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MESSAGE FROM THE CAMPUS CHIEF

It gives me immense pleasure to bring forth the maiden volume of Nepal Journal of Legal Studies. Alongside our flagship publication Nepal Law Review I hope this student edited journal will be an important addition to the legal literature in Nepal.

Nepal Law Campus being the oldest institution for legal education in the country has always been the primary contributor to the development of legal profession in Nepal. Since its establishment in 1954, the Campus has undergone a series of academic changes. Currently, the Campus offers a Three Year Bachelor of Laws (LL.B.) Program and a Five Year Bachelor of Laws Bachelor of Arts Program as well as Two and Three Year Master of Laws (LLM) Program.

The Five Year B.A.LL.B. Program with only half a decade of initiation has already shown promising signs of excellence. In the recent years, students enrolled in this Program have been able to represent the University as well as Nepal in various regional and international moot court competitions including Philip C. Jessup International Law Moot Court Competition in Washington D.C., Asia Pacific Rounds of Henry Dunant Memorial Moot Court Competition in Hong Kong, Asia Cup International Law Moot Court Competition in Tokyo and East Asian Rounds of Stetson International Environmental Moot Court Competition in South Korea. Similarly, the graduates from this Program have shown outstanding results in the nationwide Bar Examination conducted by Nepal Bar Council in 2015.

This year we are proud to introduce the B.A.LL.B. Program into the semester system. We hope this Program will continue to bring exceptional change in Nepalese legal education.

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Nepal Journal of Legal Studies is an attempt to further that movement by institutionalizing the involvement of law students in academic writing and research. This volume includes articles and insights from law students and distinguished personalities working in the legal sector in Nepal. Law as one of the multidisciplinary subjects provides the solution for multiple social problems. Law as a field of social engineering and law students as social engineers have to reduce the frictions among various interest groups in the society. Reduction of the confrontation among social groups could only be managed through research in the field and finding out the legal solutions. B.A. LL.B. students certainly are showing their interest towards the socio-legal issues and to bear the responsibility in the academic field. This journal initiated by the B.A.LL.B. students covers the multiple legal issues and this work of the students certainly will contribute to the development of legal system in Nepal.

The content of the journal relies on the hard work and strong editorial skills of our student editors comprising the Editorial Board. Likewise, the journal is also an effort to introduce the system of peer review in legal writing which enhances the quality and merits of the articles. The Campus takes pride in supporting the students and the faculty for academic and professional endeavors.

Karna Bahadur Thapa
Campus Chief
Nepal Law Campus

From the Editors

The first issue of Nepal Journal of Legal Studies (NJLS) owes deepest of acknowledgement to Prof. Dr. Tara Prasad Sapkota, the Dean of Faculty of Law, Tribhuvan University for entrusting us with this responsibility and letting us carry out this academic endeavor. Similarly, a sincere gratitude to Associate Professor Karna Bahadur Thapa, the Campus Chief of Nepal Law Campus for his invaluable guidance and support from the very inception of the idea of introducing a separate student-edited law journal.

This issue of journal would also not have been possible if it were not for the encouragement and academic guidance from Associate Professor Bibek Kumar Poudel, Director, B.A.LL.B. Program, Nepal Law Campus. The Board is also indebted to Mr. Balaram Prasad Raut, Deputy Director, B.A.LL.B. Program, Nepal Law Campus for his support and guidance as the Advisor to this endeavor.

The Board received great amount of support and guidance from the Faculty Advisors, who kept their faith intact in the team. Their role in this academic endeavor indeed requires us to specially acknowledge them. The team would have lost the track had there not been the continuous support from our Advisors.

The Editorial Board is also greatly indebted to Dr. Pratyush Onta and his team at Martin Chautari for guiding us with the Peer Review process and the role and responsibilities of the Editorial Board. The Board is thankful to Dr. Onta for sharing his experience, in a way our team could anticipate the problems and prepare for the upcoming challenges.

The Editorial Board also had the opportunity to work with more than thirty scholars in law while conducting the peer review procedures for the journal. The Board would like to acknowledge all the members of the peer review panel for the valuable time they provided us voluntarily in an effort to make this academic endeavor even more effective. Below, the Board would like to provide a list of the peer review panel (this is only a list of the reviewers who agreed their names to be published):

- Munendra Prasad Awasthi
- Luma Singh Bishwokarma
- Motikala Subba Dewan
- Barun Ghimire
- Saroj Ghimire
- Yadav Kumar KC
- Rabindra Bhattarai
- Semanta Dahal
- Mukesh Kumar Dhungana
- Rabindra Ghimire
- Bijay Prasad Jayshwal
- Subrata Lamsal

- Chandra Prasad Luitel
- Arpeeta Shams Mizan
- Alok Pokharel
- Syed Aatir Rizvi
- Purna Man Shakya
- Bipin Subedi
- Pratyush Uprety
- Rukamanee Maharjan-
- Suvanga Parajuli
- Balaram Prasad Raut
- Swechhya Sangroula
- Tejman Shrestha
- Ramkanta Tiwari
- Namit Wagle

To conduct a peer review process, the received papers were sent to at least two reviewers. After feedbacks were received from the reviewers, the reviewed papers were sent back to the author(s) for revision. While conducting the entire process, a double-blind policy was adopted by the Board, meaning the identity of the respective author(s) and reviewers were not disclosed to the respective recipient.

The Editorial Board, understanding the absence of any particular theme for this issue of the journal and realizing the dire need for an academic discourse on several aspects surrounding the new constitution, decided to place Dr. Bipin Adhikari's contribution to the journal as a featured article for this issue of the journal. The rationale behind this decision is to move forward the academic discourse on various important aspects of the new constitution and its "shortcomings" as Dr. Adhikari writes. All other contributions have been arranged in alphabetical order following the first letter of the author's family name, except for the two contributions by Hon. Balaram KC and Prof. Dr. Yubaraj Sangroula. Considering their contributions made in response to the request made by the Board and their eminent scholarly positions held in the legal field, the Board decided to place their contributions under a separate category.

For the purpose of this journal, the Editorial Board has applied the 19th Edition of Bluebook Style of Citation. A citation guide (derived from 19th Edition of Bluebook), prepared by the Editorial Board, can also be availed from the Nepal Law Campus official website; however, the guide has been prepared for the purpose of the journal only.

The Editorial Board would like to reiterate its sincere gratitude towards all the guiding hands and the contributors for trusting the Board with their works.

Editorial Board
Nepal Journal of Legal Studies

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Shortcomings of the New Constitution: A Short Commentary

Bipin Adhikari*

GENERAL BACKGROUND

The Constitution of Nepal, 2015 (2072) is the seventh constitution of the country. This is the first Constitution made and adopted by the Constituent Assembly (CA). The Assembly was specifically elected for this purpose on November 19, 2013. The first CA, which worked from May 28, 2008 to May 28, 2012, was not able to deliver a constitution as planned.

Holding the election to the CA second time was another unique experiment in the process of making a new constitution around the world. Subsequent to elections, it held its first meeting on January 22, 2014. It worked for another twenty months to complete the constitution writing. The Assembly transformed into the Parliament after adopting the new constitution with the overwhelming two-thirds majority. The new Constitution was proclaimed by the President of Nepal on September 20, 2015 (Asoj 3, 2072). The promulgation of the constitution is believed to be significant because it completes the peace process, closes the uncertainties regarding the political system, and paves the way for future constitutional politics.

The new Constitution has introduced many changes in the erstwhile constitutional system of Nepal. Apart from federalism, which is a new feature in Nepal, it tries to make the state inclusive and the democratic system more participative than before. It tries to further consolidate peoples' competitive multi-party democratic governance system, civil liberty, fundamental rights, human rights, adult franchise (or the right to vote given to all adult citizens without the discrimination of caste, class, colour, religion or sex), periodic elections, complete press freedom, an independent, impartial and competent judiciary, and the concept

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of rule of law. The state embraces multi-ethnic, multi-lingual, multi-cultural and policies based on diverse geographical specifics. It ends discrimination relating to class, caste, region, language, religion and gender including all forms of racial 'untouchability,' in order to protect and promote unity in diversity, social and cultural solidarity, tolerance and harmonious attitudes. Towards this end, it expresses determination to create an egalitarian society on the basis of the principles of proportional inclusion and participation.

These all are lofty principles. It is in the implementation of the new Constitution that the change will depend. This is not a process that can be accomplished very quickly. There is a long way to go. However, some clear comments on the Constitution may be highlighted for the purpose of discussion among law students as hereunder.

I. SOME PRECISE COMMENTS

A. Reform in the Institutions of Political Parties Ignored

The necessity of reform in the institutions of political parties cannot be overlooked in Nepal's situation. However, the Constitution does not have clear rules on financial transparency within political parties. It has not addressed the issue of campaign finance and corruption in generating it.

B. There is no Electoral Threshold

Despite its importance, and intensive national discussions, the Constitution does not contain a provision on electoral threshold (as the minimum share of the vote which a political party requires to secure any representation). This means Nepal will continue to remain a country with multiplicity of sparsely represented political parties.

C. Some Fundamental Rights could have been Immediately Enforceable

It was possible to make many of the fundamental rights guaranteed by the Constitution immediately enforceable by working further on the rights that have been included in Part 3 of the Constitution. Article 47 states: "For the enforcement of the rights conferred in this Part, the State shall make legal provisions, as required, within three years of the commencement of this constitution."

Some groups have been created for proportional inclusion for no valid reasons. It was not necessary to create the ethnic group of *Khas Arya* for the purpose of proportional inclusion. This group has been traditionally competitive and do not require state protection to this extent.

The concept of inclusion, and for that matter, the approach of how to ensure proper level of representation and participation of the deprived communities in the state structures, must be the basis of any system of proportional representation. There are five groups in the Nepalese society which need proportional inclusion: women, *dalits*, *janjatis*, *madhesis* and minorities. There was no need to create any other group at this stage. The concept of inclusion should work within these groups for the people who are deprived and less represented based on existing socio-political indicators. Article 176 (6) regarding federal and provincial proportional elections have complicated the concept by creating many groups, and leaving the question of how inclusion would work in the given scenario unattended. It was possible to organize these provisions more efficiently—giving best reflection to the political compromises made by the leaders.

D. Names and Boundaries of the Provinces

Ideally, it would have been better to bring out the Constitution with the names and boundaries of the provinces already settled, in the day of the promulgation. The Federal Commission would in that case have only to work on the less serious issues including those involving special structures.

E. Potential Interpretational Challenges

The new Constitution has certain clear problems on the substantive side of constitutional law. There may be problems of interpretation to the organs of the state including the Supreme Court.

F. Definition of Socialism

The Preamble, for example, sets the state as being committed to "socialism" "based on democratic norms and values including the people's competitive multiparty democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, full freedom of the press, and independent, impartial and competent judiciary and the concept of the rule of law." However, the term 'socialism' has been used in various ways, even authorizing authoritarian tendencies on the part of the state. It may include a range of social and economic systems characterized by social ownership and democratic control of the means of production; as well as the political ideologies, theories, and movements that aim at their establishment. Social ownership may refer to forms of public, cooperative, or collective ownership; to citizen ownership of equity; or to any combination of these. Although there are many varieties of socialism and there is no single definition encapsulating all of them, social ownership is the common element shared by its various forms. Socialism can be divided into both non-market and market forms. What is meant by socialism will remain an issue for contradictory interpretation.

G. Right to Freedom and Reasonable Restrictions

The Article 17, right to freedom is another case. The restrictions of the fundamental right provided for in this provision are quite broad. Article 17(2) guarantees six freedoms to the Nepalese citizens. They are freedom of opinion and expression, freedom to assemble peaceably and without arms, freedom to form political parties, freedom to form unions and associations, freedom to move and reside in any part of Nepal, and freedom to practice any profession, carry on any occupation, and establish and operate any industry, trade and business in any part of Nepal. Each of these freedoms is subjected to a range of reasonable restrictions.

For example, in the case of freedom of opinion and expression, "nothing … shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the sovereignty, territorial integrity, nationality and independence of Nepal or the harmonious relations between the Federal Units or the people of various castes, tribes, regions or communities or incite caste based discrimination or 'untouchability' or any act of disrespect of labour, defamation, contempt of court, incitement to an offence or any act which may be contrary to public decency or morality." This proviso does not give adequate guidance to the state on how the reasonable restrictions would be interpreted. Even with such guidance, the courts might face multiple choices in the interpretation of the proviso.

It would have been better to incorporate the principle of proportionality according to which a public authority will not be allowed to impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure. It is a safeguard against the unlimited use of legislative and administrative powers and considered to be something of a rule of common sense, according to which an administrative authority may only act to exactly the extent that is needed to achieve its objectives. More specifically, the principle of proportionality means that any measure by a public authority that affects a basic human right must be: appropriate in order to achieve the objective, which is intended, necessary in order to achieve the objective, which is intended, i.e., there are no less severe means of achieving the objective, and reasonable, i.e. the person concerned can reasonably be expected to accept the measure in question. This formulation could have been a good alternative for the above reasonable restriction clause.

H. Right against Preventive Detention

In Fundamental Rights and Duties, the question of justification is bound to occur. Some examples could be cited here. In Article 20(2), which deals with the right

of a criminal defendant to consult a legal practitioner of his or her choice, it is not clear why a citizen of an enemy state is not provided the same protection. As long as he or she is a civilian, prudence demands that he or she should enjoy the same protection as any other citizen. In Article 22, the right against torture should have been expressly extended to everyone and not only the persons who are arrested or are in detention. Everyone is entitled to this right. Further, there must be no preventive detention under Article 23 even against citizens of an enemy state as long as they are civilians. The cases when preventive detention may be imposed must be more specifically described in order to prevent any abuse.

I. Right to Property

Article 25 (4) could also be problematic if intended. Clause (1) of Article 25 guarantees every citizen the right to acquire, own, sell, dispose, acquire business profits from, and otherwise deal with, property subject to law. Clause (2) makes sure that the state shall not except for public interest, requisition, acquire, or otherwise create any encumbrance on, property of a person. Article 25(3) holds that the basis of compensation to be provided and procedures to be followed in the requisition by the state of property of any person for public interest in accordance with Clause (2) above. However, under the formulation of Clause (4), the above provision of clause (2) and (3) shall not prevent the state from making land reforms, management and regulations in accordance with law for the purposes of enhancement of product and productivity of lands, modernization and commercialization of agriculture, environment protection and planned housing and urban development. This language might be interpreted as permitting government intervention without the state's obligation to pay compensation. Article 25 is silent about how the compensation will be calculated. There is no common standard in this regard in the constitutional law of the states. It is not always required that the compensation must be at market-value. Similarly, in some cases, the standard applied is a reasonable compensation. The Constitution could have provided some guidance to eradicate chances of divergent interpretations.

J. Right to Religious Freedom

Article 26, which ensures the right to religious freedom, has its share of problem in Clause (3). In international human rights law, freedom of religion includes the right to proselytize (to induce someone to convert to one's faith) as well. Hinduism, which is a dominant religion in Nepal, does not have procedures for 'proselytization.' There is no binding conversion/re-conversion rituals prescribed. One is free to choose the Hindu religion if they want to, or follow any philosophy or belief one fancies and worship any other god in a manner they deem fit. Keeping in view the Hindu traditions, Clause (3) maintains that "no person

shall, in the exercise of the right conferred by this Article, do or cause to be done, any act which may be contrary to public health, decency and morality or breach public peace, or convert another person from one religion to another or any act or conduct that may jeopardize other's religion and such act shall be punishable by law." In religions such as Christianity or Islam, 'proselytism' is a religious obligation. Therefore, to prohibit it – even if understandable with respect to peace in the society - would not be in line with the general notion of freedom of religion. 'Proselytism' can be prohibited only in extreme cases when it leads to hatred in the society. Similarly, the other restrictions could also be abused if worked on with intolerance.

K. Right to Clean Environment

The right to clean environment under Article 30 explicitly guarantees in Clause (2) that the victim shall have the right to obtain compensation, in accordance with law, for any injury caused from environmental pollution or degradation from the polluter. In light of this language, it is not clear what will be the implication of this Clause for example when the case of the smog in Kathmandu is brought to the court? Has a person a right to compensation if he or she can prove that he or she suffered damage? Is this intended?

L. Right to Social Justice

Article 42 is an innovative approach to ensure access to political power to all deprived and underrepresented groups and communities in Nepal. The approach has been established as the right to social justice. This is to be achieved, in the case of Clause (1), by ensuring the right to participate in the state bodies on the basis of inclusive principle and ensuring distributive justice to specific claimants. At functional level, it is not easy. There is a possibility of dispute in the application of this Clause. There is no specific guidance on how this provision will be implemented in the Constitution itself. In principle, group rights, also known as collective rights, are rights held by a group *qua* group rather than by its members severally. In contrast, individual rights are rights held by individual people; even if they are group-differentiated, which most rights are, they remain individual rights if the right-holders are the individuals themselves. For critics, group rights have historically been used both to infringe upon and to facilitate individual rights, and the concept remains controversial. A fine approach will therefore be necessary on how to maintain the inclusive principle.

In Article 42(1), the constitution makers initially created sixteen groups to be enabled with the right to participate in the state bodies on the basis of inclusive principle. It did not say these groups are historically disadvantaged, although it clearly intended it to be so. The First Amendment took out two groups from the list. Even now, how to distinguish overlaps between communities (i.e., indigenous

people, minorities and *Khas Arya* for example) with given groups (i.e., farmers, labourers, oppressed or citizens of backward regions, etc) is a complicated task in the absence of clear guidance. People or individuals in these categories may have claims from both these groups and efforts to confine them in particular groups might be problematic. For example, there could be people from indigenous communities that equally qualify in the 'labour' category.

M. Fundamental Duties

Part 3 of the Constitution not just enlists fundamental rights, it also enlists fundamental duties. The duties of citizens have been enlisted in Article 48. Rights are based on the theory that individuals are born with them. It is admitted that they are not created by the state; they are only recognized by the state. As such, they are enforceable against it. Duties are not made enforceable and justiciable. This means that no citizen can be punished by a court for violation of a fundamental duty. In this respect the fundamental duties are like the directive principles of the constitution in Part 4. The directive principles lay down some high ideals to be followed by the state. Similarly, the fundamental duties in Article 48 lay down some high ideals to be followed by the citizens. But rights are not contingent on the duties. Violation does not invite any punishment. This important distinction between fundamental rights and duties must not be blurred by the courts or other law enforcement agencies. Additionally, Article 48 has dispensed with one important fundamental duty - the duty to pay taxes according to the law. Given its significant value, it is not clear why.

N. Directive Principles

Nepal has a tradition of maintaining a list of directive principles in the constitution for the guidance of the state. This tradition has been maintained by the new Constitution as well. The list has certainly grown further. Many new principles and policies have been further inducted in the list – with or without new orientation. It seems doubtful for many critiques if it helps to include all these objectives in the constitution, specifically as they are not subject to court jurisdiction as in the case of rights falling under Fundamental Rights. In a comparative perspective, there are not many constitutions with such a lengthy enumeration of the purposes of the State. They think they should better be the result of a political discussion led by the government with popular mandate than predetermined by the Constitution.

O. Boundaries of Federalized Provinces

The question of 'federalization' of Nepal has been a crucial issue. After long discussions, the CA decided to adopt a seven province model. They are not directly mentioned in the main part of the federal structure in the Constitution, but only in an annex.

Taking into consideration that the territorial structure was a main point in the discussions on the constitution it would have been better to name the provinces directly in the Constitution in order to clearly express that they are now the constitutive elements of the province. As the boundaries of these provinces are still in question, it would have been good to regulate the delimitation of the provinces in the Constitution.

P. The Question of Inconsistency with the Federal Law

Article 57 is one of the most important Articles in the federalization context. Clause (6) deals with distribution of state power under the federal set up. It reads: "Any law to be made by the Provincial Assembly, Village Assembly or Municipal Assembly pursuant to Clause (3) or (5) shall be so made as not to be inconsistent with the federal law, and any law made by the Provincial Assembly, Village Assembly or Municipal Assembly which is inconsistent with the Federal law shall be invalid to the extent of such inconsistency." The provision apparently provides for the nullity of laws of provinces and local bodies with the law of the federation. However, one has to bear in mind that a federal law which is conflicting with the law of a province may be unconstitutional as far as it relates to an issue which falls under the competences of the provinces.

Q. Natural Resource and Fiscal Commission

Again, the criteria which apply to the distribution of state income – including income from natural resources – have not been laid down in detail in Article 59 (Exercise of Financial Powers) and Article 60 (Distribution of Sources of Revenue). At present, Article 250 creates National Natural Resources and Fiscal Commission which have under Article 251 the following functions, duties and powers;

a) To determine detailed basis and modality for the distribution of revenues between the Federal, Provincial and Local governments out of the Federal Consolidated Fund in accordance with the Constitution and law

b) To make recommendation about equalization grants to be provided to the province and local governments out of the Federal Consolidated Fund

c) To conduct study and research work and prepare parameters as to conditional grants to be provided to the province and local governments in accordance with national policies and programmes, norms/standards and situation of infrastructures

d) To determine detailed basis and modality for the distribution of revenues between the province and local governments out of the Province Consolidated Fund

e) To recommend measures to meet expenditures of the Federal, Provincial and Local governments, and to reform revenue collection

f) To analyze macro-economic indicators and recommend ceiling on internal loans that the Federal, Provincial and Local governments can borrow

g) To review the bases for the distribution between the Federal and Provincial governments of revenues and recommend for revision

h) To set bases for the determination of shares of the Government of Nepal, provincial government and local level in investments and returns, in the mobilization of natural resources

i) To do study and research work on possible disputes that may arise between the federation and the provinces, between provinces, between a province and a local level, and between local levels, and make suggestions to act in a coordinated manner for the prevention of such disputes.

The National Natural Resources and Fiscal Commission is an independent constitutional body. It has been given the role in the distribution of the tax income. It is reasonable that this type of power should not be left with the government; otherwise the provinces, rather than exercising real autonomy, depend on the decisions of the federation. The Commission will also have the power to establish limits for contracting debts. However, how these issues of critical importance will be done is not clear from the constitutional text. The power of taxation has been identified by the Constitution, but have not been elaborative. There is associated risk with this approach.

R. Why the Parliament should not be in Session Regularly?

Keeping with the traditions, being followed in Nepal, the new Constitution continues with the system of two sessions every year with Article 93. The issue, however, is why the Parliament should not be in session regularly. There are of course democratic systems where the Parliament is sitting only during specific periods (i.e., in France). However, today the tasks of a Parliament are so comprehensive that it seems to be more convenient to have it sitting all the time.

S. Ministerial Capacity to Take Part in Parliamentary Business

Article 96 on the ministerial capacity to take part in the parliamentary business talks more about prerogative than responsibility. This provision should not emphasize the right of the minister to participate in the sessions of the parliament, but the obligation to answer questions of the deputies whenever he or she is invited to do so by the parliament. This is more important to maintain ministerial responsibility in the parliamentary form of government.

T. Transaction of Business in Case of Vacancy in the Seats of the Parliament

Article 98 provides for transaction of business in case of vacancy in the seats of the parliament. Either House of the Federal parliament shall have the power to transact its business notwithstanding any vacancy in the seat of its member. No proceedings of either House of the Federal Parliament shall become invalid even if it is subsequently discovered that a person who was not so entitled took part in such proceedings. In other words, the proceedings under this Article shall not become invalid if a person participated who was not entitled to do so – however, this should be construed in the sense that a participation in the voting makes the voting invalid, if the vote of this person was decisive. Otherwise, unauthorized persons could participate in the voting with the consequence that the vote is manipulated which makes it undemocratic.

U. Motion of No-confidence

In reference to Article 100, which contains provisions relating to vote of confidence and motion of no confidence, the provision is not enough. It is a feature of the parliamentary system of government based on West Minster model. It requires an executive to retain the confidence of the lower house of the parliament. It is a fundamental principle of the constitution that the government must retain the confidence of the legislature as it is not possible for a government to operate effectively without the support of the majority of the legislature. However, on this provision, there should be the possibility to combine a vote of confidence with an important political vote, i.e., a bill or another decision. In this way, the government could underline that a question put to vote is of such an importance that it will link its own existence to it.

The motion of no-confidence is not clearly drafted in the Constitution. Clause (5) of Article 100 states that a motion of no-confidence to be tabled shall also indicate the name of a member proposed for the Prime Minister. If the no-confidence motion gets passed by a majority of the total number of the then members of the House of Representatives, the President shall appoint as the Prime Minister the member of the House of Representatives proposed as the Prime Minister as above. It should have been clearly stated that the motion is successful if a new Prime Minister is elected.

V. Parliamentary Privileges

In Article 103, which deals with parliamentary privileges, most surprisingly, there is no immunity for the representatives but only a protection for their speeches and votes in parliament. Such privilege is a legal immunity enjoyed by members of the parliament designed to ensure that they are able to carry out

their duties free from interference. The privileges are freedom of speech, freedom from arrest on civil matters, freedom of favourable construction of parliamentary proceedings, and so on. It is a good tradition to grant parliamentarians protection against arrest, on specific grounds, however, always linked with the possibility of a waiver by the parliament. The immunity is not an individual right of the representative, but exclusively serves the independence of the parliament as a constitutional organ.

W. The Authority to Spend Money without Specification

Article 123 is very far-reaching, giving the government the authority to spend money without specification. This Article allows the Minister for Finance to lay before the House of Representatives a Vote of Credit bill giving only a statement of expenditures and without furnishing details (if owing to an emergency due to either natural causes or a threat of external aggression or internal disturbances or other reasons, and if it appears to be impractical or inexpedient in view of the security or interest of the country).

X. Contingency Fund

The new Constitution by its Article 124 carries forward the provision regarding Contingency Fund when dealing with federal financial procedures. Similarly, Contingency Fund of each province has also been established under Article 212. A Contingency Fund is a good idea to deal with disasters and related unforeseen expenditure, such as required during the Indian blockade in the aftermath of the promulgation of the Constitution. The Constitution does not state anywhere that it can be used without going through parliamentary approval process. This should have been acknowledged in the text itself. In UK's practice, the Contingencies Fund Act, 1974 sets the size of the fund as two percent of the amount of the government's budget in the preceding year. When parliament votes to approve the urgent expenditure, the money is repaid into the Contingencies Fund. As Parliament is effectively forced to approve actions *ex post facto* (after they've happened), the Treasury's use of the fund is actually scrutinised in detail by the Public Accounts Committee. This clarity is needed in Nepal as well.

Y. Supreme Court's Power to Interpret the Constitution

Article 128 (4) could be problematic. What does it mean that the Supreme Court may interpret the constitution and the laws "in the course of trying a law suit"? Only case by case – insofar, there might be no difference with other courts – or in an abstract way, i.e., independently from a case? Although the Nepalese tradition so far is in line with the established common law practices,

this clause could be abused. This would give it quite a lot of power, especially if these abstract interpretations will be binding as provided by Article 128(4).

Z. Attorney General as Investigator of Human Rights Violations

The experience of Nepal in the operation of the Office of the Attorney General shows that the Attorney General should not be appointed by the government in order to guarantee his or her independence in legal advisory or prosecution services. At present, the Attorney General is not only appointed by the President on the advice of the Prime Minister, but also he or she holds office during his or her pleasure. It is questionable if the Attorney General as the Chief Legal Adviser to the Government is best qualified to investigate human rights abuses which are normally committed by members of the executive.

AA. Relation between Federation, Provinces and Local Level

Article 232 intends to make sure that relation between Federation, provinces and local level shall be based on the principle of co-operation, co-existence and co-ordination. A provincial government which by its activity seriously undermines the sovereignty, territorial integrity, nationality or independence of Nepal may be warned, or suspended or dissolved with or without Provincial Assembly for up to six months. Such a decision must be ratified by a two-thirds majority of the total number of the then members of the Federal Parliament within thirty-five days. The federal rule in the province is, therefore, granted in such a situation in the framework of Article 232. Clause (2) of this provision, however, purportedly may be interpreted beyond. The Federation may issue directives to the provinces in questions concerning the national interest. It states: "The Government of Nepal may, pursuant to this Constitution and the Federal Law, give necessary directions to any Provincial Council of Ministers on matters of national importance and on matters to be co-ordinated between the provinces, and it shall be the duty of the concerned State Council of Ministers to abide by such directions." The question then is- Does this competence include matters which fall under the competences of the provinces? The answer is not clear. It is also necessary to note here that there is nothing in Article 232 which requires the federal government to get the parliamentary approval of such directives to the provinces.

BB. Provisions Relating to Political Parties

Similarly, Article 269 stands out different. It deals with provisions relating to political parties. While Article 270 has a prohibition on restriction on political parties, Article 269 deals with formation, registration and operation of political parties. Its Clause (4) lays down conditions for a political party to register with

the Election Commission along with its constitution and manifesto, among other things. The constitution and rules of such political party must be democratic. Its constitution must provide for election of each of the office bearers of the party at the federal and provincial levels at least once in every five years. Such an election may be allowed in next six month in special circumstances. There must be a provision of such inclusive representation in its executive committees at various levels as may be reflecting the diversity of Nepal. If the name, objective, insignia or a flag of a political party is of such a nature as to jeopardise the religious and communal unity of the country or to fragment the country, that party shall not be registered.

Article 271 requires parties to get registered for securing recognition for the purpose of contesting elections as political party. What will be the consequence if a party does not prove to be democratically structured, especially under the perspective of Article 270? If there is no sanction for an undemocratic structure of a party, why does the requirement exist? Should the parties be allowed to work even if they are undemocratic if they do not intend to contest elections? These questions are certainly important, and the Constitution does not attend to them.

CC. Law of Referendum

The holding of a referendum under Article 275 is not very well formulated in the Constitution. Referendum enables an entire electorate to vote on a particular proposal. It is a mechanism of direct democracy which allows citizens to make political decisions directly through a vote, without the involvement of a parliament or a government. Certain decisions are best taken out of the hands of representatives and determined directly by the people. While two option referendums is easiest, multiple choice referendums are also common. A multiple choice referendum poses the question of how the result is to be determined, if no single option receives the support of an absolute majority (more than half) of voters. A non-majoritarian methodology is also allowed at times. This question can be resolved by applying voting systems designed for single winner elections to a multiple-choice referendum. In most cases, however, referendum exists merely as a complement to the system of representative democracy than a mechanism of direct democracy. The decision given by the voting people then needs to be implemented by making necessary law by the parliament. In most cases, this may result in the adoption of a new law. As the referendum is an important means within the constitutional order, there should be a more specific arrangement in the constitution – concerning the quorum, the effects, the relationship to ordinary legislation; it should not have been left to the ordinary law, as is laid down by Clause (2) of Article 275.

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Foreign Investment: Legislative Modes of Investment, Protections and Challenges in Nepal

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ABSTRACT

Foreign Investment has played a dominant role in the global economy, even more so for developing economies. Nepal lies between two biggest economies and surrounded by four big host economies of Asia including India, China, Pakistan and Bangladesh. Nepal has the highest opportunities of retaining foreign capital and technologies in various sectors but despite immense resources and protection commitments, investment ratio has not been impressive. Thus, there is a requirement of legislative and structural reforms to convince foreign investors for importing their capital. Nepal has always realized the importance of foreign investment due to its immense potential as a stimulant for development and requires acting on it with more sensitivity than before so that the country could retain foreign capital for long run.

INTRODUCTION

Foreign capital has potentiality in playing an important role in most economies as evidenced worldwide, nevertheless the flow of foreign investment in our local context most probably deterred by the unstable political development. Nepal went through several difficult political and socio-economical transitions after the restoration of democracy in the post 1990s. As the country suffered

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from insurgency and frequent changes in the governments, this severely hit the development and economic prosperity. Implementation of constitution is still major agenda after its promulgation in September 2015 last year. During all this tenure of making constitution, before and after, the agenda of economic progress remained in shade. A number of political processes and events in the past have had negative economic implications. Against this backdrop, foreign investor's interest and their trip to Nepal in the quest for investment opportunities have never stopped.

Various plans of Planning Commissions recognized the importance of foreign capital for the overall economic development of the country. For the first time, the Sixth Plan (1980/81-1984/85) incorporated a policy for utilizing foreign capital and technology as a useful supplement. The Plan mentioned that foreign investment and technology was primarily required in large-scale industries and mineral industries. Formal invitation for foreign investment in Nepal was first time made via Foreign Investment and Technology Transfer Act, 1979. Recognizing the objective of the investment law, the Government of Nepal also introduces Foreign Investment and One-window Policy in the Year 1992. The policy recognizes the change in the world economic order and realizes open and liberal policy, for strengthening economic system led to make foreign investment attractive by farming a timely, liberal and open policy.[1]

Based on the policy introduced, an Act called Foreign Investment and Technology Transfer Act, 1992 (FITTA) was enacted. The Industrial Policy 2010 was another landmark for industrial development objective. In addition, the formation of Industrial Board for the Mega Project was possible by the enactment of Investment Board Act, 2010. The Ministry of Industry last year framed Foreign Investment Policy 2015 with various commitment of creating foreign investment friendly environment and finally the Constitution of Nepal, 2015 (Constitution), under its Part 4 relating to Directive Principles, Policies and Obligations of the State recognizes the importance of foreign capital for the whole economic development of the country.

Despite various legislative, ministerial and administrative promises to create foreign investment friendly environment in the country, in reality promises seems to have been lip services and have not yet yielded any optimistic result from the investment trends, as per Investment Statistics of Department of Industries.[2]

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[1] Foreign Investment and One-window Policy, 1992, Background.

[2] *See Industrial Statistics from 2004-2015*, Department of Industry, http://www.doind.gov.np/ (accessed on January, 2015) (Hereinafter Industrial Statistics).

Investors have been facing bureaucratic and legislative challenges in the issues relating to easy flow of investment, repatriation of their returns, protection of technology and intellectual property, industrial security and protection. The judiciary has still not delivered its position regarding the status of recognizing and enforcing foreign arbitral award made in foreign jurisdiction despite legislative commitments in the Arbitration Act, 1999 pursuant to the New York Convention on Recognition and Enforcement of Foreign Arbitral Award, 1958 to which Nepal became party on March 4, 1998.[3]

Undoubtedly, foreign investment contribute to the overall economic development of the country by various means, including potentiality of capital and finance in new industries and enhance existing industries, boosting infrastructure, productivity, and employment opportunities, retaining skill and technology, global access to the market, export and import possibilities, exchanges of services, earning foreign currency, revenue generation, competition and consumer satisfaction.

The higher growth supported by foreign investment pays dividends for the host country by increasing tax revenues and increasing the funds available to spend on hospitals, schools, roads and other essential services as promised by the Constitution. Succeeding to retain foreign investment has other benefits beyond injecting new capital. Foreign investors bringing in new businesses with connections in different markets open up additional export opportunities, boosting Nepalese overall export performance. It also encourages competition and increased innovation by bringing new technologies and services to Nepalese growing market. However, every investment has some reason in addition to the points mentioned below, that includes highly skilled workforce, sound geo-location, strong government and governance, adequate infrastructure, and most importantly investment friendly environment.

For this reason, to convince the foreign investors for importing their capital, legislative and structural reforms are essentially required. The article analyses the legislative commitments with an analysis of required reforms ahead, based on the investment opportunities, modalities and challenges for investment in Nepal.

I. DETERMINANTS OF FOREIGN INVESTMENT

Potentials of foreign investment in Nepal are accepted as heavily under-exploited, despite the fact that the country offers huge resources. Having resources only, cannot be the determinant factors for the investor's investment;

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[3] *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958,* 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

plan, political risk and economic instability are equally significant for taking into consideration. Foreign investor's decision of making investment in any other extra-territorial jurisdiction depends on various other factors. Hence, foreign investor's investment decision may not always relate to resources and overall economic outlook for a country, but also to political, social and investment policy adopted and versioned by the host states.

In addition, any foreign investor's decisions are subject to the rules and regulations pertaining to the entry and operation of foreign investors, protection of investment mechanism, speed and reliability of dispute settlement mechanism, standards of treatment of foreign affiliates, compared to local investors or entity, the credibility, functioning, and efficiency of local markets and consumers, trade, industrial investment, tax and foreign exchange policies, procurement and privatizations policies, expropriation and share transfer mechanism, business facilitation measures, such as investment promotion, incentives, improvements in amenities and other measures to reduce the cost of doing business, tax concessions and benefits, repatriation of salary, earnings and investments possibilities, expats work policies, policies relating to technology and intellectual property protection mechanism.

Determinant factors of foreign investment are complex though but they are fundamental too. Therefore, to satisfy foreign investment and pool the foreign capital as intended by the Constitution, a serious consideration requires to be given in the factors mentioned. Apart from this, one of the important factors depends on administrative work and procedure. However, time bound decisions, administrative reforms and procedural improvement, transparency and simplified procedure, reforms in laws and policies, clean and open administration committed by the Government of Nepal and various governmental authorities in their citizen charters are not convincing rather they seems to be fairy tale.

Apart for the points noted above, elimination of *red tapism* in bureaucracy, creating investor friendly environment and reduction of lethargic decision making process, minimization of corruption that is found in all level of the government and bureaucracy and accountability to the rule of law by the political leadership and bureaucracy, the investment vision will remain in vision only. In addition, concerned governmental authorities must demonstrate their positive attitude and responsible behavior including administrative reform and structural competence along with an investment aptitude, responsiveness and humility towards foreign investors by maintaining ethical and moral character, legal commitment of investment friendly environment and investment protection.

II. INVESTMENT SCENARIO IN NEPAL

Global Foreign Direct Investment (FDI) inflows fell by 16 percent in 2014 to $1.23 trillion, down from $1.47trillion in 2013.[4] The decline in FDI flows was influenced mainly by the fragility of the global economy, policy uncertainty for investors and elevated geopolitical risks.[5] Global scenario too reflected in our economy; however, the reason was slight different. The year 2015 was a very challenging year for foreign investment in Nepal. The country suffered from devastating earthquakes of 7.8 magnitudes and aftershocks. As a result of this heartbreaking earthquake, thousands of people lost their lives and millions of them are suffering from injury and psychological trauma. The country lost most of its old cultural heritages listed in United Nations Economic, Social and Cultural Organization's (UNESCO) World Heritage. This is indeed an unimaginable disaster which has displaced millions of Nepalese from their homes and has incurred extreme hardship on their lives.

Despite panic and devastating events, another milestone the people of Nepal got was the promulgation of the Constitution on September 2015 by maximum majority in the Constituent Assembly. However, immediately after the promulgation of the constitution, the country suffered more than five months blockade at the borders and *Madhesi* agitation which made the life of the people difficult and consequently various industries were closed down and unemployment heightened. The consequences of earthquake and the border blockade have deeply hit on the country's economy. The earthquake in April 2015 and the unrest in *Madhesh* region, therefore, raised a major challenge to the economy and to foreign investment.[6] The declining investment scenario can also be witnessed from the statistics of foreign investment projects as per the statistics of Department of Industry (DOI).[7]

However, the country's huge natural resources, relation with large neighboring economies, capable human resources, low competitive environment and potentiality of high profitability are the affirmative factors of investment option. In addition, progressive policies of foreign investment and wider sectors of investment in the areas of hydroelectricity, aviation, telecom, construction, manufacturing, alternative energy, tourism, mines and minerals and education, Nepal has always remained as potential investment destination for foreign investors.[8]

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[4] UNCTAD, *World Investment Report 2015 Reforming International Investment Governance*, (2015).
[5] *Id.*
[6] *Id.*
[7] *See* Industrial Statistics, *supra* note 2.
[8] *See* Investment Board Nepal, Nepal Investment Guide 2016, (2016) (Hereinafter Nepal Investment Guide).

Reviewing the foreign investment scenario until 2015, the statistics of the DOI reflects that in terms of industry approved for foreign investment, China stands in top with 874 industries and India stands second in list with 613 Industries approved. United States of America, South Korea, Japan, United Kingdom are on hierarchy in descending order with total 3,327 industries approved. Energy based industry is an industry retaining maximum foreign capital and thereafter manufacturing, service, tourism, construction, mineral and agriculture comes in the listings where total investment of budget is seen to be NPR 182,483 million. Though the industries approved for foreign investment is seen to be increased, excitingly between the Fiscal Year 2013-2015, however, after the devastating earthquake, it is expected to hit in the foreign investment in Nepal.[9]

III. FORMS OF FOREIGN INVESTMENT

In Nepal, foreign investment is governed by FITTA which was enacted with the realization that, in the process of industrialization of the country, it is expedient to promote foreign investment and technology transfer for making the economy viable, dynamic and competitive through the maximum mobilization of the limited capital, human and the other natural resources.[10] As per FITTA, foreign investment in Nepal should be in the form of foreign currency or capital assets or foreign loans. The re-investment of earnings from foreign investment also constitutes as foreign investment. FITTA defines foreign investment as investment made by a foreign investor in any industry made in following forms, a) investment in share (Equity), b) reinvestment of the earnings derived from the investment made in equity and c) investment made in the form of loan or loan facilities.[11] Likewise, foreign investor is defined to mean any foreign individual, firm, company or corporate body involved in foreign investment or technology transfer including foreign government or international agency.[12]

A foreign investor has various investment options in the industry. As per FITTA, foreign investor can make an investment either in the form of a wholly owned foreign venture (subsidiary) or a joint-venture or in the form of technology transfer. The FITTA permits foreign investors in equity participation up to 100 percent in almost all sectors except telecom, aviation, banking and insurance, and consultancy services relating to accounting, engineering and management etc., where local equity participation is a must. The foreign investment ratio in the airlines industry is eighty percent, in telecom its eighty percent, in consultancy

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[9] Industrial Statistics, *supra* note 2.
[10] Foreign Investment and Technology Transfer Act, 1992, Preamble (Hereinafter FITTA).
[11] *Id.* § 2, Cl. b(2).
[12] *Id.* § 2, Cl. d.

service fifty one percent is the highest ceiling of share capital investment.[13] The minimum threshold amount of foreign investment in Nepal is NPR 5 million (approximately US$ 50,000) which a foreign investor must meet to get an investment approval from the Department of Industry, however there is no upper cap for foreign investment.[14]

In addition to those direct forms of foreign investment in the form of use of rights, specialization, formulae processes and patents of foreign origin, use of foreign owned trademarks and goodwill and use of foreign technical, consultancy, management and marketing services are treated as technology transfers under the FITTA, which may be borrowed in Nepal by the local industries and businesses. The FITTA defines technology transfer to mean any transfer of technology to be made under an agreement between an industry and a foreign investor relating to use of any technological right, specialization, formula, process, patent or technical know-how of foreign origin , use of any trademark of foreign ownership and acquiring any foreign technical, consultancy, management and marketing service.[15] Any foreign investor, who is desirous of making a foreign investment in or transfer technology to Nepal, requires obtaining necessary approvals from the Department of Industry and/or any relevant governmental authorities as per the nature of business, the foreign investor seeks to invest.

Further, the FITTA has allowed foreign investment in various other sectors including manufacturing, hospitals, education, hotels and restaurant, information technology, energy, tourism, mineral resource, agro-based industries, service industries, construction industries etc. and the Department of Industry as concerned authority basically administers the foreign investment industries, medium and large scale industries, industrial property namely patent, design and trademark including secretarial of the Industrial Promotion Board which has the authority of making decision in respect of the project that has the capital form NPR two billion up to NPR ten billon.

In addition to this, for mega project having paid-up capital of NPR 10 billion or a project cost exceeding that amount may channelize their investment via Investment Board Act, 2010 ("IBA 2010").[16] The IBA 2010 has formed the Investment Board for facilitating mega projects relating to infrastructure and service sectors in the areas of construction, mining industry, tourism industry and airlines service industry, with various modalities including foreign investment and Public Private Partnership.

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[14] *Id*.
[15] FITTA, § 2, Cl. c.
[16] Investment Board Act, 2010, § 9(1).
[13] *See* Department of Industry, Procedural Manual of Foreign Investment in Nepal, 4 (2012).

IV. MODES OF FOREIGN INVESTMENT AND APPROACHES

FITTA allows only direct forms of investment in Nepal at present. Direct forms of investment as mentioned above is in the form of equity or shares investment that may have been done either in cash or assets.[17] Although the Government has recently committed to introduce portfolio investment in the Foreign Investment Policy, 2015 but it has not materialized yet. The foreign investors may make an equity investment in a new entity or an existing industry by transfer of shares. Foreign investment in an existing industry by transfer of shares may be done in two ways; either by transferring the shares of existing shareholder or by issuing new shares to a foreign partner, which may be issued either from the reserved shares or by increasing the issued share capital of the company.

The FITTA does not allow an investment to be made in all sectors of industry. There are certain sectors where foreign investment is not allowed. These sectors are mentioned in the Negative List of FITTA.[18] FITTA restricts foreign investment in the areas of cottage industries[19] which includes knitting, pashmina, garments, handicrafts, and boutique, dolls and toys industries. In addition, industries relating to beauty parlor, tailoring, real estate business excluding construction, motion pictures, retail business, trekking agency, water rafting are other areas which fall under the negative list and hence, are prohibited for foreign investments,[20] nevertheless there is no restriction on transfer of technology.

In addition, all foreign Investors may not be granted approvals, even in the sectors where foreign investments are permitted by the FITTA. There are various factors that are taken into consideration by the relevant government authority, before granting such investment approval. Major factors of consideration for foreign investment are based on financial and technical viability of the investment project. Apart from this, other major factors of consideration for evaluation and approval of foreign investment and technology transfer projects include foreign investor's potential contribution to employment generation, foreign exchange earnings, availability of raw materials, requirement of foreign currency for the purchase of raw materials, manufacturing process (in case of production industry),project inputs requirement (power, water etc.), the impact of industry on the environment, the pollution control measures proposed to be set up under the project, market aspects and national benefits including value addition etc.

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[17] FITTA, § 2, Cl. d.
[18] *Id.* Schedule 1.
[19] *Id.* § 2, Cl. c.
[20] *Id.* § 2, Cl. d.

V. LEGISLATIVE PROTECTION OF FOREIGN INVESTMENT

Nepal has always realized the importance of foreign investment due to its immense potential as a stimulant for development. The laws and policies relating to foreign investments have given several commitments for protection of foreign investment and creation of an investor friendly environment. Recently, the Constitution of Nepal, 2015 has also realized the importance of foreign capital for the economic development of the country. The Constitution of Nepal, 2015 in its preamble though mentions that the sovereign people of Nepal being committed to socialism based on democratic norms and values,[21] however, in Part 4 of Directive Principles, Policies and Responsibilities of the State, relating to economy, industry and commerce clearly states that the country is committed to enhance national economy through partnership and independent development of the public, private and cooperative sectors[22] and affirms that to achieve economic prosperity by way of optimum mobilization of the available means and resources, while focusing on the role of private sector in economy.[23]

Likewise, the Constitution also recognizes the importance of foreign capital and has given the commitment of attracting foreign investment and technology. The Policy relating to economy, industry and commerce also recognizes that the state shall work out to encourage foreign capital and technological investment in areas of import substitution and export promotion, in consonance with national interest, and encourage and mobilize such investment in infrastructure building[24] and shall make equitable distribution of the available means and resources and benefits of economic development[25] by framing various policies, directives and undertaking as states responsibilities.[26] Likewise, the Constitution of Nepal has guaranteed freedom of trade and business.[27] The law of the land also ensures rule of law[28] and stipulates that taxation shall be levied or raised in accordance with law.[29]

As a statutory protection, The Industrial Enterprises Act, 1992 ("EIA 1992") confirms non-nationalization of industries under any circumstances.[30] FITTA has promised to facilitate for the repatriation of earnings by the industry along with the salaries of the expats. FITTA states that, a foreign investor making investment in foreign currency shall be entitled to repatriate the amount received

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[21] Const. of Nepal, 2015, Preamble, ¶ 5.
[22] *Id.* Art. 51, Cl. d(1).
[23] *Id.* Art. 51, Cl. d(2).
[24] *Id.* Art. 51, Cl. d(10).
[25] *Id.* Art. 51, Cl. d(5).
[26] *Id.* Art. 52.
[27] *Id.* Art. 17(2), Cl. f.
[28] *Id.* Preamble.
[29] *Id.* Art. 115, Cl. a.
[30] The Industrial Enterprises Act, 1992, § 21.

by the sale of the share of foreign investment as a whole or any part thereof, [31] the amount received as profit or divided in lieu of the foreign investment [32] and the amount received as the payment of the principal of and interest on any foreign loan.[33] Foreign investor is also entitled to repatriate the amount generated from the fee and royalty received for the technology transfer. Repatriation up to 75 percent of salaries, allowances and other earnings is also permitted for foreign expatriates.[34] The Act has also guaranteed to grant business visa for the investors and non-tourist visa for their representatives along with visa for the family members.[35] In addition, under the accession to the WTO agreement Nepal has made a commitment to allow 15% of technical and managerial posts to be filled by expatriate staff by entities with foreign investment. It means that foreign investor can hire expats under international commitments of Nepal upon complying regulatory formalities of work permit.[36]

The Department of Industries has committed to mediate for the settlement of dispute and incase failed, the FITTA allows to settle the dispute by adopting UNCITRAL model.[37] FITTA has thus intends to facilitate the settlement of investment disputes amicably and in the failure of the same, the dispute may be settled by arbitration in accordance with the prevailing arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Investors are free to mention the dispute settlement mechanism in their contracts with the local parties. In addition, Arbitration Act, 1999 ensures that foreign arbitral awards are recognized and enforced in Nepal, provided that such awards are in conformity with Nepalese laws.[38]

Nepal has Patent, Design and Trademark Act, 1965 (PTDA). The PTDA protects patent, design, trademark and other related industrial property subject to their registration at the Department of Industry.[39] The PTDA ensures the title of patent to the patentee for a period of seven years from the date of registration, unless it is not renewed thereafter.[40] Likewise for design, the term of protection is five years from the date of registration[41] and for the trademark the PTDA protects for a period of seven years from the date of registration.[42] The PTDA also stipulates punishment for the violation of registered patent, design and

[31] FITTA, § 5(2), Cl. A
[32] *Id.* § 5(2), Cl. B.
[33] *Id.* § 5(2), Cl. C.
[34] *Id.* § 2, Cl. d.
[35] *Id.* § 6.
[36] Nepal Investment Guide, *supra* note 8.
[37] FITTA, § 7.
[38] Arbitration Act, 1999, § 34(1)(2).
[39] The Patent, Design and Trademark Act, 1965, § 21(B).
[40] *Id.* § 8.
[41] *Id.* § 14A.
[42] *Id.* § 18D

trade mark beside the provision of compensation for the loss sustained by the title holder [43] and have made possible to transfer the ownership of the IP[44] subject to the approval of DoI.

Apart from the statutory provision, Nepal has ratified various international conventions including Multilateral Investment Guarantee Agency (MIGA), World Trade Organization (WTO), Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), South Asian Free Trade Area (SAFTA), Double Taxation Avoidance Agreement (DTAA), Paris Convention for the Protection of Intellectual Property Rights and The New York Convention on Recognition and Enforcement of Foreign Arbitral Award and has committed to be abided by these ratified Treaties, Agreements and Conventions.[45] The applicability of these instruments have been further recognized by the Treaty Act of Nepal. Hence, the international commitment by Nepal via several instruments ensures the protection mechanism of foreign investment in the country.

Further, Nepal has also entered into Reciprocal Encouragement and Protection of Investment Agreements (which commonly known as BIPPA) with India, Finland, France, Germany, the UK and Mauritius which aims ensure protection of the foreign investments by guaranteeing equitable and non-discriminatory treatment for use, enjoyment or disposal of investments, compensation for losses and expropriation, free transfer of capital, loans and profits and access to legal remedies.

In addition to this, the government has also promised to the foreign investors by framing framed Industrial Policy 2010 and Foreign Investment Policy 2015 and has committed for time bound decisions in the matters relating to investment. Ensuring transparent and clean administration, transparency and clarity of facilities available, commitment to simplify in import of machinery and raw materials are significant. In addition, the Foreign Investment Policy 2015 has committed to facilitate foreign investors by reforming laws and policies in timely manner, adapting simplified investment procedure, enhancing competence, structural reforms in the administration of foreign investments, forming and mobilizing industrial security forces, adopting flexible immigration policies, enhancing and adopting economic diplomacy, opening portfolio investment, facilitating Non- Resident Nepalese for bringing investments in all sectors and enhanced protection of intellectual property rights in a more effective manner to create a foreign investment friendly environment within the country.[46]

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[43] *Id.* § 25.
[44] *Id.* § 21D.
[45] Nepal Treaty Act, 1990, § 9.
[46] *See* Nepal Foreign Investment Policy, 2015.

VI. INVESTMENT CONSTRAINTS AND CHALLENGES TO PROTECTION

It is self-evident that, Nepal has highest opportunities of retaining foreign capital and technologies in various sectors including hydropower, telecom, aviation, infrastructure, manufacturing, mines and minerals, constructions and real estates, tourism and developments, banks and insurances etc. Despite immense resources and protection commitments, investment ratio is not impressive. Several commitments and promises given via legislation, policies and by the Government to the investors are seen to be in words only. Among many and apart from those mentioned and discussed in the foregoing paragraphs, major includes restrictive investment regime defined in negative list of FITTA. Retail business is instrumental means of revenue generation in India but restricted in Nepal. Nepal still restricts out flows of foreign investment. The government needs to ease the restrictions on FDI outflows by non-financial Nepalese enterprises.

Nepal's tariff rates are blamed to be higher which has made constraints for export and import for the foreign investors. Lying off or redundancy is one of the important employment issues and the employment law does not allow the industries the opportunity of hire and fire and no work no pay. Trade unions are politically guided and less collective interest oriented. In addition to these inconsistencies in politics and policies of the government, lack of industrial relations, rigid labour policies, lack of investment protection in the laws and administrative adjudications, delay and time consuming in approvals and licensing, more formal procedures though time bound and transparent administration is promised, rampant corruptions and bribery at all level, vague and ambiguous legal provisions with multiple interpretations by administrative authorities.

Dispute in commercial transactions requires quick dispensing of the cases. However, taking business dispute in the regular courts of law is very time consuming. Thus, in commercial issues, settlement of dispute through arbitration is very common in both local and international transactions. Nevertheless ultimate authority of interpretation of commercial matters, settlement of dispute and enforcing the award rests in the Courts. Therefore judiciary should have expert judges having academic and judicial experiences of handling complex commercial legal issues.

Observing the composition of Supreme Court and Commercial benches in the Appellate Court, the expectation of judicial interpretation and development of commercial jurisprudence is not optimistic. The Judiciary is not seen to be fully equipped with the commercial knowledge and enforcement of arbitral award

has become one of the pertinent problems in Nepal, which may frustrate foreign investors. Hence, unless judiciary is equipped with the arbitration jurisprudence, practices, experience and exposures, the foreign investors may not feel secured of their investment dispute settlement.

Foreign Investment Policy 2015 has also recognized the problems and challenges of investment environment including political and policy level instability, lack of unskilled human resources, inconsistent laws and ambiguities, strict labor policy and likewise.[47] Realizing the investment constraints and challenges in foreign investment, the Government via its Foreign Investment Policy 2015 has promised to create conducive investment environment by reforming its governance structure, prompt decision making, widening investment areas, providing concessions and facilities, recognizing the need of investment and protection of Non-Resident Nepalese. Apart from this the Policy has promised for facilitating repatriation and opening new sectors of foreign investment including portfolio investment.[48] If the government is able to demonstrate its commitments in practice and implement its positive assertions as defined in the laws and policy, the constraints and challenges could be tackled to convince foreign investors to inflow their capital.

CONCLUSION

Foreign Investment has played a dominant role in the global economy, even more so for developing economies. Nepal's northern neighbour China is the biggest host nation worldwide. China today is the largest host nation, not because of its size and resources, rather due to the opportunities and investment attitudes that it maintains all around. The foreign investment law of China is not as much mature as our laws. Chinese investment laws have been evolved since 1990s as the economy opened up and became more market oriented, as well as in response to China's preparation for accession to World Trade Organization. They regularly review investment laws and update the investment catalog frequently by addressing the concern of investors. On the other side India is the seventh largest economy in the world[49]. Compared to most industrializing economies, India followed a fairly restrictive foreign private investment policy until 1991.[50] The Indian government has been working to promote FDI to improve the competitiveness of the country's industries and services and to prove that investing in India is a sound global strategy. To attract foreign investors,

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[47] *Id*.
[48] *Id*.
[49] *See* Andy Bergman & Tal Yellin, *World's Largest Economies,* CNN Money, http://money.cnn.com/news/economy/world_economies_gdp/ (accessed on March, 2016).
[50] R. Nagraj, *Foreign Direct Investment in India in the 1990s: Trends and Issues*, 38 Economic & Political Weekly 17, 1701 (2003).

as part of liberalization, privatization and globalization initiatives, India began to revise its foreign investment policies in the early 1990s and as of now India has the best investment laws and policies to attract investors not only in papers but in practice too. Hence, having clear, predictable and transparent, consistent investment law has remained the key factors of investment decisions. Likewise, in reference to China, prior to the initiation of economic reforms and trade liberalization around four decades ago, China maintained policies that kept the economy very poor, stagnant, centrally-controlled, vastly inefficient, and relatively isolated from the global economy. Since opening up to foreign trade and investment and implementing free market reforms in 1979, China has been among the world's fastest-growing economies.[51] The ability of China to maintain a rapidly growing economy is due to creating foreign investment friendly laws, policies and environment.

Referring to Nepal, though there is realization of foreign capital for the economic development of the country in the Constitution, laws, regulations, policies and political commitments, however, attracting foreign investments in Nepal is quite challenging. Among many, complexities of laws, regulations and policies and administrative speedy and investment friendly procedures are major. Beside this, we require behavioral changes from all sectors, and importantly from governmental authorities by demonstrating responsiveness and humility towards foreign investors, and eradicating or minimizing corruption, otherwise legal commitments praised above shall remain ineffective in achieving the desired goals. In addition, FDI laws require to be consolidated and clarify many fragmented and uneven regulations and policies, so that foreign investors will likely welcome its implementation.

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[51] Wayne M. Morrison, Congressional Research Service, China's Economic Rise: History, Trends, Challenges and Implications for the United States, 2-7 (2015).

New Methods and Modalities of Teaching Law Clinically

Yubaraj Sangroula*

ABSTRACT

This article has attempted to reflect on need of pedagogical reforms in legal education in South Asia, in general, and Nepal in particular. Nepal, over the last five decades, has carried out many different structural changes mainly focusing on 'framework of the degree', whereas the change in curricula and pedagogy has received nothing but a lip service. The article has made attempt, therefore, to review the problems facing the legal education of Nepal concerning pedagogy. The ideas reflected in the article are inspired by the several conferences held in past few years, the conference of the Asian Deans' Forum in 2012, the Legal Education Conference in Bangalore in 2014, and the research on review of legal education of Nepal conducted by Kathmandu School of Law in 2015. The article unequivocally argues for overhauling of the legal education in Nepal placing emphasis on clinical legal paradigms, ethical professionalism of defense bar in Nepal and transforming the present curricula from legal education to justice education. For this, the article emphasizes the need of ending 'insulated teaching methods' in the favor of the students' outreach participation for learning; it is argued that the myths of legal education that 'legal profession is an elitist profession' is no longer a valid argument. The article, therefore, asserts that it is a right time for gearing up towards clinical approach of teaching for socially responsive justice education.

GENERAL PERSPECTIVES

Larger part of the Asian Law Schools is still behind, rather reluctant, in using student centric teaching modalities, i.e., a reflective or critical pedagogy of teaching, which students are cognitively as well as empirically challenged in the context of indigenous epistemology. The reflective or critical

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pedagogy of teaching law requires concentration on problem resolving approach; it implies that law is essentially concerned or connected with social problems. The education of law becomes dry in isolation from problems of the given society. Explicably, the pedagogy of teaching and learning laws must be conscious about social problems and impacts of law in the society. The underlying philosophies adopted by social setting largely influence impacts of education. South Asia has always, in its long history, emphasized the education of justice rather than that of law. In *Rigveda,* it is urged that the process of justice must seek exploring 'truth' imbedded in the fact, and the construction of fact is always guided by the values adopted by the society.

Pedagogy of legal study adopted by Asian Law Schools is, however, predominantly based on 'Socratic Dialogue and Lecture Methods'. There is more than one conceptual or theoretical reason behind popularity of these dogmatic methods, which, as such, pose major inroads in looming incompetency of Asian students to compete internationally in many sectors of legal professionalism. Some of these conceptual problems that inhibit law teachers in making use of new modalities of teaching and learning law can be summed up as follows:

i) Widely prevailing 'jurisprudential misconception' about law as an object, which tends to discard 'socio-cultural, political, and economic contextuality of law as a concept, but not the object, and as such, it demands that 'it be treated contextually and pragmatically';[1]

ii) Practice of giving less attention in fundamental feature of legal education that it produces professionals to practice exactly what has been taught in law schools. The empirical methods that are necessary to develop vocational expertise of lawyers is undervalued, hence a student entering into the profession finds big gap between the nature of professionalism and theory he or she has studied in the law schools. This situation kindles serious

[1] *See* Brian Bix, *Joseph Raz and Conceptual Analysis,* 6 APA NEWSLETTER ON PHILOSOPHY & L. 2, 1-6 (2007) (Plato defined law as an 'object' and assumed that it contained universal nature. Philosophically, an object possesses universal character, for instance 'water has same character' in all parts of the world. This Platonic concept of law was 'inherently erroneous'. However, the medieval and, even the modern, concept of law in Europe were immensely influenced by the Platonic notion of law); *See* YUBARAJ SANGROULA, JURISPRUDENCE: THE PHILOSOPHY OF LAW (2010) (The hard positivism developed by John Austin in UK implicitly was founded on this notion. This theory was useful for colonial rulers because it provided a basis of argument that 'colonial laws could be imposed in colonized territory indiscriminately'. This theory promotes a theory on support of the transplantation of laws of the developed countries developing countries. Joseph Raz, and some other jurists, however, does reject the Platonic notion of law as an object; Ibid. Earlier in the 19th century, Karl Von Savigny, by his theory of *volkgeist*, rejected the theory of universality of law as an object. He said that the law is a product of the social consciousness of the given society).

anxieties and frustration among new professionals, which in fact constitutes a cause for them to learn unethical practices;[2]

iii) Having less concentration on understanding or empirical observation of the actual social problems, which law has to constantly deal with, is another pertinent problem. To reckon from this point of view, legal education demands application of a methodology that emphasizes study of law in a way by exposing students to resolve problems in their actual settings by applying reflective or critical knowledge; and

iv) Having tendency of inadvertently dismissing roles of factors or happenings in contemporary societies that affect performance of laws is also a serious problem. Since legal professionalism demands careful observation of changes taking place in the society, for rendering it a dynamic vocation, the role of legal education in preparing or developing in students a scientific approach of understanding problems realistically is crucial and mandatory.

I. CONTEMPORARY PROBLEMS IN PEDAGOGY OF LEGAL EDUCATION

The problems discussed above require law schools to make constant review of the 'teaching methodology or pedagogy'.

A. Problem Related with Conceptual Clarity about Law

The problem related with 'conceptual clarity about law' expects law schools to carefully and vigilantly watch on 'process of change' in the nature of law, as demanded by the change in society. It implies that 'law is not immutable phenomenon; rather it is changeable and functions contextually'. This principle does reject a 'tendency of transplantation of laws from one society to other indiscriminately'. Meaningful and scientific dealing of social problems by application of law therefore necessarily calls for 'contextual understanding of the law'. This principle further requires that 'education of law is fully concerned with the problems facing the society and discovering appropriate principle that remedies the problem by applying a reflective and critical problem resolving method'.

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[2] A student of law like a student of medical science is expected to professional skills and art while he or she is a student. Law schools are supposed to generate habits and commitment among students to 'behave like a lawyer' from the very first day of his or her entry into law school. A law student has to represent his or her client's interest without fault. Hence, developing professional competency in students must be priority of law schools. Most unethical affairs lawyers are reportedly comminuting in the contemporary societies are, as argued by David Laban, a professor of law from USA, caused by failures of law schools to entrench a sense among law students to behave like a lawyer. Degeneration of professional ethics of lawyers is therefore a result of problems in legal education. *See* 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) (Hereinafter Robert L. Nelson).

B. Problem Related to Professionalism

The problem related with the 'professionalism' requires development of 'adequate knowledge along with skills and art of applying law in problems'. Students need to be capable of behaving like professionals from the very beginning of their start of attending the classrooms. They should be fully aware that their profession in future demands some specific skills and arts, and they will have no time to learn when they enter the profession, because the professional integrity does not allow them to commit mistakes. As a matter of fact, it is mandatory for them to learn all professional skills and arts, rather say the culture of profession, when they are students at law school. The responsibility of law schools in this respect is thus huge.

C. Problem Related with Relationship of Law with Social Problem

The problem related with the 'relationship of the law with social problem' assumes that a rule of law does not function in vacuum. Hence, a student has to develop two skills simultaneously, firstly s/he should be a general social scientist, and, secondly, s/he should be a typical legal expert, with adequate expertise of researching, and interpreting meaning of laws. Legal education therefore must be able to maintain a balance between these two requirements of students; otherwise the prospect of a lawyer becoming a social engineers becomes bleak.

D. Problem Related with Adaption of Pedagogy with Contemporary Change

The fourth problem is related with the need of adaptation of the pedagogy of law schools with changing policies and development necessities of the State. The relation between the law and state is always prominent, as the latter is mainly responsible to articulate laws. Most laws therefore spell out policies of the state. All rapidly changing developing societies in the contemporary world do function as transitional societies. Changes in laws are thus not only rapid but occasionally abrupt. Legal education institutions must therefore be able to develop a sense in its products that they are supposed to engage in continuous observation of the society and change themselves in accordance with requirement of the time, and emerge as most dynamic social scientists. Obviously, law schools are supposed to nurture their students as social scientist, planners, social engineers and most importantly ethical professionals.

II. DETERMINING VIABLE MODALITIES

Against a background posed by these problems and needs, a dynamic approach of teaching law is determined by number of pragmatic and useful professional methods. Law Schools are thus progressive and dynamic institutions.

Understanding of the following purposes of modern pedagogy of legal education can help to develop some viable modalities.

A. De-insulation of Teaching and Learning Process

Emphasis on indoctrination of western classical theories and rhetoric is widely practiced in most of the Asian law classes. The perceptions of students regarding professors' presentations are rarely tested objectively. Most law schools in Asia, as it has been widely and conspicuously seen from 'curricula and culture of class room' in most Asian classrooms that the prime objective of teaching and learning process put emphasis on building students' career as that of abstract theoreticians or dogmatic professional. Most law schools pedagogies are found concerned predominantly with producing defense lawyers and legal counselors thereby spectacularly ignoring the need for producing law drafters, judges, prosecutors, and, most importantly, defenders of public interests with their enhanced role of building a just society. The definition of, and notions perceived in minds about, legal profession are elusive. Students are often encouraged to define legal professionalism in very broad and abstract concept apt to encompass myriads of abstract and romantic professional ideals such as a lawyer should have a good judgment, civility, maturity, competence, zealous advocacy, intelligence, honesty, and integrity and so on. Unfortunately, the responsibility of lawyers to defend the interests of deprived, vulnerable and exploited does hardly form an emphasis of curricula and pedagogy. The Asian societies are marching through an unprecedented drive of economic development, and as such are confronted with problems of environmental degradation, acute transition in social or cultural settings, overwhelming ratio of rural to urban migration, emergence of conflicts on management and workers, climatic changes and host other social issues such as child labor, sexual exploitation of children and women and minority groups. These issues however less bother professors and students. The shanty towns, ghettos, slums and life in squatters do find no reflections on curricula. The law schools are obviously isolated largely from the reality of lives of the majority of people in societies.

Professors are generally inclined to lecture on their perception, without much reference to the actual problems facing the society. The indeterminacy problem between the context of the society, its problems, and knowledge imparted by the professor is obvious. The student believes what his or her professor has said, and behaves accordingly. His or her understanding of the problem is therefore less realistic. Law schools have to, therefore, expose students to actual problems and learn to apply laws in actual problem. They should not be insulated within the classroom. De-insulation, in this context, therefore means an exposure of students to 'research based, problem solving critical study of laws'.

B. Demystification of Ideals of Legal Professionalism

In conventional paradigm, the more one attempts to define the terms of legal professionalism, the more diluted and inadequate the definition becomes. Students then find nothing but a vigorous, ongoing debate over the meaning of professionalism.[3] The delusion students are subjected to face concerning the definition of the profession is not only a 'matter of disenchantment' but also a factor to push them into 'a danger of anarchy of belief, disorganized in pursuit of practice and visionless in development of career as a successful professional. The context and needs of the given society or nation can be one of the best standards for defining the 'legal profession', which has indiscreetly been forgotten. Undeniably, legal professionalism is an elastic concept; its unanimous definition is, if not impossible, very difficult. If one happens to focus on 'legal profession' with less indulgence in myths and abstractions, the result is that it would be marked by a development of the profession based on 'pursuit of the learned art in the spirit of a public service.[4] However, the legal profession in Asia is increasingly falling in trap of controversy. On the one hand, it has been rapidly sliding to a belief that 'it is a business like other service', thus losing its virtues of service, and, on the other hand, it has been influenced by the western model, ignoring vast different societal contexts.

The law schools in Asia, therefore, ought to change the goals, curricula and methodologies of teaching, viewing the need of developing legal professionalism contextually and as per the need of meeting international standards. The contexts, value systems and structures of human interactions are fundamentally different in Asian societies, which do not allow blind transplantation of systems from the western developed countries.

As a common phenomenon of teaching law in Asian law schools, the law students are taught through lectures and are emphatically indoctrinated on the meaning of legal professionalism and their prospective roles in accordance with the 'perceptions of professors' which largely reflect on abstract ideals rather than in actual reality and need of the given society. The ideological, cultural and psychological influence of professors is indeed immense on students. How

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[3] *Id.* (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 Professionalism: ABA Programs, Plans and Strategies, 39 (1998) (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. Definition also denotes self-regulation of professional membership and conduct").

[4] American Bar Association, Commission on Professionalism to the Board of Governors and the House Delegates, "...In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, (1986).

professors behave in classrooms is forced to be absorbed by law students as a proper professional behavior. Law professors, thus, may transmit the wrong message through their manners and conducts both inside and outside the classroom. In our law schools, the number of law professors who believe on 'elitist romantic character of legal professionalism' is no smaller. What is often taught by them through behaviors, jokes and regular conversations is that 'legal profession is not fit for women, poor and for those who have possessed no 'loud and horrific' speech. The legal profession is presented in a way of dramatized paradigm. It is presented as a 'gifted talent and achievement'. A lawyer is often presented as a man with an ability of 'manipulating facts through undefeatable logic'. The early Roman and British characterization of legal profession with formidable capacity of oration and logical maneuvering has been deeply rooted in pedagogy of legal education in Asian law schools.

The 'communitarian' character of the legal profession is, hence, often ignored or discouraged.[5] In Asian law schools there are two problems that go together generating lasting negative impressions among students concerning professionalism: firstly, no skills, manners, ethics and arts of professionalism in connection with necessity of people regarding justice are taught explicitly and directly as a part of the regular and compulsory syllabus, thereby leaving students unaware of knowledge about fundamental responsibilities of legal professionals to the society and; secondly, the professors, with hard conventional belief, many of them because of their dominant stature, seniority and access to university hierarchy, constitute role models for students who indeed pass on a negative message about professionalism through their conduct, teaching methods, and dominant roles in schools' affairs. The mystified sense of legal professionalism taught in law schools is therefore responsible for engendering the following problems:

i) There is a sense of superiority of lawyers in attorney-client relationship. This condition makes them vulnerable to dictate their clients of the remedy and process to follow for. The exalted figure of lawyer in the field of law and justice destroys the 'contractual relation between client and lawyer'. Though a lawyer is employed by the client with expectation of service, for which the client has paid him, the lawyer assumes superior or higher in attorney-client relation. This unwanted psychological bearing of lawyers, which need to be addressed urgently, is largely contributed by law schools

ii) As a matter of fact, the relation between lawyers and client is obviously 'hierarchical' in nature— often lawyers think clients as powerless persons seeking pity from them, and the service provided by them is a matter of grace to the poor guy from their side

iii) Lawyers tend to be insensitive to the emotional or psychological stress the clients have been subjected to or undergoing. The socio-economic and financial impacts of the disputes on litigants do not generally matter lawyers

iv) Generally, lawyers are engaged into dealing with clients through their juniors, but they are charged high fees irrespective of who is directly involved in dealing

v) Legal profession is viewed as 'elitist' rather than communitarian, so that the tendency among lawyers excluding them from responsibility of advocacy of community's interest is phenomenal

These tendencies have rendered legal profession in many Asian countries as a business rather than service, and it has rendered the legal profession as one of the most expensive service in the society. The marginalized, poor, rural and vulnerable classes of people are directly affected by this trend. This has been thus a serious matter of concern for law schools. These emerging wrong attributes, in turn, have seriously affected the community's trust and confidence on legal profession, and ultimately the system of justice itself.[6] These wrong traits of lawyers' professionalism can be accounted for 'deeply rooted formalism[7]

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[5] A proverb that 'a horse cannot 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, so he only works but gets no money. An established lawyer has work and 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 for argument. Hence, in majority of trial level cases the junior lawyers appear with a great risk of miscarriage of justice.

[6] *See* Gray A. Hengstler, *Vox Populi: Public Perception of Lawyers: ABA Poll,*79 ABA J. 60, 62 (1993) (The survey of American Bar Association on public trust shows a shocking reality. The image of lawyers in the contemporary era is facing a great challenge. Russell G. Pearce, an Associate Professor of law at Fordham University Law School, in his article "Teaching Legal Ethics Seriously" daringly opines: "Society's respect for lawyers has dropped during the past twenty years far more than society's respect for comparable occupations." His assertion has been corroborated by the public poll of the American Bar Association, which reveals that only 22% of the American public considered the community of the American lawyers as 'honest' and 'ethical'. Earlier in 1977, 36% percent of the American public viewed that the 'legal profession in their society was respectable, but the same dropped to 17% in 1997);*See* Chris Klein, *Poll: Lawyers Not Liked*, National L. J., (August 25, 1997) (Reportedly, this drop has continued even in the recent time. The modern western version of legal profession made advent in South Asia with colonialism. In a period of one and half century, it has been institutionalized as an inevitable instrument of justice. The quality of the legal profession in South Asia is however not exception to the western countries. Skepticism towards capability of the South Asian legal professionalism in the contemporary era is wider. Such stories are common in newspapers: (a) a lawyer raped his 'disabled female client in office'; (b) a lawyer got his client signed in a document consenting to sell his property in a low price; (c) a lawyer had collected a huge contingent fee from the client and intentionally delayed the case so that he could generate interest from the bank deposit; (d) a lawyer had advised the minister to commit an act of corruption; and so on).

[7] Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy,* 28Valparaison Uni. L. Rev., 657-70 (1994). The author has rightly stated that affluent business lawyers in America had an aristocratic vision; their mission was to establish lawyers as intellectual elites 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.

or dogmatism' in the process of justice which obviously obstructs the course of unrestricted and easy access to justice for ordinary people, and avoids pragmatic approach in delivering justice. The ill-functioning of the legal profession is nothing but an outcome of defective curricula and pedagogy.[8]

To address these problems, legal education provided by Asian Law Schools need to concentrate on two important approaches:

i) Students must be exposed to real problems of the society by encouraging learning by research, based on reflective/critical enquiries and dedicating to find out a realistic solution which enables students to develop innovative ideas to apply precepts of law contextually

ii) Indoctrination about professor's ideas should not be forced or pressed. Students must be encouraged to critically engage in discourse with professors. Learning should be a joint venture of efforts between professor and students

C. Making Legal Education also a Justice Education

Education on law, generally across Asia and South Asia in particular, is confined to teaching laws but not concepts, principles and impacts of system in the society. Moreover, it has not yet been able to receive required attention of the society as well as the government.[9] Even universities are largely oblivious of the necessity of modernizing and enhancing the standard of legal education into an education of justice.[10] Frankly speaking, the concept of justice education is largely absent in Asia.[11] What the universities are habitually indulged in teaching under rubric of legal education 'are the skills of interpreting statutes and indoctrinating them with common principles and practices of law'. The system

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[8] 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 of the justice system.

[9] Prime Minister of India, Manmohan Singh, while inaugurating a two days national consultation on second generation reforms in legal education, slammed country's (India) legal education system, describing it as "a sea of institutionalized mediocrity'. He said, "we do have a small number of dynamic and outstanding law schools but I am afraid there remains an island of excellence amidst a sea of institutionalized mediocrity". He further said, "We are not even marginally nearer to profound scholarship and enlightened research in law". *See PM Slams Legal Education in India*, May 1, 2010, http://www.daijiworld.com/news/news_disp.asp?n_id=76680&n_tit=PM+Slams+Legal+Education+in+India (accessed on January 1, 2010).

[10] The budget allocated for legal education and research is negligible. Most law schools' physical infrastructure is poor, and the availability of efficient teaching faculties is in a great want.

[11] Justice education takes the pragmatic attention to access to justice. While the theory emphasizes the theory of ignorance of law is not excused, how is it possible for ignorant and illiterate people to have access to justice. The legal education takes notice of needs of empowering lawyers' skills alone, but not the impacts of the system on people.

of legal education is still acutely suffering from unresponsive attitude of the government, universities and larger community of legal professionals.[12] The investment in and planning of legal and justice education remains obviously neglected, which is consequently hindering the course of development of standard and trustworthiness of the legal education system. The attraction of bright and promising students to the legal education is seriously affected, thereby forcing an overridingly larger number of brilliant students to seek opportunity of training from European and American universities, thereby creating a distinction between professionals trained by western institutions and indigenous institutions, the latter being subjected to psychological inferiority. The impact of this undesirable state of affairs is detrimental in smooth development and modernization of education of law and justice in Asia.

One of the factors responsible for this unwanted state of legal education is associated with the history of colonization of Asia. The legal education system of Nepal, for instance, in complete ignorance of the notion of justice education, like other members of the South Asian region, continues to suffer from congenital problem, i.e. the practice of indoctrinating conventional principles of common law practices and principles with complete disregard to the local contexts and realties. As a matter of fact, the legal education system continues to be detached from the local realities, and the need of developing a contextually sound legal culture that focuses on needs of the population and burgeoning changes in the society. Some misconceptions, as highlighted herein before, loom large. They are: (a) the prime nature of legal profession is essentially elitist; (b) it is essentially political in nature; (c) it has nothing to do with developing endeavors and enhancing productivity; and (d) thus, it is not a primary field of promising bright students and scholars who believe on science and technology. These myths can be addressed by emphasizing the 'clinical approaches' of teaching and learning laws.

III. DEPARTURE OF NEW MODALITIES OF TEACHING AND LEARNING

The appropriate modalities of teaching and learning laws does, as indicated before, largely depend upon the context, needs, and several other exigencies or expediencies of the given society. The context on the other hand implies number of things, including the socio-economic development of state of the society. The development of the legal culture in the society is equally important factor. The nature of Asian developing societies is markedly different, because the legal culture is yet to be fully developed. However, the role of law schools in

[12] A lawyer in society is expected to work like a harmonizer and a reconciler. S/he must be more than simply a skilled legal mechanic; s/he must be an architect, engineer, builder, and from time to time, an inventor as well. *See* R. Singh, *Enhancing the Role of the Law Schools: As a Facilitator of Access to Justice*, 93 Law Asia, (1993).

developing the legal culture is indispensable. In developing societies, legal professionals are often treated as role models. Hence, the professionalism of lawyers, judges, prosecutors, legal academics and counselors is crucial in many ways for bourgeoning legal culture. A prudent and socially responsive lawyer in a Multinational Corporation, for instance, can be instrumental in order to prevent pollution production system and ill-treatment of workers by the management. Modalities of pedagogy of legal education are therefore relative phenomena. The following modalities can be considered for discourse in Asian law schools:

a. Critical Overview of Classical Theories by 'Intensive Tutorials'

A professor can adopt a modality of critical overview of classical doctrines or principles of law or jurisprudence by a 'modality of intensive course', in which students are provided 'such materials', such as research articles written by American jurists on 'affirmative discrimination' issues in the American society. Most Asian law schools have been teaching this 'theory' irrelevant to the local context. In many societies, the level and degree of racial discrimination USA has undergone and still undergoing may not be a problem for several reasons, the homogeneity of the population being one of the major characters. In such a situation, the 'intensive study' will provide students to reflect on the applicability of the theory in his/her society. In 'intensive study modality', the professor's role in selection of issues and materials is crucial. The steps to be undertaken in the process can be as follows:

i) Research article of a prominent authority is first provided to one or a group of students for critical understanding and presentation

ii) The article covers the specific chapter of the course, and so the student or group of students has to be informed about it

iii) Presentation is followed by a brief workshop, and comments of other students are taken into account and presented to the benefits of larger number of the students

iv) Comments or opinions of the professors are then followed: 'Intensive study' does not cover all chapters or all aspects of the course. This modality covers or focuses on some crucial/controversial issues or theories, where students need to develop critical understanding rather than indoctrinate themselves with particular view or opinion.

b. Outreach Program

An example would be relevant here. A team of students had been taking visit of a rural village in order to study about 'accessibility of women to traditional property'. In the meantime, there was a devastating earthquake which not only destroyed a city but killed a huge number of people. The

supervising or mentoring professor obtained the permission of the dean to divert the group of students to the affected area and, instead of their original plan, engage them in works of rescue and provide necessary legal support. The team of students found a number of legal problems in the area to support, such as (a) they could write application for insurance policy claim for destruction of property; (b) they could help in post-mortem of the deceased body; (c) they could approach the government authorities for early release of the 'compensation or relief fund'; (d) they could equally importantly engage in preparation of the property loss report, and represent poor and victims in the respective government institutions. This is how students could see the feasibility of the practical application of law and its service to the people. Coming back to the faculty, the group of students presented a report clearly showing the strengths and weaknesses of law and necessary improvements to be made. This is how law students by outreach can 'play role of law makers' by informing the state concerning changes to be made in law. The outreach program directly connects students with the social problems and helps to understand law from the perspectives of purpose and applicability. This approach is the finest way to understand and address the "indeterminacy of law and fact".

c. Simulation Exercises

On issues of crime investigation and collection of evidences, the concerned professors may require students to 'simulate the entire scene and make them work like police officers and procurators'. This modality is important for understanding of the problems, challenges and hindrances faced by police and procurators in their respective jobs. On the other hand, the simulation does also make the students sensitive of their profession by developing 'originality' in thinking and developing logical arguments. A group of students may be required to play the 'simulation role', whereas rest other will deeply observe and make comments. The interest of students in the previous modality and this one is always higher. Particularly, weaker students can learn effectively from this modality. Most importantly, since most of these simulations are supervised by guest experts like police investigators, they may be able to understand weaknesses in systems or procedures followed by them. This is how simulation exercises tremendously help in remedying the weaknesses of the system. University Law Schools, in this way can be catalyst of change in the system.

d. Clinics for Legal Representations

Most American schools of law have developed clinical modalities for number of purposes, such as (a) to develop ethical standards of students by habituating them to observe code of conducts of lawyers, which is so vital

to make them behave like lawyers when they are law students; (b) to connect law schools with community, which is so important developing credibility of the school; (c) to raise funds by providing legal services; and (d) to develop professional expertise of students, so that when they enter the profession they do not feel suffocation. Clinics are supervised by professional lawyers, so that a gap between academics and professional lawyers in the school is addressed. Some important aspects of clinical works feasible in developing countries can be enumerated as follows:

i) Clinic for protecting public interest: In Nepal, India, Bangladesh, and the Philippines, the experiences of using this clinic to safeguard the public interests in areas of environment, conservation of wild life, protection of natural ambience of some landscapes, preservation of cleanliness of rivers and most importantly the protection of the fairness in the decisions of the government, are rich. Students in such clinics work together with professors in research projects, which necessarily involve expertise of the concerned sector experts. Students thus may have direct benefit from such expertise. In number of cases, subsequently, the cases were brought to the notice of the courts, and courts adjudicated the issues based on research reports

ii) Prisoner legal aid clinic: Nepal in South Asia was the first country to introduce this concept. A study in 1999 showed that only in 54 percent of cases, the prisoners had been represented by lawyers, the main reason being inability to hire lawyers. This study forced many organizations, including Nepal Bar Association, to embark into service of free legal aid, and the government to introduce a national legal aid program. Kathmandu School of Law also joined the mission. Today, it has its own clinic representing around six hundred cases a year, in which students work with supervising attorneys. The problem of non-representation of prisoners is almost addressed, though the quality may need to improve seriously

iii) Street law clinic: Street law clinic is an advocacy focused program, which educates general people about civic education, both the duties and rights. This is a part of curriculum in some universities in South Asia, including Kathmandu School of Law, where students visit with pamphlets the vegetable markets, fast food restaurants, traffic hub areas and so on. People are instantly educated of their duties and rights. This program has been immensely liked by students. The activities, back at school, are reviewed and conclusions are drawn up. These are few examples. A law school in view of the local problems may introduce clinics as it deems necessary

iv) Creative works: Law students like those in other faculties may have extra talents to articulate ideas or thoughts. Law is always considered a subject of 'abstraction'. However, concept of law and justice, and the problems of society needing address by help of law can sometime be better articulated by help of arts such as photography, videos, paintings, several types of games, dramas etc. This modality is so crucial to develop a rapport between teachers and students. Many psychological problems of students are effectively addressed by this method

v) Short term research and essays: Students can be required to engage in particular legal problem and prepare a report as a part of his or her study of some specific chapter. Similarly, he or she can prepare essays for presentation. This modality will develop, especially not-good-doing students, creative activities of students

vi) Residential (in-house) teaching: Residential teaching sessions are quite successful in South Asia. In the beginning or end of course, students have been taught in residential setting. The main objective of the program is to develop habit of students to work in team. It is believed that 'the discourse does extend the understanding of students'. In the residential program, some aspect of the curriculum is identified for teaching, and the same subject is taught by experts from different perspective. For instance, Kathmandu School of Law conducts a three day residential school on theories of logic for beginners; three day residential teaching for second year students on drafting of legislation; three day residential teaching for third year students on international law, and a seven day residential school on comparative philosophy of law for advanced level students

CONCLUSION

The clinical modality of curriculum has been considered important to shifting emphasis to justice education. The concern of the education model pays attention to the notions that (a) legal professionals are service providers, hence the professional ethics of legal professionals must find a due attention in legal education if needs to be aligned with the concept of justice; (b) the community and victims of crimes must be focus of administration of justice, if a society has to balance the interests of justice; (c) the protection of the worth of human person is an undeniable value of the legal education so that, in order to link it up with education of justice, it must be careful not to be insulated; (d) the interactions of legal systems across the world is significant to promote change in legal and justice system, and (e) legal education is a scientific education, hence it needs to adapt scientific methods of teaching and learning. Asia to develop its legal education, to be able to compete with developed countries from the west, has a long way to go, but it is surely possible.

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Lessons for Nepal in Devolution and Amendment: A View from Pakistan's 18th Amendment

Waris Husain*

ABSTRACT

There have been demands for amending Nepal's newly-adopted constitution in order to devolve more power to the provinces by groups that have historically lacked political power. Some have rebuked these demands as being counterproductive for the establishment of the new constitutional order. However, there is no perfect constitution, and its long-term success depends on how it can be adapted to meet the ever-changing demands of the public. The growth of public support for devolution is not limited to Nepal, as many nations have been altering the power balance between the federal government and provincial governments. One example is Pakistan, which recently passed the 18th Amendment through a diverse parliamentary committee, and substantially altered its formula for federalism forty years after the passage of its constitution. The example of Pakistan can demonstrate to Nepali jurists and policy-makers that devolution through constitutional amendment can be an effective way to meet the demands of politically or socially disenfranchised groups. Constitutional evolution through amendment and jurisprudence from the Supreme Court can help tackle shortcomings in an original constitutional document that might not address these concerns. While Pakistan is certainly not a perfect case for devolution and Nepal's socio-political context is unique, some lessons can be learned as Nepalis move forward in their constitutional development.

INTRODUCTION

In recent months after the passage of the Constitution of Nepal, 2015 for the Federal Democratic Republic of Nepal, deep divisions have emerged

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between different groups.[1] The constitution has inspired a great deal of backlash from historically-disenfranchised groups, like the *Madheshis* and *Tharus* who "were sidelined in the entire constitution making process due to prevailing distrust towards them among the mainstream political parties"[2] and those groups are now unable to participate in the constitution-amendment process.

This is especially important, because the amendment process has been used by nations throughout the world to effectuate devolution, or increasing provincial and local government autonomy, over time. The global trend of devolution has changed the shape of federalism in countries and has been used to afford greater political rights to political, ethnic, or religious minorities.[3] For Nepal, the amendment process relating to devolution could present a valuable opportunity both for political leaders and disenfranchised groups to commit to this constitution with the hope of dynamically changing it over time to afford greater provincial autonomy. However, successful implementation of devolution through constitutional amendment will be a long road for Nepal, if Pakistan's example serves as any indication.

Pakistan presents a unique comparative example for Nepal for many political and historical reasons that will be outlined below, but the nations also share close constitutional similarities including a similar amendment process and parliamentary form of democracy. Pakistan has amended its constitution to change its system of federalism several times in its recent history, which may strike Nepali jurists as significant when they consider the long constitutional road Nepal will travel after the passage of its Constitution. In Pakistan, the conversation on amendments and devolution culminated in 2010 with the passage of the 18th Amendment. This amendment attempted to address long-running concerns from disenfranchised groups, who had many of the same complaints as political minorities in Nepal.

Presenting this comparison to the 18th Amendment is not a means to argue that Nepal should maintain and amend its current constitution rather than invalidating the whole constitution in favor of drafting a new one. Such a decision should be made by exclusively by Nepal's policy-makers, jurists, scholars, and judges.

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1 Rishi Iyengar, *Nepal Parliament Passes Constitution,* TIME, (2015) (accessed date June 1, 2016), http://time.com/4037788/nepal-constitution-sushil-koirala-protests-madhesi-tharu/ ("The constitution has not been without controversy, however, with the decision to divide the country into seven distinct provinces sparking protests that claimed at least 40 lives in recent weeks. Critics of the bill say the divisions will further marginalize Nepal's ethnic minorities like the *Tharu* and *Madhesi* communities").

2 Hari Bansh Jha, *Nepal's New Constitution: An Analysis From The Madheshi Perspective*, IDSA, September 25, 2015, http://www.eurasiareview.com/25092015-nepals-new-constitution-an-analysis-from-the-madheshi-perspective/ (accessed on March 2, 2016) (Hereinafter IDSA).

3 Andrés Rodríguez-Pose & Nicholas Gill, *The Global Trend towards Devolution and its Implications*, 21 ENVIRON. & PLANNING C: GOVT. & POLICY, 333–351 (2003).

However, Pakistan's 18th Amendment presents a comparative view from a regional neighbor that demonstrates the flexibility of constitutional law in achieving newly-realized goals in a society, despite the original shortcomings in the constitution.

Before proceeding to the substance, a clarification should be made regarding the scope of this article and its aim. While there has been a great deal of scholarship dedicated to the constitutional development of Nepal,[4] this article will not focus on explaining the country's complex constitutional history. Further, many jurists in Pakistan have drafted voluminous reports and articles examining specific provisions of the 18th Amendment and the implementation progress. While many of these reports will be referred to in this note, the discussion of Pakistan's 18th Amendment will be more general here, with the aim of exploring the comparative value of Pakistan's 18th Amendment process to Nepal. The ultimate aim is to identify points of contention from groups critical of Nepal's constitution and use Pakistan as a comparative example of how to address those kinds of contentions through the amendment process.

The amendment process is especially significant for disenfranchised groups and areas, as they will be most benefited by the transition of Nepal from a unitary to federal form of government. The shape of federalism and scope of devolution will need to be established by properly amendment the Constitution over time and properly analyzing it by the Supreme Court and newly-formed High Courts. This comparative perspective may assist jurists in contextualizing Nepal's struggle with disenfranchised groups, amendments, and federalism with examples from its regional neighbor.

I. COMPARATIVE VALUE AND LIMITATIONS OF PAKISTAN'S CONSTITUTIONAL DEVELOPMENT

While a great deal of public advocacy and scholarship has been dedicated to comparing Nepal's constitutional development to India's, Pakistan raises a perhaps more apt comparative example. First, while Nepal avoided rule under the *British Raj*, it had a domestic monarchy that ruled the country for over one hundred years.[5] This monarchy brought changes like unifying the country and adopting a legal order. Similarly, during the *British Raj* in Pakistan, provinces were organized and new laws were adopted.[6]

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4 *See* Surendra Bhandari, Self-determination & Constitution Making in Nepal: Constituent Assembly, Inclusion, & Ethnic Federalism (2014); Surendra Bhandari, Constitutional Design and Implementation Dynamics: Constitution and Federalism in Nepal (1st ed. 2016); Sushil K. Naidu, Constitutional Building in Nepal (2016).

5 *See generally* Anand Nepal, A Brief History of Nepal (1st ed. 2013).

6 *See generally* Osama Siddique, Pakistan's Experience with Formal Law: An Alien Justice (2013).

However, there are two major differences between the monarchies: Nepal had its own monarchy while Pakistan's was British, and the monarchical legal system in Nepal was relatively original while the legal system in the British colonies was a mix of British common law and Indian customs. Despite these very distinct differences, both nations began the conversation of democratic self-rule during varying forms of monarchical rule.

Second, Pakistan can more easily serve as a comparative point for Nepal as both countries lack constitutional continuity, or rather, both have adopted various constitutions instead of maintaining one constitutional document over time.[7] While scholars like Bruce Ackerman have asserted that even a singular constitution may lack continuity if its original text is substantively altered through an amendment or "constitutional moments,"[8] a basic view of the constitutional continuity theory around the world explores whether a nation maintains its original constitutional document despite periods of political upheaval. Nenand Dimitrijeviae describes, for example, that continuity was adopted in Post-Soviet states where "constitutional revisions did not lead to the adoption of new constitutions, but to a partial change of old socialist ones by amendment."[9]

One regional example of constitutional continuity is India, which may have amended its constitution over 100 times, but has maintained the same constitutional document since its inception. Pakistan, on the other hand has adopted three different constitutions over its recent history.[10] Similarly, Nepal has experienced the promulgation of seven constitutions in the modern era.[11] The lack of constitutional continuity presents both challenges and opportunities for countries. Adopting and rejecting various constitutions in a dynamic manner

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[7] For a critical view on the value of constitutional continuity in the modern context, *see* Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity,* 71 Maryland L. Rev. 1015, 1019-20 (2012); *See also* David Chang, *Conflict, Coherence and Constitutional Intent*, 72 Iowa L. Rev. 753, 792-93 (1987). Chang suggests that debates on continuity date back to Hamilton ("the notion that past constitutional choices, until amended 'by some solemn and authoritative act,' reflect current constitutional values will be called the 'Hamiltonian premise of constitutional continuity…The premise of constitutional continuity may be somewhat a matter of faith, but it is not unreasonable. Children are shaped biologically, intellectually, and emotionally by their parents…. Thus, how parents thought about the world can at least suggest how their children would think about the world").

[8] Bruce Ackerman, We the People, Volume 1: Foundations (Revised ed. 1993); Bruce Ackerman, We the People, Volume 2: Transformations (Reprint ed. 1998); Bruce Ackerman, We the People, Volume 3: The Civil Rights Revolution (1st ed. 2014); *See* Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 Harvard L. Rev. 1737, 1757-92 (2007).

[9] Nenand Dimitrijeviae, *The Paradoxes of Constitutional Continuity in the Context of Contested Statehood*, 279 (2001), http://www.komunikacija.org.rs/komunikacija/knjige/index_html/knjiga07/024DimitrijevicN_eng.pdf.

[10] Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, Utah L. Rev. 1225, (1993); Paula R. Newberg, Judging the State: Courts and Constitutional Politics in Pakistan (2002).

[11] *Here are Things You Need to Know about the 7 Constitutions of Nepal*, The Kathmandu Post, Septermber 24, 2015, http://kathmandupost.ekantipur.com/news/2015-09-24/here-are-things-you-need-to-know-about-the-7-constitutions-of-nepal.html (accessed on June 1, 2016).

might be necessary to deal with the political developments in a country.[12] However, the lack of continuity makes it very difficult to create a legal tradition based on consistent judicial interpretation and analysis of the Constitution.[13] "Rupturing" of the constitution through its invalidating often abandons "rule-of-law benefits" of constitutional continuity and disregards "the liberating tools available within the established constitutional framework for navigating the process of transition."[14]

Third, the lack of constitutional continuity has also made Pakistan a more valuable comparative point because its constitution is a modern document much like Nepal's. While Nepal's new constitution reflects global developments of law and society up until 2015, Pakistan's constitution only predates this creation by 40 years.[15] Therefore, one can compare how the fundamental rights list is similar in both countries and reflects a value for modern political and social rights.[16] One major difference, however, is that Nepal's constitution goes further than any other South Asian constitution in protecting economic rights alongside political and social rights.[17] Though some of these rights are not directly enforceable in Court as of yet, they present an expansion of rights that is worthy to note.

Fourth, due in part to democratic instability and constitutional challenges, the legal community from both Pakistan and Nepal have engaged in periods of activism to fight against anti-democratic forces or ideals. In Nepal, when state of emergency was declared in 2005 by King Gyanendra,

> "human rights lawyers have been amongst the leaders and activists who have been detained or placed under house arrest. Sindhu Nath Pyankurel (the former President of the Nepal bar Association) was reportedly one such detainee. He was ultimately released just two hours before the Supreme Court of Nepal was listed to consider his *habeus corpus* petition."[18]

During the same period, the lawyer's community protested the creation of a Royal Commission for Investigation of Abuse of Authority as lacking any

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[12] *See* Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity,* 71 Md. L. Rev. 1015, 1020 (2012), ("the commitment to constitutional continuity actually undermined--rather than facilitated--the possibility of a truly emancipatory and anti-colonial politics.") (Hereinafter Aziz Rana).

[13] Nepal has a mixed system of common and civil law traditions.

[14] Aziz Rana, *supra* note 11, at 1017

[15] Pakistan's current constitution was formed and passed in 1973.

[16] Compare: Articles 8-28 of Pakistan's Constitution to Articles 16-32 of Nepal's Constitution.

[17] Rights to Employment (Article 33), Housing (Article 37), Food (Article 36), Labor (Article 34), and Health Care (Article 35).

[18] Andrew Boon, Lawyers' Ethics and Professional Responsibility (2015) (Citing to The Honrable Justice Michael Kirby, Speech to the Law Council of Australia, Presidents of Law Associations in Asia Conference, Queensland (March 20, 2005)).

constitutional legitimacy.[19] Further, even when some judges were accused of being pro-King, the Nepali Bar Association had "frequently castigated the [Supreme] [C]ourt for its supine verdicts during the period of direct rule...."[20] Further, "[o]ver the last two decades, human rights litigation in Nepal has steadily gained maturity and drawn the Supreme Court into the lightening rod concerns of discrimination and social justice that fueled the armed conflct and that sit at the centre of discussions over a new constitutional dispensation."[21]

In comparison, Chief Justice Iftiqhar Chaudhry in Pakistan led a Lawyer's Movement for democracy, which eventually deposed a military dictatorship.[22] With activism in their histories, the Supreme Courts of both Pakistan and Nepal are integral to the development and the assessment of soon-to-come constitutional amendments.

Fifth, while the multicultural and multiethnic composition of the population differs between Pakistan and Nepal, there are some overlaps which impact constitutional development. In Pakistan, the entrenched elite in the military and democratic institutions has been upper-class Punjabis from political or industrial families, leaving other ethnic groups without great political power.[23] The same complaint has been made in Nepal against the entrenched elite belonging to upper-caste Brahmin families from the hill region, who stand accused of denying the rights of lower-caste people from the Plains or Mountains.[24] This has led to disturbances and restiveness in the border states of both countries: for Pakistan, the provinces of North West Frontier Province (NWFP) and Balochistan have rebelled against the state[25] while in Nepal the *Madheshis* and other groups from the Terai area have expressed their dissatisfaction with the state. Yet, there is a difference in goals for the groups in Pakistan versus Nepal: while the *Baloch*, for example, have petitioned for secession from the state, the Terai groups evince a desire to be incorporated more fully into the state with greater rights.

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[19] *Id.* ("The recent royal order establishing the Royal Commission on Corruption Control has also been condemned by the Nepal Bar Association.").

[20] Krisna Prasad Bhandari, *Formal Justice Too Costly in Nepal*, NEPAL MONITOR, May 25, 2007, http://www.nepalmonitor.com/2007/05/formal_justice_too_ costly_in_nepal.html.

[21] M. Langford & A.M. Bhattarai, *Constitutional Rights and Social Exclusion in Nepal*, 18 INT'L J. ON MINORITY & GROUP RIGHTS 387, 406 (2011).

[22] Toby Berkman, The *Pakistani Lawyers' Movement and the Popular Currency of Judicial Power,* 123 HARVARD L. REV., 1705 (2010).

[23] Tan Tai Yong, *Punjab and the Making of Pakistan: The Roots of a Civil Military State*, 18 SOUTH ASIA: J. OF SOUTH ASIAN STUDIES 1, 177-192 (1995) ("the rise of a Punjabi controlled military-bureaucratic oligarchy, which was organised and powerful enough to wrest control of, and dominate, the post independent state of Pakistan…").

[24] Nanda R. Shrestha, *Nepal: The Society and its Environment, IN* NEPAL AND BHUTAN: COUNTRY STUDIES (Andrea Matles Savada ed., 1993) ("The *Paharis* traditionally have occupied the vast majority of civil service positions. As a result, they have managed to dominate and to control Nepal's bureaucracy to their advantage.").

[25] *See* JUGDEP S. CHIMA, ETHNIC SUBNATIONALIST INSURGENCIES IN SOUTH ASIA: IDENTITIES, INTERESTS AND CHALLENGES TO STATE AUTHORITY (2015).

Partly due to the vesting of political power in one ethnic group or caste, both countries have struggled to create a national narrative. Pakistan's former attempts at creating national unity or developing a national narrative have been centered on Islam and have failed miserably.[26] This presents a challenge for Nepal under its new constitution: how to create a narrative that makes all citizens feel equally "Nepali" and thereby invested in the success of the constitution and the spreading of rule of law in society.

Before continuing, however, one must recognize the very real differences that exist between Nepal and Pakistan. These differences provide the boundary lines for a comparative constitutional analysis. First, Nepal is unlike Pakistan as it was not colonized by the British Empire and has therefore not adopted the English common law system. In fact, Ursheler points out that "it was the French Napoleonic Code that served as a model for a fundamental legal reform in 1854" and that the University of Ottowa still recognizes Nepal as a mixed jurisdiction with civil and common law elements.[27]

Secondly, Nepal has fought a long civil war, but it is currently in a state of rebuilding and restoration with many insurgent groups putting down their weapons to form political parties that run in elections.[28] Pakistan is still in the midst of a civil war or war on terror, and the nation has been unable to transition religious extremists groups into pacifism, much less democratic competition.[29] Further, Pakistan's grasp of territorial control is tenuous at best in some areas,[30] while Nepal's government enjoys general control over most areas in the country. Pakistan can also be distinguished from Nepal due to its repeated military interventions and coups, engineered to ensure the military controls essential state policies.[31] Lastly, the religious and sectarian divisions that have plagued Pakistan resulting in the formation of innumerable terrorist groups and militias is unique and does not existing Nepal.

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[26] *Id*.

[27] L. Heckendorn Ursheler, *Innovation in a Hybrid System: The Example of Nepal* 15 Potchefstroom Electronic L. J. 3, 99 (2012) (Citing to the University of Ottawa World Legal System Report, available at http://www.juriglobe.ca/eng/syst-onu/index-alpha.php).

[28] Maseeh Rahman, *After a Decade of Fighting, Nepal's Maoist Rebels Embrace Government*, The Guardian, June 1, 2006, http://www.theguardian.com/world/2006/jun/17/nepal.

[29] Zahir Shah Sherazi, *Pakistani Taliban Reject Peace Talks with Government*, Dawn, November 26, 2012, http://www.dawn.com/2012/11/26/ttp-reject-peace-talks/ (last visited Jun 1, 2016).

[30] Malik Siraj Akbar, The Redefined Dimensions of Baloch Nationalist Movement (2011). For example, in the province of Balochistan. ("Baloch activists burned Pakistani flags and hoisted the flag of independent Balochistan on major educational institutions including at the University of Balochistan, The underground Baloch groups have threatened to kill anyone who removes these Baloch flags or resumes singing the Pakistani anthem at schools….").

[31] *See* Husain Haqqani, Pakistan: Between Mosque and Military (2005); Aqil Shah, The Army and Democracy: Military Politics in Pakistan (1st ed. 2014).

II. FEDERALISM IN NEPAL AND PAKISTAN PRE-18TH AMENDMENT

For Nepal, the central aspect of the debate over the new constitution for groups like the *Madhesh* or others from the *Terai* relate to the scope of federalism and the creation of a new province for those groups. Despite recent amendments proposed to increase representation for these groups, many groups staged walk-outs of the national assembly during voting to protest the failure of the government to propose proper borders for provinces.[32] Therefore, it is important to note some of the basic elements of the federal structure envisioned in Nepal's constitution in comparison to Pakistan prior to the 18th Amendment. Though Nepal has yet to fully implement its federal model, the contours of the constitutionally-mandated model of federalism must be compared to Pre-18th Amendment Pakistan in order to demonstrate how much federalism can evolve over time in a country and how it will likely evolve and mutate in Nepal once its implementation and amendment begin.

Accordingly, looking to the structure of the federal model in Nepal's Constitution, the document puts forth a list of federal, provincial, and concurrent powers with 33,[33] 21,[34] and 25[35] subjects delegated respectively to each sector. Based on the numbers, we can see that the federal government retains the greatest amount of power and duties in Nepal. The same could be said for Pakistan prior to the passage of the 18th Amendment, as Pakistan also had a federal, provincial, and concurrent list that skewed towards empowering the center over the provinces.[36]

While a great deal of scholarship has been dedicated to parsing the subjects from these lists, this note merely attempts to illustrate the general limitations of federalism in Pakistan and Nepal through the issues of residual powers and constitutional amendments.

A. Residual Powers

One major difference between Nepal and Pakistan's constitutional arrangement for federalism relates to vesting of residual powers. Residual powers are any

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[32] *Nepal: Madhesi Community Rejects Constitutional Amendment as "Incomplete"*, The Indian Express, January 24, 2016, http://indianexpress.com/article/world/world-news/nepal-madhesi-community-rejects-constitutional-amendment-as-incomplete/ (accessed on June 1, 2016) (Hereinafter The Indian Express).

[33] *See* Const. of Nepal, 2015, Art. 57(1) & Schedule 5.

[34] *See id.* Arts. 57(2), 162(4), 197, 231(3), 232(7), 269(4), 289(4) and Schedule 6.

[35] *See id.* Arts. 57(3), 109, 162(4), 197 and Schedule 7.

[36] *See generally* Jinnah Institute, *Devolution: Provincial Autonomy and the 18th Amendment*, (2014), http://jinnah-institute.org/wp-content/uploads/2015/02/Devolution-Report.pdf (Hereinafter Jinnah Institute).

[37] Michael Keating, *Federalism and the Balance of Power in European States*, (2007), http://www.sigmaweb.org/publications/37890628.pdf.

subjects that are not enumerated in the Constitution, and while both Nepal and Pakistan's constitutions enumerate a great number of subjects, residual powers and duties remain significant in dividing power between the center and provinces. Professor Michael Keating explains that "[s]ome federations or devolved systems specify the powers handed to the lower tier, with everything else (the residual powers) reserved to the state; others do it the other way around. The former is usually seen as more centralizing…"[37] In the vein of centralization, Nepal's constitution delegates residual powers to the central government which may hinder the process of devolving powers to provincial and local governments.[38]

The history of residuary powers in Pakistan is not static. The debate dates back to the founding of the nation when Muhammad Ali Jinnah demanded that provinces be guaranteed residuary powers in Pakistan.[39] This was changed in the 1962 constitution when the balance of power "was heavily tilted in favour of the federal government…[and] the federal legislature was entirely dominant over the provincial legislatures."[40] Finally, through the 1973 Constitution of Pakistan, residuary powers were vested in provinces and this has been a foundational stone for Pakistan's devolutionary development.

Revisiting the issue of residuary powers may be a worthwhile activity for Nepali constitutional experts as an amendment which vests residuary powers in the provinces could engender greater support for the constitution among parties suspicious of whether the document can truly move Nepal towards a federal mode. Other federal model countries like the United States through its 10th Amendment,[41] Kenya,[42] and Nigeria[43] vest residuary powers in provinces.

The vesting of residual powers goes to the heart of devolving powers from the central government. This process can threaten the status quo of a political order, but it can also begin to incorporate disenfranchised parties by vesting them with greater self-autonomy:

It is intended that devolved governments augment people's participation in governance and self-development and shall be based on democratic principles

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[38] Const. of Nepal, 2015, Art. 58.

[39] Mansoor Akbar Kundi, *Federalism in Pakistan: Problems and Prospects*, 11 Asian & African Srudies 1, 37-48 (2002) (Hereinafter Mansoor Akbar Kundi) ("The Quaid-i-Azam proposed that constitutional arrangement be made for granting the residuary powers to the provinces by determining the excessive jurisdiction of the central government in the provinces.") (Citing to Pirzada, Sharifuddin Syed The Collected Works of Ouaid-e-Azam Mohammad Ali Jinnah. Lahore: 1986 at 319).

[40] *Id*.

[41] U.S. Const., Amendment X.

[42] Christian Roschmann et al., *Human Rights, Seperation of Powers and Devolution in the Kenyan Constitution, 2010: Comparisons and Lessons for EAC Member States*, (2012), http://www.kas.de/wf/doc/kas_33086-1522-2-30.pdf?121213123738 (Hereinafter Christian Roshmann).

[43] Const. of The Fed. Rep. of Nigeria, 1999, Art. 4(7)(a).

and separation of powers. The objects of the devolution of government, [are] to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities…"[44]

B. Conflicts and Constitutional Amendments

Along with residual powers, the constitutions of each country requires differing resolutions to conflicts between the national and provincial governments. Part XX of Nepal's Constitution lays out the inter-relationship between Federations, Provinces, and Local Levels. The BBC reported that "those who favour strong devolution say the new provinces will have fewer powers than originally envisaged - for instance their autonomy on provincial laws, banking and foreign aid will be limited."[45]

According to Article 232, if a province passes a law that violates the sovereignty of the federation, the President can reprimand the provincial assembly. The central government can also issue directives to all provinces concerning certain matters of "national importance". It will be up to the courts to interpret the limits of "national importance" however, the existence of this article exhibits the expansive power of the federal government over provincial governments in the current constitutional set-up.

For Pakistan, Article 143 allows for the national parliament to invalidate any provincial law that conflicts with federal law:

> "If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void."[46]

This article shows that despite granting residual powers to the provinces, Pakistan's constitution empowered the central government a great deal, much like in Nepal's constitution.

When it comes to the amendment of the constitution that impact provincial borders or their rights or duties, both nations have adopted nearly identical constitutional provisions. According to both constitutions, the provinces have a right to reject an amendment proposed by either federal houses of Parliament.[47]

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[44] Christian Roshmann, *supra* note 42.
[45] Charles Haviland, *Why is Nepal's New Constitution Controversial*?, BBC News, Septermber 19, 2015, http://www.bbc.com/news/world-asia-34280015 (available at June 21, 2016).
[46] Const. of The Islamic Rep. of Pakistan, 1973, Art. 143.
[47] Compare Article 269(4) of Const. of Nepal, 2015 and Const. of the Islamic Rep. of Pakistan, 1973, Art. 239(4).

In Nepal, according to Article 274, which will be discussed in depth below, if a proposed amendment impacts the borders of a Province, that Province has three months to reject such a bill by a majority vote in both houses of provincial parliament. If the provincial parliamentary majority vote against the bill, it becomes inoperable. This is an important stopgap from overreach by the federal government in limiting the borders or rights of provinces and may become important as provincial lines are currently being demarcated.

III. AMENDMENT PROCESS IN NEPAL AND PAKISTAN

Pakistan and Nepal have an almost identical constitutional amendment process: Article 239 of Pakistan's Constitution and Article 274 of Nepal's Constitution require 2/3 approval from both houses of parliament. For Nepal, the Amendment provision in the Constitution begins with a limitation that no amendment can be made that is "prejudicial to the sovereignty, territorial integrity, independence of Nepal and sovereignty vested in the people." If a proposed amendment does not violate these provisions, it must be approved by 2/3 of both Houses of Federal Parliament. Once the amendment has passed through the legislative branch, it is sent to the President for final approval, which is generally a ceremonial, not substantive, part of the process.

According to this process, since the passage of Nepal's constitution, an amendment has been made by the federal parliament. The amendment was passed in order to grant "higher representation in government bodies on the basis of proportional inclusion" to *Madheshis* and other impoverished or disenfranchised groups.[48] While the Bill passed with 2/3 approval from the legislature, *Madheshi* leaders in Parliament staged a walk-out to protest the fact that the amendment did not properly settle the question of provincial boundaries and devolution.[49]

This experience has demonstrated the difficulty of pursuing amendments which are meant to address underlying concerns from a developing society. In fact, Nepal fits into a "global trend towards devolution based on regional legitimacy" which "has historic, linguistic, religious and/ or cultural roots."[50] Therefore, the Amendment process not only has to deal with the technical issues of demarcating provinces, but also addressing issues of citizenship, language, and nationality.[51]

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[48] *Nepal Votes to Amend Constitution in a Bid to Resolve Months-long Standoff with Protestors,* ABC, January 24, 2016, http://www.abc.net.au/news/2016-01-24/nepal-votes-to-amend-constitution/7110052.

[49] The Indian Express, *supra* note 32.

[50] Andrés Rodríguez-Pose & Nicholas Gill, *supra* note 3, at 340.

[51] *See, for e.g.,*Hari Phuyal, *Nepal's New Constitution: 65 Years in the Making*, The Diplomat, September 18, 2015, http://thediplomat.com/2015/09/nepals-new-constitution-65-years-in-the-making/ ("The last minute changes in the citizenship provisions authorizes women to confer citizenship to their children, at par with men, but women groups and the *Madhesi*community still argue that further change is necessary lest the provisions make women "second class" citizens").

Despite its difficulties, Hari Phuyal points out the importance of the amendment process: "the future of Nepal's new constitution depends on how the main three parties include the Tharu and Madhesi parties in the mainstream by offering amendments after the promulgation of the constitution."[52]

IV. THE 18th AMENDMENT

In Pakistan, the debate concerning the restructuring of the federal government began in 2008, when President Pervez Musharraf's military dictatorship was replaced with a democratic government. During his reign, Musharraf restructured the constitution through the 17th Amendment, vesting many powers in the federal executive and limiting provincial autonomy.[53] In order to address this, President Asif Ali Zardari formed the Special Parliamentary Commission on Constitutional Reforms (SPCCR) in 2009. The SPCCR eventually "recommended changes to ninety-seven articles, many increasing provincial autonomy."[54]

The Reform Committee likely suggested this set of amendments in order to address historical concerns regarding the domination of Punjab as the largest province and *Punjabis* as the largest ethnic group in the country.[55] As Raza Rumi explains:

> "Right from the inception of the state, an inequality in income and service distribution amongst provinces caused smaller federating units to regard the federation and larger provinces with suspicion. With the transition to democracy in 2008, a political consensus on re-allocating several federal-level functions to the provinces emerged."[56]

The composition of the SPCCR also indicated that the government was serious about hearing the concerns of non-Punjabis. Smaller political parties were given greater representation on the Committee than proportion would dictate; "[t]he larger parties had fewer representatives than their party strength allowed, ensuring that the smaller parties received representation."[57]

This was likely to ensure that the less influential political parties representing ethnic minority groups could feel involved in the amendment process, which seems to be currently missing in Nepal, as activists have complained of being

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[52] *Id*.
[53] Iram Khalid, *Politics of Federalism in Pakistan: Problems and Prospects*, 28 South Asian Studies 1, 199-212 (2013) ("The worth mentioning fact is that such centralized amendments kept on affecting the federal character of the constitution").
[54] Katharine Adeney, *A Step Towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment*, 42 Publius: The J. of Federalism 539, 545(2012) (Hereinafter Katharine Adeney).
[55] *Id.* at 5 ("The three smaller provinces begrudge the fact that Punjab has the majority of seats in the National Assembly and has benefited from the lion's share of financial resources (allocated since 1971 on the basis of population)").
[56] Jinnah Institute, *supra* note 36, at 6.
[57] *Id*.

sidelined in national parliament. In fact, Lawoti predicted for Nepal back in 2005 that "the role of the oppressed sociocultural groups in the constitutional amendment process will be less because they have insignificant representation in the mainstream political parties."[58]

Dissimilarly, much of the success for the SPCCR's recommendations was founded on the diverse background of its members. Accordingly, subsequent to the SPCCR's report, the lower house of Parliament introduced and approved of the 18th amendment, which was subsequently approved by the Senate and signed by the President in 2010. The Ammendment altered 102 provisions in the constitution, and most significantly, removed the Concurrent Legislative List.[59] The removal of the Concurrent List meant that all the subjects formerly on the list were now vested in the provinces, greatly increasing provincial autonomy. Many of these provisions devolved duties from the center to the provincial governments and also redirected resources in order to facilitate provincial control over newly-delegated subjects.[60]

Also, the 18th Amendment was passed in order to address autonomous concerns about the *Pashtuns* living in the province formerly known as the Northwest Frontier Province who demanded the province in which they live to reflect their ethnic group.[61] Just as the other provinces in Pakistan are based on ethno-federalism like the province of Sindh for *Sindhis*, Punjab for *Punjabis*, and Balochistan for *Baloch*, predominantly *Pashtun* political parties like the ANP campaigned for a province dedicated to *Pashtuns*. Therefore, the 18th Amendment renamed NWFP to Khyber Pakhtunkhwa, referring both to the Khyber Pass and the *Pakhtun* or *Pashtun* people. This change in name is a significant move demonstrating that amendments can be used to address long-term concerns for autonomy by disenfranchised groups, be they ethnic or otherwise.

Lastly, the 18th Amendment called for the creation of Council of Common Interests composed of the prime minister of the nation and chief ministers for each province. This Council would sit in deliberation of common provincial and federal problems, and draft a report for the national Parliament each year.

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58 MAHENDRA LAWOTI, TOWARDS A DEMOCRATIC NEPAL: INCLUSIVE POLITICAL INSTITUTIONS FOR A MULTICULTURAL SOCIETY198 (2005).

59 Jinnah Institute, *supra* note 36.

60 Saeed Shafqat, *Civil Services Reform and 18th Amendment,* (2011), http://www.civiceducation.org/wp-content/uploads/2011/08/Civil-service-reforms-and-the-18th-Amendment.pdf (Hereinafter Saeed Shafqat) ("Power sharing is further facilitated by the 18th Amendment through the aegis of the National Finance Commission (NFC) award which has rearranged the fiscal structure of distribution of financial resources among the provinces by the federal government on annual basis.").

61 Katharine Adeney, *supra* note 54, at 12 ("Ever since independence, demands have been made by *Pakhtuns* for the renaming of the province to Pushtoonistan or Pakhtunistan").

While Nepal may not wish to replicate the exact manner of Pakistan's devolution through the 18th Amendment, the process does demonstrate an effective example from a regional neighbor with a relatively unstable constitutional history. It is not important whether Nepal adopts ethno-federalism for naming some of its provinces or creates its own Council of Common Interests, however, it is important to see that forty years into the lifespan of a Constitution, Pakistan's government amended the document to address provincial concerns for autonomy. This means that while the Constitution for the Republic of Nepal may not currently address autonomous concerns, it may do so down the line when political figures take a leadership role in addressing the dynamic concerns of their heterogeneous citizenry. As Jha argues:

> "A forward looking Constitution must take adequate care to accommodate rather than leave out the genuine aspirations of a substantial cross-section of people. If such aspirations remain unmet, as the persisting movement by the people of the Terai region would indicate, the ongoing crisis may deepen causing trouble for one and all in Nepal….It would require exemplary courage on the part of the Nepalese leadership to own up their mistakes and put their house in order before it is too late."[62]

However, despite the difficult process of amending the constitution to address the underlying demands of disenfranchised groups, the implementation is an equally frustrating process, as proven in Pakistan post-18th Amendment.

V. IMPLEMENTATION OF THE 18TH AMENDMENT

In order to carry out the task of implementing devolution through the 18th Amendment, the government created an Implementation Commission and after three phases of policies, "complete devolution was set for June 2011."[63] The difficult process of devolution not only included the formation of new ministries at the provincial level, but shutting down several federal ministries and agencies due to the newly demarcated division of power between provinces and the center.

Regarding health, several responsibilities including medicine control, contagious disease prevention, and population planning have been devolved to the provinces according to the 18th Amendment.[64] Further, protections for laborers were also

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[62] IDSA, *supra* note 2.

[63] Furqan Mohammed, *Protecting Pakistani Laborers Post-Eighteenth Amendment: Recognizing Rights after the Devolution of Power*, 9 Loy. U. Chi. Int'l L. Rev., 265 (2012) (Hereinafter Furqan Mohammed).

[64] PILDAT Legislative Brief, Health and the 18th Constitutional Amendment, (2011), http://www.pildat.org/Publications/publication/publichealth/PILDATAnalysisHealthandthe18thConstitutionalAmendments.pdf.

devolved to the provinces, with an aim of completely dissolving the Federal Ministry for Labor and Manpower.[65]

Also, responsibilities for maintaining clean environment were also devolved to the provinces which "has far-reaching implications for environmental governance in the country, not only in terms of future law-making, but also for implementation of existing environmental laws, rules and regulations and Pakistan's obligations under multi-national [treaties]."[66] Responsibilities concerning primary and higher education were also devolved to the provinces: under the 18th amendment "curriculum, syllabus, planning, policy,centres of excellence and standards of education will fall under the purview of the provinces."[67] Further, civil service appointments were to be devolved to provinces which will"have an impact on the very structure of federal and provincial civil services."[68]

However, these far-reaching changes have not been implemented smoothly. There are issues concerning resources, capacity, and political willingness standing in the way of successful devolution as envisioned by the amendment. First, as it relates to resources, Adeney explains that "[a]lthoughseventeen ministries have been devolved to the provinces, adequate resources have not been devolved to finance these responsibilities." Secondly, there have been questions raised about whether provincial governments and agencies will build the huge capacity it will take to effectively handle. Taking higher education as an example, nearly five years after the passage of the 18th amendment "no concrete steps are being taken by the provinces, in particular the province of Balochistan, to deal with the HE [higher education] sector.[69] Finally, in relation to political willingness, some have wondered whether the *Punjabi* elite will actually enforce devolution considering the underlying aim of devolution is to transfer power from those elite.[70]

The same concerns have been evidenced in Nepal with regard to natural resources and other resources required for provinces to exercise de facto autonomy.[71] There are also questions about whether leaders of the central

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[65] Furqan Mohammed, *supra*note 63.

[66] Zahid Hamid, Legal Implications of the 18th Amendment relating to Environment, (2012), http://www.niap.pk/docs/Knowledge%20Repository/Reports/Paper%20on%20Legal%20Implications.pdf.

[67] Shahid K. Siddique, *18th Amendment and Education*, Dawn, October 11, 2011,http://www.dawn.com/2010/10/11/18th-amendment-and-education-by-dr-shahid-siddiqui/.

[68] Saeed Shafqat, *supra* note 60.

[69] *Abdul Nabi, Higher Education: Implications of the 18th Amendment*, (2013), http://www.dawn.com/news/1041386 (accessed on Jun 2, 2016).

[70] Katharine Adeney, *supra* note 54, at 14 ("A less charitable explanation, but one that unfortunately carries weight, is that Punjabi politicians expected little to change from the 18th Amendment.").

[71] *See generally* Bishnu H. Pandit & Him L. Shresth, *Natural Resources and Revenue Sharing in the New Federal System of Nepal: A Proposed Model*, 3 The Initiation, 38-48 (2009);V. R. Raghavan, Nepal as a Federal State: Lessons from Indian Experience (2013).

government will relinquish resources to the provinces: "[e]verywhere, regional and ethnic problems have made the centre reluctant to devolve real power, as exemplified by the Nepalese Terai region bordering India."[72]

VI. JUDICIAL REVIEW AND THE ROLE OF THE COURTS

In many countries, the amendment process ends after the law has been duly passed according to the rules of the Constitution, usually with 2/3 majority in the legislative house and executive branch approval. However, across South Asia, Supreme Courts have stepped in after the proper passage of an amendment to assess whether that amendment violates the constitution itself. The idea is known as the "Basic Structure" or "Salient Features" doctrine, and dictates that the judiciary has the power to assess the constitutionality of a constitutional amendment and despite its passage by the executive and legislative branch, the amendment can be deemed void by the Court.

The original case establishing the Basic Structure Doctrine is from the Indian Supreme Court through *Kesavananda*.[73] In this case, the Court held that "every provision of the Constitution can be amended, *provided in the result the basic foundation and structure of the constitution remains the same (emphasis added.)"*[74] This "basic foundation" was composed of the following: (a) Supremacy of the Constitution; (b) Republican and Democratic forms of Government; (c) Secular character of the Constitution; (d) Separation of powers between the legislature, the executive and the judiciary; (e) Federal character of the Constitution. The structure has been applied to several amendments passed by India's Parliament, providing an active role for the judiciary in amendment-crafting.

For Pakistan, the Supreme Court has never fully adopted the "basic structure doctrine," as was evidenced in the *Pakistan Lawyer's Forum* case, in which the Court held that "even though there were certain salient features of the constitution, no constitutional amendment could be struck down by the superior judiciary as being violative of those features…[t] he remedy lay in the political and not the judicial process."[75] However, the Court later stated that "it is not correct to say that the Courts in Pakistan have rejected the basic structure doctrine as the question is still open."[76]

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[72] David Gellner & Krishna Hachhethu, Local Democracy in South Asia: Microprocesses of Democratization in Nepal and its Neighbours 17 (2008).

[73] *Kesavananda Bharati v. State of Kerala*, AIR, SC 1461, (1973).

[74] *Id*.

[75] *Pakistan Lawyers Forum v. Federation of Pakistan,* PLD, SC 719, (2005).

[76] *Baba Sardar Haider Zaman v. Federation of Pakistan*, Constitutional Petition No. 12, ¶ 12 (2010).

Accordingly, the Court has established three salient features of the Pakistani constitution that could not be amended in *Mahmood Khan Achakzai v. Federation of Pakistan;* the three features were an Islamic state, federalism, and parliamentary form of Government that secured the independence of the judiciary.[77] In *Zafar Ali Shan v. Pervez Musharraf Chief Executive of Pakistan*, the Court found that the basic features included independence of the judiciary, federalism, and a parliamentary form of government that respected Islam.[78]

In *Nadeem Ahmed v. Federation of Pakistan*, the Court was asked to review the constitutionality of the 18th amendment.[79] Though the Court approved many provisions dealing with provincial autonomy, they raised an issue with the new method of judicial appointments enumerated in the 18th Amendment. While the Court did not directly invoke the Basic Structure Doctrine in issuing its short order, it did send the 18th Amendment back to Parliament to review and fix according to the Court's decision.[80] Based on this order, the 19th Amendment was drafted to address most of the Court's concerns. This incident shows a unique collaborative opportunity between Parliamentary members and Supreme Court Justices: rather than adopting an adversarial approach, the Court and Parliament can work together to ensure respect for the constitution by amendment-drafters while still addressing newly-formed values in a nation or society. Later, in 2015 during challenges to the 18th and 21st Amendments, the Supreme Court held that there was a Basic Structure to Pakistan's constitution that could be invoked in the future, but it would not be applied to the case at bar.[81]

From Pakistan and India, one can see that the Court's involvement in the Amendment process in South Asia is unlike anywhere else in the world. The spread of the basic structure doctrine has also been a part of Nepal's legal history and potential future. The Supreme Court of Nepal has debated the Basic Structure Doctrine in the past. In fact, the 1990 form of the constitution included a provision that Amendments could not be if they "prejudice the spirit of the Preamble to the constitution."[82]

However, this provision did not get included in the 2007 Interim Constitution. Despite the lack of its inclusion, the Supreme Court held that the interim

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[77] *Mahmood Khan Achakzai v. Federation of Pakistan*, PLD, SC 426, (1946).
[78] *Zafar Ali Shah v. Pervez Musharraf Chief Executive of Pakistan*, PLD, SC 869, (2000).
[79] *18th amendment Challenged in SC*, The Express Tribune, April 20, 2010, http://tribune.com.pk/story/7799/18th-amendment-challenged-in-sc/ (accessed on Jun 1, 2016).
[80] *Nadeem Ahmed v. Federation of Pakistan*, PLD, SC 1165, (2010).
[81] 21st Amendment Deals with the establishment of military tribunals to try suspects of terrorism.
[82] Madhav Kumar Basnet, *Adoption of Foreign Values in Nepal: A Study,* https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wcclcmdc/wccl/papers/ws5/w5-basnet.pdf.

constitution presented an implied structure that could not be altered through amendment in *Advocate Subodhman Napit v. Council of Ministers, Government of Nepal et al.* NKP. In that case, the Court recognized the following as part of the implied basic structure: "(a) Republic form of government (b) Federal system (c) human rights guaranteed under core human rights treaties are basic structure of the Constitution."[83] However, it remains to be seen whether the Supreme Court will now consider the new constitution as having "basic features" that are immutable.

VII. LESSONS FOR NEPAL IN DEVOLUTION AND AMENDMENT

The example of Pakistan can provide many valuable lessons to Nepali jurists and parliamentarians. First, amendments are a healthy process to constitutional evolution, with Pakistan passing twenty-one Amendments since 1973,[84] and India amending its constitution over one hundred times since 1952.[85] Second, the shape of federalism and scope of devolution will not be set in stone during the passage of the constitution, but will likely need to be revisited every few years to meet the nation's developing demands. These two points are interrelated because adopting a dynamic approach to federalism through constitutional amendment can demonstrate the healthy development of constitutional law rather than malaise in the system,[86] despite the assertion by some of Nepal's constitutional critics.

However, an amendment to the federal structure will have most impact when it can address underlying concerns in a society.[87] For Nepal, the fear of a continued domination by certain castes or regions and the exclusion of certain groups from the political bargaining table has inspired demands for provincial autonomy by historically-disenfranchised groups or regions. Therefore, if amendments are made or provincial lines redrawn, this must be done to address (a) Continued domination and (b) Exclusion from the process. The same could be said for Pakistan leading up to the 18th Amendment, which requires Nepalese people to examine the SPCCR as a comparative example.

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[83] *Id*.

[84] Pakistan's latest Amendment was the 21st, which established military courts to deal with terrorist suspects. Ansar Abbasi, *Military Courts to Expire After 11 Months*, The News, February 12, 2016, http://www.thenews.com.pk/print/97780-Military-courts-to-expire-after-11-months (accessed on June 21, 2016).

[85] Anita Joshua, *Which Bill is 100th Amendment*, The Hindu, May 7, 2015, http://www.thehindu.com/news/national/which-bill-is-100th-amendment-to-constitution/article7178310.ece.

[86] For more on methods of constitutional amendment from comparative view, *See generally* Hoi L. Kong, *Deliberative Constitutional Amendments*, 41 Queen's L.J. 105, 138 (2015).

[87] Andrés Rodríguez-Pose & Nicholas Gill, *supra* note 3, at 340 ("In most cases, and as in previous decentralization waves, regional legitimacy has historic, linguistic, religious, and/or cultural roots. Regions and states with their own ethnic, historical, cultural, or linguistic identity have paved the way for decentralization.").

The issue of "continued domination" was addressed in Pakistan through the substance of the 18th Amendment, which devolved federal powers to provinces and local governments in a gradual manner, while ensuring greater resources be directed to provinces to help them handle their new duties. Secondly, by renaming NWFP as Khyber Pakhtunkhwa, Pakistan continued its national theme of ethno-federalism (where each major ethnicity is given a province.) This type of federalism can be dangerous as it can foster ethnic divisions and challenge the creation of a national identity. However, this form of federalism can also directly address claims by historically-powerless people, giving them a sense of ownership and inclusion in the system that can in fact foster the formation of a national identity. Nepal will need to work out the demands from some of its citizens to potentially create a least one identity-based province.

The second issue of "exclusion" was handled in Pakistan through the distinct composition of the SPCCR. Despite lacking large constituencies, small political parties representing historically-disenfranchised groups (ethnic or otherwise) were given more seats at the table for constitutional reform than proportion allowed. This was a selfless move by major political parties, but the aim was to ensure that minority parties would feel included in the process and thereby invested in the implementation of the new constitutional provisions, unlike before. This sentiment of inclusion and personal investment is greatly lacking in Nepal today, partly due to the way in which historically-powerless groups continue to be treated as outsiders. Inclusion of these groups and properly composing committees that transparently make determinations would do a great deal in building confidence among critics of the current constitution.

Finally, parliamentarians will need to prepare themselves not only for a more inclusive amendment-drafting process, but also a critical legal review of the amendment by the Supreme Court. The Supreme Court of Nepal has not yet elucidated whether the Constitution of Nepal, 2015 allows for the court to exercise judicial review over amendments duly passed by Parliament under the Basic Structure or Salient Features doctrine.

However, if Nepal's legal history and its neighbors' jurisprudential developments are any indication, the Court is likely going to step in to assess the constitutionality of amendments. In some countries, this could lead to a potential breakdown in inter-branch relations, threatening the very existence of the democratic order. However, this can be avoided if both judges and political leaders adopt a cooperative attitude rather than an adversarial one. With the 18th Amendment, the Court found issues with some provisions, and recommended that Parliament make changes, which it did through the 19th Amendment.

At any point during the process, the Supreme Court could have invalidated the entire 18th amendment with its accompanying hundred modifications to the Constitution, or Parliament could have rejected the Court's holding altogether, leaving the 18th Amendment unchanged. However, by adopting a cooperative attitude and setting aside institutional defensiveness, the Court, Parliament, and the President were able to change the scope of devolution and provincial autonomy in Pakistan for many generations to come. However, this does not mean that another constitutional amendment may not be required after a few generations, as the national priorities will change over time everywhere.

The same can be said for Nepal in its constitutional development. The question of federalism will be a persistent one, but the tailoring of federalism can provide solutions for a litany of interrelated issues like caste, class, gender, or territory. The molding of federalism will likely come from constitutional amendments which will not only need to substantively address issues but also procedurally include groups that have felt disenfranchised in the past. The substance and process of constitutional amendments relating to federalism will need to be a focal point for leaders hoping to resolve serious doubts about the current constitution.

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Battered Women Syndrome: A New Dimension in Nepalese Criminal Jurisprudence

Roshan Kumar Jha*

ABSTRACT

Battered Woman Syndrome (BWS) is a part of Mitigated Homicide developed by legal scholars and practitioners in the late 1970s and early 1980s, as a defense for women who killed their batterers. The Nepalese law, related to homicide, has recognized and classified homicide into three categories, *viz. Jyanmara, Abesprerit Hatya* and *Bhabitabya Hatya*. There is no statutory provision regarding Mitigated Homicide. Mitigated homicide is brought in significance by the Supreme Court through the decisions in homicide cases. The Supreme Court has done this by interpreting and implementing Number 188 of Court Management of *Muluki Ain*, 1963. But there is no specific law regarding Mitigated Homicide or BWS in Nepal. This article is limited to BWS, which was conceived to explain why women choose to kill abusive partners rather than leave them.[1] Legally speaking, BWS is not, on its own, an affirmative defense, instead it is a psychological theory offered within the traditional law of self-defense to explain the behavior of battered women which otherwise seems irrational.[2]

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1 BWS was popularized by Lenore Walker, a Clinical Psychologist and Forensic Expert Witness. In her book, The Battered Woman, Walker defines both the battering relationship and BWS in an attempt to explain why women in battering relationships choose self-help over the legal options apparently available to them. *See generally* LENORE WALKER, THE BATTERED WOMAN (1979) (Hereinafter Lenore Walker).

2 BWS is not a separate affirmative defense, such as self-defense or coercion. It is a psychological theory which is offered in the context of self-defense, duress, or other affirmative defenses to explain the reasonableness of the defendant's perceptions or actions. *See, e.g., People v. Romero,* 13 Cal. Rptr. 2d 332, 337 n.8 (1992); *State v. Walker*, 700 P.2d 1168, 1173 (1985); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals,* 140 UNI. OF PENNISYLVANIA L. REV. 379, 385-86 (1991); Comment, *Self-Defense: Battered Woman Syndrome on Trial,* 20 CAL. WOMEN L. REV. 485, 495 (1984).

INTRODUCTION

The term BWS was coined by psychologist and prominent feminist academic, Lenore Walker, to denote a set of distinct psychological and behavioral symptoms that result from prolonged exposure to situations of intimate partner violence[3]. From July 1978 to June 1981 Walker had conducted interviews with 435 women in the Rocky Mountain Region of Colorado, USA, each of whom had been, or were at the time, victims of domestic violence. These interviews were conducted with a view to identifying key sociological and psychological factors that made up the proposed BWS but were also aimed at testing two specific theories about battered women – the Cycle theory of battering and an adaptation of Martin Seligman's learned Helplessness theory,[4] which is also sometimes referred as Battered Wife Syndrome.

The term BWS, however, might refer to a woman, but it is also equally possible for a man to be in the similar situations and suffer the same effects. More comprehensive understanding also requires considering male and partners in same sex relations as a subject matter of BWS. For the purposes of this article though, the victim is considered to be female while the abuser is considered to be male.

BWS is new subject matter to criminal jurisprudence in Nepal. Having complicated nature, not so many efforts have been done and its practical part is poor. In the case, of *Radhika Shrestha v. The Government of Nepal,*[5] the Supreme Court, for the first time in the history of Nepal, explicitly expressed the philosophy and ground for BWS.

The court drew attention of the Government of Nepal, Office of the Prime Minister and Council of Ministers, and Secretariat of the Legislature Parliament to manage law and other infrastructure at the earliest regarding the BWS in context of Nepal. But till now, no attempt has been made for the promulgation of a new law or amendment of laws as per the mandate given by the Supreme Court of Nepal.

I. DEFINING BATTERED WOMEN SYNDROME

BWS has been defined in different ways historically, but according to the 8th edition of *Mosby's Medical Dictionary*, BWS has been defined as:

> "Repeated episodes of physical assault on a woman by the person with whom she lives or with whom she has a relationship, often

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[3] Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense,* 8 Harvard Women's L. J., 121 (1985).
[4] Zoe Craven, Australian Domestic and Family Violence Clearinghouse, Battered Woman Syndrome, 4 (2003).
[5] *Radhika Shrestha v. Government of Nepal*, 9 NKP 1417, (2014) (Hereainfter Radhika Shrestha's case).

> resulting in serious physical and psychological damage to the woman…"

According to Black's Law Dictionary, moreover, BWS has been defined as:[6]

> "A constellation of medical and psychological condition of a woman who has suffered physical, sexual, or emotional abuse at the hands of a spouse or partner. BWS was first described in the early 1970s by Doctor Lenore Walker. It consists of a three stage cycle of violence. a) The tension building stage, which may include verbal and mild physical abuse, b) The acute battering stage, which includes stronger verbal abuse, increased physical violence, and perhaps rape or other sexual abuse, and c) The Loving-contrition stage, which includes abuser's apologies, attentiveness, kindness, and gift giving. The syndrome is sometimes proposed as defense to justify or mitigate a woman's killings of men. Sometimes, more specifically the case is termed to as Battered Wife Syndrome, or more broadly as Battered Spouse Syndrome or Battered Person Syndrome."

BWS is a medically recognized condition in which women suffering from mental and emotional abuse remain in the relationship despite a repeated pattern of violence perpetrated by a spouse or a boyfriend.[7]

In *Johnson v. State,* Justice Hunstein of the Supreme Court of Georgia adopted these words:[8]

> "Under appropriate circumstances, a woman who kills her husband or boyfriend and raises the defense of self-defense may, as evidence of whether she acted in fear of her life, have an expert witness describe the battered woman syndrome… The battered woman syndrome describes a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives... including a three-phase: battering cycle that develops in abusive relationships and the state of psychological paralysis into which some women descend. The battered woman syndrome… is supported by a review of the sustained psychological and physical trauma compounded by aggravating social and economic factors that comprise the battered woman syndrome."

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[6] BLACK'S LAW DICTIONARY 172-173 (9th ed. 2009).

[7] Rebecca D. Cornia, *Current Use of Battered Women Syndrome: Institutionalization of Negative Sterotypes About Men,* 8 UCLA WOMEN'S L. J. 99, (1997).

[8] *Johnson v. State,* 469 S.E.2d 152 (1996).

In *State v. Kelly,* Justice Wilentz of the Supreme Court of New Jersey noted this definition from a mental health expert in *Circa* 1984[9]:

> "Battered woman is one who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do, without concern for her rights. Battered women include wives or women in any form of intimate relationships with men."

BWS is a psychological syndrome which is occurred when a woman, victim of violence commits a murder of her husband when she was forced to become the victim of excessive violence. In this situation, women become the victims of the psychological, physical abuse and trauma by her husband, beloved, father and other members of family time and again.

II. BATTERING CYCLE

In order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship once. If it occurs a second time, and she remains in the situation, she is defined as a "battered woman".[10]

The cycle has three distinct phases. First is the tension building phase, followed by the exploitation or act love respite after referred to as the honeymoon phase".[11] *The Cycle theory of violence* identifies three components of a battering relationship, varying in intensity and time: a) the tension building phase; b) the explosion or acute battering incident; and c) the calm, loving respite.[12]

In the initial phase, smaller emotional and physical battering and verbal harassments escalate.[13] In the second phase, the batterer loses control of his emotions and a severe, perhaps lethal, battering occurs.[14] In the final phase, the batterer is remorseful and loving, and the time is marked by a respite from aggression.[15] BWS, as it was originally conceived, consisted of the pattern of the signs and symptoms that have been found to occur after a woman has been physically, sexually and/or psychologically abused in an intimate relationship, when the partner (usually, but… always a man) exerted power and control over the woman to coerce her into doing whatever he wanted, without regard

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[9] *State v. Kelly,* 22 Ill.97 N.J. 178, 478 A.2d 364 (1984) (Hereinafter Gladys Kelly's case).
[10] *See generally* Lenore Walker, *supra* note 1.
[11] Sushila Karki, Gender Equality 237 (2011) (Hereinafter Sushila Karki).
[12] Lenore Walker, *supra* note 1, at 50.
[13] *Id.* at 56-59.
[14] *Id.* at 59-65.
[15] *Id.* at 65-70.

for her rights or feelings.[16] At the core of BWS lies the theories of 'learned helplessness'[17] and the cycle of violence.[18]

III. CONSTITUENT REQUIREMENTS OF BATTERED WOMAN SYNDROME

There are some typical characteristics of BWS, which include the following:[19]

a) Self-blame for the abuse
b) An inability to blame the abuser
c) Fear for one's life or children's
d) A belief that the abuser is all-powerful

Women who have killed their spouses or boyfriends or inflicted serious injury may use BWS as part of their defense if expert testimony demonstrates that the woman generally has the above symptoms and she has been subjected to a consistent pattern of abuse. It is not a mental disorder, though many experts have classified it as a form of post-traumatic stress disorder (PTSD).

Many states allow expert testimony on intimate partner battering and its effects to justify self-defense, which would excuse the defendant from criminal liability under certain circumstances, or lessen a charge of murder to manslaughter.[20]

IV. BWS AS SELF-DEFENSE

The Nepalese law does not recognize BWS as a legal defense, and its use in court has been criticized by many experts, but evidence of domestic violence and its psychological toll have been used to excuse instances of murder or physical harm to an intimate partner.[21]

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[16] Lenore E. Walker, The Battered Woman Syndrome 42 (2009).

[17] Lenore Walker, *supra* note 1, at 46 (Emphasizing that the Learned helpless is a psychological theory for lack of response, or passive behavior in the face of ability to act. Experiments on rats and dogs, with humans administering continuous negative stimuli such as electrical shocks, proved that psychological abuse created a sense of powerlessness in these animals. The dogs, for instance, soon learned that they could not control being given a shock, and became "compliant, passive and submissive," ceasing voluntary movement.); Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 Indiana L. J. 4, 1254-1282 (1987) (Observing that in Adapting this psychological theory to battered women, Dr. Walker claims that a woman responds with learned helplessness when she can control a given outcome but does not believe that she can. Battered women operate from a belief that they are helpless and this belief becomes reality. Because these women allow what they perceive to become beyond their control, they become submissive and passive. Battered women, therefore, do not attempt to escape the battering relationship).

[18] Lenore Walker, *supra* note 1, at 187.

[19] Roshan Kumar Jha, *The Jurisprudential Concept of Battered Women Syndrome, International Practice and its Application in Proposed Criminal Code: An Analysis*, 110 Kanoon Bimonthly Magazine, 36 (2072).

[20] *Id.*

[21] *Id.*

For a jury or trier-of-fact to consider evidence of domestic violence as self-defense, the defendant must typically prove the following:

a) The danger of serious bodily harm or death was imminent
b) The defendant had a reasonable belief that she would be harmed
c) The defendant reasonably responded to the danger

To prevail a BWS, therefore, the defendant must demonstrate that she was about to be killed, seriously injured, or be touched in an offensive manner. For instance, if her partner only threatened to kill her or harm her in the morning, the defendant's act in stabbing him while he slept would not qualify as self-defense.

However, if an expert witness testifies that the woman was the victim of repeated and severe abuse by her partner, and that she may have believed she was acting reasonably when she stabbed him, in this instance, the defendant may be seen as having held an honest but unreasonable belief that she was about to be harmed. Her "imperfect self-defense" would minimize her culpability, but not excuse it. If she killed her spouse, the offense could be reduced to manslaughter.

V. HISTORICAL DEVELOPMENT OF BWS IN NEPAL

Nepalese criminal justice system in ancient Nepal was mainly based on *Hindu Dharmashastra*, social custom, traditions, and usages and so on. In the absence of the provision of *Dharmashastra,* the king had started issuing edicts, *sandas, sawal, rukka,* etc. The gravity of crime differed on the basis of the *Veda* system.[22]

A. Kirant Period

Kiranti Ruler Jitedasti issued a legal directive in the form of edicts relating to the administration of justice commonly known as *Mundhum*. In *Kirat* period, homicide was considered as a heinous crime as well as a great sin. The culprits responsible for causing death of another person or homicide were given the death sentence, following the principle of "An eye for eye and tooth for tooth".

It shows that homicide law at *Kirat* period was based on incapacitation as well retributive theory.[23] The punishment was not mitigated through the discretionary power of the judges but it was on the occasions mitigated by the ruler by himself or herself. King was final authority for the judgment.

B. Manabnaya Shastra

Jayasthiti Malla enacted *Manabnyaya Shastra*. It was first written legal code in the Nepalese legal history. It was influenced by *Narad Smriti and* provision

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[22] Tulasi Ram Vaidhya & Tri Ratna Manandher, Crime and Punishment in Nepal: A Historical Perspective 33 (1st ed. 1985).

[23] Iman Singh Chemjung, Kirat Darshan Ko Saransa 3-7 (1st ed. 2003).

of penalty to evil, respect to elder, protection of people by state offices were provided. Court was similar to *Lichhavi* period and beside that *Kotillinga* as Civil Court and *Itachapali* as Criminal Court existed.

Homicides were not strictly divided into various categories, and punishment philosophy on homicide cases was likely based on "Incapacitation" and "Deterrent" philosophy of punishment. History of the homicide cases in the *Malla* period is not so evident. Punishment was based on the *Dharmashastra.* The concept of mitigation was available in the practice but not in the laws and policy. Only ruler had power to mitigate the punishment as their requirements and the judges were not allowed to use discretionary power in any criminal cases.

C. Muluki Ain, 1854

Muluki Ain, 1854 was enacted by Janga Bahadur Rana in the time of His Majesty the King Surendra Bahadur Shah. The promulgation of the *Muluki Ain* on 5th January, 1854 started a new phase in Nepalese legal history. This *Muluki Ain* was in operation up to 1963 with some major and minor amendments from time to time.

The *Muluki Ain* of 1854 had four Chapters, among 163 Chapters, which were directly related to homicide law. There were Chapters relevant to homicide, like Chapter 63 - "*Of waving weapon to kill*", Chapter 64 - *"Of Jyanmarako",* Chapter 65 -"*Of Bhabitabyama Jyanmareko*" and Chapter 143 -"*Of Jatakmaro.*"[24] In No. 235 of the Chapter of Court Management in the 1935 version of *Muluki Ain* 1854, there was a provision relating to mitigated homicide.

*Muluki Ai*n 1963 was promulgated on *Bhadra* 1, 2020 B.S. (1963) (in this research this *Muluki Ain* is addressed as *Muluki Ain* 1963). It abolished the Preceding *Muluki Ain* 1935 and its amendment.[25]

VI. EXISTING LEGAL FRAMEWORK

Mitigated homicide in Nepal is not the creation of legislation but of a judicial development of Supreme Court of Nepal by interpreting and implementing Section 188 of the Chapter of the Court Management of the *Muluki Ain*, 1963. It is found that waiver in punishment is given traditionally by using the provision of Court Management, No. 188 of the code. The following things are, however, taken into consideration while using the provision of Court Management's No. 188 of the country code. In the case of murdering husband, beloved or relatives

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[24] RAJIT BHAKTA PRADHANANGA, HOMICIDE LAW IN NEPAL: CONCEPT, HISTORY AND JUDICIAL PRACTICE 265 (1st ed. 2001).

[25] *Id.* at 240.

by a woman, situation of doing murder, psychological syndrome of crime, age, environment of upbringing, her family life, social environment, economic situation, children depending upon her, the life experienced by her, compulsion and reason of committing crime, supporting the investigation by expressing the truth of crime before the court, police officer and government attorney and so on. In this case, deceased himself has played the role to trigger such crime although such kind of act is culpable homicide. Moreover, in No. 235 of the Chapter of Court Management in the 1935 version of *Muluki Ain,* 1854 as well, there was also a provision relating to mitigated homicide.

A. Domestic Violence (Crime and Punishment) Act, 2009

There is no legal provision on BWS in Nepal. Domestic violence (Crime and Punishment) Act, 2009, however, has been enacted to punish the violence related acts that occur inside home and family and related to family, and to control such crimes and protect the battered person from such domestic violence. Section 2(a) of the Act has defined that domestic violence means "a person giving physical, mental, sexual and economic torture to another person having domestic relations and it is defined that such word means defaming and hurting the feeling and other works."

Section 13(1) of the same Act has provision of fine of rupees three thousand to twenty-five thousand or six months imprisonment or both to a person who involves in domestic violence. But this Act has not managed the provision to punish the crime to be occurred relating to BWS.

B. The Proposed Draft Criminal Code, 2010

Recently, Section 38 of A bill made to amend and consolidate laws in force relating to criminal offence, 2010 has provided the factors mitigating the gravity of offense.[26] It has provided that for the purpose of this Code, the following circumstances shall be considered to be the factors mitigating the gravity of offense:

a) Offender of below eighteen years age and more than seventy five years,

b) Offender has no intention of committing offense,

c) Where the victim of offense had provoked or given threat to the offender immediately before commission of the offense,

d) An offense committed instantly as a resistance for a grave offense committed against the offender or any of his/her close relative,

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[26] A Bill Made to Amend and Consolidate Laws in Force Relating to Criminal Offence (The Proposed Draft Criminal Code), 2010, § 38.

e) Where the offender has voluntarily confessed the offense or expressed remorse therefore,

f) Where the offender has surrendered to the concerned authority,

g) Where the offender having confessed the offense committed by him/her, has already provided or agreed to provide compensation to the victim,

h) Breakdown of offender's capacity due to deafness, blindness, dumbness.

C. Judicial Interpretation

Judicial Interpretation on the basis of Court Management, No. 188 of the *Muluki Ain* of Nepal in various cases are as follows:

a. HMG v. Doma Lameni[27]

In Nepal, BWS for the first time was recognized by the Supreme Court of Nepal, as a ground of mitigation for reducing the charge of *Jyanmara* to mitigated homicide in the case of *HMG v. Doma Lameni*, where the deceased husband was a continual alcoholic and the accused wife had suffered frequent and repetitive beatings from the deceased violent husband since a long time. On the day of incident, the deceased had beaten her, made wounding remarks, threatened to kill her and taunted her. The accused wife, when the deceased husband was sleeping, throttled him to death with a rope and threw the dead body in the river with the help of her son.

In this case, the Supreme Court of Nepal held that since evidence of murderous enmity and intention to kill the victim was absent and killing was caused due to the frequent and repetitive beating, threat to kill and taunts made by the victim to the accused, the punishment was reduced to ten years imprisonment, as the lower courts had opined on the above ground as per No. 188 of the Chapter of Court Management of the *Muluki Ain*. In this regard, the BWS as one of the grounds of mitigation for reducing *Jyanmara* to mitigated homicide, has also been recognized by the Supreme Court in Nepal.

b. Laxmi Badi v. Government of *N*epal[28]

In the culpable homicide of *Laxmi Badi v. Government of Nepal* through the First Information Report filed by Lal Bahadur Badi,[29] the economic condition of the defendants with eight children was extremely. In this economically vulnerable family, the deceased from the time of marriage for the last twenty-three years, had been involved in beating after having

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[27] *HMG v. Doma Lameni,* NKP 104, (1989).
[28] *Laxmi Badi v. Government of Nepal,* 7/8 NKP, 587 (2003).
[29] *Id*.

alcohol, having no feeling of responsibility towards the family, earning nothing for living, chasing out the children from home by beating them up, a sort of monster's and animal's behavior was performed in the guise of human face. Defendant *Laxmi Badi* committed such crime after losing mental balance and a helpless woman being generated hatred and being frustrated from such miserable condition. Such kind of feeling was emerged because he has been giving torture to her and her children for life long and it could be excessive when punishing her as per the rule because she has small children. The court has defined the situation and condition of BWS that punishing her of 7 years jail term could be justifiable by considering her family condition, miserable condition of the defendant, having children and the undergoing situation of begging for survival.

c. Jok Kumari Karki v. the Government of Nepal[30]

In the case of culpable homicide of *Jok Kumari Karki vs. the Government of Nepal*, the defendant Jok Kumari Karki had given birth to two sons despite the physical and mental torture given by deceased husband. The deceased defendant had not only given torture, defamed and beaten her, but also did violence against the children. Punishment to the defendant was reduced as per the Court Management No. 188 as it was found that defendant Jok Kumari Karki was battered due to the long term domestic violence of the deceased Ambar Bahadur and due to the situation of battered woman syndrome.

d. Shanti B.K. v. the Government of Nepal[31]

Likewise, in the case of culpable homicide of *Shanti B.K. vs. the Government of Nepal*, the bases of using No. 188 of Chapter of Court Management have been identified. The following things have been identified to consider while maintaining balance between crime and punishment as, a) whether the murder took place with plan and with the intention (or having *mens rea*) and being biased, b) heinous or murder with torture, c) nature and quantity of crime, d) purpose and social background of the persons involved in crime, e) situation of crime occurred, f) age of the person who commits crime, g) physical, mental, economic and family condition of the person who commits crime, h) opinion and feeling of victim, i) damage to the victim or society, j) past crime record of the accused, k) whether the accused has supported the judicial process by telling truth to the court, l) whether the feeling of confession was emerged or not, m) whether making commitment of not committing crime in the future by correcting himself/

[30] *Jok Kumari Karki v. the Government of Nepal,* 9 NKP, 1494 (2008).
[31] *Shanti B.K. v. the Government of Nepal*, 6 NKP, 769 (2004).

herself, n) whether the crime was done due to the pressure and persuasion of others and o) other appropriate reasons seen through the factual situation of the case.

Issue against women is a violence or domestic violence and issues related to battered woman also come under this. Necessary elements of situation of using for all debates for the purpose of Chapter of Court Management, No. 188 should have been determined. The use of No. 188 is done to provide waiver in punishment in the cases of culpable homicide. However, BWS is a legal facility provided to woman in whom the deceased is an abuser and woman is a victim after being battered. The crime occurred by such woman is due to the torture given by the abuser. Thus, there should be separate law to address BWS because No. 188 only is not sufficient to address it.

e. Radhika Shrestha v. The Government of Nepal[32]

This is the first landmark case decided by Supreme Court in the history of Nepal which explicitly expresses the philosophy and ground for BWS. In this case, Supreme Court drew attention of the Government of Nepal, Office of the Prime Minister and Council of Ministers, and Secretariat of the Legislature Parliament to manage law and other infrastructure at the earliest regarding the BWS in the context of Nepal. But till now no attempt has been made for the promulgation of the new law or amendment of laws as per the mandate given by Supreme Court of Nepal.

In this case, the age of defendant was only 29 years, though she had murdered the deceased by committing a heinous crime by setting fire. She had a responsibility to care two daughters. In addition to this, she had established marital relationship with the deceased husband, but she was battered with the behavior of her husband like beating, cursing after having alcohol daily and she murdered her husband with the eruption of feeling of revenge after being battered with torture and due to the family burden to be shouldered alone. However, it is seen that she has confessed before police and court by accepting the crime committed by her and helped the investigation officer and the court. In this way, the defendant Radhika Shrestha reached to the situation of murdering her own husband after being battered with the domestic violence from home and the family environment being worst and she had two daughters to care and protect. In this situation, it could be excessive while punishing the defendant as per 13(1) of the Chapter on Homicide. So the decision of the Patan Appellate Court not to

[32] Radhika Shrestha's case, *supra* note 5.

confiscate the entire property of the defendant and punishing her only ten years is deemed to be appropriate and was thus upheld.

The Major Principles laid down by Justice Sushila Karki in this case are: [33]

a) "There are some differences between violence caused by battered woman and the murder induced through provocation. There is a lack of *mens rea* in the provocation induced crime because such murder occurs due to the attack in the meantime caused by the anger erupted immediately. The claim made on BWS is a crime, but the cause of the crime is the deceased person himself.

b) In the case of claim of BWS, a woman has become battered for several years, being victim of domestic violence and being victim of misbehave from her husband, they receive hit, attack, trauma, blame from husband repeatedly of blaming of having relation with other males, receive misbehave or life threat. Such person involves in murdering her abuser husband or beloved in the meantime while they are sleeping or having alcohol, after a long time to save life. Only one cause of such murder is to remain free from emotion, hate, attack or life threat from the abuser or threat.

c) The application of No. 188 of Chapter on Court Management is done to provide waiver in punishment in the cases of culpable homicide. However, BWS is a legal facility provided to woman in which the deceased is an abuser and woman is a victim after being battered. The crime occurred by such woman is due to the torture given by the abuser. Thus, there should be separate law to address BWS because the No. 188 only is not sufficient to address it.

d) The situation of BWS is different from No. 188, on the basis of above mentioned established principles, changed context, demand of the time and seriousness of BWS, it is needed to manage provision to test BWS and to take examination report and expert's testimony on BWS as an evidence to give half waiver or full waiver in the punishment claim to the defendant in the murder case related to BWS.

f. The Government of Nepa*l* v. Sena Lama Sherpa[34]

In this case, Sena Lama Sherpa had murdered her husband by a piece of wooden block. The murder induced through provocation. She had a responsibility to care five children. She was battered with the behavior of her husband like beating, cursing after having alcohol daily and she murdered

[33] *Id*.
[34] *Government of Nepal v. Sena Lama Sherpa,* 1 SC BUL. 27, (2015).

her husband after being battered with the torture of him and due to the family burden to be shouldered alone. However, it is seen that she has confessed before police and court by accepting the crime committed by her and helped the investigation officer and the court. In this way, the defendant Sena Lama Sherpa murdering her own husband after being battered with the domestic violence from home and the family environment being worst and she had 5 children to care and protect. In this situation, it could be excessive while punishing the defendant as per 13(1) of the Chapter on Homide. So, the decision of the Appellate Court Rajbiraj to punish as per No. 13(1) is not rational. So, by using No. 188 of the Chapter on Court Management, the Supreme Court made her liable for eight years imprisonment.

VII. DISTINCTION BETWEEN BWS AND PROVOCATIONAL HOMICIDE IN NEPALESE CONTEXT

There are some differences between violence caused by battered woman and the murder induced through provocation. There is a lack of *mens rea* in the provocation induced crime because such killing occurs due to the attack in the meantime caused by the anger erupted immediately. The claim made on BWS is a crime, but the cause of the crime is the deceased person himself. The situation of killing by using kicks, fist, stick and throwing stone caused by the anger erupted immediately as per No. 14 of Chapter on Homicide is also found in case of BWS. But in the case of having demand of BWS, a woman has become battered for several years, being victim of domestic violence and being victim of misbehave from her husband, they receive hit, attack, trauma, blame from husband repeatedly of blaming of having relation with other males, receive misbehave or life threat. Such person involves in murdering her abuser husband or beloved in the meantime while they are sleeping or having alcohol, after a long time struggle to save life. Only one cause of such murder is to remain free from emotion, hate, attack or life threat from the abuser or threat.

In such case of battered woman, when demands are made to get waiver in the developed nations, the works are done to find whether such case is of battered woman or not and tested through psychological method. Similarly, studies are being carried out and treatments are made by doctors. In this situation, it could be fixed whether the case is of battered woman or not.

VIII. INTERNATIONAL BEST PRACTICES

BWS has been accepted by the United States of America (USA), Britain, Australia, New Zealand, Canada, and other countries in the world and courts in

these countries have taken the expert's testimony on the BWS and it is found that if the proofs of BWS is proved, the accused would either get less punishment or get all waiver in the punishment.

a. The USA

In the USA, the framework of the BWS of Walker has been accepted in the case of *Ibn Tamas v. US*[35] and expert's testimony on the BWS and it is found that measures were prepared on taking evidence relating to it. In the case of *State v. Kelly*,[36] the Supreme Court of New Jersey had taken the expert's testimony on the BWS as evidence.

b. The UK

In the UK, in the case of *R. v. Kiranjit Ahluwalia*[37], BWS was interpreted and diminished responsibility to the defendant was announced. In this case, crime was occurred because of the regular torture, beat and violence imposed by the deceased.[38] In the present situation, the UK has managed this provision in Section 54 and 55 of Coroners and Justice Act, 2009.[39]

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[35] *Ibn-Tamas v. United States*, D.C.App., 401 A.2d 966, 970 (1979).

[36] Gladys Kelly's case, *supra* note 9.

[37] *R. v. Karanjit Ahluwalia*, 96 Cr App R 133, (1993). The appellant poured petrol and caustic soda on to her sleeping husband and then set fire to him. He died six days later from his injuries. The couple had an arranged marriage and the husband had been violent and abusive throughout the marriage. He was also having an affair. On the night of the killing he had threatened to hit her with an iron and told her that he would beat her the next day if she did not provide him with money. At her trial she admitted killing her husband but raised the defence of provocation however, the jury convicted her of murder. She appealed on the grounds that the judge's direction to the jury relating to provocation was wrong and she also raised the defence of diminished responsibility.

[38] Sushila Karki, *supra* note 11, at 242.

[39] Section 54 of the Coroners and Justice Act, 2009 provides for Partial defence to murder as: loss of control: (1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if —(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control, (b) the loss of self-control had a qualifying trigger, and (c)a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D. (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden. (3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint. (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge. (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not. (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply. (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter. (8) The fact that one party to a killing is by virtue of this section not liable to be convicted of under does not affect the question whether the killing amounted to murder in the case of any other party to it. Section 55 of the same Act further provides for the meaning of "qualifying trigger" as: (1) This section applies for the purposes of Section 54. (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies. (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person. (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which— (a)

c. Canada

R. v. Angelique Lavallee case is taken as first case on BWS in Canada.[40] After the interpretation of this case, waiver in punishment was granted arguing that the battered woman committed the crime to save life.[41] Similarly, in the case of *Marie, Angelina Napolitano,*[42] and *Osland v. the Queen*,[43] the Supreme Court of Canada recognized the principle of BWS.

IX. ANALYSIS

As mentioned above, extended interpretation of BWS is accepted along with the framework of BWS of Walker and expert's testimony on the BWS in the countries like UK, USA, Australia and Canada and other evidences relating to this are followed. Some countries have formed measures and laws relating to BWS. On this basis, waiver in life imprisonment sentences and full waiver from punishment are granted although women are found involved in violent crime.

In these countries, to prove the BWS, psychological condition of battered woman should be probed from experts, whether the situation of attack was there or not. There should no *mens rea* of woman rather than being logical while committing crime immediately. Woman should have not got violent from the abuser for once, but should have received continuous violence. There should have negative thought on woman due to continuous attack, and there should be the situation of revenge while using force from husband or beloved or it should be proved that murder was occurred in this situation. These are taken as the bases.

CONCLUSION

On the basis of above mentioned analysis, established principles, presented examples and others, waiver in punishment or acquittal of the accused is in the case of BWS in the countries like USA, UK, Australia and Canada by taking

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constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged. (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4). (6) In determining whether a loss of self-control had a qualifying trigger— (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence; (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence; (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded. (7) In this section references to "D" and "V" are to be construed in accordance with Section 54.

[40] *R. v. Lavallee*, 1 S.C.R. 852, (1990). This case is a leading case of Supreme Court of Canada on the legal recognition of battered woman syndrome

[41] Sushila Karki, *supra* note 11, at 245.

[42] Angelina Napolitano was an immigrant to Canada who murdered her abusive husband in 1911, igniting a public debate about domestic violence and the death penalty. She was the first woman in Canada to use the battered woman defense on a murder charge. /*See* Karen Dubinsky & Franca Iacovetta, Murder, *Womanly Virtue, and Motherhood: The Case of Angelina Napolitano, 1911–1922,* 72 Canadian Historical Rev., 505-531 (1991).

[43] *Osland v. The Queen*, HCA 75 (1998); 197 CLR 316; 159 ALR 170; 73 ALJR 173.

expert's testimony on BWS as evidence. But in the context of Nepal, there is no provision of taking expert's testimony on the BWS or examination report by conducting a test on the battered woman from doctors or psychologists. In the case of *Laxmi Badi* and *Jok Kumari Karki*, the court has interpreted the BWS, but no opinion was delivered on whether taking BWS as evidence or not. In these cases, the interpretation of BWS was only made in reference to using No 188 of the Chapter on Court Management. In this way, the situation of BWS is different from the No. 188, on the basis of above mentioned established principles, changed context, demand of the time and seriousness of BWS, it is necessary to manage provision to test BWS and to take examination report and expert's testimony on BWS as an evidence to give half waiver or full waiver in the punishment claim to the defendant in the murder case related to BWS.

In the case of *Radhika Shrestha v. the Government of Nepal,*[44] Supreme Court in the history of Nepal which explicitly expressed the philosophy and ground for BWS. In this case Supreme Court draw attention of the Government of Nepal, Office of the Prime Minister and Council of Ministers, and Secretariat of the Legislature-Parliament to manage law and other infrastructure at the earliest regarding the BWS in the context of Nepal. But till now, no attempt has been made for the promulgation of the new law or amendment of laws as per the mandate given by Supreme Court of Nepal.

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[44] Radhika Shrestha's case, *supra* note 5.

Diplomatic Code of Conduct: A Nepalese Practice

Bharat Khanal*

ABSTRACT

Diplomatic Code of Conduct is important to ensure more systematic and dignified conduct of Government officials during meetings, contacts, negotiations, communications etc. Diplomatic relations have a special nature as they connect countries and government representatives. Vienna Convention on Diplomatic Relation and customary international law clearly set diplomatic obligations. Different countries have made their own Diplomatic Code of Conduct. Diplomatic Code of Conduct, 2011 A.D is introduced in Nepal in line with international protocol and protects national interests. It broadly elaborates the activities to do and not to do. Ethics and integrity stand at the core of everything we do. Time and again it is heard that diplomatic code of conduct has been violated in Nepal. This paper, against this background, discusses briefly on the aspect of diplomatic code of conduct in Nepal and highlights the areas that need to be further worked on.

INTRODUCTION

Diplomacy is the art of conducting relations with the sovereign states and international organizations. Diplomacy is to promote friendly relations among the countries. It makes social interaction run smoothly. A code of conduct is a set of rules outlining the social norms and rules and responsibilities of, or proper practices for, an individual, party or organization. Codes of conduct are principles, values, standards, or rules of behavior that guide the decisions, procedures and systems of an organization.

Every employee should comply with all principles, rules and obligations applicable to the workplace, including those concerning interaction between employees. The Codes of Conduct are set of guidelines intended to support ethical behavior

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and decision making for all.[1] They provide general framework of principles to be adopted by employees with respect to their conduct. A code of ethics, also known as a code of conduct, clarifies "an organization's mission, values, and principles, linking them with standards of professional conduct".[2] Some codes are short, setting out only general guidelines, and others are large manuals, encompassing a huge variety of situations.[3]

The examples of Code of Conduct includes The Code of Conduct for Legal Practitioners, 2051 B.S (1994 A.D), Nepal Association of Foreign Employment Agencies (NAFEA) Code of Conduct, Code of Journalistic Ethics-2003 (Amended and revised – 2008) etc. Lawyers, doctors and teachers have all established their professions as well as defined fields with certifiable standards of conduct and professional ethics and codes of conduct that are specific to each, though they share many common ethical principles.[4]

Today's global market requires following of diplomatic code of conduct. Diplomatic relations have a special nature; while they connect countries and government representatives to each other, they also build causeways between various cultures and civilizations.[5] Protocol and etiquette, even though they are not meant for themselves, are means whereby different people and cultures can interact effectively and coexist in harmony.[6] In the diplomatic circles international norms of either conduct or verbal communication is important.

This is more so with the people holding public position, who should demonstrate highest quality of human dignity and culture. If norms, values and public disciplines are violated by the people holding public position, people have every right to question about the morality of their leaders and officials to continue in the public posts. The new diplomatic code of 2011 A.D. will also make it mandatory for political parties to establish a protocol section and keep records of matters discussed by politicians during meetings with foreign dignitaries.

I. PROTOCOL AND ETIQUETTE

Etiquette refers to the customary code of social behavior or rather, a system of accepted rules, conventions, and norms governing polite behavior and interactions

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[1] Canadian Mental Health Association, Lambton Kent Branch, Code of Conduct, 2 (2013).

[2] Redwoods Good Foundation, *Code of Ethics/ Conduct*, Green Plus, http://gogreenplus.org/nuts-and-bolts-guide/people-nuts-and-bolts-guide/human-resources-employee-effectiveness/code-of-ethicsconduct/ (accessed on. Jan 7, 2015).

[3] Lisa Magloff, *Examples of a Code of Ethics for Business*, Small Business, http://smallbusiness.chron.com/examples-code-ethics-business-4885.html, (accessed on January 7, 2015) (Hereinafter Lisa Magloff).

[4] Susan R. Johnson, *Professional Ethics and Codes of Conduct for Diplomats*, Foreign Service J., 5 (2010).

[5] *A Training Course on Protocol and Etiquette for the Wives of Diplomats*, Diplomatic Institute, (2014), di.mofa.gov.qa/English/Pages/instituteallcourses.aspx (accessed on July, 2015).

[6] *Id*.

among societies. It also includes the set of norms and ethics governing the behavior of professional bodies such as medical and/or legal profession.[7] Protocol, on the other hand, refers to the code of conduct and behavior governing diplomacy and affairs of the state. It constitutes a set of rules, forms, ceremonies, and procedures adhered to and adopted by diplomatic and government officials in their international relations with the states.[8] After all, the most important components such as Courtesy, Professionalism and Respect are important concepts in different spheres of our lives.[9]

The most common sections to include in a code of conduct are:

a) Ethical principles - includes workplace behavior and respect for all people.

b) Values - includes an honest, unbiased and unprejudiced work environment.

c) Accountability - includes taking responsibility for your own actions, ensuring appropriate use of information, exercising diligence and duty of care obligations and avoiding conflicts of interest.

d) Standard of conduct - includes complying with the job description, commitment to the organization and proper computer, internet and email usage.

e) Standard of practice - includes current policies and procedures and business operational manual.

f) Disciplinary actions - includes complaints handling and specific penalties for any violation of the code.

Protocol and etiquette are vehicles to assist any politician or diplomat in the entanglement of agreements, negotiations and discussions, which are called diplomacy. Protocol and etiquette are the lubricants, which make diplomacy run smoothly.[10] Protocol is commonly used to designate the code of behavior, as practiced on diplomatic occasions.[11] According to the Concise Oxford Dictionary, Protocol is defined as observance of official formality and etiquette.

Protocols facilitate the smooth interaction between officials, the ultimate aim to avoid unnecessary confrontation or disharmony. Examples of diplomatic rules include the manner in which diplomatic ceremonies are conducted, demonstrating

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[7] *See generally* Department of the Army Pamphlet 600-60, A Guide to Protocol and Etiquette for Official Entertainment, (2001) (Hereinafter Department of Army).

[8] *Id.*

[9] *Diplomatic Protocol Manual Protocol*, (2015), http://www.eadsociety.com/wp-content/uploads/Diplomatic.

[10] Department of Foreign Affairs, Republic of South Africa, *Protocol Training Manual South African Protocol and Etiquette* 19 (2006).

[11] Estellina Namutebi, *Masters of Arts in Diplomacy and International Studies*, Uganda Martyrs University, http://www.umu.ac.ug/index.php/master-of-arts-in-diplomacy-and-international-studies/, (accessed on January, 2016).

respect to a head of state and such others.[12] This represents one interpretation of Protocol. The term Protocol also has a legal connotation. Protocol is the lubricant, which makes the protocol vehicle move smoothly and is practiced daily among States and international organizations. Etiquette is a code of behavior that delineates expectations for social behavior according to contemporary conventional norms within a society, social class, or group.[13] Protocol is the etiquette of diplomacy and affairs of the state.

Collectively, the terms Etiquette and Protocol refer to a set of rules, conventions, and norms that govern the behavior of people in general and in certain situations. They differ in terms of their sphere of influences and nature of the rules.

II. IMPORTANCE OF CODE OF CONDUCT

The Code of Conduct is a tool that we can use to seek clarity on ethical issues and concerns.[14] A code of ethics, also called a code of conduct or ethical code, sets out the company's values, ethics, objective and responsibilities.[15] A well-written code of ethics should also give guidance to employees on how to deal with certain ethical situations.[16] Code of Conduct is introduced to ensure more systematic and dignified conduct of government officials during meetings, contacts, negotiations, communications etc. with foreign governments/officials, international organizations, their representatives and other officials consistent with diplomatic norms, international practices.[17] It strengthens the friendly relations with all friendly countries, particularly with the neighboring countries on the basis of mutual interest, equality, cooperation and cordiality. It maintains coherence between national security policy and foreign policy.

As people become more informed, more aware, more competent to investigate the motives, values and rationale in the thought behind their actions, their behavior will conform.[18] A code of conduct guides on how to deal with certain ethical situations and to make ethical decisions in their professional lives and at times in their private lives. A code of ethics sets out the values of a company and the way it does business. It is a moral code that does not have the force of law. It is designed to assist staffs to better understand the obligations placed upon their conduct.

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[12] Department of Army, *supra* note 7.
[13] Merraim Webster Thesaurus 1828.
[14] The World Bank Group, Living Our Values: Code of Conduct, (2009).
[15] Lisa Magloff, *supra* note 3.
[16] *Id*.
[17] Diplomatic Code of Conduct, 2011, Preamble.
[18] Bernard J. O'Connor, *International Diplomacy and Ethics: Relevance in Commerce,* 3 J. of Int'l Business Research 2, (2004).

III. INTERNATIONAL LAW

International diplomatic law lays down comprehensive obligations to be observed by sending states and their diplomats in their relations with receiving States. Diplomats are not guided by any specifically designed code of ethics ratified by the international political community.[19] These duties fulfill a key role in the diplomatic system. Even before the coming into force of the 1961 Vienna Convention on Diplomatic Relations (VCDR)[20] customary international law had already clearly established diplomatic obligations. Moreover, legal scholars noted the existence of a strong moral responsibility of diplomats to respect obligations in the receiving State.[21] The privileges and immunities granted to foreign missions and their diplomatic and consular staff members in Nepal are principally under the provisions of the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963, to which Nepal is a party, as well as international customary laws and the prevailing laws and regulations of Nepal. Diplomatic agents have "a duty.... to respect the laws and regulations of the receiving State," along with "a duty not to interfere in the internal affairs of the State" nor may a diplomat participate in "any professional or commercial activity" for "personal profit."[22]

The DCC has also proposed designated venues for party leaders to hold meetings with foreign diplomats and dignitaries. However, this is not applicable for courtesy and farewell calls. It also has provisions to curtail the frequent movement of diplomats and would be regulated on a regular basis. Those officials who would come under the purview of the code have been prohibited from accepting expensive gifts, favors, grants, loans, remunerations and donations from foreign diplomats, governments and officials.[23] Diplomatic immunity is not intended to serve as a license for persons to flout the law and purposely avoid liability for their actions.[24] The purpose of these privileges and immunities is not to benefit individuals but to ensure the efficient and effective performance of their official missions on behalf of their governments.[25] This is a crucial point for law enforcement officers to understand in their dealings with foreign diplomatic and consular personnel.[26]

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[19] *Id*.
[20] Vienna Convention on Diplomatic Relations, signed in Vienna on 18 April 1961 and entered into force on 24 April 1964, UNTS, vol. 500, p. 95, no. 310 (Hereinafter VCDR).
[21] Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 461 (3rd ed. 2008).
[22] VCDR, Art. 41.
[23] *Ministry of Foreign Affairs Makes Public Diplomatic Code of Conduct*, Kathmandu Insider, March 10, 2011, http://ktminsider.com/blog/2011/10/03/mofa-makes-public-diplomatic-code-of-conduct/, (accessed on January 5, 2015).
[24] United States Department of State, Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities, (2009) (Hereinafter US Department of State).
[25] *Diplomatic and Consular Immunities*, Diplomacy in Action, http://www.state.gov/m/ds/immunities/c9118.htm, (accessed on January, 2015).
[26] US Department of State, *supra* note 24.

Under the Vienna Conventions, it is the duty of all representatives and their dependents, even if they are in receipt of such diplomatic or consular immunities, to respect the laws and regulations of the receiving state.[27]

Our conduct is consistent with and reflects the values enshrined in the Charter of the United Nations: respect for fundamental human rights, social justice and human dignity, and respect for the equal rights of men and women. We will respect the cultures, customs and traditions of all peoples, and will strive to avoid behaving in ways that are not acceptable in a particular cultural context.

IV. DIPLOMATIC SERVICE CODE IN DIFFERENT COUNTRIES

A. The United Kingdom

In the United Kingdom Diplomatic Service Code of the United Kingdom is applied. It is very comprehensive and covers a wide range of issues from appointment to retirement. The Foreign Service, which originally provided civil servants to staff the Foreign Office, was once a separate service, but it amalgamated with the Diplomatic Service in 1918. The Diplomatic Service is an integral and key part of the government of the United Kingdom. It supports the Government of the day in developing and implementing its policies, and in delivering public services.

Civil Servants are appointed on merit on the basis of fair and open competition and are expected to carry out their roles with dedication and commitment to the Diplomatic Service and its core values: integrity, honesty, objectivity and impartiality.[28]

B. India

In India, the All India Services (Conduct) Rules, 1968 is applied. A common unique feature of the All India Services is that the members of these services are recruited by the Center (Union government in federal polity), but their services are placed under various State cadres, and they have the liability to serve both under the State and under the Centre.[29] Due to the federal polity of the country, this is considered as one of the tools that makes the union government stronger than the state governments. Officers of these three services comply with the All India Services Rules relating to pay, conduct, leave, various allowances etc.

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[27] Foreign Affairs Canada, Conduct Abroad Code: Code of Conduct for Canadian Representatives Abroad, (2006).

[28] Diplomatic Service of the United Kingdom, Rule No. 3.

[29] *Revised All India Services Rules (Vol. I)*, Ministry of Personel, Public Grievances and Pensions, http://persmin.gov.in/DOPT_ActRules_AIS_Rules_Vol_I_Index.asp (accessed on Janauary, 2016).

C. Australia

Public servants action directly affects the lives of the public and the confidence that the public has in Government. The Australian public, quite rightly, demands high standards of behaviour and ethical conduct from the people entrusted with this responsibility. Behaving ethically is critical in the public sector.[30]

D. For the United Nations Staffs

The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat. Staff members are international civil servants. Their responsibilities as staff members are not national but exclusively international. [31]

V. DIPLOMATIC CODE OF CONDUCT, 2011 A.D.

Above mentioned Diplomatic Code of Conduct bars Nepali officials from meeting or corresponding with individuals and organizations not recognized by the government. The move is meant to bring Nepali practice in line with the international protocol and protect national interests. Such a code will make ties between Nepali officials and representatives of foreign governments and international organizations honorable and organized.[32] The Party has directed its ministers to abide by the diplomatic code of conduct and not to misuse the government facilities, including the government vehicles.[33]

The Diplomatic Code of Conduct, 2011 A.D will be effectively implemented by making timely amendments to it.[34] Minister for Foreign Affairs, Mahendra Bahadur Pandey has called on all the political leaders and officials, including ministers and bureaucrats, to strictly abide by the diplomatic code of conduct at this time of crisis in the aftermath of quakes. All the leaders and officials sitting in responsible positions must bear in mind that their conducts with foreign envoys, leaders and delegates can have larger implications in the country's national

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[30] *APS Values and Code of Conduct in Practice,* Australian Public Service Commission, http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice (accessed on January 5, 2016).

[31] United Nations, *Staff Rules and Staff Regulations of the United Nations*, Secretary-General's Bulletin 8, Art. 1, Regulation 1.1 (January 1, 2014).

[32] Anil Giri, *Strict Measures: Diplomatic Code of Conduct Okayed,* The Kathmandu Post, (July 23, 2015), http://kathmandupost.ekantipur.com/printedition/news/2011-07-13/strict-measure-diplomatic-code-of-conduct-okayed.html(accessed on November, 2015).

[33] *UCPN (Maoist) Issues 23-Point Code of Conduct for its Ministers*, Nepali Headlines, October 27, 2015, http://nepaliheadlines.com/ucpn-maoist-issues-23-point-code-of-conduct-for-its-ministers/ (accessed on January, 2016).

[34] Government of Nepal, Office of the Prime Minister and Council of Ministers, Policies and Programs of the Government of Nepal for Fiscal Year 2072-73 (2015-16), ¶ 99 (2015).

interest, security and diplomatic potency.[35] Top leaders of political parties, senior government officials, ministers and the Prime Minister are under the jurisdiction of the code.

Foreign embassy was keen to request the Department of Protocol under the Ministry of Foreign Affairs to schedule any official meeting either for its Nepal-based diplomats or the visiting delegations.

Some of the main features of the Diplomatic Code of Conduct, 2011 are as follows:

a. Courtesy calls, Official talks and Meetings[36]

The representative of the Ministry of Foreign Affairs (MOFA) is to be invited during the meetings between Nepalese authorities and foreign dignitaries. The MOFA representative should prepare the records of talks. In the absence of the MOFA representative, the concerned agency should prepare the record of talks and share with the MOFA. Summary of report of meetings held by MOFA officials should be sent to the Office of the Prime Ministers and Council of Ministers. Nepal Government's ministers, officials of the constitutional bodies or other senior officials should give prior information to the MOFA while receiving foreign diplomats and other officials for courtesy or farewell calls, formal talks and meetings. Summary report of the talks and discussions should be made available to the Office of the Prime Minister and MOFA. Meetings should be held with the foreign officials of the appropriate rank.

b. Agreements, Commitments and Diplomatic Correspondence[37]

While concluding agreements or understandings of any kind with foreign government or regional or international organizations, prior approval should be taken and participation of the MOFA should be ensured. Commitments made must be communicated to the MOFA as soon as possible. Concurrence of the MOFA should be obtained before inviting foreign government counterparts to visit Nepal. Correspondence done on behalf of the Government of Nepal with foreign missions and governments as well as international and regional organizations must be sent through MOFA or Nepalese Missions abroad.

c. Foreign visits, Representations, Presentations and Reporting[38]

Any address, speech, remarks or statements to be made by Nepalese delegations abroad must be consistent with the policies of the GON. MOFA's

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[35] *Pandey Urges Officials, Leaders to Strictly Abide by Diplomatic Code,* The Himalayan Times, June 13, 2015, http://thehimalayantimes.com/nepal/pandey-urges-officials-leaders-to-strictly-abide-by-diplomatic-code/(accessed on January 6, 2015).
[36] Diplomatic Code of Conduct, 2011, No. 4.
[37] *Id.* No. 6.
[38] *Id.* No. 7.

opinion should be sought in respect of the policy position. Concurrence of MOFA must be obtained before submitting proposals to the Cabinet on matters requiring MOFA to issue credentials. Correspondence on such visits should be routed through MOFA. Persons holding public office must use the kind of passport as specified in the Passport and the Passport Rules while visiting abroad on official business.

d. Language and Dress Code[39]

National dress or formal attire/or decent dress should be worn in formal ceremonies and other occasions. All personnel working at MOFA and Nepalese missions abroad should behave with courtesy and wear suitable and decent attire. Courteous and decent language should be used during contacts and communications with the foreigners. In case of English language, interpreter is needed for which MOFA may be approached.

e. Conduct of Diplomatic Functionaries or those holding such responsibilities[40]

Diplomatic functionaries should conduct their activities in accordance with international standards and internally accepted diplomatic norms, values and practices. No abuse of diplomatic privileges and immunities. Heads of Nepalese diplomatic missions or their spouses or diplomatic officials should not hold any position of benefit or engage in business activities. Diplomatic bag should not be used for private purpose.

f. Prohibited Acts for individuals holding public offices and those drawing remuneration from the national treasury[41]

Following activities are prohibited:

i. Sharing of confidential and sensitive information to foreigners.

ii. Issuance of public notice on conduct of foreign relations except by authorized person.

iii. Acceptance of gifts, donation, grant, loan, remuneration or any special favor from foreigners.

iv. Being a partner or an associate in the establishment, registration or management of any foreign company or organization.

v. Acceptance of any full or part time outside job supported and endorsed by foreign missions or diplomats.

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[39] *Id.* No. 8.
[40] *Id.* No. 9.
[41] *Id.* No. 10.

vi. Sharing of personal information such as marital status, age and so on.

vii. Seeking personal invitation or financial assistance from any foreign missions or international organizations or NGOs.

viii. Making unauthorized correspondence or contact/commitment or representation with foreigners or foreign organizations/missions.

ix. Acceptance any foreign decoration, medal etc. without prior approval of GON.

x. Using of foreign diplomats or agencies to put undue pressure on GON officials for personal benefits. Opposing prevailing laws and official policies of the GON.

xi. Entering into the chancery or residential premises of foreign diplomatic missions based in Nepal except for formal programs.

g. Monitoring Committee[42]

There are two types of monitoring committee, one High Level Monitoring Committee headed by Foreign Minister and the other, Standing Monitoring Committee headed by Foreign Secretary for the observance of the code of conduct. Monitoring Committees can hold meetings as and when necessary.

CONCLUSION

Ethics and integrity stand at the core of everything we do. Today many changes have occurred in the diplomatic domain. Expectations of the citizens have changed. Public have become more aware about the diplomatic activities due to mass media and technological developments. Behaviors of the public officials, their conduct and the activities have been minutely monitored and scrutinized. If we continue to violate diplomatic code of conduct it will weaken our diplomatic strength and harm our national interest. It is our responsibility to maintain the public trust. Our success in achieving our mission i.e. to make our nation prosperous and enhance the international image depends on the following the diplomatic code of conduct. Integrity, truthfulness, dedication and honesty in our actions are most important. Diplomatic staff needs to be patient, respectful and courteous to all persons. Time and again it is heard that diplomatic code of conduct have been violated. Many activities and meeting with the foreigners are conducted without prior approval from the Ministry of foreign affairs. Presence of MOFA officials in the meeting will pay more respect and honor to our Very Important Persons (VIPs).

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[42] *Id.* No. 11.1-11.3.

Today, Foreign Ministry has to be strong. Public and Media have again and again stated that some distinguished people of foreign mission's based in Kathmandu meet with high ranking officials of Nepal without approval from Foreign Ministry. We should stop these kinds of activities. If we make our Diplomatic mission and foreign ministry strong it will enhance the dignity of our nation. Nepalese Citizens are to bring it to the notice of the monitoring committee if the diplomatic code of conduct is found to be violated. Further, when the nation is at the crisis we should pay more attention. Timely amendments to the diplomatic code of conduct is necessary. Let us stand unified towards abiding the Diplomatic Code of Conduct.

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International Law and The UN Peacekeeping Missions: Legal Implications of 'Robust' Peacekeeping Missions

Apurba Khatiwada*

ABSTRACT

As the UN Peacekeeping missions have become more robust since the end of the Cold War, the legal mechanisms in place to regulate the missions and to define accountability of members of UN Peacekeeping missions however have not changed. Additionally, expanded mission mandate has also meant that traditional command and control system are increasingly called into question. In this context, this paper has presented the possible legal and practical challenges of robust peacekeeping missions. Additionally, the paper identifies new legal questions that may arise in context of robust peacekeeping missions.

BACKGROUND

On 16 July 2014, the district court of the Hague found that the state of the Netherlands was responsible for the death of around 300 people in Srebrenica during the North Atlantic Treaty Organization's (NATO) operations in the former Yugoslavia in the late 90s.[1] Interestingly, the responsibility of the Netherlands for the deaths of 300 people in Srebrenica was not because of its direct act or omission, rather the responsibility was established for the conducts

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[1] The District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014.

of Dutch peacekeepers deployed in the region under the United Nations' mandated peacekeeping operations, the United Nations Protection Force (UNPROFOR). Prior to this decision by the district court, the Supreme Court of the Netherlands had also found the state responsible for the death of three individuals in similar circumstances.[2] These decisions were hailed as important steps in the effort to hold the UN peacekeeping operations accountable for their acts and omissions during peacekeeping operations around the world. Given the difficulty in identifying applicable international law and standards of conduct for peacekeepers and peacekeeping operations and in making peacekeepers accountable for their misconducts, these decisions suggest an important development in the area of responsibility of peacekeepers and UN Peacekeeping Operations (UNPKO).

Additionally, these cases were initiated for the acts and omission of the UN peacekeepers as criminal proceedings not only against the Troops Contributing State (TCS) but also the UN. While the decisions did not find the UN responsible for the conducts of the peacekeepers, the decisions did not reject the possibility of the same. In fact, the Dutch courts accepted, in principle, that instead of the Dutch state, it is possible for the UN to be held responsible for the conducts of peacekeepers.[3] The decisions from municipal courts of the Netherlands were in line with the decisions of the British and Norwegian courts and also the European Court of Human Rights in similar earlier cases.[4]

The development of international law of responsibility of International Organizations for internationally wrongful acts in the last decade has, in this situation, further raised the hope for justice of victims of UNPKO forces. Similarly, such development in international law is also likely to affect UNPKOs in general as the attribution of the conducts of UNKPOs to the UN may become possible.

Since the first observation mission of the UN in Kashmir (The United Nations Military Observer Group in India and Pakistan (UNMOGIP)), the UNPKOs have been a symbol of the UN's role in the maintenance of international peace and order. Particularly during the Cold War, UNPKOs, in many instances, served

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[2] *The State of the Netherlands v. Mehida Mustafic-Mujic et al.* & *The State of the Netherlands v. Hassan Nuhanovic*, (Case Number: 12/03324), September 6, 2013, http://www.asser.nl/upload/documents/20130909T125927-Supreme%20Court%20Nuhanovic%20ENG.pdf (accessed on December 23, 2015).

[3] The European Court of Human Rights (ECHR) had, however, in *Stichting Mothers of Srebrenica et al. v. The Netherlands* (Application no. 65542/12) (Decision on 17 June 2013), dismissed the petition as inadmissible owing to the UN's immunity from legal proceedings.

[4] *See* UKHL, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence,* UKHL 58 (007); ECHR, *Behrami and Behrami v. France,* 46 ILM 723 (2007) (Hereinafter Behrami Case); ECHR, *Saramati v. France, Germany and Norway*, 46 ILM 743 (2007) (Hereinafter Saramati Case).

to fill up the gap left in the collective security system owing to the disagreement between two super powers.[5] In fact, UNPKO is often taken as an example of the UN's reach in managing conflicts around the world. Developing and least developed countries like Nepal take pride in sending their armed forces to serve as members of the UNPKOs and in thus, contributing to the functioning of the UN.

The UNPKOs, however, have also had their fair share of controversy. Ineffectual missions in Rwanda and the former Yugoslavia, occasional accusation of human rights violations by the members of UNPKOs, uncertainty relating to applicable laws that regulate UNPKOs and a general accountability gap with regards to responsibility for the violations of international law by the members of UNPKOs have raised serious questions relating to the structural challenges and accountability of UNPKOs.

Additionally, the nature of UNPKOs has also undergone a telling change since its first mission, particularly after the end of the Cold War. Now, UNPKOs are generally "robust" with mandates including even that of the use of force. Such changes in the nature of UNPKOs have raised concerns relating to regulation, command and control system, and accountability of UNPKOs.

In this regard, the article deals with the international legal basis of holding UNPIOs and peacekeepers accountable for their acts during a mission. The article starts with the historical evolution of the nature of the UN peacekeeping mandates and sheds light on the present "robust" peacekeeping operations and their nature. The article then, discusses various international legal implications of robust peacekeeping operations in relation to international law of responsibility.

I. HISTORICAL DEVELOPMENT OF ROBUST PEACEKEEPING OPERATION

The UN Charter does not expressly address the issue of UN peacekeeping[6]. The UN peacekeeping practice developed primarily during the Cold War when the UN Security Council (UNSC) failed to ensure great power unanimity on questions relating to armed conflicts around the world. As a result, the UN General Assembly (UNGA) intervened through the "Uniting for Peace

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[5] John Terence O'Neill & Nicholas Rees, United Nations Peacekeeping in the Post-Cold War Era (2005).

[6] UN Secretary General Boutros Boutros-Ghali has defined peacekeeping operations as "the deployment of a UN presence in the field, hitherto with the consent of the parties, normally involving UN military and/or police and frequently civilians as well. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace." UN Secretary General, Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc. No. A/47/277; *See also* International Peace Academy, Peacekeepers Handbook 22 (1984) (Hereinafter Peacekeepers Handbook).

Resolution" of 1950 that essentially allowed the UNGA to seize the matter of international peace and order when the UNSC was not able to exercise its primary responsibility of maintaining international peace and order.[7]

The Uniting for Peace Resolution, therefore, became the source of legal authority for the establishment of peacekeeping operations by the UNGA. Later, an Advisory Opinion by the International Court of Justice (ICJ) in *Certain Expenses* case confirmed the legal authority of the UNGA to establish UNPKOs.[8] However, until the end of the Cold War, after when the UNSC started to mandate UNPKOs, the question of legality of UNPKOs remained contentious. Former UN Secretary General Dag Hammerskold famously stated that the UNPKOs are "Chapter Six and half actions", thus, pointing towards the difficulty in finding the exact legal basis of UNPKOs.

After the end of the Cold War, the UNSC assumed the responsibility of peacekeeping, which has, to a great degree settled the question of legality of UNPKOs. However, with the UNSC taking the main responsibility for UNPKOs, the distinction between peacekeeping and Chapter VII's enforcement action has been affected. Similarly, after the perceived failure of the UNPKOs in preventing Rwandan Genocide and the third Balkan War, expanding of the traditional mandate of UNPKOs became a persuasive agenda. As a result, UNSC mandated UNPKOs started to have mandates that were more reflective of Chapter VII as opposed to equivocal "chapter six and half" mandates. The UNPROFOR in Croatia and Bosnia-Herzegovina and UNOSOML[9] and UNOSOM II[10] in Somalia demonstrate this change in the role and nature of UNPKOs.[11]

UNPROFOR[12], which was established by the UNSC according to Chapter VII, was given mandate that went beyond the traditional mandate of UNPKOs. It was authorized to "create the conditions of peace and security required for the negotiation of a settlement"; "to use force to secure the delivery of humanitarian aid", and enforce "no-fly zones to protect Bosnian Muslims."[13] UNPKOs missions in Kosovo (UNMIK)[14] and East Timor (UNTAET)[15] went

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[7] UN General Assembly, *Uniting for Peace,* Res. 377 (V), November 1950, UN Doc A/1775.
[8] *See* ICJ, Advisory Opinion, *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter*), ICJ Rep 151 (1962).
[9] UN Operation in Somalia, UN Security Council Res. 733 (23 January, 1992).
[10] UN Operation in Somalia II, UN Security Council Res. 814 (26 March, 1993).
[11] *See* Christine Gray, *The Use of Force and the International Legal Order, in* INTERNATIONAL LAW640 (Malcolm D. Evans ed., 2010).
[12] UN Protection Force, UN Security Council Res. 743 (February 21, 1992).
[13] UN Department of Public Information, United Nations Protection Force: Former Yugoslavia (1996), http://www.un.org/en/peacekeeping/missions/past/unprof_b.htm (accessed on December 22, 2015).
[14] UN Interim Administration Mission in Kosovo, UN Security Council Res. 1244 (June 10, 1999).
[15] UN Transitional Administration in East Timor, UN Security Council Res. 1272 (October 25, 1999).

further ahead as they became a part of the UN administration of the territory. Similarly, the UN is also trying to broaden UNPKOs missions to focus on the protection of civilians like in case of the United Nations Mission in Sierra Leone (UNAMSIL),[16] thus, opting to give such mandates to UNPKOs that go beyond traditional mandates.

The creation of the "intervention brigade" as a part of the MONUSCO[17] in the Democratic Republic of the Congo (DRC) is perhaps the most distinct example of this trend. The UNSC Resolution 2098 (2013) has authorized the intervention brigade to undertake "targeted offensive operations...with the responsibilities of neutralizing armed groups". The intervention brigade has also been tasked to "prevent the expansion of all armed groups...and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities." A similar broad mandate has also been given to the UN peacekeeping mission in Mali (MINUSMA).[18]

Another example of the blurring of the divide between Chapter VII's intervention and robust UNPKOs is the UNPKO in Cote d'Ivoire. MINUCI/UNOCI operated with peacekeeping mandate along with French troops that had Chapter VII's enforcement mandate. However, after the civil war erupted in the country following presidential elections, the UNSC broadened the mandate of the UNOCI to authorize the use of force. After which along with the French troops, UNOCI attacked the incumbent President's stronghold.[19]

In short, the mandates given to the intervention brigade of the MONUSCO along with UNPROFOR, UNOSOM I & II, UNMIK, UNTAET, UNAMSIL, MINUSMA go beyond the traditional principles of UNPKOs that were delineated by "impartiality, consent of the host state, use of force only in the form of self-defence."[20] Additionally, Murphy observes that "the traditionally passive role of peacekeepers has been replaced by a more active role of peacemaking, involving, *inter alia*, national reconstruction, facilitating transition to democracy, and providing humanitarian assistance."[21] As such, UNPKOs

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[16] UN Mission in Sierra Leone, UN Security Council Res. 1270 (October 22, 1999).

[17] UN Organization Stabilization Mission in the Democratic Republic of the Congo, The UN Security Council Res. 2038 (March 28, 2013) (Hereinafter MONUSCO).

[18] UN Multidimensional Integrated Stabilization Mission in Mali, The UN Security Council Res. 2100 (April 25, 2013).

[19] *See* Nicolas Cook, *Cote d'Ivoire's Post-Election Crisis*, Congressional Research Service, (2011), http://fpc.state.gov/documents/organization/156548.pdf.

[20] The UNSC resolution 2098 does mention that the intervention brigade shall carry out its function "without creating a precedent of any prejudice to the agreed principles of peacekeeping". However, it is difficult to reconcile the mission mandate with the traditional principles of impartiality and the use of force only in self-defence. *See* MONUSCO, *supra* note 17.

[21] Ray Murphy & Katarina Mansson, *Perspectives on Peace Operations, in* Peace Operations and Human Rights 1 (Ray Murphy et al. eds., 2009).

today are unlike traditional UNPKOs and have broader presence and mandate on the ground leading to increased risks faced by peacekeepers as well as that of peacekeepers abusing their mandate.

II. ENSUING LEGAL QUESTIONS OF 'ROBUST' PEACE KEEPING OPERATIONS

The legality of peacekeeping operations is perhaps only an academic question. The use of Chapter VII mandate since the end of the Cold War has largely filled up the possible gap of legality that might have arguably existed when Chapter VI mandate was used during the Cold War. Be that as it may, the question of legality of peacekeeping operations in the present stems from the nature of the peacekeeping operations. Increasing use of robust mandate that borders on Chapter VII enforcement/use of force has posed a difficult question in regard to the traditional nature of the UNPKOs that were based on consent, neutrality and minimum use of force. As such, some of the present UNPKOs have lost their traditional characteristics, therefore, raising possible questions mainly relating to accountability of the UNPKOs. Additionally, there is an increasing challenge to ensure that the legal framework that was largely created in context of traditional UNPKOs is also reformed in order to reflect the developments in the nature of UNPKOs.

The first legal question in this regard relates to the possibility of treating or considering peacekeepers as parties to an armed conflict. In traditional UNPKOs, the principle of neutrality meant that UN peacekeepers were simply a neutral force that had limited mandate that did not allow use of force, save for self-defense. As a result, the UN did not (still does not) consider peacekeepers as parties to armed conflicts.[22]

Be that as it may, with robust mandates that even authorize the use of force to achieve the mandate's objectives, like in the case of MINUSMA, MONUSCO, MINUCI/UNOCI, it is increasingly difficult to not see UN peacekeepers as parties to the relevant armed conflict. Consequently, peacekeepers, being a party to an armed conflict, unlike non-combatants, may become military targets according to international humanitarian law. Additionally, peacekeepers will also have specific obligations under international humanitarian law treaties as opposed to general application of international humanitarian law as suggested by the Secretary General's Bulletin on Observance by United Nations' Forces of International Humanitarian Law.[23]

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[22] UN Secretariat, Secretary-General's Bulletin, Observance by United Nations Forces of International Humanitarian Law, UN Doc No. ST/SGB/1999/13, Section 1.2 (6 August, 1999) (Hereinafter Secretary General's Bulletin).

[23] *Id.*

The second legal question relevant in this regard relates to the responsibility for the violation of international law by peacekeepers. According to the present UN command and control system in relation to UNPKOs, peacekeepers are under the command and control of national commanders as well as the operational command of the UN force commander.[24] The division of command and control in UNPKOs is mainly due to the reluctance of a few TCS to allow their troops to be commanded by UN force commander. For example, Canadian law does not allow Canadian troops to be subjected under the command of anyone other than a Canadian commander.[25]

In order to avoid the possibility of multiple sources of command and to maintain unity of command; in practice, the UN force commander's office transmits directives to the national commander who then passes the directives on to the peacekeepers under his/her control.[26] This process allows TCS to remain in full control of its peacekeepers while also ensuring that the UN's command over the operations remains unaffected by the division of command. Nevertheless, the present system of command and control makes real the possibility of confusion with regard to ultimate responsibility. That is, the present command and control system may confer responsibility to both the UN and the TCS according to the rule of attribution in international law.

In *Behrami and Behrami v. France*[27] and *Saramati v. France, Germany and Norway*,[28] the European Court of Human Rights held that the conduct of peacekeepers under the NATO force in Kosovo and the UNMIK could be attributed to the United Nations.

The recently adopted UN General Assembly resolution on the law of responsibility of international organizations[29] also suggests the possibility of attributing the conducts of UN peacekeepers to the UN. A general reading of the rule of attribution provided in the Responsibility of International Organizations indicates that the UN can be attributed for the conducts of UN peacekeepers, as long as the UN (through the force commander) exercised effective control

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[24] H. McCoubrey & Nigel d. White, The Blue Helmets: Legal Regulation of UN Military Operations 144 (1996).

[25] Gilles Létourneau, Dishonoured Legacy: The Lessons of the Somalia Affairs, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1 Structure and Organization of the Canadian Forces, 3 (1997); Ray Murphy, UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice 135 (2007).

[26] Peacekeepers Handbook, *supra* note 6, at 362.

[27] Behrami Case, *supra* note 4.

[28] Saramati Case, *supra* note 4.

[29] UN General Assembly, *Responsibility of International Organizations*, Res. A/RES/66/100, 9 December, 2011.

over the conducts of the UN peacekeepers.[30] However, the official position of the UN on this issue seems to be unclear as the Secretary General's Bulletin only provides that "in case of violations of international humanitarian law, members of the military personnel of a United Nations' force are subject to prosecution in their national courts."[31] The Bulletin does not seem to clearly define the concept of command responsibility and the rule of attribution, mainly in light of multiple sources of command and control over peacekeepers.

It follows, therefore, that with the lack of an international accountability mechanism, the legal obligation of TCS to carry out national investigations and prosecutions may not be fully effective. Furthermore, privileges and immunities accorded to UN officials and technical staffs in UNPKOs, including the force commander and higher officials, makes it further difficult to fill up the accountability gap that is likely to become apparent in the context of robust peacekeeping operations.[32] Even when applying the Responsibility of International Organization's attribution rule, clarity in the command and control system is essential, as presently there is a room for debate with regard to who has effective control over peacekeepers.[33]

The third legal question relates to the applicable law in UNPKOs with robust mandates. The UN Secretary General's Bulletin makes it clear that UNPKOs shall apply international humanitarian law during their engagement. However, the Bulletin leaves the question of applicability of international human rights law entirely up to the TCSs and the host state. This lack of clarity in the application of international human rights law during UNPKOs and general lack of definition of human rights obligations of UNPKOs is problematic, especially when their mandate is becoming more robust and vague. Additionally, human rights obligations, by their very nature, can be multidimensional in the sense that questions like derogation, positive and negative protection of human rights, reservation of human rights obligations by TCS or host state etc. may invite confusion in the application of international human rights law by UNPKOs. Such confusion, amid lack of common human rights standards, with regard to UNPKOs, signal a broader accountability gap and impunity.

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[30] *See id.* Art. 7. Article 7 reads, "Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization: The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

[31] Secretary General's Bulletin, *supra* note 22, Section 4.

[32] Andrew Ladley, *Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations*, 1 Politics and Ethics Rev. 1, 81-90 (2005).

[33] *See also* Report of the Panel on United Nations Peace Operations, UN Doc No. A/55/305–S/2000/809, 10-11 (21 August, 2000).

Finally, the developments in the nature of UNPKOs have raised important questions regarding the basic principles of UNPKOs (consent, neutrality and use of force in self-defence). Indeed, while the principles may provide guidance for ensuring a successful UN peacekeeping operation, neither do they have any formal legal status nor have they been explicitly adopted by the UNSC. However, use of force issue is not just legally important but also politically sensitive. In this sense, the lack of certainty in principles may impact operational effectiveness and leave members of military and police contingents open to criticism for failing to act or acting contrary to the legal limitations on the use of force.

Formally, UNPKOs are still treated on the basis of the basic principles developed in entirely different context. As a result, there is a difference between practice and principles. As such, the gap that is present in practice and principles can have a real and negative impact on decisions made in UN peacekeeping operations, often with unfortunate consequences including harm to civilians and increased risks to peacekeepers.

CONCLUSION

With the increasingly robust mandates, UNPKOs have greatly evolved in the last 65 years, principally so in the last twenty-five years. However, the law and policies governing UNPKOs have not been able to keep pace with such developments. As a result, there is a grave threat of lack of normative guidance and accountability gap in UNPKOs. With robust mandates it is essential that command and control system is reformed to ensure not only unity of command and therefore, effectiveness of UNPKOs but also clear delineation of responsibility for the conducts of peacekeepers. Similarly, there is a need to clarify applicable international law during robust UNPKOs and to create international/UN mechanisms, whereby wrongful conducts of peacekeepers are adequately addressed to ensure accountability of UNPKOs.

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Climate Change and Emission Reduction: Nepalese Position

Subrata Lamsal*

ABSTRACT

Climate Change is no more an uncertainty; it has become a harsh reality. States developed, developing and least developed are facing the negative consequences of this change. In this regard, states all over the world have started with their goals of emission control as prescribed by the International Climate regime set by UNFCCC and Kyoto and now the Paris Declaration. However, the constant blame game is still existent in this, with the developed world demanding equal action from developing for mitigation, while the latter continues to deny its role as an emitter controller, as it stresses more on the historical role of countries. Least Developed Countries (LDC) like Nepal have fairly any say in the International Climate regime. However, this does not curb out the risks to which Nepal as a mountainous LDC is subjected to. Climate change has begun showing its ramification in many LDC. Nepal alone is at a very high risk of Glacial Lake outburst; likewise Small Island nations are at a very high risk of submersion. In this regard, it is of immense importance that these LDCs forward their own agendas in the international forum and actively participate in emission reduction and trading schemes. For a country like Nepal, which has vast amount of forest resources, the role of emission reduction and trading is viable through various plans and programmes, including REDD and REDD+.

INTRODUCTION

Climate change is a "significant and persistent change in the mean state of the climate of its variability," caused by changes in the environment, including "anthropogenic modification of the atmosphere."[1]During the 1980s, scientific consensus emerged that concentrations of greenhouse gases in the

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[1] US Global Change Research Program, Climate Literacy: The Essential Principles of Climate, 14(2009)

earth's atmosphere were rising. These gases include carbon dioxide, methane, water vapour and various other oxides. The term greenhouse' refers to the fact that the gases permit radiation from space to pass through to the earth's surface but trap reflected radiation and its energy, thus heating the atmosphere. Carbon dioxide (CO_2) gained the most attention as it was assumed to arise from burning fossil fuels and was the anthropogenic gas which had the greatest impact on global warming after its concentration in the atmosphere rose to about 380 parts per million, which is more than a third higher than the pre-industrial revolution level. Scientific experts are around 90 percent certain that the rise in CO_2 levels is due to human activities, and caused the observed rise in global temperatures of around 0.74° C in the last century. At projected rates of build-up of greenhouse gases, warming is likely to continue at the historical—or perhaps somewhat higher—rate and induce changes in climate that are expected to reduce global GDP (Gross Domestic Product) by up to five percent.[2]

Climate change represents a considerable policy challenge. In its latest report on climate change the Intergovernmental Panel on Climate Change (IPCC) stated that "warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global mean sea level".[3] Furthermore the authors of the report argued that "most of the observed increase in globally averaged temperatures since the mid-20th century is very likely [with greater than 90 per cent probability] due to the observed increase in anthropogenic greenhouse gas concentrations"

After the release of the report '*Climate Change 2014: Impacts, Adaptation and Vulnerability'* by IPCC,[4] Rajendra Pachauri, IPCC Chairman said, "Nobody on this planet is going to be untouched by the impacts of climate change." Similarly, one of the authors of the report, Dr. Saleemul Huq stated, "Before this we knew this was happening, but now we have overwhelming evidence that it is happening and it is real."[5] In the past as well, IPCC in its meeting in Stockholm, affirmed the outcomes of its report entitled '*Climate Change 2013: The Physical Science Basis'* concluding that "Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are

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[2] Nicholas Stern, HM Treasury, Sterm Review: Economics of Climate Change, 55-143 (2007).

[3] IPCC, Climate Change 2007: The Physical Science Basis, Summary for Policymakers, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 1, 23-71(2007).

[4] Rajendra K. Pachauri & Louis A. Meyer, IPCC, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 2, 39-112(2014).

[5] Matt McGrath, *Climate Impacts 'Overwhelming'- UN*, BBC News, March 31, 2014, http://www.bbc.com/news/science-environment-26810559.

unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased."[6]

Extensive media coverage of climate issues around the world suggests that governments and the people they represent are ready for action and yet progress towards a truly global, efficient and effective response has been slow. In an attempt to slow down and stabilize the pace of climate change most countries have signed and ratified the Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC).

The Kyoto Protocol is system based on a "cap and trade" approach that sets targets for the reduction of greenhouse gases (GHG) and facilitates the trading of permits to emit GHGs between countries and individual entities. The existence of a trading mechanism allows most GHG abatement to occur in those sectors of the economy or in those countries in which it is cheapest. Although the Kyoto Protocol[7] represents a major step towards a global policy on greenhouse gas emissions, the protocol has not been ratified by the world's largest emitter of GHGs: the United States. The refusal by the United States and Australia to ratify the protocol has been viewed by many as an indication that neither government is serious about climate issues. However, economic theory suggests that quantity based permit systems like the Kyoto protocol are the most efficient way to achieving the cap on GHG emissions only under certain conditions.[8] Conversely, the theory implies that under a different set of conditions and under uncertainty there may be more efficient approaches to GHG emissions policy. Using these and other economic arguments the US and Australia have criticized the Kyoto protocol.

The international carbon market grew to US$30 billion compared to US$10 billion in 2006. Briefly, carbon trading occurs both within and outside the framework set up by the Kyoto Protocol through two types of carbon permits. GHG emission allowances are permits created and distributed under cap and trade regimes such as the European Union Emissions Trading Scheme (EUETS) which operates under the Kyoto Protocol.[9] European Union Allowances (EUAs) are permits to emit carbon dioxide issued by regulatory bodies, usually EU

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[6] IPCC, WGI AR 5 Summary for Policy Makers 2, 4-29 (2013).

[7] Peter J. Wilcoxen & Warwick J. Mckibbin, Climate Change Policy After Kyoto: A Blueprint for a Realistic Approach 5-20 (1st ed. 2002).

[8] George Milunovich et al., *Carbon Trading: Theory and Practice,* 3 The Finish J. of Applied Finance3, 3 (2007).

[9] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22, Art.17 (Hereinafter Kyoto Protocol).

state governments, whose total quantity is fixed under a trading scheme.[10] Project based permits, on the other hand, are emission credits generated from projects that reduce GHG emissions compared to a no-project scenario. Project based permits are derived from two main sources: the Clean Development Mechanism (CDM) and the Joint Implementation (JI)[11] initiative. CDM[12] is an arrangement within the Kyoto Protocol allowing industrialized countries with a GHG commitment to invest in emission reducing projects in developing countries.[13] China, India and Brazil provided most of the CDM carbon credits in 2006.[14]

Developing country interest in emissions trading is not limited to the potential for new export earnings. Achieving the goals set at Kyoto will change patterns of consumption and production within Annex B nations; and these changes will have inevitable effects on the flows of internationally traded goods.[15] As a result, developing countries will be affected through conventional trade linkages with the Annex B countries; however, these effects, both favorable and unfavorable, will be diminished to the extent that emissions trading reduce the cost of achieving the Kyoto targets.

Carbon intensity is the pathway that really matters in the next round of global climate negotiations.[16] Nations do not size their economic aspirations to their carbon goals. They project how big an economy they anticipate or desire and set a more or less ambitious goal for reducing its carbon intensity with efficiency, renewable, or other programs. Climate scientists then translate these commitments into total greenhouse pollution, and tell us how far we are from where we need to be multiplying promised intensity by projected economic size. But what nations actually alter through climate policy is the carbon intensity, not the size, of their future economy. Clearly, however, the cheaper clean energy gets, the smaller such a premium becomes. So the conversation then shifts to "how do we make clean energy cheaper for poor countries?" a question to which there are many win-win solutions, since most of them make energy cheaper for OECD nations as well. (There is still the problem of paying for the damages caused by climate disruption already occurring, what about polluter paying?)

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[10] Mathew Carr & Saijel Kishan, *Europe Fails Kyoto Standards as Trading Scheme Helps Polluters*, Bloomberg News, July 16, 2006, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awS1xfKpVRs8.

[11] Kyoto Protocol, Art. 6.

[12] *Id.* Art.12.

[13] Radoslav S. Dimitrov, *Inside UN Climate Change Negotiations: The Copenhagen Conference*, 27 Rev. of Policy Research 795, 795-821 (2010).

[14] Karan Capoor & Philippe Ambrosi, The World Bank, State and Trends of the Carbon Market 8, 11-19 (2007).

[15] Tamra Gilberstson & Oscar Reyes, Carbon Trading: How It Works and Why It Fails 15 (1st ed. 2009).

[16] Anshu Bharadwaj, *Carbon Counting*, 42 Economic & Political Weekly 13, 13-15 (2007).

In this regard the need for international co-operation in forest conservation and other alternative sources of energy is vital. This has been furthered with progressive development in UNFCCC in relation to various issues like reducing emissions from deforestation and forest degradation in developing countries as well as the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+).

I. NEPAL AS A LEAST DEVELOPED COUNTRY (LDC): LEGAL AND POLICY POSITION AND PROGRAMMES

Although, Nepal as a country is not a significant contributor to climate change, it stands as fourth most vulnerable countries to the effects of climate change. Being a mountainous country, which is geographically so diverse, climate change has begun showing its impact on Nepal. Twenty glacier lakes are highly threatened of outburst, there is expansion of glacier lakes, ice caps are melting, unannounced and irregularity in rainfall has caused flash flood and drought. Likewise, changes in precipitation patterns have hit the agricultural calendar in various ways and have also changed the forest vegetation thereby disrupting the ecosystem and food chain. The incidence of climate induced diseases like *Kalaazar,* Japanese Encephalitis and Malaria has taken a sharp toll in Nepal.[17] With the rising uncertainty and frequency of these events, it is imperative that Nepal through its diplomatic mechanism ensures fair play in the idea of common but differentiated responsibility. Likewise, with the decade long armed conflict in the country followed by a massive earthquake, it has become further pressing to sharpen our negotiation tools.

Historically, developed countries have been responsible for GHG emission and global climate change, which was later joined by bigger developing countries. However, the position of LDC does not fall within either of them. Despite the existence of G77, the standing that LDCs hold is to a larger extent different from that of developing world. As even at present the emission that LDCs contribute is minimal while that of developing countries has raced up with that of developed world. In this light, LDCs like Nepal are most vulnerable as they have not yet developed to an extent to be well prepared for adaptation and are overshadowed by the voices of developing world, whose entire focus lies on developing themselves than ensuring climate justice which they have time and again advocated for in most of international negotiations. This led LDCs to form their own concert for their own voices distinct from that of developed and developing world, as the needs and wants of LDCs are different from the others.

[17] Government of Nepal, Ministry of Forests and Soil Conservation, REDD Forest and Climate Change Cell, REDD+ in Nepal: A Brief Introduction, (2014).

In the issue of climate change and carbon trading the standing of developed, developing and least developed countries varies. There exists a group of 48 LDCs, of which Nepal was the chair in 2013 and 2014. This group has been forwarding the issue from a LDC point of view and has proposed that the world temperature should be maintained at 1.5° Celsius and that LDCs should be allowed to keep their development goals in the forefront. The need of involvement of LDCs is of immense importance to mitigate the problem of climate change, for this end each country has their own standing as per its needs.

For most of the LDCs which have undergone conflicts and crisis are in dire need of meeting their development goals so as to be able to cope up with the problems arising from climate change. Unlike well adopted and equipped countries, LDC population is most susceptible to the negative impacts of climate change. Barnett holds that violent conflict destroys and damages the resources and institutions needed to buffer populations from biophysical changes.[18] Displaced populations, reduced food production, destroyed infrastructure, disrupted internal and external markets, and other features of post-conflict societies already render populations vulnerable to natural occurrences of droughts, floods, and other climate related events. Climate adaptation strategies and funds, he argues, should incorporate the immediate needs of post-conflict societies, as these measures can help regenerate some of the social, ecological, and human capital needed to cope with climate change impacts.[19]

As a member state of UNFCCC, Nepal submitted its first CDM project (Bio gas Project) in 2005, which was rejected for its technological drawbacks. After rounds of negotiations, finally in 2011 CDM Executive Board (EB) for Certified Emissions Reduction (CER) acting pursuant to Article 12 of Kyoto issued CERs for two biogas CDM projects in Nepal. In 2007, Nepal proposed for National Adaptation Program of Action (NAPA) to the LDC fund, thereby designating UNDP as its Global Environment Facility (GEF) implementing agency.[20] 2008 onwards Nepal has been representing Asian LDCs in LDC Expert Group (LEG) as well as preparing programs for NAPA and arranging fund for its implementation. From 2008-2010 Nepal acted as a Rapporteur to Subsidiary body for Scientific and Technical Advice (SBSTA). Likewise, for 2013 and 2014 Nepal chaired LDC co-ordination group formed by 48 LDC parties to UNFCCC.[21]It emphasized on various legal principles like: Common but

[18] W. Neil Adger et al., Fairness in Adaptation toClimate Change 10-25 (2006).

[19] Jeannie Lynn Sowers, *The Many Injustices of Climate Change*, 7 Global Environmental Politics 140, 140-46 (2007).

[20] Batu Krishna Uprety, *Climate Change Negotiation: Understanding the Process, in* Climate Change & UNFCCC Negotiation Process 1, 1-12 (2012).

[21] Government of Nepal Ministry of Science, Technology and Environment, Collection of Submissions by Nepal on behalf of Least Developed Countries (LDCs) Group to the United Nations Framework Convention on Climate Change (UNFCCC), Secretariat, (2013 -14).

differentiated responsibility and respective capability, equity, inter-generational equity, right to development, principle of free trade, precautionary principle and polluter pays principle.

At national level, a Climate Change Council was formed in 2009, promising to make climate change a national development agenda. Likewise, it aimed at initiating and co-coordinating activities so as to derive benefit from international negotiations and decisions related to climate change. In 2011, GON established a Climate Change Co-ordination Committee under MoEST in order to ensure proper co-ordination of climate resilience pilot programs. In 2010, Multi stakeholder Climate Change Initiatives Co-ordination Committee (MCCICC) was formed, in order to promote functional level co-ordination amongst stakeholders and organizing activities to address impacts of climate change. Likewise, in 2010 GON established a Climate Change Management Division in MoEST, it comprises of three sections viz. Climate Change Section, Climate Change Council Secretariat Section and Clean Development Mechanism Section. Similarly, Ministry of Forests and Soil Conservation has established REDD-Forestry and Climate Change Cell.

A. Programme: Reduction of Emission from Deforestation and Forest Degradation (REDD) and REDD+

Scientifically, it has been proven that CO_2 contributes the most towards climate change. Similarly, the ecological functioning outlines the role of forests in absorbing the emitted carbon. Forests Act as carbon sink as they soak in carbon from the atmosphere and can store it for a longer period of time if maintained properly. Thereby helping to control and mitigate climate change. Forest plays dual role of both increasing and decreasing the amount of CO_2 in atmosphere, depending on its maintenance and use. Its protection helps control the amount while its destruction leads to increased emission of carbon in the atmosphere. In this regard, developed countries have been encouraging developing and least developed countries to continue such effort by providing them with economic incentives. This concept is known as REDD. REDD aims at controlling forest degradation and deforestation, sustainable maintenance and management of forests, conservation of forest carbon and increasing carbon accumulation in forests.

The economics of REDD lies on historic role of developed world in contributing towards climate change. That obliges the developed world to cut down their carbon emission. Meanwhile, making them liable to compensate the poor countries for latter's role in contributing as carbon sink through the protection and conservation of their forest resources. As well as equally suffering from

the adversities induced by climate change on their unprepared vulnerable population.

CDM, which emanated under Kyoto, confined afforestation and reforestation to carbon trading sidelining the role of REDD. CDM did not show much progress as it was focused much on larger developing countries like India and China while the role of LDCs like Nepal remained almost nonexistent. In 2005, when Costa Rica and Papua New Guinea proposed the concept of REDD in Montreal, Canada, the role of LDC was identified. In 2006, the role of REDD was confirmed by Stern's report which was forwarded a year later in 2007 in Bali. Later, in 2010, when the role of REDD was extended from control of forest degradation and deforestation to long term forest management, forest carbon conservation and increased forest carbon accumulation it was termed REDD+. Cancun Agreement identified REDD+ as:

a) Decreasing carbon emission from forest destruction and deforestation
b) Protection of forest carbon
c) Long term and sustainable management of forest
d) Increase in carbon accumulation

REDD+ required LDCs to control forest degradation and deforestation and improve the condition of forests thereby enhancing forest carbon stocks. Thereafter, the reduction in carbon emission or increase in carbon accumulation was calculated and certified. On the basis of this, developed world would make payments to LDCs. There are three known stages to REDD+ as: Readiness which refers to development of national plans, policies, strategies; Demonstration refers to the implementation of REDD+ strategy supported by various funds and modes of payment and continued implementation that seeks for sustainability of the program.[22] REDD+ mechanisms are expected to employ results based approaches where developed countries pay the developing countries for reducing forest loss rate below an established baseline or for increasing forest carbon stocks.[23]

State parties to the UNFCCC have adopted REDD as an effective mitigation measure to climate change. Many developing countries and LDC including Nepal have been carrying out pilot projects on REDD. Nepal has also acquired UN-REDD membership and has been actively involved in integrating REDD policies in its system. REDD is considered as the fastest, cost effective and the cheapest means of controlling carbon emission through minimization of

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[22] Tara Prasad Sapkota, *REDD Plus Mechanism: Opportunities and Challenges for Nepal*, 25 Nepal L. Rev. 69, 69-76 (2013).

[23] Kathleen Lawlor et al., *Institutions and Policies to Protect Rural Livelihoods in REDD Regimes*, 10 Global Environmental Politics 1, 1-11 (2010).

deforestation and forest degradation. While implementing REDD, technical factors like monitoring, reporting and verification- MRV is of vital importance, as only when forest carbon is measured according to the standards set by IPCC will it be certified and accepted for carbon trading.

Nepal, a country rich in forest resources has a newer way of looking into the idea of Carbon trading. As proposed by LDC and developing countries, in the form of REDD. There are several causes for deforestation and forest degradation.

With Nepal stepping into reducing emission from forest degradation it has opened up new avenues for benefitting from carbon trade. Nepal has adopted REDD plans and policies, Readiness Plan Idea Note (R-PIN) thereby initiating REDD+ program in Nepal. Readiness Preparation Proposal (R-PP) the basis for entering into carbon trade is now being implemented. It was approved by the forest carbon partnership facility of the World Bank (WB) in 2010. With the assistance of WB, Nepal has been on the forefront of adopting Emission Reduction Plan Idea Note (ER-PIN) to further REDD demonstration work. Despite the exclusion of REDD in Kyoto it has been scientifically proven that forest acts as a carbon sink, thus developing and least developed countries stressed on the need to recognize REDD during COP13 in Bali in 2007. The environmental impact of REDD is not local but rather regional or international in its character. For LDC like Nepal rich in forest resources the role of REDD in forwarding carbon trade is indisputable. However, there needs to be a change in structure of the governing system, i.e., it needs to move to a more liberal and stakeholder ownership role rather than strict governmental closed door functioning.

In order to strengthen carbon trading through REDD, Nepal needs a collaborative functioning of its various ministries. The focal point of UNFCCC in Nepal, Ministry of environment looks into the matter of environment conservation and REDD however, it has not been able to mobilize the community, which is vital for the program to succeed. On the other hand, Ministry of forest and soil conservation has active local community networks, but has almost no say in national and international policy making level in regard to UNFCCC's REDD.[24]

Nepal has been actively participating in the Forest Carbon Partnership Facility (FCPF) program of World Bank. Apart from the World Bank's FCPF on REDD, there are other alternative schemes such as the UN's REDD, Australia funded climate change program; Norwegian funded carbon program and so on. Nepal

[24] Bharat Pokharel & Jagadish Baral, *From Green to REDD, from Aid to Trade: Translating the Forest Carbon Concept into Practice*, 8 J. OF FOREST & LIVELIHOOD 37, 37-40 (2009).

should adopt methods to be able to mobilize these programs so as to make the best possible choice from amongst them.

The move towards REDD and REDD+ has helped LDC like Nepal put monetary value on its standing forest resources. This has opened a new prospect of earning billions of dollars in the form of carbon credits, from industrialized world to LDCs practicing REDD and REDD+.[25] After the acceptance of Nepal's ER-PIN for its first subnational REDD+ project that constitutes 12 districts of Terai Arc Landscape (TAL) in 2014, it is in the pipeline for carbon fund.[26] However, in order to qualify for performance based payments countries need to meet the outlined emission reduction; mere implementation of ER program does not suffice to receive the payment.

Nepal ratified the UNFCCC on May 1994 while it acceded to Kyoto protocol in 2005. For Nepal, the possible extension of co-operation under these convention and protocol is associated with national capacity building, technology transfer and additional new investments that Nepal is entitled to receive under Principle 4.8 of UNFCCC. Also, there is the possibility of CDM in order to promote adaptation and mitigation measures while at the same time achieving sustainable economic growth necessary to meet the basic needs of its people. As a LDC, Nepal is entitled to various kinds of assistance from developed countries. It is entitled to receive technology and fund transfer taking into consideration its special needs and situations. Likewise their concerns and needs are to be taken into consideration and at the same time assisting them to strengthen their research capability and resources. Further, they shall be assisted in education and other training programs that seek to foster their ability to march in the path of green development. Moreover, developed countries are obliged to provide financial assistance to LDC for capacity building.

Meanwhile, meaningful engagement and effective participation of developing and least developed countries and their forest management communities in international climate negotiations as well as national REDD+ policy formulation is vital.

At the UN level, there is the existence of least developed countries fund (LDCF) which requires the affluent north to help south develop adaptive technology and transfer necessary funding for the same. This has introduced and supported the idea of National adaptation programs of action (NAPA) that focuses on country driven approach. Similarly, the adaptation fund that is transferred to LDC in order to help them adapt to climate change, is equally important.

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[25] MoEST, GON, Nepal Thematic Assessment Report: Climate Change (2008).

At national level, it is imperative that the voice of local community is equally heard while formulating REDD+ strategies, plans and policies. This can only be ensured when communities are well aware of economic and technical rationale, likely tradeoffs and benefits that they could derive from the forests through REDD+.[27] In the long run, it would have a positive impact on both REDD+ scheme and communities socio- economic development. All in all, it is of immense importance that while implementing REDD+ both global knowledge and information and grass root issues and concerns in REDD+ be considered.

a. NAPA and LAPA

If we are to see statistically, the amount of GHG emission contributed by Nepal is insignificant. However, with the climate change affecting its population, Nepal has been developing and implementing various programs in order to adapt to it. The major programs are: NAPA and LAPA.[28] NAPA is a country driven consultative process that seeks to deal with adaptation issues induced by climate change especially designed for LDC. Unlike National Adaptation Plan (NAP) that focuses on mid and long term adaptation needs and is for both developing and least developed countries, NAPA focuses on immediate and urgent adaptation needs. It encompasses the role of multiple stakeholders and experts looking into 6 different thematic areas. In the context of Nepal, it began in May 2009 and was completed in September, 2010. NAPA though is a broader country wide process it seeks to promote community based adaptation through integrated management of agriculture, biodiversity, forest and water. It further seeks to help vulnerable communities build and enhance adaptive capacities through improved system and access to service for agricultural development. Also, it emphasizes on community based disaster management in order to facilitate climate change adaptation. It basically intends to protect people, livelihoods and ecosystem from adverse impacts of climate change. LAPA on the other hand is a process, also foreseen by Climate Change Policy 2011, which is a means to implement NAPA thereby integrating adaptation options into development policy and planning processes. It was initiated in mid-2010, and involves multiple stakeholders. It primarily aims at capacitating communities to understand the vicissitudes of climate conditions in future, ensuring their active engagement in developing adaptation priorities. Meanwhile it lays emphasis on implementing flexible climate resilient that is responsive to the

[26] Yadav Prasad Kandel, Youth Alliance for Environment, *Present Status and the Way Forward in Designing and Implementation of the First Subnational REDD + Project of Nepal*, IN REDD+ READINESS IN NEPAL, 11-28 (Ramesh Prasad Bhusal ed., 2014).

[27] R. Roy et al., Forest Action Nepal, Grassroots Capacity Development for REDD+: Approaches and Key Lessons from Nepal 5, Policy Brief No. 31, (2014).

[28] GON, MoEST, Adaptation to Climate Change NAPA to LAPA, (2010).

changes and facilitating multi-sectorial integration for the same. The modality of this program is bottom-up approach which is inclusive, responsive and flexible.

B. Policy: Nepalese Climate Change Policy 2011

The policy incorporates measures for climate adaptation and disaster risk reduction, by prioritizing programs like NAPA and other longer and short term adaptation programs. Likewise, it sought to enhance socio-economic development and income generating measures through proper adaptation policies. Similarly, it aimed at developing early warning system, taking proper preventive measures, mobilizing local knowledge and communities for adaptation and mitigation. Also, it sought to develop multilateral co-operation to ensure the efficacy of adaptation measures. Another focus area of the policy is in low carbon development and carbon resilience. For this end, the policy aims at adopting low carbon emission and climate resilient sustainable development path. Thereby, formulating necessary strategies, guidelines and working procedure to support sustainable socio- economic development both at national and local level. Moreover, it seeks to find alternative clean energy mechanisms and possible technology transfer and assistance for the same. Further, it looks forward to establishing carbon fund through both internal and external sources.

Likewise, it seeks to promote carbon trade and clean development mechanism so as to ensure generation of financial resources. Also, it aims to derive financial benefits through polluter pays principle and various multilateral support mechanisms, in order to invest it in forest conservation and protection as well as in sustainable socio- economic growth. Understanding the role of community in furthering the goals of climate change adaptation and mitigation, the policy seeks at empowering public through proper capacity building training, thereby ensuring their effective participation. It further aims at developing research and study on climate change issue and ways for adaptation and mitigation through technology transfer, development and utilization. The policy proposes various strategies to further these policy goals, few of which include community mobilization, technology development, encouraging CDM, strengthening institutional capacity of different bodies and so forth. However, the policy falls back on failing to address the necessity of negotiation tools and mechanisms which would serve to a larger extent to derive benefit from climate finance. Similarly, the lack of proper implementing body that would support MoEST, renders execution of entire policy weak. One of the major lacunae in the policy is that it overlooks the importance of concerted effort from various ministries and agencies. It is vital if we are to address the issue of climate change while making economic benefits from our emission reduction strategies.

II. RELEVANT NATIONAL LEGAL INSTRUMENTS

Albeit, in Nepal there does not exist a single collective legislation governing climate change and emission reduction, provisions that directly or indirectly govern them are found scattered in various piece of legislation. Few of these are as follows:

a. Constitution of Nepal, 2015

State policies states that investment shall be made in clean energy like hydropower. Likewise, forest shall be maintained in as much area as possible so as to ensure ecological balance and polluter shall be responsible for his emission and shall take precautionary measures.[29]

b. Environment Protection Act, 1997 and Environment Protection Rules, 1998

Preamble of this Act reiterates the necessity of a proper balance between environmental protection and economic development.[30] This Act further deals with pollution and its control. Likewise, the environment protection rules reiterate the necessity of initial environmental assessment. Thereby, stating various sectors that are required to submit Initial environmental assessment and Environmental Impact Assessment report; such sector being forest, industry, mine, road, water resources and energy and agricultural sector.[31] Similarly, it prohibits emission that is contrary to the prescribed standard.[32] It further requires industries to set up environment friendly technology so as to control pollution and emission.[33]

c. Forest Act, 1993

The Preamble of this Act reiterates the need to attain social and economic development while continuing proper utilization and conservation of forests.[34] With an aim to conserve forest for a broader end, it divides forests into five different kinds based on its management as: Government managed Forest, Protected Forest, Community Forest, Leasehold Forest and Religious Forest. For these varied types of forests it provides different provisions. In case of community forest it confers rights to the user group to maintain and derive income from the forest products, while continuing to preserve and conserve the forest.[35] This Act strictly prohibits deforestation, digging or cultivating or the establishment of human settlement in forest area. Furthermore, it

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[29] Const. of Nepal, 2015, Art. 51(g).
[30] Environment Protection Act, 1997, Preamble.
[31] Environment Protection Rules, 1997, Schedule 1 & 2.
[32] *Id.* Rule 15.
[33] *Id.* Rule 16.
[34] Forest Act, 1993, Preamble.
[35] *Id.* § 25.

prohibits human caused forest fire, grazing or overgrazing of quadruped in forests, illegal trading of forest products, depletion of forests, burning of forest products and so like.[36] If any person violates these provisions aimed at forest conservation and protection they are made liable both monetarily (at maximum up to 10 thousand) and are incarcerated depending on the gravity of their offence (at maximum up to 1 year).[37] Further, this Act ensures technical assistance for conservation and protection of these forests.[38]

d. National Parks and Wildlife Conservation Act, 1973

This Act speaks of constructing national parks and wildlife conservation areas so as to protect nature. For this end, it prohibits human encroachment in such protected areas, forest fire, deforestation, overgrazing or any act amounting to forest depletion.[39]

e. Soil and Watershed Conservation Act, 1982

It prohibits destruction of forest, its depletion and any act amounting to deforestation. Further, it prohibits human encroachment in any form within conservation area and restricts overgrazing of cattle.[40] If there exists any human habitation, industry or so like within such conservation area, government has the power to remove it from that place after providing reasonable compensation.[41] Upon failing to abide by these provisions one shall be liable to a punishment of up to 3 months imprisonment or a fine up to five hundred rupees or both.[42]

f. Civil Aviation Act, 1959 and Civil Aviation Rules, 1996

This provides the Government of Nepal to form rules relating to emission from aircraft that has adverse effect on environment and causes pollution.[43] While the Civil Aviation Rules made in line with the Act explicitly provides that no aircraft shall fly or operate beyond the pollution tolerance limit as prescribed by GON.[44] It seeks to minimize the effect of pollution in atmosphere and environment.

CONCLUSION

As of now, there is the absence of any such law which deals with carbon trading at all. Instead for a LDC like Nepal, whose much focus should have

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[36] *Id.* § 49.
[37] *Id.* § 50.
[38] *Id.* § 69.
[39] National Parks and Wildlife Conservation Act, 1973, § 5.
[40] Soil and Watershed Conservation Act, 1982, § 10.
[41] *Id.* § 11.
[42] *Id.* § 21 (2).
[43] Civil Aviation Act, 1959, § 3.
[44] Civil Aviation Rules, 1996, Rule 14.

been on adaptation, it is surprising that most of its laws speak of mitigation measures rather than adaptation. Mitigation measures in themselves are not sufficient for countries like Nepal. Most of the laws that deal with environment in Nepal are concerned with mitigation despite the fact that emission of Nepal is almost negligible while its vulnerability alarmingly high. Further, even in terms of making a place for itself in carbon market, the probability of Nepal entering it through CDM is very low. Which leaves a country like Nepal rich in forest resources with a sole choice of developing the REDD and REDD+ mechanism. For this end, the insufficiency of laws is pressing as the forest law and rules are not sufficient to deal with it. Therefore, it is necessary that new laws that deal with REDD scheme be introduced in Nepal, so that the country can reap benefit from international market through its forest resources.

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A Perspective on Judicial Accountability of Economic, Social and Cultural Rights

Rukamanee Maharjan*

ABSTRACT

In the past, there has been a tendency to treat economic, social and cultural (ESC) rights differently in comparison to civil and political rights. At present, ESC rights are considered equally important and enforceable rights. However, there is less clarity in relation to ensuring accountability of the State towards ESC rights. Against this backdrop, the paper discusses very briefly about the forms of accountability such as judicial, quasi-judicial and non-judicial bodies, *inter alia*, judiciary, legislature, administrative body, ombudsmen, National Human Rights Institutions, civil society and press in relation to ensuring better recognition and enforcement of ESC rights. It should be noted that the paper is focused on judicial accountability.

GENERAL BACKGROUND

It is said that rights are the product of specific historical circumstances, political, legal and economic trends as well as social relations directly influencing how rights are created, defended, and implemented.[1]

There was a time when many Western countries of the world including the United States had difficulty in accepting the legitimacy of economic, social and cultural (ESC) rights.[2] It is felt that ESC rights were neglected even in the United Nations (UN) as initially individual complaints could only be made concerning violations of the rights in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social

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1 William F. Felice, Taking Suffering Seriously 17 (1996) (Hereinafter William Fellice).

2 *Id*. at 21.

and Cultural Rights (ICESCR) remained deprived of such a mechanism.[3] The Committee on Economic, Social and Cultural Rights (CESCR) was established only on 28 May, 1985 to monitor the implementation of the ICESCR by its States parties and Optional Protocol of ICESCR came in force only after.[4]

At the national level, a variety of institutions, procedures, and constitutional arrangements—free and fair elections, bills of rights, *habeas corpus*, human rights commissions, ombudsmen and so on has evolved over generations to promote and protect Civil and Political (CP) rights.[5] Though the States agree on multi-layered obligations, namely the duty to respect, the duty to protect and the duty to fulfill thereof, they tend to refer on 'progressive realisation and resources availability' as an escape hatch.[6]

In the space of two to three decades, ESC rights have emerged from the shadows and margins of human rights discourse and jurisprudence to claim an increasingly central place as well as appeared to have been partly rescued from controversies over legitimacy, legality and justiciability in many jurisdictions, both at national and international level.[7]

With the greater acknowledgement by international community through Vienna Declaration 1993 that 'all human rights are universal, indivisible and interdependent and interrelated',[8] ESC rights are increasingly protected through law across the democratic world and with administrative and constitutional courts in France, Germany, Finland and other European countries exercising substantial review power in the area of resource allocation in addition to well-known examples of South Africa, Brazil, Colombia and India.[9] For instance, courts around the world have ordered the reconnection of water supplies, the halting of forced evictions, the provision of medical treatments, the reinstatement of social security benefits, the enrolment of poor children and minorities in schools, and the development and improvement of State programs to address homelessness, endemic diseases and starvation.[10]

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[3] *See* Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, *in* Social Rights Jurisprudence: Emerging Trends in International and Comparative Law 3-45 (Malcom Langford ed., 2008) (Hereinafter Malcolm Langford).

[4] ECOSOC, *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Res. 1985/17, 28 May 1985.

[5] Paul Hunt, Reclaiming Social Rights 1 (2002) (Hereinafter Paul Hunt).

[6] *See generally* OHCHR, Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, 11 (2008).

[7] Malcolm Langford, *supra* note 3.

[8] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, ¶ 5.

[9] Colm O'Cinneide, *Legal Accountability and Social Justice*, *in* Accountability in the Contemporary Constitution 389-405 (Nicholas Barmforthand et al. eds., 2013) (Hereinafter Colm O'Cinneide).

[10] Malcolm Langford, *supra* note 3.

In this light, it is well accepted that in order to ensure the greater accountability of the State towards ESC rights, there should be overall accountability demonstrated by all state and non-state mechanisms as well as judicial, quasi-judicial and non-judicial bodies, *inter alia*, judiciary, legislature, administrative body, ombudsmen, National Human Rights Institutions, civil society and press.

I. ESC RIGHTS AND ISSUES OF ACCOUNTABILITY

Recognition *vis-à-vis* implementation of ESC rights in domestic level depends upon four factors:

a) The nature of State and activities of social organisations including civil society;
b) The degree of the political achievement of ESC rights;
c) Judicial culture and the degree of judicialisation of human rights; and
d) Attempts to introduce ESC rights within human rights practice.[11]

Since ensuring ESC rights are not questions of government largesse, but of legal obligation, there is always the question of accountability for meeting such obligations.[12]Accountability demonstrated by government, political parties, administrative and quasi-judicial bodies as well as non-state actors including civil society and press are important to ensure greater degree of ESC rights.

In this light, ESC rights demand various forms of accountability including:[13]

a) Judicial accountability
b) Legislative accountability
c) Administrative Accountability
d) Accountability of national HR institutions
e) Civil Society Accountability
f) Press Accountability

It should be noted that the political achievement of ESC rights is essential as it creates a favourable situation to expand and deepen the scope of ESC rights. Through political achievements, ESC rights get the highest form of guarantees including incorporation in the constitution and other legislation. For example, the new constitution of post-communist European states or the constitution of India envisaged more ESC rights because of political context and wider political consciousness. Without good governance, the effective implementation of all human rights is not possible in any political system. Major challenges with regards to achieving political accountability includes corruption and lack of transparency

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[11] *Id*.

[12] Alicia Ely Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda*, 27 Human Rights Quaterly 1200, 1200-1243 (2005) (Hereinafter Alicia Ely Yamin).

[13] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Art. 2 (1) (Hereinafter ICESCR).

as well as low commitment displayed by the political actors including government and major political parties, especially in terms of ESC rights.[14]

Likewise, in many countries, ombudsman schemes developed basically because of the limitations on litigation in the courts and the task of ombudsman is to deliver rapid, unlegalistic justice, without cutting too many legal corners.[15] It should be noted that a variety of institutions, procedures, and constitutional arrangements including ombudsmen has evolved over generations to promote and protect Civil Political rights.[16] With the passage of time, it is found that the ombudsman are increasingly expanding their mandates to investigate and to apply political pressure in relation to violations of ESC rights, including in Peru.[17]

Equally, it is commonly believed that without a consciousness about ESC rights as rights within the multifaceted, non-governmental human rights community (civil society), ESC rights may not be advanced on both the external and internal level.[18] The civil society plays a crucial role in fostering greater participation and creating enabling conditions to enforcing remedies. The civil society should be active in terms of documentation of violation as well as bringing the cases in the court for establishing accountability along with follow ups and advocacy works.[19]

In this regard, the CESCR stresses that the ICESCR norms must be recognized in appropriate ways within the domestic legal order; that appropriate means of redress, or remedies must be available to any aggrieved individual or group; and appropriate means of ensuring governmental accountability must be put in place.[20] Equally, it was emphasised that "a State party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"[21] and "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[22] Therefore, it is recognized that *appropriate means* including

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[14] CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),* E/C.12/2000/4 11 August 2000, ¶ 35; Andrew Byrnes, *Second-Class Rights Yet Again? Economic, Social and Cultural Rights in The Report Of The National Human Rights Consultation,* 33 UNSW L. J. 1, 198-238 (2010).

[15] *See* Mark Elliott, *Ombudsmen, Tribunals, Inquiries: Re-Fashioning Accountability Beyond the Courts*, *in*Accountabilityin the Contemporary Constitution (Nicholas Bamforth et al. eds., 2013); Julian Farrand QC, *Courts, Tribunals and Ombudsmen*, 26 Amicus Curiae, 2-8 (2000).

[16] Pault Hunt, *supra* note 5.

[17] Alicia Ely Amin, *supra* note 12.

[18] *Id*.

[19] *Id*.

[20] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, ¶ 2. (Hereinafter GC No. 9).

[21] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art. 27.

[22] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 8.

judicial and legislative means should be taken in order to protect and promote ESC rights as well as provide *appropriate remedies* in case of rights violation.[23]

II. JUDICIAL ACCOUNTABILITY

States have multilayered obligations, namely the duty to respect, the duty to protect and the duty to fulfill in general that are somehow subject to "progressive realization and resources availability" at one hand and on the other hand, a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights whose violation constitutes a violation of such rights.[24]

In case of violation of ESC rights, judiciary could be one option to get redress in the framework of domestic level. However, the edifice of judicial accountability lies on legal status as well as recognition of ESC rights in the domestic legal system, *inter alia*, in the place in the constitution and other legislation and the constitutions of the world have treated ESC rights as below:

a) Status of ESC rights as directive principle and unjusticiable (For example, Ireland)[25]

b) Status of ESC rights as directive principle but read in with fundamental rights (For example, India)[26]

c) Status of ESC rights as fundamental rights, subject to qualification such as "as provided for in the law" but justiciable without effective remedies (For example, Nepal)[27]

d) Status of ESC rights as bill of rights/fundamental rights and justiciable (For example, South Africa)[28]

At present, many courts such as those in India, South Africa and Colombia, tend to rise to the role of ESC rights protector after clear failure to act by the executive and legislative branches and especially in India, Social Class Action Litigation is admissible in the judiciary.[29]

In India, the right to life was interpreted broadly to include a range of ESC rights, for instance, in *Bandhua Mukti Morcha v. Union of lndia* in 1984 and

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[23] GC No. 9, *supra* note 20, at ¶ 3.
[24] ICESCR, *supra* note 13; International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997.
[25] Const. of Ireland, 1937, Ch. XII & XIII. Chapter XII provided for the Fundamental Rights and Chapter XII provided for the Directive Principle of Social Policy respectively.
[26] Const. of India, 1947, Part III & Part IV. Part III provides for the Fundamental Rights and Part IV provides for the Directive Principle of State Policy.
[27] Const. of Nepal, 2015, Part III & Part IV. Part III provides for the Fundamental Rights and Part IV provides for the Responsibilities, Directive Principle and Policies of the State.
[28] Const. of the Rep. of South Africa, 1996, Ch. 2. Chapter 2 provides for the Bill of Rights.
[29] Malcolm Langford, *supra* note 3.

many other cases.[30] However, Indian experience is marked as conservative, particularly as regards to labour, housing and land rights, creating a certain level of ambivalence.[31]

The judgments from South Africa's Constitutional Court (CCSA) have captured international attention due to the clarity of the judicial reasoning and reliance on explicit constitutional rights, for instance in the pioneer case of *Grootboom*[32] and *Treatment Action Campaign's* case (TAC).[33] However, the CCSA displayed low intensity justiciability in relation to health right, especially in *Soobramoney's* case.[34]

In *Soobramoney's* case, a public hospital had rejected Soobramoney's request for renal dialysis on the basis of a rationing process that favored patients with a chance of long-term recovery and the Constitutional Court held that apportioned scarce resources among those who urgently need services did not infringe upon the right to life, weighing Soobramoney's life against the lives of others.[35]

In *TAC's* case, the CCSA displayed a robust reasonableness while ruling against the government's prohibition to use an anti-retroviral drug in public hospitals, apart from its limited trial in sixteen public sites. The CCSA peered behind the reasons given for the seemingly rational restriction and it ordered the government to end the restriction and mandated the provision of counseling and other necessary services, the latter enforceable through a contempt of court order.[36]

Likewise, the Constitutional Court in Colombia has used the *tutela* procedure to issue thousands of decisions to ensure immediate access to medicines for people living with HIV/AIDS, social security for indigent persons and food subsidies for poor and unemployed pregnant women and the Court also developed the doctrine of an *unconstitutional state of affairs* to address systemic violations of ESC rights, such as those involving internally displaced persons or a dysfunctional health system.[37]

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[30] Malcolm Longford, *Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review*, SUR – INT'LJ. ON HUMAN RIGHTS, 91-111 (2009) (Hereinafter Malcom Langford, Domestic Adjudication)

[31] *Id.*

[32] *Government of the Republic of South Africa and Others v. Grootboom and Others*, Case CCT 11/ 00, (2000).

[33] *Minister of Health and Others v. Treatment Action Campaign and Others*, Case CCT 8/02, (2002) (Hereinafter Treatment Action Campaign case).

[34] Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 HARVARD HUMAN RIGHTS J., 179- 216 (2013).

[35] *Soobramoney v Minister of Health (Kwazulu-Natal),* Case CCT 32/97, ¶ 24-31 & 57-59, (1997).

[36] Treatment Action Campaign case, *supra* note 33.

[37] Malcolm Langford, Domestic Adjudication, *supra* note 30.

In Nepal, the Supreme Court has recognised the ESC rights as justiciable rights before the court of law. For instance, in *Laxmi Dhikta's* case[38], the court recognised the right to reproductive health and abortion as a part of right to reproductive health and also held that in terms of legal remedies, there must be appropriate provisions for punishment of the guilty, compensation for the victim and other facilities for the victim's health. However, the court did not award the compensation for the victim. Likewise, in *Prem Bahadur Khadka v. the Office of Prime Minister and Council of Ministers et.al.*,[39] the Supreme Court issued a *mandamus* order to the Government of Nepal that directed it, among other things, to formulate a national strategy relating to employment, to enact a law necessary and the allocation of appropriate national budget. The court, in its ruling, underlined that the enjoyment of other human rights such as the right to food, education, health, and civil and political rights depends on the level of enjoyment of the right to work and employment.[40]

It is interesting to note that at one point, Cass Sunstein, a US legal scholar termed ESC right "absurd" and the constitution with ESC rights "a large mistake, possibly disaster", especially the new constitution of post-communist European states.[41] However, Cass Sunstein changed his opinion after *Grootboom's* decision and appreciated the court's approach as a necessary measure to provide special deliberative attention to those whose minimal needs are not being met.[42]

In this light, the advantages of judicial accountability can be listed as below:

a) Judicial accountability is deemed to be one vital form of accountability. At many instance, other means of remedies may not be effective if they are not reinforced or complemented by judicial remedies.[43]

b) Individual or Social Class Action litigation can be a vehicle for social change and a wider legal reform becomes possible with even a single favourable judgement of the court.[44]

c) Courts play a greater role to hold public authorities accountable for the substance of their resource allocation decisions impact upon the lives of individuals, especially when such decision expose individuals to greater risk of destitution, deprive them of support essential to maintain dignified existence, or otherwise have a grave impact on their well-being.[45]

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[38] *Lakshmi Dhikta et al. v. The Office of Prime Minister and Council of Ministers et al.*, (2009).
[39] Supreme Court of Nepal, Some Landmark Decisions of the Supreme Court of Nepal, (2010).
[40] *Id*.
[41] Malcolm Langford, *supra* note 3, at 29.
[42] *Id*.
[43] GC No. 9, *supra* note 20, at ¶ 3.
[44] Malcolm Langford, *supra* note 3.
[45] Colm O'Cinneide, *supra* note 9.

d) Judiciary can play a role of check and balance on the executive and legislature as well as provide corrective justice and immediate remedies that may result in improved accountability thereof.[46]

The disadvantages of judicial accountability can be listed as below:

a) The courts are blamed of exercising legislative and executive functions and inferring with political matter and policy decision as the traditional role of judiciary is to interpret laws formulated by the legislature.[47] Thus, judicial accountability with the flavour of judicial activism dilutes the separation of power as envisioned by Montesquieu at many points.[48]

b) The Court cannot as well as should not be a forum where every single resource allocation decision is fought out in detail through a long, complex and expensive litigation process.[49]

c) The court also cannot venture too far into the realm of political or expect bureaucratic decision making.[50]

d) The capacity of judiciary is questioned as the legislature and administrative process may be more suitable for dealing with distributive justice as well as providing systematic relief either by reforming large public bureaucracies or producing new legislation or governmental programs.[51] Thus, judicial process becomes a poor format for the weighing of alternatives and calculation of cost.[52]

e) The ESC rights are justiciable but at many times without effective remedies. Therefore, a grassroot inspired movement could succeed more than the court inspired movement.[53]

CONCLUSION

Important advances have been achieved with respect to enforcing ESC rights, but at many instances, they are limited to court-centric approaches.[54] Therefore, a choice to litigate cases should be scrutinized and there should be a consideration whether a decision generated from another branch of government or another body would be more effectively implemented.[55]

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[46] Kent Roach, *The Challenges of Crafting Remedies for Violations of Socio-Economic Rights*, *in* Social Rights Jurisprudence: Emerging Trends in International & Comparative Law 46-58 (Malcolm Langford ed., 2008) (Hereinafter Kent Roach).
[47] Albert Venn Dicey & John Allison: The Law of the Constitution 95-121 (2013).
[48] *Id*.
[49] Colm O'Cinneide, *supra* note 9.
[50] *Id*.
[51] Kent Roach, *supra* note 46.
[52] Malcolm Langford, *supra* note 3.
[53] *Id*.
[54] *Id*.
[55] Malcolm Langford, *supra* note 3.

Political accountability can prove just as effective in securing compensation and fostering policy changes as judicial remedies.[56] Therefore, it is better to use litigation in the court as a last resort.[57]

Example of *TAC's* case should be appreciated where the campaign was not limited on the court case litigation but was strongly backed with advocacy strategy and built on court decision implementation strategy. The positive role of civil society was witnessed in *TAC's* case. Because of considerable public attention, public marches, and other mobilizations during the course of the litigation, some provincial governments made significant concessions and changes prior to the decision and several additional mobilisations by the TAC, regular monitoring of health clinics, and treatment literacy programs for mothers after the decision ensured that the orders were implemented and that many lives were saved.

In this light, it can be rightly hoped that there might be a new Magna Carta, as once said by US President Truman, which will include economic well-being and security, that health and education and decent living standards, are among inalienable rights ensured with effective remedies and greater HR accountability including judicial and non-judicial accountability.[58]

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[56] Alicia Ely Amin, *supra* note 12.
[57] Malcolm Langford, *supra* note 3.
[58] William Fellice, *supra* note 1, at 21.

Analyzing the Inefficacy of Non-Interactive Legal Literacy Methods for the Community People: The Kwazulu-Natal Experience of the Family Advocate Workshops

Arpeeta Shams Mizan*

ABSTRACT

Interactive methods are methods of teaching by explaining the contents and subject matter in plain and simple language. For community outreach workshops and legal literacy programmes, interactive teaching methods are most useful because interactive teaching method increases the retention rate of learner by a significant percentage. Despite South Africa's legacy of using interactive methods through street law programmes, the offices under the Department of Justice and Constitutional Development in South Africa do not practice interactive teaching methods in their community workshops. This paper discusses the demerits of the non-interactive methods used by the offices and discusses possible suggestions for solution.

INTRODUCTION

The rational for community legal workshops and legal advising sessions is to help the community members understand the law and use it in an optimum way. A practical way of realizing this goal is to engage the legal advisors with the community members in a manner, whereas the advisors explain the law in

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simple language, the community members gain the capacity of visualizing clear examples using the law in diverse circumstances. In a community outreach setup, the parties are in a learning process; the community legal advisors learn as Educators and the community members learn as Learners.[1] The Educators not only learn the law and rights paradigm, but also the methods of effectively disseminating knowledge to other community members beyond the reach of community outreach setups.

This type of teaching is referred to as "interactive teaching method,"[2] which is an important method for ensuring that the learners learn and remember as much as they can. The benefit of interactive teaching method in comparison to traditional lecture method is that in interactive teaching there is more participation of learners than merely listening and this, according to the learning pyramid,[3] is one of the most effective teaching and learning processes.

In my experience with the Family Advocates Office[4] and the Directorate of Legal Administration, I have seen how the lack of interactive teaching method and non-engagement of the participants have affected the empowerment of the community. In this paper, I will analyze and evaluate the efficacy of the legal literacy community outreach programmes and consultation workshops for the citizens conducted by these two Offices, using the standard of *empowerment of the people* (emphasis added). By empowerment, I refer to community members' capacity to make informed decisions about using the law in order to exercise and protect their rights.

I. TEACHING FOR EMPOWERMENT

While judging the impacts of these workshops, I will be often referring to the Pyramid of Learning,[5] which states that the retention of knowledge by the audience varies according to the learning methods applied by the instructors. It is held that to attain maximum amount of retention of information, audience must actively engage in applying the information by doing exercises, whilst learning only by listening and reading (lectures and printed materials) enable them to retain only 15 percent of the whole content.

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[1] BRUCE A. LASKY ET AL., TEACHING METHODOLOGY: PRACTICAL LAW FOR LAW STUDENTS, (DRAFT COPY) (1st ed. 2010) (Hereinafter Lasky).

[2] David McQuid Mason, *Street Law as a Clinical Program: The South African Experience With Particular Reference to the University of Kwazulu-Natal*, 17 GRIFFITH L. REV. 1, 31 (2008) (Hereinafter David Mason, Street Law).

[3] David Mc Quoid-Mason, Using Your Imagination to Light Up Knowledge, Skills and Values for LLB Students: Some Experiences from South Africa, Paper Presented at United Kingdom Legal Education (UKLE) Centre, LILI Conference, Warwick University, (2006) (unpublished paper) (on file with author) (Hereinafter David Mason, Using Your Imagination).

[4] Discussed in detail in the sections 2 and 3 of the paper.

[5] The source of the Learning Pyramid is not clear. However, it is often attributed to the NTL Institute for Applied Behavioral Science. *See, for e.g.,* Lasky, *supra* note 1, at 9; Simon Polovina, *About the learning Pyramid,* (2015), http://homepages.gold.ac.uk/polovina/learnpyramid/about.html.

Professor David McQuid Mason[6] has found that traditional teaching approach is "the least effective method of passing on knowledge to Learners."[7] The learning pyramid shows that the retention rate (of the information) increases in cases of learner-centered method i.e., interactive teaching methods. While attending a lecture can help a learner remember merely five percent of the whole content, while using audio-visual methods (e.g. using posters, flipcharts, showing a video) increases the retention to twenty percent. Showing them demonstrations (e.g. by role plays) take it up to thirty percent, and if the learners apply the content by applying it themselves, they retain seventy-five percent. After learning it themselves, if the learners go on teaching the information to others (formally or informally), they can remember up to ninety percent.[8]

I worked with the Law Clinic of the University of Kwazulu-Natal (UKZN) as part of my winter Clinical Project at Harvard Law School. A significant portion of my project was to observe and analyze the interactive teaching methods used by the legal offices in Durban as part of the South African legacy of *Street Law*[9] methods. South Africa has a rich legacy of using interactive teaching methods for community empowerment through Street Law since 1987 in Durban.[10] Street Law has seen great success in all these years, and the Department of Justice in South Africa actively partners up with the Street Law Clinics run by the South African universities. Despite that, in my days at the Office of the Family Advocates and the Directorate of Legal Administration, I observed a great absence of interactive methods, in preference to lectures and printed materials, which were the only two methods used for the community people, while the training for the government officials were somewhat more interactive (details follow). My conclusion is that if the Offices intend to use these workshops as a means to increase the capacity and legal knowledge of the common people, then more interactive techniques should be incorporated to reach the ultimate goal.

Before beginning the analysis, I shall give a brief description of the two Offices and their non-interactive workshops.

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[6] Professor of Law and Acting Director, Centre for Socio-Legal Studies, University of Kwazulu-Natal, Durban, South Africa and President, Commonwealth Legal Education Association.

[7] David Mason, Street Law, *supra* note 2, at 31.

[8] Richard Grimes & C. Smith, *Reviewing Legal Education: What Do We Want from Our Lawyers and How Do We Get It,* 1 DELHI L. REV., 27-29 (2007); *See also* David Mason, Using Your Imagination, *supra* note 3, at 2.

[9] Street Law is a legal literacy programme usually aimed at high school children, prisoners and other vulnerable communities such as juvenile delinquents, community leaders etc. it empowers the people through law-related education (LRE) which is a blend of substance and instructional strategies. According to David McQuid Mason, 'Street law' refers to how the law affects the daily lives of ordinary people 'on the street'. It is a legal literacy program designed to enable law students and others to make people aware of their legal rights and where to obtain assistance. *See* David Mason, Street Law, *supra* note 2, at 27.

[10] *Id.*

II. OFFICE OF THE FAMILY ADVOCATES

The Office of the Family Advocates (FA) was established in 1990,[11] to cater to the well-being of children undergoing their parents' divorce and whose custody is in dispute.[12] The FA works to protect the children's rights in family disputes, especially divorce matters, such as care, domestic violence, and maintenance of the children. People also approach the FA Office to make arrangements for children born out of wedlock, to facilitate parenting responsibilities. The FA has 20 provincial offices throughout South Africa.[13] The UKZN Law Clinic often collaborates with the FA Office, especially when the legal aid branch of the FA Office does not have enough resources to support all the applicants. A simple categorization of profile of applicants who approach the FA Office can be as follows:

a) Those who have been divorced but are having custody issues about children
b) Those who are in the process of getting a divorce and need to sort out division of parental rights and responsibilities
c) Unmarried people who have children
d) One of the parties is deceased and the other party wants the parental rights and responsibilities
e) When a child is removed from South Africa by one parent without the permission of the other.

A. Functions of the FA Office

The functions of the FA Office have been threefold: Workshop, Help Desk Reference and Post Workshop Mediation.

Amongst all the functions, the most prominent involvement of the FA Office has been regarding divorce matters. Under the South African Divorce Act of 1987, every party applying for a divorce, who have children must send a copy of the summons to the FA.[14] Such summons must be accompanied with *Annexure A* which details the income, residence and expenses borne for the children by the parties. The FA Office can file an enquiry on its own under the Divorce Act 1979[15], or the parties can apply for help from the FA Office. In South Africa, the parties in a divorce proceeding either approach the Regional Court or the High Court of South Africa. When a party is not able to afford a

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[11] *The Office of the Family Advocates,* THE DOJ & CD, http://www.justice.gov.za/FMAdv/f_main.htm (accessed on December, 2015) (Hereinafter Office of FA).
[12] *Id.*
[13] *Id.*
[14] Mediation in Certain Divorce Matters Act, 1987, § 4.
[15] The Divorce Act, 1979, § 6, 8 & 12.

private attorney for the proceedings, they can get assistance from the offices providing legal aid services, free of cost. Since the FA Office provides service free of cost, hence, in a given fiscal year, on average 6000-8000 enquiries were made by parties, with an average of 20-50 reconciliations made.[16] The child care and protection system under the law and by the FA has also been very organized and systematic.

The FAs peruse the documents and if everything is in compliance with the law, they submit a memo with the Court to that effect. However, if the FA Office finds a situation not in compliance with the parental rights and responsibilities under the law, it issues a *Query Letter* (which can address issues regarding division of the parental rights and responsibilities, co-parental responsibilities, supervised contact, substance abuse by either parties, in short, any matter that might harmfully affect the best interest of the children) to the parties for attending a workshop at the FA Office. After receiving this *Query Letter*, the parties are required to file in *Annexure B* of the 1979 Divorce Act, which is a request for Query.[17]

An example can help understand it more easily. One of the crucial points discussed in the workshops is Parenting Plan. A parenting plan is where parents are co-holders of parental responsibilities and rights, including where and with whom the child is to live, the maintenance of the child, contact between the child and any of the parents or any other person and the schooling and religious upbringing of the child.[18] The workshop would then go on to explain how the law in South Africa has been reformed to make it more equitable and parent-friendly. The terms ‘custody" and "access" have been changed into "primary residence" and "contact" so as to not make any parent feel superior to the other regarding the rights and responsibilities if the children.

a. The Help Desk at the FA Office

The Help Desk takes the first step of explanation before people are sent to the workshops. However, the one way instructions delivered by the Help Desk do not always appear to be helpful. I discuss this in detail in Section 5 of the paper.

B. Using Interactive Methods in the Workshops

To a certain extent, use of the term *workshop* for the sessions is a misnomer. Unlike the conventional notion of workshop where participants engage and

[16] Advocate P. I. Seabi, Chief Family Advocate, Presentation made to the Justice and Constitutional Development Portfolio Committee on 22 March, 2006.
[17] The 2008 Regulations Relating to The Children's Act, 2005, § 13.
[18] Office of FA, *supra* note 11.

learn by doing,[19] the workshops at the FA Office are one way lecture sessions, where the FA assistants and social workers give brief lectures which explain the contents of the law, purpose and functions of the FA Office and the individual interview sessions that follow the workshops. The workshops are very brief (each spanning for about 45 minutes) and hence, the applicants get very limited, if any, opportunity to actively participate. The only interactive method used in the workshops is the Question-Answer (Q&A) session. In the Q&A, the participants ask questions, either to further clarify the information already received, or to get new information not given during the session. This often leaves a gap in the understanding of the applicants. Issues most commonly discussed in the workshops are that one of the partners not paying enough maintenance, one of the parties in breach of court order (regarding a parenting plan), one of the parties not having reasonable contact with the children, one of the parties prevented by the other party from having reasonable contact with the children, one of the parties denying to take any responsibility regarding the children, etc.

C. Interactive Methods in the Post-Workshop Mediation Sessions

The FA Office workshops are followed by individual advising and couple mediation sessions. The mediation set-up is typical, with both parties present, with the FA advisor as the mediator. Sometimes, should the matter get complicated, the social workers and FA assistants are aided by qualified family attorneys.

Issues noticed during the mediation were that the parties were in constant disapproval of each other, they were hostile towards each other and would fight with each other (physically and verbally).And if one or both of the parties were unstable and substance abusers, then they impeded the actions of the FA, with mostly mothers against the fathers were the ones who brought the complaints (under the Children's Act, 2005),[20] etc. Also, it is common for many African people to have children out of wedlock,[21] and mostly the African men come to make applications to address rights of an unmarried father,[22] who,

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[19] Workshop is defined as a meeting at which a group of people engage in intensive discussion and activity on a particular subject or project. *See* Oxford Dictionaries (Online version, 2016), http://www.oxforddictionaries.com/definition/english/workshop (accessed on January, 2016) (Hereinafter Dictionaries).

[20] The Children's Act, 2005, § 33.

[21] The rate in 2014 was 63%. *See Family Structure,* http://worldfamilymap.ifstudies.org/2014/articles/world-family-indicators/family-structure (accessed on December, 2015); *See also28% of SA Women Single Moms*, CABSA, http://www.cabsa.org.za/content/28-sa-women-single-moms-14509(accessed on December, 2015) (The article further mentions that a reason for single parent families is that South Africa has one of the lowest marriage rate in the African continent (43%)).

[22] Sections 20 and 21 of the 2005 Act presently now give more rights to fathers who can have joint parental responsibilities and rights with mothers, and all major decisions relating to a minor child (under 18 years) needs to be taken by the parents jointly. Section 20 reads: "The biological father of a child has full parental responsibilities and rights in respect of the child – (a) if he is married to the child's mother; or (b) if he was married to the child's mother at– (i) the time of the child's conception;(ii) the time of the child's birth; or (iii) any time between the child's conception and birth."

prior to the introduction of the 2005 Act, were disadvantaged for not having any rights or responsibilities in respect of the children.[23] They were in a sense totally omitted from the picture. But the 2005 Act changed it to have a separate provision for the unmarried fathers, who if satisfying the qualifications could assert their rights as co-parents of the children. This has a huge impact in terms of social justice because it makes the people feel visible in the eyes of law, help them have the rights of parenting, and also is gender friendly because it allows the women to share their responsibilities as single parent to curb the burdens.

The mediation sessions were comparatively more interactive, not least due to the nature of mediation itself. Points mentionable in this regard are that:

a) The FA officials used very imploring language that helped the applicants feel engaged and part of the process. It put them in the centre of the decision making process.

b) The conversations were conducted in a manner where the applicants were treated at par with the FA officials, so that they did not feel dependent on the FA for their decisions.

c) The whole process was designed, so as to facilitate the social justice system most smoothly. It had a client centred advocacy approach.

d) It was also focused on the best interest of the child principle, with the FA office interviewing the child before finalising the parenting plans. Thus, the environment was oriented towards being child-friendly: the employees dressed up casually, so as not to intimidate children by *officer-look*. They tried to appear approachable, so that the children could relate themselves easily with the employees. They interacted with the children in the playrooms with toys and teddies. They asked the children to call them aunties and uncles while speaking. Many employees were trained social workers who knew how to get the necessary information from the children, and most importantly, the parents were not present while children were interviewed.

III. THE DIRECTORATE OF THE LEGAL ADMINISTRATION

The Directorate of Legal Administration is under the Department of Justice and Constitutional Development, the Justice Ministry of South Africa. The

[23] Before the Children's Act, 2005, the rights and responsibilities of unmarried fathers were governed by the Natural Fathers of Children Born out of Wedlock Act. Provisions of this Act were inadequate to protect the rights, responsibilities and relationship of unmarried fathers and their children. In the case of a divorced or unmarried parents, one parent (usually the mother) was awarded the custody of a minor child and the other parent (usually the father) would be entitled to visitation. This position granted the custodian parents the power to make all the day-to-day decisions in the minor child's life without needing to consult the other parent. The new dispensation now provides consultation between parents. *See* Ian McLanrens, *Rights of Unmarried Fathers Secured*, Mclarens Attorney at Law, (2012), http://mclarens.co.za/rights-of-unmarried-fathers/.

Directorate's purpose is to manage the department, develop policies and strategies for the efficient administration of justice and provide centralized support services. The table below shows the components of the programme.[24]

A. Functions of the Directorate

The Directorate works on community outreach programmes throughout the year. Most of the outreaches are based on thematic agenda, such as violence against woman, children's rights, domestic violence etc. In conducting the outreach programmes, the Directorate focuses on the balance between the civil and customary laws of South Africa. The Directorate offers workshops for the following themes:

a) Developing Inter-sectoral understanding, involving the local and tribal chiefs and the government officials

b) Government officials and court clerks

c) Community members

d) Learners (students are termed as learners or scholars in South African jargon)

B. Use of Interactive Methods in the Community Outreaches

The Directorate of Legal Administration used more interactive methods of legal literacy and awareness building in comparison to the FA Office. The Directorate also involved more community engagement in the process of campaigning. Amongst the interactive methods, those mostly used were role plays, case studies and brainstorming ideas in cases of domestic violence against women and sexual abuse against children.[25] However, the directorate demarcated between the training for community members and training for officials. The former trainings are informal and easy going while the latter are more planned and involve more interactive methods.[26]

In the community outreach programmes, the first best practice to mention is involving the local people in the campaigns.[27] The community workshops extend from days to weeks depending on the constituency and theme.

The workshops for the inter-sectoral understanding of officials involve limited use of interactive methods while the community outreaches involve only lectures

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[24] *Vision and Mission*, The DOJ & CD, http://www.justice.gov.za/vision.html (accessed on December 2015).

[25] Interview with Patmavathi Moodley, Director, Legal Administration, Department of Justice and Constitutional Development, Republic of South Africa, (2015) (Hereinafter Interview).

[26] *Id.*

[27] *Id.*

followed by long Q&A. This part is handled very delicately because it has to make a balance between the traditional African law[28] and the Civil law.[29] Often, the trainers have to use case based examples to clarify conventional ideas. Ice breaking methods are used to create a comfortable atmosphere.

The imperative to use such interactive methods is to change the old mindset and refine the perception of the government officials so that they can make the effective use of the new progressive laws. In many cases, the court clerks, for example, have denied to register cases of sexual abuse because they did not view the case as satisfying the standard of domestic violence (e.g., if husband denied to have protected sex with the wife). The workshops would use scenarios where the participants are asked to interpret the meaning of the situations.[30]

For the learners, the Directorate mostly uses role plays. If the audience is huge, then the Directorate is assisted by the Department of Drama of the University of KZN. In other times, the learners themselves act out the role plays, with scripts provided by the Directorate. The role plays work as ice breaker for the children to warm up and be open about the problems they face. These are then followed by social counseling and teachers assisting the abused children.

The sessions with the community members i.e. the local people are very informal. The trainers always go with the flow of discussion raised by the community members. The trainers focus on lecture mostly to ensure smooth imparting of knowledge. Consequently, there is little scope to test the retention of the knowledge.

IV. RECOMMENDATIONS: HOW TO ADDRESS THE LIMITED INTERACTIVE METHODS IN LEGAL LITERACY

Not using interactive methods in the legal literacy programmes means the message may not always be successfully communicated, especially when there is no impetus for the participants to become part of the process. Briefly, the points which deserve to be mentioned are as follows:

A. Ineffective transfer of information

The first point to mention here is that during this whole discussion, the applicants are only allowed to ask limited questions. Most of their queries, especially if

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[28] The traditional African law refers to the customary laws of South Africa, which are the uncodified laws as developed and practised by the indigenous communities. Customary Law has special place in the South African legal system. In *Shilubana and Others v. Nwamitwa*, CCT 03/07) (2008) ZACC 9, the Constitutional Court of South Africa held that customary law must be accepted as the practices of the people who live according to it and adapt it to their changing circumstances and needs.

[29] Interview, *supra* note 25.

[30] *Id.*

they require a detailed response, are left unanswered for the individual mediation sessions post workshop. Since the applicants only 'hear' the discussion without engaging into problem-solving or brainstorming, they actually do not learn how to apply the law to their own situations, neither do they get a clear comprehension.

Secondly, the legal advices offered at the workshops are also not case-by-case basis but general and flat. They never use any examples while describing the law. Moreover, since the FA Office advices are merely recommendations with no binding effects, the FA advisors make it very clear that the Office does not impose anything upon the applicants. Without any experience of actually using the law in a fictitious problem solving or a small group discussion or debate (these are the most widely used interactive learning methods)[31], this creates a vacuum for the participants as they are now left to make their own informed decision, but for which they have not been ably empowered.

An incident I witnessed at the Help Desk of the FA Office can be a good example of the lacunas:

> Mr. X[32], a father disputing the custody of his child with the mother, had approached the Help Desk to make an application for a Parenting Plan. He mentioned that he had gone through the process once before, three years earlier. The father appeared to know the entire process except that one has to transform the parenting plan into a court order. The office responded by saying that the workshops always mention the fact the parenting plan must be transformed into a court order. The Office further observed that the parties often do not complete the sessions. Mr. X's omission was causing a waste of resources and time.

This can be taken as evidence that there is a gap in communicating the message to the law people. It also shows how the lecture method alone fails to have a greater impact upon the people. While the FA does mention all the necessary and relevant points about the parenting plan and procedural steps, the applicants are on the receiving end and have no active engagement. Thus once they have their primary purpose served, i.e. get the parenting plan registered by the FA, many of them omit to complete the remaining procedure. Many of them find that they for the time being are on amiable terms and hence feel that there is no reason to go to court. This is evident that they fail to appreciate the significance of having a binding instrument having the force of law.

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[31] Lasky, *supra* note 1, at 8.
[32] Names have been omitted to protect privacy.

a. Recommendations

If the applicants were given some scenarios or hypothetical test cases to brainstorm about, they would be able to appreciate the possible outcomes of omissions on their part, and realize the necessity and significance of following the due course. There should also be distribution of printed materials, so that even if an applicant cannot keep up with the flow of discussion, s/he can always refer to the materials for understanding.

B. Failing to make optimum utilization of the Mediation sessions

During the mediation, the family attorneys and mediators often assist the couples with drafting a Parenting Plan. They explore various dimensions of the couple's family life, and focus on the best interests of the child. This requires active participation of the parents in order to gain their full satisfaction and smooth functioning. However, as the mediation is a forum for dispute resolution, there is not much opportunity to apply more interactive techniques. However, since the workshops preceding the mediation are largely insufficient to empower the applicants for understanding the implications of the parenting plans and other arrangements under the law, the mediation sessions are also affected and the parties become highly dependent on the family advocate assistants or family attorneys.

C. Tendency to work within comfort zone

Apart from the outreaches for the students, the Department of Legal Administration uses the interactive methods mostly for the employees of the Directorate, court clerks, police and other government officials. In workshops for the common people, the Directorate never engages the participants actively. Those workshops are designed to render one way flow of information by lecture. The objective is to impart information about new laws, new remedies, create a forum for redress and relevant substantive and procedural aspects of the law. The lectures are accompanied with pamphlets and other printed materials.

From my experience with the Head of the Directorate, it can be concluded that the main concerns behind not engaging the people is apprehension of negative public reaction and repercussions. The common people, mainly the rural people, are apprehended to not easily welcome discussions on controversial issues and as such the Directorate chooses only to educate them on access to justice issues.

This suggests lack of confidence and willingness on the part of the government officials. The Directorate does not want to move beyond their comfort zones and do not risk making a test case.

b. Recommendations

As the Pyramid of Learning suggests, lecture and readings can help participants retain only 15% of the entire content. Therefore, the Directorate must apply more interactive methods and engage not only the officials abut also the main rights holders i.e. the common people.

D. Lack of organized and planned use of interactive methods

The interactive methods used by the Directorate are very limited. With children they use only role plays and with the government officials they only use scenarios. Due to not exploring or trying other interactive methods (such as brainstorming, debates, small group exercises, group discussions, etc.), the Directorate invests very little preparation in making the workshops more organized and effective. Greater part of the preparation of the workshops goes into logistics and finance. Although the Directorate collects statistics to understand what issues they ought to address for the concerned group, it facilitates only in setting the agenda. The actual workshop is not carefully planned in a way that Street Law sessions are planned. The lesson plans used in Street Law are focused and calculated: it envisages the objectives, assessment criteria, activities by the instructor and the participants and content. The preparation by the Directorate only includes the content and in a limited manner the objective. Lack of an organized lesson plan can greatly reduce the efficacy of a workshop on legal literacy. A well organized lesson plan facilitates in foreseeing how a session gradually is spread over the timeslot while covering all the objectives. It also helps anticipate the reactions, questions and queries from the participants, and prepares the instructors to have enough control to maneuver the session in a meaningful way.

c. Recommendations

The Directorate should consider introducing some changes in their approach to the legal literacy programs. They must use more interactive methods (for example, the Directorate should involve the community members in small group discussions so that they explore their own solutions to their problems) other than case studies and role playing, and must start engaging the adult participants more actively. They may initially face some unwanted/unfriendly reactions, but once they tune up the workshops with that approach, they will learn adapting strategies as well. Moreover, the discrepancy between the training for officials and training for communities should be removed. Both target groups should be treated equally and while culture sensitive approaches must be adopted, the community members should not be neglected (i.e. discriminated) to be prevented from participating in role plays, debates and case studies.

E. Lack of effective Training of Trainers (ToT)

The training for the Trainers is also very formal and minimal. The ToT consists of lectures on the issues and power-point presentations, and the object is to make the Trainers aware of the information and issues they must inform the people/other government officials about. The Trainers are not introduced to/ equipped with using any effective teaching and interactive methodologies as those are not considered essential. Hence, the training does not prepare them for a workshop or community outreach in the proper sense, rather makes the entire thing similar to a classroom based education.

The lack of training also affects the capacity of the instructors to fully dissolve into the situation as well. Often, the instructors keep printed copies of the power point presentations during the workshops. Referring to printed materials while delivering the information can disturb the interaction and eye contacts between the audience and the speaker, since this is different from a typical classroom education set up.

a. Recommendation

The Directorate can focus more on redesigning its approach to prepare the trainers for a more engaging session and teaching capabilities.

F. Narrow definition of 'Workshop'

The Office of the Family Advocates and the Directorate define 'workshop' in a quite narrow and limited manner. The fact that the advocates explain and educate the applicants about the law and legal requirements for children's protection and best interest is considered as amounting to a workshop. The Q&A sessions that take place after explanations are considered as interactive parts of the workshop, and the discussion between the couples for deciding on a mutually acceptable parenting plan is considered brainstorming, where the parents have to use the information acquired from the workshop to arrive at solutions.

While the lecture by the FA Office is helpful, however, it cannot be equalized to a workshop *strictu sensu.* A workshop is a meeting at which a group of people *engage in intensive discussion and activity* on a particular subject or project [emphasis added].[33] The FA workshops, as discussed, involve a one way imparting of information, and the advocates generally prefer to speak at a stretch, giving the participants to ask questions or clarifications only once they have finished the presentation. The mediations following the discussions are carefully

[33] Dictionaries, *supra* note 19.

guided and facilitated by the FA, and the decisions of the parents are always upheld so long it doesn't compromise the child's best interest. Such a setup is not helpful for a target group who are completely new to the information and ideas, for till the presentation is over, many participants stand the chance of forgetting their queries and questions while keeping up with the flow of discussion.

a. Recommendations

The FA should consider a more comprehensive approach about educating the parents about children's and parent's rights and responsibilities. The three tier process should be well described to the applicants, and the Office should take feedback from the participants. Debriefing the participants after each session is also a good way of ensuring reception of information.

G. Ineffective Approach to People's Empowerment and Capacity Building

The aim of community outreach and legal literacy workshops is not only "teaching" the people about what the law says, rather building their capacity to "know" about the law and use the law to protect their rights when necessary. The workshops and community outreach programmes conducted by the FA and the Directorate can best be described as legal information sessions and not workshops. They predominantly rely on lectures and to a limited extent on Q&A. Although the mediations by the FA are always upheld as 'recommendations' and as such tend to give the parents a sense of authority and control over their decisions, there really is very little to engage them to explore ideas, arrangements and alternatives beyond those which they already come with to the FA sessions.

Similarly, in the Directorate outreaches, after the lectures what the community members are left with is the pamphlets and brochures, which does not positively contribute towards their ability to actually use the law. Also, referring back to the experience of the Pyramid of Learning, with the lectures and pamphlets, the participants will at best remember only 15% of the information, which is insufficient to empower them.

If the sessions and outreaches fail to empower the people, then the significance of such initiatives can be seriously questioned.

a. Recommendations

The FA workshops and the Directorate outreaches should include exercises for the participants where they will have to use the law to arrive at solutions at various contexts and situations. This will provide them with a sense of

having 'experience' of using the law, which will boost their confidence and willingness to use the law in future when they face similar situations.

CONCLUSION

To sum up, the necessity and importance of interactive learning methods and the learning pyramid can never be too exaggerated. The limited use of interactive methods in any legal literacy or rights advocacy campaign more often than not works to its demerits. The case studies as discerned from the Durban experience are actually making a big impact for the communities and will go even further if the offices can move further away from 'only' lecture based sessions. People who are deprived of fine education in the first place may have difficulties in receiving and retaining information through formal lectures. If one intends to empower people, one must understand people. And to understand people they must be engaged and put to action. If the people are not empowered, at the end of the day these legal literacy initiatives fail to bring the change they promise.

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Liabilities for Medical Negligence: A Critical Analysis of Nepalese Law with Special Emphasis on Consumer Protection Act

Ramesh Parajuli*

ABSTRACT

Nepalese Consumer Protection Act (CPA) is silent regarding whether criminal prosecution and civil suit for compensation can go side by side or not. In current situation of very rare cases entering and being entertained by the court, statutory amendment for addressing such ambiguity could bring hope instead of awaiting judicial interpretation. Practice in neighbouring country India where it has now been a well settled rule that a criminal proceeding launched by complainant on the same cause of negligent action is no bar to the civil proceedings of the complaint under their Consumer Protection Act could be a reference.

BACKGROUND

People do not die just from heart attacks, cancer and bacteria, they die from system-wide failings and poorly coordinated care in medical sector. Disputes of medical negligence are constantly rising not only in Nepal but throughout the whole world and unintended medical errors have become a big threat to patient safety. Preventable medical errors are the third leading cause of death in the U.S., after heart disease and cancer, causing at least 250,000 deaths/ every year.[1] World Health Organization has listed medical negligence among the "top

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[1] Steve Sternberg, *Medical Errors Are Third Leading Cause of Death in the U.S*, US News, May 3, 2016, http://www.usnews.com/news/articles/2016-05-03/medical-errors-are-third-leading-cause-of-death-in-the-us.

10 killers in the world."[2] However, there is no data or systematic data is lacked in Nepal regarding how many people die annually due to medical negligence. Medical negligence broadly is the breach of duty owed by a doctor to his patient to exercise reasonable care and skill, which results in some physical, mental or financial disability. In negligence, a medical care provider fails to do something that s/he should have done. For example, if law imposes duty on doctor to carry initial diagnosis of disease prior to starting treatment but he fails to do so and gives medicine directly as a result if it leads to permanent disability of a patient, it amounts to medical negligence. Surgery on wrong site is another example of medical negligence.

For any medical negligence claim to be established the three essentials of Medical negligence must be proved viz. - (1) Legal duty to exercise due care. (2) Breach of the duty, and (3) Consequential damage.[3] Negligence in medical care may arise in an infinite number of ways but many instances of medical negligence can be grouped into one of the following six categories[4] viz. - (i) Misdiagnosis, (ii) Failure to diagnose in time, (iii) Surgical error, (iv) Failure to follow up with treatment, (v) Failure to treat in a timely manner, (vi) Anaesthesia error, and (vii) Medication or prescription error. Research study carried by the author shows - Errors in surgical treatment is the major cause (33.33%) of medical negligence in Nepal, the second major cause (22.22%) of negligence being errors in diagnosis.[5]

I. LIABILITY FOR NEGLIGENCE

The rationality behind the origin of legal duty to take care and the existence of liability which one should face for negligence is deeply rooted on the concept of professionalism. Courts require that the professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. Profession differs from occupation because of its four characteristics. Firstly, the nature of the work which is skilled and specialized and a substantial part is mental rather than manual. Secondly, there must be commitment to moral principles which go beyond the general duty of honesty and a wide duty to community which may transcend the duty to a particular client or patient. Thirdly, there must be professional association which

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[2] Malathy Iyer, *Medical Errors in Top 10 Killers: WHO*, The Times of India, April 20, 2011, http://timesofindia.indiatimes.com/india/Medical-errors-in-top-10-killers-WHO/articleshow/8032059.cms.

[3] D. K. Ganguly, Medical Jurisprudence & Toxicology: Principles, Practice & Procedure 785 (2008).

[4] P. Rupasinghe, *Medical Negligence and Doctor's Liability; A Critical Review in Present Legal Regime in Sri Lanka,* 262-263 (2015), http://www.kdu.ac.lk/proceedings/irc2015/2015/law-043.pdf.

[5] Ramesh Parajuli, Medical Negligence in Nepal: A Critical Study of Law and Practice in the Light of Indian Experiences, (2013) (Unpublished Ph.D Dissertation, Amity University) (on file with the Author).

regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics and fourthly, high status in the community.[6]

The concept of medical profession falling within the ambit of CPA has been recognized already by Nepalese Supreme Court in *Dr. D.B. Shah's* case[7]. As per the statute,[8] for activation of the concept of liability, there must be some loss suffered to patient. In *Dr. Buddha Basnet's* case[9] the Court of Appeal also recognized loss to patient as a prerequisite for imposing liability to medical professionals under negligence. Supreme Court in 2009[10] felt inadequacy of this general law of CPA and issued directive to the government to bring a new specific comprehensive law for dealing with medical negligence and doctor-patient relationship guided by Informed Consent model of treatment in Nepal but non-compliance by government over such directive has become a bitter truth till date.

What medical negligence exactly is has not yet been defined in Nepalese law. Likewise, government as per its obligation under CPA has neither determined which standard of medical service is to be provided at minimum to the patients nor has it shown any initiation to comply with this statutory obligation. In this scenario, Nepalese courts are overwhelmingly shouldered with burden to determine whether an alleged doctor or hospital is negligent or not by looking into the detail circumstances and facts of the individual case. In this light, necessity to enact and publish *National Standard Treatment Guidelines* by the government has been felt today.

II. AVENUES OF MEDICAL NEGLIGENCE

Negligence in medical care may broadly be classified into four levels of treatment. Firstly, medical negligence at the level of doctor/paramedical staff/ hospital authorities; in this situation, liability for negligence may be fixed at individual level and/or jointly or vicariously where hospitals/nursing homes are involved. Secondly, negligence can be classified at the level of manufacturers of drugs, equipment, etc. and dispensers. Thirdly, negligence can be classified at the level of patient himself or his attendants also known as contributory negligence and fourth, composite negligence, i.e., at more than one of the above

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[6] RUPERT M. JACKSON & JOHN L. POWELL, PROFESSIONAL NEGLIGENCE 101-103 (3rd ed. 1995).
[7] *Dr. DB Shah v. Pro-Public*, 11 NKP, 1819 (2009) (Hereinafter DB Shah's case).
[8] Section 22 of the Consumer Protection Act, 1998 provides: "In case any consumer suffers a loss or damage of any kind as a result of the sale of any consumer good or service contrary to this Act, such consumer, or any Consumer Association on behalf, may file a complaint with the Compensation Committee."
[9] *Dr. Buddha Basnet v. Jyoti Baniya,* AC Patan, (September 9, 2010).
[10] DB Shah's case, *supra* note 7.

three levels. The key stakeholders of a medical profession are: a) Pharmacy and Pharmacology (drug manufacturer, storage, supply, distributor, medical shops), b) Laboratory representative (medical laboratory technician, health lab assistant, medical technologist), c) Care Taker (who follow order and act for the patient, nursing staff), d) Doctors and other Para-medicals (Right to examine the patient, right to prescribe drugs, right to operate/surgery), and e) Hospital Management (liable for Corporate Negligence). Any of these professionals could be held liable for medical negligence. Negligence of paramedical staffs may lead to death of patient, for instance, death of a patient after transfusion of wrong group blood because of being mislabelled by a lab technician.

III. LAWS RELATING TO MEDICAL NEGLIGENCE IN NEPAL

Nepalese law does not define medical negligence. What exactly amounts to medical negligence is almost impossible to be defined in law concretely because of its wide and indeterminate nature. Nepal and many other countries including India have enacted statute to compensate victim for any kinds of proven loss because of breach of duty of care or deficiency in service by a health service provider whether it be a doctor, surgeon, nurse, hospital, nursing home, pharmacy, lab technicians, drugs or medical equipment manufacturers etc. These various situations are to be interpreted as medical negligence and the patient victims are to be awarded with compensation. Major laws relating to medical negligence in Nepal include:

A. Constitution of Nepal, 2015

Besides entitlement of right to dignified life, every patient consumer are guaranteed right not to be deprived of emergency medical service / treatment and right to be informed about medical treatment the patient is ongoing. This provision of Article 35 is landmark achievement for the patients as these rights have acquired Constitutional status being fundamental right under Part 3 whose remedy is possible directly through Supreme Court or Courts of Appeal under Extra-ordinary jurisdiction however provision of Article 47 exempts Government of Nepal from its duty to implement these rights till September 19, 2018 thereby leaving government unaccountable for the contingent period, denying patient victims to claim constitutional remedy in case of being victimized by medical negligence of medical service provider in failing to provide emergency / timely medical treatment to needy patients and for failing to comply with the principles of informed consent while delivering service.

B. Consumer Protection Act, 1998

There is at least a general law of CPA to hold doctors/hospitals liable for medical negligence. Till date, this general law which is applicable to all categories of

goods and services is used to hold doctors/hospitals liable for medical negligence. Reporting to and adjudication of medical negligence complaints for compensation is under the preliminary jurisdiction of District Compensation Committee (DCC). The Committee is quasi-judicial in nature whose office lies within the premises of district administration office. Each of the 75 districts has a Committee that is legally mandated to have initial jurisdiction to register and adjudicate complaints in case any consumer suffers a loss or damage of any kind as a result of the sale of any consumer goods or service in a manner opposed to the Act. Such consumer, or any Consumer Association on his behalf, may file a complaint to the concerned DCC in accordance to Section 22 of the Act. Composition of the Committee is overwhelmingly bureaucratic in nature.

The Act in section 10(e) prohibits producing, sale or supplying medical goods or services which may harm the health of patient. Any person who violates or cause to violate these prohibitions is criminally liable under section 18 (e) of the Act. The Act does not clearly mention liability for 'death due to negligence' but only provides for imprisonment of up to fourteen years or fine up to Rs. 500,000 or both in case of 'threat to life' as a result of above violations. In case, such violation does not cause threat to life but patient lose power of one organ then the medical service provider is liable for imprisonment of up to ten years or fine for up to Rs. 500,000 or both. In other circumstances of harm to patient (neither threat to life nor loss of one organ) the medical service provider is liable for imprisonment of up to five years or fine up to Rs. 300,000 or both.

Separate procedure has been prescribed in the Act for seeking civil remedy and initiating criminal proceedings against negligence. No plaintiff can pray to obtain a decree of imprisonment against physician by filing complaint before the DCC that can provide only civil remedy. This fact has well been discussed by Court of Appeal in *Dr. Gopal's* case[11] where it was observed:

> A plaintiff who approaches before the DCC seeking civil remedy as compensation against medical negligence under Section 22 of the Act cannot claim for punishment as well. To claim for punishment, the case must be initiated from District Court according to Section 19 and Section 20 of the Act.

Indian Supreme Court in *Jacob Mathew's* case[12] also took reference of *Syed Akbar's* case[13] where the court had dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. The judgment observed:

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[11] *Dr. Gopal Prasad Khanal v. Neshar Ahmad*, AC Butwal, 289 (June 22, 2009) (Hereinafter Gopal Prasad Khanal's case).
[12] *Jacob Mathew v. State of Punjab & Another,* 6 SCC 1, (2005).
[13] *Syad Akbar v. State of Karnataka,* 1 SCC 30, (1980).

> There is a marked difference as to the effect of evidence, viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

Though there is legal provision for penal sanction and prosecution for medical negligence in Nepal, yet the trend of filing complaints against doctors is overwhelmingly civil remedy centric. Since Nepalese law till date lacks provision for criminal negligence, it is hard to prosecute doctors for this charge of criminal negligence rather; rare cases exist where doctor has been prosecuted for accident according to Chapter in Homicide of *Muluki Ain,* 2020 B.S. In India a Doctor couple (Dr. S. C. Saraswat and his wife Dr. Usha Saraswat) were sentenced to five years rigorous imprisonment by a local court in Mathura after holding them guilty of medical negligence to a pregnant twelve years old Rajeshwari on 30 Nov. 2012. The woman was admitted to a nursing home run by Dr. S C Saraswat and his wife Dr. Usha Saraswat in the city for treatment of high fever where the doctors diagnosed her pregnancy as the cause behind the fever and removed her uterus after terminating her pregnancy.

That, however, proved to be of little help to the patient whose condition worsened as she kept losing blood. She had to be rushed to a hospital in Agra where doctors managed to save her life, although she was left partially disabled in the process. After court's intervention the case was filed against the doctor couple.[14]

IV. LIABILITIES AGAINST MEDICAL NEGLIGENCE: CIVIL AND CRIMINAL

Medical negligence is basically a matter of civil wrong where the liability attached is compensation to the patent party from negligent medical service provider. However, in very rare instances, it might lead to criminal liability as well. What are those situations that might lead to criminal liability are yet to be interpreted by judiciary in Nepal but Indian Supreme Court have established principle that doctor can be arrested and imprisoned for medical negligence in case of gross

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[14] *Doctor Couple Get 5-Year Prison Term for Medical Negligence,* Medical Times, December 2, 2012, http://www.aalatimes.com/2012/12/02/doctor-couple-get-5-year-prison-term-for-medical-negligence/.

negligence amounting to recklessness. In *Dr. Suresh Gupta's* case,[15] the appellant was a doctor accused under Section 304A Indian Penal Code (IPC) for causing death of his patient in which Indian Supreme Court held- for conviction in a criminal case the negligence and rashness should be of such a high degree which can be described as totally apathetic towards the patient.

Even though CPA is basically a remedial nature of statute, it has punitive provisions as well. This fact has also been acknowledged by Court of Appeal in *Dr. Gopal Prashad Khanal* case.[16] Unlike the procedure for seeking civil remedy against medical negligence where complaint is entertained by and compensation is awarded by DCC, the criminal cases are required to be filed by inspection officer after a thorough investigation before the concerned District Court in accordance to Section 20(1) of the CPA. The inspection officer may seek opinion of Government Attorney while investigation and such criminal cases are to be filed within 35 days from the date of completion of the investigation. Such criminal cases are initiated by Government Attorney.

Offences under the CPA that are relevant with medical profession in general are of four categories and have been dealt in Section 9 and 10. They include:

(a) Production, sale or supply of medical goods or services which may cause harm to the health of patient: Any person who violates or cause to violate these prohibitions is criminally liable under Section 18(e) of the Act. The Act does not address/mention the term *death due to negligence* but only provides for imprisonment of up to fourteen years or fine up to Rs. 500,000 or both by using a term in case of *threat to life* as a result of above violations. What exactly the term *threat to life* denotes has not been defined and is up to the court to interpret. In case, such violation does not cause threat to life but patient lose power of one organ then the responsible medical service provider is liable for imprisonment of up to ten years or fined for up to Rs. 500,000 or both. In other circumstances of harm to patient (neither threat to life nor loss of one organ) the medical service provider is liable for imprisonment of up to five years or fined up to Rs. 300,000 or both.

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[15] *Dr. Suresh Gupta v. Government of N.C.T. of Delhi and another,* AIR 2004 SC 4091 (Hereinafter Dr. Suresh Gupta's case). The operation performed by him was for removing his nasal deformity. The Magistrate who charged the appellant stated in his judgment that the appellant while conducting the operation for removal of the nasal deformity gave incision in a wrong part and due to that blood seeped into the respiratory passage and because of that the patient collapsed and died. The High Court upheld the order of the Magistrate observing that adequate care was not taken to prevent seepage of blood resulting in asphyxia. The Supreme Court held that from the medical opinions adduced by the prosecution the cause of death was stated to be `not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage.' The Supreme Court held that this act attributed to the doctor, even if accepted to be true, can be described as a negligent act as there was a lack of care and precaution. For this act of negligence he was held liable in a civil case but it cannot be described to be so reckless or grossly negligent as to make him liable in a criminal case.

[16] Gopal Prasad Khanal's case, *supra* note 11.

(b) Production, sale, supply, export or import of sub-standard medical (consumer) goods or instigate others to do the same. Commission of this offence makes the offender liable for up to three years imprisonment or up to Rs. 50,000/- fine or both.

(c) To imitate any consumer good and mislead consumers; Sale/supply of good or service by making false/misleading claim, by describing a substandard good/service as of high standard and unfair trading practices by making false/misleading publicity or advertisements relating to the use, usefulness, or efficacy of any consumer good or service. Commission of this offence makes the offender liable for up to five years imprisonment or up to Rs. 100,000 fine or both.

(d) Failure of the producer to mention particulars (name and address of the producer, and registration number of the industry) in consumer goods that is mandatory by law. Failure to comply with this provision makes the offender liable for up to two years imprisonment or up to Rs. 30,000/- fine or both.

Situation of death due to negligence has not yet been addressed by any laws in Nepal. CPA, 1998 also does not use the term in case of death of person anywhere in its whole text. The Act provides *locus standi* to file for compensation only to consumer and the definition of consumer under the Act is not wider enough to include even the relatives of patient (consumer) who die due to medical negligence. There exist no case laws till date that have interpreted in this regard as well. The Act is confusing as it is silent whether the close relative of deceased consumer should also be treated as consumer and allowed *locus standi* to file complaint on behalf of the deceased or not. Section 24 of the Act only provides in case of loss suffered by Consumer or *Hakwala*. In reality Section 22 does not clearly mention that even *Hakwala* of consumer (Nearest kin of consumer) has right to file complaint for negligence. Likewise, Rule 2(e) of Consumer Protection Regulation, 2000 does not include *Upabhokta ko Hakwala* in its term *Ujurwala* (Complainer).

Section 22 has provision that requires complaint to be filed either by consumer or organization on behalf of consumer. It is a tragedy that the Act has remained silent regarding what will happen in case of death of consumer and why this Act has not intended to expressly mention and clarify that situation. Instead why the Act left it into the interpretation of court to determine who can file complaint after death of consumer under this Act is confusing and seemingly the Act wants to follow the general principle of criminal liability i.e., the right of person dies with his death. In this situation it looks confusing whether the criminal proceedings for medical negligence needs to be initiated under Consumer Protection Act or whether to be initiated according to penal provisions of the *Muluki Ain* (Chapter on Homicide or Treatment) after consumer dies as per the demand of justice. Because the boundary of Tort ends after criminal nature begins according to Common Law's Principle. The CPA needs clarity.

The Act fails to directly address *death due to negligence* rather indirectly uses a term in case of *threat to life*. Introducing a provision in Nepalese law similar to Section 304A[17] of the Indian Penal Code (IPC), 1860 that expressly covers *causing death by negligence* would be useful in addressing this ambiguity. The Section reads as:

> Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

In *Dr. Gopal* case,[18] Court of Appeal made it clear that if a plaintiff seeks penal action against the negligent doctor, he must claim according to Section 18, 19 and 20 of the CPA (that deals with investigation and filing of case to District court by inspection officer) and not according to Section 22 (that deals with filing of compensation claim before DCC) of the Act. In this case, plaintiff had filed complaint before DCC seeking both compensation (by standing on Section 22 of the Act) as well as punishment (by standing on Section 18 of the Act) against the negligent doctor. The court denied punishment by stating that-

> To punish medical professionals for criminal negligence according to Section 18, the inspection officer has to investigate complaint and file case before District court and such case is to be cognizable as mentioned by Section 19 and 20 of the Act. However, this case was not filed accordingly; plaintiff cannot claim punishment under Section 18 of the Act.

A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct falls below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves surgical gauze inside the patient after an operation[19] or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade. To fasten liability in criminal proceedings e.g. under Section 304A of the IPC, the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus for civil liability it may be enough for the

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[17] Section 304-A was inserted in the Code in 1870 by the Indian Penal Code (IPC) (Amendment) Act, 1870. The Supreme Court has clarified that the Section 304-A of IPC is applicable only when death is caused due to rash and negligent act of the accused, which is an essential element to attract said provision. But a colossal group of legal scholars have always questioned whether this Section provides punishment for manslaughter without intention or is it a 'license to kill' in disguise of a rash and negligent act.

[18] Gopal Prasad Khanal's case, *supra* note 11.

[19] *Achutro Haribhau Khodwa & others* v. *State of Maharashtra & others*, AIR 1996 SC 2377.

complainant to prove that the doctor did not exercise reasonable care but for convicting a doctor in a criminal case, it must also be proved that this was a gross negligence amounting to recklessness. In *Dr. Suresh Gupta's* case,[20] the appellant was a doctor accused under Section 304A IPC for causing death of his patient in which Supreme Court held- for conviction in a criminal case the negligence and rashness should be of such a high degree which can be described as totally apathetic towards the patient.

It is internationally a well established principle that criminal prosecution is no bar for civil remedies. A patient who has become the victim of medical negligence holds right to file compensation complaint simultaneously before the DCC in Nepal while ongoing of prosecution in District Court. However, no any cases have come to the information of the author till date. Compensation complaints on medical negligence disputes have recently started to come before courts and there has been felt urgent necessity to frame a clear judicial perception regarding its jurisprudence. In India, it is now a well established rule that criminal prosecution is no bar for filing civil complaint seeking compensation because the objective behind the two procedures is totally different. In *Sheo Nandan Paswan's* case,[21] it was observed:

> It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. It is for this reason that in *A.R. Antulay v. R.S. Nayak* [AIR 1986 SC 2045] the Court pointed out that (SCC p. 509, para 6) punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait jacket formula of *locus standi*.

A. Chapter on Treatment in Country Code, 1963

The Code ensures only competent and authorized doctors will perform surgery and prescribe medicine.[22] Practice of medicine by fake doctors (quacks) may

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[20] *See* Dr. Suresh Gupta's case, *supra* note 15.
[21] *Sheo Nandan Paswan* v. State of Bihar & others, 1987 AIR 877, 1987 SCR (1) 702.
[22] No. 1 of the Chapter on Medical Treatment has made provision regarding who can conduct surgery, prescribe medicines and perform minor treatment. If incompetent conducts medical practice, liable for up to Rs 500 fine or up to two years imprisonment or both (No. 8) and in case of such treatment/surgery/vaccine is given by unauthorized person or quakes and if a patient dies/suffers bodily injury then additional punishment of up to Rs 100/- or up to 6 months or both. (No 9). But if no harm to patient even after treatment by unauthorized person, he/she is liable for fine up to Rs. 500/-.

lead to fine or imprisonment as per No. 9 of the Chapter. Patient's consent is required to be taken prior to surgery as a general rule.[23] Physician would not be liable for death of a patient provided that right drug and right dose was prescribed but is liable if prescribes wrong drug, overdose or for negligent surgery (*bekida sanga chirfar garda*). In case of death or injury to patient, the case is required to be investigated.[24] It also provides provision prescribing treatment procedure for insane[25] patients and directs that no sick servants/ dependants be thrown away from home.[26] Limitation to file case for offence in case of patient's death is 3 months as per No. 10 of the Chapter.

CPA is a primary statute applicable to deal with medical negligence and only in matters not addressed by the Act (example, medical practice by quacks or fake doctors), this code is applicable. No. 4 of the Chapter on Preliminary Matters of Country Code (*Muluki Ain*, 2020 BS), 1963 clearly mentions: "the matters set forth in separate laws made in specific subjects shall be governed by such laws and those matters not set forth in such laws shall be governed by this *Muluki Ain*." However, the Code itself is inadequate and outdated as it neither prescribes mutual rights and duties of patient and physician nor does it contain provision for providing relief to the victim of medical negligence.

Cases under the Chapter on Medical Treatment that involve punishment are considered as criminal offences as per No. 9 of the Chapter on Court Proceedings within Country Code. Criminal complaints regarding medical negligence by any physician both under The Country Code as well as under the CPA are to be filed before and adjudicated through District Courts.[27] These cases are required to be decided within 1 year from the date of submission of note of defense or from the date of expiry of time limit to file note of defense according to No 14 of the Chapter. Since, the civil remedies for medical negligence are provided by District Compensation Committees under CPA in Nepal, there seems no significance for the existence of this Chapter within Country Code. Rather the country is waiting to get a self comprehensive Medical Negligence Act, as directed for enactment to the government by Supreme Court in *Dr. D. B. Shah's* case[28] during the year 2009.

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[23] Muluki Ain, 1963, Ch. 12, No. 2.

[24] No. 4 of the Chapter on Medical Treatment provides that "If patient suffers bodily harm/illness or dies despite treatment/surgery by qualified doctor then following 5 things should be investigated (with help of doctor and if its poison or not should be conformed after administering it to dog/ goat): (i) remaining drug, (ii) prescription letter, (iii) instrument used in surgery/treatment, (iv) chemical/drug used, (v) correct dose given or not.

[25] No. 6 of the Chapter provides - Treatment of insane to be carried with foot cuff in (*Khor*/ hospital/prison) and can also handover to guardian upon request provided the guardian can care."

[26] Muluki Ain, 1963, Ch. 12, No. 7.

[27] The Chapter on Medical Treatment (Muluki Ain), in No.1 provides that "District courts shall have jurisdiction to adjudicate any cases for which no law has prescribed specific authority for hearing."

[28] Dr. DB Shah's case, *supra* note 7.

B. Nepal Medical Council Act, 1964

The Act establishes an autonomous regulatory body- Nepal Medical Council is a basic architecture to design and regulate allopathic system of medicine within the country. Mandatory registration in the Council is a precondition for all doctors to practice medical profession. The Council is responsible to regulate medical profession as it is mandated to: (a) recognize medical colleges, (b) recommend for cancellation of registration and approval in cases where medical colleges are found not complying with policy of the curriculum, terms of admission, examination system, other infrastructures and matters of standards, (c) determine policy for smooth operation of the medical profession, (d) issue registration license by determining qualification of the medical practitioner and conduct licensing examination for the qualified medical practitioner, (e) prepare code of conduct of the medical practitioner and take action (deletion of name from register for professional misconduct) against the medical practitioner for its breach, (f) examine whether proposed medical college meets required standards and infrastructures and if found positive, give opinion to the government to grant approval for establishment and operation of such medical college.

Though certain key terms like hospital,[29] modern medicine,[30] medical practitioner,[31] specialist medical practitioner[32], medical college[33], and registered medical practitioner[34] have been defined in the Act, all these definitions are based only for allopathic medical system and no law still exist for regulation of homeopathy system of medicine. Applicants are required to submit detail records to Nepal Medical Council while registering their name according to Section 16 of the Act. These details include degree, certificate of educational qualification, registration of name registered in the registration book of any foreign Medical

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[29] Nepal Medical Council Act, 1964 (NMC Act) in Section 2 (b) defines Hospital as "an agency operated by Government of Nepal or Non- governmental level providing health services for treatment, prevention, diagnosis and rehabilitation from diseases and this term also includes a recognized institution established with the objective of carrying out or caused to be carried out study, teaching at least bachelors level and to provide or cause to provide be given training in medical science."

[30] NMC Act in section 2(c) defines Modern Medicine as "the medicine of allopathic."

[31] NMC Act in section 2(d) defines Medical Practitioner as "a person who has obtained bachelor's degree from the recognized institution in the medical science under modern medical system and engaged in the concerned profession."

[32] NMC Act in section 2(d1) defines Specialist Medical Practitioner as "a Medical practitioner who has obtained Masters Degree, honour and diploma from the recognized educational institution in the concerned subject as well engaged in the concerned profession after obtaining special training as prescribed."

[33] NMC Act in section 2(d)2 defines Medical College as "an educational institution established with the objective of providing or causing of providing study of bachelor or master's degree or post graduate training in the modern medical science completely and this term also includes the medical institution and Dental College established for such purpose."

[34] NMC Act in section 2(f) defines Registered Medical Practitioner as "the Medical practitioner whose name has been registered in the Registration book as per the Nepal Medical Council Act."

Council, letter of oath, etc. Council conducts written examination as prescribed prior to registration of the Medical practitioner in order to maintain standard as required in the medical science as per Section 21D of the Act, however voices are being raised regarding necessity to take practical skill test examination in addition to written examination of medical students prior to issuing them licence to practice medicine as a physician and registration into the Council.

Practice of medical profession directly or indirectly by persons other than the registered medical practitioner is strictly prohibited by Section 26 of the Act. However, subject to the Drugs Act, 1978, the person whose name has been registered in the National Health Professional Council is allowed to carry out the medical profession as prescribed by the publication of notice in the Nepal Gazette. The Act prohibits mentioning or causing to mention false degree, diploma, certificate or honour relating to modern medicine with a motive of carrying out the treatment. If the name of any person is found registered by fraud or mistake or if any registered medical practitioner has become incapable to carry out medical profession owing to mental incapacity, the Council has power to constitute Enquiry Committee and on the basis of the report submitted by such Committee, the Council may remove the name of such person from the Registration book according to Section 20 of the Act. The Council also holds power to delete name of any registered Medical practitioner from the Registration book and re-registration in case of Professional misconduct.

CONCLUSION

The existing general law of CPA has numerous inadequacies to cope up with the complex nature of medical negligence disputes in Nepal. Nepalese Supreme Court in *Dr. D.B. Shah's* case[35] had directed Ministry of Health on November 15, 2009 to initiate for enactment of a "Comprehensive and Self Contained Act" for addressing Medical Negligence based on Theory of Informed Consent. It needs to be complied immediately without further delay.

Existing CPA is silent regarding whether Criminal prosecution and civil suit for compensation can go side by side or not. This has created confusion which needs to be addressed through amendment to existing CPA. It should clearly mention that criminal proceedings cannot be a bar to civil action. It is now well settled rule in India[36] that a criminal proceeding launched by complainant on

[35] Dr. DB Shah's case, *supra* note 7.

[36] Section 237 (6) of the Indian Criminal Procedure Code, 1973 provides that "No person who has been directed to pay compensation shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint." See also *Dr. Brijesh Kumar Mishra and others* v. *State Consumer Disputes Redressal Commission, U.P. Lucknow and others*, 2009 CTJ18 (All); *See also Jagdish* v. *State of A.P.,* (2009) I CPJ 18 (SC). The treatment provided by child specialist doctor, running a private hospital, based on wrong diagnosis leading to death was held negligent and court held that whether to convict even under section 200 of CrPC is within the jurisdiction of trial court.

the same cause of action is no bar to the civil proceedings of the complaint under the CPA.

There is a need of law that can clearly mention situation and circumstances under which physician could also be prosecuted for *criminal negligence*[37] and should clearly address death *due to negligence*. It should provide for the legal guidelines related to procedure for arrest of doctor in case of criminal negligence. Doctors by nature of their humanitarian profession should not be harassed and arrested easily like in case of other suspects without clear legal guidelines. A doctor cannot be prosecuted for simple lack of care and error of judgment or accident during treatment.[38] It is to be remembered that for a doctor to be arrested or prosecuted on criminal negligence, the allegation complained against a doctor must show negligence or rashness of such a high degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence which indicates recklessness by physician despite foreseeing the high probability of damage to patient alone is punishable.

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[37] Dr. Suresh Gupta's case, *supra* note 15.The court in this case held that "The act complained against a doctor must show negligence or rashness of such a high degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence which indicates recklessness by physician despite foreseeing the high probability of damage to patient alone is punishable."

[38] *Jacob Mathew v. State of Punjab*, 6 SCC 1; AIR 2005 SC 3180. In this case Indian Supreme Court laid down guidelines for filing private complaint against doctors, procedure for arrest of doctor and applicability of *res ipsa loquitor* and held:- A doctor cannot be prosecuted for simple lack of care and error of judgment or accident during treatment.

Restorative Justice: Moving Beyond the Silos

Ramkanta Tiwari*

ABSTRACT

In a conventional *modus operandi* of justice, the system defines laws and devises solutions when such legal norms are violated. In this rather formalistic paradigm of justice, the state occupies center-stage, and in some ways, owns the laws and the justice system. But if this notion of the state is essentialized with ideals of democracy, participation, or actual justice, one arrives at certain incongruities that undergird the conventional understanding of the functioning of the state and the justice system as a whole. The purpose of this paper is to discuss these incongruities through the perspective of restorative justice, and to emphasize the need of a more processual and dialogic framework of justice. The first part of this paper lays the foundations for and discusses various aspects of restorative justice. The second half of the paper outlines the current legal provisions in Nepal vis-à-vis restorative justice, and calls for a need to incorporate restorative justice in discursive and practical levels in the Nepali context.

INTRODUCTION

The conventional justice system is based on an assumption of adversarialism; it is believed that since lawyers in the courts exhibit adversarial relations among each other, the same kind of adversarial relations exist between the victims and offenders inside the courts and out in the community. As Sherman and Strang point out, "this adversarial assumption oversimplifies the roles played by citizen participants in the justice system, or the roles victims and their supporters would like to play."[1] In other words, such an assumption undermines

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[1] Lawrence Sherman & Heather Strang, Restorative Justice: The Evidence 12 (2008) (Hereinafter Lawrence Sherman).

the agency of the victims and offenders to engage with one another, participate in dialogues pertaining to their concerns and needs, and thereby reach mutually beneficial outcomes: healing (for the victims) and accountability (for the offenders).

In the judiciary of the conventional system, the courts are based on this adversarial model. A judge serves as a referee between two parties, and upon hearing the lawyers speak (less so the victims, community, and offenders), he or she pronounces one party the winner, declares that justice has been delivered, and the chapter is closed. In doing so, however, this system fails to realize that without allowing dialogues amongst the stakeholders, and without mutually agreeable outcomes, the courts' decisions only widen the gulf between victims and offenders. It would be a mistake to take for granted that victims and offenders are natural enemies and to assume that "victims are not primarily retributive in their view of justice."[2] Yet, in the conventional model of justice, this is exactly what courts do.

In the conventional model of justice (synonymously used here to mean retributive or adversarial justice), an offender is held accountable to the state, because the state is considered synonymous with the law. Thus, wrongs that have been done to the law are equivalent to wrongs done against the state. Restorative justice is a step away from this understanding, and understands justice from the perspective of those directly involved and affected by the event of crime. Unlike retributive justice systems, restorative justice maintains that an act of crime is a violation of people and of interpersonal relationships,[3] and that these violations create obligations for the wrongdoers to "put right the wrongs" and thereby repair the broken relations. As Howard Zehr succinctly puts, "crime represents damaged relationships."[4] In the most basic restorative justice logic, the right way to deal with crime is to repair the broken ties between the offender, victims, and the community as a whole.

I. RESTORATIVE JUSTICE: PUTTING A HUMAN FACE ON CRIME AND JUSTICE

The conventional justice is meant to punish in order to deter crime and violence. It is essentially dehumanizing, though, because it tends to assume that human beings are like other objects, whose behaviors can be molded through the use of force or coercive means. Seen this way, it strips humans of their "being", and discounts the possibility that individuals are corrigible through other humane

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[2] *Id*.
[3] Howard Zehr, The Little Book of Restorative Justice 19 (2002) (Hereinafter Howard Zehr).
[4] *Id.* at 20; *See generally* Gerry Johnstone, Restorative Justice: Ideas, Values, Debates (2001).

means. In doing so, an act of punishment also symbolizes the system's failure in that it is not able to lead by example, or to prevent the someone from wrongdoing in the first instance. Therefore, although punishment appears as if we are exercising power over the powerless, it is actually suggesting our weakness by illustrating our failure to lead by example.

As an alternative—and a more functional—approach to justice, restorative justice is founded on three distinct principles. First, restorative justice holds that crime is a violation of people and interpersonal relationships. Therefore, any act of crime is considered a breach of mutual trust and a violation of the dignity that each person is due. It is not simply a breach of an impersonal law. Second, restorative justice asserts that all violations or crimes create obligations towards the party against whom the wrong has occurred. This obligation has to be fulfilled by the person who causes the harm. Third, restorative justice emphasizes that the central obligation is to right the wrongs.[5] In other words, justice does not end at the moment of conviction, but it goes beyond in producing collective effort in making things right.

Seen this way, restorative justice is a relational way of looking at crime, law, and justice. It stems from the understanding that human beings are relational beings, and it is the relations that are first hit by the events of crime or conflict. Based on this logic, the best response to crime or conflict should first address reestablishing the human relationship, the lost dignity, or the fear that emanates from crime or conflict. While the conventional way of dealing with crime is to push people away, restorative justice aims to pull people in by seeking to collaboratively repair the harms done to the parties of the crime or conflict. Rather than being rights-based, it is interests-based. Rather than being isolating, it is engaging and collaborative.

In addition to the three foundational principles, there are four 'pillars' of restorative justice: encounter, amends, reintegration, and inclusion. Encounter, or dialogue, is a way of creating opportunities for all the parties concerned to come together, if they wish, to discuss how the criminal act has affected each of the parties, and what roles could each party play to mitigate the harm that has already been caused. Similarly, restorative justice provides opportunities for offenders to make amends for the harm they have caused, and to transform the amends into obligations. Reintegration is the third pillar of restorative justice. Reintegration is not only about putting victims and offenders together in the community, but is also about reinstating the mutual trust and sense of dignity that was breached when the crime occurred. Finally, restorative justice

[5] Howard Zehr, *supra* note 3; HEATHER STRANG & JOHN BRAITHWAITE, RESTORATIVE JUSTICE: FROM PHILOSOPHY TO PRACTICE (2000).

underscores the importance of inclusion in a justice-delivery process. In other words, restorative justice processes are "bottom up", since they involve the actual stakeholders – victims, offenders and community – in deciding what the outcomes of the justice process should be.

Likewise, the notion of accountability is central to restorative justice, and this accountability is towards victims and the community rather than state authorities. An act of crime has both material and emotional consequences and, therefore, a lopsided focus on material compensation for victims does not complete the full circle of justice. Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future.[6] Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through inclusive and cooperative processes.[7]

In words of Howard Zehr, one of the founding fathers of the field, restorative justice is a "process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs and obligations, in order to heal and put things right as possible."[8] Since the emergence of this justice paradigm in the 1970s, it has continued to grow as a social movement that aims to institutionalize peaceful approaches to harm, problem-solving, and crime (including violations of legal and human rights). From the time of its emergence, restorative justice has expanded beyond the confines of criminal justice to areas such as transitional justice, juvenile justice and education settings. This rise of restorative justice is aptly seen as a shift we are witnessing on matters of crime, justice, and society as a whole.

Evidently, restorative justice is a new idea, but a movement growing fairly quickly. In 2002, the United Nations made a historic decision by adopting a resolution entitled "*Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*" as a guide to encourage member states to implement restorative justice in the operation of their domestic criminal justice systems. The resolution tried to describe restorative process as being inclusive and participatory, and importantly has encouraged all member states to draw on the "Basic Principles on the Use of Restorative Justice Program in Criminal Matters" in the development and operation of restorative justice programs. Restorative justice has been recognized by the United Nations as an "evolving response to crime that respects the dignity and equality of each person, builds understanding,

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[6] Tony Marshall, Restorative Justice: An Overview 5 (1999).
[7] Daniel Van Ness, Howard Zehr, & C. Cunneen, Restorative Justice: Theoretical Foundations (2002).
[8] Howard Zehr, *supra* note 3, at 37; *See generally* Gerry Johnstone, Restorative Justice Reader: Texts, Sources, Context (2003).

and promotes social harmony through the healing of victims, offenders and communities."[9]

To take this process further, the United Nations Office of Drugs and Crime developed the *Handbook on Restorative Justice* in 2005, which was grounded in the earlier resolutions regarding restorative justice. The *Handbook* offers an overview of key considerations in the implementation of participatory responses to crime based on a restorative justice approach. It focuses on a range of participatory measures, inspired by restorative justice values, that are flexible in their adaptation to criminal justice systems and that complement them while taking into account varying legal, social and cultural circumstances. The *Handbook* serves a useful guide for both government and non-government stakeholders in rolling out restorative justice programs effectively.

A. Dialogic Justice

One of the corner-posts of restorative justice are dialogues, or encounters, which aim to create a platform for all stakeholders to share their positions on how they have been impacted by the act of crime or offence. In Howard Zehr's words, through engagement, "the primary parties affected by crime—victims, offenders, members of community—are given significant roles in the justice process".[10] In fact, in addition to victims and offenders, the community is an important stakeholder in a justice process, and there should dialogues (direct and indirect) so that they share a common understanding of a criminal event, and its consequences. Although the desirable consequence of such dialogues is that it will reach a point of mutual outcomes, the most important aspect of such dialogues is that they are crucial in empowering the victims (and the affected community) in deciding over matters that concern them the most.

Moreover, under skillful facilitation, such dialogues have a therapeutic potential by healing the wounds caused to the victims, and helping in restoring community values. On the offenders' side, such dialogues can tremendously help the offenders realize the extent of harm they have caused to the victims and community, and also provide opportunities to seek forgiveness or apologies from victims and community. Dialogues then help in restoring back the ties of interconnectedness in community, and in preventing future wreckage. This is restoration, one of the central accomplishments of restorative justice.

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[9] UN Economic and Social Council (ECOSOC), *UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, 24 July 2002, E/RES/2002/12.

[10] Howard Zehr, *supra* note 3, at 24; HEATHER STRANG, REPAIR OR REVENGE? VICTIMS AND RESTORATIVE JUSTICE (2002).

Apart from the restorative justice framework, dialogues are key drivers of conflict transformation. Seen through the lens of conflict transformation, an act of crime or anti-social behavior can also be an opportunity through which we can see and address broad structural factors that initially gave rise to such acts. Using this knowledge as a stepping-stone, we can make better use of our efforts and produce constructive changes in society. Put differently, dialogues among all stakeholders are vital for conflict transformation because rather than focusing on resolving the immediate conflict, dialogues give opportunities to learn the reasons why someone carried out certain act, what consequences it had on all stakeholders, and what could be done mutually so that everyone benefits in the future. This approach of building on the past but working for the future is akin to restorative justice principles, and is not conceivable without proper dialogues or encounters.

The role of courts, then, should be in facilitating dialogues between the stakeholders, so that the broken relations can be restored, weakened victims are empowered, and the perpetrators are held accountable. This focus on dialogues is actually the foundation of restorative justice principles. By establishing dialogues as a key component of the justice system, it is expected that the restorative justice initiatives will move towards a win-win game, benefiting all the related stakeholders—victims, offenders, community, and the like.

B. The actual stakeholding

In restorative justice, the main stakeholders of justice are the victims, offenders, and the community (as opposed to formal officials or professionals in criminal justice system).

Victims: By participating in the dialogues, the victims will get opportunities to empower themselves. Not only will they have a say in the justice processes (unlike before), they will also be able to communicate with the offenders how they have been impacted by the act of crime. Rather than relying on lawyers or judges for outcomes that suit those actors' best, the victims can define their needs and how such needs can be better addressed—with or without the participation of offenders, community, police, or others.

Offenders: One of the key achievements of these dialogues is that the offenders will be able to understand fairly closely how their actions have harmed the victims and community. They will have opportunities to seek apologies from the victims who were affected by their harmful acts, so that if an apology is granted, they will have an easier time integrate back into society. The offenders can also contribute more directly in appeasing pain caused to the victims, such as through service work for victims or restitution if this is agreed upon by the latter.

Community: Any act of crime can also be understood as an attack on community because the offender is breaching the values that held the community together. Moreover, the criminal act also generates hatred or fear among the community towards the offenders, which makes it difficult to reintegrate offenders back into the community. In this context, the dialogues can give avenues for the community to express how it has been affected by the crime, how the harm could be reduced, and what its future expectations are from the offender. The community also benefits directly from the service that the offender does as a way of making amends.

II. PROCESS MODELS OF RESTORATIVE JUSTICE

A. Victim-offender mediation

Victim-offender mediation (VOM) is a dialogue-driven process aimed at victim healing, offender accountability, and restoration of losses.[11] A VOM typically involves a face-to-face encounter between the victim and the offender, and with the help of a neutral facilitator, both parties are given opportunities to talk about what has happened in the event of crime, and how both of them can right the wrongs.

VOMs were initially known as Victim-Offender Reconciliation Programs when they emerged in the mid-1970s and 1980s in Canada and the US.[12] These programs emerged from a context where two young men were arrested for vandalizing twenty-two properties in the Canadian town of Elmira in 1974. Rather than taking them through the usual course of custodial punishment, they were asked to meet their victims and report what damage they ha4d done.[13] "Encounter" was the main objective of VOM during this time, and such programs were led by Mennonite religious communities in Canada and US. In later days, besides encounter, healing and accountability are considered to be major outcomes of VOMs, and such practices have spread across the world in Europe, Israel, Japan, Russia, South Korea, South Africa, South America and the South Pacific.[14] More importantly, although it began from minor offence of vandalism, it has now been used in a variety of instances, including severe crimes such as homicide, which requires more skill and training to handle the sensitivities that come with such crimes.

As indicated above, VOMs are process-heavy in that they encourage the stakeholders, especially the victims and offenders to converse among each

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[11] Mark Umbreit et al., *Victim-offender Mediation: Three decades of practice and research.* 22 Conflict Resolution Quarterly 1-2, 279–303 (2:004) (Hereinafter Mark Umbreit).
[12] *Id.*
[13] Margarita Zernova, Restorative Justice: Ideals and Realities (2007) (Hereinafter Margarita Zernova).
[14] Mark Umbreit, *supra* note 11.

other so that each side understands how they are related to the act of crime, and both can decide on how to right the wrongs caused by the crime. Taken this way, VOM have a greater empowering capacity for the victims than the retribution-heavy conventional criminal justice system. At the same time, when the offenders are able to see first-hand how their acts have impacted the victims, they gain opportunities to make amends. If facilitated by the skillful third party, such encounters can be transformative in outcomes.

Apart from healing victims and holding offenders accountable, such VOMs can help challenge the stereotypes of both victims and offenders and reduce fear or shame that results out of the criminal act.[15] All of these outcomes are key in developing safe and secure communities, hence the increasing popularity of VOM in justice systems at the present. VOMs have strength in these aspects.

But VOMs are not free of criticisms either. Critics argue that VOMs silence the participants[16] and that the "dialogue and exchange process is somewhat staged".[17] But staging alone should not be considered a problem unless it impacts the outcome, such as through imbalanced power relations among the parties in encounter. With regard to power relations, Presser and Hamilton note the criticism against VOM, for instance "in domestic violence, the person who dominates outside the encounter is likely to dominate inside the encounter".[18] But in my opinion, this domination of one party by another in VOM should not be taken as a drawback of the VOM itself. If the facilitators are skillful enough, such imbalances can be checked, giving rise to just outcomes. How facilitators' skills help in minimizing undue pressures of social status is exemplified by the Presser and Hamilton, who themselves took part in the VOM sessions.[19]

B. Conferencing

Conferencing, or usually Family Group Conferences (FGCs) are "a kind of decision-making meeting, a face-to-face encounter involving offenders and their families, victims and their supporters, a police representative, and others"[20]. This definition of FGC is slightly fit to FGC in New Zealand where it emerged in the late 1980s and early 1990s. The origin of FGCs in New Zealand has to be seen in the context in which the New Zealand justice system was facing a

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[15] Margarita Zernova, *supra* note 13.

[16] John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME AND JUSTICE: A REV. OF RESEARCH, 1–127 (1999).

[17] Lois Presser & Cynthia Hamilton, *The Micropolitics of Victim-offender Mediation*, 76 SOCIOLOGICAL INQUIRY 3, 319 (2006).

[18] *Id*.

[19] *Id*.

[20] ALLAN MACRAE & HOWARD ZEHR, THE LITTLE BOOK OF FAMILY GROUP CONFERENCES: NEW ZEALAND STYLE 12 (2004).

burden of juvenile incarceration, most of whom came from indigenous Maori cultural backgrounds. Frustration with this was seen among the Maoris who believed that the Western criminal justice system (as adopted in New Zealand) was both inadequate and incompatible to the Maori cultural standards of crime and punishment. Taking into this concern that the "resources of the extended family and the community be the source of any effort to address these issues"[21], a law called "Children, Young Persons and Their Families Act" was introduced in 1989. This was how FGCs became the hallmark of New Zealand's youth justice system, and have remained so till date. Today, FGCs have been used in many countries in a variety of cases.

A typical FGC involves the participation of the victim, the offender, supporters of victims and offenders (mostly parents), law enforcement official such as the police officer, and the convenor.[22] The victims' and offenders' sides are allowed to tell their own stories, and a mutual agreement is reached upon.

The rationale behind FGCs—which is also drawn from Maori cultural ideals—has been that conflicts and wrongdoings affect families and clans (or relatives), or both victims and offenders. Therefore, a culturally appropriate system including a wider circle of stakeholders is necessary to address both the causes and consequences of crime committed by the juveniles.

Conferencing is significant in bringing together a wider periphery of stakeholders related to the event of crime committed by the juveniles or the youth. The participation of families, clans, and the relatives of each side indeed expands the circle of accountability (by the offenders) and healing (by the victims). When conferencing is led or driven by the police or officials of the formal justice systems, it also helps in blurring the divide between the state and community justice systems. Removing this divide between the formal and community justice systems is crucial because it can help in cultivating public trust on the state's legal processes.

Despite all of this, conferences are not without challenges. Participation of many stakeholders might result in differences even within the respective sides of victims and offenders. Reaching an agreement might be a difficult task. Moreover, the offending child or the victimized child might not be able to speak their mind in autonomous manner because overturning parents or elders' decisions could mean being indecent. The complexities of power relations are at play in FGCs, and the coordinators need to be cognizant of this fact.

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[21] *Id.* at 11.

[22] Kay Pranis, The Little Book of Circle Processes: A New/Old Approach to Peacemaking (2005) (Hereinafter Kay Pranis).

C. Circles

Circles can be diverse in forms: talking circles, understanding circles, healing circles, sentencing circle, support circle, community-building circle, conflict circle, reintegration circle, celebration circle and so on.[23] Like Pranis, some other scholars also mention circles of support and accountability,[24] but what is common among them is that all of them are meant to promote story-telling. Each participant has a story to tell, and each story has a lesson to offer. In a typical sentencing circle, the offenders, the victims, community members, justice system personnel and other professionals sit together and discuss why such an act happened, how it has affected people, and how it can be prevented in the future.[25]

Circles, like other restorative justice models are meant at empowering each stakeholder of the crime, and their roots are found in most native practices of peacemaking. Some circles are sentencing circles, which are said to have originated in the Canadian native communities, where the first sentencing circle was held in 1992 by Judge Barry Stuart in the case of a person attempting to assault a police officer. In trying to understand what the community wanted to do with the offender, he reconfigured the court in the form of a circle, and asked the community members their opinions. The community members indicated that the offender be rehabilitated in the community rather than being sent to jail. Judge Stuart gave his order in line with this choice, and this was how sentencing circles started all over.[26]

Circles are like FGCs in that they may involve justice professionals along with the lay members of the community. Rather than driving the community towards his/her decisions, the justice professional gives power to the community to decide on the nature of punishment that is to be given to the offender. This is important because it empowers the community in deciding over justice matters, and it can adopt punishment methods which come from the cultural tradition of the communities. This transfer of ownership to the community creates accountability both for the offender and the community.

Despite this, circle processes do face some challenges. As Pranis has noted, the relationship between the lay members and system professionals is always a pressing issue in circles.[27] The professionals and the lay do not always share the same understanding or approach to crime or community, and hence they

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[23] *Id*.
[24] Stacey Hannem & Michael Petrunik, *Circles of Support and Accountability: A Community Justice Initiative for the Reintegration of High Risk Sex Offenders*, 10 Contemporary Justice Rev.: Issues in Criminal, Social, and Restorative Justice 2, 153-171 (2007).
[25] Kay Pranis, *supra* note 22, at 16.
[26] Margarita Zernova, *supra* note 13.
[27] Kay Pranis, *supra* note 22, at 63.

can have different perception of the circle outcomes. In addition to this, it is important to remember that given the variety of members in a community, not all of them will feel the import of community in the same way, hence the so called 'collective community decision' might not be always collective.

Besides the abovementioned principal models of restorative justice, there are other avenues for applications of restorative justice. Restorative justice has been used in contexts of schools (education and disciplining), prisons (victim-offender dialogues), post-prison community entry, historical dialogues, transitional justice, etc. Transitional justice is perhaps the biggest and macro-level application of restorative justice in the world today. Transitional justice mechanisms, epitomized typically by Truth and Reconciliation Commissions (TRCs) are set up in the aftermath of conflict to address crimes (and their consequences) carried during the times of conflict. The TRCs also aim at holding perpetrators accountable to their conflict-time deeds, to address victims' needs, and to restore relationships between these two. As Webster aptly puts, "poised at junctures in which the future direction of the nation is at stake, they look back at the past with one eye firmly on the future"[28]

TRCs emerge from a context of post-Second World War, and in recent times, have been constituted in countries such as South Africa, Rwanda, Timor-Leste, and Nepal which have experienced decades of conflict and socio-cultural divides. They have emerged mainly in response to the political transitions and the search for justice post-transition. In South African TRC processes, the term 'restorative justice' appeared public TRC hearings[29] however, the concept of *ubuntu* and African indigenous value systems are considered to be congruent with the principles of restorative justice.[30]

TRCs have immense power of restoring communities torn from conflict and war, promoting forgiveness and reconciliation among the previously conflicting parties. The strength of TRCs is that they tend to be forward-looking by stepping on the past. They aim to right the wrongs of the past, empower victims through restitution and reparation, and bring reconciliation to erase future animosities. But TRCs also tend to have some flaws. Most TRCs suffer from dangers of standardization (or "standard-setting"), especially when they are drawn directly from international humanitarian and legalist regime. These standardizations fail to respond to local realities, such as why the specific conflict or violence emerged

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[28] David Webster, *History, Nation and Narrative in East Timor's Truth Commission Report*.80 Pacific Affairs 4, 581-591 (2008).

[29] Christian Gade, *Restorative Justice and the South African Truth and Reconciliation Process*, 32 South African J. of Philosophy 1, 10-35 (2013).

[30] Charles Villa-Vicencio, Where the Old Meets the New: Transitional Justice, Peacebuilding and Traditional Reconciliation Practices in Africa (2009).

in the first instance.[31] TRCs are established to examine only gross human rights violations, and they therefore can miss other various forms of subnational, communal, and even interpersonal violence which affect people's daily lives. In addition, TRCs tend to be "fixed" in that they are meant to investigate crimes beginning from a certain year to another year. In reality, the roots of violence are deeper and might not necessarily start from a certain date, nor do they end at another. Some scholars have also pointed out that TRCs tend to be painful processes which disempower the victims rather than empowering them.[32]

III. A POSTSCRIPT ON RESTORATIVE JUSTICE IN NEPAL

Nepal's (criminal) justice system is heavily prosecution-centric, and it fails to address the holistic issues or ideals of justice, such as the ones espoused by the restorative justice. There have been calls to make the current laws more responsive to the needs of the victims, which has resulted in some changes in laws, especially in regards to compensation of victims. As in most contexts elsewhere, courts and formal systems are considered to be the main drivers of the justice system, and it is believed that it is the judges' "duty" or "privilege" to dispense justice to the needy. Seen through a restorative lens, this is a top-down and bureaucratic version of justice, and will only perpetuate the extant professionalization of justice and will prevent the real stakeholders from realizing justice.

The discourse of restorative justice in the modern avatar is new in Nepal. There have been recent studies on potentials of restorative justice in the Nepali context including in both formal and alternatives spheres. Given the deadlock in the current transitional justice efforts, restorative justice has been regarded as the only way out.[33]

However, looking at the current constitutional and legal framework of Nepal, there have been some provisions made for the rights of the victims. For instance, the current Constitution of Nepal, 2071 (2015) has a clear provision on the right of the victims. Article 21 of the Constitution states the following:

> Article 21: Right of the victim: (1) A victim of crime shall have the right to get information about the investigation and proceedings of a case in which he or she is the victim.

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[31] Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD QUARTERLY 2, 275–289 (2008).

[32] Catherine C. Byrne, *Benefit or Burden: Victims' Reflections on TRC Participation*, 10 PEACE AND CONFLICT: J. OF PEACE PSYCHOLOGY 3, 237–256 (2004).

[33] RamkantaTiwari, Restorative Justice in Nepal's Transitional Justice Settings: Opportunities and Constraints, (2016) (unpublished LLM dissertation, Tribhuvan University) (on file with author).

> (2) A victim of crime shall have the right to justice including social rehabilitation and compensation in accordance with law.[34]

Similarly, there are some laws in place which have tried to take into account the needs of the victims in the event of crime. For instance, Some Public (Crime and Punishment) Act, 2027 (1970) has made room for lenient punishments for first-time offenders of crime.[35] Likewise, Human Trafficking and Transportation (Control) Act, 2007 has laid out the need for social and family reconciliation for the victims of trafficking.[36] Although the mentioning of "social and family reconciliation" appears appealing in the restorative lens, there are currently no clear mechanisms in place to make this happen in reality. Similar provisions related to the compensation of victims can be found in the Civil Code (*Muluki Ain*), especially the Chapter "On Rape"[37] and the Domestic Violence (Offence and Punishment) Act, 2009.[38]

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[34] Const. of Nepal, 2015.

[35] Section 6 of the Some Public (Crime and Punishment) Act, 1970 provides: (2) Adjudicating Authority may, by considering the gravity of the offence, release the offender if it is proved that he/she has committed the offence for the first time, without imposing the penalty pursuant to Sub-section (1) upon causing him/her to sign on a document which reads that the offender pledge not to commit such offence again from the date onwards.

[36] Section 13 of the Human Trafficking and Transportation (Control) Act, 2007 provides: Rehabilitation Center: (1) Nepal government shall establish necessary rehabilitation centers for physical and mental treatment, social rehabilitation and family reconciliation of the victim. Sub-section (4), further provides that the Center shall manage for the social rehabilitation and family reconciliation of the person stationed at the Center. Sub-section (7) provides for the Management, operation standard, monitoring of the rehabilitation center, skillful training and employment, rehabilitation, family reconciliation shall be carried out as prescribed.

Section 17(1)A of the same Act provides: Notwithstanding anything contained in Sub-Section 1), if the victim is unable to get compensation because of offender's poor economic background, the court can order the compensation to be paid through the Rehabilitation Fund.

Section 21 of the same Act provides: (1) If an accused charged of committing an offence under this Act accepts an offence and co-operates the police, public prosecutor or court to collect evidence and arrest other accused or abettor, and if he/she has committed the offence for the first time, court can reduce the punishment up to twenty five percent so prescribed for that offence.

Provided that, if the assistance is not proved by the evidence or he/she gives statement against the support provided to the police or prosecutor, a case may be registered notwithstanding anything in the prevailing laws.

[37] Number 10C of the Chapter on Rape of *MulukiAin* provides: If the court, in making judgment, convicts the accused of rape on a case filed pursuant to this Chapter, the court shall mention in its decision about the compensation to be awarded to the victim from the offender and shall also cause the same to be provided to the concerned woman. For the purpose of realizing of the compensation, the court shall attach the property, including the share on joint property, of the accused immediately after the filing of a case pursuant to this Chapter.

[38] Section 10 of the Domestic Violence (Offence and Punishment) Act, 2009 provides for Compensation to be Provided: The Court may, depending on the nature of the act of domestic violence and degree, the pain suffered by the Victim, and also taking into account the economic and social status of the perpetrator and Victim, order the perpetrator to pay appropriate compensation to the Victim.

Section 11 provides for Service Centre: (1) The Government of Nepal, as per necessity, may establish Service Centers for the purpose of immediate protection of the Victim, and for the separate accommodation of the Victim during the course of treatment.

Perhaps The Children's Act, 1992 has some provisions which show the salience of restorative principles in the realm of juvenile justice, especially in regards to punishing juvenile delinquents. Section 50 of the Act, under the heading of Investigation of case and suspension of punishment reads:

(1) In case the officer hearing the case deems it not appropriate to keep a Child in prison having considered to the physical condition, the age of the accused Child who is to be investigated having detained in prison pursuant to existing law, circumstances during the time of commission of the offence and the place of imprisonment, he may issue an order to handover the Child to the custody of his father, mother, relatives or Guardian or any social organization engaged in protection of rights and interests of the Child or the Juvenile Reform Home on the condition to present him as and when required and to continue investigation or proceedings of the case.

(2) In case the officer hearing a case deems it not appropriate to imprison a child convicted of an offence and imposed a sentence of imprisonment in a prison having regard to his physical condition, age, circumstances in which the offence has been committed and times of commission of the office, he may suspend the sentence to the effect of not undergoing the sentence for the time being or he may prescribe to undergo the sentence residing in a Children Rehabilitation Home or in guardianship of any person or organization. In case the same child having had his sentence suspended in such a way is convicted of the same offence or any other offence and is imposed a sentence of imprisonment within a period of one year, the officer hearing the case may order to execute the sentences of punishment having added the earlier sentence imprisonment.

In the proposed laws, we see that there is some movement towards restorative justice. The most important of such provision is the Criminal Offences (Assessment and Execution of Punishment) Bill 2011.

The Bill provides for the following provisions, which the courts should consider following when determining the sentence:

Section 13(B) : That contributes to social and community security

Section 13(C) : That provides justice, along with compensation, to the victims

Section 13(D) : That helps in the restoration of the offenders in society

Section 13(F) : That makes the offenders accountable to the harms they have caused to the victims and community

Section 16 : The following should be considered while determining sentence for the children:

a) Best interests of children
b) Compensation that is proposed to be given for the victims
c) Apologies for the crime
d) Wishes to lead a good life

Section 22: Orders for community service: (1) If the offender has made an offence liable to punishment of less than six months, and in considering the nature of offence, age of offender, circumstance of offence, and the method of offence, if it appears that complete imprisonment is an inappropriate punishment measure, the court can order the offender to go for community service to serve the remaining period of punishment.

Section 30: Socialization of the offenders: Before the completion of prison sentencing, the prisons can release offenders with good behavior on a daily or weekly basis for the following:
a) For family reunion
b) For establishment of social and cultural relations
c) For social unification and rehabilitation
d) To start up business
e) To take trainings and skills for employment

As seen from above, although there are not restorative justice laws in Nepal already, one can see restorative elements existing in laws. These elements can serve as launchpads for taking discursive and practical shifts from the current retributive to a more restorative one. It should be emphasized that the abovementioned provisions in Nepal's context are from formal legal frameworks, and that Nepal is rich of various traditional and community-based justice systems, which have remarkable restorative potentials in them. It is based on these restorative potentials that some organizations (such as The Asia Foundation and Nepal Institute of Justice) have initiated restorative justice programs in Nepal.

CONCLUSION

Modern democracies are characterized by essences of rule of law, human rights, constitutionalism, or sovereignty. Because of this, states which aim to protect its citizens or individuals also punish those who it finds to be assaulting the condition of democracy and human rights. Hence, punishment becomes a necessary evil for many states, and is justified along the lines of J.S. Mills' philosophy that the punishment of injustice is justice.[39] Despite such claims, one can always argue that punishment is at odds with the essence of democracy.

[39] JOHN STUART MILL, UTILITARIANISM 1868 (2002).

The way democracies distinguish themselves from autocracy, tyranny or despotism is the grounded use of force. For a functioning democracy, fear or coercion should never be a motivation for people to conform to the state's laws and norms. People should internalize the meaning of a certain social wrong, and refrain from committing any activity that inflicts pain on others. By using punitive measures to shape individuals' behavior, democracies in fact reveal their failures in providing proper civic education and social values. The state also fails to provide appropriate arrangements that may prevent the occurrence of crimes, wrongs and social offences, and exhibit their inability of acting beyond the response of punishment. Although unintended, states thereby enter into the vicious cycles of punishing people, locking them up, releasing them as vulnerable beings prone to more crimes, forcing them to commit another round of crime, punishing them, locking them up, and so on.

The advent of restorative justice occurred to address the gaps in the functioning and actual realization of justice by the real stakeholders—victims, offender and the community. The movement is rapidly spreading across all corners of the world and into various jurisdictions. Therefore, it behooves the justice workers of Nepal to respond to new calls for actual justice—restorative justice, and to work towards this processual and dialogic justice. Apparently, there are some victim-friendly laws in Nepal, but they are seriously bogged down with an assumption that victims' needs are mostly materialist or financial. Whilst such needs might be important to overcome some of their immediate vulnerabilities, they are not the only needs that remain unmet in the aftermath of a crime. Like restorative justice principles suggest, crime is a violation of law for sure, but more importantly, it is a violation of people's relations and mutual trust. So, what and who will mend the ties that have been severed by the act of crime? What will reduce the feeling of revenge, fear or shame that arises among the offender or the victim? Is monetary compensation – which the current system presumes – the real needs of the victims? Does punishing the offender (such as by imprisonment) for his/her wrongdoing guarantee the non-repetition of the crime? These are some questions that remain unanswered and unaddressed in the current framework of justice in Nepal.

At present, there is no room for dialogue between offenders and victims, and no opportunities for truth-telling. Nepal's laws have no rooms for plea bargaining, and hence the offenders are never encouraged to tell the truth. The offender, once convicted as guilty, will carry this baggage of identity for all his/her life. There is a need of a serious overhaul in this overly procedural and legalistic thinking and functioning of Nepal's legal system and an urgent need to make it more responsive to the holistic needs of justice.

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Universalism in Human Rights: A Post-Colonial Critique

Namit Wagle*

ABSTRACT

Universal Declaration of Human Rights (UDHR), from its inception in the mid-19th century, has been a topic of massive debate in the current era of globalization. As an ideology, it is hard to argue against the aspiration of a global standard of inviolable rights advocated for human beings. However, it has been apparent for quite some time now that the utopian ideology of human rights, stemming from western liberalism, has not been able to translate into policies. In light of this, there is an urgent need among all humans to reassess the concept of universalization of human rights and examine the conceptual frameworks stemming from different parts of the world. In addition, redefinition of attitudes and values that uphold and advocate a multi-directional exchange in international relations is needed. The west i.e. the developed and the developing world should seriously assess the cultural, political and socio-economic standards in international society and examine the viability of existing human rights corpus in light of mutual respect and responsibility towards each other.

"Human Rights were not a free gift. They were only won by long, hard struggle…Respect for individual rights, when it passes from theory to practice, entails conflict with certain interests and the abolition of certain privileges. Men and women everywhere should be familiar with the dramatic incidents-well known and obscure-of a conquest which has been largely achieved through the heroism of the noblest of their fellows."[1]

- UNESCO

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[1] PAULGORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN(2011) (Hereinafter Lauren).

INTRODUCTION

UDHR, since its establishment and incorporation following the Second World War, has been regarded as a *pinnacle* feature of human civilization. It is one of the paramount instruments through which the success of international law is promoted throughout the globe. The emergence of a rights based concept can be traced back as far as human civilizations began; however, it was not until the atrocious events leading to World War II that a national and international society was envisioned with freedom, justice, peace and equality as its fundamental principles.[2] Following its inception, the process towards universalization of human rights escalated rapidly through numerous legal instruments, enacted at regional and worldwide levels, with the UDHR as a source of inspiration and a major frame of reference.[3] Subsequently, the collapse of the Soviet Union following the cold war rejuvenated the western ideals, led by the United States, as the dominant discourse for the new world order.[4] As a result, western ideals such as liberal democracy and universal human rights have gained prominence in the current era.

According to many, universality is one of the fundamental principles defining human rights. By definition, human rights are rights applicable to all human beings and are therefore universal.[5] In fact, slavery, genocide, torture and other basic abominations are condemned universally. In this regard, it can be argued that there are certain set of core human rights applicable to all human beings. On the one hand, the escalation of modern globalization phenomenon has accelerated the urgency for the universalization of human rights. The need for constitutional and legal enforcement of human rights, in the under-developed and developing countries, has become ever more evident in light of its growing influence. On the other hand, there are emergent debates and disagreements amongst scholars, policymakers and advocates about the character and purposes to which human rights *corpus* should be implemented.[6] Some of these debates focus on the question of normativity, the need for a cultural consensus and legitimacy, and the problems of effective and consistent enforcement.

Despite the non-partisan, universal and non-ideological proclamation of human rights *corpus*; it is almost inevitable that, if taken as a whole, it will alter the

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[2] Theo Van Boven, *From the Universal Declaration of Human Rights to the Universal Declaration of the Human Right to Peace,* (1995),http://www/imadr.org/un/feature%20story%20-Tvb%20Speech%20Spanje.pdf.

[3] Jackle Smith et al., *Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s*, 20 Human Rights Quaterly 2,383 (1998).

[4] Diane Otto, *Rethinking the Universality of Human Rights Law*, 29 Columbia Human Rights L. Rev. 1, 1 (1997) (Hereinafter Otto).

[5] P. Kirchschlager, *Universality of Human Rights,* The EWC Statement Series, 22 (2011).

[6] Makau W. Mutua, *The Ideology of* Human Rights, 36 Virginia J. of Int'l L., 589 (1996).

construction of states and have serious implications on its sovereignty, cultural diversity and its political frameworks.[7] In addition, human rights reinvigorate assertions of western liberalism and advocates states to reflect the mechanisms and values of governance that derive from the liberal democracies practiced in the west. Since the doctrine of human rights has profound implication for all human societies, especially the non-westerners, there is an undeniable obligation to analyze the universality of human rights movement. Moreover, there is an urgency to redefine attitude and values that uphold pre-existing standards in international society. It is in the interest of global welfare for the west and the developing countries to evaluate current human rights policies and re-define practically feasible options bearing in mind the diverse political, cultural and socio-economic standards of different states.

I. ORIGIN OF HUMAN RIGHTS

In ancient traditions, people acquired rights and responsibilities through their association to a family, community, class, religion or state. Historians have demonstrated that most societies, throughout the globe, adhered to the golden rule of '*Do unto others as you would have them do unto you*.[8] The oldest written scriptures such as the Hindu Vedas, the Bible, the Babylonian Code of Hammurabi, and the Analects of Confucius contain volumes of guidelines on rights, duties and responsibilities. Similarly, the prominent religions advocate moral codes of conduct based on divine law with profound ideas based on the dignity of human beings and their duties and responsibilities to others. In the same vein, Native American codes of conduct found in the Inca and Aztec codes illustrate the existence of governance based on rights and justice prior to the emergence of western human rights movement.[9] Before the 17th century, the dominant framework for moral code of conduct emphasized duties and privileges that arose from societal status or relationships with limited emphasis on abstract rights that underlay those relations or laws.[10]

However, the influence of philosophers such as Grotius, Hobbes and Locke, in Western Europe, shifted the dominant discourse from duties and social responsibilities to individual's needs and participation.[11] These rights became renowned as *natural* rights, or *the rights of man*. These natural or moral rights spread exponentially becoming an invaluable part of the political agenda.

The early precursors of the modern human rights corpus included documents such as the Magna Carta (1215) which asserted individual rights. The sanctity

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[7] Otto, *supra* note 4, at 1.
[8] Lauren, *supra* note 1, at 6.
[9] *Id.* at 13.
[10] Michael Ignatieff, Human Rights as Politics and Idolatry 128 (Amy Gutman ed., 2003).
[11] J. H. Burns, The Cambridge History of Political Thought 604 (1994).

of human life was valued by many religions and traditions; however, it was not until the Early Modern Period that the notions of inviolable rights were advocated as a fundamental requisite of human existence.[12] In the 17th century, European crusades and civil wars paved the way for liberalism as a dominant political discourse. As a result, human rights became a central concern of European intellectual culture during the 18th century Age of Enlightenment.[13] Furthermore, the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791) highlighted the enormous strides made by the human rights movement towards the end of the18th century.

The English Bill of Rights dealt with the fundamental concerns of the time. It sought to limit the power of the monarch by making the king subject to the rule of law. In addition, the document transferred the power to handle governance issues including state's income and property to the parliament.[14] Similarly, it established some basic rights to justice including the provision for fair trial under an impartial jury. However, the rhetoric of liberalism and equality associated with the movement failed to translate into policy. The concept seemed to exclude women, non-westerners, and people belonging to certain religious, political and economic groups. Similarly, the earliest US Constitution and Bill of Rights preserved the institution of slavery and did not recognize the equal rights of women.[15] Nevertheless, people across the globe facing atrocities have drawn on the doctrine to stage revolutions that assert the right to self-determination. The best example of that can be seen in the great American and French revolutions, which inaugurated the democratic revolutions and paved the way for universal suffrage.[16]

The doctrines of human rights that we possess are the direct descendants of this thinking. The disparity in rights protection in practice reflected the society of the time. The dominant discourse preached that human right was natural in that everyone possessed them regardless of their political, religious or social affiliations.

II. WESTERN INFLUENCE ON HUMAN RIGHTS

The revolutionary ideas of Hobbes and Locke, in the 17th century, transformed the European intellectual philosophies. As a result, a new western world

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[12] John Witte Jr., The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism 74 (2007).
[13] Lauren, *supra* note 1, at 11.
[14] Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 18 (1998).
[15] *Id*.
[16] *Id*.

evolved.[17] The political ethos introduced through the Bill of Rights advocated the ideology of an autonomous man. Every man is born equal and entitled to life, liberty and justice. It is then no surprise that the roots of the western human rights movement lie in liberalism. In addition, prominent liberal theorists have highlighted a direct correlation between rights and human nature.[18] According to Hobbes, the leading factor deriving the concept of human rights was the nature of human beings itself. Hobbes sought to derive the notion of rights stemming from the primal instincts of human nature, most notably the fear of death.[19] For Hobbes, the state of nature consisted of fundamental human passions which override the non-individualistic components such as social status, political agenda, religious affiliation or class structure.[20] Hobbes advocated a shift from a divine communal rights approach to an abstract individualistic needs approach. Liberty, according to Hobbes, was defined as an absence of impediment to natural rights that derive from the human desire for self-preservation.[21] Moreover, Hobbes identified human reason as the cornerstone for the collective rights and duties doctrine that preceded the western liberalism movement. According to him, the fear of survival coupled with the increased likelihood of prosperity within a group propelled human beings, that are inherently selfish, to sacrifice some of the natural rights to establish civic order.[22]

Similarly, Locke, another prominent figure of the western liberalism movement, rejected medieval notions of authority and highlighted market economy as the fundamental component in deriving assertions of natural rights and the conclusion of agreements.[23] Much like Hobbes, Locke stressed the notion of pursuit of natural security as the fundamental principle defining human rights. Aspects of this theory of natural rights form the basis for much of mainstream human rights principles. Firstly, as discussed above, natural rights advocate equality in all aspects of human endeavor. Secondly, natural rights postulate mechanisms for protection against violations of inviolable rights from the state or any other entities. Thirdly, natural rights enrich and encourage individualism. Perhaps it is the individualist postulate of natural rights theory that has sparked most debates regarding the western conception of human dignity and liberty.

Subsequently, these ideological changes in the seventeenth and eighteenth century were accompanied by far-reaching socio-economic changes in

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[17] R. Lemons, International Studies in Philosophy 103 (2008).
[18] Katerina Dalacoura, Islam, Liberalism and Human Rights (3rd ed. 2007) (Hereinafter Dalacoura).
[19] Josiah A. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 Human Rights Quarterly, 309 (1987) (Hereinfter Cobbah).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

Europe.[24] The shift from feudalism to industrial capitalism catechized government for political transparency, and individual rights became the legal instruments for cultural and state reform.[25] In other areas of the world, such as the United States, the idea of individual autonomy gained prominence through the perceived virtues of individual initiatives and colonization.[26] The rise of liberalism highlighted a shift in the theoretical conversations focusing on the concept of state and individual sovereignty. Liberal thinkers sought to abstract man from divine wholeness and isolated the individual as one with rights not only against the sovereign state but also against all state entities.[27]

Through colonialism, western concepts of liberalism and individual rights spread throughout the world. As a result, the traditional and customary political and legal processes of the colonized states inherited ethnocentric standards imposed through the colonial hierarchy.[28] In British West Africa, for example, the policy of indirect rule ensured that although certain minor disputes could be settled in the customary manner, the English Common Law remained the ultimate source of authority.[29] In other words, the colonized native had the western legal process at his disposal if deemed necessary. In addition, liberal traditions dominated the African education policies, the profound impact of which can be seen in the current political climate. The rise of 19th century brought political independence to the African countries. However, imposition of the western ideal for centuries meant that the newly formed African states inherited the western standard of governance and constitutional protection of rights.[30]

The political nature of UDHR, adopted in 1948, was abundantly clear due to the fact that most of the sub-Saharan nations were under colonial regimes during the drafting of the aforementioned legislation. Legal positivists acknowledged that the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR) together constituted an International Bill of Rights.[31] The drafters of the western model argued that the formation of international norms constituted customary international law and, therefore, all nations were bound by the code.[32] However, the continued disparity within ideology and practice

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[24] Costas Douzinas, The End of Human Rights: Critical Legal Theory at the Turn of the Century (2000).
[25] *Id.* at 8.
[26] John M. Owen, *Transitional Liberalism and U.S. Primacy*, 26 Int'l Security 3, 117-152 (2002).
[27] Dalacoura, *supra* note 18.
[28] *Id*.
[29] Cobah, *supra* note 19.
[30] *Id*.
[31] Jack Donnelly, *Human Rights: A New Standard of Civilization?,*74 Int'l Affairs 1, 1-27 (2002) (Hereinafter Donnelly).
[32] *Id*.

has led the critics to question the true universality of western liberalism and its uniform applicability to the rest of the world. The adoption of liberal and individualistic human rights framework without regard to group rights and understanding of non- western approach to human dignity poses problematic contradictions to the universality claim.

III. CONCEPTUAL FRAMEWORK OF UNIVERSALITY

Universality is one of the most discussed topics in the human rights discourse. Considering that it has only been fifty years since international law itself has become universal, through state participation, the persistent conceptual confusion over the meaning of universality comes as no surprise. At the forefront of this debate is the concept of philosophical and historical origins of human rights and anthropological universality. For many years, scholars have identified a variety of senses in which universality is understood and debated. They range from applicability and all-inclusiveness, formal acceptance and adherence, historical origin, formal origin and norm creation, to anthropological and philosophical acceptance, uniformity, indivisibility, and legitimacy.[33] Many non-western scholars have endeavored to demonstrate the universal nature of human rights through historical origins of rights based movement across the globe. In addition, scholars argue that human rights are a result of the bi-directional, political and cultural, exchange among various states with distinct civilization.[34] In that regard, universal acceptance is considered as an essential precondition for universality.

On the other hand, critics argue that the concept of human rights has evolved distinctly in all parts of the world and arguments advocating universality, in fact, obscure non-western values of humanity, justice and community.[35] This postulation of the human rights corpus is in accordance with the cultural relativists who have long emphasized the different rights concepts emanating from different parts of the world and rejected the notion of universal human rights claiming it an ethnocentric construct with limited applicability.[36]

In light of this, claims to universality of human rights are often interpreted as assertions of cultural hegemony in disguise. In fact, even though all cultures tend to define their ultimate values as the most widespread, only the western

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[33] Aristoteles Constantiniadis, *Questioning the Universal Relevance of Universal Declaration of Human Rights,* 51 (2000), https://dialnet.unirioja.es/descarga/articulo/3684784.pdf (Hereinafter Aristoteles).

[34] Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUMAN RIGHTS QUATERLY 4, 740 (1994) (Hereinafter Cerna).

[35] *Id*.

[36] Fernando R. Tesó, *International Human Rights and Cultural Relativism*, 25 VIRGINIA J. OF INT'L L. 4, 869 (1984) (Hereinafter Fernando).

culture tends to focus on universality.[37] In reply, proponents of universality assert that human rights are grounded in human nature and are entitlements of all persons who appeal to them when they experience the need for their protection. Universality of human rights in this sense is hard to deny, except for the postmodernist doubts about the universality of human nature itself.[38]

In the era of globalization cultural relativism has gradually, but effectively, lost its import within anthropology. This has resulted in the universality-versus-relativism debate losing prominence.[39] Interestingly, influential scholars have since become more sympathetic toward relativist arguments and lay more emphasis on the social structural modernity of the human rights ideas and practices rather than on their western origin.[40] In the meantime, the 1990s witnessed some serious critical rethinking of the basic assumptions of the international human rights regime. Against this background, and without turning a blind eye on the salience and achievements of human rights since the adoption of the Universal Declaration, this chapter will look at the scope of universality and identify the predominant discourses that have formulated an opinion on this matter.

IV. THE SCOPE OF UNIVERSALITY

The formulation of UDHR spelled a new era for the human rights *corpus*. Following this, in 1993, the debate took center-stage at the UN World Conference on Human Rights.[41] The declaration contained a detailed programme of action and endorsed a strong affirmation of universality.[42]

However, in the eyes of many non-westerners, this postulation was unacceptable. According to them, it re-enforced the western standards and obscured the true meaning of universality. The western states rejoiced after witnessing a fruitful rendition of their campaign. For years, leading to the Vienna Declaration, western countries had been lobbying a strong endorsement of universality in the human rights corpus. In addition, a leading proponent of the universality movement, the US, strongly dismissed the idea of cultural and social consideration among various nations with regards to the human rights corpus.[43] They sought to highlight that any advancements made to erode the concept of universality that emulated

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[37] *Id*.
[38] R. Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. OF PHILOSOPHY 10, 583 (1983).
[39] Aristoteles, *supra* note 33, at 53.
[40] *Id.* at 53.
[41] Kevin Boyle, *Politics and Human Rights, IN* 43 STOCK-TAKING ON HUMAN RIGHTS: THE WORLD CONFERENCE ON HUMAN RIGHTS, VIENNA 1993 (David Beetham ed., 1995).
[42] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.
[43] L. Henkin, *Rights: American and Human*, 79 COLUMBIA L. REV., 405 (1979).

from authoritarian regimes and were seeking adverse political gains. On the other hand, countries such as China, Iran, Iraq, Malaysia, Cuba, Libya, Yemen and Singapore, etc. argued that the declaration reflected western values and failed to take others into consideration. On top of that, the growing western influence on the internal affairs of other countries has had a negative impact on their political and economic stability. Although, it is accepted among all that there are basic set of rights that every human aspires to and seeks protection when needed, there is still a growing concern among non-westerners that the western human rights fails to take into account their social and cultural differences.[44]

For example Mr. Kishore Mahbubani, Deputy Secretary of the Ministry of Foreign Affairs of the Republic of Singapore, was quite critical of "the aggressive western promotion of democracy, human rights and freedom of the press to the Third World at the end of the cold war."[45] He conceded that Westerners and Asians are essentially human beings. They can agree on minimal standards of civilized behavior that arises out of mutual aspirations. For example, there should be no torture, no slavery, no arbitrary killings, right to trial, no shooting down of innocent demonstrators, and no imprisonment without careful review. These rights should be upheld not only for moral reasons. There are sound functional reasons. Any society, which is at odds with its best and brightest and shoots them down when they demonstrate peacefully, as Myanmar did, is headed for trouble. According to him, most Asian societies do not want to be in the position that Myanmar is in today, a nation at odds with itself. [46]

In addition, the Chinese delegation played a leading role in emphasizing regional differences and in making sure that the prescriptive framework adopted in the declarations made room for regional diversity. Most of these disagreements are emanating from the Asian states experiencing a boom in their finance, hence, there is an added concern about the western advances in halting their progress. In light of this, there is a need to question whether the human rights corpus is, in fact, truly universal in all aspects or is it a form of cultural imperialism that advocates the views of the western civilization and neglects the others?

The Vienna Declaration and the regional declarations reiterated that all human rights-civil and political, as well as economic, social, and cultural should be implemented simultaneously, and that neither set of rights should take precedence

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[44] Donnelly, *supra* note 31, at 9.

[45] K. Mahbubani, *The Sermons of Cowards,* The Guardian, March 28, 2008, http://www.guardian.co.uk/commentisfree/2008/mar/28/humanrights(Emphasizing that the West is Squandering Authority on Democracy and Human Rights: it fails to practise as it preaches).

[46] *Id*.

over the other. The challenge to the concept of the universality of human rights emanates from the concept of *private rights*.[47]

As discussed above, almost all states are willing to accept certain core group of rights as universally applicable. These rights are also mentioned in the Human Rights treaties as *non-derogable* rights.[48] Others include principles acquired through cultural evolution and formation of nations such as, the principle of self-determination and the sovereignty over state affairs including natural resources. In this regard, *private rights* seem a problematic issue since it entails private sphere or personal life of the individual.

Historically, these rights have been formulated in religious doctrines and covered aspects such as religion, culture, the status of women, the right to marry and to divorce and to remarry, the protection of children, capital punishment etc. Due to strong disagreements among states over issues of *private rights*, the concept of universality of human rights has often been at crossroads with critics. Coupled with the fact the obligation set forth by the UDHR are not legally binding but rather standards to achieve, the concept of incorporating a universal standard of human rights into *private rights* sphere has been regarded as one of the most prominent obstacles to universality claims.[49]

An example of that can be seen with the first clause of Article 18 of the Universal Declaration, which states: "Everyone has the right to freedom of thought, conscience and religion". In 1948, when it was initially formulated, the concept was acceptable to all religious faiths. However, the second clause, which states: "this right includes freedom to change his religion or belief" created a strong disagreement among the Muslim states. They pointed out that the Koran forbids a Muslim to change his religion and criticized the Christian missionaries who sought to convert Muslims to Christianity.[50] Furthermore, it lead Saudi Arabia to abstain on the final vote on the Universal Declaration in 1948. There are countless other accounts where a country has failed to adhere to customary standards.

Kuwait, for example, reserved on all provisions of the Convention that were incompatible with the laws of Islamic *Shari'ah* and the local statutes in effect. Similarly, Afghanistan, Egypt, Iran, Jordan, the Maldives, Pakistan, and Qatar all invoked *Shari'ah* law as an obstacle to the full implementation of the provisions of the Convention.[51] Some states, such as Djibouti, undertook to adhere to the

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[47] Otto, *supra* note 4, at 17.
[48] UN General Assembly, *International Covenant on Civil and Political Rights, 16 December 1966,* United Nations, Treaty Series, vol. 999, p. 171, Art. 4.
[49] Otto, *supra* note 4, at 18.
[50] Cerna, *supra* note 34, at 17.
[51] *Id*.

Convention to the extent that its provisions and articles were compatible with their religions and traditions.[52] Other states, such as Indonesia, ratified the Convention by stating that its ratification "[did] not imply the acceptance of obligations going beyond the Constitutional limits nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution."[53]

Several western countries objected to these reservations as incompatible with the object and concept of human rights. However, failure to withdraw the reservations have highlighted the fact that many countries are unwilling to accept norms created in the private sphere which are already covered through their traditional and religious practices. In this regard, the concept of universality has come under a lot of scrutiny.

V. THE CRITICISM OF UNIVERSALITY

As discussed above, there are a host of arguments for and against universality of the human rights corpus. On the one side, there are the traditional western superpowers asserting the need for a universal standard. On the other, there are the non-westerners that seek to redefine the human rights *corpus* in light of their cultural and economic differences. Some of the strongest critics of human rights doctrine have been cultural relativists. In addition, scholars claim that human rights doctrine is further obscured by entities such as states which claim the priority of their sovereignty over the universality of human rights or by the private sector which claims self-regulating approaches and uses this to define its sphere of influence within certain limits.[54] This challenge is part of the political and legal dimension of human rights emanating as a consequence of the moral dimension of human rights as well. In this regard, one can recognize a positive tendency of acceptance of human rights by states, a growth of an international institutionalization for the protection of human rights and a progress of the mechanisms for monitoring human rights performances by states to respect the universality of human rights and some small steps by the corporate world.[55] At the same time, it has to be stated that the implementation of human rights is not yet there where it should be, and that the vast majority of human beings are still victims of violations of their human rights. According to many, universality is still a claim and not reality. In further attempting to define the catalogue of rights, which have achieved universal acceptance, it is useful to consult the positions of individuals who have been most critical of western attitudes in the area of human rights.

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[52] *Id.*
[53] *Id.*
[54] W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AME. J. OF INT'L L., 869 (1990).
[55] *Id.* at 872.

Similarly, human rights principle is challenged by cultural diversity arguments emanating from the non-western parts of the world. This challenge is taking place in the moral dimension of the human rights *corpus*. Although the UN Conference in Vienna, 1993 reconfirmed the validity of the universality of human rights, the proposition faced critics from different sides because of its alleged western origin, e.g. in the so-called *Asian Values* debate.[56] At first sight, this seems a contrasting concept due to the fact that human rights protect the freedom of the individual to religion and belief and to a cultural life, therefore enhance cultural diversity. But human rights are individual rights and represent the perspective of the individual rather than that of the community. In addition, human rights do not protect traditions, cultures and religions as such but aspires to establish rights of the individual to share the beliefs, thoughts and worldviews of a community, to be part of a community and to practice their way of life.[57]This difference is criticized as an individualistic bias of human rights, overlooking Article 29, which highlights the relationship of the individual within a community and identifies the importance of individual duties and responsibilities within the community.[58]

Moreover, cultural relativism holds that moral and social institutions emerged through distinct cultural and historical variability.[59] The doctrine finds support through the notions of autonomy and self-determination. In fact, cultural relativists believe that such variability is undeniable and in some respect exempt from outsider's criticisms.[60] On the other hand, the *Kantanian* approach devised through the human rights corpus has lead us to believe that the legitimacy of international human rights corpus depends on the establishment and implementation of fundamental principles that transcend society, politics and religion.[61] It is due to these fundamental differences in approaches, the concept of cultural relativism has found itself at odds with the international human rights doctrine.

The assertion of cultural relativity is regarded as a hindrance to international enforcement of human rights standard and the assertion of human rights standards is regarded as the imposition of cultural hegemony.[62] The supporters of the human rights movement often blame the cultural relativist theory of logical

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[56] D. Mauzy, *The Human Rights and 'Asian Values' Debate in Southeast Asia: Trying to Clarify the Key Issues,* 10 The Pacific Rev. 2, 214 (1997) (Hereinafter Mauzy).
[57] *Id*.
[58] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 29.
[59] Jack Donnelly, *Cultural Relativism and Human Rights,* 6 Human Rights Quarterly 4, 400 (1984) (Hereinafter Donnelly, Cultural Relativism).
[60] *Id*.
[61] *Id*.
[62] *Id*.

contradiction.[63] The basis of their argument lies in the simple fact that human rights are based in human nature. However, the cultural relativists argue that human nature itself is culturally relative. According to them, the impact of culture on shaping individuals is systematic and may lead to predominance of distinct social attributes in various cultures.[64] For example, there are distinct cultural differences between people from the West and Islamic states. In addition, standard arguments for cultural relativism rely on isolated communities such as African tribes, Native American communities and Islamic societies. The concepts of individual rights are foreign to these communities and claims have been made to allow them to regionally device a mechanism for their protection through the process of self-determination and autonomy.[65]

Similarly, in recent times, the concept of utilitarianism has escalated the probing scrutiny of the human rights discourse. Utilitarianism entails the balancing act of protecting the abstract rights of individual against that of the broader community. The most basic utilitarian critique of human rights lies in the assertion that the scarcity of recourses in a society will inevitably render the rights of an individual void in order to achieve the greater good of the society.[66] As a result, an individual's rights, including fundamental rights, would be compromised or completely denied in specific situations where such right has to be weighed in relation to another individual's rights or the society as a whole.[67] In addition, utilitarianism raises the probing question as to the nature of human rights itself, i.e. whether human rights are either absolute or inalienable. If human rights are by definition, absolute and inalienable, then perhaps the ultimate choice in exercising such right should lie with the individual rather than the state or any sub-state entity.

In addition, a comparison of African and western social organization clearly reveals the cohesiveness of African society and the importance of kinship to the African lifestyle.[68] Whereas westerners are able to carry out family life in the form of the nuclear family and often in isolation from other kin, Africans do not have the concept of a nuclear family and operate on a broader collective basis.[69] In Asia, the values are less supportive of freedom and more concerned with order and discipline than are western values, and that the claims of human

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[63] Fernando, *supra* note 36.
[64] Jack Donnelly, Cultural Relativism, *supra* note 59.
[65] Admantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 HUMAN RIGHTS QUARTERLY 2, 320 (1996).
[66] Andrew Heard, *The Challenges of Utilitarianism and Relativism*, (1997), http://www.sfu.ca/~aheard/417/util.html.
[67] *Id* .
[68] Cobbah, *supra* note 19.
[69] *Id*.

rights in the areas of political and civil liberties are, therefore, less relevant in Asia than in the west.[70]

In light of this, Taylor has mooted the concept of cultural mediation as a response to fulfilling the universality dream. According to him, the recognition of differences between cultures leads to a better understanding and support human rights on a practical level. However, critics have argued that such a dialogue, including intra-cultural and intra-religion debates, should be held with clear consideration to the universal goal of achieving attainable standards. The acknowledgement of diversity in implementing specific treaties is a key to creating a fair and universally acceptable standard.

Similarly, Yasuanki Onuma has highlighted the nature of current human rights *corpus* as constantly evolving and attributed such changes in relation to the social, political, civil and economic dimensions of states.[71] In addition, he has urged the policymakers to provide much needed flexibility to the current corpus and create standards that would be acceptable globally. Furthermore, others such as Simone Zurbuchen have highlighted the role of human rights in maintaining cultural and religious diversity despite creating moral boundaries.[72] In light of this, it is conceivable that the human rights corpus can be implemented, albeit at a theoretical level, to encompass all humans. The main problem is converting this utopian theory into practice.

CONCLUSION

What conclusion can be drawn from this conflict between the purported universality of international human rights law and the limitations placed on universal acceptance of these norms by the different cultural and religious systems prevailing in the world? Can a system of international human rights norms be called truly universal as long as one state still refuses to accept them? For example, a common argument is that Islamic law stands in stark opposition to the Universal Declaration of Human Rights.[73] The Universal Declaration guarantees the freedom to choose one's religion and spouse, both of which are restricted under Islamic law. Some commentators argue that it is not Islam that the west has to fear as its great, new ideological competitor after the fall of Communism; rather the west should fear the ideology of *soft authoritarianism* coming from Asia's most prosperous states. There is also the complication of states reserving the right to implement an international human rights instrument

[70] Mauzy, *supra* note 56.
[71] P. Kirchschläger, *Universality of Human Rights:The EWC Statement Series* (2011), http://theewc.org/uploads/files/Statement%20Series%20First%20Issue-Final%20WEB.pdf#page=22.
[72] *Id.*
[73] Dalacoura, *supra* note 18.

only to the extent that it does not conflict with national constitutions and laws. Are these all attacks on the universality of human rights?

The only possible answer is that achieving universal acceptance of international human rights norms is a process, and different norms occupy different places on the continuum. Change and acceptance of these norms must ultimately come from within the region and cannot be imposed by outside forces. The creation of a regional human rights arrangement provides for its participants an accelerated acceptance in the region of a catalogue of international human rights norms. States with similar history, language, geography, religion, and culture have a greater influence checking the behavior of states which fail to respect the common regional denominator of decency. States outside the region, which cannot claim such ties, do not have the same influence.

The brief overview of select issues presented above emphasized the particularities and silences of the Universal Declaration and the dominant conceptualization of the human rights regime. Notwithstanding postmodern aversion for universality and the impossibility to establish universality in the anthropological sense, the concept of human rights deserves and has acquired universal validity. What is more, the emancipatory and liberationist potential of human rights needs to be broadened and strengthened so as to become all-inclusive. Indeed, if universality is to have any meaningfulness for all states, cultures and peoples of the world, it should not be identified with just one of them and ignore the input of others. If we want more than just the concept of human rights to be universal, it is essential to open up the human rights discourse to those whose aspirations it has always intended to embody, to incorporate and reflect the tremendous diversity within the international community. In the words of Abdul Koroma, a Judge of International Court of Justice,

> "The quest to define [universally applicable human rights norms] must begin in multiple legal traditions, for no culture can contain all the universal answers towards which all other cultures should aspire."[74]

This would require a three-fold endeavor. First, we should understand cultural and political contexts not as static and predetermined ways of life, but as dimensions of difference, subject to constant change, negotiation and debate through a continuous open-ended process of internal dialogue and external interaction; a cross-fertilization of cultures if a truly universal human rights

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[74] Abdul G. Koroma, *International Law and Multiculturalism*, *in* MULTICULTURALISM AND INTERNATIONAL LAW: ESSAYS IN HONOR OF EDWARD MCWHINNEY 84 (Sienho Yee et al. eds., 2009).

corpus is to emerge. Second, we should engage in internal dialogue and self-reflection in our respective culture and society. This requires pondering on whether our own conceptions and approaches are all indeed prone to human betterment. We should perhaps reconsider, for example, whether many of the evils in our societies are due to individualistic perceptions we consider as sacrosanct and which alienate many of us from the essence of family, community, society and other smaller or larger units of a shared life.

Finally, there are no regional human rights norms; there are only regional arrangements, which supervise compliance with international standards. The international supervisory bodies must realize that the international norms dealing with rights that affect the private sphere of human activity will take the longest time to achieve universal acceptance.

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