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Nepal

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Editor-In-Chief

Dr. Ananda M. Bhattarai

Judge, Court of Appeal and Faculty, NJA

Editor

Gareth McCasker

Attorney & Intern

Assistant Editor

Shreekrishna Mulmi

Research Officer, NJA

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Supreme Court Annex
Ramshah Path, Kathmandu, Nepal
PO Box No.: 24865
Tel: 977-1-42 15 604
Fax: 977-1-42 15 605
Email: njanepal@gmail.com
Website: supermecourt.gov.np/nja

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TABLE OF CONTENTS

1. MESSAGE	i
2. NOTE FROM THE EDITORS	iii
3. ARTICLES	
The Role of Judicial Education <i>Geeta Oberai</i>	1-48
Constitutionalism and the Rule of Law in Full Realization of a Systemic Change in Nepal: Some Practical and Philosophical Considerations <i>Dr. Kishor Upreti</i>	49-68
Federalism and Restructuring of the Judiciary in Nepal: Whilst creating a New Constitution <i>Diwakar Bhatta</i>	69-94
Interpreting the Constitution: The Formalism and Contextualism Debate <i>Apurba Khatiwada</i>	95-104
Singapore's Economic Triumvirate: Sowing the Seed of its Own Long Term Success or Failure? <i>Dr. Suppiah Murugessan</i>	105-122
Providing Justice for Women: The Interface Between Law and Literature <i>Anu Lohani</i>	123-130
Some Procedural Defects of the Human Trafficking and Transportation [Control] Act, 2064 <i>Ben Reed</i>	131-140
Truth and Reconciliation Commission: Glue for Divided Communities to Create a Better and Brighter Future <i>Tek Narayan Kunwar</i>	141-162
Mountains: Convention on Biological Diversity and Subsequent Developments <i>Dr. Ananda Mohan Bhattarai</i>	163-188
Dispute Resolution Mechanism Under The WTO: A Bird's Eye View <i>Dr. Trilochan Upreti</i>	189-204
Evolution of Commercial Arbitration in Nepal: Issues and Challenges <i>Bed Prasad Upreti</i>	205-220
4. Talks	
The Expected Role of a Judge <i>Justice P.N. Bhagwati</i>	221-224
Mainstreaming Women's Rights Issues in the Justice System <i>Catherine MacKinnon</i>	225-230
5. ANNEX: JUDGMENTS	
<i>Sapana Pradhan Malla v Prime Minister, Nepal Government and Office of the Council of Ministers and Others</i> [Directive to Protect the Privacy of Women, Children and HIVAIDS Infected People Involved in Lawsuits]	231-260
<i>Sunil Babu Pant and Others v Nepal Government and others</i> [Decision on the rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People]	261-286



SUPREME COURT, NEPAL

Kedar Prasad Giri
Chief Justice



February 12, 2009

MESSAGE FROM THE CHIEF JUSTICE

I am pleased to know that after an applause from among the legal luminaries and instant market success of the first issue of the "NJA Law Journal", The National Judicial Academy is bringing out its second issue.

Since its establishment in 2004, the NJA has been able to reach out to its client group with varied activities. In recent times it has been able to disseminate information about itself at international level as well and acquire some acclaim to what it has done. The Journal is one such medium for academia and practitioners, domestic and international, for sharing their views on issues pertaining to law and justice. I congratulate the NJA Team for maintaining the quality and standard of the Journal and continuing with the job that it has initiated. I hope that the current issue will also get similar response in Nepal and abroad.

Kedar Prasad Giri

Kedar Prasad Giri

Chief Justice

&

Chair, Governing Council
National Judicial Academy

Chief Justice



राष्ट्रिय न्यायिक प्रतिष्ठान NATIONAL JUDICIAL ACADEMY



Message

I am pleased to note that the NJA have been able to bring out the second issue of the 'NJA Law Journal'. Research and Legal information are two mandates of the NJA which not only supplement of judicial education but also contribute to policy reform in the Justice Sector. Our initiative has been appreciated both in Nepal and abroad. In a short span of time the NJA has been able to introduce itself to judicial educators and policy makers as an institute walking off the beaten track, evolving new tools and strategies in judicial education. I thank the editorial team for their hard work in making the issue published. I am hopeful that this issue will also receive equally warm response from the readers like its predecessor.

Tope Bahadur Singh

Tope Bahadur Singh

Executive Director

National Judicial Academy

EXECUTIVE DIRECTOR

Date: February 12, 2009

Note from the Editors

Encouraged by instant market success of the maiden issue of the **NJA Law Journal**, we are now back to you with the second issue. The main objective of the journal is to promote serious legal research, create a platform for meaningful interaction among local and international scholars with the objective of promoting justice in Nepal. To carry out this goal the journal has concentrated on the themes of judicial education, constitutional law, gender issues, current Nepali legal issues and recent landmark case law.

The NJA is a statutory body charged with the task of improving the justice system in Nepal through judicial education, research, dissemination of legal information and policy intervention. Much of its efforts revolve around the training and education of judges, court staff, government attorneys, private lawyers and other judicial employees. As a judicial education institution we take it as our duty to explain our readers about the role, importance, objective and expected outcome of judicial education. Therefore, the banner article authored by Geeta Oberoi discusses the role of judicial education. Using her experiences at the Indian NJA in Bhopal, she looks at the multi-faceted character of judicial education that attempts to address the challenges facing the judiciary. Her analysis is comprehensive, stretching from judicial education's role in ensuring justice actors understand their position in the democratic political framework, to developing judge's scientific knowledge, making judges aware of their subjectivities, engendering a culture of life-long learning and providing managerial training. It is hoped that the article will be of value to judicial educators, law professors, judges, students of judicial process and every other justice actors.

The judicial education provided by the NJA has not been possible without considering, at all times, the constitutional context. In the year 2007/08 Nepal marched from authoritarianism to democracy and from constitutional monarchy to republic. It also took a resolve to do away with the unitary system of government and embrace federalism. The election to the Constituent Assembly in April 2008 has now opened up a new phase of drafting a new constitution which is full of challenges. In view of this, constitutional law is the second concern of the 2008 NJA Journal. In order to better understand the current constitutional deliberations and to decide whether progress is being made in the right direction, a broad jurisprudential discussion of the philosophy and experiences of constitutional arrangements around the world has been provided by Dr. Kishor Uprety. The discussion of the multi-ethnic and multi-religious Lebanese and Iraqi constitutions are required reading material for anyone contemplating a federal structure for Nepal. He places emphasis on the fact that a constitutional document is not a static publication unable to be re-interpreted. Instead, he rightly contends that a constitution must continue to reflect society's needs, wants and changing moral values. The Constituent Assembly may be charged with the responsibility to compose an enduring constitutional framework, but it will only be enduring if successive generations of constitutional interpreters place this historical document in successive contexts.

Moving from the jurisprudential to the practical, Diwakar Bhatta has provided an in-depth analysis of the various choices laid before Nepali constitutional drafters. The ethnic, linguistic and religious tensions presently existing in Nepal are tendered and consequently, the constitutional ramifications are suggested. Whether Nepal chooses a federal state divided (or unified) by ethnicity, geography or economic resources will undoubtedly decide the fate of the federal state of Nepal. Perpetual peace is being gambled with. In the second part of his article, the issue of whether a federal Nepal should create an integrated or dual judicial model is canvassed. Both models have their own strengths and weaknesses that are thrashed out by the author, yet it must be remembered that simply appropriating a proven judicial model from one country is fraught with danger due to each country's diverse history and societal makeup.

To continue on with the theme of constitutional law, the article by Apurba Khatiwada provides an overview of the Formalism and Contextualism debate. The article takes the position that constitutional documents must be interpreted using the Contextual method so that the historical document is placed in the current social, political, economic and moral context. He focuses his analysis on the experience of the United States Supreme Court, which justifies his support for Contextualism. The strong arguments in favour of Contextualism mesh well with Dr. Kishor Uprety's preference for a living constitution.

In the following treatise, Dr. Suppiah Murugesan combines his first-hand experience of Singapore's political economy with additional research to explicate the Singaporean constitutional model. This model places the government not only in charge of the political sphere, but also in command of the economy and business. Whilst Singapore is an enviable demonstration of economic development, the ensuing tight government control of the economy and society leads to the obvious question of whether the form of government in Singapore is indeed democratic. The Government of Singapore would respond with its well versed argument that 'Asian Values' require a peculiarly Asian democratic system. Whatever is the case, Nepali constitutional drafters are faced with the dilemma of whether to facilitate Adam Smith's 'invisible hand' or to appoint the government as the leading captain of Nepali business that will not only set fiscal and monetary policy, but manage and/or micro-manage major industries.

The third thematic concern of this journal is gender in general and more specifically the prevention of gender discrimination in all its ugly forms. Anu Lohani discusses the deficiency of law in understanding the pain and suffering faced by women. Law cannot define pain because pain has no language, she argues. She brings *Ahluwalia* and also draws upon the Nepali context to substantiate her point. According to her, the legal process, by taking a lethargic and gender biased approach twists and even manipulates the story. Anu calls upon the law makers to be sensitive to changing times and keep the interest of women in mind while making laws.

Human trafficking is not only a gender issue, as it is a serious crime threatening both sexes. However, an article by Ben Reed discussing the flaws of the recently passed *Human Trafficking and Transportation (Control) Act, 2064* has been included with the other articles on gender, as trafficking is a phenomena that for the most part affects females, is caused by gender inequality and can be substantially prevented by the promotion of a gender equal society. The author rightly suggests the Act should be amended to ensure a presumption of innocence, an

impartial tribunal, a review of detention, witness cross-examination and due process is guaranteed for accused traffickers.

The remainder of the articles in the journal do not focus on one particular area. Instead, the contributors provide commentary and insight into some of the current and emerging legal issues that all those in the law profession should expect to contend with in the near future.

The first of these papers reflects on the elements, objectives and the strengths and weaknesses of truth and reconciliation commissions (TRCs). Judge Tek Narayan Kunwar embarks on a study of the purpose of TRCs by examining international examples such as South Africa and using academic sources. He concludes TRCs have a variety of dimensions including religious, socio-cultural, psychological, economic, political and justice dimensions. The key features of TRCs are also presented. The article provides a useful introduction to TRCs and looking forward, it may be required reading if Nepal decides to install its own TRC to help mend the damage caused by the recent conflict.

The following article transfers the focus from conflict healing to mountain protection. Nepal is fortunate enough to have some of the highest mountains in the world that possess countless biologically diverse regions rich in all kinds of resources valuable to both humans and the environment in general. Judge Dr. Ananda M Bhattarai examines international environmental instruments from the perspective of mountain and its people. The author firstly explains relevant international instruments that aim to promote the sustainable use of biological resources such as the CBD, Agenda 21 and the COP. He then highlights the various provisions that may be used to protect mountain biological diversity. The article supports the rights of the traditional owners and managers of mountainous areas, many of whom dwell in Nepal's mountainous areas. However, the author acknowledges that taking this position leads to an inevitable conflict with the principles of TRIPS. The underlying sentiment in the article hints at the unwieldiness of international biological diversity instruments, but fortunately a way forward is offered.

Remaining in the international domain, Dr Trilochan Upreti expounds the intricacies of the dispute resolution mechanisms of the WTO. Nepal has acceded to the WTO and is now in the process of complying with the multitude of obligations placed upon it as a WTO member. It is conceivable, that in the future, Nepal will become embroiled in a dispute with a trading partner and the very process detailed in this paper will be an option to resolve the dispute.

Although WTO dispute resolution mechanisms are most relevant to state actors, Bed Prasad Upreti's article on the evolution of commercial arbitration in Nepal is pertinent to all actors in the Nepali justice system. Throughout the world, arbitration is now seen as one the most expedient methods of dispute resolution. Arbitration often provides a speedier, less costly and more tailor-made remedy than the traditional court system. Therefore, this article that outlines the strengths, weaknesses and current issues of commercial arbitration is a valuable resource for any would-be arbitral party.

In this issue the readers will find transcriptions of talks delivered by two imminent jurists who visited the NJA and delivered talks. In the final month of 2007, the NJA was fortunate to arrange talk by former Chief Justice of India, P.N Bhagwati to present his views of the role of a judge to judges participating in the NJA's juvenile justice training program. He strongly argued

that a judge must facilitate justice even if they need to take an active role in a case. Otherwise, weaker parties will suffer the unfortunate and unfair consequences. He emphasized that a judge must look into the relevant positions of both parties and then ensure that both have equal access to justice. Chief Justice Bhagwati's experience as one of the most active members in an activist Indian Supreme Court provides a good example of the ability of judges to use their ample powers to guarantee a fair justice system. The second talk we have included in this issue is that of Catherine MacKinnon, a jurist and radical feminist who discusses the issue of mainstreaming women's rights issues in the justice system. She brings international experience and perspective on the subject and discusses different models developed to address discriminations, marginalization and neglect of women.

The last two entries in this journal are the historic decision handed down by the Supreme Court on the right to privacy and the right of the third gender against discrimination. The first case is: *Forum for Women, Law and Development v Prime Minister, Nepal Government and Office of the Council of Ministers and others* decision. This case contains privacy guidelines that must now be followed in all cases containing a party who is a woman, child or HIV/AIDS infected person. The case demonstrates the Supreme Court's ample directive power that permits deficiencies left in the law by the legislature to be overcome by wide-ranging court mandates. The result of this case and the subsequent protection of vulnerable parties would no doubt have received the approval of former Indian Chief Justice Bhagwati. In fact, the decision in this case is the epitome of a court fulfilling its role as a dispenser of justice without prejudice and without making the mistake of not considering the parties contextual circumstances.

The second case is: *Sunil Babu Panta and Others v Government of Nepal and Others*. Here, The petitioners among others, claimed that they should get non-discriminatory treatment regarding their gender identity as lesbian, gay, bisexual, transsexual and intersex (LGBTI) in marriage, cohabitation, citizenship certificate etc. The Supreme Court acknowledged that the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. It called upon the state to create appropriate environment and make legal provisions to enable the LGBTI people enjoy fundamental rights and insert provisions in the New Constitution to be made by the Constituent Assembly, guaranteeing non-discrimination on the ground of 'gender identity' and the 'sexual orientation' besides 'sex' in line with the Bill of Rights of the Constitution of South Africa. It also issued directives to the Government of Nepal to form a Committee in order to undertake the study on over all issues regarding the rights of LGBTI people and make the legal provisions after considering recommendation made by the said Committee.

Finally, bringing out a journal has been a very challenging task for a small institution like the NJA. But the support of our esteemed readers has kept us moving under the inspiring leadership of Justice T.B. Singh. We do hope that this issue will also receive similar support. We will appreciate, and look forward to, your critical comments on this issue also.

ARTICLES

The Role of Judicial Education

- Geeta Oberoi*

Abstract

In this article, the author attempts to discover the wide range of activities undertaken by institutes providing Judicial Education, the breadth of which defies all attempts to give a universal definition to the term Judicial Education. The reasons for engaging in a discourse of Judicial Education are not exhaustive. On one hand, identifying these reasons helps to fix the elasticity limits of the concept of Judicial Education so it cannot be stretched any further. Whilst on the other hand, these reasons point out all the possible objectives that should be realized during the education process of judges, which in turn strengthens the argument for increased state investment in Judicial Education.

1. Meaning

So far, dictionaries have not defined the term *Judicial Education* or *Judicial Training*. However, it has been defined in the World Bank technical paper No. 528¹ as:

“a term used to include collegial meetings to discuss education topics [international, national, regional and local] and all professional information received by the judge, be it print, audio, video, computer link, online or electronic. It includes distance learning – electronic and print, self study, mentoring, and feedback programs. It has two divisions – { 1 } pre-service or orientation programs and { 2 } continuing Judicial Education and professional growth training.”

2. Judicial Education for Educators in India

Prof. N.R. Madhava Menon, the first Director of the National Judicial Academy [hereafter NJA], India defines *Judicial Education* in terms of its purpose, i.e. the *only method available to achieve judicial excellence*². In a working paper³, he has made the distinction between *Judicial Education* and *Judicial Training* as follows:

“Judicial education denotes the acquisition through systematic instruction of the intellectual, moral and professional qualities and qualifications required to assume the role of a judge. Judicial training signifies the process of learning by practice the skills necessary to discharge the functions of a judge. Both, education and training are required in the making of a judge; the former imparts the knowledge of jurisprudence, the latter enables the person to apply the knowledge in delivery of justice. What is important is the understanding that the two concepts are different with distinct goals and programmes. More importantly, the instructional methods are different. While

* Assistant Professor, National Judicial Academy, Bhopal, India. Presently Commonwealth Scholar pursuing split site doctoral studies on *Judicial Education* at the University of Warwick, UK. This paper is part of the first chapter of her Ph.D. Thesis.

¹ “Furthering Judicial Education” (compiled by Waleed Haider Malik), page 76.

² Address to participants in *Juvenile Justice Refresher Course* (10th to 14th October 2004).

³ Paper by Prof. N.R. Madhava Menon distributed on the occasion of the inauguration of NUJS Campus at Salt Lake City, Kolkata and during Judges’ Seminar on *Judicial Education* and Training on 26th October 2002, available in NJA, Bhopal Library.

judicial education is relatively easy to impart, training requires greater inputs, higher cost, longer time and special expertise. Training is more about influencing attitudes and behavioral changes which in the case of an adult trainee is a complex, and, often times, individualized process.”

Prof. Mohan Gopal, has differentiated between the two terms *Judicial Education* and *Judicial Training*. According to him, training “restricts creativity of mind; one is asked to follow the other like compartments of a train. There is therefore no freedom of thinking.” On the other hand “education creates ideas and sets mind free from herd mentality and leads to innovation, creative thinking and emergence of new ideas.”⁴

Justice Arjun Sikri, defines *Judicial Education* as “an opportunity to exchange, share, and seek knowledge between different judges, explore problems that arise in day to day judging work and seek solution from fellow judges or senior judges.”⁵

3. The Possibility of a Literal Meaning for Judicial Education?

Probing beyond definitions, and entering into practice of this discourse, one senses inappropriateness of the literal meaning to be given to the phrase *Judicial Education* or *Judicial Training*. The activities go far beyond mere preaching/teaching /knowledge sharing. *Judicial Education* institutes are emerging as think tanks for apex courts, developing judicial policies to strengthen and systemize the administration of justice, serving as links between the three pillars of democracy: the judiciary executive and legislature. Take for instance, the case of the NJA in India, which has been asked by the Supreme Court and the High Courts to get involved in (i) developing delay and arrear reduction plans for all courts in the country; (ii) computerization of all courts; and (iii) selection of magistrates and junior division civil judges. Therefore, the role of *Judicial Education* institutes is stretching beyond the boundaries of their traditional roles⁶ that includes:

- (i) prepare newly appointed judges for their duties;
- (ii) guarantee greater uniformity and predictability of decisions and to ensure that the seated bench has an adequate command of laws and procedures to carry out their jobs;
- (iii) update judges in new methods, laws, and related areas of knowledge required in their work;
- (iv) in civil code countries, it includes screening candidates for the judiciary;
- (v) building a reform coalition within the judiciary or to overcome resistance to reform;
- (vi) introducing new skills and practices - even without a separate training component;
- (vii) introducing new values, attitudes and perspectives;
- (viii) identifying problems to be resolved by other reform interventions;
- (ix) identifying additional problems to be addressed by training and helping to develop solutions;
- (x) building institutional solidarity and a sense of common purpose.

⁴ After assuming the charge of Director of NJA, he has stopped the usage of word *training* for judges. *Judicial Education* is instead used to describe the activities of the NJA.

⁵ Given during a personal interview recorded on 17 October 2006 at the Delhi High Court.

⁶ Outlined by Linn Hammergren in Carnegie Paper No. 28, June 2002. This study was part of series of papers dealing with practical lessons from USAID's experience with justice reform projects in Latin America. AVAILABLE ONLINE AT: <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1015&prog=zgp&proj=zdlr> (as of December 2, 2008).

The NJA in India has identified five factors for *Judicial Education* discourse in order to achieve sustainable improvements in the administration of justice:

- (1) Role and Responsibility of Judges (including judicial ethics);
- (2) Knowledge (of substantive and procedural law) and Skills of Judges;
- (3) Judicial Method;
- (4) Management of Courts/Cases;
- (5) Organizational Efficacy— including the role of other stakeholders such as the Bar, the executive, litigants and legal educators.

Such objectives for the *Judicial Education* discourse expands the responsibilities of *Judicial Education* institutes from merely arranging conferences, seminars, workshops, retreats, meetings and deliveries of lectures to the policy development arena. This makes it impossible to tie down *Judicial Education* with one set of activities. The problem is further compounded by the attitude of judicial educators who do not view “teaching” as a respectable word to describe the activities that take place in a *Judicial Education* context.⁷

It can be concluded therefore now that *Judicial Education* discourse is being continuously developed to provide a forum for judges to consider a variety of problems they face in the functional domain and to discuss appropriate responses, with the goal to leave them with a framework for analyzing issues and options that may arise in the future.

4. Reasons for Investment in *Judicial Education*

The activities part discussed above in 3.0 shows that *Judicial Education* is a costly venture. It requires huge space, massive investment in infrastructure, maintenance, a lot of money to meet travel expenses for trainees and trainers, funding for food, accommodation, medical care, etc.⁸ The state has to contribute towards all the expenses to run such an institution and it would not be good practice to allow private contributions and donations etc.⁹ The question that logically flows from all this, is why should states invest in this costly affair, which is not going to generate any revenue for it, on the lines of investments made in other sectors? Answering it requires a survey of all the reasons that justify such investments. Some of these reasons are explored below.

⁷ For instance, in her paper presented at the 2nd International Conference on the Training of the Judiciary at Ottawa organized by IOJT Justice Georgina R. Jackson has defended judicial education processes undertaken by the National Judicial Institute (NJI) of Canada in the following words, “the NJI does not “teach” judicial ethics in the usual sense of that word. Instead, as will be seen, it provides a forum in which issues surrounding judicial ethics may be raised and discussed.”

⁸ NJA, India is provided Rupees 8.60 crores as Revenue Expenditure for the year 2008-9. For the previous year – 2007-8, this grant stood at rupees 6.75 crores – provided by the Department of Justice, Government of India. Whereas Himachal Pradesh State Judicial Academy located at Shimla was allocated a budget of Rupees 45,47,141 for the financial year 2006-2007, by the State Government of Himachal Pradesh out of which it utilized Rupees 39,16,894 for the same year on salary, wages, travel, office expenses, medical reimbursements, motor vehicles, rent-taxes, maintenance and other miscellaneous expenses.

⁹ Experiences in USA - In 2000, members of the Senate proposed the *Judicial Education Reform Act* to regulate the attendance of judges at privately-funded educational seminars. Despite such efforts, not all agree that the seminars are a cause for concern. James Pierson, executive director of an organization that has funded judicial seminars at the Law and Economics Center, has remarked that “judges are perfectly capable of assessing law and economics on their own without being told what to think.” The Kerry – Feingold Bill 2000 led to the *Judicial Education Reform Act* of 2000, (prohibiting judges from accepting “anything of value in connection with a seminar”). See Thomas M. Nickel, *Judges Deserve Access to Educational Opportunities*, 49 FED. LAW. 56, 57-58 (2002) (cataloging educational opportunities for judges). Some complain that these seminars are a plot by conservatives to lure judges into indoctrination sessions at luxurious boondoggles. Senators Feingold and Kerry introduced legislation in 2000 that would have reined in such activities. For discussion of the overall issue, See Bruce Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941 (2002)

4.1 To Clarify the Role of the Judiciary in Governance Structures

Governance provides an institutionalized means to claim rights and seek justice through the justice delivery system.¹⁰ In a democratic framework of governance, the role of the judiciary is to protect the constitution and thereby democracy itself.¹¹ Legal systems with formal constitutions impose this task on judges, but judges have been playing this role even in legal systems with no formal constitution. Israeli judges have regarded it as their role to protect Israeli democracy since the founding of the State, even before the adoption of a formal constitution¹² and judges in England, notwithstanding the absence of a written constitution, have protected democratic ideals for centuries.¹³

In India, policy-makers and law-enforcers are perceived as apathetic, if not corrupt, and politicians are perceived as opportunistic demagogues rather than visionary leaders.¹⁴ This places tremendous responsibilities on the courts wherein citizenry view them as the 'last resort for the oppressed and bewildered'.¹⁵ In such a state of affairs it would be dangerous if the judiciary acts as an *agent of the government*,¹⁶ leading to situation in Latin American States where the judiciary has lost equal footing among the three branches of representative democracy (judiciary, executive, and legislative). The courts there continued to enforce the authority of the ruling elite, rather than to equitably interpret the laws of the land. The result was that judges lost the authority to issue legal edicts or interpretations without the fear of reprisal from the executive and legislative branches and from the omnipresent church authority. Instead they were used as a pawn in conflicts between political and economic elites,¹⁷ with judges often the recipients of political favors.¹⁸ The courts began to be filled by political appointments owing their loyalty to individual presidents and political parties. Higher court judges by and large came from the same oligarchic circles, and shared the same economic and class interests.¹⁹ The judiciary was left to its own devices as long as the courts towed the party line. Given the assumption that the higher courts were expected to rubber stamp executive authority and find constitutional justification for executive actions, the courts commanded little respect from citizens or from the other branches. This lack of judicial will to interfere with executive actions left Latin American countries at the mercy of capricious lawmaking by executives. What is worse, the judiciary became a victim of its own tendencies for self-preservation. The infrastructure languished to the degree that it

¹⁰ *Citizens' Report on Governance & Development*, 2004 (Social Watch India).

¹¹ See Aharon Barak, *THE JUDGE IN A DEMOCRACY* 20 (Princeton University Press, USA, 2006).

¹² In 1999, the Supreme Court of Israel in a judgment concerning the legality of the General Security Services' interrogation methods, delivered on 6 September 1999, reproduced in *International Legal Materials*, Vol. 38 (1999), 1471 – gave a unanimous landmark ruling that prohibited the Israeli Security Services from using physical abuse of suspected terrorists during interrogation. "This is the destiny of democracy", wrote Chief Justice Barak, "as not all means are acceptable to it, and not all practices employed by its enemies are open before it." The Court noted the absolute prohibition on torture and cruel, inhuman and degrading treatment in international law; there were no exceptions and "there is no room for balancing".

¹³ *R. v. Secy of State for Home Affairs ex parte Leech*, 1994 Q.B. 198 (Eng. C.A.); *R. v. Secy of State for Home Affairs ex parte Simms*, 3 W.L.R. 328, 340 (A.C.) 1999.

¹⁴ U Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geography of (In)justice in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH*, 156, 157 (SK Verma and Kusum eds, OUP, New Delhi 2000).

¹⁵ *State of Rajasthan v Union of India* (1979) 3 SCC 634, 670 (per Goswami J.).

¹⁶ In the agency model, the judge is an agent of the Legislature. He must act according to its instructions, just as a junior officer is bound to carry out the orders of his superior officer. Aharon Barak completely disagrees with this kind of conception of the judicial role. See Aharon Barak, *supra* note 11, p. 16.

¹⁷ According to Hammergren, historically, the fluctuations in the Latin American judiciary's political role often had been at the micro level. Traditional concerns were with parties or which individuals dominated institutions and so influenced specific decisions and actions. In India, the chief of SP. Party – political outfit – gave an interview on 13th July 2008 to NDTV stating that the opponent political outfit – which is running government in Uttar Pradesh – has appointed the recently retired Supreme Court judge H.K. Sema as Uttar Pradesh Human Rights Commission Chairman as he gave just before his retirement three judgments in favour of the Chief Minister of Uttar Pradesh – Mayawati.

¹⁸ See *Inter-American Development Bank, Would You Trust This Court?*, <http://www.iadb.org/exr.htm> (as of Nov. 30, 1999).

¹⁹ There are few, if any, minority groups that are represented in the ranks of Latin America's high courts.

failed to assert itself as an equal branch of government. In Venezuela, President Hugo Chavez took a highly aggressive stance on reforming the judiciary by removing hundreds of judges during the summer of 1999. This shake-up was in reaction to atrocious conditions in a court system in which "[t]hree-fourths of Venezuela's inmates have never had their day in court," and "[h]igh-power law firms wrote verdicts themselves and bribed judges to sign them."²⁰

Before the fall of Communism in the Soviet Union and its satellites, "telephone justice" prevailed.²¹ It was not monetary bribes that tainted justice. It was instructions given to members of the judiciary by Communist Party officials. If a case was considered by the Party to be significant, the judge got a phone call from a Party leader with instructions on how to decide the case. The Party was the supreme source of authority and judges were rubber stamps who would carry out Party instructions.²²

It is no coincidence that stronger democracies have emerged in nations with stronger judiciaries. Judiciaries in the UK, USA, South Africa and Israel have created many precedents to protect democratic values. In the US after 9/11 and by December 2004, more than 600 detainees were held at Guantanamo Bay. Until the US Supreme Court intervened to declare their right to access to US federal courts, for more than two and a half years they had no access to legal representation, nor to any court of law or tribunal.²³ Lord Steyn, a serving judge in Britain's highest court, the House of Lords, described detention under these conditions as a 'stain on American justice', wholly contrary to international law.²⁴ In South Africa, the racist separation at the base of apartheid was grounded in a statute. The Appellate Division of South Africa held that the statute was unconstitutional because it contradicted legislation of a higher normative level.²⁵ To overcome this decision, the legislature enacted a second statute that provided an appeal to the Parliament. The Appellate Division reviewed this second statute that again instituted racism again and declared this decision unconstitutional on the ground that it infringed upon the authority of the courts to exercise judicial review.²⁶ In Israel, the Supreme Court invalidated an agreement between two political parties that had provisions saying that if the status quo on religious issue was violated by the judiciary, the same would be nullified by appropriate legislation.²⁷

A majority of judges in India view themselves as simply an agency of the political branch of government and think that fidelity to political views, whether conservative or liberal, is an important part of their role. For instance, after 2000, despite the diverse grounds on which the challenges have been made against large infrastructure projects, the general response of the courts to such litigation has been conservative. So much so that in no case so far the court ordered the scrapping of any project or even any significant restructuring of a project in the face of such challenges. The courts have largely taken the view that considerations of environmental impacts of a project or economic and financial considerations raise technical issues and policy matters that are best left with the expert authorities of the executive.²⁸ Also, even though judges have

²⁰ Luz Estella Nagle, *The Cinderella Of Government: Judicial Reform In Latin America*, 30 CALIFORNIA WESTERN INT'L LJ 345 (Spring 2000).

²¹ David K. Shieler, *Perspectives: Four Futures for Russia*, THE GUARDIAN (May 1, 1993) at 18.

²² Jane R. Roth, *Judging in New Born Democracies*, 54 OHIO STATE LAW JOURNAL 1109 (1993).

²³ On 28 June 2004, the US Supreme Court handed down its landmark ruling in *Rasul et al. v. Bush*. By six votes to three, the court decided that US federal courts did have jurisdiction to determine the legality of the executive's potentially indefinite detention of individuals held at Guantanamo who claimed to be wholly innocent of wrongdoing. The majority applied the historical principles of habeas corpus from English law.

²⁴ Philippe Sands, *Lawless World: America And The Making And Breaking Of Global Rules*, 2 (Allen Lane: Penguin Books, England, 2005).

²⁵ *Harris v. The Minister of Interior* 1951 (2) S.A. 428 (A).

²⁶ *Minister of Interior v. Harris* 1952 (4) S.A. 769.

²⁷ H.C. 5364/94, *Veinerv. Chairman of Israeli Labor Party*, 49(1) P.D. 758, 791.

²⁸ Citizens' Report on Governance & Development, *supra* note 10.

tremendous power, particularly in Public Interest Litigation, to design innovative solutions, direct policy changes, catalyze law-making, reprimand officials and enforce orders, of late, the courts have started reducing their powers.²⁹ This has been in accordance with the conservative trend of the courts that suits other branches of the Government. In 1988, based on a Full Court meeting, the Supreme Court of India devised guidelines to deal with PIL. These guidelines aim at ensuring that PIL is: widely representative, broadly equitable, effective, sustainable and consistent.³⁰

This constrained approach by the courts is compatible with an overall “logic of the state”, in which the higher judiciary plays its appointed role as an instrument of governance much more than its traditional role as an institution of justice. This notion of “judicial governance” imposes inherent limitations on the extent to which the court can be expected to be an active part of social movement struggles for the realization of those rights that are sought to be exercised in conflict with statist and developmentalist ideologies.³¹

It is the duty of a judge to protect the individual from abusive state action and to contribute to the meaning of citizenship and civil entitlement. In performing this duty, the court must inevitably be in conflict with the other branches. This is especially so in modern times where more and more political questions present themselves as legal questions, and are brought to be adjudicated before the courts, and especially so where the scope of judicial review over the other branches is wider than in the past. A wider judicial review carries with it a wider interest in the courts, and widening tension between the court and the other branches of government. If there will be no conflict and no tension, according to Aharon Barak, the court will not be fulfilling its constitutional role.³²

Judicial Education therefore becomes necessary to acquaint judges with judging trends from the world over; to help them realize that powerful democracies are so because of strong, independent and fearless judiciaries which have shown courage in the worst times of crisis;³³ and to make them understand their role in the governance structure of a democracy so that Latin American experiences of disreputable judiciaries are not repeated.

4.2 To Uphold the Necessity of Courts in a Democracy

Democracy works when citizens and the most marginalized people have the capacity to ask questions, seek accountability from the state and participate in the process of governance. Democracy becomes meaningful when people can shape the state and the state in turn, creates enabling social, political, economic and legal conditions wherein people can exercise their rights and achieve freedom from fear and want. Democracy is not merely elections or universal adult franchise. Democracy involves dignity, diversity, dissent and development. Unless the last person can celebrate his or her sense of dignity, exercise democratic dissent and involve

²⁹ *Sachidanand Pandey v. State of West Bengal* (1987) 2 SCC 295, 334.

³⁰ <http://www.supremecourtindia.nic.in/pilguidelines.pdf> [as of 20th July 2008].

³¹ See Balakrishnan Rajagopal, *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 166 HUMAN RIGHTS REVIEW (April-June 2007).

³² Aharon Barak, *Viewpoint*, 88 JUDICATURE 199 (April 2005).

³³ In *Abbassi v. Secretary of State for Foreign and Commonwealth Affairs* 42 International Legal Materials 358 (2003); – a case was instituted on behalf of Ferroz Abbassi challenging the failure of Britain's Foreign Office to take adequate steps to protect the basic human rights of Ferroz Abbassi – a British citizen detained at Guantanamo Bay. The British Government defended the English court proceedings with its usual vigour and thoroughness. It succeeded in getting the case thrown out at the first instance on the grounds that the case would require the court to enter the ‘forbidden domain’ of foreign relations. But in July 2002, the Court of Appeal gave Abbassi's lawyers permission to challenge the Government's inaction. The case was fast-tracked. The Foreign Office argued that America's actions were simply not justiciable before the English courts. It would be wrong, they argued, for the courts of one country to express a view on the behaviour of another. The Court of Appeal rejected the Government's defence. It ruled that it was ‘free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.’

themselves in the process of governance and development, democracy becomes empty rhetoric. Democracy dies when discrimination begins and the politics of exclusion takes root.³⁴

A key historical lesson of the Holocaust is that the people through their representatives can destroy democracy and human rights. Since the Holocaust, all of us have learned that human rights are the core of substantive democracy, the protection of which cannot be left only in the hands of the legislature and the executive, which by their nature reflect majority opinion. Consequently, the question of the role of the judicial branch in a democracy arises.³⁵

The judge in a democracy is charged with two simultaneous jobs - she/he has to bridge the gap between law and society and also, she/he has to give expression to modern developments that are occurring³⁶ like development of different theories that change legal conceptions of things, developments at international level where treaties and conventions are slowly ousting the jurisdiction of domestic courts in a number of important matters.

Judicial Education should create an understanding about the high role of the judiciary in a democracy and do away with Austinian presumptions of law as the command of the sovereign which does not fit the legal world today. Judges are and society expects them to take an active interest in the affairs of the society relating to various dimensions.³⁷ Judges will always be attacked by politicians and the sectors of public that are unhappy with the court's decisions. *Judicial Education* should help them swallow such attacks and carry out their role as the protector of human rights in a free and democratic society without becoming defensive in the face of counter-majority arguments.

4.3 To Clarify the Relationship between the Judge and the Law

There are two opposing and equally strong schools of thought on this point. Whereas formalism views a judge as merely a living 'oracle of law', the 'speaking law' or the 'mouth that pronounces the law' and that the office of the judge was 'to declare and interpret and not to make law'. Formalism found support from authorities like Coke, Bacon and Blackstone. Their logic was that the judges invent law no more than Columbus invented America.³⁸ The contrary view was taken by realist schools that judges unquestionably make law and therefore it recognized the creative role of the judiciary.

Judge Aharon Barak is of the view that:

*"Legal rules and principles together constitute a system of law whose different parts are tightly linked. The judge is a partner in creating this system of law. The extent of this partnership varies with the type of law being created. In creating common law, the judge is a senior partner. In creating enacted law, the judge is a junior partner. Nonetheless, he or she is a partner, and not merely an agent who carries out the orders of his or her principal."*³⁹

Therefore, it is still not very clear as to what are the limits placed on judges. These opinions are never threadbare discussed and debated in law schools as the young minds are not

³⁴ Citizens' Report on Governance & Development, *supra* note 10.

³⁵ See Ahron Barak *supra* note 11, p. x.

³⁶ *Id.*

³⁷ This becomes clear when we go through the case law in the UK. In *A. and Others v. Secretary of State for the Home Department; X and another v. Secretary of State for the Home Department*, Appellate Committee of the House of Lords, 16 December 2004, Britain had passed its own anti-terror law requiring it to derogate from the European Convention on Human Rights to authorize the indefinite detention without charge or trial of non-nationals who could not be deported. In December 2004 the judges of the House of Lords ruled by an overwhelming majority that the law – Part 4 of the Anti-Terrorism, Crime and Security Act 2001 was discriminatory and in violation of Britain's international legal obligations. Lord Hoffmann observed – "The real threat to the life of the nation, comes not from terrorism, but from laws such as these." Lord Scott described the law's power to allow indefinite imprisonment on the basis of a denunciation on grounds that are not disclosed, and made by a person whose identity cannot be disclosed as "the stuff of nightmares". See Phillippe Sands *supra* note 24, p.232.

³⁸ See Gobind Das, JUSTICE IN INDIA, 67 (Shangon & Shangon, India, 1976).

³⁹ See Ahron Barak, *supra* note 11, p. xviii.

ready for this higher platform debate and secondly, they will find such debates unrelated and meaningless to their profession. Only when a small percentage of them assume judgeship later on in their life do they face problems about their role.⁴⁰ At that point of life they are curious to know and to read all the literature, so that they can reflect on their role.

To fill this curiosity, orientation courses are designed in India and in other countries judges to clarify their role in democracy; the shift in that role after attaining independence; and the shift after another turning period in the nation's history (the emergency period in India and the enactment of the Human Rights Act in UK).

4.4 To Move Courts Beyond their Colonial Past

The Indian legal system during the British days functioned without the native spirit, as a corpse of law was handed down to India without life and vitality. The only goal was the stability and continuation of the British Empire. Today, six decades since independence - judges tend to forget that laws were transported from the land of the Thames along with the clothes that the East India Company brought to India to sell. Therefore, the independence of the country and the enactment of the Constitution should make a big difference in the lives of people. But this common difference is buried and not reflected upon. Be it the legislature, executive or the judiciary, all continue to sport the same lenses that were worn by the East India Company manager when he ruled over India. Unfortunately, India is still governed today by essentially the same codes, the same rules of interpretation that were valid in the era of The East India Company.⁴¹ In its mode, method of work, designations, language, approach and method of resolving disputes, the judiciary continues to have all the trappings of the system established by the foreign rulers. On the attainment of independence, this system was expected to be an effective instrument capable of ushering in a social revolution and adapting itself to facilitate the transformation of Indian society and to become an effective instrument for carrying out the mandate of Article 38 of the Constitution of India. It had the added responsibility of becoming a guardian angel for the protection of the fundamental rights of the citizens. Thus, for a purely colonial institution operating more or less as a wing of the law and order enforcement machinery, it has become a sentinel on the *qui vive*.⁴² However, very few judges since independence have met the expectations envisaged in the Constitution. Only some names can be counted and remembered (Krishna Iyer and Bhagwati for sure) who did pioneering work and gave relief from the callousness of the legislature and the executive.

4.5 To Help Courts Respond to Changed Circumstances

Changing social and political tensions presents new challenges to age-old issues. Perhaps, one of the greatest tensions facing today's judiciary deals with ethical issues and the public's expectations of what judges should or should not do. The public has the opportunity to observe TV judges, movie judges, and live court presentations with commentary by different media outlets, and they have access to studies sponsored by organizations having interests in courts. All of this "information and entertainment"⁴³ creates confusion and unrealistic expectations of judges.

Also, many a time, courts fail to respond to major political, economic and social upheavals that upset and unsettle thousands through no fault of theirs. These are special moments in history

⁴⁰ See Ahron Barak, *supra* note 11, p. x.

⁴¹ See Gobind Das, *supra* note 38.

⁴² 117th Report on Training of Judicial Officers, LAW COMMISSION OF INDIA, November 1986.

⁴³ Note: Transcript Of Panel Discussions-Centennial Reflections On Roscoe Pound's The Causes Of Popular Dissatisfaction With The Administration Of Justice, 48 SOUTH TEXAS LAW REVIEW 1079 (Summer 2007).

when bold steps are required and the judiciary is perceived as not responsive enough. In fact, some jurists see the judiciary as totally incompetent to redress such issues. For instance, Prof. Upendra Baxi has suggested that India should have its own variety of an effective truth and reconciliation commission to redress grievances of those who are violated by political violence. This suggestion came after observing that since independence courts have rarely provided a successful forum for those who have suffered from political violence.⁴⁴

There comes a time when the court should lead; and be a crusader for a new consensus. The illustration of the famous case of *Marbury v. Madison*⁴⁵ and the role of Chief Justice Marshall is a prime example. This judgment established the principle that the Supreme Court could declare an Act of Congress unconstitutional, therefore void, thus making the court and not the Congress the last authority on the validity of the law. At that time, no court anywhere in the world claimed such authority. It was thought, if any court claimed the right to nullify a law, it would make itself part of the legislative power. However Marshall tried the impossible, succeeded and it became the cardinal principle of the Rule of Law. Similarly, after the 1973 decision in *Roe v. Wade*,⁴⁶ the argument that the word “liberty” in the Fourteenth Amendment includes a woman’s right to have an abortion was no longer “off the wall.” Nor was the argument that the viability of the fetus should be the line that determines the scope of that right. Such claims simply became plausible for the well-trained lawyer, even if she was not ultimately convinced by them. After *Reynolds v. Sims*⁴⁷ and *Baker v. Carr*,⁴⁸ the argument that the Court should intervene in the political processes of the states became more thinkable.⁴⁹ For seventeen long years, the Indian Supreme Court recognized the parliament’s amendatory power as plenary. In 1969, it sought to immunize Part III granting fundamental rights from the virus of amending power. In 1973, in *Keshavanand Bharti*’s case, it modified this approach subjecting this plenary power to the discipline of a doctrine of the basic structure of the Constitution justifying it on the logic of the preservation of essential features like “democracy”, “rule of law” and “the republican character of the Indian Constitution” etc.⁵⁰

Marbury, Brown, Roe, Keshavanand Bharti, etc. serve as good examples. A court cannot continue to sustain public confidence if it pronounces such historic judgments every week. Yet, a court will not maintain public confidence if it misses the special moments that require *Marbury, Brown, Roe, Keshavanand Bharti, etc.*

To make the judiciary responsive to all types of changes that may occur in society, judges have to be engaged in the very best educational conferences – wherein diverse sections of the judiciary are invited to analyze the situation, the causes of upheaval, and the possible solutions to arrest suffering of any section of society. Such participation helps guarantee a robust and healthy judiciary in the free marketplace of ideas.⁵¹ It helps the judiciary to analyze and reflect on changes occurring within the judicial system itself.⁵²

⁴⁴ U.Baxi, THE SECOND GUJARAT CATASTROPHE, May 27, 2002 *Economic and Political Weekly* 11, pp 3519- 3531; also placed on the Website of the American Council of Social Sciences, New York.

⁴⁵ 5 U.S. 137 (1803).

⁴⁶ 410 U.S. 113 (1973).

⁴⁷ 377 U.S. 533 (1964).

⁴⁸ 369 U.S. 186 (1962).

⁴⁹ Jack M. Balkin, *Bush V. Gore And The Boundary Between Law And Politics*, 110 YALE L.J. 1407 (2001).

⁵⁰ See Upendra Baxi, *A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 557 (October 2003).

⁵¹ Thomas M. Nickel, *Judges Deserve Access To Educational Opportunities*, 49 FEDERAL LAWYER 56 (2002).

⁵² Court procedures are behind the times, prisons are filling faster, civil dockets are declining, big cases are going to arbitration. And not just the big ones but leases and consumer agreements also provide for arbitration. Many retired judges are now making more money arbitrating. One needs to investigate why courts are no more the chosen forum. Judicial educators need to keep judges up to date on changes in technology, law, and community expectations.

4.6 To Equip Courts to Meet Challenges Unleashed by Developments in Science and Technology

The current generation of judges is confronting legal issues arising in a complex world that require a more thorough understanding of advances in science and technology. Furthermore, new legal issues that turn on questions of science and technology are intermingled with far-reaching policy concerns. Such issues often reach the courts before either the science or the policy has been fully developed. For example, the fields of electronic information and DNA-based biology raise familiar issues of intellectual property and privacy, but these issues take on fresh contours in these previously unexplored contexts. The new capabilities of science and technology raise new concerns for constitutional, personal and commercial rights. If judges are to respond to these concerns, to find the truth in adjudications, they have to sufficiently understand the science and technology.⁵³ For instance, we are in the midst of a great national debate about genetically modified (GM) foods. Are they going to be harmful to the health of those who eat them? Will they damage the environment? Are they going to destroy our precious wildlife? Are they going to sabotage the purity of growing organic crops? Will they help to reduce Third World poverty? Every day the press carries stories on the subject with claims that one group of scientists contends that there is nothing to worry about while another says that there must be a moratorium and a third says that the methodology used by the first group is flawed. The politicians then give their advice. The public is supposed to make up their minds on the basis of a combination of scary stories, half digested science and conclusions stated without a legitimate basis. Members of the public may raise this sort of issue before the courts. It is not difficult to envisage a product liability or negligence claim on the basis that ingestion of GM food has caused injury to health or a nuisance claim by an organic farmer that the purity and so the value of his crops has been damaged by pollen from a nearby field of GM crops. The courts would then have to appraise the scientific evidence of causation which would be crucial to the outcome of the claim.⁵⁴

Apart from such claims in today's complex and technologically-oriented society, scientific evidence surfaces in nearly every kind of litigation: product liability, medical malpractice, patents, criminal prosecution, and antitrust, just to name a few. Also, litigants use experts to prove causation, establish the standard of care, link suspects to (or exclude suspects from) crime scenes and assess damages.⁵⁵

However, judges face a conundrum. They are remarkably ill-positioned to make the decision. Primarily trained in legal analysis, they are usually unfamiliar with the specialized information presented and they lack the background necessary to assess its reliability.⁵⁶ An assessment of toxic tort and product liability claims may require knowledge of toxicology and epidemiology. An assessment of antitrust claims requires knowledge of sophisticated statistical

⁵³ See Pauline Newman, *Law And Science: The Testing Of Justice*, 57 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW 419 (2000).

⁵⁴ Elizabeth Melville, John Melville Williams, *Science, Judges, Experts And The New Rules*, 183 - 192 JOURNAL OF PERSONAL INJURY LITIGATION, (SEP 1999).

⁵⁵ Edward K. Cheng, *Independent Judicial Research In The Daubert Age*, 56 DUKE L.J. 1263 (March, 2007).

⁵⁶ See *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005) (describing a trial court that admitted expert testimony because it "concluded that it lacked sufficient knowledge on the scientific subject matter"); Craig Lee Montz, *Trial Judges as Scientific Gatekeepers After Daubert, Joiner, Kumho Tire, and Amended Rule 702: Is Anyone Still Seriously Buying This?*, 33 UWLA L. REV. 87, 110 (2001) (describing survey data showing that judges have little background in science).

analysis. Judges certainly lack familiarity with the methodologies of toxicology and epidemiology. Getting past the scientific terminology and other idiosyncrasies of the scientific disciplines that find their way into litigation is a daunting task for a judge. At the same time, the experts, who are pre-screened and hired by the parties, invariably conflict with each other, offering the judge little help. Often, one expert steadfastly maintains that toxicological studies on mice are a well-accepted method for determining carcinogenicity in humans, and the other expert flatly disagrees.⁵⁷ This is known as the 'battle of the experts'.

Judicial Education is required to focus on scientific principles only as far as they arise in litigation. Judicial educators will have to give courts access to information about emerging technologies and their potential to violate individuals' rights. Judges need to have access to enough available information to fully understand the technologies and how they are being used or could be used, to violate the law.⁵⁸ For instance, if judges were better educated with respect to how the Internet operates as a whole, it certainly would improve the development of the common law as it is concerned with spyware and other internet data-mining technologies.⁵⁹ Such *Judicial Education* programs are a sound step towards improving the ability of judges to handle scientific evidence. They expose judges to scientific concepts and issues and they make judges more critical of expert testimonies.

Better scientific decisions will arise not from finely calibrated doctrinal tests or the use of external experts, but from a more sophisticated and well-informed judiciary.⁶⁰ Unlike external solutions, like taking the help of experts etc. educative solutions keep decision making power firmly entrenched with the judge and allows the admissibility standard to remain flexible by shifting some of the burden to the judge's own understanding of science.⁶¹

The work done by the Federal Judicial Center of USA in strengthening judges' ability to deal with issues of science and technology is commendable. In 1994, the Center published the first edition of its *Reference Manual on Scientific Evidence* to provide judges with a ready reference to information on areas of science that often find their way into litigation. The Center also included presentations on scientific evidence in its orientation programs for newly appointed judges and magistrates. In addition, the Center sends one or more faculty members to courts on request for "in-court" seminars, which deal with the social issues presented by developments in genetics, statistical inferences and scientific methodology.⁶² The Center has also given a number of distance-learning broadcasts on specific topics of science, delivered over the Federal Judicial Television Network [FJTN]. The FJTN is a network of satellite downlinks that the Administrative Office of the United States Courts has installed in some 300 courthouses around the country. It allows the judges to receive distance learning and informational programming from the studios that the Center operates in the Thurgood Marshall Federal Judiciary Building. A series of six programs on "Science in the Courtroom" includes lectures by scientists on topics such as epidemiology, toxicology, recombinant DNA and gene cloning and microbiology. These programs

⁵⁷ See e.g., Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 74, 75 (1998) (emphasizing the "continued need for appellate supervision and increased judicial education").

⁵⁸ C. R. Nesson, *Online privacy* (2001), <http://cyber.law.harvard.edu/ilaw/Privacy> (as of January 24, 2006); C. Nesson, A. Marino, and R. Kent, *Privacy* (2005), http://cyber.law.harvard.edu/ilaw/harvard_2005_module_3_privacy (as of January 24, 2006).

⁵⁹ Daniel B. Garrie, Rebecca Wong, *International Spyware: A Global Privacy Concern*, 61 CONSUMER FINANCE LAW QUARTERLY REPORT 125 (Spring, 2007).

⁶⁰ As Ron Allen and Joseph Miller note, the common law has generally favored educating juries rather than having them "defer to the judgment of others," an observation that somewhat parallels the educative versus external approaches described here. Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1133 (1993).

⁶¹ See Edward K. Cheng, *supra* note 55.

⁶² Information obtained from Director, FJC, USA via e-mail.

also include advice by judges on managing specific problems of expert testimony that arise in toxic tort litigation and patent litigation. Other distance education programs focus on the neurobiology and psychopharmacology of drug addiction. Recently, the Federal Judicial Center and the National Center for State Courts have collaborated with the Brooklyn Law School Center for Health, Science and Public Policy in a series of programs that examine evolving scientific issues, in order to assist judges in handling litigation in their courtrooms. The Center is also developing a new series of education programs, in collaboration with the American Association for the Advancement of Science and the National Center for State Courts, on emerging issues in neurobiology and law.

In India, SJAs and the NJA are providing *Judicial Education* on science related issues, though the quality and content lags far behind those provided by judicial educators in the US and the UK. Yet, it is expected that in the coming years it will catch up.⁶³

4.7 To Overcome Structural Deficiencies in the Judicial System

There are numerous intangible, but nevertheless strongly-felt limitations that constrain the judges of today.⁶⁴ Judges are checked by institutional realities; the dynamics of the judicial decision-making process; judicial collegiality including “unremitting criticism” by one judge of another’s perceptions, premises, logic, and values; judges’ own commitment, professionalism, and integrity; judges’ desire to earn the respect of sibling judges, the Bar and the public; and the authority of appellate courts to reverse decisions.⁶⁵

Having a hierarchy of administration in the judiciary creates an additional peril. When the route of an appeal follows the structure of management, the system risks the possibility of independent judgments at each level of the judicial structure. When judges spend their time worrying about the consequences of their decisions on their careers, courts become just another department of the executive government.⁶⁶

The financial dependence of the judiciary on the executive weakens the independence of the judicial branch. Only a judge’s salary comes from an independent fund. The rest of the funding for infrastructure, cars, housing, staff, office stationary, laptops and desktops, telephone bills, mobile services and travel are allocated by the state governments. After retirement, the executive decides, which judges are to be made a member or chairman of commissions, tribunals, committees, inquiry committees or even ambassadorial postings etc. The prospect for the future, coupled with the strain of the present, may cause conduct by judges not commensurate with the high office that society has chosen for them. Many firm feet are likely to falter.

There is yet another angle in the structural set up of Indian courts that places excessive burdens on them. This would be clear if we concern ourselves with the difference between the courts of two different countries: USA and India.

⁶³ In the NJA, since it became operational in the year 2004, out of a total of 167 programmes – held till May 2008, on this issue, a total of 8 programmes were devoted to the theme of “Science and Law”. Another 9 programmes dealt with some issues concerning this theme. This also includes the Summer Retreat for Supreme Court Justices held in July 2005 – in which one whole day was devoted to science related issues- doctors, scientists, engineers were called to discuss wide ranging issues. According to the Annual Report of Himachal Pradesh State Judicial Academy 2006-7, it has for the period May 2006-March 2007, conducted 75 three day advanced courses and 3 induction trainings for judicial officers and ministerial staff of the courts in the State that were attended by a total of 1187 participants. Out of these, 10 programmes on Computer Usage and other IT dimensions were for accounts clerks and another 9 for Civil Judges; 3 five day programmes on forensic sciences application were conducted for judges.

⁶⁴ Shirley S. Abrahamson, *Judging In The Quiet Of The Storm*, 24 SAINT MARY’S LAW JOURNAL 965 (1993).

⁶⁵ See Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND.L.J. 1, 9-10 (1983) (maintaining that decision is principled if grounds for the decision can be stated truthfully); Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U.I.L.L.REV. 917, 919-36 (discussing various elements of judicial processes).

⁶⁶ See *Transcript of Panel Discussions*, *supra* note 43.

The Supreme Court of USA decides 80 or 90 cases a year. All those cases are fully briefed, sometimes with many amicus briefs and almost all cases are orally argued. All nine justices work on all 80 or 90 cases. So what you have then, is a high degree of accountability to each other. You have justices appointed for many years over many different administrations and with many different points of view. And you have an environment in which, first and foremost, these judges are accountable to one another. So any judge tempted to avoid dealing fairly with the record or the law is faced with the sure and certain knowledge that he/she will be reminded of his/her failure in this respect by one or more of the other justices. Often this reminder will be in writing. So the results of their efforts are detailed in careful opinions that are subject to intense scrutiny, first by all the other justices who may be their toughest critics, and then by academics and interest groups and the public at large. Therefore, judges have a high level of accountability to the citizenry.⁶⁷ Contrast the US with what happens in the Indian Supreme Court. The Indian Supreme Court had 26 judges⁶⁸ and 61,839 cases for the year 2006 and 53,066 cases instituted for year 2007 (up to 30th September). Mostly judges sit in panels of two or three, sometimes they constitute themselves in a 5-bench panel (known as a *constitution bench*) and in rare circumstances they form a 9-bench Constitution Panel.⁶⁹ Rarely in its history has a full bench sat except for the occasional *en banc* case where all the judges sit.⁷⁰ So, only two or three judges look at almost all the cases. So then the question comes, how carefully do they look at these cases, given the fact that 26 judges are to deal with 61,839 matters. This means that each judge has to take responsibility of at least 2378 matters!⁷¹

Again, take the case of Federal Courts in the USA. On average, a Judge of the Federal Court writes between 200 and 250 opinions a year. Mostly they constitute themselves in panels of two or three, which means they look at 700 fully briefed cases a year. Not to mention several hundred other cases looked at for motions, jurisdictional dismissals etc.⁷² Compare this with the burden imposed on High Court Judges in India. A Judge in the Nagpur Bench of High Court⁷³ writes between 500 and 800 opinions a year. Nagpur High Court Judges mostly constitute themselves in a panel of one or two, decide 800 fully briefed cases in a year, and take up to 2000 cases for motions and jurisdictional dismissals. Whereas judges of the Delhi High Court write about 400 opinions in a year; mostly constitute themselves in panels of one or two; decide 600 fully briefed cases; take up to 1000 cases for motions, jurisdictional dismissals and take up to 1000 cases for oral arguments in one year.⁷⁴

So the sheer volume means that the individual cases in India cannot get the same amount of attention from the courts as any case gets from courts in the US. Add to this fact that the briefing doesn't even compare in quality or quantity with the kind of briefing you get at the courts in US.

Coming to the subordinate court level in India, the scenario becomes somewhat worse. Most of their cases are not published. The academics don't pay much attention, and the public at

⁶⁷ *Id.*

⁶⁸ Though this strength is expected to increase to 31.

⁶⁹ In the year 2006-2007, a five judge Constitution Bench sat for 44 days to hear 292 matters and a nine judge Constitution Bench held sittings for 5 days to hear 33 connected matters. See SC Annual Report 2006-2007.

⁷⁰ *Keshavanand Bharati* case 1973 (4) SCC 225.

⁷¹ Judges of Supreme Court of India have a relatively short shelf-life; they retire at the age of 65 and the average tenure of three years denies them the longevity of their American counterparts. They are moved to tears of envy when they hear about the "unconscionable" case load of American Supreme Court Justices. See Upendra Baxi, *A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence* 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 557 (October 2003).

⁷² See *Transcript Of Panel Discussions*, *supra* note 43.

⁷³ Justice R.C. Chavan, Judge High Court of Bombay, Nagpur Bench in response to a Questionnaire.

⁷⁴ Justice Madan B. Lokur, Judge High Court of Delhi in response to a questionnaire.

large pays even less. So only the parties really know what happens in an individual case. Appellate procedure is often really not an effective check on what's happening. So there is little accountability on the part of judges at the lower level.

For various reasons, the current situation is that adequate judge numbers and infrastructure facilities are not provided to courts in India to cope up with the inflow of litigation. This causes a great backlog of cases. The estimated backlog in subordinate courts as on 01/07/07 was 25 million cases. Similarly, 37.12 lakhs cases were pending in the various High Courts around the country as at 30/06/07. The pendency of cases in the Supreme Court has also slightly increased over the last few years and as at 30/09/07, 44,819 cases were pending for disposal.⁷⁵

Judicial Education offers a forum for discussion of such issues that are otherwise kept under the carpet. Not only does *Judicial Education* provide a forum for discussion and debate, but it is also an institute that develops broad guidelines, resolutions and best practices with the consensus of all to bring solutions that can remove these hiccups. Many issues are debated by judges and deliberated over a period of time, which result in solutions that are forwarded by the apex court to the Prime Minister in CJ-CM conferences.⁷⁶ The Government takes action on these solutions and provides support to implement the solutions devised by the judiciary itself to improve the administration of justice. Therefore *Judicial Education* can indirectly help in providing some solutions to the structural problems of the judiciary.

4.8 To Overcome the Dysfunctions of Bureaucratization

Bureaucratization acts as a screen that impairs the responsiveness of officials. However, with the judiciary, the impact of bureaucratization is felt in another domain altogether. Bureaucratization tends to corrode the individualistic processes that are the source of judicial legitimacy. By signing his/her name to a judgment or opinion, the judge assures the parties that he/she has thoroughly participated in the process and assumes individual responsibility for the decision. Yet, bureaucratization raises the specter that the judge's signature is but a sham and that the judge is exercising power without genuinely engaging in the dialogue from which his/her authority flows.⁷⁷ This may happen in number of matters that are decided by the registry of the High Court and the Supreme Court of India. Rather than having a judiciary deciding matters, many important matters have now as a matter of procedure been given to the administrative registrars to settle.⁷⁸

The proliferation of registries and the delegation of power to them weakens judges' individual sense of responsibility. The judge acts on the assumption that his/her work is the product of "many hands"⁷⁹ from the complicated network of relationships that exists among the individuals in his/her organization. The decision or opinion is not wholly his/her own.⁸⁰ The use of the Office of the Registrar or the Commissioner⁸¹ insulates the judge from the presentation of the facts and the law on that particular issue, thus accentuating the judge's incompleteness of perspective, and it relieves the judge of some of the obligations to explain and justify.⁸²

⁷⁵ Chief Justice of India, *SC Annual Report 2006-2007*, p. 8.

⁷⁶ *Resolutions of Chief Justices' Conference* (17-18 April 2008).

⁷⁷ Owen M. Fiss, *The Bureaucratization Of The Judiciary*, 92 YALE L.J. 1442 (July, 1983).

⁷⁸ The Courts of Registrars have been established in the Supreme Court of India under the new amendments in the Rules. At present 2 Registrars' Courts are working on 250 matters everyday. *Supreme Court Annual Report 2006-7*, p. 73 (para 15).

⁷⁹ Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 AM. POL. SCI. REV. 905 (1980).

⁸⁰ Owen M. Fiss, *supra* note 77.

⁸¹ Order 18 Rule 4 of the Code of Civil Procedure (2002).

⁸² *Morgan v. United States*, 298 U.S. 468, 481 (1936).

Judicial Education affords scope to correct such dysfunctions of bureaucratization and to devise institutional arrangements that might contain or at least alleviate the dangers to the judicial process presented by this inescapable development of delegation.

4.9 To Improve Court Operations in Rural Areas

A court in a rural area operates more in accordance with personality factors than its urban counterpart and is frequently composed of one or two judges, a clerk's office and a small support staff.⁸³ The personality of the judge, clerk or court reporter is far more likely to set the tone and pace of the court than it would in a larger operation. Due to the increased number of judges and staff in urban courts, individuals subordinate their personalities to that of the group. Finally, a smaller staff and large distances between courts often create feelings of isolation.⁸⁴ A large court setting provides colleagues with an opportunity to lunch together or hold impromptu conferences in the office. However, rural judges and clerks find it more difficult to interact informally with colleagues. In addition, a newly selected judge in a rural area has fewer role models to follow.

In the US, technology is used to deal with the isolation problem of rural courts. The telephone is used to enhance rural jury management by apprising jurors of changes in their schedule and for approving search warrants. Thus the problem of distance in those instances in which a law enforcement officer is not conveniently near a judge or magistrate is overcome⁸⁵. Videotaping and closed-circuit television also contribute to minimizing the effects of distance and isolation. Videotaped depositions overcome the problem of unavailable witnesses that results from the great distances in rural areas. The use of closed-circuit television makes it possible to conduct hearings or pretrial conferences with an attorney or judge physically separated from the other participants.⁸⁶

In India, judges posted in rural areas face more constraints. A lack of basic infrastructure, rampant power cuts, absence of sanitation and hygienic conditions in the courts, a lack of drinking water and a good chair for sitting in for the whole day are only some of the many problems which are well recognized. The incorporation of advanced technology into the courts occurs only in the largest cities, leaving courts in small towns in the dark ages. Even today, it is not unusual for lower court judges to buy supplies from their own salaries, to work on dilapidated manual typewriters, and to work under candlelight during the all too frequent power outages. Carbon paper is still in general use and there is little, if any, modern case management apparatus available outside the courts of major cities. Therefore judges posted in such areas consider their posting as punishment posting, which they get, if they have failed in their protocol duties, pleasing of higher authorities or buttering of the inflated egos of their administrative judge etc. There is yet another aspect to which no one pays attention. An absence of good schools, colleges and lucrative jobs in rural areas separates judicial families. The judges proceed to their place of posting without their family, thus creating tensions within families. Some get frustrated after certain periods and resign, some go for deputation to perform administrative works, some go to

⁸³ Pennington, *The Nonnets*, 4 JUDGES J. 74 (1974).

⁸⁴ Remarks of Ernest C. Friesen, Dean, California Western School of Law, at staff meeting on Rural Courts Project, National Center for State Courts (Jan. 1976). As a result of their isolation, court personnel lack a sense of participation in a broader system. This further enhances the feeling of isolation.

⁸⁵ See Beechen, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 U.C.L.A. L. REV. 691 (1973).

⁸⁶ See e.g., L. Berkson, S. Hays & J. Carbon, MANAGING THE STATE COURTS 296-305 (1977).

departments not concerned with judicial work and some who get to do neither of these, become frustrated and their frustration and anger begins to effect the poor litigants.

Therefore rural courts are in need of more *Judicial Education* than their counterparts in metropolitan areas. A different kind of *Judicial Education* programme has to be designed for these judges which can assist them to acquaint themselves with the use of technology for their own benefit in order to benefit justice.

4.10 To Develop Human Resources Involved in the System

Human resources constitute a critical element of any organization. The quality and quantity of human resources significantly influences the level of effectiveness as well as the efficiency of the organization. The critical importance of human resources is reflected in the often repeated adage that any organization (its structure and systems included) is only as good as the people who operate it. If the human resources of an organization thus form a very important part of an organization, it is undeniable that it must remain up-to-date with regard to; the changes in the hopes and aspirations of the people; the demands from the justice system; the contemporary needs of society; research in the field of law; new and revised methods of resolving disputes in society; the concept of equality in a society consisting of unequals; and the goals of the Constitution.

However, the statement of Chief Justice Warren Burger while addressing the American Bar Association *mutatis mutandis* applies to the present day Indian justice delivery system. He said, "*In the final third of the century, we are still trying to operate courts with fundamentally the same basic methods, the same procedures, and the same machinery, Roscoe Pound said, were not good enough in 1906.*"⁸⁷ What Lord Devlin said for British justice system has equal validity for our system. He said, "*If our business methods were as antiquated as our legal system, we would have become a bankrupt nation long back.*"

Therefore, the need for raising the competency of judicial officers for better performance of the judicial system was highlighted by several reports of the Law Commission of India beginning with the 14th Report - the Setalvad Commission report: "...

Not only has the volume and variety of the work increased but the pace at which a munsiff has to perform his duties has quickened. Unless a young officer is given the proper training, he is likely to acquire by reason of his inexperience, un-businesslike habits which he may find it difficult to shed later on and which may prevent him from becoming an efficient judge. A certain amount of training in the administrative work of a court is also essential to a fresh entrant into the service from the Bar, if he is not to be at the mercy of his office clerks."⁸⁸

The 54th Report of the Law Commission in 1973 further emphasized the subject and recommended the immediate setting up of a national academy for judicial training. It said: "*Even at the cost of repetition, we wish to emphasize that the success of any system, and particularly the judicial system depends on the men who work the system...Successful completion of the training should be a condition precedent to confirmation of appointment in the judiciary*". The

⁸⁷ Address of Chief Justice Warren Burger to the American Bar Association (1970).

⁸⁸ p.178.

117th Report⁸⁹ of the Law Commission devoted entirely to the subject of training of judicial officers observed that “*updating of the knowledge and skills can hardly be left to the voluntary effort of individual judges*”⁹⁰ *E*[*T*]raining is all the more required for a judicial officer because the sociology of law is acquiring new and added significance in the development of the society”.⁹⁰ The First National Judicial Pay Commission in 1999 prescribes a one year compulsory induction programme for newly appointed judges to improve the human resource component of the judicial system.

The need for *Judicial Education* is even recognized by the courts in many cases. For instance in, *Patel Narshi Thakershi and Ors. v. Shri Pradyumansinghji Arjunsinghji*,⁹¹ the Supreme Court recognized that the case illustrates the consequence of entrusting judicial work to those who had no judicial training. A simple question whether the family of the respondent was divided or undivided was kept pending for about 20 years in this case. The Patna High Court in *Abdul Rahim v. Tata Engineering and Locomotive Co. Ltd.*⁹² clarified that the Labour Court has to be presided over by an independent person having sufficient amount of judicial training and experience so as to act impartially as is required of a person holding a court in the strict sense of the term. In *All India Judges' Association v. Union of India and others*,⁹³ the Supreme Court took judicial notice of the prevailing factual situation regarding judicial training at that time. The court noted that “*there is not yet any definite system of judicial training in most of the States and Union Territories. A judicial officer with his first posting or until he acquires adequate experience requires guidance. It should ultimately be the obligation of the district judge to provide the same.*” The Court directed the Government of India to set up a service institute within one year at the Central and State or Union Territory level. In *L. Narasegowda v. Hutchappa*⁹⁴, the Karnataka High Court noted that judicial work has also become specialized and requires special knowledge, training and a unique judicial approach. The Supreme Court in *P.K. Dave v. Peoples Union of Civil Liberties (Delhi) and others*,⁹⁵ and the Bombay High Court *S.T. Bhingardive v. Punamchand Kashyalal Agarwal and others*,⁹⁶ held that judicial training is necessary to train judges to avoid harsh words, intemperate language and a lack of self-restraint. In *Siddhartha Kumar and others v. Upper Civil Judge, Senior Division, Ghazipur and others*,⁹⁷ the Allahabad High Court held that,

“to equip the Judicial Officers to properly discharge their responsibilities and to enable them to meet the challenging situations, it is essential that there should be intermittent training courses for the Judicial Officers in phases. There is a well established Judicial Training and Research Institute in the State. Fortunately, it is walking with long steps. The training facilities available at the Institute must be fully exploited to the full advantage of Judicial Officers. The Director of the Institute should devote his energies more on the practical aspects of the problems which arise in day-to-day working in the battling courts rather than the academic aspects of law. The training schedule should include courses to find out the ways and means to meet and encounter the court room problems-a reality to which now no one can afford to shut his

⁸⁹ November 1986.

⁹⁰ p.2

⁹¹ AIR 1970 SC 1273.

⁹² (1995) III LLJ 248 Pat

⁹³ (1992) 1 SCC 119.

⁹⁴ ILR 1994 KAR 3543.

⁹⁵ 1996 (4) SCALE 652.

⁹⁶ 1998 (3) BomCR 690.

⁹⁷ 1998 (1) AWC 593.

eyes. In the training syllabi-a new horizon about the emphasis on eliminating the delays and prompt disposal of cases should also be projected."

The court further made the case for the training of the court staff in following words, *"The staff is an integral part of the courts. Unless they are well equipped and trained in the work which is assigned to them. Presiding Officers would not be able to work effectively and efficiently. The ministerial wing of the High Court also has a major role to play in the governance of the subordinate courts. It is, therefore, considered necessary that the staff of the subordinate courts as well as High Court, particularly gazetted ministerial staff (those who are rankers) should also be imparted training, at intervals."*

In *Mata Prasad Mishra v. State of U.P. and others*,⁹⁸ the Allahabad High Court directed the Executive Government of the State of Uttar Pradesh to use the judicial training facilities available in the State to train its officers who conduct enquiries, as it was found they lack legal knowledge regarding the relevant rules and the manner in which an enquiry is conducted. Due to this failing, the delinquents who commit an act of gross misconduct resulting in a loss of public exchequer are exonerated from the charges either by the departmental disciplinary authority or appellate authority itself and the writ petition the delinquent filed is allowed. In *Net Singh v. Labour Secretary, U.P. Shasan and Ors. and Ramesh Kumar Singh v. State of U.P. and Ors.*,⁹⁹ the Allahabad High Court took note of the fact that judicial officers in the state of U.P, though well trained for judicial work, have no knowledge of court management. It asked the Judicial Training Institute of the State to introduce court management as a compulsory part of judicial officer training. The court further directed that *"No one may be appointed, or promoted unless he has gone through training in court management. Mere training is not sufficient. It is to be constantly practiced."*

4.11 To Enhance the Capacities of Judges

There are accusations and denials that the courts take too long to issue decisions; that opinions are turgid and murky; that judges write too many concurrences and dissents, leaving no clear idea of what the law is; and that judges are delegating too much responsibility to callow clerks.¹⁰⁰ Thus, the need for imparting training to the members of the judiciary at every level with a view to improving performance and efficiency cannot be over-emphasized.

Judicial Education in India is helping judges to increase their efficiency and work performance. For instance, from 2006 to 2008 at the NJA, a total of 14 regional conferences and 20 national conferences were held to raise awareness of the problem of delay in courts and to develop techniques and tools for timely and responsive justice. Enough solutions emerged in these conferences to help judicial officers in tackling the problems of delay. Some best practices emerged and these have been distributed to all. A great amount of introspection (behind closed doors) was carried out to improve the system.

⁹⁸ 1999 (4) AWC3600.

⁹⁹ (2001) 1 UPLBEC 757.

¹⁰⁰ See Barone, *Our Overworked Justices Should Fire Some Law Clerks*, WASHINGTON POST, (Nov. 24, 1982), at A17, col. 1.

Another target for improving efficiency is establishing techniques for communication among judges in areas of the law in which the court does not speak with one voice, or where fuller explanation is needed. *Judicial Education* offers a platform for judges to establish communication with each other and for judges to learn about each others views. The purpose of sharing views on such topics would not be to establish a fixed agenda for action and definitely not to decide abstract issues. Rather, its purpose would be to make judges more sensitive to their colleagues' interests and views, and to perhaps establish a general aura of agreement on their responsibility as a court to identify and to elucidate particular subjects. High Court conferences held every month in the judicial year 2007-2008 at the NJA were originally designed for such purposes.

4.12 To Make Judges Understand the Differences between Law and Justice

According to Gobind Das, "*If one subjected to the legal process is satisfied, the same order must be just. Justice may probably be said to consist of the x-ness in the system that satisfies those that are subject to the process.*"¹⁰¹ The former Chief Justice of India J.S. Verma and the Director of NJA, Prof. Mohan Gopal have revised this x-ness taken from the thesis of Gobind Das and devised a new equation: $L+X = J$. In this L stands for law, J stands for justice and X is the power of interpretation vested with the judge. Therefore law itself may not give justice. Only when a judge interprets law in a reasonable, rational manner that justice may be restored. The X factor that provides for Justice necessarily involves the use of compassion for humanity in applying the laws that may exist. A compassionate understanding is a component of fairness. The lone dissenter in *Plessy v. Ferguson*¹⁰² was Justice John Harlan. Because of his compassion for those subjected to racial segregation, he was able to see, and to give, a truer understanding of reality whilst adjudicating. The *Plessy* case illustrates that compassion [that is, the ability to understand the suffering of others, or the ability to listen to the litigant's description of their plight] can help a judge see a more complete picture of the case at hand, including the applicable law and its purpose.¹⁰³

X, the power of a judge to interpret a statute can be used to bridge the gap between law and life's changing reality. As an example, in 1986, the United States Supreme Court held that a statute criminalizing consensual homosexual relations between adults was constitutional.¹⁰⁴ Eighteen years thereafter, the United States Supreme Court overturned its prior holding and stated that the Constitution bars legislation criminalizing consensual sexual relations between adults.¹⁰⁵ The difference between these two decisions is not due to change in the Constitution but due to the change that occurred in American society regarding homosexuality.¹⁰⁶ Similarly, the Indian Supreme Court in 1950, in the *A.K. Gopalan* case had refused to incorporate the *due process* doctrine, twenty six years later in *Maneka Gandhi's* case in 1976, it treated it as part of the basic structure of the Constitution. Similar changes in attitudes have taken place in Israel too.¹⁰⁷

This implies that X plays a major role in order for justice to be rendered. One of the roles of *Judicial Education* is to stress on the content of variable X and develop different values that

¹⁰¹ Gobind Das, *supra* note 38, p. 96-97.

¹⁰² 163 U.S. 537 (1896).

¹⁰³ Justice Joyce Kennard, *Why Justice Is More Than Law*, 83 WOMEN LAW JOURNAL 10 (1997).

¹⁰⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁰⁵ *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

¹⁰⁶ Robert Post, *Foreword: Fashioning The Legal Constitution: Culture, Courts, And Law*, 117 HARVARD LAW REVIEW 4 (2003).

¹⁰⁷ See cases cited at <http://www.court.gov.il>.

can enrich variable X. In the academic year 2007-2008, the NJA developed Freedom, Equality, Dignity, Equity and Fairness (FEDEF)¹⁰⁸ as appropriate values to be given to variable X in suitable cases.

4.13 To Help Judges in their Managerial Duties

Today, many managerial responsibilities are put on judges.¹⁰⁹ District judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion.¹¹⁰ Judges have described their new tasks as 'case management', 'court management', 'docket management', 'time management'.¹¹¹ With these managerial responsibilities, judges have to learn more about cases much earlier than they did in the past.¹¹² They negotiate with parties about the course, timing, and scope of both pre-trial and post-trial litigation. These managerial responsibilities give judges greater power. Yet, the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.¹¹³

This new managerial role has been approved by the legislatures in various amendments to the civil procedure and criminal procedure codes. Judges too, are not complaining and have shown interest in learning new management principles for reducing their burden. Trial judges have accepted the new assignment to become mediators, negotiators, and planners. Partly because of their new oversight role and partly because of increasing case loads, many judges have become concerned with the volume of their work. To reduce the pressure, judges have turned to efficiency experts who promise 'calendar control.' Under the experts' guidance, judges have begun to experiment with schemes for speeding up the resolution of cases and for persuading litigants to settle rather than try cases whenever possible¹¹⁴. During the past decade, enthusiasm for the "managerial movement" has become widespread; what began as an experiment is likely soon to become obligatory.¹¹⁵

Judicial Education has to prepare judges for their new managerial role. The NJA in India, National Center, the American Bar Association in US,¹¹⁶ JSB in UK and all other *Judicial Education* providers in other nations who have studied the issue of cost and delay have encouraged judges to become more actively involved in case management. This has been based on a belief that the courts have the responsibility to preserve fairness to the parties in the litigation process and

¹⁰⁸ all enshrined in the Constitution Of India. See generally, Barbara Kennedy, JUST LAW, 2004.

¹⁰⁹ Management of Cases (Conference) Rules 2007, GN No. 197 of 2007, Government Gazette of Mauritius No. 111 of 24 November 2007 available at [http://supremecourt.intnet.mu/entry/cjei/doc/No.%20197MANAGEMENT%20OF%20CASES%20\(CONFERENCE\)%20RULES%202007.doc](http://supremecourt.intnet.mu/entry/cjei/doc/No.%20197MANAGEMENT%20OF%20CASES%20(CONFERENCE)%20RULES%202007.doc).

¹¹⁰ See Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770 (1981); Rubin, The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts, 4 JUST. SYSS. J. 135 (1978); Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978).

¹¹¹ Constantino, *Judges as Case Managers*, TRIAL 56, 57-60 (Mar. 1981).

¹¹² There is a present trend of the judges occupying highest posts in various countries to encourage via speeches management in courts. For instance, in India on 29 March 2008, at a Conference organized by the Delhi High Court, Lord Chief Justice of England and Wales, Lord Phillips in his speech available at http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf pointed out how in his 46 years career – ADR has helped the courts to manage litigation in a number of ways.

¹¹³ Judith Resnik, *Managerial Judges*, 96 HARVARD LAW REVIEW 374 (December, 1982).

¹¹⁴ See e.g., M. Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964); Aldisert, *A Metropolitan Court Conquers Its Backlog*, 51 JUDICATURE 247 (1968); Fisher, *Judicial Mediation: How It Works Through Pre-Trial Conference* (pt. 2); *From Pure Pre-Trial to Compulsory Settlement Conferences*, 10 U. CHI. L. REVV. 453 (1943); Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 420 (1953).

¹¹⁵ *Salem Bar Association, Tamil Nadu v. Union of India* AIR 2005 SC 3353

¹¹⁶ *Transcript Of Panel Discussions*, supra note 43.

that court management is integral to fairness and the elimination of cost and delay. Judges are therefore given training in various management principles that will allow the courts to respond responsibly, appropriately and efficiently.

For instance, the NJA took the initiative in 2007-2008 to develop concrete proposals for strengthening judicial systems management. In a National Conference of High Court Justices on Strengthening Judicial Systems Management, the NJA came up with a number of suggestions. An informal group of High Court Justices was formed after the Conference to guide the NJA's work in this regard. This informal group met several times under the guidance of Justice S.B. Sinha of the Supreme Court. Several specific suggestions were considered. The NJA also held discussions with national level management and IT experts. These discussions resulted in a framework for strengthening the judicial system in the country by establishing a set of performance standards and targets for courts. It also called for the establishment of a planning and management system for the judiciary, which was endorsed by the Chief Justice of India in his speech on February 24, 2008. Based on the speech of the CJI and these discussions, the NJA developed a proposed "Planning and Management System for Timely Justice" (PMTJ). The PMTJ has two main elements. Firstly, a system of "court-level plans for timely justice" (CPTJ) under which a five year plan will be developed for every court in the country. These five year plans will identify for every court a detailed road map on how the performance standards and targets established by the CJI will be achieved by that court. The plans will identify the resources needed for that court to achieve these targets. The plans, once approved by High Courts will be monitored.

Secondly, an "Information Management System for the Administration of Justice" (IMSAJ) will be established. Eventually, IMSAJ will be an enabled network that will connect all elements of the justice administration system: police, prosecution, courts and jails. The IMSAJ will minimize inefficiency, injustice and corruption arising from the current administration based on multiple and mostly manual, information systems. In the first phase, IMSAJ will develop a central data repository into which court data may be uploaded from courts across the country through the internet. The data depository will be a stand alone "special purpose vehicle" under the control of the judiciary and located in the Supreme Court. It will provide a repository for court data from across the country in a professional and systematic manner. The IMSAJ will also provide support functions such as scheduling and timetables for every case entered into the system. The IMSAJ will aim to eliminate manual/ledger based systems from courts and replace them with digital systems. In the second phase, IMSAJ will provide for uploading all documents relating to every case into the system. In the third phase the IMSAJ will envisage networking with the non-judicial systems involved in the administration of justice.

Through the *Planned Approach to Delay and Arrears Reduction: Court-Based Planning for Timely Justice (CPTJ)*, the goal of timely justice will be achieved through the incorporation of *three sets of common minimum national standards; and a planning and management system*. The three sets of common minimum national standards are for (i) court performance; (ii) human resource management; and (iii) judicial infrastructure. The planning system will provide a framework for implementing these standards as well as addressing other needs of the judiciary in a systematic manner.

4.14 To Reduce the Influence of Various Ideologies

Judge Posner, writing most recently in the Harvard Law Review, observed,

*"It is no longer open to debate that ideology (intermediary between a host of personal factors, such as upbringing, temperament, experience, and emotion—even including petty resentments toward one's colleagues—and the casting of a vote in a legally indeterminate case, the ideology being the product of the personal factors) plays a significant role in the decisions even of lower court judges when the law is uncertain and emotions aroused. It must play an even larger role in the Supreme Court, where the issues are more uncertain and more emotional and the judging less constrained."*¹¹⁷

Few judges can entirely escape from these pressures themselves or lose habits and modes of thinking acquired from their background and environment. To think of judges differently will be tantamount to looking at them through rosy spectacles. Conflicting views between judges do not materialize from thin air. In addition to different historical and cultural perspectives which play a role, judges also have divergent opinions concerning social values. This has nothing to do with prejudice or bias. This is a mixture of moral, legal, philosophical, and political convictions, and it includes an individual's understanding of the world that we live in. The judge's religious views and wider beliefs about family and society may also influence his opinions and lead him to give new meanings to concepts which do not accommodate these views. The Jewish origins of a number of leading American justices have thus been frequently analyzed in an attempt to judge their work and understand their professional behaviour.¹¹⁸

Judicial Education can be used to inculcate similar thoughts in judges belonging to different groups. Judges can be made aware of their personal conceptions. Such presentations have a tremendous impact on the thinking process and it can help to make them conscious in the future about displaying their likes and dislikes.

4.15 To Help Judges to Identify Their Biases in Order to Overcome Them

Slowly there is recognition by the judiciary itself that the phenomenon of bias does exist.¹¹⁹ Many eminent jurists, legal thinkers, writers, political and social scientists in India have pointed out that the Court's decisions are increasingly characterized by an urban and elitist bias against the poor and the countryside. In a range of cases involving conflicts between protection of the environment and workers' rights/tribal rights/housing rights, the Court has chosen the former, without bothering much to balance the two objectives.¹²⁰

¹¹⁷ Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 48-49 (2005).

¹¹⁸ Sir Basil Markesinis, *Judicial Mentality: Mental Disposition Or Outlook As A Factor Impeding Recourse To Foreign Law*, 80 TULANE LAW REVIEW 1325 (March, 2006).

¹¹⁹ In *G.X. Francis vs. Banke Bihari Singh*, A.I.R. 1958 SC 209 the Supreme Court was deciding a transfer petition filed under section 527 of the Cr.P.C. 1898 for the transfer of a criminal case from Jashpuranagar, in the State of Madhya Pradesh, to some other State, preferably New Delhi or Orissa. The complainant in the case was a member of the royal family of Jashpur, who used to reside at Jashpurnagar. All the seven accused, except one, were Roman Catholics and the other one was a Jacobite Christian. One of the grounds for asking for the transfer of the case was that there was bitterness among the communities of the accused and the complainants i.e. Christians and Hindus, in the area of Jashpurnagar. In view of the unanimity of testimony from both sides about the nature of the charged tension in Jashpurnagar, the Supreme Court ordered the transfer of the case from Jashpuranagar to the State of Orissa, for fair trial. In *Davis vs. Alaska* (1974) 415 US 308 it was held that restrictions on cross-examination were unconstitutional even if they did not cause prejudice. In the same case, the Supreme Court referred to the importance of confrontation and cross-examination for the purpose of knowing the bias of crucial identification witnesses.

¹²⁰ See e.g., *M.C. Mehta v. Union of India* (1997) 11 SCC 227; *F.B. Taraporawala v. Bayer India Ltd.* (1996) 6 SCC 58; *M.C. Mehta v. Union of India* 1996 (1) SCALE SP-22; *Pradeep Krishen v. Union of India* (1996) 8 SCC 599; *Animal Environmental Legal Defence Fund v. Union of India* (1997) 3 SCC 549.

When the Court orders polluting industries to be closed, the workers and their families who are directly affected are rarely heard before orders are issued. The Court's remarks often display much attention to the environmental issues that are of importance to urban dwellers, such as pollution, while showing relatively little attention to rural livelihoods, which are often intricately tied to the land and forests.

The Supreme Court of India in *Narmada Bachao Andolan v. Union of India*¹²¹ opined that:

"(i) displacement of the tribals and other persons would not per se result in violation of their fundamental or other rights; (ii) on their rehabilitation at new locations they would be better off than what they were; (iii) at the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets; and (iv) the gradual assimilation in the mainstream of the society would lead to betterment and progress."

Implicit in this is the notion that rural and tribal livelihoods are inferior and bound to be displaced through urbanization and modernization.

Further courts show less sensitivity towards apprehensions of vulnerable parties who are fighting their battles against influential persons.¹²² For instance, in *Jitendra Singh v. Bhanu Kumari and Ors.*¹²³ the petitioner Bhanu Kumari in her transfer petition filed before the Rajasthan High Court stated that the respondent Jitendra Pratap Singh is an influential person and MLA of Alwar City and he has created such a situation that there is a strong likelihood of the matter pending before the District Judge being decided ex-parte against her and other members. The High Court allowed the transfer but disagreed with her apprehension, terming it as "*baseless. The Courts are not influenced by politicians and influential persons. The petitioner should repose full confidence upon the court of justice. If an ex-parte order was passed by the District Judge and the petitioner was aggrieved by it, she ought to have assailed it legally. Passing of an ex-parte order by the Presiding Officer of the court cannot be a reasonable ground for transferring the case.*" The transfer was allowed due to the fact that on January 8, 2006 the respondent Jitendra Singh had lodged a complaint with the Police Station in Kotwali Alwar against the petitioner and considering the overall view of the nature of the case and convenience of the parties and in the interest of justice, the Court deemed it reasonable to directly transfer the suit from the court of Additional District Judge Alwar to the Court of District Judge, Jaipur City. The Supreme Court however nullified this transfer saying a reasonable opportunity to a hearing was not given to Jitendra Singh.

The latest report of PUCL and Amnesty International India on the death penalty, as well as many other writers have shown that the social philosophy of the individual judges often determines the outcomes of cases in India (as elsewhere), where the Court does not sit en banc as in the USA, but rather constitutes itself in two and three judge benches. Nor are these benches constant as judges retire very often, often as the cases drag on for years. This may mean that a

¹²¹ (2000) 10 SCC 664.

¹²² If a litigant alleges that the order of the court is not free from malice, he may have to face contempt proceedings as happened in *Ram Narain Shukla and Anr. v. J.O. Gyanpur and Anr.* 1965 Cri LJ 268. However, the Division Bench of the Allahabad High Court held that the statement by "Hon'ble Justice S. K. Verma is prejudiced against the applicant" cannot be regarded in any way as amounting to contempt of Court. Whenever a litigant states that he apprehends that a particular Judge is prejudiced against him the Court has only to consider whether his apprehension is justified or not. If it comes to the conclusion that it is, the Judge will release the case; on the other hand if he thinks that the apprehensions are baseless, he will take no notice of the allegation of prejudice against him. But no question of contempt arises when a litigant expresses his apprehension that he will not get justice from a particular Judge on the ground that he is prejudiced against him. A litigant has a right to state his apprehensions provided they are expressed in proper language. Therefore though it is manifest that the allegation of prejudice is without any basis, we do not think it constitutes contempt.

¹²³ 2008 (6) SCALE 594.

single case may see several judges deciding different aspects. As a result, the individual ideology of judges becomes extraordinarily important.¹²⁴

The reasons why the judge predetermines the outcome of a case, bases a decision on the way a party looks, or looks beyond the facts presented by the parties, are all encompassed in a single explanation: the judge has stopped evaluating information while making a decision. Accordingly, the common solution to all variations of judicial bias is to provide judges with methods that permit them to consider a greater number of alternatives when doing their jobs.¹²⁵ Empirical work suggests that judges can improve their judgments if they are conscious of cognitive biases.¹²⁶ Judges can only avoid biases that are known to them.¹²⁷ Even when they desire to render a "fair" decision, subconscious influences can cloud their decisions and impede their legal reasoning.¹²⁸ Consequently, in many circumstances, for judges to be fair, they must be capable of identifying subconscious influences on their behavior and they must neutralize the effects of such impulses. If the judge feels as though the present dispute is not the type of case that motivated him to become a judge, this negative disposition may cause automatic thoughts and other unintended reactions.¹²⁹

Despite numerous and inconsistent definitions of bias, court systems have agreed that education is the best approach to eliminate bias.¹³⁰ Accordingly, *Judicial Education* programs are being developed to present judges with lists of specific outcomes in cases as indicators of the presence of bias.¹³¹ These programmes are designed to challenge the perspective that judges are infallible and to make judges aware of their belief systems. Sessions are designed to focus on sensitivity training, limited group brainstorming, as well as to provide the legal definitions of different types of judicial bias. In one seminar at the National Judicial College in the US, psychologist Andrew Watson explained the realist approach in context as he imparted to judges the importance of mastering a behavioral approach in the discharge of their duties.¹³²

4.16 To Remove Gender Bias from the Judicial System

Judicial gender bias is experienced at three different levels: (i) during the selection of judges; (ii) during decision making on issues relating to women; (iii) and professional harassment of women who reach courts either to work there as lawyers, clerks, judges or as parties involved in litigation.

¹²⁴ Balakrishnan Rajagopal, *supra* note 31.

¹²⁵ Evan R. Seamone, *Understanding The Person Beneath The Robe: Practical Methods For Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE LAW REVIEW 1 (2006).

¹²⁶ Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (analyzing data showing the United States Magistrate Judges display cognitive biases and collecting studies showing biases in auditors, psychologists, physicians, option traders, soldiers and real estate agents).

¹²⁷ See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 119, 130 (1994) (explaining that awareness of unwanted mental processes is necessary before one can eliminate them).

¹²⁸ See Jerome Frank, *Justice And Emotions*, in HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS 53, 55 (George H. Williams & Kathleen M. Sampson eds., 1984) (describing behavioral impulses that impede a judge's decision-making, including "unconscious sympathies for or antipathies to some of the witnesses, lawyers or parties in a case before him").

¹²⁹ Such reactions are very common. For instance, many judges complain in various seminars about frivolous litigation. Research is required to evaluate what makes judge complain about this.

¹³⁰ JUDICIAL COUNCIL OF CALIFORNIA ADVISORY COMMITTEE ON GENDER BIAS IN THE CALIFORNIA COURTS, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS* 403 (July 1996) (final report).

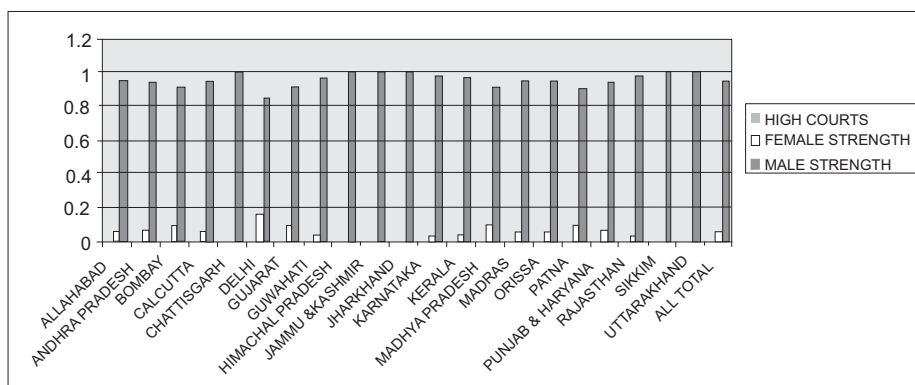
¹³¹ At one programme on "appreciation of evidence" delivered in the month of October 2006, one such exercise was taken up. One laptop was placed by the Director of NJA on the centre table and while the session was going on, one of the people who does not usually attend to duties for the judges – was told to take the laptop away. After about half an hour – the Director raised an alarm of theft of the laptop. All participant judges to the programme were then asked to jot down on paper a description of persons whom they saw taking the laptop away from the conference hall. The NJA used this evidence to base their search for the miscreant and lodging of an FIR. Everyone submitted a different description of the person. After one hour the same person came back with the laptop and the judges were made to realize how much they can rely on evidence of an eye witness. Such exercises are very useful for clearing cognitive biases.

¹³² Evan R. Seamone, *supra* note 125.

4.16.1 Selection of Women for Judging Work

In the complex imbroglio of society in India, the burden of translating justice will be heavy, if not crushing, for the shoulder of any single agency. The proper process may require the burden to be shared amongst many to create a pluralist system of administration of justice, through various countervailing institutions in society with the judiciary as the fulcrum.¹³³ Involving women in the administration of justice will give plural character to the judiciary. Whether we take the case of India or its neighbours - Pakistan, Nepal, Bangladesh, Sri Lanka and Afghanistan, or if we take examples from the West - confidence is not reposed in women and seldom do they rise to the highest position in the judiciary. For instance, while women judges do serve in Afghanistan's lower courts¹³⁴ and head both the Family and Juvenile Courts,¹³⁵ female judges are infrequently found outside of Kabul¹³⁶ and are largely "confined to lower levels." Not a single woman has secured a position at the judiciary's highest level, the Scholar Council of the Supreme Court. A 2003 Amnesty International report revealed that the biases of many male judges pose a primary obstacle to increasing female representation on the bench.¹³⁷

From the year of establishment of the Supreme Court of India in 1950, only 3 women have made it to the Supreme Court; implying in last 58 years that only 3 women could qualify for the top job! There are 21 High Courts in the country and on 8th March 2008, 6 High Courts had no women on the Bench (Jammu & Kashmir, Himachal Pradesh, Uttarakhand, Sikkim, Jharkhand and Chattisgarh). Even in other High Courts the picture is dismal. No High Court bench in India is composed of more than 15% women. The table below demonstrates these appalling facts.



¹³³ Gobind Das, *supra* note 38, p.49.

¹³⁴ http://www.unifem.org/gender_issues/voices_from_the_field/story.php (as of Nov. 1, 2006).

¹³⁵ While the 1976 Afghan Code of Civil Procedure sets forth that every district in Afghanistan shall have a specific family court, only one family court in Kabul has been established.

¹³⁶ Women Failed by Progress in Afghanistan (2004), <http://web.amnesty.org/library/pdf/ASA110152004ENGLISH>. [as of 12/12/2006].

¹³⁷ Nusrat Choudhury, *Constrained Spaces For Islamic Feminism: Women's Rights And The 2004 Constitution Of Afghanistan*, 19 YALE JOURNAL OF LAW AND FEMINISM 155 (2007).

HIGH COURT	TOTAL STRENGTH	FEMALE JUDGES	% OF FEMALE JUDGES	% OF MALE JUSTICES
ALLAHABAD	69	4	5%	95%
ANDHRA PRADESH	27	2	7%	93%
BOMBAY	50	5	9%	91%
CALCUTTA	41	2	5%	95%
CHATTISGARH	7	0	0%	100%
DELHI	32	6	16%	84%
GUJARAT	30	3	9%	91%
GUWAHATI	22	1	4%	96%
HIMACHAL PRADESH	9	0	0%	100%
JAMMU & KASHMIR	10	0	0%	100%
JHARKHAND	9	0	0%	100%
KARNATAKA	36	1	3%	97%
KERALA	25	1	4%	96%
MADHYA PRADESH	42	4	9%	91%
MADRAS	45	3	6%	94%
ORISSA	19	1	5%	95%
PATNA	27	3	10%	90%
PUNJAB & HARYANA	43	3	7%	93%
RAJASTHAN	34	1	3%	97%
SIKKIM	2	0	0%	100%
UTTARAKHAND	8	0	0%	100%
ALL TOTAL	587	40	6%	94%

Therefore, women continue to face discrimination. For example, in 1953, when Supreme Court Justice Sandra Day O'Connor graduated third in her Stanford Law School class [Chief Justice Rehnquist was first], having been a member of the Stanford Law Review and having been elected Order of the Coif, her only job offer was the position of legal secretary in a law firm.¹³⁸ Apart from this, if we take a look at the table below¹³⁹ about UK statistics of women judges, another interesting fact emerges. The more powerful and higher in the hierarchy is the post, the chance of women assuming that post shrinks. Till now, gender justice in appointments has been proved by giving women low key affairs post. Therefore as we come down in the hierarchy, up goes the number of women for that post.

¹³⁸ Bodine, *Sandra Day O'Connor*, 69 A.B.A. J. 1394, 1396 (1983). Ironically, one of the partners at the firm who offered Justice O'Connor the legal secretary position was former U.S. Attorney General William French Smith.

¹³⁹ <http://www.judiciary.gov.uk/keyfacts/statistics/women.htm> [as of 20 June 2008]

Post		Former Barristers	Former Solicitors	Total
Lord of Appeal in Ordinary	Women	1	0	1
	Men	11	0	11
	Total	12	0	12
	% Women	8.33	0	8.33
Heads of Division	Women	0	0	0
	Men	5	0	5
	Total	5	0	5
	% Women	0	0	0
Lord Justice of Appeal	Women	3	0	3
	Men	33	1	34
	Total	36	1	37
	% Women	8.33	0	8.11
High Court Judge	Women	11	0	11
	Men	98	1	99
	Total	109	1	110
	% Women	10.09	0	10.00
Circuit Judge	Women	72	15	87
	Men	492	74	566
	Total	564	89	653
	% Women	12.77	16.85	13.32
Recorder	Women	168	26	194
	Men	1028	83	1111
	Total	1196	109	1305
	% Women	14.05	23.85	14.87
Judge Advocates	Women	0	0	0
	Men	9	0	9
	Total	9	0	9
	% Women	0	0	0
Deputy Judge Advocates	Women	1	0	1
	Men	10	1	11
	Total	11	1	12
	% Women	9.09	0	8.33
District Judge	Women	13	85	98
	Men	25	315	340
	Total	38	400	438
	% Women	34.21	21.25	22.37
Deputy District Judge	Women	177	34	211
	Men	494	68	562
	Total	671	102	773
	% Women	26.38	33.33	27.3
District Judge (Magistrates' Courts)	Women	13	18	31
	Men	34	71	105
	Total	47	89	136
	% Women	27.66	20.22	22.79
Deputy District Judge (Magistrates' Crt)	Women	18	22	40
	Men	53	74	127
	Total	71	96	167
	% Women	25.35	22.92	23.95
Masters, Registrars, Costs Judges and DJ (PRFD)	Women	6	5	11
	Men	23	14	37
	Total	29	19	48
	% Women	20.69	26.32	22.92
Deputy Masters, Registrars, Deputy Costs Judges and DJ (PRFD)	Women	27	12	39
	Men	28	48	76
	Total	55	60	115
	% Women	49.09	20	33.91

4.16.2 Decision Making on Issues Related to Women

The kind of decisions that will be churned out by a gender insensitive judiciary can be garnered from the Afghani experience. Mawlawi Fazl Hadi Shinwari, Afghanistan's first Chief Justice under the current internationally-backed regime of Hamid Karzai, started the country's Supreme Court off on a noticeably reactionary and politicized path. Only ten days after the close of the Constitutional Loya Jirga, the new Supreme Court made a troubling and controversial decision when it declared "the first broadcast of a female vocalist on Afghan State television in twelve years as "un-Islamic."¹⁴⁰ The Supreme Court denounced the performance despite the fact that pop star Salma covered her hair with a headscarf while singing.¹⁴¹ While Article 121 of the Constitution of Afghanistan permits the Supreme Court to engage in the review and interpretation of laws, legislative decrees, and international treaties "[a]t the request of the Government or Courts,"¹⁴² the Court made this decision without any case before it and based on no existing law or referral of the issue by the Government. The Supreme Court's Deputy Chief Justice Fazl Ahmad Manawi offered an explanation for the decision that alludes to the Court's bias: "We are opposed to women singing and dancing as a whole [A]nd it has to be stopped."¹⁴³

Women in US courts too have had bad experiences with judges who used to trivialize violence against them. The Colorado Judiciary came under siege after a local Judge gave a minimal sentence to be served on weekends to a man who killed his wife when she tried to flee their abusive marriage.¹⁴⁴ The defendant tracked his wife and shot her five times in the face. The Judge said she provoked her husband by not telling him she was leaving.¹⁴⁵ In 1993, a New Hampshire Judge sentenced a man to twenty-eight days to be served on the weekends for assaulting his wife from whom he had been estranged for a year. The defendant stalked his wife on a camping trip and found her in a tent with another man. Another 1993 case involved an Ohio man who entered his estranged wife's home, beat her with a crowbar, then knocked out some of her daughter's teeth when she tried to call 911.¹⁴⁶ The defendant had a record for murder, rape, and armed robbery. The Judge imposed the state-required sentence of three to fifteen years, then released the defendant after he served seven months. The Judge said, "The guy walked into his house with his wife in his bed with another guy. It's enough to blow any guy's cool if he's any kind of man."¹⁴⁷ Baltimore County Circuit Judge, Thomas J. Bollinger, was disciplined in 1993 for his remarks in a rape case in which he sentenced to probation a forty-four-year old man who raped his eighteen-year-old employee while she was unconscious from drinking.¹⁴⁸ Part of the discipline the Judge received included attendance at a program to sensitize him to rape cases. He refused to attend and has suffered no consequence as a result.¹⁴⁹

For India, the *Mathura* case is cited as classic instance of a gender insensitive court. The *Mathura* case created a major nationwide campaign on the issue of custodial rape, following the open letter written in September 1979 by four legal academics – Upendra Baxi, Lotika Sarkar, Vasudha Dhagamwar and Raghunath Kelkar to the Chief Justice of India. The open letter questioned

¹⁴⁰ J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan*, available at http://iisdb.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf. [as of 3rd December 2006].

¹⁴¹ Afghan TV U-Turn on Women Singers, BBC News, (Jan. 16, 2004), <http://news.bbc.co.uk>. [as of 3rd December 2006].

¹⁴² Const. Of The Islamic Republic Of Afg. (2004), Art. 121.

¹⁴³ *Woman Singer Angers Afghan Judges*, BBC News, (Jan. 14, 2004), <http://news.bbc.co.uk>. [as of 24th August 2008].

¹⁴⁴ *Judge Upheld on Remark About Slain Woman*, N.Y. Times, (July 17, 1984), at A22.

¹⁴⁵ The sentence was ultimately vacated as illegal and the defendant was sentenced by a new judge to 10 years of imprisonment.

¹⁴⁶ Sheila Weller, MORE OF AMERICA'S MOST SEXIST JUDGES, 88, 90, 91. (Redbook, Dec. 1994).

¹⁴⁷ Lynn Hecht Schafran, *There's No Accounting For Judges*, 58 ALBANY LAW REVIEW 1063 (1995).

¹⁴⁸ Judge Bollinger stated that finding a woman in such a state was "the dream come true for a lot of males."

¹⁴⁹ Lynn Hecht Schafran, *supra* note 147.

the validity of a judgment passed by the apex court, and described the *Mathura* judgment as 'an extraordinary decision sacrificing human rights of women under the law and the Constitution'. The authors enumerated their reservations on the judgment, stating that: a young girl could not be expected to successfully raise an alarm for help when trapped by two police men inside a police station; the absence of marks or injury on her body need not imply absence of resistance; and that there is a clear difference in law and common sense between submission and consent. This letter placed debates on rape within the rhetoric of human rights violations. *Mathura's* culprits went unpunished and therefore she failed to get justice but the debate led to legislative amendments, which shifted the onus onto the accused in custodial rape cases.

However, even after the 1983 amendment to provisions punishing rape in the penal code, a study of cases¹⁵⁰ shows that the focus of the judicial interpretations remained centred on a question of the 'character' of the complainant, rather than the crime committed by the perpetrator. This therefore reduced to a token gesture, the legal proviso of shifting the onus of proof to the accused in cases of custodial rape.

A study conducted by PUDR (a Delhi based civil liberties group) in 1995, looked at ten cases of rape by police personnel and it revealed that in most cases, the victim was a working class woman. In almost all the cases, the accused has been acquitted and some have even been reinstated in their old posts. The Sessions Court, Jaipur on 5th November 1995 acquitted five men who committed gang rape on Bhanwari Devi after she reported cases of child marriage to the police. The judgment based its acquittal on two planks, including a romanticisation of Indian culture and the lack of forensic evidence. The judge, Justice Jaspal Singh stated that it was impossible in India, that members of the same community would commit rape together. Conversely, it was argued that the 5 accused were of different castes and therefore it was impossible that they would have worked together, as according to the Judge, rural gangs are not multi caste.

There have been other instances, such as the *Gita Hariharan* case where the Judge refused to strike down a personal law that made women only secondary guardians of their children. In *Batra v Batra*¹⁵¹ the court watered down what the legislature intended to do; namely give women the protection of a home, irrespective of the nature of ownership, from which they cannot be dispossessed except by a procedure established by law.¹⁵²

The US, Indian and Afghanistan experience shows that the absence of gender as a topic in legal jurisprudential education, coupled with the absence of any judicial gender training leads to a double impact on women.

The solution lies in mandating judicial gender education. Court rules for *Judicial Education* should require participation in domestic violence education. Judges must be selected, trained, evaluated, and if need be, disciplined with a focus on the fact that domestic violence is a major national problem with profound implications for the safety, physical and mental health and poverty of women and children. More importantly, it is a crime. Batterers must be held accountable for their violence. Judges must be held accountable for their role in combating it.¹⁵³

¹⁵⁰ Geetanjali Gangoli *INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA* (Ashgate Publishing Ltd, 2007).

¹⁵¹ *S.R. Batra and Anr. v. Smt. Taruna Batra* (2007) 3 SCC 169.

¹⁵² Indira Jaising, *Of crying hoarse, not wolf!* available at <http://www.lawyerscollective.org/content/crying-hoarse%2C-not-wolf%21-indira-jaising>

¹⁵³ Lynn Hecht Schafran, *supra* note 147.

4.16.3 Professional Harassment of Women in the Courts

Women face a subtle type of gender bias in courts. For example, although judges often give male attorneys their full attention, they may shuffle papers or look at the clock when female attorneys speak.¹⁵⁴ A female attorney with a complaint about a particular judge may hesitate to file it formally or to even voice it, if she is likely to appear before that judge again in the future. She may also fear that voicing such a complaint will gain her the reputation of a troublemaker throughout the legal community.¹⁵⁵ Several years ago a male trial judge in US refused to hire a female court reporter, claiming his wife did not want him traveling with a woman. Many male judges supported his decision despite state laws that prohibited sexual discrimination in hiring. Unfortunately, many of these male judges viewed court personnel as their personal employees, to be hired on the basis of their personal whims. In this instance, the woman filed a law suit for sexual discrimination and successfully recovered monetary damages.¹⁵⁶ In 1988, a male Federal Judge in Pennsylvania threatened to send a lawyer to jail when she objected to being addressed by her husband's surname in court. The Judge also objected to another attorney addressing a witness as 'Ms.' instead of 'Mrs.' The Judge later apologized. He said he always referred to married women by their married names, but he declared that "any person who appears in my courtroom may be addressed in any manner in which he or she sees fit."¹⁵⁷

The world over, there has been instances of sexual harassment of women in courts and these instances are widely reported and debated. In India,

*"unfortunately for women, there are many in the rank and file of judiciary who consider women as an instrument of man's comfort and pleasure. They cannot accept anything contrary. So when they see a woman filing a petition for maintenance or seeking shelter from a husband who batters her, he immediately becomes hostile to her. If a woman's organization is seen as supporting her case, the anger of the member of the judiciary rises more and the resentment to the complainant woman's very action of reaching out to a court not only becomes obvious, it permeates all the pronouncements from the dais so that the men in court smile and sneer while women are made to feel belittled and harassed. In such atmosphere, legal proceedings continue to be prolonged..."*¹⁵⁸

Women lawyers are also affected by gender bias in court rules. One such issue in the courts is decorum and dress. The drafters of these rules either forgot about women lawyers and women court personnel or expect women to dress like men. In India, Delhi High Court rules made for advocates do not envisage that a female can be an advocate at all! There are rules only for male advocates. Therefore, women can easily observe exemption from these Rules!¹⁵⁹

¹⁵⁴ Deborah Ruble Round, *Gender Bias In The Judicial System*, 61 SOUTHERN CALIFORNIA LAW REVIEW 2193 (1988).

¹⁵⁵ See Weber, *'Still in Good Standing': The Crisis in Attorney Discipline*, 73 A.B.A. J. 58, 61 (Nov. 1987).

¹⁵⁶ Shirley S. Abrahamson, *Toward A Courtroom Of One's Own: An Appellate Court Judge Looks At Gender Bias*, 61 UNIVERSITY OF CINCINNATI LAW REVIEW 1209 (1993).

¹⁵⁷ Debra C. Moss, *Judge Mrs. the Point*, A.B.A.J., 25 (1 Sept, 1988).

¹⁵⁸ Ila Pathak, *Ahmedabad Women's Action Group*, (30 March 1996) – quoted by Ann Stewart, *Judicial Attitudes To Gender Justice In India: The Contribution Of Judicial Training*, 2001(1) LAW, SOCIAL JUSTICE & GLOBAL DEVELOPMENT JOURNAL available at <http://elj.warwick.ac.uk/global/issue/2001-1/stewart.html>.

¹⁵⁹ accessible at <http://delhihighcourt.nic.in/history.htm>.

4.16.4 The Role of Courts and Judicial Educators

Since the 1980s, women judges and advocates in the USA and other Western countries have fought to bring the reality of gender discrimination from obscurity to prominence. These fights have been successful and resulted in the formation of gender task forces in most of the courts over in the US.¹⁶⁰ Moreover, a number of State Judicial Review Boards have publicly censured judges and attorneys for exhibiting biased conduct in the courtroom.¹⁶¹

Reformers in a number of Common Law jurisdictions have viewed judicial training in gender issues as one way of developing a legal culture based on gender justice.¹⁶² In 1980, the National Association for Women Judges and the National Organization of the Women's Legal Defense and Education Fund formed an umbrella group, the National *Judicial Education Program* (NJEP) to Promote Equality for Women and Men in the Courts. The new group was created to help judges understand how stereotypical thinking about women and men affects true impartiality and also to assist in the formation of State task forces composed of lawyers, judges, and members of the public to investigate and report on gender bias in the State's judicial system.¹⁶³ The NJEP began placing an emphasis on developing very State-specific *Judicial Education*. This then became the catalyst for the national gender bias task force movement beginning in the 1980's. Since that time, both State and Circuit Courts have been reporting their results to the NJEP.¹⁶⁴ In 1982, New Jersey was the first State to establish such a task force, and New York followed in 1984.¹⁶⁵ In Rhode Island, a judicially appointed committee examined the gender bias issue by conducting the first empirical study into the treatment women receive in the courtroom.¹⁶⁶ In California, former Chief Justice Rose Bird appointed a special judicial council committee to determine whether the recommendations of the New Jersey and New York gender bias task forces could be applied to the Californian judicial system.¹⁶⁷ Similar studies have also been undertaken in Arizona, Massachusetts, Illinois, and Florida.¹⁶⁸

However, in India, no High Court has taken the initiative to set up a task force of this kind to study gender bias. There is nothing comparable in India to hear complaints of harassment in courts, which gives an impression that all is well in the courts of India and there is no discrimination of women. Neither lawyers, nor academics, nor judges in any substantial number have indulged in this area. Even the general public and the media keep away from such issues most of the time, as they fear the contempt powers of the courts.¹⁶⁹ One very negligible development though is the formation of committees in some of the High Courts,¹⁷⁰ pursuant to the famous *Vishaka* case.¹⁷¹

¹⁶⁰ See *Women Attorneys Face Discrimination, 'Put-Downs'*, 14 CRIM. JUST. NEWSLETTER, 6 (Sept. 26, 1983); *About the New Program*, 64 JUDICATURE, 208 (Nov. 1980).

¹⁶¹ See e.g., *In Re Kirby*, 354 N.W.2d 410, 414 (Minn. 1984) (disciplined judge for calling female attorneys 'lawyerettes' and questioning their failure to wear neckties); *In Re Stevens*, 28 Cal. 3d 873, 625 P.2d 219, 172 Cal. Rptr. 676 (1981) (Superior Court Judge publicly censured for initiating conversations with a married couple employed by legislature in which he discussed sexual fantasies and proposed to the couple to engage in certain sexual conduct); *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973) (Municipal Court Judge removed from office for repeated acts of crude behavior and vulgar conduct toward court employees, including brandishing a dildo in chambers), *cert. denied*, 417 U.S. 932 (1974) (admonished judge for his practice of referring to the appearance and physical attributes of female attorneys); *State of New York Commission on Judicial Conduct: Matter of Jordan*, N.Y.L.J., Mar. 2, 1983, at 12, col. 5 (publicly censured judge for calling female attorney 'little girl' and saying to her 'I will tell you what, little girl, you lose').

¹⁶² Stewart *supra* note 158.

¹⁶³ Lynn H. Schafraan, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, 28 (Feb. 1990).

¹⁶⁴ Leah M. Perkins, *Public Hearings Underway To Examine Bias In The Judicial System*, 2 Lawyers Journal 6 (2001).

¹⁶⁵ See Schmalz, *New York Courts Cited on Sex Bias*, N.Y. Times, (April 20, 1986), at 1, col. 1.

¹⁶⁶ Breton, *Empirical Study Finds Gender Bias in Rhode Island Courts*, NAT'L L.J., 13 (Feb. 17, 1986).

¹⁶⁷ *Announcements: Women in the Courts Update*, 9 WOMEN'S RTS. L. REP. 99 (1986).

¹⁶⁸ See Marcotte, *Virginia Bars Create Panel on Women, Minorities*, 12 B. LEADER 29 (1986) (independent commission created to promote the involvement of women and minorities in the legal profession in Virginia).

¹⁶⁹ *Shri Surya Prakash Khatri & Anr. v. Madhu Trehan and Ors.* 2001 Cr.LJ 3476 – survey done by media group on judges – Delhi HC held media group guilty under the Contempt of Court Act.

¹⁷⁰ Delhi, Bombay, Madras.

¹⁷¹ 1997 (6) SCC 24.

The general public has no knowledge about the existence of such committees. A High Court Judge is made in-charge of the committee and it is difficult to get any information from this committee regarding the kinds of complaints filed. In fact, some High Courts are of the view that the guidelines laid down by statute or the Supreme Court in the *Vishakha* case do not apply to them.¹⁷²

Another step taken in this direction includes the setting up of specialized judicial institutions for women in the Family Court. It is intended to be different from the usual processes of the civil courts. Judges are empowered by statutes to deliver gender justice, often through affirmative action that is unique to such institutions.

Apart from this, State Judicial Academies and the NJA at Bhopal are fulfilling the need for gender sensitization of judicial personnel. They are equipping future judges to deal with women's issues with sensitivity, as well as with a commitment to equality and human dignity. In every educational programme judges are sensitized to deal fairly without pre-conceived notions of female rape victims. These sessions are intended to remind judges of their responsibility to intervene when gender-biased conduct occurs and to instruct judges on techniques of intervention.¹⁷³

Also, with the support of the British Council of India and with the approval of the Chief Justice of India, the School of Law at the University of Warwick in association with the National Law School of India initiated a series of gender sensitization courses in 1995 for judicial officers. Several batches of District Judges nominated by their High Courts underwent three-month long courses. Importantly, nearly two months were spent in England attending classes and visiting courts and training centres. The "Gender and the Law" course was based on a needs assessment survey and was designed to provide sophisticated training. The success of this project, has led to it being continued for a second term of two years.¹⁷⁴

The UK and Australia have both developed equal treatment benchbooks to provide guidance to their judicial officers so they can afford equality to women and avoid gender bias. Taking lessons from these countries, the NJA in India has collaborated with the Lawyer's Collective (advocacy organization) for the preparation of a Benchbook on Domestic Violence.

4.17 To Help Judges Become More Professional

A literature review on the concept of professions¹⁷⁵ reveals that professionalism is chiefly characterized by a willingness to put respect for the law and the interests of the public above personal interest. It is because of this tradition of professionalism that the public is willing to entrust the administration of justice to courts. Therefore judges need to be educated – not in the law but in the various fashionable theories and political orthodoxies which are current among feminists, environmentalists, social reformers, deconstructionalists¹⁷⁶ or whatever to meet and discuss problems of many different kinds; and secondly, to keep them in touch with developments in disciplines other than law which impinge upon and may influence the administration of justice.

¹⁷² Chief Justice of Madras High Court was of this view. However, the full court had taken a contrary view – Justice K. Chandru.

¹⁷³ During the judicial year 2007-8, around 30 conferences were held covering 3000 judges. A simulation exercise on date rape cases was done to make judges move from process based analysis of rape which they usually did by offering reasons like – "girl accompanies her boyfriend, because she drinks and acts in manner inappropriate under traditional notions of Indian women's identity, she is raped" to victim based analysis of rape – where not consenting to sexual activity by woman is given importance in delivering judgment.

¹⁷⁴ Chapter 13, para 13.6.20, FNJPC Report, 1999.

¹⁷⁵ SM Grabowski, *How Educators and Trainers can Ensure on-the-job Performance* in NEW DIRECTIONS FOR CONTINUING EDUCATION: STRENGTHENING CONNECTION BETWEEN EDUCATION AND PERFORMANCE "6 (SM Grabowski ed, Jossey-Bass, San Francisco, 1993); G. Samuels, "Judicial Competency: How it can be Maintained?" 54 ALJ 587 (1980).

¹⁷⁶ P. McGuinness, "No case for judgment by the Instant Lynch Mob" (1993) *The Australian* (20 January 1993) and reprinted in 67 ALJ 324-5.

To this end Sir Ivor Richardson, has observed that,
*“we can no longer depend almost entirely on self education by the individual judge, supplemented by informal discussions with judicial colleagues. A more systemic and professional approach is needed. Formal education programs are the most effective means of gaining information and insights; of stimulating awareness of changing social and economic perspectives and values; and generally enabling us to keep abreast of all those facets of our work in changing times.”*¹⁷⁷

Livingston Armytage, has further identified the following professional needs which needs to be supplemented by education:¹⁷⁸

- (a) a need to train and educate new appointees to assume office, to facilitate the transition from advocate to adjudicator, and to bridge the gap between inexperience and experience;
- (b) a need to facilitate the ongoing professional development of judicial officers.

4.18 To Allow Judges to Master the Art, Craft and Science of Judging

The content of *Judicial Education* programs has historically focused on substantive law. Increasingly, taking cue from professional management training courses, there has been a realization that training in theoretical framework alone would not bring better professionalism to the bench. This led to an interest in the art, craft and science of judging. Soon judicial educators began to concentrate their energies towards the judging aspect and this compartmentalization of various aspects led to the coining of the phrase – *art, craft and science of judging*. Thus, the curriculum has moved toward a more interdisciplinary content, challenging judicial educators to reach beyond traditional topics.¹⁷⁹

It has become imperative to strengthen the art, science and craft of judging to move judges forward in the Information Age of the 21st Century. Such training would transform judges by moving their decisions from personal morality and rationality to constitutional morality and constitutional rationality. Such transformation would help in strengthening the administration of justice.

4.18.1 The Art of Judging

The art of judging is used because every art has a soul. Through the judge, the conscience of society speaks. Conscience can be used as a check on wrong doing. When courts speak as the conscience of society it becomes a great piece of art. For an Indian Judge, the art of judging must be based on constitutional morality. Therefore the art of judging implies advancing constitutional values like FEDEF in all the judgments.

4.18.2 The Craft of Judging

The craft of judging includes a judge's abilities in the appreciation of facts, statutory interpretation, judgment writing, court and case management, time management, treatment/protection of witnesses/victims, language and communication, analysis and decision making, general administration skills and supervision of lower courts.

¹⁷⁷ “Changing Needs for Judicial Decision Making” 1 *Journal of Judicial Administration* 61 (1991).

¹⁷⁸ “The Need for Continuing Judicial Education”, 16 UNSW LJ 536 (1993).

¹⁷⁹ Patricia H. Murrell, *Competence And Character: The Heart Of CLE (Clinical Legal Education) For The Profession's Gatekeepers*, 40 VALPARAISO UNIVERSITY LAW REVIEW 485 (Spring, 2006).

4.18.3 The Science of Judging

The science of judging implies the use of rationality as a means to justify reasoning that is based on objective criteria and not on the subjectivity of the judge alone. *Judicial Education* institutions have developed exercises to enable judges to strengthen their scientific faculties with the help of cognition experts.

4.19 To Make Justice for the Poor a Reality

With some notable exceptions, such as a judgment dealing with the right to education, the record of courts in India in enforcing internationally recognized economic, social, and cultural rights is patchy and is getting worse. The courts failure is significant when compared to the heyday of its activism when Justices such as Krishna Iyer and Chinnappa Reddy were on the bench.¹⁸⁰

Indeed, a judgment that reflects the current judicial trend is the Court's decision in the *T.K. Rangarajan*¹⁸¹ case, declaring that the Tamil Nadu Government's employees had no legal, moral, or equitable right to strike. While individual judges in the past have shown a great deal of sympathy to labor, such as Justices Desai and Krishna Iyer, the more recent generation of judges appear to display much less sympathy. This change in the attitude of the judges towards labor rights cannot be divorced from the broader socioeconomic context of liberalization, privatization, and the World Bank's and International Monetary Fund's (IMF) demands for the reform of labor laws since 1991.¹⁸²

The Court is perceived as consisting of middle class intellectuals. Therefore, it is believed that it is more receptive to others of their ilk, to their certain social and value preferences (for instance, the right to a clean environment rather than the right to livelihood), and to certain modes of argumentation over others (technical rather than social). This perception of the Court is in itself deeply restrictive of participation. The courts are unlikely to be moved by or on behalf of 'urban poverty'¹⁸³ or 'livelihood'¹⁸⁴ issues. These outcomes are predictable and unfavourable to the suffering citizens. The approach of the Court to the issue of slums is a case on point. In the *Almitra Patel v Union of India* case¹⁸⁵, the Judge dealt with the issue of slums. He believed that slums, amongst other factors, were responsible for the solid waste problem in cities.¹⁸⁶ A connection that is not readily self-evident as waste generation per capita per day in Delhi is 420g for those in the high income group, 240g for those in the middle income group, 150g for those in the lower middle income group, and only 80g for those in the slums.¹⁸⁷ The Judge expressed himself with 'unblinking disfavour'¹⁸⁸ on the issue of slums:

"The establishment or creation of slums, it seems, appears to be good business and is well organised. The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this

¹⁸⁰ See Balakrishnan Rajagopal, *supra* note 31.

¹⁸¹ *T.K. Rangarajan v. Government of Tamil Nadu and Others*, 2003 SOL Case No. 429.

¹⁸² Balakrishnan Rajagopal, *supra* note 31.

¹⁸³ R Agarwal, Toxics Link, in a discussion with the author, Delhi, 15 September 2004 and 5 January 2007.

¹⁸⁴ B Chaturvedi, *Chintan Environmental Action and Research Group*, in an electronic discussion with the author, 26 October 2004 and 20 February 2007.

¹⁸⁵ Writ Petition Number 888 of 1996.

¹⁸⁶ Order dated 15/02/2000.

¹⁸⁷ COWI & Kadam Environmental Consultants, *Feasibility Study and Master Plan for Optimal Waste Treatment and Disposal for the Entire State of Delhi based on Public Private Partnership Solutions* (April 2004) (Executive Summary).

¹⁸⁸ U Ramanathan, *Illegality and Exclusion: Law in the Lives of Slum Dwellers*, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE WORKING PAPER 6 (2004).

way, are usurped for private use free of cost The promise of free land, at the taxpayers' cost, in place of a jhuggi, is a proposal which attracts more landgrabbers. Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket."

This opinion has been characterized as a 'disdainful dismissal of any legitimacy to the claims of the city's poor to housing'.¹⁸⁹ Yet, these words have been quoted approvingly by judges in lower courts.¹⁹⁰ The perception of the judiciary as middle class intellectuals with middle class preferences for fewer slums, cleaner air and garbage-free streets, at any cost (to others), has in itself silenced certain voices.

The courts opened its doors and liberalised *locus standi* in the late 1970s to address the 'problems of the poor'. Today, four decades on, the poor, and those who represent them, are unlikely to approach the Court with their concerns, as they are likely to be left the poorer for it.¹⁹¹

Through *Judicial Education*, judges need to be sensitized about their fear of and indifference to the poor, by reflecting on their judgments in various training programmes and analyzing the criticisms of their judgments. A platform can be provided for hearing the voices of the persons affected by the decision, their humanity acknowledged, their suffering understood and their claims considered. For instance, in a judicial seminar on Justice and Poverty held in August 2007 at the NJA, Bhopal, participants were shown a documentary made on women who were employed as daily wage labourers to cut grass.¹⁹² The purpose of the documentary was to sensitize them about the growing phenomenon of the 'feminization of poverty', to enable the judges to develop new approaches to the issue.

4.20 To Avoid Bad Judgments

Judgments can be bad because: (i) they are decided on wrong principles of law; (ii) they are not based on sound and rational reasoning supported by relevant laws; (iii) they do not conform to constitutional standards; (iv) or they reflect a judge's personal ideology and preferences. Over a period of time, such judgments become food for thought for those investing their time and energy to study judicial institutions. They are then cited by all in support of examples to substantiate the evidence of bad judging.

The study of the judiciary in every country on the globe reveals a set of unholy precedents. There are enough cases in India, USA and UK to prove the point of bad judging. These precedents are the main menu in the judicial education discourse, as trainers like to caution judges as to what should not be repeated. For the US, the watershed cases are: *Plessy v.*

¹⁸⁹ *Id.*

¹⁹⁰ See e.g. *Wazirpur Barton Nirmata Sangh v Union of India*, MANU/DE/2140/2002 (C.W. No. 2112 of 2002, Order dated 29/11/2002). The Delhi High Court noted that, '[o]ne cannot but use the expression as stated in the said judgment' and quashed a Union of India policy providing alternate sites for JJ dwellers. *Id.*, para 44.

¹⁹¹ See Lavanya Rajamani, *Public Interest Environmental Litigation In India: Exploring Issues Of Access, Participation, Equity, Effectiveness And Sustainability*, 19 JOURNAL OF ENVIRONMENTAL LAW 293 (2007).

¹⁹² Documentary made by law associates, placed in NJA Library.

Ferguson,¹⁹³ *Dredd Scott*¹⁹⁴ and *Bush v. Gore*.¹⁹⁵ For India, the majority opinions in *ADM Jabalpur*¹⁹⁶, *NBA*¹⁹⁷, *A.K. Gopalan*¹⁹⁸, *Mathura*¹⁹⁹, *Balco*²⁰⁰, *Bhopal Gas Leak*²⁰¹, *Gita Hariharan*²⁰² are some of the famous cases that are bracketed into the category of bad precedents. Therefore, all over the world, judiciaries have supported excesses to be committed on its citizens, treated itself to be part of the governance structure and therefore supported rigid regimes.

One of the important reasons for poor judging that has emerged in the Indian context is the tendency of the courts to act as the umpire dictating the ceasefire line: 'thus far and no further'. This tendency emerges from their misunderstanding of their role and the constitutional and democratic framework. Most judges believe that they are presiding over courts of law and not court of justice. This understanding makes them pronounce that 'This is law and therefore I am bound by it, and can say no more': whereas if they were the court of justice they would have said, 'This is just and if it cannot be because of the law, then the law should be struck down'.

The lay man may ask the court: "look, I came to you for justice, and what did you do? You told that the District Magistrate, if he is satisfied that I am at fault and therefore shall be detained,

¹⁹³ The United States Supreme Court's 1896 decision in *Plessy v. Ferguson* upheld the legality of racial segregation. In that case, the court denied Homer Plessy, who was black, the freedom to sit in a railway car reserved for whites. In reaching its decision, the court made the following assertion: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored Race chooses to put that construction upon it."

¹⁹⁴ *Dred Scott v. Sandford*, [1] 60 U.S. (19 How.) 393 (1856) also known as the "Dred Scott Case" or "Dred Scott Decision", was a lawsuit, pivotal in the history of the United States, decided by the United States Supreme Court in 1857 that ruled that people of African descent, whether or not they were slaves, could never be citizens of the United States, and that Congress had no authority to prohibit slavery in federal territories. It was also ruled that slaves could not sue in court, and that slaves were private property, and, being private property, could not be taken away from their owners without due process. The decision for the court was written by Chief Justice Roger Taney. The parts of this decision dealing with the citizenship and rights of African-Americans were explicitly nullified by the Thirteenth and Fourteenth Amendments to the Constitution.

¹⁹⁵ *Bush v. Gore* was troubling because the five conservatives appeared to use the power of judicial review to secure control of another branch of government that would, in turn, help keep their constitutional revolution going. Quite apart from the internal problems of legal reasoning in the opinion, *Bush v. Gore* seems troubling because of the way the Court performed its institutional role. The Court's intervention was not particularly necessary, despite the Court's insistence to the contrary. *Bush v. Gore* presents a very different type of conflict. Although all of the Justices faced the same type of conflict of interest, it pointed in different directions for different Justices. The conservatives appeared to have reasons to appoint Bush as President; the liberals Gore. The situation is perhaps closest to a lawsuit between two corporations where five Justices own stock in the petitioner and four own stock in the respondents, and the case is decided for the petitioner 5-4. [See Jack M. Balkin, *Bush V. Gore And The Boundary Between Law And Politics*, 110 YALE L.J. 1407 (2001)].

¹⁹⁶ *ADM Jabalpur v. Shirakant Shukla* 1976 Supp SCR 132.

¹⁹⁷ *Narmada Bachao Andolan v. Union of India and Ors.*, (2000) 10 SCC 664. In this case the Supreme Court put its seal of approval on the largest Court-sanctioned forced eviction in the world, although abundant international legal materials existed to show that the raising of the height of the Sardar Sarover dam was contrary to current legal standards. Although counsel in that case argued that the forced eviction of tribal people was a violation of right to life under Article 21 read with International Labour Organization (ILO) Convention 108, to which India is a party, the Court rejected the argument.

¹⁹⁸ *A.K. Gopalan v. State of Madras* AIR 1950 SC 27.

¹⁹⁹ Officially, the case is *Tukaram v. State of Maharashtra* (1979) 2 SCC 143, facts of which are In March of 1972, a sixteen year old girl named Mathura was taken to the neighbourhood police station by her brother and some other members of her family. They were concerned because she was underage and attempting to elope with her boyfriend. They wanted abduction charges brought against him. The two policemen in the station asked to talk to Mathura alone while they took her statement. The two officers then raped her while her family waited outside. More than two years later, a sessions judge acquitted the two accused on the grounds that Mathura was a 'shocking liar' who was already 'habituated to sexual intercourse', and so could not prove that she did not give consent. On appeal, the Bombay High Court reversed the previous order, and sentenced the two officers each to six years in prison. And finally in 1979, the Supreme Court overturned the High Court's decision, saying that she had not struggled enough or caused enough of a commotion, and so could not prove that she did not consent. The evidence for the case had been collected through the police station in which the crime had been committed. The outcome of the case caused an uproar in India. A slew of protests helped raise demands for more stringent rape laws, and caused the Government of India to enact the Criminal Law Amendment of 1983, which significantly amended the rape section of the Indian Penal Code. More importantly, the furor surrounding the case ruling helped to create the Indian anti-rape campaign, which has been the most influential movement for women's rights in India.

²⁰⁰ *Balco Employees' Union (Regd.) v. Union of India* (2002) 2 SCC 333.

²⁰¹ In this case, the Supreme Court of India while holding corporations engaged in ultrahazardous processes, manufacturing or industry absolutely liable – validated the state's assumption of *parens patriae* status, superseding its prior victim standing, even when it extends to state endorsement of a settlement without consultation with the victim before the Court. The Court justified the denial of due process thus entailed by invoking Macbeth: to do a great right a little wrong is justified! See Upendra Baxi, *A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 557 (October 2003).

²⁰² *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.

you cannot interfere.²⁰³ If I lose my property due to the negligence of the Police Officer, I cannot get back my property or even receive damages.²⁰⁴ I did not approach you for knowing what the law is; I wanted justice.”²⁰⁵

Again there is a misunderstanding about the idea of *fairness* in justice. Fairness requires the judge to be neutral and detached, but not so detached so as to be indifferent to the parties and their concerns. Instead, the judge must have an attentive and empathetic engagement or connection that allows him or her to understand the point of view of each of the parties, their histories that led them into conflict, and their goals in resolving this conflict. Law, in the sense of rules and legal principles, is the raw material of a judge's work. The law is the compass of the judge. Guided by the law, judges seek to do justice. To do justice, a judge should consider not only the law but also the facts, including the experiences and suffering of the parties that lie at the roots of the dispute. To disregard the human aspect would turn judges into robots, applying sterile rules in a mechanical fashion.²⁰⁶

Judicial Education therefore can step in to acquaint judges with bad precedents so that reliance on them is minimized. A wrong understanding will lead to bad precedents that in the future may ruin the whole machinery built for the administration of justice. If judges lose the respect of the people, it will lead to the overlooking of the whole institution and machinery created for securing the rule of law in the country. Consequently, there will be more and more incidents of people taking law into their own hands, settling their scores with each other or the State apparatus by violent means.²⁰⁷

4.21 To Help Judges Function in the Absence of a Jury System

Juries are an essential part of the court system in the US, UK, Australia, etc. Furthermore, the right to jury trial in the United States Constitution predates the Bill of Rights.²⁰⁸ The strengths of the jury system are commonly said to include:

- Jurors come to each case free from the biases and hardened attitudes that can too easily develop among professionals from the cumulative effect of hearing numerous similar cases;

²⁰³ For instance take the case of *Sadhu Singh v. Delhi Administration* (AIR 1966 SC 91). Sadhu Singh was detained under Rule 30(1)(b) of the Defence of India Rules. The District Magistrate swore an affidavit that he was satisfied that Sadhu Singh was indulging in anti-social activities and the activities of the petitioner was prejudicial to the maintenance of public order and that it was necessary to detain him. The petitioner challenged the facts and the jurisdiction. The Supreme Court held that making of an order under Rule 30(1)(b) proceeds upon the subjective satisfaction of the prescribed authority relating to matters enumerated in the said Rule. The satisfaction of the authority is not subject to judicial review, for the order of detention is pre-eminently an executive act. Once the subjective satisfaction of the detaining authority, a condition of the making of the order, is shown to exist, the courts cannot inquire into the sufficiency of materials on which the order is made or into the propriety or expediency of the order. What is determinative of the validity is the satisfaction of the prescribed authority.

²⁰⁴ In *Kasturi Lal v. State of U.P.* (AIR 1965 SC 1039) the plaintiff was arrested by the police officer in Uttar Pradesh on suspicion of possessing stolen property and in a search of his person a large quantity of gold was seized under the provisions of Code of Criminal Procedure. Ultimately he was released but the gold seized could not be returned as the head constable in-charge of the Malkhana had absconded with valuable property including the gold seized from the plaintiff. The plaintiff brought a suit against the State of U.P. for the return of the gold or in the alternative a claim for damages for the loss caused to him. The Supreme Court found that the evidence disclosed that the police officers had not followed the provisions of U.P. Police Regulations in taking care of the gold seized, the act of negligence was committed by the police officer while dealing with the property of the plaintiff. But the Supreme Court held that powers to arrest a person, to search him, to seize his property can be characterized as sovereign powers and therefore the claim for damages against sovereign powers cannot be sustained.

²⁰⁵ Gobind Das, *supra* note 38.

²⁰⁶ Justice Joyce Kennard, *Why Justice Is More Than Law*, 83 WOMEN LAW JOURNAL, 10 (1997).

²⁰⁷ This is exactly what happened in the 90's in most Latin American and Caribbean countries, where the judicial pillar was fractured, weak and incapable of supporting the weight of its constitutional responsibilities. See Luz Estella Nagle, *The Cinderella Of Government: Judicial Reform In Latin America*, 30 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 345 (Spring 2000).

²⁰⁸ Article III, section 2 of the United States Constitution provides: "The trial of all crimes, except in cases of impeachment, shall be by jury." U.S. Const. art III, §2, cl. 3; The Sixth and Seventh Amendments respectively guarantee the right to jury trial in criminal and civil cases. U.S. Const. amends. VI, VII.

- The jury has the benefit of the perspectives and opinions of a number of people who have all heard the same evidence;
- The jury hears only the evidence that the judge rules admissible, while a judge in a bench trial often hears inadmissible evidence and must attempt the difficult task of ignoring that evidence;
- Jurors do not speak directly to lawyers so that any animosity that might develop between the Bench and Bar in the trial of a case will not prejudice the jury's fact finding;
- A jury selected from a cross-section of the community is likely to have members whose biases neutralize each other, while there is nothing to offset those of a judge;
- A representative jury offers the possibility that at least some of its members will be from a social group that the litigants can view as a peer group, fostering greater acceptance of the jury's verdict; and
- Jury service gives citizens important lessons in civic virtues and in the law itself.²⁰⁹

India does not have a jury system and therefore judges have to perform the part of jury. *Judicial Education* has to help them in their juror role so they arrive at true facts.

4.22 To Help Judges Reduce Their Subjectivity in Decision Making

The judge holds neither a purse nor a sword and therefore s/he has no control over executive power,²¹⁰ yet she/he is the only government official whose authority is supposed to be explained by reasons²¹¹ and their opinions are used for teaching much of the law. It becomes therefore necessary that their decisions attain the qualities of reasonableness, objectivity, rationality and delete any kind of subjectivity.

Reasonableness is not a physical or metaphysical concept. Instead it is a normative concept. The meaning of reasonableness is the discovery of relevant considerations and the balance between them according to their weight. Reasonableness is a process of assessment. Unreasonableness consists in ignoring some relevant factor or in treating something as relevant which instead ought to be ignored. The world over, much literature has been developed that can help a judge in adhering to reasonableness. For instance, in German legal literature, the doctrine of *Topoi* has been developed. According to *Topoi*, the various options are listed, the advantages and disadvantages of each options are weighed, and through discussion and the exchange of opinions, the optimal solution is reached.²¹² Judicial educators can acquaint judges with such doctrines that are developed all over the world and thereby increase their powers of reason. This will take away much freedom from judges and restrict them to only relevant values for the resolution of the issue before them.

Objectivity and impartiality are two other tools that can help judges in a democracy to discover their role.²¹³ Judicial educators need to equip judges with these two tools. Impartiality will help a judge to treat the parties before him/her equally, providing them with an equal opportunity to make their respective cases. Objectivity, on the other hand, will help a judge to make judicial decisions on the basis of considerations that are external and that may even conflict

²⁰⁹ Steven A. Saltzburg, IMPROVING THE QUALITY OF JURY DECISION MAKING, VERDICT: ASSESSING THE CIVIL JURY SYSTEM 341 (R. Litan ed, 1993).

²¹⁰ Edward S. Corwin, TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 6, (New Haven Yale Univ. Press, 1934).

²¹¹ Charles Fried, *Scholars And Judges: Reason And Power*, 23 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 807 (Summer 2000).

²¹² Aharon Barak, *supra* note 11.

²¹³ *Id.*, p. 101-104.

with his/her personal view.²¹⁴ Objectivity makes strenuous demands on a judge, requiring the judge to undergo a difficult process of self-discovery. Various exercises by clinical psychiatrists and social scientists in *Judicial Education* programmes can help judges to look beyond their own conceptions on various issues.

Judges all over the world have become very frank about what goes on in the decision making process and thereby admitted that complete objectivity is unattainable. For instance, Cardozo admitted that,

"the decisions of the judges are a consideration of social policy. He is influenced by inherited instincts, traditional beliefs, acquired convictions, conception of social needs." Jerome Frank asserted that *"Judicial judgments like other judgments, doubtless in most cases, are worked out backwards from conclusions tentatively formulated. A judge being a human being merely adopts the process of normal reasoning of anybody of his kind which starts with a conclusion and afterwards tries to find premises which will be substantiated."*

Therefore some subjectivity, no matter how much training is imparted at a higher level, will remain and judges' hunches will continue to make the law. The factors likely to influence the judicial decisions are: judges' education; their family and personal associations; wealth and social position; their legal and political experience; their political affiliations and opinions; and their intellectual and temperamental traits. The Judges of Hitler's Germany and Mussolini's Italy were the implementers of oppression. In the Union of South Africa and in the United States, there are some judges who read the law through bifocal spectacles, with the upper lens being reserved for men of the white race. Moreover, nobody has heard of a Soviet Judge resisting an arbitrary execution action.²¹⁵

It is the awareness of the judge that he/she is not using his/her intellect as a cold-logic engine that is the prime safeguard. According to Justice Holmes,

*"Judges are apt to be naïf, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious – to learn to transcend our convictions and to leave room for much that we hold dear, to be done away with short of revolution by the orderly change of law."*²¹⁶

In India, judges need to be made aware of their subjectivity of which there are many proofs, the latest being the 2008 Joint Report of Amnesty International India and PUCL about death penalty cases. The report stated:

"This report has referred to a large number of cases that place it beyond doubt that whether an accused is ultimately sentenced to death or not is an arbitrary matter, a decision reliant on a number of extremely variable and often subjective factors – ranging from the competence of legal representation [in particular at the trial court stage] to the interest of the state in the case [whether to appeal or not], to the personal views and even idiosyncrasies of the judges who sit on the various benches hearing the case..."

²¹⁴ See Aharon Barak, *Justice Matthew O. Tobriner Memorial Lecture: The Role of A Supreme Court In A Democracy*, 53 HASTINGS LAW JOURNAL 1205 (2002); Jules L. Coleman, *Truth And Objectivity In Law*, 1 LEGAL THEORY 33 (1995); Brian Leiter, *Objectivity And The Problem Of Jurisprudence*, 72 TEXAS LAW REVIEW 187 (1993).

²¹⁵ Gobind Das, *supra* note 38.

²¹⁶ Edward K. Cheng, *supra* note 55, p.7.

Furthermore, the report shows that contrary to the majority Bench's views and intentions in the Bachan Singh Case, errors and arbitrariness have not been checked by the safeguards in place, and no small role has been played by judges themselves who have rarely adhered to the requirements laid down in the Bachan Singh case, making it clear that it is commonly the judge's subjective discretion that eventually decides the fate of the accused-appellant...

The arbitrariness is fatal, but it is also selective and discriminatory. The randomness of the lethal lottery that is the death penalty in India is perhaps not so random. It goes without saying that the less wealth and influence a person has, the more likely they are to be sentenced to death."

Judicial educators need to bring it to the notice of judges that their activity of judging is not merely a job but as suggested by Aharon Barak:

*"a way of life, that does not include the pursuit of material wealth or publicity; it is way of life based on spiritual wealth; it is a way of life that includes an objective and impartial search for truth. It is not fiat but reason; not mastery but modesty; not strength but compassion; not riches but reputation; not an attempt to please everyone but a firm insistence on values and principles; not to surrender to or compromise with interest groups but an insistence on upholding the law; not making decisions according to temporary whims but progressing consistently on the basis of deeply held beliefs and fundamental values."*²¹⁷

4.23 To Induce the Element of Life-Long Learning

Competence and character are shaped and reshaped across the life span. Therefore, by the use of different pedagogical techniques, a transformation in personality is possible. For instance, literature has long been accepted and utilized as a vehicle for the transmission of values in our culture and as a means of engaging with larger issues and universal concerns. The use of literature in *Judicial Education* therefore offers a means to explore how various life experiences shape our moral and ethical character at different stages of our lives. This active engagement with the narrative and the characters can assist judges in moving toward a greater understanding for and appreciation of the complexity of the human condition. It can enlarge one's system of values, provide a greater capacity for ethical behavior and help to ensure a more effective judicial system.²¹⁸ *Judicial Education* itself seems to be a generative activity. By providing professional development activities in "how to teach," the court system encourages and nurtures generative behavior.²¹⁹

Because development is never "finished," judicial educators have the opportunity to contribute repeatedly to the attempted resolution of the issues that judges confront as they face major transitions and move through the life-cycle. The individual energy involved in working through these developmental imperatives is enormous and educators, who can channel that

²¹⁷ Aharon Barak, *supra* note 11, p. 110.

²¹⁸ Patricia H. Murrell, *supra* note 179.

²¹⁹ Don S. Browning, GENERATIVE MAN: PSYCHOANALYTIC PERSPECTIVES, 21-24, 145-228 (Westminster Press 1973).

energy into learning, stand to make substantial gains. Using identity, intimacy and generation capacity as powerful motivators, a curriculum can be developed that encourages the movement from simplistic to more complex ways of thinking and making meaning. Judges are thus encouraged to become life-long learners and recognize that learning is the process by which they master the tasks necessary for the resolution of life-cycle issues and become capable of more complex thinking.²²⁰

4.24 To Compensate for Poor Legal Education

The judge is a converted lawyer. They are interchangeable, inter-dependent and equi-potentials. One of the vital tests of the synchronization of law and society is the awareness of a lawyer of the tasks to be performed and the judge's ability and preparation for these tasks. In this context, legal education or society's capacity to develop a profession specialized in the administration of justice is crucial. In the West, as the depth and pace of social change have increased, they have come to look upon law as one form of social architecture with increasing awareness and self-assurance. Western law and legal education have increasingly proceeded on the premise that the legal order can and should make a significant contribution to the effective harnessing of human energy and talent available to society. What is true for the West is more urgent for India. But at present, this quest for judicial professionalism is defeated because the composition of the teaching staff is weighed down by its inherent tendency to stifle and discourage talented juniors. An Indian law teacher's conception of law is typically a static one. Their approach to legal education is usually through the lecture method with little attention paid to the politics that underlies the rules. Legal education merely imparts information by rigid recognition of *stare decisis* and the modes of analysis and exposition are non-functional.²²¹

Using the present method and technique in the law schools, one can build a mere secretariat or a factory or at the most a research institute, but what is really needed is a cathedral. Building a factory is merely constructive, building a cathedral is creative; with construction you make a civilization, with creativity you build a culture and in India law should be an instrument of building culture.²²²

Adding to the problem of poor legal education is the poor reading habits of legal professionals in India. Although no survey has been done so far, sitting High Court Justices who have been called to provide their inputs into judgment writing sessions have admitted before an audience of more than 100 judicial officers that they have not as yet gone through the full text of judgment pronounced in the *Keshavananda Bharti* case! Most of the university students, including those of reputed well established universities do law and then earn an LL.B. degree without referring/reading basic text materials. They do not have to as they get good percentages by just copying the styles dictated by teachers in these universities and which is more often than not found similar to those printed in short series of books sold by local book shops. This makes a case for mandatory *Judicial Education* in India.

Poor legal education has produced a legal profession that lacks the understanding how to use the law as an instrument of economic and social architecture. The lawyer tends to be looked upon as a kind of manipulator or fixer, who in many ways fails to represent society's basic values and attitudes.²²³ *Judicial Education* promises to rectify the mistakes committed at the law schools, at least for those who have taken up a judgeship.

²²⁰ Patricia H. Murrell, *supra* note 179.

²²¹ Gobind Das, *supra* note 38.

²²² *Id.*

²²³ *Id.*

4.25 To Compensate for a Lack of Expertise in Complicated Issues

While the judicial system is designed to be reactive to the conflicts presented, a more thorough understanding of the dynamics and effects of conflicts can empower judges to become more creative and proactive in implementing constructive changes in court procedures. The lack of information about which bail conditions would be the most appropriate in a given circumstance, combined with the previously noted lack of *Judicial Education* regarding mental illness, can hamper sound judicial discretion when a judge is selecting bail conditions. The experts are not available at the courthouse and judges have no choice but to use training and experience by default. Judicial training therefore has to compensate for an absence of expert evidence. Therefore, judges need the knowledge about the characteristics of mental disorders, the dynamics of substance abuse and domestic violence, an overview of treatment methods and the applicability of various therapies.²²⁴

With the possible exception of the newest judges, all judges undergo some training either at the SJA or at the NJA. Nonetheless, the group training opportunities for judges are limited, with many topics fighting for consideration. Without training, no common background exists among judges regarding mental health disorders or the efficacy of alternative treatment plans.²²⁵ After enough professionals have said the same thing about a given disorder, or about best practices in some problems, the information becomes part of the judge's background knowledge - a form of on-the-job training.²²⁶

4.26 To Cultivate a Multi-Disciplinary Approach to Judging

The present generation of judges and those who will be assuming judgeship in the future will face very different kinds of issues and challenges than those faced by their predecessors. These new challenges may not be appropriately answered by confining education and judicial knowledge to legal principles. Many issues may not have a correct legal solution. In such a situation, a judge will have to board flights to other disciplines to make inquiries.

Issues related to trafficking, illegal migration, climate change, health concerns, man-made or natural disasters, ethnic conflict are all challenges that require a multi-disciplinary approach to find a just legal solution. Some basic knowledge has to be gained in anthropology, geology, biology, social science, history, psychology, political science etc. To improve judgments in emerging areas of litigation.²²⁷

Judges need to have some grasp of the role of the various professionals and experts mentioned in the statutes such as: psychiatrists, medical doctors; psychologists and psychological examiners; substance abuse counselors, including alcohol and drug counseling aides, certified drug and alcohol counselors, licensed alcohol and drug counselors; social workers and professional counselors. Not all may qualify as "experts" all of the time under the statutes, and judges need to be informed on which experts can be of help in what kinds of cases.²²⁸

²²⁴ Honorable Jessie B. Gunther, *Reflections On The Challenging Proliferation Of Mental Health Issues In The District Court And The Need For Judicial Education*, 57 MAINE LAW REVIEW 541(2005).

²²⁵ In all the five juvenile justice programmes held for five different batches of Juvenile Court Magistrates in India, judges continue to raise the same concerns regarding the raising of the age of juvenility. Therefore medical /clinical psychiatrists are called as resource persons/faculty to make judges understand that cognitive faculties are different for different age groups and to reasons therefore for including age group 0 to 18 in the definition of child.

²²⁶ Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models And Trends 4-7* (Report by National Center for State Courts, 2003); The Honorable Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57 (2005).

²²⁷ See Eric K. Yamamoto, Sandra Hye Yun Kim, Abigail M. Holden, *American Reparations Theory And Practice At The Crossroads*, 44 CALIFORNIA WESTERN LAW REVIEW 1 (Fall 2007).

²²⁸ Honorable Jessie B. Gunther, *supra* note 221.

Also, as experienced by Barak,
*"a philosophy of life and a philosophy of law can help the judge in understanding his role and in executing that role. It is important that the judge has an understanding of the philosophical discourse. Through it, he can participate in the search for truth, while understanding the limitations of human mind and the complexities of humankind. With the help of a good philosophy, he will better understand the role of the law in a society and the task of the judge within the law. One cannot accomplish much with a good philosophy alone, yet one cannot accomplish anything without it."*²²⁹

4.27 To Prepare Judges for Specialisation

What we call our NDPS Courts, Family Courts, JJBs, Mahila Courts, Lok Adalats and other special courts are actually calendars (the same court personnel take on different tasks on different dates), created within the unified court. We are able to move judges around as needed from specialized courts to general courts and vice versa. This defeats the whole purpose of the statute under which special courts are established. Tension is created by moving judges into courts dealing with matters in which they have no experience.

In the Annual Lecture 2001 organised by the Judicial Studies Board of the UK, Lord Woolf referred to a questionnaire circulated among the members of the senior judiciary in the UK calling for information about the nature of a judge's current work on the Bench and its relationship with the judge's previous experience as a lawyer. He said: *"The survey indicates that there is, in the case of some judges, a substantial distinction between their previous expertise and the work which they now perform as judges."*²³⁰

In India, several judges both in the subordinate courts and in the superior courts deal with jurisdiction in which they have had no experience while they were at the Bar. The lack of appropriate knowledge in the subject of their jurisdiction leads to delays in the hearing of the case, frustrations for the lawyer and it may even lead to the wrong exercise of discretion or a wrong decision not warranted by the facts or the law applicable. There is every need for exposure to subjects with which a judicial officer or judge has not been familiar while at the Bar in India, as judicial officers are often transferred and posted in different places and in different jurisdictions within the state, and Judges of the High Court often have to sit in various jurisdictions in the High Court.²³¹

If a judge is not familiar with a subject, there are greater chances of the litigant suffering injustice. A lawyer can take undue advantage of a judge's lack of knowledge or experience in a subject and his opponent on the other side will find it difficult to persuade the judge to accept even obvious points which, before a judge with adequate knowledge, would have taken no effort at all.²³²

No judge, however brilliant, can boast of knowledge or experience in all the subjects that come before him/her. Mandatory *Judicial Education* programs to train judges in areas of the law with which they are not as familiar is the call of the day, since all such judges must be available to try any type of case.²³³

²²⁹ Aharon Barak, *supra* note 11, p. 120.

²³⁰ 48% of Judges had this experience - Justice M.J. Rao, *Lecture delivered at the British Council Judicial Training In India*, (October 2004), available at <http://www.mjrao.com>.

²³¹ *Id.*

²³² *Id.*

²³³ Larry Brady, J.D. Gingerich, *A Practitioner's Guide To Arkansas's New Judicial Article*, 24 UNIVERSITY OF ARKANSAS AT LITTLE ROCK LAW REVIEW 715 (Spring 2002).

4.28 To Make Judgeships Attractive for Young Talent

In many countries, judicial ineptness is a delicate topic. In fact, one could argue that such attitudes are part of the root of the problems confronting judiciaries in the South Asian Region. Judgeships have often been the jobs no one seeks, unless the individual is either truly committed to social justice, or interested in a venue for acquiring wealth through bribery and corruption. Those who become lower courts judges for the sake of societal good, however, are soon stymied by their corrupt superiors who do not want reformers rocking the boat.²³⁴

Having an excellent system of administering justice depends upon having excellent personnel in the judiciary. The history of our courts is one rich with outstanding individuals serving at all levels of the judicial system. To ensure that this rich tradition continues in the future, when a strong and growing private-sector economy competes with the public service for the best among us, attention must be directed to the qualifications for office, the process of selection, and the conditions of service that will attract and retain highly qualified persons in judicial service. Judges need to be sufficiently supported with legal research tools, legal assistants, clerical staff, educational opportunities, reasonable performance expectations, and compensation/benefits packages that make judgeships successfully competitive with the many other attractive opportunities available to excellent lawyers.²³⁵

4.29 To Help in Dealing with Ever the Growing Body of Laws and Their Complications

Each year, hundreds of new civil and criminal provisions are added to the already bulky legal framework. Hundreds more are amended, repealed or renumbered. Each year, hundreds of eventful court decisions are handed down that affect the Constitution, procedural laws and a multitude of substantive laws. Along with this, each year critical new developments and milestones in many aspects of life have an impact on cases in front of the trial courts. There are developments in finance, accounting, economics, and the way businesses are managed or in today's global turmoil, mismanaged, that impact on decisions. There are developments in technology and communications. There are developments in engineering, biology, and bio-engineering. There are developments in health, philosophy, religion, the arts, government, the sciences, culture, education, and all aspects of the law and legal studies that have a profound effect.

India today has the proud privilege of being one of the largest producers of human babies and statutory enactments. The legislative output is phenomenal. According to the website of the Government of India, as at 26th March 2008, India has 1082 central enactments governing the country in its various aspects.²³⁶ The domain that is sought to be covered is from birth to death and the dimensions vary from six sections in the Contempt of Court Act to six hundred and fifty eight sections in the Companies Act; a few like the Income Tax Act, baffle normal human intelligence. Further, the field of operation of statutes is overlapping and conflicting. 'Good faith' means one thing for the Limitation Act and another for the Penal Code. 'Workman' and 'Child' has as many definitions as there are statutes for them. The meaning of words and expressions are extended and contracted by fictions. The beneficiaries or the victims of the enactments do not

²³⁴ Wendy Vicente, Comment, *Questionable Victory for Coerced Argentine Pharmaceutical Patent Legislation*, 19 U. PA. J. INT'L ECON. L. 1101, 1138 (1998).

²³⁵ Richard W. Creswell, *Georgia Courts In The 21st Century The Report Of The Supreme Court Of Georgia Blue Ribbon Commission On The Judiciary*, 53 MERCER LAW REVIEW 1 (2001).

²³⁶ <http://lawmin.nic.in/alpha.doc> [as of 4th May 2008].

understand the law but they are made to feel the weight of it.²³⁷ *Judicial Education* is continuously required to update judges on the sheer volume of change that takes place on a yearly basis.

4.30 To Expose Judges to Developments Occurring in Foreign Jurisdictions

Judges often hesitate to read, understand and rely on legal developments in foreign jurisdictions. Those who object to the use of foreign law by national courts invoke a series of well-rehearsed arguments in favour of their position. Some are ideological, like those of Justice Scalia of the United States Supreme Court,²³⁸ while other's reservations stem from different factors such as a lack of: time; expertise; materials in their own language; interest to remain up-to-date; and so on.²³⁹

Ideological opposition to foreign legal systems becomes evident in judges' extrajudicial writings and speeches.²⁴⁰ For a judge who believes for good reasons or bad that tort law is running out of control is unlikely to look at foreign law on such a topic, even if it could help dispel his/her fears. A judge who believes that women are misusing legal provisions aimed to protect their life and dignity will avoid even considering empirical evidence that dispels his/her deep-rooted fears.²⁴¹ For him or her, such an exercise will be costly and wasteful, when he or she believes they will be ignoring the "trend of developing authorities" as they have constructed it in their mind.²⁴²

To some extent, the concealment of the foreignness of the source may be justified by realistic considerations. But closing one's mind to foreign ideas altogether must, in intellectual terms at least, be seen as a sign of a closed and not a pragmatic mind. At times, it can even become bizarre, tempting one to search for the hidden motives which may not even be there.²⁴³

Also, as observed by Philippe Sands,²⁴⁴ judges who show no respect to other legal systems also oppose the global rules of international law. The case in point is *Breard v. Commonwealth*.²⁴⁵ This case had reached the fifteen judges of the International Court of Justice in The Hague concerning Virginia's right to execute a Paraguayan man called Angel Breard convicted of raping and murdering Ruth Dickie. He had been given access to defence lawyers, but was not put in contact with Paraguayan Consular Officials, and they were not informed of his arrest. Only after he had been convicted and sentenced did he and his lawyers learn about an obscure international treaty – the 1963 Vienna Convention on Consular Relations that obliged the US to ensure that he was informed immediately of his right to have access to a consular official. However, after sentencing, it was too late. Federal and State Laws meant he could no longer raise procedural rights of consular access in new appeals to the Virginia Courts or to the US Federal Courts. The Clinton Administration admitted that it had violated international rules. But it was not willing to suspend the execution ordered by the Court in Virginia. So, Paraguay

²³⁷ Gobind Das, *supra* note 38.

²³⁸ In fact, it took two years after his appointment in 1986 to the United States Supreme Court before he voiced his disapproval of a practice that began with a plurality opinion thirty years earlier in *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Thus, see his dissent in *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting), which, one year later, prevailed in *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), abrogated by Roper, 543 U.S. at 551. See Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

²³⁹ Sir Basil Markesinis, *supra* note 118.

²⁴⁰ *Id.*

²⁴¹ In 1995 Justice M.L. Phendse, acting Chief Justice of Bombay High Court at the valedictory function of a day long seminar on criminology held at Bombay University Department of Law and the Greater Bombay Legal Advice Committee stated that his experience has revealed that in Maharashtra, the section on marital cruelty is misused by women to harass their husbands and in-laws. Cited in Geetanjali Gonguli, *INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA*, 116 (Ashgate Publishing, 2007).

²⁴² Sir Basil Markesinis, *supra* note 118.

²⁴³ *Id.*

²⁴⁴ Philippe Sands, *supra* note 24.

²⁴⁵ 513 U.S. 971 (1994).

commenced a case in the International Court. It argued that the US had violated its obligation under the 1963 Convention and that the execution should be suspended. The International Court ordered the US to take steps to ensure that Breard was not executed before the Court had given its final decision in the case.²⁴⁶ But the International Court's order cut no ice with the US Supreme Court. Breard's argument, which stated, he might have run his case differently if he had access to the Paraguayan Consular Officials was held not to be plausible by the Supreme Court. It concluded that this was an area in which Virginia retained full authority, unfettered by the restrictions of the US Constitution or international law.

One can contrast the US Supreme Court's line of approach with the UK approach to rules of international law. In March 1999, the Privy Council in London ordered the execution of two Trinidadians to be suspended until their cases before the Inter-American Commission of Human Rights had been decided.²⁴⁷

Philippe Sands has tried to reason this different approach to international law by American and United Kingdom judges, by tracing the importance given to the subject of international law in the two countries during basic legal education. Most American law schools do not teach international law, and those that do, tend to treat it more as a poor relation of political science, international relations or social theory, with the result that its normative value is diminished.²⁴⁸

If we take the case of legal education in India, as far as teaching of international law in law colleges or schools is concerned, the American teaching pattern is adopted. During the LL.B., it is taught as an optional subject. During masters, there is a specialization in some concepts. However, institutions other than law colleges teach international law, with the major central university²⁴⁹ offering an LL.M. in International Relations. This makes most Indian judges presently occupying the seats ignorant of the developments taking place in international law and their affects on domestic issues. This is the reason why they have never been exposed to the internationalist environment which today's students (and tomorrow's judges) are. This is true, notwithstanding the increase of judicial contacts that seems to have taken place during the last ten or fifteen years. Those who have shown a contrary interest by "learning" foreign law are "bold spirits" rather than "timorous souls."²⁵⁰ By showing this interest, they are going outside the world in which they grew up, prompted by intellectual curiosity. One admires such intellectual restlessness, not least, since those who display it must be aware that, like Lord Denning, they will have to wait a long time before their imagination is rewarded.²⁵¹

In such a scenario, it is necessary to acquaint judges with good practices developed in different countries. Not only that, judges can be asked to experiment and emulate these good practices in their jurisdictions. For instance, in custody disputes involving children, best practices from foreign jurisdictions²⁵² can be adopted. Judges can be asked to learn and draw from some of the most progressive constitutional courts in the world, such as the South African Court.²⁵³ Case law from different countries provided and discussed in seminars is bound to play some role in the decision making of the courts.

²⁴⁶ *Paraguay v. United States*, Order of 9 April 1998 ICJ Reports 1998, p. 248.

²⁴⁷ Privy Council Appeal No. 60 of 1998, judgment delivered on 17 March 1999.

²⁴⁸ Philippe Sands, *supra* note 24.

²⁴⁹ JNU, New Delhi.

²⁵⁰ The expressions come from Lord Denning's judgment in *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, 178 (C.A.) (Denning, L.J., dissenting).

²⁵¹ Sir Basil Markesinis, *supra* note 118.

²⁵² See Hon. Peter Boshier, Damien Steel-Baker, *Invisible Parties: Listening To Children*, 45 FAMILY COURT REVIEW 548 (October, 2007).

²⁵³ See Balakrishna Rajagopal, *supra* note 31.

Further, what is striking is that judges know very little of the transformation of international relations that has taken place over the past fifty years. Notions of sovereignty have changed with growing interdependence. To claim that states are as sovereign today as they were fifty years ago is to ignore reality. The extent of interdependence caused by the avalanche of international laws means that states are constrained by international obligations in an increasingly wide range of actions. Every international treaty has a constraining effect.²⁵⁴ *Judicial Education* can play a very important role to overcome such ignorance on the part of the judge and acquaint him/her with the changing orders in international law.

4.31 To Cultivate an Independent Judicial Research Capacity in Judges

Allowing judges to educate themselves during the course of litigation through libraries and other research fills the sizable gap left by *Judicial Education*. Such independent judicial research allows judges to obtain necessary information in a timely manner and at the appropriate level of specificity.²⁵⁵ It supplements the parties' presentation of scientific information, rather than replacing it, so the parties still frame the debate. The judge's inquiry is bounded by the limits set by the parties. Within these bounds, independent research contextualizes the arguments of the parties' experts and helps the judge be more critical about them.²⁵⁶ In addition, written sources also provide stable and citable references, eliminating inaccurate or incomplete recollections from conferences long ago. Independent research is also a more readily available option than educational programs. Although educational programs may be more user-friendly because the materials and speakers are geared toward judicial issues, they are also limited by location, time, and topic. Independent research has none of these restrictions, particularly given that today's networked world makes information incredibly easy to access.²⁵⁷

Judges in India are free to undertake independent legal research unlike their Western counterparts.²⁵⁸ In fact, there are many decisions where judges have engaged in their own research and come to a conclusion, independent of the counsel's submissions. *Judicial Education* can be used to encourage independent judicial research. Judges can be familiarized with the research resources available, ultimately making independent research more productive.

Newly elevated Judges of High Courts refuse to exercise plenary power accorded to them by the legislature, citing no clear precedent available to guide them on use of that power (e.g. section 482 of Cr.P.C. giving inherent jurisdiction). If these Judges are made capable of undertaking independent research, they can come out with all the precedents governing this field and then distinguish them for situations in which they should exercise this power. It is hoped that an independent judicial research capacity will cure many ills and transform judges into a thinking and reflection mode.

4.32 To Carry Out Quality Research to Help the Judicial System

Most of the institutions providing *Judicial Education* heavily invest in their R&D activities. These research activities help judges to reflect upon their judging methodology. For instance, in the US, the 1994 Federal Judicial Center Survey showed that despite having long-standing authority to

²⁵⁴ Philippe Sands, *supra* note 24.

²⁵⁵ Concededly, independent research may not be as effective in this respect as court-appointed experts, because court-appointed experts can be more responsive to specific questions and concerns.

²⁵⁶ Edward K. Cheng, *supra* note 55.

²⁵⁷ Molly McDonough, *In Google We Trust?*, A.B.A. J. 30, (Oct. 2004).

²⁵⁸ In US, there are a number of cases that have approved independent research, either explicitly or implicitly by engaging in it.

appoint experts, 80 percent of Federal District Court Judges had never used one²⁵⁹ and the 1999 National Center for State Courts Survey showed that public trust and confidence in State Courts lagged behind the confidence ratings of other institutions.²⁶⁰ Such surveys provide feedback on the operation of the judicial system.

In 2004 in India, the NJA undertook a research project on *Access to Justice* to investigate the difficulties experienced by poor and disadvantaged people in accessing justice in trial courts, with a view to developing strategies for procedural reforms in six states. It resulted in a list of barriers that poor and disadvantaged people face in getting justice in the courts and suggestions to bring about procedural reforms. In 2007, the NJA prepared a Bench Book on Domestic Violence in collaboration with a litigation firm known for its crusade to implement this progressive law. It also carried out major research on sentencing in rape cases that showed many inconsistent approaches in dealing with those accused of rape and also those victims of rape.

5. Conclusion

The above mentioned, are some of the reasons that I could think of for writing this paper. All of these reasons justify increased investment in *Judicial Education* by the State. The State has to make adequate arrangements for continuing education not just for judges but for *all* personnel in the judicial branch, including administrators, human resource people, computer specialists, secretaries, court reporters and security personnel. The budget must be stretched to provide continuing education and training in many diverse subjects.

Finally, unlike in the civil law systems of France and Germany, where service in the judiciary is viewed as a career path involving extensive educational preparation and possibly an internship with a judge,²⁶¹ Indian judges only need to meet minimal prerequisites for service. Judges are sent on continuing education courses, but the requirements tend to be light and can be avoided. It has been found that the High Court Registry takes the final decisions regarding nomination of judges to various educational programmes. The scientific method is not followed by the Registry in allocating trainees from various cadres to different programmes and judicial officers are not asked about their willingness to join different programmes. Nobody questions this arbitrariness. All lips are sealed for fear of retaliation. Therefore, mandatory *Judicial Education* for each judge remains the only solution.

²⁵⁹ Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1004-05 tbl.1 (1994).

²⁶⁰ Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, Summary of State-Level Court Evaluation Surveys 82 JUDICATURE 58 (Sept./Oct. 1998).

²⁶¹ In France, for example, judges are selected by a competitive examination, attend a specialized school, and serve as the equivalent of government civil service officers. In Germany, prospective judges must pass two rigorous examinations and must serve a practicum with a judge. Similarly, in Japan, prospective judges must graduate from a law department of a university, pass a national examination, serve two years of training at a national institute, and then serve as an assistant judge before being promoted as a judge with a full ten-year term.

Constitutionalism and the Rule of Law in Full Realization of a Systemic Change in Nepal: Some Practical and Philosophical Considerations

- Dr. Kishor Uprety*

Abstract

The publication of this article on constitutionalism could not be timelier in light of the constitutional wrangling taking place in Nepal at the moment. The author commences by discussing the origins and various international experiences of constitutionalism. He makes it clear that the fundamental purpose of a constitution is to provide for peaceful and just relations between people. This is constitutionally achieved if power is shared between various religious, geographical, ethnic, minority and other groups. Furthermore, the author demands that modern human rights considerations be included in any constitution. However, he argues that the creation of a constitution is not the end-point. Instead ongoing law reform, judicial interpretation and accountability are required to ensure laws reflect societal expectations and morality.

1. Introduction

The need for charting a new constitution is the sequel to Nepal's peace process that started a few years ago.¹ In a country where constitutionalism and the rule of law, rather than any specific institution, failed miserably, such a crucial exercise needs to be carried out adroitly. There has been constant rhetoric for quick-fixes to these institutions. This is specifically due to opportunistic behavior that is prevalent in the power politics of the current overly fragile and tumultuous environment. In spite of these hurdles, the reform of the constitutional and related legal systems requires the creation of a functional equilibrium, acceptable to all actors (citizens, civil society, institutions) in the country: small or big; rich or poor; hill-based or plain-based; or fully organized or not organized at all. Reform means making the national system more democratic, inclusive and participatory, improving the livelihoods of the people and ensuring its sustainability. Whilst focusing on the end-result of the reform is justifiably critical, devising a consensus-based process in undertaking such a reform is equally important for ensuring its sustainability.

Against this background, this paper is a modest attempt to present, from a broad legal angle, a few ideas that seem relevant to the wide range of changes expected in the country. In doing so, the paper discusses the issues pertaining to constitution making itself, the reform of the legal framework associated with it (including the process involved, the form as well as the substance) and gives a few examples from other countries. It also contextualizes the debate over the rationale to be observed, the logic to be followed and the tools to be used in implementing changes.

* Law Degree (Tribhuvan University); Diplôme d'Etude Supérieure & Doctorate (Sorbonne, France).

¹ For a brief discussion about the conflict and its impact, and the initiation of the peace process, See Bishwambher Pyakuryal and Kishor Uprety, *Economic and Legal Impact of Conflict on States and People in South Asia. With Specific reference to Nepal*, 30 J. SOCIAL, POLITICAL AND ECONOMIC STUDIES (Council of Social and Economic Studies, No. 4, 2005); See also Kishor Uprety, *Against Enforced Disappearance: the Political Detainees' Case before the Nepal Supreme Court*, 7 CHINESE JIL (2008), paragraph 2.

2. Constitutional Reform

The opinion of experts varies over what a constitution should necessarily contain. The principal line of division is found between those who regard a constitution as primarily and almost exclusively a legal document in which space is only granted for the rule of law and those who think of a constitution as a sort of manifesto of a faith, a statement of ideas, or a charter, granting them opportunity to include a broad range of political, economic and socio-religious issues.² Also, as noted by Lawrence Tribe, [A] constitution is a historically discontinuous composition; it is the product, over time, of a series of not altogether coherent compromises; it mirrors no single vision or philosophy but reflects instead a set of sometimes reinforcing and sometimes conflicting ideals and notions".³ Therefore, it may not be out of bounds, in this context, to remind the readers that countries with supposedly great constitutions on paper can also totally fail in their nationhood, and countries without a properly written constitution contained in one single document, can also evolve unhindered. As such, it is not the size or the length, but the substance of, and behavior towards, a constitution that actually matters. Georges Bidault was absolutely right while commenting that [T]he good or bad fortune of a nation depends on three factors: its Constitution, the way the Constitution is made to work and the respect it inspires."⁴ The form of the end-product itself, on the other hand, actually depends on the country's drafting tradition. The following paragraphs highlight a few themes that may be worth considering in carrying out such an exercise.

2.1 Positing Constitutionalism in Substance

The idea that governments derive legitimacy from the consent of the governed (a notion inherent to modern democracy) has ancient origins in Greek and Roman history. The early modern European political theorists added substantially to the concept of sovereignty as residing in the people.⁵ American colonists of the Revolutionary War advanced this concept by increasing the rights specifically reserved to the people and further limiting government's reach. To prevent governments from trampling on rights by exceeding the power delegated to them by the sovereign people, the constitution created systems of internal checks and balances within a separation of law-making powers.⁶

Actually, the idea of the separation of powers is the history of class struggle in Britain (in the 17th century) and in America (from 1760-1787). It has always been treated reverentially as providing a shield against the tyrannical concentration of political power along with a guarantee of political freedom. The separation of powers is also a dialectical management of the people's sovereignty. Each branch of government would have independence in the law-making scheme, but these powers would overlap, thus constraining institutional reach within a system and providing for broad popular participation. Indeed, the constitutional three-wheeler comprising the Legislature, the Executive and the Judiciary would not reach its constitutional goal if one of them wobbled.

² See generally K.C. Wheare, *MODERN CONSTITUTIONS* 32 (Oxford University Press 1984) (1966).

³ See Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 1 (Foundation Press 1988).

⁴ Quoted by Justice A.M. Ahmadi, Chief Justice of India, *Keynote at the Inaugural Function of the Golden Jubilee Celebrations of the Constitution*, in (1997) 2 SCC JOUR 18.

⁵ See for discussions, Bertrand De Jouvenel, *Du Pouvoir*, *HISTOIRE NATURELLE DE SA CROISSANCE* (Hachette, Paris, 1972).

⁶ See for instance, Philip Allott, *The Emerging International Aristocracy*, 35 NYJ of INT'L & POL., 320.

The idea of constitutional government, rooted in liberal political ideas, originated in Western Europe and the United States as a defense of the individual's right to life, property, freedom of religion and speech.⁷ In order to secure these rights and freedoms, constitutional architects emphasized checks on the power of each branch of government, equality under the law, impartial courts, and separation of church and state. Poet John Milton, jurists Sir Edward Coke and Sir William Blackstone, statesmen Thomas Jefferson and James Madison, and philosophers Thomas Hobbes, John Locke, Adam Smith, Baron de Montesquieu and John Stuart Mill, all have unequivocally vouched for this. John Locke went on to stating more emphatically that "[F]reedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it."⁸

Constitutionalism [or rule of law] means that the power of rulers, leaders and government bodies is not unlimited. As a political or legal doctrine, it refers to government that is devoted both to the good of the entire community and to the preservation of the rights of individual persons.⁹ Under constitutional theory, government must be just and reasonable, not only from the viewpoint of majority sentiment but also in conformity with higher law, known as the constitution. The rule of law suggests an appeal to a higher standard of law and justice (transcendent and universally understood), than the merely enacted law of contemporary politicians, and indicates that if our relationships with each other (and with the state) are governed by a set of relatively impartial rules (rather than by a group of individuals) then we are less likely to become the victims of arbitrary or authoritarian whims. The political obligation implied by the rule of law applies not only to the rights and liberties of subjects and citizens, but also to those of rulers and governors.

2.2 Respecting the Process

Broad universal constitutional concepts exist, yet countries have managed their constitution making processes in their own unique way. In 1787, the United States of America became the originator and model of constitution making. The United States Constitution was drafted by a hand-picked elite group. It marked the settlement of conflict and inaugurated a new regime of powers and rights.¹⁰ Mainstream scholarship has generally presented the American Constitution as the fixed outcome of a period of nation building and constitution making. Indeed, the USA was, actually, created anew. Admirers, offering this as an example for others, tend to encourage the duplication of its perceived virtues: constitution making as an "act of completion," and the constitution as a "final settlement or social contract in which basic political definitions, principles, and processes are agreed to, and a commitment to abide by them is made".

Finality for a social contract was also the objective of the French. Indeed, one of the basic precepts of the French Revolution was to adopt constitutionality and to establish popular sovereignty. The French National Assembly began the process of drafting a constitution in the summer of 1789. The Declaration of the Rights of Man and of the Citizen, adopted on August 26, 1789, eventually became the preamble of the constitution adopted in September 1791.¹¹ Also

⁷ The priority throughout the world has not been to systematically protect individual rights. There are also systems where the focus is on the protection of community interests.

⁸ John Locke, *SECOND TREATISE*, Ch. 4.

⁹ See generally, Greg Russell, *Constitutionalism: America & Beyond*, Democracy Papers, US Department of State, (<http://usinfo.state.gov/products/pubs/democracy/dmpaper2.htm>) (as of July 2, 2003).

¹⁰ See generally, Laurence H. Tribe, *supra* note 3.

¹¹ See generally J. M. Thomson, *THE FRENCH REVOLUTION*, (Oxford University Press 1969); See also *LES CONSTITUTIONS DE FRANCE DEPUIS 1789* (GF-FLAMMARION, 1979).

the Constitution followed the lines preferred among reformists at that time: the creation of a French constitutional monarchy, although lengthy discussions took place on the controversy about the extent of power to be granted to the King of France in such a system.¹²

India and Pakistan both initiated a process of making constitutions through assemblies. The Indian Constitution was drafted by a Constituent Assembly (308 members), elected by the elected members of the provincial assemblies,¹³ which met for the first time on December 9, 1946. In the August 14, 1947 meeting, a proposal for forming various committees was presented. On August 29, 1947, a Drafting Committee was appointed, with Dr. Ambedkar as the Chairman (along with six other members). A Draft Constitution was prepared by the Committee and submitted to the Assembly on November 4, 1947. After many deliberations and some modifications, the members of the Assembly signed two copies of the Constitution (one each in Hindi and English) on November 26, 1949, which became the law of all the Indian lands.¹⁴

Pakistan, on the other hand, formed its first Constituent Assembly under the Independence Act, 1947 and entrusted it with two separate functions: to frame a constitution, and to operate as a Federal Legislative Assembly (or Parliament) until that Constitution came into effect. The first big step in framing the constitution was taken on March 12, 1949 when the Constituent Assembly passed a resolution on the "Aims and Objectives of the Constitution" (popularly known as the Objectives Resolution), enumerating the ideals on which the future Constitution had to be formulated. The Assembly also appointed, on the same date, a Basic Principles Committee (BPC) to work out the principles on which the Constitution was to be drafted. The BPC appointed a steering sub-committee to devise the scope, functions and procedure of the committee. Three sub-committees were assigned the task to advise the steering committee on three different matters: federal and provincial areas of jurisdiction and distribution of powers between the centre and the provinces; franchise; and judiciary. While the two latter subcommittees failed to finish their work, the first one submitted its report to the BPC on July 11, 1950. The BPC then submitted an interim report to the Constituent Assembly on September 28, 1950, which was not only considered inconclusive, but also subjected to severe criticism on different counts. Its consideration was therefore postponed.

A second draft of the BPC was presented to the Constituent Assembly on December 22, 1952 by the then Prime Minister, Khawaja Nazimuddin, which also became a centre of controversy. However, the ensuing deadlock was broken when on October 7, 1953, Nazimuddin's successor, Mohammad Ali Bogra presented his package (popularly known as the Bogra Formula), which was approved by the Assembly, but before it could be written down in the form of a constitution, on October 24, 1954, the Constituent Assembly was dissolved by the then Governor General, Ghulam Muhammad. On May 25, 1955, a second Constituent Assembly was elected indirectly through the electoral college of the provincial assemblies, following a federal court's decision that the Governor General who had been issuing orders in the absence of the Assembly could not act as the legislature.

On February 29, 1956, this second Constituent Assembly adopted the Constitution, although based on many arbitrarily made compromises.¹⁵ Thus after nine years of continuous

¹² See LES CONSTITUTIONS DE FRANCE DEPUIS 1789, *supra* note 11.

¹³ It included renowned figures such as Jawaharlal Nehru, C. Rajagopalachari, Rajendra Prasad, Sardar Ballabhbhai Patel, Maulana Abul Kalam Azad and Shyam Prasad Mukherjee, and also more than 30 members of the scheduled classes.

¹⁴ The Assembly met in sessions open to the public for 166 days, spread over a period of 2 years, 11 months and 18 days, before adopting the Constitution. See also generally, M. P. Jain, INDIAN CONSTITUTIONAL LAW 5-6 (N.M. Tripathi Bombay, 1987).

¹⁵ See for detailed discussions, Syed Jaffar Ahmed, *Overview of the Constitution of Pakistan*, BRIEFING PAPER NO. 17, 10-11 (Pakistan Institute of Legislative Development and Transparency, August 2004).

discussions Pakistan finally obtained a constitution, which proclaimed the country to be an Islamic Republic. The Constitution came into force on March 23, 1956.

Other unique examples of constitution making abound, but due to the space constraints of this paper, they cannot be examined. The only possible general comment is that the modes of participation of people in making such constitutions and the approach of each country vary considerably. There is no one model appropriate to all nations. Nonetheless, one point seemingly common to all, is that constitution-making still confronts the famous problem posed by Alexander Hamilton in 1787, of whether “societies of men are really capable or not of establishing good government from reflection or choice, or whether they are forever destined to depend for their political constitutions on accident and force.”¹⁶ Certainly, the contemporary makers and drafters of “new” constitutions do not seek to ignore the entire tradition: constitutions still remain higher law; specify the institutions of governance; define the rights, duties, and relationships of state and citizens; and establish the identity of the nation-state. Onto this traditional foundation, however, they seek to build new practices, and, as witnessed in the latter part of the 20th Century, make massive efforts to involve the public before, during, and after the text is finalized.¹⁷

The bottom line of the above discussion is that constitution-making (in broad sense, also law-making) must take place within certain parameters. Also, there must be approved methods for constitutions to be changed. In particular, the basic framework of a constitution, which is the most important organic document of a nation laying out the powers of the different branches as well as the limits on governmental authority, should not be easily changed because of the wishes of a transient majority. It should require the consent of the governed expressed in a clear and unambiguous manner. How the constitution is made as well as what it includes are important for the legitimacy of a new constitution and the sustainability of constitutionalism.

2.3 Managing Conflict and Ensuring Participation

The second half of the 20th Century has witnessed many nations that were deeply divided, often to the point of violence. Conflicts over the identities, powers, and rights of groups became quasi-endemic and since such conflicts have the potential of reproducing themselves in the form of new identities and claims, are likely to be a permanent feature of the 21st Century polities. As such, Alexander Hamilton’s problem posed above, even now, remains central to prospects for a peaceful and democratic world. Proof of our capacity to live together and to share in good government is ever more urgently needed, but requires plenty of creative thinking. Constitution making is now, indeed, also an exercise to transform conflict into sustainable peace. Certainly, the nature of many modern conflicts makes a final resolution very difficult, but compromising for living together even within major disagreements can and has to be the goal. Traditional constitution making that is a conclusion to conflict and a codification of a settlement that intends to create permanence and stability now threatens rather than comforts citizens. Citizens now seek assurances that such an act will not freeze the present distribution of power over the long term, nor preclude the possibility of new participants and different outcomes.

¹⁶ THE FEDERALIST PAPERS No. 1. (1787–1788).

¹⁷ Such efforts have included, inter alia, prior agreement on broad principles as a first phase of constitution making; an interim constitution to create space for longer term democratic deliberation; civic education and media campaigns; the creation and guarantee of channels of communication, right down to local discussion forums; elections for constitution-making assemblies; open drafting committees aspiring to transparency in decision making; and approval by various combinations of representative legislatures, courts, and referendums.

But to imagine a constitutional settlement, under which diverse and disagreeing groups can live, while continuing to engage in debate about that settlement itself is a challenging proposition. The tension between the security and stability offered by the traditional ideal of constitutionalism and the flexibility called for by new circumstances is what places process at the heart of new constitutionalism. A permanently open process must itself satisfy qualitative standards that were previously applied only to the outcome of constitution making. Indeed, in past thinking, a constitution was considered a contract, negotiated by appropriate representatives, concluded, signed, and observed. In contrast, today's constitution is a conversation, amongst all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable. Focus is on sustainability, not on stability. The new constitutionalism is dynamic, not static.

It is in this environment of conversational and multi-level constitutionalism, conflict management and expected dynamism that the issue of a right to participate in making a constitution arises. The idea is disliked by many who consider that only elites in modern societies possess the moderation, expertise, negotiating skills, ability to maintain confidentiality, and above all, rational incentives to compromise so as to maintain power that make for effective constitution making. But the elite-made constitution, according to those who support the new paradigm will lack the crucial cultural element of legitimacy, because the process, not just the final text, will be seen as flawed. Preempting such types of criticisms, for instance, both South Africa and Rwanda,¹⁸ while making their own constitutions, sought out public opinion through a variety of channels, used media imaginatively and devised materials to make constitutional issues accessible to their populations in multiple languages, regardless of literacy levels.

To sum up, a democratic constitution is no longer simply the one that establishes democratic governance. It is also a constitution, which deals with abuse of power, conflict resolution, nationalism, guarantees individual and group rights in a cosmopolitan democracy, and most importantly, is made through a democratic participatory process. A moral claim to participation, according to the norms of democracy, appears inherent, based on the belief that without the general sense of "ownership" that comes from sharing authorship, the public will not understand, respect, support, and live within the constraints of constitutional government.

2.4 Seeking Consensus on Strategic Issues

Curiously, the right to bear arms deriving from the US constitution, even now, remains a very touchy matter for Americans and continues to incite regular debates, criticisms, observation and controversies. In a similar vein, the "scarf" issue, every now and then, generates roaring debates in Turkey or France, the caste issue frequently bewilders South Asians and the tribal twists remain ominously common to all political discussions in Africa. Indeed, there is a huge

¹⁸ South Africa, for example, had elected a parliament that acted as the Constitutional Assembly (which Nepal has also done). On the other hand, Rwanda had elected a legislative assembly that itself then elected a Constitutional Commission. See for limited discussions, Ugo Mattei, *Patterns of African Constitution in the Making*, in CARDOZO LAW BULLETIN, (1999). It may be further noted that according to Oforu-Amaah (another scholar, in the constitutional law area), new ways were introduced for Africans to rule Africans (the notion of self-government). This was based on the spirit of nationalism that swept the continent, stemming from the pro-independence movements of the 1940s and 1950s. Oforu-Amaah further notes, that although many of these states gained independence at the height of agitation against the foreign colonial power, many of the laws that were based on the legal regime introduced by the colonial power were continued in full force and effect. Also, in the French-speaking countries, the various constitutions enacted at the time of independence provided that the laws and regulations then in force were to continue until amended or repealed, unless such laws were directly in contravention with the spirit of specific provisions in the constitution. See W. P. Oforu-Amaah, REFORMING BUSINESS-RELATED LAWS TO PROMOTE PRIVATE SECTOR DEVELOPMENT, 5-6 (World Bank, 2000).

variance in the strategic priority of countries. Such variance depends on the country's history, location, topography, the ethnic, linguistic and religious diversity and so forth. Issues related to geography, inclusiveness, or natural resources are, broadly speaking, some of the examples where one may notice variance and possibilities for strategic choices. An island nation, for instance, does not need to be concerned with territorial or border issues as much as a landlocked or contiguous nation. A primarily homogenous country does not need to spend time and energy in dealing with the issues related to the management of a complex ethnic mosaic, as opposed to heterogeneous countries with myriad ethnic groups, such as Nepal (with conflicting aspirations and diverse cultures), or with clearly polarized ethnic or religious groups, such as Rwanda, Burundi or Lebanon.¹⁹

A particular economic system may also be a strategic priority for many countries. Indeed, at one point, the USSR Constitution (1977) referred to a centrally planned economy as the foundation of the economic system based on socialist ownership of the means of production in the form of state property (belonging to all the people), and collective farm-and-co-operative property. Influenced by, and emulating from the Soviet political system, similar choices were constitutionally made by many other nations.²⁰

Directly linked with the functioning of any economic system, the use of natural resources may also become strategic and may need to be adequately covered. Countries may need to devise a consensus-based, clear and pragmatic approach to deal with their natural resources.²¹ In that context, clarifications would be warranted to ensure that it is an obligation of the State to protect these resources, to exploit them rationally, to ensure their reproduction and to improve the environment in which people will live.

In summing up, a functional and pragmatic mechanism to deal with all major areas and concerns that are strategically important for a country needs to be devised to ensure that any issues can be unambiguously and carefully addressed in times of need.

2.5 Ensuring a Balance of Power

Constitution making is foremost about the distribution of power. Unsurprisingly, the idealism of the innovations must be tempered with realism about who is really in charge.²² In that context, for

¹⁹ See also generally, Nicole B. Herther-Spiro, *Can Ethnic Federalism Prevent "Recourse To Rebellion"? A Comparative Analysis Of The Ethiopian And Iraqi Constitutional Structures*, 21 EMORY INT'L L. REV. 321.

²⁰ It may be appropriate to recall that after the collapse of the Soviet Union, fifteen former Soviet Republics emerged as newly-independent countries. Most of them set about the task of creating new constitutions and new forms of government. But many of these new constitutions are still influenced by their Soviet predecessors. Even though they are free from Soviet domination, their constitutions are not entirely free of Soviet influences. See Russell L. Weaver & John C. Knechtle, *Constitution Drafting In The Former Soviet Union: The Kyrgyzstan And Belarus Constitutions*, 12 WIS. INT'L L.J., 29 (Fall 1993).

²¹ It may be worth acknowledging that Nepal's 1990 Constitution intelligently dealt with the important issue of natural resources in the context of its famous Article 126. Indeed, the laws to be made in connection with the ratification of, accession to, acceptance of or approval of treaties or agreements to which the Nepal or its Government was to become a party, and which related to selected subjects of peace and friendship, defense and strategic alliance, boundaries of the country, and natural resources and the distribution of their uses, required a majority of two-thirds of the members present at a joint sitting of both Houses of the Parliament. Although the said Constitution also provided for such types of treaties and agreements in specific situations (when they were of an ordinary nature, i.e. not affecting the nation extensively, seriously, or in the long term), to be ratified by a simple majority, it clearly recognized the extreme importance of the issue, and offered possibilities for an informed yet pragmatic solution. See Constitution Of Kingdom Of Nepal (1990), Art. 126.

²² The fact that the successive constitutions in Rwanda failed to ensure a pragmatic balance of power between the Hutus (84%) and the Tutsis (15%) entailed protracted internal conflicts. Political turmoil over power sharing and repeated outbreaks of ethnic violence have marked this country's history, triggering the displacement of tens of thousands of Tutsis to neighboring countries starting in the 1950s through the early 1990s. In 1990, the Rwandan Patriotic Front started a civil war which culminated in 1994 with a genocide of an unprecedented scale. Records confirm that between April and June of that year, 800,000 Tutsis and moderate Hutus were killed and about 2 million people fled to neighboring countries. In July 1994, following the Arusha Accords, a Transitional Government of National Unity was formed. A new Constitution was enacted in 2003. The first multi-party presidential and parliamentary elections were held in August and September 2003. The new constitution instituted a balance of political power between Hutus and Tutsis. As per the design, no party, for instance, can hold more than half the seats in the Parliament (collectively arts. 9, 54, 76, 77 and 82), and the Constitution outlaws the incitement of ethnic hatred (art 33). See Constitution Of Rwanda 2003.

instance, in both South Africa and Rwanda, political elites initiated and facilitated the process of constitutional change, provided the personnel for the key institutions and framed the educational campaigns. In contrast, official ambivalence and continued attempts to block the process in Kenya revealed how a participatory process initiated from perceived political necessity can equally threaten the elites with loss of control and incur their resistance. In the sphere of power sharing with sub-regions, the Republic of South Africa and Russia, provide fascinating examples. The sub-national constitutions in these two countries play a significant role in creating and maintaining a balance of power among federated states, although some complexities have arisen, for instance, in the case of the Chechen Republic.

2.5.1 Balance of Power in General Federalism

Creating the right balance of power in any federal system is delicate and a challenging endeavor. Every state that implements federalism must determine how the autonomy granted to the states or regions will be balanced against the authority of the central government. Many of the countries that adopt federal systems do so in the hope that it will provide for both a unified central government and real control at the local level. One theory of federalism argues that the system prevents abusive government by decentralizing power. By vesting some power in regional governments, federalism reduces the possibility for the establishment of authoritarian dictatorships by central governments. A preference for federalism among states that have previously experienced strong and oppressive central regimes can be understood in the context of this theory: a federal system might help to prevent oppressive dictators from, once again, monopolizing the power of the state to the detriment of the people.

Federalism, as a system of government, is in place in many countries across the globe including, *inter alia*, Switzerland, United Arab Emirates, Canada, Malaysia, Nigeria, and Venezuela.

2.5.2 Balance of Power through Ethnic Federalism

A theory that federalism has the potential to prevent ethnic conflict has developed in recent years. Ethnic (or identity) based federalism, as an idea, has been most appealing in the post-colonial context, especially in Africa. As a system of government, it attempts to resolve one of the problems that the colonial history created, by granting autonomy to groups whose culture and identity have long been suppressed in the "unity" of modern nation-states. A nation-state adopting an ethnic-based federal system gives the "sub-nations" within its borders some degree of self-governance as regions (or states in a federal system). Ethnic federalism is one method by which a country may attempt to manage the interests of multiple ethnic groups within its borders and prevent violent ethnic conflict or attempts at secession. A leading scholar has argued that there is no multi-cultural state in which culture is not a part of the political reality.²³ Indeed a basic assumption of the theory of identity-based federalism is that ethnicity or religious identity cannot be removed from the political sphere. As such, it has to be managed.

Federalism based on ethnicity, or the territorial subdivision of a country in a way that divides political power among conflicting groups has been implemented in many different

²³ James Tully notes: "[T]he diverse ways in which citizens think about, speak, act and relate to others in participating in a constitutional association ... are always to some extent the expression of their different cultures. A constitution can seek to impose one cultural practice, one way of rule following, or it can recognize a diversity of cultural ways of being a citizen, but it cannot eliminate, overcome or transcend this cultural dimension of politics." See James Tully, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 5-6 (1995).

countries, including Ethiopia (starting in 1994) and most recently in Iraq. Ethiopia's experience integrating federalism, ethnic identity and group rights into a constitutional document serves as a unique example of identity-based federalism. It involves not only the structure of the state, but a constitutional mandate to give self-rule to Ethiopia's many nations, nationalities, and peoples.²⁴ The Ethiopian Constitution establishes regional states along linguistic lines, which is the primary way in which individuals identify themselves in that country. Iraq, where identity is defined by both ethnicity and religion, adopted a federal model as a way to band together a religiously and ethnically diverse country marked by deep divisions. However, Iraq's Constitution delayed the formation of regions until later action by the local units of government. Moreover, it is noteworthy that the Iraq Constitution specifically recognizes the Kurdish state in the north.²⁵ It is likely that the rest of the country will, as noted by a scholar, eventually divide into a handful of regions aligned along various ethnic and religious lines, probably including an Arab Shia-dominated State in the south and an Arab Sunni State in the center of the country.²⁶

The goal of ethnic federalism is, without doubt, to maintain a unified country in the face of the prevailing mistrust due to a history of oppression and abuse. Federalism satisfies the demands of minority or isolated groups that have previously not been allowed a fair share of power. It is therefore important to note that ethnic-based federalism succeeds only insofar as it achieves a right balance in power-sharing between regions (themselves divided into identity-based sub-regions) and the central government. Decentralization of power to regional governments can easily be undermined, despite constitutional grants of some power, while extensive regional autonomy can also cripple the unity of a country by rendering the central government completely powerless. Therefore, extreme care should be taken in the granting of political rights to individuals and groups in the country, in the preservation of the rights of minorities (both minorities within the country as a whole and the rights of those who constitute a minority in a particular region) and in the balance of fiscal power. Otherwise, the goals of ethnic federalism can easily be defeated. Finally, care should also be given to examine the question of popular legitimacy in an ethnic federal system with reference to national elections and political participation.²⁷

2.5.3 Creating a Balance through Power Sharing Amongst Religious Groups

Seeking a religious balance is another challenging issue in constitution making. Not many countries have excelled in this endeavor. For instance, in an attempt to maintain equality between Christians and Muslims in 1926, the Lebanese Constitution mandated the distribution of offices on the basis of confessionalism as an interim measure. Until such time as the Chamber of Deputies (the number and the method of their election being determined by the electoral laws in effect) enacts new electoral laws on a non-confessional basis, the distribution of seats was to be done according to the following principles: (a) equal representation between Christians and Muslims; (b) proportional representation among the confessional groups within each religious community; and (c) proportional representation among geographic regions.²⁸

²⁴ See, Constitution Of Ethiopia, December 1994, Art. 47.

²⁵ See, Constitution Of Iraq, October 2005, Art. 113.

²⁶ Iraq is approximately 97% Muslim: 60% Shia Arabs, 20% Sunni Arabs, and 17% Muslim Kurds; the remaining 3% consists of Sunni Turkmen, Christians, and other minorities. See Peter W. Galbraith, *The Case for Dividing Iraq*, *Time*, Nov. 13, 2006, at 28; *Editorial, Partitioning Iraq*, DALLAS MORNING NEWS, Feb. 4, 2007.

²⁷ See generally, Nicole B. Herther-Spiro, *supra* note 19.

²⁸ See, Constitution Of Lebanon, 1926, Art. 24; See also Antoine A. Khair, Liban, in *Recueil des Constitutions des Pays Arabes* (Bruylant 2000).

Following lengthy negotiations between the Shiite, Sunni, and Maronite leaderships, a National Pact (an arrangement that laid the foundation for Lebanon as a multi-confessional state) was adopted in 1943. The key points of the National Pact included that: (i) the Maronites would not seek foreign intervention and accept Lebanon as an "Arab" affiliated country, instead of a "Western" one; (ii) the Muslims (Shia and Sunnis) would abandon their aspirations to unite with Syria; (iii) the President of the Republic would always be a Maronite; (iv) the Prime Minister would always be a Sunni, (v) the President of the National Assembly would always be a Shia; and (vi) the Deputy Speaker of the Parliament would always be a Greek Orthodox.²⁹ Originally the Parliament members were in a ratio of 6:5 in favor of Christians to Muslims, which ratio was changed to 50:50 by the Taif Accord in 1989, thus reducing the power of the Maronite President.³⁰

It was nothing but the religious equation at the time that laid the foundation of Lebanon as a multi-confessional state. After the establishment of this constitutional agreement, the country entered into a protracted civil war, was successively invaded and manipulated by Israel and Syria, and the country recorded a demographic shift to the Muslim majority. Therefore, following negotiations between the Shiite, Sunni, and Maronite leaderships, a National Accord (commonly referred to as the Taif Accord) was signed and ratified on October 22 and November 4, 1989 respectively.³¹ Negotiated in Saudi Arabia, the Taif Accord was an agreement reached to provide the basis for ending the civil war and the return to political normalcy in Lebanon. It politically accommodated the demographic shift to a Muslim majority, it reasserted Lebanese authority in South Lebanon (then occupied by Israel), and legitimized the Syrian occupation of Lebanon. As such, it was also an instrument which *de facto* amended the Constitution.

Political de-confessionalism actually became crucial for the stability of Lebanon. It, therefore became the principal national objective of a National Reconciliation Charter (also issued in 1989) agreed to by Lebanese Muslim and Christian legislators under Arab auspices which stipulated, among other things, that militias (Lebanese and foreign) would be disarmed and disbanded. In that context, the Parliament (elected on the basis of equal sharing by Muslims and Christians) was asked to take appropriate measures to achieve this objective and to form a national commission headed by the President. Such a commission was formed and mandated to recommend to the Parliament and to the Council of Ministers, a series of measures to eliminate confessionalism and to implement a transitional plan. During the transitional stage, it was agreed, *inter alia*, that (i) the rule of confessional representation would be abolished and qualification and specialization be adopted in public offices, in the judiciary, in the military and security establishments, in public and mixed agencies and in independent authorities as may be required to achieve National Reconciliation (except for some positions at the apex level of the hierarchy which would still be equally shared by Christians and Muslims with no position being confined to either sect); and (ii) the need for specifying religion and sect in the citizen's identity card would be abolished.

The full implementation of the above de-confessionalism arrangements has not yet been possible, particularly due to the continual unfolding of events in the region, but they still remain valid in paper.

²⁹ See The National Pact, 1943.

³⁰ See *supra* note 31.

³¹ See Khair, *supra* note 28, p. 252.

2.5.4 Balance of Power through Minority Protection

There are also cases of minority protection aimed at creating adequate balances amongst population groups. For instance, the single-chamber National Assembly of the Republic of Mauritius comprises up to 70 members, 62 of whom are elected (60 from 20 three-member constituencies on the island of Mauritius plus two from the single constituency of Rodrigues) and up to eight additional seats are allocated to 'best losers' to ensure representation of a variety of ethnic groups.³²

2.6 Accounting for Geopolitics with a Focus on Nation Building

All countries do not necessarily have the same history and similar existence-related problems. Any constitution (which, first and foremost, is a political document) purporting to be sustainable, needs to take into account all historical and existence-related factors to allow the country to achieve its goals, lest the whole exercise may be futile and invite further political turmoil. In addition to the general political philosophy, the constitution should focus on nation building: making a fully integrated country and taking all necessary precautionary measures to protect it against all eventualities of disintegration.³³

Lebanon again, for instance, provides a vivid example. Through the 1989 National Reconciliation Charter, it attempts to deal with the dual problem of its occupation by Israel as well as its relations with Syria. With regard to the liberation of Lebanon from Israeli occupation, the Charter makes reference to regaining authority of the Lebanese State up to internationally recognized Lebanese borders and requires the State to: (a) pursue the implementation of the UN Resolution No. 425 and all UN Security Council Resolutions promulgating the total elimination of the Israeli occupation;³⁴ (b) adhere to the Truce Agreement signed on March 23, 1949; and (c) take measures to liberate all the Lebanese territory from the Israeli occupation, extending the authority of the State over all its land, deploying the Lebanese Army along the internationally recognized Lebanese borders and pursuing the reinforcement of the existence of the International Security Forces in Southern Lebanon so as to ensure the withdrawal of Israel and to allow for the return of law and order to the border zone.³⁵

With regard to the Lebanese-Syrian relations, the Charter emphasizes that neither Lebanon nor Syria will be made a source of threat to the security of the other. It further states that Lebanon will not permit itself to become a passageway or a dwelling to any force, state or organization which aims at undermining its security or the security of Syria, and Syria, keen on preserving the security, independence and unity of Lebanon and concurrence among its people, will not permit any act which may threaten Lebanon's security, sovereignty and independence.³⁶

Although these measures due to frequent changes in political scenarios have not yielded any satisfactory outcome and achieved the purported stability, they are still illustrative of the adaptability of constitutional and legal instruments used in dealing with the geopolitical concerns of a country that is strategically positioned on the world map.

³² See Constitution Of Mauritius 1992, Schedule 1. However, this system has also been criticized by some scholars as "undemocratic, communalistic and an obstacle to nation building and against republican values and Mauritian hood". See Rama Sithanen, *Mauritius: A Critical Appraisal of The Best Loser System* (L'Express, 5 June 2008).

³³ After the genocide, and after arriving to power, the new Tutsi led government decreed that there would be, in Rwanda, neither Tutsis nor Hutus; all will be Rwandese. See William Eng, *Legislative Gazette* (February, 2006).

³⁴ UNSC Res. 425 (19 March 1978).

³⁵ See for detail, Charter of National Reconciliation, Third Principle.

³⁶ See *Id.* Fourth Principle.

2.7 Seeking Justice and Development for All

It is generally assumed that through a holistic constitutionalism and democratic law-making alongside relevant remedial institutions, more chances can be given to people to resort to justice and claim and enjoy more rights in the society, i.e. to assist the development of the people. Development, indeed, is about the emancipation of people from the conditions that impede material and cultural realization and about their empowerment against structures of domination.³⁷ Therefore, in addition to providing a political skeleton, fundamental principles and a framework of government and basic rights of individuals, the overall goal of a constitution is to guarantee justice and the rights related to natural, physical, human, financial, social and political capital, i.e. the overall development of the country.³⁸

But the development-democracy nexus is at best, blurry. From a standpoint of development specifically, of all the elements of governance, democracy is perhaps the most controversial. There are a number of full-fledged democracies in the world with a very low level of economic development (material, physical, infrastructural), as there are many countries with a high level of economic development, which are not democratic at all.³⁹ The relation between democracy and economic growth is also problematic, as is the connection between economic globalization (development) and the protection of social and economic rights (democracy).⁴⁰ Nevertheless one should note that democracy is not designed for efficiency, but for accountability.⁴¹ It is never a finished product; it is always evolving.⁴² As noted by a scholar, "[d]emocracy, with its pluralistic flexibility and its imperative for productively sustaining diverse interests, is the best political foundation for adaptability in societies open to change."⁴³ Also, according to John Rawls, the 20th Century prominent thinker, a state of near justice requires a democratic regime.⁴⁴ This is why democracy becomes a particularly relevant element from a right-based development perspective wherein participatory law-making is critical: participation in deciding about self-determination; autonomy; culture, land; religion; adequate livelihood and suitable environment; and most importantly, in creating and living in an environment of the rule of law. Certainly, some harmonization of the different aspects of the rule of law can always be achieved through the interpretation and broader application of national standards, but its success in full

³⁷ See also, William I. Robinson, *Remapping Development In Light Of Globalization: From A Territorial To A Social Cartography*, in 23 THIRD WORLD QUARTERLY 1068 (2002).

³⁸ See also generally Caroline Moser and Andy Norton, TO CLAIM OUR RIGHTS, LIVELIHOODS, SECURITY, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT, 20 (ODI 2001).

³⁹ For an interesting discussion, see B. K. Nehru, *Western Democracy and the Third World*, in 1 THIRD WORLD QUARTERLY (1979) at 53-70 (and in particular the example contrasting China and India at 64). It is interesting to note that Amartya Sen had challenged this idea of a core of so-called "Asian Values" that are in some way opposed to civil and political rights (often invoked, together with high growth rates in parts of East Asia during the 1980s and the 1990s, along with China's record of development and poverty reduction, as evidence of the positive impact of authoritarianism on economic growth). Actually, the view was also reflected at the World Conference on Human Rights in Vienna in 1993, where some countries suggested that democracy and civil and political rights can mitigate or hamper economic growth and development. But Amartya Sen challenged this thesis countering that selective and anecdotal evidence from East Asia is balanced by several contrary evidence from other regions.

⁴⁰ See Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries*, 4 YALE HUMAN RIGHTS & DEVELOPMENT L. J. 31 (2001).

⁴¹ Melvin I. Urofsky, *Introduction: The Root Principles Of Democracy*, Democracy Papers, US Department of State, [<http://usinfo.state.gov/products/pubs/democracy/homepage>] (as of July 2, 2003).

⁴² *Id.*

⁴³ See for instance, Louis W. Goodman, *Democracy, Sovereignty and Intervention*, in 9 AM. U. J. INT'L L. & POL'Y 29.

⁴⁴ See the Chapter by John Rawls on Civil Disobedience, in Joel Feinberg And Hyman Gross, PHILOSOPHY OF LAW 105 (Wadsworth Publishing Co., 1991).

implementation depends on the social and political characteristics of the state and the specific areas in question.⁴⁵ As such, it remains a challenge for which the role of courts becomes critical.

Impartial courts and tribunals are essential to ensure recourse to justice. Courts should aim at granting all its beneficiaries the same status, and providing them opportunity to participate in law-making on equal footing (the obstacles being of economic, political and technical nature), thus granting them real justice. There cannot be empowerment without available remedies: remedies for all cases can only be conceived through a court system with a clear mandate. The challenge is thus in managing, without ambivalence, all jurisdictional issues, regardless of whether the courts have two, three or multiple tiers, and ensuring easy access to justice.⁴⁶

2.8 Observing Modern Concepts

If including the traditional and imperative norms of a nation's governance is crucial, the drafting of a constitution will certainly not be complete if it were to ignore emerging modern concepts. In the international arena, successful economic and social development has been declared to go hand in hand with democratization.⁴⁷ Similarly, around the world, many international instruments regarding marginalized groups (indigenous peoples; the poor; racial, ethnic, and language identity groups; and women that cut across all social categories) have demanded inclusion, political participation, and power sharing. These demands need to be given due consideration.

However, for most mainstream scholars, fundamental human rights have remained one of the most serious concerns and have been subjected to a myriad of studies. Referring to a study which investigated 139 constitutions, an eminent jurist made a summation of rights to procedural safeguards for persons in the criminal justice process.⁴⁸ The analysis of the study has revealed an overwhelming affirmation of such core rights as the right to life, liberty, and security of the person (51 countries); the right to recognition before the law and equal protection of the laws (108 countries); the right to be free from arbitrary detentions (119 countries); the right to be free from torture and other cruel, inhuman or degrading treatment (81 countries); the right to be presumed innocent (67 countries); the right to a fair trial (38 countries); the right to assistance of counsel (65 countries); the right to a speedy trial (43 countries); the right to an appeal (46 countries); the right to be protected from double jeopardy (51 countries); and the protection against ex post facto laws (96 countries). If the right to a fair trial (39 countries) is

⁴⁵ See also Achilles Skodas, *Hegemonic custom*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, 332 (Michael Byers and Georg Nolte, Eds.), (Cambridge University Press 2003). It is important to also add that the public's participation in law making had already been stressed several decades ago as being a significant concern, especially in connection with issues concerning the environment. The principle of public participation had been reiterated by a variety of international organizations and incorporated in a number of international instruments. See, for instance, Roda Mushkat, *Public Participation in Environmental Law Making: A Comment on the International Legal Framework and the Asia-Pacific Perspective*, CHINESE JIL (2002), 185. Indeed as early as 1982, the World Charter for Nature (UNGA Res. 37/17 (Annex), UN Doc A/RES/37/51, reprinted in 22 ILM (1982) stipulated the following: "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation". See Principle 23. The above principle was thereafter restated in several declarations, leading up to its most pronounced affirmation in the 1992 Rio Declaration on Environment and Development (UN Doc A/CONF.151/26, reprinted in 31 ILM, 1992, 874) which stated the following:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided" See *Principle 10*.

⁴⁶ For an interesting discussion on the jurisprudential aspects of justice with a focus on peace and reconciliation, See Dr. Ananda M. Bhattarai, *Transitional Justice for the Promotion of Peace and Democracy in Nepal*, 1 NJA LAW JOURNAL 23-47 (2007).

⁴⁷ As in the 1993 Vienna Declaration of the United Nations that now frames development and human rights policy.

⁴⁸ See for detail M. Cherif Bassiouni, *Human Rights In The Context Of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections In National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 292.

considered in conjunction with the right to a defense [45 countries], there exists a strong affirmation of the right to general fairness in criminal proceedings.⁴⁹

In a similar vein, the relatively high number of constitutions which guarantee the right to notice [51], to counsel of choice [47], to a speedy trial [47], to appeal [51], and to protection against double jeopardy [59] also indicates that there is broad international acceptance of these more concrete aspects of the right to a fair trial.⁵⁰ What is more revealing is the fact that although predating many of the new human rights instruments, most constitutions have already covered and dealt with the protections and guarantees in the required depth and breadth.

2.9 Focusing on Implementation

Writing a constitution is one thing, but implementing it with full force and substantial effect is another. In addition to the creation of relevant institutions, the country will need to adapt its legal framework to facilitate the implementation of the changes introduced by the newly drafted constitution. This aspect has been a challenge for many countries, big or small, as it requires extensive behavioral change, instrumentalism (legislative, regulatory, codes of conduct and so forth), as well it also needs to be managed with care and agility.

3. Sustainable Legal Reform

The issuance of a constitution will, as a consequence, need to be followed by reforming the legal framework. The nature, form and magnitude of such legal reform will largely depend on the form of the constitution itself, but in all cases, improving the domestic legal framework will essentially purport to making the national systems more progressive and in harmony with the changes introduced by the constitution. Such legal reform, regardless of whether the effect is vertical or horizontal, will also need to comply with the principles of accountability in law making and reflect societal behavior and morality.

3.1 Accountable Law-making

History records that formal laws have been made by mankind for five millennia, but the methods different societies have used to make the rules under which they will live have varied enormously, from edicts by divine-kings to majority voting at village meetings. But at all these levels, a large input from the citizenry, either directly or indirectly is always secured. Law-making bodies recognize that they are responsible to their constituents and if they fail to legislate in the people's best interests, they will face questions and even removal from their position. The basic principles attached to the issuance of all democratically created laws include the consent of the governed; the involvement of the people at all levels of law-making; open access to the process of law-making whether through voting, petitioning or filing lawsuits; or through judicial review of statutes, administrative rules and regulations, and executive office actions; and reliance on fundamental principles of government. The key to democratic law making is not the mechanism or even the forum in which it takes place, but as noted already, the sense of accountability vis-à-vis the citizenry and the need to recognize the wishes of the people. Bishwambher Pyakuryal emphatically

⁴⁹ See *Id.*

⁵⁰ *Id.*

notes that the social basis of democracy should be the transformation of social structures and an added sense of individuality and personal freedom.⁵¹

Oliver Wendell Holmes Jr., noted, in the Nineteenth Century, “[t]he substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.”⁵² Consequently, it becomes imperative to look at the origins of legal traditions and the everyday law-making process as part of a historical process. For instance, when English colonists in colonial America put into practice the law-making heritage that they brought with them, they made certain alterations to suit their new environment.⁵³ Such alterations were meant to ensure greater acceptability of the new law, particularly because introducing totally new phenomena in a society requires serious preparatory work and takes a long time to implement. As such, concluding that “a society where one type of legal tradition has prevailed for centuries will not be easily amenable to the philosophy and principles of another legal tradition” will not be incorrect. The transformation will be a very challenging one. But most importantly, whatever the approach, process and scenario may be, the purpose of law remains the most crucial element for consideration, in light of both the beneficiaries’ holding of claims as well as the enforcers’ ability to effectively ensure compliance.

3.2 Morality Based Law

Law’s autonomy from politics depends on the possibility of purposive “normativeness”. Moral autonomy, however, is a more basic claim about the objective value of law’s normative premises. As Western societies shed belief in both objective value and self-legitimizing power, acceptable social hierarchies and institutions were driven by the divorce of private morals and public needs to found the liberal state upon a rule of law which posited the possibility of rationality apart from subjective morality to sustain and re-legitimize power relationships.

Actually, the rule of law was born to contrast with moral indeterminacy. The separation of law and morals gives meaning to the rule of law only if the problem of indeterminacy can be solved. This jurisprudential task is rendered impossible by a double paradox within the rule of law. First, only a lack of clarity disguises law’s inability to resolve the conflicts over the ideal, which gave it birth. The problem of indeterminacy then is replayed within the rule of law. Second, the liberal state, premised on the need to legitimize power relationships finds itself caught between its foundation and its objective. Because the problem of indeterminacy is not resolved by the rule of law, the liberal state is unable to resolve the problem of power legitimization without destroying itself by defeating the premise of objective value. Although their merger will have a profound impact on our collective social vision, the difference between law and morals cannot be maintained.

⁵¹ See for instance, Bishwambher Pyakuryal, *Political Economy, Peace, Democracy and Development*, THE HIMALAYAN TIMES, July 18, 2006.

⁵² The Common Law (1881).

⁵³ The King of England granted charters to individual proprietors and joint stock companies of entrepreneurs for the various colonies affording varying degrees of law-making authority, but all English colonists had law without current charters and colonial statutes. They had their ancient constitution, the largely unwritten law of England known as the “English Common Law,” which prevented government from abusing the rights of Englishmen. Included in this common law was the *Magna Carta* - the charter signed by King John in 1215, which guaranteed due process of law, the protection of property rights, and access to a jury. See generally, Gordon Morris Bakken, *The Creation Of Law In A Democratic Society*, Democracy Papers, US Department of State, [<http://usinfo.state.gov/products/pubs/democracy/dmpaper5.html>] (as of July 2, 2003). But in English speaking Africa, according to some, English law was applied without consideration of its suitability to local conditions. This is not because these systems were necessarily better than traditional African legal systems, but rather because there was a lock-in that occurred, a particular path that prevailed because of the earlier experience with a specific set of institutions. See Sandra Fullerton Joireman, *Inherited Legal System and Effective Rule of Law: Africa and the Colonial Legacy*, J. OF MODERN AFRICAN STUDIES 39, 4 (2001) 577.

Despite the almost universal rejection of pure mechanical formalism, it must be the starting point for any review of the claim that law is autonomous from morals. To begin here is not to encourage tilting at straw men, for the failure of formalism to sustain this separation of law and morals and thereby to solve the problems of indeterminacy and legitimization is replayed in the corresponding failure of the principles, policies and theories. Formalism contrasts facts with values, objective with subjective and ultimately law with morals precisely to permit a determinacy in the legal order which became unavailable in ethics with the disappearance of consensual faith in objective moral truth.⁵⁴ Roscoe Pound described this attempt to fabricate determinacy by separating law and morals: as a stable solution to the problem of power legitimization.⁵⁵

Whether laws are rules, customary behavior patterns or feelings of interactive obligation, the rule of law is a specific communal response to the problem of social indeterminacy. It permits social stability by obfuscating the conflicts between custom and discretion, real and ideal, particular and universal.⁵⁶ This stability is purchased by social preclusion of progress beyond the stability of habitual contradiction. Law does not solve the contradictions that motivated it. Rather it imprisons us within them. Such imprisonment may indeed be preferable to the chaos of social confrontation with the disharmonies within us, whatever the eventual benefits of breakthrough to a communal order. Law however, prevents us from openly confronting that tradeoff by denying society a transformative vision.

In reality, no view of law has successfully resolved the problem of social innovation (development). Willed change remains only a mirage. Jurisprudence, from early formalism to modern Dworkinian legal theory, fails to disguise the disharmonies within law. The rule of law has shielded us from the puzzle within us, between our own needs and fear of others. Our legal constructs have obfuscated the conflicts, which divide us internally and from each other and have protected us from the disillusioned anguish of facing moral indeterminacy. In the process, however, they have imprisoned us (individually and collectively) in a pattern of arbitrary social hierarchies, which seem frozen, yet legitimate.

If it is true that the rule of law was meant to provide legitimacy through its autonomy from subjective morality or arbitrary power, it should seem at the least disturbing that our normative inquiry has landed us to policy arguments about morality and social or economic engineering. It should not be surprising that judicial inquiry into these areas should not produce killer arguments capable of controlling outcomes. Arguments about economics contrast visions of growth and utility maximization with spiritual peace. Ideas of quantity battle with preferences for equal distribution. Most critically, strategies focusing on sharing and trust compete with strategies based on the invisible hand or individual competition and consumption in discussion of either altruistic or individualist economic goals. There seems neither consensus nor revelation as to the more efficacious strategy. If judges seek norms in economic discourse they will only find the chaos of indeterminate polar arguments (indeterminacy also inherent to arguments about social engineering). Their reliance on it replaces the fortuity of legislative interest group representation with the whimsical choice of argumentative fragments by judges.

⁵⁴ See D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARVARD LAW REVIEW (June 1976) 1728-1731; also D. Kennedy, *Legal Formality*, 2 JOURNAL OF LEGAL STUDIES 351 (1973).

⁵⁵ See Roscoe Pound, *The Theory of Judicial Decision*, 36 HARVARD LAW REVIEW 641 (1923) 658.

⁵⁶ At a minimum, the law, as noted by a scholar, is for use as a tool, an instrument, a means for guiding action and giving effect to policies seeking common, or at least compatible, goals. See for instance, William W. Bishop, Jr., *The Role Of International Law In A Peaceful World*, in PUBLIC INTERNATIONAL LAW AND THE FUTURE WORLD ORDER 1-4 (Joseph Jude Norton ed, Rothman and Co, 1987).

The debate about morality and its relevance in a specific society is a complex one and beyond the scope of this paper. However, in which ever way it is conducted and whatever the conclusion it leads to, it is quite safe to contend that laws have a tendency of being sustainable when they mirror morality.⁵⁷

4. Implementing Change: Myths versus Reality

As already noted, once a constitution is agreed to, implementation commences. In addition to implementing the new constitution after it is prepared, there may be a need to conceive, design or issue other derivative legislations (both with vertical and horizontal effects) to create new obligations or devise new norms of behavior. At that point too, as important, the State should remain careful in philosophically approaching the subject of the reform and managing the substance of the reform, as envisaged, with the use of appropriate techniques and tools.

Indeed, a holistic account of law as a conceptual and factual structure engenders a complex theory of change. If law as a conceptual structure is understood to result from and influence action, a theory of change (or development) must account for the relationship between changes in legal theory and social changes. In other words, the development of law itself must be linked to the relationship between law and social change.⁵⁸ Such an exercise should be able to deal with the issue of instrumentalism as well as to create complementarities between law and development by demystifying the concepts and clarifying the illusions and misunderstandings inherent therein.

4.1 Instrumentalism

Legal change literature has focused extensively on the problem of legal instrumentality. This inquiry has taken two forms. Firstly, following Max Weber's lead, theorists have attempted to establish certain necessary legal conditions to economic development. By setting up legal institutions in the Western mould, economic change may be permitted, if not actually facilitated.⁵⁹ This literature was hampered by the frustrating reversibility of legal doctrine and economic result. Weber had recognized the "problem of England", an industrial society achieved with an anarchically feudal system of property laws. Economic development seemed compatible either with a legal structure freeing individual energies or with one structuring interactions.⁶⁰

Secondly, instrumentalism was taken to be the ability to use law to bring about discretionary changes in the customary social structure: translating discretion into custom. Instrumentality will vary inversely with law's differentiation from custom. The more autonomous law is from society, the more difficult it will be to implement change. This conclusion can actually

⁵⁷ On how and why men abide by laws, See R. M. Maciver, *THE WEB OF GOVERNMENT*, (Macmillan Publishing, 1965), (in particular the chapter on the Firmament of Law, at 47-61). Also, Robespierre's famous saying that the law must always offer, to the people, the purest model of justice and reason (*Il faut que la loi présente toujours au peuple le modèle le plus pur de la justice et de la raison*), still remains perfectly valid and meaningful. See, Robespierre, *Discours à l'Assemblée*, 30 mai 1791.

⁵⁸ Indeed, to borrow from Fuller, "law orders social life by subjecting human conduct to the governance of rules" (L.L. Fuller *THE MORALITY OF LAW* (Yale University Press, New Haven Press 1969) 96. But Fuller also notes "law is not just about order, it is about the establishment of a just order." (L.L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart* (1957-58) 71 *HARVARD LAW REVIEW*, at 630. Indeed, law formal or informal, hard or soft, high or low, purports to set standards and to essentially provide the framework for the fair resolution of disputes.

⁵⁹ This conclusion derives from a superficial reading of James Hurst. See James Hurst, *LAW AND THE CONDITIONS OF FREEDOM IN THE 19TH CENTURY UNITED STATES* (Madison, The University of Wisconsin Press, 1956).

⁶⁰ See Ahmed Jehani et al, *A PERSPECTIVE ON GLOBALIZATION, INTERNATIONAL JUSTICE AND RIGHT TO DEVELOPMENT. CONTROVERSIES AND ANACHRONISMS* 49-54 (SADLC, 2003).

be drawn from the factors isolated by thinkers like Karts, Friedman and Evans as responsible for resistance to innovation.

Moreover, for Karts, instrumentality depends on the disaffection of the middle level institutions and classes with the old order, which protects the upper classes and leaves the lower classes insecure. By focusing on the strata, which must be mobilized, rather than on the whole society, Karts demonstrated that implementation would be easier if those to be mobilized favored the change. Belief in the possibility of instrumental law given an appropriate connection between legal institutions and the social order leads to faith in the possibility of meaningful reform within the legal structure. If institutions can be developed which are responsive to social needs, meaningful change can be brought about.

Law exists both "within" and "without" society. A theory of change must therefore account not only for the differentiation of law and society but also for their union. It must explain innovation as well as implementation. Because law springs from social life, our vision of the ideal is limited by its institutional manifestations. Tinkering with institutions may bring them into line with some ideal only if we can perceive that ideal independently. While implementation may be facilitated by the union of law and society, innovation may be stifled. We may perceive injustice all around us and be able to alter social relations, but we have no criteria for determining what is just and what is unjust. Law will not provide us with normative guidelines, which can determine outcomes.

Legal reasoning leaves us confronted with the same substantive conflict that motivated it. Reformers then blind us to the nature of the social dilemma by attempting to repair and make more attractive a structure that blocks our path to innovative change. The contentment of belief in mediation by law must be exposed as hypocritical if change is to be "real". Anything less only supports our misguided faith. It may be argued that this innovation has its origin in the gap between current law and current custom.⁶¹ But this view misconceives the nature of meaningful innovation.

The process of the law's response to changing social patterns is indeed one of change: the drive shaft of doctrinal change in law. The conceptual legal structure responds to divergences between legal explanation and facts by the creation of a new legal fiction. This dialectic process of response to diverging theory and reality explains the expansion of legal concepts to cover an ever-greater area of social life. This merely subjects new situations to old conceptual patterns. It extends oppressive conceptual structures but it does not permit innovation outside those structures or insight into the ideal.

The program of reform is to wrest control of the process from those exercising political will and give it to the community. Implementation would be facilitated by the fusion of law and society. The people would inherit the innovative powers of their oppressors. This is often seen to be achievable by demystifying the rule of law or exposing it as an instrument of political will.⁶² However, this view only sees law as a way of arranging social life, not as a parallel arrangement of ideas. These reformers fail because they acknowledge law's differentiation but not its union with society. Innovation with discretion is nothing more than the inverse of the oppression of custom. When the mediator is eliminated as was attempted, for instance in Soviet Russia and in

61 See generally for instance, Paul Bahaman, *THE DIFFERING REALMS OF LAW, LAW AND WARFARE* (The Natural History Press, New York, 1967).

62 Scholars have also noted that an instrumental view of law can be fraught with danger. When the state is under control of authoritarians, law can become an instrument of furthering authoritarian goals. See generally, for instance, Barrister Tureen Afroz, *Why our laws have failed to promote development?* THE DAILY STAR, No 125 (January 18, 2004).

the People's Republic of China, the result was an oscillation between political terror and popular terror both, however, unquestionably under a system of rule of law. Neither could innovate. As such, an approach to law which focuses only on its ability to translate discretion into custom is no more useful than the reciprocal partial explanation of law as responsive only to custom.

4.2 Complementarities

The dual problems of innovation and implementation can only be faced if the reformers, acting as agents of change, are stripped of their illusions about laws instrumentality. This process can be commenced by exploring the complementary development of legal theory in response to social phenomena.

Generally speaking, legal concepts are responses to the contradictions of man's individual and social existence. This claim can be substantiated by examining legal doctrine for reenactments of these tensions. As the tension becomes apparent in a given legal doctrine, the faith in mediation can be maintained by restructuring the doctrine parallel to the tension. In other words, legal doctrine would develop by applying a mediating strategy to ever more instances of the social tension. This occurs in two ways.

Firstly, law may expand hierarchically by subjecting deeper levels of doctrine to the same structure. This model is experienced as the trivialization of law. Secondly, the mediation goes on at a higher level of generality. Just as hierarchical expansion replays the tension at lower levels of specificity, so does horizontal expansion replay it on an ever-higher plane. Development along these two axes preserves the sense of mediation. The most recent expansion and mutation of the model has been in response to the: (i) proliferation of primary actors of different sizes and shapes; (ii) interpenetration of primary and secondary actors; (iii) and application of the model to new subject matter of economic and social cohabitation and welfare rather than simply law and order.

However, expansion along both these axes reaches a limit. As hierarchical development progresses, faith in the meaningfulness of higher-level distinctions is eroded by each reenactment of the tension. Nevertheless, the distinctions continue to be used to determine outcomes. As this startling combination of reliance upon, and disillusionment with, legal categories affects the legal profession, faith in the autonomy of law dwindles.

This is the response to trivialization and is experienced as a tendency to regard law as irrelevant to social activity. In its irrelevance, it ceases to mediate social tensions. Simultaneously, the horizontal expansion of legal theory brings larger areas of social activity within the legal order. In the process, the model mutates in all its previous applications to become more general. As it becomes more general, it also seems less outcome-determinative. Finally it reaches such a level of abstraction that it contradicts its own original premises. The model has thus expanded to account for polar opposite results within the same mediating framework. At this point, faith in law as a mediator breaks down. The two developments recreate the contradiction of the general and the particular. When pushed, legal doctrine becomes simultaneously too specific and too general to be successful in mediating the social contradictions which gave rise to it, thus entailing the explosion of the legal structure.

There are two dimensions to the interplay of law and change. First, ideas stifle change not only in implementation, but also in innovation. This is the result of law's existence "within" and "without" society, as a response to both custom and discretion, but also not autonomous from either. When reformers can change behaviors, they cannot see the ideal beyond the real. When

this perception is possible, they cannot implement in a frozen social structure from which they remain separate. No midpoint is possible between these dilemmas for, by their nature, the existence of either denies the other, and yet each is insufficient for meaningful change. Second, ideas themselves, however, respond to social life by expansion and mutation, but eventually, they dissolve into restatements of the contradictions they sought to explain, at every level of individual and social existence.

If the above model of law, legal reasoning and change is correct (even partially), then one wonders about the shape a *post-explosion* legal world might take. It may be that obfuscation is all we can hope for. The *post-explosion* period could be a brutish one compared to the contentment of belief in legitimate mediation. If such labor can only produce another mediating myth, our struggle would seem futile. And if we are, by nature, too weak to face the conflicts within us, we may prefer a pleasant mythology. Also, if we cannot hope to end oppression (of inadequate law) we had best not expose the myth, which renders it palatable. Demystification could only create suffering and disorder until a new myth (of change) is carved together.

5. Change in Search of Real Justice

In view of the several weaknesses inherent to our society, establishing a system which ensures real justice and guarantees right-based development does not seem easy. Consequently, there is a real need for reshaping the old-style equilibrium - whereby only few "elites" influence decision making - to a new-style equilibrium - whereby "all" participate in making decisions. But for this to happen, it is imperative to change the philosophy and approach that has prevailed for decades.

Nonetheless, for the critique to have meaning, a broader vision of change is needed rather than one focusing on tinkering with institutions to bring them into line with dimly perceived ideals. The problems of implementation in a frozen customary social fabric are not unfamiliar to us. Therefore, if the model of law and legal thinking posited above is valid, a theory of change is needed to accomplish two main objectives.

Firstly, it must account for the dual problem of implementation and innovation. It must address not only the problem of differentiation of actor and subject (which blocks implementation) but of their union (which facilitates implementation). Institutions must be a part of society to be effective, but must be separate from it to be innovative and able to stimulate change. Indeed, meaningful willed change requires both differentiation from social fabric and union with it.

Secondly, change theory must address the process by which the conceptual models that mediate the conflict within society between differentiation and solidarity (amongst people) will change, develop, or collapse. If the current model can be critiqued as a single attempt to mediate the problems of order and power, we must comprehend the processes of its growth and of its potential demise and be able to distinguish its expansion from its explosion. This generalization of the mechanism is achieved through a process of repeated divergences between explanations and actualities, which are synthesized by the creation of a new fictional structure, constitutional, legal or even regulatory, hopefully acceptable to all!

Federalism and Restructuring of the Judiciary in Nepal: Whilst creating a New Constitution

- Diwakar Bhatta*

Abstract

In this aptly-timed discourse, the author discusses a broad range of concrete issues related to Nepal's current debate on federalism and suggests a federal model for the structure of the judiciary. He lays down the major ethnic, linguistic and religious differences that have previously led to conflict and are now required to be soothed through federalism. The approach of major political parties to federalism is analyzed. For federalism to function smoothly, the power relations between states and the centre need to be solidified. Therefore, the author embarks on a study of full faith and credit clauses in the United States and India and suggests that a similar clause be included in the Nepali Constitution. He then progresses to study the federal judicial models of the United States, Canada, Germany and India, provides SWOT Analyses for the integrated and dual models of the judiciary and finally suggests a comprehensive judicial model for Nepal.

1. Background

Essentially, federalism is understood as an arrangement to unite a state whilst recognising the distinctiveness of the centre and regions or sub-regions. It is the mechanism by which power is shared between different central and regional governments, so that the autonomy of a region is guaranteed. As such, a federal system creates a legal relationship governing the distribution of power between the national and regional governments.¹ Federalism is thus neither a simple contract among parties in a static relationship nor a plain device of negative pre-commitment.² Unlike unitary rule, a federal system ensures the existence of various provinces, regions or states that each represent the cultural, linguistic, ethnic and other diversities of citizens within a single national state. Accordingly, it is intended to explore the general issues that Nepal confronts with a federal system and to comparatively examine the federal judiciaries of the United States, Canada, Germany and India and to put forward an academic proposal for remodeling the Nepali judiciary.

Federal systems may be organized in two basic ways: horizontally or vertically. Central and constituent governments in a horizontal system are distinctly organized and contain a full complement of legislative, executive, judicial and fiscal powers. A good example is the United States. However, a vertically organized central government mostly acts through the constituent states while sharing a significant array of other powers. Such vertical systems exist in Germany and the European Union. Federalism may be enshrined in a formal constitution, in organic or basic laws, in treaties or even in ordinary laws that acquire a privileged status through custom and tradition.³ Accordingly, K. C Wheare, an eminent jurist of constitutional law urges that a supreme constitution and a written constitution are essential institutions for federal government.

* LL. M. (Gold Medalist), T.U. Government's Attorney, Office of the Attorney General, Business Law Faculty at Ace Institute of Management and Apex College, Kathmandu, Nepal.

¹ BLACK'S LAW DICTIONARY 644 (Bryan Garner ed, Thomas West, USA, 2004).

² *Id.*

³ Daniel Halberstam, *Comparative Federalism and the Role of Judiciary* in THE OXFORD HANDBOOK OF LAW AND POLITICS, 1 (Oxford University Press, 2008).

Moreover, he says that the supreme constitution is essential if the form of government is to be a federal system, whilst the written constitution is essential if federal government is to work well.⁴

There are more than two dozen countries that have adopted a federal system for satisfying their varied needs. For instance, different arrangements have been created to attain different goals; "sharing of power" in America; 'unity in diversity' in India; 'legitimatization of rule' in Canada; 'uniting four provinces' in Pakistan; 'keeping things from falling apart' in Nigeria and 'keeping multicultural diversity' in Malaysia.⁵ It is important to note that the federalism in Malaysia, Nigeria or Russia, is stronger in form than in reality. Other or emerging federations such as Belgium, Spain or South Africa are too new to provide useful comparisons at this point in time.⁶

2. An Explanation of Federalism

Before highlighting the emerging federal issues in Nepal, it is appropriate to first discuss the differences between a unitary and federal system. The fundamental areas that both systems need to cover include: equitably and inclusively representing the people; acquiring new territory; linguistic and racial identity; cultural distinctiveness; and religious settlement. Firstly, in a federal structure, different groups who are minorities in the larger national population can become majorities in federal regions and make policies that reflect their needs and aspirations. Secondly, a federal system ensures cultural, political and economic autonomy for federal regions and grants power to socio-cultural groups. Thirdly, regional languages, traditions, religions and culture in general get attention and protection in their regions. Finally, the people of the region feel better because of an autonomous political collectiveness and they can decide what is best for them politically, economically and socially and culturally.⁷ Federalism can therefore be a tool to provide social, cultural, political and economic autonomy to various groups in a multi-ethnic society.

The issue of self-determination is intricately linked with federalism. Federal systems marry regional self-determination with the nation state, which has encouraged its adoption around the world.⁸ In a unitary system, the centre devolves power to regions, but it may always take back that power. On the contrary, in federalism, the centre cannot easily take away power that is constitutionally awarded to regions.⁹ Of course, federalism minimizes the dissatisfaction of the regions with the centre, because power is shared under constitutionally agreed norms carried out in a formal process. Thus, the right of autonomy exercised through devolution of power to the regions provides the regions with the ability to rule their own geography and to utilize all kinds of resources including fiscal resources based on their needs.¹⁰

⁴ K. C. Wheare, *FEDERAL GOVERNMENT* 54 (Oxford University Press, 1963).

⁵ The basis of federalism depends on how the political system of the country is developed. American federalism was developed as an arrangement of power sharing that continued through various phases of revolution, civil war, reconstruction, and the final expansion and emergence as a world power. The concept has evolved from various societal stages in America like the New Deal, Fair Deal, New Frontier and Great Society. Other countries have gone through similar experiences in their political development. See Kousar J. Azam, *Federalism and Contemporary Discourses, No. 1 "Dimension Of Federal Nation Building in ESSAYS IN MEMORY OF RASHEEDUDDIN KHAN"* 24-26 (A Vijapur ed, Manak Publications, New Delhi, 1998).

⁶ Alan Fenna, *The Malaise of Federalism: Comparative Reflections on Commonwealth-State Relations*, 66 *THE AUSTRALIAN JOURNAL OF PUBLIC ADMINISTRATION*, 297.

⁷ Mahendra Lawati, *TOWARD'S A DEMOCRATIC NEPAL* 31 (Sage Publications New Delhi, 2005).

⁸ Robyn Hollander and Haig Patapan, *Pragmatic Federalism: Australian Federalism from Hawke to Howard*, 66 *THE AUSTRALIAN JOURNAL OF PUBLIC ADMINISTRATION*, 281 (2007).

⁹ *Id.* p. 33.

¹⁰ Fiscal federalism is viewed as an exercise in co-operation. The economic relationship among the federating units transcends political boundaries. All economic transactions - tax and expenditure assignments, inter-governmental and inter-jurisdictional interaction and inter-governmental transfer systems - are determined purely on economic considerations. As for the case of India, Indian federalism is criticized for inter-governmental (vertical), inter-jurisdictional (inter-units/horizontal) and fiscal imbalances. In India, the central government enjoys a comfortable position with many elastic sources of revenue like union excise duties and corporate taxes. However, the states have been given inadequate and less elastic sources of revenue. See for more detail: *Supra* note 1, p. 129.

At the same time, few are skeptical that the right to determination gives a right to secede, i.e. to be an independent state. However, the right to national self-determination, in reality, is meant to assure individuals of “their rights to preserve their national life: under no circumstances does this imply that they must always do so within the framework of an independent state. The fear of nation secession is raised with the experiences of countries like the USSR, Yugoslavia and Czechoslovakia in mind. However, federalism in democracies has united various regions and groups. In the US, various States went on to form a nation-state, whereas, in Switzerland, cantons with different language speakers and religion followers who were often in conflict were united. Likewise, India also observed the role of federalism in keeping the country united.¹¹ A successful federal system must remain flexible enough to allow for effective governance and yet be stable enough to prevent radical centripetal and centrifugal shifts of power that undermine the principle of shared rule.¹²

A federal system will flourish where there is an open environment, trust and a desire to compromise between conflicting groups. Many scholars believe that federalism plays a major role in maintaining stability and keeping democratic nations unified. However, it may be counter-productive in a territory where there is an absence of autonomy and may lead to secession the like of which occurred in Sri Lanka. In fact, autonomy guaranteed to a region certainly contributes to national unity, inter-regional development and communication, self-governance and an equitable distribution of resources within the regions of a country. Thus, federalism ultimately depends not on a parchment but on a commitment of the populace to maintaining a division of powers. Clearly, the legitimacy of federalism ultimately rests on popular consent.¹³

3. Issues of Federalism in Nepal

The history of Nepal is a story of diverse socio-cultural, ethnic, linguistic and religious distinctiveness. Yet, it has been successful in maintaining ‘unity in diversity’. Statistics say that there are about 100 ethnic, 90 linguistic and 10 religious communities within Nepal. The *Brahmins*, *Chhetris*, *Thakuri* and *Dalit*...are the aboriginals of the Hilly Region and the *Sherpa*, *Rai*, *Tamang* and *Gurung* and some other *Mongoloid* people represent the *Himal*. Whilst, the *Tharu*, *Rajbanshi*, *Muslim*, *Yadav*, *Madhesi Brahmins* have their settlement in *Terai* region. Nepal has thus been built upon a strong multi-ethnic structure with the commitment of the people to live and to work together within a bond of national unity and integrity. However, despite being in the minority, *Brahmin Chhetri* and *Thakuris* are blamed for holding major political and administrative positions that disadvantage the majority of the social and ethnic communities. Hence, an endeavor has been made to critically discuss the basic constitutional issues that Nepal needs to deal with at this stage of restructuring.

Firstly, the unitary system and minority rule has been blamed for the lack of justice provided to the majority classes in Nepal. A decade long Maoist insurgency and the related political upheavals necessitated the country to take immediate steps to create peace and to bring the

¹¹ Federalism, when established in democratic societies has worked, whereas federalism in communist countries has often led to a break-up. Federalism in the former communist countries was created from the top down. Thus, they may have addressed some of the nationality issues, but obviously they did not address all the issues. The lack of an open environment in the former communist countries, on the other hand, also did not permit progressive articulation and management of demands. Thus suppression of cultural identity issues beyond what was handed down by the centre may have created conditions for secession in some groups. See for more detail: Halberstam *supra* note 3, p. 259.

¹² Halberstam *supra* note 3, p. 2.

¹³ Halberstam *supra* note 3, p. 6.

Maoists into the political process. As a result, a detailed peace accord was agreed to by the Government of Nepal and the Communist Party of Nepal (Maoists) on 8th Mangshir 2063 corresponding to 24 November 2006. In fact, it developed a political consensus between the Government and rebels in many aspects. In particular, it established an inclusive democracy and ceased the unitary system according to clause 3.5.¹⁴

The second amendment of the Interim Constitution of Nepal, 2063 (2007) also envisaged in its preamble that the identity of Nepal would be a country with a federal and republican democracy.¹⁵ Moreover, Article 138 of the Constitution states that an inclusive, democratic and forward looking structure shall be established to eliminate class, racial, linguistic, sexual, cultural, religious and regional discrimination by ending the centralized and unitary structure of the State. In the meanwhile, the country finally elected a Constituent Assembly on Chaitra 28, 2064 corresponding to 10 April 2008. Much attention was focused on ensuring the substantial representation of women and ethnic communities. 335 seats were divided by proportional representation. The voters could cast their votes for the political parties and 240 seats were allocated by the first past the first post system (FPTP), in which the voters could choose their representatives directly.

The Constituent Assembly's election brought the insurgents into the political mainstream as they gained the most seats.¹⁶ The much-awaited historical election of the Constituent Assembly has ultimately collected a mandate from the people of Nepal to make Nepal a federal, inclusive, republican and democratic country that is to be outlined in a new constitution.¹⁷ The election assured that Nepal will not be governed by an illegitimate unitary system, but by a federal democracy.

Secondly, the smallness of Nepal's geography and population, the risk of cessation of national unity and the complex administrative and judicial structure have been impediments to the federal system.¹⁸ The foremost criticism against federalism in Nepal is that it is not fit for Nepal because of the smallness of its geographical area and its population. Nepal is often perceived as a small country, when she is generally compared with her immediate neighbors such as India and China who are the most populated countries in the world. Federal countries like Belgium (10.1 million), Switzerland (7 million), Israel (5.6 million) Papua New Guinea (4.3 million), Holland (15.4) and Austria (8 million) have a smaller population than that of Nepal.¹⁹ In fact, Nepal is the 40th most populated country among the 227 countries in the world.²⁰ Thus, these statistics demystify the widespread fallacy that Nepal is too small to require federalism.²¹

¹⁴ Detailed Peace Accord held between the Government of Nepal and Communist Party of Nepal (Maoists) on 8th Mangshir, 2063 (Corresponding to 24th November 2006).

¹⁵ See for more detail: Interim Constitution Of Nepal, 2063 (2007).

¹⁶ See for detail: Narendra Keshari and Bashu Dev Dhakal, *Result of the Election of Constituent Assembly*, 23 SOPAN, 36 (May-June 2008). Communist Party of Nepal (Maoists) is the largest with 229 seats (120 through FPTP and 100 through the proportional system and 9 through the government's nomination), Nepali Congress has 115 (37 through FPTP and 74 through the proportional system and 5 through the government's nomination), Communist Party of Nepal (UML) has 108 seats (33 through and 70 through proportional system and 5 through government's nomination). Many new political parties like *Madhesi Jana Adhikar Forum* and *Tarai Madhesh Lok Tantrik Party* including others have also been successful in representing the people with a significant number of seats. In turn, it brought 25 political parties to the Constituent Assembly.

¹⁷ Constitutionalism is a theory which stands for basic values to be in a democratic constitution, viz. rule of law, universal adult franchise, multiparty democracy, separation of powers, independence of judiciary, protection of fundamental rights and judicial review etc. and other values against despotic government.

¹⁸ Many critics of federalism in Nepal often claim that Nepal does not require regional autonomy because it is too small. First, such claim ignores the cultural aspects of federalism and focuses only on its administrative aspect. Thus, such claim does not carry much weight in discussing federalism for a multicultural society like Nepal. See for more detail: *supra* note 3, p. 254-255.

¹⁹ number inside the bracket are the population figures for the respective country for 1995.

²⁰ US Census Bureau 2003.

²¹ *Id.*

Thirdly, regarding the issue of economic sustainability and management of the federal system in Nepal, the abundant natural and physical resources that have been left untapped can be utilized by the regions to generate wealth. On the other hand, some regions may become more backward than other and require the federal government to distribute funds on the basis of need. It is likely that fiscal federalism can address the issue in both theory and practice. Federalism can be carried on in a cost-effective manner if the political and economic spheres of a country are joined together in the correct manner. An optimal level of decentralization, the right mix of public services provided by central and state governments and a centralized political authority which can ensure smooth and efficient sharing of resources is required.²² Similarly, fiscal federalism enhances decentralization and autonomy, because developmental work is carried out with resources collected from its own region's tax regime, as well as the budget the centre allocates for it. As to the issues of collecting the revenues by regions, it can be resolved through appropriate federal financial transfer arrangements.²³ Thus, the cost effectiveness and sustainability of the political structure in a federal system largely depends on how it is formed and how the power sharing agreement between the centre and region is made.

Fourthly, issues have been raised that it is difficult to maintain national integration and unity with the states in a federal system. A strong criticism of the federal system is that it will put the country in peril of secession whenever conflict arises between the centre and regions. The right to autonomy in federalism ensures that a region has the right to be an autonomous part and to be separated from the centre if the centre fails to satisfy the demand of the regions. However, the right to secession is considered to be reasonable only when the people living in a particular region vote for a separate state or secede from the federal arrangement due to hegemonic treatment by it. Similarly, the risk of disintegration equally remains with a federal or unitary system, because the later also lacks a specific mechanism to resolve conflicts. On the contrary, there is also a strong argument that federalism reduces conflicts as it provides for increased autonomy and creates fertile ground for compromises. Large scale studies consisting of more than 100 ethnic groups have discovered that federal countries often avoid violent revolutions whereas unitary structures are more apt to exacerbate violent ethnic conflicts.²⁴

The argument has also been validly raised that democracy is deepened because regional governments are better at responding to the demands of various social groups, including oppressed socio-cultural groups. Therefore, the articulation of public demands and the fulfillment of some of them will reduce the alienation of the people. However, in unitary states, dissatisfaction does not always get the space and opportunity to be aired, expressed and addressed due to constrained access to the government. Cohen explains this phenomenon:²⁵

"Federalism moderates politics by expanding the opportunity for victory. The increase in opportunities for political gain comes from the fragmentation/dispersion of policy-making power...the compartmentalizing character of federalism also assures cultural distinctiveness by offering dissatisfied

²² For instance, if a national policy is formulated that keeps in view overall national welfare, some local citizens instead of benefiting from such a policy may have to bear the cost or suffer a loss of welfare. In such cases, federal financial transfers become compensatory payments from the national to the local government.

²³ G. Thimmanian, *Decentralization Is it a Danger or Virtue?* 1 DIMENSION OF FEDERAL NATION BUILDING in ESSAYS IN MEMORY OF RASHEEDUDDIN KHAN" 116, 117 (1998).

²⁴ S. Frank Cohen, *Proportional versus Majoritarian Ethnic Conflict Management in Democracies*, COMPARATIVE POLITICAL STUDIES, 30 as cited in *supra* note 7.

²⁵ *Id.*, p. 236.

ethnic minorities proximity to public affairs, such close contact provides a feeling of both control and security that an ethnic group gains regarding its own affairs....”

Federalism is not a static concept. Over the years there has been a paradigm shift in the ideology of federalism. The concept of federalism has had to evolve in order to remain both efficient and effective. A strong type of federalism has evolved as part of regional integration in the world like the EU, NAFTA, SAARC, ASEAN etc. The issue of secession was related to a right to self-determination. However, the concept of a right to self-determination was not readily accepted by the quasi-federalist school that developed in the 1950s. The quasi-federalist school was most influential during the period from 1950-1990. Despite this the right to self-determination and choice of rule was conceptually agreed upon by international communities by the acceptance of Universal Declaration of Human Rights, 1948.²⁶

In Nepal's situation, a few scholars argue that the Maoist movement gained much support amongst the many ethnic communities as they have a feeling of injustice created by the existing unitary government. In other words, they are far removed from the government's position and decision making power. As such, the language difficulties of the *Tera*i and mountainous people with the official language that has greatly reduced their access to government bodies have not been addressed by the current unitary government. Likewise, unitary government was blamed for not being accountable and being less transparent at different levels. Federalism will enhance the regional balance more than that of a unitary system in such a way that the local people will become responsible for their own governance as power will be devolved. It is also said that decentralization of power in a unitary system can not ensure an environment to satisfy the people's demands.²⁷ To sum up, federalism more or less minimizes the internal conflict of a nation and the dissatisfaction of different communities whilst creating national unity.

Fifthly, it has been pertinently raised that federalism creates an unmanageable stable of state machinery. Undoubtedly, such complex structures are required to transform a unitary structure into a federal set up. As to the modality concerning the government's machinery, the forms mostly in practice within the horizontal and vertical forms are dual or competitive, co-operative, confederation and quasi-federalism. Nevertheless, the structure of government is to be formed by keeping in mind the geo-political setting, size of the population, availability and distribution of natural, physical and human resources. The modality of a federal structure cannot be the same even if the issues are common because of the peculiarities of each country.²⁸ Whenever the issue of restructuring is discussed, the reshaping of judicial organs also comes to the fore. The model of a judiciary is also determined by how the country carries on this process. The issue of reshaping the Nepali judiciary should be discussed together with a comparative study of some federal judiciaries around the world and the past experiences that the country has so far experienced.

²⁶ The Universal Declaration of Human Rights sets out the core principles of governance. It further elaborates on two key issues: everyone has the right to take part in the government of his (sic) country, directly or through freely chosen representatives: and everyone has the right to equal access to public services in his (sic) country. See for detail: Clarence J. Dis, *Democracy and Human Rights; The Challenge of Ethnicity and Inclusive Democracy*, 47 JOURNAL OF THE INDIAN LAW INSTITUTE, 7, 8 (2005).

²⁷ *Id.* p. 241.

²⁸ The study of the organs of decision-making in America is concerned with the distribution of governmental power among the legislature, executive and judiciary, and with the sharing of governmental power between a federal government for the nation as a whole and forty-nine state governments. In turn, although in a somewhat different relationship, the state governments share power with local units of government. This structure of government has been much described and often analyzed in terms of the collaboration and friction which attends to the functioning of these various parts. See for more detail: T. Jacob, *FEDERALISM AND GOVERNMENT*, 13 (Aavishkar Publishers, Distributors, Jaipur, India 2007).

4. Transformation of Nepal into a Federal Country

The unification of the various 52 principalities in Nepal by the then King *Prithvi Narayan Shaha* led to government under a unitary system for over 240 years. All the state power relating to tax, defense, security and coinage were held by the centre, and local administrators were only granted the power to handle the day to day activities within their respective areas and to implement the central policy. During the *Rana* regime, Nepal was divided into 35 districts. Later on it was again divided into 75 districts and 14 zones and 5 regions during the *panchayati* system. The philosophy of the state during the *panchayati* regime was to maintain national unity and integration via centralization. However, a policy of decentralization within a unitary system was tried during thirty years of the *panchayati* regime.

The diverse composition of Nepal in terms of language, ethnicity, religion and socio-cultural aspects demands a non-centralized state. There are about 103 communities including ethnic and religious communities and 100 languages distinguishing the makeup of Nepal. Thus, the pressing issue of federalism must be resolved to deal with problems such as social exclusion, non-participation and non-responsiveness in the legislature, judiciary and executive. Side by side, federalism gained momentum after the start of peace process when the rebels (Communist Party of Nepal (Maoists)) entered the political mainstream. In the meantime, the Detailed Peace Accord was concluded between the Government of Nepal and the Nepal Communist Party (Maoist) on 21st November 2006 (5th Manshir, 2063). Clause 3.5 which provided that to address the problems of women, *dalits*, indigenous and ethnic communities, *madhesi*, the deprived, the underprivileged, minorities and the people from backward regions, discrimination on the basis of class, race, language, gender, culture and religion should be ended and an inclusive, democratic and improved structure shall be made by ceasing the existing central and unitary structure.²⁹ Not only this, the Interim Constitution of 2063 has also carried over the previous accords concluded among the seven political parties, including the Maoists and the then Government of Nepal. Article 138 (1) in the first amendment of the Interim Constitution, 2063 inscribed the term “federal state” which was actually emphasized in the Detailed Peace Accord after a heated political debate in the Interim Parliament.

4.1 The Federal Plan of the Maoists

While looking at the political commitments made by the major political parties in Nepal like the Communist Party of Nepal (Maoist), Nepali Congress and Communist Party of Nepal (UML), they all have their own kinds of modalities. So far as the commitment paper of Communist Party of Nepal (Maoists) is concerned, the country has been divided into three parts (centre, autonomous and local level). It further mentions that it proposes to divide Nepal into eleven autonomous republican states, which shall further be divided into additional sub-autonomous states (regions) or units keeping in mind ethnic structure, geographical suitability, linguistic associations and economic prosperity. Similarly, the commitment paper of the Maoists reads that there shall be states like *Seti-Mahakali*, *Bheri-Karnali* established on a regional basis; *Mangrant*, *Tharuban*, *Tamuban*, *Newa*, *Tamsaling*, *Kirant*, *Limbuwan*, *Kochila* and *Madesh* on an ethnic basis; and *Madhesh* shall further be divided into three states, viz. *Mithila*, *Bhojpur* and

²⁹ See for detail: The Detailed Peace Accord concluded between the Government of Nepal and Communist Party of Nepal (Maoist) 5th Manshir, 2063 (Correspondingly 24th November, 2007).

Abhad as sub-states on a linguistic basis. Furthermore, the commitment paper also highlights that an autonomous unit may also be established within the state where a specific caste or ethnic group resides.³⁰

With regard to the division of power, the paper points out that the powers and duties of the central, regional and local levels shall be clearly listed in the constitution. According to this paper, territorial security, military management, foreign relations, inter-state commerce, currency and central bank policy, customs, revenue, mega-hydro-projects, railways, airports, national highways, central universities, standardization and measurements shall be deemed to be under the authority and regulation of the centre and other sectors shall be devolved to the autonomous states. The power concerning local transportation, local tax, education, health, sanitation and local resources shall be deemed to be under the power of the local level entities.³¹

4.2 Federal Plan of the Nepali Congress Party

The election manifesto of the Nepali Congress Party also emphasizes the restructuring of the State into a federal polity by respecting the aspirations, identity and autonomy of ethnic communities like the *madheshi* and people from other areas. Moreover, the election manifesto outlines that a federal republican democratic system shall be established in Nepal by changing it from a centrally structured unitary state to a federal association of inseparable, integrated and autonomous regions.³² The basis for creating the regions shall be national integrity, geographical suitability, population, natural resources, economic possibilities, inter-relations of the regions, linguistic/ethnic considerations, cultural attachments, political and administrative possibilities etc. In the meanwhile, the *Madhesi*, indigenous ethnic communities, *dalits* and other various groups with distinct identities living in the *Terai*, Hilly and Mountainous Regions shall be guaranteed a federal structure as per their desires.³³

Regarding the division of the State, the manifesto reveals that the allocation and management of the power, functions and duties of the State shall be made by dividing the entire nation into three parts, i.e. *centre, province and local government*. However, there is no specific mention of the name for a particular state, in contrast to the commitment paper of the CPN [Maoists]. The powers, functions and duties of the centre, region and local government shall be listed in the Constitution separately. While allocating state affairs, matters like foreign relations, currency policy, national security, and inter-regional relations such as air transportation, highways, mega-hydro-projects including projects of national importance shall be deemed to be under the authority of the centre. Other political, economic, social, cultural and linguistic rights along with agriculture, forestry, education, health and employment shall be granted to the regions and local governments. At the same time, a few matters falling within the scope of both the regional and local levels shall be deemed to be the matters of the centre on the basis of their national importance.³⁴

Regarding fiscal matters, the election manifesto of the NCP provides that custom duties, value-added tax, income tax, excise duties and other such revenue shall be collected by the centre. Such revenue shall be allocated to the central and regional levels. Taxes for building, land revenue,

³⁰ See Election Commitment Paper of The Maoists, 2065 (in Nepali).

³¹ *Id.*

³² See Election Manifesto of The Nepali Congress, 2065 (in Nepali).

³³ *Id.*

³⁴ *Id.*

property, vehicles, registration fees and taxes on other incomes shall be left to both the regional and local governments. The election manifesto of the NCP highlights that a fiscal commission shall be constituted for the allocation of revenue by the centre to the regions. Besides, power shall be given to the regional governments to mobilize loans for the construction of infrastructure and a restructuring mechanism shall be applied at the village and municipality level in order to ensure the right to self-governance.³⁵

Nepal has progressed due to the completion of the Constituent's Assembly election despite all the difficulties. For the first time in Nepali history, the election of a Constituent Assembly has provided an opportunity for the Nepali people to elect a President of Nepal as the Head of State. Now, Nepal has entered a new era and in many quarters of life, the country has taken a step towards republican democracy with a federal system and the ideology of an inclusive and equitable polity. Having said that, Nepal is in the phase of state restructuring that requires a supreme as well as written constitution with a clear division of powers and an effective mechanism for the enforcement of law.

5. The Need for a Full Faith and Credit Clause in the Federal Constitution

A federal system is beneficially inclusive, but it is very complex to manage. Any country after having been divided into federal states or provinces may have to address the following constitutional questions:

1. Does state law prevail over the federal law?
2. Will a decision of a federal court be enforced by the state court?
3. Are the state courts free to function independently or should there be an apex federal court with control over the state court's judiciary?
4. Shall one state's court decision be enforced or recognized by another state's court?

The above questions are discussed below in light of full faith and credit clauses which a federal constitution must contain.

5.1 Full Faith and Credit Clauses in the US Constitution

In the case of the United States of America, several states were free to ignore the creation of another state's law before the incorporation of a confederation state. That has created much difficulty in the running of the federal nation. The United States of America has therefore realized a need to evolve a mechanism by which rights that are legally established in one state could be given nation-wide application, and so there is a full faith and credit clause in the U.S Constitution.³⁶

Article IV, section 1 of the United States Constitution, commonly known as the full faith and credit clause, creates the duty that states within the United States have to respect the "public acts, records, and judicial rulings" of the other states. The Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and their effect thereof.³⁷ In recent years, the concept of "judicial federalism" has been developed by the decisions of the US Supreme Court. The jurists argue that federal courts must exercise their powers respecting the role played by the states and their judiciary. The full faith and credit clause has been interpreted by the US Supreme Courts at different times in the absence of any helpful Congress law.

³⁵ *Id.*

³⁶ M. P. Jain, *INDIAN CONSTITUTIONAL LAW*, 827-828 (Wadawa and Company Nagpur, New Delhi, India, 2003).

³⁷ See http://en.wikipedia.org/wiki/Full_Faith_and_Credit_Clause (as of 7th July 2008).

In *United States v. Lopez*,³⁸ the US Supreme Court (SC) opined that "it has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention, the rules for determining the primacy of state law, the doctrine of adequate and independent state grounds, the whole jurisprudence of pre-emption, and many of the rules governing our habeas jurisprudence."³⁹

Similarly, in *Arizonaans for Official English v. Arizona*, the SC saw the mootness doctrine as an important means of protecting the integrity of State Law as the Federal Court had limited its power to review the State Law when it is construed as a novel State Act not reviewed by the State's highest court. The US SC has developed abstention doctrines without expressed Congressional approval. The three distinct forms of abstention bear the names of early cases in each area.

In the first abstention doctrine, commonly known as *Pullman abstention*,⁴⁰ federal courts should abstain from decisions when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. It is also argued that such *abstention* avoids 'both unnecessary adjudication of federal questions and 'needless friction with state policies' from possibly erroneous state law interpretations. This principle states that the highest court of a state should first settle the issue if there is an issue of the constitutionality of state legislation. In other words, this type of option recognizes a limited functional independency of the highest state courts.

The second type of *abstention*, *Colorado River abstention*, is only vaguely developed and is of far less practical significance. It does not require the presence of a federal constitutional question, but rather counsels federal courts to abstain in cases where ruling upon a matter of state law would intrude greatly on specially important state interests. Such special state interests should be considered by state courts.

The third *abstention* is *Younger abstention*.⁴¹ It was designed to help preserve the institutional autonomy of a state's judicial processes by limiting attempts by litigants to obtain federal declaratory or injunctive relief. The federal court's order may not interfere with certain types of ongoing state proceedings in which they are involved that provide an adequate opportunity to raise constitutional claims. It is also argued that interference of this kind is doubly offensive as it not only hinders state efforts to maintain a smoothly running judicial system, but it also denies the *principle of comity*. The *comity principle* states that the fundamental premise of judicial federalism which holds that, since both federal and state courts have a duty to enforce the Constitution, there is no Constitutional basis, in the absence of some demonstrable infirmity in the state judicial process itself, for preferring federal courts to state courts as adjudicators of federal constitutional claims.⁴²

The American full faith and credit clause and its interpretation by the SC can be explained as follows. Firstly, the US Supreme Court must respect the state's laws or state's judicial proceedings before the federal ones if the matters are traditionally related to the state's sovereignty or if they have been provisioned by the Eleventh Constitutional Amendment. Secondly, a federal court should wait for the state court's decision on a case if the matters are primarily

³⁸ 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act, which make it a federal offence for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe is a school zone, exceeded Congress Commerce Clause Authority).

³⁹ Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 567, (New York Foundation Press, 2000).

⁴⁰ *Railroad Comm'n of Texas v. Pullman Co.* 312 US 496 (1941) cited in *Id.*

⁴¹ *Younger v. Harris*.

⁴² Tribe *supra* note 39, p. 569-570.

related to the state and the federal court can hear the cases relating to the constitutionality of legislation only after the settlement of primary issues.

Thirdly, a federal court should not interfere in the state court's proceedings and there is no constitutional basis, except in the absence of some demonstrable illness in the state judicial process itself, for preferring federal courts to state courts as adjudicators of federal constitutional claims.⁴³

5.2 Full Faith and Credit Clause in the Indian Constitution

The article providing the full faith and credit clause in the Indian Constitution was influenced by the American position. As per Art. 245 (1) of the Indian Constitution, the jurisdiction of each State is confined to its own territory. It could have been possibly argued that the acts and records of one State could not be recognized in another State. However, a federal state requires the law of one state to be recognized in another. So Art. 261 (1) of the Indian Constitution provides that "full faith and credit" is to be given throughout the territory of India "to public acts, records and judicial proceedings of the Union and the States."⁴⁴ However, in case of an *ultra vires* statute, it need not be recognized in any other state.

Likewise, Art. 261 (2) of the Indian Constitution has made more provisions for the manner in which the acts, records and proceedings referred to in Art. 261 (1) are to be proved. Furthermore, their effect thereof shall be determined 'as provided by the law made by Parliament'. Thus, Art. 261 (2) empowers Parliament to lay down by law:

- a) the mode of proof, as well as,
- b) the effect of acts and proceedings of one State in another State.

This is a matter to be managed as a concurrent subject (power given to both the federal and state governments) and therefore the states are also entitled to legislate on this matter, but subject to the exclusive power conferred on Parliament under Art. 261 (2)

In relation to the execution of a judgment, Art. 261 (3) of the Indian Constitution provides that the enforcement of a judgment by a civil court is the final judgment in any part of India and is capable of execution anywhere within India according to law. There are two provisos. First, the decision must relate to a civil matter and secondly the law means the procedural law relating to the execution of the decrees. This does not refer to the merits of the decision which cannot be reopened in another court.⁴⁵

In *Narhari v. Pannalal*, it was held by the Supreme Court of India that as the decree by the Bombay High Court was given after the Constitution came into force, Art. 261 (3) would apply to this decree. Further, Article 261 (3) would also apply to Goa because at the time of the decree's execution, the Code of Civil Procedure applied.⁴⁶

In *Trilokchand Motichand v. H.B. Munshi*,⁴⁷ it was held that the Supreme Court must refrain from acting under Art. 32 if the party has already moved the High Court under Art. 226. This constitutes comity between the Supreme Court and the High Courts. As such, when a party has already moved the High Court with a similar complaint for the same relief and has failed, and the Supreme Court insists that an appeal to be brought before it, it will not allow fresh proceedings to

⁴³ *Id.*

⁴⁴ *S. Mohd. Ibrahim Hadhee v. State of Madras*, 21 STC 378 (1968) as cited in *supra* note 24, p. 828.

⁴⁵ *Narsing v. Shankar*, AIR 1985 All 775.

⁴⁶ *Narhari v. Pannalal*, AIR 1977 SC 164.

⁴⁷ AIR 1970 SC 898 as cited in Abhilasha Kumbhat, JUDICIAL FEDERALISM IN NEPAL p 828 accessible at <http://www.gofothelaw.com> (as of 22nd July 2008).

be started. As such, the full faith and credit clause in India has also adhered to the principle of *res judicata*, which says that when a court of competent jurisdiction renders a final decision on the merits, that decision is conclusive of the cause of action and of issues litigated. A case consisting of the same elements and being heard by the same level of court or other judicial tribunals of concurrent jurisdiction shall not have the power to review the decision.⁴⁸

5.3 Adding a Full Faith and Credit Clause to Nepal's Constitution

A full faith and credit clause must be given a place in the Nepali Constitution by the Constituent Assembly. This will resolve the issue of contradicting laws between states' and also clarify the much raised question of whether one state's law or court's decision will be recognized and enforced in another state. Similarly, the constitution makers need to keep in mind the American *absentia* principle to avoid conflicts between state's law to avoid federal interference with a State's power and to avoid disputes over concurrent powers. So, as far as the American and Indian Constitutional provisions are concerned, my study concludes that there are no significant differences between American and Indian full faith clauses in theory or in practice. This is despite the differences between American dualism and Indian quasi-federalism. Now, Nepal should insert a full faith and credit clause in the new Constitution to recognize state law, public records, judicial proceedings and decisions in another state's territory and to develop a principle of federal court non-interference in state courts' judicial proceedings. At the same time, a full faith and credit clause is also required to minimize inter-state, as well as centre and state conflict.

6. The Structure of the Federal Judiciary

Each state has its own elected executive and legislature, but the judiciary will also be a fundamental institution that is required to resolve conflicts. The federal government is one of the strongest institutions, but it will have limited powers. It may exercise only the powers specified in the constitution itself. The system of a division of powers between the federal and state governments is known as "*federalism*".⁴⁹ It can be seen that there has been no uniformity in the approach of federations in organizing their courts. The legislatures have provided for the jurisdiction of courts in Canada, Australia and Switzerland, but in the United States, the Constitution provides for federal courts and to some extent state courts. Therefore, it seems true to say that the method of organizing courts under a federal government need not be the same for all countries. The principle of a co-ordinate status for the federal and regional governments permits some overlapping of jurisdiction. However, there are always some safeguards such as the power to establish parallel courts or a right of appeal from regional courts of double jurisdiction to a supreme court of the federal government, where matters affecting the law of the general governments are concerned.⁵⁰

Therefore, many countries with a federal system have followed different judicial models based on their needs and their individual national contexts. Reshaping the judicial model is one

⁴⁸ Tribe *supra* note 39, p. 21 (In the case of *Daryao v. U.P.* the decision was held that when a High Court has dismissed an application under Art. 226, on the merits, and such dismissal is not set aside on appeal, the principle of *res judicata* operates and that, accordingly, an application under Article 32, on the same ground would not be valid.

⁴⁹ Thurgood Marshall Federal Judiciary Building Washington D.C., THE FEDERAL COURT SYSTEM IN THE UNITED STATES, AN INTRODUCTION FOR JUDGES AND JUDICIAL ADMINISTRATION IN OTHER COUNTRIES 7 (Administrative Office of the U.S. Courts, 2001).

⁵⁰ Wheare *supra* note 4, p. 67-68.

of the most important tasks that the constitutional framers have to keep in mind. At this point, it is relevant to compare the judicial models of the USA, UK, Germany and India before a Nepali judicial model can be proposed.

7. The Judicial Model of the United States

The Constitution of the United States of America establishes three separate branches of government: Legislative (Article I); Executive (Article II); and Judicial (Article III). Courts are often regarded as the guardians of the Constitution because they pass judgment on the rights and liberties guaranteed by the constitution. They determine the facts and interpret the law to resolve legal disputes. The framers of the Constitution considered an independent federal judiciary essential to ensuring fair and equal justice to all citizens of the United States. Article III of the U.S Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time establish. With regard to tenure, the judges of both the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. It is argued that the Constitution they drafted promotes judicial independence in two principal ways. First, federal judges appointed under Article III of the Constitution can serve for life, and they can be removed from office only through impeachment or conviction by Congress of treason, bribery, or other high crimes and misdemeanors”, which means that neither the President nor Congress can reduce the salaries of any federal judges.⁵¹ The structure of the American judiciary is listed below.

7.1 The United States Federal Courts

With certain notable exceptions, the Federal Courts have jurisdiction to hear a broad variety of cases. Federal Judges handle civil and criminal cases, public and private law disputes, cases involving individuals and cases involving corporations and government entities, appeals from administrative decisions, and other legal and equitable matters. At all levels of the federal court system, judges decide upon constitutional matters.

7.1.1 Supreme Court

The United States Supreme Court is the highest court in the federal judiciary and consists of the Chief Justice of the United States and eight Associate Justices. The court always sits *en banc*, with all nine Justices hearing and deciding all cases together. The jurisdiction of the Supreme Court is almost completely discretionary and to be exercised, requires the approval of at least four Justices to hear a case. It hears a very small number of cases such as boundary disputes between the states. The Supreme Court acts as a mandatory appellate review body. As a general rule, the Supreme Court only agrees to hear cases when there is a split of opinion between courts of appeal or where there is an important constitutional or federal law issue that needs to be clarified.

⁵¹ *Id* pp. 8-9.

7.1.2 Appellate Courts

There are twelve Circuit Courts with one of them, the Court of Appeals for the Federal Circuit handling the appeals over the decisions made by various 94 District Courts. A Court of Appeals hears appeals from the District Courts located within its circuit, as well as appeals from certain Federal administrative agencies. The Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims. An appeal is considered a right of a party. The Court of Appeals typically sits in panels of three judges. It is important to note that the Court of Appeals does not hear additional evidence, so it must generally accept the factual findings of the trial judges.

7.1.3 Trial Courts

The United States District Courts are the principal trial courts in the federal court system. The District Courts have jurisdiction to hear nearly all categories of federal cases. There are 94 Federal Judicial Districts, including one or more in each State, the District of Columbia, Puerto Rico, and the Overseas Territories. Each Federal Judicial District includes a Bankruptcy Court operating as a unit of a District Court and it has nationwide jurisdiction over almost all matters involving insolvency cases except criminal issues. The Bankruptcy Courts are administratively managed by the bankruptcy judges. Two special trial courts, viz. the Court of International Trade and United States Court of Federal Claims also come under this judicial structure.

The trial court's proceedings are conducted by a single judge, sitting alone or with a jury of citizens as finders of fact. These courts apply the jury system in the following conditions: 1) all serious criminal prosecutions; 2) those civil cases in which the right to jury trial applied under English law at the time of American Independence; and 3) cases in which the United States Congress has expressly provided for the right to trial by jury.

7.2 State Courts

There are fifty States in the United States of America and each State has its own Constitution. The powers and duties are provided separately by the Constitution of each respective State. At the state level, the structure of the judiciary varies greatly. The statistics say that about 90% of the cases are generally decided by the state courts. Although federal courts are located in every State, they are not the only forum available to litigants. In fact, the great majority of legal disputes in American courts are addressed in the separate state court system established in each of the 50 states. Most state court systems, like the federal judiciary have trial courts of general jurisdiction, intermediate appellate courts, and a State Supreme Court. They may also have specialized lower-level courts or justices of the peace to handle minor cases. The judicial structure of the state judiciary in the USA is found below.⁵²

7.2.1 Trial Courts

These courts are commonly called the municipal courts or county courts. As a court of first instance, different nomenclature like superior court, court of common place is given to these

⁵² Tika Ram Bhattarai, COMPARATIVE STUDY ON JUDICIARY OF DIFFERENT COUNTRIES (NYAYA PRASASHAN KAAAYAMHARU) 87 (SOPAN) 2063).

types of courts. In New York, the trial court is called the Supreme Court. These courts often hear the criminal and civil cases and the cases are heard by a single judge and a jury when required.

7.2.2 Intermediate Courts of Appeal

The intermediate courts of appeal are the second tier of courts in the middle of the State's Supreme Court and Trial Court. Generally, these courts hear the appeals of the decisions made by trial courts within their jurisdictions. However there is no uniform practice in this matter. In other words, few cases of a serious nature are entertained by the Intermediate Courts of Appeal. Instead, the appeal will usually be heard by the State Supreme Court.

7.2.3 Supreme Courts

At the apex level of the state court hierarchy is the highest court that is commonly known as the Supreme Court. Different names are often given to these courts in different states. It has been called a Court of Appeal in New York and Court of Errors in Connecticut State. In this court, the Chief Justice and other Associate Justices are appointed to handle the job of justice dispensation.

The federal and state courts are required to extend "full faith and credit" to each other's respective judgments. Under the Supremacy Clause of the Constitution, however, a federal law pre-empts any state law that is in conflict with it.⁵³

7.3 The Jurisdictional Division of American Courts

State Courts	Federal Courts	State or Federal Courts
<ul style="list-style-type: none">• crime under state legislation;• state constitutional issues;• family law issues;• landlord and tenancy disputes;• most private contract disputes (except those resolved under bankruptcy law);• most issues involving the regulation of trades and professions;• most professional malpractice issues;• most issues involving the internal governance of business associations such as partnerships and corporations;• most personal injury law-suits;• most workers' injury claims;• probate and inheritance matters;• most traffic violations and registration of motor vehicles.	<ul style="list-style-type: none">• crimes under statutes enacted by federal congress;• most cases involving federal laws or regulations (for example tax, social security, broadcasting, civil rights);• matters involving interstate and international commerce, including airline and railroad regulation;• cases involving securities and commodities regulation, including takeovers of publicly held corporations, admiralty cases;• international trade law;• patent, copyright, and other intellectual property issues, cases involving rights under treaties, foreign states, and foreign nationals, state law disputes when 'diversity' of citizenship exists, bankruptcy matters disputes between states, habeas corpus actions, traffic violations and other misdemeanors occurring on certain federal property.	<ul style="list-style-type: none">• crimes punishable under both federal and state law.• federal constitutional issues, certain civil rights claims, "class action" cases, environmental regulation, certain disputes involving federal law.

53. *Id.*

In the United States, the jurisdiction of a subject matter is either: federal, state or concurrent. There are separate matters for the jurisdiction of both the State and the Federal Courts. "Few matters are under the exclusive jurisdiction of the Federal Courts, such as crimes and offences against the United States; prizes, patent, copyright, and some bankruptcy cases; civil cases of admiralty and time jurisdiction; cases to which a state is a party, and cases involving a foreign ambassador." The Federal Court does not ordinarily interfere e.g. by habeas with the administration of state law by a state court unless fundamental rights guaranteed by the Federal Constitution are invaded or when the enforcement of state law appears otherwise repugnant to the Constitution, laws or treaties of the U.S.⁵⁴ Thus, the orderly administration of justice in a state court is not to be interfered with unless exceptional circumstances exist.⁵⁵

8. Judicial Model of Canada

Generally speaking, Canada's court system has four court levels in its hierarchy i.e. Supreme Court of Canada, appellate courts of the Provinces and Territories, superior level courts of the Provinces and Territories, and inferior courts. Each court is bound by the rulings of the courts above them. However, they are not bound by their own past rulings or the rulings of other courts at the same level in the hierarchy.⁵⁶

8.1 Supreme Court of Canada

The Supreme Court of Canada is the final and highest court in the country by the Act of the Parliament of Canada 1875. Its decisions could be reviewed by the Judicial Committee of the Privy Council until 1949. The court currently consists of nine judges, which include the Chief Justice of Canada and its duties include hearing appeals of decisions from the appellate courts and on occasions delivering references (court's opinion) on constitutional questions raised by the Federal Government.⁵⁷

8.2 Appellate Courts of the Provinces and Territories

These courts of appeal exist at the Provincial and Territorial levels and were separately constituted in the early decades of the 20th Century. There are 13 in number. The function of these courts is to review decisions rendered by the superior-level courts and to give references (i.e. deliver a judicial opinion) when requested by a Provincial or Territorial Government. These appellate courts do not normally conduct trials and hear witnesses. These courts are Canada's equivalent of the Court of Appeal in England and State Supreme Courts and U.S Courts of Appeals in the United States.⁵⁸

Besides the above mentioned courts, the Federal Tax Court of Canada and the Federal Court of Appeal also exist at the federal level.

⁵⁴ Indian constitutional practice is similar to this effect of the full faith and credit clause.

⁵⁵ Kumbhat *supra* note 47.

⁵⁶ http://en.wikipedia.org/wiki/court_system_of_Canada (as of 7th May, 2008).

⁵⁷ *Id.*

⁵⁸ *Id.*

8.3 Superior-Level Courts of the Provinces and Territories

These courts exist at the Provincial and Territorial levels. The superior courts are the courts of first instance for divorce petitions, civil lawsuits involving claims greater than small claims and criminal prosecutions for “indictable offences”. They also perform a review function for judgments from the “inferior” courts and administrative decisions by Provincial or Territorial Government entities such as labor boards, human rights tribunals and licensing authorities. Furthermore, some of these superior courts [i.e. Ontario] have specialized branches that deal only with certain matters such as family law or small claims. Although a court, like the Supreme Court of British Columbia may have the word “supreme” in its name, it is not necessarily the highest court in its representative Province or Territory.⁵⁹

8.4 Provincial and Territorial (“Inferior”) Courts

Each Province and Territory in Canada has an “inferior” or “lower” trial court, usually called a “provincial court” to hear certain types of cases. Appeals from these courts are either heard by the superior court of the Province or Territory or by the appellate courts. These courts are created by provincial statute and only have the jurisdiction granted by statute. Similarly, inferior courts do not have inherent jurisdiction. These courts are usually the successors of older local courts presided over by lay magistrates and justices of the peace who did not necessarily have formal legal training. Many inferior courts have specialized functions, such as hearing only criminal matters, youth matters, family matters, small claims matters, “quasi-criminal” offences (violations of a provincial statute). In some jurisdictions, these courts serve as an appeal division from the decisions of administrative tribunals.⁶⁰

9. Judicial Model of Germany

Unlike the American and Canadian judicial model, Germany’s judicial model is unified and integrated, which has been created by a vertical and hierarchical structure. There are three tiers of courts namely: trial, appellate and central. The types of courts include ordinary, specialized and constitutional courts.

There is no separate hierarchy for the *lander* and federal courts, but there is horizontal separation. There are 6 types of federal courts established under the Basic Law namely, Federal Constitutional Court, Federal Court of Justice, Federal Administrative Court, Federal Finance Court, Federal Labor Court and Federal Social Court.

9.1 Federal Constitutional Court

The Federal Constitutional Court (*Bundesverfassungsgericht*) is the highest court dealing with constitutional matters and it can also check the compatibility of federal law or state law with the Constitution or the non-compatibility of state law with other federal laws.⁶¹ As such, constitutional courts focus on judicial review and constitutional interpretation. Basic Law of Germany Article 92 provides that judicial power is vested in the judges; it is exercised by the Federal Constitutional

⁵⁹ *Id.*

⁶⁰ *Id.* Further, there are other “tribunals” that are non-judicial; adjudicative bodies that adjudicate but are not presided over by the judges. Instead, these adjudicators may be experts in the very specific legal field handled by the tribunal like labor law and human rights etc. The presiding adjudicator is normally called Mister/Madam Chair.

⁶¹ Article 93 the Basic Law of the Federal Republic of Germany.

Court, by the Federal Courts provided for in this Constitution and by the courts of the State [Länder].⁶² There is one Federal Constitutional Court and there are fifteen State Constitutional Courts.

Except for Schleswig-Holstein, each *Land* has a state constitutional court. These courts are administratively independent and financially autonomous from any other government body. The Federal Constitutional Court at the apex level of constitutional courts consists of 16 judges and is Germany's highest and most important judicial body. The Bundestag (lower house) and the Bundesrat (upper house) each chooses half of the Court's members and thus partisan politics plays a major role. A candidate requires two thirds of the votes to be appointed. The Court is divided into two senates, each consisting of a panel of eight judges with its own Chief Justice. The first Senate hears cases concerning the basic rights guaranteed in Articles 1 through 19 of the Basic Law and concerning judicial review of legislation. The Second Senate is responsible for deciding constitutional disputes among government agencies and how the political process should be regulated. Unlike the United States Supreme Court, the Federal Constitutional Court does not hear final appeals as this function belongs to the specialized federal courts. The basic law explicitly confines the jurisdiction of the Federal Constitutional Court to constitutional issues. By the late 1980s, the majority of the articles in the Basic Law had been subjected to judicial review, and the constitutionality of federal and state legislation had been considered in hundreds of court cases.⁶³

9.2 Ordinary Courts

Ordinary courts are established at four levels: local (Amtsgerichte; sing: Amtsgericht); regional (Landgerichte; Sing: Landgericht); land (Oberlandesgerichte; Sing: Oberlandesgericht); and federal level (Bundesgerichtshof in Karlsruhe). The Federal Court of Justice is the highest ordinary court (Amtsgerichte: Sing) and also the highest court of appeal and it can hear both criminal and civil cases.⁶⁴ Ordinary courts deal with criminal and many civil cases. Ordinary courts under the jurisdiction of the Federal Court of Justice number 828 in which 687 are at the local level, 116 at the regional level and 24 at the appellate level and 1 is at the federal level.

9.3 Specialized Courts

Specialized courts hear cases related to administrative, labor, social, fiscal and patent law. The Administrative Court works under the jurisdiction of the Federal Administrative Court and there are 69 within Germany in which 52 are at the local level, 16 at the higher level and 1 at the federal level. Similarly, there are tax courts in the Federal Finance Court, of which there are 20 in Germany. There are 19 at the local level, and 1 at the federal level. The Labor Court works under the Federal Labor Court and there are 142 in which 122 at the local level, 19 at the appellate and 1 at the federal level. The Social Courts are altogether 86, in which 69 are at the local level and 1 at the federal level. The Federal Patent Court is in Munich and is the only such court.

As outlined above, the judicial model of Germany has a vertical as well as horizontal structure. A structure exists from top to bottom based on the provision of regular appeal, but the jurisdiction differs based on the subject-matter of the case. Thus, Germany has a unified and integrated model of judiciary under a federal structure.

⁶² *Id.*, Article 92.

⁶³ *Id.*

⁶⁴ See http://en.wikipedia.org/wiki/SupremeCourts_of_Germany (as of 7th May 2008).

10. The Judicial Model of India

India, despite being a federal state, has an integrated model of the judiciary unlike the United States and it is to some extent similar to Germany. India is the largest democracy in the world and at present has 28 States. The Constitution of India 1950 Schedule 7 has divided the powers of the nation into a Union list, State and concurrent list. As such, it has also laid down a rule that if there is not a clear definition of power on a particular matter, the Union Legislature has power to frame the necessary provisions. Therefore, India has a different federal polity than that of the United State of America. It is sometimes criticized because the centre has a powerful role in defining the present and the future of each State. The structure of the judiciary in India represents an integrated and unified model that is discussed below.

10.1 Supreme Court of India

There shall be Supreme Court of India consisting of a Chief Justice of India and until Parliament by law prescribes a larger number, not more than seven other Judges. Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such Judges of the Supreme Court and of the High Courts in the States that the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.⁶⁵ In the appointment process, while appointing the Chief justice, the advice of the Supreme Court and other Judges of High Courts is taken. So far the appointment of other justices is concerned, a consultation is taken from the Chief Justice and other Justices. However, the role in the appointment by the Minister for Law has been ever more crucial since 1993.⁶⁶

The Supreme Court of India has original jurisdiction to hear disputes between the Government of India and one or more States or States on one side and one or more States on the other.⁶⁷ Likewise, it has the power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, quo warranto and certiorari, or any of them, for any purposes other than those mentioned in Clause 2 of Article 32.⁶⁸ Not only this, the Supreme Court of India has also been conferred the power to hear appeals from a High Court in certain cases. The Constitutional provision reads that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the Territory of India, whether in a civil, criminal and other proceeding, if the High Court certifies under Article 134 A that the case involves a substantial interpretational question of constitutional law. As such, an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court:

- a) has an appeal reversed regarding an order of acquittal of an accused person and sentenced him to death; or
- b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
- c) certified under Article 134A that the case is fit for appeal to the Supreme Court.

⁶⁵ Constitution Of India, Article 124.

⁶⁶ M. P. Jain, INDIAN CONSTITUTIONAL LAW 225, Wadawa and Company, Nagpur as cited by Tika Ram Bhattarai in *supra* note 52, p. 75.

⁶⁷ *supra* note 65, Article 131.

⁶⁸ *Id*, Article 139.

The Supreme Court of India also has the power to hear appeals from High Courts in regard to civil matters on the condition that:

- a) that the case involves a substantial question of law of general importance; and
- b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

It is a court of record and is also empowered to punish for contempt of itself and of other lower courts. Besides, it has wide scope in exercising power of a federal court under existing law to be exercisable by the Supreme Court, in proving special leave for appeals and to review judgments or orders of its own.

10.2 High Courts

High Courts are also constitutional courts under the Indian Constitution at the state level. Article 213 provides that there shall be a High Court for each State. However, there are 22 High Courts in India at present. In particular there is one for *Punjab* and Haryana State, one situated in Gohati for Assam, Nagaland, Meghalaya, Manipur and Tripura and others are in various States. Every High Court shall consist of a Chief Justice and other such Judges as the President may from time to time deem necessary to appoint.⁶⁹ Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting judge, as provided in Article 224, and in any other case, until he retains the age of sixty-two years.⁷⁰

The High Court has authority to issue to any person or authority including any Government within those territories, any directions, orders or writs, such as *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* for the enforcement of any of the rights conferred by Part III or for any other purpose. Likewise, every High Court shall have superintendence over all courts and tribunals, throughout the territories in relation to which it exercises jurisdiction.⁷¹ Moreover, if the High Court is satisfied that a case pending in a court subordinate to it requires a substantial question of law regarding the interpretation of the Constitution to decide the matter, then it shall withdraw the case and may:

- a) either dispose of the case itself; or
- b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

10.3 Subordinate Courts (District Courts and Other Lower Courts)

In each district of a State, there are separate courts to hear civil and criminal cases. As such, separate civil and criminal courts are also established in the metropolitan city areas where the population is more than one million. The appointment of District Judges is made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.⁷²

⁶⁹ *Id.*, Article 216.

⁷⁰ *Id.*, Article 217.

⁷¹ *Id.*, Article 227.

⁷² *Id.*, Article 233.

The Session Judge shall preside over the Session Court. It has original and appellate jurisdiction in the sense that he/she hears criminal cases as a court of first instance and also hears appeals of the decisions made by subordinate Magistrate Courts. There are two kinds of Magistrates in India, namely Judicial Magistrates and Administrative Magistrates. The former has judicial power. Furthermore, petty criminal cases are heard by the *Panchayat* in the local area.

So far as the civil district courts are concerned; the District Court is authorized to hear civil cases with original and appellate jurisdiction. As was the case in the *Munsit's Court* and *Nyaya Panchayat*, subordinate judge's still have the power to hear cases at the first instance that involve large value matters. Appeals of their decisions are then filed in the District Court. However, in the metropolitan area, small causes courts are established to hear petty civil cases having an amount less than two thousand Rupees and no appeal is allowed.

As for the recruitment of persons other than District Judges to the judicial service, it has been stated that an appointment shall be made by the Governor of the State in accordance with the rule made by him/her after consultation with the State Public Commission and the High Court exercising jurisdiction in relation to the State.⁷³

In India, there is a unified and integrated model of the judiciary under the vertical structure. The Supreme Court of India is the final arbiter of fundamental rights under which the High Courts, District Courts and other subordinate courts function.

11. Future Model of the Nepali Judiciary

11.1 Basic Values to be Considered

Article 101 of the Interim Constitution of Nepal, 2063 has mandated that there be three tiers of courts. It has also opened a way to establish special courts or tribunals for hearing special types of cases apart from the regular courts set out in the Constitution. Now, the Supreme Court, Appellate Courts and District Courts are empowered to hear all types of civil and criminal cases except for the provisions made in other laws. Special courts and tribunals like the Special Court, Labor Court, Administrative Court, Revenue Tribunal and Debt Recovery Tribunal and its appellate level courts have been set up to hear special types of cases. The present structure of the Nepalese court is definitely integrated under a unitary system of government. After the many recent political changes, the country is in the process of restructuring by which the judiciary of Nepal should be remodeled in line with the new political developments. However many questions remained unanswered.

11.2 Issues for Remodeling the Nepali Judiciary

First, what type of federal structure should Nepal have? Second, should the judiciary have its own structure regardless of the federal structure of the nation? Third, should Nepal follow the dual model as in the United States of America or a unified model as in Germany and in India or should a new court structure be created.

⁷³ *Id.*, Article 234.

The above-mentioned questions must be answered on the basis of the following values:

- Geographical setting;
- Economic situation;
- Structure of federal system and administrative division of the country; i.e centre, regions and autonomous areas.⁷⁴
- The basic values like rule of law, separation of powers, independence of judiciary, constitutionalism and protection of basic human rights;
- Division of powers like central, state or concurrent ones;
- Application of the principle of *stare decisis*;
- The people's expectation from judiciary and the dissatisfaction that they now have;
- Jurisdiction of courts and any changes to be made;
- A provision for full faith and credit to state court's decisions when heard before another state's court;
- Past experiences of the Nepali judiciary.
- Need for court management and appropriate mechanisms.
- The availability of legal practitioners and people's access to them.
- Need for SWOT {Strength, Weakness, Opportunity and Threat} analysis of the dual and integrated model of judiciary in the Nepalese context.

11.2.1. *SWOT Analysis of the Dual and Integrated Model of Judiciary in the Nepali Context*

Strengths	Dual Model	Integrated or Unified Model
	<ol style="list-style-type: none">1. Appropriate for a vast country in size and population.2. Ensures judicial autonomy and independence of all levels of courts.3. Speedy settlement of disputes by the state courts.4. Settlement of constitutional questions even by the State's Supreme Court.5. Full faith and credit clause ensures respect for each state's laws, records or judicial decisions by other states and enforces their decisions.6. Flexibility given to state's legislature to shape the state judiciary and therefore the state's legislature has a key role.7. The provision for the appointment, tenure and salary and fringe benefits to the State's judges are subject to State legislation.	<ol style="list-style-type: none">1. Appropriate for a vast country in size and population.2. Ensures judicial autonomy and independence of all levels of courts.3. Speedy settlement of disputes by the state courts.4. Settlement of constitutional questions even by the State's Supreme Court.5. Full faith and credit clause ensures respect for each state's laws, records or judicial decisions by other states and enforces their decisions.6. Flexibility given to state's legislature to shape the state judiciary and therefore the state's legislature has a key role.7. The provision for the appointment, tenure and salary and fringe benefits to the State's judges are subject to State legislation.

⁷⁴ The three major political parties like the Communist Party of Nepal (Maoists), Nepali Congress and Communist Party of Nepal (UML) have divided the country into three levels in their election manifestos.

Weaknesses	Dual Model	Integrated or Unified Model
	<ol style="list-style-type: none"> 1. It is complex to economically manage and less cost-effective. 2. It requires a large institutional set up and many human resources. 3. There is little chance of correction by the federal courts which may reduce the people's faith towards the judiciary. 4. The dual structure may create jurisdictional conflict between federal or state courts. 	<ol style="list-style-type: none"> 1. It is easy to manage but more centrally guided and thus may become less effective. 2. The reduced institutional size of a unitary justice system may not be supportive of justice, as the judiciary should be accessible to remote people including paupers and the disadvantaged. 3. The federal court may be overburdened and therefore delay may occur in justice dispensation. 4. The judges may be more focused on their careers rather than justice dispensation.
Opportunities	Dual Model	Integrated or Unified Model
	<ol style="list-style-type: none"> 1. It is complex to economically manage and less cost-effective. 2. It requires a large institutional set up and many human resources. 3. There is little chance of correction by the federal courts which may reduce the people's faith towards the judiciary. 4. The dual structure may create jurisdictional conflict between federal or state courts. 	<ol style="list-style-type: none"> 1. It is easy to manage but more centrally guided and thus may become less effective. 2. The reduced institutional size of a unitary justice system may not be supportive of justice, as the judiciary should be accessible to remote people including paupers and the disadvantaged. 3. The federal court may be overburdened and therefore delay may occur in justice dispensation. 4. The judges may be more focused on their careers rather than justice dispensation.
Threats	Dual Model	Integrated or Unified Model
	<ol style="list-style-type: none"> 1. A threat of conflict remains between the federal and state judiciaries. 2. The country may not have adequate economic and human resources. 3. To implement a dual model, the country should be ready to follow the federal system like that of the United States. 4. It may require separate constitutions for various states. 	<ol style="list-style-type: none"> 1. This model can be blamed for being more static at the time of restructuring. 2. The existing budget, facilities and human resources may not be that helpful when restructuring the Nepali judiciary into an integrated model. 3. It requires a careful constitutional division of central and state's courts power which may not always be appropriate.

Based on the above analysis the following conclusions are derived:

1. Nepal needs to learn from her past experiences while reshaping the judicial model into an integrated model or a dual one.
2. Distinct Nepalese conditions relating to geography, population, economics, structure of society and the needs of the country suggest that it will be better for Nepal to follow an integrated model like that of Germany and India rather than that of the United States.
3. There should be an in-depth discussion among the political leaders, judges and experts to develop an appropriate model of the judiciary for Nepal.
4. An integrated structure seems to be more cost-effective and easier to manage for Nepal.
5. We should neither be idealistic, nor radical, but be pragmatic as well as dynamic to meet the upcoming challenges.

6. The dual judicial model may be more dubious, conflicting and complex to use in the Nepali context.
7. The judiciary of Nepal in the future must be made a time concerned, efficient and effective organ of the state as per the people's aspirations.
8. The matter of full faith and credit to one state's laws, records and judicial decisions in other states should be placed in the new constitution.
9. The process of the appointment of judges must be merit-based with the aid of clear and transparent criteria.
10. All of the courts including the state courts must be classified as Constitutional Courts.
11. While restructuring the model of the judiciary, the people must be assured of the protection and promotion of their fundamental human rights.

12. Proposed Judicial Model of Nepal

The proposed judicial model of Nepal may be as follows:

12.1 Tiers of Court

There shall be three tiers of Courts viz. Supreme Court, Provincial Appellate Courts/ Provincial Specialized Courts, and District Courts/Specialized District Courts.

12.2 Structure and Jurisdiction of the Supreme Court

12.2.1 Divisions of Benches in the Supreme Court

Benches like the constitutional bench, criminal bench, civil bench, corruption cases bench, administrative bench, green bench, commercial bench, labor bench, juvenile bench, social welfare bench and family bench could be established in the Supreme Court.

12.2.2 Jurisdiction

A Constitutional bench shall hear the cases relating to the infringement of fundamental rights and the constitutionality of legislation and possess the power to invalidate legislation not in harmony with The Constitution. Other benches shall hear cases with original and appellate jurisdiction, as provided by federal law, in the matters they are concerned with.

12.2.3 Appointment of Judges

The Chief Justice shall be appointed by the President upon the recommendation of the Constitutional Council and other Judges of the Supreme Court. Other Judges of the Supreme Court shall be appointed by the President upon the recommendation of the Chief Justice of the Supreme Court.

12.3 Structure and Jurisdiction of Provincial Appellate Courts and Specialized Courts

12.3.1 Division of the Benches of Provincial Appellate and Specialized Courts

The benches like constitutional, civil and criminal benches could be established in the Provincial Appellate Court. Similarly, many specialized courts like the labor court, corruption court, revenue

court, juvenile court, commercial court, administrative court and juvenile special court could be established at the appellate level.

12.3.2 Jurisdiction

All the Provincial appellate and specialized courts shall generally have appellate jurisdiction. However, the constitutional bench shall hear all kinds of writs for the protection of fundamental rights and may test the constitutionality of state legislation. Other benches of both the appellate courts and specialized courts at the appeal level shall hear appeals on the decisions made by District Courts and district level specialized tribunals.

So far as the application and interpretation of federal law is concerned, the provincial appellate courts may interpret such federal law if there is any connection to it in State law. However, the courts will have to refer the disputes that are exclusively related to federal law to the Supreme Court. At the same time, a full faith and credit clause must be included to ensure that any enforcement of decisions of one state's court by another state's court is recognized.

12.3.3 Appointment

The Judges of the Appellate Courts shall be appointed by the President upon the recommendation of the state level judicial advisory body. Similarly, Appellate Judges may be transferred from one Appellate Court to another within a state on a routine basis and to the courts of other states only after completing a certain number of years in a particular state.

12.4 The Structure and Jurisdiction of District Courts and District Level Specialized Courts

12.4.1 Benches of the District Court and District Level Specialized Court

The benches like the constitutional bench, criminal bench and civil bench shall be established in district courts and a corruption bench, administrative bench, green bench, revenue bench, commercial bench, labor bench, juvenile bench and social welfare bench could be established in a specialized court.

12.4.2 Jurisdiction

District Courts shall hear the cases falling within the territorial jurisdiction of a court of first instance. Similarly, specialized district level courts shall also hear special cases depending on their nature. As well, District Courts shall facilitate mediation in the settlement of petty cases regarding civil and tort liabilities and execute arbitral awards.

12.4.3 Appointment

The judges of both district courts and district level specialized courts shall be appointed by the President upon the recommendation of the state level judicial advisory body as provided by the Constitution. Moreover the salaries, fringe benefits, tenure and conditions of transfer shall be made as mentioned in the Constitution and federal law.

12.5 Establishing Mediation Centres/Boards

These informal mechanisms will work with the guidance and in support of district courts and district level specialized courts. They shall rather be considered as a supplementary forum for

resolving the disputes at the local level. Moreover, the panel of mediators or arbitrators shall be appointed by district courts based on their expertise.

13. Conclusion

Reforming the judicial structure should not be too radical, too negative or too traditional. As discussed earlier, it has been realized that Nepal has to actually understand her size, population, availability and distribution of resources, fiscal and non-fiscal development and aspirations of the people before any concrete decisions can be made. While mapping out Nepal as a federal state, the proposed model must be realistic, functional, as well as effective. Similarly, no form of federalism in the world could be free from criticisms or full of attributes. Nevertheless, the structure of the judiciary should not be at the whims of the legislature, but instead its composition should be solely guaranteed by the Constitution. Dicey has appropriately pointed out that federalism means legalism, the predominance of the judiciary in the constitution and the prevalence of a spirit of legality among the people” in that federalism “substitutes litigation for legislation.”

While taking about the election manifesto of major political parties, they more or less agree on the point that Nepal shall be a federal system that will ensure the autonomy of the regions and the right of self-governance of autonomous areas. The entire country under the federal structure could be structured with a centre, region/province and local level in accordance with global political standards. Political parties are not willing to restructure the country in a dual manner like the United States. Nor are they ready to make the country a confederation. So in restructuring the Nepali judiciary, Nepal should prefer a model that could be more practical, cost-effective and easy to manage in terms of structure and procedure. At the same time, the judiciary must be proved as an institution to bolster the sovereignty, integrity and unity of the nation at large.

The central, state and concurrent powers in the constitution must be clearly stated. As mentioned before, we can learn from other countries’ experiences. A new constitution must also contain a full faith and credit clause that guarantees a state court’s autonomy and give priority to state courts when settling disputes related to state law. Most importantly, adequate research and comprehensive studies into restructuring the judiciary are required.

Last but not least, Nepal can follow an integrated and unified model of the judiciary so that management of the judicial system is simple and practical. The effective utilization and management of existing human and physical resources will ease the transition to this model.

As far as this study is concerned, it is the first of this kind and therefore, the study has raised many issues and left them for further areas of research. Firstly, an in-depth study should be conducted about the application and enforcement of federal law by the state courts in Nepal. Secondly, a further study can be made into the jurisdiction and procedures of federal and state courts in a federal regime.

Interpreting the Constitution: The Formalism and Contextualism Debate

- Apurba Khatiwada*

Abstract

In this article, the author discusses the benefits and disadvantages of the sometimes conflicting Formalist and Contextualist approaches to constitutional interpretation. The focus of the article is the interpretation of the United States Constitution, but the lessons learnt can be applied in any constitutional setting. The author concludes by strongly advising that judges should follow the Contextualist approach in order to provide contemporaneous standards of justice no matter the age of the constitution. This debate is usually only of relevance to mature constitutional democracies. However, it is relevant to Nepal, because some of the issues raised in the debate could actually be prevented from ever occurring in Nepal if the constitutional drafters learn from the mistakes of more mature constitutional democracies.

1. Introduction

Adjudication of a dispute by a judge in a formal process involves two stages: first, a reconstruction of facts; and second an application of relevant laws to the facts discovered. Logic and reasoning, aided by evidence contribute to the reconstruction of facts. And for a judge it involves the process of making a choice among the facts contended by the parties to the dispute on the basis of rules and principles of evidence.

However, the application of laws is the trickier and more controversial part of adjudication. In some cases, when there is no obvious application of law, because [a] there is no settled rule dictating a decision (hard cases); [b] there are competing interpretative tools that when employed will likely create divergent conclusions; and [c] there is legislative use of 'policy' terms like 'reasonable', 'good faith', 'peoples' aspiration', which give no coherent and single meaning and indicate adjudication may take a subjective guise. It is deemed subjective, because judges who are required to seek answers from the existing law are deprived of the most obvious aid, being the law, and thus have to appeal to different interpretation principles and 'processes of [judicial] reasoning' or logic.

By its nature, adjudication should be reasoned and rational.¹ Thus, whilst a judge is giving a decision, the reasons must be given by him/her which sufficiently justifies the application of law or the meaning given to the law. Here, I wish to take up only the later aspect of the application of law. That is, in this paper I have dealt primarily with the 'process' and 'principles' by which judges give or should give meaning to an unapparent law. And for this, I have taken refuge under the convincingness of interpretation given to the law and its outcome, through a comparative analysis of two broad principles: judicial 'Formalism' and 'Contextualism'. To mitigate complexity, I have dealt with the issue by focusing on the application of a constitution. To fulfill this objective,

* LL.B. 5th year, Kathmandu School of Law. I place on record my sincere thanks to Dr Yubaraj Sangraula for his comments on the article.

¹ "Adjudication is a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366-367 (1978-1979).

I have first tried to make it clear what it means to interpret, and what are the challenges of interpreting a constitution. Then, I have discussed judicial Formalism and I have highlighted the insufficiency and obscurity of the principle. Finally, with Contextualism, I have simply tried to delineate the nature of Contextualism and its value in interpreting unapparent provisions of a constitution.

2. Interpreting a Constitution

A constitution is an incredible document, it is not only meant to order the present life but also the future of unborn generations.² Moreover, as most constitutions are hard to change, interpretation of the text of the constitution is required to discover the relevance of constitutional provisions and make them relevant to the ambit of new born facts and problems. Hence, through the interpretation of a constitution, the same text is able to arbitrate in different contexts and in dissimilar disputes.

And when, that context or dispute culminates into a 'hard case', a case which "cannot be brought under a clear rule of law that is laid down by some institution in advance"; and when there exists no definitive provision that endows any party to the dispute any clear cut rights; and that the judges, who are called upon to decide the case have to do so within the ambit of the recognized principles of adjudication discover the rights of the parties involved in the case,³ or, when "reasonable lawyers disagree" and "where no settled rule dictates a decision either way,"⁴ judges interpreting the constitution face great challenge. Furthermore, by their very nature constitutions are more than just about texts; they are beyond their literal words. Constitutions rather, transcend their underlying values and object. Therefore, to probe into its real sense, a constitution must be constructed with logic and wit. Traditional literal interpretation of constitution, thus, cannot be of much help in deriving the true meaning and thereby solving most compound constitutional disputes that court is asked to settle these days.

In the first parliamentary dissolution case,⁵ the Supreme Court of Nepal encountered this very reality. The Court was asked to settle, among other things, 'whether the Prime Minister can resign and then dissolve the parliament or not'. The then Constitution of the Kingdom of Nepal 2047, in Article 53 (4) provided that "His Majesty on the recommendation of the Prime Minister may dissolve the parliament". However it was not clear whether a Prime Minister can resign from his post and recommend dissolution of the parliament at the same time. Indeed, the text of relevant provision of the Constitution was not in any way helpful in deciding the question. The Supreme Court had to decide in favor of one of the party by adhering to a Constitutional provision, which was completely silent on the very question of law. Hence, the Court had to explore the essence of the concerned provision beyond the literal texts, when it decided the case.

In fact, it is the nature of a constitutional text that it almost never provides "direct answers to the cases that are taken to court, that make the idea of judges being able to tell people what they cannot decide for themselves".⁶ Hence, judges must decide complex constitutional questions that have no obvious answers and that the relevant provision is mute. For instance, in parliamentary dissolution cases courts have held 'that the Prime Minister after resigning from

² Chief Justice John Marshall stated, "provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch v. The State of Maryland et al.* 4 L. Ed. 579, 603 – 604.

³ See, Ronald Dworkin, *TAKING RIGHTS SERIOUSLY*, 81-130 (Universal Law Publishing, New Delhi, 2005).

⁴ *Id.* p. 83.

⁵ *Hari Prasad Nepal v Honorable Prime Minister Girija Prasad Koirala NKP Golden Jubilee Edition* 88 (Supreme Court, 2052).

⁶ Beatty M, *THE ULTIMATE RULE OF LAW*, 5 (Oxford University Press, New York, 2004).

his post can dissolve the Parliament'⁷ and 'the Prime Minister cannot dissolve the parliament after the house is summoned'⁸, even though the relevant constitutional provision was silent on those issues.

It is not only hard cases, but also *stare decisis* considerations, which makes interpretation of a constitution significant and thus can have vital influence on how a judge may choose to interpret a provision. A judge by adjudicating on a case is in effect, also indicating possible courses of adjudication in similar future cases. That is, even though a judge decides a case with the primary objective of adjudicating the dispute in front of him, he is also laying down a general rule for other people to follow. In this regard, John Dewey has suggested that judges must combine and balance two different goals while adjudicating.⁹ The first goal is to choose legal rules that have desirable social consequences. The second goal is 'to enable persons in planning their conduct to foresee the legal import of their acts' by judicial decisions that 'possess the maximum possible stability and regularity.' And to accomplish this, judges must announce their decisions in the form of rules that citizens can use to plan their conduct.¹⁰

Indeed, because of the above reasons, judicial reasoning and interpretation of a constitution necessitates not only judicial ingenuity in imputing and discovering a meaning relevant to the case in front of them, but also the skill of judging the impact of such an interpretation, as a rule for the future. Moreover, other considerations in the form of legal determinacy¹¹, a judge's private perceptions and beliefs¹², policy-questions, separation of powers, the limits of *stare decisis* and so forth, also have significant influence on this process. Thus, any interpretation a judge may give to a provision of a constitution should also necessarily balance all such considerations. Judicial Formalism and Contextualism have evolved for the same reason, but with visibly different methods and consequences. Thus, these two principles are not merely about method but also about the outcome, they are principles conscious of the interpretation process and its potential effects on legal philosophy as a whole.

3. Judicial Formalism

Formalism "seeks to gain theoretical information and/or practical guidance concerning the law through attention to its 'form' as opposed to its (historically and geographically variable) content, and hence without regard for the detailed findings of history, sociology, anthropology and so on."¹³ Formalism assumes law is a self-executing system¹⁴, inherently capable of giving answers in all circumstances through a simple mechanical alignment of law and legal disputes.

⁷ *Hari Prasad Nepal v Honorable Prime Minister Girija Prasad Koirala* supra note 6.

⁸ *Rabi Raj Bhandari and Others v Honorable Prime Minister Man Mohan Adhikari* NKP Golden Jubilee Edition 1 (Supreme Court, 2052).

⁹ John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17 (1924).

¹⁰ Joseph William Singer, *Legal Realism Now: Review Essay* 76 CAL. L. REV. 465, 471-472 (1988).

¹¹ See for detail discussion on legal determinacy Mark C. Modak-Truran, *SECULARIZATION, LEGAL INDETERMINACY, AND HABERMAS'S DISCOURSE THEORY OF LAW*, accessible at <http://papers.ssrn.com/abstract=987821> (as of 14 July 2008).

¹² See for detail, Anthony G Amsterdam & Jerome Bruner, *Minding The Law* (Harvard University Press, 2000) as cited in Dennis Patterson, *Fashionable Nonsense: Book Review Essay* 81 TEX. L. REV. 841 (2002-2003) for the cognitive theory of law, and the influence of mind of judge on decision.

¹³ Martin Stone, *Formalism in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW*, 170-171 (Jules Coleman and Scott Shapiro eds, OXFORD UNIVERSITY PRESS, 2002).

¹⁴ Lawrence Alexander defines Formalism as "adherence to a norm's prescription without regard to the background reasons the norm is meant to serve (even when the norm's prescription fails to serve those background reasons in a particular case). A Formalist looks to the form of a prescription—that it is contained in an authoritative rule—rather than to the substantive end or ends that it was meant to achieve. A norm is formalistic when it is opaque in the sense that we act on it without reference to the substantive goals that underlie it." Lawrence Alexander, *Law And Formalism*, UNIVERSITY OF SAN DIEGO LEGAL STUDIES RESEARCH PAPER SERIES RESEARCH PAPER (No. 07-18, October 2005), accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829327 (as of 14 July 2008).

The application of Formalism in adjudication requires a "closed logical system" of judicial reasoning, where judges deduce decisions "by logical means from predetermined legal rules without reference to social aims, policies, moral standards."¹⁵ Thus under judicial Formalism, judges settle cases, by giving absolute credence to the written law. In other words, judicial Formalism stresses on the notion of 'value-neutral judging'¹⁶. In this purpose, judicial Formalism employs, generally three 'tendencies of,' Originalism, Textualism and Conceptualism¹⁷.

As to the merit of the principle, Formalists argue that judicial Formalism ensures legal determinacy, fidelity to, transparency of and objectivity of the law.¹⁸ They also argue as a matter of policy and principle that 'judges should not make laws but discover them'¹⁹ by giving them their true or original meaning. However, Formalists seem to be divided over whether the original meaning of the text or that of the drafters is to be preferred.²⁰ In any case, in constitutional law, Originalism corresponds to the assertion that the original intent of the constitution should be reflected on any meaning given to it by the court,²¹ thus 'authoritatively settling' any possibility of 'moral' differences²² in the understanding of constitution, again ensuring predictability²³ (determinacy) in the decision of the court and in the application of the constitution.

The appeal of Originalism, thus also of Formalism, is most profound in its ability to demonstrate fidelity to the constitution²⁴. It gives respect to the text and its original meaning and thus represents a relatively 'uncontroversial and authoritative' way of deriving the meaning of the constitution. Fidelity to the constitution means, the constitution is always regarded as the "moral center of gravity"²⁵. This guarantees the constitution is absolutely abided by and the work of interpreting the provisions of it is confined to the limits and scope envisioned by the constitution. Formalists believe, Originalism maintains the supremacy of the constitution and argue if Originalism is substituted, by other competing principles of constitutional interpretation, the judiciary can have the power to alter the constitution and place the courts above the constitution.

Advocates of Formalism also press for the separation of private beliefs and perceptions of a judge and their professional duty of adjudication. In this regard, Justice Scalia has argued that Originalism by preventing "judges own predilections for the law, & establishes a historical criterion that is conceptually quite separate from the preferences of judges."²⁶ Thus regulating

¹⁵ See, Hart, H. L. A, *Positivism and The Separation of Laws and Morals* 71 HARV. L. REV. 593, 601 (fn 25) (1957).

¹⁶ Chemerinsky Erwin, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 2 (2001).

¹⁷ In Thomas C. Grey, *The New Formalism*, STANFORD PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES, 2 (accessible at http://papers.ssrn.com/paper.taf?abstract_id=200732) (as of 14 July 2008). The author defines conceptualism as treating "abstract categories like contract and tort as coherent structures of concepts and principles, rather than as bodies of sub-legislation generated in the course of judicial dispute-resolution." When text is clear and operative, there can be no dispute as to the application of the provision, since the debate for and against judicial Formalism necessarily presupposes the failure of Textualism in addressing the dispute. Hence, in this article, I have made efforts to discuss judicial Formalism in terms of Originalism, as it best represents Formalism, in interpreting the constitution, when text is insufficient and equivocal. So, on some occasion two terms have been used interchangeably.

¹⁸ See for further discussion, Grey *supra* note 18.

¹⁹ "The Originalist conception of adjudication would seem to rest on two broad and interrelated sets of ideas. The first comprises beliefs about the certainty of language and the methods of discovering its meaning. The second is made up of beliefs about the *allocation of institutional responsibilities between legislative bodies and courts.*" (*emphasis added*) Harry H. Wellington, *THE SUPREME COURT AND THE PROCESS OF ADJUDICATION, INTERPRETING THE CONSTITUTION*, 54-55 (Universal Law, New Delhi, 1990).

²⁰ See for detail, Antonin Scalia, *The Rule of Law as a Law of Rules* 56 U. CHI. L. REV. 1175 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, NORTHWESTERN UNIV. L. REV. 226 (1988).

²¹ See for detailed discussion on the development of the principle, Eric J. Segall, *A Century Lost: The End of The Originalism Debate* 15 CONST. COMMENTARY 411 (1998).

²² Alexander *supra* note 15, p 2-14.

²³ See for detail Scalia *supra* note 21.

²⁴ Kent Greenwalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, 300 (Jules Coleman and Scott Shapiro eds, OXFORD UNIVERSITY PRESS, New York, 2002).

²⁵ Beatty *supra* note 7, p 6.

²⁶ Antonin Scalia, *Originalism: The Lesser Evil* 57 UNIVERSITY OF CINCINNATI LAW REVIEW 849 (1995).

“unconstrained judicial discretion”²⁷ that may take center stage in the absence of Originalism and ensuring that the constitution is distinct from what a judge may think of it.

From the above arguments, a common thread in Formalism is apparent that is mirrored by the form of the Formalists’ obsession with the ‘prevention of change.’ Originalism directs judges to find the meaning of the constitution as it was understood when it was drafted, thus it prohibits any imputation of a new understanding of the constitution. For all Originalists, including Justice Scalia,²⁸ a constitution does not suggest changeability, but “rather its whole purpose is to prevent change - to embed certain rights in such a manner that future generations cannot readily take them away.”²⁹

4. Why Formalism is Not Preferable?

A brief account of judicial Formalism, in the preceding section raised few arguments in favor of judicial Formalism: first, the pledge of ‘fidelity to the constitution’; second, the ‘prevention of change’; third, ‘value-neutral judging’ with no other consideration apart from law; and finally, the historical method of understanding a constitution. However, each of the above features is marred by at least one of three deficiencies: (a) it is wrong and against constitutional values; (b) it is impossible to follow and (c) at times it is self-contradictory and insufficient in solving all constitutional disputes.³⁰

Formalists argue that Originalism contributes to “fidelity to the constitution”. But the possibility of fidelity ties in with the problems of legitimacy. A constitution draws legitimacy from the recognition by the ‘existing’ society. Present society deems Originalism inapt, since it only harps on about fidelity to the constitution on the basis of a historical understanding. Originalism completely ignores the ‘existing’ social-political context that is equally relevant when applying the constitution. Thus, it is grossly inappropriate and against the true essence of the constitution that Formalists direct judges to owe an unconditional duty of compliance to people who lived long ago, who may have failed to anticipate the aspirations and preferences of future generations.

Similarly, ‘value-neutral judging’ as advocated by Formalists also suffers from the above mentioned deficiencies. First ‘value-neutral judging’ is impossible. It is impossible, because an adjudication of a dispute can never be boxed into a mechanical rule. The process of judging necessarily invites a judge’s own beliefs, ideas, principles and philosophies.³¹ Second, asking judges to interpret a constitution on the basis of history is not actually ‘value neutral’. Directing

²⁷ Greenwalt *supra* note 25.

²⁸ See Scalia *supra* note 27.

²⁹ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton U. Press, 1997, including a Comment by Ronald Dworkin, among others) cited in Segall *supra* note 22, p 420,421.

³⁰ Kay *supra* note 21.

³¹ “Any judge will develop, in the course of his training and experience, a fairly individualized working conception of law on which he will rely, perhaps unthinkingly, in making these various judgments and decisions, and the judgments will then be, for him, a matter of feel or instinct rather than analysis.” Ronald Dworkin, *LAW’S EMPIRE*, 256 (Universal Law, New Delhi, 1986).

“Judges are respected for their adherence to reasoned discourse; they are expected to decide legal issues based upon rational argument, serious reflection, and fidelity to the rule of law.” Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia* 51 NEW YORK LAW SCHOOL LAW REVIEW 908 (2006/2007) (*emphasis added*).

“candid insight into the thinking of two experienced and distinguished English judges suggests the importance of intuition - what might be called old-fashioned judgment. We should not be too surprised that this plays a part for it is simply the application to a particular case of the accumulated experience of professional life. Yet intuition may itself be the product of unrecognised psychological forces, cultural assumptions and social attitudes. Working under the pressure of constant decision-making, the average judge does not have a great deal of time to pause and clarify, in his or her mind, the myriad of influences which are at work. Hon Justice Michael Kirby, *Judging: Reflections On The Moment Of Decision*, accessible at http://www.hcourt.gov.au/speeches/kirby/kirby_charles.htm (as of July 19, 2008) (*emphasis added*).

judges to resolve the flashpoints of social conflict in their communities against the understandings of people who lived many years ago, leaves them free to come down on whatever side of a case their consciences tell them is right. Thus, by placing no restraint on judges, is like telling judges they must give effect to the original intent of the constitution "but without providing them with any guidance or direction and imposing no constraints,"³² which inevitably leads to the countless understandings from which they can choose the meaning they wish. Likewise, such a historical account of the intentions of the constitution cannot be a judge's area of expertise. One of its own faithful advocates suspected as much and discussed how Originalism is impossible and unnecessarily complex:

*"E[Originalism] requires immersing oneself in the political and intellectual atmosphere of the time-somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer"*³³

Furthermore, even if all the obsessive credence given to the intention of the drafters of the constitution is correctly inferred, it may not be able to mirror the real and overarching sense of the constitution. And by sticking to Originalism, importance is given to the minds of the drafters who more often than not were preoccupied with their own political and personnel beliefs and ideologies, which are bound to differ from person to person. Thus Originalism fails to create a collective intention of the group of drafters creating a same common constitution. Larry Alexander identified the problem of a multiplicity of authors by arguing that "if there are no group minds, how can there be group intentions."³⁴ So an attribution of any sort of intention to a constitutional provision would be mere assumption rather than a fact. Hence, as David Beatty correctly argued, Originalism "in practice can't meet the standards it sets for itself. In fact, in Originalism there is no neutrality in the derivation, the definition, or even the application of the law"³⁵. Originalism is unreasonable and a self-contradictory notion.

Finally, Originalism is insufficient because it fails to be flexible while accommodating other normative and value based considerations of constructing a constitution. It fails to include new aspirations and expectations of people from the constitution. Furthermore, it is of no value when resolving new and improvised constitutional deadlocks. Originalism's resolve against change, coupled with the inevitable human errors of drafters, results in limitations of the constitution and hence leads to a dim and sometimes dangerous construction of the constitution.

The peril of such construction was quite apparent when the Supreme Court declined to issue an interim order against the Royal government in *Ram Krishna Nirala v HMG* [Unreported]. The government after 2005 royal coup promulgated Media Ordinance 2062 (2005) that curtailed press freedom of FM and Television stations. The Government stuck to Originalist construction of Press and Publication Right under Article 13 of the Constitution of the Kingdom of Nepal after the constitutionality of the said Ordinance was challenged in the Supreme Court. Article 13 of the Constitution had provided "[1] No news item, article or any other reading material shall be censored. [2] No press shall be closed or seized for printing any news item, article or other reading material." Government on its part argued that the Constitution did not guarantee the right

³² Beatty *supra* note 7, p. 9.

³³ Scalia *supra* note 27.

³⁴ Larry Alexander, *Originalism or Who is Fred*, 19 HARV. J. L. & PUB. POL 321, 322 (1996).

³⁵ Beatty *supra* note 7, p. 9.

of Press and Publication of 'transmitting or broadcasting' news by 'electronic media' including Television and FM Stations as it did to the press to publish 'newspaper and other article', therefore Television and FM stations were not protected under right to press and publication. Indeed Supreme Court also seemed convinced with such construction³⁶ and did not issue an interim order against the government.

Thus Originalist's account of press freedom under 1990 Constitution would be limited to freedom of newspapers and other prints but not electronic media, internet and so forth. An Originalist would assert that in 1990 in Nepal the electronic media, let alone Internet was a distant, unanticipated source of information that was not surely intended within the ambit of Article 13 of the Constitution of the Kingdom of Nepal 1990 as it has been under article 16 of the Interim Constitution of Nepal 2007. Hence, as much as absurd it may sound, if we went by the Originalist notion, then 1990 Constitution never protected right of press and publication of 'transmitting or broadcasting' news by electronic media. And such argument is not only preposterous, but also flagrantly against the essence of 1990 Constitution, which surely did not intend to determine subjects of press freedom but to secure fundamental right of people to freedom of press and publication.

5. Contextualism

This article began with a definitive purpose. The purpose was how can hard cases be adjudicated? And from the discussion so far, it is clear that judicial Formalism cannot succeed in this task of solving intricate constitutional disputes. So an alternative principle in the form of 'Contextualism'³⁷ is now discussed. Contextualism is much more than an antonym of Formalism, rather it should be understood as a technique as well as a philosophy of constitutional interpretation in which there is a blend of factual and normative considerations that are taken into account while interpreting the constitution.

In fact, if taken together, Formalism and Contextualism are complementary to a certain extent. Contextualism does complement and incorporate some ideas of Formalism in it. Understanding the true intention of the drafters of a constitution and the politico-legal environment that contributed to the development of constitution is one of many normative considerations that Contextualism takes into its account when interpreting a constitution. However, unlike Formalism it is not the only one consideration that it takes into account.

What primarily differentiates Contextualism from Formalism is the acknowledgment by Contextualism of the notion of a "living constitution"³⁸. Indeed, the notion of a living constitution and Contextualism share the same roots. As a stout supporter of living constitutions Justice Holmes once opined, "when we are dealing with the constitution, we must realize that they have called into life a being the development of which could not have been foreseen completely by the

³⁶ In fact, in *Thir Prasad Pokhrel v Harihar Birahi* NKP 770 (2049), the Supreme Court observed the main reasons behind the drafting of Article 13 of the then Constitution. In its decision, the Court stated that, "experience of unreasonable censorship of the press, closure or seizure of newspapers, and punishment of newspaper and book sellers, during Panchayat era" prompted drafters to frame Article 13. This clearly shows that the word 'press' and overall intention of drafters was to cover newspaper and other printed articles and surely not more advanced means of communication like email, internet, and so forth, which at the time of drafting the constitution could not have been imagined as a part of press.

³⁷ The author would prefer Contextualism in place of non-Originalism as used by Antonin Scalia *supra* note 27 and Practical Reason as used by Larry Alexander, IN "PRACTICAL REASON AND STATUTORY INTERPRETATION, COLLECTED ESSAYS IN LAW, LEGAL RULES AND LEGAL REASONING, 319-328 (Dartmouth Publishing Company, 2000), simply to cohere the idea under a different name and to avoid a negative understanding of the concept as opposed to Originalism in particular and Formalism in general.

³⁸ See for detail, William H Rehnquist, *The Notion of a Living Constitution* 54 TEX. L. REV. 693 (1976).

most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken years and has cost their successors much sweat and blood to prove that they created a nation."³⁹ Justice Holmes by referring to the successors' work in preserving and keeping alive the living constitution clearly intended a theory of constitutional construction beyond a mere application of history. Justice Holmes deliberating on the same case made it clear when he opined, "cases should be considered in light of their whole experience and not merely on what was said a hundred years ago"⁴⁰ and that very statement is that which forms the essence of Contextualism.

Contextualism could be defined as philosophy as well as technique of making real sense of a constitution based on the context of the dispute, keeping in mind, intention of the drafters, constitutional values, a contemporary sense of justice and subjective rights, morality⁴¹, "wisdom and justice of various interpretations,"⁴² norms regarding institutional relationship, rule of law virtues, social norms, efficiency, and most essentially the practical efficacy of constitutional provisions in the present context. Contextualism simply is about common sense and reminds judges the wider goal of a constitution beyond particular provisions and speaks to the needs and aspirations of the present generations and prevailing notions of constitutional law. In other words, Contextualism enables social-context adjudication where justice, equality, fairness takes center stage when judging a case, thus effectively bridging the gap between law and life and law and justice.⁴³

Indeed, Contextualism asserts that a constitution must not necessarily always be read looking backwards, but should also be read with full knowledge of the present allowing adaptations to change and be a part of it. And when there are cases involving contention of several possible meanings of constitution that could only be settled by reasons and arguments that are independent of the methods of interpretation. And it is for Contextualism that dares to conflate reasons, arguments, values and sense of justice (Normative Considerations) with the purely Factual Considerations in the form of words, meanings and provisions in order to rightly conclude what the constitution really means.⁴⁴

So a Contextualist interpretation of the constitution would involve more than amassing evidence of the text's meaning, it would involve a value judgment and a churning out of the spirits and norms of the constitution in order to get over the impediments of new generations and hard cases in the constitutional development. By this, Contextualism advocates more discretion to judges "in imparting specific, modern content to constitutional provisions."⁴⁵ Furthermore, Ronald Dworkin suggests judges need to think of themselves as joint authors writing separate chapters that fit in and make sense of a novel that never ends,⁴⁶ also contributes to the transition of a mechanical to more alive interpretation of constitution.

³⁹ *Missouri v Holland* (1920) as cited Beatty *supra* note 7, p. 13.

⁴⁰ *Id.*

⁴¹ See for detail Ronald Dworkin, *In Praise of Theory* 29 ARIZONA ST. L. J. 353 (1997).

⁴² Alexander *supra* note 38, p. 321.

⁴³ See for detail, Prof. (Dr.) N.R. Madhava Menon, *Social Context Education For Social Justice Adjudication* 1 JOURNAL OF THE NATIONAL JUDICIAL ACADEMY 241 (2005).

⁴⁴ Perhaps the illustration put forward by Ronald Dworkin in this juncture is of some use, in throwing better light on the principle, "Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind." Dworkin *supra* note 4, p. 134.

⁴⁵ Chemerinsky *supra* note 17, p. 13.

⁴⁶ Dworkin *supra* note 32, p. 225-275.

6. Conclusion

The interpretation of a constitution and thus the adjudication of a constitutional dispute is one of the most important tasks courts are asked to perform in a democracy. Hence, courts should carry out this duty in the best possible way. This means choosing appropriate tools and principles of interpretation so that not only the dispute in hand is settled but also that the constitution is made relevant. On the other hand, courts in this process must also realize that with every decision, they are laying general rules that will be applicable in future cases. Hence, courts are effectively adding new chapters to the constitutional law of the nation with every decision they hand down.

Formalism and Contextualism, in this regard, are principles devised for the aid of courts while they perform their duty. However, among them, Formalism distinctly suffers from ill-founded and false assumptions of fanatically neutral courts and judges, requiring a mechanical application of a constitution without any value judgment or contextual appreciation of facts. On the contrary, such value judging is inevitable⁴⁷ thus it is no more than pretence that judges do not or should not value judge. Indeed, according to Erwin Chemerinsky, "There is great cost to pretending that judging in constitutional cases can be value neutral." "Value choices are hidden and implicit" he argues. Hence, the preferable alternative should be "for the value choices to be transparent and explicit. This would facilitate discussion and debate among justices and the legal community".⁴⁸

Moreover, the value-based construction of the constitution as opposed to the Formalist approach is in many cases not only inevitable but also desirable. The cost of maintaining strict neutrality these days is too high to afford. Courts cannot cast a blind eye towards the shifting tide in areas of constitutionalism and human rights by making sense of the constitution through past philosophical ideas. It must be pertinently asked, can a court pledge Formalism and value-neutral judging when government justifications are sufficient to permit the government to interfere with a fundamental right of people.⁴⁹ If no, Formalism cannot direct judges sufficiently in all constitutional cases. It requires judges to appreciate the context and use their wisdom in deciding a case. For every reason Formalism fails, Contextualism is the answer. Contextualism makes all the more sense as the better way of reading a constitution as it accommodates new values with the old facts to really make a constitution speak its mind. Contextualism continually makes a constitution relevant in the new age and applicable to new situations.

⁴⁷ "Principled neutrality has its limits, it cannot possibly mean the abandonment of a choice of values...in the interpretation of the Bill of Rights and of the Fourteenth Amendment, a valued choice is inevitable" Friedmann, W, *Law in a Changing Society*, 72 (Universal Law, New Delhi, 2003).

⁴⁸ Chemerinsky *supra* note 17, p. 15.

⁴⁹ *Id.*, p. 14.

Singapore's Economic Triumvirate: Sowing the Seed of its Own Long Term Success or Failure?

- Suppiah Murugesan*

Abstract

The dilemma of how to promote economic development, sustain growth and provide the requisite social space for a contented populace is dealt with in this paper. The so-called 'Asian Values' political economy model of Singapore is the main focus of this paper. The experience of Singapore is particularly relevant to Nepal at this juncture in its history, as the decisions made whilst drafting the constitution will provide the framework for the political-economic nexus that will control Nepal's development. During this article, the author describes the Singaporean model, discusses the effects of this model on society and outlines a host of issues Singapore faces whilst attempting to continue its admirable record of economic development.

1. Introduction

In the 1960s the People's Action Party (PAP) Government of Singapore began transforming its Constitution from the Westminster parliamentary model to a uniquely Singaporean authoritarian model. Freedom of speech and association were stifled and the trade unions were emasculated by the Government controlled National Trade Union Congress. The PAP Government has used and continues to use judicial processes and private law to apply additional pressure on the opposition. In return the PAP promises and delivers political stability and economic prosperity.

In the first part of this paper I consider the economic strategies adopted by the PAP that helped to deliver to Singapore its prosperity; how they became integral to PAPs political hegemony; and how they have created certain structural problems for the Singaporean economy and society. We will see in this paper how the political-administrative and commercial branches of the Government are inextricably interfaced and interdependent.

The second part of this paper discusses whether the controlled political-administrative and commercial branches of the Government will lead to a political and economic bottleneck in the long term.

2. Economic Strategies

We can speculate whether Singapore's economic success could have been produced through the normal democratic processes but given Singapore's precarious birth and formative years, the PAPs theory that authoritarian rule was necessary for Singapore's safety and wellbeing has gained credence. The three key elements of the PAP economic strategy were and continue to be:

* LLB (Hons) London, LLM, PhD. Lecturer in Law at the TC Beirne School of Law, University of Queensland.

1. The attraction of foreign multi-national corporations (MNC) to Singapore by the creation of favourable domestic conditions and economic incentives;
2. Large scale state participation in the economy through government-linked corporations (GLCs) including the giant Government of Singapore Investment Corporation (GIC) all of which are insulated from normal political scrutiny;
3. The use of mechanisms such as compulsory savings and public housing as a means of applying private wealth in aid of the Government's economic strategies and to assist with political and social control.

MNCs and the GLCs are the twin engines of the Singaporean economy. The MNC-GLC dominance of the economy has not been without serious costs. For example, they are represented by stunted growth of local enterprise and inadequate generation of local talent and innovation. The pragmatic PAP leadership acknowledges these costs and apparently wishes to reduce them. The economic strategy implemented by the PAP in the 1960s, which curbed political and civil rights was a necessary evil for the vastly uneducated multi-racial, multi-cultural and multi-religious population. Liberal democracy would have been dysfunctional in the circumstances. Liberals themselves would not have entrusted the uneducated masses with political power.

The PAP leadership has for a long time admitted that the country has moved from Third World to First World status. This transformation began in the 1960s and continued through the 1980s, during which Singapore was identified as an oasis of stability and profitability for MNCs. Since then the world has been swept by a tide of economic and political liberalisation. However, Singapore still remains an extremely attractive base for MNCs as it continues to have stable rules; enviable internal and external security; and an efficient, transparent and clean government relative to its competitors in the region. Nevertheless the nation is now facing much stiffer competition not only from awakening giants like India and China, but also from developed nations in a hurry to readjust their economies in the face of the global economic challenges and opportunities. In fact some two decades ago, Singapore was finding it difficult to move into the middle level technology hierarchy due to competition with higher-wage developed countries¹. Higher capitalisation and higher labour costs during the 'Second Industrial Revolution' of Singapore in middle level technology resulted in a reduction of profits in the manufacturing sector when pitted against more established and higher-waged countries.² However, the global recession in 1985 exposed the vulnerability of Singapore's heavy economic dependence on MNCs and in particular its special dependence on the USA consumer market.³ The key question is whether the implementation of liberal economic policies in the region, including in India and China, would lead to constitutional changes that would loosen the Singaporean Government's grip on the state economy and liberalise political and civil rights. Would it be wise for the government to relax its grip on the economy? Will this unravel the PAPs hegemony? Has the PAP government locked the state into an authoritarian corporatist model with its attendant high political costs at some stage?

To answer the key questions as mentioned, we need to examine the connection of the Singaporean political and economic system. Whereas the Marxist-socialist states sought to

¹ Rodan G, *Singapore: Economic Diversification and Social Divisions* in THE POLITICAL ECONOMY OF SOUTH-EAST ASIA, 148, 156 (G. Rodan et al eds, Oxford University Press, Melbourne, 1997).

² Rodan G, *Singapore: Economic Diversification and Social Divisions* in THE POLITICAL ECONOMY OF SOUTH-EAST ASIA (G. Rodan et al eds, Oxford University Press, Melbourne, 1997); Rodan G, THE POLITICAL ECONOMY OF SINGAPORE'S INDUSTRIALIZATION: NATIONAL, STATE, AND INTERNATIONAL CAPITAL, 154 (Forum, Kuala Lumpur, 1989).

³ Rodan G, THE POLITICAL ECONOMY OF SINGAPORE'S INDUSTRIALIZATION: NATIONAL, STATE, AND INTERNATIONAL CAPITAL, 156 (Forum, Kuala Lumpur, 1989).

eliminate market processes by enforcing state control of capital and labour, the PAP strategy has been to establish the state as the dominant actor in the marketplace capable of decisively influencing the country's economy. The PAP chose to work with market processes rather than against them.

2.1 One of the Main Engines of the Singaporean Economy – The MNCs

Over the last forty years, the rapid growth of the Singaporean economy was driven by the influx of multinational corporations (MNCs) that were attracted to it by tax incentives, first-rate infrastructure, a compliant English-speaking workforce, favourable employer laws and the possibility of unrestricted profit repatriations.⁴ Singapore eagerly encouraged the investment by MNCs due to the following five problems:

- 1) Lack of inward entrepot experience among locals to market export products worldwide;
- 2) Foreign exchange problems when investing in production equipment;
- 3) Rising unemployment;
- 4) Lack of technological and managerial skills; and
- 5) Threat of Communism during the Cold War.⁵

The presence of MNCs granted the city-state economic survival and national security. The post-WWII search by MNCs for foreign production sites offered economic opportunities for countries like Singapore that had little indigenous resources and provided a security umbrella from the MNCs parent states.⁶ "In the case of Singapore, economic policies have been geared both to secure protection from friendly external powers as well as to induce moderation on the part of neighbours with whom it maintains sensitive security relations".⁷ This explains why the Singaporean Government has given the USA access to its naval base after the closure of the USA's base in Subic Bay in the Philippines.⁸ By 2001, more than 7000 MNCs were involved in every conceivable type of business that had been set up in Singapore. Not surprisingly, according to Chee, "MNCs account for more than 75 percent of investments in the manufacturing sector, 70 percent of the gross output in the manufacturing sector, more than 50 percent of employment, and 82 percent of direct exports".⁹

Apart from the concessions and inducements the authoritarian government of Singapore has been able to offer MNCs a strong and stable institutional framework within which to operate. This factor has allowed Singapore to outperform other less developed countries who offer similar pecuniary incentives to attract MNCs. Human technological skills, capital, and cheap labour are fundamental to wealth creation. Many developing countries, despite being abundantly endowed with natural resources and cheap labour are unable to benefit or take advantage of investment by MNCs due to weak political institutions. Investment by MNCs leads to wealth creation via the use of rapidly changing technology that mass produces goods and services at

⁴ Huff, W.G, THE ECONOMIC GROWTH OF SINGAPORE: TRADE AND DEVELOPMENT IN THE TWENTIETH CENTURY, 324-325 (Cambridge University Press, Cambridge, New York, 1994).

⁵ Carter, C, EYES ON THE PRIZE: LAW AND ECONOMIC DEVELOPMENT IN SINGAPORE, 98 (Kluwer Law International, The Hague, New York, 2002).

⁶ Acharya A and Ramesh M, *Economic Foundations of Singapore's Security: From Globalism to Regionalism?* in SINGAPORE CHANGES GUARD: SOCIAL, POLITICAL AND ECONOMIC DIRECTIONS IN THE 1990S, 134-135 (G. Rodan ed, Longman Cheshire, Melbourne, 1993).

⁷ *Id.*

⁸ Bell, D.A, EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA, 268-269 (Princeton University Press, Princeton, 2000).

⁹ Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, (Open Singapore Centre, Singapore, 2001).

competitive prices for the global market. It is not proposed to discuss the reasons for these institutional deficiencies but it is worth observing that Singapore enjoyed a natural advantage over other developing economies because it had a deep harbour and a prime geographic location in the heart of global shipping lanes¹⁰

Singapore, which has depended heavily on MNCs for its export oriented industrialisation strategy has prospered under authoritarian governance by having strong institutions that provide stable government, a safe and clean environment, efficient financial services, a skilled workforce (albeit increasingly imported), excellent infrastructure and a knowledgeable uncorrupted bureaucracy. The critical question is whether Singapore in its present form will be overtaken by historical transformations occurring in its part of the world.

The PAP is vigilant in its quest to retain its share of MNC investment. For example, in 1986, both in response to the mid-1980s economic recession and in order to resurrect Singapore's competitiveness in manufacturing, Singapore's labour costs were reduced.¹¹ Again in 1999, after the 1997 Asian Financial Crisis, the Singaporean Government realised it was losing MNC investment to neighbouring countries and responded by announcing that it was cutting the employers' Central Provident Fund (CPF) contribution from salaries by 10 per cent. This cut was in spite of the fact that the wages of Singapore workers were already among the lowest in the world.¹² Singapore was forced to undertake such drastic measures because the surrounding countries have an abundant supply of cheap labour. Singapore's neighbours are becoming much more competitive at providing good infrastructure and attractive investment incentives. Malaysia, Singapore's closest neighbour and competitor, could pose a serious challenge to economic growth and political stability. But this appears somewhat difficult at present because Malaysia requires a communally based politic to protect the economic well being of its majority indigenous Malay population.¹³ In its economic experiment, Malaysia recently "unveiled a slew of incentives to woo foreign investors into its southern state of Johor, including tax perks and tax exemptions from the country's race-based rules on corporate ownership and employment".¹⁴

2.2 The MNC factor

Reliance on MNCs as an engine of growth has not come without economic and cultural costs to Singapore. Overdependence on footloose alien capital may have resulted in the underperformance of the local entrepreneurial sector or state sponsorship of MNCs may have adversely distorted the playing field for local business. Large numbers of migrants have arrived in Singapore to cater for the MNCs' skill requirements. They have their own sets of values and habits and this has accordingly caused local discontent and societal division.

The advantages of attracting MNCs are obvious. They bring capital and "know-how" to the host country. They create employment. In the long term, the host country expects that MNCs will improve its local human resources and technological know-how. In the case of Singapore,

¹⁰ Huff, W.G, *THE ECONOMIC GROWTH OF SINGAPORE: TRADE AND DEVELOPMENT IN THE TWENTIETH CENTURY*, 8 (Cambridge University Press, Cambridge, New York, 1994).

¹¹ Rodan G, *Singapore: Economic Diversification and Social Divisions* in *THE POLITICAL ECONOMY OF SOUTH-EAST ASIA*, 148, 157 (G. Rodan et al eds, Oxford University Press, Melbourne, 1997).

¹² Chee, S. J, *YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE*, 47 (Open Singapore Centre, Singapore, 2001).

¹³ Bell, D.A, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA*, 272 (Princeton University Press, Princeton, 2000) quoting Malaysian Prime Minister Mahathir who had acknowledged in saying, "We do practice meritocracy, but one which is based on race" (quoted in the *Hong Kong Standard*, 16 June 1996).

¹⁴ Hong, C, *KL throws Johor project wide open to foreigners*, *THE STRAIT TIMES*, 23 March 2007 - It would not surprise anyone if the majority of foreign investors are Singapore based companies.

improvements in technological know-how have been disappointing.¹⁵ While statistics on this fact are scarce, Chee¹⁶ states that, from 1981 to 1985 there was only one additional R&D project.¹⁷ There have been other factors that have inhibited local human resources development in Singapore. Leggett¹⁸ noted three MNC related factors that would have an adverse effect on the development of human resources in the 1990s and possibly beyond. Firstly, it is very difficult to achieve Japanese efficiency because, unlike in Japan, employers are foreign companies. Secondly, work discipline that is enforced by government influenced trade unionism has a demoralising effect on workers. Thirdly, the suppression of free speech stifles initiative and creativity in the workforce.

The Government is the largest employer in the city-state. By recruiting the cream of the intelligentsia into the civil service and other governmental or semi-governmental vocations, it diverts skilled human resources from the private high-tech industries. Singapore has an inadequately trained workforce that lacks post-secondary education when compared with industrialised countries such as Japan and the United States.

The other problem is that roughly one third of the workers older than 40 years have no more than primary school education.¹⁹ This poses a serious problem to the city-state that relies on robust economic growth provided by MNCs using their workforce. The then deputy Prime Minister Lee Hsien Loong admitted as much when he noted that workers in Singapore are "really not adequately educated for the future".²⁰ In short, a high-skill-based industry needs an innovatively productive workforce, which Singapore lacks due to the presence of illiberal laws and policies that retard the natural development of society. However, it would appear that even when substantial economic progress was achieved after 1970, nothing much was done to create an innovative workforce.²¹ In addition, two years (and in some cases, two and a half years) of compulsory military service by all young male Singapore citizens could have contributed negatively to the development of entrepreneurial skills. However, the Government perceives that national service is vital in the Singaporean context to maintain national security and political stability that is attractive to foreign investors.

The Government has been unable to reduce the economy's dependence on MNCs and has been "trapped in the treadmill of export-oriented economics".²² 'fed largely on foreign capital which comes with a price. Some believe this is "a price that is not insignificant and one that the country is only beginning to pay."²³ It appears the Government has not done enough to develop a pool of local skilled workers to meet new economic challenges and has perhaps sustained a compliant low-waged semi- or unskilled workforce for the manufacturing sector that the MNCs require.

¹⁵ Thompson, G. *Multinational corporations and democratic governance* in THE TRANSFORMATION OF DEMOCRACY?: GLOBALISATION AND TERRITORIAL DEMOCRACY, 154 (A. McGrew ed, Polity Press, Cambridge, 1997).

¹⁶ Chee, S. J. YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 46 (Open Singapore Centre, Singapore, 2001).

¹⁷ As Chee points out the statistics in 1981 showed only 59 MNCs out of more than 4000 wholly or partially foreign-owned firms carried out R&D projects in Singapore. This is probably not surprising given the very nature of MNCs whose business logic is to search out cost-effective bases of operations to gain a competitive advantage.

¹⁸ Leggett, *Singapore* in LABOUR LAW & INDUSTRIAL RELATIONS IN ASIA 116, 131 (Stephen J. Deery and Richard J. Mitchell eds, 1993).

¹⁹ Chee, S. J. YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 48 (Open Singapore Centre, Singapore, 2001).

²⁰ cited in Teo A. *Cost competitiveness on Singapore's priority list*, BUSINESS TIMES, 18 January 2000.

²¹ Some would argue that it could have been a deliberate political attempt to keep the working class less informed so that they would be less likely to know of and demand political rights or challenge authority (Ratnapala, 2003: 226). Expressing Adam Smith's view on the growing division of labour that has a tendency to make some classes "stupid and ignorant" as their working lives become confined to "a few simple operations".

²² Chee, S. J. YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 54 (Open Singapore Centre, Singapore, 2001).

²³ *Id.* p. 53.

What then are the alternatives to make Singapore's economy not totally dependent on the whims of the foreign multinationals under the Export Oriented Industrialisation strategy? One of the alternatives is to shift the emphasis from the manufacturing sector towards the services sector to transform Singapore into 'a total business centre'.²⁴ The Government has identified the "emerging trends in international patterns"²⁵ in the Asia-Pacific region where the MNCs "locate a more comprehensive range of higher value-added processes and services in discrete geographic regions".²⁶ To ensure the MNCs' presence in the city-state, the Government has invested heavily in the social and physical infrastructure. Another technique that has been used to develop Singapore has been to increase the role of the state-controlled government-linked companies (GLCs). They now play a vital regional and international economic role. In 1995, "the Government introduced the S\$1 billion Cluster Development Fund for strategic investments (inside and outside Singapore)".²⁷

2.3 The Other Engine of the Singaporean Economy – GLCs

The lacklustre performance of local businesses in a deregulated economic environment may have been caused, at least initially in the 1960s, by the absence of an industrial bourgeoisie that led to a lack of capital and expertise necessary to industrialise Singapore.²⁸ On other hand, the combination of the PAP Government's economic dependence on MNCs, the linkage between economics and national security²⁹ and the perception that MNCs may leave its shores for cheaper production sites appears to have spurred the regime in developing an array of GLCs. These GLCs that are financed by public savings and budget surpluses have accumulated a worldwide worth of over US\$100 billion. Nearly four decades of almost uninterrupted rapid economic growth saw the real GDP grow at an average of 8.6 percent a year.³⁰ The substantial control of the economy by a combination of MNCs and GLCs suggests that the PAP government sees economic control as part of its political survival.

GLCs have come to represent something of a Singapore Inc with great financial might and control over sectors of the economy "from phones, ports, utilities, power to property and, at point, pastry shops."³¹ The government has developed GLCs to such an extent that there exist three large conglomerates of massive holding companies. These are the International Trading Company, Singapore Technologies, and Temasek Holdings that in turn control about "fifty corporations that run more than five hundred subsidiaries that in turn spawn even more sub-companies. All in all, there are more than one thousand GLCs that make up to 70 percent of all Singaporean companies."³² Through these companies the PAP government continues to play a major role in the economic growth of the country.

²⁴ Rodan G, *Singapore: Economic Diversification and Social Divisions* in THE POLITICAL ECONOMY OF SOUTH-EAST ASIA, 157 (G. Rodan et al eds, Oxford University Press, Melbourne, 1997).

²⁵ *Id.* p.158.

²⁶ *Id.*

²⁷ *Id.* p.159-160.

²⁸ *Id.* p.148-150.

²⁹ *Id.*

³⁰ Malik, W.H, JUDICIARY-LED REFORMS IN SINGAPORE: FRAMEWORK, STRATEGIES, AND LESSONS, 7 (The World Bank, Washington DC, 2007).

³¹ Shameen, A. and Reyes, A, *Creative Destruction City*, ASIaweek, 24 March 2003 at pp. 43-51.

³² Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 55 (Open Singapore Centre, Singapore, 2001).

2.4 The Government of Singapore Investment Corporation (GIC within the GLC)

The Government of Singapore Investment Corporation (GIC) is an exempt private limited company and possibly Singapore's largest GLC in terms of assets.³³ The GIC alone, in its own right, is said to be "the custodian of Singapore's foreign reserves of US\$120 billion."³⁴ It invests the country's foreign reserves all over the world in assets such as equities, bonds, money market instruments, real estate, and special investments.³⁵ About fifty percent of these funds are invested in global equities in some 2,000 to 3,000 companies worldwide.³⁶ Privatisation of the GIC would entail public transparency and accountability revealing how the public's money has been invested by government officials. The Government is able to withhold these details on the grounds that revelation would provide its business competitors with information that might compromise the GIC's advantage and the national interests and to deter speculative attacks on the Singaporean dollar.³⁷

Except for certain politicians and economic technocrats, the majority of the people have very little knowledge of the operations of GLCs and in particular the GIC.³⁸ Through tight media control, only authorised information in relation to the performance of GLCs is revealed. Hence there is a serious lack of transparency and public accountability with respect to investments made by GLCs.³⁹

Whereas most GLCs are nationally focused, GIC is an international player. Its worldwide investments provide the PAP Government with a unique capacity to ride out international economic shocks and in good times to amass more wealth. For example, its overseas property investment portfolio includes "a stake in Sydney's landmark Chifley Tower as well as the Royal Pines Resort on the Gold Coast."⁴⁰ Singapore is one of the largest investors in Australia "with assets in the electricity, and gas sectors, as well as Singapore Telecommunications' stake in Optus, and hotels including Sydney's Westin and Melbourne's Park Hyatt."⁴¹

Given that GLCs (including the GIC) are insulated from public scrutiny and control by the governing elite, there is strong evidence that points to the increasingly oligarchic nature of Singapore's economic strategies.

3. Part II

This part of the discussion will be centred on whether the controlled political-administrative and commercial branches of government will lead to its political and economic bottleneck in the long term.

³³ Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 74 (Open Singapore Centre, Singapore, 2001).

³⁴ Burrell, A, *Singapore buys future wealth*, THE AUSTRALIAN FINANCIAL REVIEW, 25 September 2005.

³⁵ Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 55, 75 (Open Singapore Centre, Singapore, 2001).

³⁶ Raj, C. and Yin, L.H, *GIC funds managers consistently beat benchmark*, BUSINESS TIMES, 23 May 2001.

³⁷ "In response to an opposition parliamentarian's calls to open the books, Lee Hsien Loong, the Deputy Prime Minister and chairman of the Monetary Authority of Singapore, fired back: 'It (the Government) does not stand up and say, "Here are all the things; here are all the data; here are my national secrets; here are my defence secrets; here are my foreign-policy moves; and here are my innermost reserves".'"

³⁸ Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 73,74 (Open Singapore Centre, Singapore, 2001). Chee states that GIC invests the country's foreign reserves of over \$136 billion all over the world and yet remains unaccountable to anyone – not even to the Parliament. The corporation maintains its status as a limited exempt private company. S.M.Lee, as the chairman of the board of directors, controls the corporation.

³⁹ Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 80,81 (Open Singapore Centre, Singapore, 2001).

⁴⁰ Burrell, A, *Singapore buys future wealth*, THE AUSTRALIAN FINANCIAL REVIEW, 25 September 2005.

⁴¹ Burrell, A, *Singapore buys future wealth*, THE AUSTRALIAN FINANCIAL REVIEW, 25 September 2005.

3.1 Downside of the GLC Dependence

3.1.1 Depressive Effect on Local Enterprise and Talent

The dangers of an intractable dependence on MNCs have been discussed in Part I. Many have also argued that the Government needs to divest its interests in the economy so that the country could effectively meet the challenge of globalisation.⁴² The first argument is that the GLCs omnipresence in the economy is stifling the emergence of local entrepreneurship. The GLCs not only take up much of the economic space left by the MNC's, but they, together with the regular public service, absorb the cream of potential talent, which comprises approximately 5 per cent of the society.⁴³ This means that the local entrepreneurial sector becomes an inadequate source of talent not only for that sector but also for the GLC sector.

In the context of economic management, there is a small coterie of civil servants who coordinate and control economic resources. They are a virtual 'class' of public entrepreneurs who are closely connected to the ruling PAP. The upper echelons of the civil service are the main recruiting ground for the PAP.⁴⁴ These arrangements provide added insurance of security to the ruling party.

In relation to divestment of GLCs and statutory boards to local businesses, it is almost impossible to get substantial information about the improvements made in the area. There is certainly lack of sufficient data on the subject matter.⁴⁵ Although the local private sector was encouraged by the government to participate in the new economic strategy after the 1985 recession, "the post-recession period has been characterised by a general increase in the level and institutionalisation of interactions between capital and state in the policy process."⁴⁶ He observes that "private sector participation in the policy process is still largely at the behest of the state."⁴⁷ Even if the Government claims to have been divesting its shareholdings this does not translate into "any surrender of control over the economy, nor the likelihood of such."⁴⁸ Asher states:

"A strong case can be made that in the Singaporean context, its privatisation programme will make the role of government even stronger and more extensive. This is because there is an overall budget surplus, so the divestment proceeds are not intended to either reduce taxes or expand expenditure. Instead, these can be invested at home and abroad."

The measures taken in the past to immediately create an economy under difficult political and economic conditions have primarily benefited the MNCs and the GLCs. However, there may need to be some drastic changes to enable the country to leap into the next phase of economic development. This will require intensive nurturing of local innovators and talented entrepreneurs.

⁴² Ministry of Trade and Industry, Economic Committee Report, THE SINGAPORE ECONOMY: NEW DIRECTIONS (1986); Chee Soon Juan, *Your Future My Faith Our Freedom*, OSC Publication, 102-103 (2001); and Susan Long, *Govt's Role in Entrepreneurship With bureaucrats, how can S'pore win?*, THE STRAITS TIMES, November 8, 2003, at 30.

⁴³ Chee, S. J., YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 124-125 (Open Singapore Centre, Singapore, 2001), citing a statement made by Lee Kuan Yew in 1967 in T.J.S. George (1975) *Lee Kuan's Singapore*, p. 186, 'that every society has approximately 5 percent of the population "who are more than ordinarily endowed physically and mentally and in whom we must extend our limited and slender resources in order that they will provide that yeast, that ferment, that catalyst in our society which alone will ensure that Singapore shall maintain its pre-eminent place in the societies that exist in South and Southeast Asia."'.

⁴⁴ Rodan G, *Singapore: Economic Diversification and Social Divisions* in THE POLITICAL ECONOMY OF SOUTH-EAST ASIA, 160 (G. Rodan et al eds, Oxford University Press, Melbourne, 1997).

⁴⁵ Carter, C, EYES ON THE PRIZE: LAW AND ECONOMIC DEVELOPMENT IN SINGAPORE, 157 (Kluwer Law International, The Hague, New York, 2002).

⁴⁶ Rodan G, *Singapore: Economic Diversification and Social Divisions* in THE POLITICAL ECONOMY OF SOUTH-EAST ASIA, 159 (G. Rodan et al eds, Oxford University Press, Melbourne, 1997).

⁴⁷ *Id.* p.160.

⁴⁸ Asher cited in *Id.*

The current PAP leadership has acknowledged that the Government urgently needs to develop a large local pool of talent and has gone to the extent of linking this shortage to the stifling political conditions. The PAP claims to be more tolerant to public criticism now and this underscores the progress made in public social awareness.⁴⁹

The response to the local talent shortage and the high level of emigration is resolved by replacing them “with wealthy and skilled migrants from Hong Kong, mainland China, India and elsewhere.”⁵⁰ This strategy has been reactivated in recent times. The discreet recruitment of foreign personnel to help run the vast stable of GLCs is one of the less observed parts of Singapore's success story. However, this reliance on foreign talent to sustain economic growth may be a short-term solution to a long-term social problem. Like MNCs, who look for low-cost-production locations, foreign talent moves to where pastures are greener. In an increasingly globalised labour market, the movement of highly skilled workers to better paying jobs in environments that provide better life-styles with liberal values may be unavoidable. The larger successful liberal democracies attract migrants who embrace the whole package and who want to make the country their home for themselves and their descendants. They develop a sense of national identity. It is by no means clear that Singapore can generate that kind of fidelity on the part of skilled migrants given its combination of socio-economic and political environment. The financially opportunistic nature of skilled migration may serve PAP's immediate interests as such migrants are unlikely to concern themselves with the state of illiberal democratic values in Singapore. Yet in the longer term, the failure to generate indigenous talent on the required scale may incur a heavy cost in terms of Singapore's viability as a nation as opposed to a super-corporation. There are difficulties in instilling patriotic fervour to build nationhood in this tiny country that has a mixed population of three different races, cultures and religions. Yet these difficulties have been aggravated by policies that remind Singaporeans of their race, language and religion.

3.1.2 Problems Associated With Unlocking The Government Grip On The Economy

It is clear that the PAP now realises that if Singapore is to progress in the intensely competitive global environment, its grip on the economy must be loosened and more space needs to be created for genuine indigenous enterprise. It is reported that “Singapore's leaders are thinking of accelerating plans to pull the state out of business, through deregulation of major industries like electricity and the speedy sale of public stakes in GLCs”⁵¹ so “the economy can be recast into one truly driven by private enterprise.”⁵² This of course means the gradual privatisation of the GLCs. The Government will have to genuinely relinquish controlling interests in these companies. Despite this official concession, the PAP has not taken any steps in this direction with its apologists claiming that the local business community is incapable of taking over these businesses. There are two theories explaining this problem.

The PAP theory is that local entrepreneurs lack exposure and experience to take over the GLCs. They are viewed as risk-wary conservatives with inadequate managerial skills when it comes to large-scale international businesses. Simon Tay, the nominated MP and law lecturer, explains that the problem is historical. “For decades, State companies were the main economic

⁴⁹ Tan, T. How (2002) ‘Speak out, but beware the man with the stick’, *THE STRAITS TIMES INTERACTIVE* (Singapore), 24th March, 2002.

⁵⁰ Bell, D.A, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA*, 263 (Princeton University Press, Princeton, 2000).

⁵¹ Shameen, A. and Reyes, A, *Creative Destruction City*, ASIAWEEK, 24 March 2003 at pp. 43.

⁵² *Id.*

players, providing many essential goods and services which businesses just could not deliver. Small enterprises, moreover, have long been excluded from major economic and business policy-making.⁵³ If this is a real problem, then it is partly of the Government's own making. The State ventured into businesses of this magnitude by employing the best local and overseas brains at the managerial level and by using its powers to keep wage costs down at the employee level. Many believe that GLCs and the rest of Singapore Inc are part of the Government's plan to ensure patriarchal control over the economy as part of its political hegemony.

3.1.3 Historical Pro-Communist Connection of Local Chinese Businesses

The alternative theory challenges the notion that the local business community is incapable of taking over privatised GLCs. Yet, there seems to be no good reason why local businesses, especially the successful Chinese businesses are incapable of running large units in a competitive environment. It could not be that they are or were handicapped in their knowledge of the English, the international language of commerce. Singapore was already a thriving economy even before the advent of the PAP.⁵⁴ The traditional prowess of the overseas Chinese Diaspora across much of Asia in managing hugely successful modern corporations cannot be doubted, even by the PAP regime.⁵⁵ The Chinese brethren in Hong Kong, who were and to a large extent are in the same situation have succeeded spectacularly. The mainland Chinese people, with no big business experience under the Communist state economy and with no English proficiency, are producing similar results since the market reform that has taken place in that country. In fact it is recently reported that "the private sector in China is now responsible for more than two-thirds of economic output and employment."⁵⁶ While contesting the PAP line, Chee offers an intriguing politico-historical reason for this. He relates it to the leadership rivalry in the 1960s between the moderate Cambridge educated Lee Kuan Yew and the left leaning Chinese educated Lim Chin Siong. Lim Chin Siong later broke away from the PAP and formed the opposition party, the *Barisan Socialis*. The Chinese domestic bourgeoisie, along with Chinese student and left-wing labour movements aligned itself with the opposition political party. They were concerned with the erosion of Chinese language and culture. By aligning and supporting the opposition *Barisan Socialis* the local Chinese business class engendered PAP's suspicion of it⁵⁷ and in fact "virtually wrote its own obituary."⁵⁸ The *Internal Security Act* was used to neutralise the *Barisan Socialis* stalwarts and thereafter the "the PAP has understood that to control the economy, especially in a city-state like Singapore, is to ensure long-term political hegemony."⁵⁹ This would also probably explain the retention of the law on preventive detention. Thus the politico-historical hypothesis seems more plausible.

Although it is claimed that the PAP government did attempt to promote the development of locally-based companies through the Small Industries Finance Scheme and Capital Assistance

⁵³ *Id.*

⁵⁴ see Huff, W.G, THE ECONOMIC GROWTH OF SINGAPORE: TRADE AND DEVELOPMENT IN THE TWENTIETH CENTURY, 1-4 (Cambridge University Press, Cambridge, New York, 1994).

⁵⁵ King, A.Y.C, *The Transformation of Confucian in the Post-Confucian Era* in, (Confucian Traditions in East Asian Modernity, 259-264 (Tu Wei-Ming ed, Cambridge, Harvard University Press, 1996).

⁵⁶ The Straits Times, THE STRAITS TIMES INTERACTIVE (2005).

⁵⁷ Rodan G, *Singapore: Economic Diversification and Social Divisions* in THE POLITICAL ECONOMY OF SOUTH-EAST ASIA, 155 (G. Rodan et al eds, Oxford University Press, Melbourne, 1997).

⁵⁸ Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 56 (Open Singapore Centre, Singapore, 2001).

⁵⁹ *Id.* p.55.

Scheme and the Product Development Assistance Scheme⁶⁰ critics argue that these were facades and the PAP government was never fully committed to developing local businesses. In fact it has been argued that such a course of action was antithetical to the government's philosophy and was considered to be in opposition to its economic strategy.⁶¹

Prior to the PAP split in 1963, the left-wing critics within the PAP Government saw a greater role for the State in direct investment to ensure more favourable conditions for workers. However, after the split, the PAP Government was placed in a position of substantial economic power and influence. It is therefore unlikely that the government would want to strengthen local business enterprise so as to avoid the possible risk to the former's economic and political dominance.⁶² This would also explain the PAP regime's drive to attract foreign capital and the export oriented industrialisation strategy when the import-substituting industrialisation strategy failed in 1965 due to the separation and the loss of Malaysia as its economic hinterland.

Having emasculated labour unions and having exclusive access to all arms of the State and its inseparability from it, the PAP would prefer to remain insulated from the political control or influence of local businesses. It would rather have foreign capital and investments, statutory bodies and government-linked companies to support its social and economic policies. It could depend on these institutions for its economic power and political survival as they provided the people with substantive social and economic improvements that won their loyalty, which in turn, assured the PAP an undeniable legitimacy to rule. Rodan⁶³ argues "This rationale evolved into a comprehensive ideological case for elitist, technocratic government in the years ahead." The politico-historical distrust of local Chinese businesses supports "the second linkage between economics and national security", which mask the regime's instinct for self-preservation.⁶⁴

Whichever theory is accepted, it seems accepted by all sides that the GLCs, despite their great domestic and offshore successes, have created significant structural problems for Singapore.

3.1.4 Problem of Financial Accountability

The lack of financial transparency is also a major drawback of the GLC model. While it is fair to presume that the GLCs on the whole have significantly contributed to Singapore's growth, there is limited capacity to measure their performance. Since the ownership is confined to Government agencies, public participation is minimal. There is hardly any way to assess GLC performance except by reference to governments own disclosures and assessment of its economic performance.⁶⁵ There are no known bankruptcies involving GLCs, or the extent to which particular GLCs have been bailed out. The normal share trading that provides signals of corporate performance does not apply in the case of the GLCs.

The strict confidentiality that the Government imposes on GLCs deprives the public of information such as the financial interests of the board of directors, some of whom are ministers

⁶⁰ Rodan G, THE POLITICAL ECONOMY OF SINGAPORE'S INDUSTRIALIZATION: NATIONAL, STATE, AND INTERNATIONAL CAPITAL, 124 (Forum, Kuala Lumpur, 1989).

⁶¹ *Id.*, p.125-126.

⁶² *Id.*

⁶³ Rodan G, *Singapore: Economic Diversification and Social Divisions* in THE POLITICAL ECONOMY OF SOUTH-EAST ASIA, 149 (G. Rodan et al eds, Oxford University Press, Melbourne, 1997).

⁶⁴ Acharya A and Ramesh M, *Economic Foundations of Singapore's Security: From Globalism to Regionalism?* in SINGAPORE CHANGES GUARD: SOCIAL, POLITICAL AND ECONOMIC DIRECTIONS IN THE 1990S, 135 (G. Rodan ed, Longman Cheshire, Melbourne, 1993).

⁶⁵ No Government will admit that the economy has not done well due to its own incompetence.

and the status of their various investment portfolios.⁶⁶ The Government takes any unofficial leakage very seriously and will fully implement utilise the *Official Secrets Act* to protect GLC information. Section 5 of the *Official Secrets Act* forbids anyone, on pain of imprisonment, to communicate any official secrets. In the case of *Public Prosecutor v Phua Keng Tong*,⁶⁷ the accused was charged under the *Act* for unauthorised communications of Government documents and giving Government information to another who in turn used such information to speculate in the foreign exchange market. It was held by the court that the prohibition under the *Act* was designed to ensure 'public order' and good government. The accused was found guilty and convicted. On appeal the court found that the *Act* was enacted in the interest of the security of Singapore and fell within a matter expressly listed in article 14(2) of the Constitution and so did not infringe "the right to freedom of speech and expression"⁶⁸ under article 14 of the Constitution of Singapore.

The above state of affairs offers another explanation of the difficulty that the government faces in privatising certain GLCs. Privatising GLCs goes against the PAPs understanding of the national interest and the regime's instinct for self-preservation.⁶⁹ "Every political party is in the 'business' of ensuring its own survival"⁷⁰ This may also explain why the Government has vehemently discouraged a viable opposition in Parliament, as it would prefer not to be questioned on its national economic undertakings for which it currently has complete autonomy and confidentiality. Thus we see that the structure and the *modus operandi* of the GLCs have a direct bearing on the political system.

GDP growth rates are usually used as indicators to reflect economic performance for a given period but this does not take into account how much was spent to increase the GDP. In this respect, worker efficiency is crucial to Singapore's economic success. Research done by an economist from the Massachusetts Institute of Technology revealed that increased levels of capital investment, not productivity and efficiency of the workers, accounts for all of Singapore's growth.⁷¹ In short the economic growth in Singapore has very little to do with increased worker efficiency. It has to do with increased capital investment. By comparison, approximately 80 per cent of the rise in per capita income in the US is due to the productivity and efficiency of the workers themselves. Singaporean workers' efficiency and productivity did not do well compared to the Japanese. In terms of creativity and adaptability another study showed Singaporeans were behind the Indians, Taiwanese and the Filipinos.⁷² It has been stated that Singapore's economic growth performance is not better than Hong Kong and that the island state has spent much more of its resources in propping up economic growth through accumulation of physical capital via

⁶⁶ Burrell, A, *Singapore buys future wealth*, THE AUSTRALIAN FINANCIAL REVIEW, 25 September 2005.

⁶⁷ *Public Prosecutor v Phua Keng Tong* (1986) 2 MLJ 279 (High Court, Singapore) cited in Kevin Tan and Peng Lam, *Constitutional Law in Malaysia & Singapore*, MALAYAN LAW JOURNAL 641-642 (1991); For a recent OSA case see Ross Worthington, GOVERNANCE IN SINGAPORE 155 (Routledge Curzon, 2003). involving Tharman Shanmugaratnam, former Administrative Service Officer and now a fledgling minister in the PAP Government.

⁶⁸ *Id.*

⁶⁹ Acharya A and Ramesh M, *Economic Foundations of Singapore's Security: From Globalism to Regionalism?* in SINGAPORE CHANGES GUARD: SOCIAL, POLITICAL AND ECONOMIC DIRECTIONS IN THE 1990S, 135 (G. Rodan ed, Longman Cheshire, Melbourne, 1993).

⁷⁰ Phang, A, THE DEVELOPMENT OF SINGAPORE LAW, 241 (Butterworths, 1990).

⁷¹ Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 63 (Open Singapore Centre, Singapore, 2001).

⁷² *Id.*

forced national savings whereas in fact it enjoys the lowest returns on physical capital in the world.⁷³ The Government claims it has done well and the people generally believe what the Government says. Arguably, the PAP government may be quite content with the current state of affairs. Its economic performance is measured through GLCs and “the solicitation of a veritable deluge of foreign investments.”⁷⁴

Although there have been speculations in the past that a number of the GLCs had not done well, the verification of GLC performances remains difficult.⁷⁵ The Government has firmly rejected any suggestions of corruption or abuse by citing statistics from Transparency International “that showed Singapore holding seventh position in its 1998 Corruption Perception Index,”⁷⁶ whose ranking improved in 2002 when the city state was placed fifth out of 102 countries.

Chee⁷⁷ draws attention to a number of major GLCs like Singapore Technologies, Singapore Telecommunications (SingTel), Singapore Cable Vision, Singapore Airlines and the Development Bank of Singapore (DBS) that have incurred huge losses. DBS's Vice-Chairman admitted that the acquisition of Thai Danu Bank in 1999 was an expensive mistake. In 2001, DBS made another acquisition in the Dao Heng Bank of Hong Kong for \$10 billion and the public has little information, except that the day after its purchase the DBS's stock market value plunged, wiping out \$1.83 billion of its market capitalisation.⁷⁸ Further, due to lack of sufficient information on Singapore's US\$20 billion dollar investment in the Suzhou Industrial Park Project in China it is hard to know whether the Government has suffered losses and whether the project has maintained its long term viability. Indeed it was reported that Lee had to approach the Chinese leadership to “complain about the ‘municipal shenanigans’ committed by the Suzhou authorities.”⁷⁹ Liberalisation of the GLCs in the wake of globalisation will therefore expose such failings on a much wider scale and probably reveal more failures with even more serious economic consequences.

Business misjudgements are not unusual and the cases mentioned above do not amount to a systemic failure. The danger though is that in the absence of transparency there is really no way for the public to know the extent of these failures. This is the surest way to encourage improbity and abuse. However, it needs to be stressed that while misjudgements happen in the private sector, companies are not routinely bailed out with State funds. They become insolvent. In the case of the GLCs none of those companies that were mentioned as running into financial difficulties have faced insolvency. Have they been discreetly bailed out with state funds? Such questions are not publicly asked, nor would a straight answer be expected. In this context one could argue that a government has no business to be in business. While it may be claimed that some of the GLCs are listed on the stock exchange and have in fact generally been doing well in their foreign investments, there is still this lingering doubt about the actual state of their corporate affairs due to lack of transparency and accountability to the public. Be that as it may, there is little evidence of public concern on such issues. It would appear that the citizens of Singapore have tacitly accepted the fact that the PAP Government should remain as the entrusted custodian of State assets and maintain substantial control of the State economy.

⁷³ *Id.*, p. 63-64.

⁷⁴ *Id.*, p. 64.

⁷⁵ *Id.*, p. 56-57.

⁷⁶ See *Id.*, p. 75.

⁷⁷ *Id.*, p. 56-60.

⁷⁸ ‘DBS shares tumble to 22-month low’, THE STRAITS TIMES, 13 April 2001.

⁷⁹ ‘The trouble with Singapore’s clone’, The Economist, 3 January 1998.

Lack of transparency, independent auditing and shareholder accountability exposes corporations to mismanagement and corruption. Yet, in Singapore there is little evidence of this. The integrity, commitment, vigilance, foresight and ruthless discipline imposed on the organisations by the senior leadership led by Lee Kuan Yew may be given credit for this situation. The question though is whether in the long term, the happy state of affairs can be sustained without external independent accountability mechanisms.

4. Control of Private Wealth

As previously mentioned, the Singaporean Government is the largest employer in the public service. It is also one of the largest private sector employers through its GLCs. This limits investment opportunities for local enterprises and it invariably creates conditions of dependency. The Government has strengthened this dependency through a series of measures leading to domestic savings and asset control.

The Central Provident Fund (CPF) system that began in 1955 is the chief social security institution in Singapore.⁸⁰ Although the system provides generous tax benefits to contributors, it is unclear whether it genuinely provides adequate social security for individuals. "The increased cost recovery in the health sector comes at a time of declining contributions by Government in total health expenditure from 40.1 per cent in 1979 to 27.4 per cent in 1989,⁸¹ whilst Government health expenditure as a proportion of GDP remained constant at 0.9 per cent between 1980 and 1989.⁸² This was achieved through increased commercialisation of the health sector.⁸³ Nevertheless, the CPF board, a statutory body, has become the chief financial stakeholder in the Singaporean economy as almost every citizen has substantial funds held by it. Substantial contributions from employers and employees have been compulsorily appropriated into this government-administered body over the past few decades.⁸⁴ It must be taken into account that the Government is the largest employer and that the "CPF provides incentives for people to be employed rather than self-employed or entrepreneurs."⁸⁵ This forced-saving mechanism with its contribution level of approximately 40 per cent of the net wage provides the Government with immense control."⁸⁶ This scheme forms as an integral part of the macroeconomic management of the Singapore economy. The Government periodically reviews the amount of contributions to be made by employers and employees. It also determines when and how such savings can be utilised for investments, including the right to use CPF funds as down-payments and instalment repayments on public housing towards Housing and Development Board (HDB) flats. Most of the CPF savings goes into the purchase of 99 year leases of HDB flats, although some CPF savings

⁸⁰ Asher, M.G., *Planning for the Future: The Welfare System in a New Phase of Development* in SINGAPORE CHANGES GUARD: SOCIAL, POLITICAL AND ECONOMIC DIRECTIONS IN THE 1990S, 153, 155 (G. Rodan ed, Longman Cheshire, Melbourne, 1993).

⁸¹ *Id.*, p. 35.

⁸² Phua, K.H., *Privatisation and Restructuring of Health Services in Singapore*, INSTITUTE OF POLICY STUDIES, OCCASIONAL PAPER NO. 5, 20 (1991) – see table 1.

⁸³ Asher, M.G., *Planning for the Future: The Welfare System in a New Phase of Development* in SINGAPORE CHANGES GUARD: SOCIAL, POLITICAL AND ECONOMIC DIRECTIONS IN THE 1990S, 160 (G. Rodan ed, Longman Cheshire, Melbourne, 1993).

⁸⁴ *Id.*, p. 156, Asher claims that the compulsory contribution "is by far the highest rate in the world." See also Huff, W.G., *THE ECONOMIC GROWTH OF SINGAPORE: TRADE AND DEVELOPMENT IN THE TWENTIETH CENTURY*, 34 (Cambridge University Press, Cambridge, New York, 1994) – Singapore achieved savings of over 40% of GDP in the 1980s – the highest savings ratio in the world".

⁸⁵ Asher, M.G., *Planning for the Future: The Welfare System in a New Phase of Development* in SINGAPORE CHANGES GUARD: SOCIAL, POLITICAL AND ECONOMIC DIRECTIONS IN THE 1990S, 159 (G. Rodan ed, Longman Cheshire, Melbourne, 1993).

⁸⁶ Tremevan C., *THE POLITICAL ECONOMY OF SOCIAL CONTROL IN SINGAPORE*, 54 (Macmillan Press, Houndmills, 1994).

may be utilised as approved investments, insurance and others. The lessor of these flats is the HDB, another statutory body and government agency.⁸⁷ As long as the overwhelming majority of Singaporeans have to live in public housing and use their CPF savings to purchase these flats, it will not be difficult for the PAP government to exert social control and extract political obedience⁸⁸

Political obedience is extracted in many forms. Threats are often made threatening not to upgrade HDB flats if electors do not vote for PAP candidates in general elections.⁸⁹ The substantial increase in the value of these flats in recent years has raised the wealth of its citizens on paper because there has been a corresponding rise in the value of private properties. A rise in CPF contributions in good times invariably sends the HDB prices higher thereby enriching the Government's coffers. Even in bad times the HDB prices have remained fairly stable because the HDB sets the posted value of these flats, thereby ensuring the prices of these flats remain fairly consistent. Thus the Government has substantial financial and social control over its citizens through the public housing and compulsory savings institutions.

Recently, the right to withdraw one's entire savings at 55 has been revised so that now citizens have to keep a substantial sum in the CPF and are only allowed to withdraw smaller amounts on a monthly basis. Would citizens with a large portion of their life savings in the government-controlled CPF Public Housing schemes risk having an untested non-PAP government in power? It may indeed be correct to postulate that the citizens have for purely economic reasons exercised self-censorship in politics and given the Government a free hand in practically all spheres of human activity in Singapore.

By controlling a substantial part of the citizens' retirement funds in the form of a compulsory CPF savings scheme and social control through HDB flats, the government has arguably attended to social security issues without creating the welfare state which most high income countries have become. Asher⁹⁰ argues that the Government "considers that present welfare states erodes the work ethic and the saving habit, and moves attention away from growth towards redistribution, thus stifling what it regards as economic dynamism."⁹¹ He states further: "while not explicitly stated, a move to a welfare state would also reduce the state's capacity to plan and to control the social, economic and political development of Singapore. After all, it would reduce the Government's control over the nation's consumption-saving choices and its discretionary authority in social security, since the concept of entitlement would become more prevalent."⁹² Whether political development can be expected to occur in Singapore in the wake of global economic changes may well be determined by the longevity of these social and political controls.

⁸⁷ Carter C, *EYES ON THE PRIZE: LAW AND ECONOMIC DEVELOPMENT IN SINGAPORE*, 210 (Kluwer Law International, 2002). "HDB houses approximately 86 per cent of the population".

⁸⁸ Tremewan C, *THE POLITICAL ECONOMY OF SOCIAL CONTROL IN SINGAPORE*, 55 (Macmillan Press, Houndmills, 1994).

⁸⁹ Case W, *Manipulative Skills: How Do Rulers Control the Electoral Arena?* in *ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION*, 104 (A Schedler ed, Lynne Rienner Publishers, London, 2006).

⁹⁰ Asher, M.G, *Planning for the Future: The Welfare System in a New Phase of Development in SINGAPORE CHANGES GUARD: SOCIAL, POLITICAL AND ECONOMIC DIRECTIONS IN THE 1990S*, 166 (G. Rodan ed, Longman Cheshire, Melbourne, 1993).

⁹¹ Rodan *supra* note 1, p.149 where Rodan confirms "the ideological hostility of the ruling People's Action Party (PAP) to welfare-oriented redistributive policies, ...".

⁹² Asher, M.G, *Planning for the Future: The Welfare System in a New Phase of Development in SINGAPORE CHANGES GUARD: SOCIAL, POLITICAL AND ECONOMIC DIRECTIONS IN THE 1990S*, 166 (G. Rodan ed, Longman Cheshire, Melbourne, 1993).

5. The Social Cost of Running the Economic Engines – The Loss of Civil and Political Rights

The PAP government enacted a panoply of laws that restrict political and civil rights. The predecessors to these illiberal laws were the English colonial laws enacted to protect the commercial interests of the colonial power in the Singapore Colony. Examples of such laws include the *Trade Unions Ordinance 1930*, *The Preservation of Public Security Ordinance*, and *Printing Presses (Amendment) Ordinance*. The PAP incorporated the laws of its colonial master into its legal system and then further them with their own legislative devices to limit civil and political rights in order to establish favourable investment conditions for MNCs. For example, cheap labour was made possible by government intervention in adopting two measures: “the *Employment Act* and the *Industrial Relations (Amendment) Act of 1968*, ‘depoliticised the labour movement, established *de facto* government control over unions and transferred bargaining power from the workers to employers”⁹³ The laws highlight the PAPs vision of how Singapore should be governed to achieve rapid economic growth in the context of the political and economic uncertainties of the early and late 1960s. In a landscape of political turbulence in the region, the PAP created an oasis of political and economic stability.

The PAP Government’s success in creating these conditions won accolades from Transparency International (TI), the Political and Economic Risk Consultancy (PERC), the Business Environment Risk Intelligence (BERI), and the World Economic Forum (WEF) (including from former United States Defence Secretary and Chairman of Forbes, Casper Weinberger). None of these organisations showed any discomfort with the repressive nature of governance in Singapore. The reluctance to jeopardise their “commercial interests for the sake of their liberal principles”⁹⁴ is obvious. The WEF of 1999 applauded Singapore for being the most competitive economy in the world. While one may hardly expect private companies to act in anything but their self interest, the muted response by the governments of liberal democracies to Singapore’s suppression of basic rights is not surprising. Some see this as a maddening contradiction in that some developed liberal democracies champion such rights in their own societies but remain muted when such rights are not practised in Third World countries in which they have high economic and political stakes.⁹⁵ While there may be some pressing needs for young developing nations to suppress political and civil rights in the formative years of nationhood to achieve economic and social progress, it is submitted that nations cannot afford to abdicate their own responsibility for developing political and civil rights.

The PAP government, having played a major role in attracting MNCs and developing the GLCs, established these institutions as dominant features of the economy. This support has assured ‘one-party rule’ and the hegemony of the PAP. The country seems unable to break the shackles of dependence on MNCs,⁹⁶ because local businesses have not been developed and

⁹³ Huff, W.G, *THE ECONOMIC GROWTH OF SINGAPORE: TRADE AND DEVELOPMENT IN THE TWENTIETH CENTURY*, 324 (Cambridge University Press, Cambridge, New York, 1994).

⁹⁴ Mallet V, *THE TROUBLE WITH TIGERS*, 45 (HarperCollins, London, 1999); Also see Chee, S. J, *YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE*, 82-84 (Open Singapore Centre, Singapore, 2001).

⁹⁵ See the scathing comments from the former Commonwealth Secretary-General Shridath Ramphal *Development and the Rule of Law*, *MALAYAN LAW JOURNAL*, lxxvii (September, 1981).

⁹⁶ Chee, S. J, *YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE*, 54 (Open Singapore Centre, Singapore, 2001).

local expertise has not been encouraged to take on or replace foreign expertise. As stated earlier, the PAP leadership admits the inadequacy of the Singaporean workforce to meet these commercial challenges and the Government continues attracting highly skilled workers from overseas through a combination of high salaries and better working incentives.⁹⁷

Although the Government claims that there is a trinity of understanding to work towards the common goal of increasing output, raising productivity and fairly sharing wealth between government, labour unions and employers, an alternative explanation is more plausible. There has been an argument that only 'a two-way' understanding between employers and the State exists, because there has long since been an emasculation of the unions under one government-controlled umbrella organisation, the National Trade Union Congress (NTUC).⁹⁸

The extent of the integration of unions into the PAP agenda is reflected by the fact that the NTUC is involved in a number of large scale businesses providing all sorts of services, including running of taxis and supermarkets that are quite unrelated to any union activities.⁹⁹ In fact, ever since the National Wage Council's (NWC) was established 20 years, the Government and the NTUC has followed its recommendations. The NWC itself represents over 900 national and multi-national employers through the Singapore National Employers' Federation. This body was set up under the auspices of the Ministry of Labour in 1980.¹⁰⁰ It is through such State sponsored mechanisms that Singapore's regional economic competitiveness is achieved. For example, the ease with which wage cuts can be implemented is a result of paternalistic governance, the emasculation of trade unions and the lack of a viable opposition in Singapore. On the other hand, Japan, South Korea and Taiwan have active trade unions to ensure employees' interests are protected. In Singapore, the only trade union that apparently represents the interests of workers is the NTUC. The Secretary-General of the NTUC is a minister of the PAP government.¹⁰¹ Therefore in Singapore, there is the odd situation that the Government, being the largest employer in the land, has assumed the role of the protector of workers' interests, such that Leggett¹⁰² states, "the self-styled 'symbiosis' of the NTUC and the PAP makes it difficult to distinguish government from unions in Singapore's industrial relations." The state has removed the independence and relevance of labour unions without any public protests and taken upon itself the task of regulating employees' interests to ensure economic growth.

Singapore's economic triumvirate of multi-national corporations, government linked companies and government directed savings presently provides the PAP Government with a tight grip over the economy ensuring its political hegemony. There appears to be no dynamic force within the PAP corporatist state today that will establish a more open civil society that could sow the seeds for a longer lasting political, economic and socially cohesive future.

⁹⁷ *Id.* p. 213.

⁹⁸ Selvan T.S, SINGAPORE THE ULTIMATE ISLAND: LEE KUAN YEW'S UNTOLD STORY, 30 (Freeway Books, Victoria, Australia, 1990).

⁹⁹ See Ginnie Teo, *NTUC to open hypermart*, THE STRAITS TIMES INTERACTIVE, available at: <http://straitstimes.asia1.com.sg/storyprintfriendly/0,1887,110181-1017007140,00.html> (as of 28/3/2002). It is stated that "NTUC is the largest supermarket chain here with 63 FairPrice stores island-wide."

¹⁰⁰ Leggett C, *Singapore in, LABOUR LAW & INDUSTRIAL RELATIONS IN ASIA: EIGHT COUNTRY STUDIES*, 100 (S.J. Deery and R.J. Mitchell eds, Longman Cheshire, Melbourne, 1993).

¹⁰¹ Chee, S. J, YOUR FUTURE, OUR FAITH, OUR FREEDOM: A DEMOCRATIC BLUEPRINT FOR SINGAPORE, 83 (Open Singapore Centre, Singapore, 2001).

¹⁰² Leggett C, *Singapore in, LABOUR LAW & INDUSTRIAL RELATIONS IN ASIA: EIGHT COUNTRY STUDIES*, 101 (S.J. Deery and R.J. Mitchell eds, Longman Cheshire, Melbourne, 1993).

Providing Justice For Women: The Interface Between Law And Literature

- Anu Lohani*

Abstract

Law and literature in many places supplement each other by providing base for creative imagination adding life to legal abstraction by connecting it to real life situation. The author in this short note maintains that law does not give scope to narration of pain, which is a great shortcoming of the legal discourse. She brings British and Nepali cases to examine the interface between law and literature in connection to providing justice to women. A sexed approach in law marginalizes women. She argues that the law need to be sensitive to the need and concerns of women and adequately address their problems.

1. Introduction

Law can not bring out all the details of a person's story. It can talk about parts of the story but cannot address the more important heart-wrenching details. Law cannot define pain because pain has no language. Law can not elaborate upon the concept of suffering. Literature on the other hand can cover the whole gamut of emotions. There is no specific way that the narration should be done. There are no specific choices of words that need to be used to create meaning. The person can open up his/her heart and narrate the story in the exact way it happened without any changes. He/she need not worry about his/her past conduct or his/her moral standing.

This paper seeks to study the interface between law and literature as far as justice for women is concerned. This paper looks at the interesting approach taken by Vasudha Naragaraj of 'Anveshi'¹ that analyses the different stages a case has to pass through before the verdict is given and whether the real story gets somewhat lost in the process.² How much of a women's story is covered by the legal text? Do provisions of law gauge pain and suffering? What if witnesses turn hostile? This paper questions whether the law is sexed, in arriving at a particular verdict. Do judges view women in the same way they are viewed by society? Will the judgment be different if the judge knows that a woman is not of good moral character? These are some of the strands that this discourse seeks to put together to arrive at a decision at the end of the paper. My own views will be substantiated with real life situations of domestic violence in the Indian context as in the case of *R v. Ahluwalia*³ as well as the Nepali context. Furthermore, the approach taken by courts in these types of cases will be discussed.

* Currently working with Forum for Women, Law and Development (FWLD), Kathmandu, Nepal. She has an integrated B.A/LL.B. (Hons.) degree from National Law School of India University, Bangalore, India.

¹ It is a Research Centre for Women's Studies based in Hyderabad.

² She has prepared a report of a Study of Convicted Women, conducted as part of the Telugu Material Production project.

³ [1992] 4 All E.R. 889.

2. Part I: Women As Subjects Of Law

Women have historically been seen as the weaker sex. Economic dependence on the husband and the family has a big role to play. As far as the Nepali context is concerned, women are expected to be exemplary wives and mothers are expected to hold the family together. If they have matrimonial problems and the husband tortures them, they are encouraged by their parents and friends to somehow make the marriage work and stay within the matrimonial setup as far as possible. This is because of a variety of reasons such as the stigma associated with walking out on the husband no matter how much he has tortured her. Battered women become so demoralized and degraded by the fact that they can not predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation.⁴ In addition to these psychological impacts, external social and economic factors often make it difficult for some women to extricate themselves from battering relationships. As mentioned earlier, the stigma that attaches to a woman who leaves the family without her children undoubtedly acts as a further deterrent to moving out. When they want to leave the relationship, they are typically unwilling to reach out and confide in their friends, family, or the police; either out of shame and humiliation, fear of reprisal by their husband, or the feeling that they will not be believed.⁵ Various objective and subjective conditions contribute to female client's powerlessness and thus their inability to pursue legal remedies. In many cases, these conditions also result in women's complacency in the face of violations of their human rights.

Violence covers an entire gamut of - exploitation; discrimination; maintaining unequal economic and social structures; and creation of an atmosphere of terror - all of which are supported and mandated by the socio-economic context of power relations.⁶ Despite many years of activism condemning violence against women, the lives of large numbers of women rest on "a continuum of unsafety".⁷ Some writers have discussed the concepts of "learned helplessness" where they talk about why battered women do not attempt to free themselves from battering relationships. Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, and "helpless". Cultural conditions, marriage laws, economic realities, physical inferiority etc. teach women that they have no direct control over the circumstances of their lives. They deliberately allow themselves to be taken advantage of. They are subjected to both parental and institutional conditioning that restricts their alternatives and shelters them from the consequences of any disapproved alternatives.⁸

2.1 R v. Ahluwalia⁹

Where the words or conduct of the wife are raised as the basis for a plea of provocation, matrimonial behavior becomes the focus as the centre of responsibility for her husband's actions. By portraying the victim as unsatisfactory in matrimonial terms, the responsibility of the offender is reduced. The wife is seen as the husband's obedient, compliant, and exclusive sexual object who can cause her own death through refusal to live up to expectations. In this case the wife had

⁴ M. Becker et al, CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, 383-428 (West Group, USA, 2001).

⁵ *Id.*

⁶ U. Vindhya, *Battered Conjuality: The Psychology of Domestic Violence* in THE VIOLENCE OF NORMAL TIMES: ESSAYS ON WOMEN'S LIVED REALITIES, 197-219 (K. Kannabiran ed, Women Unlimited, New Delhi, 2005).

⁷ *Id.*

⁸ Becker *supra* note 4.

⁹ [1992] 4 All E.R. 889.

been living in a physically and emotionally abusive matrimonial relationship for 10 years. One day it just got too much and she decided to burn her husband (not with an intention of killing him) so that he experiences the feeling of extreme pain. The husband succumbed to his injuries later in the hospital. In arriving at the verdict the judge had considered the fact that the wife was otherwise a dutiful wife who was extremely obedient and never questioned the intentions of the husband. She submitted to the wishes of the husband and quietly put up with all the violence that the husband committed on her. An extract of a letter that she wrote to her husband when he went missing for a few days is also mentioned in the judgment to reflect on the fact that she was a docile and submissive wife. She has mentioned that she will do everything as per his wishes and will never anger him. In this case, the sentence of murder was reduced to one of manslaughter. Provocation was taken as the defense even though it was not 'sudden and temporary'. Would the judgement in this case have been any different if the wife was not as submissive and dutiful even though she was victimized in the same manner? Would the judge have taken the view that she partly deserved such torture by virtue of not being an exemplary wife?

In this case, even though Kiranjit Ahluwalia got legal justice, the court would never get to know the extent of her misery because there is no provision of law that quantifies pain. Many parts of her story would have got lost in the process of being translated from the form of narrative to fit into the legal mould that the world understands. Therefore, it is justifiable to view the law as a template to convey one's story.

The law is like a mould which can not be expanded or extended beyond a point to fit in one's story perfectly. Whatever fits in the mould is written in the form of legal text and if a story doesn't fit in, it is then lost. Whatever is not covered by the legal text is the "other". In the case of literary narration, the case is very different. These set standards of conformity are not present in literature. One can narrate his/her story the way he wants without barriers of any kind. There are no moral standards that one needs to stick by, before he starts the narration. Literature gives vent to any kind of emotions to whatever extent a person wants to take it to. He can narrate the minutest detail of his story. Unlike the court system, his story does not have to pass through different stages such as trial and cross examination etc... He need not worry about his witness turning hostile and twisting the story around. The different stages a case has to go through before the decision is pronounced also affects the final outcome of the case. There are many players involved in a case from the date it is filed to the day the judgement is pronounced. The family, relatives, village or community and the entire society could have a say in the case. Therefore there are many factors that influence the way the case turns out. Even if the innocent party gets justice in the end, the world might not have heard his entire story. Half of his story could have been lost in the middle because it could not fit into the ready-made legal mould. A woman's actual story for example may be best known by her neighbor who has been a part of each and every narrative of hers. The story that the world hears though the media etc& could be entirely different in the legal form. Therefore, the power of narrative justice is very important; more so in this context because most of the atrocities against women are committed in the private domain where the reach of the law is not as much as in the public domain. There is no way to test the veracity of the matter at hand. This is why it is also very easy to change the story to suit the male member of the house and make the woman appear to be the culprit by casting aspersions on her moral conduct for example. In other words, the law does not fit women's' experiences.¹⁰

¹⁰ K. O'Donovan, *Defences for Battered Women Who Kill*, 18 (2) JOURNAL OF LAW AND SOCIETY 219-240 (Summer, 1991).

2.2 The Nepali Context

The actual figures of women living in abusive relationships may not be known. Nepal is no exception when it comes to gender-based violence. Due to economic dependencies and lack of education, women in Nepal are constantly harassed. However, there have been instances of such violence even in educated and well-to-do families. Cases filed in courts provide heart-wrenching stories of how their own matrimonial home became the seat of constant torture and harassment. There are many cases where women are living in physical and mental torture. Due to fear of being ostracized, they continue living in such set-ups which further encourages perpetrators of violence. The civil society in Nepal is very active and has managed to agitate against many such cases through sit-ins and hunger strikes.

The judiciary in Nepal has handled cases of gender-based violence and violence against women in particular, quite sensibly. Even though there is no comprehensive legislation criminalizing domestic violence yet, judicial activism has created quite a big impact. Recently, the Apex Court has given a judgement where it has applied the “*battered women’s syndrome*” in case where the wife committed the husband’s murder apprehending threat to her own life and the life of her small son.¹¹ Just like in *R v. Ahluwalia*, her punishment has been reduced to one of manslaughter as there was no malicious intent and premeditation. She has been sentenced to 10 years of imprisonment. Due to strong treaty jurisprudence in Nepal, lawyers have argued cases on the basis of the Convention on the Elimination of all forms of Discrimination against Women [CEDAW] provisions as well. The Treaty Act 1990 gives over-riding powers to international instruments over domestic laws.

While even law cannot provide justice in terms of remedying the actual pain a person goes through, it certainly reduces instances of such crimes in society. Penal sanctions act as deterrents to people considering repeating the same offence. Is there any other way in which the sufferer’s pain can be alleviated? Law can lessen the pain to a considerable extent by doing justice. However, there is no other way in which a victim can completely undo the suffering and the pain.

2.3 Jurisprudential issues

The concept of a reasonable woman standard has been mooted by feminist writers. Just as the reasonable man was created for convenience, can’t there be a reasonable woman standard as well?¹² According to Usha Ramanathan, women in law are portrayed in mostly three categories: wife, non-wife and criminal. Are there limits on judicial tolerance of a man venting his anger on his wife? Small beatings may not be legal cruelty.¹³ This can be understood from the import of the judgments given in favour of the husbands who torture or even kill their wives in fits of rage. Judges have interpreted killings by husbands by saying that the husband was otherwise very sweet to the wife and he never troubled her. On this particular day, she really got on his nerves and he unintentionally ended up killing her! Judges even take past conduct of women into account in exonerating husbands from the conviction for murder. They talk of how her evil ways were the common scandal of the village and thus that caused the husband extreme mental agony, shame and humiliation.¹⁴

¹¹ *Nepal Government on behalf of Rajan Rai v. Amrika Rai*, Case no. 236/2061 (Shravan 5 2065).

¹² U. Ramanathan, *Reasonable Man, Reasonable Woman and Reasonable Expectations* in *ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR* 33-71 (A Dhanda and A. Parashar eds, Eastern Book Co., Lucknow, 1999).

¹³ *Id.*

¹⁴ *Id.*

Upendra Baxi has put forth a very interesting question. What kind of society do the women's bodies dream of?¹⁵ I'm sure we are all aware of the answer to this question but bringing about societal changes is not an easy task. We have to all be aware of our rights first. Then we should educate everyone about theirs. Only when the society is mature enough to accommodate the interests and wishes of the present day men and women can we call ourselves a modern society.

A dramatic shift occurred in the feminist legal thought in the early eighties. Essays by a feminist lawyer called Catharine MacKinnon brought about this change. She argued that the very category of women was not a thing of nature. Rather what it was to be a woman was a matter of social construction and in a patriarchy the category of woman was constructed by men. What was thought of as the female sex was not in fact the nature of women. According to her, an apparent positive identification of women with their ascribed identity was only women being what men wanted them to be. Thus, there was nothing natural or positive about the female sex: the meaning of women was very much the cultural work of men who had crafted women according to their sexual interests.¹⁶

Nicola Lacey states that law produces sexed subjects. This is done by means of constructing certain sexualities, sexual practices and sexual identities as having particular social meanings. It constitutes the conception of adult male heterosexuality as the sexual "norm", a certain sexed body as the subject of the shape of the legal subject.¹⁷ Law is a powerful discourse because of its claim to truth which in turn enables it to silence women who encounter law. Women are sexed by the law because sexualized meanings are attributed to the corporeality of women. Law is therefore a reflection of male interests or values, and it is part of the patriarchal state.¹⁸ Women see the world differently and as an oppressed group, can see the reality of the system and can provide the valid, correct and true analysis.¹⁹ Therefore, whenever women have to take recourse to the law, they know that they will be viewed as subordinate to men and that their demands will be fulfilled only if they are not in conflict with those of men.

3. Part II: Interface Between Law And Literature

Does the exact story of a person always come out in the court when they are narrating it? Do some parts get lost in the process because the law cannot provide solutions for them? For example, if a woman was to explain the extent of emotional torture she went through at the hands of her husband, how would she do it? Do our legal texts accommodate feelings of pain, suffering, misery and helplessness? Any battered person's narrative will never be complete unless there is room for addressing these emotions. Legal texts can never go the whole length in understanding the story of a person. Only the relevant portions are taken into consideration and the rest are left behind. Even if a person gets justice at the hands of the law, the version that the world gets to

¹⁵ U. Baxi, *From Human Rights to the Right to be a Woman* in *ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR* 275-290 (A Dhand and A. Parashar eds, Eastern Book Co., Lucknow, 1999).

¹⁶ N. Naffine and R. Owens, *Sexing Law* in *SEXING THE SUBJECT OF LAW* 3-76 (N. Naffine and R. Owens eds, Sweet and Maxwell, London, 1997).

¹⁷ N. Lacey, "On the Subject of 'sexing the subject...'" in *SEXING THE SUBJECT OF LAW* 3-76 (N. Naffine and R. Owens eds, Sweet and Maxwell, London, 1997).

¹⁸ C. Smart, *Law's Power, The Sexed Body and Feminist Discourse* in *LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM* 70-87 (Sage Publications, London, 1995).

¹⁹ *Id.*

²⁰ V. Nagaraj, *Contextualising Criminality: Convicted Women's Narratives and Procedures of the Criminal Trial* 1-9 (Anveshi Research Centre for Women's Studies, Hyderabad, October 2002).

know may be completely different from his actual version. Therefore law can never tell the details of the actual story that literature can tell. That's exactly where the concept of literary justice fits in.

The juxtaposition of women's narratives and judicial discourses allows for a critical examination of the biases that are embedded in alleging cruelty to women. A range of institutions participate in this process. Among these are the family, the immediate community that is the village or the basti, party organizations, village panchayats and the judicial system.²⁰ Their stories can completely change the picture the woman would have painted by herself as far as injustice to her is concerned. Identities of gender, class, caste and religion determine the entire process of naming the women a "criminal" and underwrite the judicial discourse. Insufficient evidence of violence within the home is also one of the main reasons why outsiders interfere so much and give the story the angle they desire.

The law has been seen as a site of many contesting issues of women's oppression. Intense campaigns around issues like rape, domestic violence etc... have been consequential in framing new laws. New spaces like women's police stations and family courts dealing exclusively with cases of violence against women have emerged from these campaigns.²¹ Does this mean that women's problems will be addressed better now? Will they be able to narrate their story without much of it getting lost in the process? The starting point of law is that it is assumed to be inherently good, capable of being just and neutral. This is however not always true. Different factors are involved from the point a case is started until it ends. The family may not always be supportive in the way expected. Also extra-legal aspects of the criminal trial are considered to be the sleazy details. That's why criminal courts have been largely a male domain because it is presumed that the women lawyers cannot handle the different levels of a criminal trial.²²

Centrality of marriage to the definition of womanhood remains a disabling factor in women's entitlements to justice and remedies at work.²³ Even when law treats men and women equally, it is discriminatory to women because men and women are located in an unequal and hierarchical manner in cultural, social and economic formations. In other words, it is unjust to treat unequals equally.²⁴ The law and the state render invisible women's subjective experience of oppression since objectivity is installed as the norm. In this sense, the law is essentially 'male' and can only ever partially comprehend the harms done to women.²⁵ This also explains why legal agents interpret laws in patriarchal ways. Sexual/reproductive issues have not been "public" unlike economic issues which makes the fight all the tougher. Women have found it easier to fight against the State, or against social custom through the State than to fight for their rights within the family or on "personal" issues.²⁶

Legal language is specific and historically bound, while literary language is inherently ambiguous. Legal texts must be interpreted according to the intention of the author. What this means is that it has to be in line with the Constitution or the framers thereof. Literary texts, on the

²¹ *Id.*

²² *Id.*

²³ K. Kannabiran, *Introduction in THE VIOLENCE OF NORMAL TIMES: ESSAYS ON WOMEN'S LIVED Realities* 1-45 (New Delhi, Women Unlimited, 2005).

²⁴ N. Menon, *RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW* 1-21 (University of Illinois Press, Chicago, 2004).

²⁵ *Id.*

²⁶ *Id.*

other hand, require the reader “merely to assign some coherent and satisfying meaning” irrespective of what an author may have had in mind.²⁷ Legal texts derive from authority, to wit their authors’ minds, whereas literary texts, lacking authority in the legal sense, demand a freedom of interpretation that the law does not allow.²⁸ Writers like Posner believe that the author’s intentions in creating a literary work are relatively immaterial; the function of the literary interpreter is to “assign a coherent and satisfying meaning to the words”. A focus on the choice of words of the author or framer is essential to the interpretation of a legal text.²⁹

4. Conclusion

Legal texts cannot entirely capture the extent of a victim’s story. There are various constraints that prevent a story from being narrated in the same manner as it would be told to a third person. The legal system is very rigid in that there are certain procedures that have to be followed once one enters the legal domain by registering his case. There are various stages the case has to pass through before the final outcome of the case is heard. It is a very time consuming process which may even take many years. There are chances of the story getting twisted if witnesses are bribed to turn hostile. Other court officials can also be suitably manipulated. There is immense scope for changing the face of a particular case, as it is all out in the public domain. The rich and powerful who can hire better lawyers have a better chance of winning the case. Therefore, the facts of a particular case may turn out to look very different when it passes through different stages of trial. Therefore, legal justice might not always do justice to a particular case. There may be many small details of the case which have been omitted or changed to bring it in line with the case to be argued at hand. When the factual details are omitted, the emotions that the victim would have experienced at that time also automatically get wiped out. Even otherwise, legal texts cannot capture the depth of one’s pain and suffering. It becomes very difficult for a woman to narrate her story that took place in the private space of her house. In most of these cases, evidence is lacking so it is very difficult to prove them before a court of law. Another difficulty lies in the vulnerability of the women who narrate their stories to the public at large. Once the story is out, it no longer remains in the private sphere and not all women are comfortable with their stories being discussed by the world at large.

Better laws and sensitive court room procedures that recognize the complexity of women’s complaints, go to some length in reducing the cumbersome procedures that women have to go through. Framers of new laws have to be sensitive to the changing times and should keep interests of women in mind while making laws. Women in the 21st Century are educated professionals who have financial stability. Therefore, laws should be progressive in nature and should not be sexed. Laws in the private sphere should be sensitive towards the needs of today’s educated women and should address their problems adequately.

²⁷ R Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard UP, 1988); S. Levinson et al., *Interpreting Law and Literature: A Hermeneutic Reader* 89(6) COLUMBIA LAW REVIEW 1374 (Oct., 1989).

²⁸ *Id.*

²⁹ *Id.*

Some Procedural Defects of the Human Trafficking and Transportation (Control) Act, 2064

- Ben Reed*

Abstract

In this article the author discusses issues relating to the procedural laws governing the crimes of human trafficking and transportation in Nepal. He argues that this law is in violation of the ICCPR, many other non-binding international human rights instruments and the Nepali Constitution. The rights to a presumption of innocence, an impartial tribunal, a review of detention, witness cross-examination and due process are demonstrated to be missing from the Trafficking Act, 2064. Necessary reforms are suggested.

1. Introduction

This article examines some procedural problems of the Human Trafficking and Transportation (Control) Act of 2064 (*Trafficking Act*). As the name suggests, this law was passed to address a serious social problem, and to vindicate the rights of trafficked persons. The law, however, has created a Kafkaesque and mechanistic process that violates international law. This article will briefly compare the *Trafficking Act* against the requirements of the ICCPR. It will also refer, where appropriate, to the provisions of human rights conventions similar to the ICCPR, such as the European Convention on Human Rights, and to cases and commentary on those sources. The latter are not binding on Nepal, but are indicative of how the ICCPR's more general provisions should be interpreted.¹ After describing the problems with respect to international and Nepali law, this article will make some suggestions on reforming the law to an acceptable standard.

Two caveats are in order. First, this article examines the *Trafficking Act* primarily in relation to the requirements of international due process, particularly the International Covenant on Civil and Political Rights (ICCPR); it will only briefly compare them to the requirements of Nepali criminal and constitutional law. Although the latter comparison is important, it requires an understanding of Nepali law that I do not possess. However, it will appear to the educated observer that the *Trafficking Act* violates a plain reading of the Nepal Constitution.

Second, while this essay focuses on defects in the *Trafficking Act*, this should not be construed to mean that such a law might not be necessary. On the contrary, insofar as the *Trafficking Act* specifically allows prosecution of crimes that would be otherwise difficult to deal with under Nepali law, it represents an advance over some of the more problematic aspects of Nepali jurisprudence, as well as of traditional Nepali justice.² The intent of this essay, therefore, is constructive as well as critical – not simply to identify problems with the *Trafficking Act*, but also to suggest ways in which its substantive and procedural law could be improved.

* J.D. The University of Montana; Rule of Law Specialist, The Asia Foundation. The author is grateful to Angela Krueger, J.D., and Dr. David Mikosz, for advice on proper use of law and language. All errors that remain are the author's. The views expressed here are the author's, and do not represent those of The Asia Foundation.

¹ See http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf (LAWYERS COMMITTEE FOR HUMAN RIGHTS, WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE 2 (2000)).

² For a discussion of which see, e.g., the brief overview of the history of criminal law in Nepal prepared by the Center for Legal Research and Resource Development (CeLRD) and on the internet at http://www.celrdd.org/intervention_in_reforms_of_criminal_justice_system.php.

2. The Human Trafficking and Transportation (Control) Act (2064)

The *Trafficking Act* was preceded by the Human Trafficking (Control) Act, 2043. The *Trafficking Act* has a much broader scope, and provides that any person who has been sold, transported or put into prostitution, put into slavery, bondage or, in addition to existing laws, forced labor; as well as had their organs removed, may seek redress under its terms.³ This redress is initiated as follows: a victim, or anyone else aware of such an offense⁴, makes a report to the nearest police station.⁵ The complainant may request that his or her identity be kept confidential.⁶ The police officer then takes the complainant to the nearest district court, at which a judge verifies the statement.⁷ The verified statement is evidence even if the victim does not appear in the court.⁸

At this juncture, the person named in the statement as an alleged trafficker may be arrested and further investigated.⁹ The court is not permitted to release the alleged trafficker from custody during the period of prosecution.¹⁰ Alleged traffickers are presumed to be guilty from the time of accusation.¹¹

3. Due Process Under International Law

While these provisions may seem to provide swift justice, they conflict significantly with international norms in the area of due process. Article 9 (3) of the ICCPR provides that it shall not be the general rule that persons awaiting trial shall be detained in custody. Article 14 (1) of the ICCPR provides that any person charged with a criminal offense is entitled to "a fair and public hearing by a competent, independent and impartial tribunal established by law."¹² Article 14 (2) provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." A fair trial is defined by Article 14 (3) as one that guarantees a defendant, at a minimum, the following rights:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

³ Human Trafficking and Transportation (Control) Act, 2064, s 4.

⁴ The *Trafficking Act* says nothing as to what constitutes "awareness of the offense," nor does it require that the police make an effort to review the veracity of the report. It might be hearsay, or entirely spurious. There are provisions for investigation, but no requirement that the matter be investigated.

⁵ *Supra* note 3, s (5)(1).

⁶ *Supra* note 3, s (5) (2)

⁷ *Supra* note 3, s (6)(1).

⁸ *Supra* note 3, s (6) (3).

⁹ *Id.*

¹⁰ *Supra* note 3, s (8).

¹¹ *Supra* note 3, s (9).

¹² International Covenant on Civil and Political Rights, art. 14(1), adopted Dec. 19, 1966, 999 U.N.T.S.171, 6 I.L.M. 368 (entered into force Aug. 14, 1991 [hereinafter ICCPR]).

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.¹³
- (h) Article 14, in short, establishes the basic requirements of international due process. Nepal acceded to the ICCPR in 1991, obligating the government to ensure that all of its courts “give effect to the rights recognized” by the treaty.¹⁴

4. Due Process Under the *Trafficking Act*

With the terms of the *Trafficking Act* and the ICCPR set out, I will now address the manner in which the *Trafficking Act* violates international standards of due process. Some of those violations are clear from a facial reading of the law; others can be inferred from positing simple fact patterns.

4.1 The Powers of the Judge

Under the *Trafficking Act*, the judge is responsible for verifying the statement that initiates the criminal process.¹⁵ With that verification, the judge simultaneously initiates the investigation (if one is conducted), authorizes the questioning of suspects, and requires suspects to be detained.¹⁶ From the standpoint of international due process, this concentration of functions investigative is problematic. First, it is arguably inconsistent with the suspect’s absolute right¹⁷ under Article 14 of the ICCPR to an “impartial tribunal” – one in which the judges do “not harbor preconceptions about the matter before them.”¹⁸ But according to the *Trafficking Act*, a judge presented with a statement must verify it.¹⁹ By doing so, if the process of “verification” means anything at all, he affirms his belief in the truth of the matter therein stated. He is then bound by law to detain the suspect he has not personally investigated.²⁰ As a practical matter, he is not able to act as a tribunal at all; his independence is solely nominal, as the law does not permit him to question either the arrest or the detention.

Second, because judges are bound to detain a suspect based solely on the basis of the statement presented to them, the standard for provisional detention is inadequate. The standard employed by, for example, the International Criminal Court (ICC) is far more stringent: the Court can only issue a warrant of arrest if it is satisfied that there are “reasonable grounds to believe

¹³ *Id.* art. 14(3).

¹⁴ *Id.* art. 2(2). Under section 9 of the Nepal Treaty Act, the ICCPR will prevail in the event of a conflict between it and other national laws. There is no language in the *Trafficking Act* that permits the judge to determine the validity of the statement.

¹⁵ Section 7 of the *Trafficking Act* reads as follows: **Arrest without warrant and investigation:**

(1) If any act considered an offence under this Act is committed or is planned to be committed in a house, land, place or a vehicle, and if there is a chance the offender will escape or evidence relating to the offence will disappear or be destroyed if immediate action is not taken; notwithstanding anything contained in the existing law, a police officer of the rank of at least sub-inspector may prepare a warrant and perform any of the following activities at any time:

(a) Enter, investigate or seize such house, land, place or vehicle.

(b) While carrying out their duties, if faced with opposition, the officer may open or even break windows or doors if necessary,

(c) Investigate or arrest without warrant any person engaged in such activity,

(d) Gather and seize all evidence found in the house, land, place or vehicle.

¹⁷ See *Gonzalez del Rio v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 20 (“the right to be tried by an independent and impartial tribunal is an absolute right”).

¹⁸ ICCPR, Art. 14(1); *Karttunen v. Finland*, Communication No. 387/1989, P 7.2, U.N. Doc. ICCPR/C/46/D/387/1989 (1992).

¹⁹ *Supra* note 3, s. 6.

²⁰ *Supra* note 3, s. 8.

that the person has committed a crime”²¹ — a standard equivalent to probable cause.²² In this case, the judge simply acts as a rubber stamp, affirming the actions of the police.

Regarding Article 14 (1) of the ICCPR, the UN Basic Principles on the Independence of the Judiciary state: “2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressure, threats or interferences, direct or indirect, from any quarter or for any reason.”²³

The *Trafficking Act* creates a judge who nominally investigates and decides whether to detain, and, by doing so, essentially makes the judge an agent of the police — or the complainant. It is unclear whether any of these problems rise to the level of an Article 14 violation; to date, no international court has addressed the potential conflicts associated with this issue. However, this problem pales in comparison with a more fundamental flaw in the *Trafficking Act*.

4.2 The Presumption of Innocence

A second significant issue is related to the right of a suspect accused of a crime to be presumed innocent as guaranteed by the ICCPR.²⁴ The *Trafficking Act*, however, simply ignores this, and requires that the accused prove his innocence.²⁵ This element of the *Trafficking Act* also falls far short of international standards in the way in which it implicates the right to silence. Although Article 14 of the ICCPR does not specifically mention a right to silence, the European Court of Human Rights has consistently held that “there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure.”²⁶ Since suspects are presumed to be guilty, they must present evidence to contradict that supposition before the court. If the only witnesses to the acts alleged are their accusers, a significant way in which they may attempt to place evidence in their defense is by testimony that they themselves present.

4.3. Review of Detention

A third problem concerns the review of detention. Section 8 of the *Trafficking Act* requires the judge to detain a suspect through to the end of the trial, regardless of the role that the accused plays in the alleged trafficking scheme and regardless of the risks of flight on the part of the accused.²⁷ This decision is not reviewable. The *Trafficking Act*’s “general rule,” therefore, is that a suspect in pre-trial detention will remain in custody for the duration of trial with no chance for bail. This flatly contravenes Article 9(1) of the ICCPR, which states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”²⁸ According to Article 9(3) of the ICCPR:

²¹ ICC Statute art. 58.

²² See BLACK’S LAW DICTIONARY (8th ed. 2004) (defining probable cause as “[a] reasonable ground to suspect that a person has committed or is committing a crime”).

²³ UN Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

²⁴ ICCPR, Art. 14(2).

²⁵ *Supra* note 3, s. 9.

²⁶ *Murray v. United Kingdom* 22 Eur. Ct. H.R. 26, 60 (1996); see also *Saunders v. United Kingdom*, 23 Eur. Ct. H.R. 313, 329 (1996) (noting the same right).

²⁷ *Supra* note 3, s. 8, *Prosecution in custody*: Notwithstanding anything contained in existing laws, and except the offence under clause (e) of subsection (1) of Section 4, the court must keep the accused in custody while s/he is being prosecuted.

²⁸ ICCPR, art. 9(1).

[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody.”²⁹

In its General Comment on Article 9, General Comment No 8 “Right to liberty and security of persons”, the United Nations Human Rights Committee has stated:

... if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law [1], information of the reasons must be given [2] and court control of the detention must be available [3] as well as compensation in the case of a breach [4]. And if, in addition, criminal charges are brought in such cases, the full protection of article 9 [2] and [3], as well as article 14, must also be granted.

The *Trafficking Act*’s absolute prohibition of release on bond is contrary to the prohibition of arbitrary arrest and detention in Article 9. The suspect’s only hope for relief is the possibility that the investigative judge will exercise his discretion and decide to dismiss the case on his own authority – for which there is no provision in Nepali Law. Not only is that extremely unlikely, but it falls far short of complying with the ICCPR’s injunction that a detained suspect “be brought promptly before a judge.”³⁰ Moreover, the suspect does not have any right under the *Trafficking Act* to present an argument for release – a basic requirement for pretrial detention according to the European Court of Human Rights, if the legality of detention is not reviewed by a different authority than the one that makes the initial decision to detain.³¹

In addition, this presumptive detention, as required by the verified accusation, violates the presumption of innocence. The accused loses his liberty without an individualized determination of the need for his detention. Because the only basis for detention is the accusation of the crime, detention effectively constitutes punishment for the alleged crime before it is proved at a fair trial. If the presumption of innocence means anything at all, it means that the accused should not be punished prior to an adjudication of his guilt.

4.4 Cross-Examination of Witnesses

The *Trafficking Act* allows statements by witnesses whom the defendant never had an opportunity to cross-examine to be used at trial. Section 5 of the *Trafficking Act* requires that the identity of

²⁹ *Id.*, art. 9(3).

³⁰ “Judge,” here means a judge who might exercise control of the detention. Such control is not available to judges in these cases.

³¹ See *De Wilde, Ooms an Versyp v. Belgium*, Judgment, 18 June 1971, Series A No. 12, p 76 (holding that with regard to pre-trial detention, “an authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty. If the procedure of the competent authority does not provide them, the State could not be dispensed from making available to the person concerned a second authority which does provide all the guarantees of judicial procedure”); while appeal by writ to the Supreme Court, as per fn.38, below, might resolve the case in the defendant’s favor, the fact that no such check on the court’s power exists within the law is a significant flaw.

³² *Supra* note 3.

³³ ICCPR, Art. 6, which provides as follows: *Verifying the statement:*

(1) If the person complaining under Section 5 is a victim him/herself, the police should take his/her statement immediately and also take him/her to the nearest district court as soon as possible to verify the statement.

(2) If a police officer brings to verify a statement under subsection (1), the district judge, notwithstanding anything contained in the existing law and even if the offence related with that statement doesn’t fall within the jurisdiction of that district court, shall verify the statement after reading it aloud and noting any additional details or changes of the case.

(3) If the statement of the victim is certified under subsection (2), the court can take the certified statement as evidence even if the victim does not appear in the court.

By the strict reading of the law, then, if the complainant is not the victim, the law does not require that he/she appear before the judge. There is no requirement that the complainant be made available to defense counsel, or that the complainant be required to testify in court.

the complainant be kept confidential, and Section 6(3) affirmatively provides that the judge can consider the verified complaint as evidence even if the victim fails to appear at trial.³² Technically, if the complainant is not the victim, the judge may never set eyes on him or her.³³ This is a clear violation of the plain language of the ICCPR.

Article 14(3)(e) of the ICCPR provides that “[i]n the determination of any criminal charge against him, everyone shall be entitled ... to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”³⁴ Subparagraph (e) does not require all witness statements to be made in open court; a statement obtained during the pre-trial investigation can be used at trial, as long as the defendant was afforded an opportunity to cross-examine the witness at some stage of the proceedings. In the absence of that opportunity, however, admitting the witness’s statements not only violates the defendant’s right of confrontation, it deprives him of a fair trial.³⁵ Despite Article 14(3)(e), there is no provision that would allow the cross-examination – or even the examination – of the prosecution’s witness.

The confidentiality requirement also impacts on the right to present a defense and confront the accuser. If the accused is not informed of the identity of the accuser, it makes it difficult if not impossible to present evidence on his own behalf, and question the accuser, regarding his/her motive to lie, failure to identify the perpetrator accurately, etc. Granting confidentiality assumes that the accused is indeed guilty of the alleged offense, and creates a risk of fraud and injustice by authorizing fraudulent accusers to hide behind the veneer of confidentiality.

4.5 Burden of Proof

As indicated above, the *Trafficking Act* provides that all defendants must be presumed guilty.³⁶ Aside from the basic contradiction with the ICCPR standards mentioned above, the Human Rights Committee has explicitly stated in its commentary on Article 14(2) of the ICCPR that “[n]o guilt can be presumed until the charge has been proved beyond reasonable doubt.”³⁷ By any standard, therefore, the *Trafficking Act*’s standard is inadequate.

5. Due Process Under Nepali Law

The Interim Constitution of Nepal (2063) was written to express the nation’s commitments to, among other values, civil liberty, fundamental rights, human rights, and the concept of the rule of law.³⁸ In Article 1, it states that any portion of laws inconsistent with the Constitution shall be void.³⁹ Article 24 of the Constitution enumerates the rights regarding to justice, among which is the right to the presumption of innocence.⁴⁰ The presumption of guilt in Section 9 of the *Trafficking Act* is in direct contradiction to this Constitutional guarantee. Article 25 of the Constitution

³⁴ *Id.* at 13, art. 14(3)(e).

³⁵ See *Delta v. France*, 191 EUR. CTT. H.R. (ser. A) at 16 (1990).

³⁶ *Supra* note 3, s. 9.

³⁷ Human Rights Committee, P.9, General Comment No. 13, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994).

³⁸ Constitution (2063), Preamble.

³⁹ *Id.*, Article 1.

⁴⁰ *Id.*, art. 24(5): No person accused of any offence shall be assumed as an offender until proved guilty committed by him.

⁴¹ *Id.*, art. 25: Right against Preventive Detention: (1) No person shall be held under preventive detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty and integrity or law and order situation of Nepal.

requires that no defendant may be detained without a showing that they are a threat to the sovereignty and integrity of Nepal, or pose a continuing or ongoing threat to law and order.⁴¹ The requirement of Section 8, that the accused be held without bail for the duration of trial, is likewise in direct contradiction to this Constitutional guarantee.

There is a tenuous argument that Article 13 might allow some deviation in these Constitutional guarantees to benefit women and children, since the *Trafficking Act* may have been designed primarily to protect women and children.⁴² However, the language of Article 13 would seem to be designed to allow laws to particularly benefit persons who have traditionally been victims of discrimination, and not to deprive other Nepali citizens of their rights. For example, this provision might allow a new law to give preferential treatment to women in hiring, despite the provisions of existing Labor Laws. However, this Constitutional provision is designed to privilege the underprivileged, and not to strip rights from Nepali citizens. The argument is further indefensible because the *Trafficking Act* takes great care to remain gender-neutral in its language, and so it cannot be said to be designed to protect less privileged genders or castes. As well, Nepali women and children are not the only victims of trafficking.⁴³

Detainees can certainly take measures to make an attempt to vindicate their rights under Nepali Law. In May of 2007, the National Human Rights Commission (NHRC) reviewed the implementation status of the International Human Rights Treaties to which Nepal is a party and made recommendations to the Government on actions for effective implementation of human rights enshrined in international agreements such as the ICCPR.⁴⁴ In its review of the Government's responsibilities under Article 14 of the ICCPR, it noted:

*Under the Judicial Administration Act 1991, each citizen has a right to invoke the jurisdiction of the concerned District Court (Trial Court) in case of violation of his or her legal rights. The parties to a case have a right of first appeal. Most importantly, under article 107 of the Constitution, any Nepalese citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with the Constitution. For the violation of any legal right conferred by the Civil Liberties Act, an aggrieved person may file a petition in the concerned Appellate Court under section 17 of that Act. The Appellate Court may, in turn, issue an order of injunction or a writ of mandamus or habeas corpus or to that effect.*⁴⁵

⁴² *Id.*, art. 3: Right to Equality:

(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, race, sex, caste, tribe, origin, language or ideological conviction or any of these.

(3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of the interests of women, Dalit, indigenous ethnic tribes, Madhesi, or peasants, laborers, or those who belong to a class which is economically, socially or culturally backward, and children, the aged, disabled and those who are physically or mentally incapacitated [emphasis added].

⁴³ On August 26th, the families of 12 Nepali men filed a lawsuit in U.S. Federal Court accusing U.S. corporation KBR Inc. of trafficking; in 2004, after being promised jobs in Jordan, they were instead sent to Iraq, where they were kidnapped and beheaded. See <http://www.msnbc.msn.com/id/26442436/> and http://judiciary.senate.gov/testimony.cfm?id=2613&wit_id=6203.

⁴⁴ A Study Of The Domestication Status Of International Covenant On Civil And Political Rights In Nepal, National Human Rights Commission, May 2007.

⁴⁵ *Id.* p.31.

However, this requires that the defendant has access to counsel who are willing to challenge these provisions. Even were there enough attorneys in Nepal who were willing to undertake such time-consuming litigation, shifting this burden to the defendant, or defense attorneys, generally seems to be contrary to the Constitution.

6. Suggestions for Reform

The above issues all work to undermine the utility of the *Trafficking Act*. However, with the following reforms, it could function according to its original intent, and do so in a fashion that does not compromise the civil and political rights of Nepali citizens. Suggested reforms are as follows.

6.1 Judicial Review of the Statement

Given the actions that this document sets in motion, the judge who signs it should be required to affirm that the document provides sufficient facts to show that there are reasonable grounds for suspecting an individual's involvement in the specific crime of Trafficking. After arrest, the defendant should be allowed to appear immediately before a separate bench than that which has verified the statement, and should be allowed to contest his detention based on the facts therein.

6.2 Bail or Supervised Release

The Constitution of Nepal provides for release, "unless there is sufficient ground of existence of an immediate threat to the sovereignty and integrity or law and order situation of Nepal."⁴⁶ The *Trafficking Act* should place no higher obstacle than this before the defendant. If the defendant is, in fact, an "immediate threat," it should be incumbent on the prosecutor to prove this.

6.3 Confidentiality

In order to stop possible threats of victims or witness, protective measures may certainly need to be taken. Confidentiality measures employed are to guarantee that victim or witness's identity is not revealed to the public or press. These measures include withholding of the victim's name from the court's public record (such as transcripts, order, decisions and judgments), the use of a pseudonym for a victim throughout the proceeding; (usually by using letters and/or numbers); and a prohibition of disclosing a victim's identity by any of the participants in the trial to a third party. Since the proceeding will be conducted in camera in any event⁴⁷, confidentiality over and above these measures may not be necessary.

Granting full anonymity to a witness, at least in the sense contemplated by the *Trafficking Act*, is impermissible, as indicated above; the defendant's rights cannot be violated in favor of the rights of the accuser. The law must allow the defendant to have access to each and every witness the prosecution intends to present, including the individual bringing the accusation. If the accuser alleges a concern for his or her safety, the judge may grant a higher degree of anonymity, but only if the judge finds specific and compelling reasons to do so. This anonymity can never compromise the right of the accused to question the accuser.

⁴⁶ *Supra* note 38, art. 25.

⁴⁷ *Id.*, art. 27.

6.4 Burden of Proof

The fundamental problem with the presumption of guilt – setting aside legal issues – is that there are a variety of situations in which innocent people could be charged and convicted, either because their accuser acted out of malice, or because the defendant might have lacked the mens rea to commit a crime.⁴⁸ The *Trafficking Act* requires that, unless the defendant can convincingly prove that he is innocent, the judge must convict a defendant – even where there is a doubt as to the truth of the accuser's statements.

Both the common law principle of presumption of innocence and Article 14(2) of the ICCPR require that the prosecution should prove the guilt of the accused beyond reasonable doubt. It would certainly be possible to shift the burden to a greater degree, if such is in fact the desire of the legislative branch. Although these rights in the ICCPR are expressed in absolute terms and are not subject to explicit exceptions or qualifications, it has generally been accepted elsewhere that an easing of the presumption of innocence, or reversing the burden of proof, may be justified if it has a rational connection with the pursuit of a legitimate aim, and if it is no more than necessary for the achievement of that legitimate aim.⁴⁹ Usually this is done by transferring the burden as regards mens rea to the accused, so that after the prosecutor has proved the facts of the offense, the defendant must convince the judge that, more probably than not, he is innocent of any criminal intention.⁵⁰

In this case, however, there is no such question. Section 9 should simply be eliminated from the *Trafficking Act*.

⁴⁸ Two examples that have been cited by members of the Nepali Judiciary have been those in which (a) parents disapprove of their daughter's choice in men (often because of caste), and complain "on her behalf;" or (b) the defendant signed the victim up with a labor company under terms that turned out to be fraudulent without the defendant's knowledge.

⁴⁹ Before the European Court of Human rights, see *Salabiaku v. France* (1988) 13 EHRR 379; in the United Kingdom, *Reg. v. D.P.P., ex parte Kebilene* [2000] 2 AC 326 at 385, per Lord Hope of Craighead; in South Africa, *S v. Manamela*, 2000 (3) SA 1 at 17).

⁵⁰ See, e.g., *Sweet v. Parsley* [1970] AC 132 at 150C, per Lord Reid. The Nepali Abuse of Drug Prevention Act (1976) also uses this technique.

Truth and Reconciliation Commission: Glue for Divided Communities to Create a Better and Brighter Future

- Tek Narayan Kunwar*

Abstract

The end of the conflict in Nepal is only the first step among many on the path to creating a peaceful and prosperous society. In this article, the author deliberates on one of the next steps in this process: reconciliation through a truth and reconciliation commission. He reasons that TRCs are an effective mechanism to bring about individual and community healing. He discusses the philosophy behind restorative justice and provides a definition of a TRC. The objectives and dynamics of TRCs are presented as well as a discourse on its religious, socio-cultural, psychological, economic, political, and justice dimensions. The author comments on the contentious issues of justice such as forgiving and forgetting, amnesty, reparations, accountability and reintegration, apologies, naming names and hearings. He finally concludes the article with an analysis of the strengths and weaknesses of TRC mechanisms.

1. Background

Justice is not merely a technical enterprise for the courts. Justice concerns what is just or right with respect to the allocation of value in society. Therefore, justice is generally understood to mean what is right, fair, appropriate and deserved. Justice is achieved when an unjust act is redressed and the victim feels whole again. Justice is something that is dependent on many factors, such as the societal understanding of what is meant by the term, the fairness of the process by which it is to be achieved, the responses of victims, and the 'correctness' of the outcome.

In his dialogue *The Republic*, Plato uses the character of Socrates to argue for a single account of justice which covers both the just person and the just city-state. Justice is a proper, harmonious relationship between the warring parts of the person or a city.¹ It is widely believed that to build tolerant societies in countries that have been torn apart by violent struggles, the inter-group conflicts of the past must be dealt with. New experiments have been made in this discourse and some of them have been more successful. 'Restorative justice' that provides balanced justice through a truth and reconciliation commission has been widely successful.

Since the mid 1970s, many states have attempted to make the transition to democracy. If transitional justice is undertaken with a balanced approach, it can create a harmonious future in an injured society. One of the most significant issues many of these states have had to deal with is how to induce different groups to peacefully co-exist after years of conflict. Over the last decade, the concept of reconciliation has been increasingly discussed as a method to prevent further conflict in war-torn societies. Since the early 1990s, the international human rights

* District Judge, Kathmandu District Court, Nepal.

¹ See justice as a harmony, <http://en.wikipedia.org/wiki/Justice> (as of 29-4-2008).

community has been advocating the use of truth commissions as an important part of the healing process. In fact, they have been suggested as part of the peace process in almost every concluded international or communal conflict.

In the case of South Africa, the Truth and Reconciliation Commission (TRC) provided the opportunity for victims to recount their stories, to be heard and acknowledged and to eventually be compensated to a certain extent.² Advocates of truth commissions (as well as other forms of transitional justice such as war crimes tribunals) argue that some reckoning with the past is necessary in order for former opponents to come together and create a shared and peaceful future.

New Zealand was the first developed country to formally introduce this method of dealing with crime into its justice system. First trialed in Argentina and Uganda in the 1980s, TRCs came to be an international phenomenon. Now, around 34 countries have established commissions to deal with and recover from past human rights violations. The mandates of the TRCs have been different from country to country. In Chile and Argentina, the TRC was limited to investigations of extrajudicial executions and forced disappearances regardless of whether the perpetrator was the state or an armed resistance group. On the other hand, the TRCs in South Africa, Guatemala, and El Salvador, carried wide mandates that extended to almost all types of gross violations of human rights. Of these TRCs, the South African Truth and Reconciliation Commission (1995) was the most important TRC and was given the widest mandate. It is renowned as a model TRC.

Thus, a TRC is an important mechanism to establish a harmonious, balanced, peaceful and just society. Via a TRC, the rights of victims and their families can be restored by revealing the truth behind past incidents. A TRC does not only try the perpetrator, but it also obtains the real truth about the pattern of past human rights violations. This means that policy and institutional changes can be implemented. With these changes, it is believed that reoccurrences of these same violations can be prevented in the future.

2. Restorative Justice: The Way of Social Harmony

Restorative justice is a value-based approach in responding to conflict. It maintains a balanced focus on the person harmed, the person causing the harm, and the affected community. This is an alternative approach. It is a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within communities. Moreover, it gives the offenders the chance to understand the real impact of what they have done and to do something to repair the harm.

Tony Marshall says, "restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."³ Restorative justice focuses on transforming relationships harmed by wrongdoing. This process gives victims the chance to tell perpetrators the real impact of their crime, to get answers to their questions and to receive an apology.

² Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, UNIVERSITY OF TORONTO LAW JOURNAL 356 (1999).

³ Tony Marshall, *RESTORATIVE JUSTICE: AN OVERVIEW*, 5 (London: Home Office Research Development and Statistics Directorate, 1999).

According to John Haley,

*“restorative justice is a process through which remorseful offenders accept responsibility for their misconduct and in response allows the reintegration of the offender into the community. The emphasis is on restoration: restoration of the offender in terms of his or her self-respect, restoration of the relationship between the offender and victims, as well as restoration of both the offenders and victims within the community.”*⁴

Restorative justice does not force a situation to fit the theory. Rather, as a theory, it is open and flexible enough to apply at various levels and in different contextual situations. Braithwaite recognizes this in his reply to restorative justice's two questions. To the *who* question, he replies, 'restorative justice is about restoring victims, restoring offenders and restoring communities. To the *what* inquiry, he suggests 'whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime.'⁵ Jennifer J. Llewellyn and Robert Howse argue that restorative justice practices associated with a TRC do achieve the various instrumental goals in question better than criminal trials and punishment. However, punishment is an intrinsic requirement for restoration of the moral order.⁶ Stuart Wilson reveals that “restorative justice aims to repair the relationship between the victim and the wrongdoer. This involves a fourfold commitment: first, a recognition of the damage done by a violation; second, the expression of remorse for the wrong committed; third, a willingness to try to ‘make good’ the violation through reparation or restitution; and fourth, to achieve forgiveness and reconciliation between the victim and the wrongdoer.”⁷

Scholars agree on the view that without justice, there can be no peace. Such peace can be achieved only by using the restorative justice mechanism. They also believe that lawyers and courts do not have the sole power to render justice. Hence, there are varieties of means and methods for dealing with legacies of human rights violations. At this juncture, restorative justice appears as an alternative approach, a response to the crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within communities. This type of justice can be created by the TRC mechanism. Therefore, the restorative justice is an umbrella notion. In particular, it preserves the intrinsically social dimension of the moral intuition that ‘something must be done’ in response to the offence.⁸ It asserts the logical necessity of re-integrative measures. Under this concept, the truth and reconciliation process has been developed as a unique transitional justice mechanism which is able to establish durable peace in a post-conflict society.

3. Defining Truth Commission

There is not one commonly accepted definition of a TRC. One certain point however, is that the commission is created during a political transition to handle gross violations of human rights or crimes against humanity. A truth commission is generally understood to be a “body set up to

⁴ John Haley, *Crime Prevention through Restorative Justice: Lessons from Japan*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, 352 (Burt Galaway and Joe Hudson eds., Monsey, NY; Amsterdam, The Netherlands: Criminal Justice Press and Kugler Publications, 1996).

⁵ Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 UNIVERSITY OF TORONTO LAW JOURNAL, 373 (1999).

⁶ *Id.*

⁷ Stuart Wilson, *The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty*, SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS, 544, (2001).

⁸ Llewellyn *supra* note 5, p. 379.

investigate past violations of human rights in a particular country including violations by the military, other government forces or armed opposition forces.⁹ Such commissions have a mandate to discover the facts of the violations, whether they be the entirety of the truth or at least a portion of it.

Truth commissions allow victims, their relatives and perpetrators to give evidence of human rights abuses, providing an official forum for their accounts. In most instances, truth commissions are required by their mandate to provide recommendations on steps to prevent a recurrence of such abuses. They are created, vested with authority, sponsored, and funded by governments, international organizations, or both.¹⁰

As described in the *Truth and Reconciliation Act of 2000* in Sierra Leone, truth telling was to be the primary means by which the TRC pursued the five goals of its mandate: "to create an impartial historical record of violations and abuses . . . , to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered."¹¹ In this way, if we look at the commissions existing in a variety of countries, it becomes noticeable that they differ in name, mandate, and authority, depending on the type of human rights crimes being examined. Even with these stark differences, the various commissions share one common characteristic which is to resolve human rights violations.

Priscilla B. Hayner delineates the following four main characteristics of truth commissions.¹² First, they focus on the past. Second, truth commissions investigate a pattern of abuse over a set period of time rather than a specific event. Third, a truth commission is a temporary body, usually operating over a period of six months to two years and completing its work by submitting a report. And, fourth, truth commissions are officially sanctioned, authorized, or empowered by the State. According to Hayner's view, the TRC focuses its investigation on past crimes. Their sole aim is to obtain a comprehensive picture of human rights violations and crimes under international law during a specified timeframe and without focusing on just one case. Furthermore, they have a limited time of service usually finishing with the completion of a report. Finally, they have authority to access information from all institutions, and provide legal protection to witnesses.

Truth commissions should not be deemed to be a substitute for the prosecution of the four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture. Although these commissions may run in conjunction with prosecutions, their role is to establish a record of what has happened, and to disseminate this information widely at both the national and international level.¹³ Internationally, the South African Truth and Justice Commission provided a powerful example of a country seeking to come to terms with the horror of its past and seeking to heal the wounds in order to move forward.

⁹ Priscilla B. Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study* 16(4) HUMAN RIGHTS QUARTERLY, 558 (1994).

¹⁰ Truth Commissions Digital Collection, <http://www.usip.org/library/truth.html#tc> (as of 3-28-2008).

¹¹ February 2005/Special Report No. 130 RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE, <http://www.usip.org/pubs/specialreports/sr130.html> (as of 3-28-2008).

¹² Priscilla B. Hayner, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY*, 14 (Routledge, New York, 2001).

¹³ Priscilla B. Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study* 16(4) HUMAN RIGHTS QUARTERLY, 597, 607 (1994).

4. Objectives of TRCs

Robert I. Rotberg and Dennis Thompson contend that “Never again!” is a central rallying cry of truth commissions and one about which perpetrators and victims can agree. The notion of “never again” captures the response of societies that are recovering their own balance, their own dignity, and their own sense of integrity. Truth commissions are intended to be both preventive and restorative.¹⁴ Allan and Allan claim that “it is inevitable that, for some of them [testifiers], psychological dysfunction and emotional pain will follow.”¹⁵ The authors point to the fact that the usual aim of truth commissions is to focus on collective rather than individual experiences, a factor that might be anti-therapeutic. “We still await studies about the psychological impact of truth commissions” states another scholar.¹⁶ However, as Hayner writes, “the central aim of a truth commission is not therapy.”¹⁷ Nevertheless, many truth commissions do aspire to function as a therapeutic tool for society. In this process it is important to remember the individual suffering behind the stories and to ensure that the appropriate care is given.

Margaret Popkin and Naomi Roht Arriaza also describe the four main goals of truth commissions. Firstly, truth commissions seek to contribute to transitional peace by “creating an authoritative record of what happened. Secondly, they seek to provide a platform for the victims to tell their stories and to obtain some form of redress. Thirdly, truth commissions seek to recommend legislative, structural or other changes to avoid a repetition of past abuses. Fourthly, they attempt to establish who was responsible for the injustices so the perpetrators can be held accountable.”¹⁸

In view of Christie Kenneth, the first and general aim of truth commissions is to officially investigate and provide an accurate record/analysis of the broader pattern of abuses committed during repression and civil war.¹⁹ Inherent to this investigation is hearings of the victims and perpetrators stories. In that sense a truth commission can also be seen as a non-judicial approach to achieve some form of justice to victims as it provides a forum for victims, as well as perpetrators to give evidence of human rights abuses. The subsequent report forms the first official acknowledgement of past human rights abuses people have suffered.

Truth and reconciliation commissions can not prosecute and try alleged human rights abusers and so justice is not actually done. In this way, truth commissions are particular in their scope, form, and mandates. Nevertheless, many commissions attempt to achieve a number of goals. Firstly, truth commissions attempt to obtain official knowledge from individual victims by permitting them to submit statements. Secondly, the TRC can focus its attention on certain incidents during a period of time in which the violations were committed in order to make historical corrections according to what actually happened. Thirdly, the TRC focuses public attention on human rights violations and through this increases general awareness of the social and individual loss that results from human rights violations. Fourthly, the TRC can investigate the consequences and nature of systematic and institutional human rights violations. It helps to prevent the

¹⁴ Robert I. Rotberg and Dennis Thompson, *TRUTH V. JUSTICE: THE MORALITY OF THE TRUTH COMMISSIONS*, 3 (Princeton University Press, 1997).

¹⁵ Allan and Allan, *The South African Truth And Reconciliation Commission as a Therapeutic Tool*, 18 *BEHAVIORAL SCIENCES AND THE LAW*, 459-477.

¹⁶ Dirk Kotzé, *REVIEWS: TRUTH COMMISSIONS AND FORMULAS*, (International Studies Reviews 4, No. 1, 2002).

¹⁷ Hayner *Supra* Note 12, P. 139.

¹⁸ Quoted in Christie, Kenneth, *The South African Truth Commission*, 61 (St. Martin's Press, New York 2000).

¹⁹ See Paavani Reddy, *TRUTH AND RECONCILIATION COMMISSIONS INSTRUMENTS FOR ENDING IMPUNITY AND BUILDING LASTING PEACE*, (United Nations Chronicle on-line Edition Issue 4, 2004).

reoccurrence of human rights violations. Fifth, the commission gathers in depth information on human rights violations and their impact on victims. The Commission can then make recommendations on ways to help victims face and overcome their experience. Finally, the commission may also gather information about individual human rights perpetrators and their role in human rights abuses. They may give recommendations that the perpetrators need to be removed from public positions or give factual evidence for indictments in a court of law.

It is important to note the view of Kadar Asmal that “more important than criminal prosecutions (of which there have been several and will be more) is the acknowledgement of today’s indebtedness to those who were wrongly vilified, tortured, maimed and killed yesterday. In particular, justice includes the undoing of past unjust criminal prosecutions as much as it includes the establishment of new findings of criminal guilt (by the courts) or moral and political responsibility (by the Truth and Reconciliation Commission) today”.²⁰

According to T. A. Borer, one of the goals of the TRC is the promotion of a human rights culture. He questioned how we measure this. Another goal of the TRC was to “restore the dignity of victims.” He argues again, how do we define dignity? How do we measure it? In the absence of serious methodological work, such questions will remain unanswered, and no meaningful assessments of the TRC can be undertaken.²¹

5. Reconciliation: Key dynamics Of Healing

There can be many different views of the meaning of reconciliation. In general, reconciliation is a societal process that involves mutual acknowledgment of past suffering and the changing of destructive attitudes and behaviour into constructive relationships that promote sustainable peace. Reconciliation involves justice, recognition and healing. It is about helping all victims move forward with a better understanding of the past and how the past affects the lives of survivors today.

Priscilla Hayner argues that reconciliation implies building or rebuilding relationships today that are not haunted by the conflicts and hatreds of yesterday.²² In her view, it seems that the present relation building should not be negatively affected by past evils. Some scholars define reconciliation as a psychological process for the formation of lasting peace. During this process, past rivals come to mutual recognition and acceptance, have vested interests and goals in developing peaceful relations, feel mutual trust, positive attitudes as well as sensitivity and consideration of the other party’s needs and interests. Hayner believes reconciliation can be as simple as getting back to ‘normal’ life after the troubles are over. But it has become unnecessarily theorized and idealized in recent years. Reconciliation as a policy objective really came into its own in the species of commission of inquiry known as the ‘truth and reconciliation commission’.

The International Institute for Democracy and Electoral Assistance (IDEA, Stockholm) identifies reconciliation as “a process through which a society moves from a divided past to a

²⁰ Kader Asmal et. al, RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID’S CRIMINAL GOVERNANCE, 13 (David Philip Publishers, Cape Town, 1997).

²¹ Tristan Anne Borer, *Reconciliation in South Africa: Defining Success*, 20:OP:1 KROC INSTITUTE OCCASIONAL PAPER 3 (March 2001).

²² Hayner, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY, p 161. (Routledge, New York, 2001).

shared future.²³ In relation to this definition, the development of democratic norms in the post conflict society is fundamental for this route, as structural injustice creates the basis for new conflict. In the process of reconciliation, peaceful co-existence, trust and empathy evolve within this framework of democracy for sustainable peace.

Robert F. Drinan argues that the term “reconciliation” sounds peaceful and reasonable, but how do you reconcile a history in which you and everyone you know have been cheated, defeated, and dehumanized? What do you do to obtain the human rights stolen from you?²⁴ To get answers on his inquiry we have to take a look into the South African example. It employed a combination of techniques available to balance the desire for a peaceful resolution to an awful problem. It has used the power to grant amnesty in exchange for the revelation of truth.²⁵ It was an experiment with noble aspirations. No matter whether it would be a model for other countries or not, it has made a great impact in this discourse.

In sum, reconciliation is more about socio-political psychology. By altering the socio-political psychology of a state in conflict, the community can be safeguarded from further political violence. The reconciliation process should be prepared to handle further injustices in post-conflict situations. The door of forgiveness must remain open to the perpetrator. Reconciliation then is the ability to forgive or forget political bitterness for the sake of creating a better political system in the future. In short, reconciliation stresses reaching that final goal, rather than criminal prosecution. Therefore, reconciliation emphasizes to overcome the distrust or animosity between perpetrators and victims and to strive to regain a friendship or goodwill by pleasant behaviour.

Truth commissions and other mechanisms to expose the truth are based on a more restorative function for criminal justice. Admitting the truth is often the first step to make changes within society. Reconciliation as a conflict handling mechanism requires some core elements. At first, honest acknowledgment of the harm or injury of each party has inflicted on the other is foremost. Secondly, sincere regrets and remorse for the injury suffered should be given in this process. Thirdly, readiness to apologize for one's role in inflicting the injury is also an important step. Fourthly, a willingness of the conflicting parties to ‘let go’ of the anger and bitterness caused by the conflict is necessary. A commitment by the offender not to re-offend is also a significant element in this process. Moreover, a sincere effort to redress past grievances that caused the conflict and compensate the damage caused to the extent possible is required. Entering into a new mutually enriching relationship is imperative to bring the individual and community together for a brighter future. Consequently, reconciliation then refers to this new relationship that emerges as a consequence of these processes. What most people refer to as ‘healing’ is the mending of deep emotional wounds generated by the conflict that follow the reconciliation process.

Experiences show without doubt that the TRC has re-awakened painful memories and practices that call into question how much healing actually takes place in its work. By asking victims to retell their stories after so many years, by entrenching long-buried conflicts, by reopening old injuries and by its incapacity to provide long-term care and support, the TRC at times seems to be an instrument for anger and pain, rather than a vehicle for healing and reconciliation. However, in its overall contribution to reconciliation and healing in the country, the TRC helps thousands of people in a multitude of ways at the macro level.

²³ David Bloomfield, *Reconciliation: An Introduction*, in RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK, 4 (David Bloomfield ed, International IDEA, Stockholm, 2003).

²⁴ ROBERT F. DRINAN, S.J., *THE MOBILIZATION OF SHAME*, 176 (Yale University Press, New Haven & London, 2001).

²⁵ *Id.*

Interestingly, the manner in which the TRC accomplishes that work is a relevant inquiry here. It can be seen in four folds. Firstly, the TRC normalize the symptoms of trauma and exposure to gross violence. It makes it socially acceptable to talk about pain in public, to mourn the loss of loved ones with displays of emotion and to seek counseling in order to overcome the traumas of the past. By building up public awareness of the consequences of trauma and suffering, the TRC inevitably assists survivors in grappling with their pain and possibly removed some of the stigma of mental health.

Secondly, the TRC obviously generates a platform for survivors to experience the humanity of their perpetrators through amnesty hearings. Regardless of the outcome of the hearings, survivors have the chance to see their perpetrators as humans, placed in an entirely new relationship of power where the balance is tipped in favour of the victims.

Thirdly, the TRC has the power to effect healing through its emphasis on the prevention of future human rights violations.

Fourthly, the TRC has the potential to remove some of the most powerful cues and reminders of the human rights violations of the past which can contribute to sustaining survivors' trauma. It can recommend changing the names of notorious security centers, prisons, and torture facilities. And, the TRC can propose the creation of parks, monuments, and other symbols of reconciliation. It could help victims and survivors to heal their hurt and injured souls.

In addition, the TRC can recommend reasonable reparations for the victims. By dismantling the symbols of past repression, the TRC can help facilitate healing by rendering those symbols impotent and constructing new reference points with new meanings.

In conclusion, these are only a few of the numerous ways in which the TRC as a national instrument of reconciliation has the potential to contribute towards individual healing long after its work is finished. The positive benefits of reconciliation for the healing process both at a national and an individual level is readily apparent. There is definitely an important role that national reconciliation can play in the healing process for survivors of political violence. More specifically, reconciliation can remove some of the key stress factors that perpetuate trauma for survivors of socially organized violence. Furthermore, reconciliation ends conflict which exacerbates ongoing trauma, removes cues and reminders which trigger painful memories and can be interpreted as a victory for victims on both sides. These are important social by-products of reconciliation.

6. Dimensions of Reconciliation

According to substantial research from the literature, there are six different dimensions of reconciliation. These dimensions are religious, socio-cultural, psychological, economic, political, and justice.

6.1 Religious Dimensions

The term 'reconciliation' has strong religious connotations. In Christianity, reconciliation between God and humanity through Jesus is a fundamental theme. Historically, within Christianity there has also been a division between Eastern and Western traditions regarding the view of sin and thus also of reconciliation. The Eastern Orthodox Church considered sin from a relational perspective, emphasizing the breaking of loving relations between God and man or between human beings. Western Christian traditions (Catholicism and Protestantism) were in the past

more influenced by the Roman legal tradition and focused thereby on the legal dimension of sin – seeing sin mainly as disobedience of the law of God. Today, however, the Western traditions have shifted from this preoccupation with normative moral rules to considering sin and reconciliation from a relational point of view.²⁶

One approach to the Bible's concept of justice is that it can be seen as interpersonal reconciliation, which focuses in particular on the issues of compassion, mercy and forgiveness.²⁷ Interwoven in the theological context of reconciliation is also the notion that human justice is limited. Justice can never achieve full retribution for the victims, especially not for the dead, but the theological hope is that victims will be vindicated after death. Reconciliation is from this point of view seen as the "ultimate fulfillment of justice", requiring forgiveness.²⁸

In the Buddhist tradition, compassion rather than forgiveness is stressed. The fundamentals of the Buddhist Middle Path are acceptance, tolerance, and above all, compassion. There are no examples as yet of a Buddhist country officially working for reconciliation after internal conflict. However, in Cambodia ongoing negotiations are being held between the government and the UN on how to deal with the country's conflict-filled past.²⁹ In a paper on the pursuit of justice and reconciliation in Cambodia after the atrocious regime of the Khmer Rouge, Wendy Lambourne states that some Cambodians she interviewed were skeptical of replicating the "Christian concept" of truth commissions as they are based on "confessing and forgiving".³⁰ One interviewee explained that it would not be applicable to Cambodian tradition where, in accordance with Buddhism, people who have committed crimes will always be held responsible for them – there is no God who will ultimately forgive. Another interviewee argued on the same lines but drew the opposite conclusion, saying that it would be easy for Cambodians to forgive because they believe the perpetrators will be punished in the next life.

6.2 Socio-Cultural Dimensions

Culture is the rich and complex blend of beliefs, attitudes, and behaviour regarding everything from food to art to politics and religion in a certain society. Culture shapes how we perceive ourselves and others.³¹ Violence, fear and hatred during war result in the modernization of old myths³² and stereotypes to explain one's own or some other group's gruesome behaviour – and thereby justify whatever atrocities are committed. After the war, the societal and cultural fabric is drenched with these beliefs. They can be seen in how history is described, how the language is used, in education, the media, theatre etc. In order to live in peace, these beliefs must be questioned and transformed. Unfortunately there is no universal technique for this. The search for sustainable peace in a society after conflict must begin from its own roots, importing from

²⁶ Stanley S Harakas, *Forgiveness & Reconciliation: An Orthodox Perspective*, in FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY & CONFLICT TRANSFORMATION, (Raymond G. Helmick and Rodney Lawrence Petersen ed, Templeton Foundation Press, Philadelphia, 2001).

²⁷ Biggar, MAKING PEACE OR DOING JUSTICE: MUST WE CHOOSE, p 17.

²⁸ *Id.*

²⁹ Since 1997, the UN has worked for the establishment of an ad hoc international criminal tribunal in Cambodia for the Khmer Rouge period (1975-1979). Due to differing views between the UN and the Cambodian Government of how such a tribunal should be composed, none has been established to date. However, there are several nongovernmental organisations working for documentation of the genocide, justice and reconciliation in Cambodia, for example the Yale University based Cambodian Genocide Program, the Documentation Centre of Cambodia, and the Centre for Social Development.

³⁰ Wendy Lambourne, *Domestic Politics, International Obligations and the Pursuit of Justice and Reconciliation in Cambodia and East Timor* (A paper presented at the 43rd Annual ISA Convention, New Orleans, Louisiana, USA, 2002).

³¹ Starken, WORKING FOR RECONCILIATION: A CARITAS HANDBOOK, p 78 (Caritas International, 2002).

³² Stuart J. Kaufman, MODERN HATREDS: THE SYMBOLIC POLITICS OF ETHNIC WAR, CORNELL STUDIES IN SECURITY AFFAIRS (Cornell University Press, New York, 2001).

outside whatever can be of use, but basing that society's transformation on its own unique set of traditions and cultural heritage.

In the South African Truth and Reconciliation Commission (TRC), the African notion of *ubuntu* held an important meaning. *Ubuntu* means that humanity is intertwined, a person is a person through other people, we are human because we *belong*. Through this concept, Desmond Tutu argued that "even the supporters of apartheid were victims" and "the oppressor was dehumanized as much as, if not more than, the oppressed."³³ The misconduct of one person reduces everyone's *ubuntu* while good deeds increase the *ubuntu* and well-being of all. Thus, reconciliation was part of restoring *ubuntu* in both victims and former perpetrators, for everyone is linked together. In this way, the TRC brought together its mission for national reconciliation, which often used Christian vocabulary, with the traditional African cultural heritage in the attempt to pave the way for reconciliation.

In Caritas International's handbook *Working for Reconciliation* a "Tool Box for Keeping a Cultural Perspective in Reconciliation Work" is proposed.³⁴ The recommendations include the following: to identify cultural dimensions to the conflict (e.g. ideology, religion, social inequality); to identify cultural realities that impact negatively (prejudice and fear etc) or positively (shared values regarding cooperation and similar reconciliation customs) on the resolution of the conflict; and to explore traditional or cultural methods for reconciliation. Thus, it needs to support local and national culturally grounded initiatives for reconciliation. Reconciliation that follows these guidelines will have the highest legitimacy and sustainability in the long run.

6.3 Economic Dimensions

Studies show that post-civil war societies are significantly more likely to experience civil war again than societies with no prior experience of war. Barbara Walter argues that two factors are imperative for war to reoccur and these are both related to the individual citizen's incentives to go to war. The two factors required are: firstly, people feel that continuing life in the current condition is worse than the possibility of death in war; and secondly, there is a closed political system that does not permit change, except by use of violence.³⁵ Walter's study of civil wars suggests that improvement in the economic well-being together with increased political openness significantly decreases the risk of once again experiencing war. Walter writes "conflict begets conflict not because violence makes poor countries poorer or undemocratic governments more autocratic, but because individuals in these countries fail to experience any improvement over time."

On the same lines, Collier and Hoeffler argue that negative economic growth rates are the primary source of civil war.³⁶ Furthermore, studies show that war greatly strains the economy, "so that there is the potential for a trap – a cycle of economic deterioration and repeat conflict."³⁷ There is also the risk of spillover effects in neighbouring countries, leading to instability in the region and the risk of expanding the conflict.

It must now be considered how the economy relates to reconciliation. Economic development seems essential for peace, and peace is essential for reconciliation. Furthermore, and more specifically, in the work of truth commissions around the world economic compensation

³³ Tutu, *No Future without Forgiveness*, (Doubleday, 2000).

³⁴ Starcken, *WORKING FOR RECONCILIATION: A CARITAS HANDBOOK*, pp 78-84 (Caritas International, 2002).

³⁵ Barbara F. Walter, *DOES CONFLICT BEGET CONFLICT? EXPLAINING RECURRING CIVIL WAR*, (2002).

³⁶ For reference, See COLLIER AND SAMBANIS, *UNDERSTANDING CIVIL WAR - A NEW AGENDA*, p 8.

³⁷ *Id.*

is of the utmost importance. "Reconciliation must go hand in hand with economic justice," states Alex Boraine.³⁸ Survivors of atrocities and injustice have often not been given access to education, jobs, housing, and medical care. When the time comes for building a new and peaceful society, the gaps are vast between former perpetrators and survivors regarding all areas. As Robert I. Rotberg writes: "Reparations and compensation strengthen the rule of law, reconciliation, and the overall process of institutional reform."³⁹ Money can never compensate the death of loved ones but can help a surviving family build a better life as well as serve as "an official, symbolic apology."⁴⁰

The truth commissions in Argentina and Chile have given the most substantial economic reparations for victims.⁴¹ Other countries' commissions have recommended financial compensation for victims but the governments have failed to provide resources and expedite this crucial step in reconciliation. For example, in South Africa testifiers in the TRC had been promised economic compensation, but the monetary help was rarely handed over to the victim. This led to renewed anger and feelings of humiliation for the victims.

For reconciliation, economic justice is crucial. Thus, economic compensation must also reach those who do not take part in a truth commission. Supporting micro-finance projects, joint market days, and other economic projects in order to reduce gaps and compensate suffering is thus central to reconciliation.

6.4 Political Dimensions

Is a state of reconciliation politically desirable? Timothy Garton Ash argues "the reconciliation of all with all is a deeply illiberal idea."⁴² Whether this is so or not of course depends on how reconciliation is defined. If reconciliation demands no conflict, no differences, and only love, harmony, and unity – then reconciliation is probably both illiberal and impossible. If we use our definition from above: "Reconciliation is a societal process that involves mutual acknowledgment of past suffering and the changing of destructive attitudes and behaviour into constructive relationships toward sustainable peace" this neither implies lack of conflict nor total harmony. Rather, it refers to a process after atrocities and injustice that builds a future by remembering the past, handling conflict without violence and respecting the rights of all society's members.

In the first systematic attempt to study reconciliation on a national political level, Long and Brecke have examined the presence or absence of 'reconciliation events' after civil conflict and the subsequent relations between former adversaries.⁴³ Reconciliation events are defined as including: firstly, a meeting between senior representatives of the former opposing factions; secondly, a public ceremony, covered by national media; and thirdly, ritualistic or symbolic behaviour that indicates peace. By studying all countries that experienced civil war in the 20th Century, Long and Brecke found that for countries in which a reconciliation event took place, 64 % did not return to violent conflict. However, among countries that had not experienced a reconciliation event, only 9 % did not return to war. This supports the notion that political attempts at reconciliation after internal conflict are essential in the quest for peace.

³⁸ Alex Boraine was deputy chair of the South African Truth and Reconciliation Commission 1995-1998. The quote is from his introductory speech at the *Stockholm International Forum: Truth, Justice and Reconciliation*, April 23-24, 2002.

³⁹ Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in *TRUTH V JUSTICE: THE MORALITY OF TRUTH COMMISSIONS*, 12 (Robert I. Rotberg and Dennis Thompson eds, Princeton University Press, Princeton, 2000)

⁴⁰ Hayner *supra* note 12, p. 170.

⁴¹ *Id.*, pp 170-82.

⁴² Peter Digeser, *POLITICAL FORGIVENESS* 14 (Cornell University Press, Ithaca, 2001).

⁴³ Long And Brecke, *WAR AND RECONCILIATION: REASON AND EMOTION IN CONFLICT RESOLUTION*, (MIT PRESS, 2003).

A good example of politically symbolic behaviour indicating peace is an official apology by the Government. An official apology has been an increasingly common phenomenon in recent years. German Chancellor Willy Brandt was one of the first political leaders to offer an official apology, when he fell to his knees in the Old Jewish Ghetto in Warsaw in 1970 and gave an apology for Germany's atrocities during World War II. The Pope has apologized for the Catholic Church's past maltreatment of the Jewish people; the IRA has apologized for having killed civilians in its 30-year anti-British campaign and in 2001 the Japanese Prime Minister Koizumi expressed remorse for the Korean suffering under Japanese rule during World War II. The UN Secretary General Kofi Annan apologized to Rwanda for the UN's inability to act and prevent the 1994 genocide; former US president Bill Clinton did the same. In Sweden, the Government and the Church are working for reconciliation with the Swedish Saami, a minority living in northern Sweden who have been subjected to discrimination for centuries.⁴⁴ In Australia, an official report *Bringing Them Home* titled 'Bringing Them Home' published in 1997, described how up until the 1970s aboriginal children had been stolen from their families and were placed in white Australian families and raised by them so that they assimilated with 'White Australia'. The Australian population was outraged by this report. For a long time the government did not officially apologize for its past conduct, but an annual "Sorry Day" was held on May 26, and "sorry books" were distributed around the country for the public to sign. Within a year hundreds of volumes were filled with signatures from over 100,000 Australians.⁴⁵ Finally, in February 13, 2008, Australian Prime Minister Kevin Rudd apologized in parliament to all Aborigines for laws and policies that "inflicted profound grief, suffering and loss."⁴⁶ In this way, the official acknowledgment of and expression of remorse for past wrongs has an entirely new role in today's world politics.

After internal conflict, in which the state has been an actor, initiatives should be encouraged to increase the awareness among top-level leaders of the importance of official self-reflection and an acknowledgement of past atrocities committed by the state. After acknowledgment of past injustices, governments should be encouraged to provide compensation. Governments need to take political responsibility for reconciliation by enacting example laws and increasing reconciliation education.

6.5 Psychological Dimensions

Individual traumatic experiences do not disappear if they are not revealed to others. As Hamber writes: "Psychologically, sleeping dogs do not lie; past traumas do not simply pass or disappear with the passage of time."⁴⁷ Psychological trauma research has shown that it is of great importance to heal traumatic wounds in order for life to continue without the trauma becoming cemented as a physical and/or mental disorder. Victims of torture and other human rights violations often have a feeling that no-one would believe them if they told their story – just as they often have been told by their perpetrators.⁴⁸ Official acknowledgement of past atrocities and injustices

⁴⁴ Bo Andersson, *Försoning För Att Kunna Börja Om: Svenska Kyrkan, Sveriges Samer Och Uppgårelsen Med Det Förgångna [Reconciliation in Order to Begin Again: The Swedish Church, Swedens Saami, and the Settlement of the Past]*, in SAMHÄLLETS DEMOKRATISKA VÄRDEGRUND: EN FRÅGA OM MÅNGFOLD, OLIKHEIT MEN LIKA VÄRDE [THE DEMOCRATIC VALUES OF SOCIETY: A QUESTION OF MULTPLICITY, DIFFERENCE BUT EQUAL VALUE], Bo Andersson ed. (Göteborg: Värdegrunden, 2000).

⁴⁵ Hayner, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY, 17 (Routledge, New York, 2001).

⁴⁶ Australia apology to Aborigines, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7241965.stm> (as of 25-3-2008).

⁴⁷ Hamber, REMEMBERING TO FORGET: ISSUES TO CONSIDER WHEN ESTABLISHING STRUCTURES FOR DEALING WITH THE PAST, 57 (Londenderry: University of Ulster/INCORE, 1998).

⁴⁸ Lone and Montgomery Jakobsen, *Edith, Treatment of Victims of Torture*, in AN END TO TORTURE: STRATEGIES FOR ITS ERADICATION, (Bertil Dunér ed, Zed Books, New York, 1998).

is important when working with an individual traumatic experience because it validates past experiences and helps restore dignity and self-esteem. Telling one's story to someone who listens is of greater importance than one might first imagine. However, to speak of traumatic wounds, which often have left feelings of deep humiliation, shame and guilt, is difficult and painful. Therefore the manner in which the talking and listening is performed is of great importance.⁴⁹ It is also important that the victim is aware that revealing their experiences does not lead to instant healing.

During truth commission hearings, victims must recall and relive traumatic experiences in a public environment. Usually, victims have only one opportunity to testify and most likely they will not meet the commissioners they are speaking to again. In South Africa, the TRC had the objective of uncovering past atrocities in order to achieve healing and reconciliation in the nation. The objective of *healing* led to much debate among psychologists in South Africa.⁵⁰ Some expressed their support, others were skeptical and some considered it to be more harmful than beneficial. Alfred Allan cautions the belief that witnessing in a commission would lead to healing. He refers to studies showing that some individuals, both victims who testified and staff members who listened to the testimonies were further traumatized by the experience of participating in the TRC.⁵¹

He argues that even though some individuals who gave testimony believed the experience was cathartic, this does not necessarily imply that it was therapeutic. He states that "the question remains whether the process brought about an enduring change for the better, or merely a short-term symptomatic relief" and then he suggested more research in the area.⁵² Similarly, Swartz and Drennan argue that it is not clear today if emotional self-exposure, even in a clinical setting, automatically has a positive effect on mental health.⁵³ Allan warns the "myth" that testifying in a TRC is a healing process can involve risks. For example, survivors may be misled into testifying due to the belief that it will be good for them. There is also the risk that governments believe in the myth and will fail to arrange for treatment needs. Another risk is that this belief may deprive people in grave need of adequate treatment.⁵⁴

Allan and Allan claim that "it is inevitable that, for some of them [testifiers], psychological dysfunction and emotional pain will follow."⁵⁵ The authors point to the fact that the aim of truth commissions usually is to focus on collective rather than individual experiences. This aim might actually be anti-therapeutic. "We still await studies about the psychological impact of truth commissions..." states another scholar.⁵⁶ Moreover, as Hayner writes, "the central aim of a truth commission is not therapy."⁵⁷ Many truth commissions do nevertheless aspire to function as a therapeutic tool for society. In this process it is important to remember the individual suffering behind the stories and ensure that appropriate care is given.

⁴⁹ Daniel J. Christie, Richard V. Wagner, and Deborah Du Nann Winter, *Peace, Conflict, and Violence : Peace Psychology for the 21st Century* (Upper Saddle River, N.J.: Prentice Hall, 2001); Brandon Hamber, "Conclusion: A Truth Commission for Northern Ireland?," in *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition*, 84 (Brandon Hamber ed, INCORE, Derry, 1998).

⁵⁰ Cheryl de la Rey and Ingrid Owens, *Perceptions of Psychosocial Healing and the Truth and Reconciliation Commission in South Africa*, 4(3) PEACE AND CONFLICT: JOURNAL OF PEACE PSYCHOLOGY (1998).

⁵¹ 81 Alfred Allan, *Truth and Reconciliation: A Psycho-legal Perspective*, 5 ETHNICITY AND HEALTH 3-4 (2000).

⁵² *Id.*, p. 198.

⁵³ Leslie Swartz and Gerard Drennan, *The Cultural Construction of Healing in the Truth and Reconciliation Commission: Implications for Mental Health Practice*, ETHNICITY AND HEALTH 5, no. 3-4 (2000).

⁵⁴ Allan, TRUTH AND RECONCILIATION: A PSYCHOLEGAL PERSPECTIVE ROUTLEDGE, (PART OF THE TAYLOR & FRANCIS GROUP ETHNICITY AND HEALTH, VOLUME 5, NUMBERS 3-4, 1 AUGUST 2000).

⁵⁵ Allan and Allan, *the South African Truth And Reconciliation Commission as a therapeutic tool*, BEHAVIORAL SCIENCES AND THE LAW, 18, 459-477.

⁵⁶ Dirk Kotzé, *Reviews: Truth Commissions and Formulas*, 1 INTERNATIONAL STUDIES REVIEWS 4, (2002).

⁵⁷ Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, p 139. (Routledge, New York, 2001).

National initiatives for psychological rehabilitation are much more important. How this is designed depends on the country's tradition, history, and culture. However, during and after truth commissions, some sort of psychological support programs for victims, perpetrators, as well as staff is crucial in order to avoid further suffering and generate the best circumstances for reconciliation.

6.6 Justice Dimensions

The question of how to deal with the atrocities of the past in a country emerging from internal conflict is critical and enormously complex. Should there be tribunals to punish perpetrators? Should amnesty be granted in order to avoid disturbing a fragile peace? Alternatively, should a truth commission be established to ensure that the past will be acknowledged and not repeated and dignity restored to the victims and survivors? What does the justice versus stability equation look like and what is best for the process of reconciliation? Rama Mani states that there are three dimensions of justice that must be taken into account in peace building after internal conflict.

Firstly, *the rule of law*: the apparatus of the justice system must be restored as it has usually broken down and lost all legitimacy during the war. The rebuilding of the rule of law also "may serve as an indication to combatants and civilians in war-torn societies of a return to security, order, and stability."

Secondly, *rectificatory justice*: addressing the injustice and pain that has been suffered by people during conflict. This is important from three distinct perspectives: by international law, countries are bound to prosecute past abuses; politically it is needed to establish legitimacy and stabilize peace; and psychosocially it aids to understand and heal trauma.

Thirdly, *distributive justice*: "addressing the underlying causes of conflict, which often lie in real or perceived socio-economic, political or cultural injustice" in order to prevent further violence.⁵⁸

In this process of building a new justice system that adheres to the dimensions above, a country must then decide *in what way* will it deal with the crimes of the past and what justice will it use. This decision is central to the discussion of reconciliation. There is a strong consensus that, as Professor Daniel Bar-Tal puts it, "justice is indispensable for reconciliation."⁵⁹ Within the literature on reconciliation, there has been much discourse in recent years concerning *retributive* versus *restorative* justice.

Retributive justice, also called criminal, procedural, or legalistic justice, focuses on crime as the violation of law. Crime is, one could say, a matter between the perpetrator and the state. Punishment and suitable compensation to the victim is decided upon by the criminal justice system, transferring "the individuals" desire for revenge to the state or official body.⁶⁰ Although being the most commonly seen form of justice in the world today, retributive justice is a fairly recent idea historically, with roots in the Middle Ages.⁶¹

Restorative justice, on the other hand, which is also known as transitional or reparative justice, focuses on crime as a conflict between individuals, whilst also focusing on the injuries

⁵⁸ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* 88, (Polity Press, Cambridge, 2000).

⁵⁹ Daniel Bar-Tal, professor of psychology at Tel Aviv University, speech held at the "Stockholm International Forum: Truth, Justice and Reconciliation", (April 23-24 2002).

⁶⁰ M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 26 (Beacon Press 1998).

⁶¹ Mica Estrada-Hollenbeck, "The Attainment of Justice through Restoration, Not Litigation: The Subjective Road to Reconciliation," in *RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE*, 67 (ed. Mohammed Abu-Nimer, MD: Lexington Books, Lanham 2001).

crime inflicts on all parties: the victim, the perpetrator and the society.⁶² The interest of the justice system here is to reconcile and heal conflictive relationships in order to end the vicious cycle of crime, revenge, and recurring crime. This is done *inter alia* by an official acknowledgment of the past, publicizing the names of perpetrators (seen as a form of punishment in itself), formalized apologies and compensation to victims.⁶³

Restorative justice systems can be traced back several thousands of years. There are Babylonian and Sumerian Codes from around 2000 BC with instructions for how conflicting parties should proceed to bring about the restoration of broken relationships and order in society.⁶⁴

The dilemma for a country in the transition from conflict to peace is to find a balance between the moral desire for restoration, which inherently involves compromise and the legal desire for retribution, which innately carries the risk of silencing the past (as war criminals will seek to avoid punishment by withholding certain truths). As one scholar poses, how is it possible to accommodate "individual criminal responsibility and national reconciliation?"⁶⁵

A budding trend can be seen in countries attempting to deal with a conflictive past by promoting reconciliation: namely the combination of these two forms of justice. In Rwanda, offences committed during the genocide in 1994 have been graded according to severity. The most severe criminals, such as organizers and leaders of the genocide, are to be tried in the conventional courts, including the International Criminal Tribunal for Rwanda.⁶⁶ The perpetrators of slightly less serious crimes however will be tried in traditional community courts, called the *gacaca*⁶⁷ courts. In this way it is hoped that the involvement of the population in the trials will promote a process of reconciliation. Similarly, in South Africa the TRC gave amnesty to those who confessed to having been part of the apartheid rule. The accounts helped paint a picture of the past and finding the truth was seen as more important than attempting to achieve legal justice, also considering the fact that "full justice is not always possible in a society in transition."⁶⁸ In East Timor a similar method of blending restorative and retributive justice is being used in the Commission for Reception, Truth and Reconciliation.⁶⁹ Restorative justice, including (retributive) prosecution for certain crimes holds promise for the future.

Therefore national initiatives for restorative justice needs to include support for truth commissions and tribunals, securing reparations and compensation (medical, psychosocial, economic) for witnesses, educational programs in trauma and human rights, documentation of testimonies and secret files. Prosecution and punishment of severe crime is also important for restorative justice. Thus, supporting actors in the retributive justice system, such as the police, prisons and the formal legal institutions are also of great importance for reconciliation.

⁶² See Howard Zehr, "Restorative Justice," in *PEACEBUILDING: A FIELD GUIDE*, ed. Luc Reyckler and Thania Paffenholz 74 (Boulder: Lynne Rienner Publishers, 2001), and Estrada-Hollenbeck, "The Attainment of Justice through Restoration, Not Litigation: The Subjective Road to Reconciliation".

⁶³ Alex Boraine, introductory speech at the "Stockholm International Forum: Truth, Justice and Reconciliation", April 23-24; Minow, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE*, p 23 (Beacon Press 1998).

⁶⁴ Estrada-Hollenbeck *supra* note, p. 75.

⁶⁵ Carsten Stahn, "Accommodating Individual Criminal Responsibility and National Reconciliation: The U.N. Truth Commission for East Timor," 95(4) *AMERICAN JOURNAL OF INTERNATIONAL LAW* 95 (2001).

⁶⁶ It was created on November 8, 1994 by the United Nations Security Council in order to judge those people responsible for the acts of genocide and other serious violations of the international law performed in the territory of Rwanda, or by Rwandan citizens in nearby states, between January 1 and December 31, 1994.

⁶⁷ The Gacaca (pronounced "gachacha") Court is part of a system of community justice inspired by tradition and established in 2001 in Rwanda, in the wake of the 1994 Rwandan Genocide, when between 400,000 and 1,000,000 Rwandans, mostly Tutsi, were slaughtered.

⁶⁸ Alex Boraine, "Truth and Reconciliation in South Africa: The Third Way," in *TRUTH V JUSTICE: THE MORALITY OF TRUTH COMMISSIONS*, 147 (eds. Robert I. Rotberg and Dennis Thompson, Princeton, N.J. Princeton University Press, 2000).

⁶⁹ Stahn, "Accommodating Individual Criminal Responsibility and National Reconciliation: The U.N. Truth Commission for East Timor," 95(4) *THE AMERICAN JOURNAL OF INTERNATIONAL LAW* 952-966 (Oct., 2001).

7. Some Contentious Issues of the TRC Mechanism

The following discussion relates to some experiences that were obtained from the literature, which are contentious issues of reconciliation. These issues are related to forgiving and forgetting, amnesty, reparations, accountability and reintegration, apologies, naming names and hearings.

7.1 Forgiving and Forgetting

The experience in Sierra Leone was an exemplary example of forgiving and forgetting past traumas. Its people had a long historical experience of reintegrating combatants, reworking relationships and rebuilding moral communities. Research conducted by Rosalind Shaw proves that Sierra Leonean people did not wait for the TRC before working to rebuild their lives and social communities. While the reintegration of ex-combatants was problematic in many areas, people in different parts of the country developed and adapted techniques of healing, reintegration, and reconciliation, sometimes with the input of NGOs and religious groups.⁷⁰

According to these findings, people and communities were engaged in a variety of processes of social recovery. People had been talking about the violence when the violence was present, but once the violence stopped, healing took place through practices of social forgetting. Social forgetting is a different process from individual forgetting, in that people still have personal memories of the violence. But speaking of the violence, especially in public, was viewed as encouraging the return of violence.⁷¹ Thus, the researcher concludes that social forgetting “unmakes” past violence and “remakes” ex-combatants as new social persons. It is not a panacea but a practice that enables and sustains ongoing process of healing and social recovery.⁷²

7.2 Amnesty

Amnesty is a legislative or executive act by which a state restores those who may have been guilty of an offence against the state to the position of innocent persons. It is more than a pardon. With human rights violators often still playing prominent roles in society, a question facing transitional states is whether to grant amnesty to promote reconciliation. This is usually not a decision that truth commissions can participate in. However, amnesty is often necessary to allow truth commissions to operate with impunity without fear of reigniting the conflict once the ‘real truth’ of the conflict is discovered. For example, within five days of the release of the report in El Salvador, a sweeping amnesty law was passed to prevent anyone from being tried. In South Africa, the TRC gave amnesty to those who confessed to having been part of the apartheid rule. However, the amnesty process was often the subject of scrutiny and criticism.⁷³ Nevertheless, the Committee believed that, in all facets, the amnesty process made a meaningful contribution to a better understanding of the causes, nature and extent of the conflicts and divisions of the past.⁷⁴ It is established that “full justice is not always possible for a society in transition.”⁷⁵ In East Timor a similar method of blending restorative and retributive justice is being used by the

⁷⁰ Rosalind Shaw, *Rethinking Truth And Reconciliation Commissions: Lessons From Sierra Leone*, SPECIAL REPORT FOR UNITED STATES INSTITUTE FOR PEACE, 9 (2005).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Some Reflections Of The Amnesty Process*, REPORT OF THE AMNESTY COMMITTEE, SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, Vol. 6, Sec. 1, Chapter 5, p. 84.

⁷⁴ *Id.*, p. 90.

⁷⁵ Alex Boraine, “Truth and Reconciliation in South Africa: The Third Way,” in TRUTH V JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, (Robert I. Rotberg and Dennis Thompson ed, Princeton University Press, Princeton, 2000), p 147.

Commission. However, it is not necessary that all TRCs be given the same power of yielding amnesty. As required under international law, the Commission can not recommend amnesties or similar measures of impunity with respect to crimes under international law. International human rights bodies have consistently affirmed that the establishment of a truth commission does not relieve states from their obligation to prosecute crimes breaching international law.⁷⁶

7.3 Reparations

The issue of monetary reparations is of paramount importance for impoverished survivors of violence. Ruth Picker affirms: “not providing timely and adequate reparations endangers the credibility of the process. It fundamentally violates victims’ sense of justice to see the lives of the perpetrators untouched by the transgressions while their own lives have been severely disrupted.”⁷⁷ Simply speaking, reparation means compensation that is given or received for an insult or injury. This is a sensitive and ambiguous topic during the course of TRC proceedings. Sometimes some victims and survivors may perceive reparations as a cheap effort to buy guilt and pain.

7.4 Accountability vs. Reintegration

In transitional justice, it is believed that local techniques of post-conflict healing, reconciliation and reintegration removes the need for justice and accountability. Here Ruth Picker argues that a distinction should be drawn between the need to make states and leaders accountable for mass violence on the one hand and the treatment of rank-and-file perpetrators on the other.⁷⁸ If most survivors of the violence want some form of retributive justice against the latter, then a truth commission or TRC is unlikely to be an adequate response.⁷⁹ On one hand, Human Rights Law places obligations on the state to punish human rights violators and the rule of law notion never exempts the accountability of a gross human rights abuser. On the other hand, retribution may increase the possibility of further conflict in the war-torn society. In such a transitional phase, transitional justice needs to balance prosecutions and reconciliation.

7.5 Public or Private Hearings

Investigations by a truth commission may be legitimately confidential as long as the final report is released to the public. When fairness and neutrality can be generally assured, which may in some cases require international sponsorship or an international observer, then private investigations may be preferred.⁸⁰ There is a tendency in Africa to receive testimony and interview witness in public. Often, the proceedings are broadcasted live on the radio or television. Indeed, international human rights organizations such as Africa Watch have argued that as a general rule, investigations should be public “in order to safeguard their impartiality”⁸¹ Also, public hearings sometimes seem quite risky. Most commissions even reported that some witnesses hesitated or refused to testify for fear of reprisal.

⁷⁶ See Amnesty International, *Truth, Justice And Reparation: Establishing An Effective Truth Commission* (AI Index POL 30/009/2007), June 2007, 18.

⁷⁷ Ruth Picker, *Victims’ Perspectives about the Human Rights Violations Hearings*, Research report written for the Centre for the Study of Violence and Reconciliation, February 2005, p. 17. <http://www.csvr.org.za/papers/pappick.htm>. (as of 12 June 2008).

⁷⁸ *Id.* 11.

⁷⁹ *Id.*

⁸⁰ See Hayner *supra* note 13, p. 647.

⁸¹ *Id.*

7.6 Naming Names

Few issues have attracted as much controversy in truth commissions as the question of whether a commission should publicly name those individuals found to be responsible for human rights crimes. The debate concerns two contradictory principles, both of which can be strongly argued by human rights advocates.⁸² Firstly, due process requires that individuals receive fair treatment and are allowed to defend themselves before being pronounced guilty. Due process is violated if a commission report names individuals responsible for certain crimes. Therefore, no names should be named. Secondly, telling the full truth requires naming persons responsible for human rights crimes when there is undeniable evidence of their culpability. Naming names is part of the truth-telling process, even more so when it is clear the judicial system does not function well enough to guarantee that they will be prosecuted.

8. Strengths of the TRC Mechanism

8.1 Legitimacy

Truth commissions uncover details of past crimes and officially acknowledge the past. It contributes to establishing transitional peace by creating an authoritative record of what happened in the past and what should be done in the future. It is a way for a new government to establish legitimacy by espousing democratic ideals, the rule of law, formal legal equality and social justice. Desmond Tutu explains the reason for the Truth and Reconciliation Commission (TRC) this way: "While the Allies could pack up and go home after Nuremberg [war crimes tribunals following WWII], we in South Africa had to live with one another."⁸³

8.2 Healing Through Reconciliation

Reconciliation heals a nation and individuals as well. By learning about the truth of past atrocities, a nation can honestly debate why and how these terrible crimes could happen. It is noteworthy that as the Greensboro TRC mentioned "there comes a time in the life of every community when it must look humbly and seriously into its past in order to provide the best possible foundation for moving into a future based on healing and hope."⁸⁴ At this point, truth, healing, hope and reconciliation are long-term goals that must take place across what are currently deep divides of distrust and skepticism in a community.

8.3 Better than Litigation

If the goal of healing individual and societal wounds in post-traumatic situations is performed morally and practically, Minow suggests that the truth commission method might be more beneficial than a criminal prosecution. Litigation "is not an ideal form of social action." Trials have procedural pitfalls. If resisting the dehumanizing of victims is a societal objective, trials are inadequate. Hence, for public acknowledgement of what happened and who did what to whom, a truth commission provides a safe and effective setting for explicating the truth. In this context, the trade of amnesty for testimony is justifiable.⁸⁵

⁸² *Id.*

⁸³ Desmond Mpilo Tutu, NO FUTURE WITHOUT FORGIVENESS, 21 (Doubleday, 2000).

⁸⁴ Greensboro Truth and Reconciliation Commission, *Executive Summary*, Presented to the residents of Greensboro, the City, the Greensboro Truth and Community Reconciliation Project and other public bodies, p.2 (May 25, 2006).

⁸⁵ See Rothberg *supra* note 78, p. 16.

8.4 Preventing Conflict in the Future

The aim of truth commissions is to expose the factors that allowed crimes to occur and in doing so help to prevent their recurrence. Yet everyone is not always satisfied with foregoing retributive justice.⁸⁶ Truth commissions represent a signal to domestic and international audiences by the new government that they intend to make a break with the history of impunity. While not all truth commissions have held public proceedings they have often received strong media attention, which gives them a greater opportunity to influence the national psyche.⁸⁷ It: focuses on the harm caused by crime; repairing the harm done to victims and reducing future harm by preventing crime; requires offenders to take responsibility for their actions and for the harm they have caused; and seeks redress for victims, recompense by offenders and reintegration of both within the community is achieved through a co-operative effort by communities and the government.

8.5 Restorative Justice

The TRC process helps restore dignity to victims and perpetrators as well. Often describing the terrible details of crimes can bring peace. The truth commission encourages victims to open their past pains. "The chance to tell one's story and be heard without interruption or skepticism is crucial to so many people and is so vital for survivors of trauma."⁸⁸

8.6 A Key Alternative

In comparison, a commission of inquiry charged with investigating and reporting human rights violations may seem a pale and inadequate substitute. International human rights activists and scholars also argue that criminal prosecution is the best response to atrocities and that truth commissions should be used only as an alternative when such prosecutions are not possible.⁸⁹ Following this view, truth commissions become an important alternative because practical reasons such as evidentiary difficulties, political ramifications and other concerns often interfere with or prevent prosecutions.

8.7 Therapeutic Benefits

The TRC process of coming to terms with the past can have great psychological benefits for those seeking trauma healing. In many cases, being able to tell their story is tremendously therapeutic for victims of violence. Truth commissions can assist in the healing process because the listener has official status.

8.8 Not as Adversarial as a Court

Truth commissions are not adversarial like court proceedings, thereby providing a more comfortable environment for victims. In this respect, Mark Embriet believes that restorative justice provides a very different framework for understanding and responding to crime. Crime is understood as harm to individuals and communities, rather than simply a violation of abstract laws against the state. Those most directly affected by crime such as victims, community

⁸⁶ Eric Brahm, Truth Commissions (Knowledge Base Essay), 2004, http://www.beyondintractability.org/essay/truth_commissions/ (as of 26-04-2008).

⁸⁷ *Id.*

⁸⁸ Minow Martha, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE*. (Beacon Press, Boston 1998).

⁸⁹ E. g., Mary Albon, *Truth and Justice: The Delicate Balance-Documentation of Prior Regimes and Individual Rights in TRANSITIONAL JUSTICE*, 290 (Kritz ed, Harvard University Press, 1992).

members and offenders are therefore encouraged to play an active role in the justice process. Rather than continuing the current focus on offender punishment, restoration of the emotional and material loss resulting from crime is far more important.⁹⁰ In summary, restorative justice through TRC mechanisms involves a different way of responding to crime than the formal justice mechanism that courts of law offer.

8.9 Pragmatic Solution

There are strong voices in favour of restorative justice through truth commissions. Firstly, accountability is often about revenge and is therefore unproductive. Secondly, it is often more helpful if society's resources are directed towards the future rather than past injustices which can not be changed. Moreover, the question about who to investigate or prosecute, how far back to go and what to investigate or prosecute leads to arbitrary decisions and often leads to public unrest. Likewise, there are other more constructive ways of going about things. No punishment is adequate for some of these crimes. So, there is still doubt about whether it is beneficial to victims. Anyway, the risk of an unfair process that does not provide due process may violate the rights of accused persons and it may cause new problems.

8.10 Not beyond International Standards

Amnesty International (AI) agrees that in situations of political transition, truth commissions can play an important role in providing a full account of past human rights violations, contributing to their investigation and eventual prosecution, preventing their repetition, and ensuring that victims and their relatives are provided with full reparations (including restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition).⁹¹ But, AI neither supports any kind of amnesty nor excludes the possibility of prosecution too.

8.11 South African Success

TRC examines the context, causes, sequence and consequences of past atrocities and it makes recommendations for community healing regarding the tragedy. In the words of TRC Chairperson Archbishop Desmond Tutu:⁹² "Our nation needs healing. Victims and survivors need healing. Perpetrators are, in their own way, victims of the apartheid system and they, too, need healing." The ultimate objective of the TRC, it would seem, is to heal 'victims', heal 'perpetrators', and heal 'the nation.' It should be noted that TRC does not always mean an all encompassing amnesty.

9. Weaknesses of the TRC Mechanism

9.1 Danger of Misuse

Despite its potential, truth commissions have sometimes merely served as a means of legitimizing new governments. While they are generally associated with regime transitions, that transition need not be toward democracy. The 1986 Ugandan Commission and the Chad Truth Commission

⁹⁰ Mark Embriet, *Avoiding the Marginalization and 'McDonaldization' of Victim-Offender Mediation: A Case Study in Moving Toward the Mainstream in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME*, 213 (Gordon Bazemore and Lode Walgrave eds, Criminal Justice Press, Monsey, 1999).

⁹¹ Amnesty International, Document: Nepal: Reconciliation does not mean impunity: A Memorandum on the Truth and Reconciliation Commission, <http://www.amnesty.org/en/library/asset/ASA31/006/2007/en/dom-ASA310062007en.html> (as pf 25-4-2008).

⁹² Tom Winslow, *Reconciliation: The Road to Healing?*, 6(3-4)TRACK TWO (December 1997).

are examples of truth commissions being used mainly as a tool to discredit the previous regime. In other cases, such as Uganda's 1974 Commission, it seemed the TRC did not make a sincere attempt to rectify the past, but made a rather flimsy effort to placate international pressure.⁹³ Furthermore, in places such as Zimbabwe and Haiti, the publication of the commission's report was hindered or completely stopped because it was too critical of the new government. In Bolivia and Ecuador, commissions were disbanded before completing their work because the investigations became too politically sensitive. Clearly, the commissions cannot be solely blamed for this failure as the political will to act on their findings did not exist.⁹⁴

9.2 Encouragement of Post-Traumatic Stress

The commission process may re-ignite victims' old anger and may trigger post-traumatic stress. A survey conducted in South Africa revealed that two-thirds of the respondents felt the truth commission process had harmed race relations and made people angrier.⁹⁵ Martha Minow views that the notion of healing seems foreign to the legal world that conducts prosecutions. Emotional and psychological healing did not figure prominently in national and international responses during the decades after the Holocaust. Yet healing recurs in contemporary discussions, perhaps reflecting the popularization of psychological ideas over the course of the Twentieth Century.⁹⁶

9.3 Undermines the Rule of Law

The basic principle of rule of law is that 'no person is above the law.' According to this notion, everyone is accountable for his/her actions that breach the law. The notion of a TRC sometimes goes against this principle. Aryeh Neier argues that the truth and reconciliation process and amnesty in particular, undermines support for the rule of law. He further says, "when the community of nations shies away from responsibility for bringing to justice the authors of crimes against humanity, it subverts the rule of law". Therefore, it is worth considering whether attitudes toward the rule of law or towards legal institutions correlate with views of the truth and reconciliation process.⁹⁷ These criticisms stem from supporters of retributive justice rather than restorative justice. Again, Mary Albon reveals that the use of criminal trials through the rule of law framework provides for making those responsible for unspeakable conduct accountable, for deterring future violations and for gathering a formal public record so that the attempt to destroy groups of people cannot succeed in destroying their memory.⁹⁸

9.4 Affects International Obligations

Internationally, all states have an obligation under international law to prosecute and punish perpetrators of crimes such as genocide, crimes against humanity, war crimes and other crimes that breach international law. Moreover, victims have a right to an effective remedy such as having the perpetrator punished and to receive reparations. Hence, this criticism is based on the

⁹³ Eric Brahm, Truth Commissions (Knowledge Base Essay), 2004, http://www.beyondintractability.org/essay/truth_commissions/ (as of 26-04-2008).

⁹⁴ *Id.*

⁹⁵ Priscilla B Hayner, "Truth and Consequences" 81 (2) FOREIGN AFFAIRS 128 (2001).

⁹⁶ Martha Minow, "The Hope for Healing: What Can Truth Commissions Do?", in TRUTH V. JUSTICE, 241 (Robert Rotberg and Dennis Thompson ed, 2000).

⁹⁷ James L. Gibson, "The Truth About Truth And Reconciliation In South Africa", 26(4) INTERNATIONAL POLITICAL SCIENCE REVIEW (2005), p. 350.

⁹⁸ *Id.* p. 236.

deterrence principle which attempts to prevent conflict by educating society about the consequences of breaking the law.

9.5 Lack of Accountability

The TRC process is based on feelings, compromises and non-judicial hearings. It cannot break cycles of violence and impunity. There are some strong reasons why the accountability (criminal justice) route should be followed. First of all, restoring law and order and establishing the rule of law in a country requires a strong accountability enforcing mechanism. This mechanism is obviously a court of law. This system breaks cycles of violence and impunity by holding individuals accountable. A rule of law approach helps to make a break with the past and enable society to be transformed. In addition, it creates a new legal order to mend the war torn society.

10. Conclusion

In a post-conflict society, the challenges faced are many. Deep-rooted conflicts impact negatively on almost every area of political and social relations. Hayner notes that in this respect truth commissions can play an imperative role. She further advocates "truth commissions are very much in favor within the international human rights community for ending civil conflict. They are clearly not necessary, as one can point to a number of cases of relatively peaceful transitions to democracy in which the past has not been systematically examined."⁹⁹

Despite the growing prevalence of truth commissions, we do not yet have a clear understanding of their effectiveness. Studies have typically described operations, but it is not clear whether truth commissions have the desired effect or whether there are other unknown factors making an impact on post-conflict societies. Evidence is often anecdotal.¹⁰⁰ Many of the existing comparative studies focus on a few prominent cases, namely Argentina, Chile, El Salvador, South Africa and Guatemala. Most of the lessons learned from truth commission experiences have thus been drawn from only a small number of cases. Still, they are intuitively appealing and have many supporters in global civil society.¹⁰¹

Nevertheless, a number of commissions have been a notable success. Their investigations have been welcomed by survivors of violence and human rights advocates alike. Their reports are widely read and their summary of facts is considered conclusive and fair. Such commissions are often referred to as having a "cathartic" effect in society, as they fulfill an important step in formally acknowledging a long-silenced past.¹⁰² The reality is that truth commissions are not magic elixirs, either for individuals or societies.¹⁰³ They are only one among many mechanisms necessary for comprehensively dealing with a legacy of human rights violations. In this way, TRCs are an effective mechanism to bring about individual and community healing. This often results in the reconciliation of divided communities, which allows a society to move forward towards a better and brighter future.

⁹⁹ Priscilla B Hayner. "Truth and Consequences" 81 (2) FOREIGN AFFAIRS 128 (2001).

¹⁰⁰ Eric Brahm, Truth Commissions (Knowledge Base Essay), 2004, http://www.beyondintractability.org/essay/truth_commissions/ (as of 26-04-2008).

¹⁰¹ *Id.*

¹⁰² Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, 16 HUMAN RIGHTS QUARTELY 600 (1994).

¹⁰³ *Id.*

Mountains: Convention on Biological Diversity and Subsequent Developments

- Dr Ananda M. Bhattarai*

Abstract

Protecting mountain biodiversity and ensuring the sustainable use of mountainous resources is essential to the long-term development of an intrinsically hilly country like Nepal. Moreover, the resources located in these mountains may also be of great benefit to humankind in general. In this article, the author discusses the various international instruments including inter alia, the CBD, Agenda 21 and the COP that aim to promote the sustainable use of biological resources. He then details how mountain regions are encapsulated by this international regime. The definitions of sustainable and biodiversity are addressed. The author then progresses to demonstrate that international management of biodiversity is threatened by: a lack of knowledge and scientific uncertainty; a lopsided international legal environment; and the lack of a collective resolve to remove impediments and take benefits from the existing framework. Finally, the interaction of the CBD and TRIPS is considered. The author argues that the sovereign rights of States over biological resources and their rights to participate in benefit sharing and technology transfers contained, all of which are contained within the CBD, are seriously threatened by TRIPS.

1. Introduction

Mountain biodiversity issues were a last minute entry in the Prep-com meeting¹ on the Convention on Biodiversity (CBD), which was one of the four instruments adopted at the historic Rio de Janeiro environmental summit with a view to conserve biodiversity, make sustainable use of its component and to create a global partnership for benefit sharing and technological transfers. In the final text of the CBD "mountain" had a passing reference only in one place.² This is the case with other Rio documents as well where mountains have been given a casual mention.³ However, the CBD is of tremendous significance to countries lying in the margins and mountains, because its uniqueness in covering the whole biodiversity, not just wildlife or specific crops in specific areas. It also creates hopes of benefit sharing through the sustainable use of bio-resources and associated

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¹ The protection of mountain areas was not explicitly mentioned in the list of nine issues entrusted to the Prep. Com. See the resolution 44/288 of 22 Dec. 1989. It is only in the report of the Secretary General of the Conference of July 2, 1991 that mountains are explicitly mentioned along with other fragile ecosystems such as arid lands, coastal areas etc. A mountain agenda was ultimately pushed by Andean States in the third Prep COM (Geneva, Aug 12- Sept 4, 1991). See also Laura Pineschi, *The Protection of Mountain Areas in the Instruments Adopted at the Rio Conference in ENVIRONMENT AFTER RIO*, 173 (Luigi Campiglio et al eds, Graham & Trotman/Martinus Nijhoff, London, 1994).

² The reference is made in Art 20(7) in the context of funding and technology transfer where it is said that "consideration shall also be given to the special situation of developing countries, including those that are most environmentally vulnerable, such as those with arid and semi-arid zones, coastal and mountainous areas".

³ The Framework Convention on Climate Change and the Rio Declaration are almost silent on the problems of mountain areas, or, if they address some issues in any way, hand out general prescriptions of inferential value. Whatever the instruments provide for on issues such as "trans-boundary environmental effects", "traditional knowledge of the indigenous and local community", "fragile ecosystems", they can be generally considered relevant to mountain areas. See Principle, 15 (precautionary principle), 17 (EIA), 18 (assistance on trans-boundary issues) of the Rio Declaration; Preamble, and Art 3 and 5, (trans-boundary issues and cooperation), Art 8 (in-situ conservation), Art 14 (EIA) of Convention. Only the Framework Convention on Climate Change uses the expression "mountain ecosystems" while calling on states to give consideration to the adverse effect of climate change or the impact of the response measures. See Art 4.8 (g) of the Framework Convention.

traditional knowledge. Besides, the work of the institutions under the CBD in several thematic areas such as agriculture, forests, dry and sub-humid land biodiversity and inland waters, as well as in several cross-cutting issues such as climate change, tourism, ecosystem approaches, protected areas, sustainable use, tourism, traditional knowledge and the like are relevant in the context of biodiversity conservation in mountainous areas. Of late, mountain biodiversity has evolved as an additional thematic area under the Convention. Against this backdrop, in this article I will present the background and give an overview of the Convention on Biological Diversity and present an update on major developments. Finally, I will discuss achievements, issues and challenges and the way forward for realizing the objectives of the CBD generally and in the context of the mountain environment and its biodiversity.

2. Background

The CBD is not a totally new convention that has been created in a vacuum. When it came into existence, there were already more than 300 regional and global multilateral agreements for the protection of the environment. Of these, approximately 30 percent address biodiversity-related issues. Most of them are aimed at protecting specific species, sites or regulating particular activities.⁴ Among them, the following squarely deal with the conservation of fauna and flora and management of habitats:

- The Convention Relating to the Preservation of Fauna and Flora in their Natural State, London 1933;
- The International Convention for Regulation of Whaling, Washington DC 1946;
- The International Convention for the Protection of Birds, Paris, 1950;
- The International Plant Protection Convention, Rome 1951;
- The Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva 1958;
- The Convention on Wetlands of International Importance, Especially as Waterfowl Habitat [Ramsar Convention] 1971;
- The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington DC 1973⁵;

The Convention on the Conservation of Migratory Species of Wild Animals (CMS), Bonn 1979.

A major shortcoming of the treaties mentioned above, is their limited scope. They cover only specific species [whale, birds] or flora or fauna in natural habitat or one type of ecosystem [wetland] or one type of threat [international trade] or one type of species [migratory], or sites of extraordinary international importance [world heritage]. There was no convention that supported actions to conserve biodiversity at the genetic, species and ecosystem levels and focus on in-situ conservation within and outside protected areas. Furthermore, in view of the current terrible pace of mass extinction of biodiversity never witnessed in the last sixty million years, it was really necessary to check mass extinction at the earliest possible stage and at the

⁴ See Philippe G. Le Prestre, *Introduction* in GOVERNING GLOBAL BIODIVERSITY, 9 (Philippe G. Le Prestre ed, Ashgate Publishing Co, Burlington VT, 2002).

⁵ Besides the above there are treaties such as the Convention on the High Seas, Geneva 1958; The Convention for the Conservation of Antarctic Seals London, 1972; The Convention Concerning the Protection of World Cultural and Natural Heritage Paris 1972, United Nations Convention on the Law of the Sea 1982; and The International Tropical Timber Agreement Geneva 1983 that deal partly with biodiversity.

global level.⁶ However, the concern about the narrow approach to conservation was slowly growing, at least at the regional level during the 1960s and 1970s. There was already a movement to include broader terminologies such as “renewable resources, soil, water, flora and fauna”, “species and habitat conservation”⁸ and “marine living resources.”⁹ At this point, two instruments at the international level contributed in making a clear departure from the then existing sectoral thinking.¹⁰ The first is the World Charter for Nature which proclaimed for the first time that “every form of life is unique, warranting respect, regardless of its worth to man”.¹¹ The second is the UN Food and Agricultural Organization (FAO) Undertaking on Plant Genetic Resources, which vested special responsibility on States to conserve certain elements of natural heritage for present and future generations as the “common heritage of mankind”. Parallel to this, but on another front, the IUCN Global Conservation Strategy 1980 urged the States to embrace a broader vision for conservation with the objective of “maintaining essential ecological processes and life support systems, preserving genetic diversity and ensuring the sustainable utilization of species and ecosystems”. It is against this background that the Brundtland Report [1987] “Our Common Future” used the concept of biodiversity, after illustrating the challenges imposed on the global environment. It called upon the States to create a global treaty on species and ecosystems with appropriate financial measures.

While the loss of biodiversity was a major concern which required a partnership of developed and developing nations on the basis of a “common but differentiated responsibility,”¹² along with an appropriate funding mechanism, there were other concerns as well. One such was the proliferation of biotechnological research prospecting, along with the exploitation of the biological resources of the biodiversity rich but economically poor countries. Usually exploiters made considerable profits without compensating the resource or knowledge holders. Many in the South are asserting their sovereign right over resources. Biological resource use without compensation is termed “bio-piracy”. As the economically poor countries of the South are bio-rich, there was a need to forge alliances by recognizing the sovereign rights of the countries, allocating concurrent responsibilities and building partnerships for the sustainable use of the resources and associated knowledge on a fair and equitable basis. It is against this background that the CBD was negotiated and a treaty regime was carved out with an overarching theme not covered by the existing conventions; accommodating all major concerns where possible; laying down principles; creating a partnership for the conservation of biodiversity, sustainable use of its components; benefit sharing; and creating institutions for that purpose.¹³

⁶ The pace of mass extinction of biodiversity in the current decade is said to be 1,000 times the natural rate of extinction. See CBD/UNDP, THE CONVENTION ON BIOLOGICAL DIVERSITY: FROM CONCEPTION TO IMPLEMENTATION (CBD news Special edition) 2003 at p. 4.

⁷ 1968 African Convention on the Conservation of Nature and Natural Resources Algiers, 1968.

⁸ Convention on the Conservation of European Wildlife and Natural Habitat, Berne 1979.

⁹ Convention on the Conservation of Antarctic Marine Living Resources 1980.

¹⁰ In fact two other instruments, namely the UN Convention on the Law of the Sea 1982 and the Treaty on the Protection of the Ozone Layer (1982) also had global approach and in that sense the number would be four.

¹¹ UN GA Res37/7, 1982.

¹² This principle was already incorporated in an all global agreement in the 1980s. See Francoise Burhenne-Guilmin, *Biodiversity and International Law: Historical Perspectives on Present Challenges: Where Do We Come From, Where Are We Going*, in BIODIVERSITY CONSERVATION + LIVELIHOODS: BRIDGING THE NORTH AND SOUTH DIVIDE, 32 (Michael I. Jeffrey et. al. eds, 2008).

¹³ But biodiversity in the deep sea bed came under the jurisdiction of the Convention on the Law of the Sea 1982 and ex-situ genetic resources taken out before the Convention came into effect were kept out of its scope. Access to ex-situ collections not acquired in accordance with the CBD, were matters covered in Resolution 3 of the Nairobi Final Act 1992. See Lyle Glowka, Francoise Burhenne-guilmin and Hugh Synge in collaboration with Jaffrey A McNeely and Lothar Gundling A GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY, 2 (Environmental Policy Paper No 30, IUCN Environmental Law Center, 1994). The Actual initiative for the convention was taken by EUEP in 1987 which called for the convening of a series of expert group meetings from 1987 first through the Ad Hoc Working Group of Experts on Biological Diversity and in 1991 in the Intergovernmental Negotiating Committee (INC). The INC met four times between February 1991 and May 1992, culminating in the adoption of the final text of the CBD in Nairobi on May 22, 1992.

3. Convention on Biological Diversity: Nature, Scope and Framework

The CBD is a unique umbrella type convention that addresses the problem of the loss of biological diversity in a global way. It deals with the variety of life on earth and the web of life. The CBD is more or less weaved around the following three themes:

- i) Conservation of biological resources;¹⁴
- ii) Sustainable use of its components;¹⁵ and
- iii) The fair and equitable sharing of the benefits arising from the use of genetic resources, including by *appropriate*:
 - access to genetic resources, taking into account all rights over those resources;¹⁶
 - transfer of relevant technologies and taking into account all rights to technologies;¹⁷ and
 - funding.¹⁸

As the term “biodiversity” indicates, the CBD is not about any specific species or genes or ecosystems or their richness, but it is about the “variability among living organisms from all sources”.¹⁹ In simple terms, diversity relates to the richness of the nature supporting our livelihood. Biodiversity also includes the differences in species created due to their genetic profiles which are the building blocks of life. At another level, biodiversity deals with a variety of ecosystems such as deserts, forests, wetlands, mountains, lakes, rivers and agricultural landscapes. Each of these, including human beings, forms a community interacting with one another and with the air, water and soil around them. The CBD proposes to conserve diversity in all types of ecosystems, i.e. “within species, between species and in ecosystems.”²⁰

The “conservation of biological diversity” is the first objective of the CBD. In general parlance, “conservation” means the act or process of preservation of a material in its present state, protecting it from loss, damage or neglect. But conservation in the context of CBD is not just “preservation”. The CBD takes an anthropocentric approach, and while being conscious of the intrinsic values, looks at conservation from a human angle that also brings into the fold scientific, ecological, genetic, economic, social, educational, cultural, recreational and aesthetic perspectives. Conservation is linked with sustainable use and benefit sharing. In other words, conservation accepts human intervention so long as such intervention does not threaten the ecological processes, species and genetic variability to such an extent that their rejuvenation capacity is lost.

The CBD also uses two other terms in the context of conservation: in-situ and ex-situ conservation. Art 8, among others, calls upon parties to maintain “viable populations of species, rehabilitate and restore degraded ecosystems and promote the recovery of threatened species”, regulate, manage and control risks that are likely to have adverse environmental impacts that could affect conservation”. Without forbidding the use of biodiversity, it cautions states to “maintain compatibility between present uses and the conservation of biodiversity and sustainable use of its components.” In the context of ex-situ conservation, terms such as “recovery and rehabilitation of threatened species” are used obviously for conservation and sustainable use purposes.²¹ One

¹⁴ CBD Articles 6-9, 11 and 14.

¹⁵ CBD Articles 6, 10 and 14.

¹⁶ CBD, Article 15.

¹⁷ CBD, Articles 16 and 19.

¹⁸ CBD Art 20 & 21.

¹⁹ CBD Art 2.

²⁰ CBD Art 2.

²¹ See Convention on Biological Diversity, Art 9.

strategy developed by the Conference of the Parties (COP) for conservation is the “ecosystem approach”. It propagates the idea of integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way and helps to achieve a balance among the three objectives of the convention. Therefore the term “conservation” used in the CBD should not be construed just to mean maintaining the status-quo, but rather enhancing the ability of ecosystems to generate as living systems. In that sense, the sustainable use objective of the Convention complements the idea of conservation²² and helps “conservation” to be examined through a utility prism.

3.1 Sustainable Use

What then is “sustainable use”? It is the next question that one faces whilst grappling with the objectives and themes of the CBD. In general parlance, a thing is sustainable when it is long lasting, not perishable and usable. The literal meaning of “sustainability” is the capacity of being born, endured, upheld or defended. By the term “sustainable use”, we mean a use that does not adversely affect the productivity [of the resource in our context] both in the short and long term, in the sense of being destroyed, used up or finished. The Ramsar Convention used the term “wise use” implying almost the same meaning as sustainable use.²³ The Brundtland Report which enunciated the idea of “sustainable development” defined it as meeting “the needs and aspirations of the present without compromising the ability to meet those of the future.”²⁴ Building upon it further, the CBD defined “sustainable use” as “the use of the components of biological diversity in a way and at a rate that does not lead to the long term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”²⁵

The CBD calls for the integration of the concept of sustainable use “into relevant sectoral and cross-sectoral plans, programs and policies and national decision making.”²⁶ It also encourages countries to “endeavor to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components,”²⁷ as well as to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”²⁸ Further, the CBD takes into consideration the economic aspects of sustainable use in incentive measures and in access and benefit sharing.²⁹ The states are required to conserve biodiversity and to make sustainable use of its components within the limit of their national jurisdictions. Moreover, in the case of processes and activities, states are to conserve these “regardless of where their effects occur and when they are carried out under its jurisdiction or control”.³⁰

²² Aphrodite Smagadi, *Analysis of the Objectives of the Convention on Biological Diversity: Their Interrelation and Implementation Guidance for Access and Benefit Sharing*, 31 COLUM.J. ENVTL.L. 243,253 (2006).

²³ The term “wise use” was later defined as “the use of wetlands in their sustainable utilization for the benefit of mankind in a way compatible with the maintenance of the natural resources of the ecosystem” and “sustainable utilization” was defined as the “human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations”. See http://www.ramsar.org/rec/key_rec_3_annex.htm (Ramsar Information Paper no. 7, Annex) (as of 21.10.08).

²⁴ Gro.H. Brundtland, World Commission on Environment and Development, OUR COMMON FUTURE (1987) at 51, accessed at <http://www.worldinbalance.net/pdf/1987-brundtland.pdf> (as of 21.10.08).

²⁵ CBD Art 2.

²⁶ CBD Art 6, 10.

²⁷ CBD Art 8(i).

²⁸ CBD Art 8(j).

²⁹ CBD Art 11 & 15.

³⁰ CBD, Art 4.

The concept of "sustainable use" embraced by the CBD is further developed by the COP which adopted the Addis Ababa Principles and Guidelines for Sustainable Use of Biodiversity.³¹ This document laid down seven underlying conditions and 14 practical principles and operational guidelines for sustainable use. They state that "it is possible to use biodiversity components in a manner in which ecological processes, species and genetic variability remain above the thresholds needed for long term viability". The Guidelines embrace the ecosystem approach; adaptive management; interdisciplinary research; cooperation and appropriate policies and linkages at all level of government; communication; minimization of waste and optimization of use; and empowerment of local people with rights and responsibilities. We will revert to these Guidelines and Principles later when discussing the major works of the COP.

3.2 Sovereignty Principle

The principle adopted by the CBD is the sovereignty principle. It rejects the "common heritage approach" encapsulated in the 1983 FAO Undertaking in favor of the sovereign right of the states to use their biological resources.³² Yet the CBD strikes a balance by emphasizing that "conservation of biological diversity is a common concern of humankind".³³ The term "common concern" implies a common responsibility to the issue based on its paramount importance to the international community as a whole.³⁴ While exercising their sovereign rights, the states are also called upon to take a cautionary approach ensuring that it is in consonance with the Charter of the United Nations and the principles of international law. They are more specifically required to ensure that "activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction."³⁵

3.3 Objectives

The substantive provisions of the CBD, as indicated above, further the three objectives. The Convention starts with conservation and sustainable use, which is aimed to be achieved through new national strategies, plans and programs that are to be linked with relevant sectoral or cross-sectoral plans, programmes and policies. The linkage helps to streamline biodiversity concerns in all relevant aspects of governmental activities.³⁶ The Convention favors in-situ conservation, i.e. conservation within the ecosystem and natural habitats and in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties [on-farms]. Ex-situ conservation i.e. conservation of components of biological diversity outside their natural habitats (e.g. herbarium, etc), is taken as a complementary conservation strategy and is to be done where possible in the country of origin of the genetic resource.³⁷

The CBD also has several complementary measures that elaborate and support its three objectives. These include incentive measures,³⁸ research and training,³⁹ public education and awareness,⁴⁰ impact assessment and minimizing adverse impacts,⁴¹ liability, redress and

³¹ COP VII/12.

³² CBD, Preamble, Art 3 and Art 15.

³³ CBD, Preamble.

³⁴ Lyle Glowka et. al. *supra* note 13 at p.3.

³⁵ CBD, Art 3.

³⁶ Grunden Henne and Saliem Fakir, *The Regime Building of the Convention on Biological Diversity on the Road to Nairobi*, MAX PLANCK UNYB 3 (1999) at 315,322.

³⁷ CBD Art 9.

³⁸ CBD Art 11.

³⁹ CBD Art 12.

⁴⁰ CBD Art 13.

⁴¹ CBD Art 14.

technology transfers,⁴² exchange of information⁴³ and technical and scientific cooperation.⁴⁴ Similarly, financial resources and financial mechanisms are described in Art 20 and 21 respectively. It is beyond the scope of the present work to discuss them in detail. Nevertheless, we will touch upon some of the provisions in the following chapters as the context so requires.

3.4 Enforcement Mechanisms

The CBD is not a self-executing instrument but is enforceable through various institutions. The institutions created for making decisions are: the Conference of the Parties (COP),⁴⁵ the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA)⁴⁶ and the Secretariat.⁴⁷ The COP is the policy making body. It is responsible for implementation of the Convention and may adopt protocols, amendments and establish subsidiary bodies for specific purposes. It periodically reviews the progress, adopts rules of procedure for itself and subsidiary bodies which it may establish, and also adopts financial rules that govern the funding of the Secretariat. The decisions of the COP are generally considered an authoritative interpretation of the CBD.⁴⁸ The COP is supported by a small Secretariat. SBSTTA is a permanent advisory body which submits its opinions and recommendations to the COP. The Global Environmental Facility, which was provisionally designated as a funding agency, is now adopted by COP under a MOU to do the same job.⁴⁹

Initially, the CBD was generally termed as a framework agreement.⁵⁰ A framework agreement sets broad objectives and lays down broad general principles but it does not impose mandatory obligations on the parties, nor does it set specific targets or timetables.⁵¹ Such framework agreements obviously get popular support and meet with little resistance. In contrast to this, a noble purpose agreement is designed to address a specific problem within a specific time framework. Such an agreement firmly imposes obligations and sets target and timetables for the achievement of goals.⁵² An examination of various provisions of the CBD and its activities under the COP suggest that the convention is a mixture of both. There are framework type provisions such as the provisions relating to the living modified organisms or the clearing house mechanism,⁵³ which requires parties to consider the subject further. But there are provisions which impose obligations on the parties such as the "restoration of the degraded ecosystem or the recovery of threatened species" which give guidance to the parties to implement the convention at the national and local levels. Further, the COP has helped the CBD grow in such a way that it has begun setting targets such as significant reductions of the current biodiversity loss

⁴² CBD Art 16.

⁴³ CBD Art 17.

⁴⁴ CBD Art 18.

⁴⁵ CBD Art 23.

⁴⁶ CBD Art 25.

⁴⁷ CBD Art 24

⁴⁸ See Art 31 and 32 of the Vienna Convention on the Law of Treaties. See also Grundrun Henne and Salim Fakir, *supra* note 35 at p 319.

⁴⁹ See MOU between GEF and the COP at III/8.

⁵⁰ This is naturally so because the negotiating history itself shows that the UNEP mandate for the Ad Hoc Working Group to investigate "the desirability of ...an umbrella convention" (UNEP Governing Council Res. 14/26(1987) was rejected. By 1990 the Ad-Hoc Working Group reached a consensus that a new global treaty on biodiversity conservation was ...a framework treaty building upon the existing convention. See Lyle Glowka, et al *supra* note 13, p. 1.

⁵¹ Lyle Glowka et al, *Id.* According to the authors, the CBD is a framework agreement in two senses: first it leaves it to individual parties to determine how most of the provisions are to be implemented; and secondly it leaves the possibility of negotiating future agreements and protocols to the Conference of the Parties.

⁵² See W. Robert Ward, *Man or Beast: The Convention on Biological Diversity and the Emerging Law of Sustainable Development*, 28 VAND. J. TRANSNAT'L L. 823, 824-25 (Oct. 1995) for a clear example of a novel purpose agreement being the Montreal Protocol on Ozone Depleting Substances.

⁵³ CBD Art 19(3) & 18(3).

by 2010 or developing guidelines, plan of actions thus casting aside the original thinking about the Convention as a framework convention.

The CBD is a very flexible international instrument. In a world where states have different capacities, where the issue of biodiversity conservation is full of uncertainties and where there are multiple players in the market, obligations undertaken by states are difficult to be discharged in absolute terms. Perhaps, for this reason, most of the articles in the CBD have been prefaced by phrases such as "as far as possible and as appropriate", limiting their obligation so as to give adequate flexibility in implementation, and also to link them with the capacities of each Party to discharge the obligation.⁵⁴ In view of the global nature of the Convention, elasticity of expression was to some extent necessary and desirable,⁵⁵ though these expressions are admittedly being used for justifying non-action. The flexibility of the CBD can also be appreciated from the fact that it does not affect the other rights and obligations of states deriving from any existing international agreements, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity.⁵⁶ In other words, the CBD gives primacy to other "existing" (not subsequent) international agreements. However, if such existing agreements cause serious damages or impose a threat to biodiversity then perhaps there will be reason to take appropriate preventive measures.

Another notable characteristic of the CBD is its emphasis on a varying degree of responsibility for developed and developing countries. While it calls upon all states to discharge their responsibilities, at times it makes explicit the distinction between what is expected from developed and developing country parties.⁵⁷ It is necessary, because of the diverse needs, priorities, resources and capacities of developed and developing countries. The CBD, therefore, acknowledges that economic and social development and the eradication of poverty, and not conservation *per se* are first and overriding priorities of developing countries. Since, without the support of the developing country parties who are rich in biodiversity but where the losses are spiraling, the goal of the CBD cannot be achieved. Instead, it attempts to bind developed and developing countries by accepting the principle of common but differentiated responsibility, and thus, acknowledges that "the extent which developing country parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country parties of their commitments under this Convention related to financial resources and transfer of technology".⁵⁸

Because the CBD possesses too many watered down provisions, it is sometimes called a lowest common denominator treaty. The North-South conflict covertly surfaces on almost every major issue, be it objectives, or principles, or strategies or the funding. While "conservation of biological diversity" was a major priority of the North, sustainable use of bio-resources, poverty alleviation and other development works were matters of overriding concern to the developing countries. The latter were also disturbed by the unchecked piracy of bio-resources and associated

⁵⁴ See Lee A Kimball, *The Biodiversity Convention: How to make it Work*, 28 VAND. J. TRANSNAT'L L. 763,765 (Oct 1995). The author takes the view that such phrases have watered down the effectiveness of the treaty.

⁵⁵ Lyle Glowka et al, *supra* note 13 at p 4.

⁵⁶ CBD Art 22. Over the years this article has been very contentious especially in the relations of the CBD with other international agreements.

⁵⁷ For instance Art 20 (1) imposes an obligation on developed country parties to "provide new and additional financial resources to enable developing country parties to meet the agreed full incremental costs" to implement measures that the latter are required to implement. It was also agreed at Rio that the developed country parties will contribute 0.07% of their GNP for the implementation of the Rio instruments.

⁵⁸ CBD Art 20(4); In Agenda 21 the UNCED estimated that the cost of implementing just the monitoring provisions of the CBD would exceed \$5 billion per year during the 1993-2001 period. The cost of fully implementing the Convention could double that cost estimate. See Daniel T. Jenks, *The Convention on Biological Diversity: An Efficient Framework for the Preservation of Life on Earth* 15 NW.J. INT'L L. & BUS. 636, 659 (Spring 1995).

traditional knowledge and the fast expanding scope intellectual property laws. Therefore, what appears in the CBD in the form of access to genetic resources, benefit-sharing and technology transfers is a sort of a compromise that the States tried to forge for conservation and the sustainable use of biodiversity. Now, whether or not this compromise is clear and in consonance with the “sovereign rights of the states over their natural resources”; and whether or not what the developing countries achieved through the provisions protecting traditional knowledge, access to genetic resources and benefit sharing is still intact, or are overshadowed by other international treaties; is a continuous query which requires further research.

4. Agenda 21 and Sustainable Mountain Development

Agenda 21 is a massive 500 plus page document often cited as “a blueprint for the clean-up of the environment”⁵⁹ and a program of action for “sustainable development” to be taken globally, nationally and locally by organizations of the UN system, governments and other major actors in every area in which humans impact on the environment. It covers issues such as international cooperation to accelerate development in developing countries, combating poverty, demographic dynamics and integrating the environment and development in decision making. It also covers issues such as protection of the atmosphere; combating deforestation, promoting sustainable agriculture, conservation of biodiversity; environmentally sound management of biotechnology; protecting oceans, seas, coastal areas etc...; protecting the quality and supply of fresh water; and environmentally sound management of toxic chemicals, hazardous wastes, solid waste, sewage and radio active wastes. It further discusses issues relating to strengthening the role of major actors and the means of implementation.⁶⁰

Agenda 21 is the first international document which specifically addresses mountain issues. It contains many programs of actions useful to the mountain people and the environment.⁶¹ Besides, it also devotes a separate chapter titled “Sustainable Mountain Development”, which is perhaps an acknowledgement by the international community that mountain issues need to be separately addressed. Agenda 21 notes that mountains are “susceptible to accelerated soil loss, landslides and rapid loss of habitat and genetic diversity. On the human side, there is widespread poverty among mountain inhabitants and increasing losses of indigenous knowledge.”⁶² The Agenda puts forward a two-pronged strategy for ushering in sustainable mountain development, viz, generating and strengthening knowledge about the ecology and sustainable development of mountain ecosystems; and promoting integrated watershed development and alternative livelihoods.

In order to generate and strengthen knowledge, the Agenda proposes to undertake a survey of different resources; generate a database of information; improve and build on land, water and ecological knowledge bases; create and strengthen the communication network; and to coordinate regional efforts through appropriate mechanisms including regional legal and other instruments. In order to promote integrated watershed development, it proposes to develop

⁵⁹ Brian C. Athey, *Rio + 10: Preparing for the Earth's Environmental Future Today* 27 WM. & MARY ENVTL. & POLY REV. 1, 4 (Fall, 2002).
⁶⁰ See Agenda 21 at <http://www.un.org/esa/sustdev/documents/agenda21/English/agenda21toc.htm> (as of 22.10.08).

⁶¹ A few chapters that are important for mountain people as well include combating poverty (Ch 3), changing consumption patterns (Ch 4), planning and management of land resources (Ch 10), combating deforestation (Ch 11), desertification and drought (Ch 12), sustainable agriculture (Ch 14), conservation of biological diversity (Ch 15), management of biotechnology (Ch 16), management and use of water resources (Ch 18), management of solid waste (Ch 21), global action for women (chg 24), indigenous peoples (Ch 26), and the role of farmers (Ch 32).

⁶² Agenda 21 Ch 13, <http://www.un.org/esa/sustdev/documents/agenda21/English/agenda21chapter13.htm> (as of 22.10.08).

appropriate land-use planning and the management of both arable and non-arable land in mountain-fed watersheds, to promote income-generating activities such as sustainable tourism, fisheries, environmentally sound mining and to develop technical and institutional arrangements to mitigate the effects of natural disasters.⁶³

The Agenda accepts that there is lack of sufficient information, scientific or otherwise, about mountain systems, which is a testimony to the neglect or indifference of mainstream society. More importantly, the Agenda emphasizes an integrated management technique for ushering in sustainable mountain development through regional partnerships and the development of regional legal instruments. Nevertheless, its approach seems to be interventionist and protectionist. It does not prescribe specific action for income generation and the use of bio-resources for conservation and livelihood improvement of mountain people, nor does it take poverty alleviation as an issue in tandem with biodiversity conservation in the mountains.

5. Developments Since 1992

The development of environmental law since the Rio Conference has taken many new strides even though the development has not been steady. The continuous opposition of the US to major environmental initiatives has greatly hindered the environmental movement. It has been witnessed over the years that the achievements of Rio are being stifled or bypassed. Nevertheless, the following international agreements and protocols, which have a bearing on the CBD objectives, can be deemed to be significant developments.

5.1 UN Convention to Combat Desertification 1994

The need for a convention to combat desertification was felt in Rio. Chapter 12 of Agenda 21 developed programs to combat desertification. As per the call of the Rio Conference, the UN General Assembly established an intergovernmental Negotiating Committee to prepare the Convention.⁶⁴ This committee finished its work in relatively quick time. The Convention acknowledges that desertification and drought are problems of a global dimension and that joint action of the international community is needed to combat desertification and/or mitigate the effects of drought. The objective of this Convention is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification. Africa is a particular focus. The aims of this convention are hoped to be achieved through effective action in accordance with the framework of an integrated approach consistent with Agenda 21.⁶⁵ The Convention acknowledges that achieving this objective involves long-term integrated strategies that focus on improved land productivity and the rehabilitation, conservation and sustainable management of land and water resources. Hopefully, this will lead to improved living conditions in particular at the community level.⁶⁶ Participation of the local people, international solidarity and partnerships, the promotion of a better understanding of the nature and value of land and scarce water resources and a focus on the special need of the affected countries are the general principles of the Convention.⁶⁷

⁶³ *Id.*

⁶⁴ The Convention was adopted in Paris 17 June 1994 and entered into force on Dec 26, 1996.

⁶⁵ See UNCCD Art 2(1).

⁶⁶ See UNCCD Art 2(2).

⁶⁷ See UNCCD Art 3.

5.2 Kyoto Protocol to the UN Convention on Climate Change 1997

Parties to this Protocol are called upon to achieve quantified emission targets and to individually or jointly ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the six greenhouse gases⁶⁸ do not exceed their assigned amount, calculated pursuant to their quantified emission limitation and reduction commitments with a view to reducing their overall emissions of such gases by at least 5 percent below 1990 levels in the commitment period 2008 and 2012. Each party included in Annex 1⁶⁹ is called upon to make demonstrable progress in achieving its commitment by 2005. The USA is yet to ratify the Protocol. In view of the growing impact of climate change on biodiversity (both positive and negative), and now as the COP has begun discussing the proposals on integration of the climate-change activities within the programmes of the CBD, the Kyoto Protocol assumes more importance.⁷⁰

5.3 Cartagena Protocol on Bio-Safety 2000

The Cartagena Protocol is an offspring of the CBD system, and in a way it is an unfinished agenda of the negotiation.⁷² The Protocol was adopted after protracted negotiations.⁷³ The objective of the Protocol is to ensure an adequate level of protection for the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biodiversity. The Protocol makes it necessary for the exporting party: to obtain an advanced informed agreement; to inform of export procedures, labeling, notifications to the Bio-safety Clearing House and competent national authority; implement risk assessment; risk management and measures to be undertaken upon unintentional trans-boundary movement of Living Modified Organisms (LMOs); and implement emergency measures. Capacity building, public awareness and participation are other measures mentioned in the Protocol. Illegal trans-boundary movement is subject to domestic legal action by the parties. By and large, the Protocol operates under the same institutional structure as the CBD.⁷³ The USA, Russia and Japan are yet to sign the Protocol.

5.4 United Nations Millennium Development Goals (MDGs) 2000

In 2000, the United Nations set eight development goals which range from halving extreme poverty to halting the spread of HIV/AIDs and providing universal primary education by the target date of 2015. One of the MDGs is to ensure “environmental sustainability”. Under this, the following sub-goals are set:

- Integrate the principles of sustainable development into country policies and programs; *reverse the loss of environmental resources* [emphasis added].

⁶⁸ The six gases include: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride. See <http://unfccc.int/resource/docs/convkp/kpeng.html> (Annex A Kyoto Protocol) (as of 20.10.2005).

⁶⁹ The Annex includes the USA also, which is yet to sign the Kyoto Protocol.

⁷⁰ See COP IX/16.

⁷¹ The proposal for bio-safety provisions was introduced by Malaysia on 25th Nov 1991 at the 3rd meeting of the INC. Due to time constraints it could not be discussed and incorporated in the INC meeting. The CBD therefore just touches upon LMOs in Art 8(g) and 19(3). See CBD/UNEP, THE CONVENTION ON BIOLOGICAL DIVERSITY FROM CONCEPTION TO IMPLEMENTATION, p. 6.

⁷² The North-South cleavage on this Protocol can be understood from the excerpts of the preamble which, *inter alia*, says; “Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development, *Emphasizing* that this Protocol shall not be interpreted as implying a change in the rights and obligations of a party under any existing international agreements, *Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements”.

⁷³ The first meeting of the Conference of the Parties of the Protocol adopted labeling requirements for all living or genetically modified organisms (known as LMOs and GMOs) intended for food, feed or processing. The new system is binding on all countries that are party to the Protocol. See UNEP. ANNUAL REPORT 2004, p 70.

- Reduce the proportion of people without sustainable access to safe drinking water by half.
- Achieve significant improvement in the lives of at least 100 million slum dwellers by 2020.

5.5 International Treaty on Plant Genetic Resources for Food and Agriculture 2001⁷⁴

This Treaty was adopted under the auspices of the FAO and is informed and enriched by various developments under the International Convention for the Protection of New Varieties of Plants 1961 (UPOV) and the International Undertaking on Plant Genetic Resources. The treaty re-stresses the sovereign right of states over their own plant genetic resources for food and agriculture and thus rectifies the mistake that the FAO Undertaking made by declaring plant genetic resources as the “common heritage of mankind”. Even though this concept was amended by the FAO in 1991 itself,⁷⁵ the entrenchment of the concept in the Treaty added strength to it.

The Treaty fulfils the call made by the parties to the CBD, more particularly the Nairobi Final Act,⁷⁶ which amongst others, recognized the need to seek solutions to outstanding matters concerning plant genetic resources, in particular: access to ex-situ collections not addressed by the Convention; and secondly, the question of farmers’ rights.⁷⁷ The Treaty recognizes the past, present and future contributions of farmers and indigenous communities, particularly those in the centre of origin and crop diversity, in conserving, improving and making available agricultural resources. It stresses the same as the basis for the protection of farmers’ rights. The responsibility of realizing farmers’ rights is vested in national governments. Contracting parties are, subject to national legislation, called upon to take measures to protect farmers’ rights which include:⁷⁸

- Protection of traditional knowledge;
- The right to equitably participate in shared benefits;
- The right to participate in decision making on matters related to conservation and the sustainable use of plant genetic resources for food and agriculture;
- The right of farmers to save, use, exchange and sell farm saved-seed/propagating material.⁷⁹

The Treaty establishes a multilateral system for facilitating access to genetic resources for food and agriculture and also for fair and equitable sharing of benefits on a complementary and mutually reinforcing basis.⁸⁰ These resources include 64 major crops and forages of plant genetic resources for food and agriculture⁸¹ and other crop varieties held prior to the Treaty coming into force in the ex-situ collections of the International Agriculture Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) and in other international

⁷⁴ The Treaty was signed by 116 member states of the FAO (and adopted by Resolution 3/2001) but the US and Japan abstained. The treaty came into force on 29 June 2004.

⁷⁵ See 26th FAO Conference 25 Nov 1991.

⁷⁶ Nairobi Conference for the adoption of the Agreed Text on Biological Diversity May 22, 1992, Resolution 3.

⁷⁷ See The Nairobi Final Act, Resolution 3. It was also agreed that these matters should be addressed within the FAO’s forum. See also Agenda 21 Chapter 14, which also calls for strengthening of the FAO Global System on Plant Genetic Resources, and its adjustment in line with the outcome of the negotiations on the CBD.

⁷⁸ See Art 9.1 and 9.2 of the Treaty.

⁷⁹ See Art 9.3 of the Treaty.

⁸⁰ See Art 10 of the Treaty.

⁸¹ Among them 35 are food crops and 29 forages. See Annex of the Treaty. Although the annex covers 80 to 90 percent of crops most vital to world food security, it excludes many such as soybeans, groundnuts, sugarcane, wild relatives of cassava, and tomatoes, all of which could be expected to be on the list constructed with food security in mind. Listed forages are largely of temperate origin and under representative of African and Latin American ones. Developing countries asserted sovereignty over some crops (e.g. Iran/wheat, China/soybeans, Columbia/cassava, Brazil/groundnuts) and refused to add their most prized resources unless others added theirs. Similarly, industrial crops such as tea, coffee, rubber, and oil palm are also excluded but are largely governed commercially by other commodity specific agreements. See George Rose, *International Law of Sustainable agriculture in the 21st Century: The International Treaty on Plant Genetic Resources for Food and agriculture* 15 GEO.INT’L ENVTL.L.REV 583, 616-617 (Summer 2003).

institutions.⁸² Plant genetic resources may be obtained from the multilateral system for utilization and conservation in research, breeding and training. When a commercial product is developed using these resources and the product may not be used without restrictions by others for further research and breeding the treaty provides for payment of an equitable share of the resulting monetary benefits. If others may use it, payment is voluntary.⁸³

The body of the Treaty is silent on its relationship with other international treaties but there are some contradictory statements in the preamble. On the one hand, it mentions that nothing in the treaty will be “interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements” and then it immediately contradicts this in the next paragraph. It mentions that “the above recital is not intended to create a hierarchy between this Treaty and other international agreements.” Given the controversial relation that the CBD has with TRIPs, what relation the Treaty establishes with the latter is a matter of utmost interest.

5.6 World Summit on Sustainable Development, Johannesburg, 2002

The summit was conceived to be a logical progression from the Rio commitment, but Johannesburg failed to rekindle the waning hope of the environmental movement or give a concrete shape to sustainable development. Often considered a victim of the USA's stonewalling of negotiated global treaties, principles, targets, and timetables,⁸⁴ major outputs that the Summit was able to produce were the Type II deliverables called “concrete partnerships aimed at practical implementation of Agenda 21” totaling 220 in number for which US \$ 235,000,000 was promised.⁸⁵ Perhaps owing to treaty fatigue, no new treaty was signed in Johannesburg. However, the delegates reaffirmed their “commitment to the Rio principle, the full implementation of Agenda 21 & the UN Millennium Development Goals; the Johannesburg Plan of Implementation, Johannesburg; and the Declaration on Sustainable Development.”⁸⁶

So far as sustainable mountain development is concerned, several issues that have a direct bearing on the life of the mountain people were taken up by the Plan of Implementation of the World Summit on Sustainable Development, such as poverty eradication, changing unsustainable use patterns, and protecting and managing the natural resource base. Besides, the Plan of Implementation also discusses a number of issues such as biodiversity,⁸⁷ forests⁸⁸ and sustainable development in a globalized world and the problems related to them. In particular, the following paragraphs of the Plan of Implementation are directly related to mountain biological diversity and sustainable development in the mountains:

- *Paragraph 7*: reduce poverty and hunger, develop national programmes for sustainable development;
- *Paragraph 10 (f)*: support sustainable livelihoods for the poor through the sustainable management of natural resources;

⁸² See Art 12 of the Treaty.

⁸³ See Art 11, 12, 13 of the Treaty.

⁸⁴ George Rock Pring, *The 2002 Johannesburg World Summit On Sustainable Development: International Environmental Law Collides with Reality, Turning “Jo Burg” Into “Joke Burg”* 30 DENV. J. INT'L L. & POL'Y 410, 414-415 (Summer 2002).

⁸⁵ *Id.* p. 415.

⁸⁶ See World Summit on Sustainable Development Plan of Implementation (para 1), accessible at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (as of 4.12.08).

⁸⁷ *Id.* Para 44.

⁸⁸ *Id.* Para 45.

- *Paragraphs 41 (c) and 44 (c)*: support synergies between the Convention on Biological Diversity, the United Nations Convention to Combat Desertification (UNCCD) and the United Nations Framework Convention on Climate Change;
- *Paragraphs 44 (e) and (o)*: the achievement by 2010 of a significant reduction in the current rate of loss of biological diversity; negotiate within the framework of the CBD,...an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources.

The Plan of Implementation acknowledges the contribution of the mountain ecosystem to particular livelihoods and includes significant watershed resources, biological diversity, and unique flora and fauna. Taking note of the fragility of the system and its vulnerability to the adverse effects of climate change it proposes a number of actions:

- *Paragraph 42 (a)*: develop and promote programmes for sustainable mountain development and strengthen international cooperation;
- *Paragraph 42 (b)*: implement programmes to address erosion, deforestation, disruption of water flows and the retreat of glaciers;
- *Paragraph 42 (c)*: develop gender-sensitive programmes for mountain communities;
- *Paragraph 42 (d)*: implement programmes for diversification of mountain economies and sustainable livelihoods;
- *Paragraph 42 (e)*: promote participation and involvement of mountain communities in decision-making and integration of indigenous knowledge;
- *Paragraph 42 (f)*: international support for applied research and capacity-building for effective implementation of mountain ecosystems.

5.7 Mountain Biological Diversity and COP

After Agenda 21, another major initiative regarding mountain issues at the CBD level came at the COP VII that endorsed a "Program of Work on Mountain Biodiversity."⁸⁹ The program was developed keeping in mind the target of making a significant reduction in the rate of mountain biological diversity loss by 2010 and linking mountain biodiversity, poverty reduction and sustainable development for the benefit of indigenous and local communities who are dependent on mountains. The Program of Work calls for the State Parties to take into account the activities being undertaken in several thematic areas and to link them for addressing mountain biodiversity issues where relevant. In particular, the Strategic Plan and the Global Strategy for Plant Conservation should be linked. It focuses on addressing characteristics and problems specific to mountain biodiversity such as:

- The particularly high concentration of biological diversity hotspots in mountain regions, including the high ecosystem diversity, high species richness, high number of endemic and endangered species, and high genetic diversity of crops, livestock and their wild relatives;
- Cultural diversity, and the particularly key role of indigenous and local communities in the conservation and management of mountain biological diversity;
- The fragility of mountain ecosystems and species, and their vulnerability to human and natural disturbances, in particular to land-use changes and global climate change (such as the retreat of glaciers and the increased areas of desertification);

⁸⁹ See COP VII/27.

- The upland-lowland interactions that characterizes mountain ecosystems, with special emphasis on the relevance of upland ecosystems for the management of food, water and soil resources.

The Program of Work has three elements: direct actions for conservation, sustainable use and benefit sharing; means of implementation; and supporting actions. Direct actions consist of five goals to:

1. Prevent and mitigate the negative impacts of key threats to mountain biodiversity;
2. Protect, recover and restore mountain biodiversity;
3. Promote sustainable use of mountain biological resources;
4. Promote access to and sharing of benefits from the utilization of genetic resources related to mountain biodiversity; and
5. Maintain genetic diversity in mountain ecosystems through the preservation and maintenance of traditional knowledge.

For the prevention and mitigation of the negative impacts of key threats, the Program of Work emphasizes on reducing adverse land use practices; reducing human-induced slope instability; maintaining and/or enhancing soil stability and ecosystem integrity by way of diverse vegetation cover; preventing or mitigating negative impacts of economic development and other human-induced disturbances; preventing the introduction of invasive alien species and controlling them; reducing negative impacts of climate change; preventing key pressures on mountain ecosystems, such as human-induced forest fires, overgrazing, inappropriate mining practices etc.

Similarly, in order to protect, recover and restore mountain biodiversity, the Program of Work suggests actions such as development and implementation of programmes for restoration of degraded mountain ecosystems and protection of natural dynamic processes and their capacity to resist and adapt to climate change; the establishment of corridors for enabling vertical migration of species and ensuring viable population sizes; conservation of existing levels of endemic species with a focus on narrowly-distributed taxa, emphasis on in-situ conservation; development of strategies for land-use and water resource planning at the landscape level using the ecosystem approach taking into account the elements of ecological connectivity and traditional uses; establishing networks; the promotion of the role of sustainable agriculture and pastoral activities using sustainable traditional practices; maintaining of biological diversity in mountain ecosystems; support for community-based management systems; and support in the use of traditional knowledge. The Program emphasizes reducing the negative impacts of tourism, strengthening local capacity for sustainable tourism management, promoting sustainable use of economically valuable wild plants and animals for income generation, and promotion of integrated watershed management.

In a nutshell, the Program of Work is interventionist in nature and does not seriously dig into the causes of poverty or conflicts. It does not advance methods to redress the plight of mountain people or highlight the need to include their participation in policy formulation and implementation. It does not offer to survey and document their existing traditional knowledge, nor does it offer much on the high-land and low-land contract. It cursorily mentions the need to promote trans-boundary cooperation but does not discuss about its modality. It mentions nothing about the amendment and harmonization of laws and policies at the local, national and regional level, compensation to the mountain people for the use of local biological/genetic resources and benefit sharing or their capacity building in this regard. It talks about establishing peace-parks without digging deeper into and finding out the root causes of conflict.

5.8 Other Activities of the COP

The CBD institutional regime is currently involved in ever proliferating activities. Over the span of the last 15 years the institutional regime of the CBD has moved from rule setting to rule implementation. It currently works in the following thematic areas and cross-cutting issues.

Thematic Programmes	Cross-Cutting Issues
Agricultural Biodiversity	Biodiversity Target
Dry and Sub-humid Lands	Access to Genetic Resources and Benefit-sharing
Forest Biodiversity	Climate Change and Biodiversity
Inland Waters Biodiversity	Communication, Education and Public Awareness
Island Biodiversity	Economics, Trade and Incentive Measures
Marine and Coastal Biodiversity	Ecosystem Approach
Mountain Biodiversity	Global Strategy for Plant Conservation
	Global Taxonomy Initiative
	Impact Assessment
	Identification, Monitoring, Indicators and Assessments
	Invasive Alien Species
	Liability and Redress
	Protected Areas
	Sustainable Use of Biodiversity
	Technology Transfer and Cooperation
	Tourism and Biodiversity
	Traditional Knowledge, Innovations and Practices

The work in some of these areas has already taken shape, while in others it is continuing. During the course of the last 15 years, the CBD institutional regime has been able to set targets, develop approaches, strategies, guidelines and mechanisms. The following is a list of some of the more important of them.

5.8.1 Ecosystem Approach⁹⁰

The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.⁹² It is based on the application of appropriate scientific methodologies that are focused on levels of biological organization which encompass the essential structure, processes, functions and interactions among organisms and their environment. It recognizes that humans, with their cultural diversity, are an integral component of ecosystems. Given the complex and dynamic nature of ecosystems and the absence of complete knowledge and understanding of their functioning, the ecosystem approach endorses adaptive management so as to be able to respond to uncertainties. It does not preclude other management styles but rather recommends concerned managers to include them

⁹⁰ Ecosystem "means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit." See Art 2 CBD.
⁹¹ COP V/6.

in this approach. The 12 evolved principles revolve around respecting societal choice, focusing decentralized management, taking cognizance of the effects of activities on adjacent and other ecosystem, reducing market distortions, the promotion of biodiversity conservation, internalization of the costs and benefits in the given ecosystem, conservation of ecosystem structures and functions and the management within the limits of their functioning, long term management, striking a balance between conservation and use, use of all relevant information and the involvement of all relevant sectors. The five operating guidelines emphasize functional relationships and processes within an ecosystem, enhancing benefit sharing, use of adaptive management practices, decentralized management and intersectional cooperation. Overtime, the ecosystem approach has become an all encompassing approach and a primary framework of action under the Convention.⁹²

5.8.2 Bonn Guidelines

These voluntary guidelines on access to genetic resources and the fair and equitable sharing of the benefits arising from their utilization were adopted by COP VI.⁹³ As clearly mentioned, and by their very nature, these voluntary guidelines do not negatively or positively affect any rights stipulated in the CBD, national legislation or agreements. All genetic resources and associated traditional knowledge, innovations and practices covered by the Convention, and benefits arising from the commercial and other utilizations are within the scope of the Guidelines. They outline objectives; delineate roles and responsibilities of national focal points and competent authorities; discuss about the participation of stakeholders; and lay down steps in access and benefit sharing. And in the annex, the Guidelines also provide suggestive elements for material transfer agreements.⁹⁴ Obviously the Guidelines are of valuable assistance to the states and other stakeholders in developing an overall access and benefit-sharing strategy, and in identifying the steps involved in the process of obtaining access to genetic resources and benefit-sharing and more specifically in establishing legislative, administrative or policy measures on access and benefit-sharing and/or when negotiating contractual arrangements for access and benefit-sharing.

5.8.3 Strategic Plan of the Convention

The COP at its sixth meeting adopted a Strategic Plan for the Convention on Biological Diversity.⁹⁵ The purpose of the plan is to effectively halt the loss of biodiversity so as to secure the continuity of its beneficial uses through conservation and sustainable use and benefit sharing. The Plan raises the issue of biodiversity loss, discusses achievements and challenges, sets mission and strategic goals and finds out ways to address the challenges. Through this Plan, the state parties commit themselves to a more effective and coherent implementation of the three objectives of the Convention, which is to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level, as a contribution to poverty alleviation and to the benefit of all life on earth.⁹⁶ The Plan is to be updated at COP-10.

⁹² See Ecosystem Sourcebook at <http://www.cbd.int/ecosystem/sourcebook/Beginnersguide/Advancedguide/>.

⁹³ See Decision VI/24. They refer to Art 8(j), 10(c), 15, 16 and 19 and contracts and agreements mutually agreed to by the parties.

⁹⁴ *Id.*

⁹⁵ See decision VI/26 of the COP, Convention on Biological Diversity.

⁹⁶ See <http://www.biodiv.org/sp/default.asp#> (as of 10.10.08).

5.8.4 Global Strategy for Plant Conservation

The COP adopted at its sixth meeting the Global Strategy for Plant Conservation including 16 outcome-oriented global targets for 2010. The ultimate and long-term objective of the Global Strategy for Plant Conservation is to halt the current and continuing loss of plant diversity. The Strategy provides a framework to facilitate harmony between existing initiatives aimed at plant conservation, to identify gaps where new initiatives are required, and to promote mobilization of the necessary resources.⁹⁷

5.8.5 2010 Biodiversity Target

In April 2002, the COP committed to “achieve by 2010 a significant reduction in the current rate of biodiversity loss at the global, regional and national level as a contribution to the poverty alleviation and to the benefit of all life on Earth.” The target was subsequently endorsed by the WSSD and the UN General Assembly and was also incorporated into the MDGs. The target was discussed in various COP meetings,⁹⁸ and has been considered in the Strategic Plan developed by the COP as well. The COP VII has developed goals and sub-targets and was provided a flexible framework within which national and regional targets could be developed. The sub-target apparently seems to be measured, but some of the measurable sub-targets are: effective conservation of at least 10% of each of the world’s ecological regions; control of the pathways for potential major alien invasive species; management plans in place for major alien species that threaten ecosystems, habitats or species; and ensuring all transfers of genetic resources are in line with the CBD and International Treaty on Plant Genetic Resources for Food and Agriculture. Setting a target is a very important exercise and developing the sub-targets also facilitates measurement, but since the implementation relies on national initiatives, it is unlikely that the target will be met by 2010.

5.8.6 Clearing House Mechanism⁹⁹

The idea of the clearing-house is based on the philosophy of exchanging scientific and technological information, which varies tremendously among parties and is necessary for successful implementation of the Convention according to Art 18(3) of the Convention. It emphasizes that broad participation of members and easy access to information must be a top priority under the CBD. The Mechanism has three main missions *viz*: to promote and facilitate technical and scientific cooperation within and between countries; to develop a global mechanism for exchanging and integrating information on biodiversity; to develop a necessary human and technical network. Currently, the Clearing House Mechanism [CHM] is electronically based.¹⁰⁰ The CHM is coordinated by the Executive Secretary and overseen and guided by an Informal Advisory Committee set up by the parties. Furthermore, a network of national focal points is being established for facilitating cooperation.

⁹⁷ The reason for a strategy under the CBD is that setting meaningful targets is feasible since scientific understanding of at least higher plants, though incomplete, is better than for most other groups. See <http://www.biodiv.org/programmes/cross-cutting/plant/default.asp> (as of 15.10.08).

⁹⁸ See COP VI/26, VII/30, VIII/15 & IX/8, 9.

⁹⁹ The term “clearing-house” originally referred to a financial establishment where checks and bills are exchanged among member banks so that only the net balances need to be settled in cash. Today, its meaning has been extended to include any agency that brings together seekers and providers of goods, services or information, thus matching demand with supply.

¹⁰⁰ See <http://www.biodiv.org/chm/> (as of 11.11.08).

5.8.7 Biodiversity Inclusive Environmental Impact Assessment

The draft guidelines were endorsed by COP VI which called parties to incorporate biodiversity related issues in Environmental Impact Assessment (EIA) legislation and processes.¹⁰¹ The guidelines first explain EIA and Strategic EIA, and explain the purpose and approach. As a prerequisite, they call parties to incorporate the concept of biological diversity as defined by the CBD in the definition of the term “environment” so that plants, animals and micro-organisms are considered at the genetic, species/community and ecosystem/habitat levels, and also in terms of ecosystem structure and function. The guidelines also emphasize that EIA legislation and processes should refer, apart from the CBD, to the Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES], the Ramsar Convention, UN Convention on the Law of the Sea [UNCLOS], and European directives on the EIA.

5.8.8 Addis Ababa Guidelines for Sustainable Use

Sustainable use has been a thorny issue for the CBD. And now the COP VII has adopted the Addis Ababa Guidelines for Sustainable Use of Biodiversity. The Guidelines are premised on the principle that “it is possible to use biodiversity components in a manner in which ecological processes, species and genetic variability remain above the thresholds needed for long term viability.”¹⁰² It is crucial that biodiversity in ecosystems is maintained, or in some cases recovered, and to ensure that those ecosystems are capable of sustaining the ecological services on which both biodiversity and people depend. The government and resource managers are called upon to take into account and accommodate the changes taking place in ecosystems, ecological processes within them, species variability, genetic variation and other stochastic events that may adversely affect biodiversity and influence the sustainability of its use and adopt measures which may help to avoid or minimize impacts on biological diversity. It states, where biological diversity is used for providing basic necessities of life or industrial use, the government should have an adequate policy and capacities in place to ensure that such uses are sustainable cognizant of the limits and constraints regarding productivity, resilience and stability of the ecosystems and do the needful to ameliorate any potential negative long-term effects by taking precautionary steps in the management of biodiversity. The Guidelines have fourteen principles and operational guidelines. The 14 principles call for the following:

- i) Supportive policies, laws and institutions are to be in place at all levels with effective linkages between these levels;
- ii) Local users of biodiversity components are sufficiently empowered and supported by rights to be responsible and accountable;
- iii) Laws and policies that distort markets and contribute to habitat degradation or otherwise generate perverse incentives are identified and removed or mitigated;
- iv) Adaptive management is practiced;
- v) Sustainable use management goals and practices avoid or minimize adverse impacts on ecosystem services, structure and functions as well as other components of ecosystems.
- vi) Interdisciplinary research into all aspects of the use and conservation of the biological diversity is promoted and supported;

¹⁰¹ See COPVI/7-A.

¹⁰² *Id.*, Annex II.

- vii) The spatial and temporal scale of management is compatible with the ecological and socio-economic scales of the use and its impact;
- viii) Where multinational decision making and coordination are needed there is an arrangement for cooperation,
- ix) An interdisciplinary and participatory approach is applied at appropriate levels of management and governance related to the use;
- x) International and national policies take into account; current and potential values derived from the use of biological diversity; intrinsic and other non-economic values of biological diversity; and market forces affecting the values and use;
- xi) Users should seek to minimize waste and adverse environmental impacts and optimize benefits for users;
- xii) The needs of indigenous and local communities are reflected in the equitable distribution of the benefits from the use of those resources;
- xiii) The cost of management and conservation of biological diversity is internalized within the area of management and reflected in the distribution of the benefits from the use;
- xiv) Education and public awareness programs on conservation and sustainable use are implemented and more effective methods of communication are developed between and among stakeholders and managers.

The Addis Abba Guidelines provide a framework for advising governments, resource managers, indigenous and local communities, the private sector and other stakeholders about how they can ensure that their use of the components of biodiversity will not lead to the long-term decline of biodiversity. As explained, they are intended to be of general relevance and do not equally apply to all situations or with equal rigor and can be used as functional guides to be implemented within the broader framework of the ecosystem approach. Their application varies according to the biodiversity being used, their conditions and the institutional and cultural context. Yet, they are valuable tools for conservation, as they create incentives for conservation and apply to both consumptive and non-consumptive uses.

6. Achievements

Even though there are serious drawbacks and some of them are already raised in different sections above, the CBD remains a fairly promising document from the point of view of science and economics.¹⁰³ It may not be an all encompassing document, but it is certainly a good starting point even from the point of view of its coverage. It may not lay out binding obligations but it does provide management strategies and an outline of best practices.¹⁰⁴ The spirit of the CBD is to create a new type of biodiversity enterprise through cross-institutional collaborations, technology transfers, the creation of new knowledge and skills in developing countries and the flow of capital back to the developing countries.¹⁰⁵ It has taken a practical and pragmatic approach

¹⁰³ This is because even today an estimated 40 percent of the global economy is based on biological products and processes. See UNEP, Annual Report 2004, accessible at http://books.google.de/books?id=HB2cQrrp5vAC&dq=UNEP,+Annual+Report+2004&printsec=frontcover&source=bl&ots=8jQcwddqBew&sig=SBFg_OiGaEUah-s38fa4kQvfiM8&hl=de&sa=X&oi=book_result&resnum=4&ct=result#PPP1,M1 (as of 4.12.08)

¹⁰⁴ Lee A. Kimball, *The Biodiversity Convention: How to Make It Work* 28 VAND. J. TRANSNAT'L L. 763, 765 (October, 1995); the author says; "the Biodiversity Convention, however, arguably falls into a new category of recent, comprehensive, global conventions on environmental matters that define objectives, if not legal obligations. These conventions recognize the possibility of more detailed legal instruments that may contain binding obligations. They provide incentives for states to act. And even in the absence of hard law, they provide a conceptual framework for national and international implementation and management actions. In this sense, the Biodiversity Convention offers a starting point".

¹⁰⁵ Edgar J Asbey and Jill Kempenaar, *Biodiversity Prospecting: Fulfilling the Mandate of the Biodiversity Convention* 28 VAND. J. TRANSNAT'L L. 716, 748 (Oct 1995).

which is further being operationalized by the COP in the form of strategies, plan of actions, guidelines and the fixing of a timeline for the achievement of targets. It reinforces the linkage between the environment and development and thereby contributes to sustainable development. Credit for the adoption of the Bio-safety Protocol and the Convention on Desertification can be given to CBD initiatives.

Overtime, the CBD regime has created a tremendous awareness among the countries and the people about environmental issues. New values are entrenched. New initiatives are being undertaken for information gathering, creating legislative frameworks, drawing up plans and programs, monitoring the environmental health of the country, the re-allocation of costs and benefits, and the evaluation of the activities of the stakeholders.¹⁰⁶ New alliances have been built at the regional, national and local levels to realize the objective of the Convention.¹⁰⁷ Environmental management has emerged as an important element of governance in practically every country.¹⁰⁸ Ecology, which for a long time was considered an externality of the economy, is gradually being considered as a fundamental concern through EIAs and cost benefit analysis of projects. The values, norms, strategies, and plans of action are developed under the aegis of the CBD to help countries to draw plans and programs for themselves and transform challenges into advantages.

From a developing country's perspective, the CBD is the first instrument that is sensitive of and sympathetic to the rights, concerns and difficulties of developing countries. The three inter-connected objectives of the CBD are clearly beneficial to developing countries. Provisions on access and benefit sharing, technology transfer and principles such as sovereign rights, precautionary principles, common but differentiated responsibilities and the principle of additionality are weighed in favor of the bio-rich but economically poor countries of the South. More importantly, the CBD inscribes provisions relating to financial resources and emphasizes funding and the transfer of technology. In doing so, it calls upon the developed countries to take note of the fact that economic and social development and the eradication of poverty are overriding priorities. It also calls upon the parties to take "full account of the special situations of least developed countries," small island states, and those "environmentally vulnerable such as those with arid, semi-arid zones, coastal and mountainous areas".¹⁰⁹ Thus, hope is given to the countries in the margins and mountains and in the extreme South of socio-economic development.

As can be seen from the above, apart from the Program of Action on sustainable mountain development in Agenda 21, over time, mountain issues are being discussed at the institutional regime of the CBD and also at other global forums such as the WSSD and programs such as the MDG. International consortia, institutions and partnerships are being evolved. Besides, mountain issues are increasingly being discussed in the United Nations and its agencies.¹¹⁰ The resolutions, plans and programs focus on creating specific policies, appropriate institutions and processes

¹⁰⁶ See generally, Carl Bruch and John Pendergrass, *The Road from Johannesburg: Type II Partnerships, International Law, and the Commons* 15 GEO. INT'L ENVTL. REV. 855, 862-63 (Summer 2003) that states that in many instances the domestic legal framework often includes soft-law provisions as well as the precautionary principle, the polluter pays principle and even occasionally inter-generational equity.

¹⁰⁷ One such recent initiative is the effort of the Like-minded Mega-diversity Countries. See their Declaration at Cancun, Feb 2002, and Delhi Declaration Jan. 21, 2005.

¹⁰⁸ See Nicholas A. Robinson, *Befogged Vision: International Environmental Governance a Decade After Rio* 27 WM. & MARY ENVTL. L. & POL'Y REV 299 (Winter, 2002).

¹⁰⁹ CBD Art 20.

¹¹⁰ See A/RES/53/24 19 Nov. 1998 (declaring 2002 as the International Year of Mountain); A/RES 189 of 20 Dec. 2000; A/RES 57/245 of 20 Dec 2002; A/RES/57/254 30 Jan. 2003 (calling for more partnership, voluntary contributions, and designating 11 Dec as International Mountain Day); A/RES 58/216 of 23 Dec 2003; A/RES 59/238 of 22 Dec 2004 (on rendering assistance to poor mountain countries to overcome obstacles in socio-economic and ecological areas); A/RES/60/198 8 Mar. 2006 (Sustainable Mountain Development); and A/RES 62/196 (on Sustainable Mountain Development). The UN asked the FAO to take a lead role in the International Mountain Year 2002 and since then FAO is also increasingly involved.

for sustainable development of the mountain areas. Similarly, they incorporate mountain biodiversity and livelihood issues in regional, national and local plans and programs. The inclusion of mountain issues in the biodiversity target at the global level; the creation of infrastructure and network for actions emphasizing the role of indigenous and local people; and the inclusion of women and other minorities in the policy formulation, implementation and benefit sharing are some of the prioritized agendas now.

Mountain systems are increasingly considered not only as “fragile systems” that gives a sense of weakness and helplessness or something breakable, but as a living environment providing sustenance to its people and millions of others who live on the resources provided by it: a system unfortunately disturbed and harmed by both endogenous and exogenous pressures today. A sense of urgency is thus created for protection of its biodiversity and for a resurgence of the livelihood of its people. And in the course, constructive new management approaches, concepts, tools or devices are evolved. Some of these include spatial planning, adaptive management, diversified farming, trans-boundary coordination, information sharing through Clearing House Mechanisms, ecosystem integrity/approach, debt for sustainable development, micro-credit, micro-finance, micro-insurance, highland-lowland-contract, payment for environment services such as watershed management, biodiversity conservation, farming diversification, carbon sequestration and livelihood rejuvenation through community level projects on eco-tourism, forest, micro-hydro development etc.

The evolving policy on biodiversity now brings mountain states to the center of the activities proposed. It also calls for multi-sectoral involvement and regional coordination for bringing about sustainable development in the mountain areas by using and refashioning the values and norms in the biodiversity discourse. The partnerships of the countries in the Andean mountains,¹¹¹ Alps¹¹² and more recently in the Carpathians¹¹³ should be followed.

7. Issues and Challenges

Today, biodiversity policy making at the national, regional and international level, faces three types of critical challenges: lack of knowledge and scientific uncertainty; a lopsided international legal environment; and the lack of a collective resolve to remove impediments and take benefits from the existing framework.

The scientific community knows so little about biodiversity. The knowledge about the high species such as mammals, birds, amphibians, reptiles etc... and higher plants may be satisfactory, but the knowledge of lower plants, fungi, invertebrates and micro-organisms etc... is scant.¹¹⁴ At the current pace, it may take several hundred years for scientists to make an inventory of species, before which, many will become extinct from the Earth. Regarding scientific uncertainty, though the CBD gives a working definition of biodiversity as “the variability among living organisms

¹¹¹ The process of creating the Andean community started with the signing of Cartagena Agreement in 1969. This community has its own legislative, executive and judicial bodies, common foreign policy and a free trade zone for its four member states Bolivia, Columbia, Ecuador and Peru, and can be considered a sub-regional grouping of mountain countries in South America. see <http://www.comunidadandina.org/ingles/who.htm> (as of 25.10.2005).

¹¹² Council Decision 96/191/EC of 26 February 1996 concerning the conclusion of the Convention on the Protection of the Alps, see http://www.cipra.org/en/alpenkonvention/Rahmenkonvention_e.pdf (as of 25.10.08).

¹¹³ Draft Framework Convention on the Protection and Sustainable Development of the Carpathians 2003. UN DOC.ECE/CEP/14 (21 May 2003), see also <http://www.carpathianconvention.org/text.htm> (as of 25.10.08).

¹¹⁴ As of now, scientists have basic information about 4300 species of mammals, around 9700 species of birds, about 10,500 species of amphibians and reptiles. They also know about 85-90 percent of 250,000 species of higher plants. See Glowka et. al., *supra* note 13, p. 37.

from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part..." it does not help in setting legal standards, goals and timetables for the conservation or imposition of legal obligations on stakeholders at the local, national, regional or international level, nor does the definition help in anyway whatsoever to remove the scientific uncertainty that exists in the realm of biodiversity today.

Prof. Fred Bosselman, has widely discussed this uncertainty in his highly regarded article "A Dozen Biodiversity Puzzles".¹¹⁵ Biodiversity does not refer to a single number, though discussion of it usually begins with a species count.¹¹⁶ Biologists recognize that biodiversity is an inherently multi-dimensional idea that cannot be simplified into a single formula. Besides the number, diversity of populations within species, diversity of species within a functional group, and diversity of functional groups within an ecosystem are equally important.¹¹⁷ Arguing that the species are not monolithic collections of indistinguishable units; and that genetic diversity within populations play a vital role in establishing the resilience of ecosystem and its ability to provide goods and services, scientists are of the view that biodiversity is a picture whose intricacies defy simple description.¹¹⁸ Environmentalists and scientists are yet to find answers of many puzzles that relate to biodiversity. Existing scientific knowledge also does not definitively guide policy makers or give conclusive answers about the desirability of species on the basis of their present function and future need¹¹⁹ or factors such as genetic composition,¹²⁰ speciation¹²¹ or particular hidden traits, evolutionary history [lineage] or phylogenetics,¹²² morphology,¹²³ purity, endemism, dispersal capacity, genetic distinctiveness,¹²⁴ etc... Scientists are generally in agreement that the high degree of genetic variability enhances a species' adaptability to changing environments,¹²⁵ but there exists uncertainty as to the degree of variability that should be treated as a norm, or the types of species to which it is relevant to.¹²⁶ Similarly, there is no consensus on whether checking the present trend of biodiversity loss is

¹¹⁵ Fred Bosselman, *A Dozen Biodiversity Puzzles* 12 N.Y.U. ENVTL. L.J. 364-406 (2004); See also Edith Brown Weiss et. al. INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 858-868 (Wolters Kluwer, 2007).

¹¹⁶ *Id.* citing Andy Purvis and Andy Hector, 405 Nature 212 (2000) at fn 35.

¹¹⁷ *Id.* p. 375.

¹¹⁸ Quoting Princeton University Biologist Simon A Levin, *id.* at p 376 and fn 36.

¹¹⁹ On the basis of dominant functions, species are identified as focal species (species having key, broad-scale ecosystem-level effects - it encompasses a number of categories called "umbrella", "indicator" and "key stone" species), unique species (species playing a unique role by virtue of having greater or lesser distance of their relationship with most other species), sibling species (organism which appear identical to us but not to themselves) and endemic (any species that is found only in one particular area and not found in other places) or peripheral species (species found in the peripheral range of their original range). Not all the species have the same value. Over the years the focus is also shifting from tall species to small species and micro-organisms which scientists call "infrastructure species". They can also perform the function of ecosystem engineers. See Fred Bosselman *id.* at 402-420.

¹²⁰ Here factors like variation in the genetic composition, appearance, taxonomic categories, and ecological function become important. See Fred Bosselman *id.* p 377 (referring to Richard S. Ostfeld et al at fn44).

¹²¹ This refers to creation of species which is a natural process. Genetic engineering keeps the potential of changing the pace of speciation. See Fred Bosselman *id.* p. 473.

¹²² Phylogenetics is the term for using genetic information to trace the evolutionary paths taken by particular organisms, and to measure the degree to which they share the same genetic material. Modern techniques of molecular biology allow phylogeneticists to trace the ancestry of a species and to measure the degree of genetic differences between members of populations, species and even kingdoms of organisms. Such measurements not only enable biologists to trace the lineage of an organism, but to estimate the time since the species evolved and to map differences among the species on the landscape. The development of phylogenetics is attributed to German biologist Willi Hennig, which some say, has made the Linean system obsolete. See Fred Bosselman *id.* at p 425-426 referring to numerous scientists at fn 317, 318, 319.

¹²³ Basically distinguishes species on the basis of their appearance and reproductive behavior.

¹²⁴ Even though scientists say that genetic distinctiveness would have greater value than populations of a species that are genetically more uniform.

¹²⁵ The lack of adequate genetic diversity results in "inbreeding depression. But with the development of microbiological technology it is now found that many bacteria and other microorganisms reproduce asexually - their offspring are natural clones, genetically identical to their parents. Nevertheless, the genetic diversity among bacteria is greater even than that among insects, which have long been noted for their genetic diversity". See Fred Bosselman *id.* p. 385 and referring to Michael Travisano and others at fn 78, 79.

¹²⁶ Bosselman *id.* p. 391 referring to David Merrel and others at fn 117.

sufficient or efforts should be made to promote new mixtures of species that can better adapt to continuing environmental change. Again, if promotion of the biodiversity should be the goal does it mean that we should allow the evolution of species that are resistant to antibiotics or pesticides or should we intervene at such occurrences? Some conservation biologists see greater merit in protecting the evolutionary process that creates biodiversity rather than the present pattern of biodiversity.¹²⁷ The fact that not only evolution, but also co-evolution is important for genetic variability, the issue of genetic variability within a given species cannot be understood without also studying the other species with which it interacts.¹²⁸

While there are so many uncertainties regarding biodiversity, as have been encapsulated above, the definite aspect of the dynamics is human-induced incremental change in the environment which has affected natural evolution and selection processes. The rapid growth of human populations and their changing patterns of consumption have seriously contributed to habitat loss at an unprecedented pace, leading to increasing extinction rates and decreasing the speciation rate. This needs to be checked if not reversed. As the scientific uncertainties might not be wished away, they need perhaps to be addressed through adaptive management techniques that regularly feed the output of human interventions into the decision making system.

Regarding the lopsided international environment, since the CBD came into existence, its relationship with existing and emergent general international law and the intellectual property right regime under TRIPS has been problematic. The CBD was a visible admission by the international community that historically, the North exploited the South's resources without providing adequate compensation. The CBD was therefore meant to be a crucial step in halting such uncompensated exploitation, and creating a *quid pro quo* arrangement in the sharing of resource and benefits.¹²⁹ But this step did not bring many benefits nor did it bring respite for long. Just after two years, the biodiversity rich developing countries were almost coerced into accepting TRIPS in 1994.¹³⁰ Art 27 of TRIPS allowed patents for any inventions, both products and process in all fields of technology, without discrimination to the place of invention, the field of technology and whether the products are imported or locally produced. This, as is feared, virtually nullified what the developing countries got from the CBD, which recognized the sovereign rights of states over biological resources and their right to benefits from the use of biological resources through a regulated regime of access to genetic resources, benefit sharing,¹³¹ technology transfers,¹³² the sharing of information and participation in research etc.¹³³

¹²⁷ Bosselman *Id.*, p. 429 referring to Kaneko & Yomo and others at fn 353.

¹²⁸ For example, flowering plants have evolved in tandem with the insects and birds that pollinate them. Parasitologists study how microbes and larger animals and plants join in unique adaptations to environmental conditions See Fred Bosselman *Id.*, p. 389 (citing Tom Wakeford and others at fn 102, 103 and 104).

¹²⁹ Edgar J Asbey and Jill Kempenaar, *Biodiversity Prospecting: Fulfilling the Mandate of the Biodiversity Convention* 28 VAND. J. TRANSNAT'L L. 703, 716 (Oct 1995).

¹³⁰ Chetan Gulati, "The 'Tragedy of the Commons' in Plant Genetic Resources: The Need for a New International Regime Centered Around International Biotechnology Patent Office" 4 YALE H.R. & DEV. L.J. 63, 72 (2001). See also Laurence R. Helfer, Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking 29 YALE J. INT'L L. 1, 4 (2004) stating... "revisionist readings of TRIPS' negotiating history now stress the power-based bargaining strategies that industrialized countries employed to coerce developing states into agreeing to treaty terms about which they had little understanding, let alone meaningful input."

¹³¹ CBD Art 15 Today, not much is heard about the agreement on access and benefit sharing. But on the other, the distribution of patents gives an indication of how the IPR regime supported by the TRIPS is lopsided. Of some 25,000 biotechnological patents granted throughout the world between 1990 and 1995, only about 6 percent originated outside the US, Japan, and the European Union. See Edgar Shane Mulligan and Peter Stoett, *A Global Bio-Prospecting Regime*, INTERNATIONAL JOURNAL, 224, 238 (Spring 2000).

¹³² CBD Art 16.

¹³³ CBD Art 19.

The developing countries on their part are yet to capitalize on the limited opportunities offered by the CBD regime and come forward with collective plans and programs for sustainable use of bio-resources and associated traditional knowledge.

8. Way Forward

While concerted global scientific and technological initiatives can reduce some of the uncertainties discussed above and a non-partisan approach by the global community can overcome the hurdle created by stilted international law affecting the conservation and sustainable use of bio-diversity, a separate and focused effort with a multi-sectoral partnership of government, resource managers, civil society organizations, indigenous people and the local community is required to change the spiraling environmental and livelihood challenges in the mountains.

As can be seen, the uncertainties emanating from the lack of scientific data and the adverse effects of the unfair legal regime are more pronounced in the case of mountains. It is only recently that infrastructure began to be created for recording various data on the ecology, economy and biodiversity dimensions of the mountains. While one can not deny the importance of data creation, or the creation of the new tools and approaches and strategies, what seems to be lacking is the bold approach of 'taking people first'. Unless the peoples' problems such as poverty, dispossession, discrimination, neglect, injustice, social fragmentation and encroachment of resources are addressed, sustainable development remains a lofty dream.

Discussions on biodiversity and other environmental issues on mountains still implicitly treat mountain people as part of the problem and hence consider them as objects of development. Mountain environments would have been arguably much worse had there been no people in the mountains contributing engineering marvels for centuries in maintaining slope stability in the form of terraced-farming, gully control, creating small farmers' canals and other similar technological enterprises. Further these people kept in-depth knowledge about the local environment and its outputs in the form of food, fodder, medicine etc. Therefore, interventionist measures such as the internalization of costs and benefits in the planning, promotion of tourism, creation of parks and reserves have the likelihood of only partially addressing the problem. The policy makers involved in these areas so far, look at the mountains from the base and not from the saddle or the summit, from where the world looks entirely different. Unless the local people's perspective is involved, the ownership of such initiatives will remain wanting. Further, time has now come to account in detail and pay for the ecosystem service, the mountains and its people have offered free of cost for generations. The creation of "peace parks" without digging up the root causes of conflict and continually overlooking the continuing dispossession of the people, at best portrays the picture of a quack trying to cure a terminal disease. While there is a need to make the concerned governments more responsible and accountable to their own people it must be acknowledged that many mountain areas or their biodiversity have regional expanse. The regional policies and management initiatives, exchanges of information, the collective resolve in conservation and the sustainable use of the bio-resources keeps alive the promise of the rejuvenation of environmental, social and cultural livelihood of the mountainous areas. For this, the CBD has immense potential in creating financial and other resources. Resolution of the unresolved issues in the CBD, therefore, seems a logical expectation.

Currently, the countries of the technology rich North and bio-rich South seem to be interacting in at least three forums for the resolution of the conflict between the CBD and the IPR regime, the most vexing issue of the regime so far perceived:

- Under the CBD institutional regime, two working groups: one on access to genetic resources and benefit sharing (ABS), and the other on Art 8(j) about traditional knowledge are currently working.¹³⁴ The Working Group on ABS was given the responsibility of international regime building as per the recommendation of the World Summit on Sustainable Development which mandated it to “elaborate and negotiate an international regime on ABS with the collaboration of the Working Group on Art 8(j).”¹³⁵
- Under the WTO through the Doha Declaration (para 19), which called for looking “at the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity, the protection of traditional knowledge and folklore”. The TRIPS Council is now collecting and collating submissions from countries on the desirability and content of the amendment of Art 27.3 (b) of the TRIPS or other provisions and trying to evolve a consensus on the issue.¹³⁶
- Besides the above, the Conference of the Parties of the CBD also asked the World Intellectual Property Organization (WIPO) to examine issues regarding the interrelationship between the CBD and IPRs.¹³⁷ Accordingly, the WIPO General Assembly decided on a process to respond to the COP invitation. Currently discussion is going on at an appropriate forum within the WIPO on the issue.¹³⁸ Besides, the IGC of the WIPO is also developing Core Principles and Policies on TK and TCE. It is also working on a draft on Substantive Patent Law Treaty (SPLT).

Given the polemic relationship that has existed for over a decade now between the technology rich developed countries and biodiversity-rich developing countries on issues such as access to biological resources, benefit sharing, prevention of bio-piracy, technology transfers and the IPR, it will be naive to expect easy answers agreeable to all. However, much regarding the resolve of the world community in checking biodiversity loss also depends on the resolution of these contentious issues.

¹³⁴ The Open-ended Inter-sessional Working Group Art 8(j) was established by COP V/5. Similarly, the Ad Hoc Open ended Working Group on Access was established by COP v/26.

¹³⁵ See World Summit on Sustainable Development, Plan of Implementation, para 44(o) and also see COP VII/29 which endorsed the mandate from WSSD.

¹³⁶ See TRIPS: Reviews, Article 27.3(b) and related issues Background and current situation at http://www.wto.org/english/tratop_e/trips_e/art27_3b_background (as of 13.05.05).

¹³⁷ The COP VII/19 asked the WIPO to “examine, and where appropriate address, taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the CBD, issues regarding the interrelation of access to genetic resources and disclosure requirements in the intellectual property rights applications, including, *inter alia*:

- i. Options for model provisions on proposed disclosure requirements;
- ii. Practical options for intellectual property rights application procedures with regard to the triggers of disclosure requirements;
- iii. Options for incentive measures for applications;

An identification of the implications for the functioning of disclosure requirements in various WIPO administered treaties. There are two such treaties: Patent Cooperation Treaty, and Patent Law Treaty.

¹³⁸ Now after the member countries submitted their opinion and also gave their views on the Draft Report prepared by the Secretariat, the WIPO Ad Hoc Intergovernmental meeting on Genetic Resources and Disclosure requirement at its meeting in Geneva June 3, 2005 was supposed to discuss the draft and prepare a further revised draft and submit to the September 2005 General Assembly of the WIPO. But this issue does not seem to be in the Agenda of the WIPO. See WIPO/IP/GR/05/3 May 12, 2005, p 3.

Dispute Resolution Mechanism Under The WTO: A Bird's Eye View

- Dr. Trilochan Upreti*

Abstract

The WTO is an organization that facilitates international trade. It came into existence in 1995 and is the direct successor of the General Agreement on Tariffs and Trade. The difference between these two regimes is that the WTO provides enforcement mechanisms such as the Dispute Resolution Mechanism, which the author discusses below. As Nepal acceded to the WTO in 2004, these mechanisms will govern all future disputes within WTO Agreements that Nepal finds itself embroiled in. In this article, the author provides a comprehensive overview of the DSU, discusses its scope, outlines the types of possible complaints and analyses the entire range of remedies available. He argues that stronger enforcement mechanisms of the WTO are a tremendous step forward in international trade policy, however the ongoing Doha Round negotiations should consider improving the DSU.

1. Introduction

The creation of an effective Dispute Settlement System (DSS) to settle disputes between members of the World Trade Organization (WTO) can be cited as one of the most remarkable achievements of The Uruguay Round of trade negotiations. DSS is indeed the central pillar of the multilateral trading system. Without the DSS, the rule-based system would be less effective because rules would not be enforceable. The WTO procedure underscores the rule of law, making the trading system more secure and predictable. It is based on the philosophy of force of argument and not argument of force.¹ It is worthy to note that the DSS is a central element in guaranteeing security and predictability in the multilateral trading regime².

Prompt settlement of disputes is undoubtedly essential to the effective functioning of the WTO. A review of the Dispute Settlement Understanding (DSU)³ suggests that the priority is to settle disputes in an equitable, fast, effective and mutually acceptable fashion and not to pass judgment. The DSU sets forth a comprehensive statement of dispute settlement rules and while it builds on past practices, it makes several fundamental changes to the operation of the DSS. It regulates dispute settlement under all covered Multilateral Trade Agreements, although under some agreements special rules and procedures are applicable.⁴

Through the DSU, members have agreed that should they believe fellow members are in violation of trade rules, they will use the DSS instead of taking unilateral action and abide by the

* Secretary, Ministry of Law, Justice and Parliamentary Affairs.

¹ World Trade Organization, Understanding the World Trade Organization, 2005, Geneva.

² (Article 3.2 of the Dispute Settlement Understanding (DSU); It is formally known as the Understanding on Rules and Procedures Governing the Settlement of Disputes, which is Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization.

³ The full text of the Dispute Settlement Understanding is available at <http://www.wto.org/wto/dispute/dsu.htm> (visited on 24th July 2008).

⁴ Annex 2 to the DSU lists the special or additional dispute settlement rules and procedures. There are special rules particularly under the Anti-dumping and Subsidies Agreements.

agreed procedures and respective judgments. Under the WTO regime, a dispute arises when one country adopts a trade policy or takes some action that fellow WTO members consider to be breaking WTO agreements. As a matter of fact, the WTO's strengthened dispute resolution mechanism was designed to have the authority to tread the fine line between national prerogatives and unacceptable trade restrictions.⁵

2. DSU: A More Structured Process

Under the old General Agreement on Tariffs and Trade (GATT), procedures for settling disputes were ineffective and time consuming. Even a single nation, including the respondent, could effectively block or delay every stage of the dispute resolution process. The old GATT had no mechanism for reviewing legal issues reported by panels. When a panel issued a report, a member country was able to block its adoption by the GATT Council. Even though a report was adopted by the Council, no guarantee was provided by the GATT to ensure compliance by the respondent or payment of compensation to the complainant.

The principal complaints about the old GATT dispute system include: disuse; delays in the establishment of panels; delays in appointing panel members; delays in the completion of panel reports; uncertain quality and neutrality of panelists and panel reports; blocked panel reports; and non-implementation of panel reports.⁶

Bearing in mind these weaknesses, the DSU has introduced a more structured process with more clearly defined procedural stages. It sets greater discipline for the length of time a case should take to be settled. It could be described as tending to uphold rule-oriented rather than power-oriented techniques for the peaceful settlement of international disputes.⁷ If a case runs the full course to a first ruling, it should not normally take more than one year and 15 months if the case is appealed. It is important to note that the agreed time limits are flexible and when a case is considered urgent, for instance perishable goods are involved, the process is accelerated as required. It also establishes an appeal system to standardize the interpretation of specific clauses of agreements⁸.

Significantly, the DSU, which subjects all WTO members to its jurisdiction, makes it impossible for the losing party to block the adoption of a ruling. Unlike the old GATT procedure, rulings are automatically adopted unless there is a consensus to reject a ruling. The DSS under the DSU is therefore, widely considered to be a bulwark against unilateralism and an endorsement of a rules-based multilateral trading system over a power-oriented system.

⁵ Tracy M. Abels *The World Trade Organization's First Test: The United States-Japan Auto Dispute* 44 UCLA LAW REVIEW 503 (1996).

⁶ These problems were epitomized by the so-called DISC case, involving an EC challenge to a US tax law and a counter-challenge by the US against the tax rules of several European countries. Over a year elapsed between the start of consultations and the decision to establish a panel, and roughly two and one-half years passed prior to the selection of members. While the panel reports were issued promptly, their quality and content were severely criticized and they lingered on the Council agenda for several years before action was finally taken. See John H. Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INTL. L. 747 (1978).

⁷ For an elaborated analysis as to these techniques, See John H. Jackson, *THE WORLD TRADING SYSTEM* (1989), pp 85-88.

⁸ Rubenstein, Kim and Schultz, Jenny, *Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO* 11 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 278 (1996).

3. General Principles Underlying the DSU

Various general principles redefined by the DSU can be enumerated as follows:

- (1) Dispute settlement is a central element in providing security and predictability in the multilateral trading regime.
- (2) Dispute settlement cannot add to or diminish the rights and obligations provided in the covered agreements.
- (3) Focus is on the maintenance of a proper balance between the rights and obligations of members, which is in reality conciliation.
- (4) Panels should adopt a positive approach to any dispute.
- (5) A solution that is mutually acceptable to the parties is preferred.
- (6) The most preferred remedy is to secure the withdrawal of the measure concerned. Therefore compensation should be resorted to only if the immediate withdrawal of a measure is impracticable.

3.1 How long to settle a dispute?

The periods shown below are approximations for each stage of a dispute settlement procedure and are target figures since the DSU is flexible. Moreover, members can settle their disputes by themselves at any stage.

60 days	consultations, mediation, etc.
45 days	panel set up and panelists appointed
6 months	final panel report to parties
3 weeks	final panel report to WTO members
60 days	DSB adopts report (if no appeal)
Total = 1 year (without appeal)	
60-90 days	appeals report
30 days	DSB adopts appeals report
Total = 1 year 3 months (with appeal)	

4. Functions and Objectives of DSS

A review of the DSU shows that the DSS attempts to perform and achieve various functions and objectives. These are discussed below.

4.1 Providing Security and Predictability to Multilateral Trading System

A central objective of the DSS is to provide security and predictability to the multilateral trading system.⁹ The aim of the DSU is to provide a fast, efficient, dependable and rule-oriented system to resolve disputes. By reinforcing the rule of law, the DSS makes the trading system more secure and predictable. Where non-compliance with the WTO Agreement has been alleged by a member, it provides for a relatively rapid resolution to the matter through an independent ruling that is required to be implemented promptly.

⁹ Article 3.2 of the DSU.

4.2 Preserving Rights And Obligations Of Members

Typically, a dispute arises when one member adopts a trade policy measure that the other member considers to be inconsistent with WTO obligations. In such a case, the other member is entitled to invoke the DSU to challenge that measure. If the parties to a dispute fail to reach a mutually agreed solution, the complainant is guaranteed a rules-based procedure in which the merits of its claims will be examined by an independent body viz. panels and the Appellate Body. If the complainant prevails, the desired outcome is to secure the withdrawal of the inconsistent measure. Compensation and countermeasures are available only as secondary and temporary responses to a contravention of the WTO Agreement.¹⁰

Thus, the DSS provides a mechanism through which members can ensure that their rights can be enforced. This system is equally important from the perspective of the respondent whose trade activities are under challenge, since it provides a forum for the respondent to defend themselves. In this way, the DSS serves to preserve the members' rights and obligations under the WTO Agreement. The rulings are intended to reflect and correctly apply the rights and obligations as set out in the WTO Agreement. They must not change the WTO law that is applicable between the parties.¹¹

4.3 Clarification of Rights and Obligations Through Interpretation

The precise scope of the rights and obligations contained in the WTO Agreement is not always evident from a mere reading of the legal texts. Pertinent provisions often require an interpretation for a various reasons. First, these provisions have been drafted in general terms so as to be of general applicability. Second, various legal provisions might lack clarity because they are compromise formulations resulting from multilateral negotiations. In view of this fact, the DSU expressly states that the DSS is intended to clarify the provisions of the WTO Agreement in accordance with the customary rules of interpretation of public international law.¹² The DSU, therefore, recognizes the need to clarify WTO rules.¹³

Pertaining to the methods of interpretation, the DSU refers to the customary rules of interpretation of public international law.¹⁴ Many such rules can be found in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties. While the reference in Article 3.2 of the DSU does not refer directly to these Articles, the Appellate Body has ruled that they can serve as a point of reference for discerning the applicable customary rules.¹⁵

4.4 Mutually Agreed Solution as a Preferred Solution

The DSS is intended to uphold the rights of aggrieved members and to clarify the scope of the WTO rights and obligations. However, the primary objective of the system is not to make rulings or to develop jurisprudence. Rather, like other judicial systems, the priority is to settle disputes,

¹⁰ Article 3.7 of the DSU.

¹¹ Articles 3.2 and 19.2 of the DSU.

¹² The general rule of interpretation as provided in Article 31 of the DSU focuses on the interpretation of a treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. A special meaning is to be given to a term if it is established that the parties so intended.

¹³ In addition, Article 17.6 of the DSU implicitly recognizes that panels may develop legal interpretations. The "exclusive authority" of Article IX:2 of the WTO Agreement must therefore be understood as the possibility to adopt "authoritative" interpretations that are of general validity for all WTO Members unlike interpretations by panels and the Appellate Body, which are applicable only to the parties and to the subject matter of a specific dispute. Accordingly, the DSU mandate to clarify WTO rules is without prejudice to the rights of Members to seek authoritative interpretations under Article IX:2 of the WTO Agreement (Article 3.9 of the DSU).

¹⁴ Article 3.2 of the DSU.

¹⁵ APPELLATE BODY REPORT, Japan-Alcoholic Beverages II DSR 1996: I, 97 at p. 104.

preferably through a mutually agreed solution that is consistent with the WTO Agreement¹⁶. Adjudication is to be used only when the parties cannot work out a mutually agreed solution. By requiring formal consultations as the first stage of any dispute, the DSU provides a framework in which the parties to a dispute must always at least attempt to negotiate a settlement. Even when the case has progressed to the stage of adjudication, a bilateral settlement always remains possible.¹⁷

4.5 Prompt Settlement of Disputes

Justice must not only provide an equitable outcome but must also be swift. Accordingly, the DSU sets out in considerable detail the procedures and corresponding deadlines to be followed in resolving disputes. The detailed procedures are designed to achieve efficiency, including the right of a complainant to move forward with a complaint even in the absence of agreement by the respondent. If a case is adjudicated, it should normally take no more than one year for a panel ruling and no more than 16 months for a case to be appealed. These timelines might seem longer. However, one must note that disputes in the WTO are usually very complex in both factual and legal terms. The parties need time to prepare factual and legal arguments and to respond to the arguments put forward by their opponent. The Panel and the Appellate Body need to consider all of the evidence and arguments, hear experts and provide detailed reasoning in support of their conclusions.

4.6 Prohibition Against Unilateral Determinations

WTO members have agreed to use the multilateral system for settling their trade disputes rather than resorting to unilateral action¹⁸. That means abiding by the agreed procedures and respecting the rulings and not taking the law into their own hands. The DSU mandates the use of a multilateral system for disputes settlement between WTO members when they seek redress under the WTO Agreement.¹⁹ This applies to situations in which a member believes that another member violates or otherwise nullifies or impairs benefits under the WTO Agreement.

Whatever further actions the complaining Member takes, it may only take them based on the findings of an adopted panel or Appellate Body report or arbitration award. The Member concerned must also respect the procedures foreseen in the DSU for determination of the implementation time and also the imposition of countermeasures only on the basis of an authorization by the DSB. This excludes unilateral actions such as those described above.

4.7 Exclusive Jurisdiction and Compulsory Nature

By mandating recourse to the DSS for the settlement of disputes, Article 23 of the DSU not only excludes unilateral action but also precludes the use of other forums for the resolution of a WTO-related dispute. Use of the DSS is compulsory. All members are subject to it for all disputes arising under the WTO Agreement, as they have all signed and ratified the WTO Agreement as a single undertaking²⁰ of which the DSU is a part. Therefore, unlike other systems of international dispute resolution, there is no need for the parties to a dispute to accept the jurisdiction of the WTO DSS

¹⁶ Article 3.7 of the DSU.

¹⁷ Articles 3.7 and 11 of the DSU.

¹⁸ Article 23 of the DSU.

¹⁹ Article 23.1 of the DSU.

²⁰ A single undertaking means that the WTO Agreement had to be signed in its totality (except for Agreements in Annex 4 known as plurilateral agreements). Signatories were not allowed to sign only individual parts of the entire package.

in a separate declaration or agreement. Consequently, every member enjoys assured access to the dispute settlement system and no accused Member may escape that jurisdiction.

5. Participants in the DSS

5.1 Parties and Third Parties

The only participants in the DSS are the member governments of the WTO, which can take part either as parties or as third parties. The WTO Secretariat, WTO observer countries, other international organizations and regional or local governments are not entitled to initiate dispute settlement proceedings in the WTO.

5.2 No Non-Governmental Actors

Since only WTO member governments can bring disputes, it follows that private individuals or companies do not have direct access to the DSS, even if they may often be the ones (as exporters or importers) most affected by the measures that are allegedly in violation of the WTO Agreement. The same is true of other NGOs with a general interest in a matter before the DSS. They, too, cannot initiate WTO dispute settlement proceedings. Of course, these organizations can, and often do, exert influence or even pressure on a member government with respect to the triggering of a dispute.

There are divergent views among members on whether non-governmental organizations may play a role in WTO dispute settlement proceedings. For example, it is debatable whether NGOs should be able to file *amicus curiae* submissions with WTO dispute settlement bodies. According to WTO jurisprudence, Panels and the Appellate Body have the discretion to accept or reject these submissions, but are not obliged to consider them.

6. Substantive Scope of DSS

6.1 The Covered Agreements

The DSS applies to all disputes brought under the WTO Agreements listed in Appendix 1 of the DSU. In the DSU, these agreements are referred to as the “covered agreements”. The DSU itself and the WTO Agreement are also listed as covered agreements. In many cases brought to the DSS the complainant invokes provisions belonging to more than one covered agreement.

6.2 A Single Set of Rules and Procedures

As the DSU applies to all these covered agreements, the DSU provides for a coherent and integrated DSS. It puts an end to the former “*GATT à la carte*”, where each agreement not only had a different set of signatories but also separate dispute settlement rules. Subject to certain exceptions, the DSU is applicable in a uniform manner to disputes under all the WTO Agreements. In some instances, there are so-called special and additional rules and procedures on dispute settlement contained in the covered agreements. These are specific rules and procedures designed to deal with the particularities of disputes under a specific covered agreement. They take precedence over the rules in the DSU to the extent that there is a difference between the rules and procedures of the DSU and the special and additional rules and procedures.²¹ Such a difference exists only where

²¹ Article 1.2 of the DSU.

the provisions of the DSU and the special rules of a covered agreement cannot be read as complementing each other because they are mutually inconsistent.²²

6.3 Special and Differential Treatment to Developing Members

The DSU also addresses the particular status of developing country members although the approach taken differs from that of the other covered agreements. Unlike those agreements, which set out the members' substantive trade obligations, the DSU primarily specifies the procedures under which such substantive obligations can be enforced. Accordingly, in the DSS, special and differential treatment²³ does not take the form of reducing obligations, providing enhanced substantive rights or granting transition periods. Rather, it takes a procedural form, by making available to developing country members additional or privileged procedures, and longer or accelerated deadlines.

6.4 Special Procedures for Least Developed Countries (LDCS)

A review of the DSU reveals that some special procedures are envisaged, which are applicable at all stages to the determination of the causes of a dispute and of dispute settlement procedures involving a LDC member. Such provisions can be summarized as follows²⁴:

- (a) At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a LDC member, particular consideration is to be given to the special situation of such member.
- (b) Members are to exercise due restraint in raising matters under the DSU involving a LDC member.
- (c) Where nullification or impairment is found to result from a measure taken by a LDC member, complaining parties are to exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations under the DSU.
- (d) In dispute settlement cases involving a LDC member, where a satisfactory solution is not found upon consultations, the Director General or Chairman of DSB must, on request by such member, offer their good offices, conciliation and mediation so as to assist parties to settle the dispute prior to making a request for a panel.

7. Types of Complaints Under GATT

The WTO DSS provides for three kinds of complaints namely violation complaints, non-violation complaints and situation complaints. A review of Article XIII:1 of GATT 1994²⁵ shows that nullification or impairment of benefits as a result of the failure of another party to uphold its obligation or the application by another party of any measure whether or not it is conflicting or the existence of any other situation could trigger the DSS.

²² APPELLATE BODY REPORT, *Guatemala-Cement I*, paras. 65 and 66.

²³ "Special and differential treatment" is a technical term used throughout the WTO Agreement to designate those provisions that are applicable only to developing country members.

²⁴ Article 24 of the DSU.

²⁵ Article XXIII:1 of GATT 1994 states: 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of a. the failure of another contracting party to carry out its obligations under this Agreement, or b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or c. the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

7.1 Violation Complaint

The first and the most common complaint is the so-called 'violation complaint'.²⁶ This complaint requires "nullification or impairment of a benefit" as a result of the "the failure of another member to carry out its obligations under the GATT. This "failure to carry out obligations" is just a different way of referring to a legal inconsistency with, or violation of the GATT. There also needs to be "nullification or impairment" as a result of the alleged legal inconsistency.

A violation complaint will succeed when the respondent fails to carry out its obligations under GATT or the other covered agreements, and this results directly or indirectly in nullification or impairment of a benefit accruing to the complainant under such agreements. If it can be established before a Panel and the Appellate Body that these two conditions are satisfied, the complainant will win the dispute. In practice, the first of these two conditions, 'violation', plays a much more important role than the second condition, nullification or impairment of a benefit. This is due to the fact that nullification or impairment is presumed to exist whenever a violation has been established. This presumption evolved in GATT jurisprudence²⁷ and is today codified in Article 3.8 of the DSU, which provision is concerned only with violation complaints when there is an infringement.

7.2 Non-Violation Complaint

The second type of complaint is the so-called 'non-violation complaint'.²⁸ A non-violation complaint may be used to challenge any measure applied by another member, even if it does not conflict with the GATT, provided that it results in "nullification or impairment of a benefit". For a non-violation complaint to be successful it should meet three conditions²⁹ namely: the application of a measure by a Member; the existence of a benefit accruing under the applicable agreement; and the nullification or impairment of a benefit as a result of the application of the measure. It is worthy to note that there have been few such complaints both under GATT 1947 and during the WTO regime.

Then, a question does arise: Why should there be a remedy against actions that are not inconsistent with the WTO Agreement? The reason could be that an international trade agreement such as the WTO Agreement can never be a complete set of rules without gaps. As a result, it is possible for members to take measures that comply with the letter of the agreement, but nevertheless frustrate one of its objectives or undermine trade commitments contained in the agreement. The non-violation complaint provides for a means to redress such imbalances. Again, it could be taken as a tool to encourage members to make tariff concessions.

It would, however, be wrong to believe that the non-violation complaint has a wide scope of application and is suitable to address all sorts of otherwise consistent measures. Panels and the Appellate Body have stated that the Article XXIII:1(b) remedy should be approached with caution and should remain an exceptional remedy.³⁰ It is also worthy to note that non-violation cases could pose a troublesome question since judgments would be law making rather than law applying, which runs counter to the basic tenets of the DSU.

²⁶ GATT 1994, Article XXIII:1(a).

²⁷ PANEL REPORT, Uruguay-Recourse to Article XXIII, para. 15.

²⁸ Article XXIII:1(b) of GATT 1994.

²⁹ PANEL REPORT, EC-Asbestos, para. 8.283.

³⁰ PANEL REPORT, Japan-Film, para. 10.36.

7.3 Situation Complaint

The third type of complaint is the so-called 'situation complaint' referred to in Article XXIII:1(c) of the GATT. It could literally cover any situation whatsoever, as long as it results in nullification or impairment of a benefit. However, although a few such situation complaints have been raised under the old GATT, none of them have ever resulted in a Panel Report. It is interesting to note that in the WTO, Article XXIII:1(c) of GATT 1994 has so far not been invoked by any complainant.

Notably, there is no reverse consensus rule applying to the adoption of the panel report and the authorization of the suspension of obligations in the event of non-implementation of rulings with respect to situation complaints.³¹ In this case, the decision of 12 April 1989 is applicable, which means, *inter alia*, that the reverse consensus rule does not apply to situation complaints.

In sum, given the admissibility of non-violation and situation complaints, the scope of the WTO DSS is broader than that of other international dispute settlement systems, which are confined to adjudicating only violations of agreements. Simultaneously, the WTO DSS is narrower than those other systems in the sense that a violation must also result in nullification or impairment. This particularity of the DSS reflects its rationale to maintain the negotiated balance of concessions and benefits between members.

7.4 Types of Complaints Under GATS

Importantly, the General Agreement on Trade in Services (GATS) provides for only two types of complaints, namely the violation complaint and the non-violation complaint. There is no situation complaint and the GATT 1994 clause referring to the scenario that the attainment of any objective of the Agreement is being impeded also does not exist.

8. Dispute Settlement Body (DSB) Mechanism

8.1 Functions and Composition

The General Council discharges its responsibilities under the DSU through the DSB.³² Like the General Council, the DSB is composed of representatives of all Members. The DSB is responsible for administering the DSU, which includes overseeing the entire dispute settlement process. The DSB³³ has the authority to establish Panels, adopt Panel and Appellate Body reports, provide surveillance of the implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements.

The DSB meets as often as is necessary to adhere to the time-frames provided for in the DSU. In practice, the DSB usually has one regular meeting per month. When a member so requests, the Director-General convenes additional special meetings. The staff of the WTO Secretariat provides administrative support to the DSB.³⁴

³¹ See Article 26.2 of the DSU.

³² WTO Agreement, Article IV: 3.

³³ DSB is simply a special meeting of the General Council in its dispute settlement role and is composed of all General Council Members present at the DSB meeting.

³⁴ Article 27.1 of the DSU.

8.2 Decision-Making in the DSB

The general rule is for the DSB to take decisions by consensus. However, when the DSB establishes panels, adopts panel and Appellate Body reports and authorizes retaliation, the DSB must approve the decision unless there is a consensus against it. This special decision-making procedure is commonly referred to as "negative" or "reverse" consensus. During the three important stages of the dispute settlement process (establishment, adoption and retaliation), the DSB should automatically decide to take the action ahead, unless there is a consensus not to do so. This means that one sole Member can always prevent this reverse consensus. To do so, the member merely needs to insist on the decision to be approved.³⁵

Unlike under GATT 1947, the DSU provides no opportunity for blockage by individual Members in decision-making on these important matters. Negative consensus applies nowhere else in the WTO decision-making framework other than in the dispute settlement system.

9. Dispute Settlement Process

The key stages in the DSS will now be explained.³⁶ First, the parties must attempt to resolve their differences through consultation.

Second, if that fails, the parties may avail themselves of the good offices, conciliation and mediation services of the WTO.³⁷ Unlike consultation, during which a complainant has the power to force a respondent to reply and consult or face a panel, good offices, conciliation and mediation are undertaken voluntarily if the parties to the dispute so agree. No requirements of form, time, or procedure exist. These informal methods may be used in addition to or in lieu of the panel process as described hereunder.

Third, and in the alternative, if consultations fail to settle a dispute for 60 days after the request for consultations, a panel may be established to hear the dispute. The DSB forms a panel unless there is a consensus not to establish a panel. Thus there is effectively a right to have a panel established. The DSU gives any interested member having a substantial interest in the matter before a panel an opportunity to be heard and make written submissions to the panel.

Fourth, the panel members are selected. Panels are composed of well-qualified individuals, whose governments are not parties to the dispute. Three panelists compose a panel unless the parties agree to have five panelists. The Secretariat proposes nominations for panels that the parties shall not oppose except for compelling reasons. If the parties disagree on the panelists, then upon the request of either party, the Director-General may appoint the panelists.

Fifth, the panel's terms of reference are set. As an innovative step, the DSU provides for standard terms of reference absent any agreement to the contrary. The standard terms are to examine the matter referred to the DSB in the light of the relevant provisions of agreements and make such findings as will assist the DSB in making recommendations or giving rulings.

Sixth, the panel hears the disputing and other interested parties and issues its report. It is to note that panel proceedings are not public. The DSU requires the panel to submit their legal analysis for comment as well. After the expiry of the time set for comments, the panel submits an

³⁵ See Articles 2.4, 6.1, 16.4, 17.14 and 22.6 of the DSU.

³⁶ John H. Jackson et al., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, CASES, MATERIALS AND TEXTS*, 338 (1995).

³⁷ Article 5 of DSU includes provisions on good offices, conciliation and mediation and provides specifically that the Director General of WTO may offer to provide such services in an effort to assist members in resolving disputes.

interim report to the parties. A panel report should normally be issued within six to eight months of the establishment of the panel.

Seventh, the report is considered for adoption by the DSB. The adoption procedure assumes adoption unless there is a consensus against adoption. Unlike the old GATT procedure, the adoption procedure is automatic. Within sixty days of the panel report's circulation amongst the members, the panel report has to be adopted by a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If an appeal is made, the report is not adopted until completion of the appeal.

Eighth, an innovation under the DSU is the possibility of an appeal by any disputing party to the standing Appellate Body and the adoption of its report again by reverse consensus. The Appellate Body, which is composed of seven persons, three of whom serve on any one case, is limited to considering issues of law covered in the panel report and legal interpretations of the panel. Its proceedings are confidential and its reports anonymous. The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel. The appellate proceedings should normally take only 60 days, and in any event not exceeding 90 days.

Ninth, assuming that either the panel report or the Appellate Body report is adopted, the implementation of its recommendation is monitored.

Finally, if the recommendations are not implemented, the possibility of authorizing the withdrawal of concessions is considered.

10. Implementation of Dispositions

The DSU holds that prompt compliance is essential to ensure the effective resolution of disputes for the benefit of all members. Implementation modality under the DSU follows some logical steps.

Firstly, the DSB adopts reports making recommendations and rulings that affect the losing party. In the case of a successful violation complaint, the DSB will require the offender to bring itself into compliance with WTO Law or in the case of a successful non-violation complaint, to make a mutually satisfactory adjustment. Absent such adjustments, the first objective of the DSS is usually to secure the withdrawal of the inconsistent measures.

Secondly, it is the duty of the losing member to inform the DSB at a meeting within 30 days after the adoption of the report, of its intention to implement the recommendations and rulings.

Thirdly, if immediate compliance is not possible, the losing party has a reasonable period of time (RPT) for achieving that compliance. The RPT could be set by the member concerned after it is approved by the DSB, by agreement of the contending parties or absent agreement, by arbitration. Normally the period does not exceed 15 months. The RPT is a grace period granted to the member concerned, during which it may continue to apply these measures without ramifications, for bringing its measures into compliance.

Fourthly, there is continuous surveillance by the DSB. Any member can raise the issue of implementation at any time in the DSB. Unless the DSB decides otherwise, the issue of implementation is placed on the agenda of the DSB six months after the establishment of the RPT. For example, the EC-Bananas III dispute has been on the DSB agenda for years and opened every regular DSB meeting during that time.

Fifthly, there can be a compliance review under Article 21.5 of the DSU. When the parties disagree on whether the losing member has implemented the recommendations and rulings,

either of them can request a panel under Article 21.5. Wherever possible, the DSB is to refer the matter to the individuals serving on the original panel, which is then supposed to decide within 90 days.

11. Non-Implementation

11.1 Negotiations for Mutually Acceptable Compensation

If the implementing member does not fully comply within the RPT, it has to enter into negotiations with the complaining party with a view to agreeing a mutually acceptable compensation.³⁸ This compensation does not mean monetary payment; rather, the respondent is supposed to offer a benefit, for example a tariff reduction, which is equivalent to the benefit which the respondent has nullified or impaired by applying its measure.

The parties to the dispute must agree upon the compensation, which must also be consistent with the covered agreements,³⁹ implying, notably, consistency with the MFN obligation. Therefore, WTO members other than the complainant would also benefit, if compensation is offered e.g. in the form of a tariff reduction.

11.2 Counter Measures by Prevailing Members

If, within 20 days after the expiry of the RPT, the parties have not agreed on satisfactory compensation, the complainant may ask the DSB for permission to impose trade sanctions against the respondent. Technically, this is called suspending concessions or other obligations under the covered agreements.⁴⁰ Concessions are, for example, tariff reduction commitments which members have made in multilateral trade negotiations and are bound to under Article II of GATT 1994. These bound concessions are just one form of WTO obligations. Suspending obligations in relation to another member requires a previous authorization of the DSB. The complainant is thus allowed to impose countermeasures that would otherwise be inconsistent with the WTO Agreement in response to a violation or to non-violation nullification or impairment. This is also informally called retaliation or sanctions. Such suspension of obligations takes place on a discriminatory basis only against the member that failed to implement the changes.

Retaliation is the final and most serious consequence a non-implementing member faces in the WTO DSS.⁴¹ Although retaliation requires prior approval of the DSB, the countermeasures are applied selectively by one member against another. However, such authorization has only been granted once⁴². Attempts to obtain such authorization failed because of the consensus rule, with the targeting country opposing the authorization. Again, retaliation shall be first limited to the same sector. If the complaining party considers the retaliation insufficient, it may seek retaliation across sectors. Moreover, the level of suspension of obligations authorized by the DSB must be equivalent to the level of nullification or impairment.⁴³

Now, under the DSU, suspension is to be authorized automatically in the absence of implementation or compensation absent a consensus in the DSB to the contrary within thirty

³⁸ Article 22.2 of the DSU.

³⁹ Article 22.1 of the DSU.

⁴⁰ Article 22.2 of the DSU.

⁴¹ Article 3.7 of the DSU.

⁴² It was in 1995 that the Netherlands was authorized to suspend concessions made to the United States as the result of US quotas on Dutch agricultural products. The Netherlands apparently never utilized the authorization.

⁴³ Article 22.4 of the DSU.

days of the expiry of the RPT. The respondent may object to the level of suspension proposed. The DSB normally recommends the withdrawal of any measure found inconsistent with WTO obligations. Such withdrawal is preferred to compensation or suspension of concessions. Compensation and suspension of concessions are temporary measures to be used when a report is not implemented in a RPT.

11.3 Sequencing

One of the contentious issues arising at the implementation stage is the relationship between Article 21.5 and Article 22.2 of the DSU. The issue concerns which of the two procedures, if any, has priority: the compliance proceeding or the suspension of obligations.

On the one hand, Article 22.6 of the DSU mandates the DSB to grant authorization to suspend obligations within 30 days of the expiry of the RPT. A possible arbitration on the level or form of retaliation must conclude within 60 days after the expiry of the RPT. However, this time is not sufficient to complete the compliance review under Article 21.5 of the DSU (90 days for the panel, plus possible appeal) in order to establish whether there has been full implementation of the DSB recommendations and rulings.

On the other hand, Article 23 prohibits members from deciding unilaterally whether a measure is inconsistent with the covered agreements or whether it nullifies or impairs benefits. This conflict came to a head in the EC-Bananas III dispute. In subsequent cases, the parties have usually reached an ad hoc agreement on the sequencing of procedures under Article 21.5 and Article 22.

12. Arbitration as an Alternative Means Under WTO

Members may seek arbitration within the WTO as an alternative means of dispute settlement in order to solve certain disputes that concern issues that are clearly defined by both parties. Those parties must mutually agree to arbitration and the procedures to be followed. Agreed arbitration must be notified to all members prior to the beginning of the arbitration process. Third parties may become a party to the arbitration only with the agreement of the parties that have agreed to have recourse to arbitration. The parties to the proceeding must agree to abide by the arbitration award. Arbitration awards must be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any relevant point. The DSU provisions on the surveillance of implementation measures and remedies are applicable *mutatis mutandis* to arbitration.

Arbitration is often agreed to in two situations. Firstly, to establish the RPT; and the second is where a party is subject to retaliation and they want to use arbitration to object to the level or nature of the suspension of obligations. These two forms of arbitration are thus limited to clarifying very specific questions regarding the process of implementation and they result in decisions that are binding on the parties.

13. WTO DSS in Operation

Over the 13 year period of the DSS's operation, a plethora of cases have been addressed by the WTO's DSB. These include complaints against countries with economies as small as Guatemala and as large as the European Union. Such complaints have also targeted countries at vastly different stages of development, including countries like India at one end of the spectrum and the United States and Japan on the other.

A great number of disputes pertaining to agricultural products, alcohol and other beverages, textiles and clothing, animal skin products, electronics, telecommunications, automobiles, aircraft, cement products, chemical products and pharmaceutical products amongst others have been dealt with. It is interesting to note that in the entire forty-seven years of the GATT only some 200 cases were disputed. On the other hand, as at 3 March 2008, the DSB has already handled 373 disputes in only thirteen years of operation.

Due to the wide range of topics addressed by the dispute settlement panels, it is difficult to make generalizations about the overall impact of the DSU. Nevertheless, some trends are evident. The majority of complaints have been brought by developed countries against other developed countries. The next largest category is complaints by developed countries against developing nations. These complaints have dealt with traditional sectors such as trade in goods, manufactured goods and agricultural products, but they have also dealt with more advanced trade issues such as intellectual property rights.

Since WTO agreements cover a wider range of topics, dispute settlement panelists find that many subjects come under their authority. This places WTO dispute panels in a delicate position. On the one hand they must identify cases where nations are failing to comply with WTO agreements; on the other, they must be cautious when making recommendations that reverse the preferences of governments. There has been a tendency to write decisions in a way that minimizes the burden on nations to change their regulations and laws in order to comply with their WTO trade obligations. The panel reports on some important cases that have received much attention (e.g. *European Hormone Case* and *Kodak Fuji Case*) reflect the WTO's tendency to avoid becoming overly involved in the internal regulatory affairs of nations.

14. Conclusion

The WTO DSS has many strengths, but also many weaknesses. Its weaknesses can be summed up as follows. First, despite the deadlines, a full dispute settlement procedure still takes a considerable amount of time, during which the complainant suffers continued economic harm if the challenged measure is indeed inconsistent with WTO obligations. During this period there is no interim relief available to protect the economic and trade interests of the complainant. Secondly, even after prevailing in dispute settlement, a successful complainant will receive no compensation for the harm suffered during the time given to the respondent to implement the ruling. Nor does the "winning party" receive any reimbursement from the other side for its legal expenses. In the event of non-implementation, not all members have the same practical ability to resort to the suspension of obligations. Thirdly, in a few cases, a suspension of concessions has been ineffective in bringing about implementation.

How successful one considers the DSS to have been depends on the benchmark one applies. If one compares the WTO dispute settlement system with the old GATT system, the current system has been far more effective. Moreover, its quasi-judicial and quasi-automatic character enables it to handle more difficult cases. These features also provide greater guarantee for members wishing to defend their rights. Compared with other multilateral systems of dispute resolution in international law, the compulsory nature and the enforcement mechanism of the WTO DSS certainly makes this mechanism a unique one.

Considering the need to make further improvements in the DSU, the Doha Ministerial Declaration mandates negotiations on improvements and clarifications of the DSU. It states that

the negotiations will not be part of the single undertaking i.e. that they will not be tied to the success or failure of the other negotiations mandated by the declaration. The Doha mandate also set a deadline of May 2003. In July 2003, the General Council extended the deadline to May 2004. A further extension was agreed by the General Council in the context of the "July Package" on 1 August 2004 without setting a new deadline.

Currently, several proposals have been made for improvements and clarifications to the DSU. Such proposals are designed, *inter alia*, for enhancing third-party rights; introducing an interim review and remand (referring a case back to a panel) at the appeals stage; clarifying and improving the sequence of procedures at the implementation stage; enhancing compensation; strengthening notification requirements for mutually-agreed solutions; and strengthening special and differential treatment for developing countries at various stages of the proceedings.

The issue of transparency has also attracted active negotiations. Under the DSU, dispute settlement proceedings are confidential. Only the main parties and where appropriate, third parties to a dispute are fully informed. Transparency means opening up the dispute settlement proceedings either to the public (i.e. external transparency) or to WTO members other than those who are already parties to the dispute (i.e. internal transparency). Some developed countries have proposed opening up dispute settlement proceedings, while a number of developing countries have opposed such proposals.

Evolution of Commercial Arbitration in Nepal: Issues and Challenges

– Bed Prasad Uprety*

Abstract

Due to the time delays being experienced in the courts, arbitration has become a popular means for resolving disputes. Below, the author provides an overview of the concept of arbitration and progresses to discuss the various forms of arbitration in Nepal along with the various pieces of legislation that give these arbitrations legal effect. He discusses the advantages and disadvantages of arbitration, some of which have been exposed in the relevant case law, and then presents the challenges faced by the arbitration system in Nepal. An enforceable, efficient, timely and cost-effective arbitration system will undoubtedly assist in the promotion of commerce and economic development.

1. Introduction

“Honest men dread arbitration more than they dread lawsuits.”¹ The notion articulated in this statement is gradually changing, as uncertain and unpredictable commercial disputes need to be efficiently and effectively resolved. The modern business community can not tolerate delays in the settlement of disputes and they are aware of continual delays in the formal judicial system. Accordingly, commercial arbitration is being used as an alternative means of private dispute settlement to provide an expeditious, expert and civilized forum for resolving many differences of opinion which may arise as a normal incident of commercial life. As a result, the concept of commercial arbitration has been growing in Nepal.

“Arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”² The term *commercial arbitration* is used to indicate the settlement of a dispute related to trade, industry and commerce. “The term *commercial* should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to the following transactions: any trade transactions for the supply or exchange of goods or services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreements or concessions; joint ventures and other forms of industrial or business corporations; and carriage of goods or passengers by air, sea, rail or road.”³ Nevertheless, Nepali arbitration law does not define this term.

* The author has an LLM specializing in commercial law and is currently working in the Rautahat District Court, Nepal.

¹ Quoted from Robertson's History in Anthony Walton, RUSSELL ON ARBITRATION, 1 (Stevens & Sons, London, 1979).

² Bryan A. Garner, BLACK'S LAW DICTIONARY (Thomson West, 2005).

³ UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 4 (4), Explanation. This Model law was revised in 2006.

Arbitration is a kind of Alternative Dispute Resolution (ADR) method in the USA but not in the UK. The history of arbitration in England had been associated with the *Arbitration Act, 1697*.⁴ In both jurisdictions, arbitration is known as a voluntary (with the consent of the disputing parties) mechanism created by a written contract. A breach of an original contract by one or both parties or through no fault of either party is a reason to invoke an arbitration clause in the same contract or under a new contract to settle the dispute by consent of the parties. Most importantly, the parties must be willing to decide the dispute under voluntary arbitration. It is a party initiated dispute resolving process and should be treated as an *institutional* and *ad hoc* mechanism. Courts are formal institutions to settle disputes. Arbitration is an informal justice system, though a part of the broader legal system. Basically, it is adopted in commercial disputes. Nevertheless, it can be adopted in any civil dispute whether contractual or not. Sometimes a court will control the arbitration process but it takes on a limited role. Once arbitration is initiated it needs to be completed in a reasonable amount of time. An arbitration award is final and binding for parties but there are some exceptions on its finality provided by statutory provisions regarding legal questions, public interest and public policy. There are some remaining issues and controversies regarding appeals and court intervention after an award has been given. In the formal system, a judge as a neutral third party decides the case. Likewise, in arbitration the dispute is also decided fairly and impartially by a third party who is known as an arbitrator or umpire. However, there are some basic differences between these two methods of dispute settlement.

An arbitrator or umpire is a person who needs to decide the dispute, fairly and neutrally, and his/her decision is known as an award. The neutral role of an arbitrator is recognized by Nepal's law even if the arbitrator is appointed by one party. The duty of an arbitrator is not only towards the disputing parties but also towards the fairness of the arbitration process and the public at large. An award or decision of an arbitrator is final and binding for parties unless the award is not against fairness, the law or public interest and/or public policy. Usually, if an arbitral award is given by fraud, corruption or other undue means it will be void⁵, but Nepal's *Arbitration Act 1999* is silent in this regard. There is no case law in Nepal using public policy and public interest to invalidate an arbitral award due to fraud, corruption or other undue means. But the previous *Arbitration Act 1981* contained specific provisions in these matters to determine the validity of an arbitral award.

Nowadays, civil courts are generally supportive of arbitration but Nepal's court system appears less in line with this notion. They are restricted by legislation not to interfere with the award of the arbitrator. Being an expert, speedy, less costly and flexible procedure, arbitration is very popular in domestic as well as international commercial dispute settlements. Nepal's context is quite different, because it does not have a long history regarding arbitration in the modern sense as a method of commercial dispute resolution, as arbitration was only introduced by the *Arbitration Act 1981* [B.S. 2038]. This act was the first legislation that provided comprehensive provisions governing the entire arbitration process for voluntary arbitrations. Before this act, arbitration provisions were scattered around in different legislation. For example the *Development Board Act 1957* was the first legislation⁶ in which the concept of arbitration was articulated. Before that act, Nepal's indigenous legal system provided other forms of ADR such as mediation and conciliation but not the arbitration known in the modern sense even though the goals were similar.

⁴ Biswadeep Adhikari, *Arbitration: Concept and Application*, 2 NEPCA HALF YEARLY BULLETIN 8 (2055).

⁵ THE UNIFORM ARBITRATION ACT OF USA, Section 12, quoted in, Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, 239 (West Publishing Co, 1992).

⁶ Bal Bahadur Mukhia, *COMPARATIVE JURISPRUDENCE*, 216 (Mrs. Malati Mukhia & Agam Mukhia, Kathmandu, 2004).

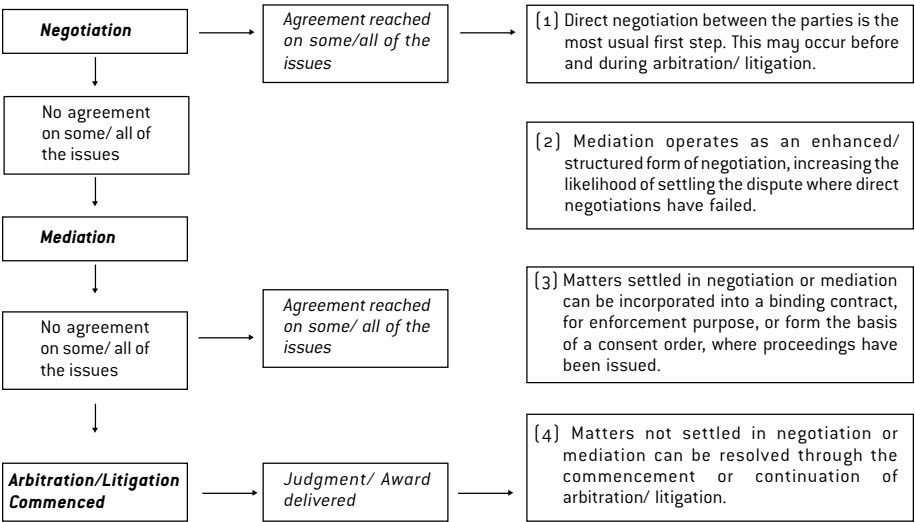
2. Concept

The concept of arbitration can be understood by the following paragraph:

*"It is an alternative mechanism for resolving disputes different from the traditional and established judicial system. It can not be defined etymologically. However, there are certain features usually found in arbitration: the need for an agreement to refer a matter to arbitration; the privacy of the proceedings; adjudication; and the finality of the award. These are the accepted and common principles of arbitration. Especially in commercial disputes, both parties wish for an effective, amicable, inexpensive and expeditious manner to settle civil disputes which is quite impossible in using traditional justice mechanisms due to their working manners, resources and lack of other technical expertise. Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matters in difference between parties."*⁷

Arbitration is an effective method for the settlement of commercial disputes. It is one method of alternate dispute resolution as can be seen below.

ADR flow Chart Model⁸
[This is a Hybrid Processes]



⁷ David St. John Sutton et al., RUSSELL ON ARBITRATION, 3 (Sweet & Maxwell, London, 1997).
⁸ Karl Mackie et. al., COMMERCIAL DISPUTE RESOLUTION, 227 (Butterworths, London, 1995).

It is a process of resolving disputes that arise between two or more parties to an agreement or a contract in which a neutral third party called the arbitrator renders an enforceable decision. All parties of any agreement or contract, who agree to settle the dispute through arbitration, should agree to appoint the arbitrator to whom they submit their dispute for settlement. During the arbitration process there is a possibility that the parties will compromise and the dispute will be solved, but if no such solution is found, the arbitrators can render an award of binding nature.

3. Historical Evolution

Arbitration can be traced back to the system of '*Panchayat*' in Nepal long before the codified judicial system developed. *Panchayat* was an informal tribunal of five gentlemen chosen from among the villagers to render an impartial decision in the settlement of disputes between the members of villages. Since early times the decisions of *Panchayats* were acceptable and binding on the parties. *Panchayat* as private tribunal was a different system of arbitration and was subordinate to a regular court of law.⁹ In the *Lichhavi era*, the *Panchali* which was also known as *Pancha Sava*, was empowered to decide disputes at the local level. This form of dispute settlement mechanism that was practiced for a long period should be considered as the foundation of the concept of arbitration in Nepal's context, but not the same as the modern notion of arbitration. In Nepal, the concept of arbitration in its modern sense was first found in government contracts.¹⁰

The history of the modern notion of commercial arbitration in Nepal is brief. Before the enactment of general legislation on commercial arbitration in 1981, statutory provisions of commercial arbitration were found in a scattered form in different legislation with different purposes. Such a provision first appeared in section 9 of the current *Development Board Act 1957* which provided for the resolution of a dispute under a contract to which the Board is a party.¹¹ This type of arbitration is termed compulsory arbitration. Therefore parties are forced to follow the rules set out in the statute. The objective behind introducing such an arbitral process may be looked at in the context of inviting foreign capital and technology for economic enhancement and fostering development plans and industrialization in the country.¹²

The *Arbitration Act of 1981* was superseded by the *Arbitration Act of 1999* and is the prevailing general law on commercial arbitration. Furthermore, it was made in line with the UNCITRAL Model law. On the basis of this new act, the Supreme Court of Nepal has promulgated the *Arbitration [Court Procedure] Rules, 2002* relating to court procedure in order to promote arbitration in Nepal. Despite the above legal framework promoting and facilitating arbitration in Nepal, there are still many remaining challenges.

⁹ Dr. Bharat B. Karki, *UNCITRAL Model Law on International Commercial Arbitration* (1985) and *Nepalese Arbitration Law*, 15 NEPCA HALF YEARLY BULLETIN 8 (2061).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

4. Kinds of Arbitration

4.1 Ad Hoc Arbitration

Arbitration consisting of only one issue.¹³ Basically, UNCITRAL rules provide for ad hoc arbitration.

4.2 Permanent Arbitration

It happens on an institutional basis. The ICC and in Nepal's context, the NEPCA, are permanent arbitration tribunals. But, currently, NEPCA is not recognized by law as a permanent arbitration institution.

4.3 Compulsory Arbitration

Arbitration is required by law or forced by law on the parties.¹⁴ This is also termed *statutory arbitration*. Government contracts are held on the basis of a statutory arbitration clause which can be classified in this category. Section 13 of *Privatization Act, 1994* and Section 7 of the *Foreign Investment and Technology Transfer Act (FITTA), 1992* are some examples of laws that require disputes in certain matters to be compulsorily referred to arbitration and to be decided under arbitration law.

4.4 Judicial Arbitration

Judicial arbitration is court-referred arbitration that is final unless a party objects to the award.¹⁵ Section 3(2) of *Arbitration Act, 1999* provides for this kind of court-referred arbitration.

4.5 Voluntary Arbitration

Voluntary arbitration is arbitration by the agreement of the parties.¹⁶ Section 3(1) of *Arbitration Act, 1999* has provided this kind of arbitration which is very useful for commercial dispute settlement.

4.6 Arb-Med

Arb-Med occurs when arbitration is under process and at the same time when parties are ready for an amicable settlement, a mediation process is initiated. Here the arbitrator has no decisive power and he/she needs to follow and facilitate mediation. Section 40 of *Arbitration Act, 1999* also mentions this notion.

5. Basic Aspects of Arbitration

- *Arbitration Board*: A panel of arbitrators appointed to hear and decide a dispute according to the rules of arbitration.¹⁷
- *Arbitration clause*: A contractual provision mandating arbitration and thereby avoiding litigation of disputes about the contracting parties' rights, duties, and liabilities.¹⁸

¹³ Garner, *supra* note 2.

¹⁴ Garner, *supra* note 2.

¹⁵ Garner, *supra* note 2.

¹⁶ Garner, *supra* note 2.

¹⁷ Garner, *supra* note 2.

¹⁸ Garner, *supra* note 2.

- *Arbitrator*: A neutral person who resolves disputes between parties, especially by means of formal arbitration. An arbitrator can also be termed an *impartial chair*.¹⁹

6. Submissions/Arbitration Clause/Arbitration Agreements

A written agreement is required to submit present or future disputes to the arbitrators, whether or not the legal relationship is contractual.²⁰ It does not make any difference whether or not the name of an arbitrator is named therein. Furthermore an arbitration agreement must be made. This bilateral nature is necessary because a “unilateral” arbitration clause did not provide an arbitration agreement but only an option²¹. An arbitration agreement must be in writing if it is to come within the *Arbitration Act, 1999*. Otherwise, no particular form is necessary. A valid arbitration agreement may be contained in a clause quite collateral to the main purpose of an agreement.²²

7. Appointment of Arbitrators, Umpires and Third Arbitrators

There is little difference between an arbitrator and umpire in their appointment process. An arbitrator is appointed generally by the parties, but if one party fails to make an appointment, the court is empowered to make the appointment. Yet an umpire is generally appointed by the arbitrators. Again, if arbitrators fail to appoint an umpire the court may make an appointment by default. A third arbitrator is also appointed by an arbitrator unless there is no contrary provision in the arbitration clause or agreement.²³ Section 5(1) and (2) of the *Arbitration Act, 1999* are related to the appointment of both arbitrators and umpires but the provisions of law are less clear in regard to the court’s appointment of an umpire and third arbitrator.

8. Evolution of Statutory Arbitration Under Special Statutes in Nepal

In the context of statutory arbitration, the following observation is relevant:²⁴

A statute may provide that disputes of a particular class shall be determined by arbitration of a particular sort, either in every case or upon certain steps being taken by the parties. Where such a provision applies, the arbitral tribunal laid down by the statute has exclusive jurisdiction over such disputes. Since this involves excluding the jurisdiction of the courts, it can only be done by clear language in the statute concerned.

It may sometimes happen that when a statutory arbitration is held, the parties wish to have other matters arising between them, which are not compulsorily referred to that arbitration, dealt with at the same time. There would seem to be no objection to this being done, but the statutory arbitrator would also have to be appointed by agreement under the *Arbitration Act, 1999*. All the matters could then be dealt with at the same time, but there will in fact be two

¹⁹ Garner, *supra* note 2.

²⁰ ARBITRATION ACT, 1999, Section 2 (a).

²¹ (*Union of India v. Bharat Engineering Corporation* (1977); and *Baron v. Sunderland Corpn.* (1966)) as cited in Walton, *supra* note 1, p. 43.

²² Walton *supra* note 1, p. 41.

²³ ARBITRATION ACT, 1999, Section 6 (4).

²⁴ Walton, *supra* note 1, p. 10.

arbitrations.²⁵ In this situation, two issues can be settled during the same process which is less time consuming, but in many cases the best practice is to have separate awards. The widespread tendency to exclude the *Arbitration Act, 1999* in modern statutes should be especially noted.²⁶ Some of the more important special statutes providing for arbitration in Nepal's context are briefly discussed below.

8.1 Development Board Act, 1957

Section 9

Sub-section (1) has provided that any dispute arising out of any contract with the Board or relating to its performance, if provided in such contract is to be referred to arbitration for settlement and shall be settled by an arbitrator appointed under such contract. The act has further provided that no court of law shall have jurisdiction to hear or decide upon such dispute.

Sub-section (2) deals with the laws of the arbitration in matters of taking evidence etc...

Sub-section (3) stated that the award given by the arbitrator shall be final and binding upon the parties. It further provides that on a petition moved by an aggrieved party, the appellate court may annul the award on the ground of manifest misconduct or that the award is perverse showing bad faith on the part of the arbitrator or the award is patently arbitrary or that the award on the face of it is contrary to law.

Sub-section (4) empowers the court to appoint another arbitrator where an award has been annulled.

Sub-section (5) deals with the execution of the award.

8.2 Royal Nepal Airlines Corporation Act, 1962

Section 23 of the act provides that any dispute that arises regarding the contracts between the committee, managing director or any other official of the corporation and other parties shall be decided by the sole arbitrator appointed by the GON. The section further provides that the arbitration shall have the right, equal to a court, to check the evidence, call parties and view other related documents. The decision rendered by the arbitration shall be final and binding for the party.

8.3 Petroleum Act, 1983

Section 20 of *Petroleum Act, 1983* states that any dispute relating to a petroleum agreement which cannot be amicably resolved shall be settled by arbitration.

8.4 Foreign Investment and Technology Transfer Act (FITTA), 1992

Section 7 of FITTA provides that at first the parties to a dispute must conduct negotiations with the involvement of the Department of Industry if there is any dispute relating to foreign investment. Only when there is no solution from negotiations, the rules of UNCITRAL become relevant. Section 7(4) of FITTA, 1992 under the first amendment of 2052 B.S. has incorporated the new legal rules which are very flexible regarding the prescribed foreign investment industry regulations under

²⁵ Walton, *supra* note 1, p. 13.

²⁶ Walton, *supra* note 1, p. 14.

this act. If the transaction is above the amount fixed by the above regulations, the disputing parties are not required to undertake negotiations and can simply begin with arbitration.

8.5 Privatization Act, 1994

Section 13 of the *Privatization Act, 1994* also provides for the arbitration process. Parties to the arbitration agreement may be government or individuals.

8.6 Bank and Financial Institution Act (BAFIA), 2006

Section 78 of the BAFIA, 2006 has made the Nepal Rastra Bank as an arbitrator able to decide upon disputes arising between licensed financial institutions. Its decision is binding and final in this regard.

8.7 Local Self-Government Act, 1999

The arbitration is conducted by local authority bodies for the settlement of disputes relating to the allocation of natural resources, land use, domestic violence etc under the power conferred to them by the *Local Self Government Act, 2055*.²⁷ Arbitration under this act has been expanded to the local government level and is very different to commercial arbitration.

9. Evolution of the General Law of Commercial Arbitration in Nepal

9.1 Arbitration Act, 1981

The general law of domestic commercial arbitration originated in Nepal with the *Arbitration Act, 1981* [2038]. Under this act, any disputes of a commercial nature arising out of agreements may be settled by arbitration as provided for in such agreements. If the agreement that provided for arbitration fails to provide rules to determine the number of arbitrators or to provide the rules governing substantive or procedural law, the provisions of the *Arbitration Act, 1981* would apply as default legal rules. To understand the arbitration process it is necessary to know about the "default rule."

The default rule provides an option to the contracting party to make or choose their own rules to settle the dispute that are not contrary with the law. Otherwise the general rules of the act will be implemented.

This act provided that if the parties to the agreement fail to appoint an arbitrator under the agreement or the arbitration agreement is silent in this regard, any party is empowered to file an application at the District Court asking for the appointment of an arbitrator.²⁸ As per the previous legislation, if an award is given by fraud or bribery it will be a ground for the court to invalidate the award, but the new legislation provides that this may only be a ground for the removal of an arbitrator.

9.2 Arbitration Act, 1999

Why was the previous act replaced? To provide an answer to this question the following observation may help us.

²⁷ Er. Bindeshwar Yadav, *Problems Faced in Nepal in the Settlement of Disputes Through Arbitration*, 11 NEPCA HALF YEARLY BULLETIN 8 (2059).

²⁸ ARBITRATION ACT, 1981, Section 5 (2).

*"There are various reasons for the replacement of the old Arbitration Act, 1981: the fundamental reason was its ineffectiveness. Other reasons include: incompleteness and inadequacy of the act, by which the defaulters benefited; unnecessary delays and interferences made by the courts in the arbitration process; appointment of inefficient arbitrators lacking knowledge of arbitration processes and procedures who often favored their nominators; a lack of institutions supporting arbitrations; a paucity of literature relating to arbitration; drafting of defective arbitration clauses in contracts; lack of law providing action against the biased arbitrators."*²⁹

The 1999 act is the prevailing law of the land and is mostly influenced by UNCITRAL Model Law. An arbitration agreement is defined as "an agreement between the parties to refer present or future disputes arising in respect of a defined legal relationship whether it is contractual or not".³⁰

An award given by an arbitrator that is produced through fraud, bribery or other malpractice provides an appropriate reason to make the award universally void by the court but the new law is directly silent in this regard. Though, there are other sections of this legislation to curb this problem. Section 30 (3)(b) of this Act provides that to protect the public interest and public policy, the court has the power to quash the award. Fraud or bribery or other malpractices are such phenomena which directly hamper public morality as well as breach public policy. The term, "public policy" is defined as "broad, principles and standards regarded by the legislature or by the courts as being a fundamental concern to the state and the whole of society" More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large."³¹ So, in this regard, we can conclude that the court has been given the duty by legislation to control such misconduct in the name of public policy if the arbitrator's decision appeared so, but up until this date no such interpretation has been evinced in Nepal.

It is mandatory for the parties to submit their dispute in front of the arbitrator if it is so provided in the arbitration agreement or arbitration clause.³² This provision broadens the scope of arbitration in Nepal. Court referred arbitration applies when a dispute is of both a commercial and a civil nature.³³ Therefore, many disputes of civil nature can not be resolved through court referred arbitration. Both new dimensions and the lacuna of the *Arbitration Act, 1999* are discussed below.

9.2.1 Severability Clause

This is a new provision of the arbitration law articulated in section 16 of the 1999 Act. It is also called a severability clause under the principles of contract. As per Black's Law Dictionary this clause is known as "a provision that keeps the remaining provisions of a contract or statute in force if any portion of that contract or statute is judicially declared void, unenforceable, or unconstitutional."³⁴ We must understand a *severable contract* to understand a severability clause in regards to arbitration. A severable contract means "a contract that includes two or more promises each of which can be enforced separately, so that a failure to perform one of the promises

²⁹ Dr. Karki, *supra* note 9, p. 9.

³⁰ ARBITRATION ACT, 1999, Section 2 (a).

³¹ Garner, *supra* note 2.

³² ARBITRATION ACT, 1999, Section 3 (1).

³³ ARBITRATION ACT, 1999, Section 3 (2).

³⁴ Garner, *supra* note 2.

does not necessarily put the promisor in breach of the entire contract.”³⁵ Here, an arbitration clause or agreement that is embodied with the original contract can be separated *ipso facto* from the original subject of the contract even if the original one is invalidated by an arbitrator or court.³⁶

9.2.2 Enforcement of Arbitral Awards

Enforcement of international commercial arbitral awards was much more challenging than domestic awards in previous days but now with the result of harmonization under treaty law it has become easier yet not completely successful. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 has existed since June 7, 1959³⁷ and Nepal acceded on October 1997.³⁸ As per section 34 of Nepal's prevailing *Arbitration Act, 1999*, to enforce international arbitral awards in Nepal there must be reciprocal provisions of the law in the applicants nation.

9.2.3 Public Interest Clause

Section 30(3)(b) of the present Act states that an award can be set aside by the court if it is against the “public interest”. The term “public interest” has never been defined by Nepal's judiciary or any legislation as it is very difficult to do so. “This is fraught with danger. It should be limited to “public policy” as propounded by the UNCITRAL Model Law”.³⁹ Public interest and public policy are not the same things but they may overlap.⁴⁰ In the UK, both terms are adopted in section 1 (b) and 33 of *Arbitration Act, 1996*. But, “public interest has been explained in the DAC Report in terms of the mandatory duty imposed on a tribunal by s 33 of the *Arbitration Act, 1996*.”⁴¹

9.2.4 Immunity

Regarding the *arbitral immunity* of an arbitrator, this Act is silent and the court has not yet developed any standards in this matter. In the case of *M.D. Chandra Krishna Jha v. Pro. Dinesh Bhakta et.al.* [2059], the Supreme Court ordered a counter affidavit to be submitted by the members [arbitrators] of the arbitral tribunal. What will be the policy implication of this tendency by the court? Nobody will be ready to be an arbitrator in the future because he/she may face litigation even if he/she is acting in good faith. Some standards should be developed. As a general rule, an arbitrator enjoys *testimonial immunity* and may not be required to testify regarding the merits of an award. There are, however, exceptions to this rule.⁴²

9.2.5 Issues Regarding Panel Composition When Rehearing Awards

If the court decides that the appealed arbitral award is not according to law, the appellate court may decide to send the matter back to an arbitrator. Unfortunately, the law is silent about whether this arbitration panel will be the previous panel or will consist of a newly appointed panel.

³⁵ Garner, *supra* note 2.

³⁶ ARBITRATION ACT, 1999, Section 16 (3).

³⁷ NEPCA, *International and domestic Arbitration Kit 2* (1998).

³⁸ Dr. Karki, *supra* note 9, p. 9.

³⁹ Er. Yadav, *supra* note 27, p. 10.

⁴⁰ Sutton, *supra* note 7, p. 17 fn 4.

⁴¹ *Id.*

⁴² Jacqueline M. Nolan-Haley, *ALTERNATIVE DISPUTE RESOLUTION*, 154 (West Publishing Co, St. Paul, Minn, 1992).

9.3 Arbitration (Court Procedure) Rules, 2002

The rules deal with the procedural matters relating to the *Arbitration Act, 1999*. The Supreme Court of Nepal prepared this rule after having such rule making power delegated. The rules clarify and prescribe the provisions in respect of court fees, arbitration panels, interim orders, annulment and enforcement of foreign and domestic awards etc... that help to facilitate the arbitration process.

9.4 Contract Act, 2000

The parties are free to determine the measures of dispute settlement arising from contracts as per section 4 and 87 (2) of *Contract Act, 2000 (2056)*. By this legal provision it is clear that the parties are free to choose the formal or informal justice system (ADR) in a contractual dispute. Therefore, this provides contracting parties the room to choose commercial arbitration for private dispute settlement.

10. Arbitral Institutions in Nepal

The Nepal Council of Arbitration (NEPCA) was established in 1991 to facilitate arbitration in Nepal, but is yet to be recognized by the law. Yet, the court has already impliedly recognized it because the court has heard a petition after NEPCA's panel award. This is the only institution working on a permanent basis which provides rules (new rules, 2003 made in line with *Arbitration Act, 1999*), venues and a panel of arbitrators to the conduct arbitration process. NEPCA is a non-profit institution, but it still needs to pay for arbitrators. Since NEPCA's establishment it has been providing a forum under which some crucial disputes were settled but the rest of the pending cases are going to be delayed as per the NEPCA bulletin.

11. Advantages and Drawbacks of Arbitration

Arbitration, as a method of commercial dispute resolution is popular because it provides: predictability, party participation, finality, enforceability, cost reductions, privacy, speedy relief, more amicable post-dispute relations, and a neutral and expert forum. However, there are some drawbacks:⁴³

- In arbitration, a panel must be selected before anything substantive can happen. Therefore, speedy relief is unlikely.
- In a bitter dispute, there may not only the specified arbitration but also litigation resulting from attempts to avoid the arbitration.
- Some consider that arbitration tends toward splitting the difference rather than deciding whether either side is totally right or totally wrong.

So, other processes such as mediation, mini-trials and other ADR techniques are available and are beginning to make some head-way in international dispute resolution, but the use of them remains relatively infrequent.⁴⁴

⁴³ Tibor Varady et. al., INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE, 24 (West Group, St. Paul, Minn, 1999).

⁴⁴ *Id.* p. 25.

12. Case Law

The Supreme Court of Nepal has given verdicts in regards to different issues of commercial arbitration. The Supreme Court held that the Division Bench of the Appellate Court is the proper authority to hear arbitration related issues.⁴⁵ The basic difference between arbitration and litigation was recognized by the court by indicating that it is a special means of dispute settlement rather than litigation to provide a legal remedy to the suffering party.⁴⁶ The Court has provided a very limited role of the law in arbitration matters. This notion was supported by the Court stating that there will be no right to appeal against the order of the appointment of an arbitrator.⁴⁷ Another dispute decided by Nepal's Supreme Court was that an arbitrator's *ad hoc* order to stop bank guarantees was held *ultra vires* and illegal. The Court said that the arbitrator has no such legal power to enforce a bank guarantee because it is a matter related to a different contract between the plaintiff and the Nepal Bank Ltd. who was a third party.⁴⁸ This case was decided by the Court under writ jurisdiction. This decision was given on B.S. 2055-11-25, which was before the *Arbitration Act, 2055* came into force on the date of B.S. 2056-1-2. It stated in section 21 (1)(D) that arbitrator's only have the right to enforce bank guarantees against foreign parties.

Regarding *statutory arbitration*, the Supreme Court of Nepal held that if the act states that such specified acts need to be resolved through mandatory arbitration, then this mandatory provision of law must be followed accordingly.⁴⁹ In *On behalf of Flowra Nepal Pvt. Ltd. Chandra Kumar Golcha v. Appellate Court Patan et. al.*, the Supreme Court of Nepal held that the Appellate Court has only such rights to appoint the arbitrator through court procedures if the parties fail to appoint an arbitrator. Besides this, the Court has not any jurisdiction to enter into the merits of the dispute.⁵⁰

Since the general legislation was enacted in 1981, it was paradoxical to see what sort of judicial control or intervention was deemed necessary in arbitration awards. In this matter, two issues were unsettled viz: (a) what about writ jurisdiction's effect on arbitral awards?; (b) after the first instance of judicial control on the limited ground of arbitration legislation, whether or not the right to appeal for dissatisfied parties should be provided. Arbitration law was silent on these two issues continuously, though the Supreme Court has tried to develop some standards on the basis of creative interpretation in line with international practices and principles of ADR. The attempt of the court clearly manifested itself in the case of *M.D. Chandra Krishna Jha v. Pro. Dinesh Bhakta et.al.* (2059). However, it was not satisfactory for the settlement of the commercial dispute. In this case, the court held that if there are no further avenues for appeal after trying all possible remedies in the Appellate Court, writ jurisdiction can be entertained in the Supreme Court.⁵¹ By this precedent, every case that falls within section 30 of the present *Arbitration Act, 1999*, needs to provide writ jurisdiction to the Supreme Court if the parties are interested to check the validity of award. This was not the intention of Parliament. The beauty or advantage of commercial arbitration relies on its speedy, informal, expert judging panel and cost efficiency but on the other hand its process is being made lengthier by providing writ jurisdiction to every case that falls under section 30 of the *Arbitration Act, 1999*.

⁴⁵ *Kailash and Company v. HMG Ministry Of Education* as cited in, NEPCA, 7 NEPCA Bulletin 24 (2057).

⁴⁶ *Anangaman Sherchan v. Chief Engineers of RTO*, NKP. 201 (SC 2020).

⁴⁷ *G.M. Water Supply Corporation v. Middle Regional Court*, NKP. 624 (SC 2044).

⁴⁸ *On behalf of NEE, Kriti Chand v. Appellate Court Patan et. al.* (2055).

⁴⁹ *Surya Man v. Cottage and Rural Power Development Committee*, NKP.241 (SC 2040).

⁵⁰ *On behalf of Flowra Nepal Pvt. Ltd. Chandra Kumar Golcha v. Appellate Court Patan et. al.*(2061).

⁵¹ *On Behalf of Agriculture Goods Corp., MD. Chandra Krishna Jha v. On Behalf Mili-Mili Enterprises, Pro. Dinesh Bhakta et.al*, NKP.285 (SC 2059).

However, in the aforementioned case, the Court strictly rejected the notion of an appeal of the Appellate Court decision which is a very positive interpretation that facilitates and promotes commercial arbitration in Nepal. Since then, Nepal's legal system has been providing stability in this regard which gives a sound and predictable message to the international and domestic business communities.

13. Issues and Challenges

The issues that were raised above need to be examined appropriately to ensure that the goal of successful arbitration is obtained. Now we are facing or may face in the future these issues and challenges that are discussed below.

13.1. Delay

Delay on the finality of an arbitral award by entertaining writ jurisdiction must be curbed. Delay on appointment of an arbitrator is also a great issue. It contradicts the concept of arbitration.

13.2. Cost

The cost of the arbitration process is being increased day by day which may prevent the business sector from choosing arbitration as a form of ADR.

13.3. Definition

The term 'commercial arbitration' is not defined by law which is very uncertain.

13.4. Award by Fraud or Corruption

What will happen if the award is given by fraud or corruption? It is internationally recognized that an award by fraud or corruption not only provides grounds to remove arbitrators but also provides grounds to invalidate awards in a court of law.

13.5. Code of Conduct

Till this date, Nepal has no code of conduct for an arbitrator. There is a real need in Nepal for arbitral jurisprudence.

13.6. Judicial Review of Awards

What sort of judicial review of arbitral awards is necessary for Nepal's legal system? The grounds provided for judicial review in section 30 of 1999 Act may be adequate or not? The ground to make void an award on the basis of damage to the "public interest" is absolutely vague.

13.7. Recognition

Whether or not NEPCA or other institutional arbitral organizations should be recognized by the law itself is a matter that must be dealt with.

13.8. Substantive Law

Which substantive law applies to arbitrators? Section 18 of the *Arbitration Act, 1999* has provided the default rules. Parties are free to make agreements on this matter. If an arbitration agreement is silent in this regard the Nepali substantive law will prevail. But, here in this section a rule has

ignored the principle of natural justice which stated that arbitrators are not free to follow the doctrine of *ex aequo et bono* and *amiable compositor*. Without consent, both of these doctrines are usually followed by decision makers if there is any lacuna or gap in the written law or contract for the sake of justice. An arbitrator must get both parties to consent to apply these values, which is very rigid, mechanical and hard, because usually a party who wants to make any delay (doing so he/she may be benefited) may be reluctant to give their consent. An arbitrator must always follow the written contract.⁵² When making a contract, every factual situation which may arise in the future can not be incorporated. Therefore, parties must be aware of what they include in contracts, otherwise one party may become vulnerable.

13.9. Arbitral Immunity

In the USA, both state and federal courts recognize that arbitrators enjoy quasi-judicial immunity from legal liability for actions taken in their arbitral capacity. This principle has also been observed in the international commercial setting.⁵³ There is a sufficient rationale to do so. The rationale behind this immunity was observed by the court and “continues to influence the courts today.”⁵⁴ The court held that:

*An arbitrator is a quasi judicial officer, under Nepal's laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of the opinion that the same immunity extends to him.*⁵⁵

But Nepal's scenario is different from the above explanation. It is found that in an *ad hoc* arbitration process after the arbitrators have given an award, they are often personally defending their position in a writ petition. Arbitrators were also made a party to litigation which I have already mentioned above. If it is continuously happening nobody will be ready to be an arbitrator in a commercial dispute because of their fear of further litigation.

13.10 Res Judicata, Collateral Estoppel and Arbitration

It is well-settled that the doctrines of *res judicata* and collateral *estoppel* apply to arbitration awards.⁵⁶ This sort of notion or concept is not found in Nepali arbitration law and case law. Like standard litigation, a valid and final award must also abide by these doctrines.

13.11 Pendente Lite Interest

Pendente lite is a Latin term which means “during the proceeding or litigation; in a manner contingent on the outcome of litigation.”⁵⁷ Both, interest and its rate during the arbitration proceeding is a crucial issue which needs to be decided properly by the arbitrator or court. In arbitration, section 33 of *Arbitration Act, 1999* has strictly rejected that there will be no interest between the period of date of the award and the date of enforcement of award. Regarding the interest rate, the contemporary rate of a commercial bank must be acknowledged by the arbitrator. It should be noted that this rate varies from bank to bank which may invite controversy.

⁵² ARBITRATION ACT, 1999, Section 18 (2) (3).

⁵³ Nolan-Haley, *supra* note 42, p. 153.

⁵⁴ Nolan-Haley, *supra* note 42, p. 154.

⁵⁵ *Hoosac Tunnel Dock & Elevator Co. v. O'Brien* (1884), cited in Nolan-Haley, *supra* note 42, p. 154.

⁵⁶ Nolan-Haley, *supra* note 42, p. 162.

⁵⁷ Garner, *supra* note 2.

Furthermore, laws for the resolution of ordinary civil disputes in Nepal's legal system have a different approach to interest calculations.

13.12 Issues Regarding Panel Composition for Rehearing Awards

The law of arbitration in Nepal does not specify the composition of the panel to rehear awards that the appellate court has sent back to arbitration.

14. Suggestions

- Delay on the finality of an arbitration award made by an arbitrator should be avoided. For this, writ jurisdiction should not be entertained by the Supreme Court in the name of an alternative remedy in all cases, but instead specifically address genuine issues of law and not fact.
- Delay itself produces cost. It can be reduced by speedy proceedings and a schedule for the hearing. Arbitrators are engaged in their own profession and their business may postpone the date of arbitral hearing. So, it should be managed accordingly.
- The term 'commercial arbitration' is not defined by law which produces uncertainty. So, it needs to be defined by law itself in line with the UNCITRAL Model Law.
- An award given by fraud or corruption can be controlled under the "public policy" clause as provided in section 30 (3)(B) of the *Arbitration Act, 1999* though it seems quite unclear what public policy actually is. This clause provides grounds to the court of law to invalidate an award. But it should be better to add one sub-clause in the legislation that expressly invalidates the award if the arbitrator gives an award by fraud or corruption.
- A code of conduct should be made in line with internationally accepted standards.⁵⁸
- The term 'public interest' needs to be defined appropriately. It is a very difficult task. Therefore, if no definition is possible, it is better to remove this term from the law and only include the 'public policy' term contained in the UNCITRAL Model Law 1985. Doing so provides certainty and reduces the court intervention in the award.
- It is not necessary to recognize any particular arbitral organization by the *Arbitration Act* because there can be numerous such organizations for the facilitation of arbitration. Up to this date, the court does not seem reluctant to hear petitions upon voluntary arbitration awards.
- When making contracts, every factual situation that may arise in the future can not be incorporated. This indicates that parties must be aware in the making of the subject of the contract and the arbitration clause. Otherwise, one party may become vulnerable. To address this problem, when making an arbitration clause before or after the dispute arises one clause must be included saying that the arbitrator has been given the consent of all parties to act under the principle of *ex aequo et bono* and *amiable compositor* if it is required in the future due to insufficient contractual provisions.
- Both, arbitral and testimonial immunities are necessary for arbitrators. For this, certain rules or standards need to be developed which may enable the arbitrators to think that they are protected when they are acting in a fair manner.

⁵⁸ *i.e* Code of Ethics for Arbitrators in Commercial Disputes (1977) which is supported by the American Arbitration Association.

- The law should be clear in regard to court appointed umpires and third arbitrators.
- The almost established 'Commercial Bench' of the Appellate Court should hear arbitration related disputes.
- The arbitration law should expressly state which arbitral panel should rehear matters returned to the arbitral level. In this case, until the law is reformed, the Appellate Court should have the discretionary power to choose on a case by case basis the makeup of the arbitral panel.

15. Conclusion

The number of private disputes related to trade is going to increase as the volume of private business tremendously expands within the transnational arena. When the volume of business grows at the national and transnational level within a complex transactional network, commercial disputes are inevitable. Settling these commercial disputes by the private means of commercial arbitration is an effective method but not the panacea. Commercial mediation is also increasingly being used now as a form of ADR for commercial disputes. Once the arbitration method is adopted in an arbitration agreement or clause, there is no flexibility to undertake other methods of dispute settlement unless both or all parties give their consent.

Despite the few drawbacks of commercial arbitration it is a widely popular tool for domestic as well as international commercial dispute resolution. It would be better to adopt harmonized arbitration standards and enforcement procedures to facilitate the growing transnational nature of business activity.

TALKS

The Expected Role of a Judge

Justice P.N. Bhagwati*

Abstract

When Justice P.N. Bhagwati, former Chief Justice of India (1985-1987) visited the National Judicial Academy on Dec 18th, 200. A pioneer of public interest jurisprudence and a messiah of judicial activism, justice Bhagwati is described as "lithic, humane, witty and above all a doer", a mascot of social activists.¹ Justice Bhagwati made seminal contribution in adding meaning to constitutionally guaranteed "right to life". Upon his retirement from the Supreme Court. Prof. Upendra Baxi wrote a column where he described him as "a strong champion of the rights of unorganized labor, a capable juristic interrogator of the abuse of discretion and power by state, impassioned in his concern for the extension of rights to the disadvantaged, dispossessed, and deprived masses of India and a superb judicial craftsman producing chiseled enunciations of constitutional and legal doctrines with a sure eye to the pre-eminence of the supreme judiciary in national affairs...He gave to judicial power a human face. And in this process he assisted the emergence of the Supreme Court of India into a Supreme Court for Indians."²

Following his retirement also Justice Bhagwati remained active in several social and human rights related activities. The notable among them is his appointment to the Chair of UN Human Rights Committee of which he is still the member.

Justice Bhagwati visited National Judicial Academy on 18th Dec 2007 where he was greeted by Executive Director of the NJA, Justice Tope Bahadur Singh, Faculty Dr Ananda Mohan Bhattacharai and other staff whereupon he was briefed about the activities of the NJA. Justice Bhagwati was kind enough to address the judges participating in the juvenile justice program. Dr Ananda M Bhattacharai, Judge and Faculty, first introduced the participants to the visitor, briefed him about the nature of the current training that is being imparted on juvenile justice and asked the distinguished visitor to enlighten the participants on the following questions:

- *What is it to be a judge?*
- *What is a judge's role?*
- *What is expected of him/her?*
- *How should a judge conduct himself/herself to meet societal expectations?*

The following is what Justice Bhagwati said:

Hon District Judges

It is a great pleasure and a privilege for me to be able to talk to the members of the judiciary of this country. The judiciary has to play a very important part in national life. There are several spheres in which the judiciary can play an active role.

There are large numbers of people yearning for justice. Very often justice is denied to them not by the court but I mean by the society. I am particularly going to refer to the poor and the privileged sections of the society who are leading a life of poverty, wantonness... They are

¹ Sumit Mitra, INDIA TODAY, Aug 15, 1987.

² LEX ET JURIS, Jan 5, 1987.

unable to afford to go to the court because they are unable to know what their rights are. Even if they do know the rights they do not have the capacity go to the court to enforce their rights ...with the result they suffer silently the injustice heaped upon them by the state or by the vested interest. And even when they come to the court they are often not well represented by lawyers because they cannot afford to have good lawyers. It is here your responsibility as a judge comes into play. Because, when the case comes before you very often the parties are not evenly matched. They are not properly balanced. One party is superior to the other by the reason of material resources, by reason of the fact that they are able to engage a very competent lawyer whereas the other party is not. And there is always the possibility that injustice will result for want of proper representation of the case on behalf of the weaker section or the weaker party.

It is here that you have to be very careful to see that the weaker party does not suffer for want of proper legal representation. The judge has to play an active role in such cases in order to see that justice is done, in order to see that the case of the weaker section is properly presented. Of course, the case ends... to see that proper presentation is made on both sides. ...on the basis of that the judge should decide.....absolutely impartially. Even if you have to decide impartially you cannot forget the fact that that the weaker person before you does not match against the stronger person. And therefore a certain set of approach has got to be adopted, an approach with a view to see that justice is done, and when we talk of justice it is not only justice according to the letter of the law,...justice according to the spirit of the law... law is very often capable of two interpretations, as you will find in your judicial career as you go along. And you have got to see when there are two levels of interpretations: one is a liberal interpretation and another strict interpretation. You always adopt liberal interpretation which is in favor of the common man who comes before you. Because otherwise the common man will be always be at a disadvantage. The issue applies the law very strictly against him. Of course this does not mean that you should not be impartial. Of course you need to be impartial, but impartiality does not mean being totally oblivious to the conditions of the people who are coming before you. It is a very difficult job. In order to balance, what I would call, total impartiality along with a certain concern for the weaker section of the community. It is that balance you have got to maintain.

And ...many of you will be dealing with criminal cases where there is a presumption of innocence. And very often the accused is not properly defended. Sometimes he may not have even a lawyer to defend him and I don't know whether you have any adequate legal aid system...in my country what we used to do was whenever a person, a poor person was ...he had no legal assistance, he could not afford any legal assistance. And there was no legal aid at a time I am talking of early days, in those days... we would ask a senior lawyer, a good lawyer, request him to appear *amicus curae*, as a friend of the court, to appear in the defense of the accused. And when the court asks a good senior lawyer...the senior lawyer would never refuse...and the poor man would be adequately represented. I have done that in many cases before the legal aid system came into force in my country. But once a legal aid system is enforced, there you got to ensure that every accused gets legal aid and is properly, adequately represented.and you have got to see that justice is done. Presumption of innocence is fully observed.

And look at the problem from the humanistic point of view. Of course I am not going to speak to you from criminal jurisprudence... there are a number of decisions that are given. But the basic point I want to mention is: as far as the criminal jurisprudence is concerned keep a few principles in mind... first the presumption of innocence, the secondly that the person, the accused before you is adequately represented by a counsel; and thirdly that there should be no delay in

dispensation of justice and no criminal case should be unduly delayed. These are the three requisites of a criminal trial laid down in the international covenant of civil and political rights. These three elements must be observed in any circumstances.

So as civil cases are concerned, of course... you will be dealing with many of them...they are ...part of it as will see, you need to see that adequate representation is available to the weaker section of the community. Law is capable of, as I said, always capable of two interpretation; always accept that interpretation which is broad and liberal, which advances human rights, and which carries out and effectuates the whole objective of human rights jurisprudencethat everyone is entitled to basic human rights. Very often you find in the course of your career...human right to the weaker section is very often trampled upon. And it is your obligation to see that those human rights are enforced. It requires a certain amount of sensitiveness on your part, It is ... you don't sit in the court to do justice...blindly.

In Anglo-Saxon Jurisprudence, the goddess of justice is blindfolded. I have often said that as judges you have to remove the bandage on your eyes...and let the goddess of justice see for herself the inequalities between the parties and see that justice is done to the party which is in an unequal position. If you keep in mind....this must be the end of justice. Justice is not an abstract virtue. Justice is a living reality...and as a judge, as I have often said, and I am quoting what I myself said in my judgment,a judge is not a mimic, not an imitator, he is a creative person, he has to invest, ...meaning and content... and he has to apply it for the benefit of the mankind... not just for the benefit of mankind generally, but with a view to advance the cause of human rights, the cause of justice. And that is the function which I expect all of you to discharge.

And always remember... and I end with the words...of Lord MacMillan, one of the great Judges of England. He said, he told a congregation of lawyers and judges. He said: "Look out of your window. You will see the common man looking at you with wistful eyes. He is looking at you for justice. Will you give him justice?" That is a question that we ask to lawyers and judges, and that is a question that we all must ask ourselves and we must see that justice is done to all those who come before us, justice not strictly according to the letter of the law but justice according to the spirit of the law, justice according to human rights, justice which fulfils the aspiration of everyone. That is the message which I have to give to you.

And I am sure that you are all judges....it is a very sacred and solemn task entrusted to you. I am sure you will discharge it with great care and responsibility. For today the judiciary stands as a bulwark of human rights and freedoms...and if the judiciary fails the whole system, the whole edifice of democracy will crumble. Therefore on us, there is a very heavy responsibility. And I am sure you will discharge that responsibility...with these words I congratulate you, I convey my best wishes to you and hope and trust that you will march further ...take more and more strides, towards reaching higher positions in your career. Thank you.

Dr Ananda M Bhattarai: Thank you your lordship, we have recorded your statement here. We will show this to all our judges who come to the NJA.

Mainstreaming Women's Rights Issues in the Justice System

- Catharine MacKinnon *

Introduction - Dr Ananda M. Bhattarai*

It is my pleasure to welcome Professor Catharine MacKinnon amongst the scholars, law teachers, women rights activists, judges, attorneys and law officials gathered here. This is perhaps the first program we have arranged at such short notice. I thank you all for your spontaneous and warm response to this program. I also welcome the teachers and students of the Kathmandu School of Law who have studied her texts for years and have come all the way from Bhaktapur some 16 km away from here.

Catharine MacKinnon, a leading Feminist legal scholar and jurist is currently a Professor of Law at the University of Michigan. Only a few days ago while I was talking to Hon. Justice Kalyan Shrestha he informed me that Catherine was in Nepal on a private visit. Consequently, we arranged for her to give a talk program at short notice. Thank you to Sapana ji for making this talk possible.

I would like to thank Prof MacKinnon for accepting our invitation agreeing to talk on "Mainstreaming Women's Rights Issues in the Justice System". I place on record my sincere thanks to Hon'ble Justice Shrestha for chairing this talk, though it seems a poor formality to say "welcome" to Justice Shrestha, who started the NJA, and who is a perennial source of inspiration and guidance for everyone of us.

When we were studying law in the 70s or 80s there was no topic in jurisprudence called "feminism". It was introduced to South Asia slowly in the late 90s. Today, it is a studied critiqued and practiced in this part of the world. Feminism as a theory has grown strongly in jurisprudential, liberal, assimilationist, bivalent, incorporationist, cultural or relational and dominance or post-modern variants, criss-crossing and interacting with other streams. It has also inspired practitioners and helped them to understand discrimination and the exploitative mazes from a new gaze. Overall, feminist theory has challenged all sorts of subordinations, created a need to study law, state and social relations, justice and judicial discourse from a woman's experience and perspective.

I do not want to go any further into the thicket of feminist jurisprudence, as I would only reveal my ignorance. Here is in front of us is a towering jurist and a radical feminist who has contributed to the discourse by bringing a new Marxist perspective. But, please allow me to cite a classic statement of Catharine MacKinnon which is often cited in feminist discourse. Challenging the so-called neutral, liberal and rule of law state she said

"The state is male in the feminist sense: law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender-through its legitimating norms, forms, relation to society and substantive policies. The state's formal norms recapitulate the male point of view on the level of design." [1989]

* Feminist Jurist and Professor of Law at the University of Michigan. The talk was given on May 12, 2008 at the NJA. Transcription was recorded by the NJA

* He is a judge at the Court of Appeal in Nepal and a faculty member of the National Judicial Academy.

Catharine has come to Nepal when some meaningful work is being done in terms of entrenchment of rights of women in the constitution, development of gender sensitive laws with a special focus on domestic violence, sexual harassment, protection of women victims, their right to privacy and at the time when the judiciary is taking a very proactive role in the rectifying the legal and judicial system and developing the judicial discourse of equality. She will bring a jurist's and feminist's discourse perspective on mainstreaming women's rights issues in the justice system, challenges and possibly the way forward. With these few words I welcome you all to this program and now I would like to request Catharine MacKinnon to give her speech.

'Mainstreaming Women's Human Rights In National Justice Systems' – Catharine A. MacKinnon

Thank you so much for that inspiring introduction. I am honored to be a part of the wonderful work of the NJA in furthering judicial education, which is advanced beyond what have seen elsewhere. You are to be congratulated, with the originators and administrators, for this exciting and progressive project. I look forward to telling colleagues around the world about the NJA's approaches.

Judicial education is a major tool for mainstreaming rights, including women's rights, in legal systems. You do it; this talk is engaging in it. That generous and thoughtful introduction concerning the state and law as male serves to remind us that one way to mainstream women's rights in the justice system would be to create the ation in which it was no longer true. When women's rights have been mainstreamed, the state will no longer operate from the male point of view, seeing and treating women the way men in an unequal society see and treat women. That is one test what mainstreaming women's rights in the judicial system could produce, implemented on many possible levels of integrated action. I will touch on just a few possible approaches. The examples are selected in hopes that the models will be of assistance to you.

Mainstreaming has many different definitions. My definition for its success would be that the state no longer operates from the male point of view. In some places, mainstreaming has justified putting men in charge of women's centres or hiring a man to head the gender justice division. A man with sensitivity to gender justice can mainstream gender as policy, but just hiring someone because he is a man to run things for women can also simply mainstream male power. Biology is not the point of mainstreaming gender. Putting a woman in power, if she does not identify with women's gendered needs, or see the need for change in women's inequality to men, will not mainstream gender. She will simply mainstream sex. This is not a biological matter, but a matter of pursuing for the first time the gendered interests of a very large social group, including equalizing them through policy.

Mainstreaming implies making something normal, the mainstream is the normal central flow of things. Margins are edges. Politically, women have been kept at the margins—out and down, marginalized. So mainstreaming means going from margins to centre, becoming a central and ordinary part of the way things are done everyday. That is the ambition of taking an awareness of socially imposed sex inequality from a marginal political insight and making the reality of women's equality with men—which is fundamentally real but not a socially recognized—part of the things are normally done. The agenda of mainstreaming women's rights is to make the reality of women's equality normal in law as a way of making it normal in life.

Women's rights can be defined, integrated, and implemented in many ways. I was asked to focus on how international women's rights can be mainstreamed in a domestic judicial system

like Nepal, focusing on areas that I have particularly worked in, so humanitarian law will also be included, embracing the criminal as well as the civil side.

Every right that exists to be guaranteed, a woman needs sometimes. So in any nation, including Nepal, it is helpful to have a treaty framework encompassing the basic international treaties, which Nepal essentially has. Women's rights aren't just rights to women as women only; they have to include all rights if she is to be part of the mainstream. All economic rights, social rights, cultural rights, political rights, civil rights, and on the criminal side rights from torture, rights against genocide, rights in war as civilians—all of those rights have to be there. I am not telling you anything you don't already know, but I just want to make clear that all human rights need to be guaranteed for women to have human rights and to be available to be implemented in a domestic legal setting. Often when people think about women's rights they think about CEDAW, and yes one needs that, but one also needs everything else. That treaty framework which has existed for some time in Nepal, including refugee rights, rights of the child and all major international treaties, needs to be there and preferably with their optional protocols, and recognition of the International Criminal Court, so that citizens of a country such as Nepal can complain against the government if it violates their rights. In situations where Nepal has not ratified optional protocols, hopefully it will, and hopefully it will decide under the new government to re-embrace all of the treaties it has embraced in the past, and extend recognition to some of that it hasn't previously. That is the first step, and obvious, but cannot go without saying.

The judiciary in many countries has creatively mainstreamed international rights for women, often followed by legislation. India is particularly exemplary, but this has also occurred in Bangladesh and Pakistan, in Canada in particular, and also in several of the more progressive apex courts in Africa. These jurisdictions are using international treaties and principles to extend women's rights domestically, including creatively employing international treaties as a guide to interpret national existing constitutional rights. This has produced constitutional recognition of rights for women, for example, that may conflict with legislation or with traditional or customary law that may also be recognized at some level of the constitution. When there is a tension or a conflict, or a recognized right needs to be extended further, courts in India and Canada and some parts of Africa, drawing on international precedent, have extended rights to women. CEDAW or the ICCPR can be used, or principles of the UNDHR (which is not a treaty but is recognized as customary international law and exists at a very high level of principle) have been drawn upon by creative jurists to expand their domestic law. Especially clear examples come from India's *Chopra* and *Vishakha* cases recognizing sexual harassment as a violation of women's equality rights judicially, drawing on CEDAW's interpretation by its Committee. India's highest court detailed what companies must do to comply with this right as a guide for legislation, providing a powerful model of judicial mainstreaming of international women's rights in a national setting.

African instances involve the application of international equality principles to property rights, nationality rights (women losing their rights to be citizens of their own countries by marriage or having the men they marry not being able to be citizens of their own country), inheritance rights, including in polygamist marriages, rights of widows, including rights to bury their husband's remains. In these and similar instances, we see international principles being used in African domestic law to mainstream the human rights of women.

Another model is illustrated by Canada, in which a statute criminalizing hate propaganda was challenged as a violation of freedom of speech under the constitutional structure that is the Charter of Rights and Freedoms in the *Keegstra* case. The Supreme Court of Canada there first drew

upon a progressive interpretation of equality that it had created, which has increasingly become international, recognizing that equality is not about sameness and difference but about eliminating hierarchy, that is, domination and subordination on group grounds. This idea of equality has moved from Canada to South Africa, is expanding into Europe and across the international system. The Court then drew upon its international obligations to uphold that statute, concluding that international law recognized that hate propaganda is an incitement to discrimination rather than protected expression. The hate propaganda statute thus survived because of the equality concept, because international law made clear that hate propaganda incites discrimination, given Canada's international treaty obligations. This is a second structural model. Upholding this statute based on international law against racial and ethnic discrimination then became a precedent for upholding Canada's law against pornography, when challenged as a violation of freedom of expression. Through the route of international law against racial, ethnic and religious discrimination, women's rights in Canada were mainstreamed by recognizing a right not to be harmed by pornography, a sex equality right, upholding its law against pornography in the *Butler* case.

A third model is provided by the way regional instruments and systems have worked in some other parts of the world, including Europe, Latin America, and Africa. Regional systems, a form of international law, have been extremely progressive for women's rights at times. The regional organization in Asia is not quite yet at the legal level that it exists in these other regions so far as women's rights are concerned. In those regions where international instruments exist, regional legal systems are interpreting regional instruments, making progress in mainstreaming women's human rights and influencing other jurisdictions. Sometimes the rulings are only guidance; sometimes they are binding. In both Europe and Africa, the system is developing. Africa has an excellent Protocol on women's rights, with highly progressive language. In Latin America, the regional instrument on women's sexual and reproductive rights, the Convention of Belem do Para, is also strong, producing results that domestic judicial actors can draw upon. It has been especially helpful in Brazil. Europe has some binding rulings, including on rape, such as one called *MC v Bulgaria*, holding that a country must enforce its rape law. Since rape laws are generally not enforced, this is powerful, particularly given that this case involved rape by an acquaintance. The better one knows someone the more likely a rape will take place and that nothing will be done about it. So it was very powerful to have the European Court of Human Rights (ECHR) conclude that, taking an equality approach, they believed her, so letting the rapist go was unacceptable. This decision is controlling on all countries in Europe, in that they must enforce, not ignore, their rape laws, providing another example of how women's international human rights can be and are being mainstreamed in domestic judicial systems.

Another model involves the use of international humanitarian law and international criminal law more generally. A highlight here is the Palermo Protocol to the Transnational Organized Crime Convention on trafficking women that is being adopted in legislation in countries all over the world. This defines trafficking in general (including sex trafficking and labor trafficking of women and men) as including the usual requirements of force, fraud, deception, or coercion of some sort, with the new development that trafficking includes abuse of position of power or condition of vulnerability that results in exploitation. This definition, worked for by women's rights organization, can be a basis for national legislation but can also be used to interpret existing trafficking prohibitions judicially. It is a truly equality-orientated definition. Sometimes you get further with equality when you don't use the word; this is one of those instances. Technically, this protocol is not an equality law or a human rights law yet it contains the most far-reaching and forward looking definition of what it really takes to traffic a person. Sometimes there isn't something you can prove

as force or fraud or deception or even what people think of as coercion, but there is an abuse of a position of vulnerability such as being very poor or an abuse of a position of power such as being someone's parent. This definition has gone around the world in judicial systems, legislation, human rights commissions, guidelines, and policy development. Wherever sex trafficking is addressed, it is being mainstreamed. This is a model of multi-level human rights concepts and principles going in at all levels of a system, together with NGOs who both contribute and mobilize this understanding and use it at all levels of national discourse.

The area of civil remedies provides a final model of mainstreaming. The applicability of this model depends on the legal specifics of each system. But I will describe one instance, a case I brought in the US for Bosnian women (Muslim and Croat) who were victims of sexual atrocities by the Serbian fascist forces in the genocide in Bosnia. In our view and their experience, this was a genocide, making the International Court of Justice wrong when it decided that it was not. What we did in their case was mainstream women's international human rights in the justice system by bringing a civil case based on international criminal law. The provision we used was the 1789 Alien Tort Statute, a tort being a harm and an alien being a non-citizen. By judicial interpretation, the law permits suit under this provision for violations of customary international law, implementing the law of nations in a federal civil provision. No police, no prosecutors, only civil lawyers bringing it for regular clients, regular everyday civil litigation, but for the first time anywhere for rape as an act of genocide, genocide being customary international law. Rape we argued was an act of this genocide, with the clients sexually violated as part of it. We also claimed rape as torture and as a war crime. And won, terms of being able to bring it at all, which was a seven year fight all the way to the US Supreme Court. The case was against Radovan Karadzic, leader of the Bosnian Serbs, who hired a lawyer and came to court with us. He argued that we had no jurisdiction to do this; we won this and then we won at trial, establishing that he owed 745 million dollars to our clients for what he was responsible for doing to them. This is a rather large reparation which we are still attempting to collect. But consider this use of legislation: the possibility of civil claims against very damaging people to collect substantial damages from that person to the people that he hurt. This is another way to mainstream those international women's rights in a domestic legal setting. Some other countries have analogous processes. Belgium allows something somewhat similar; so does Spain. Some jurisdictions, like France, have criminal laws that allow a civil claim for violation of a criminal law. It is infrequently used but it is available.

These observations show the implementation of principles from international criminal law. Of course you need to prove each one—for genocide, willful destruction of the group as such, for torture, official action, unfortunately, for war crimes, whether they are international or internal, and that they are an armed conflict. The international rubric of crimes against humanity has a lot of potential for women's rights, particularly as expanded and specified by the Rome Statute of the ICC. It addresses widespread systematic atrocities against civilians, which happen to women everyday of the week, in every country of the world. That construct is available to be implemented by mainstreaming it within domestic legal settings.

These few observations raise challenging possibilities at this propitious moment in Nepali history. I have faith that many of them can be accomplished here.

End

After the conclusion of her speech, Catharine MacKinnon answered many thoughtful questions from the enthusiastic audience.

ANNEX: JUDGMENTS

Supreme Court Directive to Protect the Privacy of Women, Children and HIV/AIDs Infected People Involved in Lawsuits

Abstract

This decision that upholds the right to privacy guaranteed in s28 of the Interim Constitution of Nepal 2007 will have a significant effect on the protection of women, children and HIV/AIDS infected people in the court system and their access to justice in general. A directive order stemming from the courts power under s107 of and the Office of the Council of Ministers as well as the Ministry of Law, Justice and Parliamentary Management to make a law including the below-mentioned provisions which describe the rights and duties of the concerned parties and maintain the level of privacy as prescribed (by the law) in some special type of lawsuits in which victim women or children or HIV/AIDS infected persons are involved as a party to the case right from the time of registration of the case in the police office or its direct registration in a law court or in other bodies till disposal of the case or even in a situation following the disposal of that case.”¹ Until such law is enacted, the guidelines contained within this decision should be followed in all proceedings.

Supreme Court Division Bench Hon’ble Justice Khil Raj Regmi Hon’ble Justice Kalyan Shrestha Order

Writ No. 3561 of the year 2063 B. S {2006}

**Sub: Praying for the issuance of appropriate order or directive including mandamus as per
Article 88(2) of the Constitution of the Kingdom of Nepal, 1990.**

*On behalf of Forum for Women, Law and Development, located at Kathmandu
Metropolitan City, Ward No. 11, Thapathali and also on her own behalf Advocate
Sapana Pradhan Malla.*

- Petitioner

Vs.

*Prime Minister, Nepal Government and Office of the Council of
Ministers, Singhdurbar*

1

¹ Hon’ble Justice Kalyan Shrestha *Forum for Women, Law and Development v PM, Nepal Government and Others*, 43, (SC. 2063 BS) (2006 AD). The text of the judgment, given in Nepali, has been translated into english with the financial support of FWLD.

<i>Ministry of Law, Justice and Parliamentary Affairs,</i>		
<i>Singhdurbar</i>	<i>1</i>	
<i>Speaker, House of Representatives, Singhdurbar</i>	<i>1</i>	
<i>Ministry of Women, Children and Social Welfare,</i>		- Petitioner
<i>Nepal Government, Singhdurbar</i>	<i>1</i>	
<i>Ministry of Health and Population, Nepal Government,</i>		
<i>Ramshahpath</i>	<i>1</i>	

The present writ petition appears to have been filed as Public Interest Litigation (PIL), pursuant to Article 88(2) of the *Constitution of the Kingdom of Nepal, 1990*, praying for the issuance of a directive order for the purpose of making and implementing the necessary law for the enforcement as well as protection of the right to privacy guaranteed by the aforesaid Constitution.

The present writ petition has been filed not because the petitioner herself or the organization (Forum for Women, Law and Development), which she represents, has itself become a victim due to the violation of the right to privacy mentioned in the petition but because the petitioner organization, by virtue of being an organization engaged in the advocacy of addressing through various means the legal rights and welfare of the classes such as women, children etc. and the community affected by problems like HIV/AIDS, seems to have entered the court for seeking relief by displaying its meaningful concern for the present issue.

Even though the *Constitution of the Kingdom of Nepal, 1990*, which has been shown as a basis for filing this petition, already stands repealed at present, and since the right to privacy mentioned by the petitioner has been enshrined also in Article 28 of the Interim Constitution of Nepal, 2007 and as Art. 107 of this Constitution has also retained the extra-ordinary jurisdiction of this court in respect of granting judicial remedy in matters of public interest or concern, it is feasible to deliver justice in regard to the issue prayed for by the petitioner on the basis of the provisions of the 1990 Constitution which was in force at the time of the filing of this writ petition and those of the Interim Constitution of Nepal, 2007 which is currently in vogue. Hence, there is need of considering the issue raised in the petition in the light of the aforesaid provisions.

The summary of the writ petition and the verdict delivered thereupon are as follows:

Freedom, equality and self dignity are the inherent rights of the human beings. The rights of equality and self dignity provide guarantee for the individual liberty of the human beings. These rights of equality and self dignity have been accorded protection at the international level through various legal provisions relating to human rights including the Universal Declaration of Human Rights. These rights of equality and self dignity are guaranteed by Articles 11 and 12 of the Constitution of the Kingdom of Nepal 1990. The main basis for protecting the right to self dignity of an individual is his/her right to privacy. In the life of every individual there use to be some matters of personal concern which need not be exposed to public knowledge. The State must display concern for the protection of their privacy. The Preamble of the Charter of the United Nations has reaffirmed the basic human rights and the right to self dignity of all men and women. Whereas Art. 12 of the

Universal Declaration of Human Rights has guaranteed dignity and respect for the individuals and the right to privacy of their residence, family and correspondence, Art. 17 of the *International Covenant on Civil and Political Rights*, 1966 and Art. 16 of the *Covenant on the Child Rights* and its Optional Protocol have also recognized the right to privacy as an inalienable right of the individual. Art. 22 of the *Constitution of the Kingdom of Nepal*, 1990 has enshrined the right to privacy as a fundamental right. Similarly, Section 49 of the *Child Rights Act*, 2048 [1991] has provided for, during the proceedings of any case relating to a child, the presence in the court room, of the legal practitioner, the father, mother, relative or guardian of the child and, if the official trying the case deems it appropriate and allows, any other person or social organization engaged in activities aimed at the protection of the rights and interests of children. Likewise, Rule 46(b) of the *District Court Rules*, 2052 [1997], Rule 60(a) of the *Appellate Court Rules*, 2048 [1991] and Rule 67(a) of the *Supreme Court Rules*, 2049 [1992] have provided for in-camera proceedings and the formulation of procedures for conducting the trial of cases relating to minors, rape, trafficking in human beings, establishing relation, divorce and also any other case which the court deems fit for trial in the camera court.

Even though all the Covenants and statutory Acts and laws mentioned above have recognized the right to privacy as an inalienable right of the individual, no clear legal provision has been made for protecting the privacy of the names and identity of the persons involved in the cases relating to women and children and the persons infected by contagious diseases like HIV/AIDS. Since due to the ever increasing threat of spread of diseases like HIV/AIDS there is a state of infringement of the economic, social, cultural and property rights of such persons, and as those victims have found it difficult to get access to justice and as there has also cropped up a situation in which they seem to be also deprived of the right to hearing by a competent court protected by international human rights law, the writ petition seems to have prayed for the issuance of an order directing for immediate enactment and enforcement of necessary law for guaranteeing the right to privacy granted by Art. 22 of the *Constitution of the Kingdom of Nepal*, 1990; for making appropriate provisions for maintaining privacy of the procedural formalities on the basis of gender sensitivity, taking into consideration the gender sensitivity of women and also the discriminations and allegations suffered by them, in cases relating to women in respect of the proceedings ranging from filing of the case to pleadings, submissions and delivery and publication of the judgment; for making appropriate provisions for maintaining privacy in cases relating to children right from the initial procedure of the cases in order to ensure juvenile justice to them, taking into consideration social stigma likely to be faced by the children in the future; for making necessary legal provisions for maintaining privacy in cases relating to the persons infected by HIV/AIDS right from the beginning of the process of registration of the case in view of the fact that the persons infected by HIV/AIDS are being victims of social discrimination and stigma and they are also being deprived of reasonable opportunities; and for making legal provisions for maintaining privacy in the case in the event of a party to the case moving a petition at the time of registration of the case or while it is in progress requesting the court for issuing an order for maintaining such privacy by showing special reasons and facts which justify such a demand; and also for making breach of such privacy by any person concerned with maintaining privacy in such cases punishable and also for providing reparation to the persons affected by that.

This court, issuing an order on July 16, 2006, directed the issuance of a notice to the defendants asking them to explain within fifteen days why an order should not be issued as requested by the petitioner and, taking into consideration the issue raised in the petition, also

granted priority status to the petition for the purpose of hearing.

Replying to the notice, the Prime Minister and the Office of the Council of Ministers contended that the writ petition should be rejected as the petitioner has also framed that office as a defendant without specifically mentioning which rights of the petitioner have been infringed.

In its written reply, the Ministry of Women, Children and Social Welfare maintained that the enactment of law or its amendment is a matter falling within the exclusive jurisdiction of the Legislature and, as the petitioner has failed to explain the reasons with justification as to which act of that Ministry has adversely affected the constitutional and legal rights of the petitioner, the petition was baseless and based on subjective logic and, therefore, it deserved to be rejected.

Likewise, in its written reply, the Ministry of Law, Justice and Parliamentary Management, praying for the rejection of the petition, contended that the right to privacy guaranteed by Art. 22 of *the Constitution of the Kingdom of Nepal, 1990* is in itself a law and, according to that provision, because it is inviolable except in the circumstances specified by the law and as an aggrieved person, in case of the infringement of such a right, can himself/herself move the court for the enforcement of that right, the petitioner has failed to specifically mention who, and how, has infringed the fundamental right of any person. Furthermore, as the writ petition appears to be related to cases relating to the privacy of a person or issue in which connection a provision has been already in the Court Rules and as also the Supreme Court is competent to make additional provisions in that regard pursuant to Section 31 of *the Judicial Administration Act, 2048* [1991], the petitioner's claim appears to be baseless and unreasonable.

Speaker of the House, Subhash Nemwang, in his written reply, contended that no one can disagree to the claim of the petitioner that the State must implement the obligations prescribed by various International Covenants relating to human rights by making relevant laws. The State must be always cautious in this direction, and the House of Representatives has always remained committed to and active in drawing the attention of the State in this regard. Expressing the commitment that the Government of Nepal must ratify the treaties and covenants relating to human rights including the one concerning International Criminal Court, Rome Statute etc, the House of Representatives is also discharging functions such as issuing relevant directives to the Nepal Government. The Speaker further stated that if either the concerned Ministry of Nepal Government presented the relevant Bill or any other member of the House of Representatives presented a private Bill before the Parliament Secretariat for the enactment of law on any matter in accordance with *the House of Representatives Rules, 2006* in connection with making appropriate and effective law for the enforcement and guarantee of the rights to equality, privacy and self dignity equally ensured for women, children and HIV/AIDS infected persons, the House of Representatives stands committed to the enactment of that law by initiating the necessary legislative process.

As this court had directed the petitioner on March 9, 2007 to produce before the court the outlines showing which model and procedure shall be effective to ensure privacy in the context of the guarantee accorded to the right to privacy by the Constitution, the petitioner has submitted a model of the guidelines as per that order.

Appearing on behalf of the petitioner in course of hearing of the writ petition which has been presented before the Bench as per the Rules, learned Advocate Rup Narayan Shrestha pleaded that the Constitution has protected the freedom and equality of a person, besides also protecting the right to privacy, which can be viewed as the main basis for the protection of an individual's self-dignity. The international human rights law has also laid emphasis on protection

of the right to privacy of an individual. Although the Constitution has protected the right to privacy, no exhaustive law has been enacted and implemented in this regard. Various international human rights laws have provided for making special provisions for the protection of the privacy of victim women, children and HIV/AIDS infected persons. As in our legal system, in the absence of any clear legal provision ensuring the privacy of the name and identity of women, children and HIV/AIDS infected persons involved in the legal proceedings, there is a scenario depicting the infringement of their economic, social and property rights and lack of access to justice, the learned Advocate pleaded for the issuance of the order as requested by the petitioner.

The written submission produced by the petitioner states that the rights to equality and self dignity are essential for a dignified living of the human person. Equality and self dignity guarantee freedom. It is the right to privacy which serves as the basis for the protection of self dignity. This is also linked with the privacy of information in a social, physical and mental manner. If the public exposure of some matters presented in course of a legal proceeding is not discouraged there is always the danger of deprivation of justice for the victims. In case of failure to protect the privacy of some matters the victim may be faced with a situation in which the rest of his/her life may be exposed to danger and s/he may also suffer from a social stigma. Particularly, if the privacy of the classes [of the people] exposed to risk is not protected, they cannot exercise their right to receive justice. Management of this right must be undertaken in order to protect against discrimination and stigma. If that is not done, it may result in restrictions also on the exercise of the right against exploitation, the right against violence, the right to property and the right regarding criminal justice. Besides, light has been thrown also on the various provisions made in the international human rights laws. On the basis of that it has been contended in the written submission that the order prayed for by the petitioner must be issued and, pending the enactment of relevant law as per that order, Guidelines for the protection of privacy should be issued.

Appearing on behalf of the defendant, Ministry of Law, Justice and Parliamentary Management, learned Advocate Narendra Prasad Pathak argued that the claim made by the petitioner in this petition is not clear. Since the Constitution has protected the right to privacy and provided for seeking judicial remedy from the apex court in the event of infringement of that right, and as provision has been made for in-camera trial of specific cases relating to women and the cases in which children are a party, there is no basis for the issuance of the writ and, therefore, it must be rejected.

As the present writ petition has been scheduled for today for delivery of judgment, in view of the submissions made by the learned counsels and the written submission presented by the learned counsels appearing on behalf of the petitioner, the following issues need to be addressed in this writ petition:

1. Whether or not one has got the right to maintain privacy about the identity or the other related information concerning the victim women, children or HIV/AIDS infected or affected persons involved in the legal proceedings? Whether or not it has any legal ground or justification?
2. What is the status of the existing legal provisions regarding the protection of privacy? Are they adequate or inadequate?
3. Does the claim for the right to privacy affect the other party's right to fair judicial hearing?
4. Whether or not maintaining privacy of information in the judicial process casts any impact on the right to information?
5. Whether or not the court possesses the power to issue an order to maintain privacy in the judicial process about the details of the party or the victim or the witnesses mentioned in the

petition ? And whether or not it is proper to issue a directive order, as requested by the petitioner, to make law for protecting the information regarding their identity ?

6. Whether or not it is desirable to make some immediate provisions pending the formulation of adequate legal provisions ? If the interim provisions are to be made, what type of provisions can be included in those interim provisions ?

It looks essential to first consider the special nature of those sections of the victim women, children or HIV/AIDS infected or affected persons involved in litigation who have got their own personal special nature and needs, and for whom the petitioner has sought for maintaining the privacy about their introductory and related information. There are some specific circumstances for the protection of the privacy of the victim women. Likewise, the factors and circumstances necessary for the protection of the privacy of HIV/AIDS infected persons or children are of different nature.

Let us first consider the case of women. Women like men may also get involved in conflict with the laws. And in the event of violation of law by women generally there is no need of protecting the privacy of the identity and other related description of the concerned women. The legal liabilities of a woman are similar to those of others in a situation where she is involved in some crime.

Even though Art. 13 of the *Interim Constitution* has provided for equality before the law and equal protection of the laws under the right to equality, in view of the present social context of the country on account of various religious, social, economic and cultural reasons the women do not appear to be in a position to enjoy equal opportunities in the political, social, economic and educational fields nor can they acquire a status similar to that of their male counterparts on account of various religious, social, economic and cultural factors. There are several things to be done by the State to change that situation and to create an equitable condition. Particularly the female community seems to be the victims of discrimination due to the existing discriminatory social, cultural and psychological factors, and besides other things, they also seem to be experiencing obstacles in the enjoyment of public rights or opportunities or facilities which are available according to the law. Consequently, not to talk of enforcing their rights, the women feel hesitant even to seek judicial remedy for violence or injustice committed against them, and, without enjoying their right relating to justice, they appear to be bound to surrender or tolerate the injustice. Such a situation is visible in the incidents of violence committed especially against women.

The women use to feel hindrances in getting access to justice by lodging complaints and appearing as witnesses for the substantiation of their complaints due to threats given by the criminals or the criminal group or due to the fear of the society levelling allegations against the character or purity of the women themselves in view of the nature of the violence committed against them.

Children are another class for whom the petitioner has asked for maintaining privacy regarding their identity and the related information. The concept of juvenile justice seems to have developed on the basis of the need for giving a judicial treatment, different from the one meted out to the adults charged with a similar offence, to children in conflict with the laws in view of some factors like the young age of children, evolving stage of their learning and understanding, positive social contributions expected from them in their long life in the future and the long-term impact on the society in case of the increase in criminality or perversion in the children. Under this, in course of taking action against a child for violating any law steps are taken to prevent him/her from repeating the violation of law in the future instead of sending him/her to detention or

prison, to arouse the feeling of repentance in him/her for the act s/he has committed, to adopt alternatives to punishment like imprisonment, to provide the victim with relief and reparation also with the involvement of and under the responsibility of the parents of the child and to explore the possibility of reform in the child, besides attempting at the rehabilitation of the child in the society through the restorative justice measures. It is for this reason that the claim has been made seeking imposition of restrictions on the publication, for public purpose, of the introductory and other related description of a child recorded in the judicial proceedings involving children where s/he has acted either as a defendant or suffered as a victim.

If the violation of law committed by a child is recorded and made public in stead of keeping it confidential, the society, after having knowledge about that, may treat the child as an anti-social element and there may develop some distance between the child and the society or a situation of conflict may arise between them. Even though the child repeats the violation of law, taking into consideration the principle of the best interests of the child, there have been made legal provisions not to punish the child as a habitual offender and to protect the privacy of the introductory details of the child during the progress of the legal proceedings or even after the decision of the case — in both the circumstances whether the child is a defendant or a victim. If the fact of prosecuting the child for getting in conflict with the laws or punishing him/her is kept in the written form or published, it may cause obstacles to the career development and character building of the child in the future. Therefore, a system has been developed in some countries to destroy the records after the decision of such a case.

Moreover, if the child happens to be the victim and his/her sensitive and vulnerable condition is published, other people may get thrilled at or attracted by such condition of the child and may also feel tempted to make additional exploitation or derive illegal benefits from the child. The violence committed against the child may haunt him/her life long and its publication may further increase the pain. If the privacy of the child is not protected there may arise a situation in which the child may not come forward to claim for judicial remedy against the violence or injustice committed against him/her or may not even participate in that process. Thus the issue of the privacy of the children involved in the juvenile justice process appears to be of a different nature.

So far the question of protection of the privacy of the introductory information of HIV/ AIDS affected or infected persons or the condition of their infection is concerned, this seems to be a problem of a different nature. It is relatively a new health related problem for which no curative remedy has been discovered so far, and as its infection is silently spreading in the society, this problem needs to be addressed in a strategic manner. The reasons behind this infection and the problems experienced by the infected persons are of multi-dimensional nature. Some factors like poverty, illiteracy, lack of awareness, lack of medical treatment and facilities, the problem relating to discharge of duty by the persons responsible for providing public service etc. help in the spread of infection of this disease. On the other hand after becoming a victim of infection the infected person is found to be suffering from violation of some human rights - including discrimination, boycott, deprivation etc. in the family, community and public utilities. As a result, the infected person experiences a gradual decrease in his/her access to education, employment, health facilities, recreation, family assistance and property etc., and s/he becomes compelled to seek judicial remedy for acquiring those things. At a time when the judicial remedy is required against all kinds of injustice, due to the fear of being a victim of additional neglect and boycott in the event of disclosure of one's infected physical condition and identity coupled with systemic delay, one may opt for discarding the process of judicial remedy. If such a situation is created, the

infected person has not only to face a threat to his/her life rather if such an infected person, who is incurable and dejected, behaves in a way as if s/he was not infected, a vicious circle of infection is created. This finally compels the society to bear an unexpected and unbearable burden.

The above description makes it clear that according to their respective condition and nature, there are specific needs of the classes for whom the petitioner has asked for protection of their privacy, and, consequently, the demand for maintaining such privacy needs to be considered exhaustively.

Now let us consider issue No. 1.

If it is to be considered whether or not the victim women, children or HIV/AIDS infected persons have got a right to the protection of their introductory information and if it is so granted, what are its legal grounds and justification. Besides the national constitutional and legal provisions made in this regard, the provisions contained in the international human rights conventions also need to be considered.

Under the fundamental rights provisions of the *Interim Constitution of Nepal, 2007*, several rights including the right to freedom [Art. 12], the right to equality [Art. 13], the right to privacy [Art. 28] and the right to constitutional remedy [Art. 32] have been included. Human rights or fundamental rights are the matters which need to be considered in the context of the relation of the individual with the State. It is the principle that the people accept the right of the State on the condition that the State shall also respect and safeguard the specific rights of the people or community such as freedom, equality etc. and shall not infringe those rights. As on the basis of this principle the State has legally recognized and guaranteed some natural necessities, these rights are treated as inviolable. The rights such as the right to life, the right to equality, the right to personal freedom, the right to property, the freedom of thought and expression, the freedom of publication, the right regarding justice etc. are treated as basic human rights. The right to privacy is directly or indirectly linked to all those rights in an indivisible manner, thereby prohibiting outside interference in the personal matters of an individual. For example, the right to life does not only signify an individual's right to live in a physical manner rather it also signifies one's right to live with dignity. If some highly personal information of an individual or citizen is subjected to disclosure except when its disclosure is essential for some specific legal purpose, the individual or the citizen is unnecessarily made to stand in the defense line and also falls in a position where s/he may not confidently do the work which s/he likes to do.

A demand for uncalled for openness regarding some one's personal information may lead to a situation where it shall be impossible to enjoy one's rights or to demand even for the fulfillment of one's legal obligations. For instance, in the event of taking any health service, even though the status of anybody is not directly related with that matter, if s/he is made to disclose whether or not s/he is married or whether or not s/he is infected with HIV/AIDS and, if s/he is a child, whether or not s/he has been charged with theft or whether or not s/he is involved in any litigation, simply that very reason may lead to a situation where it shall be difficult for him/her to enjoy the facilities provided by the law. If any pregnant woman wants to abort her unwanted pregnancy and the institution providing that service forces her to disclose the identity of the person who has made her pregnant or whether or not she is married, the pregnant woman may feel compelled to discard the abortion service as she may not want to disclose that information or such an act may make her feel uncomfortable. Such problems may be multiple and it is not possible to mention all the dimensions.

As a result of entanglement with the problems like HIV/AIDS, the status, guardianship, health etc. of the parents of the children may also be dragged into controversy. For instance, while talking about protection of the privacy of the introductory information about a child affected by HIV/AIDS or also in a dispute about the guardianship of a child it may be essential to provide protection of privacy of the status of the parents of that child. Even if the introductory information about the child is protected, the disclosure of the identity of his/her parents may destroy the meaning and purpose of the privacy of the identity of the child. If a child has been brought up in a prison due to the imprisonment of his/her mother the information about such a rearing may also need to be protected. Such instances may be multiplied.

In the process of enjoyment of judicial remedy the petitioner seems to have requested for making provisions for protecting the privacy of the introductory information about women who have been victims of violence against women, of children who are parties to a case and of persons who are infected with HIV/AIDS. Article 28 of the *Interim Constitution* has provided that the person, residence, property, documents, data, correspondence, character etc. shall be inviolable except in the circumstances specified by the law. Since that provision has made the privacy of the above-mentioned matters generally inviolable and has provided for specification of the conditions by the law for disclosure of their privacy, it appears that the law has made privacy a general matter whereas disclosure is an exception.

There is some special significance of various rights mentioned in the Constitution and their hierarchical order has not been fixed nor can it be possible to do so. No right is complete and absolute in itself, and for the enjoyment of any one right other rights may be related and subsidiary. The infringement of one right may cause obstruction to the enjoyment of also another right. Therefore, it is essential to consider any question relating to any right in the totality of the provisions regarding fundamental rights and also on the basis of their complementarity. For instance, even though only the right to privacy of the HIV/AIDS infected persons is to be considered, it may become essential also for the protection of their right to health. In order to prevent any otherwise impact on his/her personal or his/her family's right to education or employment or to prevent discrimination it becomes equally essential to protect the right to education, the right to labour, the right to property and the right to equality.

The right to privacy has got its own significance in the context of women or children. It has been mentioned in Art. 20(3) of the *Interim Constitution* that no physical, mental or any other type of act of violence shall be committed against women and that such an act shall be punishable by law. Because it has been mentioned in the Constitution that no discrimination shall be made against any person only because the person is a woman, if any woman involved in any specific litigation or placed in a particular situation does not feel the presence of a friendly environment for easy access to justice at par with men, the act aimed at bringing change in such a situation shall have to be treated as a part of the greater process of removing discrimination against women. The exercise of the right against torture guaranteed by Article 26 of the *Interim Constitution* is also relevant for safeguarding privacy in order to remove discrimination against HIV/AIDS infected or affected persons and to control torture or inhuman behaviour against them. If the treatment meted out to any party or victim creates a feeling of fear, threat or inferiority complex in the mind of such a party and makes him/her feel insulted such a treatment is considered to be insulting.²

² V. Vs. United Kingdom, European Court of Human Rights, 2000, 30 EHRR, 121.

Thus, in the present case, in order to make the right to privacy mentioned by the petitioner effective and meaningful there is a need for considering this right in the relativity of other relevant rights, and, especially, in the present context it needs to be considered in the light of the right to life, the right to freedom, the right to health, the rights of women, the rights of children, the right to property, the right to information and, most importantly, the right to justice and judicial remedy.

In the context of the analysis made above, it becomes relevant to look at the provisions made by the international law, especially the international human rights law, and our Constitution and the laws.

Article 22 of *the Constitution of the Kingdom of Nepal, 1990* had afforded protection to the right to privacy by providing that the privacy of a person, home, property, document, correspondence or information of any body shall be inviolable except in the circumstances specified by the law. Article 28 of the Interim Constitution has, expanding its sphere by also embracing other facets of the privacy of a person, guaranteed that "the privacy of the matters relating to the person, home, property, document, data correspondence and character of any body shall be inviolable except in the circumstances specified by the law." Under the provision of the right to privacy the privacy of the person as well as his/her confidential information, too, seem to be protected. If the privacy of the data and the personal introductory description of an individual relating to his/her character and other related information is not protected, the right to privacy becomes extremely contracted and may not attain its objective.

The use of the word 'person' in Art. 28 of our *Interim Constitution, 2007* signifies not only the inviolability of the body but also the physical health and the personal introductory matters. The data of a person, irrespective of whether it is concerned with any case or health, are treated as inviolable except in the circumstances specified by the law. In other words, for open dissemination of such information permission should have been granted by the law itself. Otherwise, it shall be inviolable. So far as regards the question of whether or not the data received in the judicial process fall under this category, if it is argued that only because it is a judicial process all matters should be open and easily accessible, in that case the above mentioned constitutional provision shall become meaningless.

The right to privacy is found to have acquired recognition as one of the significant human rights at the international level. Article 12 of *the Universal Declaration of Human Rights, 1948* has provided, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has got the right to the protection of the laws against such interference or attacks". That Article seems to have ensured the right to privacy regarding an individual's honour, reputation and his/her residence, family and correspondence. Likewise, Art. 17 of the *International Covenant on Civil and Political Rights, 1966* has also provided, "[1] No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. [2] Everyone has the right to the protection of the law against such interference or attacks." Thus this provision has also laid emphasis on the protection of the privacy of the honour and reputation, residence, family and correspondence of an individual.

Likewise, Article 16 of *the Convention of Rights of Child, 1989* has also provided, "No child shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, nor to unlawful attack on his/her honour and reputation," And, by further providing that "the child has the right to the protection of the law against such interference or attacks" it seems to have recognized the children's right to privacy.

Article 8{4} of the *Optional Protocol to the Convention of Rights of Child on the Sale of the Children, Child Prostitution and Child Pornography, 2000* seems to have included the matter of taking appropriate steps in accordance with the national law to remove undue flow of information regarding introductory matters relating to a child in order to protect his/her identity and privacy. [“Protection as appropriate to the privacy and identity of child victim and taking measures in accordance with the national law to avoid the inappropriate dissemination of information that lead to the identification of child victim.” - Art. 8{6}].

UN General Assembly, Special Session [UNGASS]³ on HIV/AIDS has also stated that the governments need to make law and Rules and undertake other measures to ensure the rights of the persons infected with HIV/AIDS, and under this their confidentiality and privacy should be also protected.

Article 9 of *UNESCO Universal Declaration on Bioethics and Human Rights* has also made special provision regarding privacy and confidentiality and observed in this regard as follows: “The privacy of the persons concerned and, the confidentiality of their personal information should be respected. To the greatest extent possible, such information should not be used or disclosed for purposes other than those for which it was collected or consented to, consistent with international law, in particular international human rights law.”

The human rights Conventions adopted and enforced by various regional groups, in accordance with the above mentioned Conventions, have also accorded respectable place to the right of privacy of a person and have thus guaranteed its protection. For example, the provisions made by Article 8 of the *European Convention on the Protection of Human Rights and Basic Freedoms* [1950] and Article 11 of the *American Convention on Human Rights* [1969].

It becomes clear that the above mentioned Conventions and Declarations have created obligations for the States to protect effectively the right to privacy of the individual by making laws. Even though the human rights Declarations do not carry mandatory force as exercised by treaties, the States should implement their spirit by relating them to the main treaties.

As Nepal has become a party to the international human rights Conventions and accepted the obligations imposed by them, there is no dispute that the State must implement those obligations by incorporating them in the Constitution, statutes, law and rules and also various programmes. Several judgments delivered by this court in the past have already made adequate interpretations regarding the national recognition of the treaties in the context of Section 9{1} of the *Treaty Act, 1990*. What is remarkable is that it is essential to consider the right to privacy and the right to access to justice from the view point of basic human rights. Besides the right to justice, the right to constitutional remedy has been also guaranteed in the *Interim Constitution of Nepal, 2007*. In addition to Articles 24 and 32, certain rights regarding judicial remedy also get mobilized in course of justice dispensation by the general courts under their ordinary jurisdiction.

Out of the general and extra-ordinary jurisdictions available for the protection of fundamental and legal rights of a person, the proper jurisdiction is invoked as required by the situation. It is the regular remedies which are sought especially for the resolution of the question regarding juvenile justice, violence against women and also remedy for property or other rights of HIV/AIDS infected persons. So the right to privacy is limited not only to the application of the Criminal Law but also extends to the implementation of the Civil Law. If any person has filed a

³ Declaration of Commitment on HIV/AIDS, 2001.

lawsuit asking for expenses or his/her share of property or compensation for medical treatment for having been infected with HIV/AIDS, information regarding such a situation, too, cannot be allowed for unrestricted dissemination. At least the relevant portion needs to be given protection upto a desirable limit. So there is a need for looking at the right to privacy as to how the judicial process can be made basically fair, free from discrimination and friendly for the court users in course of judicial treatment.

The petitioner has, in her written submission, drawn attention to the *Declaration of Basic Principles for Victims of Crime and Abuse of Power* [29 Nov. 1985] which seems to be relevant also in the context of the present case. It has been mentioned in that Declaration that the victims should be given respectable and sympathetic treatment and their access to judicial mechanism should be ensured and speedy remedy should be provided to them in accordance with the law for the losses suffered by them. It has been also stated in that Declaration

Irrespective of the way in which the victim has been made to suffer from injustice, our social outlook upon them may have, in stead of making efforts to heal his/her wounds, turned negative for some fallacious belief. If it so happens, in addition to the violence suffered by the victim earlier, a situation may arise forcing such a person to further suffer continuously from the second stage of violence or pain as a result of publication or recording the physical condition of that person. The psychological tension or damage caused to a person on account of violence is treated as an additional recurring violence falling under the second category. In the absence of legal and other protection aimed at tackling such a problem, if obstacles are created also in the way of enjoyment of other rights or facilities, the search for justice turns into a curse in stead of a bliss for the victim.

Adverse social psychology still exists in our society in a religious or cultural form. An extensive movement needs to be launched for bringing about broad changes in such a type of thinking, but it has not taken place so far. By a mere declaration of rights in the law negative social psychology or obstacles existing in the way of enjoyment of the rights may not disappear automatically. If such a reality is ignored, there may be a danger of our findings becoming more technical than substantive. As a result, our services may not be automatically available to the people for whom they have been created or to whom they have been dedicated. If favourable conditions are not created, the parties, despite their willingness, may not have the capacity to accept our services. In that event a situation may arise where our services may not be available to those who need them most whereas those who do not need them may get more benefited by them. Therefore, taking into consideration such a stark reality, it is necessary to, by ensuring an individual's right to judicial remedy, grant him/her effective and easy access to justice and to guarantee privacy of the personal identity of the parties involved in the judicial process through the protection of the right to privacy. Its main objectives are that the concerned party may not lose his/her courage to seek remedy against injustice and s/he may not be made to experience any additional disqualification or disadvantage in practice for the reason of having raised one's voice against injustice. It is the belief of this Bench that if in the eyes of the incapacitated sections of the society our services lose attraction or do not carry conviction it shall have to be treated as an indication of the gradual end of the social utility of our services.

In fact, the right to access to justice is a right covering an expansive area which has got various complementary dimensions. Out of them, in addition to other matters, it is clear that the protection of the right to privacy of the victim is an important part. It is essential for the judicial

system to always maintain a balance between the obligation to give fair treatment to the parties present in the judicial process and the right of the parties to have access to justice. In this context, without guaranteeing the personal privacy of the victims and their personal security and without taking into consideration the disadvantages confronted by the victims, justice cannot take a firm and expressive form in the midst of revenge and fear. For arousing this feeling of self-confidence and security among the persons who have come forward to seek justice it is essential to give them guarantee of the privacy of their personal identity or other related information. If viewed in this way, the need and relevance of the protection of the privacy of the personal identity and other related information of the women, children or HIV/AIDS infected persons who have come to be present in the judicial process appears to be clearly important from the viewpoint of the enjoyment of the right to judicial remedy.

Let us now consider the second question - **What is the existing legal provision regarding the protection of the personal introductory information of the persons mentioned in the petition ? Is it adequate or not ?**

Although the right to privacy has been declared in Art. 28 of the Interim Constitution, it has been placed under the clause "except in the circumstances specified by the law," and no extensive provision of the law has been made so far. Till today extensive legal provisions regarding the right to privacy of the women, children or HIV/AIDS infected persons have not been made. As a result, the rights and interests of both the person seeking privacy and the person demanding information are virtually uncertain in practice and dependant on the administrative discretion.

As the right to privacy needs to be managed according to the nature and needs of the class seeking that right, it is not possible to make similar provisions for all classes or in all circumstances. Therefore, there is a need of regulating the right to privacy by first deciding the nature and extent of privacy on the basis of specific sections, classes or circumstances, and the Legislature and the Executive are needed to take special steps in this regard. As regards the question of the right to privacy of the victim women, children and HIV/AIDS infected persons who have entered the judicial process, in the recent days a provision has been made for in-camera trial of the cases relating to rape, trafficking in human beings, children, ascertainment of relation and divorce. Besides, it has been also provided that if the court deems any other case fit for in-camera trial, it may issue an order accordingly. Such a provision has been made by Rule 46(b) of the *District Court Rules, 2052* (1995), Rule 60(a) of the *Appellate Court Rules, 2048* (1991) and Rule 67(a) of the *Supreme Court Rules, 2049* (1992). In those Rules, as no mention has been made about the civil or criminal cases in which HIV/AIDS infected persons are involved as plaintiffs or defendants, those Rules do not seem to include such cases under this category.

It has been provided that while taking the statement of a victim woman in course of conducting investigation of any offence under the chapter on Rape in *Muluki Ain* (**the National Code**) a female police personnel must take that statement⁴. Likewise, it has been further provided that during the trial of a case under that chapter only the concerned legal practitioner, the accused, the victim woman and her guardian, the police personnel granted permission by the official entrusted with the trial of the case and the court employees may remain present in the court room.⁵

⁴ *Muluki Ain*, Sec. 10a of the chapter on Rape.

⁵ *Supra*, f.n.3, sec. 10b.

The Children Act, 2048 (1991) has provided that during the trial of any case involving any child the legal practitioner, parents, relation or guardian of the child and, if the official trying the case deems it proper and grants permission, any person or representative of any social organization involved in the activities concerning the protection of the rights and interests of children may remain present in the court room⁶. Besides, *the Children Act* has also imposed restriction on the publication, in any daily or magazine, of the description of any incident relating to such a case without the permission of the investigating officer or the official conducting the hearing of the case.⁷ The same Act has further provided that the police office must maintain, in a confidential manner, the record of the name of the child arrested in connection with the charge of any offence, his/her address, age, sex, family background, financial position, the offence committed by the child and the description of any action if taken in that connection,⁸ and if such data are published for the sake of any study or research it can be published only on the basis of age or sex, and that, too, without mentioning the name, family title or address of the child⁹.

Although the above mentioned provisions have provided for in-camera proceedings and the protection of privacy in regard to publication in dailies and magazines, no thought has been given so far to the inclusion of a provision regarding maintaining privacy about the introductory information of the child also in the case file and the documents included therein. Moreover, there is no effective implementation of the existing law.

Even after making the provision for camera court no exhaustive Guidelines have been prepared and issued for the purpose of conducting the proceedings in a camera court. The physical environment and management aspects of camera court have been almost forgotten. Not even initial work has been done in the direction of ensuring necessary sensitivity, awareness and skill in the mind of judges, employees and also the legal practitioners in regard to conducting the in-camera trial. Information has not been disseminated in an extensive manner about the provisions of the in-camera proceedings and its advantages. Camera court does not simply signify a process restricting the unnecessary entry into the place where the Bench is physically operating. No formal provisions having theoretical and practical clarity have been formulated regarding the responsibility to be shouldered by those participating in the in-camera proceedings in accordance with the spirit of this trial, irrespective of whether they are inside or outside the camera court or whether the in-camera proceedings are in progress or they are over.

One of the objectives of the camera court is to protect the victim party to the case against a discouraging environment which dissuades him/her from bringing to light even the matter which s/he is willing to disclose only because the Bench is open, and thus to empower him/her to make his/her participation and presence in the judicial process in an effective and actual manner. But if the victim is made to face the accused even inside the camera court or if there arises a situation in which the victim is not in a position to bear the fear or terror caused by his presence and if the victim could not be protected against all this, there shall be no possibility of the camera court serving its purpose. Rather due to the presence of the limited number of persons inside the court room the victim may feel additional insecurity from the defendants. If it so happens the advantages of the open Bench shall be lost whereas only the risk of the camera court shall become obvious. Hence, in order to ensure the immediate and long term benefits of

⁶ Sec. 49(1).

⁷ sec.49(2).

⁸ Sec. 52(1).

⁹ Sec. 52(2).

the camera court necessary study, management, monitoring and evaluation are still to be undertaken, for which it is necessary that the concerned courts themselves should first display special management and readiness on their own responsibility.

Even though the objective of the provision for setting up camera court in some specific cases is to address the specific needs of the victims in the concerned cases and to prevent unnecessary disclosure, the victim women, children and HIV/AIDS infected persons have felt the lack of guarantee of the privacy of their introductory and other related information. Besides, no thought has been given in regard to the protection of the privacy of their introductory information following the disposal of the case.

The provision of camera court is a provision which can be activated only after the filing of the case. However, in a few sensitive cases there may arise a need for protecting the privacy of the introductory information of the complainant or the victim right from the time of lodging of the first information report (FIR). The victim may not feel like filing the FIR for the fear of the general people forming negative opinion about him/her by coming to know about his/her condition only because of the filing of the complaint and the unnecessary dissemination or publication of unwanted information through that means. The victim, therefore, thinks that the general people would not have learnt about his/her condition had s/he not filed the complaint leading to the initiation of the case, since after the start of the process of the case following filing of the FIR the victim is presented before the court, his/her proofs and evidences are subjected to examination and they are also kept in the written form and brought to light.

All the criminal events taking place in the society are not found to be recorded as complaints only because of the failure to maintain and guarantee the privacy of the information relating to the victims. Such a trend is treated as an additional opportunity for the criminals to commit crimes and on the other hand it also aggravates the vulnerability of the victims. Therefore, it is essential to guarantee the identity and other information related to a sensitive class like victims and children right from the time of investigation of the offence. At present the prevailing scenario in our country shows a trend of disclosing all the information about the victim right from the time of filing of the FIR, disclosing the case file and the documents contained therein, the concerned party enjoying the freedom of demanding their copies and inspecting them and also the media having unlimited access to them. That is to say, the prevailing scenario shows that the needs and interests of the victims have been left unregulated. If all the problems relating to access to justice - ranging from investigation to judicial adjudication, and, thereafter, publication and implementation of the decision - are not addressed, the self confidence of the victims cannot be enhanced only by conducting proceedings in a camera court which start in the middle and also end in the middle of the judicial process. In order to make the existing camera court meaningful and to ensure the judicial guarantee of a high order for the victim and the sensitive party it is, therefore, essential to make additional provisions for protecting the privacy of their introductory personal information and other related information.

Let us now consider the issue No. 3.

It is necessary to consider in the present context what type of relation exists between the right to privacy and the right regarding justice to have fair hearing from a competent court. Whereas the right to privacy compels to protect the privacy of certain specific information, everybody, under the right to justice which remains as an integral part of judicial remedy, possesses a right to information about any action taken against them and also to have fair hearing from a competent

court. Judicial impartiality and unbiasedness are the main prerequisites of the right to justice. The right to information, the right regarding justice and the right to judicial remedy can be viewed both as mutually independent and as complementary to one another.

Public information can be sought for under the freedom of speech and expression and the right to information, and the judicial information is also included under this. Our constitution has guaranteed several matters under the right to justice enshrined in Art. 24. But under that provision it has not been specified that every trial must be made public nor has it been made mandatory that all the subject matters of judicial hearing should be also made accessible for the common people. Since it is the right of a defendant to seek, under the freedom of speech and expression, necessary information in order to examine the evidence and information presented against him/her, s/he is entitled to have the natural right to seek, receive and present his/her version in that connection. In addition to that, the matters regarding the enjoyment of one's rights granted by Art. 24 are also there. The rights of the victim, too, are another aspect in a case which need to be considered along with the rights of the defendant. His/her right to express himself/herself without any hindrance needs to be recognized in order to reach the goal of judicial remedy. Only in a proper environment and with proper opportunities the victim may express him/herself in a proper manner and present all the available proofs. Hence, it is the duty of the state to manage the judicial trial ensuring guarantee for all this.

Although Art. 24 of the *Interim Constitution* has not provided for judicial dispensation only through an open court as a necessary prerequisite for the enjoyment of the right regarding justice, our judicial procedures seem to be generally automatically oriented towards the system of open trial. In fact, it can be said that making judicial trial generally open seems to remain as a characteristic of our judicial system. And our judicial system seems to be conducted in accordance with the spirit pervading in Art. 11 of the *Universal Declaration of Human Rights*¹⁰ and Art. 14 of the *International Covenant on Civil and Political Rights* which have been also ratified by Nepal.

According to the above mentioned Article 14 of ICCPR all persons are equal before the courts and tribunals. It has also provided that in the determination of any criminal charge against any person or his/her rights and obligations in a suit of law s/he shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. It has further provided that the press and the public may be excluded from all or part of a trial for reasons for moral, public order or national security or if the interest of the private life of the parties so requires or in the circumstances where the court is of the opinion that in special circumstances publicity would prejudice the interests of justice. Besides, it has also provided that any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juveniles requires otherwise or the proceedings are concerned with matrimonial disputes or the guardianship of children.¹¹

¹⁰ Article 11.1 (UDHR) - "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence."

¹¹ Article 14 (ICCPR) - "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone, shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice, but any judgments rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

The above-mentioned Article 14 has provided for imposing restriction on the presence of the press and the public during a trial in order to maintain public interests, national security, morals etc. Moreover, it has been also clearly mentioned that restrictions can be imposed on public hearing if, in the opinion of the court, the purpose of justice may be defeated if open trial was allowed or the court proceedings were published. Also, even while making any decision public it has been provided that exceptions can be made in the interests of children or in the issues relating to matrimonial disputes or guardianship of children.

Although the concept of public hearing has been included in *the International Covenant on Civil and Political Rights*, it is not proper to say that the very use of the term “public hearing” must necessarily be viewed as an open hearing. The hearing conducted in accordance with the law does not also lose its public element only for the reason of restriction imposed on the entry of some particular person with a view to regulating hearing in certain specified circumstances or due to a hearing conducted in a camera court or due to not disclosing the identity of a particular party or witness. Even where the hearing is conducted after making such an arrangement, in actuality, it is the public law which is being applied, and the judicial process is regularized. The main thing which needs to be considered in the judicial process is whether or not the concerned party was dealt with fairly and whether or not that party received adequate opportunity for his/her defence.

Our *Muluki Ain* (**the National Code**) and the laws and Rules relating to judicial administration have also granted it recognition to a desirable limit.¹² It has been already discussed above about the provision of camera court in some particular cases. It is not that there shall be judicial fairness only when the Bench is open and that the judicial fairness would be a casualty the moment the hearing is conducted in a camera court. For a fair hearing it looks essential to make a provision for some major prerequisites like opportunity provided to the party for presenting his/her claim or defence without any hindrance, procedural simplicity, opportunity for legal aid or representation, congenial environment, judicial impartiality etc. In fact, in our judicial system, the judicial process has been generally kept open and the in-camera proceedings are conducted as an exception only in some cases in which the parties of some specific conditions are involved. And while doing so, the approach remains that even in those sensitive circumstances the judicial flow must continue uninterrupted. It is necessary to view this, in fact, as an attempt at striking a balance between judicial fairness and judicial effectiveness.

Only because special type of protection has been afforded to the parties or witnesses there is no reason to believe that the dignity of open hearing shall be eroded only for that reason. If there is possibility of fear or influence also in the open court, justice may get obstructed even there. It is for this reason that there is generally no place for questioning the justification of public or open court. Nonetheless there seems to be no reason to believe that fair judicial hearing may not be possible only because in special type of cases or in cases involving special type of people the hearing has been made public only after maintaining the confidentiality of some specific information or the hearing has been conducted in a camera court. If the necessary prerequisites or qualities required for fair judicial hearing are present, it should be presumed that there is of fair judicial hearing irrespective of the fact whether there is an open court or a camera court.

In fact, the right to public hearing and the victim's or the party's right to privacy are a matter to be viewed in a balanced way. It is not correct to say that an accused person's right to

¹² Sec. 49 of The Children Act, 2048; Sec. 10b of *Muluki Ain*.

defence and fair hearing has always got precedence over the victim's right to judicial remedy. For the guarantee of fair administration of justice it is essential that the victim persons must present their evidence without any fear or obstacle and the decision maker must also issue the necessary orders for the same. ["The state has an interest in fair administration of justice. It requires that the victims and witnesses depose without fear and intimidation and that the judge is given sufficient power to achieve that object"].¹³ In fact, under the right to judicial fairness it is necessary to view in a coordinated manner the party's right to defence of his/her innocence along with the victim's right to seek judicial remedy for the injustice committed against him/her. When sometimes it becomes necessary, in view of the nature of the case, to provide protection to the privacy of the introductory information of also a party to the case (for example, children) as it appears compulsory in the interest of justice, it becomes all the more important in the case of the victim. It is not possible to say where this balance shall be struck. There is a need for continuous review of the circumstances for striking such a balance. In the present context a defendant's right to defence does not mean that he can subject the victim's evidencem or the victim to cross examination in any manner or to any extent. Rather it simply signifies that s/he must be provided with a guarantee of the basic opportunities required for defence.

Nowadays due to the expanding nature of terrorism and in order to ensure, for the sake of fair justice, the desirable participation of all the concerned by protecting them from the emerging new trends seen in the world of crime, the procedures have been already adopted to conduct the trial in a camera court after shifting the case from the open court, and to record the evidence and statement of the witnesses, protecting the victim or the witness from confronting the defendant, through audio visual medium or close circuit television or by using a bar erected between the defendant and the victim. The Indian Supreme Court has ruled, in *Sakshi vs. Union of India*¹⁴, that if any testimonial statement has been recorded by using video screen and the defence has watched it, the requirement of a defendant's right to have the proofs examined in his presence should be treated as fulfilled. In order to deal with the menace of terrorism various legal provisions including Section 13¹⁵ of the Indian Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) and Section 30¹⁶ of the Prevention of Terrorist Act, 2002 (POTA) have been made.

Some new methods of examining a child witness, allowing a few exceptions to some general rules followed in course of examination of an adult witness, have started finding place in our system. For example, even the cross examination made by the defendant is indirectly conducted through the judge; informality is adopted while examining a child witness and the examination of the witness takes place in a suitable manner, after considering his/her mental level and after providing him/her with a friendly person or environment; the version of the child witness is recorded through an audio-visual means for presenting it in the court. It is necessary

¹³ *Scott v. Scott*, 1913, AC 417.

¹⁴ 2004(6), SCALE.

¹⁵ Section 13 of TADA:

- (1) Notwithstanding anything contained in the Code, all proceedings before a Designated Court shall be conducted in camera; provided that where public prosecutor so applies, any proceedings or part thereof may be held in open court.
- (2) A Designated Court may, on an application made by a witness in any proceedings before it or by the public prosecutor in relation to a witness or on its own motion, take such measures as it deems fit keeping the identity and address of the witness secret.

¹⁶ Section 30 of POTA: Protection of witness:

- (1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reason to be recorded in writing, be held in camera if the Special Court so desires.
- (2) A Special Court, if an application made by a witness in any proceeding before it or by the public prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

to protect the privacy of the introductory information about the concerned party in certain conditions in the judicial process in order to ensure the act of seeking and receiving justice in view of basically sensitive cases or the sensitivity of the concerned party and the needs of justice. But it is equally necessary to take precaution against making such a situation adverse thereby allowing it to become prejudiced enough disabling the defendant to get justice. The need for a fixed procedure or Guidelines can be realized in order to ensure such a situation.

Let us now consider question No. 4.

While considering the question of whether or not the act of keeping the personal details of a party to the case or the victim secret contradicts the defendant's or the public community's right to information, as the right to information has been also accorded protection in the present Constitution it cannot be said that the need for creating a demarcation line between the right to privacy and the right to information may not arise. The right to information is also treated as an integral part of a person's freedom of expression. For a meaningful enjoyment of one's freedom of thought and expression the act of seeking and receiving some information of public importance, which is felt necessary for some one, constitutes the inner contents of the right to information. It has been already mentioned in the law relating to information that the procedure of getting information of public importance should be provided in the law itself. A provision regarding giving other persons compulsory access to private information is neither there in the law nor is it proper to do so. In fact, personal information is inviolable except where the law compels to do so. Imbibing this very spirit, *the Right to Information Act, 2064* [2007] has provided for giving protection against unauthorized publication and dissemination of any information of a personal nature.¹⁷

The Right to Information Act, 2064 has also provided for the use of personal information only after obtaining written consent except where it is necessary for the sake of preventing any serious danger to the health or security of the public or controlling corruption and where the law permits for such publication.¹⁸ Therefore, it does not seem that the utility of the provision regarding privacy guaranteed by the right to information can be obstructed. In fact, it is worth remembering that under the right to expression, is also included the right of a person who is not in a position to express him/herself. Particularly, as the victim women and children exposed to risk and HIV/AIDS infected persons can express themselves or explore the judicial remedy for their judicial needs only if the privacy of their personal introductory information or other information is guaranteed, it is also the duty of the State and the society to provide guarantee for such things.

It is not proper to say that the right to privacy always obstructs the flow of information. The information for which legal protection is not considered essential does not fall under the confines of privacy, and even within the law relating to privacy relaxation can be given for allowing access to information. Also, under the right to information the provisions regarding refusal of access to a person's information declared inviolable may also be included. What is most important is to provide protection in the judicial process to the information regarding privacy of the introductory and personal information of the classes exposed to danger within a necessary and desirable limit in order to create a situation for the enjoyment of their rights.

¹⁷ Sec. 28(1).

¹⁸ Sec. 28(2).

Another right related to the right to information is the right regarding publication, transmission and press. The right regarding publication, transmission and press is considered as an enlarged form of the freedom of expression and publication. That right and the right to information both help in giving expression to a person's freedom of expression and publication. The above-mentioned rights also help in the promotion of greater public interest. Nevertheless, in the hierarchical priority of rights, these rights are not considered as enjoying superiority over other rights. Under the right to publication, transmission and press embodied in Article 15 of the Constitution a provision has been included which says that laws can be made with a view to imposing restrictions on the activities aimed at disturbing the good relation between various castes, races or communities, causing slander or contempt of court or adversely affecting public etiquette or morality. Thus it is clear that even while enjoying the right to information it must be enjoyed confining oneself within the area defined by that right.

If, through those rights, positive contributions are made to the enjoyment of a person's right to justice and the right to judicial remedy in an unhindered way, the meaningful protection of every right can become possible.

Now let us consider question No. 5.

In the context of analysing various questions the status of the existing rights and the relevant laws relating to the protection of the privacy of the personal introductory information of the women, children or HIV/AIDS affected or infected persons mentioned in the petition has been analysed. This has made it clear that making legal provisions, addressing the necessities of all the sectors, regarding the enjoyment of privacy, which has been recognized as a fundamental right, has become necessary. Now a question arises whether or not an order can be issued for protecting the privacy of the introductory information of the persons who have come to join the judicial process in the capacity of a party or a victim. Actually, this question is very significant. It is necessary to consider whether or not such an order can be issued and, if yes, in which capacity such an order can be issued.

Article 100 of the *Interim Constitution of Nepal, 2007* has provided that the powers relating to justice shall be exercised in accordance with this Constitution, other laws and the recognized principles of justice. Besides, in Article 107(2), extra-ordinary jurisdiction has been granted to settle any dispute relating to a constitutional or legal question by issuing a necessary and appropriate order. For this purpose this court also possesses the power to issue appropriate orders with a view to imparting full justice and providing appropriate remedy. It is the duty of the court to defend the people's right to justice by exercising, in a meaningful way, the jurisdiction created by the law relating to judicial administration in addition to the right to constitutional remedy granted by Article 32 and the extra-ordinary jurisdiction enshrined in Article 107 of the Constitution. Exercising such a right is not a mechanical work. The above mentioned jurisdiction needs to be adopted in the totality of the right of the party, the need or problem experienced in course of its enjoyment, the creation of infrastructure required for addressing it properly and also reasonable thinking and conduct.

No existing law seems to hamper the act of conducting any programme about the protection of the victim witnesses initiated in view of the special needs of the specific classes placed in a disadvantaged situation or the party exposed to risk provided that justice can be delivered by protecting the secrecy of specific identity or details or by adopting anonymous

procedure in that course. No where it has been accepted that under an accused person's right to have information about the charge against him is also included his right to compel the victim witness to be present before him and the right to make public defence after obtaining all the information from the latter. Such a right is treated as a relative right which can be regulated to a desirable extent, and in totality it has been accepted by several countries that the right of the accused and the right of the victim ought to be viewed from the viewpoint of the balance of interests. Hence, in order to meet the needs of justice it has been recognized as an integral part of the court's inherent jurisdiction regarding dispensation of justice to make necessary arrangements as an exception to the open court and to issue an order under that provision protecting the privacy of any specific party or victim. And it is a general belief that the absence of any specific law does not create any obstacle to do so.

In the United Kingdom, the House of Lords, in *Attorney General Vs. Leveller Magazine*,¹⁹ has explained about such a provision and declared that the court, under its inherent right, retains the power to maintain secrecy about the name of the witness.

Also in *Taylor Vs. Attorney General*, the Court of Appeals of New Zealand has ruled that the court reserves the right to issue a directive as to which extent publication about any case should or should not be allowed outside the court.²⁰

The Supreme Court of Canada has also, in *R. Vs. Dunett*²¹, held that the right to fair hearing in a case is not absolute, and that anonymity can be permitted if disclosure of the identity of the complainant or an innocent person is detrimental to his/her interests, and that seems more essential than the interest of the defendant.

In several countries separate laws are found to have been made regarding protection of the personal information of the victims or witnesses as a part of the Victim/witness Protection Scheme. For example, mention may be made of *the Witness Protection Act, 1991 of Victoria* and *the Evidence (Witness anonymity) Amendment Act, 2000 of Queensland of Australia*, *the Witness Protection Ordinance [67 of 2000] of Hong Kong*, *the Witness Programme Act, 1996 of Canada*, *the Portugese Legislation Act (Act No.93/99 of 14 July, 1999) of Portugal* and *the Witness Protection, Security and Benefits Act (Republic Act No. 6981) of the Philippines*.

Besides, different provisions are found to have been made in several states of the United States of America in regard to the victim or witness protection. Article 706-57 and 706-63 of *the French Penal Procedure Code* has made the following provision:

"If it is found that there is danger to the life or the physical integrity of the witness or any member of his family or of a close relative then the examining magistrate – public prosecutor will be justified in authorizing declaration of such witness as protected without his identity appearing in the file of the procedure. In no circumstances can the identity or the address of such a witness be disclosed."²²

In some countries like Japan, Netherlands, Germany, Italy etc. also such legal provisions regarding protection can be found. This is indicative of the emergence of a new trend of the protection of privacy by law.

The above analysis shows that the courts have, exercising their inherent judicial jurisdiction, issued orders for the protection of the personal privacy of the party to a case or the

¹⁹ 1979, AC 440.

²⁰ 1975(2), NZLR, 675.

²¹ 1994 (1), SCR, 469.

²² With acknowledgement to Law Commission of India, 198th Report, August 2006, P. 493.

victim on the basis of necessity and appropriateness for the sake of fair dispensation of justice. However, it does not mean that a demand has been made for not allowing the defendant to know, even for the purpose of his defence, who are the witnesses against him in that case or to close all the ways of cross examining them. Rather the demand has been made only for the protection of the secrecy of the personal introductory information in the proceedings of a case right from its beginning. In such a situation where the privacy has been protected there is a need for conducting or regulating the presentation of evidence, the procedure of the examination of witness and some other related matters in a special manner in order to make such protection more effective. Not that comprehensive provisions regarding the privacy of a party to the case or the victim cannot be the subject matter of legislation. In fact, making a separate legal provision in this regard is not only desirable but also essential because such a need can be better addressed only through the means of effective law.

For this, it looks essential that the Executive and the Legislature must take initiatives to make law for the protection of privacy of the victim women, children and HIV/AIDS infected persons. It is necessary to include adequate provisions in the law and to implement such provisions including protection of the privacy of the personal information of the persons whose privacy needs to be protected, the information about their physical and medical conditions and the information which has come to light in the judicial process, providing necessary counseling, disclosing some information after obtaining informed consent, specifying the conditions when the information may be disclosed, protecting the privacy of information or prescribing the procedure and authority for disclosing such information, making provisions for necessary punishment, reparation and treatment for its effective implementation, providing for a record system equipped with necessary techniques and methods of monitoring and evaluation for controlling the misuse of that provision and also making provisions in the law, if so needed, for essential conduct.

The written replies submitted by the opponents do not show any ideological objection to the act of protecting privacy by making a law relating to privacy as requested by the petitioner. The Speaker of the Legislature Parliament has not only not expressed his opposition to making law for the protection of privacy of the classes of people mentioned in his written reply but has also expressed his consent for the need of such a law and displayed his willingness to facilitate the process if the necessary Bill is presented by the government or the concerned party. The positive expression given by the speaker of the House of Representatives in his written reply in respect of the request made in the petition appears to be a praiseworthy beginning, notwithstanding the fact that no initiative seems to have been taken so far for making law in this regard.

Therefore, this directive order is hereby issued to the respondents Prime Minister and the Office of the Council of Ministers and also the Ministry of Law, Justice and Parliamentary Management to present, at the earliest, a Bill before the Legislature Parliament, also taking into consideration the aforesaid legal questions, for making law containing comprehensive legal provisions, after having consultations with a committee set up for this purpose and comprising as its members the concerned Court, Bar Association, women, children and the people representing the marginalized sections of the society including HIV/AIDS infected persons or the organizations working in their interest, the representatives of the civil society and also the petitioner Forum for Women, Law and Development.

Even though an order has been issued as mentioned above, since it would take some time for the law making process, let us now consider the last question whether or not some interim

provisions should be made for immediate arrangements.

Women become involved in various cases, such as, rape, incest, abortion, claim for establishing relations, divorce etc., all of which are related to violence against women and which also cause birth to several other legal problems. Similarly, even today throughout the Kingdom of Nepal there are several cases involving children as petitioners or opponents and also cases involving the persons infected by HIV/AIDS which may have been registered in various Police Offices, Government Advocate Offices, District Administration Offices and other Judicial/quasi-judicial bodies and which may be currently passing through various stages ranging from investigation to prosecution and filing of the charge sheet or the trial being in progress. It is worthwhile to consider whether or not it would be proper to let the persons involved in the cases mentioned above continue to remain in the system followed earlier prior to the delivery of this decision, pending the formulation and implementation of a legal provision as mentioned above.

If, even after this decision, this Bench allows the continuing infringement of the right to privacy in the cases involving the persons, such as, victim women, children and HIV/AIDS infected people who have been recognised by this Bench as belonging to a sensitive category, even though the law to be made after the issuance of this order shall provide protection to the right to privacy, the damage caused to such persons due to the violation of privacy already suffered by them cannot be compensated. Hence, not only that the continuation of such a state of affairs shall be undesirable, rather it is also urgently necessary to stop such a process at the earliest. Pending the enactment and implementation of a comprehensive law for this purpose in accordance with the directive order issued in this case, it must be considered as to what type of interim provisions, and having which kind of structure, should be appropriate for formulation and implementation.

In the context of the totality of the requests made by the petitioner a Division Bench of this court had sought the advice from the petitioner organization on March 9, 2007 to suggest which model or procedure shall be appropriate to protect the privacy guaranteed by the Constitution, and the latter, on the basis of its study, seems to have given some valuable assistance by presenting a model of the procedure relating to the protection of the right to privacy.

Because it is essential to make different types of provisions for the protection of privacy according to the nature of the specific needs of various concerned classes, it does not seem to be an easy task. Notwithstanding the fact that, as mentioned above, the privacy of any personal information even in regard to the cases involving victim women and children has not been protected so far by any concerned body including the courts, now it does not look proper to allow such a situation to continue any more. It is so because the people belonging to this class have got a fundamental and human right including the right to judicial remedy, and it is also the duty of the court to safeguard such a right. Although the court does not make law for this, it cannot be said that the court cannot issue Guidelines or orders, without contravening the prevailing laws, in special circumstances for the purpose of the protection of the present legal liabilities, after identifying them, on the basis of the existing Constitution, laws and the recognized principles of law and various international human rights laws to which Nepal is also a party. It has been provided by Art. 88 of the Constitution of the Kingdom of Nepal, 1990 and Art. 107 (2) the Interim Constitution, 2007 that the Supreme Court is equipped with extra-ordinary jurisdiction to issue appropriate orders with a view to imparting full justice. It has been clarified above that it is also an inherent right of the court to issue necessary Guidelines or orders for enabling the party, which has come to it for seeking justice, to have effective access to justice. This court is found

to have issued eight-point Guidelines regarding implementation of the right to information also in the case of *Gopal Shivakoti and others vs. the Finance Ministry and others*.²³

The Indian Supreme Court has also, in *Vishaka Vs. State of Rajasthan*,²⁴ ruled that if the other political organs fail to discharge their duty of making law it becomes the duty of the court to fill up such a lacuna, and also formulated and issued some Guidelines containing various provisions relating to definition of sexual harassment in order to control its occurrence at a public place, means of deterrence for its prevention, prosecution, disciplinary action, designating the authority for hearing such complaints, causing awareness about the rights of the women employees, protection of the rights of the third party etc.

These are only a few of the examples. Such Guidelines are issued not for the purpose of imposing restrictions on the rights granted to the parties by the Constitution, the Statutes and the laws but for facilitating the implementation of the existing law. Thus, by removing the unclarity at the stage of implementation of such rights or filling up the lacuna, thereby helping to make, at least to some extent, the law relating to rights more effective, it seems proper and permissible to issue some Guidelines of interim nature which shall remain effective till comprehensive legal provision are made.

While thinking about what type of guidelines should be issued for the protection of the privacy of the women, children and HIV/AIDS infected persons who are victims or a party in the context of a case, the issues which need to be addressed at the least include chiefly the classes to be covered by it, the duty of the concerned officials, the type of information that needs to be protected, the way of its protection, the condition in which the concerned party should be given information, the manner and the amount of information which should be given, the duty of the person receiving the information, the action to be taken against the persons including the officials or employees who violate the privacy of information, the procedure to be adopted while seeking the privacy of information and the right to disclosure of information in cases where the privacy of information is not required.

This provision must be implemented by all the related bodies including all the law courts, police offices, the government attorney offices working under the Attorney General, the District Administration Offices etc. Recognition must be granted to the provisions like imposing restriction on demand for copies of the introductory or other private information made available in the process of the law suits relating to the persons or the classes included in the Guidelines, not mentioning anything even in the rulings leading to the disclosure of such information, restricting publication of such information by the media, including newspapers and magazines, resulting in the violation of the privacy of such of information and permission granted even to researchers to get access only to the information about the details other than the personal information.

There is a need of making a provision which allows the concerned court to treat the violation of the Guidelines as its own contempt and initiate action and slap punishment for the same. Even though the Constitution has provided for the right to privacy, still no legal provisions have been made so far which specify the circumstances in which protection should be granted to the privacy of the people belonging to some specific classes including the victim women, children or HIV/AIDS infected persons and also describe the circumstances where their personal

²³ Nepal Kanoon Patrika, 2051, No. 4, Decision No. 4895, p. 255.

²⁴ AIR, 1997, SC, 3011.

information may be disclosed. Comprehensive provisions are yet to be made to address all this. Taking into consideration the above-mentioned matter, a directive order has been issued to the respondent Prime Minister and the Office of the Council of Ministers as well as the Ministry of Law, Justice and Parliamentary Management to make a law including the above-mentioned provisions which describe the rights and duties of the concerned parties and maintain the level of privacy as prescribed [by the law] in some special type of lawsuits in which victim women or children or HIV/AIDS infected persons are involved as a party to the case right from the time of registration of the case in the police office or its direct registration in a law court or in other bodies till disposal of the case or even in a situation following the disposal of that case. And, therefore, this order is hereby issued to the aforesaid respondents to comply with and cause compliance with the Guidelines attached herewith pending the enactment of such a provision. The office of the Registrar of this court is directed through this order to write to the concerned courts, bodies and offices for its implementation and also to discharge the function of necessary monitoring and coordination.

Finally, this Bench wants to extend its thanks to Under Secretary Tika Ram Acharya, Secretary to the Judicial Council Prakash Kumar Dhungana and Deputy Registrar of this court Bipul Neupane for providing research oriented assistance in connection with the work related to this order. A copy of *The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064* (2007), having six pages and issued today by this Bench, is attached herewith.

.....
[Justice Kalyan Shrestha]

I concur with the aforesaid verdict.

.....
[Justice Khil Raj Regmi]

Done on day 10th of the month of Poush, 2064 [Dec. 25, 2007]

Attachment

Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special *Types of Cases 2064 (2007)*

Preamble:

Even though *the Interim Constitution of Nepal, 2007* has, by including the right to privacy under the Fundamental Rights, also guaranteed the right to judicial remedy, since, for the want of a definite legal provision for its protection, it has been realized that the persons infected with HIV/AIDS in the event of such infection, the women in the event of violence committed against them and the children in the event of getting involved in conflict with the law are experiencing obstacles in seeking remedy against injustice or getting access to justice, and since they are also encountering additional crisis and inconvenience in living a life of self dignity due to the failure in providing protection to their personal introductory information in course of the proceedings of law suits ranging from their investigation to the implementation of the decisions and also during the period ensuing thereafter; and as it has been decided by this court to issue, by exercising the inherent power of this court under the power granted by Article 107(2) of the Interim Constitution of Nepal, 2007, an order to the Government of Nepal to make legal provisions including also the procedure for protecting the privacy of the people belonging to such classes, these Guidelines for protecting the right to privacy, which shall be applicable to every stage of the proceedings of the above-mentioned cases of special types, are hereby issued, pending the enactment of such a law, with a view to imparting full justice and providing a suitable remedy for the protection of the right to privacy.

1. Short Title and Commencement: -

- [1] The title of these Guidelines shall be "*The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064 (2007)*".
- [2] These *Guidelines* shall come into effect after thirty days from the date of today.

2. Definition:-

Unless the subject matter or context requires otherwise, in these Guidelines :

- (a) 'Lawsuit' means, for the purpose of these *Guidelines*, the following types of cases specified by the concerned official after making a decision on protecting the privacy of the personal introductory information:-
 - [1] the criminal cases, requiring protection of privacy on the basis of the nature of the case and the impact that they can leave on the victims, having women as victims and including rape, abortion, sexual abuse, transactions in human beings, trafficking in human beings, incest and violence against women;
 - [2] the criminal cases having children as a party and tried by a juvenile court or Juvenile Bench;

- (3) the cases related to HIV/AIDS affected or infected persons where such information has been disclosed;
- (b) 'Personal introductory information' shall signify,
 - (1) all the related description regarding disclosure of the identity including name, family title, address, etc. of the victim women in the context of the cases mentioned in sub clause (1) of clause (A);
 - (2) all the related description regarding disclosure of the identity including name, family title, address etc. of the children who are involved as a party in the context of the cases mentioned in sub clause (2) of clause (A);
 - (3) all the related information regarding disclosure of the identity of the persons affected or infected with HIV/AIDS in the context of the cases mentioned in sub clause (3) of clause (A).
- (c) 'The Concerned Official' shall signify the District Judge in the context of the District Courts, the Registrar of the concerned court in the context of the Appellate Courts and the Supreme Court and the Officer-in-charge of the concerned office in the context of other bodies or offices.

3. Personal Introductory Information not to be Disclosed:-

- (1) All the bodies including the investigating body, the body trying the case and the verdict implementing body shall have to protect the privacy of the persons appearing as a party to the cases mentioned in Section 2 in course of all the activities conducted right from the filing of the complaint to investigation, prosecution, trial, delivery of verdict, implementation of verdict and even during the period following the implementation of the verdict.
- (2) The privacy of the personal introductory information, not disclosed as mentioned in Clause (1), shall have to be protected in all conditions including the lawsuit, rejoinder, complaint, petition, report, appeal, decision or any public publication to be made by the court or any other body.
- (3) The concerned person cannot be compelled to disclose the introductory information kept secret in accordance with clause (1).
- (4) Nobody, including any party or his/her counsel, expert, witness, judge or employee, who appears at any stage of the legal proceedings and comes to know about the personal introductory information kept secret, shall disclose to anybody the information thus kept secret.
- (5) The information kept secret according to these *Guidelines* shall not be disclosed even after the disposal of the case.

4. Disclosure of Private Personal Information:-

Permission may be granted for the disclosure of the personal introductory information, kept secret, to the extent considered necessary in the following circumstances:

- (1) if the official responsible for maintaining secrecy deems it legally fit for disclosure and grants permission accordingly;
- (2) if it looks necessary for the protection of fair judicial hearing; and
- (3) if the person, whose personal introductory information has to be kept secret, presents a written application stating that maintaining privacy of such information is no more essential.

5. Procedure for Maintaining Privacy:-

- (1) The personal introductory information kept secret in accordance with Section 3 must be recorded on a separate page and sealed in an envelope, and a separate introductory name or number or indication mark must be given to indicate the information kept private and that must be certified by the concerned authority.
- (2) If the privacy of any document or evidence needs to be protected for the sake of maintaining secrecy of the personal introductory information it must be sealed and its details mentioned on a separate sheet of paper and attached to the case file.
- (3) For the sake of protecting the privacy of the information kept secret, the concerned court or office must make arrangements for creating a separate roster of such case files, giving indication marks and preserving the records.
- (4) If any person requests for protecting the privacy of his/her personal introductory information, it shall be as decided by the concerned official whether or not to protect the privacy as requested. In case the personal information is to be kept secret as requested in any case, the reasons justifying such a decision must be mentioned in a written form.

6. Introduction: -

- (1) Notwithstanding the presence of a person, whose introductory information has been kept secret in course of investigation or proceedings of the case, the introductory matters relating to him/her shall be mentioned only by the name, number or indication mark assigned to him/her. His/her signature, too, shall have to be made by that very symbol, name, number or indication mark.
- (2) The person whose personal introductory information has been kept secret in accordance with these *Guidelines* must be given an identity card mentioning his symbol, name, number or indication mark.

7. Summons, Notice and Correspondence:-

While issuing any summons, subpoena or notice to or corresponding with the persons, whose introductory information has been kept secret, it must be executed by using his/her symbol, name, number or indication mark. If the other party asks for official introduction regarding such information, the information shall have to be given by opening the sealed particulars after making arrangements for preventing unnecessary disclosure of the personal introductory information thus kept secret, and after the completion of the work it must be resealed.

8. Restriction on Publication of Information:-

The information relating to the identity of a person kept secret in accordance with these *Guidelines* must not be brought to light or disseminated by any means.

9. Violation of Privacy to be Punishable:-

- (1) If, in contravention of these *Guidelines*, anyone discloses the name and information regarding someone, whose introductory information has been kept secret, resulting in the revelation of his/her real identity, such a person shall be considered to have violated an order of the court and shall be subjected to the contempt of the court proceedings.
- (2) No personal introductory information or information kept secret, which comes to the knowledge of any employee during the proceedings of the camera court, shall be disclosed

to any third party outside the camera court. If any act is done in contravention of this provision, departmental disciplinary action also may be taken in addition to the action to be taken pursuant to clause [1].

10. Authority Designated for Entertaining Complaints:-

If a complaint is to be filed seeking action against any employee for the violation of these *Guidelines*, the complaint must be filed before the concerned officer-in-charge in case of an employee and before the concerned authority of a superior level in case of an officer-in-charge. Any complaint filed in this manner must be disposed within seven days.

11. Compliance with the *Guidelines*:

It is the duty of the concerned office, court and all concerned to comply with these *Guidelines*.

12. Provisions Regarding Implementation of the *Guidelines*:-

- (1) These *Guidelines* must be disseminated by means of public media for the knowledge of the common people.
- (2) These *Guidelines* must be displayed on the notice board of the courts of all levels, police offices and the government attorney offices.
- (3) If any impediment arises in the implementation of these *Guidelines*, the concerned official shall remove the impediment by adopting an appropriate method. But if the concerned official cannot remove that impediment, the Supreme Court shall settle the issue by removing the impediment on a report submitted before it.
- (4) The provisions contained in these *Guidelines* must be followed in the proceedings to be undertaken henceforth including in those cases which are currently in progress.

13. Existing Law to Prevail:-

The matters other than those provided in these *Guidelines* shall be dealt with in accordance with the existing law.

Decision of the Supreme Court on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People

Abstract

The decision given below was handed down in a case filed by Mr Sunil Babu Pant of the Blue Diamond Society and others on behalf of lesbian, gay, bisexual, transsexual and intersex (LGBTI) people where the petitioners prayed for the issuance of an order of mandamus in order to provide the gender identity on the basis of their gender feelings and to recognize their co-habitation as accordance with their own sexual orientation. Here, the Supreme Court acknowledges the growing ascendancy of the notion that homosexuals and third gender people are not mentally ill or sexually perverts. Therefore their rights should be protected and they should not be discriminated in the enjoyment of rights guaranteed by the constitution and human rights instruments. The Court holds that it is an appropriate time to think about decriminalizing and de-stigmatizing the same sex marriage as according to it. The Court takes the view that that no one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural and that the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. The court further holds that gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural. The court takes the view that selection of sexual partner or fixing of marital relation is a matter falling entirely within the ambit of the right to self-determination of such an individual. It also seems to be in favour of gradual internalization international practices in regard to the enjoyment of the right of an individual in the context of changing global society and practices of respecting the rights of minority. It calls upon the state to create appropriate environment and make legal provisions to enable the LGBTI people enjoy fundamental rights and insert provisions in the New constitution to be made by the Constituent Assembly, guaranteeing non-discrimination on the ground of 'gender identity' and the 'sexual orientation' besides 'sex' in line with the Bill of Rights of the Constitution of South Africa. It issues a directive order to the Government of Nepal to form a Committee in order to undertake the study on over all issues in this regard and make the legal provisions after considering recommendation made by the said Committee.

Supreme Court Division Bench*
 Hon'ble Justice Mr. Balram K.C.
 Hon'ble Justice Mr. Pawan Kumar Ojha
Order

Writ No. . 917 of the year 2064 BS (2007 AD)

**Case: Let an appropriate order including the order of Certiorari, Mandamus, Prohibition
 be issued**

1. *Sunil Babu Pant, Executive Director of Blue Diamond Society*
2. *Meena Nepali, Vice Chairperson of MITINI Nepal*
3. *Sanjeev Gurung, Chairperson of Cruse AIDS Nepal*
4. *Manoranjana Kumar Vaidya, Executive Director of Parichaya Nepal*

Petitioner

Vs.

1. *Nepal Government, Office of the Prime Minister and Council of Ministers*
2. *Legislature-Parliament*
3. *Nepal Government, Ministry of Law, Justice and Parliamentary Affairs*

Respondents

The summary of the writ petition filed in this court, under Article 107(2) of the Interim Constitution of Nepal, 2063 is as follows:

The writ petitioners in their writ petition state that, we, the petitioners, are involved with the organizations which represent the minority people in terms of sexual orientation and gender identity. We are being denied by the existing society, law and state mechanism to provide us proper position in the existing society. Expressing our dissenting view with the prevalent social structure or norms as well as legal provisions adopted by the state based on the interest of majority people i.e. heterosexual male and female persons, we are demanding for the appropriate place in the society for recognition of our rights. Because of such practices and provisions we have ample instances of ourselves being subjected to physical and mental torture. We, four petitioners, have represented at least 60 thousand people.

The writ petitioners further state that the female homosexuals (lesbians), male homosexuals (gays) as well as the people of the third gender are considered as minority people on the basis of sexual orientation and gender identity. Such people introduce themselves as third types of people. Those people are also known as third gender and homosexuals in general parlance. We have been categorized under the five different groups. Those are known as lesbian, gay, bisexual, trans-gender and inter-sexual. Such identities of human beings are not hypothetical but

* Translated into English by Mr. Yadav Pokharel and reviewed by Mr. Shree Prasad Pandit. At the NJA the text has been further reviewed by the editors to ensure that the translation very closely carries the meaning given in the Nepali text. However, in case of any contradiction/incongruence, the Nepali text should be considered as authentic.

a scientifically proved fact. Even in a Report the World Health Organization has acknowledged the existence and birth of such types of people. By confirming the existence of such types of people, the report has also emphasized that it is a natural phenomenon and not a disease. Despite the fact that the aforesaid persons are born naturally, the existing society mistrusts their existence in the name of unnatural phenomenon. We have been boycotted by the family and the society as a whole. Even the state has ignored us. In the situation of being socially boycotted, we should have been protected by the law but the law does not seem serious in this issue. The state has not taken any initiative to resolve our problem. The state is responsible to provide equal status to all citizens by making sufficient laws in this issue.

The writ petition states that, the Interim Constitution of Nepal, 2063, in Part III and IV, has incorporated the provision of Fundamental Rights and Responsibility and Directive Principles and Policies of the State. Being the citizens of this country we have sufficient rights to claim and exercise all fundamental or human rights incorporated therein. The international human rights instruments, including the Universal Declaration of Human Rights have prohibited discrimination on the basis of race and origin. Many countries including the European countries have made remarkable legal provisions to protect the rights of the people in regard to the sexual orientation and gender identity. The latest one is South Africa which has made constitutional provision to ensure non-discrimination on the basis of sexual orientation. Similarly, the Constitution of Fiji has incorporated similar provisions. Number of instances can be found regarding this issue in the decisions of the courts in the United States of America and Canada as well as the European Court of Human Rights. There are many groups in different places of this category. In India, there is a group known as *Hijaras* and there is the provision of specifying their own sexual identity as *Hijara* in their passport and other identity cards.

The writ petitioners further state that there is no doubt that all Nepali citizens have equal standing in the eyes of the constitutional provisions of Nepal and rights enshrined by these provisions. It is the obligation of the state to treat all the people equally as well as to guarantee all fundamental rights to the people. Nepal has been the party to various international conventions and treaties after signing and ratifying them, and according to section 9 of Nepal Treaties Act, 2047 [1991 AD], the provisions of international treaties and conventions, to which Nepal is a party, should be adopted as national law. Thus, while there are fundamental rights guaranteed by the Constitution on one hand there are international human rights standards on the other. Therefore, as a party to such conventions, Nepal is responsible to fulfill the obligations set by such conventions. From the point of view of talking practically and legally, one segment of the population based on the sexual orientation and gender identity are deprived of exercising their human rights. The people of this community have suffered from the domestic, social and state violence everyday. Police administration and other state mechanisms are not sensitive towards the condition of such people. Even the officials of the concerned government agencies are also in a dilemma in the matter of issuing citizenship certificate to us mentioning our sexual identity because our sexual identity is neither male nor female. We do not want to get the citizenship certificate as indicated other than of our identity. While going to the police administration to bring forward the issues of violation of our human rights as well as other violence and inhuman treatment meted to us, they seem reluctant to handle the case. The UN report has also mentioned this fact with emphasis. Even in the schools, colleges, government and private organizations including other public places, such people are facing offensive behavior and the perpetrators are not being subjected to the punishment; they are always being deprived of the utilization of other privileges

provided by the state. The state relies on the tradition of not allowing one to marry a person of one's own choice. All these practices act against the self esteem of a person and the right to life as well as right to live with dignity.

That the writ petitioners state in their writ petition that, we, the people based on sexual orientation and gender identity being minority in number, are denied from enjoyment of the rights guaranteed by the Constitution and international human rights laws and we are compelled to live as a second class citizen, we the petitioners have filed the writ petition, requesting for issuance of the order of *mandamus* and other appropriate order for the protection and acquisition of our rights on the basis of constitution and laws, international law, precedent propounded by the Supreme Court in regards to the right to life of every person and other precedents, principles and values established by the United Nations in regards to the human rights. Moreover, we, the petitioners, hereby, request for the issuance of an order directing the opponents for granting the citizenship certificate and to make the laws based on the equality by repealing other discriminatory laws as well as for making necessary legal and institutional arrangements immediately by drafting new laws with the appropriate participation of concerned people to protect the rights of those people who have suffered due to discrimination and violence and none of the state owned institutions be involved in the discriminatory activities and violence. If they are involved in such activities there should be the provision of appropriate compensations. Further, the writ petitioners have also sought for issuance of an ad hoc order for the period until the law is made as this court had passed in the case of *Gopal Siwakoti Chintan vs. Ministry of Finance et al.*

The Legislature-Parliament Secretariat, in its affidavit submitted to this Court, has stated that the writ-petitioners have mentioned in their petition that they do not want to obtain the citizenship certificate other than their own identity. The government also cannot issue such citizenship certificate. There does not seem any legal hindrance to obtain Nepalese citizenship certificate by choosing any other gender in the application form in case of not falling under the 'male' or 'female' category while mentioning their sex. Only concerned individual can enter into the court for the enforcement of such legal rights with evidence in case of being rejected the issuance of citizenship certificate even after submission of application. This writ petition seems to have been based on hypothetical presumption describing and analyzing only the issue without mentioning any example of discriminatory provisions against the people of different gender identity. In case the petitioners were treated in a discriminatory manner or given degraded treatment or violence is committed against them, nothing restricts them in getting remedy specifying their sexual identity distinct from a male or a female. Hence, the writ petition should be rejected.

The Office of the Prime Minister and Council of Ministers, in its affidavit submitted to this Court, has stated that the rights provided by the Constitution and other prevalent Nepal laws are equally applicable to all citizens. The writ petitioners have not mentioned anything as to how they were obstructed from enjoying the rights conferred to them. So far as the question of making a separate law for the group of people based on sex orientation and gender identity is concerned, the rights of the petitioners can be protected under the existing legal framework, and it is not necessary to make a separate law for the said purpose. Since it is the absolute jurisdiction of the legislature to decide as to what type of law should be made and amended on a particular issue, and as this matter does not fall under the jurisdiction of this office, therefore, there does not seem any pertinent reason and valid ground to make this Office a respondent. Let the writ petition be dismissed on the ground that the unconcerned Office is being made as an opposite party in the case.

Similarly, the Ministry of Law, Justice and Parliamentary Affairs, in its affidavit submitted to this Court, has stated that the state has not imposed any restriction to the writ petitioners enjoying fundamental rights conferred to them by Part III of the Interim Constitution of Nepal, 2063 [2007 AD]. It seems obvious that the petitioners are natural persons. They are independent and able to enjoy all constitutional and legal rights to be obtained in the capacity of a person. The state has made no discrimination to the petitioners. Therefore, the claim made by the petitioners does not appear reasonable. So far as the question of citizenship is concerned, the Nepal Citizenship Act, 2063 [2007 AD] has defined the term 'person' and this Act has not imposed any restriction to the petitioners from obtaining citizenship in the capacity of a person as every natural person may obtain the citizenship by birth and by descent according to the provision of this Act. Since the Ministry has not done anything that may infringe human rights of the writ petitioners from enjoying the fundamental rights conferred to them as the citizens, therefore, the writ petition should be dismissed.

During the hearing of the case presented before the bench as per the rules, Learned Advocate Mr. Hari Phuyal appearing on behalf of the writ petitioners, argued that the state has a mandatory responsibility to protect the human rights of its citizens. The international instruments relating to human rights have guaranteed the right to equality to all human beings before the law, accorded equal protection of law and guaranteed non-discriminatory treatment on any grounds. The interpretation made by the South African Constitutional Court ensuring such human rights to the third sexes also may be taken into consideration in our context. The Constitutional Court has construed that no person can be subjected to discrimination on the ground of sexual orientation which includes the third genders as well. Nepal being a party to the major international conventions relating to human rights, the state should make arrangements for complying with such conventions in accordance with the provisions of Nepal Treaty Act, 2047 [1991 AD]. As the people of third gender are not treated equally and as no effort has been made towards the protection of their rights, an order should be issued as sought by the writ petitioners. Likewise, the learned Advocates Mr. Hari Prasad Upreti, Mr. Chandra Kant Gyawali, Mr. Rup Narayan Shrestha, Mr. Bhuvan Prasad Niraula, Mr. Premchandra Rai and Ms. Sharmila Dhakal also put their arguments on behalf of the petitioners stating that the present writ petition was filed analyzing the troubles and difficulties faced by the people of third gender occurring due to nonexistence of the relevant legal frameworks and not fulfilling the responsibility by the state to protect the civil, political, economic, social and cultural rights of the minorities from the point of view of gender identity and sexual orientation by analyzing the international practices in this regard. It is the responsibility of the state to provide the documents including the birth certificate, citizenship certificate, passport, voter-identity card etc specifying the sex as per their interest to the people of gender minorities to make them free from the practice of gender discrimination. Accordingly, the word "sex" should be so defined by the law which may cover the third sex and group representing sexual orientation. And therefore, an order should be issued declaring the legal provisions, which seem inconsistent with these principles, null and void as sought by the writ petitioners.

Appearing on behalf of the respondents including the Government of Nepal, Learned Deputy Government Attorney Mr. Krishnajibi Ghimire putting his argument before the Bench submitted that the Interim Constitution of Nepal, 2063 [2007 AD] has guaranteed that no citizen shall be discriminated in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction. The writ petitioners have not been restricted by anyone to enjoy such rights. If any violence or misbehavior happens against the people of different

gender identity, they also have equal rights to get remedy as other individuals. Hence, the writ petition must be rejected.

After making perusal of the case file and hearing the arguments presented by the learned counsels representing both the sides, the bench has to resolve the following questions:-

- a. Whether or not the present writ petition filed in regards to the rights of homosexuals and the people of third gender, considered as minority on the basis of gender identity or sexual orientation, falls under the category of public interest litigation (PIL);
- b. What is the basis of identification of homosexual or third gender people? Whether it happens because of the mental perversion of an individual or such characteristic appears naturally;
- c. Whether or not the state has made discriminatory treatment to the citizens whose sexual orientation is homosexual and gender identity is third gender; and
- d. Whether or not an order as sought by the petitioners should be issued.

So far as the first question whether or not this writ petition, filed in regards to the rights of homosexual and the people of third gender considered as minority on the basis of gender identity or sexual orientation falls under the category of public interest litigation (PIL) is concerned, the society is an integrated form of different religion, race, origin, language, class, sex, gender, caste, community. All societies cannot be of the same structure and characteristics. There may be the situation in the society, where all classes of the people have not acquired equal opportunities. So, it is a constitutional duty and responsibility of the state to make the deprived and socially backward classes and communities able to utilize the opportunity and enable them enjoy the rights equally as other people do. In jurisprudential parlance, it is usually called the distributive justice and is also kept under the dimension of social justice. In our judicial practice, the issue of social justice is being recognized as an issue of public interest or the issue of public interest litigation (PIL). Definitely, because of many reasons including social, economic, cultural etc. as well as inaction of the state, the question of the protection of the rights of disadvantaged people or groups falls under the category of PIL. Our judicial practice and constitutional provisions are oriented towards this direction.

This writ petition seems to have been filed pursuant to Article 32 and Article 107 (2) of the Interim Constitution of Nepal, 2063 (2007 AD). The right to constitutional remedy conferred by Article 32 is also a fundamental right. However, the right guaranteed by Article 32 is not an absolute right in itself. Instead it is a right to file a petition before this court under its extraordinary jurisdiction in pursuance of Article 107 (2) for the enforcement of other fundamental rights conferred by Article 12 to Article 31 of Part 3 in case such rights have been infringed. Further, the right under Article 32 is to be considered as a right to provide the *locus standi* to file a petition before this court in case of infringement of various fundamental rights enshrined to the citizens by Part III of the Constitution. In other words, the right under Article 32 is a right to move the Supreme Court for the remedy in case of infringement of fundamental rights.

Likewise, there are two types of extraordinary jurisdictions vested in this court as provided by Article 107. The extraordinary jurisdiction of sub-article (1) of Article 107 is the jurisdiction to make the judicial review of legislative power of Legislature for scrutinizing whether the statutes enacted under the legislative power and the rules issued under the delegated legislative power are inconsistent with the Constitution or not. Sometimes either due to the aversion of the legislature or mistake or error made by the draftsman in course of drafting the statutes inconsistent with the Constitution may be passed as a bill. It may also be passed because

of the legislative inadvertence. There shall be no room to any statutory law which is inconsistent with the Constitution because in countries including Nepal where the constitutional supremacy prevails, the Legislature has supremacy only in the law making process. The Constitution is the only standard for this. The Constitution is enacted under the constituent power by the delegates chosen by the sovereign people using their inherent sovereign power of enacting the Constitution.

The Legislature is created under the Constitution, in other words it is a creature of the constitution. Hence, while exercising the legislative power, the Legislature cannot enact the law which contradicts with its own creator [i.e. the Constitution]. The law which is inconsistent with the Constitution may be repealed or amended only through the constitutional process. However, it may take time to do so. There may not be sufficient time to summon and convene the session of the Legislature to repeal and amend such laws that are found enacted against the constitutional provisions. The rights of the people protected by the Constitution shall be at stake when it takes such a long time to repeal or amend these unconstitutional enactments. The Article 107 (1) of the Constitution has provided extraordinary power to this Court to declare such laws unconstitutional in order to protect the citizens from such risks. As the issues raised in this writ petition does not seem directly related to the provision of Article 107 (1) no further analysis is required on this matter.

Article 107(2) has also granted the extraordinary power to this Court. Under this Article, this Court imparts full justice by exercising its extraordinary power in situations given below:

- for the enforcement of rights conferred by the Constitution; or
- for the enforcement of any other legal right for which no other remedies have been provided or such remedies appeared inadequate or ineffective; or
- for the settlement of any constitutional or legal question involved in any dispute of public interest or concern.

Under the provision of Article 107 (2) as mentioned above or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern which is also known as Public Interest Litigation (PIL) or Social Action Litigation (SAL), this court may issue the appropriate orders and writs including *habeas corpus*, *mandamus*, *certiorari*, *prohibition* and *quo warranto* for the enforcement of the rights infringed.

The interest of the petitioner must be seen in a dispute where an individual is requesting for the enforcement of rights of personal interest. Otherwise the petition shall be rejected for the lack of *locus standi*. On the other hand the petitioners need not establish *locus standi* in a dispute of public interest where constitutional or legal question is to be settled. Any public spirited individual can file a petition *pro bono publico* and the petitions are entertained by the court and such rights can be enforced under Article 107 (2). In other words, the concept of traditional and conservative *locus standi* is, and should be, widened for the settlement of any constitutional or legal questions involved in the public interest litigation (PIL). The *locus standi* is widened because in such disputes the groups of victims may not be able to secure justice for want of *locus standi* notwithstanding extraordinary powers being provided to this Court.

This writ petition has been filed by the Executive Director of the NILHIRA SAMAJ on behalf of the organization and others. It is seen from the written memorial submitted by the learned counsels on behalf of the petitioners, the English name of the organization appears as the Blue Diamond Society (BDS established in 2057 (2000 AD) for the protection of the rights and the interests of third gender community. It is also seen that the petitioner organization is working for the protection, of the rights of sexual minorities in Nepal. Upon perusal of the writ petition, it is

seen that the writ petitioners have prayed for the issuance of an order of *mandamus* and other appropriate orders regarding lesbian, gay, bisexual, transsexual and intersex (LGBTI) people of sexual minorities in order to provide the gender identity on the basis of their gender feelings and to recognize their co-habitation as accordance with their own sexual orientation.

A case where a constitutional or a legal question is involved is known as the public interest litigation where the issue as mentioned in the Article 107 (2) of the Constitution is raised. There are some norms and values behind having such provisions which allow the filing of petition on behalf of the victim by anyone in this Court where personal right of the petitioner is not necessarily infringed.

The Constitution has guaranteed different fundamental rights to the citizens. All individuals and citizens of different classes, groups and castes in the Nepalese society are not educated and aware. The people of different class, communities and castes residing in different parts of the country have been exploited and suppressed because of the lack of proper attention by the state and also due to prevailing illiteracy, lack of proper knowledge, social values, traditional practices, customs and economic backwardness or poverty etc. They are not even aware of their rights and do not have sufficient knowledge towards the enforcement of their infringed rights. It is for this reason that they have remained disadvantaged as a class.

All citizens and groups in the society are not economically well off. In other words, due to the lack of education, ignorance and poverty the disadvantaged group of people are not aware of their rights conferred by the constitution or that the rights which are infringed and can be enforced by this Court. Therefore, the Article 107 (2) of the Constitution has provided the rights to any public spirited individual to file the petition on behalf of such disadvantaged groups by widening the traditional rule of *locus standi* for the settlement of constitutional or legal question involved in a dispute of public interest or concern. And any individual, on behalf of such disadvantaged group, can file a petition for the enforcement of their rights under this Article 107 (2).

Since our traditional society has recognized only two types of sexes i.e. male and female. A dominant role has been provided to these two sexes 'male' and 'female' in the society. There exist practices of treating the people of third sex differently. The Court should take this matter into the judicial notice. Due to the lack of awareness, education and knowledge the tradition and practices of treating the third gender, other than the male or female, differently continues not only in our society but also in other countries. Therefore, the claim that the people of third gender may not file the petition on their own behalf cannot be held otherwise.

The Part III of the Constitution confers various fundamental rights to the Nepali citizens. The Directive Principles and Policies of the State stipulated Part IV of the Constitution have kept the State at the centre for the upliftment and development of the citizens. **All human beings including the child, the aged, women, men, disabled, incapacitated, third genders etc. are Nepali citizens. All the territory of this country including all citizens collectively constitutes the nation. The third genders among the population are also part of the Nepalese population as a whole.** The third gender are still considered as disadvantaged class of citizens because of the social perception towards them and social behavior as well as lack of education, knowledge and economic backwardness within the society of third gender. The concept of public interest litigation has been developed by the court for the settlement of constitutional or legal questions involving the dispute of public interest or concern. In other words, the provision of Article 107 (2) of the Constitution has been incorporated for allowing any public spirited individual to file a petition *pro bono publico* on behalf of the backwarded people who due to reasons economic, social and

educational etc can not do so by themselves.

The Part III of our Constitution provides several fundamental rights. However, all citizens who are supposed to enjoy such rights are not educated. All citizens are not economically well off. They are ignorant too. Such multiple factors push the people to backwardness. Hence, if the Court embraces the narrow concept of *locus standi* and traditional pattern of court on such issues, there can be no access to the fundamental rights and justice for the disadvantaged group of people. In view of this, the provision of filing the petition by any individual on behalf of the disadvantaged group of people has been made.

There is no provision in the Indian Constitution, similar to Article 107 (2) of our Constitution that provides for settlement of disputes involving public interest. Nevertheless the decision of Supreme Court of India in the case, *S.P.Gupta and others vs. President of India* is significant in regard to the issue of public interest litigation where the constitutional or legal questions are involved for settlement. The judgment in this case should be considered as a model for the concept of public interest litigation. Justice P.N. Bhagwati while clarifying the concept of PIL observed:

“...where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision without authority of law or any such legal wrong or legal injury or illegal burden is threatened and helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief any member of the public can maintain and application for an appropriate direction or order.”

The fundamental rights are stipulated in the Part III and the Directive Principles and Policies of the State in the Part IV of the Interim Constitution of Nepal. Such provisions have been made with the approach of securing the well being of citizens by transforming the country into welfare state. Furthermore, since the year 2047 BS (1990 AD), Nepal has ratified more than 18 international conventions including International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of All Forms of Discrimination against Women (CEDAW). While formulating the policies, enacting and enforcing the laws, the Executive should keep in mind the constitutional provisions regarding the fundamental rights of the citizens and the Directive Principles and Policies of the State and international conventions relating to the human rights which are ratified by our country. But where the Executive fails to do so, provisions of Article 32 and 107 (2) get activated. Therefore, the Executive should fulfill its constitutional responsibility keeping in mind the above mentioned provisions. While observing the working style of the Executive till now, it does not seem that these provisions have been complied with properly.

The provision that allows everyone to file a petition for the settlement of constitutional or legal questions involved in a dispute of public interest or concern has been incorporated not only in the Article 107 (2) of present Constitution but also in the Article 88 (2) of the previous Constitution of the Kingdom of Nepal, 2047 (1991 AD) which is now repealed. This Court has issued appropriate and proper orders in different writ petitions filed by various non-governmental organizations (NGOs and/or INGOs) and other public spirited individuals on behalf of the disadvantaged groups of people and for this purpose this Court has widened *locus standi* under its extraordinary jurisdiction in PIL cases where the constitutional or legal questions are involved

for settlement. However, the question of *locus standi* is being raised time and again. Hence, it is seen necessary to interpret as to what type of dispute falls under the concept of PIL in which constitutional or legal questions involved are to be settled. In the context of Article 107 (2) of the present Interim Constitution of Nepal, 2063 (2007 AD), the following disputes can be considered as PIL for the settlement of any constitutional or legal questions involved:

- Matters pertaining to the deprivation of the enjoyment of fundamental rights provided by Part III of the Constitution to the citizens of various classes, castes, tribes, sex, groups, language to the inaction of the state;
- Matter pertaining to the deprivation of enjoyment of fundamental rights due to the negligence in implementing the Directive Principles that are to be gradually implemented by the State;
- In the situation where the State has acted against the letter and the spirit of the preamble to the present Constitution, especially its fourth paragraph.
- Matter pertaining to the intervention on the independence of judiciary and other constitutional bodies which are required to act independently;
- Matter pertaining to environmental pollution;
- Matter pertaining to the interest and rights of the people of different castes or classes for whom special provisions can be made for the protection and empowerment as provided in the proviso to the Article 13 (3);
- Matter pertaining to the interest and rights of other persons or group or class as mentioned in the Part 3 and 4 of the Constitution;
- The issue falling under the public trust doctrine and the natural resources of Nepal viz. public land, rivers, forests etc;
- The historical and archeological issues regarding the cultural heritage of Nepal;
- Matter pertaining to the suffering of the citizens of any class or group or caste due to the negligence in upholding its constitutional duty by the executive; etc.

Above mentioned issues are the issues of public interest litigation in our context. Any public spirited individual or group may file the petition on these issues on behalf of the disadvantaged group of people under Article 107 (2) of the Constitution. However, this is not an exhaustive list of matters; some other issues may also fall under this category as per the constitutional provisions. It cannot be limited by making a list of such issues.

The issues raised in the writ petition such as gender identity, gender discrimination and obstacles faced due to it as well as the issue of gender recognition etc. are matters concerning social justice and social interest. This Court has enunciated the principles in several cases by emphasizing the right to move to the Court on such issues for necessary remedies.

This writ petition, which is filed for the rights and interest of their group which represents the homosexuals and third genders on the issues of gender identity and sexual orientation by protesting the behavior of the state and the society towards them, seems within the scope of public interest litigation. Moreover, the petitioners seem to have substantial interest and meaningful relation with the issues that is raised in the writ petition. Hence, as analyzed above, the Court does not agree with the arguments of the defendants that the organizations established for the protection of the interest and rights of LGBTI people lack the *locus standi* to file this petition. So, the Court holds that the writ petitioners have the *locus standi* to file this writ petition.

The second question raised above, relates to the basis of identification of homosexual or third gender people and whether it happens because of the mental perversion of an individual

or such characteristics appears naturally. It seems to us that there is a practice of using the term 'sex' to depict the difference between the individuals on the basis of genitals whereas the term 'gender' is used for the role assigned by the society on the basis of sex. There are people having the identity of 'third gender' in minority in the society other than the 'male' and 'female', which are categorized as the mainstream on the basis of gender identity.

It is found that the medical science and psychology have categorized three types of people of different sexual attraction on the basis of sexual orientation. According to this practice, sexual relation or sexual attraction between the people of same sex is called homosexual relation. On the contrary, sexual relation or sexual attraction between the people of opposite sex is called heterosexual relation and the sexual relation or the sexual attraction between the people either of same sex or of opposite sex equally is called bi-sexual relation. Similar to what men and women are considered as the mainstream of the society on the basis of gender identity, from the point of view of the sexual orientation, the heterosexual people, because of their number, are considered as the mainstream of that group. On the other hand, the number of homosexual and bi-sexual people is not large in the society. Among the homosexuals also two types female homosexual (lesbian) and male homosexual (gay) are found. Similarly, persons who are born with the physical characteristics of one sex but psychologically feel and behave like members of opposite sex are called transsexual.

The other category of sexual minority are intersexuals who are born naturally with the both genetic sex organs of male and female. The number of such people is very few. Their gender is determined on the basis of their sexual orientation when they become adult. Thus, in totality, the five categories are found within the group of sexual minority, namely lesbian, gay, bisexual, transgender, intersexual which are known as LGBTI in an abbreviated form. The main contention of the writ petitioners is that this group has not been recognized yet on the basis of sexual orientation and gender identity.

Prior to considering the contention of the petitioners, it seems relevant to define the term 'sexual orientation' and 'gender identity'. A meeting of the human rights experts working in the field of sexual orientation and gender identity held in Yogyakarta, Indonesia from 6th to 9th November 2006 has adopted The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. The definition of sexual orientation and gender identity given in the principles is as follows:

Sexual Orientation is understood to refer to each person's capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

Gender Identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

In this context, it seems relevant to give lexical meaning of some words and phrases frequently used in this petition which are as follows:-

Lesbian - A woman who is sexually attracted to other woman.

Gay - A homosexual person especially a man.

Bisexual - a person who is attracted to both man and woman.

Transsexual - A person especially a man who feels that he should have been opposite

sex, and therefore behaves and dresses like a member of that sex.

Homosexual - A person, especially a man, who is sexually, attracted people of the same sex and not to people of the opposite sex.

Source - Cambridge Advanced Learner's Dictionary (online version)

Transgender - *Transgender is the state of one's "gender identity (self-identification as woman, man, or neither) not matching ones "assigned sex" (identification by others as male or female based on physical/genetic sex). "Transgender" does not imply any specific form of sexual orientation; transgender people may identify as heterosexual, homosexual, bisexual, pansexual, polysexual, or asexual. The precise definition for transgender remains in flux, but includes:*

- *"Of, relating to, or designating a person whose identity does not conform unambiguously to conventional notions of male or female gender roles, but combines or moves between these."*
- *"People who were assigned a sex, usually at birth and based on their genitals, but who feel that this is a false or incomplete description of themselves."*
- *"Non-identification with, or non-presentation as, the sex (and assumed gender) one was assigned at birth."*

Intersexuality - *Intersexuality is the state of a living thing of a gonochoristic species whose sex chromosomes, genitalia, and/or secondary sex characteristics are determined to be neither exclusively male nor female. An intersex organism may have biological characteristics of both the male and female sexes. Intersexuality is the term adopted by medicine during the 20th century applied to human beings who cannot be classified as either male or female. Intersexuality is also the word adopted by the identity-political movement, to criticize medical protocols in sex assignment and to claim the right to be heard in the construction of a new one.*

Source-wikipedia

In this context, it also seems relevant to quote the following excerpt published in the book titled, **Sexual Orientation and Gender Identity in Human Rights Law**, published by the International Commission of Jurists.

Discrimination on the grounds of sexual orientation and gender identity may give rise to the most egregious human rights violations, such as extrajudicial killings, torture and ill-treatment and arbitrary detention. Demonstrating that discrimination has consequences in the deprivation of enjoyment of all other guaranteed human rights. These include inter alia the right to life, right to liberty, right to a fair trial by an independent and impartial tribunal, right to privacy, freedom of conscience, freedom of opinion, freedom of assembly and freedom of association, equal access to public services, equality before the law and equal protection of the law, right to work, right to social security including social insurance, right to the enjoyment of the highest attainable level of health, right to education, and right to adequate housing. The social sexual orientation exposes them more to violence and human rights abuses; this stigmatisation also increases the climate of impunity, in which such violations frequently occur.

In some countries, sexual relationships between same-sex consenting adults or "unnatural behaviour", such as the manifestation of transgender behaviours, are criminalized under "sodomy laws" or under the abuse of morality laws, which violate the right to privacy and the equal protection of

the law without discrimination. Such criminalization reinforces attitudes of discrimination between persons on the basis of sexual orientation. In some countries such acts are punishable by corporal punishments or the death penalty impairing the right to be free from cruel, inhuman or degrading punishment and the right to life. Treaty bodies, the former Commission on Human Rights and special procedures have expressed concern at such criminalization, called on States to refrain from such criminalization and where such laws exist repeal them, and urged all States that maintains the death penalty not to impose for sexual relations between same-sex consenting adults.

Violence taking place in some countries against lesbian, gay, bisexual or transgender (LGBT) persons, including killing, “social cleansing”, torture and ill-treatment, impairs the right to life, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and the right to security and is also a matter of concern of treaty bodies and special procedures of the former Commission. Victims of criminal offences suffer. From discrimination because of their sexual orientation and gender identity, as they are often perceived as less credible by law enforcement agencies and police officials frequently show prejudice towards such persons. These particular in cases of abuse, ill treatment, including rape or sexual assault, torture, or sexual harassment, and may be disinclined to investigate promptly and thoroughly extrajudicial executions of LGBT persons. The refusal to bring those responsible for such killings to justice and to ensure that such killings particularly disturbing. The special procedures and the treaty bodies have repeatedly asked the States to take action to protect the right to life of LGBT persons, including proper investigation in cases of violence against LGBT persons. They have also called on states to take initiatives against homophobia and hate crimes, including policies and programmes aimed towards overcoming hatred and prejudice against LGBT persons.

While studying the exercise and practices in regard to the gender identity, the High Court of the United Kingdom has in 1970 held that the gender identity should be determined on the basis of three inherent elements of an individual like genital sex, chromosomal sex and gonadal sex. However, dissenting with this precedent, a Family Court of Australia observed that the actual sex is being used to identify whilst determining the gender for the purpose of marriage, and the biological, physical and psychological characteristics (e.g. brain sex) should also be taken into consideration for this purpose. This decision has accepted the self perception of concerned individual. It seems relevant to mention some portion of the decision of the Australian Family Court here:

It is wrong to say that a person's sex depends on some limited range of factors, such as the state of the person's gonads, Chromosomes or genitals (whether at birth or at some other time)£ the relevant matters include the person's biological and physical characteristics at birth;£ the person's self perception as a man or woman;£ and the person's biological, psychological and physical characteristics at the time of the marriage, including any biological features of the person's brain that are associated with a particular sex.

The European Court of Human Rights has accepted the concept of this decision in the case of *Goodbin v. United Kingdom*. Similarly, the scientific and medical studies have, on the basis of research, drawn conclusions that only genitals at birth do not determine an individual's gender identity. Mental characteristics also have an impact on it.

The issue of sexual orientation has also been raised in the writ petition. The petitioner has stated that the homosexuals are being treated differently by the society only because of their sexual attraction towards the person of similar sex. The interpretation of the Constitutional Court of South Africa is significant in this context. It seems relevant to quote here some portion of the judgment of this court in the case of *National Coalition for Gay and Lesbian Equality and others v. Minister of Justice and others*:

"... Sexual Orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbian, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to member of his or her own sex."

Similarly, in a publication of the Human Right Watch states that "*E Sexual Orientation generally refers to the way in which a person's Sexual and emotional desires are directed. The term categorizes according to the sex of the object of desire- that is, it describes whether a person is attracted primarily toward people of the same or opposite sex or to both.*"

The Supreme Court of United States of America in the case of *Lawrence et.al. v. Texas (2003)* has declared a law unconstitutional which considered an act of sexual relation between the consenting adults of same sex a crime. It is also found that the Constitutional Court of Ecuador has also declared a provision of the national law that pronounced a homosexual relation a crime, and hence null and void. The said court as early as in 1997 declared Section 516 of Criminal Code of that country null and void for being contrary to the Constitution and Article 26 of the ICCPR.

After considering above mentioned various contexts, it seems to us that the traditional norms and values in regards to the sex, sexuality, sexual orientation and gender identity are changing gradually. **It is also seen that the concept specifying that the gender identity should be determined according to the physical condition and psychological feelings of a person is being established gradually. The concept that homosexuals and third gender people are not mentally ill but leading normal life style, is in the process of entrenchment.** In this context, it seems contextual to quote relevant portion of the Report of Interdepartmental Working Group (of the UK):

"...there is zero evidence that psychiatric intervention can 'cure' transsexualism, just as there is zero evidence that psychiatry can 'cure' homosexuality."

According to a report (Kinsey Report) there are 5 to 8 percent people in the society who are included in the group that is covered by the definition of the sexual orientation given above. This fact has portrayed the life style of a certain number of people who are in minority in the society on the basis of gender identity and sexual orientation. This helps to substantiate view that sexual orientation is a natural process in course of physical development of a person including self-experience rather than due to the mental perversion, emotional and psychological disorder.

Now let's discuss the third question as to whether or not the state has made discriminatory treatment towards the citizen whose sexual orientation is homosexual and gender identity is trans-gender. The petitioners have alleged that the state has made discriminatory treatment to the citizen whose sexual orientation is homosexual and gender identity is trans-

gender. The contentions of the petitioners also seem that the people of this community have been the victim of violence perpetrated by the family, society as well as the state; that they are deprived of social, economical, cultural, political and civil rights; that they have been humiliated in the society and family; that they have been deprived of the enjoyment of service and benefits provided by the state; and that they have also been deprived of the basic rights such as employment, marriage and citizenship etc.

The issue of vindication of the identity of third gender is not the problem facing our country alone. It has been an issue of intense debate all over the world. Definitely, the third gender people cannot easily be established in the society with their natural characteristics. In this context it seems relevant to state a portion of the Report of the Special Rapporteur of the United Nations in regard to the problem being faced by this community:

...member of sexual minorities are disproportionately subjected to torture and other forms of ill treatment because they fail to conform to socially constructed gender expectation. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill treatment to take place.

The Yogyakarta Principles has also clearly stated the problem which is being faced by the people of different sexual orientation and gender identity. The portion stated in the preamble of the principles is as follows:

“...Disturbed that violence, harassment, discrimination, exclusion, stigmatisation and and prejudice are directed against persons in all regions of the world because of their sexual orientation or gender identity, that these experiences are compounded by discrimination on grounds including gender, race, age, religion, disability, health and economic status, and that such violence, harassment, discrimination, exclusion, stigmatisation and prejudice undermine the integrity and dignity of those subjected to these abuses, may weaken their sense of self-worth and belonging to their community, and lead many to conceal or suppress their identity and to live lives of fear and invisibility;

Aware that historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual, because of their consensual sexual conduct with persons of the same gender or because they are or are perceived to be transsexual, transgender or intersex or belong to social groups identified in particular societies by sexual orientation or gender identity.”

The incidents against the gender minority in Columbia have been recounted in the Report of the High Commissioner for Human Rights published on the 16th May 2006 as follows:

“... Lesbians, gays, bisexual and transgender were exposed to murder and threats in the name of “social cleansing.” Generally speaking the results of investigations into the identities of perpetrators are very inadequate. Those groups were the victims of arbitrary detentions and cruel, inhuman or degrading treatment by member of the police force. There have also been allegations of harassment of homosexuals by members of the illegal armed

groups. There are no specific public policies to prevent or penalize such actions or to eliminate discrimination against those groups, especially in educational establishments, in the field of employment, in the police force and in detention centers..."

These facts demonstrate that the incidents of ill-treatment against the third gender and homosexuals are taking place not only in Nepal but also in national and international level as well.

Let us consider the context of Nepal by keeping the abovementioned facts and contexts in background. Article 13 of the Interim Constitution of Nepal, 2063 (2006 AD) has guaranteed the right to equal protection of laws and has proscribed discrimination on the grounds of sex, race and caste and the like. Similarly, Articles 33 has provided for abolition of discriminatory laws and Art 34 for securing social justice. Likewise, Nepal has shown its commitment towards the universal norms of the human rights by ratifying a significant number of international conventions for the protection of human rights. Nepal has already ratified the International Convention on Elimination of All Forms of Racial Discrimination, 1965, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on Elimination on all Forms of Discrimination against Women, 1979 and the Convention on the Rights of the Child, 1989. The provisions such as protection and promotion of human rights of the individual and elimination of all forms of discriminations have been accepted in these conventions. Being a party to these international treaties and conventions, the responsibility to implement the obligations created by instruments to which state is a party rests on the Government of Nepal according to the Vienna Convention on International Treaties, 1969 and the Nepal Treaty Act, 2047 (1991 AD).

It has already been mentioned that the term 'sex' denotes the men and women only. **It is an old notion considers the people of third sex other than the men and women as rare and that the people of third sex are sexual perverts. Such old notions have no value if one holds the view that welfare states, dedicated to the human rights should protect the right to life of every citizen.** In countries such as India, USA, Brazil, Mexico, United Kingdom, Spain, Belgium, The Netherlands, Colombia etc. voices are being raised for the recognition of third gender people and legalization and de-stigmatization the same sex marriage. If one looks at the situation prevailing in our neighboring country, India, one will find thousands of *Hijras* and *Kothis* there. To be a homosexual or a third gender is not a disease in itself. There is a legal provision in our country that criminalizes same sex marriage on the ground that it is unnatural coition. However, **the sexual preferences and choices of every individual may not be the unnatural coition. Hence, it is an appropriate time to think about decriminalizing and de-stigmatizing the same sex marriage by amending the definition of unnatural coition.**

In this context it is significant to state the provision of Article 26 of the International Covenant on Civil and Political Rights- ICCPR.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of law. In this respect, the law shall prohibit any discrimination and guarantee to all person's equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

The above mentioned Article 26 has emphasized that all persons are equal before the law and they all are entitled to the equal protection of law. It has also accepted the principle of non-discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national origin, property, birth or other status. The Human Rights Committee of the United Nations has asserted that in order to construe the Article 26 of ICCPR, the article includes the term sexual orientation within this definition.

The Committee has mentioned that “...*Sexual Orientation needs to be understood as link inseparably to the equality of men and women. Thus discrimination on grounds of Sexual Orientation is connected to discrimination against people who do not live out socially accepted norms for “masculinity” and “Femininity”. The concept of “Gender Identity” cannot be separated from that of “Sexual Orientation” as prohibited grounds of discrimination.*”

The European Court of Human Rights has also articulated the similar kind of jurisprudential concept. The court, while developing the jurisprudence on privacy and sexual orientation has proscribed discrimination on the ground of gender identity. In the case of *Van Kuck vs. Germany*, which was filed against the discriminatory insurance provision that did not take the responsibility of the surgical operation for sex change, the court has interpreted that “...*the applicant’s freedom to define herself as a female person, one of the most basic essentials of selfdetermination the very essence of the European Convention of Human Right being respect for human dignity and human freedom. Protection is given to the right of transsexual personal development and physical and moral security.*”

Similarly, the court in two cases namely, *Goodwin vs. United Kingdom* and *I vs. United Kingdom* in 2002 explicitly recognized the rights of the third gender individuals. In this case the UK government had declined to prepare the legal identity papers of individuals corresponding to the present sex following the change through surgical operation. The court held that *changes in their identity papers holding their right, to respect for their private lives and also their right to marry had been violated.*

Article 26 of the International Covenant on Civil and Political Rights, 1966 is an article pertaining to the rights to equality of the human being. This is accepted under the provision of right to equality enshrined in the constitutions of all the independent and sovereign states. The Article 13 of our Constitution can be taken as an example. This Article provides the right to equality for all citizens which states:-

Article 13. Right to Equality:

- (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.
- (2) There shall be no discrimination against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these.
- (3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement women, Dalits, indigenous ethnic tribes, Madeshi or peasants, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are physically or mentally incapacitated.

(4) There shall be no discrimination with regard to remuneration and social security between men and women for the same work.

According to the data published by the Center Bureau of Statistics/Government of Nepal in 2005, there are different religious groups in Nepal such as Hindu, Buddhist, Muslim, Kirat, Jain, Christian, Sikh, Bahai and others. The state cannot discriminate these religious groups. According to the data of the Government of Nepal, there are 102 identified races and castes in Nepal. The state cannot discriminate anyone on the ground of religion, race and caste. Similarly, it cannot discriminate on the basis of sex also. Non-discrimination on the basis of sex is a fundamental right of every citizen. The male and female have been clearly mentioned under the category of 'sex' in the data published by the Center Bureau of Statistics whereas the identity of third gender has not been accepted there. Only male and female are mentioned in all reports. The third gender has not been mentioned even under the 'others' category.

It is a simple belief is that a child generally is born normal at birth. However, sometimes abnormal children such as having more than five fingers in a hand or blind or Siamese twins or handicapped are also born. Similarly, on the basis of genitals, intersex children, other than the male and female, having both genitals may also born. Sometimes, a child born with genitals of one sex, due to the biological and natural process can develop sexual characteristics other than the one acquired at birth. It is not appropriate to think that they are not human beings or the citizens only because of such changes. It is an uncontroversial fact that only two sexes- male and female- are being recognized on the basis of sex in traditional society. The expressions such as human beings, sex or gender are fundamentally different. **The fundamental rights comprised under Part III of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the state.** For this reason, the fundamental rights stipulated in Part III **are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizen of this country as well.**

Except in Article 13 [4] which refers to equal remuneration, the terms 'citizen' or 'sex' are used instead of 'men' and 'women' everywhere in the Interim Constitution. But it can be possible to classify the natural person under various categories not only the above mentioned categories. For example child, aged, adult and old on the basis of age or tall and short on the basis of height or black and white on the basis of complexion. Similarly, a natural person can be classified as male or female or third gender on the basis of gender. Thus, **the people other than 'men' and 'women' including the people of 'third gender' cannot be discriminated on the ground of sexual orientation. The State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution.**

Taking note of Art 26 of the ICCPR, in the constitutions of several countries, the term 'sex' has been used instead of 'men' and 'women'. This is for the purpose of eliminating possible discrimination on the ground of sexual orientation. No citizen is allowed to be discriminated on the ground of sexual orientation. South Africa may be said to be the first country which has incorporated the provision of non-discrimination on the ground of sexual orientation in the 'Bill of Rights' of its Constitution. Under the provision of right to equality, the Sub Article {3} of Article 9 of the Constitution which was adopted on 8 May 1996, amended on 11 October 1996 and came into effect from 7 February 1997 reads as follows:

Article 9 (3) : The state may not unfairly discriminate directly or indirectly against any one on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Thus, it is clearly mentioned in this Constitution that no person can be discriminated on the ground of sexual orientation.

Similarly, the interpretation made by the Constitutional Court of South Africa on equal protection of the homosexuals and the people of third gender seems significant in this regard. While guaranteeing the constitutional protection against all forms of discrimination on the ground of gender identity, the court has emphasized that *"The concept 'Sexual Orientation' as used in S. 9(s) of the 1996 Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex."*

The decision made by the Constitutional Court of South Africa can be considered an important document with regard to the right and interest of the people of the third gender.

Likewise, Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has called for the modification of all types of prejudiced and customary social practices that make people inferior or superior on sexual ground. The Article states that

"... States parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority or either of the sexes or on stereotyped roles for men and women."

As can be seen from the numerous initiatives mentioned above, the jurisprudential concept that the rights of sexual minorities need to be protected is getting stronger. The sensitivity and awareness regarding sexual feeling and natural behavior of a human being is also developing. The social principle that accepts natural tendencies in human behavior is slowly evolving. Here, it will be pertinent to quote a portion written by Paul Hunt in an UN Report on Rights and Health. It reads *"Esexual rights include the right of all persons to express their sexual orientation with due regard for the well being and rights of others, without fear of persecution, denial of liberty or social interference."*

Various opinions and views are expressed in regard to the rights of homosexuals and the people of third gender. Several countries especially the Muslim countries seem to stand against recognition of homosexuality as a right because of their religious and cultural beliefs and values. However, it seems to us that it is not just an issue of mere debate now. It has acquired wider concern and interest at the national and international level. The following was the view of Ms Luis Arbour, the UN High Commissioner for Human Rights in the International Conference of Homosexuals and Transsexuals in Montreal on 26 July 2006:

"Freedom of religion is a right that also protects the freedom not to share in religious beliefs or be required to live by them. Under the broad and ill-defined mental of 'culture' states may fail to recognize the diverse voices within their own communities, or may deliberately chose to suppress them. Such an approach stems from an ossified vision of culture, however, which ignores the indisputable transformation of social mores as well as the obligation to promote tolerance and respect for diversity required by human rights law as core aspects of the right to privacy."

...respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental right to life, security and privacy by criminalizing harmless private relation between consenting adults. Even when such laws are not actively enforced or worse when they are arbitrarily enforced, their mere existence fosters an atmosphere of fear, silence and devil of identity in which LGBT persons are confined. Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killing that gay, lesbian, bisexual and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT person is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.

Even today various opinions are expressed against the abovementioned norms and values developed in regard to the recognition of the sexual orientation and gender identity, to the effect that sexual activities among the homosexual and transsexual are not natural; that they are not capable of reproduction and that it engenders social pollution. Stating it to be an unnatural relation, strong views are, thus, expressed against its legalization. However, such views are influenced by traditional approach of gender identity that recognizes only male and female. **The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural. In the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. In such a situation, therefore, gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural. When an individual identifies her/his gender identity according to the self-feelings, other individuals, society, the state or law are not the appropriate ones to decide as to what type of genital s/he should have, what kind of sexual partner s/he needs to choose and with whom s/he should have marital relationship. Rather, it is a matter falling entirely within the ambit of the right to self-determination of such an individual.**

In consideration of the backgrounds as mentioned hereinabove in various paragraphs, it seems to us that efforts have not been made to protect and promote the interest and rights of the homosexuals and the people of third gender under the Nepali laws. Although, there is no distinct law that declares the relation between homosexuals as crime (it is kept within the definition of unnatural coition), there is a claim that the state mechanism has implicitly contributed to the discrimination created due to negative attitude of the society towards these people which cannot be ignored. As the concept of trans-sexuality has not been legally accepted, one cannot also dismiss the claim that the transsexual and homosexual peoples are not living their lives easily by keeping their own identity. These people have been compelled to appear in the public life with the identity as determined according to their genitals instead of their own characteristics, and, it is very important to reconsider the prevalent values in the context of human rights and fundamental rights.

We should also gradually internalize international practices in regard to the enjoyment of the right of an individual in the context of changing global society and practices of respecting the rights of minority. If we continue to ignore the rights of such people only on the ground that it

might cause social pollution, our commitment towards respecting human rights will be questioned internationally. It cannot be said that only because of their behavior, activities and conduct guided by their self-feeling as well as their cross dress other than one imposed by the society according to their gender identity, will pollute the society. This is so, as an individual does not change his own natural identity merely to imitate other people. **The medical science has already proved that this is a natural behavior rather than a psychiatric problem. Now, therefore, it is not desirable to cling to the old belief by ignoring the conclusion drawn by science and medicine. Any provision that hurts the reputation and self-dignity as well as the liberty of an individual is not acceptable from the human rights' point of view. The fundamental rights of an individual should not be restricted on any grounds such as religion, culture, customs, values and the like.**

The legal provisions in our prevailing laws such as the chapters 'Of bestiality', 'Of Marriage', 'Of Husband and Wife' of the Country Code [*Muluki Ain*], 2020 [1963 AD] **as well as provisions incorporated in other statutes and rules with regard to the citizenship, passport, voter list, security check etc and similar legal practices have not only refused to accept the identity of the people of third gender but also declined to acknowledge their existence. Similarly, it seems necessary to analyze the situation in which due to administrative thinking and social environment the people of third gender are not finding it conducive to lead the life springing from their behavior and character and dictated by their nature.** For example, an individual who is born with a male genitals may show feminine character when he becomes an adult and dress up like a woman. Yet he holds the identity card of a man as provided by the state and the society. Similarly person born with female genital may show masculine character but may carry with him/her the identity certificate of a woman as provided by the state or society. It is obvious that such persons face the problem of identity.

Coming to the fourth question i.e. whether or not an order prayed for by the petitioners should be issued, the writ petition seems to have been filed on behalf of the minority people on the basis of sexual orientation and gender identity. The major contentions of the petitioners can be classified as follows:

- Legal provisions should be made to provide for gender identity to the people of transgender or third gender, under which female third gender, male third gender and intersexual are grouped, as per the concerned person's self-feeling. Such people should not be discriminated on the basis of sex.
- The fundamental human right of the lesbians, gays, bisexuals and transgender people should be protected by the state and society according social recognition on the basis of their sexual orientation and by making appropriate legal provisions that ensures them the life with freedom as other heterosexual people.

In consideration of the first contention, the petitioners seem to argue that the people of third gender, for not being 'men' or 'women', are deprived of the identity papers including the citizenship certificate from the government offices that mentions their own sex; that they are deprived of the benefits from the educational institutions as well as other public offices as citizens; and that they are also being dishonored and disrespected by concerned public office bearers. Therefore, they claim that discriminatory laws which make 'male' or 'female' as the base should be repealed and their fundamental rights and human rights, which recognize their gender identity based on self-feeling, should be protected.

The people under the category of LGBTI, except those whose sex has been changed through sex change operation either from male to female or from female to male, grow up with the

natural process. Similarly, among the people other than LGBTI, some are born healthy, agile and have good height; some others are disabled and handicapped; yet some others are blind, dwarf and deaf-mute. They are considered either man or woman simply because of their genitals. These people who have been clearly identified as men and women do not face any difficulty in the enjoyment of fundamental rights. However, persons other than those clearly identified as men or women face difficulty in the realization of fundamental rights. It is not appropriate to have such discriminatory constitutional and legal provisions that restrict the people having third gender identity enjoying fundamental rights. The LGBTI people who, otherwise have normal characteristics, should not be deprived of the enjoyment of their fundamental rights only because of their sexuality or because of their indifference towards the people of opposite sex in contrast to other heterosexual persons, or because of their varied cross dresses. The state should make necessary arrangement for the people of third gender besides male or female. While the people with the identity of either a 'male' or a 'female' despite having abnormal physical conditions - either handicapped or dwarf or deaf-mute etc. - can enjoy such rights with their own identity, it would not be reasonable to say that the people, with different gender identity and sexual interest, who otherwise are normal, cannot enjoy their fundamental rights and human rights guaranteed by the constitution and other international instruments relating to the human rights. If any legal provisions exist that restrict the people of third gender from enjoying fundamental rights and other human rights provided by Part III of the Constitution and international conventions relating to the human rights which Nepal has already ratified and applied as national laws, with their own identity, such provisions shall be considered as arbitrary, unreasonable and discriminatory. Similarly, the action of the state that enforces such laws shall also be considered as arbitrary, unreasonable and discriminatory.

In this context it seems pertinent to quote here some provisions of the International Covenant on Economic, Social and Cultural Rights [ICESCR] and International Covenant on Civil and Political Rights [ICCPR]:

ICESCR - Article 10:

...marriage must be entered into with the free consent of the intending spouses.

ICCPR - Article 2:

1. 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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

- [a] To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

As mentioned already, it is an established fact shown by different scientific research, analysis and experiments that the lesbian, gay, bisexual, trans-sexual and intersex, commonly referred as LGBTI are also natural person regardless of their sex which may be either male or female as well as their gender which may be either masculine or feminine. Therefore, these people cannot on any ground be excluded from full enjoyment of the provisions of the international covenants mentioned above once they get the recognition as a person before the law. It is also not possible to make restrictions in enjoying the fundamental human rights on any other grounds, once s/he gets the recognition as a person before the law. The LGBTI people, do obviously possess equal rights as others for the enjoyment of the rights guaranteed by these international covenants such as right to marry with free consent, right to form a family, non-interference on privacy, non-discrimination on the grounds of race, colour, language, religion, political or other opinions, national or social origin, birth or other status.

All fundamental rights provided in Part 3 of the Interim Constitution of Nepal, 2063 [2007 AD] from Article 12 to 32 have been guaranteed to every Nepali citizens and persons. Though the petitioners are in minority the enjoyment of these rights with their own identity is the fundamental rights of the petitioners as well. The Part IV of the Constitution provides for Directive Principles and Policies of the State. It is the right of the petitioner to benefit from these policies with their own identity. It cannot be construed that the legal rights and fundamental rights as well as human rights provided to the individuals by the Constitution and other human rights related international instruments to which Nepal is a party, may be enjoyed only by men and women merely because the term 'sex' - [meaning male and female] is mentioned in the Constitution. **As the people with third type of gender identity other than the male and female and different sexual**

orientation are also Nepali citizens and natural person they should be allowed to enjoy the rights with their own identity as provided by the national laws, the Constitution and international human rights instruments. It is the responsibility of the state to create appropriate environment and make legal provisions accordingly for the enjoyment of such rights. It cannot be construed that only 'men' and 'women' can enjoy such right and other people cannot enjoy it only because they have a different gender identity and sexual orientation.

Similarly, Article 12 of the Constitution has guaranteed the right to freedom. Article 12 (1) provides that every person shall have the right to live with dignity and Article 12 (2) provides that except as provided by law no person shall be deprived of his/her personal liberty. The said Article 12 should be considered as relating to the right to life. The terms 'men' and 'women' are not mentioned in this article. The freedom guaranteed in Article 12 is for every person. The word 'person' implies every natural person. Being the natural person LGBTI should be entitled to live in the society enjoying all the freedoms with dignity. The Article 12 (2) has guaranteed minimum freedoms to human beings. The freedoms guaranteed by this Article can be enjoyed with one's own identity irrespective of sex. The freedoms guaranteed in sub-clauses (a) to (f) of Article 12 (3) can only be restricted by laws. And such laws should not be arbitrary, discriminatory and unreasonable. Reasonable restriction on such freedoms can be imposed if an act undermines the sovereignty and integrity of Nepal, or jeopardizes harmonious relations subsisting among the peoples of various castes, tribes, religion or communities. There are two significant expressions - 'with dignity' mentioned in the article 12 (1) and 'except for the provision in law' mentioned in the article 12 (2). The interpretation of these two expressions should be made in such way that they do not frustrate but contribute to the furtherance of fundamental rights or human right of all people including women, men and LGBTI.

Similarly, Article 13 of the Constitution has guaranteed the right to equality. According to sub Article (1) all citizens are equal before the law and no person is denied equal protection of the laws. And pursuant to sub article (2), there can be no discrimination against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of them. Similarly, sub-article (3) reads that the State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these. However, there is a proviso in this sub-article which provides that nothing shall be deemed to prevent the enactment of special provisions by law for the protection, empowerment or advancement women, Dalits, indigenous ethnic tribes, Madhesi or peasants, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are physically or mentally incapacitated. The sub-article (4) provides that there shall be no discrimination with regard to remuneration and social security between men and women for the same work.

The said constitutional provisions relating to equality have guaranteed equality before the law, equal protection of law, non-discrimination on the application of law, non-discrimination by the state on any ground and non-discrimination on matters of social security as well.

In Article 12 (2) of our Constitution provides that except when provided by law no person shall be deprived of his/her personal liberty. By analyzing this provision it seems that such liberty can be restricted by making law in the public interest. The right provided by Article 12 is the right to life which is a crucially important right for the human beings. In brief, every citizen and every person shall obtain such rights on equal basis such as the right to have one's own identity. Such freedoms cannot be restricted by making discriminatory or arbitrary law. The existing property

laws, other personal identity including citizenship related laws, the law of marriage as well as some other laws seem male and female sex specific. Such laws do not seem to accept even the existence of the people other than the 'male' and 'female'.

It has now been accepted that the gender identity of an individual is determined not only by the physical sex but also by her/his behavior, character and perception. Generally, a person may physically be either a male or a female at birth but during the process of physical development s/he may, as per her/his identity, acquire either masculine or feminine character. However, all people may not be viewed with the same approach. Some people may acquire different traits and behavior contrary to their physical sex at birth. As is already observed, it happens naturally. However, there does not seem any provision in our existing law that allows these people to practice any profession as well as to maintain conjugal relationship with their changed sexual identity. The law which does not allow the people to enjoy their fundamental rights and freedoms retaining their own identity, may be considered as discriminatory. While making harmonious interpretation of the provisions of Articles 2, 16 and 17 of the ICCPR, it seems that the state has to recognize every individual with their own identity or every person has the right to have one's own identity. Article 10 of the ICESCR and the Article 23 of the ICCPR, to which Nepal has already ratified and applied as national laws have provided the right to marry only to the men and women. The Article 17 of the ICESCR provides the right to privacy of the family life to an individual as well as the right not to be subjected to unlawful attacks on her/his honour and reputation. As provided by section 9 of the Nepal Treaty Act, 2047 (1991 AD), the ICCPR and the ICESCR should also be considered as the national laws of Nepal, it seems to us that the LGBTI should be allowed to enjoy the rights guaranteed by the Nepalese law without discrimination and with their own identity like other individuals. Therefore, this directive order is hereby issued to the Government of Nepal to make necessary arrangements towards making appropriate law or amending existing law for ensuring the legal provisions which allow the people of different gender identity and sexual orientation in enjoying their rights as other people without any discrimination following the completion of necessary study in this regard.

Likewise, according to the provisions of the Fundamental Rights given in Part III and Directive Principles and Policies of the State given in Part IV of our Constitution, the state seems to have the responsibility to make special legal provisions for the upliftment of the oppressed and disadvantaged people such as women, children, the aged, incapacitated, indigenous, dalits etc. We all should take note that the terms 'men' and 'women' are mentioned here instead of the term 'sex', whereas in the Constitution instead of the terms 'men' and 'women', the term 'sex' is mentioned which may be construed to include the people of third gender as well besides 'men' and 'women'. As the term 'sex' refers not only to men and women but also the people of third gender, **this judicial comment is hereby made as it looks necessary to keep a clear provision in the new Constitution to be made by the Constituent Assembly, guaranteeing non-discrimination on the ground of 'gender identity' and the 'sexual orientation' besides 'sex' in line with the Bill of Rights of the Constitution of South Africa.**

Another claim of the petitioners pertains to the protection of the fundamental right of the lesbians, gays and bisexual people by the state though appropriate legal provisions which, by granting them legal and social recognition from the state and society on the basis of their sexual orientation, ensures a life of freedom as other heterosexual people have. In reality, this claim is specific in regard to the issue of same sex marriage or co-habitation of such couple. Looking at the issue of same sex marriage, **we hold that it is an inherent right of an adult to have marital**

relation with another adult with her/his free consent and according to her/his will. The same sex marriage should be viewed from the view point of interest and rights of the concerned people as well as that of the society, family and all others. It seems appropriate to reach a conclusion after studying the legal provisions and practices of other countries regarding gay and lesbian marriage. It has already been recognized in some countries whereas in some others it yet to be recognized. Therefore, it is essential to carry out a thorough study and analysis of international instruments relating to the human rights, the values recently developed in the world in this regard, the experience of the countries where same sex marriage has been recognized, and its impact on the society as well. **The Government of Nepal has hereby been directed to form a committee as mentioned below in order to undertake the study on over all issues in this regard.**

Formation of the Committee

a.	A Specialist Medical Doctor as designated by the Ministry of Health	Coordinator
b.	One Representative of National Human Rights Commission as designated by the commission	Member
c.	A Representative of the Ministry of Law, Justice and Parliamentary affairs	Member
d.	One Sociologist as designated by the Government of Nepal	Member
e.	A Representative of Nepal Police (Specialist on this issue)	Member
f.	A Representative of Ministry of Population and Environment	Member
g.	Advocate Hari Phuyal, who represents the petitioners	Member

The 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 is directed to make the legal provisions after considering recommendation made by the said committee.** It does not seem appropriate to set the terms of reference for the committee by this court because it may be appropriate to provide this task to the government due to the gravity and seriousness of the subject matter. The directive order is also hereby issued to the respondent Government of Nepal to submit a copy of the report to this court that is submitted by the said committee.

It is hereby further directed to write to the Office of the Attorney General to inform the respondents supplying the copy of this order as well as to the Monitoring and Inspection Division of this court for the regular monitoring of the implementation of this order. It has also hereby been ordered that the notification of this order be provided to the petitioners including the copy of the order and the file be delivered to as per the rules.

I concur with the aforesaid verdict.

.....
[Justice Balram K.C.]

.....
[Justice Pawan Kumar Ojha]

Bench Officers:
Shyam Kumar Bhattarai
Yadav Raj Pokharel

Date:- 6th day of the month of Paus, 2064 BS (corresponding to 21st December, 2007 AD)

PERI: Introduction and How to Access Full Text Journals?

PERI (Program for the Enhancement of Research Information) is one of the important programs of the INASP (International Network for the Availability of Scientific Publication). After PERI's implementation, Nepali researchers, scientists, students graduates, and other scholars in different fields will have access to Full Text database of world's more than 7000 high quality scientific journals. Likewise they will have full access to contents and, abstracts from 25,000 scientific journals.

PERI is guided by local demands and is coordinated by local organization. It brings together governments, research institute, academia, developmental agencies, commercial and non-commercial publishers, libraries, editors, trainers, and information providers.

What PERI does?

- Delivers information.
- Strengthens national research publications.
- Supports country collaboration and networking.
- Enhances ICT skills.
- Initiates research and development.

The following e-resources are available in Nepal through PERI program which are very useful in the field of Law.

- Blackwell-Synergy
(URL: www.blackwell-synergy.com)
- Oxford University Press
(URL: www.oxfordjournals.org)
- Springer (URL: www.springerlink.com)

This apart different other e-resources are also available through the PERI programs which are useful in the field law.

How to access full text?

There are two ways of establishing access to PERI resources

- by IP address
- by username and password

In case of NJA we can access some resources through IP address, and others through username and password. The librarian at the NJA will be more than willing to assist the member of its target community in accessing PERI resources.

Yours'
Kedar Ghimire

NJA Team

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Hon'ble Tope Bahadur Singh
Former Justice, Supreme Court

Faculty

Hon'ble Devendra Raj Sharma
Judge, Court of Appeal
Hon'ble Dr. Ananda Mohan Bhattarai
Judge, Court of Appeal
Hon'ble Dipendra Adhakari
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The National Judicial Academy (NJA), a member of International Organization for Judicial Training, was established in 2004 to serve training and research needs of the judges, government attorneys, government legal officers, private law practitioners and others who are directly involved in the administration of justice. Originally established by an Ordinance, it is now governed by the NJA Act, 2006. The NJA works under the broad policy guidelines of the Sixteen Members Governing Council headed by the Chief Justice. Executive Director heads the Executive Board.

Vision

To promote an equitable, just and efficient justice system through training, professional development, research and publication programs which address the needs of the judges, government attorneys, government legal officers, private law practitioners and others who are directly involved in the administration of justice.

Objectives

- Enhancement of knowledge and professional skills of judges, judicial officers, government attorneys and private law practitioners and bring about the attitudinal change that enhance competence.
- Undertake research in the field of law and justice and to make available legal literature of scholarly and practical significance to judges, judicial officers and others who are involved in administration of justice.

Partners

- Supreme Court and Subordinate Courts
- Office of the Attorney General
- Ministry of Law, Justice and Parliamentary Affairs
- Nepal Bar Association
- Judicial Council
- Donor Agencies INGOs and NGOs

Training Activities

The NJA believes that training should contribute to overall personality development of the learners. It should facilitate the enhancement of knowledge and skills that positively impact on the promotion of effective, efficient and accessible justice. NJA designs, organizes and conduct trainings seminars, conferences, symposia and related programs for its target communities.

Research and Dissemination of Information

- Carry out research and produce publications, reports and recommendations in respect of reforms to relevant aspects of the law and administration of justice.
- Inform the judiciary and the wider community of new technology and its use in the administration of justice.
- Disseminate web-based information

Promotion and Co-ordination

- Promote training as an integral part of career development for judges, judicial offices and law practitioners.
- Liaise with other judicial training institutions to develop training programs which are of internationally recognized standard.
- Liaise with Government of Nepal and international donor agencies in respect of judicial training programs within the justice sector.