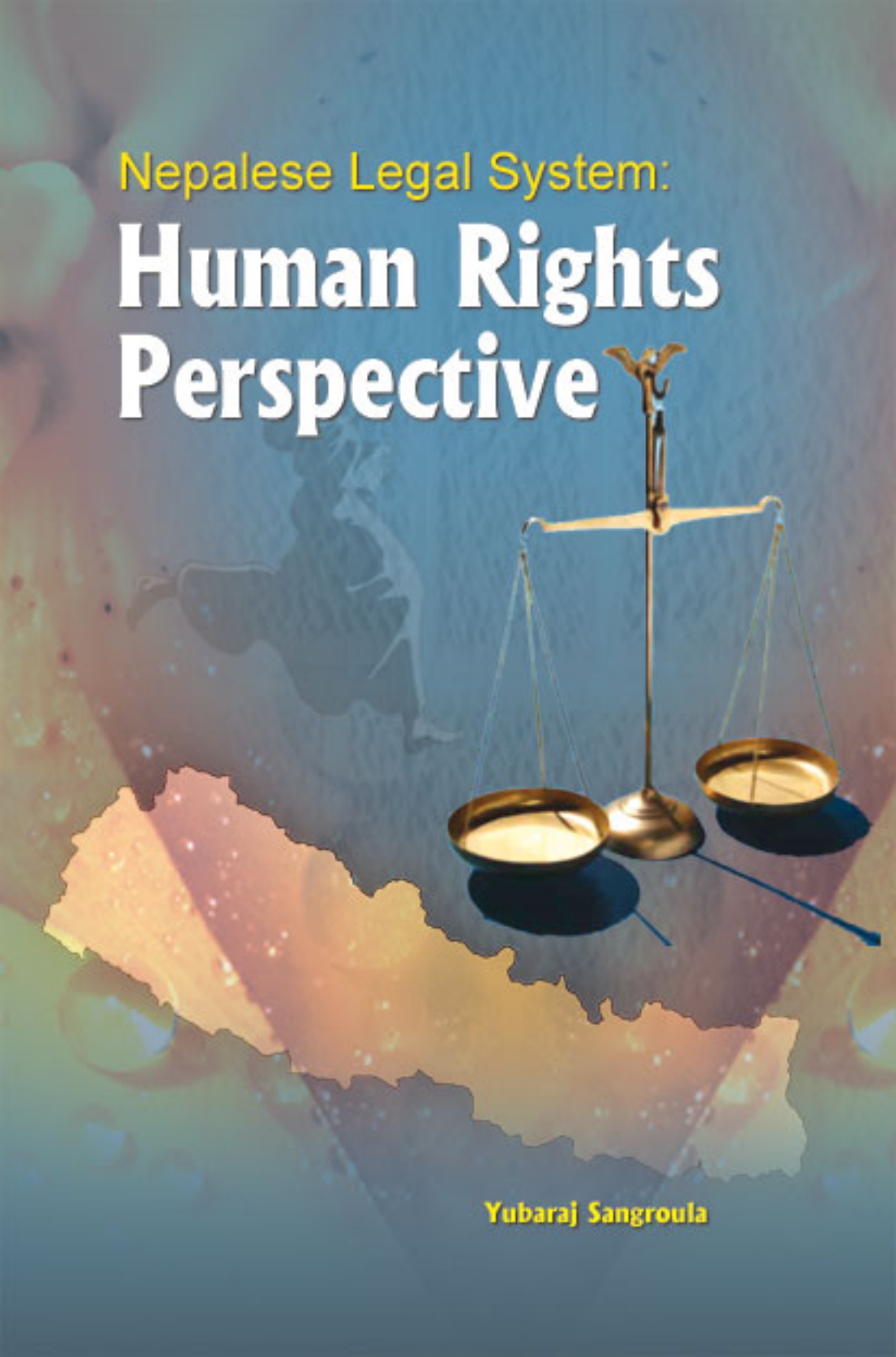
Nepalese Legal System:

Human Rights Perspective



Yubaraj Sangroula

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HUMAN RIGHTS PERSPECTIVE

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List of Abbreviations

AG	:	Attorney General
AG	:	Auditor General
ANC	:	African National Congress
B.L.	:	Bachelor in Law
B.S.	:	Bikram Sambat
CAT	:	Convention against Torture
CDO	:	Chief District Officer
CeLRRd	:	Center for Legal Research and Resource Development
CIAA	:	Commission of Investigation of Abuse of Authority
CJ	:	Chief Justice
CPN Maoist	:	Communist Party of Nepal (Maoist)
CRC	:	Convention on the Rights of Child
CVICT	:	Center for Victims of Torture
CWIN	:	Child Workers in Nepal
DAO	:	District Administration Officer
DDC	:	District Development Committee
DIHR	:	Danish Institute for Human Rights
DSP	:	Deputy Superintendent of Police
EC	:	Election Commission
EU	:	European Union
F/Y	:	Fiscal Year
FIR	:	First Information Report
HC	:	House of Commons
HMG	:	His Majesty Government
HoR	:	House of Representatives
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economical, Social and Cultural Rights
ILO	:	International Labor Organization
INGO	:	International Non Governmental Organization
INSEC	:	Informal Sector Service Center
JC	:	Judicial Council
KGB	:	*Komitet Gosudarstvenno-Bezopasnosti*
KM	:	Kilo Meter
KSL	:	Kathmandu School of Law
LL.B.	:	Bachelor in Law
LL.M.	:	Masters in Law
MP	:	Member of Parliament
NGO	:	Non Government Organization
PM	:	Prime Minster
PSC	:	Public Service Commission
RNA	:	Royal Nepal Army
SAARC	:	South Asian Association for Regional Cooperation
SC	:	Supreme Court
SWC	:	Social Welfare Council
UDHR	:	Universal Declaration of Human Rights
UK	:	United Kingdom
UN	:	United Nation
UNDP	:	United Nations Development Program
UNESCO	:	United Nations Educational, Scientific and Cultural Organization
USA	:	United States of America
USAID	:	US Agency for International Development

Preface

This book is a compilation of my research articles reflecting on the legal system of Nepal from human rights perspective. Many of them have already been published in national and international law journals. The present compilation is the result of inspiration by acute want of information on emerging human rights jurisprudence in Nepal. In the days of my teaching in law schools in Nepal and abroad, I often encountered students' interests to know about Nepal's legal as well as judicial system. Unfortunately, such literature is very sparsely available in consolidated form. I was, thus, instigated to give a shape of the book to some of my research based articles.

Some of the articles included in this book had been written a few years ago, and as such they might not fully reflect the present scenario. However, the articles will definitely help to comprehend the development pattern of the legal and judicial system of Nepal. Most of other articles are written in the backdrop of development in the recent past, which is marked by the constitutional dilemmas and utter failure of political parties in driving 'democracy in right track'. In the perspective of political instability and failure of good governance and rule of law, human rights issues are in forefront in every sector of the national life. Nevertheless, these problems are rarely approached in academic and research perspective.

Since1990, I have fully indulged myself in academic field, and as such, have been teaching as a fulltime faculty in Kathmandu School of Law. Acute lack of research-based literature in the field of law and justice has been greatly felt. I had an opportunity to lead a number of research projects on law and justice after 1998. In this course, I had an opportunity to observe the system of law and justice in depth. I also had an occasion to observe the functionality status of the system in practice. These research experiences helped to closely understand the issues of law and justice in Nepal. Obviously, most of the articles included in this book attempts to unearth the issues identified by the criminal justice system of Nepal It also explores details on human rights situation, gender equality, access to justice and rule of law.

My thinking concerning reform of law and justice system of Nepal drives that it is not very 'optimistic' to judge it from the perspective of people's expectation. As some articles expose, the rule of law has been one of the sectors often ignored and overshadowed over the last one decade. The legislative body is largely dysfunctional in its objective, and thus it has terribly failed to 'generate required legal frame to consolidate rule of law'. The House of Representatives has failed even to 'frame laws' that were very basic to 'consolidate rule of law' in bureaucracy, constitutional bodies and political apparatus of the state, such as, Council of Ministers, political parties and local elected bodies. The role of legislative body, particularly, in framing laws in the sector of 'protection and promotion of human rights' has been negligible. In this regard, the National Human Rights Commission Act and Torture Compensation Act were two major statues enacted by the democratically elected parliament. Unfortunately, quality of both Acts was hardly appreciable. Most importantly, the legislative body has failed to 'enact law on a vital area like "right to information'. The scenario of the gone decade presents unique scenario of the judiciary. Most strikingly, likewise in the past, it continued to be 'neglected' by the state, especially in the financial matter. A traditional concept of the state that 'investment in the judiciary is unproductive' loomed large in the executive branch of the state. While the political significance of the judiciary was largely increased by 'induction of politically high profile cases in the Supreme Court', its performance standard in matter of delivery of justice is still not beyond the question. The problem of delay in justice continued even after the change in political scenario of the country.

In socio-economic front, the country achieved significant improvement after the restoration of democracy. The country made unbelievable achievement in information technology and several other sectors observed impressive changes. However, the nation miserably failed in the sector of good governance. Economic and social rights of the people continued to be neglected. Even the constitution failed to enshrine

economic and social rights as fundamental rights of the citizens; these rights were made no-justiciable by the judiciary. The change in the economic and social life of the marginalized and disenfranchised population was fully ignored; thus creating problem of the 'Nepali democracy'. The corruption, on the other hand, continued to mount incredibly. Socio-economic negation of marginalized and disenfranchised population accompanied by uncontrolled corruption doomed to the 'outbreak of violence' in the country leading to rapid deterioration of the human rights situation.

Various articles present in this book like issues of good governance, human rights and corruption are interrelated. Corruption destroys the prospect of good governance and, in turn, it absolutely corrupts human rights situation. In Nepal, this problem has been phenomenal. Both, before and after the restoration of democracy, the corruption penetrated every aspect of the public life in Nepal. It ranged from petty corruption (*chiyapaani*) to extortion of the government expenditure. In the *Panchayati* regime, incidents or affairs of corruption went unreported due to absence of press-freedom. However, after 1990, the press effectively exposed the corruption as well as corrupt practices. Unfortunately, the attack was largely confined to the 'leaders of the political parties' who led the democracy restoration movement in 1990. It does not, however, mean that all leaders of political parties were 'corrupt' but it also does not mean that all 'political leaders' allegedly involved in corruption were 'clean'. But the issue became extremely generalized so as to 'stigmatize the whole community of political leaders' as well as the political parties. This unmanaged propaganda is one of the factors for 'demolition of democracy' within a very short period of time. The generalized apathy created by the press, although not strategically and dishonestly, largely attributed to the 'emergence of psychology among the people that the democracy has failed in Nepal'. Undoubtedly, the press successfully exposed the 'corruption scams', but equally failed to do so retrospectively. As people are aware, the population of rich people in Nepal is smaller, but within this echelon, the size of 'business persons and traders' is negligible. Most of the rich and influential persons come from politically active community, or they are the person who have powerful stake in 'state's power'. The press failed to 'expose' this group, who, for last long period, has been plundering the nation. Obviously, a neo-corrupt group was exposed, but the 'stronghold' of corruption was left unaffected.

The culture of corruption has, thus, long history in Nepal. It was a serious challenge for leaders of the political parties. People of Nepal had high expectation to the political parties. They also had great regards to the political leaders. But this love and respect didn't keep any meaning for political leaders, and thus people were thrown in despair. Regressive elements were 'welcomed with red-carpet' by political parties whereas committed cadres were pushed out. Within few years of democracy, political parties had been deformed and converted into 'a junta' of power-wielders. The regressive elements worked hard to destabilize the democratic forces.

In this context, the rule of law was extremely affected; it was not the 'rule of law', but the 'rule of corruption' prevailed. Accountability was severely affected, and in a society where accountability was neglected democracy lost into kleptocracy. It was not an end. Nepalese society saw 'emergence of a violent conflict' in 1996, which largely shattered its fabric. Vested agenda of the political forces used "Maoists insurgents" against each other. Each was happy when the other was attacked or affected by insurgents. The democratic forces deceptively played using insurgents against each other, and everybody virtually was in trouble.

In that wake, the Nepalese society was once again deprived of an opportunity to consolidate the democracy. The local government was left in abeyance; it was shifted at the hands of bureaucracy. Prime Minister followed the tendency of dissolution of House of Representatives as an instrument to prolong his tenure by weakening or punishing opposition and own party alike. Political dirt was often thrown in the judiciary, thereby pushing it to 'political vulnerability'.

This unhealthy scenario of the national political life has far reaching impact on lives of citizens. I, myself, definitely am not an exception. I made attempt to 'look into' these issues jurisprudentially, which sometimes drove me towards intellectual debate, if not controversy. Nevertheless, I continued to consider these issues critically. Obviously, some of these articles appeared as an attempt to 'unfold' the dynamics of the given problem. In this course, I ventured with a sincere urge and motivation that 'consolidation and devolution' of the democracy is the only right solution to the problem. I observed conflict and problems as usual outcome of 'clashes of interests' and 'failure in adjustment' of concerns of all sectors of national life. In my opinion, the conflict could be or would be 'energy' for progress, if its dynamics are truly

understood and if attempts are made to address it socially, economically and politically. However, state's authorities blundered by 'defining it as a matter of law and order'. They failed to understand that 'conflict is a matter of transformation' but 'not suppression'.

In my opinion, violation of human rights is an 'outcome of failure in socio-economic and political fronts'. Economically speaking, the major reason behind the ensuing conflict is 'widespread disparity' in distribution of resources. As statistics show, a smaller proportion of population, about 10%, consumes approximately 50% of the total national income whereas the 20% at the lowest bottom-line has to rely only on approximately 5% of it. This disparity should be the most important agenda of reform for the democratic governments. Unfortunately, wheels did roll down opposite. Obviously, the true intervention of the situation is, thus, lying on the realization of the 'socio-economic rights' of the disenfranchised community. No good governance is feasible to be forged out in ignorance of the 'socio-economic rights' of the marginalized and disenfranchised community. While in the last 15 years, many friends of Nepal put billions of rupees for consolidation of the good governance. These interventions doomed to be failure due to their exaggerated emphasis on 'civil and political domain' of the governance. Policy makers, because of their naive understanding of the interdependence between civil and political rights and economic and social rights, could not perceive the notion of 'indivisibility' of human rights. Consequently, the concept of 'good governance' was dealt exclusively with political perspective. As development plans demand for resource mobilization, the authority to generate resource holds indispensable and undeniable power of the local government authorities. But this principle was fully ignored. Local government bodies were, thus, subjected to 'subordination of central government' in matters of tax. The devolution of power to local bodies was, thus 'simply a myth', which seriously hindered the consolidation of democracy.

Protection and promotion of human rights was one of the serious failures of the state. The conflict and ensuing constitutional breakdown, sharp dissensions among legitimate political forces, dissolution of the House of Representatives and local government bodies aggravated the deterioration of human rights situation. Especially, the reform of criminal justice system, one of the sectors needing most urgent improvement, was left stagnated. The past features of the system, which comprised, inter alia, the confession oriented investigation system, the nineteenth century notion of absolute separation of investigators and prosecutors, and incredibly higher rate of prosecution failure continued to affect the system, thereby eroding the confidence of people. This sector, thus, constituted a 'major sector' of human rights violation.

Articles included in the book reflect these issues in this or that way. However, the core concern of each article is contextual and subject oriented. It is hoped that the collection would help to raise the issues for discussion, which will ascertain the usefulness of the book

I am deeply indebted to my colleagues for their professional assistance while editing this book. Ms. Geeta Pathak (Sangroula) has assisted me in clarifying number of gender issues reflected on various articles. Ms. Ekta Singh, Ms. Bidhya Pokhrel and Mr Pradeep Pathak deserve my thanks for their cooperation in the hectic task of language edit and other formalities. Mr. Maheshwor Phuyal receives my appreciation for bearing responsibility of 'typing and laying out' the book. My daughters Yugichhya Pathak Sangroula and Swoichhya Pathak Sangroula deserve my affection for helping me in arranging logistic support and affectionately caring me during my writing journey of this book.

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Yubaraj Sangroula

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1 Dynamism of Government Branches for Sustaining Democracy

Preface:

The success of the democracy in a society is dependent on the pragmatic realization of the core values the constitution is built on. The universally accepted principles like distribution of power among three branches, the popular consent and the accountability and transparency of governmental institutions are only outer framework of the democratic governance. The progressive and sustainable functioning of the democracy is contingent on the core values. Any constitution, irrespective of their framing process including constituent assembly, are doomed to be failure if they disregard the equal participation in governance of all castes, ethnic, linguistic, religious and sex groups and populace divided by geographical landscape of the country.

The structure and functional *modes operandi* of government branches are determined by a set of core values of the given society. They would be virtually dysfunctional unless their relevancy with core values is entrenched. Successive failure to comprehend this simple fact is a decisive cause for failure of series of constitutions in Nepal. The temptation for both the monarchical "absolutism" and party "majoritarianism" are outcomes of these failure born out of the tendency of disregard to the widespread 'diversity' of life, which is a fundamental core value of the Nepalese society. The life of the constitution, as an organic process, is contingent on the 'core value', thus the borrowing or importation of the structure and the functional *modes operandi* of government branches would yield nothing but instability.

Historically, Nepal practiced four constitutions in a short period of half century, each of them lasting only a short period of time. The making of each constitution is marked by a process of 'heavy borrowings' from alien constitutions. The interim constitution of 1951 was simply an abridged and unsystematically copied version of the Indian constitution, while the constitution of 1959 was a copy of the Westminster model along with some 'bargained domains' between the Nepali Congress and the King Mahendra, the emergency power of the king being feature of the bargain. The *Panchayati* constitution of 1963, was a 'hybrid' of characters imported from some totalitarian countries, welfare principles of Tito's socialist regime and the concept of 'one man' ruled partyless regime from the regimes of Sukarno and Sadat. The 1990 constitution is virtually a copy of the Westminster model.

The structuring of the House of Representatives (HoR) after the "House of Commons" (HC), a parliament based on the concept of the "majoritarianism" was an original cause for the disruption in the smooth functioning of the constitution in Nepal. The structure and styles of functioning of the HC are virtually shaped by the traditions marked by the homogeneity of the English society. This character was absent in the Nepalese society, so that it was not possible for HoR to function smoothly. Hence, to have a new constitution reflecting the 'core value' of the Nepalese society is necessary for smooth functioning of the government branches and to the transformation of the present crisis.

This article intends to provoke discussion on present constitutional crisis in Nepal. With a view to attract a lively debate, an endeavor is made as much as possible to raise some pertinent issues needing attention of the whole nation.

Assumptions:

Before entering into critical discussion on specific issues, let me have some pertinent assumptions propose for the consideration.

A constitution is an account of political compromise between diverse political elements of a given society. Only a constitution can be effective if it is successful to formulate principles and engender institutions in accord with core values of the society.

A constitution is a documentary standard of the wills and aspirations

of the people. If the framing of constitution is predominantly influenced by "centralist legalist approach", it is prone to disregard the indispensability of the people's active control over the governance.

A constitution infallibly underlines the visions, goals and strategies for the national development, with emphasis on equitable distribution of the resources among the people. The constitution making is thus a usual political process of the people.

Borrowed or Imported Government Branches will Certainly Fail

The constitution becomes deluded when principles and institutions enshrined into it are borrowed or imported from other systems. The 'borrowing and importation' approach is an affable way of sustaining 'elitist' control over the government, in exclusion, and sometime suppression, of the popular consent. In Nepal, the constitutions engineered the government branches in a fashion that the people could hardly make distinction in their democratic or totalitarian characters. For instance, GP Koirala dissolved the first HoR simply for the reason that his 36 colleagues defied his despotic manner. It was an intra-party crisis; in no ways the national crisis. The Supreme Court (SC), however, held in a baffling way that the dissolution of the House was a democratic prerogative of the Prime Minister. The court could not simply understand that the prime minister's prerogative could not prevail over popular mandate, a basic principle of the democracy and rule of law. It did not think necessary to answer the question as to how a prime minister could punish the whole 'body' of the people's deputies in his own failure to obtain support. Was not it a totalitarian pursuit of democracy? Such delusions are outcomes of 'systemic failure of the government branches' caused by the absence of realistic engineering of value-based relation between the "powers" (organs) and "values" (constitution).

Structurally, government branches must secure representation of constituents, people. This has been a sheer joke in Nepal. If one gives a glance on the history, for instance, the SC of Nepal has had not a single judge from ethnic groups and classes other than Brahmin, Thakuri, Chettri and Newar. The judiciary, an important branch of the government, has thus become an exclusive club of a few elite classes. Likewise, the electoral process of House of Representatives is based on first past-post voting system. The districts are divided

into constituencies, each constituency having one member elected based on the larger number of votes obtained compared to other individual contestants. If his/her votes are compared to aggregated accumulation of all loosing contestants, the so-called winner is nothing but a representative of the minority voters. This system absolutely inhibits people making alternative choice, and thus fails to protect their votes going useless. Obviously, only a minority votes are valid as opposed to the large majority votes. In such a system, the parliament is nothing but a 'debate club' of a few political elites.

Functions of Government Branches are Affected by Structural Relationship with Subsidiary Institutions

The three branches of government becomes functional by independent, fair and impartial activation of several other institutions, technically known as constitutional bodies, like Election Commission (EC), Public Service Commission(PSC), Auditor General(AG), Commission on Investigation of Abuse of Authority(CIAA), Judicial Council(JC), etc. Main branches' fairness and impartiality is largely determined by fairness and impartiality of these subsidiary ones. The peoples' deputies get elected in accord with the procedures fixed by the EC. The fairness and impartiality of EC is, therefore, decisive in ensuring 'legitimacy' of the house. Nevertheless, the EC, in Nepal, is fully controlled by the executive branch for its employees come from the executive bureaucracy. The fairness and impartiality of the electoral process is thus virtually ruled out.

Similarly, the employees of the CIAA come from the executive bureaucracy too. The subordinates of the Prime Minister's lawyer, the Attorney General, prosecute and defend the cases of corruption and abuse of authority in the court. The fairness and impartiality is thus virtually in question. The staffs of the AG too are recruited by HMG. The oversight of the functions of these institutions by the legislative body is, therefore, simply meaningless. When the parliament's role of overseeing the enforcement of laws is hindered by the subsidiary institutions, the erosion in the sanctity of the constitution is impossible to be checked. The sanctity of the parliament is preserved by its broad representativness, which in turn is a ground rule for the preservation of the core values enshrined into the constitution. By neglecting to incorporate the following ground rules, the framers of the 1990 constitution have ruled out

the possibility of true representation of people at HoR:

1. Election of deputies based on proportional representation: Seats of parliament in this system are divided among the all political parties securing minimum required votes. For instance, in Germany it is 5% of valid votes.
2. Block representation: In this system people are able to make choice of a block of candidates by a single vote. For instance, people can stamp six candidates from Kathmandu district by simply electing the party of their choice. The advantage is that the political party can pick up candidates representing diversified walks of life.
3. Alternative voting: This gives the people a chance of making choice of more than one person according to the preferential priority. The person to get victorious must secure 51% of votes; otherwise the person securing the largest preferential priority will be elected. Three Gs (gunda, gun and gold) have less impact in these electoral processes, as opposite to the present one in Nepal.

Where and how did we fail ? The framers of 1990 constitution blindly imported 'the system of majoritarian' rule from the English Westminster model, which is even not followed by its own vassals like Ireland. Fiji encountered a serious problem in the past for such importation. Sri-Lanka had to change it. Even the countries like New Zealand had to quit from the so – called majoritarian model. The Westminster system is a unique product of the homogeneity of the English society, thus it was not compatible for ours with widespread diversity. It was of course a sheer political negligence, if not an absurdity. The HoR thus lacked the "ownership" of the people, and the current situation in the country is nothing but a concrete 'expression' of 'disowning' of the imported system. Although the Nepalese people have firmly stood for the democracy, they have evidently shown indifference to the political parties' demand to restoration of the ailing HoR. The whole nation has expressed dissatisfaction to the royal movement, but in the meantime they declined to go along with the imported West ministerial model. Experiences of government branches in many countries borrowing the contents and values from the alien constitutions manifest the following scenario at common:

a. The legislature is ineffective and less pro-active in law making. It is sharply divided for no purpose and the overseeing of law enforcement is fully neglected.
b. The executive branch is openly engulfed in corrupt practices. The governance by ordinances and regulations as well as politicization of bureaucracy is common.
c. The judiciary is stuck with traditional formalism. Courts express reluctance to intervene in favor of the citizens. The technicality prevails over the rights of people.

Virtually, the constitution becomes largely paralyzed or defunct. The political parties are prone to interpret the constitution to suit their vested interests. The current situation of Nepal is a typical example. Let us examine a few examples:

Deuba revolted against Koirala for latter's failure to address the Maoist problem politically. He acclaimed Prachanda as a brave leader, and insistently argued that the looming insurgency was a political problem needing political intervention. But when he was inducted into power, his efforts too were flimsy to transform the conflict. His ministers engaged in dialogue without preparation and political agenda. They had hardly any vision of political landing of the crisis. His government denied constructive engagement of opposition in peace making process. When the crisis deepened and democracy virtually came into threat, he, simply to linger his government, preferred to kill the HoR, and declared election despite larger majority in the parliament against the move. The constitution was thus deadly hit by killing of the HoR in a circumstance when crisis had extremely deepened threatening the very fabric of the democracy.

The political parties were not capable of facing the challenges of election; neither the government was sincere to hold it. They, therefore, clandestinely agreed to extend the date of general elections resorting to the most controversial and vulnerable provision of the constitution. The monarch took advantage of the situation and took the most controversial decision. Political parties remained dormant against monarch's usurpation. Political parties played double standard roles; they opposed and boycotted the Chand government, but consistently engaged in dialogue with the king to form the government of their own. They called the king for renouncement of the executive power

supposedly taken, and while doing so failed to comprehend that it would keep the king above the constitution. The existing constitution allows no king to behave above the constitution; thus the so-called takeover had no constitutional significance. The political parties were supposed to hold the sanctity of the constitution, but in contrary they declared it dead and let stone fall on the feet.

Most unconstitutionally, at the end, the political parties called for the restoration of the HoR by the king. Obviously, if so happens, it will make the political parties historically liable for death of the democracy. The dissolution of the HoR is held constitutional by judgment of the SC, which can be overruled only by the larger bench of the SC, but not by the king. If the king is compelled to do so, the existence of SC will be redundant. Moreover, it will implicitly give an absolute power to the king. If he can restore the HoR regardless of SC judgment, he can do so in other issues too. So that the demand of political parties to restore the HoR by effect of king's declaration is potentially dangerous to revive the absolute monarchy in the country. Such demand occurs because the political parties have less respect to the constitution. They have less respect to the constitution because they had played no effective role in its making.

Foundation for Functionality of the Government Branches:

The rule of law and the principle of general rule and exceptions provide the foundation for functionality of the government branches. The rule of law on the other hand becomes operative through a scheme of dividing the power of government into three branches and several other institutions. This scheme is envisaged to disable the state to resort in governance in dissonance with popular consent. Only the governance in accord with popular consent provides the legitimacy of the functions of government branches. The legitimacy, in turn, preserves the inalienability of the rights of the people. To secure this rule apply in practice, the framers of a democratic constitution must answer the following three questions, which constitute a prelude of people's ownership to governance system:

- question of the source of legitimacy of the governmental powers,
- question of the proper structure of the government, and
- question of fundamental notion of the liberty and freedoms of people.

For the source of the legitimacy of governmental powers is rested on the popular consent of the people, no branch of the government in a democratic nation can remain out of the orbit of people's control. Any exercise of powers which lacks popular consent is doomed to be illegitimate, and thus becomes totalitarian.

The powers granted by the constitution are wielded by branches and institutions independently, within a perceptible framework of 'check and balance'. The structural division of the power is objectively effected to preclude the misuse or abuse of the power by such organs. As Montesquieu says, "the merger of the legislative and executive power will destroy the liberty of people as the parliament will enact a draconian law and executive will enforce it with the help of whips. The liberty will also be destroyed if the legislative power is merged with the judicial one. The judge will then be a lawmaker and interpreter in the same time. If it is merged with the executive, then judge will be a tyrant. In a free society, certain rights of people are inalienable and underogable. These rights inhere on people as an antithesis to arbitrary monarchical, theocratic or military power.

The constitution in this dimension is a declaration of the supremacy of the people over the rulers and supremacy of the law over the discretions of the rulers. In view of Herman Belz, a noted constitutional scholar, a constitution is an account of the ways in which people of the given nation establish and limit the power by which they govern themselves, in accordance with the ends and purpose that define their existence as a living and organic political community.

The effectiveness of the functionality of branches is thus dependent on their accountability to the people. However, as noted before, the absence of fairness and impartiality of the subsidiary institutions pose a risk of structural failure of the main branches. Principles of rational interpretation of the relations between three branches and subsidiary institutions can help somehow correct the problems. One of such benign principles is the prevalence of "general rule over exceptions". In Nepal, however, the Supreme Court's frequency of unrestrained intervention in the

political questions has virtually destroyed this possibility. Some illustrations are put forward to support this argument.

The then Prime Minister GP Koirala dissolved the HoR as a result of conflict between he and his 36 dissident colleagues, the sole objective being only to punish the dissidents, and show up power arrogance. Pursuant to the established doctrine of check and balance, the dissolution may be possible only in two conditions: firstly, to get rid of recalcitrant opposition causing trouble in normal course of governance, and, secondly, to be rewarded with fresh mandate when the government has achieved remarkable achievements. None of these conditions were present in the case of the G.P. Koirala. He, as opposed to rule moral values, perceived that article 53 (4) of the constitution was an unrestricted "rule of game" to overpower the uneasy HoR. However, the "rule of value" is that the "parliament" is a reflection of the people's popular consent, so that it should be respected in all circumstances. The issue could be placed in a right position by SC but it too saw the provision "from the perspective of rule of game".

The principle of "general rule" prevails in such a circumstance. The continuation of the HoR for its full tenure is the general rule and the dissolution an exception. The application of the rule of exception is contingent on explicitly entrenched grounds that rule out the possibility of the normal functioning of the legislative body. The failure of the bill to get through in the HoR was not a condition posing abnormal situation. The Prime Minister (PM) simply could resign, or ask for reconsideration over the bill. The majority of judges in the SC, however, interpreted the provision by unreasonably applying the "rule of 'exception", and thus justified the killing of the HoR. The judgment was a dangerous beginning of erosion in the democratic values. This judgment diametrically destroyed the power balance between the executive and the parliament, thus making PM a master over the HoR. The predominance of PM over the house was reflected in second dissolution of HoR by PM Man Mohan Adhikari. Eventually, the SC was compelled to revoke its previous judgment, but the court then plunged into a crisis of eroding confidence. The two incidents of dissolutions and two contradictory judgments of SC engendered a deep constitutional confusion in the country with the following dilemmas:

a. The Supreme Court came into vortex of political controversy, the confidence of the people to the court being sharply divided.

b. The provision of the Constitution relating to the 'confidence motion' became redundant.

c. The article 53(4) and 42 (1) (2) and (3) perceptively came into a contradiction.

d. This situation gave the legal dimension obtained an overwhelming position, thus impeding the organic evolution of the constitution. The configuration of the constitutional functionalism was thus totally broken, leading to a sheer political breakdown of the scheme of 'check and balance'.

Constitutional Engineering of the Government Branches

Constitution may be framed by applying various processes and modalities. However, no particular process or modality is effective than other to secure functional grounding of the government branches. The structure and *modes operandi* of the branches of government is largely determined by the values the constitution is built on. Thus, it is not the method of framing but the "contents and values" which count for effectiveness of the branches. To address this issue, the framers of the constitution are indispensably obliged to answer, inter alia, the following questions:

What does the given society look like? The structural attributes of a society virtually determine the contents and values to be addressed by the constitution. The values, in turn, determine the structure and *modes operandi* of the government branches. If the given society is, for instance, marked by diversities, the legislative body may be conceived in multiple tier system. The framers of 1990 constitution failed seriously in this point. While importing the West Ministerial model, they failed to see the widespread diversity as an indispensable character of the Nepalese society. South African constitution framers, for instance, took the national integration as a core issue to be addressed by the constitution. Thus, they came up with a design of parliamentary system with national unity government, as opposed to majoritarian rule.

How much or deep the society is divided into ethnic composition,

class, religions, economic groups, caste and political ideologies is another core issue to be precisely addressed. One of the main reasons for success of the South African constitution is, for instance, that the framers addressed this question honestly and positively. South African political parties preferred to experiment with interim constitution first, and to build gradually by learning from weaknesses. Reconciliation and participation of all in the governance was the main agenda of the constitution. So that the ANC was able to generate political, ethnic and racial participation in the constitution making process. . Before the constitution framing started, a declaration containing the consensus of political parties and traditional forces was signed up, which provided an agreed framework for the framers. Thus making of constitution was virtually founded on the commitment.

No engineering of government branches is possible without deep study and finding pragmatic answers of those questions. The history of the constitution framing in Nepal has persistently defied this scientific course. Thus to save the nation from the crisis in future, the new beginning of thinking for reformulation of the constitution is indispensable.

In a nation where the leadership of all constituent groups is not fully developed, the access to participation in the government only through political competition will push the minorities, marginalized and backward communities to helm of politically insignificant corner. The autonomy in governance to these segments of population should be a core agenda of the reformulation of the constitution. The constitution must categorically provide a mechanism for their effective and meaningful appearance in the national legislative body straight from their traditional constituencies. For instance, in Fiji election constituencies are fixed based on the racial representation, so that the indigenous population is not politically pushed back into the marginal line. To address this objective, the following propositions are put forward for discussion:

- Dividing the power between central and provincial scheme: Cambodia, although a smaller country, has introduced this concept. The provinces have their own administration in civil and welfare affairs. They have their own tax systems and rules for voting for provincial government.
- County System: In Denmark the counties function as a bridge between the central government and the municipalities, the local governments. The counties have extensive development functions to perform. Counties have their own election systems. Nepal can choose one of the models to be adapted in the local situation. In Nepal, the power is centralized and divided into pockets. The development and stability of the country is not possible without destroying these power pockets.

- The constitution must secure 50 % of deputies in the lower house (House of Finance Bill) being directly elected on the county or provincial basis. The present system of representation where deputies are elected only through political constituency is friendly only to elitist groups.
- The national legislative body should be a "national unity body", where deputies elected based on linguistic, cultural, and geographical constituencies must make an equal appearance along with deputies elected based on political ideologies.
- The present system of the king appointing the leader of the majority party as the Prime Minister is remnant of feudal practice. This system protects the family or clan dominance in the politics. The Prime Minister should be elected by the joint house of the legislative body, in accordance with the preferential or alternative voting system. This will prevent the "trading" on ballots.
- The proportional and block voting electoral system must replace the present first-past-post voting system. This system will ensure the representation of all groups, classes and professional settings.
- Except the Prime Minister and four deputy prime ministers, for looking after the defense, foreign relation, internal security and planning and legislation, other ministries should come from professionals directly appointed by the Prime Minister and fully accountable to him/her.
- The lowest level of votes for obtaining seats in the parliament must be fixed at 2% of the total valid votes casted.
- The post of Prime Minster must not be repeated more than two times.

- The present number of districts must be reduced to 50%.

There is no single exclusively effective constitution making process to address these issues. Any type of process can take these issues to be properly addressed, if framers committed to address the need of the country. Thus, one should not confuse the issue of constitution framing with that of constitution making. Constitution making is a political consensus making process, whereas the drafting is a technical work. , Internationally, the following constitutional making processes have been practiced successfully:

Constituent Assembly

In this modality, the popular consent is obtained from the people directly through franchise. The people elect deputies for the purpose of making the constitution. India used this system to make the present constitution. However, the Constituent Assembly of India was an indirectly elected body. Within the Assembly was elected the leader to head the process. Dr. Ambedkar had been assigned to this role. Thus, Indian constitution was framed by a kind of commission within the Assembly itself. This modality of making the constitution is widely democratic and very much effective in a nation where the independence has been newly obtained.

Constitution Draft Commission

The commission is constituted by supreme political authority of the nation in accordance with the political compromise made. The commission may be of two types. Some commissions are vested with legislative mandate, authority to promulgate the constitution, whereas others function simply as drafting committees. The Bishow Nath commission was of the latter type. The commission with legislative power is the most preferred modality in the recent times. The interim constitution of the South Africa had followed this modality.

Political Consensus for Interim Constitution and Parliament Converted Constitutional Assembly

This modality was used by the South Africa with a view to give effect to the reconciliation declaration signed by Government and the African National Congress together with other political parties,

and various other traditional regimes. The fundamental contents of the interim constitution were laid down by the declaration of intent. Thus the interim constitution was a reconciliatory document, which ended the apartheid and colonial rule in the South Africa. Pursuant to the interim constitution, the election of the parliament was held. The parliament was then converted into a constituent Assembly. Pursuant to interim constitution, the National Assembly and Senate, sitting in joint Session, constituted a Constituent Assembly under the chairpersonship of the President of the Senate, the upper house. A new constitutional text was introduced in the parliament in line of political agreement reached in 1993. The interim constitution itself provided that the new text should be adopted within two years after approval by a two-thirds majority. In the event of failure the text was supposed to be referred to an independent panel of five constitutional experts for advice. Should the deadlock remain, a simple majority plus a 60 % referendum approval was to be invoked after the Constitutional Court had certified the contents as complying with the Constitutional Principles. As a last option, the Parliament was to be dissolved, and new elections were to be held and a new Constituent Assembly would pass the final constitution with a 60 % majority.

This modality can best serve the purpose to address the present crisis in Nepal. The change in the constitution is inevitable. It should now concentrate to address the core value of the Nepalese nation. The national unity body of the people's deputies must be the legal sovereign body, with adequate monitoring and overseeing power over the executive, including the constitutional monarch. The future of Nepal is dark in failure to develop a widely acclaimed center of "national unity". The traditional forces and values have lost their significance to "keep the nation" united amongst diversity.

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Concept of Rule of Law and Good Governance: Implications in Nepal 2

Definition and Scope of Rule of Law

According to Jeffrey Jowell, an administrative law expert, the concept of rule of law provides a set of principles that require feasible limits on official power- the executive, legislative and judicial powers the state is supposed to entertain for administration of the public affairs. Undoubtedly, the concept of rule of law purports to prevent misuse as well as abuse of powers. Lord Denning says: "There are two aspects of the rule of law: on the one hand it prevents exercise of power arbitrarily, and on the other provides resource to law when power is exercised arbitrarily".[1] The rule of law is, therefore, a foundation of the concept of good governance as well as justice.

In fact, the whole of the 19th century and the first half of the 20th century were marked by endeavors to conciliate and combine two currents of thoughts: on the one hand, the pure democratic tendency to give all power to the people at the risk of ending up with authoritarian or dictatorial deviations "in the name of the people"; on the other, the liberal current (today more usually termed constitutionalism) that mistrusts all absolute power and seek to multiply the checks and balances and use power to put brakes on power. The rule of law thus emerged, as pointed by Justice Brandeis of USA, in order to promote efficiency and to impede the arbitrary use of power".[2]

1. Lord Denning, 1993. *What Next in the Law.* Buttersworth. P.307.
2. Progressive Governance for the 21st Century, Conference Proceeding, Florence, 20-21 November, 1999.

The term "governance" gives different connotations to different people. The Asian Development Banks defines it as the "manner in which power is exercised in the management of a country's economic and social resource development". On this meaning, the concept of governance is concerned directly with the management of the development process, involving both the public and private sectors.[3] This definition well reflects on development aspect of the governance, yet it fails to 'connect its relevance to civil and political aspect of human rights. No concept of good governance is conceivable in absence of people's freedoms to unrestricted access to, and participation in, political or policy making process. The concept of good governance is essentially related with the 'people's right to self-determination", which connotes the following understandings:

- the sovereignty (state's power) is popularly controlled by the constituents of the government,
- the welfare of the people is a prime responsibility of the state and as such the state is a service delivery institution,
- the power to rule is an inherent power of the people, so that centralization of power by the government is an anti-democratic notion, and
- the devolution of power is an expression of autonomy of governance, hence the decentralization should be understood as an autonomy.

The resource management for economic development is, of course, an essential element of the 'good governance', yet the access of people to political and decision making process is equally crucial one. In this sense, the concept of 'good governance' means "self-governance". Rule of law thus provides theoretical foundation for the 'good governance' as it provides an instrument to prevent arbitrary exercise of power as well as remedy for harms and injuries caused by misuse or abuse of power. Human rights on the other hand are measures to test the legitimacy of the 'governance'. The relation between the concepts of rule of law, good governance and human are entwined and inseparable. One of them essentially obtains form other an inspiration and legitimacy

3. ADB, 2004. "Governance and Sound Development Management". Asian Development Bank <www.adb.org/Documents/Policies/Governance>

for workability.

Interrelation of Human Rights and Good Governance

The bill of human rights recognizes the indivisibility and universality of fundamental rights of human person. The dependency of economic and socio-cultural rights, inclusive of rights to development, and civil and political rights with each other is absolute. The protection of 'right to life' is meaningless in absence of the protection of human dignity economically, socially and culturally. One of the connotations of the good governance is thus to create a system of 'safeguard for indivisibility' of the human rights. The concept of 'good governance' in this sense functions as a mechanism to ensure "respect and protection of human rights" in practical reality.[4]

With the collapse of cold war situation, the concept of good governance and human rights has entered into a new stage. The emphasis of the international order has shifted from the claim of equity between nations to the claim of equity within nations. Theo van Boven, a noted international scholar, puts:

> *"The days are over that the UN General Assembly declared the realization of the new international economic order an essential element for effective promotion of human rights and fundamental freedoms and should be accorded priority. While the right to development*

4. The right to form and operate political association is one of the most significant civil and political rights guaranteed by the Bill of Human Rights. The practical realization of this right is, however, dependent on 'democratic political system'. The economic development of a society is one of the contributing factors for 'consolidation' of democracy, yet the economic development alone does not guarantee political freedoms. There are States, for Singapore, China, Cuba and so on, which are economically fairly developed in terms of welfare programs, per-capita income of citizens and technological development. Nevertheless, the peoples' say in policy and decision making is generally neglected. The right to form and operate political associations necessarily attaches right to 'participate in government'. The concept of good governance is thus primarily founded on 'peoples' freedoms to choose political ideologies and form and operate political association. Ultimately, the right to form and operate political associations is related with the process of 'devolution of powers', which in turn is a pre-condition for practical realization of the 'right to self-determination'. The concept of good governance thus means an instrument of securing respect and protection of human rights with due care to its indivisibility. Good governance in this sense can be defined as a 'link between human dignities with opportunity for development benefits".

retained its place on the international agenda as a preferred item of developing countries, industrialized countries wanted to carry on the development debate from the different perspective, in spite of the affirmation in the UN Declaration on the Right to Development that this right is a prerogative both of nations and of individuals who make up nations and in spite of its focus on the human persons as the central subject of the development and the beneficiary of the right to development. Thus, the tone and the content of the discourse changed and emphasis were put on the virtues of democracy, democratic government, the rule of law and pluralism" (Boven, 1995)[5]

The concept of good governance and human rights are thus essentially connected with the concept of democratic government, rule of law and pluralism. The respect and protection of human rights is thus dependent on 'democracy, rule of law and pluralism'. The Charter of Paris, for instance, signed by European Heads of State or Government, on 21 November, 1990, stated that "the free will of individual, exercised in democracy and protected by the rule of law, forms necessary basis for successful economic and social development". "We will", they declared, "promote economic activity with respects and uphold human dignity" (Boven, 1995). They further held that "Freedom and political pluralism are necessary elements in our common objective of developing market economy towards sustainable economic growth, prosperity, social justice, expanding employment and efficient use of economic resources". Respect and protection of human rights thus becomes one of the goals of the concept of good governance. In this sense, the concept of good governance means: 1) civil and political freedoms and pluralism in governance system; 2) sustainable economic development contributing to the prosperity of the people; 3) social justice; and 4) expanding employment and efficient use of economic resources.

The concept of 'good governance' is thus obviously linked to 'human rights- a system of protecting and promoting human dignity'. In this sense, the good governance is an 'art of steering societies and organizations' for the purpose of respecting and protecting human dignity, welfare and development. The "good governance" encompasses

5. Theo Van Boven, 1995. "Human Rights and Emerging Concept of Good Governance". University of Limburg and ECDPM, Maastricht <www.ecdpm.org>

interaction among structures, processes and traditions that determine how power is exercised, how decisions are taken and how citizens and stakeholders have their say secured. Fundamentally, it is about power, relationship and accountability.[6] The power, relationship and accountability are tested against measures that are commonly known as "human rights".

Manifested Elements of Good Governance

As Plumptre and Graham suggest, most writers agree that governance itself has "no automatic normative connotations". However, some forms of governance are undoubtedly better than others. The following elements, however, need to be overtly manifested to make a 'governance system "a good governance system":

1) Constitutional Legitimacy
2) Judicial Independence
3) Democratic Elections
4) Transparency
5) Rule of Law
6) Absence of Corruption
7) Political Openness
8) Active Independent Media
9) Freedom of Information
10) Predictability & Stability of Laws
11) Administrative Competence Merit-based public service,
12) Administrative Neutrality accountability to public interests on issues of public concern,
13) Tolerance, Equity, Public participation, Public expenditures directed to public purposes.

Human rights exist as a regime to govern the legitimacy of the system. From the perspective of the rule of law, pluralism and democracy, the human rights regime provides a ground for legitimate functioning of these elements. Development programs (i.e. UNDP) and multi-lateral agencies, however, emphasize accountability, participation, predictability and transparency as four basic elements of good governance. The World Bank identifies 1) public sector management, 2) accountability, 3) legal framework development, and 4) transparency and information as four key dimensions of the concept of good governance. Accountability is

6. Tim Plumptre and John Graham, 1999. "Governance and Good Governance: International and Aboriginal Perspective". Institute on Governance, Canada.

a condition for officials to be answerable on their acts and behaviors to public. Accountability also means establishing criteria to measure the performance of public officials, as well as oversight mechanisms to ensure that the standards are met. The element of participation is founded on a principle that people are the heart of development; they are not only the ultimate beneficiaries of development, but are also the agents of development. At the grassroots level, participation implies that government structures are flexible enough to offer beneficiaries, and other affected, the opportunity to improve the design and implementation of public programs and projects. Participation is thus directly associated with the right to 'self-determination'. Predictability refers to (i) the existence of laws, regulations, and policies to regulate society; and (ii) their fair and consistent application.

The element of predictability is directly associated with the doctrine of rule of law which encompasses the well-defined rights and duties as well as mechanisms (procedures and institutions) for enforcing them, and settling disputes in an impartial manner. Transparency is associated with system of providing information to the general public and clarity about the government rules, regulations and decisions.

It requires to absolutely recognizing the citizens' right to information along with a mechanism of enforceability. Transparency in government policy and decision making and implementation thereof reduces uncertainty and can help inhibit corruption among public officials. Conceptually, these four elements are mutually supportive and reinforcing. Accountability is often related with participation, and is also the ultimate safeguard of predictability and transparency. Similarly, transparency and information openness can not be assured without legal frameworks that balance the right to disclosure against the right of confidentiality, and without institutions that accept accountability.[7] At the same time, the predictability also requires transparency, because without information about how similarly placed individuals have been treated, it may be difficult to ensure adherence to the rule of equality before the law. Finally, a transparent system facilitates governmental accountability, participation and predictability of outcomes.

7. Op. cit note 3.

Right to Development as a Crux of Good Governance

Right to development is intrinsically associated with the right to life. It believes that every individual is entitled to "ensure better conditions of life" which in turn ensure the dignity of life. The ultimate goal of the good governance is to promote the participation of every individual in development as a beneficiary as well as an agent. It is why the State or the Government is obliged to be transparent and accountable. State or the Government is strictly prohibited to exercise the power arbitrarily. The prohibition on arbitrary exercise of power by the state or government enables individuals to 'participate in the development process'. Article 1 of the Declaration on the Right to development states that "the right to development is inalienable human rights by virtue of which every human person and all people participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized. The right to development includes:

- Full sovereignty over natural resources
- Self-determination
- Popular participation in development
- Equality of opportunity
- The creation of favorable conditions for the enjoyment of other civil, economic, social and cultural rights.

The Vienna World Conference on Human Rights, 1990, has expressly linked the right to development, human rights and democracy as interdependent and mutually reinforcing.

Interface of Rule of Law and Good Governance:

It is often difficult, if not impossible, to precisely demarcate the crossing point between the concept of rule of law, good governance and human rights. Simply speaking, the concept of rule of law is a set of principles governing the legality of power, whereas the good governance a condition in which an individual's participation in political process and development is ensured as a beneficiary as well as an agent. The concept of rule of law in this context disables or inhibits the state or government to entertain discretionary power. The concept of good governance through certain defined standards enables citizens to enjoy civil, economic, social and cultural rights. The concept of good governance is thus a favorable condition for citizens to

participate in decision and policy making and implementation thereof. The concept of human rights is 'a capacity of citizens as human being to restrain state and government to put limitation on their human qualities'.

According to the concept of rule of law, a power is rested on rule but not on man, and as such it defies a rule of man.[8] The possibility of rule of man emerges out of wider discretion of power.[9] The fundamental objective of the rule of law is thus to subject the government to 'rule and principles of law' so that exercise of discretion becomes restricted. The rule of law in this sense is an ideal of democratic government. In India, for instance, the Supreme Court has recognized the concept of rule of law as a basic structure of the constitution. Hence, the Supreme Court can review even the provision of constitution, and can declare invalidated if it contradicts with the principle of rule of law.[10] The fairness of procedure is a mechanism of rule of law to prevent government from being arbitrary. For determining the fairness of the procedure, the principle of rule of law sets out the following standards:

a. **Absence of discretionary power in the hands of the government officials.** It implies that justice must be done through known principles.
b. **An absence of special privileges for government officials or any other persons**. This standard is obviously violated in the issues of corruption by ministers in Nepal.
c. **All the persons irrespective of status to be subjected to the ordinary courts of law of land**. In Nepal, disregard to this implication, a special protection is offered to certain level of public officials against investigation of corruption charges.
d. **Everyone to be governed by the law passed by the ordinary legislative organs of the state.** In Nepal, the executive government's tendency to rule the country by regulation is phenomenal. Statues are made ambiguous and vague intentionally to avoid restrictions on dissection.

8. I.P. Massey. *Administrative Law*, 4th Edition, Eastern Book Company.
9. A.V. Dicey. *Law of the Constitution, 8th Edition.*
10. Shom Raj v. State of Haryana , 2.SCC, 653-59. 1990. Supreme Court of India.

Extension of the Concept of Rule of Law

The basic postulates of rule of law are universal. They include equality, freedom and accountability. "**Equality**" is not a mechanical and negative concept but has progressive and positive contents, which oblige every government to create conditions (social, economic and political) where every individual has an equal opportunity to develop his personality to the fullest and to live with dignity. **"Freedom"** postulates absence of every arbitrary action. It ensures free speech, expression and association, personal liberty and many others to each individual. These basic rights of individuals in any society may be restricted only on ground that the claims of these freedoms would be better served by such circumscription. The basic idea behind '**accountability**' is that rulers' rule with the sufferance of the people, and therefore must be accountable to them in the ultimate analysis.

During the last few years, the judiciary in the third world has strategically extended the scope of rule of law to the protection and welfare of poor and downtrodden people. Hence, the devolution of power to the grassroots, and the safeguard of socio-economic interests of poor, marginalized and displaced people are major concern of rule of law. Hence, the concept of rule of law with its extended scope requires that:

- the state must not legislate discriminatory laws,
- state must legislate laws for effect of providing special treatment to special categories of people,
- state should abstain from interfering in cultural matters of people, hence it should not legislate laws which deprive people of their rights to religion, language, etc.,
- state must abstain from using force against people while resolving problems, and
- state must legislate for enabling people to participate in the process of governance.

The extension of scope of the rule of law is valid because the rule alone cannot prevent the government of man. There are several other alternative means to control discretion. Accountability, participation, inspection system, investigation of corrupt affairs, and schemes for giving effects for civil society's view play dominant roles in securing rule of laws.[11]

11. Robert Baldwin, 1996. *Rules and Government*. Oxford Press.

Legal Framework for Operation of Rule of Law in Nepal

The constitution of the kingdom of Nepal, 1990, incorporates, inter alia, through it permeable the human rights to every citizens and independent and competent system of justice as the basic structure of the constitution. These basic structures provide a basis for operation of the administrative and judicial systems of the country. The operation of rule of law is fundamentally rested on these basic structures. Along with the preamble, the concept of rule of law operates with the help of following devices:

1. The constitution of the Kingdom of Nepal is the fundamental law of Nepal, and all laws inconsistent with it are null and void to the extent of inconsistency (article 1). The scope of the provision is very wider. Here the term "laws" also include policies, decisions and actions of the state.
2. The constitution of the Kingdom of Nepal guarantees rights to equality in application of the general laws irrespective of sex, caste, religion, political ideology, etc (article 11, 1). The Supreme Court's Judgement on Reena Bajracharaya V. Royal Nepal Airlines has reinforced the applicability of equality in actions without compromise.
3. The rights to freedoms and liberty guaranteed by the article 12 (2) of the constitution provide another mechanism for operation of rule of law in Nepal.
4. Directive principles incorporates the following alternative mechanisms to ensure the absence of arbitrary exercise of power by the State:
   - the state must endeavor to raise the living standard of the citizens through education, health, housing and employment,
   - the state must endeavor to raise economic progress of the people who are dependent on agriculture by raising the productivity,
   - the state must endeavor to promote women's participation in the task of national development by making special provisions for their education, health and employment,

   - the state must endeavor to safeguard the interest of children, and protect them from exploitation,
   - the state must endeavor to provide helpless women, the aged, the disabled and incapacitated person accessibility to education, health and social security,
   - the state must endeavor to promote interest of economically and socially backward groups and communities by making special provisions with regard to education, health and employment.

The Section 9 of the Treaty Act, 1993, provides for application of rule with international perspective as it subjects the legal sanctity of the Nepalese laws to their consistency with international conventions and treaties.

Problems and Challenges of Rule of Law in Nepal

This chapter deals with specific areas of problems and challenges facing the rule of law in Nepal.

Rule of Law in Relation to Autonomy for Local Governance:

Devolution of power to the local people is one of the best alternative safeguards to prevent arbitrary exercise of power. The accumulation of power at center leads to excess exercise of power. Politically, the concept of local government represents both; a form of devolution of power from central government and a basis for local democracy.[12] The local governments have the following powers without any interference and control of the central power:

a. The local government institutions can elect their officials independently. Their election process is not controlled by the central administration. The people can participate not only in exercising the rights to vote, but also in framing the norms of elections, code of conducts for candidates and fixing the qualifications of officials.

b. Local government institutions are enabled to adopt development policies and plan, which includes power to adopt bye-laws.

12. S.P. Sathe. *Administrative Law*. 5th Edition.

c. The right to levy and collect taxes is inherent with power of adopting policies and plan.

d. The local government institutions are empowered to fully control the welfare schemes and development projects at local level.

In Nepal, the existing practice shows that the notion of local governance with autonomy of power is discarded. The autonomy of local governance is politically wrongly dealt with as its legal postulates are totally ignored. Legally, the concept of decentralization and autonomy are two different concepts, and so that the decentralization does not necessarily mean autonomy. The autonomy is a process of devolving power, whereas the decentralization simply delegates the power of central government to local entities. The concept of decentralization does not recognize the ownership of local institutions to power devolved to them. The following illustrations will amply justify that the local governance is largely a myth in Nepal:

a. The power attached to local governance is related to right to self-determination. However, the Local Autonomous Governance Act of Nepal is founded on de-recognition of the people's right to self-determination. The Act delegates only those power to local institutions that are inconvenient for it to entertain.

b. The power to local governance is owned by the people themselves under the principle of popular sovereignty. However, under Act the power conferred upon is not owned by people. For instance, many powers conferred upon them are effective through regulations adopted by HMG.

c. The concept of social welfare and security of the people is politically backed by the principle of popular sovereignty. However, this power is severely restricted by following practices:

- daily administration of the local institutions is controlled by the central government as it deputes officials or personnel of the central government to run the administration,
- audit is done centrally,

- the local institutions are bound to follow central government's financial guidelines
- the planing is indirectly controlled by the central government as the central government employees are involved in preparation of policies and plan,
- the local institution can formulate bye-laws for recruitment of the staff, but such regulations are effective only after approval of HMG,
- the right to recall representatives is not given to people, but vested on central government.
- the election is held by the central government under direct control of its administrative officer, CDO.

The circumstance impels us to conclude that the government of Nepal:

- lacks of political will to institutionalize local governance with autonomy of power.
- lacks of conceptual clarity to understand the difference between decentralization and autonomy, administration and self-governance, state's power and right to self-determination of people.
- disregards right to self-determination as ruling elite has persistently ignored the equal opportunity of ethnic groups to participate in governance in Nepal.

These facts clearly show that the question of rule of law is obviously in pernicious condition. No rule of law can flourish ignoring the right to governance.

Rule of Law in Relation to Civil Society:

Active involvement of the citizens in civic and development affairs is essential for democratization of the society. This is equally important to promote civic competence whereby individual and collective behaviors can significantly influence public policies.[13] NGOs are

13. Gopal Pokhrel, 1996. "Civil Society and Role of NGOs in Political Education" in POLSAN (ed.) *Democracy and Decentralization; Policy Perspective.*POLSAN, Kathmandu.

instruments for giving expression and shape to concerns and efforts of civil society. In spite of good efforts of many organizations, because of misdoing of few NGOs, the entire credibility of NGOs in the social development sector is being questioned.[14] The following problems are noticed in this sector:

1. The government policies on civil society are not clear. In fact the government is not yet prepared to accept civil society as partner in governance.
2. Government has shown no interest for developing mechanism to monitor civil society's activities.
3. The relation between INGOs and NGOs is not precisely defined. INGOs have no rules and guidelines for partnership with NGOs. The partnership is generally guided by personal relationship. With some exceptions, the same situation is true of the donor agencies. Similarly, there has been a growing trend of INGOs to perform a role of implementers.[15]
4. Civil society, like many other spheres, is divided on partisan basis.
5. The evaluation of programs funded by INGOs and donor agencies is largely based on report prepared by recipients.
6. Many NGOs have no policy concerning recruitment of manpower. No rule of equal opportunity applies in the sector of NGOs/INGOs.
7. The priorities of donors are changing. The programs in grassroots should meet the priority of or funds available with donors. The needs of the people are not matters of consideration.

Apart from these weaknesses, NGOs are lost in the wilderness of ambiguities of government policies. The government-controlled Social Welfare Council, for instance, functions sometimes as an NGO and sometimes as a governmental organization. In principle, the SWC may not have power to control independence of other NGOs. SWC is a statutory body, and as such is a legal person. It can function for its objectives, but it cannot control organizations, which are registered

14. NEFAS, 1998. *The Role of Civil Society and Democratization*. 55. Kathmandu.
15. Ibid. 56

under other laws as legal persons too. The government is allegedly using it to get funds for party supporters and activists. The secretary is politically appointed. One can imagine the kind of influence such government interference can have for those working in the social service sector.[16]

Access to Political Process and Electoral System:

Nepal is passing through a direct and chaotic experience of liberal democracy. The problem of good governance is seriously felt as a great challenge to the sustainability of the democracy. The democracy rests on accountability of people in power, and the accountability finds is expression first in free, fair and regular elections. But it does not end with fair elections alone. It also expresses itself in the day to day moral attitude to work and money. Nepal has failed in these both aspects. Elections are mockery in many parts of the country. The 'three-Gs (gold, guns and gundas) have virtually controlled elections.

The following factors contribute immensely to the disarray of electoral process:

1. There is a lack of strict and realistic code of conducts for elections. The so-called existing code of conducts is nothing but a conciliation of political parties in disregard of democratic values.
2. The Election Commission is dependent on government for manpower, which is generally subject to manipulation by party in power.
3. Commissioners are vulnerable to be influenced by party in power or big parties, and as such they may not be fair to smaller parties.

Elections are mechanisms to secure proper representation of people. The independence and fairness of the electoral process is therefore most fundamental perquisite of good governance, the lack of which essentially rules out the possibility of the rule of law. The fourth dimension of election is that it must be

16. Op.cit note 47.

representative enough.[17] However, the electoral process has largely failed in this respect. The following illustrations will amply justify the statement:

- Local elections are controlled by CDOs, who represent executive government,
- The proportion of women representation in parliament is limited to 3.41 percent.[18] The situation of local level is further worse.
- Government of Nepal, like other SAARC countries, fails to satisfy ethnic minority groups. The more failure to resolve the problem will lead to politicization of ethnicity, and if the country fails to promote or at least tolerate its expression, will loss its legitimacy to govern, making grounds for secession of the country justifiable.[19]

Rule of Law in Relation to Civil Service:

As Devendra Raj Pandey says: "After 1950, the bureaucracy has tended to grow rather than develop. From 28,000 employees, it increased to around 100,000 by 1995. Moreover, the incessant flow of technical experts has made Nepalese bureaucracy more and more dependent upon foreign aid, assistance and loan."[20] Another feature commonly noticed in the Nepalese civil service system is the ***Jagire culture***. The civil servants do not serve people, they rather rule. Nepotism and favoritism persists. Merit is rarely recognized. And, as a consequence, low morale pervades among the employees.[21] (Bhatta, 100).

Rule of Law and the Problem of Corruption:

The problem of abuse of power and corruption has devastating effect to the consolidation of emerging democracy in Nepal. The corruption range from taking bribes to extortion of the government expenditures and pillaging of the state's property. A few illustrations

17. Ibid. 97.
18. Op.cit.note. 29.
19. Ross Mallik, 1998. *Development, Ethnicity, and Human Rights in South Asia.* Sage Publication, Delhi. PP. 113-115.
20. Devendra Raj Pandey, 1998. "Administrative Development in a Semi-Dependency: The Experience of Nepal" in *Public Administration and Development* Vol. 9.
21. Bhim Dev Bhatta, 1996. *Administrative Reform: Democracy and Decentralization.*

are cited for instance:

- The 36th Report of the Auditor General reveals that the Prime Minister used State's fund totaling Rs. 96,00,000 to travel by helicopters for the local projects and conventions of local party units. Such expenditure is not permitted under finance regulations.
- Similarly, the same report unravels an embezzlement of State treasury to pay party aids (so-called secretaries).
- A secretary of the Prime Minister's office received Rs. 80,000 for medical treatment in India without sanction of medical board.

The annual report of the Auditor General brings such incidents to public notice every year. The counter corruption mechanism's effectiveness is greatly suspected. Role of Commission on Investigation of Abuse of Authority (CIAA), although its performance is somehow improved recently, is insignificant. A study shows that 81 percent of key informant respondents suspect on efficiency and effectiveness of CIAA.[22] Similarly, 76% of key informant respondents suspect on judiciary's willingness to address the situation of corruption.[23] As revealed by studies the following factors are encouraging corruption with impunity:

- The definition of corruption is narrower in the Corruption (Control) Act, 1961, which simply includes "***RISWAT***" , meaning taking of bribe.
- Several of the Act's provisions are vaguely formulated and therefore susceptible to misinterpretation. For instance, terms such as "post of benefits", "nation's servant", "post of public responsibility" "quantity of offence", etc almost defy definition.
- CIAA Act section 19(11) privileges politically appointed persons like ministers through the non-disclosure of corruption charges and investigation.
- The Section 19 (2), by allowing exemption to ministers of corruption charges, allows the Prime Minister, Speaker and Chairman to override the authority of CIAA.
- The mechanism of CIAA itself is fully inconsistent with the sprit of rule of law. The CIAA staffs are recruited by HMG.

22. CeLRRd, 2002. *Study on Counter Corruption Legal Framework.* Kathamndu. P. 16
23. Ibid. P.21.

Access to Justice and Fair Trail

The State's institution of justice is a mechanism to address the problems like misuse of power, violation of people's rights, and put the government within the bound of laws. This sector however records progress far below the standard.

- Only 35% of criminal cases are tried by the independent courts of law. Interestingly enough, many institutions, which can take cognizance, are solely involved in investigation as well as the adjudication of offences, and as such the fairness of the process is simply ignored.
- A study carried out in Saptari, Kathmandu, Syangjha, Banke and Dadeldhura reveal that:
  - 60% of prisoners interviewed had not been allowed to have legal defense during the police custody,
  - 67% of prisoners complained torture during police custody,
  - 72% of prisoners complained forced to sign prepared confession,[24]
  - 56% of prisoners had been sentenced to imprisonment without representation of legal counselors, [25]
  - over 50% of cases take more than one year for disposal in the trial court[26]
  - property bond is asked for in 94% of cases[27]

These findings suggest a deplorable condition of criminal justice.

Strategic Approaches for Consolidation of Rule of Law in Nepal

1. Governance System:

A. Problems:

a. The governance system of Nepal has failed in three major sectors: (1) maintenance of peace and security; (2) control and prevention of corruption, and (3) providing moral

24. CeLRRd/DCHR, 1999. *Analysis and Reforms of Criminal Justice System in Nepal.* Kathmandu. P. 140.
25. Ibid. P. 137.
26. Id. P. 115.
27. Id. P.111.

leadership. Similarly, Nepal has too many public servants and too little service, and there has been too much control and too little welfare. Most importantly, there have been too many laws and too little justice. These three failures have largely obstructed the process of democratization.

b. Prof. Irving Younger (Cornell University) suggested that judges should evolve the doctrine that "no law is validly enacted unless legislators voting for it have read it". By this test 95% of the laws passed by the Nepalese Parliament would have to be invalidated. They pass the law without giving even eye-birds' view. For instance, the Local Autonomous Governance Act is conflicting with at least 34 known Acts.

B. Recommendations:

a. Building moral leadership by implanting values of rule of law should be a strategy for transforming the current electoral democracy into liberal one. For this education on values of democracy and rule of law should be widespread and intensified.

b. The information of MPs and political leaders on values of liberal democracy must be strengthened through developing a resource base in the parliament. However, at the mean time, the current " strict whipping system" must be annulled. The MPs must be enabled to use their wisdom. Simultaneously, they should be encouraged to bring private bills as much as possible.

c. Enhancement of local governance at multi level is a need of the country. This is necessary for democratizing the nation at all level, and at the same time empowering the people to share country's sovereignty (governance competence) at all level. The system of shared sovereignty does not necessarily resemble and call for the federal system.[28] The shared competence is more or less a mechanism of devolving autonomy of state at multi-levels.

28. Tanja A. Borzel and Thomas Risse, 2000. "How to Constitutionalize a Multi-Level Governance System: What Kind of Constitution for What Kind of Polity"? Schhuman Center for Advanced Studies, European University Institute. PP. 45-59.

d. The autonomy at different level will a create condition for participation of heterogeneous groups in governance, and this will give the legitimacy to the democracy. The heterogeneity at bottom level is necessary to build plurality at the national level. The recognition of 'heterogeneity' at the regional or local level will be catalyst to foster leadership of various ethnic groups for national competence. To achieve goals of shared competence, the Parliament must amend the Local Autonomous Governance Act with effect of the following:

- The Local Autonomous Law must give full autonomy to local government in matters of resource mobilization, including levying taxes within the framework of constitution and laws enacted by the parliament.
- The government must stop recruiting staff to the local government institutions.
- The DDC must be provided with a clear legal basis for impelling the line agencies to accept its leadership in matters of determining priorities, planing projects, monitoring the progress and making expenditures. The local authorities must be involved in planning process.
- The control of the services provided and property owned by the central government must be handed over to the local government.
- Alternative dispute resolution mechanisms must be strengthened at local level.

2. Electoral System:

A. Problems:

a. Both the fairness and representativeness of elections at all level are seriously maligned in Nepal. Elections are therefore not becoming a mechanism to secure participation of people in governance, but merely an instrument of securing elite groups to power. This statement is proved by level of representation of women, ethnic groups and minorities.

B. Recommendations:

a. In order to secure the fairness and independence of elections

the following measures must be undertaken.

- The independence of Election Commission must be secured by having a system of independent recruitment of staff.
- The electoral laws must provide strictly for declaration of property by the candidates at the time of filing the candidacy, and the scrutiny of the declaration must be made instantly. The law must clearly provide that falsity of statement would forfeit his post.
- The law must also provide for disclosure of the funds used by the political parties during elections, and such disclosure must include the source of funds.
- The civil society must be encouraged for empowering voters through voters' education.
- The present election system is not friendly to ethnic minorities. For building Nepal a society of ethnically shared competence for governance, the election system must be changed to ensure equal opportunity for all ethnic groups take part in and be elected at all level of elections.

3. Civil Society:

A. Problems:

a. Issues of accountability and transparency are major concerns with regard to NGOs in Nepal despite their increasingly potential roles in organizing the civil society and democratizing the society. The following recommendations are suggested for strengthening the accountability and transparency:

B. Recommendations:

a. NGOs must maintain effective linkages at the local and national level. They should strengthen their capacity to influence the national policies based on their experience gained at community level.

b. Strengthen their capacity to understand the problems and need of the Nepalese society.

c. They should develop their expertise at the level so that INGOs cannot interfere in their concepts and actions.

d. Provide a forum for INGOs to transform knowledge and skills.

4. Control and Prevention of Corruption:

A. Problems:

a. Apex level of State or Public officials is involved in extortion of government expenditures and pillaging of state property through various means. Public officials, elected officials in particular, enjoy exemption of actions against corruption. The exemption is thus becoming a basis for impunity. The possibility of rule of law in such circumstance will simply be a myth.

b. The definition of corruption is taken in very stricter sense in Nepal. Hence, CIAA, which is supposed to investigate corrupt actions, has to limit its actions to the scope of corruption set by Corruption (Control) Act, which is only specific law on crime prevention in Nepal.

B. Recommendations:

a. The following five "Ds" are suggested.

- Defussion of Power: Concentration of power is nest of corruption. A strategy of decentralizing and devolving power will help preventing corruption.
- Deformalization of Process: Excessive bureaucratic formality of governance promotes good environment for growth of corrupt practices. Hence, government administrative procedures must be simplified.
- Democratization of Mechanism: Democratization will secure accountability and transparency of works. Hence, citizens should be entitled to unrestricted information on decision making process.
- Dedication and Commitment: Corruption investigating officers must be dedicated and committed. The independence of tenure and protection against interference by powerful executive officials is prerequisites for dedication. The present CIAA Act must be immediately amended with effect of giving power to CIAA for recruitment of its staff independently.
- Deconstruction: The hierarchy based bureaucracy system of Nepal should not affect the administration of CIAA. Hence, to protect investigating officials from influence, their work must be kept outside of interference of any officials.

5. Access to Justice and Fair Trail:

A. Problems:

a. Only 35% of criminal cases are tried by the independent court of justice, rest others are taken cognizance by quasi-judicial bodies like CDO, Forestry Office, Immigration Office, Revenue Office, etc. Interestingly enough, these institutions are solely involved in investigation as well as the adjudication of offences.

b. Sensitivity to respect human rights and develop a culture of human rights is severely lacking.

B. Recommendations:

The following strategic changes are suggested in the justice system:

- Departmentalizing of criminal justice system should be stopped immediately, and the criminal offences involving restriction on individual liberty should not be left in hands of executive officials for trail and punishment. The judicial administration law should be amended to the effect of banning on departmentalizing the criminal justice system.
- Court of civil and criminal justice must be separated at trial level, and the concept of specialized justice system must be introduced.
- Legal education and training must be revitalized to meet the standards of justice recognized by the international community.

Conclusion:

The rule of law is not a stereotyped principle, and is not strictly a lawyerly concept. Rule of law as a principle of good governance has socio-economic and political bearings. Conventionally, the concept of rule of law has been advocated as means of controlling governmental discretion. Indeed, when discussing how a governmental activity should be carried out there is a strong temptation to ask: 'Should this activity be governed by rules versus discretion ?'. Assessing governmental processes involves, however, far broader issues than are encompassed in the rules versus discretion debate.

Using governmental rules is one way of controlling or executing governmental functions but it is by no means the only one. Alternative controls include accountability to variously constituted bodies; scrutiny, complaints, and inspection systems; arrangements to ensure openness (such as requirements to publish performance indicators and statistics) and schemes for giving effects to citizens' view.

In asking whether, when, and how rules may best contribute to good governance, it is necessary to bear in the mind the potential of controlling or enabling devices like electoral process, effective participation of, and involvement in actions, civil society in policy making, prevention of corrupt practices, and remedy for the violation of citizens' rights.

Framing good laws alone therefore cannot ensure the rule of law. The good governance can be achieved by securing operation of rule of law with the help of alternative controls.

Police and Civil Society in the Context of Nepal's Emerging Democracy 3

In Nepal, the police have always been treated as an 'armed force'[1] to impose state sponsored discipline in the society. The institution of the police is conceptually founded on a notion that the society could be better regulated with the support of an 'armed police'. The notion is still prevalent even among present ruling echelon of the Nepalese society that the 'armed' character of the police is indispensable for the efficient enforcement of law. In the past the notion was buttressed by political necessity of despotic regimes for maintaining control over political opponents. The characteristic of ruthlessness of the police in enforcing draconian laws was therefore designedly emphasized, and the people's distrust for this institution emerged and was institutionalized.

Socio-Political Circumstances and Transition to Democracy

This section provides a brief overview of societal conditions and political developments in Nepal. The aim of this section is to draw an attention to a few contexts in the socio-political situation, in which the problems of human rights violation should be analyzed, and the role of police institution must be ascertained.

1. When a youth dreams of joining the Police Institution, he has his picture in the mind that he will have a uniform essentially accompanied with 'fire arms', and he will thus be distinct from ordinary people. He finds in the uniform and the arms a separate status for him somehow different and superior to ordinary people. He then believes that it is deserving and permissible for him to be 'impolite' and 'commanding', and not accountable to people. He also believes that his loyalty goes to his senior, but not to the people.

The British colonial rulers in Asia instituted a legacy of raising the police institution as a 'semi-military force', which had guns and parade as identical attributes. The emphasis on the 'force' element of the police is therefore a major reason for the widespread notion among the police personnel that 'they should always maintain a distance with the civil society'. The police personnel have been traditionally trained to wear a unique type of uniform and hold a unique type of 'stick' or 'gun'. These peculiarities are considered necessary for rendering people to feel that the 'police institution and the civil society in distance was an outcome of the 'vested colonial interest'. The uniform is taken as "clothing with hierarchy". Now the tragedy is that the police institution is taken by civil society as a 'threat or scourge to human rights', and the 'civil' society' by police an institution antagonistic to 'law and order'.

Culture of Political Corruption and the Institution of Police

This section of the paper will make a brief attempt to uncover the deep-rooted relationship between the culture of political corruption and the institution of the police in Nepal. As obvious from the discussion above, one of the reason for raising and maintaining the police institution as an instrument to impose state sponsored discipline is to preserve an atmosphere congenial for corruption. The following politico-historical facts help to legitimize the assertion:

1. For the past two centuries, the governance of Nepal has been dominated by competition between two ruling dynasties, the Shahs and the Ranas.[2] The Ranas ruled Nepal from 1846 to 1951, the king being nominally significant in governance affairs and politics. The monarchy was completely alienated from the people during this whole period. The British colonial rule in India provided full support to the prolongation of the Rana regime.[3] The Ranas had a tacit understanding with the British that they would be left to manage the affairs of the kingdom in exchange for the protection of vital British interests. In a Police mutiny in India during the British colonial regime, the military of Nepal had been effectively used by the British Government, which proved that the use of thousands of Nepali youths as a British Armed Force could be a clever strategy for consolidating the colony in Indian sub-continent. Henceforth, a tradition of raising a "Nepalese Force" in the name of "Gurkha Brigade" was firmly established, and lasts to this day. Joining the foreign military and police force then almost grew to be a profession for the Nepalese youths in Nepal. Politically, the Ranas used this tradition to ensure that the British left the regime to work uninterruptedly. In order to have unrestricted access to hill populations for colonial soldiery, the British Government effectively cooperated with the Ranas to suppress the people's movement in Nepal.[4] Economically, the Ranas pocketed millions of rupees as a royalty out of the recruitment of the Nepalese youths.[5]
2. The hill-tribes were exclusively preferred to the recruitment in the colonial military force. In the Second World War alone, over 2,50,000 hill-youths had been recruited. This heavy recruitment completely drained off the eligible Nepalese population. In the long run, the tradition led to a situation of alienation of the hill-people from the mainstream of development. The politics, civil service, economy, and several other areas of statecraft came under the exclusive control of the elitist segment of the population. The country is now almost

2. The Rana Regime was a family oligarchy. The Ranas represented one of the economically, socially and politically elitist clans in Nepal. They captured power during 18th century from the Shah dynasty of kings. The monarchy was stripped of all powers. The Ranas introduced a custom of hereditary Prime Ministers, distributed among brothers and sons of Prime Ministers. It was a very complicated system. Since, there was a long line of successors, coups often took place. One group or another was always busy for securing its position on the cost of others' lives. The Ranas ruled Nepal for 104 years, until 1951.

3. Nepal has never been colonized. In the past, there was a fierce war between two armies. The war ended with a peace treaty, which provided for the privilege given by Nepal to recruit Nepalese citizens to the British Army. This was necessary for the British to maintain colonial peace and security. For Nepal's consent to recruit its citizens to the army, the British recognized the independence of Nepal. The British regime fully recognized the Rana autocracy as there was a danger that popular government in Nepal would disagree with such recruitment.

4 When Dev Shumsher, a liberal Rana Prime Minister, made a request to the British Government at Calcutta to assist in the establishment of a popular government, and for a constitution for that to be drafted by a group of legal experts from the UK, the request was rejected. Instead, an official called Bentham in Calcutta suggested to the British Government that it should not assist the mission. Democracy and popular government in Nepal would have negative impact on the colony in India, as he opined. See, Dilli Raman Regmi, "A Century of Family Autocracy in Nepal" PP. 120-121.

5. Annually 10 hundred thousand Indian Currency was received by the Rana Prime Minister from the British Government. This was used by the British to control the Ranas.

in a verge of the communal crisis. Conceivably, the problem of Maoist insurgency has a close connection with that reality. (The Maoists are an armed group split from the communist political mainstream, and with much popular support in many areas of Nepal. They have recently been declared to be terrorists by the Government.) The alienated hill-community is attracted to the insurgency as other disadvantaged groups of people like Dalits, women, minorities, etc. The problem of violation of human rights in Nepal is therefore intrinsically related to the defective societal structure and the governance system, i.e. a smaller group of an elitist force has been predominant in the power over the centuries[6]. The democracy has not been able to heal the situation. Of course, the police institution, even at present, is largely structured to perpetuate the interests of the elitist element. The service to the people is considered a less vital duty compared to the duty of protecting the interest of the ruling elite. This is very much evident from the policy of preference to certain castes adopted by the government while promoting the officers in the higher ranks. In a history of almost 40 years of the institutionalized system of police, over 95% of appointments to the post of Inspector General are made from amongst those who belong to elite caste like Ranas, Thakuris, Chettris and Bahauns.

3. As the aging autocratic Rana regime intensified the public discontent, the people's movement eventually succeeded in forcing the Ranas to accept an interim constitution in 1951, which was a sharing of power between the King, the Ranas, and the political parties. From 1951 to 1959, the ten different cabinets of the Nepali Congress and other parties ruled the country. The political chaos is therefore self-evident. Feuds within and between political parties led to the revocation of the royal proclamation made in 1951 that promised a constitution made by an elected constituent assembly. Instead, the

6 Nepal is multi-ethnic society. However, Brahmin and Chettry ethnic communities have absolute control in politics, administration and other affairs of State. Ethnic minorities like Limbu, Rai, Magar, Gurung and Tamang have traditional practice of joining British and Indian armies. Their presence in the state affairs is negligible. The recruitment in the foreign armies has drastically reduced leaving a large number of youths from these ethnic groups unemployed. They are not represented in the decision making institutions, and many polices of state are obviously racially discriminatory. The societal structure where few ethnic communities are dominant to absolute disadvantage of other communities is defined as defective societal structure.

King, who gained substantial power in the wake of fights among the political parties, constituted a "Constitution Draft Commission" to frame a constitution. The corruption in the interim period had devastating consequences. The police institution was used by the government to suppress its opponents, which was one of the reasons for the constantly deteriorating confidence in the Nepal police.

4. Extortion of the public treasury has been a phenomenon in Nepal throughout its history. The Rana Prime Ministers and their courtiers shamelessly pocketed the overwhelming large part of the treasury for their sheer private benefit. The extortion of public fund continued during the Panchayat period too. After restoration of democracy the situation became worse. The public funds have been plundered for the private benefit of the political leaders. In 1996, the Council of Ministers, headed by Sher Bahadur Deuba, waived the custom duty on import of vehicles for Members of Parliament, Ministers, Supreme Court Judges, Government Secretaries, Chief Commissioners and Commissioners of the Constitutional Bodies and other high ranking officials. The decision also conferred the privilege of obtaining the foreign currency required to purchase the vehicles upon these officials. A medical allowance of huge amount was made available to those categories of people entitled to go abroad.[7]

5. Political leaders who had gone to jail during the Panchayat regime had been paid a ransom, and the amount was not accounted for. The images of the leaders were tarnished due to these plunders of public funds. In the perspective of deteriorated images of the leaders, the support of the police to rig their votes became phenomenon. Hence, the politicization of the police institution was fostered deliberately. The promotions of police officers were then determined not by their performance and honesty, but by their hypocrisies on behalf of political leaders. Those who rode on the back of the leaders sidelined the genuine officers.

7. For situation corruption in Nepal see "Counter Corruption Legal Framework in Nepal", a research report. 2000, Kathmandu, Nepal. Center for Legal Research and Resource Development. www.celrrd.com

The rampant corruption in the political leadership encouraged the police officers to purchase the posts. Obviously, the quality change in the institution could not be expected. The police officers themselves involved in wider sphere of corrupt activities. They sold vehicle-driving licenses. They served criminals. They became servants to smugglers and so on. Accountability was therefore totally tarnished for most of the police service.

Policing System and Safeguard of Human Rights

Pro-community policing is a basis of democratic governance. In an emerging democracy, it is generally the elitist group that wields the power of the State, and as such the community members such as women, children, and the aged, indigenous and ethnic minorities are generally pushed back in the care, protection and development agenda. Such groups are generally not represented, and also do not have share in the policymaking process. In such circumstances, if the police system simply happens to be an instrument of state machinery then to be called as "law and order"; it is obviously vulnerable to accusations of acting against weaker sections of the society. The police are susceptible to politicization in an emerging democracy. In these circumstances, a police force may be violent, oppressive and corrupt leading to the following challenges:

- The liberal or popular political system may attract police officers or personnel to political affairs or ideologies. Consequently, they might be tempted to become closer to certain political groups or party, and thus unfriendly or oppressive to members of supporters or cadres of other political groups, which they dislike.
- Political parties may make attempts to penetrate the police force and make it supportive to them. Senior police officers are easy prey for this. The positions might to sell or gifted by the political leaders in power. This circumstance will not only turn the police institution into a corrupt force, but it will also render the institution inefficient and parasitic.
- Plunder of financial resources and pillaging of state funds will become phenomenal. The welfare of personnel at lower levels will be taken by the sophisticated facilities of senior officers. Nepal is a clear example of this situation. The welfare of the bottom line service holders and their families is one of the least prioritized agenda for the police institution. This may create a gap between the senior and junior levels of personnel. The situation as an outcome generates frustration among those who are not privileged in the institution. And the frustration may be vulnerable to accusations of a violation of human rights.

The following additional factors lead to further worse conditions:

1. The vulnerable groups of society are not simply unaware of their rights and freedom, but also ignorant of the rights and remedies. Also, they are incapable of having fair access to formal and informal systems of redress.[8]
2. Both the formal and informal systems of redress may have been predominantly elitist, racist, religiously fundamentalist, sexist and politically biased.[9]
3. Recourse to redress may further expose the victim to the danger of revenge by perpetrators, or social humiliation or intimidation.[10]

Together, these factors cause a loss of confidence or trust of people in the police institution. Nepal is passing through this bitter phase of transition. In such a situation, the civil society and the police often reflect antagonistic attitudes towards each other as a

8. For instance, there are less than 12 cases of compensation for torture registered at the Kathmandu District Court, the largest trial court in terms of volume of cases in Nepal. It means the implementation of the Torture Compensation Act is negligible. Generally, the victims of torture come from the economically, educationally and socially backward communities. The process for them is alien and they hardly are aware of the procedures to be applied. They are also not familiar with the remedy they are supposed to obtain. Hence, the police of Nepal are hardly afraid of the law. The police personnel now "resort to the procedures of compensation that would be more torturous for victims".
9. A study done by the Center for Legal Research and Resource Development, CeLRRd, reveals that women do not have equal access to fair trial in Nepal. The system is gender biased and not friendly to women. See, Condemned to Exploitation: Trafficking of Women and Girls in Nepal. 2000. Kathmandu, Nepal.
10. A study carried out by CeLRRd is respect of the victims of trafficking and rape in relation to the Criminal Justice System revealed that only a very few of them reported cases to the police. Those who had reported the cases had to encounter sexual harassment during the police investigation. Those were bold enough to go ahead had to encounter revenge from the offenders. Further, those who still bold enough to pursue the course of justice had to encounter the social stigmatization and humiliating trial process in court.

common phenomenon. However, the civil society is the loser in general.

Since the police institution happens to be strongly backed by resources, bureaucracy and logistics, along with vested political interests, the voice of people goes unheard. The gap between the police system and civil society exists as a characteristic feature of a society where democracy is still emerging. Moreover, the following notions prevalent in the police institutions of transitional society render the vulnerability of human rights more acute:

- Police generally believe that offenders come from shantytowns, low-income people, bartered or deserted women, street children and migrant workers. Hence, police are always chasing these categories of people as problems of society. The police work with a deep-rooted concept that the places inhabited by poor people are the source of crimes. Therefore, the vulnerability of the human rights of these categories of people is always serious and widespread in a society like that of Nepal.
- The general people on the other hand believe that the police department is an "institution" to suppress the poor and protect the powerful. Women feel that "it is not a safe place for women". Children are educated that if he/she does wrong he or she should encounter a policeman. The distrust between the civil society and police is therefore phenomenal.
- Civil society is seen by police to be an "instigator" of the problem. Police generally expect submission from the community. Civil Society's dislike or criticism of the excess of power by the police is often taken to be a challenge to the police institution. It is also taken as a challenge to the hierarchical position of police.

To be brief in this regard, it can be concluded that in a transitional, developing and traditional society, the police and civil society harbor a deep distrust towards each other. The community based policing is the best model to transform the police from "armed police" to "service delivery civil police". To achieve this goal, the following elements have to be taken into account.

Some Problems Associated with a lack of Pro-Community Policing:

Exhaustive discussion in this regard would not be possible at this juncture. Hence, only a very few key areas of problems are briefly accounted for. The discussion above somehow indirectly reflects on the very source of the problems of force-assisted policing.

1. **Wrong Schooling of Policing:** Nepal has suffered rules of tyranny in the past, and the police force has been effectively used as an instrument to suppress the genuine aspirations of people. The governments in the past practiced a schooling to detach the police institution from the people. The attitude of the police has been built to make them behave like an armed force. The police personnel have been deliberately trained to behave in that way. The schooling of police as service providers is only touched upon. This lack of schooling is therefore responsible for keeping police and civil society as antagonistic forces. The gap is in fact an intentionally created condition. Inculcation of the values of democracy and wider deculturization of the wrong schooling are, therefore, the starting points for reforms in the police institution.
2. **Widespread Impunity for Violation of Human Rights:** Impunity for violations of human rights has been a culture in the police. Although deterrence is not a lasting solution, it is an essential element for rendering police accountable to civil society.
3. **Lack of Human Rights Culture in Work:** Many police officers are highly educated and have obtained a series of opportunities for training on human rights abroad. Although their enlightenment on human rights has been significantly increased, the culture of non implementing the knowledge in practice is still a serious problem. This is matter of cultural insensitivity, which largely sprouts out of the wrong perception that the concept of 'human rights' is an invention of the western world.

These major problems are associated with working conditions, circumstance, opportunity and facilities available to police personnel. The corruption grows unabated due to poor conditions of pay for multi-faceted responsibilities and hard work.

The salary system in Nepal can be taken as an example.

S.N.	Post	Salary*	Current Salary
1	Constable	890.	3,300.
2	Head Constable	1100.	3,600.
3	Assistant Sub-Inspector	1240.	4,100.
4	Sub-Inspector	1,460.	4,900.
5	Inspector	2,050.	7,500.
6	Deputy Superintendent of Police	2,620.	8,650.
7	Superintendent of Police	3,340.	10,500.
8	Deputy Inspector General of Police	3,505.	11,430.
9	Additional Inspector General of Police	3,790.	14,000.
10	Inspector General of Police	3,970.	14,000.

**Salary till and During Interim Government, 1990. In Rs.*

Note: Exchange Rate: 1 USD = 76 Nepalese Rupees.

Although there has been substantial improvement in the salary structure, it is evident that the structure is largely elitist, i.e. the basic salaries are not determined in accordance with the needs but the post held. This is one of the reasons for more corruption, inefficiency and insensitivity among the lower ranks of police personnel.

The police force is overwhelmingly predominated by males. Only a very insignificant number of women are allowed into the police force, and they are never allowed to hold senior posts. To this date, there is not a single woman holding a post beyond Superintendent of Police. Obviously, the police force is largely gender unbalanced. The caste hierarchy is equally dominant in the institution, so that only a few certain castes often head the institutions. These circumstances indirectly hinder the positive attitude of civil society to the police.

Reform Initiatives:

Following the restoration of democracy, there have been attempts to democratize the police system in Nepal, and in certain respects the attempts have been quite successful. A few initiatives towards reform can be highlighted as follows:

1. **Introduction of Community Policing:** Community policing is a concept introduced recently in 14 districts for the prevention of crimes through the participation of the grassroots community. The decisions and procedures in the community policing are controlled by a Committee, which is headed by a civilian person. Hence, it is not police who make decisions but the people themselves are engaged in the decision-making process, as well as their implementation thereof. This concept may largely bridge the gap between police and civil society. The concept is being introduced in some districts now.
2. **Women cell:** In the last few years women cells - the special investigation and enforcement unit to deal with crimes related to women - have been created in Kathmandu, Lalitpur, Kaski and Morang districts, the main urbanized centers. This development is the one part of the Police System to introduce specialization within the service.
3. **Crime Trend Analysis:** Center for Legal Research and Resource Development, CeLRRd, in assistance of Criminal Investigation Department, is developing computer software to help analyze crime trends to help expand the scope of the impartial and fair crime investigation system. A baseline survey is now being conducted to establish the following information in precise form:
   - Consistency of code of conducts of police, prosecutors, judges and lawyers with international standards,
   - Consistency of procedures relating to investigation, prosecution and adjudication of crimes with minimum standards set up by UN Conventions,
   - Situation of torture,
   - Filtering and funneling of criminal offences, this will include the number of cases reported, investigated, prosecuted, convicted, percentage of reversal of trial judgement by superior courts,
   - Level of police officers involved in investigation, and criteria of prosecution.
4. **Establishment of a Scientific Laboratory:** Scientific equipment to help prove accuracy and authenticity of evidence is a key aid in helping to solve crimes. The central scientific laboratory

has been established to help the collection and examination of the evidence. Recently, a provision has been made to appoint specially trained Scene of Crime Officer in order to help collection of objective evidences. The Criminal Investigation Department launches this project in financial assistance of Danida.

5. **Human Rights Training:** In collaboration with the UN Office of the High Commissioner for Human Rights, preparation of a training manual has just been completed. The National Police Academy has initiated conducting training for senior level of police officers. Criminal Procedural Guidelines has been prepared in assistance of Danida. In this project, all actors of criminal justice, including defense bar, are working in one platform. CeLRRd has been supporting the project as secretariat. Under this project, 28 orientation workshops on guidelines will be conducted for about 400 participants, i.e. trail judges, prosecutors, police investigators and criminal defense lawyers.

Conclusion:

Powerful Civil society is one of the guarante for accountable policing in each society. In Nepal, the civil society has not yet emerged as a potential force. Society is strongly patrician hindering wider participation in affairs of governance. The distrust between the police and civil society is to some extent an outcome of the partisan civil society. With growth of non-partisan civil society, the distrust will be largely addressed. Addressing the circumstance of impunity for violation of human rights is a significant instrument for making police accountable. In brief, a non-partisan civil society and accountable policing are the basic needs for the promotion of human rights.

Turning Human Rights into Touchstones of Civilized Social Orders in the Context of Nepal

4

Incorporation of human rights in domestic jurisprudence is a consistently emerging international movement, the active involvement of the third world countries being the main feature. The ratification of major international human rights instruments, including ICCPR, by People's Republic China and its massive restructuring of the criminal procedural and penal code have ended the era of "Asian notion of cultural relativism" towards human rights jurisprudence that has been evolved by and around the United Nations.[1]

As rightly pointed out by a former CJ of India, "human rights are as old as human society itself, for they derive from every person's need to realize his/her essential humanity. They are not ephemeral, not alterable with time, place and circumstances. They are not the products of philosophical whim or political fashion. They have their origin in the fact of the human condition, and because of this origin, they are fundamental and inalienable"[2]

1. The People's Republic of China has promulgated the new Criminal Procedural Code in 1997 guaranteeing the basic safeguards of Fair Trial, including right to access legal counsel even during pre-trial stage. The Code has guaranteed the State sponsored aid to suspects and accused if he/she has been unable to have one in his/her own cost. The ratification of major international human rights instruments and promulgation of such codes in China have largely addressed the long debated discussion on "western origin of the international human rights law".
2. P.N. Bhagawati, CJ. In Keynote address for Regional Judicial Colloquium on "Gender, Equality and the Judiciary" held at Georgetown, Guyana. 14-17 April, 1997. Cited from Kristine Adams & Andrew Byrnes (ed), 'Using International Human Rights Standards to Promote the Human Rights of Women and the Girl Child at the National Level' (1997). Commonwealth Secretariat. 31. Representation ". In Christian Joerges, et.el. (ed). 'What Kind of Constitution for What Kind of Polity". (2000). Harvard Law School. 125-138

The statement implies that human rights are not conferred by conventions, constitutions or governments. Human rights are values indispensably associated with the human dignity, and as such they obtain recognition in themselves, and are relevant and essential for the protection and safeguard of the humanity itself. The question of recognition of human rights by constitution, laws or government is immaterial and redundant. The failure to recognize human rights as human values and indispensable instruments of safeguarding the human dignity, in ultimate the humanity itself, is therefore nothing but a "cynicism" towards fair, just and impartial societal structure and its mechanisms. From this notion, the theories and concepts of democracy, the rule of law and good governance emanate and derive their validity and become functional.

Judiciary and Administration of Justice:

The quest for justice has been one of several important inspirations for human being to desire and defend an organized structure of the society. The administration of justice is therefore an institution or instrument developed by human being for the protection of its rights, and to provide safeguards for the dignified life, and prompt and convincing remedy wherever and whenever his/her rights and dignity are violated. The administration of justice is therefore a touchstone of the human rights in the practical life. This secures the human rights for everybody by way of "balancing the interests between the public safety and procedural safeguards of individual under state's deprivation of liberty for his/her unacceptable behavior, e.g. the commission of offence or wrong. The task of achieving the balance, however, is a tough job to do, and as such is vulnerable to miscarriage of justice against the society as well as the individual.

Protection of Public Safety: The interest of protecting the public safety by the administration of justice calls for role of judiciary for creative and innovative approach towards dispensation of justice in order to prevent crime and criminal behavior in the society. A crimeless or well protected society is the best guarantee or foundation stone for full realization of human rights. The prevention of crimes through effective administration of justice involves two basic characteristics:

a. Efficient and fair trial, and proper sentencing of offenders

b. Deterrence to potential offenders by efficient enforcement of criminal law.

Attainment of these elements prevail in the administration of justice will ensure confidence of the public to the system, and at the meantime they efficiently protect the common citizens against vices of criminal offenders.

An effective administration of justice is a multi-pronged process- the effective and impartial investigation being the touchstone of the effective and impartial prosecution and ultimately the adjudication. An effective and fair trial is, therefore, not possible in lack of efficient and pragmatic balance of the interest of public safety and the protection of accused against arbitrary deprivation of rights. The defense/protection of accused against arbitrary deprivation is founded on the procedural safeguards of fair trial. The balance of these two conflicting interests is the touchstone of a civilized administration of justice, and eventually the civilized society.

Protection of Procedural Safeguards of Accused: To protect the interests of the accused against arbitrary deprivation rights and liberty, the jurisprudence of criminal procedural law has been gradually evolved over the centuries, often with conventional skepticism and resistance towards change, but with great events of reforms.[4] The pace of development has been occasionally slowed down, and sometimes severely affected by political developments to absolutism and anarchy.[5] The development of human rights perspective in the criminal procedure

4. Historically, the development of Magna Carat can be taken as a touchstone of the development of human rights in the context of suspects and accused persons' right to fair trial. The fifth and sixth amendment of the constitution of the USA had been greatly inspired and founded on the Magna Carat. The Miranda Warnings emerged as elusive tangible construction of the Fifth Amendment. These events made a great breakthrough in development of human rights in the context of the criminal procedural law. The influence of Miranda Warnings issued by Warren court was not limited only to US, but it had deep impact in all systems of laws in all continents.
5. The Nazi Criminal Law and similar events in many countries during the periphery of the Second World War, an in some countries even after that, not only neglected the importance of procedural fairness in the Administration of justice, but the all institution of justice had been rendered an instrument to serve ill design. Japan suffered similar fate. The KGB rule in former Soviet Union was another example of oppressive development. Krut Madlener "The Protection of Human Rights in the Criminal Procedure of the Federal Republic of Germany". In A.J. Andrews (ed), "Human Rights in Criminal Procedure: A Comparative Study". 1982, British Institute of International and Comparative Law, P.240.

is often passive and slow in third world countries due to hierarchical societal structure, feudalistic attitudes of actors and lack of sense that delivery of justice is an essential service of the State to the people and political stability.[6] Even in Europe, some countries like Germany, that practiced inquisitorial system for long time, resisted the changes in attitude towards suspects, and as a result denied to adopt procedural safeguards as an instrument of achieving the balance of interests of public safety and suspects' protection for fair trial.[7] The widespread expansion of the notion of modern criminal procedural law that developed in USA following the Fifth Amendment is largely an outcome of the rapid democratization of the criminal justice system, which integrates the concept of due process of law as an essential element of the good governance. The modern criminal procedural law therefore guarantees the fair trial safeguards as inalienable and inherent human rights of accused persons.

The rights to fair trial have been endorsed as human rights values, and as such discard the norms and attitude that the state's police apparatus can have absolute powers in matters of investigation. The modern criminal procedural law, being grounded on the Fifth Amendment of the Constitution of USA and proactive in approach, recognizes the procedural safeguards to suspects and accused person as the basic human rights in order to provide safeguards of their human dignity, and consequently they imply limitation on state's police power.

An author has rightly remarked: "Protection of human rights is a question of values and attitudes to those values".[8] The fairness of

6. In Nepal, the safeguards for protection of suspects and accused persons' right were no recognized till 1990, when democracy was restored. Courts themselves did not seriously take the independence of judiciary. The insensitivity of actors of justice to international Human Rights development was resulted due to deep sense of cultural relativism. The treatment of suspect as a bad citizen prevailed among actors. Hence, alertness among actors towards protection of the rights of suspects and accused persons did not have seriousness. Also See, Yubaraj et.al "Analysis and Reforms of Criminal Justice System of Nepal", 1999. Centre for Legal Research and Resource Development, Kathmandu, Nepal.
7. Kurt Madlener, "The Protection of Human Rights in the Criminal Procedure of the Federal Republic of Germany" in A.J. Andrews (ed) "Human Rights in Criminal Procedure: A Comparative Study". 1982, British Institute of International and Comparative Law, Martinus Nijhoff Publishers, London)
8. K.W. Lidstone " Human Rights in the English Criminal Law". In A.J. Andrews (ed.), op.cit. 108.

the criminal proceeding before and during trial, to ensure that the human person of suspect or accused is not impaired in any form or sense, is the main goal of the safeguards provided. The fairness of the proceeding is, however, not secured simply by putting those values on paper. It is ensured only by acceptance of those values and commitment to protect them by all concerned in the criminal process.

Undoubtedly, no law in society, irrespective of the level of socio-economic, cultural and political development, works effectively without the means of enforcement, and thus the apparatus of police cannot be simply ignored. As Thomas Hobbs, a 17th century English philosopher, wrote in *The Leviathan*,

"The bonds of words are too weak to bridle men's ambition, avarice, anger and other passions without the fear of some coercive power".[9] Hobbs might be right at his time, but the world has significantly changed thereafter. The belief that the fear governs human beings is crumbled, and the freedoms of person have been greatly loved now. The freedom of individual but not the power of state is a foundation of the modern relation between individuals and the state, and as such societies aim to maintain laws largely through the acquiescence of free will and benevolent persuasion, whilst reserving the power or coercion to deal with few who often for their own reasons tend to violate laws and values.

The societies therefore have to have enforcement mechanisms that work with infallible manner for respecting the liberty of individuals. Such institutions do not tend to become the master of people; they rather function with deep sense of delivering service to the society with added importance towards respecting human rights of individuals.

The role of police in the society is thus secured as an enforcement agency but not accountable to the arbitrary desire of the state machinery for implementing its undesirable wills, but an institution to strengthen

9. Quoted from John Alderson, "Human Rights and Criminal Procedure". In A. J. Andrews (ed). op.cit. 332.

and provide protection of the human rights of people.[10] It definitely exercises coercion and use force, but the same is subjected to scrutiny of the judicial review, and to sanction in case of the abuse or excess use of such power. Since the police have to exercise the coercion and use of force for performing the duty they are entrusted with, it is always potential of misuse and abuse. And this is where freedom of persons and security of the society, although two are not incompatible, may come in conflict if either is taken to far from other. The criminal procedural safeguards of suspects and accused persons are therefore devised in administration of justice for achieving a systematic balance between the freedoms of persons and security interest of the society.

Human Rights as the Foundation Stone of the Administration of Justice:

Undoubtedly, in a society, where the administration of justice is founded on the notion of inalienability of human rights values, the state uses police institution as an instrument of social security for best guaranteeing of the protection of human rights and freedoms of all. Some form of police is therefore a need of the society beyond question. But the institution having endowed with considerable amount of power with it is potent of being good and

10. In accordance with UN Code of Conducts of Law Enforcement Officials, which has set a series of principles for guidance of law enforcement officials, the proper functioning of law enforcement services is essential not only for an effective criminal justice policy but also for the protection of the fundamental human rights of individuals. Code of Conducts was adopted by the General Assembly in its resolution 34/169 of 17 December 1979. The Code states that the functions of law enforcement in the defence of public order, and the manner in which those functions were exercised, had a direct impact on the quality of life for individuals, as well as for society as a whole. While the Assembly stressed the important task that law enforcement officials were performing, it also noted the potential for abuse that the discharge of their duties entailed. The Guidelines for the Effective Implementation of the Code aim at the further promotion of the use and application of the Code of Conduct for Law Enforcement Officials.

    The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and welcomed by the General Assembly in its resolution 45/166 of 18 December 1990, were formulated in order to provide more detailed rules on the use of force and firearms by law enforcement officials. These international instruments render the police force directly accountable to the society in their exercise of power or force. The Principles of Independence of Judiciary renders the courts accountable for judicial review of the performance of the police institutions in order to avoid circumstances that subject the freedoms, liberty and rights of individuals to State's arbitrariness.

bad both. We have seen at least two notorious police systems in our own time, i.e. the Gestapo of National Socialist Germany and KGB, the State Security Agency of Soviet Union. The vestiges of Gestapo and KGB are not totally eliminated from many parts of the world, including Nepal before 1990. The incident of Bhagalpur [11] in our southern neighbor, where police blinded a number of people, is a shocking example too. Interestingly, in many countries the police still bear a stature of armed force or paramilitary characters.[12] Mostly in developing hierarchical societies, the state apparatus of the police is effectively engaged in political interests of the ruling echelon, and thus the potentiality of abuse of power always looms large.[13] Even in some developed societies, the police are directly controlled by the politics.[14] In such conditions, the fair administration of criminal justice becomes simply a myth. These characteristics of a society negate the promising applicability of human rights law and as such negate the inalienability of the human dignity. The administration of justice is a device to prevent the situation. The role of judges for

11. In Bhagalpur India, the police force blinded a number of people following a severe torture. The police arrested a number of people for so-called security reasons. The arresters had been mercilessly treated, as the tortured lead to complete destruction of eyes of several people.
12. In developing countries like Nepal, India, China and so on, the police have been taken as a type of armed force. Importantly, the role of police for crime investigations and maintenance of general law and order are not separated. A police personal is simultaneously involved in crime investigation and patrolling. They often wear combatant dress and roam in and round offices like a paramilitary force. Use of weapons and force is his/her daily business. There has been departmental approach to keep police isolated from the civil society, and an impression that police do not take suggestions but makes command is deeply rooted in society. (See, CeLRRd, Baseline Study on Criminal Justice System)
13. For instance, the Police are directly under political control of the Communist Party of China. The Police take instructions of the political party, and directly function for the interest of party.
14. Democratic police systems are capable of aberrations also. The French secret police, through Barbouz, Committed some notorious kidnappings and alleged terror tactics even during the presidency of General de Gaulle. More recently in the United States of America, both the Central Criminal Intelligence Agency and the Federal Bureau of Investigation have been revealed as out of democratic control by indulging in political affairs. Both the French and American systems of police are much more the arm of politics. In France politicians, even major operational matter, directly control police. They are armed and equipped in quasi-military fashion and regarded as powerful arm of the State. In the U.S., on the other hand, the police have become more political and chiefs are often appointed to carry out political programs of the City Mayor or the State Governor. County sheriffs campaign for election. (See, John Alderson, "Human Rights and Criminal Procedure: A Police View" in A.J. Andrews, 1982. op cit)

protecting the human rights and building a touchstone of a civilized society is not only emphasized, but it is also indispensable.

Safeguards Against Police Interference in Person's Liberty a Touchstone of Human Rights Protection in a Civilized Society: Criminal procedures protecting offenders' liberty are found to be developed inherently around the Human Rights values. Over the decades in all systems of law, there have been a set of protections recognized as basic, inalienable and underogable rights of suspects or accused. In fact the respect to, and enforcement of, these protections provide important measures of a society's civilization. These protections are considered to be fundamental for human dignity. What are these "protections" that constitute "human rights of suspects or accused persons" in the context of criminal procedure is question being continuously discussed in different times and different societies, with no complete agreement. The historical perspective of the growth of various institutions in different systems in relation with the administration of justice is one major factor of this incessant discussion. And more important again perhaps, to what extent should the human rights of the suspect and accused be protected when other important interests of society are under attack and in possible conflict with the interest of the accused?

No society can compromise with its safety when the fundamental interests of its members are at stake. Truly speaking, the criminal justice system functions for the better security and safety of the society, and as such one of its crucial goals is to deter the prospective anti-social elements or criminals by bringing the offenders to justice, i.e. the fair trial leading to appropriate punishment. Therefore the maintenance of human rights in criminal procedures cannot be divorced from the criminal law itself, nor the treatment of the offenders. The protection of suspects and accused in the context of the criminal procedure does in no circumstance imply 'a scheme' that protects criminals against the safety of the society. The protection of suspects and accused in the context of criminal procedures also do not imply an exemption to offenders from punishment for a criminal act he/she has committed. The protection of human rights in the context of criminal procedures secures a condition where the treatment and punishment to offenders is not governed by arbitrary or caprice discretion of the State or its functionaries. To give a fair

treatment during criminal proceeding in accordance with due process of law is the core theme of human rights in the context of the administration of criminal justice. Indeed, to secure the fair treatment to offenders in the criminal proceeding is a society's vital interest. Obviously, the interest of suspect or accused to receive protection against unfair treatment and punishment coincides with the natural interest of the society. For instance, all societies or legal systems exclude confession obtained by duress. This principle is not only important in protecting the interests of the accused, but it is also equally important in protecting the interest of the society itself, which has a natural interest in ascertaining the truth. The protection of the suspect and accused person's interest of fair justice is however conditional on substantive criminal law, which is supposed to be founded on the need and desire of protecting the human dignity.

Safeguards by Substantive Criminal Law: The safeguards against unfair treatment in the context of criminal procedural becomes meaningless, if there are no safeguards provided by the substantive criminal law. Indeed, no concern of safeguard of human rights in criminal procedural law arises if there has been a violation of the right guaranteed by the substantive criminal law. The substantive criminal law relates with criminal act, and a criminal act ensues when an individual or group of individuals confront with rule of law established by a "predetermined substantive criminal law".[15] A confrontation with such rule establishes a 'condition', which permits interference against liberty of the individual, defined as offender. The protection granted against the interference, if there is no violation of 'pre-determined substantive law', is defined as 'safeguard against ex-post-facto law'.

The confrontation with 'pre-determined rule of substantive criminal law' results in deprivation of freedom to liberty. However, the deprivation cannot be permitted save in accordance with due process of law, or the procedures established by law. The condition of 'pre-determined substantive law' follows two requirements: first, it must be adequately accessible; there must be an adequate indication for citizens of the legal rules applicable in given case. Secondly, a norm cannot be regarded as "law" unless it is formulated with sufficient

15. Richard Card "Human Rights and Substantive Criminal Law". In A.J. Andrews (ed.). op.cit. 350

precision to enable citizens to regulate their conduct.

Fair Trial a Foundation Theme of Human Rights in Administration of Justice:

The rights to a fair trial are a set of basic human rights associated with a competent and independent criminal justice system. The term 'fair trial' may be utilized in a variety of contexts. Moreover, it has different connotations in different places, at different times and for different purposes. Discussion of the concept of a fair trial often leads to contentious debate. The provision of a 'fair trial' is equated with the concept of due process: a trial is fair if it satisfies the substantive and procedural requirements of due process. As pointed by Justice Cruz, it is accepted that both substantive and procedural due process has established meanings.[16] As discussed already, the "substantive due process requires the intrinsic validity of the law in interfering with the rights of the person to his/her life, liberty or property". The guarantee of procedural due process is one 'which hears before it condemns', proceeds upon inquiry and renders judgment only after trial. Justice Cruz enumerates the following requirements, imperative to ensuring procedural due process. Collectively these establish the foundation of a fair trial:

- There must be an impartial court or tribunal clothed with judicial power to hear and determine the matter before it;
- Jurisdiction must be lawfully acquired over the defendant;
- The defendant must be given the opportunity to be heard;
- Judgment must be based upon a lawful and legitimate hearing of the case.

In administrative proceedings, the following further elements of procedural due process must be guaranteed without exception:

- The right to a hearing, which includes the right to present ones' case and submit evidence in support thereof;
- The tribunal must consider the evidence presented;
- The decision must be supported;
- The evidence must be substantive;
- The decision must be based upon the evidence presented at the hearing, or at least recorded and disclosed to the parties affected;
- The tribunal or body or any of its judges must act of its own or his own independent consideration of the law and facts of the case and not simply accept or disregard the views of a subordinate in arriving at a decision; and
- The tribunal must present its decision to all controversial questions in such a manner that the parties to the proceedings can understand the various issues involved, and the reason for the decision.

16. Isagani A. Cruz 'Constitutional Law" (1959). The Philippines. 101.

These standards provide a set of human standards at micro level for fairness of justice. Judiciary has to administer justice in accordance with law, but the law must be one that commands legitimacy with the people. The legitimacy of the law would depend upon whether it accords with justice. The concept of justice has no universally accepted definition. It has meant different things to different people, in different societies, at different times. It is therefore necessary to have a standard of values specifically of justice, against which a law can be measured. The set of standards mentioned above provide a 'set of agreed standards to measure the legitimacy of laws".

As P.N. Bhagawati, CJ, points out: "Such standards must necessarily be superior to the law itself and would, therefore, constitute the highest rank in the legal hierarchy. There was a time when the standard of divine law, as revealed by God to human being in some holly scriptures, was applied and served to confer legitimacy upon laws enacted by rulers. But over the years, religion as a standard of values began to lose its vitality and significance. Morality, though undoubtedly important and certainly complimentary, was unable to solve the complicated problems of modern society and to provide a standard against which to judge the laws enacted by rulers. Some other ground had to be found to support a standard against which to judge the rulers' laws and this ground was provided by concept of human rights".[17] The concept of human rights which provide a basis for testing of the legitimacy of the laws has been founded on three important principles:

a. *the principle of universal inherence*: every human being has certain

17. Op.cit. note 2.

rights, capable of being enumerated and defined, which are not conferred on him/her by any ruler, nor earned or acquired by purchase, but which inhere in him/her by virtue of his/her humanity alone.

b *the principle of inalienability:* no human being can be deprived of any those rights, by the act of any ruler or even by his/her own act.

c *the rule of law:* where rights conflict with each other, the conflict must be resolved by consistent, independent and impartial application of just laws in accordance with just procedures.

These three principles provide a foundation for a legal and governance system of a civilized society, e.g. a relation among citizens and with rulers based on fairness, impartiality and consistency. As such these principles provide a foundation for 'respect of human dignity', which is a touchstone of a civilized society.

A Critical Analysis of Human Rights Situation in the Context of Administration of Justice:

International Legal Framework for Fair Trial: To ensure that all the elements of procedural due process discussed above are fully observed before somebody is condemned, international human rights instruments require the following minimum standards to be fully observed:

- Any person under investigation with regard to the commission of an offence shall have the right to be informed of his/her right to remain silent and shall have the right to competent and independent legal advice and assistance, preferably of his/her own choice. If the person cannot afford the services of counsel, he/she must be provided with such services (UDHR Article 11, ICCPR Article 14.3 b, d and g; and Basic Principles of the Role of Lawyers Article 1).
- No person shall be subjected to arbitrary arrest and detention. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power (UDHR Article 9 and ICCPR Articles 9.1 and 9.3).

- No one shall be subjected to torture or cruel, inhumane, or degrading treatment or punishment. (UDHR Article 5; ICCPR Article 7; CAT Article 7; Guidelines on the Roles of Prosecutors Article 16).
- In all criminal prosecutions, the accused shall be presumed innocent until proved to the contrary, and shall enjoy the right to be heard directly and through counsel (UDHR Article 11; ICCPR Article 14.2; Guidelines on Role of Prosecutors Article 14; Basic Principles on the Role of Lawyers Articles 2, 5, 6 and 7).
- The suspect shall have the right to be informed of the nature and cause of his arrest or of the accusation made against him (ICCPR Article 9.2).
- The suspect shall have the right to a speedy, impartial and public trial by an independent tribunal (UDHR Article 10 and ICCPR Article 9.3).

The state of compliance and enforcement of these provisions would become clear from the discussion that follows herein:

Nepalese Domestic Legal Framework:The rights enunciated by various articles of the UDHR, ICCPR and other international human rights instruments mentioned above are defined as basic elements of or minimum standards for a fair trial. A fair trial is not possible without unrestricted access to these rights or maintaining these standards. The Constitution of the Kingdom of Nepal enshrines these rights in the following provisions and establishes them as fundamental rights in the pursuance of criminal justice:

- No person shall be deprived of their liberty save in accordance with the law, and no law shall be made which provides for capital punishment (Article 12.1).
- No person shall be punished for an act that was not punishable by law at the time the act was committed (Article 14.1).
- No person shall be prosecuted or punished for the same offence in a court of law more than once (Article 14.2).
- No person accused of an offence shall be compelled to be a

witness against himself (Article 14.3).

- No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture; nor shall he be subjected to cruel, inhumane or degrading treatment. Any person so treated shall be compensated in a manner as determined by law (Article 14.4).
- No person who is arrested shall be detained in custody without being informed as soon as possible of the grounds for his arrest; nor shall he be denied the right to consult with and be represented by a legal practitioner of his choice (Article 14.5).
- Any person arrested and subsequently detained in custody shall be brought before a judicial authority within twenty-four hours of arrest (Article 14.6).

The following adverse conditions and weaknesses are widely acknowledged to exist in the criminal justice system of Nepal and manifestly indicate widespread violations of the right to a fair trial. The implication of this is that the protection of human rights within the Nepali criminal justice system lacks a solid foundation.

According to one estimate (AG Reports) 35% of criminal cases are still tried by executive tribunals such as the District Administration Office (DAO), the Forest Officer, the Conservation Park Warden and Customs Officers. When conducting criminal trials these authorities act with disregard for the constitutional guarantees for procedural fairness, in pretence of honest duty to the Government.

Remarkably, these authorities are also solely and independently involved in the investigation as well as the adjudication of offences. The impartiality of the justice system in these cases is therefore simply not perceivable. Provision for such executive officers to conduct criminal trials is prevalent under the various Statutes listed in Figure 5. It is pertinent here to mention the observation of the US Department of State on the DAOs' judicial power (US Department, 1998):

> *"...(The) Public Offences Act permits arbitrary detention. The Act and its many amendments covers such crimes as disturbing the peace, vandalism, rioting and fighting. Under this Act, the Government detained hundreds of civil servants during a 55 day anti government strike in 1991. Human Rights monitors express concern that the Act vests too much discretionary power in the Chief District Officer (DAO), the highest-ranking civil servant in each of the country's 75 districts. The Act authorizes the DAO to order detention, to issue search warrants, and to specify fines and other punishments for misdemeanours without judicial review. Few recent instances of the use of the Public Offences Act have come to light as it has become more common, particularly with the Maoist situation, to arrest people under the Public Security Act".*

DAOs also have extensive judicial power under various other Statutes. Trials conducted under these powers and those afforded by the Public Offences Act are generally carried out in the absence of legal counsel, and formal motions rarely take place. A DAO, who is an administrative officer, is generally not concerned with the conduct of the trial and subordinates are generally involved in the preparation of orders and verdicts through dictation. Many of these Statutes provide for punishment with a term of imprisonment. Therefore the fundamental human right of personal liberty is at stake. In these circumstances one must accept that trial by a DAO or any other executive officer's department is nothing more than farcical.

Legal Representation at Trial: According to a recent study, only 56% of prisoners have access to lawyers during trial meaning that 44% of defendants face trial without legal representation.[18] As the study reveals, none of the respondents had been allowed to consult lawyers within 24 hours of arrest and many were not even aware of the right to legal assistance. A UN Human Rights Commission's Working Group has made a similar observation:

> *"While the presence of counsel during custody is possible, the Working Group observed that it is not compulsory and noted instances where detainees had not received assistance from counsel for almost a year after their arrest".*[19]

18. Yubaraj Sangroula, et.el (ed). 'Analysis and Reforms of Criminal Justice System of Nepal'. (1999). CeLRRd. 137.
19. 1996.

Article 14(5) of the Constitution of the Kingdom of Nepal guarantees to every citizen the right to legal counsel of their choice if they are accused with the commission of a crime. This constitutional provision confirms the principle recognized by international law in Article 11 of the Universal Declaration of Human Rights which provides for the right of a detainee or imprisoned person to acquire the services of a legal practitioner of his choice and subsequently to be defended by that practitioner. The International Covenant of Civil and Political Rights and the UN General Assembly Resolution 45 (Basic Principles for the Treatment of Prisoners) also outline the basic rights of detainees. However, the right to be defended by legal counsel is frequently violated or denied in Nepal. Almost without exception, detainees are refused access to legal counsel within the first 24 hours of arrest.[20] The following table gives a complete picture of this situation.

Particulars	Number	Percent
Total Respondents	321	100
Those with Legal Representation at Trial	181	56
Those without Legal Representation at Trial	140	44
Lawyers Hired	133 (out of 181)	73
Legal Aid Obtained	48 (out of 181)	27

Occurrence of Torture: Torture is common in Nepal and is inflicted as a form of punishment as well as a means of extracting confessions. Investigators never rule out the use of every means or approach possible to extract a confession. Torture is encouraged as a consequence of reliance on confessions as the most superior form of evidence. A survey of prisoners revealed that police subjected 67% of the detainees to torture, for the purpose of extracting a confession.[21]

20. Op.Cit. Note. 18. P. 135
21. Ibid. 133

The Centre for Victims of Torture (CVICT) has reported that it has received some 1337 complaints of torture in the past three years. Devastatingly, those tortured included children.

Year	Male	Female	Juveniles	Total
1999	256	70	11	337
2000	637	110	12	759
2001	143	46	2	191

Source: CVICT

Similarly, the Informal Sector Service Centre (INSEC) has reported that 1294 people have been tortured in the last three years.

Year	Male	Female	Juveniles	Total
1999	411	36	9	456
2000	527	18	14	559
2001	264	10	5	279

Source INSEC Year book (1999, 2000, and 2001).

The National Human Rights Commission has received 23 applications relating to torture in the year 2001. These figures collectively confirm the phenomenal use of torture in Nepal.

According to both INSEC and CVICT, incidents of torture have sharply increased in recent years. The Human Rights Yearbook 2002 has reported 2195 cases of torture, whereas the National Human Rights Commission received only 34 complaints of torture. Torture is committed both by the State's security forces and Maoists rebels. The National Human Rights Commission received 138 complaints from victims of Maoist oppression. A study conducted by CVICT for the National Human Rights Commission reported that 75% of torture victims had been tortured both physically and psychologically.[22] As revealed by the study, in 67% of cases the police perpetrated torture and in 30% of cases the perpetrators were Maoists. As revealed by the

22. Source, CIVICT, 2001.

study, the majority of victims claimed to have been tortured between April 1999 and March 2000. Approximately 59% of the victims were accused of being Maoists. The percentage of victims accused of being anti-Maoist was 27%. Both Maoists and the police had tortured seven percent of victims; the Maoists believing them to be anti-Maoist and the police believing the converse.

While assessing the rate of disability caused by torture, the study revealed the incidence of disability as being 57, 58, 66 and 48 in Jajarkopt, Rolpa, Rukum and Salyan respectively. This points out to the conclusion that the incidence of torture is most prevalent in areas of Maoist insurgency, the consequence being severe physical and mental health problems.[23]

The States' impunity to their involvement in torture, and the killing of people whilst in custody, is becoming a major threat to an improved human rights situation in Nepal. According to the Human Rights Yearbook 1997, one person was killed by the police and Forest Security Guards in 1992. In 1993 this number increased to seven. 1994 and 1995 saw a considerable decrease in this number, which remained one in both years. In 1996, the number of killings and torture by police and Forest Security Guards rose to four. In 1997, in a slight improvement from the previous year, it was three.

The following information will mirror the situation of torture.[24]

S N	Designation	Violation/act committed	Punishment	Remarks
1.	Superinten-dent of Police	Physical Assault on Police Constable Kutpit	Warning given not to repeat such actions.	Despite action promoted
2.	DSP	Physical Assault on Police Inspector	Warning	

23. Ibid.
24. Source, National Human Rights Commission. Human Rights Status Paper. (2002). Yet to Publish.

3.	DSP	Physical Assault on Asst. inceptor	Warning	
4.	Inspector	Person in custody died*	Suspension of grade	
5.	Inspector/ Doctor	Sexual Harassment (*Mahila Mathi Avadra Byabhar*)	Suspension of Grade	
6.	Inspector	Sexual Harassment	Suspension of grade	
7.	Sub-Inspector	Person in custody died	Suspension of grade	
8.	Sub-Inspector	Sexual Harassment	Action in progress	
9.	Sub-Inspector	Sexual Harassment	Service termination	
10.	Asst. Sub-Inspector	Sexual Harassment	Suspension of grade	
11.	Asst. Sub-Inspector	Physical Assault on priest	Suspended. Action in progress	
12.	"	Torture of person in custody	Suspension of grade	
13.	"	"	"	
14.	"	Attempt to Rape	Service termination	
15.	Head Constable	Torture of person in custody	Suspension of grade	
16.	"	Rape	Service termination	

* The person in the custody found dead but the charge against the police doesn't indicate that the person was killed. Instead it is said "dead"

17.	"	Rape	"	
18.	Constable	Physical assault on Priest	Suspended. Action in Progress	
19.	"	"	"	
20.	"	Torture of person in custody	Promotion Suspended	
21.	"	"	"	
22.	Inspector	Person in custody died	Grade suspension	
23.	Sub-Inspector	"	"	
24.	Asst. Sub-Inspector	"	"	
25.	"	"	"	
26.	"	"	Service termination	
27.	Constable	"	Promotion Suspension	
28.	Sub-Inspector	"	Service termination	
28.	Constable	Person in custody died	Service termination and implicated murder crime.	
29.	Asst. Sub-Inspector	"	Warning	
30.	"	Physical assault on DSP	Service Termination	
31.	"	"	"	
32.	"	"	"	

33.	"	"	"	
34.	"	"	"	
35.	"	Person in custody dead	Service termination and implicated in murder crime	

The actions taken against the perpetrators are simply not adequate, and as a matter of fact the situation is promoting the state of impunity. The state of impunity is therefore largely thwarting the emergence of culture of human rights in works.

Some Additional Factors Vitiating the Situation of Fair Trial in Nepal

Besides factors discussed above, there are several other factors that directly or indirectly impair the situation of fair trial in Nepal.

An Excessive Civil Caseload in the Trial Courts: The volume of civil cases in the trial courts is remarkably huge than that of criminal cases. The existing civil caseload takes 72% of judicial time at all levels.[25] The civil caseload therefore consumes a large portion of judicial time and this effectively imposes unacceptable delays to criminal trials.

Many Prisoners are Forced to Accept Trial Judgment: Only 34.08% (10, 431 out of 30,605 cases at district court level) of defendants invoke the right to appeal against the judgment of the trial court.[26] Although this is mainly the result of defendants' ignorance of their right to appeal, a number of defendants avoid appealing against the judgment due to the provision of an increase in sentence by 10% provided the decision of the lower court is upheld. Some defendants also avoid appealing against the judgment of the trial court purely because the sentence imposed by the trial court is less than the time already spent in custody. In all these circumstances, the defendants' right to a fair trial is compromised.

25. Yubaraj Sangroula, et.el 'Trial Court System of Nepal: With Special Reference to Women's Accessibility to Justice'. (2002), CeLRRd.
26. Ibid.

Moreover, prisoners are not necessarily imprisoned in districts under the jurisdiction of the District Court or Appellate Court that is to conduct the trial or appeal hearing. In a number of cases judgment is not timely, making it difficult for an accused to prepare for trial or appeal, and adhere to judicial procedural requirements. Obviously, many prisoners are not kept informed of the progress of their case, nor do they have legal representation.

An Excessive Overload of Cases Restricts the Possibility of a Fair Trial: The average caseload of a trial judge is 661 per annum (Supreme Court Annual Report 2056-57).• Under the present trial system, each criminal case takes place over several inconsecutive sessions before completion. This means that a judge has to perform a multitude of tasks in each case. In such a situation it is simply unreasonable to expect a judge to meet such an excessive caseload and one cannot expect to receive fair and impartial justice from a judge on whom such an incredible volume of work has been imposed. Ten years of Annual Reports of the Supreme Court (2047 to 2057), plainly show that the increase in the number of judges over this period is negligible, whereas the caseload has increased enormously. For instance, from F/Y 2048 - 49 to 2054 - 55 the caseload rose by 29.02% (from 55,052 to 191,407). The increase in the number of judges is therefore insufficient to cope with the existing caseload. This situation indicates an element of apathy on the part of the State to meet the obligations undertaken under the Preamble and substance of the ICCPR and Article 14 of the Constitution of the Kingdom of Nepal 1990, to provide for the right to a fair trial. One can reasonably infer from this that the State lacks the sensitivity and reactivity to address the increasingly excessive caseload and that there is a lack of commitment on the part of the State to meet its obligation to provide fair, impartial and speedy justice.

Lack of an Effective Filtering and Funneling Mechanism: The investigation of crime in Nepal begins with the arrest of the suspect which usually takes place immediately after the first information report (FIR) is lodged. After the investigation is completed the Government Attorney Office, which is the prosecuting agency of Nepal, is supposed to conduct a process of filtration on the cases

• Figures are extracted from report.

presented to it. Under Article 110 (2) of the Constitution, the Government Attorney holds the final authority in deciding whether or not to prosecute a particular case. However, this power is hardly exercised. As a result, a trend of indiscriminate prosecution leads to a high failure rate at trial. The following figures illustrate the remarkably low level of case filtration at the prosecution stage.[27]

Fiscal Year	Total FIRs	Cases Investigated by Police	Cases Not pursued by the Government Attorney	Percent
2051-52	9,111	6,098	364	5.97
2052-53	9,421	6,155	282	4.58
2053-54	9,456	5,641	291	5.16
2054-55	10,562	6,137	283	4.61
2055-56	10,504	6,028	268	4.45
2056-57	10,640	6,228	234	3.76

As shown on the table, the proportion of cases filtered at the stage of prosecution is on average merely 5% of the total cases investigated by the police. This situation shows an extremely high rate of indiscriminate prosecution and as such, is the potential cause of mass human rights violations. The results presented above lead to either of two conclusions:

- The investigation of the police is flawless, and thus the Government Attorneys do not feel the need to scrutinize case files. The prosecution is based only on the evidence collected by the police; or
- There is no practice of case filtration. In other words, the Government Attorneys conduct almost random prosecution or they transfer the case files to the trial courts without any judicial scrutiny or consideration. Those prosecuting rarely require investigators to collect additional evidence indicating that the prosecution accepts case files from the police in *toto.*

27. Op.Cit. Note. 24. P. 59

This suggests that Government Attorneys are not concerned with the filtering process, allowing the vast majority of cases to proceed to trial regardless of the strength of their evidential basis. Such practices have the potential to result in serious violations of fundamental human rights.

It is hard to justify the first conclusion due to the fact that a large proportion of cases (between 40% and 50%) fail to result in the successful conviction of the defendant.[28] On the basis of the present conviction rate, one would be compelled to conclude that the Government Attorneys' office is not sufficiently active or efficient in filtering unfounded cases. The effect of this conclusion is necessarily the high prosecution failure rate and the currently excessive judicial caseload. On this basis one must further conclude that a large number of cases with no or insufficient evidential foundation are pursued, leading to unnecessary deprivation of personal liberty.

Prevalence of Statutes Vitiating Fair Trial: Due to the prevalence of a number of Statutes empowering various executive institutions to conduct criminal trials, the criminal justice system of Nepal is subjected to an extreme state of departmentalization. It is concerning and worthy of note that many of these institutions, as well as investigating offences, may also be responsible for the prosecution and adjudication of them. Further, these institutions also have the power to pass sentence. This includes the power to impose a sentence of imprisonment and in certain circumstances for a term of life. As referred to earlier, such institutions try approximately 35% of all criminal offences. In such a situation, the reality of the criminal justice system is inconsistent with the theoretical right to a fair trial as safeguarded by Article 14 of the Constitution and international human rights instruments. [29]

Conclusion

Sincerity and honesty in works by all actors towards respect of human dignity is the touch point for beginning of reforms in administration of justice.

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28. Ibid. P. 72
29. For detail of such statutes see, Analysis and Reforms of Criminal Justice System of Nepal. (1999). CeLRRd.

5 Nepal's Foreign Relations: Critical Understanding

Foreign relation in its most wild terms is defined as a 'strategic game of powers between two or more countries', the power being the decisive element in all aspects and very moment in treatment of each other. In this game, the 'power' plays the decisive role; the powerful partner in the pact is prone to impose wild 'conditions' over powerless one. The position of weaker countries in the realm of 'international relations' is thus always vulnerable.

The dominant partner plays the game of 'cordial relations' with weaker nations with three basic strategies as its strong instruments to render the latter as 'obedient' partner. They are: firstly, the dominant partner indulges in 'negotiation with its weaker counterpart' with instrument of persuasion;[1] secondly, the dominant partner, if the instrument of persuasion fails, uses psychological threats to 'render the weaker counterpart abide by the given 'design'; and thirdly, it, if both instruments fail to achieve desired goals, resorts to 'physical force', the politico-econmic sanctions being the most initial but prominent ones.[2]

This is what, as the history has been educating over two hundred years, the Nepalese people roughly take the meaning of 'foreign relation.[3]

1. This strategy is 'generally defined as diplomacy'. Owing to the 'imbalanced nature of relations between two partners' the consequence is generally disadvantageous to weaker one. This is why 'the term diplomacy is cautiously taken, and often used skeptically by the weaker nations.
2. The 1989 embargo imposed by India against Nepal is a suitable example of the 'manifestation of the third dimension of diplomacy'.

Over the years, Nepal has experienced the 'diplomacy' in its dimensions as discussed above. In many times, it has faced difficult times from the 'south', without much difference even after the 'quit of British colonial regime' in 1947. Sugauli Treaty, Gurkha Regiment and status of Suzerainty were the products of 'three dimension diplomacy between a powerful British Colonial regime and weaker Nepal. The legacy of this 'three dimension diplomacy' continued even after 'victory' of independence movement in India.

Nepal's foreign relation has come to a 'crucial point' in the context of Maoist insurgency and the global fight against the menace of terrorism. The traditional paradigm of 'neutrality' or 'tilting neither to South nor North' has almost come to a 'verge of collapse'. The mounting and phenomenal growth of the Maoist insurgency has dragged Nepal into active agenda of many countries. Although, its traditional partners like China, India, UK, America, Japan and Germany have deeply expressed their concern to address the conflict, the meaningful collaboration of these countries to help Nepal address this problem is largely absent. No consensus among these countries to address this devastating conflict is emerged among them. In contrast, the conflict has gradually led the way to 'build a military pact between Nepal and alliance of India, UK and USA'.[4]

UN and EU have expressed their deep concerns regarding Nepal's continuously deteriorating situation, and their interest to 'political resolution versus military one' is obvious, but their role to that

3. When a 'group of ordinary Nepalese people- comprising some bus drivers, farmers, shoppers, venders and low ranking employees of the organized and unorganized sector- was interviewed, an overwhelming majority of them said: "thula le sanalai pelne niti kutniti ho' (a policy of powerful rendering the powerless subordinated is a diplomacy). Many of them cited 'America's attack against Iraq, as an example. Similarly, 'Indian embargo against Nepal in 1989' was also cited as the example. Some of them also referred to 'British discriminatory treatment of Gurkhas". Obviously, the meaning of foreign relation in a country like Nepal of which situation is vulnerable is taken from the negative perspective. This perspective indicates to 'imbalanced reciprocity', where the powerful does not feel necessary to 'respect the rules of game' in relation to the weaker partners.
4. Although, the reaction of 'China' to this development is not yet 'manifested' in concrete term, but it is obviously potential of 'serious change in China's attitude to Nepal' in future. The military support to 'Nepal' has been increasing from these three countries as a joint venture. Increased military support from these countries in the context that 'Nepal already has a military relation with India through the Gurkha Regiment' with India may seriously affect the 'Sino-Nepal traditional relations'. For China it may mean an 'outset of Nepal's tilting to South' in future.

direction is seen less dynamic compared to military support of 'India, UK and USA. Japan has consistently urged to 'political resolution' of the conflict, yet its role too is inactive.

Shifting Paradigms of Nepal's Foreign Relation: Out-bound mobility of Nepalese over the years is sharply increased, which automatically necessitates the country's foreign relation take note of this fact. But this is a field where Nepal's diplomacy is not only inactive and undefined, but also left in anarchy.[5] Together with increased openness of Nepal to the world, the Maoist insurgency has ushered 'Nepal's foreign relations to a new dimension with emerging challenges'.

Long back, King Prithwi Narayan Shah said in his Divyopadesh (Divine Counseling), "Nepal is a yam between two boulders, whose existence can only be kept intact if the strategic relations with these two powers could be kept politically balanced". The international scenario of his period was marked by an era of 'colonialism'. The war was 'defined as a privilege of the powerful country', and annexation of the smaller nations a duty of the empire. The context of the international relation is now fully changed. Colonialism and imperialism are deplored and denounced. Two boulders in the north and south of Nepal have shifted from political power to economic booms. Nepal has thus ceased to a 'yam between two rocks'. If the capacity to exploit international trade and commerce is built, Nepal's

5. In my personal experience, the Nepalese diplomats (?) seriously lack the culture of diplomacy. One of the main reasons behind is lacking of 'diplomatic expertise' and obligation to work for the country. Inferiority complex is pervasive in them. Their existence in any country is not understood as governed by the issue of equality of sovereignty and mutuality of interests. They rather take themselves as 'passive agents to participate in rituals, pronouncing the government's interest or expectation for cooperation, etc. Generally, the diplomats are those who have retired their service. It is a country where even the retired chief justice and parliament speakers have accepted the position of 'ambassadors'. Diplomacy for Nepal is therefore a 'mission to spend a retired life'. This practice has seriously hindered the 'culture of diplomacy in Nepal'. I found a "Fijian Ambassador" in a European country visiting universities and explaining his country's social, economic and political situations. I found him successful in getting European countries' interest generated to his nation. He was active in developing added information about his country to European countries. He told the history of his country and created groups of youths interested in Fiji. This is what I mean a 'diplomatic culture'. Moreover, he kept him busy for exploring areas of business for his countrymen/women and approached educational institutes to get students from his country admitted. If you ask many expatriate Nepalese what Nepalese ambassadors do in other countries, the blunt answer is that they 'eat *dalbhat*', and are busy to buy gifts for '*chorijawai*'. This might not be exactly what they only do, yet these are what they often and preferably do.

position can be defined as a 'floating lotus' in a big pond of economic prosperity. But Nepal has miserably failed in this mission; rather Nepal has rapidly been converted into a 'garbage container' by concentration of spies, intelligence missions, arm smugglers and traders, human traffickers, etc.

Some Assumptions Needing Empirical Enquiry: The foreign policy of Nepal is said to have been built on 'a concept or principle of neutrality'. What does neutrality means is however not defined. King Birendra, through his peace zone proposal, made attempt to define it as a 'concept of equidistance to both neighbors, but the proposal itself disappeared with induction of Nepali Congress in government after 1990 popular movement.[6] The principle of 'yam between two rocks' propounded by King Prithwi Narayan to define geopolitical situation of Nepal, did not cease to haunt the Nepalese feudal rulers in any part of the history after unification. This haunting has stayed in the mind of rulers of Nepal as

6. Concept of equidistance meant absolute no-leaning position. Culturally, Nepal's proximity with India has strongly been felt. Mobility of people to each other's country is a religiously, socially and culturally entrenched phenomenon. The openness of the border and free mobility across each other's border has brought Nepal and India closer. The same is not true with China. There was a segment of peoples during '*panchayat* regime which often suggested the king that 'to be too closer in relation with India will distance Nepal with China'. By doing such maneuver, as they believed, could please the Chinese government. Concept of Zone of Peace was an emerging principle of international law which outlawed war. The concept of neutrality, as it was practiced by Switzerland during II World War, does not define war of aggression *per se* is a crime against international law. A country preferring to be 'neutral' do not support or denounce any party engaged in the war. By promising 'neutrality' to warring parties, it safeguards its independence. Concept of Zone of Peace was, however, used by a group of 'ultra- royalists' to practice a policy to 'pull Nepal form its closer relation with India in a pretext of equal distance with China, which was determined so by its 'rugged topography in the north'. It was nothing but a diplomatic bankruptcy of the 'pseudo-intellectuals in and around royal palace'. India thus suspected the concept from the very inception. India preferred to nullify the proposal then by proposing the Indian sub-continent itself a 'zone of peace'. The declaration of the concept by King Birendra, however, projected the concept of equiproximity, though in abstract sense. See for detail, Yubaraj Sangroula, *Concept of Zone of Peace: An Emerging Theme of International Law*, 1988. Kathmandu, Nepal.
7. Often political leaders and intellectuals attribute this factor as a major hindrance to the development of Nepal. People of Nepal have psychologically been prepared to take this situation as a 'condition of squeeze'. Rulers of Nepal have described this situation as a perennial source of their 'hardship'. The situation is advocated as 'curse of nature' building a pessimistic impression in the mind of peoples. This has devastatingly affected the need of learning a skill to develop a 'creative, critical and active' diplomacy. As an outcome the population of Nepal has nurtured a sense of 'inferiority' to their neighbors; they feel helpless, incompetent to compete in business, trade and commerce. The culture of " *choukidari*' (a typical word used to denote what most of Nepalese are engaged in India) is thus emerged strongly in the last one hundred years.

an inerasable obsession. In this perspective, there have been some assumptions emerged which need to be empirically tested in order to 'revisit the foreign policy of Nepal'.

- Owing to the given 'geo-political situation of Nepal' (yam between two rocks), the existence of Nepal is dependent on the strategically balanced relation with India and China (two rocks in the sense of big powers). This geopolitical placement of Nepal is defined as a 'disadvantageous' condition of Nepal.[7] or a 'perennial survival threat'.[8]
- Nepal and India share 1600 kilometers long border. The socio-cultural and ethnic similarity has compelled Nepal to keep its border open with India.[9] The socio-cultural and ethnic proximity of the people of India and Nepal induce Nepal's closeness to India,[10] which in turn demands for

8. Owing to this principle of 'survival diplomacy', the population of Nepal has been educated to believe on 'likelihood' of invasion from one neighbor if Nepal is closer to other. Especially, the leftist political force, along with royalists during the Panchyat regime, advocated to 'militant nationalism', founded on pre-empted fear of invasion from the South. The closeness in relation with India is thus viewed by a quarter of population as coveted with possibility of Indian interference and invasion. The Nepalese diplomacy with neighbors is thus wrongly founded on the perceived 'survival threat'.
9. The compulsion of 'open border' is attributed to the socio-economic and ethnic proximity between Nepal and India. To have a border open per se is not a problem. The problem in fact lies in failure to 'properly regulate it'. It is simply not possible for any countries to 'maintain borders undefined and unregulated'. If one closely observes the 'problems in relation between India and Nepal' over the last five decades, the disputes over the 'border lines' are the major factors for building 'suspicion' to each other's motives and interests. Open border does not connote to a 'circumstance' that people can jump in from one country to other anytime for any reason. There is definite purpose for a national of one country entering to other. Pakistan, Bangladesh and India were a 'single country' in the past. They have maintained a 'defined border regulation system'. Russia, Belarusia, Ukraine and several other former Soviet Union members are socially, culturally and ethnically are as close as Nepal and India. But they too have maintained a defined border policy. The illegal transactions, including arms smuggling, is a serious problems facing the Indo-Nepal border. This problem thus demands to be addressed by proper policy to border.
10. This statement is not fully true. The ethnic groups that maintain proximity with dominant Indian population constitute not more than 30% of the total population. Overwhelming majority of the population consists of tribal and Mongoloid stock peoples. The socio-cultural proximity may be equally true with China, the Tibetan Autonomous Part. The population dwelling in the northern part of Nepal maintains proximity with Tibetan ethnicity. Nevertheless, the rugged mountain and Himalayan peaks obstruct free and easy access to Tibetan region of China. Nepal thus has been compelled to maintain its dependence in trade and commerce with India. This factor keeps Nepal and India closer. Proximity with India is a Nepal's compulsion. This aspect of the Indo-Nepal relation is overshadowed. Emphasis on socio-cultural proximity between Nepal and India as the overriding factor of good relation in fact blurs the 'objective reality' of the Indo-Nepal relations.

increased political and economic relations between these countries, in exclusion of China. The equal distance between two neighbors is thus not possible.

- The open border between Nepal and India has facilitated the increased incidents of illegal transactions of commodities, contrabands, arms, close border crimes like human trafficking, robbery, money counterfeiting, smuggling of forest resources and immigration of labor force etc. The open border is also a source of problem of population growth in Nepal.
- Increasing incidents of illegal transactions and immigration have negatively attracted the 'peoples and governments of the both countries' to their relation, which is, if not overtly, largely founded on 'suspicion to each other'.
- India is a regional power. Nepal's elongated position on the north is strategically important for India. Nepal is thus viewed by India cautiously, and so that its motive is rested on need of keeping Nepal by any means under its security umbrella. India's growing strategic concern to Nepal is an outcome of the lack of institutionalized foreign policy.[11]
- India's interest to Nepal is based on 'abundant water resources'. India wants to benefit from Nepal's water, if not possible peacefully even by use of force. Nepal's sovereignty is thus threatened from the south owing to 'water resources'.[12]

11. Nepalese political forces have failed to develop a 'consensus' view on foreign policy. Even the various kings have dissimilar approaches to Indo-Nepal relations. King Mahendra was keen to develop strong bilateral ties with China as a means to strategically keep India far from meddling in Nepal's affairs. King Birendra followed his father's footstep. King Tribhuvan, however, maintained reliance on India. Widespread difference of views of political forces to China and India is a real problem. The caution of Nepal for strategic balance between India and China is largely an outcome of perceived threat. The threat is an argument rather a fact. The Communist parties are suspicious of India, whereas the Congress and some other right forces are suspicious of China. Both are largely influenced by their own perception and ideologies rather than 'an entrenched fact'.
12. Nepal has repeatedly failed to 'figure out its development agenda'. Water resource is one of the most neglected and mismanaged sector of policy making. The lacking of adequate and appropriate policy concerning water resource is a cause of 'disputes between Nepal and India". Transparent, adequate and appropriate policy could put the water resource under its firm control, where India could have its investment channeled for resolving its huge power crisis. The conflict between Nepal and India concerning water resource is thus largely an outcome of 'Nepal's failure to manage its precious water resource'.

These are the assumptions one can find in abundance in the fragile 'market of foreign policy politics' of Nepal. One or other of these assumptions often influence 'Nepal's foreign policy', sometime leading to a catastrophic mistake. Obviously, Nepal's foreign policy to neighbors lack consistent approach and paradigm. Its failure to develop a consistent approach to foreign policy to neighbors also seriously affects its relations with other countries, such as UK, America, and Japan etc. In the light of this reality, this article has also made attempt to analyze the existing stature of 'foreign relation' of Nepal. This article will make attempt to examine the grounds and validity of these assumptions.

Changing Characters of Foreign Relation in New Millennium:

2002 was the most exciting year in the history of Nepal's foreign relation. In this year, Nepal found adequate space in the international media due to visits of series of high level dignitaries. In January, United States of America's secretary of State Mr. Colin Powell paid an official visit to Nepal.[13] This visit gave a new dimension to the US-Nepal relation. Nepal started receiving army assistance following his visit.[14] Powell's visit was the highest-level official visit from the US, since the initiation of diplomatic ties between Nepal and the United States.[15] In the preceding years, US did give no higher importance to the 'higher political and economical relation' with Nepal.

13. Powell visited Nepal in January 18-19.
14. US assistance to arms ended the conventional paradigm of Nepal's foreign relation. Nepal in the past received no assistance for arms in the past from the west, one of the most serious reasons being its strategic relation with neighbors. The reaction of India and China in this regard is yet to be assessed. Definitely, this event has bolstered US-Nepal relation to a new height. Who benefits from this support is yet to be seen. Is the fledging democracy is the beneficiary? The answer is still in the womb of future. However, some people argue that 'sophisticated weapons' will eventually benefit the 'regression'.
15. In March 1995, Rodham Hillary Clinton, the then First Lady of US, had a very short visit of Nepal. But the visit was for a fun. Unlike other countries in the region (SAARC), she showed no interest to 'discuss the socio-political and development issues. For her Nepal presented a 'unusual' society or 'interesting mass of peoples'. In her autobiography she described, leaving so many important issues untouched, "The landscape of Nepal is among the most beautiful in the world, but inhabitant regions of the country are overcrowded. Human waste is used for fertilizer and clean water is a rarity. The Americans I met all had stories of getting sick after spending time in Nepal, making it sound like an inevitable rite of passage"… "Hotel pool was drained before we arrived, and they refilled it with mineral water". These statements show that high level American leaders have very few information and interest about Nepal prior to Nepal became known for Maoist Insurgency (Living History, Headline Book Publishing, 2003 p. 281).

Similarly, earlier in January 14-17, former Japanese Prime Minister Ryutaro Hasimoto visisted Nepal. In the midst of mounting Maoist insurgency, 11th SAARC summit concluded in Kathmandu on 6th January. Mr. Atal Bihari Bajpayee, the then Prime Minister of India, came to Nepal to participate in the SAARC summit and said: "It is an uplifting experience for me to be here in this charming city of Kathmandu, the earthly abode of the Lord Pashupatinath, and in a country with India is linked by geography, kinship, tradition and culture'.[16]

Mounting interest of these countries to Nepal is basically activated 'by intensified Maoist Insurgency'. The silent diplomacy between western countries and Nepal is shifting to'conflict management diplomacy'. The interest behind is the 'treatment of Maoist politics' rather than the treatment of 'socio-economic backwardness of the Nepalese people'. It is obvious that Nepal has failed to address the insurgency, and as such it has been largely internationalized. How it will deal with the new challenges is unclear and undecided. Can it be able to 'prevent outside interference' and deal the insurgency independently? The conventional foreign relation has no answer to it, and a 'new approach is absent'. Nepal is thus passing through virtually a 'state of zero sums' in foreign policy concerning the conflict impacting all aspects of the Nepalese life. The undue influence of powerful countries is thus potential.

Historical Perspective of Nepalese Foreign Policy: History of Nepal's foreign policy is very short. The crude form of formal foreign relation started from 'Treaty of *Sugauli Sandhi'*, in which, one of various terms and references, Nepal agreed to the British Colonial Government to allow it open a 'resident office' in Kathmandu and 'stay under its effective suzerainty'.[17] Prior to this treaty, Nepal was engaged in series of active wars to annex several principalities, and as

16. See, Nepal News 01/24/2002 at www.k2news.com/nepal1012402.htm
17. Some people argue that Nepal had had diplomatic relation with countries prior to that. They refer to the "marriage of a daughter of Aungsuverma (a feudal chief during early Lichhavi dynasty) Bhrikuti to Tibetan monarch. The marriage was intended to maintain good relation between Nepal and Tibet. It might be defined as a form of diplomacy, but was a means of 'security' of the dynasty than the State itself. Rebellion within the court was a serious problem in those periods. Rebels often engaged in overthrowing the reign of the sitting monarch with help of its neighbor. The establishment of cordial relation through marital relation between two courts was an instrument of safety of each other or guarantee of 'non-involvement in war conspiracy or invasion. These kinds of affairs were sporadic and not fully trustworthy. It is therefore not wise to define these kinds of incidents as an example of 'diplomacy'.

such it was in their eyes an expansionist force; it was an emerging 'invading power' in the Himalayan range. The rugged terrain of the country helped to equate with 'modern and sophisticated weapons of British Colonial regime'.[18]

The adventure of unification of country was in fact motivated by the king's 'whim of strength' rather than a strategic plan to build Nepal as a stronger nation state.[19] As a matter of fact, to establish 'foundations for foreign relation' did surface no where. The monarchy, with absolute power, treated the governance as its 'inherent privilege', and thus no instruments of control or rules to limit its power were acceptable to the monarchy and its 'puppet courtiers'.

The foundation of sound foreign relation and the nation's prosperity is rooted in the system of good and popular governance, which Nepal lacked absolutely all throughout the history. The ' power politics' was the center point that consistently invited intrigues and conspiracies as main occupation within the royal courts. For instance, Pratap Singh Shah had nothing to do except drink, enjoy sex maids and indulge in *tantramantara* (meditation for magical power) at Basnata Durabar (Palace). He died in an age of 28 years in 1834 B.S (See, Gyan Mani Nepal, *Nepal ko Mahabharat.* Sajha Prakasan, 2050). He had two wives, and one was supposed to go for '*sati*' (a practice of dedicating life in the funeral pyre of the deceased husband).

18. When British colonial government decided to 'invade Nepal', several thousands of troops along with modern weapons marched inside the territory of Nepal from Butwal and several other places to face a tough time. Mountain guerilla warfare of the Gurkhas not only pushed the British army back, but also had been able inflict severe injury to it. Thus British had to suffer a terrible and humiliating defeat. Gurkhas had been able to chase the British army till Gorakhpur, and hold it. See, Mery Des Chen, "Soldiers, Sovereignty and Silence: Gurkha as Diplomatic Currency, South Asia Bulletin, Vol. XIII Nos. 1&2, 1993.
19. For example, Bahdur Shah, an exile son of Prithwi Narayan, after death of his brother Pratap Shaha and his wife Rajya Laximi, returned to Nepal from India, and was appointed as the *nayabi* (chief guardian) of infant king Ran Bahadur, his nephew. He immediately engaged in adventure of annexing other principalities in the west and the east. He also ventured to attack Tibet, and had overpowered it. An agreement was signed in accordance to which Tibet was to pay fifty thousand annual royalty to Nepal annually. Tibet did not abide by the condition, and consequently the second war with Tibet broke out. China joined Tibet to help it. Eventually, Nepal signed an agreement with China, thus ending the war. Some intellectuals in Nepal take these incidents as 'examples of Nepalese foreign policy'. Nevertheless, an event of war and resultant agreement cannot be an instance of 'foreign relation'.

Pundit Braja Nath Poudel was interested to make Rajendra Laxmi to take 'sati', as he could have then monopoly in the royal palace. But she had a two years son without guardian. Another wife Maiju Rani was pregnant. Rajendra Laxmi smelt the conspiracy on the side of Maiju Rani. She then sent Mahadev Upadhaya to Betia to convince Bahadur Shah, brother of deceased husband, to help her in this difficult situation. Queen's *sati* was then postponed, and Pratap Singh Shah was cremated along with his eight kepts (sex maids) See, Ibid: P. 15. Queen Rajendra Laxmi's opponents started playing foul, and made all hard efforts to stop Bahdur Shah to come to Kathmandu. The history following the death of Pratap Singh shows that the royal palace had been continuously divided between courtiers often headed by wives of kings. The culture of killings of courtiers by rival groups was phenomenal during the Malla regime. Prithwi Narayan Shah made efforts to stop it.

But once the Queen Rajendra Laxmi took reign on behalf of infant son Rana Bahadur, the culture of killing revived. The person to suffer from this intrigue was Pundit Braja Nath Poudel, who led a group of courtiers against her in the palace. Immediately upon arrival of Bahadur Shah in Kathmandu, Braja Nath was exiled his head cross shaved (a practice of humiliating Brahmin). He was charged of plotting murder of the queen and having had sexual relation with a princess. Ibid, p.18. Most strikingly, by an agreement between Bahadur Shah and Rajendra Laxmi, Maiju Rani, another wife of Pratap Singh, following the delivery had been sent to '*sati*', after a month of his death. Ibid. P. 19. The feud between Bahadur Shah and Rajendra Laxmi did not take long time to start. Consequently, Rajendra Laxmi, with cooperation of magars of Gorkha, put Bahadur Shah under preventive detention. Sarbajit Rana was then declared the chief kaji (equivalent of Prime Minsiter). In a very short period of time, the rumors that the Queen was engaged in sexual relation with Sarbajit Rana did spread. It was a right time for Bahadur Shah for revenge. He then, in 1835 B.S., with the help of Daljit Shah and Shree Harsha Panta, raided the royal palace and arrested Rajendra Laxmi. She was put in 'silver handcuff'.

Kaji Sarbajit and his followers and supporters had been taken to basement of Kumarighar and beheaded. Ibid, p.20. Bahadur Shah obtained full control over the reign. After 10 month, on request of Rajendra Laxmi, Budda Choutaria came to Kathmandu to support

the queen. He prevailed over Daljit Shah, who had been the incharge of Basnatapur Palace, when Bahadur Shah was preparing for adventure of war for further expansion of the nation. She was freed and regained the power. She then banished Daljit and killed several other officials. Sarbajit's relatives were then declared officials of the state. Budda Choutaria killed a Brahmin in Paupatinath for nothing. He was so severely beaten up that he died. Rajendra Laxmi was cautious of 'increasing power of Budda Choutaria, and it was a right occasion to get rid of him. For a charge of killing an innocent Brahmin, he was banished. On death of Rajendra Laxmi in 1842 B.S. Bahadur Shah returned to Nepal again. He expanded the boundary of Nepal and made it a great country. Rana Bahadur Shah, the crown prince, took the power as the king, and the first act he did was the 'ouster of Bahadur Shah from the palace'.

This event initiated another series of 'rivalries, conspiracies and killings' in the royal palace of Nepal. Rana Bahadur followed the footsteps of his father. He was interested in luxury. Beautiful girls and women were his most liked enjoyment. In Pashupati Nath a Brahmin family had come for pilgrimage from Janakpur. A childwidow named Kantawati was accompanying the family. She was beautiful. The information about such beautiful girl was staying at Pashupatinath reached to the palace. King Rana Bahdur Shah then went to Pashupatinath on the back of Elephant to see the girl. He was captivated by the beauty of the girl and she was forcefully abducted, and brought to the palace. She was not ready to be a kept. She asked for the status of the queen. Captivated by the beauty, he agreed to the proposal of Kantawati and married to her at Gorkha. Ibid, p. 35. Once Kantawati became pregnant, with a fear that her child would be rejected by the courtiers and Bahadur Shah could obtain support, Rana Bahadur Shah arrested the former and charged with 12 different types of crimes. He was then sent into imprisonment. In 1854 B.S. Bahdur Saha was killed in the prison. He was found hanging in a prison room. Ibid p. 36. This sequel of conspiracy and rivalry continued. The royal palace was with the king at the center point embroiled in feud between Pandey vs. Thapa and so on. Bhim Sen Thapa was killed. Mathaber Singh was killed. Gagan Singh was killed. Junga Bahadur Rana came in power following a dastardly massacre. (It was followed by Bhandarkhal massacre.) The court politics of Nepal is thus bloody throughout the history.

The inter court rivalries and feuds were not only unusual affairs, but also dastardly criminal acts. Plots of killings to usurp power were a regular business within the royal palace'. In such a pernicious environment, the issues of the prosperity of nation, enhancement of good governance, and the promotion of sound and open foreign relation were virtually unimaginable. Amidst the phenomena of inter-court rivalry and competition for power, Nepal was dragged to war with British Colonial Government in India. The defeat in the long term was natural in the context of 'super arms and military strength of the enemy'. The government engaged in limited circle of court politics had less intelligence and capacity to judge consequence of the 'unplanned war' with a rudimentary armed capacity.[21] The war ultimately ended with a 'treaty between Nepal and British Colonial Government', which reduced the status of Nepal to a 'British Suzerainty'.[22] This shows the bleak diplomatic condition of Nepal.

After *Kot* Massacre,[23] Junga Bahadur introduced a family oligarchic

21. During the Anglo-Nepal war, Bhimsen Thapa was the principal power holder. He too was a clever and shrewd conspirator. He was the chief architecture of the First Bhandarkhal Massacre. He was a ruthless ruler. In the history has done many such acts which is unimaginable for ordinary peoples (See for detail Ibid, P 63-65) In the defeat of Nepal with Britian, a group of courtiers emerged to punish Bhim Sen Thapa. In this group Gaja Raj Mishra, Bijaya Singh Shahi and Srbajit Pandy were prominent figure. However, the sudden death of the crown prince and other members of the royalty disturbed the move of the group against Bhimesen Thapa, so that he had been able to continue as powerful person even after defeat in the war. Bhimsen Thapa in this context murdered a number of peoples. The first Bhandarkhal massacre eliminated dozens of state officials clearing the way for family oligarchy for Rana regime. In 1894, six month son of Rajendra Bikram died. Bhimsen Thapa was charged with a crime of conspiracy for killing the prince using a poisoned medicine through a doctor. He was then arrested and detained. His opponents grabbed the power and ultimately he committed a suicide.
22. Colonization of Nepal was not impossible in the context of Nepal's shameful defeat. However, British India did not want to instigate Chinese suspicion and alert. Takeover of Nepal would invite war with China. To analyze the given situation intelligently, one can argue that British did not want to takeover of Nepal in order to avoid possible outbreak of war with China.
23. The political conspiracy in the royal court of Nepal even after demise of Bhimsen Thapa continued to exist with its ugly face. At the time of Junga Bahadur's rise, the royal court, as described by Dr. Oldfield, the then British resident at Kathmandu, was divided into three parties; these owed loyalty to the King, queen and the prince, respectively (See, D.R. Regmi, *A Century of Family Autocracy in Nepal*, Published by the Nepali National Congress, 1958. pp 52-58). The party to the Queen was led by Gagan Singh, Commander In Chief. The party to the prince, Surendra Bir Bikram Shah, Junga Bahadur was siding to him, but he also strategically maintained half inclination to the queen. In the party of the King included Chautarias, the chief being the Fatejung. Dr. Oldfield wrote of the situation on the eve of infamous Kot massacre of September 1846: "Earlier the queen had contrived to cause the death of Premier Mathabar Singh Thapa, who, though raised to the exalted position by the Queen's favour, had showed tendencies to become her rival in power and a protagonist of prince Surendra's right to succeed the thrown. The queen wanted her own son get it. Junga Bahadur was related with this man as his nephew by his sister, but participated in the plot playing the chief role as the person who shot the Premier dead at the instigation of queen. Since then Junga Bahadur was taken by her confidant. (Quoted from Ibid, p. 54). When Junga Bahadur was unscrupulously gaining power by killing his own maternal uncle, the British resident promptly extended his hand of assistance to this man. Dr. Dilli Raman Regmi writes: "In the beginning the then resident Lawrence had a very poor opinion of his charater and wanted to use him for imperialist interest not without certain amount of test of his sincerity and loyalty to British cause, which till the Sikh war had not been furnished. Junga Bahadur firmly stood in the side of the British in this war; consciously to gain the latter's support to his ill-motive of capturing the power. (See, Ibid, p.55).

regime in Nepal. The British colonial power had strong support behind it. Incessant instability wrought by court rivalry and resultant massacres was convenient for it to consolidate its influence over Nepal as well as to augment the chance of using Nepal for imperialistic mission of suppressing the mounting anti-British movement in India.[24]

Obviously, with the emergence of Rana regime, the independence of Nepal further squeezed as it surrendered to the service of colonial power. Rana's foreign policy was thus virtually pro-imperialist and anti of sovereignty and independence of Nepal. Emergence of Rana regime was thus pernicious to 'independence as well as integrity of the Nepalese nation'.

24. With his success to gain power Junga Bahdur became an eminently important man for British regime. The British resident then became a backbone for Junga Bahadur. British resident's help for him was now unlimited. Thus backed by the British arms Junga Bahadur proceeded to capture power with most consummate skill of conspirator. He was shrewd and master in playing double roles. He knew that unless he removed all his opponents, he would not even dream of the final capture of the power. So he planned to Gagan Singh, and he did it. He did it keeping him close to the queen's plot so that she would not have suspicion to him. He then incited the queen to take revenge of the Gagan's murderer. "He said to Queen, Your Majesty, I am close friend of the late Gagan. On that account my life is not safe. But I feel, your majesty and your son are not out of danger too'. (Quoted from Ibid, p.58). Designedly, Birkishor Pandey was thus charged with the said crime. The queen ordered his arrest and detained. He was chained. The king remained silent. But when his men faced a danger of massacre, King Rajendra Bir Bikram quietly left the palace for British Legation to inform the Resident of the happening at the court. But the British legation's doors were closed. Resident Lawrence had not even courtesy to come down and give hearing to the royal visitor (See, Ibid, 59). Queen was torturous. Fatejung defied what she was doing. The incident eventually culminated to the killing of all courtiers by Junga Bahadur's force. One more dark in the history of Nepal. This perpetuated one century long darkness in Nepal.

Rana British Alliance to Subordinate Nepal's Sovereignty: Dr. Dilli Raman Regmi has rightly remarked:

> *"Junga Bahadur's success in the Nepal Durabar was a triumph for the British diplomacy". Now the British colonial regime had nothing to fear from Nepal, instead the way for number of benefits had been opened for its free use. Anti-British Nepalese officials were fully eliminated. It is said that Junga Bahadur entered into a secret pact with Governor General of India renouncing the previous policy of distrust. Henceforth, the Nepal government became not only the faithful ally of the British imperialists, but began to function as a collaborator in the act of subjugating Indian sub-continent".*[25]

Features of the Nepalese foreign relations during the post Junga Bahadur's usurpation of power can be summed up as follows:

- The conventional sovereignty that existed before and after unification got largely lost to the British. While Nepal was still an independent country, its independence was subjected to the British mercy. The treaty of 1835 had already placed Nepal in a subordinated position to the British regime concerning Nepal's foreign relation. This treaty prohibited Nepal from seeking external contact without the permission of the British rulers in India. Completion of the subordination was materialized by success of Junga Bahadur's take over of power, who willingly allowed himself to be dictated by the British rulers even in matters of internal matters. The tiny Himalayan Kingdom thus allied to promote the imperialist mission. The Nepalese diplomacy for a period of one century thus served the purpose of colonial power'.
- The rise of Junga Bahadur had negative impact in Indian people's freedom movement. Nepal's courage to fight with British regime till 1816 inspired a number of Indian royalties

25. Ibid. p. 76. Although Nepal was a small country, its role in sustaining colonial rule in Indian sub-continent was crucial. The British colonial rule prolonged mainly due to unlimited and support of the Rana rulers. The history of the foreign relation of Nepal in the past is thus largely stigmatized. Thus, it is anti-people and anti-independence of Nepal. It gives no room for the pride in the history.

to defy to and prepare fight against colonial regime. King Ranjit Singh's mission in Punjab was one of the most profound one. When Nepal ceased to be an enemy, the British rulers accelerated their war against several princely states in India, and successfully eliminated them. Junga Badhadur did not only keep him neutral to the war between Indian states and British force, but he offered support with eight battalions of soldiers in the Anglo-Sikh war. The Nepalese foreign relation in this context was fully anti-people and pro-imperialist. It is a stigma in the history of Nepal.

- This pro-British Imperialist foreign relation has had devastating impact on Nepal. To please the British colonial regime, the Ranas had to be utterly anti-nation. Their existence was possible in a tyranny. Their luxury and comfort could only be met by sheer exploitation of the people. This became possible for them because of the British support in lieu of the Ranas support to the colonial regime. The diplomacy practiced by the Rana regime was thus a plunder of Nepal's prospect of the development. The foreign relation thus served as an effective 'instrument to suppress the people'.
- As late Dr. Regmi points out, "...although he (Junga) did not formally accept the British suzerainty by way of treaty provisions he unabashedly went near to it to call himself in private conversations the most loyal servant of the British queen".[26] This way the Rana period's foreign policy of Nepal was nothing but a strategy to loot the country in support of the British regime. This regime in reality brought the country under a 'colonial shape'.
- Nepal's foreign policy in this era tremendously helped to 'consolidate the slavery in India. It was immensely crucial to sustain the British colonial rule in two ways: firstly, it sold the Nepalese youths to defend British colonial regime and put the people of the Indian sub-continent into iron chain; and secondly, by volunteering to suppress the Indian people movement, such as in Indian Sipohy Mutiny incident, it

26. Ibid. p. 80.

showed abominably selfish and unpatriotic zeal to defend the interest of the imperialist force. With the wealth accumulated by providing unlimited service to the British colony, the Rana regime was able to establish a strong power base, which still continues to 'influence the Nepalese politics'.

These historical stigmas are still haunting bad days of Nepal. Moreover, the legacy is still transmitted to modern politicians of Nepal. Nepal has not yet come out of the 'influence and habit of being dictated by foreign powers' in its diplomacy. It has almost lost the sense of thinking independently of its 'pragmatic diplomacy' which can help it to stand high among the community of nations.

Youths Export for Private Revenue Diplomacy of Ranas: If one can be objectively sensitive of the history of Rana regime, he/she cannot resist saying that "Ranas were robbers of Nepal's pride of history and its future both". They were brutal, inhuman and unpatriotic. The country has not yet liberated from the cruelty of loot and barbarity they committed in a period of one century.

Quite before the Treaty of Sugauli was signed in 1816, the East India Company had covertly commenced to execute the plan of raising Gurkha troops for the defense of its colony in India. Captain Hearsay was the first British officer to propose this idea, and General Ochterlony the great supporter. After cessation of Anglo-Nepal war, the idea was swiftly forwarded. From the perspective of diplomacy, several short term and long term purposes induced British rulers to 'establish' Gurkha regiments under their army.

- The captive Gurkha soldiers had been forced to join the enemy army and serve it. Engagement of them in the enemy army would raise suspicion of the Government of Nepal, and these people could not return due to fear of punishment. They could be thus compelled to work continuously for the enemy on the one hand, and it could also reduce the size of the Nepalese army to be a threat to the British colony on the other.
- With its reduced size and war-torn economy, Nepal had not been in position to continue maintaining a large contingent of the military force. It was thus possible for Nepalese army personnel to be enticed by the British rulers, which could offer them employment.
- Those who had served in the British Army had been able to maintain a taintless loyalty to officers. It was not possible with native Indian people considering the mounting consciousness and movement for independence. Gurkhas therefore could be best force to address the possible uprising of the Indian people.
- In the defeat with British in war, the people of Nepal felt terrible humiliation. It was immensely sensed by the British residents in Nepal. People in Nepal hated British as *"Melekchi Firangi*" (uncivilized and invaders). Nepal could thus reorganize its force and pose a serious threat to British colony. The recruitment of Nepalese in large size under the British army could drain the youth population in Nepal, and as such would let no chance for reorganization of a strong army to be a threat for the British colony as well as ally for their enemies, the princely states in India.[27]

For Ranas, these British concerns and needs proved to be a 'milking cow". They were shrewd to understand that British would be facing a tough time to maintain their colony in the days to come. Exports of youths would be a huge source of revenues for their comfort and luxury. The Ranas therefore took no moment to allow British to 'employ its nationals in the latter's military'. As Mary Des Chen, a Gurkha Historian says:

27. Brian Houghton Hodgson, a British resident in Nepal during 1920s, vigorously advocated for policy of Gurkha recruitment. His report to the British Government in India reveals that the policy had multi-dimensional hidden objectives. Apart from weakening the Kingdom of Nepal militarily, it would have been a means of wearing out the Gurkhas deep seated distrust towards the British. Besides, the Gurkhas could be held as a pledge for the Nepalese Governments' supportive behavior during emergency. He also pointed out that if the martial tribesmen were drained off the country, the military character of the Nepalese Government and its turbulence would also be diminished. He said, "If we could draw off the surplus soldiery of Nepal into our army, we might do her an immense service, enabling her to adapt her institutions to her circumstances, at the same time that we provided ourselves with the best materials in Asia for making soldiers out of ". See Hudgson Memorandum Relative to the Gurkha Army, 14 Feb. 1825, FM. Vol.125.

"The details of recruitment maneuvers are complex, but the essential dynamic was very simple. The Nepalese rulers became gradually willing to exchange hill peasants for things they wanted from the British. The things they wanted included, at different times, assurances of Nepalese independence, restoration of territory, honors, title, money and guns and ammunition. The British were willing to give things it wanted in exchange for 'raw materials" for their Gurkha regiments".[28]

The independence and regain of the lost territory were not substantial issues for Ranas as compared to the honors and money. Ranas were the rulers who wanted to have for them a 'life style' of Europe in exchange of 'country's youths'.

Rana Prime Minister Bir Shamsher, in lieu of British support to him against Junga Bahadur's family after his death, lifted ban on recruitment of Gurkhas in 1885. He issued a "*rukka*" (order) calling to the citizens of Nepal to volunteer for recruitment in the British Army. With this "rukka", the selling of the Nepalese youths was formally legitimized. For this, British Government offered a sum of ten hundred thousands as gift to the Rana Prime Ministers. In the Second World War alone, 1, 24, 000 youths had been recruited. The youth population was thus fully exhausted; the subsequent census showed that the population of Nepal decreased in the history of Nepal. The post Junga Bahadur Rana regime's diplomacy was mainly founded on and around the issue of Gurkhas. This diplomacy resulted in:

- Dilution of national interests among youths of Nepal. This trend is present even today. To migrate to India and other countries for work has been a culture in Nepal, which has been posing a serious threat to Nepal's emergence of a strong nation.
- Educational development of the Nepalese society was severely affected, as the large part of the 'Nepalese youth population' inherited an 'army recruitment culture.
- Since the recruitment was basically concentrated on hill-ethnic tribes, their participation in the political and civil administration was severely affected, resulting in the present absolutely

28. "Soldiers, Sovereignty and Silence: Gurkha as Diplomatic Currency, South Asia Bulletin, Vol. XIII Nos. 1&2, 1993. P. 68

discriminatory situation. This has been one of the serious causes of the rise of the Maoist insurgency.

- British government had used this population without any security of livelihood. The majority of the retired Gurkhas are abjectly poor. The recruitment thus pushed them in a state of economic marginalization. The historical practice of recruitment of the Nepalese people in the foreign armies is one of the serious causes of the 'deep rooted poverty in Nepal'.

The legacy of the recruitment continued even after the withdrawal of British regime in India. Ranas with India and Britain signed an agreement, popularly known as Tripartite Treaty of 1947, which legitimized the presence or recruitment of the Nepalese youths in the Indian and British Armies even in the modern times. A sovereign country, with avowed policy of non-alignment, has maintained a culture of 'selling youths in foreign army'. This has been a paradox of the Nepalese sovereignty as well as the foreign policy. Obviously, no foreign policy of Nepal can be objectively studied without keeping in mind the reality of 'its citizen's participation' in foreign armies.

To conclude the historical contexts, the following summaries can be drawn up:

- Royal courts of Nepal had been formed and destroyed frequently. The administration of the country was carried out not by mutual trust and cooperation among courtiers and officials. Foundation of the state was rested on 'rudimentary feudal values', where kings and courtiers could see their roles nothing more than that of 'tribal chiefs". Courtiers did not trust each other, and incessantly engaged in conspiracy to get rid of one another, because their selection or access to power was not governed by system of rules and quality. One could be trusted person of the king by supplying beautiful women and getting into plunder of people for wealth necessary to the 'pleasure and comfort of the king".[29]

29. This allegation is absolutely proved by the facts of lives of Pratap Singh Shah and Rana Bahadur Shaha. Rana Bahadur Shah believed that the king had privilege to 'have sex with every beautiful woman he liked'. It was why he even dared to kidnapped a 'widow', which according to religion was 'intolerable sin'. This incident shows that they even dared to violate moral codes 'for the sake of sexual lust and physical comfort'. Many of these killings and court-crisis are related with sexual adultery of the kings and queens.

The development of the nation and welfare of the people had never been a concern within and around the royal courts. Absolute power and plunder for accumulating the wealth had been a sole mission of courtiers. Obviously, the sequel of massacres never stopped especially from the Malla period. None of the rulers had national vision. They took nation as a crowd and kings considered themselves 'chieftain' with unlimited powers. The lack of intelligence, national vision and system of administration hindered Nepal's emergence as a 'nation state'. In such a state, it is natural to fail in developing a 'well-thought and defined' foreign relation. None of the royalties prior to Prithwi Narayan had come out of their conspiratorial court politics, nor did they have bit information about the world. Modernity in all aspects of life was thus fully rejected in the royal courts of Nepal.

- Prithwi Narayan Shah made attempt to 'see Nepal beyond his court'. His intelligence could explore the 'significance' of Nepal as a nation state. Survival of the Himalayan kingdom could not be possible in situation where the nation was divided into dozens of 'rudimentary princely states'. While the adventure of the unification was an adventure to 'establish him as the historical monarch', he was also fully convinced that the existence of his state (Gorkha) was also in trouble in the context of expanding and consolidating British colonial empire in India. However, there was hardly any other person within his own court, who could understand this development. He had subtle understanding of the fact that it was far harder to 'save the unified Nepal' than to unify itself. It is why he 'subtly defined its position as a yam between two rocks', the movement of any rock could squeeze and crushed the fragile yam. His fingers were covertly pointing out to the increasing colonial empire in the south, as its mission to Nepal and across China could not be ruled out. China had sense of it too. In both ways, Nepal could be the first victim. He made efforts to 'educate his officials of this fact' and made hard efforts to 'prevent a circumstance' of rivalries within the court. He therefore did not give special privilege to his own brothers. However, he failed in this mission. Right before his death, his bothers started engaging

'conspiratorial court-politics', which emerged in a heinous and nasty form during his first successor, Pratap Singh Shah. King Prithwi Narayan's 'strategic vision of foreign relation' ceased to exist along with his death.[30]

- The rise of Rana regime fully shattered Prthiwi Narayan's strategic vision[31] on foreign policy. Ranas fully surrendered to British colonial regime, and in 1929, through a treaty of friendship, obtained an assurance to independence of Nepal. This assurance was, nevertheless, not an outcome of 'mutual respect to each other's sovereignty'; rather it was a reward of the British colonial regime to Ranas for their incessant, unlimited and unreserved service to strengthen the colonial rule in India. Ranas were in fact nothing but 'group of covert' agents of the British regime, especially important to collect youths of Nepal for its army. Their surrender to the British regime resulted in total rejection of 'Prithwi Narayn's vision of foreign policy. Independence, not the mere existence of

30. Bahadur Shah raided Tibet and created a situation where China was dragged to support Tibet. This event took place when British colonial regime in India had been seriously planning to 'destroy Nepal as a powerful state'. It shows that Bahadur Shah had little understanding or insights of father's vision of foreign policy. It leads us to conclude that none of Prithwi Narayan Shah's successors had faint understanding of his strategic foreign policy'. On the other hand, a huge number of courtiers were 'traitors'. They did not hesitate to approach British rulers against the interest of Nation. Often the group after its defeat in the court conspiracy ran to the British rulers. Even Amar Singh Thapa, a person so praised as a national hero today, after the defeat in war did not return to Nepal; rather he befriended to British. (See, Gyanmani Nepal, Ibid).
31. What did his vision mean is, however, still not accurately understood. Some people take it as'strategic neutrality'. In my opinion, this understanding does not have substance as well as ground to be convinced. The concept of neutrality had no meaning at that point of time, in the context of this region. British colonial rulers' interest in the region was to accumulate wealth, and for that they had no respect of any principles. The way they plundered the Indian states showed that there was no barrier between the right and wrong for them. Prithwi Narayan clearly understood this 'fact'. He had subtle idea that Nepal could not save it 'by invoking its desire to be neutral'. The statement that "Nepal was a yam between two rocks" rather intended to educate the 'courtiers, military and people at large' of the difficult position Nepal was placed at. He was trying to aware all of this reality and urge people to carefully prepare themselves to defend the nation. This message, in the context of divided Nepal, was also meant to several annexed or yet to be annexed princely states. He was trying to 'strategically convince them that their existence as a smaller state' was not possible, so that the unification of Nepal as a powerful nation able enough to defend itself was a historical demand. During the Panchayat regime, there was an attempt to 'define strategic neutrality-based foreign policy', and for this the philosophy was drawn up from Prithwi Narayan's Divyoupdesh. How far they understood the 'insights' of the Prithwi Narayan's vision is however not investigated.

Nepal as a nation, was the 'fundamental underpinning' of the Prithwi Narayn's vision of foreign policy. Ranas had been able to maintain existence in the cost of independence. The concept of independence in turn underpins a notion of protecting the freedom and capability of defending the sovereignty of the nation. Unfortunately, defense capability was destroyed by the 'conspiratorial court politics of his own successors' and the freedom by the Ranas. In brief, Prthiwi Narayan's vision was founded on the 'activism of people to defend the nation' rather than the 'passive neutrality' of the rulers to other countries. 30 years Panchayat regime's foreign policy was influenced by the latter notion. The concept of zone of peace, however, could be implemented to transform 'passive neutrality' into 'constructive and strategic diplomacy'.

- Bir Sumsher's *Rukka* and 1947 Tripartite Treaty completely ended the 'independence as well as neutrality' of the Nepalese foreign policy. These two instruments institutionalized the 'recruitment of Nepalese youths' in foreign armies, thus rendering Nepal as country of mercenaries. Gurkhas are in many occasions condemned as 'mercenaries' even today. A country which maintains a 'military pact' with other country cannot be defined as a 'neutral country', and a country of which citizens are recruited by others in their armies cannot be termed as 'independent'. Nepal's independence is thus severely circumscribed. While the practice has been tolerated by neighboring country China, Pakistan and others, the tolerance itself cannot address the limitation in independence and purify the stigma attached. Thus, the foreign policy of Nepal is yet to be defined, and it would be hard to do so unless the issue of the 'Gurkha recruitment in foreign armies is settled down'. Excuses like employment opportunities to peoples, economic benefits, historical legacies or any such things cannot constitute 'good grounds for justification as 'concept of independence and sovereignty and a practice of citizens' recruitment in other countries' armies are uncompromisingly contradictory to each other both from the stand of international and domestic laws. Conventional international law 'defined such practice' as 'source of mercenary soldiery'. Modern international law founded on UN charter, on the other hand, rejects any practice that promotes armament and military build-up. No civilized theories can be used to defend a 'practice like Gurkha recruitment'. Obviously, the existence of this practice fully stigmatizes the Nepalese foreign policy.
- 1947's treaty exists without any improvement or ratification of the Parliament even after the promulgation of the 1990 Constitution. According to article 126, it requires such treaties to be ratified by two third majority of the joint session of the parliament. The treaty which allows Nepalese citizens recruitment in the foreign armies violates, although implicitly, the avowed principle of non-alignment protected by the constitution. Prithwi Narayan's vision of foreign policy is thus 'rejected by his all successors, all kinds of regimes and all kinds of political forces, including certain groups of communist party'. Occasional statement of political leaders and state's officials that "Nepal's foreign policy has been guided by Prithwi Narayan's Divyoupadesh" is nothing but a sheer lie.

Contemporary Foreign Relations of Nepal with Other Countries:

After 1951, Nepal has been opened to the world and has been active in many international forums. It has been pretty much involved in 'peace making process in different parts of the world', despite a fact that the peace in the country itself is subjected to a 'unprecedented crisis'. What Nepal gained or lost from its expanding international relation is a question demanding critical analysis. Moreover, does Nepal have any principles or values of foreign policy is also an important question. In the following part of this article, an attempt will be made to explore nature and importance of Nepal's diplomatic relation with various countries in the present context.

Western Countries: USA, UK, Germany, France, Denmark and Russia are the major western countries having bilateral relations with Nepal. Politically, the USA and UK are comparatively significant than others. Economically, Germany and Denmark are crucial partners. Nepal and United States official relation was established in 1947 and as such USA has been the first country to 'set up diplomatic relation

with Nepal' from the western hemisphere after the 1951 change in Nepal.[32] USA established its embassy in Nepal in 1959. USA started economic assistance to Nepal from 1951, and since then Nepal has received $791 million for its development efforts. In recent years, the annual economic assistance through US Agency for International Development (USAID) is about $40 million. This assistance primarily supports development projects in various sectors like agriculture, health, family planning, environmental protection, democratization, governance, and hydro-power. United States has a permanent embassy in Nepal. Germany and Denmark have substantially contributed in democratization, resource mobilization and infrastructure development of Nepal.

Nepal's relation with western countries has come to a crucial point due to following factors:

- Closer cooperation with China, a rapidly emerging global economic powerhouse, is important for western countries' interests, USA in particular.[33] In the context of Nepal's strategic location due to sharing of a long border with China, American foreign policy to Nepal cannot be seen in isolation of its larger interest and relation with China. America's relation with India during the post cold war era has taken a 'new dimension'. It seems that the former has 'recognized the latter's dominant role in the region'. Nepal's lying in between these two boulders is strategically important for America to 'monitor' its relation with China as well as the SAARC region. For America, Nepal provides a 'safer place' for its diplomatic as well as secret maneuvers towards China and India. While this factor was more relevant during the cold war, its importance is still undeniable. For this reason, America needs a stable Nepal, so that its diplomatic mission to China and SAARC can be carried out from Nepal. Nepal-America relation is thus significantly influenced and determined by the latter's interest to the region rather than Nepal itself.

32. UK's relation with Nepal was set up right after 1816 Treaty. However, the relation between Nepal and UK then was not a 'relation between British Government at UK. It was a 'relation between East India Company Government and Nepal. Relation with UK should therefore be defined as a 'traditional neighborly relation'. UK and Nepal relation before 1947 was thus a 'relation between British India and Nepal'.
33. See, Bangkok Post, Tuesday, November 16, 2004 (US should look beyond China).

- India is consistently emerging regional power in the South and South East Asia. Series of events in the post independence era of India such as separation of Pakistan as an independent nation; separation of Bangladesh from Pakistan; and annexation of Sikim by India have frequently changed the political 'status quo' of the region. In the context of prolonged disputes with Pakistan resulting in full scale wars twice in the past, and also border disputes with China leading to a war in 1962, India has put its 'security concern' as primary agenda of 'diplomacy' with neighboring countries as well as others. This situation on the other hand has engendered several implications in Nepal's foreign relation with other countries in the region as well as overseas.
    - India has insistently urged for a 'stable' tie with its neighbors, whereas the same has often been defined by its neighbors as a 'quest to a regional bully'. While India has 'perceived a threat' if Nepal has not been within its security umbrella,[34] the Indian perception has been taken as a 'bully' to a smaller nation by the Nepalese population. Because of these differing attitudes, Nepal's relation with India has been

34. India has made its security concern as a primary agenda for its relation with Nepal since its independence. Indian Prime Minister Jawaharlal Nehru, for instance, in one of his speech before the Parliament in 1950 summed up India's security concerns vis-à-vis Nepal. He stated: "From the time immemorial, the Himalayas have provided us with magnificent frontiers… We cannot allow that barrier to be penetrated, because it is also the principal barrier to India. Therefore, as much as we appreciate the independence of Nepal, we cannot allow anything to grow wrong in Nepal or permit that barrier to be crossed or weakened, because that would be a risk to our own security." Nehru and his successors subsequently stated that any Chinese attack on Nepal would be regarded as aggression against India. (See, Library of Congress Country Studies: Nepal. http://1cweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field (DOCID+np0146). India's perception of threat from China had occasionally devastating impact on Indo-Nepal relation. Failure of India to develop a friendly relation with China during the period from 1950s to 1980s had engendered a 'situation in which Nepal suffered seriously'. This situation often threatened the 'independence and integrity' of Nepal. Although, Nepal never sensed or perceived threat of attack from China, and it had been able to forge a 'friendly relation with China', India persistently failed to 'see friendly relation between Nepal and China' a boon for Indo-Nepal relation. The sudden annexation of Sikim by India, on the other hand, severely affected the psychology of the Nepalese people. While India could assure Nepal of non-violability of its independence and integrity, it implicitly demanded Nepal to 'accept a condition suzerainty' that prevailed during the British colonial regime. The time has now amply shown that India's perceived security threat from China was 'unrealistic' and 'unfounded'. This reality now demands for 'redefinition' of the 'Indian perception of relation between India and Nepal'. However, there has been less change in the perception founded on 1950s doctrine of Nehru.

oscillating considerably over the years, particularly in matters relating to security.

- India's perception of threat from China[35] and its failure to develop a friendly relation with it hindered open diplomacy of Nepal with other countries. Its relation with western countries was also somehow affected by India's preferred relation with Soviet Union. Nepal's relation with China in the perspective of the latter's unpleasant relation with Soviet Union and India engendered 'skepticism' in the south bloc to Nepal's emerging open international relation.[36] Obviously, Nepal's relation with China and other countries in the one hand was marked by 'shy and covert diplomacy'.
- Formal annexation of Tibet by China sparked a 'tension' to the European and American countries. Their interest to this region was thus heightened. Particularly, USA became sensitive to this issue. Western countries thought Nepal as a

35. India's suspicion that China would invade Nepal posing a security threat to India was 'fictitious' and 'unfounded', whereas the same could not be denied between them for their border dispute. Since there was a vast border between China and India to invade India, if China liked so, it was not necessary to take Nepal's route, which required a vast rugged terrain to cross to approach India via Nepal. Nepal and China maintained friendly relation since 1792, when they signed a Sino-Nepalese Treaty in 1792, after China defeated Nepal in a war. If China had intention to invade Nepal, it could do earlier. According to the treaty, China would come to the aid of Nepal should it ever be invaded by a foreign power. It was probably one of the reasons British colonial regime did not invade Nepal. In 1956, the previous agreement was replaced by a treaty of amity and commerce with China. In subsequent years, China offered, to remove any suspicion of invasion, to sign a pact of non-aggression or mutual defense with Nepal. However, Nepal did not agree to it considering the sensitivity it would engender in its southern neighbor. This proves that Indian suspicion of Chinese invasion of Nepal not founded on 'fact'.
36. In 1950 China took Tibet under it, which India regarded as a buffer zone shielding the subcontinent form real or potential Chine invasion. For India, Nepal thus became important in India's security calculations. Regarding the issue of Tibet, Indian views coincided with Western countries. Fearing that China might eventually subvert or invade Nepal, India signed a 'Treaty of Peace and Friendship with the regime dominated by Ranas in 1950. Western countries thus did not object or suspect India's move to Nepal. For them India's any move for blocking the China would be acceptable. This suggests that 'Western Countries as well as India's relation with Nepal is largely marked by need of blocking China'. Thus their relation with Nepal in broader perspective is characterized by an "instrumentality' of monitoring China. This character limits 'other countries' relation with Nepal strategically to its proximity to China. Obviously, significance of Nepal beyond its strategic location is largely overshadowed in the international arena, which is a great injustice to Nepal. For instance, Nepal played a crucial role in 'victory of allied force in the II World War by contributing its over two hundred thousands youths in British infantry. However, the sacrifice made by Nepal was even not acknowledged by the international community.

vulnerable country to come into 'communist helm', in the context of massive propaganda of Beijing and Nepal's emerging closer relation to it. Soviet Union was equally cautious to China's influence to Nepal and diplomatic reaction of the USA. Soviet Union thus entered into an active diplomatic relation with Nepal to 'ensure its position in the region'. Beijing too thought 'conglomeration of the western powerful countries along with India' in diplomatic relation with Nepal as a threat to its interest. China thus reacted by establishing a huge diplomatic mission in Nepal. Indeed, diplomatic relation of all these powerful countries with Nepal was prompted or engendered by their 'covert interest of balancing or counter balancing the influence of one another' and 'attraction to Nepal was based on negative factors'. Each was abundantly skeptical of other and the dire impact of it was the division of the Nepalese population into several groups as pro or anti to these various powerful countries. These countries' relation with Nepal was thus 'founded on dynamic of negative attraction'.

Obviously, Nepal has been a 'home for serving the regional interests of big powers', and as such is effectively being used for preventing one another's influence, which in turn has converted it into a hot-spot for 'diplomatic games and maneuvers'. Its internal politics and policies were thus largely influenced by 'powerful nations' diplomatic agenda or maneuvers'. The competition to 'win over' the political forces within Nepal was pervasive and immensely active. This competition is marked by the following characters of the Nepalese politics since 1951:

- India actively supported Nepali Congress till the end of 1960s. China's active support to Nepal during 1960s encouraged the monarchy of Nepal to 'challenge the Congress force, and eliminate its elected government. Silence of western countries to the 'monarch's role during 1960s pushed the Nepali Congress to the helm of India.
- Nepal's leftist force being attached to Indian leftist force as its patron, China preferred to rely on monarchy rather than the leftist parties themselves. It created an agony among the many

communist leaders, which helped Soviet Union to pocket a group of it. The division of the leftist force contributed to strengthen the undemocratic government in Nepal, and in the meantime it pushed 'a segment of the leftist force' to 'extremist line', the CPN Maoist being its present continuation. China continued its 'some kind of moral support' to the communist party, without threatening its relation with monarchy. This policy of China widened the gape between 'congress and leftist' as the former considered 'royalty and communist' as partners for conspiracy against democracy.[37] This allegation on the other hand 'destroyed a foundation of relation between China and the Nepali Congress'. Obviously, the Congress and some Communist Parties had been 'branded as pro-Indian and Pro-Chinese parties'. This divided the nation terribly weakening the prospect of restoration of democracy for a long time.

- Royalty, although maintained a good relation with China by assuring its equal distance with India, suppressed pro-China leftists, which was necessary to please the western countries as well as Soviet Union. Western countries vehemently disliked leftist force for their ideology of 'Maoism' as well as support of 'China's annexation of Tibet'. Western countries thus consistently supported royal mission to suppress leftist force. On the other hand, they maintained an indifferent policy to Nepali congress for it being closely aligned with Indian democracy, which largely sided to Soviet Union. The western countries' support to restore democracy was thus largely absent till 1980s, when Nepali Congress lost its support of Indian

37. The Nepali Congress consistently and indiscriminately defined communists as its longtime political and ideological foe. It harbored deep misgiving over communist political intentions. Many western and Indian observers shared with the Nepali Congress that open political environment would allow disciplined communist cadres to mount street protests, paralyze the government, and force a showdown with the king and the army. Army officers, most of whom rejected the antimonarchist platform of the communists, invariably regarded the communists as a potential security menace and threat to the throne. This view was rejected by the subsequent development as responsible communist parties invariably defended the 'constitutional monarchy'. Indeed, this element that consistently engaged in anti-communist propaganda and design was afraid of its longtime engagement in the extortion of the national treasury in name of 'supporters of the monarchy'. When the shocking massacre of the king Birendra took place, it became established that 'the royalty was at danger inside the place itself'.

Congress and avowed to forge 'a policy to achieve reconciliation' with monarchy. Continued dislike and apathy of western countries even to the moderate leftists in fact severely hindered their 'induction in the liberal democratic process', and thus provided a 'ground for emergence of the extremism'.

Historically, the support of western countries, except a few like Denmark, Switzerland, etc, to consolidate democracy and enhance economic development has not been a prime agenda of their 'relation with Nepal'; in other words, Nepal itself does not constitute a center point of 'western countries' relation with Nepal'. One can thus argue that the 'western countries' diplomatic relation with Nepal has not been constructive to transform the latter into a 'viable and vibrant democratic society', which lies one of the most important cause of 'present Maoist insurgency'.[38] Western countries share almost a similar foreign policy to Nepal, except some differences concerning military aid.

USA: As pointed out by Donald Camp, US Deputy Assistant Secretary for the South Asian Affairs, US-Nepal relation has obtained prominence in the context of rising Maoist insurgency. In an address to the occasion organized by the "Heritage Foundation", he said: "US concerns with events in Nepal has increased over the past

38. Western countries have largely failed to differentiate between liberal democratic left force and extremist communist groups. A account given by the Library of Congress country studies, for instance, is as follows: "The strong communist showing in the 1991 election was disturbing development from the perspective of Birendra and the army" (See, Internal Security Concerns, op. cit note 29). This statement has no truth. The communist making big show in the 1991 election had publicly avowed the faith on 'multi-party system' and 'constitutional monarchy'. However, the so-called royalist force did it best to destabilize the leftist force, who had actively participated in the constitution making process. This element was however actively working to 'divide the Congress and Leftist force' as a grand design to destabilize the infant democracy. Many western diplomats and intellectuals in Nepal had been deeply influenced by the deceptive propaganda of the so-called royalists. They had been actively engaged to oust the UML government from moment it was formed. The immature dissolution of the UML government did seriously hinder in consolidating the faith among the leftist cadres towards 'their roles in democracy'. It justified the CPN Maoist's propaganda that leftist parties would not be tolerated within the 'framework liberal democracy'. Obviously, a huge number of leftist youths who enthusiastically participated in the general elections switched their loyalty to 'extremism' advocated by CPN Maoist. Western diplomats have thus made a serious mistake with regard to 'liberal leftist force of Nepal'. Indeed, no instance of discord and dispute was reported between the monarch and the communist prime minister during 9 months' UML government.

couple of years, and our assistance levels have gone up accordingly".[39] US policy towards Maoist insurgency is critical as well as offensive. To quote Donald Camp, "From a humanitarian standpoint alone, the US does not wish to see these (Maoists) insurgents prevail... But the Maoists threaten US interests for other reasons as well. The leadership has made clear that it seeks to replace the constitutional monarchy with an absolutist communist regime-one that would be overtly hostile to the Unites States".[40] Obviously, the political interest is always in higher tone in the US foreign policy to Nepal. The nature of the US assistance to, and relation with, Nepal would thus be largely determined by the 'insurgency context'. One of the dominant characteristics of this policy in the present context is the extension of the 'assistance to the military purpose'. As Donald Camp maintains:

> *"We are meeting this challenge (Maoist Insurgency) with integrated strategy that involves a number of elements. On the assistance side, we are increasing our development aid to Nepal, in an effort to alleviate the legitimate grievances that helped give rise to the Maoist insurgency in the first place. At the same time, we have begun supplying the Government with security aid intended to give the Royal Nepal army the ability to contain Maoist threat-including rifles, basic equipment, and military training". This combined assistance strategy, along with our political and economical efforts, is designed to help create a more secure environment in which Nepal can continue its badly needed socio-economic development, as well as to stave off a Maoist victory, convince the insurgents that they cannot win militarily, and pave the way for a political settlement".*[41]

The statement is plain. It overtly shows high intention of the USA to diplomatically engage in the 'present situation', and thus the present context has a great stake in the US-Nepal relation. The Maoist insurgency has played a crucial role in shift of the 'dynamics of the

39. See, US Department of State, Statement on Nepal. Remarks to the Heritage Foundation, Washington, D.C. March 3, 2003.
40. Ibid.
41. Ibid.

foreign policy of Nepal' with USA.[42] Interestingly, the Maoist context has brought India, UK and America in a common platform with regard to their 'foreign policy to Nepal'.[43] The US engagement in the military assistance along with India and UK to Nepal has largely done away with the 1965 covert treaty (it was an exchange of letters but had treaty effect in true sense) between Nepal and India that prohibited Nepal obtaining arms from a country other than India. Moreover, this pact has ended the traditional equidistance policy of Nepal to India and China. This development has established Nepal's tilting to the South in acquiescence of the western countries. One has to wait the 'Chinese reaction to it'.

The US policy of arming the RNA has two basic objectives: firstly, to help the Government reestablish control in the countryside; and secondly, to persuade Maoists to lay down their weapons and work peacefully toward a political solution. Based on actual reality of current Nepal, materialization of both of these objectives is a serious challenge to face. The Government has almost lost its control in the countryside, and Maoists have gained strength quantitatively and qualitatively even after the military assistance of USA. The following facts thus demand

42. One of the striking features of the shift of American foreign policy to Nepal is that US has brought India decisive partner. Christine Rocca, Assistant Secretary for South Asian Affairs, in her testimony before the House International Relations Sub-Committee on Asia and the Pacific remarks: "I would like to start with India, where we are continuing to transform our relationship. Soon after taking office, President Bush outlined his vision of a transformed and deepened US-India partnership, one that reflects India's emergence as a major regional power and the shared values that unite the world's two largest democratic countries. The scope of the relationship has widened and broadened significantly over the past two years. The United States and India have overlapping vital national interest-promoting peace and the stability in South Asia, combating international terrorism, and preventing the spread of weapons of mass destruction… Over the pats year we have stepped up consultation s on strategic and regional issues, and greatly fortified cooperation in science and technology, defense exchanges, intelligence dialog and law enforcement". U.S Department of State, Released on March 20, 2003.
43. As pointed out by Donald Camp, US in coordination with other countries, including India and the UK, has begun helping RNA to meet its critical basic needs. The US military assistance budget to Nepal is $ 14 million for FY 2002, aid that will help the Government reestablish control in the country side and to persuade the Maoists to lay down their weapons and work peacefully toward a political solution. Connected to this aid are steps that encourage human rights improvements among the security forces. We have unfortunately seen an unacceptable number of abuses over the last year-on the both sides. The US has successfully pushed for the establishment of a human rights cell within the RNA, and all of our joint exercises undergo a comprehensive human rights vetting before they can take place. At the same time, the training we provide to the military and civil police includes a human rights component. Op. cit Note 36.

review of the military assistance policy of USA:

- With increased capacity of Maoists to strike against the Government security force, the eminent danger of Maoists strength gained by seizing sophisticated weapons supplied by USA has sharply increased. This will obviously thwart the peace as well as the possibility of peaceful settlement of the problem.
- Reportedly, the human rights violation by the security force has sharply increased. It has stood as the first in rank to commit 'determinate killings and disappearances' of persons.[44] This has been serious blow to the 'principle of rule of law and due process', which are indispensable elements of the democracy. The US military support may boost the anti-human rights psychology of the security force, and as such human rights situation may face further deterioration. This fact has been well realized by the US government itself. Donald Camp, for instance, in his remarks to Heritage Foundation has maintained: "...We have unfortunately seen an unacceptable number of abuses over the last year".[45]
- In the current situation of the constitutional deadlock, the democracy has severely suffered. Consistent military support, in a situation where human rights violation has become a serious problem, without accountability to representative government may severely jeopardize the future of democracy.

Of course, the given situation demands US to review its policy concerning military assistance. The protection and promotion of democracy should be the center point of the US diplomacy to Nepal, because the resolution of the problem in absence of democratic institutions would largely be a myth. To ensure control of the countryside by people's representatives is the first and foremost requirement. Moreover, the likelihood of US dependence on India concerning the foreign policy to Nepal might destroy its traditional neutrality with neighbors.

44. See, Human Rights Watch, 2004, *Between a Rock and a Hard Place: Civilian Struggle to Survive in Nepal's Civil War.* http://hrw.org/reports/2004/nepal1004/
45. Ibid.

India: The 1950 Treaty on Peace and Friendship is a traditional foundation of the Nepal-India relation. The treaty and letters between two countries concerning their relations state that "neither government shall tolerate any threat to the security of the other by a foreign aggressor". The treaty obligates both countries "to inform each other of any serious friction or misunderstanding with any neighboring state likely to cause any breach in the friendly relations subsisting between the two governments". The treaty also provides Nepal a preferential treatment in economic and economic opportunities in India. The bilateral relation between Nepal and India, nevertheless, has occasionally seen tough times and a number of misgivings.

India has consistently demanded Nepal to be within its security umbrella, which many Nepalese have regarded as a 'bullying against Nepal". It is a general perception of the Nepalese intelligentsia that India has failed to understand 'difficulties faced by Nepal due to its landlocked situation and strategic location between two big countries'. In the wake of the rise of the China as a communist country, India saw a threat to its security from the north and as such it demanded Nepal without hesitation to 'side it' against China. This is plain from Indian Prime Minister Pundit Jawaharlal Nehru's speech before the Parliament in 1950. He stated:

> "*From time immemorial, the Himalayas have provided us with magnificient frontiers... We cannot allow that barrier to be penetrated, because it is also the principal barrier to India. Therefore, as much as we appreciate the independence of Nepal, we cannot allow anything to go wrong in Nepal or permit that barrier to be crossed or weakened, because that would risk our own security.*"[46]

Many Nepalese view that the statement was unnecessary to make, if not totally wrong. A few things which history does not support in the statement are that:

- Firstly, Nepal has been an independent nation at least for recorded period of over 2500 years, and throughout its history

46. See, Library of Congress Country Study, Op cit note 29.

it has been able to maintain a peaceful relation with the northern neighbor. As early as 1792, Nepal and China signed a treaty of amity declaring a commitment that none of them would invade each other. Thus, it was not necessary for India to be afraid of 'Nepal's independence'.

- Secondly, India did not exist as a country like today in the history. It was divided into several kingdoms prior to British colonization. India thus never faced a situation of invasion from the north.
- Thirdly, although it was a generosity of Prime Minister Nehru to appreciate Nepal's independence, yet it was a historical fact that Nepal existed as an independent nation with its own strength throughout the history.

The statement thus unnecessarily sparked suspicion of Nepal towards intention of southern neighbor, and for so-called ultra-nationalist it became a boon for 'politics' based on feigned threat for the south to Nepal's independence and integrity.

Although India and China had encountered a war between them, nevertheless, it was due to their failure to settle border disputes. Nepal had nothing to do with it. The so-called perception of security threat from the North is thus largely a 'myth' than a reality. Over the years, the situation has largely changed. Most importantly, India and China have developed friendly relations. The Indian concern of security threat from the north is thus largely obsolete. Obviously, Nepal and India in their bilateral relations have nothing to do with 'presence of communist China in the north frontiers of Nepal".

However, it does not mean that Nepal and India don't have problems in their relations. But these problems are not associated with security issue; rather they are outcomes of failure to adjust each other's genuine interests in matters of trade and transit.[47] In 1978, India agreed to separate trade and transit treaties. Nevertheless, in 1989 the relation between Nepal and India faced a 'nightmare' in their traditional longstanding friendly relations. Failure to renew the trade and transit treaties in 1989 resulted in a virtual Indian economic blockade of Nepal that lasted until late April 1990.

Although economic issues were major factors in two countries confrontation, Indian dissatisfaction with Nepal's 1988 acquisition of Chinese arms played an important role. India perceived the armed purchase with China as an indication of Nepal's intent to build a military relation with China, in violation of the 1950 treaty and letters exchanged in 1959 and 1965, which included Nepal in India's security zone and precluded arms purchase without India's approval. In this perspective, the Indo-Nepal relation has been marked by following trends and characters:

- Nepal and India have kept their borders open and militarily unmonitored. The open border is a source of series of problems ranging from evasion of custom duty to smuggling of contrabands and arms. India's incessant security concern due to smuggling of arms and ammunition by terrorists and penetration of foreign intelligence freely from the Nepalese territory has been a source of discontent between two countries. Nevertheless, government of none of the country has expressed willingness to regulate the borders. In fact, Nepal's trade is adversely affected by the open border. As reported by various studies, the illegal trade outweighs the legal trade between Nepal and India, seriously affecting the Nepalese economy.
- Nepal's grievance to India that it has consistently ignored the difficult geo-political position of Nepal is not seriously

47. The problem of trade and transit has specially surfaced since 1970s. Due to its special location marked by landlocked position, Nepal has been pressing for substantial favor of India in the trade and transit treaty. In 1978, India agreed to concede with demand of Nepal to enter into a separate Trade and Transit treaty, satisfying Nepal's long-terms demand. In 1975, King Birendra proposed that Nepal be recognized internationally a zone of peace; the proposal immediately received the support of China and Pakistan. India, however, held its recognition. In its view, if the proposal did not contradict the 1950 treaty and was merely and extension of non-alignment, it was unnecessary. If it was a repudiation of the special relation, it represented a possible threat to India's security and could not be endorsed. This issue implicitly contributed to 'cool the relation between' Nepal and India. India's obsession of insecurity from the north hindered the 'Nepal's Zone of Peace' getting an international recognition. Indeed, the proposal was nothing but an expression of the difficulty engendered 'by Nepal's sandwiched landlocked position', demanding special favorable treatment for neighbors. It was in fact an 'institutionalized assurance from the side of Nepal to refrain from any kind of acts that would hinder India's security' in lieu of its special privileges concerning free trade and transit through India territory. India, however, failed to understand its 'insights' in a friendly manner. Nepal took it 'suspiciously'.

considered and addressed by India.[48] Consequently, the Nepalese people often feel India is bullying against Nepal's interests.[49]

- Located in a strategic and difficult position and India's perennial suspicion of insecurity from the north, Nepal is obliged to 'convince or please' India in its each and all efforts concerning international relation. This in turn makes Nepalese to think of their independence crippled or squeezed. This has been a 'perennial source' inferiority complex on the part of the Nepalese people.[50]

In crux, while there has been a habit in the south block to consider Nepal's position not beyond that of a suzerainty, the Nepalese people think this attitude as a practice of 'bully' by India. Most importantly,

48. India has always used the security agenda as 'a condition for Nepal India relation'. This issue creates a severe situation to Nepal due to its sandwiched position. India's quest for Nepal's tilting to its might jeopardize its independence and integrity. As it is difficult to 'stay away from India', it is equally difficult to do the same with China. India has always failed to understand this reality. Following the incident of Indian Airline's hijacking, India put an air embargo against Nepal. Indian media have consistently baselessly accused Nepal for giving a closed eye to Pakistani intelligence agency ISI agents, who, as they say, are using Nepalese soul against Indian interest. Nevertheless, India is not interested to close the border. Nepal has vigorously asserted that it has never allowed its territory to be used by anybody against its neighbors; however India is not ready to accept it. Most importantly, Nepal has always been unable to convince the South Block mandarins about its bona fide in maintaining proper security at border so that no one can use it against India.
49. Some year before, an Indian Airlines jet had been highjacked by a group of Islamic terrorists. The highjackers had been boarded on plane by Indian airlines staff, as the ground handling of the Indian airlines in Thribhuvan International Airport is carried out by its own staff. The tickets had been issued by the Indian Airlines Office in Kathmandu itself. The aircraft was highjacked at Indian territory. It was flown to Indian territory. Indian mass media condemned the security system of Nepal. Most painfully, an allegation was made that a Nepalese national who had been a passenger in the aircraft had been condemned as 'accomplice of the terrorist'. Nepal had been described as a 'nest of Pakistani spies (ISI). However, the propaganda of Indian mass media was a sheer lie. This propaganda seriously tarnished the image of Nepal, and seriously jeopardized tourism industry of Nepal. The shocking impact of the false propaganda was never addressed by the Indian government. From 1996, Nepal came into a crisis of Maoist insurgency, which organized and controlled from Indian territory. In Nepal, there had been a serious fight going on, but Maoist leaders had been able organize massive demonstration in Delhi. Indian government allowed the demonstration take place. Many Nepalese had thus been compelled to believe that India had been allowing its territory to 'use against Nepal.
50. While the Nepalese people share cultural and social similarity with Indian people, the Indian government's stereotyped attitude to Nepal has hindering 'people's level diplomacy'. The Indian government's attitude is largely an obstacle to 'forge pragmatic relations between Indo-Nepalese institutions. It is true that the *Panchyati*-regime of Nepal had been largely responsible to 'foment nationalism in Nepal which implicitly propagated anti-Indian feeling among the Nepalese people. The Nepalese people had been educated that 'their nationalism meant opposition of India'. Nevertheless, this regime sustained largely due to support of the Indian government.

India, which is a big power, has more expectation from Nepal,[51] and that expectation is often expressed without sensitivity of the problem of a 'landlocked and strategically located' smaller nation. Despite a number of outstanding issues that have oscillated the Indo-Nepal relations in certain occasions, their relations are historically very extensive. India has been substantially involved in the economic and infrastructure development of Nepal since 1951. The first assistance of India to Nepal was the construction of 'Tribhuvan Airport". The Tribhuvan Highway was another crucial assistance in the infrastructure development of Nepal during 1950s. Other assistance include construction of 78.5% of the East West High Way, construction of 22 bridges at Kohlpur area, Tanakpur-Mahendranagar link road, Raxaul/Birgunj Broad Gauge Rail Link, establishment of B.P. Koirala Institute for Health Sciences and Expansion of the Bir Hospital. Besides these, India has supported several other projects in the sector of education and health.[52]

China: Communication between Nepal and China dates back to time immemorial.[53] There have been a number of historical anecdotes that

51. Although the 1950 treaty spells out the nature of 'relation between Nepal and India', Nepal is alone obliged to comply with the terms and reference of the treaty. According to the 1950 treaty, each party is obliged to inform the other about the danger of invasion by other force and provide support in that situation. However, India did never comply with this provision. India engaged in wars two times with Pakistan, but Nepal no information was given to Nepal. Similarly, India gave no information when it engaged in war with China. India has been nuclear power, and possesses sophisticated arms. Thus, it would be simply unrealistic to think of security threat from Nepal to India. The reciprocity if thus not fully entrenched, See, Prof. K. Khanal, "Nepal's Foreign Policy- A review: Prospect of Consensus and Reorientation.
52. See for detail, India-Nepal relations. Embassy of India, Kathmandu Nepal. www.south-asia.com/Embassy-India
53. The historical relation between Nepal and China goes back to Jin and Tang dynasty when great Chinese scholars Fahein and Huen Tsang visited Nepal and wrote about Nepal. Fahien, a Buddhist Monk, visited Lunbini, the birth place of Buddha, in 406 AD in ppursuit of knowledge and peace. Among the same time a Nepali Monk named Buddabhadra visited China to preach the teachings of Buddha. The travel writings of Xuan Zhang, a Chiese traveler who visited Lumbini and Kathmandu in the 7th century, have been one of the main sources Nepalese pre-medival history. Nepalese Princess Bhrikuti was given in marriage to Chinese King Srong Tsangampo. She along with Chiense Princess was instrumental in converting Buddhism in Tibet. Later Araniko and his followers visited Tibet and China in order to build monasteries and temples. The white Pagoda in Beijing, built by Araniko, still stands as an immortal witness and testimony to the antiquity of Nepal-China relations, See, Nepal China Relation, www.nepalembassy.org.cn/nepal_china_relation.htm. Some Chinese scholars like Huen Tsang spent considerably long time in Nepal and described Nepal as a 'store of culture and civilization'. It is said that Chinese learned the 'practice of writing in paper from Nepal'.

show Nepal and China exchanged artists and intellectuals to understand each other. However, diplomatic relations between Nepal and China was started since 1792, when a treaty of amity was signed following a war. Formal diplomatic relation with communist government of China started from August 1, 1955. In 1956, Nepal and China signed an agreement which replaced a treaty of amity concluded in 1856, at the conclusion of war between China and Nepal.

Since the establishment of the diplomatic relation in 1956, China has been a constant development partner, and as such it has significantly contributed to Nepal's infrastructure development.[54] Nepalese intellectuals believe that Sino-Nepal relations have always been characterized by a deep sense of understanding, friendship and cordiality.[55]

China has respected Nepal's sovereignty resolutely and firmly, and this has been in reciprocity to 'recognition of Tibet and Taiwan as integral parts China'. Nepal and China share 1,414.88 KM border. The border has been amicably fixed, and, unlike India and China, Nepal and China do not have any issue of border left unaddressed. One striking features of the Sino-Nepal relation is that the former has refrained to 'meddle or interfere in the internal affairs of Nepal', and it has proved its commitment to work with any segment that come in the power of Nepal. In addition, China has resolutely refrained to 'suspect Nepal of its engagement against security of China'. Obviously, the relation between Nepal and China is peaceful and stable.[56]

54. Over the years, China has provided more than two dozens of infrastructure plants as economic aid to Nepal. Its economic assistance has helped Nepal to build its capacity to supply, to some extent, the common needs of food, shelter, health, clothing, transportation and power. See, Prakash Chandra Lohani, nepalnews.com (Kathmandu Monday May 14 2001) http://www.nepalnews.com.np As late as 2002, the economic cooperation of China to Nepal has further increased. During King Gyanendra 's visit to China, in July 2002, two countries agreed to open a consulate office at Sanghai. Agreements were also signed between two countries, which ensured 780 million Nepalese rupees annual aid to Nepal. The grant was envisaged to construct 18 KM road between Rasuwa and Sabrubehi, to open a civil servant hospital and a polytechnic institute at Banepa.
55. Ibid.
56. Chinese government has been smart enough to 'maintain a peaceful and stable relation' with its southern neighbors like Nepal, Bangladesh, Bhutan, Myanmar and Pakistan, which India has consistently failed. M. Zafar, columnist, says, "China wisely acquired a good measure of it by being friendly to its neighbors. India insists to browbeat its neighbors into submission and has met with nothing but frustration". See, Face of New Chinese Diplomacy, Defense Journal, September, 2000. www.defensejournal.com/2000/sept/chinese.htm

China is growing as an economic as well as political superpower. Its relation with other countries, including its neighbors, is not sporadic and undersigned. Obviously, the Sino-Nepal relations also need to be considered in totality of its international diplomacy. The following characters are important:

- Chinese diplomatic efforts in the Indian subcontinent are two-pronged: one aimed at the pursuit of ultimate geo-strategic objectives in the company of India, the second effort is tactical and devoted to widening the windows of cooperation with India. The American interest in this regard is crucial. The point where continental interests of America and Asia collide is exactly the point where Sino-Indian interests coincide.[57] The Chinese diplomatic agenda concerning the Indian subcontinent is thus largely determined by the American and Indian relations. Their close cooperation and alliance will enhance the Chinese effort to strengthen its ties with other South Asian nations, and increased cooperation and trust between India and China will draw it to added 'neutrality'. Obviously, Sino-Indian relation will have 'bearings on the nature of Sino-Nepal relation'. Nepal's security interest in fact is better protected by increased cooperation and mutual trust between China and India.
- China has been cautious of international disorder that might jeopardize its rapidly growing economy. Peace and tranquility in and around China and throughout the world serve its best interest. Obviously, China's diplomatic interest is guided by 'a policy of non-engagement in conflict'. The scope of further improvement of the Sino-Indian relation is greater,[58] which will significantly ease the 'tension created by the strategic placement of Nepal'.

57. Ibid.
58. India and China have agreed to peacefully resolve their border problems. In autumn 2003, China and India held a meeting that yielded significant progress on their long standing border dispute, and their respective claims to Sikim and Tibet. Most importantly, Chinese and Indian warships have just held unprecedented joint exercises, while Sino-Indian trade has expanded from 2 billion dollars to 10 billion dollars in four years. See, Francis Fukuyama, China: Global Citizen or Growing Menace in The Daily Yomiuri, 2004/05/17. www.asianewsnet.net

- Over the last decade, there has been a vast shift in the traditional Chinese diplomacy.[59] For examples:[60]
  - China during 1990s ratified the Nuclear Non-proliferation Treaty, the Chemical Weapons Convention and the Comprehensive Test Ban Treaty. China at the same time has taken a much more active role in large multilateral institutions.
  - China used to abstain from UN Security Council resolutions authorizing the use of force because of its concerns that they would violate the principle of sovereignty. But in recent years this changed. China, for instance, voted for Resolution 1441 that sent weapons inspectors back to Iraq, arguing that the latter had defied the UN's authority and by all accounts played an active and helpful role crafting Resolution 1511 on the transition to Iraqi sovereignty.
  - One of the most significant shifts has been in Chinese policy to North Korea to resolve the Nuclear Weapons problem.
  - China has been gearing its roles in constructive regional diplomacy and institution building, involving the Association of South East Asian nations, Japan and South Korea.

These shifts largely assure the role of China in promotion of regional as well as international peace. However, failure of Nepal to understand this shift of Chinese diplomacy is obvious. Tilting to south

59. 16th National Congress of the Communist Party of China has mandated the government to take fresh efforts to create a new situation in diplomacy and help to bring about favorable international conditions for China's modernization drive. As outlined by Jiang Zemin, General Secretary of the CPC, in his report to the congress, the China's diplomacy in the years is to stress the need of maintaining world peace and promote common development. The delegates emphasized that it was possible to maintain peaceful international and favorable neighboring conditions for a relatively long period of time to come as the trends toward multipolarization and economic globalization have provided opportunities for world peace and development. The Congress has thus pledged for better economic cooperation and international peace as a foundation of the future diplomacy of China. Emphasis on favorable neighboring conditions has indicated to 'better relation with neighboring countries'. The India's stereotyped security concern from the north is thus largely outdated. See for detail, Xinhua News Agency, November 14, 2002. www.china.org.cn/international/48717.htm

60. Ibid.

in military affairs might seriously affect the 'Sino-Nepal relations in the days to come'. However, China's failure to understand Nepalese people's democratic concerns is seen one of the reasons to increasing dependancy of Nepal on India.

Japan: Japan has been a constant development partner of Nepal over some decades, and their relations are always friction free. Japan's assistance to Nepal comprises agriculture and human resource development, natural disaster prevention and management, health and education infrastructure development, and basic infrastructure development such as road and bridge construction.[61] Japan's involvement in the South Asia has been marked by two spectacular features: one promotion of bilateral relation through enhanced economic cooperation among individual nations of the region;[62] and second the reduction of the proliferation of nuclear weapons in the region which obviously threatens the peace in the region and world at large. Obviously, its relation with Nepal is founded on different parameter than that with India and Pakistan, the nuclear powers of the region. Japan-Nepal relation is fully founded on the mutual understanding of peace and prosperity of the people of Japan and Nepal.

Over the years, Japan has shown its keen interest on peaceful resolution of the Maoist insurgency, which is causing great setbacks in Nepal's development efforts. Japan has firmly stood in support of the resolution of the problem by dialogue. Its disinclination to provide military support to the resolution of the problem holds the significance of human rights

61. Japan's financial assistance is crucial in development projects of Nepal. So far it has extended billions of dollars to the development of Nepal.

62. Nepal and Bangladesh are non-nuclear nations and have maintained stable relations with Japan. Its relations with these two countries are fully related with 'economic cooperation'. The political agenda is less obvious in relations of Japan with these two countries. Japan highly appreciates their commitment to cooperate in reduction of nuclear proliferation in the region. Japan's relation with India and Pakistan is not so stable and easy like other countries in the region as they represent nuclear powers. India and Pakistan have been embroiled into several conflicts over the past. In this context, the politics is not out of scene in the relations of Japan with these two countries. For instance, in 2000, the then Prime Minister Mori of Japan urged these countries to indulge in dialogue to address their problems and also explained Japan's stand concerning nuclear disarmament and non-proliferation issues. This indicates to a fact that Japan's relations with India and Pakistan is largely dependent on their attitudes to 'nuclear disarmament and non-proliferation'. Nepal in this perspective is a country for stable relations with Japan in the region. See, Visit by Prime Minister Mori to South Asia (Summary and Assessment). The Ministry of Foreign Affairs of Japan. August 28, 2000. www.mofa.go.jp/region/asia-paci

as well as the protection of democracy. The following excerpt of the country statement of Japan in the Nepal Development Forum Meeting at Kathmandu is a 'crux of the Japan's policy to relation with Nepal:

> *"Japan believes that the spirit of overcoming difficulties with self-reliant efforts is the most fundamental driving force for development programs. Furthermore, the reinstatement of peace is a prerequisite for development activities. Therefore, Japan urges HMG of Nepal to put every effort in resolving the prevailing conflict through dialogue with all the conflicting parties. Japan will continue to support the efforts of HMG of Nepal on the approach in tackling the two key issues simultaneously-restoration of peace and alleviation of poverty*".[63]

Japan's interest to assist Nepal in its development efforts is sincere and honest. Obviously, to raise the living standards of the people of Nepal has been one of the core concerns of the Japan's assistance to Nepal. As a matter of fact, Japan has consistently urged and encouraged Nepal to promote industrial development under leadership as well as increased involvement of the private sector.[64] Japan's policy to relation with Nepal is thus fully founded on its broader conviction to international peace and security, i.e. to bring an end to the conflict for addressing the issue of human security, consolidation of peace, and poverty reduction, maintenance of international peace and security by eradicating terrorism, and disarmament and nonproliferation of nuclear weapons. Under these premises, Japan has highlighted its foreign policies as follows:[65]

- In order to consolidate peace, maximum participation and cooperation of international community is necessary. Ownership for peace should also be promoted.
- For preventing terrorism, it is essential for all countries to strengthen their counter-terrorism measures from the standpoint of denying terrorists who act across borders safe haven and means to commit terrorist activities and of overcoming vulnerability to terrorism.
- Every nation must pursue 'Three Non-nuclear Principles' of not possessing nuclear weapons, not producing nuclear weapons and not permitting their introduction to Japan.
- It is important for the resolution of conflicts not only to monitor ceasefire but also to address the root cause of conflicts.
- Poverty reduction should be a key development goal shared by the international community

63. See, Nepal Development Forum 2004 (Japan's Country Statement). Embassy of Japan in Nepal. www.np.emb.go.jp
64. Ibid.
65. Source, The Ministry of Foreign Affairs, Japan.

Nepal's Relation with Some other Important Countries: Denmark, Canada, Australia, Britain, France, Switzerland, Germany and Norway are other some important countries Nepal has been maintaining relations for considerably long period of time. Of them, Britain has maintained its relation with Nepal since Sugauli Treaty. It has been one of the countries helping in development affairs of Nepal. However, Nepal's contribution through Gurkha regiment to the British government definitely outweighs that what is obtained by Nepal in reciprocity. Britain's military tie with Nepal provides dissimilarity in relation to that of many other European nations.[66]

Bilateral relations of Nepal with countries like Denmark, Canada, Australia, France, Switzerland and Germany are largely founded on financial assistance to the development projects of Nepal. Danish cooperation to Nepal is substantial in the areas of primary education,

66. Britain's position in Nepal's international relation is influential. Even in the context of Maoist conflict, its appearance is significant. It has been playing vital role in military support to the HMG, to get rid of Maoist. On February 19 2002, British Parliamentary Under Secretary of Sate for Foreign and Commonwealth Affairs responsible for South Asia, Ben Bradshaw's statement shows pervasive interest of the British government in Nepal's current conflict. He said: "We are worried about Nepal's security situation and our cooperation in this regard will be continued". On may 19 2002, Michael Boyce, Chief of Britain's Defense Staff, visited Nepal to discuss on the potential British military and development assistance to the Royal Nepal Army in fighting against the Maoist rebels. On June, British Government assured to increase the military support from 0.7 to 7 million sterling pound annually. on July 24, 2002, British Embassy in Kathmandu revealed that the UK Government announced an aid package of 650 million to tackle Maoist insurgency and two transport aircraft to Royal Nepal Army. The UK Foreign Office Minister O' Brian visited Nepal on October 9 to chair the first follow up meeting to the international conference of friendly countries on Nepal. See for detail, www.fesnepal.org/reports/2002/annual_reports/democracy_report_2002.htm

forestry and democratization process and good governance. Switzerland has been engaged in roads and suspension bridges construction. Australia has been long involved in preservation of forestry and reforestation. Although these countries' assistance is immensely important in restoration and preservation, their influence in the Nepal's international relation is less obvious. Except UK, all these European countries have stood firmly in the line of 'peaceful resolution of the present conflict', and have abstained from providing military support to the State. However, their disinclination to military support is 'passive', as it has failed to counter active military support of other countries. These countries have thus largely failed to pressurize the Nepalese government to seek active way to peaceful resolution of the Maoist conflict.

Conclusions:

As it is obvious from the discussion, Nepal's foreign relation has been significantly expanded and enhanced over the last 50 years, and it has taken a great shift after 1990, following restoration of democracy in Nepal and new developments in power equation after the cessation of cold war. Some features of the Nepalese foreign relation in the changed context can be summed up as follows:

- The financial cooperation of friendly and neighboring countries has significantly been increased over the years. Japan has been a consistent partner for the economic as well as infrastructure development of Nepal. Following the restoration of democracy in 1990, countries like Denmark and Norway have come up with significant support in the field of 'democratization and enhancement of the good governance'. Moreover, UN has made significant contribution to the enhancement of democratization and good governance. This positive development has been a fruit of Nepal's reentry into democratic community. The expansion of the economic cooperation in terms of amount as well as the countries, has expanded Nepal's interaction in the international community, and as such is helpful to come out of position created by constraints associated with difficult geo-political location.
- However, due to the rise of Maoist insurgency largely instigated by the failure of 'political leadership to achieve consolidation of democratic process', the foreign relation of Nepal has come to a 'point', where the increasing military assistance is pouring in. This development is potential of affecting 'neutrality-based diplomacy', which is so crucial for its secured existence.
- In addition, the foreign relation of Nepal is increasingly diversified in the context of Maoist insurgency. Currently, Nepal maintains diplomatic relations with many countries which are distinctly divided in approach to deal with the issue of insurgency. China and Japan along with European countries, except UK, have consistently urged Nepal to find peaceful political solutions of the crisis, whereas countries like India, USA and UK are keen to leave military option open and let it go side by side with political solution of the problem. In this context, sophisticated weapons are entering into Nepal. The size of the military and armed police force is incessantly increasing, consequently a huge part of the national income is being shifted to 'arm expenditure', thereby hindering the development projects.
- In the context of mounting conflict, the violation of human rights is emerging as a serious problem. Over twenty thousand peoples have lost lives, and thousands have been displaced or affected by the conflict. The human rights violation by conflicting parties is incessant. Mounting incidents of determinate killings and disappearances by the State's security force and kidnappings and gruesome killings by the rebels have earned to the nation a sad distinction of being among the world's prime locations for enforced disappearances and determinate killings. According to U.N. Working Group on Enforced Voluntary disappearances, Nepal had the highest number of disappearances in the world in 2003.[67] Unfortunately, this unprecedented level of human rights violations has not been a concern of countries that have been pouring assistance in Nepal. Obviously, the increased amount of military assistance and

67. Human Rights Watch, *Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War. 2003.*

violation of human rights with impunity is threatening a very fabric of the Nepalese democracy.

- In the present context, Nepal is being gradually drawn to the 'helm' of southern neighbors' security umbrella. Moreover, an emerging partnership of the USA and UK with India in security and other international issues, and their joint military assistance to tackle Maoist insurgency in Nepal is likely to have far reaching impact on Nepal's traditional 'equidistance' policy to neighbors. This development might create a 'difficult' situation to Nepal in future. In domestic situation, this development might help military element prevail over the democratic norms and values. Internationally, Nepal might loss its ever standing 'non-aligned position'.

Right Direction to Go:

Nepal needs to emerge smart to define its foreign policy. The long-standing 'psyche' that Nepal is a 'weaker and vulnerable' nation needs to be removed. Nepal has to learn live strategically in accordance with the changed context and demand. It has to be able to understand that 'China and India' are markets for its commodities, and to gain its strength to harness that potential, Nepal must prepare itself to move ahead with enthusiasm and optimism. Nevertheless, Nepal should not forget that this potential can be avail only through 'conscious balance' in relation with its two big neighbors. To move forward to the said direction, Nepal must pursue the following policies with full determination:

- The open border between Nepal and India need to be pragmatically regulated. The pragmatic way to do it is to 'fence the border leaving the exit points open for free and unrestricted mobility of the peoples of two countries'. The meaning of the 'open border' should not be taken as something to neglect the need of maintaining and regulating borders that might be exploited for illegal or criminal purposes. The systematic regulation of borders would help reduce the 'security concerns of both the countries'.
- In the given strategic geo-political situation of the country, it is plain for all that it would not be possible for Nepal to defend its independence and integrity by 'military strength'. Survival

of Nepal is fully dependent on its 'constructive neutrality', which can be defined as "Zone of Peace". As the concept of Zone of Peace connotes 'non-alignment, complete disarmament and elimination of military strength', the maintenance of a huge army is meaningless. The Zone of Peace signifies that Nepal has no one to fight with. The concept of Zone of Peace will tremendously help Nepal to 'transform itself into a intermediary station for the trade and commerce between China and India'. This concept will thus establish Nepal's position as a 'liaison country for two powers of Asia'.

- Economic diplomacy' should be the crux of Nepal's foreign policy. Nepal being placed in between China and India should be a 'free trade zone' and "free port' for both countries. Nepal's prosperity and existence are dependent on developed trade and commerce. Nepal can share vast energy with these two countries. To achieve this goal, the civil society and political elements must work for:
  - redefining the Nepal's position as a peace zone,
  - resurrecting the optimism of unhindered and unchallenged existence by removing the negative or inferior psyche of the peoples
  - redefining the 'governance system and its structure', with indispensable emphasis on 'autonomy of the people at local level',
  - recognizing the diversity as the 'core value of the Nepalese national life',
  - changing the education system to make the future generation to compete, become self-reliant and maintain allegiance to the nation.
- The development of the national consensus to achieve this goal is where the 'beginning takes place'. The development of the consensus on the other hand is dependent on enhancement of the 'democracy and good governance'. The enhancement of the 'democracy and good governance' in turn requires 'resurrection of the new political forces' i.e. the growth of the visionary youth leadership. These changes will ensure much more

assistance, honor and dignity from the international community. The resolution of the Maoist insurgency thus calls for 'emergence of a new leadership' in the country capable of representing 'all segments of the society'.

- Nepal should strive for becoming a 'center for international affairs'. The endeavor for securing a 'regional headquarters' should be emphasized, and for that necessary environment and infrastructure should be developed. Nepal being a 'birth place of Buddhism as well as the place for religious tolerance' should be developed as a sanctuary of peace. It should be destination of peace and education for peoples from all over the world.

Finally, the Government must immediately strive for bringing the rebels to the table for peace, and for this 'the constituent' assembly must be meeting point. The restoration of "House of Representatives" is a precondition for 'holding the constituent assembly election. No legitimacy of the declaration of the 'constituent assembly' is entrenched without a 'constitutional forum to transform the power'. The civil society has thus great role to perform for generating 'consensus' for 'restoration of House of Representatives leading to Constituent Assembly Election'

Roles, Opportunities and Challenges of the Juvenile Justice System in Nepal: Need of a Diversion from the Criminal Justice System

6

Some Theoretical Premises:

The concept of diversion in the context of juvenile justice system emphasizes on children's accountability from a developmental perspective. The idea of diversion in this context, in a very simple note, is a departure from the traditional concept of the criminal judicial administration that renders children criminally accountable for their acts which have allegedly harmed others. The concept of juvenile justice system which necessarily attaches the juvenile acts with criminal justice procedures denies treating children differently than adult offenders.

The underpinning objective of this traditional concept is to punish the child offenders for his/her acts which harm others. However, no theory of justice has been able to rationally justify that a child can be subjected to the criminal liability of his/her act that comes to conflict with a law. The objective and notion of the criminal justice system in the context of child justice is thus obviously challengeable.

The old fashioned system of justice has failed to create a positive impact in prevention of the child delinquency. It has failed to take preventive as well as restorative approach into account while dealing with the child who has committed acts against the law. Juvenile courts in the western countries have widely experienced the failure of the juvenile court. In many countries juvenile courts are being challenged by an increase in the number of child coming into conflicts with laws before them. As Child Delinquency Bulletin Series, May 2003,

cites; the US juvenile courts, alone in 1997, handled 1, 80,000 juvenile offenders younger than 13 years old. These child delinquents accounted for 1 in 3 juvenile arrests in arson, 1 in 5 juvenile arrests for sex offences and 1 in 12 juvenile arrests for violent crimes.[1]

Studies conducted by Office of the Juvenile Justice in USA demonstrate that youths referred to juvenile courts before the age of 13 are far more likely to become chronic offenders than youths whose initial contact occurs at a later age. This finding gives a reason for concern about growing number of child delinquents in the context of countries like USA.[2] A number of psychological studies have pointed out those teenagers often tend to be idealistic in thinking about what "should be", intolerant of anything that seems unfair from their perspective, and vulnerable to a moral that values loyalty above all.[3] The tendency of inquisition and deviation from what is entrenched as a value is always great among the juveniles. Moreover, they are less aware of the importance of system of order and its mechanism as well as procedures. They therefore less care and respect the process of formal justice system. The formal judicial treatment is potentially destructive of child psychology. It is counterproductive to the system as well. The formal system values its operational procedures higher to the interest and need of the child, which is a potential to instigate a "revolt" not only against the judicial system, but also against the so-called values or morals of the society. The use of formal judicial system to treat the juvenile offenders may, therefore, be in itself a cause for generating more juvenile offenders. This has been what is widely experienced at least in USA.[4]

The main and fundamental conception of child justice system is thus founded on need of protecting the paramount interest of the child, which essentially requires change in the traditional approach. The modern approach calls for 'developmental and restorative' justice. This notion of child justice system seeks to hold juveniles accountable for their actions by combining consideration on adolescent development process,

1. Office of Juvenile Justice and Delinquency Prevention. U.S. Department of Justice. USA.
2. Ibid.
3. See, Best Practices in Juvenile Accountability: Overview. JAIBG Bulletin, 2003. >htt://www.ncjrs.org./html/ojjdp/184754/intor.html<
4. See for detail, Child Delinquency: Early Intervention and Prevention. Child Delinquency Bulletin Series. May 2003. Office of Juvenile Justice and Delinquency Prevention. Department of Justice, US.

public safety and effects of victimization into a process that helps young offenders acquire empathy for those affected by their actions and make changes so they are less likely to put themselves and others at risk in the future.[5]

The answers to a question why juveniles need an alternative system of justice will amply justify the 'causes and efforts' for emergence of a 'diversion scheme' in the juvenile justice system. Answers can be enumerated as follows:[6]

- Children are inquisitive, and extremely concerned for justification of values they are instructed to follow. When these values create obstacles in matters of their free choice, they may tend to 'revolt' and disregard the values, and in many occasions they even come in conflict with laws. Nevertheless, they revolt for their own 'goodness' but not for the harms of others. The harms and injuries the others sustain is thus conceived only as an indirect consequence. In such a state of affairs, the imposition of a punitive sanction against them would be inviting more serious revenge or revolt from their part. As a matter of fact, for juvenile offenders to take responsibility for their actions, they need to be helped to think beyond their first response to the perceived or real unfairness of adult, lack of opportunity, or rivalry with another group and assisted in understanding consequences.
- Fear is another factor for children being able to make right choice of decision. Frequently, juveniles who use weapons do so when they feel threatened and their judgment is distorted. For young people who have felt intimidated because of their gender, race or as victims of physical or sexual assault, self-protection is an understandable defense against helplessness.
- Young offenders need to learn mature through process, (which include anticipating the consequences of behaviors, developing and following a plan, imagining the worst

5. Pranis, K. Guide for Implementing the Balance and Restorative justice Model, Washington, D.C. US Department of Justice Office, Juvenile Justice Program. 1998.
6. 'A Celebration or a Wake? The Juvenile Court After 100 Years. Washington D.C., Coalition for Juvenile justice, 1998. pp. 43-44.

outcome of actions, seeing alternative choices, and acquiring other aspects of critical thinking skills and abstract thinking), and to gain empathy so they can understand what they have done to their victims and can do make amends to them and to the community.

- Many young offenders have neurological problems resulting from substance exposure in utero. Many have failed in schools for years. Many live in high-crime neighborhood where it is difficult not to be involved in delinquency. Many seem hopeless about employment prospects. Young people behave better when their strengths are appreciated and they become involved in programs that build their competencies rather than punish them for their deficits.

Griffin has described three interdependent areas of accountability:[7]

a. For young offenders, recognizing that they have done and are taking action to make amends victims and the community.

b. For community, reinforcing young offenders' efforts to make reformation by teaching them and volunteering in restitution and mediation programs rather than sending to prisons or out of community; and

c. For the juvenile justice system, restructuring "to hold itself responsible for outcomes and devise a carefully designed large range of response to juvenile crime".

The theoretical discourse above amply suggests that the juvenile justice system as an essential part of the criminal justice system ignores the paramount interest of the child, and as affects the interests of the community as well as the victim. Since the young people think differently than adults, are emotionally immature, and do not have fully formed moral values, the existing traditional paradigm of the juvenile justice system does not address the need of the child. As indicated above the juvenile accountability requires a combination of skills building, reparation to victims, and citizen

7. Griffin, P. Developing and Administering Accountability-Based Sanctions for Juveniles, Washington D.C. US Department of justice, Office of the Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 1999. pp, 2-3.

protection in an approach that encourages the development of young people so they become contributors to the community.[8] As the Coalition for Juvenile Justice described in its 1998 report to the congress:

"Because juveniles are developmentally and socially different from adults, they are more likely to be rehabilitated by carefully designed and tested treatment programs than by a purely punishment-based sanction system.... Young people who break law must be held accountable for the consequences of their illegal behavior... by a legal system that balances the protection of the community, the developmentally appropriate correction of juveniles who violate the law, and the protection of the legitimate rights of the victims of juvenile crime".[9]

To sum up, the separation of child justice system as an independent system is justified by the following grounds:

- No child is considered capable of committing a crime, as the crime is an outcome of the pre-conceived thought and pre-determined action to transform the thought into reality. An act of child constituting the violation of law is not an outcome of the pre-conceived thought, nor is it materialized with pre-determined plan.
- No child is criminally liable to be punished for his/her act. Although, his/her act harms others, he/she is considered equally affected thereby needing a help to come of this situation.
- The child justice system should be concerned with the correction and rehabilitation of the child thus benefiting the community as well as the victims. The criminal proceeding of a child is potential of destroying him/her psychologically and socially, the ultimate consequence being the transformation into a state of criminality.

The perception that the juvenile justice system is an integral part of the criminal justice system is, therefore, inherently defective. This perception is intrinsically founded on a number of wrong notions

8. Ibid.
9. A Celebration or a Wake? The Juvenile Court After 100 Years, Washington D.C., Coalition for Juvenile justice, 1998. pp. 43-44.

concerning the child's treatment in and by the family and the society, which subject the child into a number of adverse circumstances.

The concept of criminal liability of the child's act is based on idea of obliging him/her to the perceived obligation of molding in accordance with entrenched values of the society. The conflict between the child's choice and societal values is, therefore, always potential. Any act of child in antagonism to the perceived obligation is defined to be a threat to the existing norms of the society. In this context, the juvenile justice system as a part of the criminal justice system is taken as an instrument to reinforce the loyalty from the child to the traditional/entrenched values of the society. Consequently, a child who comes into conflict with laws is thus necessarily subjected to criminal liability in order to protect the entrenched values in disregard of the best interest of the child.[10]

Nepalese Context:

The juvenile justice system in Nepal, in practical sense, is hardly different from criminal justice perception in strict sense, i.e. prosecution and sentencing of offenders. Although there are some special provisions set forth by laws concerning special treatment of the child engaged in conflict with law, the procedure applicable to child in criminal proceeding is similar to that of adult. This situation makes the juvenile justice system in Nepal not only archaic, but also inconsistent with the spirit of the constitution and the provisions of the Children's Act, 1991.[11]

10. The conventional approach of the juvenile justice system is founded on the theories of sociological jurisprudence that emphasizes to maintain the balance of conflicting interest between an individual and the society in the favor of the latter. These theories call for use of laws as coercive instruments to protect the interests of society, the benefit or welfare of the larger number of people being the thrust. The individuality of the person is thus compromised to the interest of the society. The importance, need and recognition of the individual person's entity are disregarded for the purpose of upholding the sanctity of so-called social interest. The criminal justice system is thus postulated as an instrument to 'suppress all those affairs of individual members" that violate the perceived values of the society. The difference between a person of minority and majority in age is immaterial in this sense.
11. Article 26 of the Constitution of the Kingdom of Nepal, 1990, stipulates special treatment and welfare for the children. The Children' Act on the other had guarantees special safeguards to the children. These safeguards are however generally violated or ignored. For instance, children are incarcerated along with adults. Children are detained while investigation is undertaken, and most importantly they are fettered in handcuffs.

The Concept of God residing in child versus the wrong interpretation of *karmic*[12] philosophy: The wrong interpretation of the perception of "*karma*"[13] is instrumental for subjecting children to pervasive ill-treatment. The procedural aspect of the law is, of course, very heavily influenced by the Hindu doctrine of "*karma*". The *Muluki Ain*[14], which provides the substantial part of the procedural law, has been indirectly but immensely influenced by the Hindu doctrine of karma.

Till 1951, Nepal practiced an indigenous 'inquisitorial system' which emphasized the confession of crime as a part of "*prayaschitta*".[15] The perception of "*prayaschitta*" was applicable for people irrespective of age and sex. Accordingly, the criminal liability had been taken as an instrument of "*prayaschitta*", supposedly a good deed for next life. The child was thus subjected to criminal liability as a process of rectifying his/her misdeed in order to help him/her come out of the *pap* (sin) which was thought to be essential for his/her better next life.

12. "Geeta" a religious text on "Hindu Philosophy of Life" as expounded by Lord Krishna, one of the incarnation of the Lord Vishnu, one of the three Supreme Gods, explains that the 'life of human being is subjected to birth and rebirth till the salvation is achieved. The birth and rebirth is an outcome of the deeds in the past life. The present life is thus determined by the deeds in the past life. All acts of human being the present life are therefore viewed as the result of the past life, and to face what comes is a process to proceed to the next life. The commission of the crime was thus defined 'an outcome of the deeds in the previous life" – purbajanmako ko karma of phal. Irrespective of the age and sex, each person is thus subjected to face what comes to him/her. The punishment (*danda*) was considered as an instrument for 'rectifying' the wrong committed, so that the life marching to the road of the ultimate salvation (*paramatma*) is possible.
13. Hindu philosophy defines all acts of human being are determined by his/her 'good or bad deeds' in the past life. The destiny of a person is virtually determined by his/her deed. The type of life in the present form is a consequence of the deeds in the past life, and the act and its liability in this life is something governed by the dictates of the past life. The accountability is thus not only important from the perspective of law, it is equally important from the moral and religious perspective too. This philosophy founded on Bhagawata Geeta, highlights on "discharge of liability" for betterment of the next life leading to salvation. This perception is pervasive in all aspects of lives of Hindus, irrespective of age and sex.
14. Laws of the Land. This was the first formal codification of Nepal after unification of the Kingdom. The original code was promulgated in 1854. It was replaced by new one in 1964. Recognition of caste system and gender differences in matters of personality of individual, rights and privileges and system of penal liability were the foundation principles of the code. Protection of the orthodox Hindu values was the supreme objective of the code, which, among others, put children under strict discipline imposed by the parents or guardians. Children could be put under criminal liability for acts resulting in criminal offences.
15. Prayaschitta is 'absolution' from the guilt through internal realization of the misdeed. It is an internal aspect of the punishment.

The punishment for any undesirable or unacceptable act (*dharma*-religion-is defined as acceptable behavior, so that an unacceptable act was defined *adharma*-anti-religious) is, therefore, a mandatory process to rectify the mistakes or wrongs, and thus to lead to the ultimate salvation. In the Hindu society, the enforcement of the law has two fold objectives; firstly, the crime is an outcome of the *pap* (sin) in the past life, so that the punishment is an instrument to rectify the sin committed; and secondly, the punishment is an 'instrument' to reduce the degree of bad consequence of the *pap* for the next life.

This wrong interpretation of *Geeta*[16] has pervasive influence in the legal and justice system, including the one that is applicable to juveniles. This doctrine considers the crime not only a deviant act incurring the sanction-punishment- but it is also taken as a "*pap* affecting the substance of life in its chain of reincarnation". This doctrine has immensely negative connotation to the child's act that violates the law. It is, however, contradictory to the original philosophy of *Geeta* and several other texts that the child is an incarnation of the God. These texts have profoundly entrenched a conception that the child's soul is a residence of the God. The interpretation of the criminal act as a "karmic outcome" is therefore irrational and exists against profound principle of child's innocence and ignorance of the consequence of the act. The prevalence of the so-called *karmic* doctrine thus ignores the well-established Hindu belief that "the god resides in every child". The act of subjecting the child to criminal liability is therefore essentially an outcome of the wrong interpretation of the *karmic* philosophy.[17] The application of the wrong interpretation of the *karmic* philosophy has resulted in number of anti-child mentality and practice:

- A child committing a crime needs to be punished to rectify his/her next life. The punishment is, therefore, taken as a normal phenomenon. The low-criminal liability age,[18] the disregard of the need for preventing child from being affected psychologically, the lacking in consideration for circumstances forcing the child to commit violation of the laws while subjecting to criminal liability and sentencing, and disregard of the assistance to the child to socially and psychologically rehabilitate him/her are few very stark examples of laws being influenced by said *karmic* doctrine.
- The influence of the 'doctrine' is heavy and pervasive among the actors, and
- The juvenile justice system is essentially integrated with the criminal justice system.

Reforms of the System: After 1990, following the restoration of democracy, there have been attempts made to reform the juvenile justice system. The Constitution of the Kingdom of Nepal prohibits physical and mental torture of a person who is detained during the investigation.[19] It forbids cruel, inhuman or degrading treatment, and, moreover, provides for the compensation in case the torture arises. The Torture Compensation Act, 1996, enables persons subjected to torture for compensation, yet the Act has failed to criminalize the torture. It is one of the reasons, despite constitutional protection to torture, the children are vulnerable to both the mental and physical torture during incarceration in police custody.

Nepal hardly had any juvenile justice concept prior to the promulgation of the Children Act, 1992. Even after this development, the juvenile justice is not treated as a separate and independent system, thus obviously subjecting the children in conflict with laws to general criminal procedures and as such the prevailing practices exist in strake contradiction to the UN Convention on Child Rights, 1989. However, after 1990, a number of developments have ensured optimism. The ratification of the CRC is one of the most important developments, followed by promulgation of the Children Act, 1992. The following provisions of the Children Act have made serious attempt to modernize the juvenile justice system:

16. A socio-political and religious text which lays down code conducts for socio-political and religious lives.
17. Many Hindu Religious Texts refer to child as an innocent, incapable of harming others and devoid of any stigma as the God resides in the child. This perception about the child does not allow the legal and justice system define a child as an 'offender'. The perception that a child is an innocent and harmless person does rule out any possibility that the criminal procedure is applicable in an act of the child that violates the existing law. The provisions law that subject the child to criminal proceeding is, therefore, contrary to fundamentals of the Hindu *dharma* concerning the treatment of a child.
18. Clause 11 (2) of the Chidern's Act subjects a child above the age of 10 years to criminal liability of his act.
19. Article 14 (5).

a. Clause 7 strictly prohibits the torture and ill treatment of child in conflict with laws. Moreover, the Torture Compensation Act, 1996, capacitates the child tortured or ill treated during detention.[20]

b. Clause 11 prescribes a duty on law enforcement agencies and the courts to be liberal in matters of treatment and punishment. This provision helps the judiciary to adopt a child friendly sentencing policy.

c. Clause 12 prohibits 'recidivism' in the case of child. This is a non-negotiable provision.

d. Clause 15 prohibits stiffer sentencing.

e. Clause 42 provides for establishment of the juvenile reform home.

f. Clause 50 stipulates for suspension of judicial custody and punishment.

g. Clause 55(5) enables the government to work out procedures for composition of the juvenile bench in the district court. The juvenile bench may include social worker, child specialist or child psychologist along with the judge.

h. Section 55(6) enables the juvenile courts or benches; Procedure for juvenile court or district Court for trial of cases in accordance with the Summary Procedure Act, 2028 (1974), which sets a limit of three months for disposal of the case.

In addition, the following developments can be taken as important indicators of the reformative approach to the juvenile justice system:

a. Clause 9(2) of the Treaty Act, 1993, recognizes the supremacy of the international treaty and conventions in case the domestic law is contradictory to them. This provision provides a stronger foundation for the enforcement of the CRC.

20. Pursuant to Clause 83 of the Court Management Section of the Muluki Ain, guardian of the child may file a case in the District Court for compensation. The Torture Compensation Act is thus enforceable in the case of the child's torture through guardian.

b. The Supreme Court's instruction[21] to all trial courts to set up juvenile bench is another significant development.

c. Pursuant to the directive of the Supreme Court, the Ministry of Women and Children has set a Reform Home in Kathmandu with capacity to accommodate 60 juveniles at a time.

d. The positive intervention of the Supreme Court in a number of juvenile cases which prohibited the detention of children along with adults is also a remarkable development. These judgments have also obliged the government to set up the child reform home.

e. Creation of the baseline information and review of the legislation was equally significant development. The following research and activities are important in this regard:
   - Overview Research on Juvenile Justice System in Nepal with comparison to International Standards
   - Baseline survey on Juvenile Delinquency situation
   - Study on trend of Juvenile Delinquency in the Kathmandu valley
   - Psychosocial Analysis of Juvenile Justice System of Nepal
   - Development of Procedural Guidelines on Juvenile Justice System
   - Preparation of proposal for amendment of the laws for modernizing the juvenile justice system

21. In Bablu Godia V. HMG, Writ No. 3390. 2057 B.S. (2000), the Supreme Court instructed the Government to place Bablu Godia , a 14 years old child, in the juvenile reform home as prescribed by the clause 42 (3) of the Children Act. In **Keshav Khadka vs. Dhankutta District Court and others** (writ no. 3685 of 2000) , the Supreme Court held placement of minor in incarceration with adult as inappropriate. In, **Ashish Adhikari vs. His Majesty's Government and others** (writ no. 3391 of 2000) the Supreme Court obliged the Government to set up the juvenile reform home. In **Pode Tamang vs. Sindhupalchowk District Court and others** (writ no. 4022 of 2001), the Supreme Court reiterated the need of setting up of a reform home, and issues a stricture that the Government had given no **proper attention toward the rights and interests of the** children. In **Sarita Tamang vs Illam District Court and others** (writ no. 21 of 2001) the Supreme Court directed the Jail authority to release the Child as she was not put into a reform home. These judgments manifest a proactive attitude of the apex court towards reformation of the juvenile justice system in Nepal.

- Development of the electronic data-base and scheme for exchange intra-and inter country information
- Preparation of training curriculum for the actors of the juvenile Justice System
- Training to 110 professionals from various agencies

Kathmandu School of Law (KSL) which played a crucial role of conducting research and coordinating the activities is a pioneer institution to intervene in this situation for positive transformation.

Problems:

Despite a number of successful interventions and successful stories in the past three years, a number of problems still loom large. These problems need prompt and systematic interventions.

1. The present law on criminal liability of the child is fixed at extremely low age. The current law therefore exists in stark contradiction with the CRC and international practice. Section 9(2) of the Treaty Act, 1993, of Nepal stipulates supremacy of international treaty or convention ratified by it to laws that exist in contradiction with such treaty or convention. The amendment of the existing laws negatively affecting the best interest of the child is thus considered one of the most serious problems needing immediate intervention.
2. Juvenile justice system is traditionally considered as an integral part of the criminal justice system. The existing criminal justice system suffers from a number of problems concerning fair and impartial trial, and juvenile justice system in this context is no exception. The trial procedure is lengthy and troublesome. Children have to wait long process of trial, and consequently psychologically their interest is negatively affected. Investigation system is not pro-child or child friendly. The following factors render the problem persistent affecting the best interests of the child affected:
   - Actors of criminal justice system are not sensitive to the child friendly procedures and process,
   - The government of Nepal had developed no special plan of action to develop a child friendly justice system,

   - The civil society is equally insensitive to the rights of child to the child friendly justice system,
   - Concept of diversion system is grossly lacking,
   - Criminal Procedures applicable to adult offenders are equally applicable to juveniles,
   - The existing mentality of the actors of the criminal justice system is not suitable for the diversion system
   - There has been a lack of coordination among the actors of criminal justice system and other concerned government institutions, as well as between the government and the civil society
   - There has been a great lack of human resource like child psychologist, child right activists, etc.
3. Lacking of mechanism for monitoring and oversighting the juvenile justice system is also considered as one of the major problems. Judiciary still has not been able to materialize the concept of juvenile court although there has been a policy of establishing a separate Juvenile Bench in each trial court. The judiciary has complete lack of concept of juvenile bench or court at the higher level of the judiciary.
4. Inadequacy of Reform Homes is also a major problem. After positive intervention of the Supreme Court, the Government has created a Reform Home at Kathmandu, but it can hardly address the problem of other parts of the country.
5. Children are not exception to exercise rights regarding criminal justice guaranteed by the constitution. However, there are instances of denial for providing such rights at the pre -trial stages. It is said that the juveniles are in most vulnerable situation in the immediate phase after their arrest. They are put into a hostile environment and ill treated. There is no specific cell for minors in police station, in some cases; police officers falsify the date of arrest of the minor accused. A report made by CWIN in 1996 shows that 81% of young offenders were detained in police custody and subsequently mistreated. Among them 36% were beaten during interrogation, 11% were forced into labor, 7% were threatened and abused, 3% were kept starving, 21% were deported to the city boarder, and 3% were sent to adult

prison. One may differ on the accuracy of figures as it is shown by the CWIN. But it is an unanimously accepted fact by the researchers that a large number of juveniles are mistreated at the time of arrest and while they were in police custody.[22]

Reform Agenda:

The modernization of the juvenile justice system requires multi-pronged approaches and schemes. Some of them are highlighted as follows:

- Amendment of the Children Act in order to incorporate the concept of diversion and address the present state of ambiguity is thought to be the first step to begin. As it has been widely discussed before, the juvenile justice system has been taken as an integral part of the criminal justice system, and the Children's Act has not been able to address this ambiguity and error.
- Strengthening the capacity of actors/stakeholders of the child justice system by strengthening the sensitivity and culture of child friendly treatment in all aspects of juvenile justice system is another area of prime concern.
- The Supreme Court played pro-active role in reforming the system. However, the sensitivity of the lower courts is negligible. The trial courts, in particular, are found indiscriminately placing the children in judicial custody. The pro-activeness of the lower level courts has to be strengthened. In the meantime, the following interventions are considered as priority agenda:
  - Widespread application of judicial activism in the juvenile issues;
  - Formulation of a separate body of procedures for investigation, prosecution and adjudication of the juvenile cases, emphasizing need of diversion in all stages.
  - Development of a monitoring and supervising mechanism, so that the functions of lower courts in relation to the juvenile issues ensure fair trial.
  - Setting up of electronic baseline information on juvenile issues.
  - Establishment of Central Steering Committee to coordinate between actors and stakeholders.
  - Arranging suitable trainings and sensitization programs for the judicial personnel; and
  - Issuing juvenile justice process guidelines.

22. Khatiwada, Ishwor, Nepalese Juvenile Justice System: An Overview, KSL Journal. Vol 3, 2004. Kathmandu School of Law, Nepal.

Conclusion:

Juvenile Justice System is an independent justice system which, without negotiation and compromise, looks after the best interest of the child. Obviously, it is fundamentally different from the criminal justice system, of which main purpose is to punish the offender. Developing and underdeveloped countries have less clarity of the concept of child personality, which is not perfect due to his/her physical and mental immaturity. This is one of the fundamental reasons for "criminalizing" the child act. The reform agenda therefore must concentrate on 'deconstruction' of the traditional or stereotyped concept of the justice. The development of the diversion from the criminal justice system can be an appropriate way to modernize the juvenile justice.

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7 Compliance of International Standards in Nepal: Critical Analysis of Situation of Fair Trial and Safeguard of the Rights of Accused in Nepal

Constitution of the Kingdom of Nepal, 1990, is a basic guarantee to fair trial in Nepal. The guarantees have been expressed through various articles.

- The **Preamble** of the constitution has recognized the protection of human rights as one of the basic features of the Constitution. This is an explicit commitment on the part of the State that it would respect the spirit of the international instruments on human rights.
- The **Preamble** has also explicitly made promise to people that it would adopt and implement an independent and competent system of justice. The commitment obliges institutions involved in the process of justice that they would work fairly, efficiently and independently. It means that the State recognizes the obligation of complying with the doctrine of rule of law and due process. It further means that any acts or actions of State's institutions against the said commitments result in denial of justice. **Article 1**[1] of the Constitution has animated these commitments.

1. Constitution has been declared the fundamental law of the nation. Hence, any laws, which are inconsistent to the constitutions, become null and void. This is how the State is prohibited to go against the sprit of the preamble. Otherway speaking, by virtue of the Article, the commitments of the State toward protection of human rights and independent and competent justice have been enlivened to be applicable in practice without any kind of limits. The argument often made by some judges, government attorneys and police officers in relation to compliance of minimum standards of fair trial that the situation should be viewed in the Nepalese perspective and reality but not in that of America and Europe, is not only reactionary but also ostensibly ultra-constitutional. This argument is fully baseless in the light of the preamble and Article 1 of the constitution.

- Another landmark provision to fair trial is **Article 12(2),** which unequivocally ensures a guarantee against deprivation of personal liberty save in accordance with law. This Article is landmark in the sense of prohibiting:
  - the extra-judicial proceedings and sentencing;
  - the extra-judicial killing;
  - the extra-judicial detention;
  - the extra-judicial trial, including summary trial;
  - the punitive detention; and
  - the violation or infringement of the procedures established by law.
- **Article 14** is an immediate and straight guarantee to the fair trial and competent justice. Provisions enshrined into the Article provide for safeguards to the citizens from:
  - two separate trials and punishment for the same crime,
  - forced or imposed confession,
  - use of retrospective legislation,
  - physical and mental torture, or cruel, inhuman and degrading treatment,
  - arbitrary arrest and detention, and
  - deprivation of the right to see and be defended by a legal counsel of choice.
- Article **23 and 88(1) and (2)** stand as provisions of remedy for violations of fundamental or basic rights guaranteed by the constitution. By virtue of these Articles, the Supreme Court, in some instances also the Appellate Courts, can strongly intervene in the situation and restitute the violated rights of individuals. The intervention of the Supreme Court can even extend to judicial review of the legislation denying of, or posing threat to unrestricted exercise of the fundamental rights. These guarantees have no limits and conditions allowing the actors of criminal justice to permit excuses.
- Clause **9 of the Treaty Act, 1990,** plainly upholds the sanctity of the international human rights instruments meaning that no laws or actions can be interpreted inconsistent to the standards of fair and competent justice[2].

2. In case of inconsistency between the provisions of Nepalese Law and provisions of an international treaty to which Nepal is a party, the provision of the treaty shall apply.

Treaty Obligations of Nepal:

As a member of the United Nations and other international as well as regional organizations, Nepal is party to large number of international human rights instruments. As of date, Nepal has acceded or ratified the following international human rights instruments directly concerned with fair and competent criminal justice and treatment of the prisoners:

- International Covenant on Civil and Political Rights, 14 May, 1991.
- Optional Protocol to the International Covenant on Civil and Political Rights, 14 May, 1991.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 14 May, 1991.
- Second Optional Protocol to the International Covenant on Civil and Political Rights.

By ratification of these international instruments, the Kingdom of Nepal agreed to follow the standards of criminal justice as stipulated therein. Therefore, no excuses can be tolerated in any level or forms of institutions, which are responsible to execute the fair and competent criminal justice. The Judiciary, including all levels, and quasi-judicial bodies have to interpret the laws in consistent to the standards declared in the conventions.

The practice, however, record far below standard in compliance with these minimum standards of criminal justice. Both the national studies and observation of the international community, including the UN Human Rights Committee discover utterly dissatisfactory situation in respect of fair and competent justice.

Although the problem of applying retrospective legislation and resort to process of trial twice for the same crime do no longer exist, the situation of use of torture, cruel inhuman or degrading treatment both for punitive and confession purposes prevails widely during the investigation, no instances of attempts on the part of the Government Attorneys and the Judges are found intervening the situation.

Compliance of International Standards and Enforcement of Constitution:

Arbitrary Arrest and Detention: As it becomes spectacular for the discussion above, at the constitutional and legislative level, Nepal

has gradually established a system consistent to rule of law and modern standard of criminal justice system. While significant achievement is made in respect of enshrining the principles, the practice of those principles in reality has received no encouraging accomplishment. A large number of arrests take place without warrant and suspects have been put into police beyond the constitutional deadline of 24 hours with impunity[3].

As discovered by a study on "Analysis and Reforms of the Criminal Justice System in Nepal, 1999, detention in the police custody beyond 24 hours, without concurrence of the judicial authority, is recorded in 37% of the cases. Similarly, suspects are arrested without warrant in 46% of the cases[4]. The report of the Amnesty International substantiates the findings of the study[5] . The violation of the international instruments and concerned provisions of the constitution is evident in the given situation.

Torture and other Forms of ill-treatment: In its report, the observation team of the Commission on Human Rights reported that the tendency of extracting confession is one of the main reasons for the quite frequent cases of torture or ill-treatment inflicted during investigations and , consequently, as a source of judicial error[6]. The volume of the number of incidents of torture reported by prisoners is serious. In the scrutiny of 222 criminal cases carried out, an allegation of physical torture for confessing the crime is reported by suspects in their deposition at courts in 50% of cases, whereas inhuman treatment, like handcuffing, verbal abuse etc, is reported in 19% of cases[7].

Legal Assistance: Guarantee of legal assistance by counsel of choice and adequate time for preparation for defense is most fundamental element of fair trail. This is where the criminal justice system in Nepal is seriously handicapped. Suspects are effectively and deliberately

3. Report of the Working Group on Arbitrary Detention. Addendum, Visit to Nepal, 26th November, 1996. Commission on Human Rights.
4. Report on "Analysis and Reforms of Criminal Justice in Nepal, published by CeLRRd. PP. 91, 96.
5. Amnesty international, Nepal, Human Rights at a Turning Point. 15 March, 1999. P. 6.
6. Report of the Working Group on Arbitrary Detention. Addendum, Visit to Nepal, 26th November, 1996. Commission on Human Rights.
7. Report on "Analysis and Reforms of Criminal Justice in Nepal, published by CeLRRd. P. 105.

preventing from approaching the lawyers in the initial stage of arrest. Generally, a suspect is allowed to contact or consult the lawyer only after his/her statement is recorded. Evidently, the whole process of interrogation is carried out without giving an access for suspect to consult his/her lawyer. Often, it is seen that the interrogation completes with extraction of confession. A survey of 321 prisoners reveals that none of them had been allowed to consult the lawyer before interrogation was completed and the deposition was signed up[8].

Role of Lawyers in Defending Fair Trail:

By disregard of the right to legal counseling and be defended adequately, all other fundamental rights associated with fair trial are ostensibly transgressed. In such a circumstance, post investigation representation of lawyers faces challenges, and as such becomes extremely difficult in the one hand and extremely sensitive on the other hand. In such a circumstance, the fight of defense counsel must be directed equally to representation of fact in issue as well as the legal issues. The problem of the Nepalese legal profession is that it is not generally sensitive to issues of transgression of the fair trial elements. The insensitivity is reflective in the following circumstances:

- Suspects make complaints of long prior detention before first remand (within 24 hours). Often, the prior illegal detention is mentioned in their statement made before the judge. Provided the illegal detention is proved, under the existing premise of constitutional provisions and UN standards for fair trial, the whole subsequent proceeding becomes marred and consequently extra-legal. In such circumstance, the role of lawyers begins with challenging the illegality of the detention and the whole process of investigation. However, Nepalese legal profession is not sensitive to such matters. It normally proceeds to adjudication process accepting the sanctity of the evidence procured by the police. The prosecution, which precedes illegal detention, itself is never challenged.
- As it is clearly established by naked facts and reports of the studies, the right of the suspect to have legal counseling is effectively and deliberately denied. Under the prevailing State Cases Act, 1993, the statement of the suspect is to be recorded in presence of the concerned Government Attorney. The statement is recorded as a final process of interrogation. During the whole interrogation process, the suspect is kept aloof from his/her guardians or relatives and deliberately preventing from approaching the lawyer. Considering that Government Attorney's role is to protect prosecution of innocent, he/she is stipulated to confirm whether the suspect had enjoyed a chance to consult his/her lawyer or not. However, instead of protecting the suspect's right of consulting the lawyer, the government attorneys are found actively supporting the police in evading the rights. The legal profession is not unaware of this circumstance. However, it is not found sensitive to issue that "an interrogation and whole process of investigation and prosecution effectively preventing the suspect from exercising the right to consult and legally assisted in defense", render the criminal proceedings extra-judicial. It is an established fact that no challenge of criminal proceeding is made on the ground that the right to defense was violated. The legal profession in Nepal takes it normally.
- A concept among the lawyers that the representation commences at court with arguments for bail, is predominant in Nepal. This is an outcome of insensitivity to the fair trail and the values of justice that "no one can be condemned without being heard adequately". Participation and follow-up of the procedures during the investigation and prosecution are therefore never made.
- The suspect and his/her defense lawyer is never given access to documents procured during investigation. Even the copy of statement made by suspect is kept hidden and access to it is deliberately denied. The charge sheet and other prosecution documents are not made available to defense lawyer or the suspect before hearing in the court for bail. The bail hearing determines the fate of the suspect as to whether he/she would be put into judicial incarceration- indeed in Nepal, it is virtually imprisonment because the accused is put together with convicted criminals. This is therefore momentum when an important decision is made about personal liberty of a person. In such circumstance, the accused deserves unrestricted privilege to

8. Ibid. P.135.

defend himself/herself. But how he/she can defend himself/herself through a lawyer where documents are not available to him/her.

There are several excuses made by police, government attorneys, and lawyers to these circumstances, and importantly the system of confession oriented investigation is primarily responsible to this.

- **Police:** Consultation between lawyer and the suspect prior to interrogation is completed, create hurdles to police to discover facts.
- **Government Attorneys:** This is not an accountability of Government Attorney to check this matter. There is no legal authority on them to instruct the police to respect the right of the suspect to legal counseling[9] .
- **Judges in the Trial Court:** It is not their responsibility to examine this issue while remand period continues. They have no legal authority to intervene in this circumstance. Rather, this is habeas corpus jurisdiction of the Supreme Court.
- **Lawyers:** There can be nothing running behind such things. The judiciary is not ready to act so pro-actively.

These excuses in totality render the criminal justice a mockery. The psyche of the various actors, including lawyers, of the criminal justice system is therefore major factor for non- compliance of the international standards of the criminal justice system. Pro-activation of the legal profession is therefore necessary for forcing the compliance of standards by various actors of criminal justice system.

The legal profession thus needs to prepare itself for taking up the challenges of enforcing the constitution and international instruments of human

9. I had a chance to a make presentation in a training program for the Under Secretary level of judicial officers. These excuses had been widely discussed. A participant responded "How could we behave in a way like Americans do" ? He said " It was not possible to get a lawyer for suspect". He further said " They are the Government Staff, and as such are not obliged to act as an independent institution and examine whether a suspect is innocent or not. According to him, the role of Government Attorney is confined to prepare the charge sheet. Thus, they don't feel necessary to make inquiry as to if the suspect had provided with access to have a legal counsel or not during police custody. This psyche of the prosecuting officers may random at least at the subordinate levels.

rights. Especially, the lawyers dedicated to represent the prisoners must strategize the actions for fair and competent criminal justice with priority of defending the following rights:

- Right to be informed of charges promptly and precisely.
- Right against forced and imposed confession.
- Unrestricted right to legal assistance from the moment of arrest.
- Right to public and adequate hearing.

While protecting these rights, a defense lawyer must be conscious of representing the suspect adequately in every stage of the proceeding. He/she should be conscious of removing the excuse or psyche that he/she has nothing to do with investigation and prosecution stages of proceeding. His/her service is more importantly paramount in these stages.

Strategies for Defense of Suspects:

Discussion above is fairly indicative of poor state of criminal justice system as well as the legal profession. It is not the academic background of the Nepalese lawyers, but their sensitivity towards gross violation of the elements of fair trail is a problem. Hence, breaking the iceberg of sensitizing the lawyers should begin with the following planing:

- **Protection of Right to Legal Assistance**: Right to Legal Assistance is unrestricted and unconditional right. Exercise of this right cannot be limited by putting limitations or imposing conditions. The following international instruments have affirmed the non-violability of the rights under any circumstance:
  - Article 7 and 9 and 11: Universal Declaration of Human Rights[10].

10. **Article 11**: 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 had all the guarantees necessary for his defense.

- Article 14: Convention on Civil and Political Rights[11].
- Basic Principles on the Roles of Lawyers[12].

The right to legal assistance covers the following various aspects:

- Receive legal advice of lawyer since the moment of arrest.
- To be interrogated in presence of legal counsel.
- Representation in hearing motions.
- Examination and cross-examination of the witnesses.

Right to legal assistance provides a good basis for protection of several other rights like, right against arbitrary arrest and detention, right to notice of charges, right against self-incrimination etc. Thus, the defending lawyer is supposed to jealously defend the right of accused to defense. No compromise can be made in this regard.

Scope of Legal Assistance: Scope of right to legal assistance is very much determined by the international instruments of human rights, national constitution and interpretations of the Apex courts. Supreme Court of Nepal in 1971 made a landmark interpretation in a Habeas Corpus case [13], which clearly laid down the principle that the legal assistance cannot simply be ignored on the ground that the detainee made no request for. This judgement indicated to the obligation of investigators that the detainee should be aware of his/her right to contact the lawyer. In this connection, defending lawyers should venture to uphold the following

11. **Article 14 (2)**: Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
(3): In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality,
(a) To be informed promptly and detail in a language which he understands of nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.
(c) 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 interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.
12. Access to Lawyers and Legal Services: (1) All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings. (2) Governments shall ensure the efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, color, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status..
13. Yagymurti Banjade v. HMG, 1971

principles laid down by a American Judgement[14] while interpreting the Article 14 of the Constitution of the Kingdom of Nepal :

- Legal assistance of a counselor of choice is an indispensable rule of due process of law.
- Deprivation of the right to legal assistance amounts to deprivation of liberty.
- Types of offence or punishment are immaterial for exercising the right to legal assistance.
- The right to legal assistance is a fundamental prerequisite to the very existence of a fair trial.
- The Right to be heard would be meaningless if the right to legal assistance is not unconditionally protected.
- Imprisonment without representation of legal counsel would amount denial of liberty.
- Even the statute cannot prohibit exercise of the right to legal assistance.

The legal assistance is paramount especially during the initial stage of interrogation. Under the premise of right to be heard properly, a suspect has to know about what are his/her rights and what is the procedures to be followed. In this regard, the Miranda case is worth mentioning which laid seven obligations to be discharged by the investigators in the beginning of the interrogation. The investigator must aware the suspect of the following:

- You have the right to remain silent.
- Anything you say can and will be used against you in a court of law.
- You have the right to talk to a lawyer and have him present with you while you are being questioned.
- If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
- You may stop answering questions at any time.
- Do you understand each of these rights, I have explained to you.
- Having these rights in mind, do you wish to talk to us now?

These requirements were propounded in Miranda V. Arizona case by the Supreme Court of America (384. US.436, 1966).

Especially, the legal aid lawyers, who are also proudly known as alternative

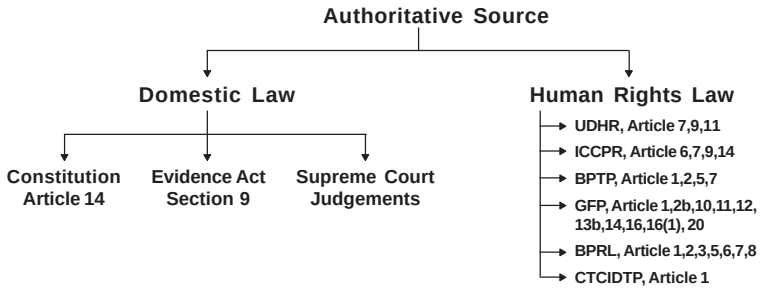
14. Arsersinger V. Hamlin, 407.US.25, June 12, 1972.

lawyers, are to be jealously encouraged to defend these principles while representing the case. In this connection, the following few approaches should be pursued in order to ensure fair trail:

Proposed Movement to Ensure Fair Trail in Nepal: The police and the government attorneys, for fully depending on investigation and prosecution respectively, still believe on confession as a decisive evidence for conviction. The courts enjoy entertaining such evidence without much care about the Constitution, Evidence Act and other international instruments. Viewing this situation, it is advisable for defense lawyers rejuvenate the legal profession with the following strategies:

- Approach the Government attorney and seek his assistance to secure the legal assistance is accessible to the suspect.
- If the Government Attorney is not cooperative, approach the district court for making intervention. In district courts, the judges have already done it.
- Appear in the court during remand process and argue the case.
- If the District court is not cooperating, initiate the Habeas corpus case together with other relevant writ jurisdictions, challenging the whole trial process. It is important to develop a strategy to challenge the legal sanctity of the evidence collected through a process, which exists in contravention to the constitution.

Strategic Structure of Defense:



UDHR : Universal of Declaration of Human Rights
ICCPR : International Convent on Civil and Political Rights
BPTP : Basic Principle for Treatment of Prisoners
GFP : Guidelines for Prosecutor
BPRL : Basic Principles of Roles of Lawyers
CTCIDTP : Convention against Torture and Cruel, Inhuman or Degrading, Treatment or Punishment

The focus of the lawyer while representing the suspect should be given on protection of the following rights:

- **Right to be presumed innocent**: The right to be presumed innocent is entertained by execution of some unavoidable principles of criminal justice. These principles have been evolved and enshrined into the constitution and laws to render the prosecutors pay full attention to the fair trial. Negligence of fully applying the principles in practice should benefit the suspects as rule.
  - **Right to Silence**: The principle that a suspect can remain silence stands as guarantee against the State forcing the confession. Pursuant to the principle, the accused is virtually immune from the obligation of proving his/her innocence. The immunity is fully guaranteed by the Article 14 of the Constitution of the Kingdom of Nepal, and Article 14.3.g. of the ICCPR.
  - **Guilt to be proved Beyond Reasonable Doubt**: This principle virtually imposes obligation on the prosecutors to recognize the right to silence of the accused. The Article 11.1 and Article 14.2. of the UDHR and ICCPR respectively recognize the principle.

Why Fair Trial and need to protect the Rights of Suspects Jealously:

The cost and risk of social breakdown and consequent impact thereof created by wrong investigation are more the matters of criminology and anthropology. In the given premise, therefore, we are more concerned with standard treatment of the detained persons, which is a basic requisite of a fair trial. The fair trial is necessary for following reasons:

- **State V. Individual**: State wields huge power and possesses strongly organized machinery for interrogating the suspect and collecting evidence against him. The same circumstance is not available for suspect to prove his/her innocence. Hence, the obligation of proving the guilt, without any relaxation, remains upon the prosecutors. His/her any prejudicial actions, therefore, not only create default in given obligation, but they are necessarily treated as illegal actions with consequences.

- **Suspect is in Custody of Prosecutor:** Suspect's liberty during the investigation is curtailed and thus he/she has been incapacitated to help himself/herself. Rather, he/she is in active and effective disposal of the counter party. In such circumstance, there is always a risk of the State being prejudicial to the detainee. Hence, he/she needs to be protected by help of lawyers and leniency of the court.
- **Suspect is affected by his/her Circumstances**: The suspect has to undergo mental tension as he/she has been isolated from the family of community. In such a circumstance, for fear of known or unknown consequences and resulting sufferings, he/she may not be able to decide what is good or bad for him. Hence, he/she is jealously protected by a lawyer since the beginning of investigation.
- **Suspect may Lack Resource**: Compared to the State machinery, human resources, logistic support and financial resource, the suspect is left in misery. In such a circumstance, it is implausible to believe that an individual can protect him/her. Moreover, the tendency of the prosecutor generally directs toward incrimination.

Out of the given situation, the following circumstances may appear:

- Being influenced by subjective analysis of the facts and circumstances, the investigating officer may act like a judge. He/she may, therefore, be prejudiced to the suspect, and as such, instead of engaging himself in discovering the independent evidence, he may indulge in using force to extract confession. And for that purpose, he may use means of torture. This would lead to miscarriage of justice.
- To hide the result of his illegal action, the investigating officer may deny the suspect to have the right to lawyers exercised deliberately.
- To suppress the evidence against the suspect, the investigating officer may cook or forge the real evidence.
- To disable the detainee for having effective defense preparation, the investigating officer may intentionally withhold the notice of charges.

These circumstances again lead to the miscarriage. In such situation, if judges, prosecutors or the lawyers don't become serious to their accountability, the process of justice will end at mockery, which is largely true in Nepal. This is why lawyers have to have taken lead to break the iceberg.

Community Responsive Legal Education for Community Responsive Legal Professionalism: Legal Aid not Facility but a Right to Access to Justice

8

Affairs like imparting legal education, development of legal professionalism and delivery of legal service to the community (legal aid in particular) are inseparably entwined. The quality of each of them affects the other necessarily. Yet, the professionalism operates in the center stage; for educational affair it is a goal to achieve and the legal service delivery an ideal to pursue. Professionalism is a concept widely articulated within the legal community, yet a clear and uniform definition remains elusive. Legal commentators from the academy, the judiciary, and the practicing bar continuously attempt to define professionalism with negligible resolution.[1]

Students of law are worse affected by 'elusiveness' in definition of legal professionalism. Often they are encouraged to define professionalism in very broad and abstract concept that encompasses various professional ideals and qualities, including good judgment,

1. Melissa L. Breger, et.al , *Teaching Professionalism in Context: Insights From Students, Clients, Adversaries and Judges. 55 S.C.L. Rev (South Carolina Law Review) 303(2004)*. Lawyers, law teachers, judge and public in general take "professionalism" in law in different tone. For lawyers, it means generally a technical mastery on law practice, whereas for law teachers it means more a 'code of conducts' required by the profession of law practice. Judges view it more in terms of 'lawyers' personality'. The community on the other hand takes it as 'legal wisdom or knowledge of law'. While there are a variety of opinions on the meaning of 'professionalism of law practice, there is a world wide consensus that there is perceived decline in professionalism in recent decades. Interestingly enough, legal education is supposed to have diversified and technologically become better than in the past, the assumption of 'decline in legal professionalism' pose a challenge to the

civility, maturity, competence, zealous advocacy, intelligence, honesty, and integrity. In this paradigm, the more one attempts to define the term, the more diluted and inadequate the definition becomes. Students then find nothing but a vigorous, ongoing debate over the meaning of professionalism.[2] The delusion students are subjected to face concerning the definition of the profession is not only a 'matter of disenchantment' but also a factor to push them into 'a danger of anarchy in belief, disorganized in pursuit of practice and visionless in development of career. The context of the society may be one of the best standards for defining the 'legal professional' pragmatically. It is an undeniable fact that legal professionalism is an elastic concept; its unanimous definition is, if not impossible, very difficult. If one does focus on 'legal profession' instead of 'abstract concept of professionalism, the result is that it is marked by 'pursuit of the learned art in the spirit of a public service.[3]

Legal profession comprises some indispensable fundamentals that constitute its 'professionalism". It embraces the realm of ethics, but also reaches far beyond. It also encompasses principles of appropriate attorney conduct and aspirational ideals for an effective advocate, counselor, officer of the court and member of the bar. In the context of less developed and less literate society where vast majority of people are marginalized, the legal profession also encompasses the 'responsibility or accountability' to protect and preserve general public from sub-ordination to, and subjection by, rulers or elite class. The legal profession in countries like ours thus stands in forefront of social and restorative justice. The legal education is therefore a justice education. Unfortunately,

2. There are myriad of definitions provided for professionalism. For instance, Jerome J. Shestak, President of American Bar Association in 1998, stated that "(a) professional lawyer is an expert in law pursuing a learned art in the service to clients and in the spirit of public service, and engaging in these pursuits as a part of a common calling to promote justice and public well". American Bar Association, *Forward to* PROMOTING PROFESSIONALIM; ABA PROGRAMS, PLANS AND STRATEGIES 3 919980. Professionalism has also been defined as 'the set of norms, traditions, and practices that lawyers have constructed to establish and maintain their identities as professionals and their jurisdiction over legal work. Robert L. Nelson and David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession, in* LAWYERS' IDEALS/LAWYERS' PRACTICE: Transformations in the American Legal Profession 1, 5 (Robert L. Nelson et. al. eds., 1992). Definition also denotes self-regulation o professional membership and conduct.
3. *"... In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism,* Report of the Commission on Professionalism to the Board of Governors and the House Delegates of the American Bar Association (August 1986).

the dynamics and dimensions of the legal education in the paradigm of justice education is hardly a matter of concern for legal education institutions in our regions. The discussion on issues of 'professionalism' hardly matters. Any meaningful scheme of legal education should therefore make an attempt to teach students about the contextual nature of professionalism.

Problems in Legal Education in a Society like Nepal:

Experiences of teaching law over the years in a directly or indirectly government controlled law school have helped to identify the following problems that seriously hamper to relate legal education with needs of community and qualitative service to the needy.[4]

a. **Teaching of Substantive Law to Develop Students Knowledge of Legal Principles and Theories:** Law schools are assumed to take charge of teaching professionalism to law students. However, law schools in Nepal are criticized to have been failed to teach professionalism adequately, if not meagerly. To adequately equip the students with 'fundamentals of professionalism', the teaching needs to be carried out by law professors along with practicing lawyers, which is popularly known as clinical legal education method. This method made no appearance in the legal education in Nepal till early 1990s. Obliviously, the scope of teaching law meant nothing but doctrinal instructions of professors on substantive law, the principal objective being to develop students' awareness or knowledge on fundamental concepts and principles of law. This method even failed to address basic requirements of 'developing

4. Kathmandu School of Law, in a students and teachers participatory research, has revealed a series of problems facing the justice system of Nepal. A case study, for instance, reveals the following scenario in relation to 'fair trial'. The Article 14 of the Constitution of the Kingdom of Nepal guarantees 'right legal counsel' as fundamental rights of persons. However, the detainees under police custody are hardly allowed to enjoy this right. Incidents of illegal and arbitrary detention are phenomenal in Nepal. Persons arrested by the police are neither given the 'cause and grounds of arrest' nor the notice of detention. Although the State Cases Act 1993 prohibits extension of remand beyond 25 days, incidents of submission of the charge sheet along the detainee on expiry of the remand limitation are frequent. Nevertheless, in none of the cases petition against such practice is moved to the court. Violation of procedural safeguards of detainees is simply ignored by the defense lawyers. They are found not inclined to 'challenge the legality of the detention', which is a serious violation of the right to fair trial. CeLRRd, *Trail Court System of Nepal*, 2002. Kathmandu.

students' skill in legal analysis, reasoning, and oral advocacy.[5] In its improved form, the doctrinal course emphasizes the ability to "think like a lawyer" and "to make legal arguments, clarify legal issues by adversarial process and choose from among judicial precedents the one most relevant to a particular question of legal interpretation. Thus, students, particularly in their early years of law schools, tended to equate 'legal professionalism' with ability to 'think like a lawyer', and a lawyer was necessarily portrayed as a person who vomited fire when he/she argued ruthlessly in the court rooms.[6]

b. **Indoctrination of Professors Idealism and Views about Professionalism:** As a common phenomenon, law students absorb messages of what it means to be a professional from law professors and cultural influences. How professors behave in class rooms is absorbed as proper professional behavior by students. Law professors, thus, can transmit the wrong message through their manner and conduct both inside and outside the classroom. In our law schools, the number of law professors who believe on 'elitist character of legal professionalism' is no smaller. What is often taught by them through behavior, joke and regular conversation is that 'legal profession is not fit for women, so-called lower caste people and those who have no 'loud and horrific' speech. Moreover, the 'communitarian'

5. Mark Neal Aronson in his article *Thinking like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 1-2 (2000), puts: "The traditional law school curriculum emphasizes thinking about what the law is and should be". What seriously lacks in traditional methods or curriculum is the emphasis on 'critical and empirical' understanding of the function of law and lawyers' roles in rendering the profession of law practice responsive to community's need.

6. Lawyers' personality or identity in Nepal, might be similar in other South Asian countries, is portrayed as a 'clever and professionally lie teller'. A genuine, shy, and hard working student is supposed to be unfit for legal education. A lawyer who is soft-spoken and gentle person is not viewed 'proper to be appointed as a legal counsel' by litigant in his/her case. A lawyer is adjudged best one if he/she is 'overwhelmingly' or implausibly strong 'manipulator'. In June 2002, a woman visited me at my office to enquire if her son could apply for LL.B. program. She was extremely interested to get her son 'admitted in legal education', the reason for that being neither his personal interest nor her prudent decision. The sole reason she intended to get her son in legal education was that he was over smart in dealing with people and often engaged in arguments with family members and friends. His quality of "argumentativeness and interest in public dealings" was considered fit for legal profession.

character of the legal profession is often ignored or discouraged.[7] In our schools there are two problems that go together generating a lasting negative impressions among students concerning professionalism: firstly, professionalism is not taught explicitly and directly as a part of the regular and compulsory syllabus, so that students are left unaware of knowledge about fundamentals of the legal professionalism; and secondly traditional professors, many of them because of their dominant stature, seniority and access to university hierarchy, constitute role models who convey negative message about professionalism through their conduct, teaching methods, and dominant roles in schools' affairs. The traditional legal education is therefore responsible for the following pervasive nature of law professionalism in Nepal:

- Lawyers view that they are in superior or dominant position in attorney-client relation. This condition makes them vulnerable to dictate their clients of the remedy and process to follow for.
- The relation between lawyers and client is absolutely 'hierarchical'- often lawyers address their clients using derogative and low-status reflective communication.
- Lawyers are not sensitive to the emotional or psychological stress the client is subjected to. The socio-economic and financial impacts of the disputes are generally not the matter of concern for lawyers.
- Lawyers are engaged into dealing with clients through their juniors, but they are charged high fees irrespective of who is directly involved in dealing.
- Legal profession is viewed as 'elitist' rather than communitarian, so that the tendency of excluding lawyers

7. A proverb that 'a horse can not make a compromise with fodder' is popularly used in the classroom. Similarly, it is also popularly said that 'a new entrant in the legal profession should work hard without expectation of remuneration of fees, so he only works but no money. An established lawyer has work and the money both. A senior lawyer has only money but no need of hard work. These kinds of wrong messages passed on to students in the classrooms have seriously affected professional responsibility of lawyers. In Nepal, senior or established lawyers are neither interested in pro-bono service nor appearance in lower level courts fro argument. Hence, in majority of trial level cases the junior lawyers appears with a great risk of miscarriage of justice.

involved in strategic advocacy of community's interest or rights as legal professional is phenomenal.

These wrong attributes, in turn, seriously affect the community trust and confidence on legal profession, and ultimately justice system itself. These wrong traits of lawyers' professionalism are directly accountable for 'deeply rooted formalism[8] or dogmatism' in the process of justice which obviously:

- obstruct unrestricted and easy access to justice for common people, and
- avoid pragmatic approach in making justice.

One can therefore conclude that the sub-standard facing the legal profession is an outcome of the un-pragmatic teaching of law.[9]

c. Teaching Law in Idealized Controlled and Insulated Settings: In Nepal, none of the university takes legal education with priority agenda of development. The State's longstanding view in our society that investment in justice sector is unproductive severely influences the 'education policy makers', thus pushing the legal education in 'back corner'. Consequently, legal education courses are sparsely reviewed and updated. For instance, the empowerment of women and marginalized groups has been enshrined as a directive principle of the State by the Constitution. Yet, universities' legal education curriculum still fail to include rights to development, adequate standard of liv-

8. Amy R. Mashburn in *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy, 28* VAL. U.L. Rev. 657-70 (1994) has rightly stated that affluent business lawyers in America had an aristocratic vision; their mission was to establish lawyers as an intellectual elite in the eyes of the public. This trend also equally applies to lawyers practicing public laws like constitution involving political issues. This section through its close political association with politicians is not only keen to form a disguised political 'elite' class of lawyers, but also vulnerable to foster systematic abuse of power by defending vested interests of those in powers. The influence of affluent business lawyers and politically vulnerable lawyers in legal professionalism is a legacy inherited from the west is emerging strongly in legal profession of the developing countries. The legal education in our society is so far largely unheeded to address this problem.
9. The utility and consequence of the syllabus and teaching methods are hardly considered as a regular part of the academic activities. Law schools are reluctant to conduct social audit of legal education. Demands of consumers of law schools products are not considered at all. Most importantly, law schools are hesitant to take role and responsibility, along with actors of justice system, fostering justice and thus become an indispensable actor the justice system.

ing, education, and work as essential components of their legal education curricula. Democracies in our regions talk of 'rule of law and due process'. The fair trial and access to justice are taken as ideals of the governance system. However, law schools seem to be less concerned to orient students in these regards.

Purpose and process of curricula development is governed by "thoughts" of professor's ideologies about society rather than social needs established by empirical lists. Interestingly, in our region the empirical test of the need and impact of the legal education is largely ignored phenomenon. Law professors' perceived ideas about the 'values and ideologies of law and justice' pre-dominantly influence the purpose and process of curriculum development and teaching methodologies. As such the legal education in our region is controlled by professors' ideologies instead of societal requirements.

Students are insulted within the law schools and hardly have chance to learn more than what professors teaches. The empiricism which promotes 'learning by experience in real or actual work' is deceptively discarded. Some schools making 'innovative way ahead to empiricism through intensified clinical education system' are baselessly criticized for 'westernizing legal education'.[10]

Fundamental Problems of Legal Education and Results in Professionalism:

Based on experience of Nepal, the legal education system manifests (a) lacking of a desire among legal educators and policy makers to develop empiricist and pragmatic approach of teaching; (b) ignorance, if not apathy, among university policy makers to understand its vocational traits; (c) predominance of thoughts that directly or indirectly deny that efficient and meaningful legal education is a pre-

10. Those who criticize 'clinical settings of law teaching fail to understand that it provides law students with rich and varied views of professionalism due to the pedagogical structure and wide-ranging practice areas of clinical education. Clinical experiences allow students to explore and discuss theoretical ideals of professionalism in the classroom and then test these ideals in the courtroom as students employ professional behavior with actual cases. One should understand that law schools' teaching should include the subjectivity and contextual nature of professionalism. See, *op cit note* 1.

requisite to access to justice and foundation of fair, impartial and effective justice system; and (d) the absence of motivation and zeal among law teachers to 'popularize or deelitize' the legal education. These manifestations are directly responsible for rendering the legal education alienated from community. For its lacking of 'community responsiveness' the legal profession is largely idealized and insulated. It is thus a major factor for Bar Associations failing to address the 'popular demand of legal aid to the people' which essentially deprives the people from access to justice. The disinclination of Bar Associations to address the widespread need of 'legal aid' is thus an outcome of the legal education which is neither community responsive nor pragmatic.

As a preliminary effort, the problem of 'legal profession's alienation from the community' can be addressed by introducing the 'community responsive' legal education, of which methods and approaches are founded on clinical and community outreach settings of the curricula. To rescue the legal education from present idealized, controlled and insulated condition is the 'first step towards building and institutionalization of the sustainable legal aid program'. By rescuing the legal education from the present condition, law schools can play vital roles in deconstructing the Bar's 'traditional ideals' or 'values concerning the legal professionalism'. As the haphazard medical education will certainly pose a threat to peoples' life; an inefficient and visionless legal education may seriously affect the prospect of rule of law, access to justice and preservation of human dignity.

Right to Legal Aid and Access to Justice:

One can very much see that the legal profession along with the judicial system in Nepal, which might be a truth in other countries in the region too, is predominantly elitist and influenced by 'hierarchical societal structure'. Legal profession is considered to be an appropriate profession only for the elite class. This deep rooted misconception has seriously affected the process of induction of 'commoners' into the legal profession. Since the profession is 'romanticized' as an indicative of 'high class' status, its concern with access to justice for all and prevention from deprivation of common people is often suspected. Of course, the Bar Associations in the region are found highly sensitive of the 'civil and political rights', which ultimately is a requirement of

the 'elite' class. No Bar Association can have meaning of its existence in absence of democracy. The larger community's concern, however, is the economic and social rights or justice in absence of which the civil and political rights have no meaning. The legal aid for elite controlled Bar is thus 'romanticized' phenomenon too- it has been taken by 'lawyers as their benevolence or greatness'. Obviously, legal aid has never been taken as ' Bar's obligation or responsibility' to common people.

Community responsive legal education is a right approach to break the 'misconceptions' looming large in the legal professions. Kathmandu School of Law has made attempt to respond to this problem in two ways:

a. Access for deprived or marginalized class students to legal education: As a mandatory rule of the school, quotas have been offered for students from indigenous/ethnic groups, *dalit,* and tribal community. Students from these communities are provided full scholarship- fee exemption and subsistence allowance. Currently, over a dozen such students are nearing to successfully compete the LL.B. program.[11] All these students come from remote areas of the country. To help them successfully and comfortably compete with other students, the school has offered special tuition support in areas like language and fundamental subjects. These students, according to the agreement between the school and them, have to work, at last five years, in their home districts or town.

b. Community outreach of students as university academic requirement: The prevailing LL.B. and LL.M. course of the Purbanchal University requires to undertake following community outreach programs for students:

   - First year: Three weeks' field research program introduces students with socio-legal problems of the rural community, e.g. the "witchcraft", untouchability, etc. In this research, students have to make an intensive presentation in the school, and ideas are developed to help them devising intervention. Based on such studies, a group of students are now launching a "legal aid program" for "*Raute* Community", which is still nomadic and has no citizenship credentials with it. Students are helping them to obtain the same from the administration.
   - Second year: Three weeks' community work, in which students with various grassroots NGOs work for raising legal awareness.
   - Third year: Students have to undertake human-rights issue based research, e.g. exploitation of girls in brick kiln industries, etc.
   - Fourth year: Students work in Prisoners Legal Aid and Women Victims' Legal Aid Program. In this year, students do not visit courts. They work as assistant to legal aid lawyers in the clinic. As such they visit jails frequently.
   - Fifth Year: Students work in the clinic as support lawyers to the Legal Aid Lawyers. They visit courts and argue in the court along with their seniors.

11. For detail, see Prospectus 2002.

These approaches are found effective to develop "community responsiveness" in the legal education structurally. These approaches ensure both the induction of marginalized community into the legal profession and expose students to the larger community interest of justice. KSL, together with CeLRRd, Pro-Public and pro-community members of Bar Association has taken these approaches as foundation for consolidation and sustainability of "pro-bono" or free-legal aid scheme in a society like Nepal, where State hardly funds legal aid program.

Training and Continuous Legal Education for Lawyers is another approach to strengthen free-legal aid scheme by lawyers. For this, Bar Council initiated a program to train fresh group of lawyers by KSL. As per the Bar Council Act, a law graduate has to pass the "bar exam' to join the legal profession. Once they obtain practicing license, the incumbents must undergo a training program. KSL recently competed training for 28 people. This training is good opportunity to inculcate the ideas of 'societal and ethical responsibilities of lawyers'. KSL has effectively utilized the platform to sensitize young lawyers' interest to embark into pro-bono lawyering as a part of their regular profession. A negotiation with Nepal Bar Association is currently going in order to introduce a continuous legal education for senior lawyers. All these activities target to 'reorient the legal professionalism contextually'.

Implementation of Clinical Legal Education Program has been a sound basis for strengthening of the community responsive legal professionalism. In Nepal, a group of young law teachers during early 1990s raised voice to immediately initiate efforts to update legal education system. It was their premise that transformation of traditional teaching methods into clinical settings would encourage students to become 'reflective practitioners', conscious to the human impact of their work. Opportunity to work in actual conditions of life would expose students to understand the problems of the society, individuals and state and their interrelations. This method would then help students to 'contextualize' their profession.

Clinical Legal Education Program was introduced in Tribhuvan University Law Campus in 1991. The enthusiasm of the younger generation of teachers to revamp legal education through clinical setting was, however, one of the less desirable events among many senior teachers and college administrators[12].

As early as 1970s, Nepal Law Campus, the government funded central law college in Nepal, made an attempt to introduce some elements of clinical legal education system. Author of this article was the last group of students to benefit from it. The tribute to introduce pragmatic reforms in legal education goes to Prof. Dhurba Bar Singh Thapa, the then Dean. His charismatic and dynamic leadership made many things possible to happen. However, with his retirement many innovations started crumbling down and currently the condition of Nepal Law Campus is miserable. The clinical setting has thus been simply a 'dream

12. The program had to face problem of dislike of senior teachers from the day of its inception. Senior law teacher's cynicism to change the traditional paradigm was one of the most frustrating experiences. Many of they took it a threat to their 'self-esteemed credibility' and entrenched practice ' hierarchical relations between teachers and teachers and students. Few excuses put forward were that the method was financially not-sustainable; academically less adept; and managerially not feasible. These excuses were, however, mere reflection of cynicism to move for change. It can also be said as 'entrenched love to status quo'. The cynicism was also a reflection of the contradiction between "idealism vs. pragmatism" and "status quo vs. change". The team involved in the program, however, effectively resisted challenges, which provided enormous source of inspiration to go ahead. However, the environment did not remain congenial for long time for continuation of the program. In 1995, the program virtually collapsed.

of students' in Tribhuvan university law campuses.

In late 1990s, a group of law teachers in Tribhuvan University realized to set up a new law school focusing on 'departure from traditional paradigm'. Thanks to the collective efforts and commitment of the group, establishment of Kathmandu School of Law has been a dream materialized, which offers a changed environment for learning through 'convergence of classroom-learned knowledge into actual practice'. A few characteristic interventions of curriculum are:

a. **Reflecting Upon Professionalism:** This paradigm provides lively interactions of students with clients, adversaries, judges, bar members and clinical teachers, and such interactions in turn allow students to come face-to-face with the impact of their work, providing valuable opportunities to reflect upon professionalism issues.

b. **Interrelationship between Professionalism and Skills:** Students have opportunity to learn fundamental lawyering skills and values. Students thus obtain skills about advocacy, communication, interviewing and negotiation. Related component in this regard is the teaching professional ethics which address issues of professional zeal, loyalty, accountability, civility, etc.

c. **Exposure to the Contextuality and Core Values of the Professionalism:** Students are taught about contextual nature of professionalism. They are motivated and encouraged to use their zeal, loyalty, judgment, expertise, excellence, dedication, competence and civility (core values listed) for the development and strengthening of "young democracy, rule of law, human rights culture, accessibility of justice and protection of marginalized groups through group actions", which constitute the 'core contexts' of the Nepalese society. Through this aspect of teaching, students are inspired to be 'Good Persons" not only "Good Lawyers". Involvement in "legal aid service" and "lawyers' activism" in protection of human rights, environment and defending democracy are highlighted.

Challenges and Innovative Clinical Programs

A series of research activities over a decade has identified the following problems in the context of legal profession and its contribution towards strengthening of access to justice, fairness and impartiality of justice and promotion of human rights culture:

a. Conservative attitude looms large in the judiciary to apply activism in protection and promotion of human rights. A study shows that over 50% of criminal trials still go unrepresented by legal counsel,[13] and representation of poor in the judicial process in civil cases is out-balanced.[14] Courts are still very much reluctant to recognize the 'lacking of compulsory representation of legal counsel' a violation of due process of law. Legal aid is thus still only a 'great dream" in Nepal. Paranoia of the judges to depart from 'traditional formalism' is a serious obstacle to achieve an unrestricted opportunity of legal aid.

b. Lawyers are less inclined to 'pro-bono' legal aid, especially senior lawyers have very little time to offer such service. Senior lawyers are more inclined to 'political opportunity' than the 'legal aid service to poor'. Many activities of Bar concerning legal aid in the past have failed to produce desired results due to less sensitivity concerning 'pro-bono' service to the people.

c. Ethical standards of legal professionals are often seriously questioned by the civil society.

d. Legal aid support generally encompasses the areas or issues of civil and political rights and overshadows the representation of the issues of economic, social and cultural rights.

e. Bar association's concern to 'update legal education so that contextual professionalism' could be developed is less obvious. It is more concerned with interests of lawyers than strengthening of bar through involvement of 'youth potentials'.

13. CeLRRd, "Reform and Analysis of Criminal Justice System of Nepal", 1999. p. 90.
14. Nepal Law Society, "The Judiciary in Nepal: A National Survey of Public Opinion". November 2002.

These problems are largely an outcome of the 'system of education'. Failure to train lawyers aware of 'societal or national context of legal professionalism' in law schools is indispensably bound to generate problems discussed above. Kathmandu School of Law (KSL), aware of these challenges and problems, has introduced the following initiatives:

1. **Networking of Legal Aid Lawyers**: In partnership with Center for Legal Research and Resource Development (CeLRRd) and Danish Institute for Human Rights (DIHR), KSL has embarked into an action of 'developing a national network of legal aid lawyers', which may maintain a 'working relation with Nepal Bar Associations in order to cooperate with latter for institutionalizing the national legal aid program. A significant number of members of the network come from various units of the bar itself. The network's secretariat currently resides at KSL premise, in which a representative of the Student Society of KSL is made necessary. This network is instrumental in bringing young and energetic lawyers in working relation with law school.

   KSL plays vital role in offering training skills and values of legal aid. The training offered by KSL includes, inter alia, following components:

   a. Use of international human rights instruments in courts for defending rights of people
   b. Special responsibilities and code of conducts of legal aid lawyers, with focus on public defense system
   c. Special skills of legal aid lawyers
   d. Managerial skills implementing legal aid scheme

   The training has two modules- Leadership Capacity Building and Legal Aid Skill Development. The former module is an extensive training course, which is offered to leading legal aid lawyers for a period of 2 weeks.

   KSL runs the "Prisoners Legal Aid Clinic", which currently provides service to over 600 indigent prisoners from and around the Kathmandu Valley. The service is available to 5 prisons, comprising about 2500 inmates. KSL Prisoners' Legal Aid Clinic as well as

other centers of Network expressed their commitment to abide by the declaration adopted by a conference of the legal aid lawyers.[15]

In KSL Prisoners' Legal Aid Clinic, four full time lawyers along with 3 part-time lawyers operate the daily business of the clinic, where students are involved to assist lawyers. Major roles of students include visit of jails along with lawyers to interview clients and to brief the current development of the court process; to prepare memorandum and conduct research of the case; and assist lawyers in representation of cases at court. KSL's clinical program is thus not simply a 'simulation laboratory'; it is rather a service center for community where students play vital roles. This clinic is thus a center of excellence for students to learn actual experience concerning professionalism as well as linking the law school with community's need. Other centers of network (in Nepalgunj, Biratnagar and Chitwan) help new lawyers to develop their capacity through serving the community. With these attributes, KSL and Network have been largely successful to institutionalize the "pro-bono" legal aid scheme in Nepal.

Service for Women Victims of Violence and Trafficking: In 2001, in tiny financial support of the UNESCO, CeLRRd introduced a Hotline and Legal Aid Service to the women victims of violence and trafficking. This program now, in 2004, has been taken over by KSL, which is fully managed by LL.M. students, mostly women students. This clinic functions as a part of the Women Studies and Development Center of KSL. The clinic locates in the down town. The service

15. We, hereby, proclaim the **"Nagarkot Declaration"** with the following five specific points;
    1. Agreeing to form the Nation-wide Legal Aid Network with the view of protection and promotion of Prisoner's Constitutional and Human Rights, are willing to accept that that Legal Aid concept is a primary right of people for justice.
    2. Realizing the need of a structure to fulfill the concept of National Network, presently with the formation of action committee on the regional (Five Regional Development areas of Nepal) basis, we have agreed to extend it from regional to district level in tune with decentralization principle.
    3. Realizing the need of drafting the Constitution and guidelines of Network for systematic administration, the Executive Council of the Network is authorized to adopt its constitution.
    4. Realizing the necessity of institutional integrity for effectiveness of Legal Aid Programme, we have agreed to affiliate the Network with Nepal Bar Association, Bar Council and other concerned Governmental and Non-Governmental Organizations.
    5. Realizing need of institutionalization of the Legal Aid Programme, participants of the Legal Aid Lawyers national conference have expressed their commitment to volunteer for pro-bono representation (at least five cases a year).

provided by the clinic is called "critical legal aid service". Beneficiary, by telephone or personally, approaches the attendant student lawyer for primary counseling. Most part of the works carried out by this clinic is related with immediate legal problems.[16] However, when there is need for judicial representation, the clinic provides the free legal aid. Since most of LL.M. students are holding practicing license, availability of lawyers is not a problem.

Conclusion and Recommendations:

It is viewed that 'the development of a community based or oriented legal aid scheme' is dependent on teaching approach taken by law schools to train lawyers. The 'meaning and dimensions' of the legal professionalism taught by law schools are largely the determinants of the 'success or failure' of the legal aid scheme. It is obvious that government in a country like Nepal is hardly interested to put money on enlarged and widespread legal aid programs. Obviously, most of the legal aid programs are funded by foreign donors, and thus are at risk of dissolution once the funding stops. The legal aid program implemented by Nepal bar Association is an example, which failed being sustainable even after 12 years of funding by Norwegian Bar Association. However, every year the quantity of lawyers is increasing as more students are produced by law schools.

It is an entrenched fact that the law schools have largely failed to view the instrumentality of the legal aid to ensure 'access to justice'. No legal aid scheme is thus possible to be sustainable without addressing the 'contextuality' of the legal profession. The 'romantic objectives and paradigms' of the legal education system in our region are obstacles for 'communitarian legal professionalism'.

Preparation of young generation of lawyers to take the 'socially responsive' legal professionalism is a 'beginning to build a plausible

16. For instance, women visit this clinic if or when there are legal problems. The husband, for instance, is engaged with extra marital relation. The wife approaches the clinic for counseling. She is then properly advised concerning the legal solution or steps to be followed. This clinic works in close relation of Women Police Cell. Whenever, the Police support is required, the service is immediately obtained. This helps to 'effectiveness of the service'. Obviously, this program is highly popular. LL.B. students are not engaged in this program considering the nature of 'professional expertise required and the issue privacy involved'.

edifice of the legal aid'. This approach necessarily calls for definition of 'legal aid' as a basic human rights related with access to justice. The new generation of lawyers, therefore, needs to be trained in this line.

The collaboration between Law Schools and Bar Associations is instrumental in transforming the existing traditional legal education into a pragmatic setting and eventually transforming the legal profession from 'idealized and insulated professionalism to community responsive one'. Law schools, for building "typical contextual legal professionalism in the South Asian region", have to review their policies and programs in order to ensure increasingly larger number of 'commoners' in the legal profession and to secure widespread participation of law students in social issues.

9 Legal and Political Position of Dalit Women in Nepal*

Each society has its own typical values on which its structure is constituted. These values play vital roles in shaping the pattern of the social life of the given society. It is possible that great deals of such values are exploitative, and as such often tend to impose disadvantageous conditions on weaker sections of the population. However, the change in the paradigm of social value system is inevitable process of the social development. We find in many societies that the traditional hierarchical values have been modified by modernity. If we critically observe the social development process, we can perceivably see that it has always marched from tyrannical condition to the democratic setting with liberal attitudes. The worst form of tyranny experienced in the history is the "feudalism", which possesses the following basic characteristics:

* Reference materials used for this article: Ross Mallik, Development, Ethnicity and Human Rights in South Asia, Sage Publication, New Delhi, 1998. PP. 11-13 and 41-73; S.N. Choudhary, Community Power Structure, HAR-ANANDA PUBLICATIONS. 1993. PP.22-30; Peasants, Dalit and Women: Democracy and India in People's Rights: Social Movements and the State in the Third World. Edited by Manoranjan Mohanty, Partha Nath Mukherji with Olle Tornquist. Sage Publication, New Delhi. 1997. PP. 223-243; Amita Bavisakar, Development, Nature and Resistance: The Case of Bhilila Tribals in the Narmada Valley. Cornell University, 1992. PP. 283-89; G.K. Lieten, Community and change in the Rural West Bengal, Sage Publication, New Delhi.1992; Dor Bahadur Bista, People of Nepal, Ratna Pustak Bhandar, Kathmandu. 1996. PP.119-130; Achin Vanaik, Communalism Contested: Religion, and Secularization. Vistaar Publication, New Delhi.1997. PP.65-129; "The Untouchables"; The Rights of Subordinated Peoples, Edited by Oliver Mendelsohn and Upendra Baxi, Oxford India Paperbacks. 1996. PP.64-115; Yubaraj Sangroula, Condemned to Exploitation: Trafficking of Women and Girls in Nepal. Kathmandu School of Law, 2000. PP. 20-50.

- Power, signifying the status of person as a basis of the identity essentially based on the hierarchical structure,
- Aristocracy, signifying a societal hierarchy of the group with absolute grip in the resources with the help of political power, which in turn strengthens autocracy- it revolves as a circle,
- Occupation, signifying subjection or subordination of certain group under other group holding societal hierarchy. The subordination is effectively used to minimize the status of larger number of people who provide essential service to society- the group maintaining hierarchy claims absolute control over occupation.

The minimization of occupation is consistently used to undermine the social status of people involved in the given occupation, and as such has been taken as an effective instrument to hold control over them in suppressive manner. Many rules are founded in this course to strengthen the control of elite group , which in course of time are interpreted as social values . These values are then interpreted as a basis of societal governance based on caste and race. These values are therefore used as an instrument of reinforcing the control of elite class to working classes. This vicious circle is an instrument, which operates to prolong the hierarchical (feudal) society.

In this way, feudalism indirectly gives the shape to the division of a society based on castes. The occupation is then defined essentially associated with caste, a prelude to caste system. A particular occupation is first designated to be carried out by a specified group of people, and the subordination of the group is then imposed on the basis of occupation. It means that Dalit situation is the offshoots of feudalism. Since the leadership of feudalism lies in the ruling echelon of Chettris and Bahuns, the Dalit community is the victim of feudalism controlled by them. Historically, Bahun may not be politically aristocratic community as Chettris are predominant in politico-military power of the Nepalese society. However, Bahuns have maintained a huge participation in the political reign of the society, and as such constitute an essential element of the feudalism. Spiritually, Bahuns' community is the predominant classes in the Nepalese society, and as such are founders of so many anti-people values. In a conservative society like Nepal, by maintaining spiritual control the community of Bahun wields the local power most effectively. Hence, both the Bahun and Chettris are equally

responsible to suppress the Dalit community. The division of the society on basis of the sex is another characteristic feature of the Nepalese society. The value system that segregates the society on the basis of caste is equally effective for division of the society on the basis of sex. Consequently, Dalit males are equally aggressive to suppress the Dalit women as in the Bahun and Chettri communities.

Problem of Dalit Women:

The problem of Dalit women is therefore an offshoot of sex discrimination as well as the caste discrimination .Therefore , before going into critical discussion of the problem , it may be justifiable to begin by clarifying its characteristics:

1. The problem of Dalit women in broader context is a problem of feudal practice of the Nepalese society. Like their non-Dalit counterparts, Dalit women are abjectly suppressed by the values of the hierarchical society. Dalit women's personality counts nothing for *Bahun* and *Chettris*. Hence, they are extremely vulnerable to the exploitation of these communities. Hence, the problem of Dalit women is a problem of caste distinction.
2. Since the Dalits have been the subject of suppression and exploitation in hierarchical social system, a major part of Dalit women's problem is an outcome of the exploitative feudal system.
3. The feeling of caste superiority is pervasive among Bahun and Chettri women. The upper caste women also suppress Dalit women. Therefore, the problem of Dalit women is a problem of social discrimination of women by women.
4. Each family has its own culture, values and characteristics. The superstition and conservatism take birth from the womb of tradition and lack of adequate knowledge and development opportunities. Such menaces are kept as vogue in the society. Dalit society is also largely influenced by defective culture based on orthodox Hinduism. As a matter of fact, Dalit males like Bahun and Chettri are equally suppressive to women. Therefore, the problem of Dalit women is the gender discrimination problem within their own community.

Social Factors behind Dalit Problem and Women:

As mentioned earlier, the Dalit problem is a result of the feudal hierarchical system based on orthodox Hindu traditions. Religion often plays decisive role in shaping the culture and traditions. The problem of untouchability amounting to social hatred of certain communities is a result of the traditions and cultures based on orthodox Hindu religion. The problem of Dalit women is therefore not independent of the problem of Dalit in general. Hence, at the outset, the Dalit women's problem should be analyzed in general and in connection with the problem of the community at large. It is an established fact that the community Dalit is economically deprived and socially oppressed, resulting in denial of access to resources, development and education. It is indeed a fact that , therefore , the complete destruction of the so-called societal structure, which recognizes the caste based identity of persons, is the ultimate way to do away with all the problems associated with Dalit community. The liberation of Dalit women is therefore dependent on liberation of Dalit community at large. But the problem of Dalit women is not exhaustive with liberation of Dalit community itself. The liberation of Dalit community may liberate Dalit women from hierarchical societal suppression , but the gender discrimination they are subjected to within their own community would still continue. Nevertheless, the liberation of Dalit community will bring at least a guarantee of educational development for Dalit women as that of men.

Legally, the Dalit community has been freed from imposed values of Hinduized societal structure .New Muluki Ain (The Code of the Laws of Land) promulgated in 2020 B.S. has prohibited the discriminatory treatment against Dalit community. But the execution thereof is a complete fiasco. The main reasons for the failure of law to give effect to the change in the situation are multiple, but the disinclination to raise socio-economic and political upliftment of Dalit community is the fundamental one. The ruling segment of the society, which comprises a few Chettri, and Bahun and Newar families, indiscreetly neglected the fact that no liberation of Dalit community was possible without its soco-economic and political empowerment. It can be concluded that the lack of the political will of the ruling segment of the Nepalese society is also equally responsible for continuity of the degraded state of Dalit community.

The constitution of the Kingdom of Nepal has guaranteed the right to equality, unequivocally prohibiting the caste - based discrimination. Indeed, this has succeeded to generate a popular basis for emancipation of the community. However, the provision is doomed to be stagnated, because the government has failed to introduce legislative instruments enforcing the spirit of the constitution. Undoubtedly, the equality guaranteed in the constitution is therefore largely defunct notion. Equality requires competition, and competition is possible only among equals. The constitution guarantees equality, but the State has failed to address the longstanding problem of imposed disqualification of Dalit community. It means that State has forced Dalit community with all obstacles and hurdles to compete with community, which has enjoyed all privileges over the centuries. By instituting a system for open competition has set Dalit community to compete with groups which are socially, economically and politically advanced in development. Therefore, the state is not seriously sensitive towards the wide spread problem of cruel inequality imposed on Dalit people. Only guaranteeing a set of civil and political rights can't be sufficient to socio-economic and political mainstreaming of the Dalit community. It can be therefore argued that the government must urgently enact a consolidated legislation to set the Dalit liberation in motion. Such legislation has to concentrate on the following issues for addressing the problem realistically:

- provisions for special welfare package for facilitating the socio-economic and political development of Dalit community
- special reservations in matters of decision making in issues concerned with their development interests
- secularization of the state bureaucracy with stiffer penalty for those who directly or indirectly involve in differential treatment to Dalit community,
- sensitization of bureaucracy on need of elimination of differential treatment to Dalit, and
- Punishment for violence, including sexual violence, based on caste basis.

Obviously, it is not fully possible to address the problem of Dalit women without addressing the problem of liberation of the Dalit community at large. To speak in other words, the problem of Dalit women is not simply a problem of gender discrimination. It is entwined

with caste discrimination, and as such is a complex socio-economic and political problem.

Sexual Exploitation:

Sexual exploitation of women is often entangled with socio-cultural milieus. The Nepali society, having based on the concept of women's inferiority, hardly recognize the sexual exploitation of women as a problem .In a society which is divided into caste basis, the following two characteristics are obvious:

Sexual exploitation is rampant in the Nepalese cultural milieu, like rape, polygamy, incest, child marriage, forced pregnancy, multiple pregnancies, etc. These exploitations do not only derogate the right to independent personality and life, but also cause a series of mental and physical torture, depression and social ostrasization.

For Dalit women the situation is the worst. Many of such exploitation against Dalit women are simply taken as insignificant. Sexual harassment and assaults against Dalit women by men of so-called upper class are often incognizable.

Sexual affliction on Dalit women is often ignored by the law enforcement agencies. It is viewed that " there is no question of chastity" in their case as the sexual affliction on them does not affect their social position. The sexual crime in Nepal is defined not in terms of violation of right to integrity of body, but in terms of violation of moral value. The existing value system maintains safeguard for protection of chastity of women, the violation of which is taken as an invasion of the men's position or dignity in the society. This notion of sexual offence against women is a characteristic feature of the patriarchy and feudal domination. The sexual assault against Dalit women by so-called superior castes is not treated as crime against individual. The sexual violence against Dalit women is thus indirectly permitted under the existing societal structure of the Nepalese society, which is a matter of great shame. To observe at micro level, the so-called aristocratic Nepalese society is not ready to accept, or define, a sexual affliction on Dalit women is a crime in itself. This is obvious from having no law that prohibits or punishes a crime of sexual exploitation, which is merely induced by caste discrimination. It is also evident from increasing number of Dalit girls being smuggled into sex market. This development is simply a prolongation of practices

of engaging women of certain Dalit communities for sexual pleasure. Girls from Gainee and Badi are the examples.

The following instances of discrimination further deteriorate the condition of Dalit women:

1. Women in Nepal, irrespective of their caste, are deprived of contractual, property and individual identity rights. Like their sisters from other communities, Dalit women are also not entitled to share in parental property and determine their personality. The marriage is indispensable for them, and they are the husbands who are real master of their lives.
2. Like women in other communities, the identification of the children of the Dalit women is determined by their fathers' ancestral lineage. The children's nationality is not determined by mother , but by father.
3. Like women in general, a Dalit woman is subjected to a series of domestic violence and sex - based discriminations. The husband is entitled to consummate another marriage, provided that the first wife is not capable of having a baby within a period of ten years after marriage.
4. Family is composed after the father, the mother and sons being the subordinate members. Daughters are excluded from the family. The birth has been taken as a qualification of the family membership for son. But daughters are prevented from having membership of the family at birth; rather the marriage is imposed on them as a qualification of the membership of the filial family.

Existing Nepalese legal system neglects daughters as member of natal family. There are two conditions imposed on her for getting family membership:

- She must remain unmarried, and
- She must attain an age of 35 years.

There has been no exception to these conditions. The natal family has only two obligations to daughters: support for subsistence, and giving away for marriage when she reaches 16 years of age. This condition results in:

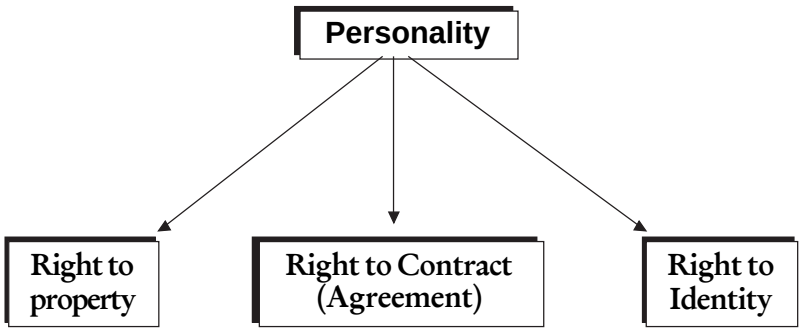
- Deprivation of the freedom of choice, including matters of

marriage,

- Prevalence of child marriage,
- Role of women is confined to begetting children for continuation of the family lineage of husband,
- Deprivation of the right development,
- Sexual exploitation of women and girls, including trafficking for sexual exploitation, etc.

Personality and Its Attributions:

A personality is an aggregate of rights and duties recognized and protected by the law. However, a few rights are inherent. They inhere on people as inalienable rights. Rights which constitute the personality of people, can be grouped in three categories:



Every individual has his/her own identity. Nepalese legal system is absolutely silent in giving this right to women. For example, mother can't transfer her nationality to children as the citizenship of a person in Nepal is determined by his/her father's nationality. The father's identity is essential for determination of children's nationality. Generally, it has been taken as a defect in legal capacity of child, but it is not true. Rather it is incompetence imposed by law on personality of women. Women have to always live under the direction and protection of men. Before marriage, she comes under the protection of father and after marriage she comes under the protection of husband. After the death of husband, she comes under the protection of son.

Rights to contract denote to the self - decision making right. Right to property means the right regarding the acquisition; enjoyment and disposal of resources .The enjoyment of these rights largely depend on the dependence of the individual's identity. Deprivation of the right to self - identity automatically stigmatizes the other rights. Women's identity is always attached to that of father , husband or son. Lacking of independent personal identity negates the rights to contract and property. Existing debate of women's property right is not concerned with this aspect, hence the crux of independence of women is not addressed.

Legal Defects to be removed:

Existing legal system has not only disqualified women to have share in Aungsabanda of ancestral property, but also deprived them of the right to self -determination. Therefore, it's not simply a question of discrimination on property right, but it is also a question of discrimination in personality on the basis of sex. It is clearly established that women's legal position in Nepal is defined in terms of their sex and marital status. Hence, improvement of the condition of women means removal of all those instruments, which subject women to control of men. The amendment of property right law does not suffice to the end. Removal of all discriminatory laws and enactment of affirmative laws should go simultaneously.

- The discrimination on the basis of birth imposed by the law of Nepal should be terminated. No discrimination based on sex should be allowed to prevail in matters of personality. The existing law excluding daughter from Aungsabanda must be terminated without excuse of any kind.
- The boundary of male dominance should be abolished even after marriage. Otherwise, woman will again be dependent on rights to be obtained through marriage. Marriage should be deemed as the result of an agreement between couples, and should not be viewed as a sacred relation to put women under domination of men. Women should not be considered as an instrument of continuing the genetic lineage of the men. Hence, the following suggestions must be taken into account while thinking of independent status of women:
  - Marriage is an agreement of consent, and as such it is a

social contract. It can be created and terminated by consent. When spouses find accommodative to each other, they are bound by certain family obligations and as such both have certain requirements to behave in order to maintain the good relations. When it stops working, it should not jeopardize the life of one of the partners.

- Since empowered woman is a keystone of family, state should empower them through various affirmative actions. Hence, the special law, a complete bill of rights covering all aspects of life, should be enacted with a view to end discrimination against women.
- The laws which are inconsistent with independent status of women should be removed .The movement of women's independence should not be confined to achieve only the rights to ancestral property, rather it should be wider and targeted to achieve only the equal status of personality.

The constitution of the Kingdom of Nepal, 1990 has guaranteed right against discrimination based on any ground, including sex. It is an established fact. No one can refuse this comply with this factual truth. The famous jurist of Hindu jurisprudence, Jimutabhan promulgated a rule of interpretation. This rule empowers judges to interpret laws in the way that the fact established is unavoidable. (Factum Valet)

He says, "Even hundreds scriptures cannot change the established fact. A daughter is a "child" like "son". Any religious rule therefore cannot change her status". The Nepalese law in this connection is therefore even inconsistent with the rules of "*mimansa*" (interpretation) under Hindu jurisprudence. Prohibition on independent identity of women is main problem of Nepalese women.

Summary of Key Values Prevalent in Nepal:

"Mitakcshara", one of the schools of Hindu jurisprudence has given absolute power to the husband in the property. This school even defines wife as the property of husband . "Dayabhaga", another school, however , denied women as the property of husband. "Mitakcshara" does not merely define women as property, but also take woman as commodity. Not only eastern civilization but also as antique Roman

civilization considered women as commodity rather than personal entity, that was why murder of women was not taken as a crime in the western society. "Dayabhaga" of the Hindu jurisprudence to some extent seems flexible to the status of women in society. However, it too is not progressive in providing gender rights. The Nepalese law is heavily influenced by these schools , and as such it is not only gender discriminatory, but also caste discriminatory. Since the law takes general assumption to women as commodity, the treatment offered to women are sexually biased .The source of discriminatory approach is a defective value of marriage between male and female. This is reflected in existing legal system. As per this approach, marriage directs the personality of women. Naturally such ideology keeps women under husband. The imposition of male dominance is emerged by this theory. That is why marriage is defined as an expression of man's dominance upon women.

Conclusion:

Dalit women's problem has doubled edges. On the one hand, the issue relates to larger problem of social segregation and suppression based on the imposed caste, and on the other hand it relates to their conjugal life, where the husband is master of the life in all aspect. In the later case, the position of Dalit women has no difference from women from other castes. In the former case, the women's problem is rather a caste problem. However, the social segregation largely contributes to the vulnerability of invasion to the physical and mental integrity of Dalit women. The law does not protect affirmatively the Dalit women against vulnerability.

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Building Competency of Legal Education: Need for Innovative Approach of Teaching and Methodology 10

Perspective:

Nepal practiced an indigenous legal and judicial system till 1951, the key character being the 'enforcement of rules' deeply saturated by customs mostly evolved out of background of Hindu values. Hinduisation of Nepalese legal system started taking place from 4th century, when the dynasty of 'Lichhavi' kings replaced that of 'Kirats'. Nepal's first Code of Law was promulgated in 14th century, which provided an elaborate set of laws, ranging form land measurement system to caste obligations. As noted by a group of Nepalese legal historians, the said code was based on "Narada Smiriti". Largely, the Code was a compilation of the prevailing customs, based on patriarchal and caste value system. The prime objective of the code was to reinforce moral sanctity that had been increasingly eroding in wake of lack of consolidated body of rules of law. The code obviously made attempt to 'concretely entrench' Hindu moral codes in the body of laws. The classification of caste and gender obligations was the main cord of Nepalese legal and judicial system.[1] In 1854, *Muluki Ain*, a comprehensive code of laws, was promulgated. The *Muluki Ain* too was heavily influenced by Hindu values and practices. But this code imported a number of ideas from the French Code concerning the judicial procedures, in relation to

1. For detail study, see Kaisher Bahadur K.C, "Judicial Customs of Nepal", Ratna Pustak Bhandar. Mahesh Chandra Regmi "Nepalko Baidhanic Parampara". Tanari Prakashan. CeLRRd, "An Analyis and Reforms of Criminal Justice System of Nepal".

the criminal justice system in particular.[2] The courts of Nepal both under the 14th Century Code, known as "*Manab Nayasastra*", and the *Muluki Ain* practiced an indigenous inquisitorial judicial system, the continental system being a great inspiration under the later one.

The British Common Law system which was imposed in India by the colonial power was effectively resisted by the Nepalese regime till 1950s.[3] In Nepal, the Anglo-American system started consolidating its position only after the advent of lawyers and judges educated in common law legal system in India. The advent of the adversarial judicial system from 1950s thus gradually replaced the inquisitorial system. Theoretically, Nepal in the present position falls in a category of the countries following the Anglo-American legal system. In practice, however, the influence of inquisitorial system is pervasive, which often creates a serious confusion to the smooth and progressive development of the legal and judicial system.[4] The following developments geared up the consolidation of the Angol-American System in Nepal:

2. A number of provisions concerning the criminal judicial administration had been brought from the Napoleon Code. For instance, the Napoleon Code prohibited arrest of persons and search and seizure of evidences during the time in between the sunset and sunrise. The provision is still exists in the Nepalese criminal procedural law. Similarly, the deposition of suspects is taken without an oath taken. This provision exists in the continental legal system to avoid the application of the law of perjury in the case of suspect. The suspect is not obliged to self-incriminate. The practice of obtaining deposition of the suspect at the court without oath is still prevalent in Nepal.
3. Mr. Hari Parsad Pradhan, the first chief justice of the Apex Court, was a career judge in India.India then under the British colonial rule practiced common law system, which practiced accusatorial approach in the criminal justice system. By 1951, the Indian judiciary had been practicing fairly developed adversarial system, where the suspects' procedural safeguards had been protected. The jurisdiction of the Apex Court in Nepal was established by the Apex Court Act in the similar line. The right to legal counsel, and the defense of case in the court was one of the remarkable provisions in the Act, which dragged the criminal justice from the inquisitorial line to adversarial one. So that the role the first chief justice is crucial in introducing the accusatorial system Nepal. See, CeLRRd/HUGOU, 2002. p. 21. Also, ILRR, 1999.
4. The danger of confusion between the inquisitorial and accusatorial systems is obvious. The treatment of the 'statement of admission of fact' and the 'statement of commission of offence' alike is vulnerable to subject the suspect to a condition of miscarriage of justice. This condition may result in throwing the burden of proof on the suspect, which is not only undesirable but prohibited in the system that follows the accusatorial system. The definition of the 'confession' in confusion with 'admission of the fact' may deprive a person from benefit of an offence for 'self-defense'. Similarly, accidental and unintentional acts of offence may be defined as culpable crime resulting in severe sentences to suspects. The failure in distinguishing the term "*swikarokti*" (admission of facts) from *sabit* i (confession) is vulnerable to create disuniformity in application of the "statements" made by suspects. Obviously, persons admitting the "facts" may be witnesses to the commission of crime. Nevertheless, the admission of fact being potential of taken up as confession, the person who is merely a witness of the crime may be prosecuted as a co-accused.

- Apex Court Act, 1952, which provided for the establishment of the Pradhan Nayalaya, envisaged for the independence of the judiciary. An extra-ordinary jurisdiction to issue writs in order to protect people's fundamental rights has been conferred on the court. The adoption of writ jurisprudence called for the emergence and consolidation of the legal profession – the Bar.
- Appointment of Hari Prasad Pradhan as Chief Justice, who had been trained in India, was a good lawyer familiar to the adversarial system in India. He therefore developed the judicial practice in Nepal in tune with the adversarial system.
- In 1960 (2017 B.S.), the State Cases Act was promulgated which distinctly outlined the roles and responsibilities of prosecutors and adjudicators. It institutionalized the system of the state prosecuting and defending criminal cases as a party. In principle, the judiciary then was given the role of an umpire, independent of executive control over its procedures.
- In 1974 (2031 B.S.), the Evidence Act was promulgated which placed the burden of proof of criminal charge on the state.
- The Constitution of the Kingdom of Nepal, 1990 (2047 B.S.), fully recognized the suspects' right to remain silent. Further, the following provisions of the Constitution fully consolidated the adversarial system in Nepal:
  - independent and competent justice and protection of human rights of individuals are regarded as one of the basis structures of the Constitution,
  - human rights guaranteed under part three of the Constitution are inviolable, and the supreme court has absolute jurisdiction to grant redress when such rights are violated,
  - the judicial system has been granted full independence in its procedures, and appointment and tenure of its actors, and
  - universal principles of justice provide a basis for interpretation of statutes.

The rapid consolidation of the Anglo-American legal system

significantly attracted the Nepalese students to train themselves in the system. The Apex Court in 1952 (2009 B.S.) further encouraged a group of Nepalese students to obtain legal education from Indian institutions, which had been tremendously influenced by the Anglo-American legal system. The emergence of legal education in Nepal took momentum with the multiplication of lawyers trained in foreign legal systems. The following few characteristics should not, therefore, be ignored while considering the development of the Nepalese legal education:

- The curriculum since the inception of legal education in Nepal is immensely influenced by the Anglo-American legal system, mostly in the shape adapted in India.
- The teachers and students are used to view legal problems and interventions from the perspective of the principles, practices, approaches and methods prevalent in the Anglo-American system.
- As it is obvious from the historical facts, the transformation of the indigenous inquisitorial system to adversarial system took place without systematic need assessment and planning of the legal system based on adversarial system. This lacuna hampered the process of systematic development of the institutions necessary for effective, efficient and smooth implementation of the adversarial system.

However, in lack of proper planning and failure to establish the concrete objective behind the transformation of legal and judicial system to adversarial system, the prevailing practices based on indigenous system were forgotten to be addressed objectively. The century-long practices thus remained unchanged affecting the smooth implementation of the adversarial system. The legal education too failed to address this problem. It is one of the reasons that the legal education has been frequently changed without any difference in consequence.

Story of Repeated Failure of the Legal Education in Nepal:

Legal education in Nepal has passed almost a half-century with several experiments, without much success in its restructuring. The following cursory glance presents an unusual trend in its development:

1. A B.L. degree was introduced in affiliation with Patna University. It was a two years after-graduation course based on the Indian laws. Teaching was fully based on lecture method. Orientation on skills of communication, drafting, etc was non-existent.

2. The same course, with a superficial change, was adopted by the Tribhuvan University following its establishment. The curricula exposed students to Anglo-American jurisprudence. The Nepalese jurisprudence is hardly explored. Students had been indoctrinated in western jurisprudence, so that the problems of law and justice had hardly been concern of the then legal education. The production of committed and community-concerned lawyers and legal experts had not been an objective of the legal education wanted to address. Obviously, no students came from the common or grassroots background. The legal education was simply a mater of privilege for dominant class or caste families. Emphasis on theory of Anglo-American system overshadowed study of the core problems and values of the Nepalese society, like:

   - protection of unprivileged and marginalized sections of the Nepalese society
   - protection of gender relations
   - the social welfare and benefits
   - the justice system, which largely remained the feudalistic in character.

   The legal profession became monopolized by a handful of peoples from so-called higher strata. The vast majority from the grassroots community could have hardly been in reach of the legal education. The justice therefore meant a process of formal interpretation of the statutes rather than the pro-active enforcement of laws for the benefit of vast majority.

3. Five years (2+3 years proficiency certificate and diploma in law respectively) course replaced the two years' B.L. program during 1970s. This new curriculum comprehensively included the components of Nepalese law, and as such was envisaged to generate legal human resources adequately familiar with the Nepalese legal and judicial system. Since the legal education was made available in many parts of the country, it became reachable for many in the grassroots. This system destroyed the monopoly of handful of elites in the legal education. A number of lawyers and legal experts then came from the grassroots communities, thus making the legal profession accessible to common peoples. However, its teaching approach was largely based on the lecture method. The component of research was insignificant, and it lacked the clinical teaching component as well. The course also failed to address the emerging socio-legal issues as it ignored to inspire students to empirical study of such issues.

4. In 1984 (2041 B.S.), the five years' semester-based course was abruptly changed for no reason. A three years B.L. after proficiency certificate level was introduced. Subsequently, a decision was taken to do away with the certificate level, and a three years' LL.B. program after graduation was introduced. The interest for doing with the system is obscure. The 10+2+3+3 (8 years in total) course system thus destroy the possibility of reach of common people to legal education again, as it is simply financially not-affordable to students from poor and lower middle class community.

Interestingly enough, none of these changes in the series of courses were outcomes of findings of any type of research and empirical studies; rather they were outcomes of individuals' whims. It is obvious that every time the change was sought through change in the structure of the course but not in substance. No one at the policy level made attempt to investigate that the low quality of the legal education was caused by the lack of vision, inefficient, inadequate and inappropriate components of curricula and obsolete teaching methodologies. Merger of the two or three subjects in one or the bifurcation of one into several was thought to be a timely change in the course to update its quality. Finally, the blame was put on students; they were condemned to have been involved in politics, having absent of motivation to legal education, and so on. Indeed, the policy makers of legal education in Nepal never felt seriously that:

1. Legal education is a part of social science, and therefore it is essentially influenced by the societal phenomena. The legal education exists to address the contemporary legal problems of the time, and as such it is essentially concerned with the contemporary social development and issues. No legal education can ignore the socio-economic and political development of society.

The legal education policy makers in Nepal hardly thought the relevancy of contemporary socio-legal problems in legal education. For them the legal education meant nothing but indoctrination of theories of the western jurisprudence.

2. The legal education lacked research component as an essential part of the regular teaching activity. Students were encouraged to become "good orators" of the principles of western jurisprudence, but not "talented intellectuals" capable of addressing the legal problems of their own society. They had been taught to be "tricky", "magical" and "clever". They were invariably told that their ability was to manipulate the issue in a tricky way. Their role of social engineers was absolutely forgotten. They were taught to be 'rich' and sophisticated citizens, who own foreign cars and big buildings, pocket a large amount of wealth and maintain a dubious and prolific lifestyle. This method simply forgot to motivate or inspire students to be "creative and innovative".

3. Ideals of profession and professional responsibilities were not the components of the course. The legal education totally forgot to emphasize the 'legal profession's responsibility' to the community. The use of technology was not inspired. The link of socio-political and economic development with legal profession was ignored. Students were thus simply left on the streets with nicely printed out degrees. The legal education never took accountability for the miserable failure of students in the practical life.

4. Legal education failed to become responsive to the community, its needs and potentiality. The "delivery of service to the community" was emphasized, but the "community was defined as a market for lawyers".

5. Concepts of globalization, privatization and market economy rapidly invaded the traditional regimes of human relations. They had tremendous bearings on the legal judicial systems. However, students were kept unaware of these implications.

6. In 1990 (2047 B.S.), Nepal entered into an open society with a strong commitment to apply the rule of law in practice. Nepal also accepted the challenge of competing internationally in trade and commerce. It endorsed a new system of tax. Legislation to encourage induction of foreign investment was promulgated.

With gradual expansion of the regime of international trade; foreign banking systems, security systems, and stock markets made their appearance in Nepal. However, the legal education could not pay attention to these new developments. Hence, lawyers found themselves in a state of great confusion to address the emerging problems. The legal education then became a platform to create a "confused mass of legal professionals". This in turn created a vulnerability to mal-practice by lawyers, leading to deterioration of the confidence of people in the legal profession.

7. On the whole, legal education in Nepal failed to produce competent legal professionals. A large number of students were then forced to seek education from foreign institutions, which had two major negative results:

   - Students who had been admitted into LL.B. program in foreign institutions were deprived of the opportunity for orientation on Nepalese law, and as such faced difficulties in joining the legal profession upon completion of their degree in foreign countries,
   - Students who had to participate in foreign courses lacked adequate exposure to socio-legal issues of Nepalese society, which indirectly obstructed the development of independent Nepalese jurisprudence.

Present Reality: Predictability of Dearth of Efficient Legal Human Resource

The after-graduation three years' LL.B. program is not giving a satisfactory result in terms of number of students as well as the quality. The participation of students in academic pursuit and induction of graduates into legal profession both are grossly affected. A number of reasons are responsible for that.

1. A student in the present context of the academic calendar has to loose two years for nothing by the time he/she finishes the LL.B. course. There is a gap of one year in between intermediate and bachelor level, and similarly, one more year in between bachelor and LL.B. The LL.B. course is a three years full time course. As such a student has to spend 10 years (8 academic calendar years + 2 years' loss) to obtain the degree. No student in a poor country

like Nepal can afford to continuously engage him or her for a period of ten years in university. No education system can simply snatch a productive period of students for no meaningful reason. Students who have to engage themselves in earning their bread and butter cannot afford a three years' LL.B. course subsequent to graduation. Consequently, a large number of students who enroll the law school join the work, leaving the legal education merely as a matter of secondary interest. The quality of legal education thus suffers terribly.

2. This trend has negatively affected the induction of fresh groups into the legal profession. A fresh group is always expected to introduce new concepts and developments in the legal profession. However, the absence of the induction of new or fresh graduates in the profession with motivation for legal profession is obviously hampering the quality of the bar, and eventually the course of justice itself.
3. Since students are not turning up in the classrooms, teachers are irregular in their jobs. They do not become involved in research works and academic activities. The quality of law teachers is therefore vulnerable to deteriorate. A large number of law teachers therefore appear in the colleges only to receive their salary.
4. If students are not exposed to research works and current socio-legal issues, they fail to compete in any level. In the wake of foreign investment's induction in the country, indigenous lawyers are not capable to address the needs of foreign companies. Hence, the jobs created by the development of trade and commerce are being taken away by expatriate lawyers. The situation is thus forcing Nepalese lawyers to engage themselves in unethical practices.

Need for Innovation, Commitment and Dedication

An innovation in legal education is therefore an urgent necessity to address the following immediate needs and challenges facing Nepal:

1. The fast increasing trend of globalization and open market economy is posing a challenge to the legal professionals of Nepal in competing with professionals from other countries. The trend of

foreign investors to employ alien lawyers is becoming phenomenal, subjecting Nepalese professionals to unequal competition. Hence, the country has to have a legal education system competent enough to generate legal experts in the country who are capable of competing with expatriates.

2. Many students from Nepal are forced to seek legal education from other countries. Thus, their mastery is confined to foreign laws. They evidently lack expertise on Nepalese laws and the judicial system. The importation of knowledge of foreign laws alone does not properly address the problems facing the country. Such students have to spend a considerable time after graduation to obtain orientation on Nepalese law before assuming the profession. This causes both a loss of time and resources.
3. The training in foreign country is expensive, so students with talent that lack resources are deprived of higher education in law. This problem is vulnerable to render the legal education a 'privilege' of the elites. The progressive legal education should be conveniently accessible to those who cannot afford spending a large cost for becoming a lawyer.
4. The value system, with which laws and judicial systems maintain a close relation, is different in foreign countries and thus it often creates a problem for graduates trained in foreign laws in accommodating with the reality and environment of the judicial system of Nepal. This problem results in frustration of students to legal profession.
5. The growing tendency of young people joining the foreign institutions is blocking the process of transference of the professional experience of native senior legal experts to the coming young generation.
6. The country has a democratic system with pluralism. The principles of democracy and rule of law require rationalization of the traditional systems in accordance with international trends and values. However, in the lack of a legal education to address such needs, democracy may suffer underdevelopment.

The five-year' LL.B. program is therefore introduced as a timely

response to the need of a viable and competent legal education system, which has been very effectively and meaningfully implemented in countries like India, a next door neighbor. The five-year's LL.B. is an emerging trend in the legal education in many countries in all continents. The effectiveness of and attraction to the course is rightly proved by preference of immensely large number of students to the five-year' course and increasingly large number of institutions being established in India as well as other countries. The following positive traits have been identified in this program:

1. Students join the course as a 'preferred option' to the course with perfect commitment to develop the career of legal professionals. Hence, this program is expected to effectively address the problem of students' disinclination to active participation in academic pursuit. The Kathmandu School of Law has been able to establish this result. The commitment and dedication shown by students is not only inspiring but praiseworthy.
2. The five years' program provides for an adequate time span for acquainting students with social studies, clinical practice and research skills. Since, students have adequate time for clinical practice, their professional skills can be fully developed during school time and as such they do not need to spend extra time learning professional skills.
3. Since the course runs consecutively for five years, students are relieved from losing a year while waiting for their results.
4. The five years' course has an adequate time span to introduce specialized knowledge to students. Like the Bangalore School of Law and many other universities in Australia, New Zealand, UK, and South Africa, Purbanchal University has adopted a course which provides the opportunity for students to develop a field of specialized expertise right from LL.B.

The five years' LL.B. program has been developed to face the challenges left unaddressed by the traditional system. Definition of the objective is one of the prime concerns, which considers the need of the country as well as the changes the time must address. There is a need of reviewing the history and contemporary needs

that the legal and judicial system must address.

Efforts to be made for Making Legal Education Timely and Efficient to Address the Challenges

Compulsory Law Firm Placement as Interns: Like medicine and engineering, legal education is a vocational education. Students are expected to utilize their knowledge and skills learned in the schools in practice. Hence, involvement of students in a professional career is necessary right from the stage of studenthood. They should get the chance to develop a professional behavior from the moment they enter the law school. The placement of students in law firms is therefore essential. Hence, the universities must encourage a legal education that emphasizes practical learning and development of the professional behavior of students.

Involvement in Research Activities: Law is indispensably related with social issues. The study of law is not only incomplete but also inefficient if it ignores social issues and the process of social development. Research is therefore an indispensable element of the legal education. Hence, legal education must be fully research oriented.

Clinical Approach in Teaching: Socratic lectures largely destroy the creativity of students, as they do not develop a habit of innovative and logical thinking. Law is a matter of frequent interpretation and the environment and the needs influence the interpretation. If creativity is ignored, a law school will be doing nothing but generating a confused mass of people. The clinical approach is especially developed to help students:

- To link themselves to community problems, which is in itself an opportunity for them to use their theoretical knowledge on actual problems,
- To build a community based approach to justice,
- To identify problems needing legal interventions, and
- To deliver service to community through building awareness.

Developing Excellence: Development of excellence should be a focus of universities. As a multi-ethnic and diverse society, the legal relations of individuals are not set up in a stereotypical pattern. The

relations are fragile and volatile as they are governed by multiple value systems. Similarly, the problems of environment, development, equitable distribution of resources and participation in governance system are acute, requiring the service of talented jurists to design a workable legal framework. This task is not possible to be performed by legal experts who have no in-depth knowledge on the complexities of the Nepalese society. Only the jurists who have keenly observed the problems and have developed insights to address problems can deliver this service. This capacity can be developed only by a native institution. Hence, the need of the time is how to develop such an institution in the country to cater for the need.

Purbanchal University has made a breakthrough by adopting timely and efficient curricula for five years' LL.B. and two years' specialized course on Master of Laws. Both the courses have been developed through extensive research on experiences of successes and failures of the legal education system in the past. The process involved participation of academics as well as stakeholders. However, the development of the course itself is a fair guarantee for excellence. The following elements play a vital role in achieving the desired goals:

1. Appreciation and Punishment: Evaluation of teaching staff is indispensable element for monitoring and maintaining the quality of legal education. This is where legal education has terribly suffered in the past. Purbanchal University must be serious in this regard. A few suggestions are drawn up for future actions:
   - The status of educational institutions with profit making ventures and non-profit making ventures must be made separate. A grant should be given to non-profit making institutions.
   - The status of teachers is a major issue for affiliated colleges. The University must develop a system where teachers may, without subjecting the University to financial burden, be able to promotion. The University should develop a system to recognize the status of teachers involved full time in the college. Similarly, teachers who have undertaken academic administration should not be undertaking responsibility in other institutions.
   - Teachers who are engaged full time in teaching should not be allowed to practice beyond a limit of three cases a week.
2. Legal institutions should conduct clinical programs. This is essential for the development of students' professional skills.
3. Legal journals are a necessary feature of the life of every law faculty. Hence, university must require publication of journal necessarily.
4. There should be adequate space for a moot court and clinical activities in legal faculties. Moot court practices should be compulsory and observed by a panel constituted by the University.
5. Masters degrees should be absolutely research based. Students research papers should be of highly standard.

Evaluation System of the Students: Effective evaluation system is necessary to ensure that the students have met the necessary goal. In order to compel the students into academic activities, internal evaluation system is a measure to meet this end. Home assignment, class test and periodical terminal examinations or oral examinations can be adopted in this regard. Twenty percent of the total mark can be set aside for internal evaluation and eighty percent for the external examination. This is the policy that has been adopted by Kathmandu School of Law from the very beginning of its academic activity. If internal evaluation system is effectively carried out, it dispenses with semester system of academic operation.

Semester system is more emphatic upon formal examination rather than actual learning of the students. The twenty and eighty percent of evaluation mechanism may also be used to evaluate the efficiency, devotion and honesty of the teachers and examiners concerned. Teachers and examiners must be accountable to the great disparity, if any, in twenty percent internal exam and eighty percent external exam result. This could operate as a check and balance between internal and external examiners. Too much reliance upon external evaluation only is traditional and not fruitful to meet our goal. If students are made to work from the very beginning of the academic year and if internal evaluation is made effective, they will be less

tempted to leave the class and peruse illegal activities in the examination. Extra curriculum activities can be carried out immediately after the examination. Teachers framing external examination questions must be subjected to provide evaluation guideline on each question framed by him. This approach would make him to be more objective to the standard of students expected by him. It would also help to the external examiner to evaluate the answer book fairly. If he wants to make any comment on the question or on the examination guideline, he may do so and draw the attention of the concerned authority in this regard.

Teaching Methodology and Teachers: Teaching is a technical profession requiring skills of communication, manipulation of students and honest and devoted approach of academic excellence. New teacher must be made trained for some week through experience teachers and experts. Let us redefine the term "Teaching". Teaching is not what the teacher taught in the class. Teaching is what the students learned from the class. Lecture method is the traditional method of teaching. It may be reversed the other way. Student participatory method is the alternative to it. Students can be made to work to their level best by providing synopsis of class they are to face before hand. They may be encouraged to find solutions by providing some questions on the related issue and work in the library. So they come to the class not with blank knowledge but with some querries and comprehension of their level. Such class would be more interesting and fruit-full. New teachers may not be aware of such things. He/she must be made proficient in the knowledge of the subject matter, the evaluation techniques and the methods of helping and encouraging the students.

The Role of the University: Academic institution and the campuses must be given wide range of autonomy to run their internal activities. The experts of the university or the authority must limit themselves to monitor the campuses or the institutions as the case may be from time to time to see whether the institutions have maintained the required standard or not. They may guide the institution for the betterment; link the institutions for the exposure to the outside world and provide financial support where the institution shows encouraging result. University

activities must be predominantly concerned with academic upliftment. Examination activities of it are important of course, but not the sole activity. The university must be fair, boastful of its academic performance, autonomous and free from party politics.

University is for the nation, university is for the academicians of the whole world.

11 Accountability, Transparency and Representation in the Perspective of the Existing Parliamentary System of Nepal: Problems and Prospects

The doctrine of separation of power and check and balance had been conceived decades of ago for realizing the need of accountability of the system of the government. The doctrine prevails in democratic countries with added spirit of constitutionalism to promote the concept of rule of law and wider participation and control of the sovereign constituents in governmental affairs. The concept of devolution of the power to local institutions and non-governmental institutions emerged to materialize the need of popularizing the democracy.

The central system of government, in abstract legal sense called state, operates through division of power in three institutions, viz the legislative, executive and judiciary. For the excess exercise of power by any institution remains as an eminent danger, the doctrine of separation of power and check and balance is employed as an effective instrument to address the problem in roots. The fundamental objective of the doctrine is to secure that the state functions with full accountability and transparency. The doctrine is a fundamental basis of governance system of an open democratic society. The constitution, which is a fundamental document of the governance, underlines the following scheme for the separation and check and balance of power in order to secure the governance system function with perfect accountability and transparency:

- The parliament, two houses with the king, makes laws as a primary function of the governance of its part.[1] The Prime Minister who heads the executive government with confidence of the House of Representatives is accountable to the House.[2] The provision for confidence of parliament to Prime Minister materializes the check of parliament over executive.[3]
- The Minister of Council is responsible for implementation of law, and maintains law and order.[4] The planning and implementation of the development activities, including welfare services, is other important function of the executive branch. However, the executive controls the purse of the nation, and the Prime Minister, if the parliament is uncooperative and recalcitrant, can dissolve it.[5] This provision operates for check of executive over parliament.
- The Supreme Court, with its subordinate courts and judicial institutions, is responsible to interpret laws.[6] However, considering that judicial anarchism may arise in absence of control on it, a provision for impeaching an unethical and corrupt judge is incorporated in the constitution.[7] This is a check of parliament over the judiciary. On the other hand, the Supreme Court checks the parliament by means of exercising a jurisdiction of invalidating laws that contravene with the constitutional provision or impinges the fundamental rights of the citizens. Further, the Supreme Court has extraordinary jurisdiction to invalidate the illegal or unconstitutional actions of the executive government. The constitutional Council consisting the Prime Minister, the Speaker and the Opposition Leader, appoints the Chief Justice, and judicial council, comprising the law minister as a prominent member, appoints the judges.

The aforementioned constitutional schemes are the basic

1. Article 68, Constitution of the Kingdom of Nepal, 1990
2. Article 36(4), Constitution of the Kingdom of Nepal, 1990
3. Article 59 and 42(3), Constitution of the Kingdom of Nepal, 1990
4. Article 35(3), Constitution of the Kingdom of Nepal, 1990
5. Article 53(4), Constitution of the Kingdom of Nepal, 1990
6. Article 84 and 85, Constitution of the Kingdom of Nepal, 1990
7. Article 87(7), Constitution of the Kingdom of Nepal, 1990

groundwork for accountable and transparent governance system. These principles are the fundamentals of a democratic system. Apparently, the constitution has provided a solid ground for an accountable and transparent system of government in Nepal. The constitutional scheme, however, do not operate in itself. The implementation thereof is dependent on adequate legislation, honest implementation thereof and effective over-sighting system. This is where the maladies do exist tainting the system, and the accountability and the transparency of the governance system become stigmatized. The political dishonesty and extreme partisan attitude provide the basis for stigmatization.

Problems of Accountability and Transparency

About a decade has passed away since the restoration of democracy. The governance system, however, has presented no promising trend in respect of transforming the governance system into an accountable and transparent system. The following setbacks are found prevailing for stigmatizing the process of transformation, leading to overwhelming disenchantment and distrust of the sovereign constituents over the political forces:

Extreme Form of Political Gimmick: The gimmick of the political parties in the parliament in its notorious form apparently incapacitated the parliament to consolidate the emerging democracy. Often it threatened the power equation between three organs. Owing to what is manifested while making and unmaking of several governments during the second parliament, the people's suspicion towards competence and credibility of the existing political parties to develop a value based democratic system has heightened incredibly. For the two dissolution cases had been dragged to the court, the political leadership presented lack of prudent and state craftsmanship obviously. The judiciary was put into potentiality of being politicized to achieve mischievous political interests of political actors.

Unholy Polarization: Owing to the unholy making and unmaking of polarization in the House of Representatives, the stability of the executive government was absolutely thwarted. The game inspired by inter-party and inner-party political distrusts and dishonesty largely deformed the credibility of the multi-party democratic system. The concept of accountable parliament and accountable executive became a political mockery throughout the tenure of the

second parliament.

Lack of Political Restraint: The manifestly lack of political ethical self-restraint on the part of law makers in activities of indulging in immoral political trading largely converted the parliament into a forum of hatching political conspiracy against executive government. These undemocratic activities largely obstructed lawmakers to play progressive roles of formulating legislation, and over-sighting the implementation thereof. The politically unethical role played by a few Nepali Congress and Rastriya Prajatantra Party members to cause fall of the governments of their own upset the whole concept of political discipline.

Consequently, an atmosphere was established that thwarted the potentiality of an accountable and transparent government as mentioned below:

- The parliament, the accountability of which was deadly hit, lost its significance of a sovereign institution to consolidate the democratic practice of governance.
- The parliament became a forum for polluting politics for the vested interests of the leadership of the political parties. In this course, the leadership of party and its membership crossed all the barriers of ethics and political morality.
- The role of parliament became confined in making and unmaking of the executive governments. The resultant politicization of the bureaucracy and extortion of public revenue by enlarging undue welfare and benefits of the parliament membership, gave unrestricted way to institutionalization of the corruption. The country was thus plunged into a rubbish of white-collar crimes. This caused almost a deathblow to the administrative transparency.
- The Prime Minister's attitude to dissolve parliament for any cause or no cause weakened the significance of the law making body, eventually the sovereignty of the constituents. This attitude is vulnerable of opening a road to autocratic system in guise of pluralism.
- By rendering the court to settle political issues time and again the potentiality of politicization of the judiciary apparently grew

up. The attitude of the people to have access to the judicial decision on partisan line raised significantly. Obviously, impartiality of the court is largely subjected to suspicion.

- Political dishonesty like burning down the constitution while not being in the government surfaced without challenge. This created a situation that the political party, insisted of being punished for an act against constitution, got reward for unholy political zeal of the imprudent leaders.

The question of accountability and transparency in this context has been a myth rather than a reality. It is disheartening to say that the existing condition is progressing to further deplorable consequences.

Role of Consolidating the Accountability and Transparency

The role of consolidating the accountability and transparency of the governance system lies on parliament. The pluralistic society cannot function without accountability of parliament. The process of concretizing the accountability and transparency of the governance gets forwarded with efficient and adequate legislative and over-sighting functions of the parliament. This is in turn achieved by fostering a widespread national consensus for consolidation of the democracy. For this purpose, the following hurdles must be removed first:

- Elimination of extreme polarization within and between the political parties,
- Protection of the impartiality and neutrality of the judiciary and bureaucratic institutions,
- Promotion of the roles of specialized committees of the parliament,
- Creation of an atmosphere for political culture in the parliament,
- Elimination of the extreme whipping of the members of the parliament, and
- Mandatory participation by the members in the parliamentary process.

These interventions are valid to address the problems of current

system. Under the given circumstances of multi-linguistic and ethnic population, topographical diversity and disparity of population distribution in terms of geography, the strategic location and the domination of certain ethnic communities in the administration and politics, some fundamental changes need to be brought in the constitutions to address the problem of accountable and transparent national governance with sustainability. The changes must focus on the following aspects:

- **Wider representational parliamentary system:** The composition of the parliament under the present constitution, which is modeled in a shape of the British Westminsterial system, is vulnerable of being dominated by a certain categories of communities in isolation of others. Under the context of the constitution emphasizing the roles of political parties, the representation of the individual in the parliament cannot be assumed to play roles. Apparently, the issue of multi-ethnic representation through organizational political process is something the constitution has to address in pragmatic paradigm, failure to which essentially leads to regionalization of politics.

  The Westminster model of democracy that flourished in Britain quite a long time ago has been proved old model of popular representation, and is changed by many countries even in Europe. This model is good for a nation of population with homogeneity. This system cannot effectively work for a nation with diversity of population by ethnicity is evidently proved by the Indian context. It is why some of the countries have already adopted a parliamentary system that represents the diversified population through proportional representation system. Sri Lanka in this region has successfully introduced the system, but quite after the ethnic problem turned into violence and separatist movement. Nepal should take precautions that the bad experience of Sri Lanka is not repeated in Nepal. The issues of accountability, transparency and representation should be viewed in broader perspective of change in the parliamentary system. The change must be directed to provide a proportional representation system so that the access to politics and national decision making process is equally available for population from every ethnic community. The Westminster model of parliament, which is vulnerable of generating political elite, is not a

progressive system of institutionalizing the representation and accountability of the national governance system.

- **Popularizing the Central Governmental Legislation Process:** Legislation process is a fundamental instrument of addressing broader policy needs of the society. It consists of processes like policy research, determination of best policy alternatives and eventually, materializing alternatives into a form of law. This methodology of legislation is always discarded in Nepal. Making laws in Nepal means imposition of obligations upon people, and provide privileges to take decisions for government. Since the political parties function with 'strict whip-system' in matters of law making process, the intellectuality and individual experience of individual lawmakers is strictly restrained from taking role. For the individual lawmakers are restrained from playing role in the policy formulating process through legislation, the interest groups have no access to have role in getting the parliament act to address their legislative needs. The absence of the practice of private bill is a result of the said hurdle. Apparently, the scope of popular accountability is largely diminished. This system puts the individual member into accountability to political party of his/her affiliation, but not to the constituents. Being not accountable to constituents is evident by the scam of "*pajero* purchase and sale and red passport scandal".
- **Wider power to Local Governance:** Central government has a prominence in Nepal's constitutional arrangement, which may partially be explained by the unitary nature of the state. Officials in Singhadurbar, however, cannot carry out all government. Village Development Committees, Municipalities and District Development Committees, the local authorities under prevailing statues carry out many tasks of the government. These authorities are composed of elected representatives, yet administrators appointed by central government effectively control them. Local government doesn't have long history in Nepal, and its scope for freedom of action has been reduced by inappropriate and inadequate legislation. Moreover, disguised trend of centralizing the government is also responsible for limiting the scope of freedom of actions of the local bodies.

Conclusion

Democracy means an accountable, transparent and representative system of governance. However, the existing Westminster model of representation in parliament does not represent sovereign constituents in a popular accountable manner. The legislation process is restricted by monopolization of the central government, and stigmatized by strict politicized whip-system. The local autonomy of the governance is effectively denied. In this context, to make the democratic system function accountably and in transparent manner the following changes must be effected:

- Amendment in the Constitution to change the existing representation system into popular proportional representation system.
- Encouragement to process for lawmaking through private bill, and
- Greater autonomy for local government in decision making and implementation.

Ω

Right to an Adequate Standard of Living, Development and Social Respect and Dignity 12

"Shiva Devi, a mother of a three years daughter, committed suicide killing her daughter first. She was five months' pregnant. She had no foods for three days as the three days' general strikes kept her out of work. Starvation left nothing for her but to end her life along with her daughter. Her husband left home for Punjab of India for works three months ago, but could send nothing for support for the pregnant wife and infant child."

"Laxmi Maya had been dragged out of home and physically assaulted by a mob. She was condemned to ostracization for being a 'witch'. She held responsible for miscarriage of Ram Maya. The mob was violent. She was not only beaten up severely, but eventually compelled to confess and take "human excreta".

"A man from Dalit family was ousted from village for his attempt to enter a local temple".

"The landslide swept away the houses of poor Chepangs. A few kilograms of rice had been saved for occasion of delivery of the daughter-in-law. The landslide did not leave the rice too. There is nothing to feed the daughter when she will give birth to the baby, a Chpang Mother says. We have been compelled to live with "tarul and vhyakurs" (roots of wildly grown audible plants).

In the South Asian region, frequency of such stories is phenomenal. The instances cited here are only few to mention out of millions. Quite contrary to the painful scenario exhibited by the stories, the South Asian region affords billions of dollars to maintain one of the largest military in the world.

Our region has mastered in superb technological competence including the one to 'manufacture sophisticated long range missiles' with capacity to hit the target at far distance generally beyond the imagination of ordinary human being. These missiles projects consume a huge amount of scarce revenue which otherwise could have been used for sustenance, medical care and many essential services necessary for dignified life.

Moreover, this region holds more factories to produce guns and explosive powders than pharmaceuticals. The number of fighter jets lethally killing human beings downsizes the number of hospitals to 'save lives'. Much more fund is expended to 'prepare armed recruits' than to 'produce doctors'. The number of women and girl children condemned to trafficking and other forms of sexual violence, and maternity related death is larger to that of those who are fortunate to graduate from universities". Briefly speaking, "We the people of South Asia are compelled to live in paradox or crystal contrast of reality".

It is not unnoticed that thousands of girls in our region either end up at early marriage and vicious cycle of misery to follow-early pregnancy, health hazards and maternity related deaths. It is also a fact that many of them are condemned to sexual exploitation, generally ending at prostitution within or across the border. Youths of nations in our region dream of 'migration' abroad for works from the moment of life they start understanding about it.

The remittances they yield abroad often working in inhuman conditions constitute one of the major sources of state exchequer. Many mothers are compelled to migrate abroad, developed countries in the west in particular, as "*nannies*" leaving their infant children at homes. They generously offer love and affection to children in western hemisphere and Japan, who having their parents busy in works lack love and proper take care. But back in homes their infant children are deprived of the same.[1] For overwhelmingly large

proportion of people in our region, the dream of the 'standard living' is thus something never to be true- simply a 'myth'.

In the given background, this article has made attempt to investigate the 'prospect of enforceability and justiciability of the right to an adequate standard of living, inclusive of the right to development and social respect and dignity' in the context of South Asian region. The article attempts to articulate that the 'right to an adequate standard of living' is not an exclusive privilege of the people from the developed countries; this is equally an indispensable right of the people from any part of the world irrespective of sex, religious belief, social origin, political ideology, nationality, and so on. Peripherally, the article endeavors to examine the scope of the said right from political perspective. The main thrust of the article is to explore the ' challenges and prospects' concerning the justiciability of the right to an adequate standard of living.

Based on the impressions founded on several years' experiences, it is hard for us to realize that the democracy in our region hardly means more than a 'system of ballots", a complex of twisted, tampered, messy and bewildered phenomena. The democracy for our region is hardly something more than a event to elect the parliament and constitute the government, generally headed by this or that group of elites. It is a grounded reality of our region that the governments often expect people to serve them respectfully- people are hardly given a status more than that of servants. The societies of our region

1. If there is a good woman behind every great man, behind every great woman a good 'nanny'. The restructuring of the American and other western countries' families have crated a huge demand for child care. According to a 1992 Department of Consumers' Affairs Report that calls the nanny-placement industry a "free for all ", there are almost 400,000 children under 13 in New York City whose parents both work. As much as these mothers suffer, their children suffer more. And there are a lot of them. An estimated 30 percent of Filipino children- some eight million-live in households where at least one parent has gone overseas. These children have counterparts in Africa, India, Sri Lanka, Latin America, and the former Soviet Union. How are these children doing? Not very well, according to a survey Manila's Scalabrini Migration Center conducted with more than seven hundred children in 1996. Compared to their classmates, the children of migrant workers more frequently fell ill; they were more likely to express anger, confusion, and apathy; and they performed particularly poorly in school. Other studies of this population show a rise in delinquency and child suicide. When such children were asked whether they would also migrate when they grew up, leaving their own children in the care of others, they all said no. See, Barbara Ehrenreich and Arlie Russell Hochschild (Eds), *Global Woman: Nannies, Maids and Sex Workers in the New Economy*. Granta Books, London, 2003.

are basically founded on 'notion of hierarchically structured relations of human beings". Obviously, benefits and privileges the peoples are entitled to are not determined by the 'needs' but by the assigned position of the beneficiary. The social respect and dignity of human being in our societies is thus something that is not considered 'inherently' endowed equally to all; it is rather taken as an exclusive privilege of the elite population.

The core assumption of the paper lies on a belief that the ability of the people to govern themselves, i.e. democratically, is necessary for the protection of all human rights.[2] As Prof. Franck argues, the right to self determination is the cornerstone of the democracy. Conversely, the democracy is the cornerstone of the right to self-determination. Obviously, the concepts of democracy and self-determination maintain an innate connection, in lack of one, other cannot exist meaningfully. It is said that the human rights seeks to protect individuals and subjected groups from governmental impositions.

Democracy presumes that these individuals or groups have share in the government. The democracy therefore protects human rights through a representative government.[3] The state of democracy in the South Asian region is passing through a volatile situation. Riggings of polls, horse-trading in governments, making and unmaking alliance for vested interests, rebellions and incidents of terrorism have rendered the democracy 'a mockery'. The protection of rights of people is thus a serious challenge facing the region.

In this context, this article has made efforts to analyze the issue of 'right to an adequate standard of living' from the prevalent values perspective also.

2. Prof. Thomas Franck, *The Emerging Right to Democratic Governance,* 86 A.J.I.L.46 (1992). Prof. Thomas claims that democracy is a growing trend of the international affairs. He argues that democracy is essential both for preserving the peace and human rights.
3. Prof. Oloka Onyanga has suggested that one primary reason for the failure of effective implementation of economic rights in Africa has been the maintenance of centralized power, often through one party government. See, Prof. J. Oloka Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa,* 26 Cal.W.Int'l L.J. 1, 41 (1995).

Conceptual Standing of the Right to an Adequate Standard of Living:

The right to an adequate standard of living is dealt here inclusive of the right to development and social respect and dignity. This right is a major aspect or component of the economic right. The prevailing international economic order, therefore, has inseparable bearing on the right to an adequate standard of living. The developing countries' situation is becoming increasingly deplorable for several factors, the unfair trade relations between developed and underdeveloped countries. The economic globalization is punishing than rewarding the poor countries. Rudolph Walsh has rightly remarked:

> *"In the economic policies of the government, one finds not only the explanation for its repressive crimes, but also a greater atrocity with punishes millions of human beings with carefully planned misery".*[4]

The international economic order is a serious hurdle or backlash for the progressive consolidation of the economic rights as equally indispensable human rights. However, economic rights currently maintain a subordinate status, as the primary importance is being given to the civil and political rights.[5] Economic rights are inseparably linked up with social rights, and they both are cornerstone or prerequisite for practical realization of the civil and political rights. The civil and political rights are ultimately fruitless in absence of the economic rights. This assertion requires emergence of a strong movement seeking incorporation of the socio-economic rights in international legal discourse with the same attention that is paid to civil and political rights. The objective of the movement should be to ensure 'protection against economic exploitation of the people of this third world' as well as to guarantee the right to an adequate standard of living to through providing equal access to material resources and quality opportunities.

4. *Open Letter to the Argentinean Junta, reprinted in Richard Falk, Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries, 1 UNIVERSAL HUM. RTS. 3. (1979).*
5. See, e.g. Abram (USA), E/CN.4/Sub.2/SR.24, at 6 Paras, 19-21.

Succinctly, the concept of the right to an adequate standard of living implies a concretely entrenched condition of 'socio-economic justice' to the people, with urgent emphasis on the deprived and marginalized communities in particular. Meanwhile, it implies a pro-active attitude to materialize the said need in practice, and for that it demands for pro-active and democratic changes in the system of governance and existing socio-economic settings. In the given political context of the South Asian region, the issue of right to an adequate standard of living is closely linked up with the need of consolidation of the democracy.

The ultimate goal of the socio-economic justice is to protect the 'right to life, which necessarily includes those conditions that are necessary for a dignified life. The sweep of The Supreme Court of India in a case has rightly maintained:[6]

> *"It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. The equally important facet of that right is the right to livelihood because; no person can live without the means of living, that is, the means of livelihood".*

Availability of adequate and nutritious foods for sustenance and protection of the means of earning livelihood is the most primary condition for socio-economic justice. The protection of the livelihood is a basic guarantee for the 'socio-economic justice. The deprivation of the 'livelihood' thus amounts to be a denial of the "socio-economic justice". In turn, the denial of socio-economic justice necessarily means deprivation of the "right to life". It is, therefore, legitimately argued that if the right to socio-economic justice is not treated as a precondition of the right to life, it would be the easiest way for depriving a person of his/her right to life. Breaking of the link between the concept of socio-economic justice and the right to life would provide the state an 'excuse to starve the people', and thus will be politically able to suppress the 'unliked' ones". The socio- economic justice has thus no meaning or standing

6. Basheshar Nath v. The Commissioner of Income Tax Delhi (1959), Supp. 1 S.C.R. 528.

in oblivion of the right to an adequate standard of living.

The socio-economic rights are inseparably interlinked and interdependent, and the deprivation of one will create a 'cyclic impact' on the whole perspective of socio-economic justice. The lowered social condition or deprivation of social justice, for instance, necessarily and successively results in economic deprivation, which is, as a widely recognized factor, a major cause of social marginalization.[7]

Both in concept and implication, the right to an adequate standard of living comprises socio-economic well-being of individual person as well as his/her family. Specifically, this right includes provision of adequate food, clothing, housing, medical care and necessary social services. The right to security in events of unemployment, sickness, disability, widowhood, old-age or other lack of livelihood in circumstances beyond his/her control is another essential component of the right to an adequate standard of living.[8] Denial of these basic needs of human being virtually amounts to be a deprivation of the 'right to life'. A nation failing to recognize and guarantee these basic rights (often expressed in the forms of basic needs) can be termed as a 'failed state" in the premise of governance. The state's political legitimacy is dependent on its level of recognition and protection of the 'right to an adequate standard of living'. Obviously, this right maintains a heavy bearing on democratic governance. A government's legitimacy is in fact grounded on fact of recognition and guarantees the right to an adequate standard of living. This is evident from ICESCR's following provision.

Sate parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) are required to adopt, inter alia, the legislative measures necessary to realize the right to an adequate standard of the living, the right to adequate food being the most important component. Pursuant to the obligation created by the covenant, several states have enshrined the provisions on the right to food in their constitutions. In the South Asian region, India, Bangladesh, Pakistan and Sri Lanka have explicitly enshrined into their

7. See, Matthew C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development.* 8 (1995), Cited from Zeshan Khan, *International Economic Rights.*<http://law. gonzaga.edu.borders/khan.htm>

8. <http//www.un.org/pubs/cybershoolbus> Also see, Article 25 of the Universal Declaration of Human Rights.

constitutions the obligation of the states to provide an adequate standard of living to their citizens.[9] The Nepalese Constitution, however, does not explicitly commit the state to take obligation to provide inadequate standard of living. In article 25, it outlines the following references in the forms of directive principles of the state:[10]

- Promotion of the condition of welfare on the basis of the principles of an open society by establishing a just system in all aspects of national life, including social, economic and political life.
- Transformation of the national economy into an independent and self-reliant system by preventing the available resources and means of the country from being concentrated within the limited section of the society.
- Establishment and development, on the foundation of justice and morality, a healthy social life by eliminating all types of economic and social inequalities.
- Enjoyment of the fruits of democracy through wider participation of the people in governance.

Raising the standard of living of the general public, through development of the infrastructure such as education, health, housing and enjoyment of the people of all regions, has been enshrined in the constitution as one of the directive policies of the state. It is clear from allusions above that none of the constitutions in this region has recognized the 'right to an adequate standard of living' as the fundamental right to be enforced judicially. The following societal notions or values have negatively affected the process of

9. Bangladesh: "It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement of the material and cultural standard of living of the people, with a view to securing to its citizens...the the provision of basic necessities of life, including food, clothing, shelter...." (Article 25) India: "The state shall regard the raising of the level of nutrition and standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavor to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health." (Article 47). Pakistan: "State shall provide basic necessities of life, such as food, clothing, housing, education and medical relief (article 38). Sri-Lanka: "The State is pledged to establish in Sri-Lanka a democratic socialist society, the objectives of which include... the realization by all citizens of an adequate standard of living for themselves and their families, including food, clothing and housing." (Article 27).

popularization or enforcement of the right to an adequate standard of living:

1. The South Asian region, like many other economically developing or underdeveloped parts of the world, is immensely influenced by belief on 'fatalism' as a deeply rooted value governing the general life of people. As one of the most evident implication of the practice of 'fatalism', the wealth or economic prosperity has been taken as a 'gift' of the god and the poverty a 'curse'. A poor is 'born poor' as he/she has been condemned by the god to be so. The economic disparity is thus constructed as a 'godly phenomenon'. The economic disparity is thus an instrument of perpetuating the concept of 'hierarchical structure'.

2. The states' polices and plans as well as the legislative measures are indirectly but pervasively influenced by the widespread belief on 'fatalism'. It ignores or rejects the 'ideology of equality' among peoples from different classes, faiths, sexes and social origins. Fatalism does reinforce the 'static condition' in the life. A woman, for instance, is required or expected to learn only those skills or arts of life, which are necessary for being a good mother or wife. Similarly, a poor must serve the rich for his/her better protection. The fatalism as a value is obviously antagonistic to the concept of equality.

3. In the South Asian region, the widespread practice of feudalism is another strong value system that determines norms of, or basis for, 'inter-personal relations between members of the society. Feudalism promotes a concept of ' dominant class or groups' ownership over the means of livelihood or material resources'. The ownership of the land, which constitutes the major means of livelihood in countries like ours, is supposed to be exclusively controlled by the landlords or peoples coming from certain privileged clans. Of course, the ownership of the land is an important source for acquiring 'status'. The equality in material resources is therefore hindered by the feudal concept of 'social status' based on land holding. Obviously, the government of our regions have less motivation towards 'land reform' programs; rather they are indirectly against or apathetic to 'rational distribution of land holdings' to the needy. The right to an adequate standard of living is contrary to the feudalistic value concerning means of economic prosperity.[11]

4. It has been a strongly grounded belief in our region that 'poverty' is an outcome of the lacking of 'resources'. In fact, the poverty has largely been an outcome of 'lacking of proper resource management' and 'quality opportunity for employment'. Lacking of 'quality opportunity for employment' and the rampant poverty maintain a 'cyclic consequential relation'. An untrained bus 'cleaner', for instance, strives to address the need of daily foods, and thus is incompetent for development of the skills to 'enrich his/her quality to upgrade'. Education and empowerment constitute the major instruments for attaining the right to an adequate standard of living. However, as the material resources are fully controlled by the socially high-strata groups, the development policies and plans of the governments are hardly directed to the benefits of the disadvantaged and marginalized groups. This phenomenon obstructs the process of building an equitable social equilibrium, thus pushing the weaker groups towards marginal lines. This condition can be defined as an absence of ' socio-economic justice'.

5. As an outcome of the feudalistic and fatalistic notions and practices, the 'work' is condemned or degraded. An individual who really need not work is defined to be a 'lucky person'; he/

10. Article 25 of the Constitution of the Kingdom of Nepal, 1990.

11. In Nepal, the grant of land used to be a reward to be given by the government to persons for their special service to the nation. The concept of '*birta*", which provided an exclusive ownership over the land, was used as the most important instruments of the land administration in Nepal. The practice of "big land holding by elite class of people" emerged out of the system of *birta*. It was abolished by the democratic government in 1959 through a statue. In practice, however, the powerful control of elite class over the land continued, depriving thousands of people from livelihood. In the last 50 years, there have been several commissions constituted to address this problem without any success. The successive failure of the governments to address the land issue has been linked up as a factor for the emergence of present crisis in Nepal. Nepal has been facing a serious problem concerning land management system in two folds: Firstly, actual farmers lack ownership over the land; and secondly, the fragmentation of the land has become a serious problem in itself, which negatively affects the productivity of the land. Migration from hills to flat lands, uncontrolled urbanization destroying productive lands and impeding possibility of agricultural mechanization are by products of the poor land management system.

she is described as the favorite of the 'god'.[12] This notion of thought destroys the 'culture of work', which in turn divides the society between those "who are constantly and continuously served" and "those who are constantly and continuously serving". Continuity of this division demands for existence of two classes of people severely affecting the prospect of 'popularization and enforcement of the right to an adequate standard of living.

6. Moreover, in our societies the professions are categorized and judged in accordance with the 'social status of person involved in the given profession'. A black smith's work is down graded because the black smith's social stratum is placed at the bottom line. Equality will thus challenge the 'so-called higher social stratum' enjoyed by socio-economic elite group. Obviously, any efforts to achieve equality might be resisted by the elite segment of the population.

These factors play crucial role in minimizing the prospect of enforceability of the 'right to an adequate standard of living' within the legal regime of our societies. These factors are obviously responsible for obstructing the constitutional and legal process of recognizing the fundamental characters of the rights like standard of living, development, education, etc. The values associated with fatalism and feudal practices are constructed as cultural identity of the society thus 'blocking or preventing' prospect of enforceability and justifiability of the economic and social rights.

Issue or Concern of Justiciability of the Socio-Economic Rights:

The concept of 'judicial non-enforceability' of the directive principles is primarily responsible for courts' traditional approach to accept justiciability of the socio-economic rights. Many of these rights are taken as 'institutional interests' rather than entrenched rights of the people, and as such there is a belief that it would be difficult or not feasible for judicial process to 'enforce those claims that are not

12. In the Nepalese society, a woman who need not work is supposed to be a 'luckiest' woman. This perception is so pervasive that parents hunt for rich families for their daughters' marriage, so that they must not work. This perception also applies to boys. Generally, men in the Nepalese society look for rich wife than professionally competent wife.

concrete and crystally entrenched by the prevailing laws. Legalists believe that courts have no jurisdiction to enforce something that is not clearly established by the law as a right. This notion is detrimental to the emergence and institutionalization of the concept of 'justiciability'.

The issue of non-justiciability is thus a complex outcomes of the following wrong perceptions:

- Socio-economic rights are merely general interest of people which are not capable of enforcement by the courts,
- Rights are products of laws, thus their existence is dependent on state's consent or choice to enforce. Socio-economic interests of people are abstract values rather than the enforceable rights.
- Socio-economic interests of people are development concerns of society instead of matters for judicial intervention.
- Socio-economic rights are collective interests of the people, so that it would be impossible for a single individual to assert or enforce them.
- Some people argue that human rights derive legitimacy from natural laws that supports civil and political rights but not economic rights.[13]
- A contention is also made that unlike civil and political rights, economic rights, because they are positive rights, are subjected to the availability of appropriate resources before they can be implemented effectively.[14]

These perceptions, however, fail to realize that the issue of socio-economic rights concerns the overwhelming population's interests for better and secured life. Those who argue about the non-justiciability of the socio-economic rights fail to understand that lives of millions are at stake; their livelihood, health, education and development are at stake. State's failure to address these concerns of marginalized and disadvantaged sections of the population is a root cause for dark

13. Although the UN now generally considers economic and social rights to be indivisible from civil and political rights, little action has been taken to set the stage for the proliferation of economic rights. See, Proclamation of Teharan,33 U.N.GAOR, Resns., Supp. (No.45), at 150 (1977).
14. *Supra* note 14.

future of these millions of people. The disparity in matters of equitable distribution of resources is what causing an incredible gape between the peoples.[15] The demand for justiciability of socio-economic rights thus challenges the traditional paradigm of the 'justice' or theories of jurisprudence that are essentially founded on the notion of centralist legalist approaches.

Many of the problems facing the vast majority of the population are outcomes of the irrational, exploitative and inequitable distribution of the material resources, service delivery and opportunities. In one case, the Supreme Court of India, while rejecting the plea of the government that the slum dwellers of Bombay city had failed to adduce evidence to show that they would be rendered jobless if they had been evicted from the slums and pavement, viewed that the main reason of the emergence and growth of squatter-settlements in big city like Bombay, is the availability of job opportunities which are lacking in the rural sector. The court convincingly expressed that these facts constitute empirical evidences to justify the conclusion that persons in the position of petitioners (slum dwellers) live in slums and on the pavements because they have small jobs to nurse in the city and there is nowhere else to live.[16]

As it is evident, millions of people live in a given type of live condition because they have no other options for them. In rural villages, women die because they get no medical support. In squatter-settlements, children are dying because there is no medical care to address the diseases like tuberculosis, malaria, and other various forms of transferable sicknesses. The socio-economic rights in this perspective do not simply mean affairs needing development interventions, but they are, most importantly, the matter of concerns of 'justice' and as such require the attribute of justiciability, so that they are tested or tried by the courts on the basis of authentic empirical data.

15. Martin. 80% of the total GDP in Nepal is used by 20 % of the population, whereas the rest 80% is compelled to live with 20% of the GDP. The elite groups of the society thus exclusively enjoy the fruits of the economic development of the country. This group benefits from the most part of the service delivery of the state, but unfortunately it is hardly loyal to the nation. This group has been monopolizing in the education system but it hardly works for the society. Most part of the human resource persons thus generated migrates to developed countries after benefiting from the educational or service delivery system funded by the tax of the poor people.
16. In Re: Santa Ram (1960) 3. S.C.R. 499.

Is it wise for the court to intervene in cases where the investigation of the government policies and programs is starkly obvious? Many people still have strong skepticism about the justiciability of the socio-economic rights. Traditionally, it is suggested that the judiciary must maintain a 'self-restraint' in issues where the policies or programs of the government are concerned. This opinion or theory obviously discards the omnipotence of the 'fundamental or human rights'. A simple fact is that the state and its machinery, including judiciary, exists for the service of the people, and as such they simply cannot 'close their gates' for the sake of mere formalism.

The governance, of which fair, objective and impartial justice is an indispensable element, cannot be a 'robotically' formalized system; it cannot ignore people's concern with any excuse. The Supreme Court of India's decision on Smt. Ujjam Bai v. State of Uttar Pradesh (1963)[17] refers to three classes of cases, if the jurisdiction to deal with writ petitions under Article 32 of the Indian Constitution is concerned, in which the question of enforcement of the fundamental rights would arise, namely (1) where action is taken under a statute which is ultra vires the Constitution; (2) where the statute is intra vires but the action taken is without jurisdiction; and (3) an authority under an obligation to act judicially passes an order in violation of the principles of natural justice. The socio-economic right which directly concern with the right to life cannot be considered to be out of the scope of the judicial review.[18] It is unquestionably believed that the right to life includes the right to livelihood and dignified

17. 1963, 1 S.C.R. 778.
18. Olga Tellis v. Bombay Municiapal Corporation and ORS.ETC. (1985.07.10) Supreme Court of India. In this case CJ Chandrachud, while presenting his view, held: "The right to life which is guaranteed by Article 21 includes the right to livelihood and since, they (slum dwellers) will be deprived of their livelihood if they are evicted from their slums and pavement dwelling, their eviction tantamount to deprivation of their life and is hence unconstitutional. For the purpose of the argument, we will assume the factual correctness of the premise that if petitioners are evicted from their dwellings, they will be deprived of their livelihood… The sweep of the right to life is conferred by Article 21 is wide and far reaching, It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right life. An equally important facet of that right is the right If the right to livelihood because, not person can live without means of living, that is the means of livelihood. If the right to livelihood is not treated as part of the constitutional right to life, the easiest way of depriving person his right to life would be to deprive him of his means of livelihood to the point of abrogation."

conditions attached thereto, including a right to an adequate standard of living. Obviously, denial of right to livelihood would be a deprivation of the right to life and as such the violation of the constitution and the international human rights instruments.

Development Concerning the Acceptance of 'Justiciability' of the Socio-Economic Rights:

Against many people's wrong perception, one can argue that the socio-economic rights have existed for many years, predating the UN Charter.[19] Some people have argued that economic rights have had a place in the international human rights regime longer than civil and political rights. However, the credit of bringing the international legal discourse on the economic rights goes to the American President Franklin D. Roosevelt, who characterized the 'economic rights' as the "freedom from want", which includes the right to a useful remunerative job, the right to earn enough to provide adequate food and clothing and recreation, the right to every family a decent home, the right to adequate medical care and the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; and the right to good education.[20] The ICESER expanded these ideas to include economic self-determination, favorable working conditions and the right to trade union.

Following the establishment of the UN, the economic rights had been more focused by the socialist countries, headed by the former Soviet Union. Obviously, for the western world the emphasis on the socio-economic rights smelt a 'fear of socialism'. The expansion of First World welfare model to include the "right to work, right to development, right to social service, right to adequate health were taken suspiciously close to socialist paradigms and was thus avoided for political reasons.[21] Obviously, the enforcement of the Covenant on Economic, Social and Cultural Rights was intentionally pushed back

19. Zeshan Khan, Id. Presidents, 1970-1966, 2875, 2881 (Fred L. Israel ed., 1966).
20. Eleventh Annual Message to Congress (Jan. 11, 1944), in 3 the State of the Union Messages of Presidents, 1970-1966, 2875, 2881 (Fred L. Israel ed., 1966).
21. Phillip Alston, *US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy,* 84 A.J.I.L. 365, 366 (1990). Alston claims that Americans tend to think of the ICESCR "less as an international treaty seeking to promote the satisfaction of basic materials needs that as a "Covenant on Uneconomic, Socialist and Collective Rights". Id.

by the western countries. In fact, this convention was viewed to be a socialist manifest thinly veiled under the traditional rights analysis.[22] The domain of the socio-economic rights thus remained stagnated. The overwhelming emphasis on civil and political rights was thus not a coincident; it was rather planned phenomenon geared up by the western countries which, indeed, seriously jeopardized the interests of millions of disadvantaged and marginalized peoples of the third world countries. For them the regime of human rights hardly meant something more than a 'myth'.

The campaign for popularization and enforcement of the socio-economic rights took momentum following the demise of the Cold War and the disappearance of the Soviet Union, the western latent fear of socialism subsided and there has been an increase in the amount of international efforts to press the enforcement of the ICESCR and academic literature promoting the rights. The increasing pro-active approach of the judiciary in third world countries and the emerging civil society consciousness that the 'recognition and guarantees of socio-economic rights' is a solution to number of conflicts and chaos are surfacing with added strengths.

The emergence of the economic rights can also be traced back to the formation of the International Labor Organization following the World War. However, ILO's focus was on regulating certain aspects of the employer-employee relations rather than on larger macro-economic dimensions of the economic and social policy.[23] The ratification of the UN Charter brought forth the first international reference to the protection of the economic rights, although they were not labeled as such. The Charter referred to the 'higher standard of living' as one of the instrument for maintaining friendly relations among the states as the prevailing economic conditions of many countries themselves had been recognized as one of the threat to peace. As some people argue, the reference to the standard living, economic progress and development of the people of the world had been a response to increasing decolonization and the need of maintaining cooperation between the

22. Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an Entirely New Strategy,* 44 Hastings, L.J. 79, 119 (1992).
23. See Colleen Shepard, *A Review of Lucie Lamarche, Prespectives Occidentalales du Droit International des Droits Econmiques de la Pernonne,* 41 MCGILL.L.J. 907 (1996).1981.

newborn states and former colonizers.[24]

In three years later of the establishment, the UN adopted the Universal Declaration of the Human Rights, which formally endorsed the "standard of living adequate for the health and well being himself and his family, including food, clothing, and medical care and necessary social services, and the right to security in the vent of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control" as one of the human rights.

The language used by the UDHR was vague. In 1966, the ICESCR made attempt to address the issue in concrete terms. However, the ideological dispute between the capitalist and socialist states largely overshadowed the possibility of the ICESCR emerging as an enforceable international human rights law. The Western states asserted that civil and political rights took priority over economic rights because they were the foundation of liberty and democracy in the free world.[25] The Soviet allies promoted social and economic rights as the basis for socialist society.[26] The ideological conflicts between the western and Soviet allies were responsible for stagnation of the economic rights. The following facts illustrate the negative and positive developments of the conflict:

1. The ICESCR had been overshadowed by ICCPR. Although the Soviet Union ardently advocated for social and economic rights, the mechanisms within its political system had hardly any place for development of these rights as inviolable international human rights of individuals. These rights in the Soviet polity were rather used as an instrument of the international legitimacy of the socialist system.
2. In the western countries, where the social and economic rights had been viewed as instruments of socialism, the national governments hardly took efforts to develop mechanisms for their enforcement. Rather the jurisprudence of the west made attempt to define such rights as

24. Louis Henkin Quoted from *Supra* note 14. 1981.
25. Mathew C.R. Craven, The International Covenant on Economic, Social and cultural Rights: A Perspective on Its Development. 9 (1995).
26. Id.

'institutional interests' of the people, not capable of direct intervention by the courts.[27] The development of the jurisprudence of economic rights thus took no momentum. The principle of indivisibility of the human rights was thus politically subjected to a setback.

3. Since ICESCR failed to receive enforcement momentum owing to conflict between the First and the Second World, it forced the peripheral nations to begin enacting regional agreements.[28] Although these agreements embodied the specificity of the ICESCR, but they did contextualized the language to reflect the regional concerns and ideals. The principle of the universality of the economic rights thus suffered. The regional contextualization legitimized the attempt of nations to ignore the significance of the economic rights on the excuse of 'scarcity of the resource'.

These constraints have caused the advancement, implementation and protection of socio-economic rights fallen behind civil and political rights. In this context a remark of the Committee on Economic, Social and Cultural Rights is worth mentioning:

27. Bodenhiemer classified the rights as concrete and institutional rights. Social and economic rights of the people had been seen as 'institutional interests', which existed below the level of rights, in the sense of genuine individual claim to be enforced by the court. Obviously, many social and economic rights did not surface 'in the judicial process of the western countries'. Less priority to these rights was also placed due to absence of 'the problem of abject poverty' in the west. The poverty and starvation was mainly the problem of Asia, Africa and Latin America, where most of the societies had been ruled by dictators. The judicial enforcement of the rights had hardly feasible and likely in these societies.
28. For example, the European Social Charter enumerated the work related rights of the citizens of signatories. The Organization of the African Unity (OAU), through Banjul Charter, focused primarily on the self-reliance of African countries amongst themselves in an attempt to separate themselves from their former colonizers. In Latin America, the Protocol of San Salvador established the rights to work, to have access to trade unions and social security and the right to health. These regional arrangements, though present regional priorities and as such are not antagonistic to ICESCR, minimized the potentiality of the emergence of the universal pressure or force in favor of the enforceability of the economic rights. Thus, despite obligation under the covenant to enact legislative measures to enforce social and economic rights, state parties to the covenant took oblivious attitude to promote and strengthen socio-economic rights of the people. A trend of addressing the socio-economic rights through directive principles or states duties took momentum, which indirectly but effectively ruled out the possibility of justiciability of these rights.

"The international community as a whole continues to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights."

The implementation or effective enjoyment of the civil and political rights is indispensably dependent on the preservation and guarantees to the socio-economic rights. Considering their indivisibility, the Teheran Framework, which identified four pillars of regional human rights technical cooperation, recognized the crucial role of the judiciary in promotion and protection of human rights. Building on the inspiration from the Teheran Framework, the Office of the 'UN High Commissioner for Human Rights' held a workshop of South Asian judges, on 17th November, 2001, viewing the need of promoting an understanding towards justiciability of the economic, social and cultural rights. This workshop explicitly recognized that human rights were indivisible and interdependent, and the rights enshrined in the International Covenant on Economic, Social and Cultural Rights contained in some national constitutions represented statements of clear legal obligation for the states concerned. The workshop also agreed that the principles set out in those documents gave direction to the States concerned and give content and meaning to the fundamental rights enshrined in those constitutions.

Although the workshop ruled out the traditional view of the justiciability, it seriously considered the factors that hindered the judicial intervention for the protection and enforcement of the socio-economic rights. The negative factors affecting the justiciability of the socio-economic rights identified by the workshop were as follows:

1. The inability of the large majority of persons in every society to have access to justice, and failure of States to remedy that inability,
2. The lack of awareness and in some cases the absence of interest in learning more about international human rights standards on the part of the legal community,

3. The lack of understanding of the nature and legal and policy implications of international commitments,
4. Absence of awareness and indifference of government officials, in certain cases, in the implementation of those commitments,
5. Inadequate follow up to the public commitments such as plans of action and pronouncements made in international forum, and
6. The failure to implement the ICESCR fully.

The workshop showed its concerns to address this weakness by pledging to develop a jurisprudence of justiciability of the social and economic rights, and for that purpose adopted the following responsibilities to be taken by judiciary and other institutions:

1. Judiciaries must, in consistent with principles of Bangalore Declaration and Plan of Action, interpret domestic laws in conformity with the international human rights instruments.
2. Judges must take steps or initiatives to call the government to provide information regarding the policies and programs and expenditures allocated by it for the implementation of the socio-economic rights.
3. The national human rights agencies like National Human Rights Commission must play pro-active role in monitoring the performance of the legislative and executive branches of the State in the area of socio-economic and cultural rights. Such institutions must also play role in providing to the judiciary the information about jurisprudence and documents generated by the international human rights mechanisms. The role should include the monitoring and reporting on the implementation of policies regarding socio-economic and cultural rights.
4. Judiciary must use the public interest litigation to enhance the justiciability of the economic, social and cultural rights.
5. Judges must be concerned to protect the vulnerable from helplessness due to arbitrary and discriminatory action; ensure the right to adequate housing of the people; and ensure that no forced evictions were conducted, except in exceptional cases on satisfaction of the mandatory conditions such as consultation with persons who would be affected, reasonable notice, hearing prior to eviction, opportunity for legal redress and provision of

the right to adequate housing in the alternate location.

6. Judiciary must examine the right to health in a comprehensive manner, so as to include prevention, cure, rehabilitation, easy access to health services and attainment of core minimum standards which state parties were committed to implement under ICESCR.

7. The judiciary, as the servant of people, should share the urgency of the people that the objectives of the ICESCR should be fully attained and its provision given effect as far as possible.

Challenges Facing the Enforceability and Justiciability of the Socio-Economic Rights

Effective and efficient enforcement of the economic rights (ICESCR in general) face number of challenges, which can be outlined as follows:

1. Unfettered expansion of the open market or privatization of the economy has fostered an incredible disparity between the wealthy North Atlantic countries and the world's poor.[29] The disparity is created by, inter alia, exclusion of poor countries from the benefit of economic development and international trade and commerce, as these nations are hardly competent to compete with them in the one hand, and in the other, the laws of the western countries are hardly liberal to poor countries in matters of trade and commerce.

2. The multinational companies from the west are exploiting the labor and material resources in the poor countries for their sole benefits, and in the cost of a penny. The west has been seen conservative in economic laws, which are framed to keep things in their sole benefits. The intellectual property law, for instance, generally benefits the western countries. Many laws of the western countries block the poor countries' access to their market unhindered.[30]

3. The historical colonialism is another significant cause of the economic disparity, which left many currently poor states prone

29. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, MAASTRICT, Jan. 22-26, 1997.

30. *Supra note 14.*

to poverty and debt. The abject condition of poverty in such countries has increased their dependency upon wealthier countries, which has retarded economic rights. The guided development has further been intensified by World Bank and other powerful funding agencies. This factor may significantly reduce the 'scope of the right to economic self-determination'.[31]

Conclusion

Human rights are indivisible. They are interdependent. The prospect of economic rights is dependent on consolidation and sustainability of the democracy, and the sustainability of the democracy is dependent on the institutionalization of the socio-economic justice. Civil and political rights are ultimately fruitless without heeding the constraints laid out by economic rights conventions as the International Covenant on Economic, Social and Cultural Rights. One of the major challenges to enforce the economic rights is preparedness of the national judiciary to intervene judicially. The concern, therefore, must focus on preparing the judicial system to act pro-actively to the 'issue of justiciability of the economic rights as omnipotent human rights'.

31. The level of the poverty in Nepal compared to last 20 years has gone up from 33 to 41%. The volume of the debt on per-capita has significantly increased. The huge chunk of the revenue collected from the mobilization of internal sources goes to 'debt service'. While the open market economy has induced consumerism, the purchasing power has slided down. The coca-cola is replacing the water even for poor labor force. The condition created by the dependent economy has been increasingly retarding the possibility of enforcement of the right to an adequate standard of living. See for detail discussion on the situation, Working Paper (unpublished) on "Poverty Alleviation" prepared by NGO Federation for Civil Society's regional and national meetings on "National Development Forum's Meeting in Kathmandu, 4-5th May, 2004. Source, NGO Federation, Katmandu Nepal.

13 Women's Personality is defined in Terms of their Sex and Marital Status

Nepal has its own idiosyncratic legal system that developed in line with Hindu customs over the centuries. The Nepalese legal system is largely an offshoot of Hindu legal system. The molding of Nepalese society and law according to Hindu tradition began in the fourth century AD during the rule of Licchavi kings. The most notable aspect of Hinduization during the Licchavi period was the introduction of Hindu *Varna* system, and an attempt to allocate places to all Nepalese within this system, regardless of whether or not they were Hindus. However, there was no real systematic attempt to unify and codify Nepalese society until the late fourteenth century during the reign of King Jayasthiti Malla.

Jayasthiti Malla promulgated the "Manab Nyaya Sastra (Legal Rules for Human Justice). It was a comprehensive codification of substantive and procedural rules based largely upon Hindu scriptures, Narad and Yagyavalakya Smirities in particular. Rules in Manab Naya Sastra were formulated based on "gender and caste". Hence, an individual's social status was the determining factor of laws. The social system was envisaged to sustain with support of stiffer penal system. The penal system was based on the intensity of the crimes, and intensity of the crimes, in turn, was determined by social status of the offenders. Hence, a crime committed by so-called lower caste person was dealt with heavy hands of the state, whereas if the criminal belonged to the so-called higher-class it virtually did not attract punishment. The Rules for Human Justice prohibited inter-cast marriage, and had made it punishable provided the provisions had been violated. For instance, if a lower

caste person married an upper caste woman, either the penis of the person was cut off as punishment, or the death penalty would have been imposed. The law recognized the customary practices of the people. For instance, the husband of a woman having illicit sexual relation with another man could kill the latter. The law recognized this practice as a right of men.

The modern period of Nepalese law is said to have begun in 1853, when Muluki Ain was promulgated. It is so called because the code introduced the concept of written law as an authoritative source of law. Muluki Ain too was heavily influenced by Hindu dogmas; it is why the Code includes provisions, which envisages reinforcing the Hindu caste and gender disparity systems. For instance, women were not acceptable in the courts as witnesses. In 1964, New Muluki Ain replaced the old one, and it was a piece of progressive laws in the sense that it eliminated caste system, but it was equally regressive as it still continued with "inequality of genders".

Weaker Legal Position of Women and Girls:

The Nepalese legal system is largely a reflection of defective value system related to the structure of the society. The patriarchal domination is deeply imbibed in the societal value system, which denies equality of status to women. The denial is "intentionally" designed in order to weaken their position in the society so that men's absolute control over their personality and sexuality is rendered possible. This value system is defined as the defective value system. The following three characteristics of defective value system are expressive in the Nepalese legal system:

- Disregard of the independent personality of women.
- Invisible but absolute control over sexuality of women and girls.
- Comodification of women by men.

Disregard of the Women's Personality:

Personality is an aggregation of rights, comprising claims, power, liberty and immunity. Claims indicate simple entitlement over something, like if one works he deserves wages. If the employer denies payment, the employed has valid claim to get paid. Power denotes

special legal capacity to alter the "legal position of other". For instance, a father may deny sharing his property with children (at least in other countries). The legal capacity of father depriving his children from right to share the property is defined as the "power of father". Liberty is a capacity of making "choice", a man can have a wife of his choice, and no other person can impose on him. Immunity is an exemption from some liability, like a diplomatic agent is immune from criminal jurisdiction of Nepal. Defects in claims, power, liberty and immunity impair personality of an individual. These values have no gender characters, and modification is acceptable in exercise of such values by women. Ultimately, these values get an expression through three broad types of rights viz. Right to Identity, Right to Property and Right to Contract.

Right to Identity:

Right to identity directly relates to his/her "self", so every person has the right to have a name and legal safeguard to protect his/her "reputation". Gender is an identity in itself and as such is protected from infringement upon, or disregard of any kind. But the right to identity itself has no tinge of 'gender'. In the eyes of law of personality, every human being, irrespective of sex, is a person, not man and woman. The right to identity is a strong basis for recognition of the 'nationality' of a person. However, in Nepalese law, the situation is different. Section 3 of the Citizenship Act, 2020, by defining the father as a sole source for Nepalese nationality of the child[1], obviously flouts the right to identity of women. The provision overtly prohibits mother to transmit her nationality to the children. Many people take this circumstance as a "weakness" on the part of child imposed by law. However, the view is apparently mistaken understanding of the fact. In fact, it is a blatant weakness imposed by the law on

1. Article 3 of the Citizenship Act, the nationality law of Nepal, is the fundamental law governing the acquisition of Nepalese Nationality. For obtaining Nepalese nationality by descent, the said section providers " the father of the child must necessarily be the citizen of Nepal". A mother, who is a bonafide Nepalese national, cannot transmit her nationality to her child, born out of wedlock with foreign husband. The law was challenged in the Supreme Court through a writ petition by Walter Peter, a man who was born out of wedlock of a Nepalese national with Indian husband. Walter Peter was born and brought up all through in Nepal. He took Nepal as a country of allegiance. He had never been to Father's country. He spoke Nepalese language as a mother tongue and professed culture of Nepal as a culture of his family. Despite the facts that he was "Nepali" by every criteria, the Supreme Court rejected the writ petition on the ground that "he was not a child of Nepalese father".

"women" in order to incapacitate them as the source of nationality of the children. Of course, the provision is an instrument devised to rebut the right to identity of women. Implicitly, the provision prohibits women to give birth to a child without identification of a "man" as his/her father. In turn, the implicit consequence serves as a severe dishonor of the right to identity, restrains women from independent exercise of their 'sexuality'. By incorporation of the given gender biased provision in Article 8, the Constitution of the Kingdom of Nepal itself has been impregnated by the concept of 'women's subordination to men's personality, a defective value system practiced over centuries.

Rights to Property:

The right to property is referred to mean claims, power, liberty and immunity in relation to things and reputation. It enables person to hold possession of, maintain ownership on, and realize disposal of the goods of property as per their choice. Except for certain general conditions of limitation, the right to property is absolute and universal. Like the right to identity, it has no element of gender attached to govern the exercise thereof. However, the Nepalese property law prevails over centuries in contravention of fundamentals of universality, secularity and perfection of women' right to property. The legal system in Nepal has maintained full control of men over women in relation to their property right.

Muluki Ain (State's Code of Laws), promulgated in 1853, was the first codified law in Nepal providing for, among other things, the rules on property. The promulgation of the code in 1853, although Hindu scriptures on conduct of human being heavily influenced it, marked the beginning of modern era of the Nepalese legal system. This is so viewed because the Muluki Ain introduced the comprehensive code of 'legal rules' governing the substantive and procedural realm of law in Nepal. Until this period, the Hindu scriptures had unquestioningly been treated as the source of 'rights and duty of peoples" in Nepal[2]. The promulgation of the Code was an attempt to introduce a secular legal system, however, in sprit it was deeply influenced by Hindu philosophy on law and society. It is evident

2. See "Brief Historical Overview of Legal and Justice System in Nepal" in Analysis and Reforms of the Criminal Justice System in Nepal, 1999. A Research carried out by Yubaraj Sangroula and other for Center for Legal Research and Resource Development, CeLRRd.

from its framework itself, which envisaged reinforcing the caste system and gender distinctions as the basis of social relations. Hence, in practicality, the code appeared merely as a collection of Hindu dogmas and customs. Junga Bahadur Rana, the first Rana Prime Minister and promulgator of the Muluki Ain, also partially abolished the custom of "Sati", the practice of widow burning themselves along with the bodies of their husbands during cremation. The practice denotes absolute denial of "selfness" to women. The custom overtly recognized a proposition that "women's existence is not possible without husband". It was a legacy handed down by orthodox "Hinduism".

Rana Prime Minister Chandra Shamsher, politically a ruthless successor of Junga Bahadur, did partially abolish the custom of "Sati" giving way to recognition of "mortal existence of women" even after death of their husbands. It was the first step to disassociate the "person" of women from that of "men". However, women's position was effectively underestimated in formal system, like women were not accepted as witnesses in the courts, and similarly they were prohibited to disposing of property by independent choice of their own. These provisions apparently reduced women to "matters of men's property". Having incorporated the dogmas of Hinduism, the Muluki Ain made attempts to define legal relations of individuals in society in terms of "Kul" (kind group), Santan (family lineage), Jat (caste) and Linga (sex) as the societal bases. His/her caste and gender therefore, determined the status of individuals. Clause of the Section on "Aungsabanda" (partition of shares of property), for instance, allowed the father to discriminate, in matters of property, against his sons born out of wedlock of a woman of inferior caste.[3] Similarly, the Muluki Ain prohibited the son to claim the share in property, if he was born from a "prostitute". Prostitutes were legally denied the status of a normal human being.

The New Muluki Ain, 1964, repealed the former one, and, to some extent, it proved to be a progressive piece of law. It did away with the "castism" as a basis of socio-legal relations. It thus created a ground for movement of ending the oppression and inhuman treatment

3. If a Brahmin man married to a Chhteri Woman, the son born out f their wedlock was entitled to have only one fourth share of the property compared with those born out of wedlock with woman from same cast. Sons born out of wedlock with woman from same caste enjoyed equal share with father. For more detail see, Clause 3,4,5,6,8,10 and 11 of the Section on Aungsabanda of Muluki Ain, 1853.

inflicted upon "Dalit" community. Unfortunately, it prolonged the gender discrimination on many matters as usual in the past. The New Muluki Ain prohibited daughters from sharing the parent property as "coparceners". This Muluki Ain is still in effect as a general law in matters of property in Nepal.

The property of law in Nepal defines personality of women in terms of their sex and marital status. The "Aungsabanda" section of New Muluki Ain, in particular, is an intensely gender segregated law. According to clause 16, if a woman is not married till 35 years of age, it qualifies her to share the property with other coparceners. But subsequent marriage would forfeit the share thus obtained. A woman by virtue of marriage becomes coparcener of the husband's property, and as such is entitled to share the property with the husband. Nevertheless, the right is dependent on certain conditions to be fulfilled: firstly, she has either to reach an age of 35 years or should have completed 15 years of marriage; secondly, the marriage should not be broken due to extramarital relation or any thing else; and thirdly, there should not be a divorce. Absolute sexual loyalty is the most required condition for entitlement for right to be a coparcener in the husband's property. The status of a woman is, therefore, clearly subjected to her sex or marital status. The following briefs help in better understanding of the situation:

- Daughters are secluded from "Aungsabanda" (becoming coparceners of parental property) for they do not constitute the members of the natal family. It is the "sex" they are endowed with which deprives them of the membership. However, sons' position is different. They are recognized as having inherent right to "Aungsa" of the parental property. There are no other grounds of difference but the "sex" for differential treatment in matters of property between sons and daughters. The identity of a woman as a "person" in the natal family is thus denied simply because of her "feminine gender".
- Daughters, unlike sons, have to prevent themselves from getting married if they want to be benefited from property of parental family as coparceners. The legal stipulation that a woman must reach 35 years of age and remain unmarried to receive the share in the parents' property is a legal instrument,

which virtually defines women's personality in terms of their marital status. It implies that a woman is not a "person" by virtue of her birth as a human being, but by her "condition of matrimonial life". She is entitled to obtain "Aungsa" by reaching 35 years of age and remaining "unmarried" implicitly relates her "personality" to marital condition, because, then, there is only a limited probability of her marriage. That is why there is an explicit provision to return the property obtained in "Aungsa" back to other coparceners in case she gets married subsequently. The acquisition and termination of the right to "Aungsa" has no other basis but the marriage.

- By marriage a woman is entitled to be a coparcener to the property of husband, but the termination of the marriage takes away the rights too. Here too, the marriage is a sole determining factor of her "personality".
- The right to succession is also conditioned on marriage. A daughter is prohibited to succeed the deceased parents so long as the sons and sons' sons of the deceased person survive. If no sons or sons' sons survive, the married daughters get one share of the property whereas two shares go to unmarried daughter. Here again, the legal capacity is determined by marital conditions.
- A divorced woman can claim alimony from the former husband under condition of her incapacity to earn livelihood of her own. However, the marriage subsequently terminates the right to receive alimony. Marriage is again a matter of determinant of right.
- A widow is entitled to succeed the share of her husband's "Aungsa", but gets forfeited on consummating sexual relation with any person. Suppression of sexual desires of widows is an attempt to relate property rights to her marital condition.

The marriage and sexual relations are prescribed as fundamental elements of women's personality. These elements remain as "condition precedents" for acquisition and exercise of rights over property.

The traditional concept of kinship is the fundamental basis of the gender

biased property law jurisprudence of Nepal. The Hindu societal value system recognizes only sons having capacity for continuity of ancestral lineage. Hence, daughters are virtually secluded from having "kinship" relation with the natal family. Fictitiously, daughters are supposed to constitute "kinship" with the ancestors of husband. The "ancestral kinship" is taken by the property law of Nepal as a "primary source" of rights relating to identity and property, which, together with right to contract, constitute the 'legal personality' of every individual human being. Ancestral kinship is, therefore, the most fundamental element qualifying an individual for the membership of the given family. Since daughters are considered as having no attachment of "ancestral kinship" with natal family, they do not qualify to obtain the membership thereof. The marriage is taken as an instrument to create their kinship with husbands' family. Hence, gender based discrimination in the Nepalese society begins at this point- kinship which is an unavoidable qualification for family membership is obtained by sons at birth, whereas the same is obtained by daughter through marriage. Obviously, a daughter is a liability of parents until puberty. After which, she is given away for marriage. This defective value system is pervasive in property and family law of Nepal. The following examples will profusely explain the statement:

- Not the mother but the father is a source of nationality of the children. (section 3 of Citizenship Act, 1964 and Article 8 of the Constitution of the Kingdom of Nepal, 1990)
- Marriage of girl at 16 years is valid irrespective of their consent. Parents can very much decide who should be her husband.
- Since parents can decide on her marriage, her right to remain unmarried and qualify herself as coparcener to the family property is easily evaded.
- The divorce, extra-marital sex and sexual relation of widow terminate the marital relation and thus the right to obtain "Aungsa" from the husband's family, but such incidents do not bring her back to station she was at before the marriage. She remains in "kinshipless" state. In this state she remain with greatly "deformed" personality.

By denying, to identify the rights and interests, a girl child is forced to face several disadvantages and difficult circumstances. A few instances

can be cited as follows:

- For not taken as members of the family, daughters are simply the liability. Hence, investment on their education and other development opportunities is something like "watering the neighbor's flower plant". Rampant ignorance and illiteracy is therefore the result of defective societal value system. The ignorance subjects women to vulnerability of exploitation of all forms.
- 16 Years of age is a minimum legal age for marriage. The marriage being unavoidable religious and moral obligation of parents, it is a chance never to miss. Hence, child or early marriage is a common phenomenon. Such marriages lead to early pregnancies, leading to birth of unhealthy children and larger maternal mortality. Hence, right to property is integrally related with reproductive and health conditions of women.
- Uneducated wives are virtually enslaved and taken as "machine" to procreate children for husband.

Right to Contract:

Right to contract is one of the basic rights associated with the "personality" of an individual. Defects on rights to contract seriously impair the personality. Generally, the right to contract is expressed in the form of "power to agree or disagree" to something. The "marriage and associated matrimonial relations" like divorce, extra-marital relations, and judicial separations etc. fall within the scope of right to contract. However, women in Nepal are effectively subjected to inferiority in exercise of the contractual rights, leading to serious impairment in their "right to identity". The situation is expressive in the following circumstances:

- Choice of husband is something not exercised by women, but imposed by parents. A woman is competent to make independent decision on marriage when she reaches 18 years of age[4]. She is considered an adult at 16 years, and so is thought fit for legal marriage. However, she is not permitted to consummate marriage by independent decision by herself[5]. Parents can give her away for marriage, but the same is not recognized if the woman herself consummates it. This provision of law is not based on any rationality. Of course, this provision of law is an obvious infliction on right to contract of women. To give in marriage without women's consent virtually amounts to a "sell". If she is considered incompetent to express independent consent for marriage of choice before 18, how can she be thought to be competent "doing the same" when marriage is arranged by parents. The marriage arranged by parents is therefore an involuntary marriage imposed on women seriously impairing their right to contract.
- Husband is empowered to consummate the marriage with other woman if the first wife is not able to procreate the children[6]. However, the woman is not empowered to the same if the husband suffers infertility. If the woman marries another man, she gets forfeiture of the right to "Aungsa" from the former husband. Empowering a person's breach the trust of marriage on the ground of infertility is explicit violation of the right to contract.
- Under the succession law of Nepal, husband and wife are competent to inherit each other. However, the husband without any legal constraints can consummate the marriage after the death of wife, and can inherit the property of the wife too. The same privilege is not granted to a widow. For succeeding and enjoying the property of the husband, she should remain a widow throughout the life.

In practice, there are several other restrictions on performance of contract by women. For instance, a woman is not granted the passport without concurrence of her father or husband. This rebuff is an implicit ban on travel of women independently. Similarly, a woman is denied to sign a contract of employment with a company outside of Nepal independently. In many property matters, women are restricted to perform independent disposal rights. Lack of control over family resources is an outcome of inability for exercising the right to contract.

It is interesting to mention that the principal legal terms in law books (statutes) used to define women in connection to marriage and sexual

4. Section on Marriage, Muluki Ain.
5. Ibid.
6. Section on Husband and Wife, Muluki Ain.

relations. Women are characterized as "Kanya" (virgin), bihe nagareko (never married), bihe gareko (married) "liyako" (brought as wife but not formally married), "bahira rakheko (kept informally outside the home), "santan hune and nahune (with or without children) and bidhawa (widow). These terms are derogatory of the personality of women in themselves. But they also signify inferior position of women in competency to contract relations with men.

Imperfections or limitations imposed upon these three rights virtually render the "status" of women subjected to men's control. "Control over sexuality" is the main purpose of limitations on women's personality. The existing legal system, despite the constitutional guarantee of equality of sex and safeguard against exploitation, maintains the men's control over female sexuality basically through the following instruments:

- Restricting women from transmitting her identity to children. The implication of restriction extends to ban on transmission of mother's nationality to children.
- Restriction on birth relation of women to their fathers' ancestors. The implication of restriction obliges women to consummate marriage with compulsion, and to accept the family lineage of husband. The system of acquiring family lineage of alien family through institution of marriage disqualifies women to entertain rights over natal property.
- Recognition of law for prevalence of parents' decision on matters of marriages of daughters, virtually converts the marriage into an institution granting to husband the full control over sexuality of women. The implication of the practice renders the women's right to property dependant on their "sexual behavior".

These three instruments maintain full domination of men over women's position in the Nepalese society. They also help in elaboration of sets of rules to be adopted or practiced by women folks in their general life. A few to mention, for instance, are:

- Girls should be educated to behave well with their husbands, and should remain always sexually faithful to them.
- Sooner the marriage, better the chance for settled life.
- Women should not interfere in public affairs.
- Girls should learn domestic chores since early age by helping mothers in those affairs.
- Education has no meaning for women, as procreating and rearing children is their natural obligation.
- A woman unable to have a child, or is childless, is considered unlucky and abnormal.

The social taboos and milieu based on these indoctrinations are responsible for:

- degraded social status of girl children, and their comodification;
- seclusion of girl children from development mainstream ;
- deprivation of girl children from investment on education and mental development;
- de-personification of women;
- emergence of sex market, where men can buy "sex" through bodies of women.

Ignorance, illiteracy and exploitation of girls and women are therefore outcomes of the defective value system inherited and zealously protected by the Nepalese society with the help of archaic laws.

The lack of State's (three organs plus political parties) commitment to bring about changes into laws discussed above, has nullified the potentiality of the constitution's scheme of equality of gender. The State has virtually failed to understand the role of empowered women in the development of family and society at large. It is interesting to note that a woman, who is constitutionally capable of becoming a Prime Minister of the country, is not thought capable of transmitting nationality to her child. It is just ridiculous. This is only a stance. There might be several laws, which silently "nullify" the objectives of democracy. One just cannot imagine a democracy functioning with "Men becoming masters of Women".