jurisdictions and in matters relating to the international instruments relating to cybercrime.
- To understand vital issues in the field of cybercrime, data protection and electronic evidences, as well as in the functioning of the criminal justice system in Europe.
- To promote harmonization of the domestic legislation of Nepal on cybercrime and electronic evidences with the Budapest Convention, rule of law and human rights standards.
- To enhance knowledge regarding best practices of the judicial authorities of European Union in fighting cybercrime and to developing international cooperation;
- To initiate development and strengthen network with Council of Europe and judicial institutions in Europe.

### **4. DURATION OF VISIT**

The visit lasted from July 09 to 21, 2018 as per the Schedule presented in Annex 1.

### **5. OUTCOMES FROM THE VISIT**

Delegates became familiar with the key themes of cybercrime, data protection, and international cooperation as well as controlling mechanism in European countries. Basically, team learned and observed the following phenomena:

- Techniques of investigation and prosecution of cybercrimes, adjudication and controlling mechanism in different countries;

- Role of public prosecutors in investigation, prosecution and legal advice in the cases of cybercrime;
- Plea bargaining and implementation aspects;
- Role of public prosecutors to determine conviction and sentencing in course of cybercrime case;
- Reformative approach, criteria of suspended sentence, execution of probation and parole service and socialization aspect (including restorative justice to delinquent child and victim support mechanism);
- Withdrawal of cases, pardon and remission (cancellation of charge);
- Implementation aspects of penal code and sentencing.

## **6. ACTIVITIES AND OBSERVATION IN PROGRAM**

### ***6.1 Octopus Conference, 2018 on "Cooperation against Cybercrime"***

The Council of Europe brought together several high level officials from Africa, the Asia/Pacific region and Latin America. Altogether 95 countries represented in the conference. Participants of the conference were prominent personalities including cyber law experts, representatives of civil society organizations, data protection experts, law enforcement officials, prosecutors, judges, ministers and computer service providers. Primarily, the focused discussion was related to step up international cooperation to fight against cybercrime. Moreover, the conference was focused on strengthening the rule of law in cyberspace through a protocol to the Budapest Convention. The Conference did consultations on more effective ways to secure electronic evidence, cyber violence, the global state of cybercrime legislation and progress made through capacity building programs and exchanging best practices between the different countries.

### **6.2 Basic Context and Understanding of the Team**

The basic context and understanding of the team may be communicated in the following points:

- Cyber-attacks against democracy and interference with elections.
- The link between cybercrime and human rights, including recent case law of the European Court of Human Rights.
- The question of access to WHOIS information which requires urgent answers.
- Evidence in cyberspace: multi-stakeholder consultation on the protocol to the Budapest Convention.
- Global state of cybercrime legislation: progress 2013 – 2018.

- Jurisdiction in cyberspace.
- Capacity building on cybercrime and e-evidence.
- Cyber violence: challenges and responses, and
- Creation of a focal point/observation status.

### *6.3 Role of the Attorney General in the Octopus Conference*

In the concluding session of the conference, Hon'ble Attorney General of Nepal, Mr. Agni Prasad Kharel was invited as a panelist to deliver concluding remarks. He extended sincere gratitude to the Council of Europe for providing an opportunity to himself and the Nepali team to attend the Conference. During his speech he recalled a Workshop on "Cyber Legislation in Nepal" held in Kathmandu from 26-28<sup>th</sup> February, 2018, organized by the Council of Europe, in which the Attorney General had delivered an inaugural speech. The Workshop had underscored the need for a comprehensive cybercrime prevention law in Nepal. Further making reference to various issues discussed in the Conference, Hon'ble Attorney General Mr.Kharel highlighted the success of the Conference in identifying the issues relating to cybercrime and to devise the prevention strategies.

"National legislation based on international standards, its proper implementation, development of international cooperation between the countries, protection of individual privacy and human dignity, secured society and capacity building of law enforcement agencies are the common basis that have been identified by the conference as indispensable elements for cybercrime prevention", he observed."In fact, the Octopus Conference has successfully achieved these objectives", he noted. He further observed that the Conference enhanced ideas and knowledge regarding the cybercrime issues and those ideas and knowledge would be useful for Nepal in crafting policy and legislation on cybercrime issues.

He also added that a global network can be established among the investigating authorities, prosecutors and judges for proper investigation and exchange of information among the countries. Though Nepal is not party to the Budapest Convention on cybercrime, he viewed that it would be benchmark for making comprehensive cyber law in Nepal and ensure international cooperation.

### *6.4 Key Messages of the Conference and Team's Observation*

The key messages of the conference have been as follows;

- Cybercrime has been affecting the security of individuals and core values of societies. Massive worldwide ransom ware attacks illustrate the

vulnerability of societies to cybercrime. At the same time, examples of best practices are demonstrating that the successful investigation of transnational cybercrime is possible through enhanced international and public/private cooperation on the basis of international agreements such as the Budapest Convention.

- Interference with elections through attacks against computers and data used in elections and election campaigns combined with disinformation violate rules to ensure free and fair elections and undermine trust in democracy. While rules on elections need to be adapted to the realities of the information society and while systems need to be made more secure, greater efforts need to be undertaken to prosecute such interference.
- Governments have the obligation to protect society and individuals against crime, including through criminal law. Criminal justice authorities need to be provided with more effective means to prosecute cybercrime and secure electronic evidence in specific criminal proceedings.
- The Additional Protocol to the Budapest Convention – currently being prepared by the Cybercrime Convention Committee – is expected to offer meaningful ways to render mutual legal assistance more efficient while also enabling direct cooperation with providers across jurisdictions and extending searches to access evidence in the cloud with the necessary rule of law safeguards.
- Specific legislation, consistent with human rights and rule of law requirements, is the basis for criminal justice action on cybercrime and electronic evidence. Many governments around the world have undertaken legal reforms in recent years, often using the Budapest Convention on Cybercrime as a guideline. Some 95 States, that is, almost half of UN member states have adopted substantive criminal law provisions in recent years. Although measurable progress is being noted but more reforms are still necessary, especially with regards to procedural powers for securing electronic evidence and the ability to engage in international cooperation.
- Capacity building of law enforcement authorities is considered as one of the most effective means to address the challenges of cybercrime and electronic evidence. Based on broad international consensus, governments, international organizations, civil society and private sector initiatives in recent years have been made, but it is not enough. So, those programs have to be continued to strengthen national legislation, provide

training to criminal justice officials, promote public-private cooperation and make international cooperation more efficient.

- Cyber violence comprises a broad range of conduct that directly affects the dignity and rights of individuals. It is often gender-based and targeting women and children. While prevention is essential and should be given priority, criminal justice is part of the response. Better training and awareness programs for criminal justice authorities of different jurisdictions should be provided under the Budapest, Lanzarote and Istanbul Conventions of the Council of Europe, as well as the Protocol on Xenophobia and Racism to the Budapest Convention, whether or not States are Parties to those instruments.
- National strategy is important aspect to cope the cybercrime. Cyber legislation, compatible to the international standards is also important for fighting against cybercrime and harmonization of cyber law. It shall be taken into account that the enforcement of legislations is properly done and international cooperation through mutual legal assistance (MLA), Joint investigation for cyber offences and electronic evidences is ensured.

## **7. TEAM'S OBSERVATION**

The problem of cyber violence has morphed into a very negative development. Enhancing synergies between the Budapest Convention, the Lanzarote Convention on the Sexual Exploitation and Sexual Abuse of Children and the Istanbul Convention on Violence against Women and Family Violence would seem to be a part of the response. We also need to discuss a topic that will be at the forefront in the future, namely the question of cybercrime and artificial intelligence. Artificial intelligence and machine learning raise fundamental questions on the future of humanity and this is why several Committees of the Council of Europe are now dealing with it. Non-member states or institution can join the Council of Europe either as a contact point or with an observation status. In future, Octopus Conferences and probably also the Cybercrime Convention Committee will then need to deal with the ramifications of artificial intelligence in much finer detail.

### **7.1 Meeting with the Relevant Authorities of the European Union**

The team of OAG visited and held successive meetings with judicial and law enforcement authorities of European Union and Belgium Federal Prosecutor Office on 16<sup>th</sup> to 19<sup>th</sup> July, 2018 in the Netherlands, Belgium and Strasbourg, France.

**a. *Eurojust Office***

The OAG team led by Hon'ble Attorney General visited Eurojust office in the Hague on 16<sup>th</sup> July 2018. The President of Eurojust Mr. Ladishav HAMRAN welcomed the Attorney General and the visiting delegation. Hon'ble Attorney General Mr. Agni Prasad Kharel highlighted the objective of the visit and extended sincere thanks for providing time for the meeting. Joint Government Attorney Mr. Padam Prasad Pandey briefly shed light on the prosecution system of Nepal and role of the Attorney General of Nepal as a chief prosecutor and chief legal adviser to the Federal government. He also explained the objectives of the visit to Eurojust and the expectations of Nepalid elegation regarding international cooperation and capacity building program for prosecutors of Nepal.

Ms. Solveing WOLLSTAD, Member of the Board of Eurojust in Relations with Partners made presentation on Eurojust role and its cooperation with third states. Since different legal systems exist in EU countries, Eurojust has developed into a coordinating agency for prosecution and investigation of criminal offences throughout the European Union. It has power to request to member states to investigate and prosecute specific acts, coordinate between member states through judicial coordination meeting and set up a joint investigation team. It has some cooperation program for non-member states for capacity building. It requires cooperation agreements through contact points. It has concluded co-operation agreements with countries such as USA, Iceland, Norway, Montenegro, etc.

In the meeting, Ms. Daniela Buruiania, Chair of the Cybercrime team explained about the Eurojust work in the field of cybercrime and its challenges.

**b. *Europol Office***

The team from OAG visited the Europol office at the Hague on 16<sup>th</sup> July, 2018. Head of the European Cyber Crime Center made a presentation thereon. The team was told that the Europol EI has a mandate to support member state's law enforcement authorities for fighting terrorism, cybercrime and other forms of organized crimes. It also provides valuable intelligences and ideas to member states to prevent significant threat from criminals and ensure internal security of EU and safety of the EU people.

The meeting was concluded with an idea to build global cooperation between the countries on the basis of Budapest Convention.

**c. *International Criminal Court (ICC)***

The team from OAG held a meeting with the ICC Prosecutor Ms. Falou Bensouda on 16<sup>th</sup> July, 2018 at the ICC building. The ICC was established in 2002 and 123 states are parties to its statute.. The Court exercises jurisdiction on the most serious crimes of international concern namely genocide, crimes against humanity, war crimes and the crime of aggression.

The Office of the Prosecutor is an investigating division and has been investigating situations in Uganda, Sudan, Kenya and Libya, Georgia, Mali and Burundi. A total of 106 people are working in prosecution division and 200 people are in the investigation team. The prosecutor files the case with the name of The Prosecutor v. offender(s)' name. We learnt that there are 4 cases on trial stage, 2 at appeal stage, 3 at the reparation stage, 1 at the acquittal and 11 are in pre-trial stage as informed by the ICC Prosecutor Office.

**Trial Cases:**

1. The Prosecutor v. DOMINIC ONGWEN (Brigade commander of Sinia brigade of LRA)
2. The Prosecutor v. BOSCO NTAGANDA (Deputy Chief of General staff of Patriotic Force for the Liberation of Congo)
3. The Prosecutor v. ABDALLAH BANDA ABAKAER NOURAIN (2007, Darfur Sudan)
4. The Prosecutor v. LAURENT GBAGBO AND CHARLES BLE GOUDE) (Post elections violence 2010-2011 in the Cote de Ivory)

Prosecutions are made relying on scientific and forensic evidence. The team noted that witnesses location, identification, language problems, reparation and victim and witness protection are the pertinent issues that the Prosecutor's Office has been facing as major challenges. The job of ICC hinges on the cooperation of states in the implementation of arrest warrant and evidence collection process.

**d. *Belgium Federal Prosecutor's office***

The visiting team had a meeting at Federal Prosecutor's Office of Brussels with Vice-Federal Prosecutor Mr. Eric Bisschop and Prosecutor Young Catechakre. During the meeting on behalf of OAG, Joint

Government Attorney Padam Prasad Pandey highlighted the Prosecution system of Nepal and the objectives of study visit by the Nepali delegation. Mr. Eric Bisschop, the Vice-prosecutor welcomed the Nepali delegation team and briefly lectured on the prosecution service of Belgium.

In Belgium, there are 830 prosecutors serving across 14 District level Prosecutor offices, 5 General Prosecutor offices and 1 Federal Prosecutor Office. Generally, District Prosecutor Office conducts investigation and prosecution of criminal offences; the Federal Prosecutor office has full competency in prosecution of terrorism, international humanitarian law, not-localized crime, cyber offence and organized crimes. It has authority to coordinate between district prosecutor offices and facilitate international cooperation as well. The FPO (Federal Prosecutor Office) also has a power to make surveillance on the functioning of Belgium Police. In Belgium, a Magistrate has authority to register a criminal case and he or she hands the case over to the prosecutor to investigate and prosecute the same. The investigative judge of first instance court has to give permission to the prosecutor to investigate the crime and make search and seizure proceedings to collect evidences.

For investigation and prosecution of cybercrimes, under the guidance note of Board of Prosecutor General, a Cybercrime Unit has been established in Belgium. There is a general agreement that cybercrime has become bigger challenge than terrorism. Problem of data retention, no sufficient ISP collaboration, no clear rules on trans-border access are some challenging issues for undertaking cybercrime investigation. Article 39 of Belgium Penal Code provides authority to Magistrate to extend search to another computer system which is located elsewhere and to make copy from other jurisdictions.

*e. Court of First Instance of Antwerp, Machelean Section*

The delegation visited the Court of First Instance of Antwerp at Machelean on 17<sup>th</sup> July 2018. Judge Philippe Van Linthout and Judge Theo-BYL welcomed the delegation and briefly introduced the court. There are 112 judges including investigative and hearing judges in Machelean and Antwerp. Criminal investigations are dealt by investigative judges and hearing is done by the hearing judges.

There is pre-trial stage sentencing and community sentences under Belgium Penal Policy. Pre-trial detention, electronic monitoring,

conditional suspension are some examples of pre-trial stage sentencing. Under conditional sentencing, house arrest, training, interdiction to use the internet, interdiction to contact certain persons may be imposed. In Belgium, normally first offender shall not be sent to imprisonment, rather he or she is referred to conditional sentences.

*f. Council of Europe on International Judicial Cooperation and Data Protection Standards*

The Nepali delegation visited the Council of Europe on 19<sup>th</sup> July and held meeting with officials of European Commission for the Efficiency of Justice (CEPEJ) and Consultative Council of European Prosecutors (CCPE). The CEPEJ was established in 2002 aimed at avoiding the excessive length of judicial proceedings in member states; exchanging the good practices among EU countries and protecting fair trial rights of the party. The CEPEJ frequently conducts research work on evaluation of judicial systems by composing different working groups. It gives priority to quality of justice and quality of courts and issue guidelines for time frame judicial procedures.

The Consultative Council of European Prosecutors (CCPE) came into being in 2005. It organizes annual conferences of prosecutors of member states and observer countries. The CCPE issues opinions to improve judicial system and ensures cooperation between the member countries. It also issues opinions on the role of prosecutors in relation to the rights of victims and witnesses in criminal proceedings.

Data protection and protection of individual privacy are considered more important to ensure human rights and rule of law. Personal information are being used in different areas like job application, paying bills, buying something, etc. So, the Council of Europe has Data Protection Unit for the protection of data and individual privacy. It is the duty of service providers, government institutions, data protection authorities and Ministry of Justice alike to protect such data.

## **7.2 Achievements from the Visit**

The notable achievements from the visit may be portrayed in the following points:

- Participation in the Octopus Conference and interaction with various sectors' high level experts including judges, law enforcement officials, service providers and prosecutors on cyber law and its implementation is

crucial for developing Nepali perspective towards the review of present cyber legislation.

- The team of OAG got an opportunity to visit European law enforcement authorities like Eurojust, Europol, and observed their roles and coordination among the member countries towards the cause of strengthening criminal justice system of respective countries.
- The delegation visited the Belgium's Federal Prosecutor Office and Court of First Instance of Michelean and interacted with prosecutors and judges regarding the prosecution system and court proceedings. The role of prosecutor in crime investigation is significant in Belgium. Investigation of crime is considered as the major function of prosecutor.
- The delegation returned with enhanced knowledge and witnessed the best practices of judicial authorities of European Union on criminal justice system and in fighting cybercrime.
- The visit has been successful to expedite the areas of international cooperation with European authorities in the reform of legislation and capacity building of prosecutors.

### **7.3 Recommendations**

Major recommendations may be put forth in this connection, as follows:

- Setting up a process for contact with Council of Europe for international cooperation on capacity building program for investigator and prosecutors.
- Establish law drafting committee to review existing national laws related to cybercrimes and data protection so as to make them consistent with international standards.
- Enhance cooperation among the countries on these subjects, both on regional and international levels.
- Develop bi-lateral relationship to learn the best practices of criminal justice system of respective countries.
- Review our organizational structure to introduce administrative wings from non-legal background by emulating the practice of Federal Prosecutor Office at Brussels.
- Establish cybercrime unit at the Office of the Attorney General, Nepal.

- Draft a separate Government Attorney Legislation with compatible remuneration and tenure in line with the Court of First Instance of Antwerp at Machelean in Belgium.
- Correspond with the Council of Europe for seeking new ideas and resources as well as participation in the next Octopus conference to be held in 2019.

