Judicial Activism in the protection and promotion of basic Human Rights in Nepal

A Thesis

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For the Award of the Degree of Doctor of Philosophy (Ph.D.) in Law

By
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30 December, 2014

CERTIFICATION

This doctoral thesis entitled " Judicial Activism in the Protection and Promotion of basic Human Rights in Nepal" is the outcome of the research undertaken by Shashi Kumary Adhikary Raut under the supervision of Professor (Dr.) Bharat Bahadur Karki, Professor of Law and Ex. Justice of Supreme Court, Ex. Attorney General and Ex. Dean and Head of the Dept. of the faculty of law, T.U.

This is certified that the work registered in this thesis is original and this has not been submitted to any other Universities and higher educational institutes for the award of the degree.

We hereby give our considered view to make a final submission for evaluation and award.

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Prof. Dr. Bharat Bahadur Karki	**Shashi Kumary Adhikary Raut**
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DECLARATION

The Doctoral Thesis entitled "Judicial Activism in the Protection and Promotion of basic Human Rights in Nepal" embodies the outcome of my research work pursued and undertaken under the supervision of Prof. Dr. Bharat Bahadur Karki**.**

"I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree of the university or other institute of higher learning, except where due acknowledgement has been made in the text." The researcher has duly acknowledged the relevant contributions and publications of the different writers from here and there at appropriate places and has extended due respect to them. The researcher has submitted the Thesis for final evaluation in connection with the award of the Degree of Doctor of Philosophy (Ph.D.) in Law.

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LETTER OF RECOMMENDATION

I certify that this thesis entitled" **Judicial Activism in the protection and promotion of basic Human Rights in Nepal** was researched and written by **Shashi Kumary Adhikary Raut** under my guidance. I hereby recommend this thesis for final examination by the Research Committee of the Faculty of Law, Tribhuvan University, in fulfillment of the requirements for the degree of **DOCTOR OF PHILOSHOPY (Ph.D.) in LAW.**

I wish her grand success in his future endeavor.

Date : 30 December, 2014

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Prof. (Dr.) Bharat Bahadur Karki

Supervisor

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Date : 30 December, 2014

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List of ABBREVIATION

AIR	All India Report
ANN	Annual
Art., Arts	Article, Articles
amend., amends,	Amendment, amendments,
Ab initio	at, or from, the beginning
ANN	Annual
Add.	Additional
APA	American Psychological Association
bk., bks.	Book, Books
Black L.J.	Black Law Journal
B.C.	Before the Christ
BULL.	Bulletin
CPA	Comprehensive Peace Agreements
CA	Constituent Assembly
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
C.J.	Chief Justice
C.	Chancellor
CASE & COM.	Case and Comment
CENT.	Central
ch., chs.	Chapter, Chapters
cl., cls.	Clause, Clauses

co.	Company
col., cols.	Colamn, Columns
Coop.	Cooperative
dec., decs	Decision, Decisions
NDC	National Dalit Commission
CJ	Criminal Justice
e.g.	exempli gratia (for example; for the sake of; such as)
et al.	and others
etc.	et cet. era (and other similar things, and the rest, and so on)
et. seq.	and the following
FWLD	Forum For Women Law and Development
FNJ	Federation of Nepalese Journalists
GON	Government of Nepal
GESO	Gender Mainstreaming and Social Inclusion
HMG	His Majesty's Government
i.e.	That is
Ibid	In the same place or work
illus	illustration
infra	below
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICPD	International Conference on Population and Development
ICJ	International Court of Justice (ICJ)

IDP	Internally displaced persons
J.	Judge, Justice
JJ.	Judges, Justices
L.J.	Lord Justices
Mag.	Magistrated
MOWCSW	Ministry of Women Children and Social Welfare
NWC	National Women Commission
NHR	National Human Rights Commission
NFC	Nepal Food Corporation
n.p.	no place of publication given
n.d.	no date of publication
NLR	Nepal Law Report
NKP	Nepal Kanoon Patrika
No., Nos.	number, numbers
ORD.	Order
p., pp.	page, pages
para., paras.	Paragraph, paragraphs
PIL	public interest litigation
PM	Prime Minister
pt., pts.	Part, parts
REC.	Record
REP.	Report
Rep.	Representative
rev.	Revised
sec., secs.	Section, Sections
SCC	Supreme Court Cases
SC/S.Ct.	Supreme Court
Supra	above

St.	Saint.
TU	Tribhuvan University
USA	United States America
US	United States
UDHR	Universal Declaration of Human Rights
UN	United State
UNICEF	United Nations International Children's Emergency Fund
UK	United Kingdom
vol.,vols.	Volume, volumes
vid., vide.	see
V.C.	Vice Chancellor
v.	versus
vice versa	the turn being reversed
UDHR	Universal Declaration of Human Rights
WHO	World Health Organization

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ABSTRACT

Human Rights are those rights that every individual must have by virtue of being a member of the society. They are based on demand for life in which the inherent dignity of human being aspires for respect, protection and dignity. Human rights are innate individual and are of an intrinsic factor in the quality of human persons.

Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents, and conscience and to satisfy our physical, spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection. Human rights are Universal and are applicable to all without discrimination. Human rights are sometimes called 'Natural rights', Basic rights' and 'Fundamental rights'. The Fundamental rights are recognized as the basic rights of individuals. These also promise the removal of all kinds of inequities from the lives of people. As fundamental or basic rights they are rights which cannot, rather must not, be taken away by any legislature or any act of the government and which are often set out in a Constitution.

Human Rights recognize the inherent dignity and fundamental freedoms of all members of human family. The equality of civilization of a country is measured

by the respect it shows for the protection, promotion and implementation of human rights. In our modern justice system accused persons are not by mere charge of an offence, denuded of all the human rights and fundamental freedoms, which they otherwise possess. Now it is universally recognized in the legal and political fields that an accused have the basic freedoms and human rights even in custody.

Human Rights can be defined as those basic rights, which are inherent in our nature and without which we cannot live as a human being. Fundamental freedoms and human rights help us to develop and use our intelligence, qualities, talents and conscience to satisfy our mundane and spiritual needs by the respect of human rights. The respect for human rights and human dignity is the foundation of freedom, justice, fraternity and peace in the world.

The term human rights are comparatively recent in origin but the idea of human rights is as old as the history of human civilization. The new phrase 'Human Right' was adopted only in the present century from the expressions previously known as 'Natural Rights' or 'Rights of Men'.

Denial of human rights and fundamental freedom not only is an individual and personal tragedy but also create conditions of social and political unrest sowing the seeds of violence and conflict within and between societies and nations. Just to avoid these problems, various international agencies including League of Nations, U.N.O laid stress for the protection of human rights permanently although the idea of human rights predates the United Nations.

Nepal is a party to several International Human Rights treaties including, International Covenant on Civil and Political Rights (ICCPR), International

Covenant on Economic, Social and Cultural Rights (ICESCR), which recognize numerous rights that are relevant in the context of addressing reproductive issues. In addition, other two core international human rights treaties Elimination of All Forms of Discrimination against Women (CEDAW) and the United Nations Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities enumerate very significant provisions concerning reproductive rights. Similarly, the Government of Nepal has also participated in several key international conferences and has endorsed the development goals and human rights principles contained in the resulting consensus documents, which include 1993 Vienna Declaration and Program of Action, 1994 International Conference on Population and Development (ICPD), 1995 Beijing Declaration and Platform of Action. Treaty Act 1992 provides that provisions under the international instrument to which Nepal is a state party, are equally applicable to prevailing Nepalese laws within the territory of Nepal. As a result, the Government of Nepal addresses the reproductive health issues through a variety of complementary and sometimes, contradictory laws and policies. The manner in which these issues are addressed reflects a government's commitment to advancing reproductive rights and health.

In recent days, the role of judiciary and its approach to pursue its objective has been deeply influenced by judicial activism, and it has been called upon to transform its role of indifference to that of activism. The law and justice are two different matters but have correlation with each other. The doctrine of separation of powers confers on the legislature, the responsibility of the enactment of law. Whereas the judiciary is vested with the responsibility of administering or delivering the justice according to rule of law. The task of law making is the exclusive preserve of legislature and the judiciary has to define

and interpret the constitutional provisions. Judicial review as a doctrine and as an institution or system right from the very beginning of its pronouncement in *Marbury v. Madision* case.

Judicial Activism is to be properly understood in the context of the extent the vigor and the readiness with which the courts exercise their power of judicial review. When courts actively perform an interventionist role one can witness the phenomenon of judicial activism. The court's activism in this sense is gauged by its use of judicial review, the power to overturn acts of other policy markers on the ground that they violate the constitution. Judicial Review is not the only basis for activist policies; the court may come into conflict with policies of the other branches through its interpretations of statutes. Thus the term Judicial Activism is used in many ways: one key element of the concept is court's willingness to make significant changes in public policies, particularly in policies established by other institutions.

In India, the concept of the Judicial Activism emerged since the 1980s. Initially, it was concerned with expanding rights under Article 21 of the Constitution. The Court focused on the rights of bonded laborers and the right to clear environment. By 1990's the court's focus shifted from those issues to the executive accountability. It was the contribution of the two former prominent justices V.R. Krishna Iyer and P.N. Bhagawati who seriously drew court's attention to the social Justice.

The issues of human rights, the observation of Justice Chandrachud (as he was then) in Keshavananda Bharati v. State of Kerala is relevant to be reproduced, "It is really the poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights. In the

absence of explicit mandate, the court should abstain from striking down a constitutional amendment which makes and endeavor to wipe-out every tear from every eye."

Human rights perspective, social justice and empowerment, denial of reservation benefit to the converted people, need of human rights education, etc. Human Rights and fundamental freedom allow us to develop fully and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs.

Nepalese model of constitutional review is closer to that of American one, there and some new and specific provisions for judicial review in the Constitution that has made Nepal different from America and other country of the world. Article 88 of the 1990 Constitution and Article 107 of the 2007 Interim Constitution of Nepal has vested the exclusive jurisdiction in the Supreme Court to determine all questions relating to the constitutional validity of laws in force in the territory of Nepal, and to issue order for the settlement of any constitutional and legal question involved in any dispute of public interest or concern.

The Constitution has explicitly mentioned the provision of public interest litigation (PIL), which is very much advanced form of judicial activism and which cannot be found in Indian and American Models. In India and American there is a practice of PIL, but they have not explicitly mentioned the same in the Constitution. Similarly, the fundamental rights also have been specially guaranteed in the Constitution. The Constitution has provided unlimited grounds of *locus standi* Any Nepalese citizen can file a writ petition in the

Supreme Court to declare the legislative acts and administrative actions void to the extent of inconsistency with the Constitution.

The system of judicial review has been foresightedly in-built in the Nepalese Constitution, in order that the integrity of the Constitution may be preserved against any hasty or ill considered changes, "the fruit of passion or ignorance". The Constitution maker of Nepal very wisely incorporated in the Constitution itself, the system so as to maintained the balance of state organs, to protect fundamental rights guaranteed to the citizens and to afford a useful weapon for equality, liberty and freedom. The system of judicial review in Nepal has not only a legal basis but it has also a philosophical and ethical foundation, and the vitality of this system stands mostly on the historical perspective, social and economic view of life and also on the persuasive conscience of the judiciary.

The judiciary is the guardian of the individual rights in Nepal like in elsewhere, the fundamental differences in approach to the question of individual rights between Nepal and other country, in particular, the UK, is that while the UK seems anxious to protect individual rights only from the abuses of executive powers, but the founding fathers of Nepalese Constitution were apprehensive of tyranny not only from the executive but also from the legislature.

This study analyzed some praiseworthy steps of judiciary towards promoting the rule of law by ending the situation of impunity and towards protecting and respecting human rights. It also analyzed the remarkable orders issued by Supreme Court such as; Right to equality, Property right, Reproductive Rights , citizenship, the end of impunity, inclusion in state mechanisms, untouchability, rights of the senior citizens, education, health, the right to employment, impartial investigation of the incidents which occurred during the armed

conflict, electoral roll, among others. It deals on the concept of judicial creativity and craftsmanship, judicial policy making, judicial populism through the judicial activism, the ideological and personal differences among judicial law makers, how courts deal with them is an important part of judicial policy making. The Meaning and Concept of Judicial Restraint intends to define the modes of Imposing Judicial Restraint and Basis of the judicial Activism such as; Socio-Economic and Political Condition, Rule of Law, Human / Personal Factor and Independence of the Judiciary. It also described the ability of judges, attitude of the judges in the field of judicial activism and the the important role of independent of judiciary for judicial activism. It has also deals on Major Techniques of Judicial Activism such as; judicial review, public interest litigation, fundamental rights and constitutional doctrine. It has illustrates the concept of constitution, constitution the living organism and the effective constitution - that satisfies the principles of justice.

It deals Greek tradition of Socrates and Plato's natural law, law that reflects the natural order of the universe, essentially the will of the gods who control nature. It explains the philosophy of Aristotle, St . Thomas Aquinas basic human needs such as self preservation require fundamental human rights, Hobbes and Bentham philosophy who believed that human rights needed strong laws to protect human beings. John Locke's theory of natural right to self preservation, Rousseau's came up with the social contract theory, Immanuel Kant's concept of each individual freedom should not impinge on the freedom of others, John Stuart Mill's Liberties such as freedom of expression and association should not be absolute, but that they should exist in such a way as not to deprive others of their ability to achieve their own liberties. Likewise, Marx and Engels, the fathers of communism, an entirely different view, that they were unconnected to

the reality of the exploitation of the working class. Ronald Dworkin's philosophy of human rights, John Rawls presents a more compassionate view of human rights, one with the greatest degree of individual liberty and equality while maintaining these rights for all. Thomas Hobbes's positive law, instead of human rights being absolute, Jeremy Bentham, another legal positivist sums up the essence of the positivist view.

It is also deals regarding the Magna Carta which is known as a mile-stone in the field of human rights and justice likewise, French Declaration of the Rights of Man 1789, and all citizens have rights, same for all, whether it protects or punishes. American Bill of Rights 1789 serves to protect the natural rights of liberty and property.

It elucidates the basic principles of Geneva conventions which reposing on the respect of the human being and are respecting its dignity and evolution of International Human Rights. It also explains the concept, definition, principle, human rights Jurisprudence and various theories and sources of human rights which gradually evolved over the past several centuries. It has also explained the role of The United Nations Organizations and protection and promotion of Human Rights. Likewise, in international level it highlights the guidelines and commitments of protection and promotion of basic human rights through various international legal frameworks i.e. The Charter, UDHR, ICCPR, ICESCR, CEDAW, CRC, ICERD, CAT, UN Human rights agency.It also illustrates with the commitments of the international legal framework concerning protection of basic human rights of women, children and backward communities.

It has analyzed the role of judges and judiciary regarding the concept of human rights and social justice which are today's challenging concern. It intends to analyze the role of judiciary for the application of international human rights. It also analyzing the constitutional history of USA, the first constitution was adopted and pushes to adopt a bill of rights, a major event in its own right.

It has highlighted the famous American case Marbury vs. Madision is deemed to be the embarking point to this concern. The court was most uniformly supportive of civil liberties and most activist in its policy making. Probably the best Known decision of this period was Brown V. Board of Education which invalidated the controversial decision of Plessy V. Fergusan and ordered a desegregation of southern school systems and began the process of supporting the rights of black Americans in Several areas of policy making. In this way American Supreme Court paved the way of Judicial Activism which later not only flourished in American legal system also got warm welcome to the legal system of the different country.

It also explained the Indian Judicial Activism which has distinct face in comparison to American concept and American activism which is much more concerned with civil Liberties for the protection and promotion of human rights of citizens. Likewise, Judicial Activism in India is far more complex then American activism. It intends to pinpoint the exercise of Indian judicial activism for social change and advances the protection and promotion of basic human rights of the poor.

It has analyzed the Judicial activism in Pakistan took a new turn in 1997 when a tussle began developing between the apex court and the government. The court has play the activism role in some cases such as the Benzir Bhutto's, Ms.

Shehla Zia, Muhammad Nawaz Sharif, Raeesul Mujahideen Habib, Wahab Khairi are the famous cases of Pakistan.

It intends to pinpoint the exercise of judicial activism and public interest litigation as the instrument for legal reform concerning protection and promotion of basic human rights of women and marginalized groups. It has also assessed the jurisprudential basis of directive orders issued under the role od judicial activism with associating to realist school of jurisprudence.

This study also intends to explain the Trends and Practices of Judicial Activism in Nepal with reference to historical development of Nepal, from lichhchavi dynasty to the earlier Kirati dynasty of early history, middle period in Nepalese history Malla dynasty and Modern Period of Shah dynasty. It analyzes the Constitutional development and it's provision regarding the judicial system in Nepal and the provision of Apex Court likewise, Pradhan Nyayalaya to Supreme Court. It also defines the constitutional provisions regarding the judicial review and fundamental rights of each constitution such as; Government of Nepal Act 1948, Interim Government of Nepal Act 1951, The Constitution of the Kingdom of Nepal 1959, The Constitution of Nepal 1962, The Constitution of the Kingdom of Nepal 1990 and The Interim Constitution of Nepal 2007.

It has analyzed the Constitutional provision of citizen regarding file a writ petition in the Supreme Court on the ground of the violation of their rights that are guaranteed in the Constitution. This chapter has intended to observe the judicial trends and practices in lights of judicial pronouncements made by the Supreme Court of Nepal, in particular, in the time between 2010 to date.

It has analyzed the role of judges and judiciary in the context of new development concept of human rights, social justice and right to equality, which are today's challenging concerns.

Chapter - I

Introduction

1.1 General Introduction

Judicial review has two prominent functions; legitimating the governmental action and protecting the Constitution against any undue encroached by the government. The notion of rule of law as said by *Jeffrey Jowell and Down Oliver* is enforced through judicial review.[1] The system of judicial review is always directed against despotism, and its sole objective is to protect the constitution from the undue encroachment of the government and to establish a just society.

Judicial review in general is defined as the process where, by supreme judicial body of the state examines decisions given by the inferior judicial bodies in order to establish whether or not they are under the process of due law. In the context of constitutional law, the term judicial review is, however, used differently. In a wider sense, it is simply a final consideration and decision by a court of law on the dispute between private parties or between the private party and the state or public authority. In a narrow sense, it is a constitutional provision of the state whereby a court of law examines constitutionality and basic legality of any law made by legislature, or rules or orders or decisions made by the executive or executive departments. Judicial review is of two kinds, namely, the judicial review of administrative action[2], and the judicial review of legislative Acts.

So far as Judicial Activism is concerned, it was first originated in English courts in the form of concepts like equality, natural justice at a time when there were no significant safeguards for people in statutory laws. With the widening jurisdiction of the courts, especially through the instrument of public interest litigation, the issue of judicial activism has become a matter of national concern. It requires an amicable

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1 Jeffrey Jowell and Oliver Dawn (7th ed.) (2011). *The Changing Constitution* 57, Oxford, Clarendon Press.

2 *Union of India V. Cynamide India Ltd*., (1987). 2 SCC 720.

solution through scholarly exercises and broader consensus on constitutional values between the judiciary on the one hand, and the legislature and the executive on the other.[3] Judicial activism particularly can be seen in reference to judicial review and public interest litigation, the major techniques of judicial activism.[4] In *Dr. Bonham's* case *Justice Coke* had propounded the notion. In England, an act of parliament conferring the charter of the Royal College of Physicians gave incorporated society of physicians power to impose fines upon members offending against its rules. Half of such fine was to go to the crown and the other half to the society. A physician *Dr. Bonham* was imprisoned for nonpayment of fine. He brought an action for false imprisonment. The Chief Justice of England *Sir Edward Coke* held in 1610 that the Act was void in as much as it had made the society the prosecutor and judge at the same time which was against common law and reason. *Coke* thus asserted the power of Judicial Review even against legislation.[5]

Similarly, Judicial Review first appeared in America in 1780, in the case of *Holmes V. Walton*[6] in which the Supreme Court of New Jersey State refused to carry out an act of legislature providing for the trial of a designated class of offenders by a jury of six, whereas the court held that the state constitution contemplated a common law jury of twelve and thus, the legislative measure of a state was struck down by state Supreme Court. Judicial Review was formally developed into a doctrine in 1803 through the decision in the case *Marbury V. Madison*[7], in which the court declared a provision of the Judiciary Act of 1789 to be in violation of the constitution and thus null and void. American Supreme Court paved the way of Judicial Activism which later flourished not only in American legal system but also got warm welcome to the legal system of the different countries. Under Chief Justice *John Marshall*, the court established the principle of judicial review and also introduced the concept that the constitution must be flexibility interpreted to serve changing needs of the society.

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3 Mahandra P. Singh (11th ed.2011). *V.N. Shukla's Constitution of India*, Eastern Book Company, Lucknow, India. p.117

4 M.P. Jain (2010). *Indian Constitutional Law* (6th ed.). Reprint (2013). LexisNexis Wadhwa, Nagpur, India. p.1693.

5 Deshpande V.S.(1992). *Judicial Review of legislation*, India : Eastern Book Company Inc., p. 16.

6 Bachan Lal Kalgotra (1892) Austin Scott, *'Holmes V. Walton*, the New Jersey precedent' in the American Historical Review, IV, 456.

7 Lewis Lipsitz (1993). *American Democracy,* New York: St. Martin's Press Inc., p. 405.

American activism was much more concerned with civil Liberties for the protection and promotion of human rights of citizens.

Likewise, judicial activism in India is far more complex then American activism. One stream of Indian activism radiates capitalism, champions the cause *status quo* and services the rights of the vested interests, while the other stream radiates socialism, espouses the cause of social change and advances the protection and promotion of basic human rights of the poor[8]. Judicial activism in India was developed in a systematic way in 1970, though *Justice J.S. Verma* preferred to trace the history way back in 1893. In his words; the judiciary will continue to respond to the changing needs of the times.

In India, the concept of the judicial activism was, in fact, oprationalized since the 1980s. Initially, it was concerned with expanding rights under Article 21 of the Constitution. The Court focused on the rights of bonded labourers and the right to clear environment. By 1990's the court's focus shifted from those issues to the executive accountability. It was the contribution of the two former prominent justices *V.R. Krishna Iyer* and *P.N. Bhagawati* who seriously drew court's attention to social Justice.

The liberalized doctrine of *locus standi* led to the development of public interest litigation (PIL). In the *Asiad* case[9] a voluntary organization filed petition for protection and promotion of the rights of workers. In such scenario, the Indian Supreme Court has set up a unique form of epistolary jurisdiction through which public citizens or groups can activate the court for violation of fundamental rights of ethnic and minorities in Indian society. Any citizen may activate the court by means of a letter which is treated as a writ petition. In *Dr. Upendra Baxi V. State of U.P*, law professor of Delhi University addressing a letter to the court was deemed to have the standing to complain about the prisoners of the Protective Home at Agra where the prisoners were living in inhuman and degrading conditions. Though such moves were criticized by the judges like *V.D. Tulzapurkar* saying; such a practice would

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8 Mohammad Ghouse (1990). *The Two Faces of Judicial Activism,* New Delhi: Deep and Deep Publications, p. 107.

9 *People's Union for Democratic Rights V. Union of India*, AIR 1982 Sc 1473.

result in confirming a privilege on the complainant to have a judge or forum of his own choice which is clearly subversive of the judicial process and enjoins that no litigant can choose his/her forum, moreover it will result in the erosion of the administrative powers of the chief justice[10]. But the court went a step ahead and frequently appointed 'commissions' and 'sociological committees' to investigate and collect necessary facts in various cases. Emphasizing on the usefulness of new procedural innovations*, Chief Justice Bhagawati* responded;

> The constitution makers deliberately did not lay down any particular forms for enforcement of fundamental rights nor did they stipulate that such proceedings should confirm to any right pattern of or straight jacket formula … We have therefore to abandon the *laissez faire* approach in the judicial process … and forge new tools, device new methods and adopt new strategies for the propose of making fundamental rights meaningful of the large masses of people[11].

In Nepal, the Pradhan Nyayalaya Act, 1955 under its Section 30 empowered the Pradhan Nyayalaya the writ jurisdiction with the power of judicial review for the first time in the legal history of Nepal. By exercising the power of judicial review, the full bench of the Pradhan Nyayalaya in *Bisheshwor V. Commissioner Magistrate* case declared the Section 1(zf) of Commissioner Magistrate Rule (Sawal) void as being contrary to Section 30 of the Pradhan Nyayalaya Act, 1955[12].

Article 88 of The Constitution kingdom of Nepal 1990, and Article 107 of The Interim Constitution of Nepal, 2007 have vested exclusive jurisdiction to the Supreme Court of Nepal to determine all questions relating to the constitutional validity of laws in force in the territory of Nepal, and issue order for the settlement of any constitutional or legal question involved in any dispute of "Public Interest" or concern. These Articles also give "unlimited" grounds for *locus standi. A*ny Nepali citizen can sue a writ petition in the Supreme Court challenging the legislative and administrative actions on the grounds that they are inconsistent and contrary to the

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10 Sudesh Kumar Sharma (1983). *Public Interest Litigation* : New Delhi: Deep and Deep Publications, p. 211.

11 *Bandhua Mukti Morcha V. Union of India*, AIR 1984 Sc 802.

12 *Bisheshwor Prasad Koirala V. Commissioner Magistrate*, 1959 NLR 123.

provisions of the Constitution. It allows the judiciary to invalidate laws, which it considers inconsistent with the provisions of the Constitution. This power of judicial review has definitely magnified the scope of judicial activism. The Constitution has defined the powers of the institutions of Executive and Legislature. But these institutions being political in nature often tend to cross the limitation placed on their powers by the Constitution in the fulfillment of their interests. The judiciary being the guardian of law, and Constitution, and upholder of justice and ultimate protector of citizens' rights, cannot remain indifferent towards the people in the name of interpreting only the letter of law. Thus, it is imperative for the judiciary to play an activist role in such conditions.

The court in Nepal had attempted to make harmonious relation between fundamental rights and directive principles of state policy. In *Godabari_Marble case*[13] the Supreme Court used Article 26(4) of the Constitution of the Kingdom of Nepal 1990 to order the government to enforce the Mines Act, 1986 which had been passed long ago but was not implemented and to enact necessary laws in order to protect and preserve the environment. Similarly in the case, *Yogi Naraharinath,*[14] the court ruled that it had the power under article 24 of the Constitution of 1990 to identify those actions of the govt. which contravene the directive principles. In the case *Meera Dhungana*[15] the petitioner challenged section 16 of the Country Code in the Chapter on Partition which discriminated between son and daughter in the share of father's property. The petitioner argued that the provision was discriminatory and void as being inconsistent with Articles 11 and 17 of the Constitution of 1990. The court issued a directory order, which stated; "while it is desirable to review the family laws related with property in their entirety, the court hereby directs HMG to introduce an appropriate Bill in the parliament within one year of the receipt of this order". Nevertheless, this is not best held unless the state creates a number of administrative bodies and enacts laws in order to enforce them. In these circumstances there may be misunderstanding about the scope of powers and sometimes also a misuse of power.

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13 *Surya Prasad Dhungel V. HMG,* 1992 NLR at 169.

14 *Yogi Naraharinath V. Girija Prasad Koirala*, 1996 NLR at 33.

15 *Meera Dhungana V. Law, Justice and Parliamentary Affairs Ministry* NKP. No.6,1996. p. 462.

A. Process of Constitution making

Politically, Nepal is now in a transitional stage, the new constitution making process is prolonging because of lack of consensus between political parties. The spirit of Interim Constitution of Nepal 2007 was to enact a new Constitution through Constituent Assembly. The first Constituent Assembly (CA), which was dissolved in May 2012, could not deliver the Constitution because the major political parties could not forge a consensus on aspects of federalism. Mainly there was disagreement on the nature of federalism and the number of federal provinces. The federalism issue is going to haunt the second CA as well. The second elected Constituent Assembly, which is working at a snail's pace, is yet to nominate 26 CA members and give complete shape to the Assembly. In March 2014, the CA was able to elect its five committee heads based on political consensus. With the appointment of these heads, the constitution-writing process might be faster but many problems are yet to be overcome. Despite the recent optimism, everything depends on how the major three political parties would be able to take all the other political parties into confidence. They also need to address concerns of the minority groups like Dalits, women, Madhesi, Janajati, Muslims and people from backward regions that have been fighting for equality, identity, social justice and dignified representation in the state under a federal system. Without their support, the CA will not be able to deliver a viable constitution. The another challenging task for them is to reach out to the Mohan Baidya-led CPN-Maoist. If the political parties are able to meet all of these challenges, they might be able to deliver the constitution by the stipulated time, which is mid-February 2015. If the political parties fail to deliver the constitution the second time around, the country will have to face serious consequences.

Clause 66 of Constituent Assembly Regulations 2008 has defined the terms of reference of the Restructuring of the State and Distribution of State Power Committee. Structure of the federal democratic republic of the State, principles and grounds for delineation of federal units; demarcation of every federal unit and giving them names, distribution of power between the legislative, executive and judiciary of the different levels of government of federal units, list of the power of different levels of federal units and determination of the common list, determination of inter-

relationship between the legislature, executive and judiciary between federal units, determination of resolution of disputes that may arise between federal units and other miscellaneous issues are now the work of the political dialogue as consensus of committee, and others of the CA.

The following issues are now the debatable issues in the Constituent Assembly for constitution making process:

Restructuring of the State, and number, name and boundary of provinces, structure or form of Government, formation of executive, which election procedure will be followed for the election of President, Prime Minister, Member of Parliament and local Bodies, structure of Federal and Provincial legislature and number of legislatures. How to ensure the representation of minority groups like Dalits, Women, Madhesi, Janajati, Muslims and people from backward regions. Structure of Judiciary; who will give last interpretation of Constitution? Whether the Supreme Court or the constitutional court? Who will appoint the Judges of Federal Supreme Court? Provincial High Courts, and other local Courts? Aspects of amendment of Constitution, principle of basic structure.

The Second CA took ownership of the achievements and agreed formulation of certain aspects of Constitution making of first CA, so less than half and very important agenda still left out to reach consensus. The political parties; Nepali Congress, Unified Marxist and Leninist Party (UML) and few small political parties have owned 2/3 majority in the CA, which is enough to adopt new Constitution, other opposition parties are against the majority approach and want consensus in everything. In principle all political parties agree to consensus but in practice the ruling alliance is skeptic to it, and want the new Constitution to be adopted by majority in case no consensus reaches despite all efforts.

Once the debatable issues will be addressed and consensus reached the constitution making process will take a speed and a new constitution would be promulgated within the fixed date.

B. Aims and Needs of Judicial Activism

Nepal is a party to several International Human Rights treaties including, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognize numerous rights that are relevant in different contexts. In addition, other core international human rights treaties, i.e. Elimination of All Forms of Discrimination against Women (CEDAW), the United Nations Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities enumerate very significant provisions. Similarly, the Government of Nepal has also participated in several key international conferences and has endorsed the development goals and human rights principles contained in the resulting consensus documents, which include 1993 Vienna Declaration and Program of Action, 1994 International Conference on Population and Development (ICPD), 1995 Beijing Declaration and Platform of Action. Treaty Act, 1992, which make provisions under the international instrument to which Nepal is a state party, and endorsement of which have been made through prevailing Nepalese laws.

In recent times, the role of judiciary and its approach to pursue its objective has been deeply expected upon to transform its role of indifference to that of activism. As law and justice are two different matters but have correlation with each other. This corrective means and ends of state have to be carried out by State actors. The doctrine of separation of powers confers on the legislature, the responsibility of the enactment of good law whereas the judiciary is vested with the responsibility of administering or delivering justice by expanding it and making it accessible according to rule of law. The task of law making is the exclusive preserve of legislature and the judiciary has to define and interpret the constitutional and legal provisions. Judicial review as a doctrine and as an institution or system right from the very beginning of its pronouncement in *Marbury V. Madision* [16] seeks to serve the following aims and needs:

[16] 5 U.S. at 175–78.

- Guaranteeing the protection of rights, avoidance of their violations to socio-economic uplifts, and to alert the government to be in conformity with Constitution;
- Enforcing the Constitution by declaring legislative acts and administrative actions violating the constitutional mandates null and void;
- Protection of fundamental rights of the people guaranteed by the Constitution;
- Enable the Constitution act as a living organism so as to satisfy the needs of the time;
- Sustain the supremacy of the Constitution;
- Create just and valid social order by invalidating the unjust, bad and unconstitutional law;
- Enforce the rule of law; and so forth.

C. Judicial Review / Activism in Nepal

The Constitution of Nepal has vested the exclusive jurisdiction in the Supreme Court to determine all questions relating to the constitutional validity of laws in force in the territory of Nepal, and to issue order for the settlement of any constitutional or legal question involved in any dispute of public interest or concern.[17] Among others, the Constitution has explicitly mentioned the provision of public interest litigation (PIL), which is very much advanced system of judicial activism to that of Indian and American Models. In India and America there is a practice of PIL, but the same is not expressly mentioned in the Constitution. Article 88(1) of the previous Constitution of Kingdom of Nepal 1990 and Article 107 of the present Interim Constitution of Nepal 2007 provided unlimited grounds of *locus standi.* Any Nepalese citizen can file a writ petition in the Supreme Court seeking order to declare the legislative acts and administrative actions void to the extent of inconsistency with the Constitution.

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[17] *Constitution of the Kingdom of Nepal, 1990.* Article 88 and *Interim Constitution of Nepal, 2007* Article. 107.

Theory of the separation of powers has illustrated that judiciary; the third branch of the government got the responsibility of interpreting law. By using this power, the court can put checks upon the other two branches of government; executive and legislative but this power is not for the encroachment of the powers (jurisdiction) of other branches. If it makes any encroachment, then it has to suffer or say parliament can move to the extent of proceedings of impeachment against the judges. But after the discovery of the principle of Judicial Review through *Marbury V. Madision* case the judges confirmed their authority to determine both the legality of executive conduct and the constitutionality of legislation,[18]

Judicial activism is to be properly understood in the context of the extent of vigor and the willingness with which the courts exercise their power of judicial review. When courts actively perform an interventionist role one can witness the phenomenon of judicial activism.[19] In this sense, the court's activism is determined by its use of judicial review, the power to overturn acts of other policy makers on the ground that they violate the constitution. Judicial Review is not only the basis for activist policies; the court may come into conflict with policies of the other branches through its interpretations of statutes.[20] Thus the term Judicial Activism is used in many ways: one key element of the concept is court's willingness to make significant changes in public policies within the Constitutional parameters, particularly in policies established by other institutions.[21]

The Interim Constitution of Nepal 2007 guaranteed the right to constitutional remedies[22] under Article 107 (1), that laid the rights of citizen as, any citizen of Nepal may file petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution. Because it imposes an unreasonable restriction on the enjoyment of fundamental rights conferred by this Constitution or on any other ground; and the Supreme Court shall

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18 David P. Currie (1988). *The Constitution of the United States* – A Primer for the People. Chicago: The University of Chicago Press. p. 18.

19 Soli J. Sorabjee(1997/1998). "Judicial Activism: The Indian Experiences". *Essays on Constitutional Law*. Vol.26. Kathmandu:Nepal Law Society. p. 66.

20 Lawarence Baum (1992).*The Supreme Court (*4th ed.). Delhi: Universal Book Traders. p.186.

21 Bradley C. Canon (1982). "A Framework for Analysis of Judicial Activism". *Supreme Court Activism and Restrain.* Lexington, Mass: Lexington Books. pp. 385-419.

22 *Interim Constitution of Nepal, 2007*. Article 32.

have extraordinary power to declare that law to be void either *ab initio* or from the date of its decision, if it appears that the law in question is inconsistent with this Constitution. Article 107(2) with the power of hearing public interest or concern issues, has provided the court strong opportunity performing the activist role in favor of meeting people's aspirations and establishment of the just and welfare system within the state.

1.2 Statement of the Problems

A study on judicial activism in the protection and promotion of basic human rights is usually emphasized on the normative contents of state's framework of Constitution. Considering only the normative contents of judicial review would not lead us to a better understanding of how in actual life the system has been working for. The term 'Judicial Activism' and Judicial Restraint' have become the topics of great debate within the legal field. But in practice there is no such condition. Because judicial activism or restraint as means of revolution or *status –quo* have not still occurred in our context. Similarly' Judicial Activism' is not the concept having specific meaning. It's meaning, trend and position depend upon many factors, such as time, place, socio-legal, political and economic condition of the country, the knowledge, belief and attitude of the judges, functioning of other two branches of the government, choices and priorities of social activists etc. That is the reason why one cannot find exact views on judicial activism and similar trends of court's activism in different countries of this study. Hence, the place of court's activism is determined by very many factors and the court's role is often changing *vis-à-vis* activism and restraint depending on the nature of cases and issues. In this circumstance, the researcher proposes some theoretical considerations. In particular, there are three theoretical problems in understanding the system of judicial review / judicial Activism in the context of Nepal. Firstly, the question of adequacy of scope and limitations dealing with the issue of judicial activism, Secondly, the question whether Nepali judiciary has established any strong set of norms in regard to judicial activism? Thirdly, Is Judiciary playing any vital role regarding the protection and promotion of fundamental rights of people and its current impact on the domestic legal system?

1.3 Objectives

The objective of the study is intended to achieve the following:

- To explore and examine the concept of judicial activism,
- To understand the concept and development of human rights jurisprudence for the protection and promotion of basic human rights.
- To analyze the trends of judiciary towards judicial activism.
- To identify the process of judicial activism on Nepalese judicial system and its function.

The study has primarily dealt with the fundamental concept of judicial review / activism, including its concept and scope; determining the constitutionality of the governmental action including legislation; reasons for vesting the power of judicial review in the judiciary; need and rationale of judicial activism; major techniques; concept of human rights, fundamental rights, and constitutional doctrine; including its evolution and philosophy.

1.4 Significance of the Study

This study seeks to explore the important role of Supreme Court concerning the initiation of Judicial Activism in the protection and promotion of basic human rights. The Supreme Court in the present era, is empowered not only to provide justice in accordance with law but also to correct the law if it is inconsistent with the Constitution and the norms of international human rights conventions. The significance of the study can be mentioned as follows;

- Exploration of the concept of Judicial Activism in the protection and promotion of basic human rights,
- Analysis of the historical development of human rights jurisprudence,
- Assessment of the Court's verdict concerning human rights and legal reform through the analysis of writ cases with special reference to social, economic, gender, ethnic and minorities issues,

- Analysis of international human rights instruments in the protection and promotion of basic human rights,

Once this research work or thesis will be open for readers, then it could be treated a solid work on this subject matter of that period. This will be helpful to those who are interested to know about this subject matter. Additionally, it will also be supportive to those who try to make further research on this subject. Further it will be helpful to the members of implementing Agency, Judiciary, concerned Government Agencies and legal academics.

1.5 Scope and Limitation of the Study

Basically, the scope of study is intended to be unique. It analyses the particular issues of Judicial Activism in the protection and promotion of basic human rights through writ cases under extraordinary jurisdiction of the Supreme Court. Essentially, the study focuses on the Supreme Court's verdicts or opinions towards human rights issues particularly related to social, economic, cultural, ethnic and minorities groups.

Another major context of the scope of the study is to address the concerned provisions of international human rights instruments and governmental initiatives with regard to the protection and promotion of human rights through its program and policies. Because Nepalese government has ratified various international human rights instruments including, ICCPR, ICESCR, CEDAW, CRC, and has also enacted Nepal Treaty Act, 1990 for the purpose of application of these international instruments. Hence, this study encompasses every part of above mentioned aspects of Judicial Activism in the protection and promotion of basic human rights.

One of the major problems encountered in the course of this study was the absence of such publications which could provide consolidate information concerning the state of judicial review in Nepal during the period ranging from the first constitutional enactment of 1948 up to the present time. The works done in this area reveal difference in approaches on the issues of judicial review. This has made the researcher work hard to consolidate ideas and come to a fair conclusion. Another constraint is the language of the Court judgments, which is in Nepali language, so the researcher was compelled to translate them into English, which consumed more time

to complete the assignment. Another important limitation of this study has been that it covers the law, legal information and data, cases, laws of only upto the period of end 2013, and not beyond that except to the reference of political events ending 2014.

1.6 Research Methodology

The nature of research work is doctrinal. Basically this study is based on historical, comparative, analytical, descriptive and case analysis approach. So, the research design can be said to be descript-analytical. This research is based on APA (American Psychological Association, 6th Ed., 2010) rules of citation. The following methodological variables have been adopted in carrying out the study:

Published materials concerning the theme of the study have been thoroughly studied and scrutinized in order to use them as source materials. The main sources of information are the primary and secondary sources. The primary source such as the constitutional documents, various law statutes, rules etc. are used to describe the legal and constitutional provisions. The secondary sources such as the relevant scholastic books, comments, law journals, periodicals, articles, and numbers of websites have also been used during the information collection.

The use of case law study method has enriched the study. Almost all the important recorded cases on judicial review have been critically reviewed and analyzed. This method has been adopted with a view to assessing the role of judiciary as a guardian of fundamental rights and also to scrutinizing its trends and practices towards judicial activism.

1.7 Organization of the Study

The study has been organized into the following seven chapters. **The first chapter** deals with the general introduction, structure and methodology of the study. In this stage, it involves some elementary questions and indicates answers why the study matters.

Second chapter contains the review of literature. Some prominent works done in the area of judicial review and pronouncements made by the judiciary in this connection are reviewed in this phase.

Chapter three deals with the conception of judicial Review/ Activism, fundamental rights and constitutional doctrine. The theoretical part of the thesis relies on these core issues. So the thesis inbuilt in this chapter is that there can be no Constitution without fundamental rights, no fundamental rights without judicial review and none all of these without independent, competent and impartial judiciary.

Chapter four outlines the concept and development of human rights jurisprudence, and in particular the International human rights instruments which protect and promote the basic human rights.

The fifth chapter deals with the trends of Judicial Review/Activism. It also makes a comparative study with special reference of the experiences of USA, UK and India on judicial Activism. It deals mainly with the system of judicial activism in Nepal with a special focus on evolution of the concept and its trends.

The sixth chapter makes the assessment of the practice of Judicial Activism in the Protection and Promotion of basic Human Rights in Nepal through the analysis of cases.

The seventh chapter draws the conclusions and findings of the study.

Chapter - II

Review of Literature

2.1 Review of Literature

The literature reviewed in the process of study can be broadly divided into primary and secondary sources. For the purpose of the study on Judicial Activism for the protection and promotion of basic human rights, various relevant literatures are reviewed. The primary sources used in the study include constitutional documents, acts, rules and case laws. As far the secondary sources are concerned, the relevant authoritative books, laws journals, articles have made important direction for finding right track of this study. The secondary sources reviewed in the study are as follows:

S.P. Sathe

Judicial Activism in India'

Oxford University Press, New Delhi (2002) (2nd edition) at pp 249-251

This work has been done in the light of the Indian experiences examined in the area of judicial review and judicial activism. It looks the issues in a different angle and analyses accordingly. In fact, the strength of Sathe's work in this book lies in delineating diverse traditions of judicial review and judicial activism in a comparative context.

In his book Sathe has described on Public Interest Litigation, the Court has granted access to persons inspired by public interest to invite judicial intervention against abuse of power or misuse of power or inaction of the government. Not only was the requirements of *locus standi* liberalized to facilitate access but the concept of justifiability as widened to include within judicial purview actions or inactions that were not considered to be capsule of resolution through judicial process according to traditional notions of justifiability. The Indian Supreme Court not only makes law, as understood in the sense of the realist jurisprudence, but actually has started 'Legislating' exactly in the way in which a legislature legislates. Judicial law making

in the realist sense is what the court does when it expands the meanings of, the words 'personal liberty' or 'due process of law' or 'freedom of speech and expression'.

In his work, he defines; the doctrine of separation of powers envisages that the legislature should make law, the executive should execute it and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable.

Broadly it means that one organ of the state should not perform a function that essentially belongs to another organ while expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law, which the supreme court has been doing through directions in the above-mentioned cases is not a legitimate judicial function.

He argues about; the court has not supplanted but has merely supplemented the legislative through such directions. It has said in each case that it legislated through directions only because no law existed to deal with situations such as inter-country adoption or sexual harassment of working women and that its direction could be replaced by legislation of the legislature.

The survey of the decisional law of the Indian Supreme court has brought to the conclusion that the court clearly transcended the limits of the judicial function and its undertaken functions that really belonged to either the legislature or executive.

Its decisions clearly violated the limits that the doctrine of separation of powers has imposed on it. A court is not equipped with the skills and competence to discharge functions that essentially belong to the other co-ordinate organs of government. Its Institutional equipment is not adequate for undertaking legislation or administrative functions. It cannot create positive rights such as the rights to work, the right to education or the right to shelter.

Sathe's in his book raises the issues in a different angle and analyses accordingly. In fact, the strength of Sathe's work in his book lies in delineating diverse traditions of judicial review and judicial activism in a comparative context. This book reveals at least two kinds of judicial activism at work in India: reactionary and progressive.

Much of the Nehruvian era activism in issues of Land reforms and right to property, and the pro-emergency activism manifests 'reactionary' judicial aculminates in activism. The 'progressive' judicial activism commences with Golaknath and Kesavananda and culminates in a wholly different genre of social action litigation. This book illustrates how fragile as well as fractured progressive activism is.

Sathe is not overly concerned with the tasks of construction of the meanings of judicial activism. He remains concerned with the more important issues of its 'efficacy' and 'legitimacy'. His principle message is that judicial activism is a form of state power inherent at odds with itself. Or, he wanted to say is that justices can be activists only within the confines of the traditions of administration of justice. They may expand and enhance that tradition but their work remains tradition-constituted.

In democratizing societies, he believes, judicial review can contribute towards the deepening of the commitment to constitutional values. And, the Indian experience of judicial review needs to be seen in this light. Judicial review under a written constitution with a bill of rights cannot remain merely technocratic because the expressions used in the bill of rights, such as 'equality before the law', 'equal protection of law', 'personal liberty', 'the procedure established by law' or 'freedom of speech and expression' are open -textured and continue to acquire new meanings as society evolves and social change occurs.

Sathe writes there are two models of judicial review. One is a technocratic model in which judges act merely as technocrats and hold a law invalid if it is *ultra vires* the powers of legislature. In the second model, a court interprets the provisions of a constitution liberally and in the light of the sprit underlying it keeps the constitution abreast of the times through dynamic interpretation. A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist court.

Judicial activism can be positive as well as negative. A court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its integrity to maintain the *status quo* in power relations is said to be negatively activist.

Professor M.P. Jain

Indian Constitutional Law

(sixth ed.). Reprint Pal Senior advocate Barrister has thoroughly revised & enlarged) lexis Nexis Butterworth Wadhwa Nagpur, 14th Floor, Building 10, Tower (2011)

The book has been revised earlier by the author himself. This is the first revision which is being done by someone other than the author; apart from the up-dating of the law and additional corrections the text has not been disturbed. The opinions earlier expressed by the author and the format have been maintained despite some reservations.

M.P. Jain described the constitutional law is of importance, of abiding interest, and is constantly in the process of development. This book seeks to explain the principles of the Indian constitutional law to the students as well as seeks to do that using the case-law as the source material.

Jain also analyzed constitutional law, historical perspective, salient features of the Indian constitution, modern constitution, parliament, the central executive, the supreme court, states and union territories, the state legislature, executive, judiciary, the federal system, legislative, finance, fundamental rights, directive principles of state policy and basic duties, safeguards to minorities, scheduled caste, scheduled tribes and backward classes, constitutional interpretation, Judicial review, etc. with reference to various committee reports, case law and exhaustive commentary.

In the topic on doctrine of judicial review the author highlights regarding the judiciary function; the primary function of the Courts is to settle disputes and dispense justice between one citizen and another. But courts also resolve disputes between the citizen and the state and the various organs of the state itself. In many countries with written constitution there prevails the doctrine of judicial review. It means that the constitution is the supreme law of the land and any law inconsistent therewith is void. The courts perform the role of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. This

judicial function stem from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.

The author also analyzes,- the courts can declare any exercise of power invalid if it infringes any provision in the constitution. In a constitution having provisions guaranteeing fundamental rights of the people, the judiciary has power as well as the obligation to protect the people's rights from any undue and unjustified encroachment by any organ of the state. Further, in a country having a federal system, the judiciary acts as the balance - wheel of federalism by settling disputes between the centre and the states.

Judicial review has two prime functions:- i) legitimize government action, ii) To protect the constitution against any undue encroachments by the government, these two functions are interrelated.

Prof. Mahendra P. Singh,

V.N. Shukla's Constitution of India,

Eleventh Edition, Eastern Book Company, Lucknow 34, Lalbagh, Luknow-226 001, (2011)

This book has been expanding its acceptability with every new edition. It has been referred to by the Supreme Court of India in various decisions among them Rameshwar Prasad V. Union of India (2006) 2 SCC 1 at p. 64). This book represents the correct position of law and its practice. It provides a right perspective for the future actions of those who have to work with the Constitution.

Prof. Shukla has incorporated many cases relating to judicial review/ activism of Supreme Court of India. In this regard he has clearly highlighted the spirit of fundamental rights and common theme of human rights and duties that carry primarily the theme of the 'dignity of the individual' and also of the 'unity and integrity of the nation'. Somebody imbued in the Western theories of human rights may generally classify these three parts respectively, as negative obligations of the

State not to interfere, with the liberty of the individual; positive obligations of the state to take steps for the welfare of the individual; and the duties of the individual to the society and fellow individuals. While he will readily accept the first one as part of human rights regime, he will have reservations with respect to the second and definitely reject the third one as antithesis of rights.

Judicial review in India is based on the assumption that the Constitution is the supreme law of the land, and all governmental organs, which owe their origin to the Constitution and derive their powers from its provisions, must function within the framework of the Constitution, and must not do anything which is inconsistent with the provisions of the Constitution. In federal system it is a necessary consequence to have an impartial and independent judiciary whose basic function is to act as an arbiter in a dispute arising between the Centre and the states. Under the Indian Constitution, there is a specific provision in Article 13(2) that the State shall not make any law which takes away or abridges the fundamental rights enshrined in the Constitution, and any law made in contravention of this provision shall to the extent of inconsistency be void.

Judicial review in India bears resemblance to that available in the United States where the Supreme Court and other courts have endowed themselves with the power to declare a law unconstitutional if it is found not to be in conformity with the provisions of the Constitution.

Judicial review in India goes far beyond its counterpart in U.S. insofar as the validity of the constitutional amendments can also be reviewed by the courts on the ground that an amendment violates the basic structure or features of the Constitution. In Kesavananda Bharati V. State of Kerala, Indira Nehru Gandhi V. Raj Narain, Minerva Mills Ltd. V. Union of India are the landmark decisions of Supreme Courts of India. Judicial interpretation has played specially important role in Indian Constitution insofar as the Supreme Court has held that the basic structure or framework of the Constitution cannot be changed by an amendment of the Constitution. This limitation on the power of amendment and court's power to examine whether that limit has been exceeded have been held to be part of the basic structure of the Constitution.

Since about the mid-twentieth century a version of judicial review has acquired the nick-name of judicial activism, especially in U.S.A. With the widening jurisdiction of the courts, especially through the instrument of public interest litigation, the issue of judicial activism has become a matter of national concern. It requires an amicable solution through scholarly exercise and broader consensus on constitutional values between the judiciary on the one hand and the legislature and the executive on the other.

This book has more references to it in legal literature including overseas publications, I have benefited of the acceptability of the book among the academic sphere. In this book the writer has dealt on rule of law, principles of reasonableness, supremacy of constitution, function of the courts, fundamental rights and judicial review which are the very important for my study.

Dr. Durga Das Basu,

Constitutional Law of India

8th Edition Reprint (2009), Justice Bhagabati, Prof. BM Gandhi, Lexis Nexis Butterworths Wadhwa Nagpur C33, Inner Circle, Connaught Place, New Delhi (2009)

This edition contains the text of the Constitution of India amended up to date including all amendments made up to the 96th Constitutional Amendment Act. This book has incorporated landmark judgments of the Supreme Court up to 2008.

This book provides an exposition of the major features of the Constitution of India and incorporates their recent developments. It enabled the researcher to understand about the structure of the Indian Constitution, the Fundamental rights and Directive Principles of the Constitution and their fundamental concepts which are analyzed in the part III and IV of the book.

This book perceives that Constitution is concerned with the roles and powers of the institutions within the state and with the relationship between the citizen and the state. It also perceives that the Constitution is a living, dynamic organism which at any point in time will reflect the moral and political values of the people it governs,

and accordingly, the law of the Constitution must be appreciated within the socio-political context in which it operates. This book also incorporated landmark judgments of the Supreme Court and has analyzed the effects of recent decisions.

This book has analyzed the role of fundamental rights in the Constitution of India. The Constitution of India embodied a number of Fundamental rights, which are available not only against the executive, but there are also limitations upon the powers of the Legislature. Though the model has been taken from the United States, the Indian Constitution does not go so far, and rather affects a compromise between the doctrines of Parliamentary sovereignty and judicial supremacy.

Basu has analyzed the Court's power and duty to declare a law unconstitutional, as the courts have power of judicial review. In determining the question of constitutionality of a statute, the Court has examined its provisions in the light of the relevant provisions of the Constitution. The constitutionality of a law is challenged on the ground that it infringes a fundamental right; the Court has to consider the direct and inevitable effect of law. Public spirited individual or associations can question the constitutionality of a law. But they must act *bona fide* in the cause of justice, and for the person who is directly unable to move the court because of some disability. Thus the Courts now are not rigid regarding the *locus standi*.

Basu analyzing the spirit of the Constitution of India, and its Article 141 declares that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Once, the Supreme Court declares a law to be unconstitutional, the decision becomes binding on all courts within the territory of India.

This book has more references to it of legal literature including overseas publications, I have benefited of the acceptability of the book in my academic work. In this book the writer has concentrated on rule of law, principles of reasonableness, supremacy of constitution, function of the courts, fundamental rights and judicial review which are the very important for my study.

Prof. Geoffrey R. Stone, Prof. Louis M. Seidman, Prof. Cass R. Sunstein, Prof. Mark V. Tushnet,

Constitutional Law

ASPEN LAW & BUSINESS A Division of Aspen Publishers, Law Center, New York (2001)

This work has been done in the light of the American experiences examined in the area of judicial activism. The authors focus on power and function of the Constitution and role of the Supreme Court in the Constitutional Order. In this context, the important holding in the case is that the Supreme Court has the power to declare acts of Congress unconstitutional. It is striking to many modern readers that chief justice Marshall's principal arguments rely not on the text of the Constitution but instead on its structure and on the consequences of a conclusion that judicial review was unavailable. In this book the writers explores the Court's struggle to define and apply the Constitution's requirement of equal treatment. Within this, chapter section A devoted to a historical case study. It examines the ways in which the Court has interacted with other social forces in dealing with issues of racial equality. The remaining sections focus more directly on Constitutional Doctrine. Section B explores the meaning of "equality" in the context of "rational basis" as review of "Ordinary" social or economic classifications. Section C returns to racial classifications as the prime example of "suspect" classifications subject to "heightened scrutiny". Sections D and E discuss the problems of classifications based on gender and sexual orientation and section F explores the claims of other "disadvantaged groups, such as aliens and poor, to special scrutiny of laws arguably discriminating against them.

In this work the authors also trace out the evolution of the Constitutional doctrine concerning discrimination against African-Americans. They have also highlighted the Court's decisions regarding the discrimination against African-Americans. This book is very relevant to my work and helpful for my study.

Professor Calvin Massey

American Constitutional Law: Power and Liberties

Aspen Law & Business, A Division of Aspen Publishers, Inc. Gaithersburg New York. (2001)

Massey has tried to comprehend the scope of American constitutional law; as this has been no easy task. He had tried to include the materials which have actually covered most of the courses of constitutional law taught in American law schools. Constitutional law is a political subject, but it is not just politics, learning constitutional law is a bit like learning a new language. There are new vocabulary, grammar, and syntax to be learned in order to speak politics through the vernacular of the law. This is not to suggest that the making of constitutional law is some version of Orwellian" news speak" but to suggest that constitutional law deals with political disagreement in a fashion of its own. A principal objective of this book is to enable the students to master, as thoroughly as is possible in a introductory course, the fundamental of the language of constitutional law.

Massey explains the role of courts in constitutional interpretation. He highlights that constitutional law is primarily a study of judicial interpretation of the U.S. Constitution. He also explains, Constitution and constitutional law is not the same thing, the strongest voice in constitutional interpretation is that of the U.S. Supreme Court.

Massey also explains on judicial review in constitutional structure. Judicial review is the process by which courts decide whether actions of government officials comply with the Constitution. The fundamental premise of a representative democracy is that the people, through the elected representatives, are free to decide on social and political arrangements. But that freedom may not be constrained by the Constitution is the task of the Courts through judicial review to ensure that governments act in accordance with the Constitution, and the legislatures do not squeeze, but foster the basic human rights.

Massey defines the concepts of equal protection and due process of law, both stemming from American ideal of fairness, though not mutually exclusive. Equal

protection of the law is a more explicit safeguard of prohibited unfairness than "due process of law", and therefore, do not imply that the two are always interchangeable. Discrimination may be so unjustifiable as to be violative of due process. Liberty is not confined to mere freedom from bodily restraint but extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective. In view of the decision in Brown V. Board of Education that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

Massey has explained on the topic of fundamental rights "the government action significantly impinges upon a "fundamental right or interest" that action is presumptively void. The government's action is valid only if it can prove that the infringement is necessary to accomplish some compelling government interest.

The term "fundamental right or interest" requires definition. For purposes of equal protection a right or interest is "fundamental" if (i) it is an independently protected constitutional liberty (e.g., free speech), or (ii) it has been identified as "fundamental" for equal protection purposes even though it is not independently protected by the Constitution.

The first type of fundamental right is unremarkably any government action that seriously infringes another constitutional right is also a presumptive equal protection violation. The second type of fundamental right is quite different. The source of these fundamental rights is equal protection itself, which is surprising because the equal protection clause mandates" equal protection of the laws" but does not specify the substance of those laws.

Justice(R) Fazal Karim

Judicial Review of public Actions

First published in Pakistan by Pakistan Law House, Lahore, (2006)

Justice (R) Fizal in his outstanding work argues that judicial review as "judicial power" in action; it has also been described as the practical aspect of the rule of law

and refers to different jurists such as Greek Philosophers, including Plato and Aristotle, who had a different conception of justice. He has highlighted in chapter six of this book regarding "judicial activism" or "judicial restraint" within this topic he has defined the word judicial activism and judicial restraint.

He argues regarding the interpretation and its relation with judicial review and judicial power, the power to decide and that includes the power to interpret the core function of the judge is to decide by applying the law to the facts of the case before him. It is an exercise of judicial power of the state and consequently a function of the judiciary alone to interpret the written law (Lord Diplock in Chokolingo V. AG of Trinided and Tobago (1981) 1 All ER 244)

He also incorporates the definition of Black's law dictionary; "judicial activism" is defined as a judicial philosophy which motivates judges to depart from strict allowance to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally those decisions represent intrusion into legislative and executive matters".

"Judicial self -restraint is defined as self - imposed discipline by judges in deciding cases without permitting themselves to indulge their own personal views or ideas which may be consistent with existing decisional or statutory law".

Judicial restraint, on the contrary, argues that the court should allow the decisions of other branches of government to stand, even when they offend the judges own sense of the principles required by the broad constitutional doctrine, except when those decisions are so offensive to political morality that they should violate the provisions on any plausible interpretation, or, perhaps, when a counter decision is required by clear precedent.

Justice (R) Fizal highlights on judicial activism in India and Pakistan. The Supreme Court of India has, because of its judicial activism, earned the reputation of having become "the most powerful apex court in the world".

Michael T. Molan

Constitutional Law

The Machinery of Government, 3rd Edition, (2001),

Third edition of this text reflects the progress made by the labor government in furthering its programme of constitutional reforms, including new membership arrangements for the House of Lords, and very significant changes to the conduct and financing of elections, following the enactment of Political Parties, Elections and Referendums Act, 2000 and Representation of Peoples Act, 2000.

The book is reviewed in order to trace the meaning and operation of judicial review of executive action in the context of UK. An examination of judicial review of executive action provides an opportunity to see the principles of constitutional law i.e., the doctrine of separation of powers and concept of rule of law in operation. The power of High Court is clearly mentioned in this book. The book illustrates that the High Court has the power to review the action of an executive or public law body to determine whether or not that body has acted within the scope of its powers. By the process of judicial review the courts are acting as a check upon the executive.

Michael T. Molan highlights on the actual procedure to be followed by a person seeking to invoke the aid of the courts by way of an application for judicial review, and the remedies available thereby. Similarly, the book has clearly mentioned the basis upon which such an application might be made in the context of UK. Moreover, the book shows the purpose of judicial review in details alongwith the examples of different cases on judicial review.

Michael T. Molan has mentioned that Judicial Review is concerned with the legality of executive action. If an executive decision is vitiated by illegality whether procedural or substantive, it can be struck down. A court exercising its power of judicial review should not be concerned with the merits of the executive action in question (i.e., whether or not it was a 'good' decision). Further it should be borne in mind that even if an applicant succeeds in persuading a court, that, for example, a minister has exceeded his powers in making a particular decision, the court will simply quash the decision.

Judicial review is concerned with legality, not merits, hence the courts would not normally review a tribunal's findings of fact, but in the example given the types of errors illustrated are sometimes called 'jurisdictional' because they relate to facts upon which the jurisdiction of the tribunals or decision maker depends.

Michael T Molan also highlights that where an application for judicial review is made an applicant can request any one of a range of remedies. These include the three 'public law' remedies of quashing order, mandatory order and prohibiting order (formerly the prerogative orders of *certiorari, mandamus* and *prohibition*), and the private law remedies of injunction, declaration and damages. Before considering each in turn a number of general points should be borne in mind. The court will have considerable discretion as regards the granting of relief. Even if a *prima facie* case of *ultra vires* action has been made out, there are a number of grounds upon which the court may decide to refuse relief, for example, the applicant may lack standing (*locus standi*); may be out of time; the issue involved may not be justiciable, the proceeding may be seen as futile; the court may view the applicant as 'undeserving; the applicant may be seen as being largely responsible for bringing about the decision that he now seeks to have quashed; the granting of the remedy may be seen as having undesirable consequences; and there may be another more suitable remedy provided by statute.

K.L. Bhatia

Judicial Review and Judicial Activism

Deep & Deep Publications, New Delhi (1997)

In this book Bhatia has designed to provide insights into the perceptions and contours of judicial review and judicial activism in India and Germany. It is a comparative study of Constitutions and administrative laws of both countries from which Bhatia has made an initiative for a progressive development of law.

Bhatia writes that the courts whether in India or Germany have a valuable as well as indispensable role in the administrative process though through different routes and mechanisms, viz., judicial process intends to censor or control the executive with a sole purpose that an administrative authority behaves in such a way that it must reach 'just ends by just means'.

This study presents some aspects of positive side as well as negative side of the Indian and German systems of judicial review; it also presents some of the advantages and shortcoming of judicial activism of both the system. It explores the notion that judicial review is not concerned with the decision of an administrative authority but with decision-making process.

The study unfolds that an individual either in India or in Germany is protected against any invasion or breach or infringement of his fundamental right or basic right or ordinary right by the executive- a wonderland of bureaucracy - through the instrumentality of judicial review.

Judicial review, to Bhatia, is an amour to check lawlessness-legislative as well as executive. In India right from the inception of the Constitution, the judicial review has been effectively exercised and any endeavor to undermine or crumble its sanctity has been counterproductive, i.e. struck down because it being the basic structure of the 'ground norm', to him the Constitution.

Bhatia has presented judicial review as a foolproof system to combat the arbitrary, unreasonable, illegal, biased, non-reasoned, and incompatible. To streamline the notion of judicial review in the area of administrative law the institution of Ombudsman is coming up to cleansing the administration from varied ills. But the moot question is that has Ombudsman become a substitute for judicial review in monitoring the administrative process at the central and local levels of administration or a panacea for its ills?

V.G. Ramachandran

Law of Writs

Eastern Book Company, Lucknow, India (1993)

In this book Ramchandran deals very exhaustively and exclusively with the practice of prerogative writs in India. The court, in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonable and supported by evidence. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the 'feel of the

expert' by its own view. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land.

This book was quite useful for the researcher to understand general principles of writ jurisdiction which is very much essential in the study of judicial activism.

Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made and it would be an error to think that the court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself. In the state where the written Constitution is adopted, the power of the judicial review is accepted as the *heart* and *core* of the Constitution.

Norman Redlich, Bernard Schuartz, John Allanasio,

Constitutional Law

Matthew Bender & Co. Penn Plaza, New York, 1996.

This book highlights on the equal protection clause, with important exception of the prohibition against titles of nobility, the emphasis on equality is of comparatively recent vintage in the American constitutional landscape. The Supreme Court should interpret towards property or economics; others involve more personal liberties, such as the right of the accused explicitly guaranteed by the Bill of Rights, or such other areas as childbearing and child rearing. Some of the rights that the court has grounded in the Due Process Clauses have largely procedural content, while others are overtly substantive.

The authors have explained regarding the different attitudes of court towards gender; the court has exhibited toward gender discrimination over time and reviewed the court's struggle to settle on an appropriate standard to deal with these cases. The court analyzes these cases using a "Middle tier" level of scrutiny that is less exacting than the strict scrutiny standard that is less exacting than the strict scrutiny standard used to review discrimination based on race or ethnicity.

After treating some general themes in equal protection jurisprudence relating to gender, the writer also defines gender discrimination cases involving employment, government benefits and pregnancy. Particularly difficult for the court have been cases involving the constitutionality of allegedly benign discrimination programs, which are designed to compensate for past discrimination but are often criticized for falling prey to the same stereotypes that they are trying to combat.

This book also discusses on the stringent protection that the modern court affords freedom of speech and association continuing with the theme of political speech and association, the power of judicial review.

The power of courts to overturn decisions of government as unconstitutional is fundamental because all but a few of the cases discussed by the authors and the power of judicial review is a fundamental building block for the entire course. At the same time it also involves the structure of one branch or component of the American government.

K.E. Mahoney

Gender and the Judiciary: Confronting Gender Bias

K. Adans and A. Byrnes (eds.), Gender Equality and the Judiaciary, UK: Common Wealth Secretariat, (1999)

Kathleen E Mahoney in his article entitled "Gender and the Judiciary: Confronting Gender Bias" discusses mainly at how judge made legal doctrine and principle that affect women as a group. Mahoney urges that as a proliferation of laws continues to expand the judicial role, a greater diversity of judges to reflect the pluralistic nature of the population and the life experiences of minorities is argued to be necessary to maintain public confidence in the administration of justice. He further urges the judiciary to be properly representative of all the population. Merely putting more women or members of minorities on the bench will not remove doctrinal bias or perceived bias in the administration of justice. He ultimately emphasizes a changed sensibility with respect to differences, which can only be achieved by effective rigorous and on-going gender-based analysis which is best taught and learned in judicial education programs on gender, race and class issues.

Mauro Cappelletti and John Clarke Adams

Judicial Review of legislation: European Antecedent and Adaptations

Haward Law Review, Vol. 79, Number 6, April (1966)

Mauro and John speaking on the origins of judicial review of legislation argues that from the political experience of the United Nations the defeated nations, in an endeavor to prevent a return of the autocratic governments that were held responsible for the outbreak and more than their share of the atrocities of two world wars and to establish a better political order borrowed the doctrine of judicial supremacy which gives the courts the power and obligation to declare invalid all law that is incompatible with the Constitution. By endowing their regular courts or some specially established court with that power, the framers hoped to ensure the preservation in their countries of a system of government that would foster the growth of liberal democracy. Other European nations have also adopted this striking peculiarity of the United States System of Government. Thus, in the last half century, Austria, Denmark, Germany, Italy, Cyprus, Turkey and Yugoslavia instituted systems of judicial review of legislation, while Switzerland and Norway have employed such a system for almost one hundred years. Austria became the first country to adopt judicial review of legislation by the federal Constitution of October 1. 1920; similarly Yugoslavia became the first communist state to adopt judicial review, having done so in 1963.

Mauro and John with the analysis of traditions of judicial review in Europe also highlighted about the latter development of European systems of judicial review concerning principally with three aspects of the phenomenon: (1) the organs in which the power of judicial review resides, (2) the procedures by which questions of Constitutionality are resolved, and (3) the effects of a finding of unconstitutionality on the law under review and on the specific case (if there be one) that gave rise to the Constitutional question.

An excellent article of a comparison of the American and European systems of judicial review of legislation concludes that judicial review is in essence an endeavor to judge positive law in the light of ultimate values. It is means by which human

aspirations, as expressed in constitutional absolutes, are concretized into a living Constitution.

Ashwani Kant Gautam

Human Rights and Justice System

S.B. Nangia, A.P.H. publishing corporation, 5, Ansari Road, Dariya Ganj, New Delhi, 110002, (2001)

Gautam has explained that Human Rights and Fundamental Freedoms are universally recognized as the birth right of all human beings. In the new emerging world order, Human Rights, it has been said are the ultimate norm of politics. The issue of human rights has assumed increased prominence as interdependent and mutually reinforcing. To be sure, Human rights are a product of history. The protection of Human Rights should be accepted by all as a Universal Principle transcending all political, economic, social, cultural, legal, religious and civic systems to make it effective. The promotion and protection of human rights is a matter of priority for international community.

He also defined; respect for human rights without distinction of any kind is a rule of International Human Rights Law. Human Rights recognize the inherent dignity and fundamental freedoms of all members of human family. The equality of civilization of a country is measured by the respect it shows for the protection, promotion and implementation of human rights. In our modern justice system accused persons are not by mere charge of an offence, denuded of all the human rights and fundamental freedoms, which they otherwise possess. Now it is universally recognized in the legal and political fields that an accused have the basic freedoms and human rights even in custody. This book is aimed at the protection of human rights and fundamental freedoms of accused in the justice system.

Mohammad Sabir

Human Rights in the 21st Century

Rawat Publications, Satyam Apts. Sector 3, Jawahar Nagar, Jaipur 302 004 India (2011)

Mohammad Sabir explains; Human Rights are those rights that every individual must have by virtue of being a member of the society. They are based on demand for life

in which the inherent dignity of human being aspires for respect, protection and dignity. Human rights are innate individual and are of an intrinsic factor in the quality of human persons. According to Jefferson, "Inherent and inalienable right of men come within the framework of Human Rights". The first document using the expression 'Human Rights' is seen in the Charter of United Nations, which declares promotion and fostering of human rights as one of the basic goals of United Nations, though it does not explain the contents of human rights. (The International Bill of Human Rights, which was drawn subsequently, comprises).

Human Rights can be defined as those basic rights, which are inherent in our nature and without which we cannot live as a human being. Fundamental freedoms and human rights help us to develop and use our intelligence, qualities, talents and conscience to satisfy our mundane and spiritual needs by the respect of human rights. The respect for human rights and human dignity is the foundation of freedom, justice, fraternity and peace in the world.

Human rights are Universal and are applicable to all without discrimination. Human rights are sometimes called 'Natural rights', Basic rights' and 'Fundamental rights'. The Fundamental rights are recognized as the basic rights of individuals. These also promise the removal of all kinds of inequities from the lives of people.

Mohammad Sabir pointed out that initially the attitude of judiciary in India towards directive principles was not favorable as it had nullified many important legislations embodying socio-economic reforms, but with the passage of time, there has been a shift in the attitude of the Indian judiciary towards socio-economic rights. Basically, the directive principles intend to promote social welfare in consonance with basic objects of the human rights which acclaim global perspective and are enforced at national level.

Mohammad Sabir also highlighted on the issues of human rights, the observation of Justice Chandrachud (as he was then) in Keshavananda Bharati V. State of Kerala is relevant to be reproduced, "It is really the poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights. In the absence of explicit mandate, the court should abstain from striking

down a constitutional amendment which makes and endeavor to wipe-out every tear from every eye".

Mohammad Sabir discuses on constitutional jurisprudence in relation to reservation in favour of Indian backward Muslims, social duties and human rights, extension of reservation policy in private sector, social status and legal rights of prostitution, genocide in international law and Indian state practice, women in governance through empowerment by reservation, Dalit and violation of their human rights, domestic violence as an aberration in women human rights, good governance, human rights and the rights of minorities, the need of communal harmony in India with reference to the Hague Peace Agenda, conversion and its implications to marriage, human rights of displaced person and marginalization of manual scavengers in India. Human rights perspective, social justice and empowerment, denial of reservation benefit to the converted people, need of human rights education, etc.

Dr. Paramjit S. Jaswal and Dr. Nishtha Jaswal

Human Rights and the Law

APH Publishing Corporation, (1996)

The Book, "Human Rights and the Law" gives vivid picture of the ambit, presents an analysis of the articles and clearly sets the parameters; it tests the interpretations with reference to judicial decisions mostly of the Apex Court of India and ultimately tries to present a harmonious synthesis of the various articles in the Declaration.

The book contains lucid exposition of the various provisions of Constitution of India, which are aimed at protecting and promoting the human rights in India. The judicial activism, which led to the development of new human rights jurisprudence' in India, has been discovered by analyzing the latest judicial decisions. Various aspects of prison justice, human rights and judicial wisdom have been discussed in this book.

The United Nations Charter refers to Human Rights in its preamble and six other articles. In the preamble to the charter of the United Nations, the people of the United Nations expressed their determinations "to reaffirm faith in fundamental human rights in the dignity, and worth of human person, in the equal rights of men and women and of nations large and small and… 'to promote social progress and better

standards of life in larger freedom.' The purpose of the United Nations are proclaimed in Article 1 of the Charter Article 1(2) provides: to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace. Article 1(3) further provides: to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religion.

The word 'based on respect for the principle of equal rights and self determination of peoples' in Article 1(2) and the word “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion are the right-based approach of UN.

Article 1 puts the promotion of respect for human rights on the same level as the maintenance of international peace and security as a purpose of the United Nations. The basic obligations of the organizations and its member states in achieving these purposes are set out in Articles 55 and 56 of the Charter.

The General Assembly is empowered under Article 13(1)(b) to initiate studies and make recommendations for the purpose of : promoting international co-operation in the economic, social, cultural, educational and health fields and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Similar powers are conferred by the Charter of U.N. to Economic and Social Council under Article 62. It was argued that Article 2(7) of the U.N. Charter prohibits the United Nations or others 'to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the member to submit such matters to settlement under the present charter", and thus reduces the role of the United Nations in the protection of Human Rights to a maximum.

Human Rights and Fundamental freedoms have become the subject of solemn international obligation and a fundamental purpose of the Charter.

There are seven specific references in the Charter of the United Nations to Human Rights and Fundamental Freedoms but the Charter nowhere defines or catalogues them. At the United Nations Conference on International Organization, held at San Francisco in 1945, the delegation of Chile, Cuba, Mexico and Panama had proposed that the Conference should adopt a "Declaration of the Essential Rights of Man". The Conference, however did not deal with the proposal because it required a detailed consideration for which time was not available.

The concern of the San Francisco Conference for the "International Bill of Rights" was evident from the closing speech of President Truman who stated: We have good reasons to expect the framing of an international bill of rights, acceptable to all nations involved… The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere – without regard to race, language, or religion – we cannot have permanent peace and security.

Dr. Kaarthikeyan

Human Rights: Problem & Solution

Gyan Publishing House, New Delhi, (2005)

The book entitled "Human Rights: Problems & Solution" dealt with the entire range of human rights including Civil and Political Rights, Economic, Social and Cultural Rights and the Right to Development.

Kaarthikeyan emphasizes the integrity of these three categories of human rights and presents them in a holistic manner and points out that both civil and political right as well as social and economic rights need to be pursued with equal vigor since neither set of human rights can be realized without the other, so integrally connected they are. It is only through the realization of both civil and political right and social and economic right that there can be true development of everyone in the society leading to realization of human dignity and human happiness.

Kaarthikeyan has emphasized that the interdependence and integrity of all human rights is at the heart of human rights jurisprudence. This book reflects author's concern over the protection of human dignity, values and human rights.

This work is a compilation of some of the lectures on certain aspects of human rights. The work deals with a variety of issues, including poverty, gender justice, women and human rights, human rights of disabled, terrorism and human rights, human rights violation, problems of refugees, judicial activism, etc.

Basically this book is reviewed in regard to view the human rights in the context of India and the role and responsibilities of court for the protection of human rights.

Dr.T.Padma & K.P.C.Rao

The Principles of Human Rights Law

Published by Manohar Gogia (HUF), Ajay Gogia (HUF) and Neeraj Gogia (HUF), ALT Publications, high Court Road, Hyderabad- 500 002 (A.P.) India.(2010)

The book is reviewed to trace the basic understanding of concept and principles of human rights law. The work is comprehensive and well-organized. The book deals with meaning, definition, evolution of human rights, adoption of human rights by UN Charter, international conventions on human rights along with human rights protection in India.

Dr. T. Padma & K.P.C. Rao, has emphasized that the term human rights is comparatively recent in origin but the idea of human rights is as old as the history of human civilization. The new phrase 'Human Right' was adopted only in the present century from the expressions previously known as 'Natural Rights' or 'Rights of Men'.

Dr. T. Padma & K.P.C. Rao have, illustrated that the denial of human rights and fundamental freedom are not only individual and personal tragedy but also create conditions of social and political unrest sowing the seeds of violence and conflict within and between societies and nations. Just to avoid these problems, various international agencies including League of Nations, U.N.O. laid stress for the protection of human rights permanently although the idea of human rights predates the United Nations.

Human Rights and fundamental freedoms allow people to develop fully and use their human qualities, intelligence, talents and conscience and to satisfy their spiritual and

other needs. This book has assembled various definitions of human rights from various scholars and judges of India. Similarly, the book has mentioned the definition of human rights according to different religions, such as; Hindu, Christian, Buddhism and Muslim. All religions give importance to the human dignity, liberty, equality and other basic rights. One cannot understand or evaluate human rights divorced from the historical and social context.

Dr. T. Padma & K.P.C. Rao have described the meaning and definition of human rights, evolution of human rights, adoption of human rights by the UN Charter, human rights conventions and human rights protection in India. The authors define the term "Human Rights", the rights of an individual and the interest to be protected collectively both at International and National level by the coordinated efforts with the intervention of the States in pursuance of intended objectives and collective wisdom is utilized for formulating basic polices on a uniform pattern which are given recognition jointly so as to adopt and enforce them from the so-called human rights, and in this process even if there is any conflict of interest among various nations but occupies insignificant position and having least regard to national boundaries, common consensus arrived at for the purpose of upliftment of mankind, in general and for improving the lot of downtrodden masses in particular. Dr. T. Padma & K.P.C. Rao also define the basic problem that arises concerning human right related to the proper enforcement of "Human Rights Law" and this aspect varies today from State to State. This is indeed so because the first initial step in the direction of enforcement of human rights is very much confined to the national frontiers of the States where the individuals reside. It would be certainly justified to presume that so far as the basic job of drafting the human rights is concerned, it was successfully accomplished by the efforts of member states of United Nations Organization, but the basic problem has been the effective enforcement of human rights so as to eradicate poverty and improve standard of living of mankind, in general and the worker, in particular. The concept of human rights tells a detailed story of the attempts made to define basic dignity and worth of the human beings and his or her most fundamental entitlement.

Some decisions of the Supreme Court of Nepal

Volume -2, (2010), Volume -3(2011), Volume -4 (2012) and Volume- 5(2013,

Published by the Supreme Court, Nepal

These volumes contain diverse cases, the second volume cover the decisions of Supreme Court of Nepal, in promoting and consolidating democracy, constitutionalism, human rights, press freedom, personal liberty, and civil rights of citizens. Apart from this, important decisions have been compiled, which involved key issues of public interest guiding the state to follow the norms of constitutionalism and rule of law.

The third volume which covers decisions on cases regarding other property matters, inheritance, recognition of the decisions made by the court of foreign countries, right to information, positive discrimination, public interest litigation and heinous nature of criminal cases such as rape, human trafficking, murder etc. These decisions are useful not only to the litigating parties; but are equally important to researchers and academics.

Majority of decisions contain in the fourth volume, which are related to enforcements of fundamental rights the precepts of which are originated from the international instruments and questions involved in them. The fifth volume includes the human rights issues, in which a number of universal principles of human rights have been implemented by the Supreme Court of Nepal through its decisions. Having complied the leading cases of different times and published in English version, the book has been of greater importance to this researcher particularly analyzing the case decisions.

The Supreme Court of Nepal has resolved many difficult domestic political questions by pronouncing wise decrees. After restoration of democracy in 1990 the role of Supreme Court has further widened. It has rendered many liberal interpretations in relation to the compliance of statutory provisions enshrined in international treaties, agreements, conventions and protocols ratified by the country. When municipal law differs with international instruments, the most crucial situation arises of interpretation shaping the domestic law as intended by that instrument. More critical

become the cases as the state resources become short to meet the proposed objectives of the case decisions.

Sometimes, the legality of the question raised by the petitioner and statutory vacuum felt during the hearing, remedy sought thereof and chances of availability of justice becomes very slim, though the issue raised is hard to be ignored by the court. In such a case the Supreme Court directs the government to bring policy measures in order to avoid injustices in future.

Dr. K. L. Bhatia

Judicial Activism and Social Change

New Delhi, Deep & Deep Publication, (1990).

It is a compilation of 34 research papers covering different aspects of subject matters, presented in the All-India UGC Seminar on Judicial Activism and Social Change; organized by the Faculty of Law, University of Jammu. The research papers basically cover the main aspects of Judicial Activism i.e. Jurisprudential Dimensions of judicial activism, civil liberties and judicial activism, family law and judicial activism, Criminal law and judicial activism and miscellaneous papers on judicial activism. The research papers of imminent Jurists and legal scholars from the different parts of India have become successful to throw sufficient light on various aspects of the subject. On the Jurisprudential aspect, the papers of D.N. Saraf, S.P. Sathe, Mohammad Ghouse, Kripal Singh Chhabra, K.L Bhatia, Parmanand Singh, K.K Arora, Sudesh Kumar Sharma, Yogesh Mehta, R.N. Sharma and Bachan Lal Kalgotra are included. Likewise on the civil liberties the papers of H.C.Dholakia, J.K. Mittal, Chhatrapati Singh, M.P.Singh, B.Errabbi, S.R. Bhansali, Subir K. Bhatnagar, P.S.Jaswal and Nista Jaswal, V.P.Magotra and K.P.Singh are covered. On the area of Family Law, papers of Lalita Parihar, Brinder Pal Singh Sehgal, Nisar Ahmed Ganai and Shyam, and on criminal law the papers of Gurpal Singh, Subash C. Raina and Jag Mohan Singh are also compiled. And the papers on Miscellaneous subjects are prepared by I.P. Massey, Mahesh C. Bijawat, M/L. Upadhyaya, S.S.H. Azami and V. Ramaseshan, cover the areas-movement of judicial activism and social change in Himachal Predesh, Taxation Laws, Agrarian Reforms, Workers Right to winding up and state contracts.

S.K Bhattarai and U. Koirala's

Sarbochha Adalatbata Jari Bhayeka Nirdeshnatmak Adeshharuko Karyanwoyanko Abastha:

Anusandhanmulak Adhyan Pratibedan" (Impementation Situation of Directive Orders issued by Supreme Court Research Study Report-2006)

This study, focus on the directive orders issued by Supreme Court of total writ cases since, 1990 to 2007 under the prevalence of the Constitution of the Kingdom of Nepal, 1990. The main objective of this report is to accumulate and update the directive orders issued by the Supreme Court and to identify the issues of such orders. The major findings of this report show that the Supreme Court has played significant role regarding public interest issues especially after the application of Constitution of kingdom of Nepal, 1990. Basically, in the promotion of the egalitarian society, promotion of the norms of rule of law in the direction of legal and social change, the apex court has played significant role. Nevertheless, this report concludes that, there is no space of satisfaction regarding the effective implementation of the directive orders issued by the Supreme Court.

In order to get a better understanding of the main concept of judicial activism in the protection and promotion of human rights, and in the context of study objectives set by the Researcher the following materials were also consulted besides these reviewed hereinabove.

For the national origins of modern Constitutions, Hans Kohn, The Idea of Nationalism: A Study in Its Origins and Background (1944, reprinted 1977). A concise description of the contribution made by the idea of the "inalienable rights" of the individual to the development of modern Constitutional law, together with an analysis of the recent expansion of the protection of such rights at the international level, can be found in Louis Hen Kin, The Rights of Man Today (1978). Valuable works on modern Constitutionalism include Carl. J. Friedrich, Constitutional Government and Democracy: Theory and Practice in Europe and America, 4th ed. (1968); and Karl Loewenstein, Political Power and the Governmental Process, 2nd ed. (1965). On federalism as a form of government, William S. Livingston, Federalism

and Constitutional Change (1956, reprinted 1974); K. C. Wheare, Federal Government, 4th ed. (1963, reprinted 1980); Carl J. Friedrich, Trends of Federalism in Theory and Practice (1968); and Michael Burgess (ed.). For a history of the separation of powers in Europe and America, M. J. C. Vile, Constitutionalism and the Separation of Powers (1967). For surveys of modern Constitutional trends, John A. Hawgood, Modern Constitutions Since 1787 (1939, reprinted 1987); Herbert J. Spiro, Government by Constitution: The Political Systems of Democracy (1959); C.F. Strong, Modern Political Constitutions: An Introduction to the Comparative Study of their History and Existing Forms, 8th rev. and enlarged ed. (1972); K. C. Wheare, Modern Constitutions, 2nd rev. ed. (1966), reprinted 1980); and Arnold J.Zurcher(ed.), Constitutions and Constitutional Trends Since World War II: An Examination of Significant Aspects of Postwar Public Law with Particular Reference to the New Constitutions of Western Europe, 2nd ed. (1955, reprinted 1975). The republic of India: The Development of its Laws and Constitution, 2nd ed. (1964); Ardath W. Burks, The Government of Japan, 2nd ed. (1964, reprinted 1982); and Aryeh L. Unger, Constitutional Development in the USSR: A Guide to the Soviet Constitutions (1981, reprinted 1986).

Chapter - III

Judicial Review/Activism, Fundamental Rights and Constitutional Doctrine

3.1 Meaning and Definition of Judicial Activism

Judicial activism particularly can be seen in reference to judicial review and public interest litigation, the major techniques of judicial activism. Judicial review plays two prominent functions; legitimating governmental action and protecting Constitution against any undue encroachment by the government. These two functions are inter-related. In exercising the power of judicial review, the courts discharge a function which may be regarded as crucial to the entire governmental process in the country.[1] The interpretative function of the constitution is discharged by the courts through direct as well as indirect judicial review. In direct judicial review, the court overrides or annuls an enactment or an executive act on the ground that it is inconsistent with the constitution. In indirect judicial review, while considering constitutionality of a statute, the court so interprets the statutory language as to steer clear of the alleged elements of unconstitutionality.[2]

Great Britain has no written constitution and therefore, there is no direct judicial review. But courts do resort to indirect judicial review at times. They interpret constitutional provisions restrictively to protect civil liberties.[3]

The doctrine of judicial review is an integral part of the American judicial and constitutional process although the U.S. Constitution does not explicitly mention the same in any provision. The Constitution merely says that it would be supreme law of the land. Before the Constitution, legislation of the American colonies was subject to judicial review. But, after the Constitution, in 1803, in the famous case of *Marbury*

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1 M.P. Jain (2010). *Indian Constitutional Law* (6th.ed.) Reprint (2013). LexisNexis Wadhwa, Nagpur, India. p. 1693.

2 *Ibid.*

3 *Id.*

V. Madision[4]*,* in one of its most creative opinions, the U.S. Supreme Court very clearly and specifically claimed that it had the power of judicial review and that it would review the constitutionality of the Acts passed by Congress. The Court argued that the Constitution seeks to define and limit the powers of the legislature, and these would be no purpose in doing so if the legislature could overstep these limits at any time.

Natural law doctrine found expression in Britain in 1610 in *Dr. Bonham's case*,[5] where Coke, LCJ, asserted: "when an act of Parliament is against common law right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void".

The doctrine of judicial review is an integral part of the American judicial and constitutional process, a part of the living Constitution in the U.S.A., and the same is true of India. There are overwhelming reasons as to why the courts should act as authoritative expounder of the constitution and possess power of judicial review[6].

Constitution, fundamental rights and judicial review are interrelated and interdependent. Constitution and fundamental rights cannot be separated from judicial review. Nor can judicial review be separated from fundamental rights and constitution. That is why; there will be no constitution without fundamental rights, no fundamental rights without judicial review, and no judicial review without competent, impartial, independent and responsible judiciary[7].

Similarly, judicial activism can be seen in reference to PIL; Public Interest Litigation is a strategic arm of the legal aid movement intending to bring justice within the reach of the poor masses. It is different than the traditional litigation which is essentially of an adversary character involving a dispute between two litigation parties i.e., one making a claim or seeking relief against the other and that other opposing such claim or resisting such relief[8]. Public interest means something in

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4 1 Cranch 137; 2 L Ed. 60.
5 8 Coke's Reports, 114 at 118.
6 *Supra Note* No. 1. p. 1696.
7 Dr. Bhimarjun Acharya (2012). *Comparative System of Judicial Review*, A.K. Books and educational Enterprises Pvt. Ltd. p. 37.
8 *People's Union for Democratic Rights V. Union of India*, AIR, 1982 SC 1473.

which the public the community at large, has some pecuniary interest or some interest by which their legal rights or liability are affected[9].

Supreme Court of Nepal, in *Radhashyam Adhikary V. Cabinet Secretariat of Government of Nepal and others*[10] defined the term public interest litigation as, a dispute of public interest litigation signifies a dispute related to the collective right or concern of the general public or any class of people. In order to enter any dispute as a public interest in the apex court that dispute must be based on the issues of constitution or law and should be worthy of judicial resolution. Thus the concept of PIL which has been and is being fostered by judicial activism has become an increasingly important one setting up valuable and respectable records, especially in the area of constitution and legal treatment for the unrepresented and under represented[11].

Accordingly, the term 'Judicial Activism' refers to judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions into legislative and executive matters[12]. Although activism is one word but it connotes different meaning for different persons, who use the term. Court performs its activist role through different ways. We find different jurists and legal experts defining judicial activism in different ways. One such definition is that a court exhibit activism when it exercises the power of judicial review regardless of whether it declares a governmental action constitutional or unconstitutional[13]. In India, at the present time, the Supreme Court is laying great emphasis on vindication of the rights of the poor and deprived people, this sentiment has been expressed graphically by a Supreme

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9 Prof. (Dr.) Nomita Agrawal (2003). *Jurisprudence (Legal theory),* New Delhi: Central Law Publication (4th ed.). p. 336.

10 NLR 1991 at 810.

11 NRL 1991 at 811.

12 H.C.Black (1979). *Black's Law Dictionary* (5th ed.) St. Paul Minn.: West Publishing Company. p. 760.

13 Hiroshi Itoh. (1990). "J*udicial Review and Judicial Activism in Japan*". Law and Contemporary Problems. Vol. 53. North Carolina. p. 169.

Court Judge as follows: "Judicial activism gets its highest bonus when its order wipes some tears from some eyes".[14]

Judicial process must have strong commitment and support at the institutional and program level to make justice system more effective and competent[15]. Modern judicial review came into existence when Supreme Court justices not only engaged in judicial activism. But did so, on the basis of this theoretical understanding of judicial power that legitimized judicial legislation.[16] Likewise, Judicial Activism is defined in terms of conflict between the courts and the political branches on constitutional policies.[17] The court is activist when its decisions conflict with those of other policy makers.[18]

There are two legal concepts; passive and active. The passive conception of law regards law as the reflection of existing social relations, which is in favor of status quo and traditions whereas active conception of law regards law as a tool for social change. It always remains in favor of modernity and change. Modern sociological judicial thinking allows judiciary to adopt activist approach and inspires justices for the guidance of the country.[19] Sociological jurisprudence is influential in developing the notion of social justice (or distributive justice) in the present socio-economic context. It is desirable, having this background cue, to examine succinctly sociological jurisprudence, social justice (or distributive justice) and the influence they have on the judicial activism[20].

Judicial activism implies the "use of the court as an apparatus for intervention over the decisions of policymakers through precedent in case law".[21] In doing so, the

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14 *Supra* Note No 1. p. 1696.

15 Prof. Dr. Bharat Bahadur Karki and others (2003). *Final Report on baseline Survey in Four Pilot District Courts*, Prepared for UNDP/HMG Reform of Judiciary Program, Kathmandu. p. 1.

16 Christopher Wolf (1986). "The Rise of Modern Judicial Review". *Constitutional Interpretation to Judge Made Law* New York : Basic Books Inc. p. 327.

17 Hirashi Itoh, (1965). "The Political Role of the Court". *Judicial Policy Making* . pp .131-35.

18 Glendon Schubert (1972). "The Supreme Court in American Politics: Judicial Activism V. Judicial Restraint". *Judicial Policy Making*. London : Heath and Company. p. 17.

19 Markandeya Katju (1993)."Law, Religion and Politics". *Maya*, 15th September. p. 31.

20 K.L. Bhatia, (1990). "Judicial Activism and Social Change", *Deep & Deep Publication.* New Delhi, pp. 149-50.

21 Nicholas Katers, (2014). *Judicial Activism and Restraint: The role of the Supreme Court.* Available online at, (July 2014).

Court often creates law and seeks to play a greater part in the governance of a country through "allowing their personal views about public policy" to aid them in their decisions[22]. The role of judges in such cases goes beyond the traditional "interpretative" role that has been assigned to them, and shifts to a model by which judges seek to make law, encroaching on the Separation of Powers doctrine, which forms the bedrock of the Indian and United States constitutional system. When a Court strikes down a law in an "activist" manner, it places primacy upon its interpretation of a constitutional text, sidelining the opinion of the legislature or executive.

Therefore, the courts in India justifying judicial review; *Ramaswami, J.*, has observed in *S.S. Bola V. B.D. Sharma*.[23]

"The founding father very wisely, therefore, incorporated in the Constitution itself the provisions of judicial review. So, as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and afford a useful weapon for availability, availment and enjoyment of equality, liberty and fundamental freedoms and to help to create a healthy nationalism. The function of judicial review is a part of the constitutional interpretation itself. It adjusts the constitution to meet new conditions and needs of the time.

Justice Markandey Katju defines judicial activism as such expression;

The Separation of Powers principle, propounded by the French political thinker Montesquieu[24], has been elaborately discussed in my judgment in Divisional Manager, *Aravali Golf Course V. Chander Haas (2008) 1 SCC 683* (vide paragraphs (17 to 40). Judicial activism is basically a deviation from this principle. Judicial activism is based on the theory of Jurisprudence called Sociological Jurisprudence, which arms the judiciary with wide legislative and executive powers.

Justice P.N. Bhagawati emphasizes on the exercise of judicial activism for willed result. According to him, that willed result is the goal of ensuring social justice to all

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22 H.C Black (1997). *Judicial Activism,* Black's Law Dictionary.

23 AIR 1997 SC 3127, 3170.

24 Separation of Power has been held by the Supreme Court to be a basic feature of the Constitution vide *State of West Bengal V. Committee for Protection Democratic Rights*, AIR 2010 SC 1476.

including the poorest of the poor and evolving an egalitarian society where there is no place for any kind of exploitation of any one.[25] *Bhagawati* not only emphasized on social justice by means of judicial activism, he also noted that it can take many forms i.e. 'technical', 'juristic' and social activism.[26] *Bhagawati* illustrates that 'technical activism consists of declaration by judges of freedom to have recourse to wide range of techniques and choices. Such an activism he thinks is 'technical' because it is concerned merely with keeping Juristic techniques open-ended, it does not specify when and for what purpose a judge can have recourse to this techniques and choices, … this activism simply ensure that judges have the necessary freedom of action and no more.[27] Apart from this, Juristic activism is concerned merely with the appropriation of increased power, it concerned as well with the creation of new concepts irrespective of the purpose they serve, … in this kind of Juristic activism, the judge is not concerned with the social consequences generated by the creation of new concepts or principles, or with the question as to whom these new concepts and principles will serve.[28] The focal point of justice *Bhagawati's* philosophy is social activism that exercises judicial power geared to serve the cause of 'social justice' by remaining under the framework of constitutional values, objectives and goals.[29] In the process of achieving social justice through judicial activism many enclaves have been produced e.g. human rights jurisprudence, slum dwellers jurisprudence, anti death sentence jurisprudence, bonded labour jurisprudence and many others.[30] In this way, judicial activism refers to the phenomenon of the courts dealing with issues which they have traditionally not touched upon.

Judicial activism is inherent in judicial review,[31] whether it is positive or negative activism depends upon one's own version of Social change. Judicial activism is not an aberration but is a normal phenomena and judicial review is bound to mature into

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25 Mool Chand Sharma (1995). *Justice P.N. Bhagawati: Court Constitution and Human Rights*. Delhi: Universal Book Traders. p. 44.

26 *Ibid.* pp. 45-6.

27 *Id.* pp. 46-7.

28 *Id.* pp. 47-8.

29 *Id*. p. 58.

30 S.L.A. Khan (1996). *Justice Bhagawati on Fundamental Rights and Directive Principles*. New Delhi: Deep and Deep Publications. p. 2.

31 S.P. Sathe (2002). *Judicial Activism in India*: Transgressing Boarders and Enforcing Limits, New Delhi: Oxford University press (1st ed.). p. 7.

judicial activism. Judicial activism also has to operate within limits. These limits are drawn by the limits of institutional viability, legitimacy of judicial intervention and resources of the court since, through judicial activism, the court change the existing power relations, judicial activism is bound to be political in nature. Through the Constitutionalism, the court becomes an important power centre of democracy as it is vested with the power of judicial review.

In this sense the term judicial activism denotes 'Judicial populism', 'Judicial policy making', and 'judicial creativity' so on. The subsequent paragraphs highlight the concepts relevant to judicial activism.

3.1.1 Judicial Populism

Critics of judicial activism charged this movement inspired by the populist wishes of the judges. For the support of their logic they cited some decisions or orders of the courts which exactly represent the issue.[32] The critics also using various terms i.e., 'over activism', judicial heroics', 'expansionism', and despotism', *Justice Bhagawati* does not accept the charge by saying that the term 'judicial activism' is not the term of 'fashion' or 'populism' but a term signifying an important source of judicial power, which judges should use for realization of 'willed result'.[33] But Prof. Upendra Baxi is not hesitant to accept the term. According to him judicial populism had become pronounced… particularly in the great decision in *Golak Nath*[34] and *Keshevanand Bharati*.[35] In 1974 *justice Krishna I yer.* reinforced the tendency towards judicial populism. As such, judicial populism was partly an aspect of post emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimate of judicial power.[36]

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32 In the case State of *Himanchal Pradesh V. A Parent of a student of Medical College*, Simla AIR (1985). Sc. 910 high court ordered the state govt. to initiate an anti-ragging legislation but Sc overruled it, Supreme Court also directed the PM to enact a common civil code.

33 *Supra* Note No. 25. p. 44.

34 *Golak Nath V. State of Punjab*, AIR 1967 Sc 1643.

35 *Keshavananda Bharati V. State of Kerala*, AIR 1973 Sc. 1461.

36 Upendra Baxi (1988). "*Taking Suffering Seriously:* Social Action Litigation in the Supreme Court of India" Bombay: NM Tripathi (Pvt.) Ltd. p. 393.

The critics of judicial activism further charged the judiciary being over active and also argue that the exuberance of judicial activism claiming monopoly over justice dispensation by heroic extension of remedies, will only lead to judicial despotism allowing individual philosophies to dominate the adjudicatory system.[37] Not only that, it is also assumed; the over activism is not only undermining the people's faith in judicial institutions, but also causing internal antagonism within the courts. To this, the activists react by calling the legalists as 'judicial feudalists', 'judicial terrorists', 'forensic colonialists' and so on.[38] Although the suspicion expressed by anti activists seems exaggerated, but it also can not be forgotten that courts must be patient while performing activist role.

3.1.2 Judicial Policy Making

The debate over judicial policy making often is discussed in terms of judicial activism and judicial restraint.[39] Judicial policy making is broader or more inclusive than day to day decision making that disposes of individual personal disputes and cases of crimes. Judicial Policy making deals with the broader significance of judicial decisions…Courts are constantly confronted with innovative and thornier issues. How courts deal with them is an important part of judicial policy making.[40] The basic assumption of the political process (political jurisprudence) approach is that judges are policy makers, just like presidents and congressmen and many administrators. Therefore, the appropriate subject to be studied in investigating the decision making of courts is not law but the politics of the judiciary.[41] In this regard, it does not matter how judges and legislators justify their behavior. It is only necessary to look at the concrete substance of judicial decisions and compare it to the content of policy made by legislators or governors and presidents. If the judicial policy conflicts with the policy of the other branches of government, courts will be perceived by most people as being activist no matter what judges say they are doing.[42]

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37 Permanand (1986). "Judicial Socialism and Promises of Liberation: Myth and Truth" *Journal of the Indian Law Institute*. Vol. 28, July-Sept. p. 339.

38 *Ibid*. p. 340.

39 Henry R. Glick1 (988). *Courts, Politics and Justice* (2nd ed.). USA: Mc Graw Hill Book Company. p. 308.

40 *Ibid*. p. 292.

41 *Supra* Note No. 18. p. 13.

42 *Supra* Note No. 39. p. 310.

The policy making role of the court is an accepted fact and court perform this role through different ways i.e., overruling precedent, overruling legislation and political conflict.[43] These are also the ways of defining judicial activism and restraint. The activists support judicial decisions that substitutes judicial policy for the policy of the elected branches of the government, particularly legislature, whereas the restraint oppose such kinds of role of the court and believe that the court should normally defer to elected branches of government. The supporters of the policy making role of the court considered the Supreme Court as a political as well as legal institution. They believe its independent, unelected and life tenured justices often play a role in the formulation of public policy…Its' power as the power of choice, choice between competing interpretations of the law. In particular through its constitutional interpretations, the court enjoys discretion to limit the two popularly elected branches of government.[44] Thus it is evident that the appellate judges not only involve in judicial policy making, they also put limits on other two branches of the government. Courts such role is often visualized as judicial activism.

3.1.3 Judicial Creativity and Craftsmanship

The concept of judicial creativity and craftsmanship is concerned with judicial activism. In the present era, it is reasonably conceded by all that judges not merely declare or interpret the law but they do something more, and that is, they make the law, create the law, discover the law and invent the law.[45] The judges of the Indian Supreme Court have not just amply exercised their legislative power but they have also exercised constituent power.[46] Judicial Activism is one area in which the judiciary has expressed its imagination and creativity.[47] Judicial creativity may be described as 'the new equity', a phrase commonly associated with *Lord Denning*. This refers to the fact that, the common law system, once running in two parallel streams of strict common law and equity. The old equity is hence so closely interlaced with the daily working of formal justice as to lose the quality it once had

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43 *Ibid*. pp. 308-310.

44 Richard Funstorn (1978). *A Vital National Seminar: The Supreme Court in American Political Life*. California: Mayfield Publishing Company. p. 30.

45 *Supra* Note No. 20. p 136.

46 K.K. Methew (1978). "Democracy, Equality and Freedom". *Journal of the Indian Law Institute*. Lucknow: Eastern Book Company. p. 1.

47 Kalyan Shrestha(1998). "Judicial Activism and the Nepalese Experiment". *Nyayadoot* (English Special Issue). Vol. 7. Kathmandu: Nepal Bar Association. p.7.

of being a fertilizing and leavening influence standing outside the common law. Hence the need for a new equity giving the judges once more that freedom to arrive at the equitable and just solution which they once enjoyed.[48]

The journey towards activism should not be slow and imperceptible in the changed circumstances. It has become imperative for the judiciary its role accordingly and display activism in order to deliver meaningful and distributive justice. If the modern Justice delivery system intends to live up to the living reality of the society, the judiciary must respond with judicial activism character by imagination and creativity.[49] Likewise it is not only the creativity but also the judicial craftsmanship becomes important value while appellate judges do make law. On this note, Upendra Baxi comments;

> If appellate judges are to make law (as they have to and do) they must adopt Standards of craftsmanship at least equal to those of legislative craftsmen. Appellate judges are not entitled to say what they do not mean or to mean what they do not say.[50]

Clarity of thought and expression is an irreducible minima of judicial craftsmanship.[51] Ideological and personal differences among judicial law makers prompting separate or dissenting opinions, may also expose judicial craftsmanship to special hazards.[52] Making, creating, discovering and inventing the law is not alone craftsmanship of the judge but it is the courage as well as creativity of the judge which bring him a name as a maker or creator or discoverer, or inventor of law.[53] In this way, judicial creativity and craftsmanship proves to be a component of judicial activism.

In this way, we reach to the conclusion that judicial activism is a relative concept and it should go with proper relation to the restraint.

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48 C. G. Weeramentry (1998). *An Invitation to Law* New Delhi: Lawman India Pvt. Ltd. p. 218.
49 *Supra* Note No. 31. pp. 92-3.
50 Upendra Baxi (1974). *'The Constitutional Quickstands of Keshavanand Bharati*, Twenty- fifth Amendment. p. 45.
51 *Ibid*.
52 *Id.*
53 *Supra* Note No. 20. p. -136.

3.1.4 Judicial Restraint

(a) Meaning and Concept of Judicial Restraint

Although the judicial activism and restraint in judicial behavior are two mutually exclusive alternatives, they are the two poles of wide purview of possible judicial behavior. There has never been a court or a justice who was, in all actions, totally committed to self defined in terms of harmony between the policy of the court and that of other decision makers.[54] The court exercises restraint when it accepts polices of other decision makers. In this light 'judicial (self) restraint' is often termed as 'judicial conservatism' - not political conservatism, but a conservative view of the nature of the judicial process. Advocates of judicial restraint believe that the courts should interpret law rather than make law, because the justices are not elected and the Supreme Court is not a democratic organ, proponents of restraint fell that members of court should not exercise their values and attitudes in decision making. Those who support restraint believe that policy making is best left to the elected branches of government.[55] In American legal field *Alexander Bickel, Justice Frankfurter, James Bradley Thayer, CJ. Warren Burger* and many others are considered as strong examples of judicial restraints. Among them, *Bickel* not only actively supported the restraint view, he criticized judicial review saying; judicial review runs so fundamentally counter to democratic theory,…. that in a society which in all other respects rests on that theory, judicial review cannot ultimately be effective.[56] Advocates of Judicial restraint attack activism on several grounds, of which three are especially important: (1) activism is risky because the court is vulnerable to attack when it takes controversial positions, (2) activism is illegitimate because the court is a relatively undemocratic institution, and (3) it is unwise because courts lack the capacity to make effective policy choices. The assumption that court was weak and vulnerable has formed the basis for arguments on judicial restraint. The arguments for restraint from weakness echoes throughout the legal and political science It is an argument that has been adopted, at one time or another, by *Alexander*

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54 *Supra* Note No. 18. p. 17.

55 Richard L. Pacelle, Jr.(1991). *The Transformation of the Supreme court's Agenda*; From the New Deal to the Regan Administration, USA: west view press. p. 25.

56 Sylvia Snowiss (1995). *Judicial Review and the Law of the Constitution,* 1st Indian Reprint, Delhi: Universal Book Traders. p. 221

Bickel, Water F. Murphy, Jesse H. Choper, John Marshall Harlan, Lewis Powell and countless others.[57] Judicial restraint has to said to involve one or more of the following elements.[58]

(i) 'deference to the other branches of government'

(ii) 'a lack of result - orientation', that is, a concern 'with legal principles, not the social or economic effects of … decisions'

(iii) reliance on precedent

(iv) Avoidance of 'political' questions.

Though the propounders and followers of **j**udicial restraint forwarded the concept as the measure for minimizing the conflict among the three organs of the government, this logic is not seen always acceptable, and the proponents of judicial activism consider it as a hindrance in the process of social change.

(b) Modes of Imposing Judicial Restraint

The modern democratic Constitutions incorporate the mechanism of checks and balances with the principle of separation of powers. Such mechanism may or may not be efficient, this is a separate question, but there are ample measures within a constitution for the restriction of court power. In general the ways of imposing restraints upon judiciary are : (i) Restraints imposed by congress (ii) Restraints imposed by executive, and (iii) Restraints imposed by the court itself or self restraint.[59]

Congress or legislature is the body which can amend the constitution and alter the power and jurisdiction of the court. According to political scientist Walter Murphy;

'Congress can increase the number of justices, enlarge or restrict the court's appellate jurisdiction, impeach and remove its members, or purpose constitutional amendments either to reverse specific decisions or drastically alter the judicial role.[60]

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57 Willam Lasser, (1988). *The Limits of judicial Power*: *The Supreme Court in American Politics*, London: The University of North Carolina Press. p. 271.

58 Stephen L. Wasby (1984). *The Supreme Court in the Federal Judicial System, (*2nd ed.) USA: Holt, Rinehart and winston. p. 225.

59 *Supra* Note No. 44. pp. 18-21.

60 Walter F. Murphy (1962). *Congress and the Court*, Chicago: University of Chicago Press. pp. 2-3.

While legislature may control the court's jurisdiction and functioning, the executive has even more effective mechanism for influencing judicial policy making. The Court lacks the power to enforce its decisions; this responsibility is fulfilled by the executive. In many countries executive has its hand for the appointment of the justices for different level of the court. Likewise, executive is responsible for providing adequate funds to the court. All these powers facilitate the executive to impose restraints upon the court.

Restraint upon the court by itself is known as judicial self- restraint. Judicial self - restraints are such limitations which the court itself has developed on the timing and scope of its judicial functions. The major techniques of judicial self restraint appear to fall under the two headings; procedural and substantive. Under the former, fall the various techniques by which the court can avoid coming to grips with substantive issues, while under the latter would fall those methods by which the court, in a substantive holding, finds that the matter at issue in the litigation is not properly one for judicial settlement. [61] For the purpose of procedural self-restraint necessary laws can be formulated. For example, since the passage of the judiciary Act of 1925, the US Supreme Court has had almost complete control over its business.[62] Likewise, under the substantive self restraint, once a case has come before the court on its merits, the justices are forced to give some explanation for whatever action they may take.

Self-restraint can take many forms, notably, the doctrine of political questions, the operation of judicial parsimony and particularly with respect to the actions of administrative offers or agencies the theory of judicial in-expertise. [63] If the court feels that a question before it, e.g., the legitimacy of a state government, the validity of a legislative apportionment, or the correctness of executive action in the field of foreign relations, is one that is not properly amenable to judicial settlement, it will refer the plaintiff to the 'political' organs of the government for any possible relief. Political questions are matters not soluble by the judicial process; matters not soluble

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61 John p. Roche (1967). *Judicial self Restraint*, David F. Forte, p. 9.
62 *Ibid*.
63 *Id.*

by the judicial process are political questions.[64] But this matter also is not free from debate, Alexis de Tocqueville comments; scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question.[65]

Judicial parsimony is another major technique of substantive self interest. In this technique the court has held that it will not apply any more principles to the settlement of a case then are absolutely necessary, e.g., it will not discuss the constitutionally of a law if it can settle the instant case by statutory construction. … A variant form of this doctrine, and a most important one, employs the 'case or controversy' rule. According to this rule, the court must confine itself to real issues, in a real controversy between real parties[66].

The method of utilizing substantive self-restraint is … the doctrine of judicial expertise; it is founded on the unwillingness of the court to revise the findings of experts. These self constraints are highly flexible, the Supreme Court, in particular can invoke them when it wishes to avoid an issue and ignore them when it wishes to get involved. When the Court consistently ignores the restraints, it tends to become more and more involved in public policy making[67].

Judges feel that self restraint is only healthy check. Any external check will be detrimental not only to the independence of the judiciary but also to the whole constitutional scheme. Therefore, the judges have to be sensitized to the need for self restraint.

3.1.5 Basis of the Judicial Activism

Judicial Activism is a concept inspired and shaped by many factors. These factors may be both subjective and objective. The factors which contribute for judicial activism can be mentioned as follows:

(a) Rule of Law

Rule of Law is a concept which aims to protect individual liberty limiting arbitrary

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64 *Supra* Note No. 61.

65 Alexis de Tocqueville (1945). *Democracy in America,* trans. Henry Reeve., Rev. Francis Bowen, New York: Alfred A. Knopf. p. 280.

66 *Supra* Note No. 44. p. 22.

67 Lewis Lipsitz (1986). *American Democracy*, New York: St. Martin's inc. p. 406.

power of the government within the prescribed legal framework. Judicial Activism and Rule of Law are close concepts. Dicey's doctrine of Rule of Law has placed into three headings i.e. (i) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Absence of arbitrary power: No man is above law. No man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary courts. The government cannot punish anyone merely by its own fiat. (ii) Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts. Equality before law: Every man, whatever his rank or condition, is subject to the ordinary law and jurisdiction of the ordinary courts. No man is above law. (iii) Individual Liberties.

The general principles of the British Constitution, and especially the liberties of the individual, are judge-made, i.e., these are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts from time to time[68].

Though Dicey's concept on rule of law got strong support in the field of law and justice, side by side his concept got remarkable modifications also. The basic controversy to the Diceyan concept was that, his concept carried the sentiment of *laissez-faire* thinking and was the product of British experience. But the basic changes occurred in the politico-economic scenario of the world which were guided by the welfare concept invited newer modifications and explanations to the concept. Basically since 1948, rule of law became the concept of international concern in parallel with human rights movement. The preamble of Universal Declaration of Human Rights says;

> It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.[69]

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[68] Dicey, A.V (2013). *An Introduction to the study of the law of the Constitution*, (10th.ed.), Universal Law Publishing Co. Pvt. Ltd., G.T. Karnal Road. pp. 202-203.

[69] United Nations, Human Rights: *The International Bill of Rights,* New York: (1993). p. 4.

European Convention on Human Rights (1950) emphasized that European Countries have a common heritage of political traditions, ideals, freedom and the rule of law and sought to create machinery for protecting certain human rights.[70] Similarly, Delhi Congress of the International Commission of Jurists, held in 1959 formally declared that the rule of law is dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society.[71] The Commonwealth meeting held at Harare in 1991 also expressed the support for the rule of law. It linked the rule of law, the independence of judiciary and the protection of human rights with democratic processes and institutions.[72] Besides these institutional efforts made in favour of the rule of law, different legal scholars have contributed a lot for the positive development of the rule of law. An eminent scholar Joseph Raj has mentioned that, many of the principles which can be derived from the basic idea of the rule of law depend for their validity or importance on the particular circumstances of different societies.[73] In this way, Rule of law has been recognized as the cornerstone of democratic principle. Most of the constitutions of the modern world are the manifestations of the rule of law. That is the reason, it is also claimed that modern governments are the government by law and not by men. The core of the rule of law, which has been supported consistently as a fundamental principle of the English and American Constitutions, is that Governmental power be bound strictly by law in order to protect individual freedom or liberty. The law exists to protect individual rights and liberties both in substance and in procedure…. Such an understanding of the law is made possible by the existence of the common law, which is judge made law. In the common law system, the law is enforced by courts, and the rule of law is realized through the judicial process.[74] If there has been progressive failure on the part of the executive to perform its administrative function, or the rule of law is in peril, the executive is violating rule of law.

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70 Wade and Bradley (1993). *Constitutional and Administrative Law,* (11th ed.). ELBS: p. 107. New Delhi.

71 *Ibid.*

72 *Ibid*. p. 108.

73 Joseph Raj (1995). "The Rule of Law and its virtue", *Cases and Materials on Constitutional and Administrative Law,* (3rd ed.). New Delhi: Law man (INDIA) (Pvt.) Ltd. p. 184.

74 Norihu Urabe (1990). "Rule of Law and Due Process: A comparative view of United States and Japan", *Law and Contemporary Problems*, Vol. 53, North Carolina. p. 61.

In various countries basically the concept of the rule of law has got momentum through the activist role of the court. In America the historical decision given in the case *Marbury V. Madison* not only established the supremacy of US. Constitution, it also applied the rule of law principle in practice. Later, US supreme court by the help of 'Due process' provision of the constitution followed the activist way, which not only went to the heart of civil liberties doctrine, also ensured the position of the rule of law. Similarly, Indian Supreme Court by adopting activist trend propounded the theory of basic structure. This doctrine was a novel doctrine innovated by the Indian Court which was also superb example of juristic activism on the part of the court and the judges[75]. While delivering justice, in the case *Indira Nehru Gandhi V. Raj Narayan* the Supreme Court mentioned rule of law as one of the basic structure of the Indian Constitution[76].

(b) Socio-Economic and Political Condition

Law is a strong means of social control and change. The socio-economic and political condition of any society plays a dominant role in making and application of law. Unfortunately, third world societies are still status-oriented caste-ridden societies with marked inequalities among the different strata of society. These social inequalities interact with economic inequalities, and the process each strengthens the other.[77] Even the benefits of various social and economic rescue programs initiated by the governments through administrative measures have not effectively reached the poor and weaker sections of the community. The poor find that the law is unjust and is heavily weighted against them and they have lost all faith in the capacity of the law to help them to change their life conditions.[78] The result is that the poor come to regard law as their enemy rather than as their friend.[79] Alongwith these facts, it is also proved that judiciary is a political organ and the act of all law-making and law

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75 *Supra* Note No.25. p. 51.
76 AIR, 1975, Sc. 2299
77 P.N. Bhagawati (1991) "Law as an instrument of change", *law and social Action*, university of Delhi. p. 7.
78 *Ibid.* p. 8.
79 V.R. Krishna Iyer (1986) *Equal Justice and Forensic Process: Truth and Myth*, Lucknow: Eastern Book Company. pp. 36-37.

application is the exercise of political power.[80] There is always probability of using this power in favour of the privileged class of society.

In such a situation, the need of activist judges accepting the humanist ideology of the constitution is the need of the time. Activism of judges also requires recourse to counter ideologies. Judicial Activism and attack on the lawlessness of the state are, therefore organically connected.[81] Social Activism of the justices has to operate to fight the menace of the epoch- tyrannies of religious and political majority, selfishness of the politicians, polluters, producers and oppressions of the dominant elements.[82]

Socio-economic and political condition of the country influences the judges in moulding their thinking in one side, and on the other, it compels the judges to adopt activist view while giving their decisions for the purpose of solving the problems. That is the reason, appellate courts of different countries preferred to follow judicial activism. In this direction, US Supreme Court, apart from the historical decision *Marbury V. Madision*[83], delivered many striking decisions- *Powell V. Alabama*[84], *West Virginia Board of Education V. Barnetle* [85], *Brown V. Board of Education* [86], *Mirinda V. Arizona*[87] and *Nixon V. Herdon.*[88] These decisions are not only reflected courts' activist tendency, it also guaranteed US citizen's Socio-Political and Civil rights. Likewise, the Indian Constitution, in its preamble has clearly set its objective to secure to its entire citizen - social- economic and political justice.[89] Similarly, the Constitution of the kingdom of Nepal 1990 and Interim Constitution of Nepal 2007 has incorporated the objective of securing to the Nepalese people social, political and

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80 Malcolm M. Feeley (1976) "The concept of laws in social Science: A critique and Notes on An Expanded view", *Law and Society/ Summer*. p. 520.

81 Upendra Baxi (1985), *Courage, Craft and Contention: The Indian Supreme Court in the Eighties*, Bombay: N.M. Tripathi (Pvt.) Ltd. p. 16.

82 Permanand Singh, *Supra* Note No. 36. p. 346.

83 Supreme Court, 1 Cr. 137 (1803).

84 Supreme Court, 287 US (1933).

85 Supreme Court, 319 US. 624 (1943).

86 SC. 347 US 483 (1954).

87 SC 384, US 641 (1966).

88 SC.SC. 273, US 536 (1927).

89 P.M. Bakshi (1992) *The Constitution of India: Selective Comments*, (2nd edition) Delhi: Universal Book Traders. p. 1.

economic justice long in to the future.[90] Indian Supreme Court has completed a long and courageous journey to that direction adopting the activist working style. Nepal also is on the threshold, and stepping ahead very cautiously. Thus, it is expected that the courts can serve as a source of power for those who are too weak to exercise the right provided by the constitution. This depends on the political philosophy of the judges, their feeling for democratic life, and their willingness to risk controversy. Apart from this, it is equally remarkable that the constitutional mandate to the judges is that while discharging their duties they should keep in view the objectives which the constitution seeks to protect, promote and provide as embodied in the law.

(c) Human / Personal Factor

The personal factor indicates the personal role of any particular judge based on his own merit. Under human factor of judicial activism basically following matters can be mentioned.

(i) Accountability

To whom the judiciary (judges) is to be accountable is always the matter of discussion, whether the judiciary should be accountable to the appointing authority, to the constitution or to the people? In different countries judges are appointed by different authorities following separate procedures. Similarly, if the judges from whom high level of impartially is accepted, such organ becomes accountable with other organ then the spirit of the separation of powers will be collapsed. While we talk about the second logic, the justices take an oath to preserve and protect the constitution.[91] So it is their duty to function in accordance with the spirit of the constitution and to uplift the ideals of the constitution. It is necessary to the justices to be accountable to the constitution. Judges should be aware about the condition of the people. Every constitution is a document devoted to the people of the country. The constitution as the fundamental law of the nation has got mandate from the people. *Alexis de Tocqueville* long ago pointed out the importance of public opinion in guiding the courts in the following words;

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90 *The Constitution of Kingdom of Nepal (1990). and Interim Constitution of Nepal (2007)*

91 *Supra* Note No. 50. p.20.

….. their power is enormous, but it is the power of public opinion. They are all powerful as long as the people respect the law, but they would be impotent against popular neglect or contempt of the law. The face of the public opinion is the most intractable of agents, because its exact limits cannot be defined, and it is not less dangerous to exceed than to remain below the boundary prescribed.[92]

In 1993, Italian judges became public heroes following the arrest of more than 1000 people, including cabinet ministers, in a Kickback scandal involving organized crime.[93] Italy's experience shows how an activist judiciary helped by mass activism, can revitalize a degenerating socio politico- economic order … The work of the Milan judges against the mafia was followed up by the people of Italy, who brought down the entire edifice of the Italian ruling bloc and in the process exposed how the ruling bloc had come to be shaped and entrenched.[94]

On the basis of above discussion it can be said that justices are equally accountable to the constitution and the people. Court's accountability to them might cause substantial grounds for the achievement of just society and the people-only the people are the target of the constitution. In such a situation, court carries heavy burden and is waited for successful performance of its role.

(ii) Attitude

The attitude of the judges plays vital role in the field of judicial activism. A judge who is near with the realities of existing social problem, then it is sure that his attitude is reflected with the feeling of social justice. The ground for being activist may differ from judge to judge. For instance, in India among activist judges chief *justice P.N. Bhagawati* has followed 'goal oriented' approach, *justice Krishna lyer* 'humanist reformist' approach and *Justice Ranga Nath Mishra* 'Community oriented' approach.[95] Similarly, the socialist justices are very fond of quoting Lord Denning of Britain, *justice Murphy of Australia*, *Justice Earl Warren of America*, who never waited for legislative intervention and molded the law so as to serve the needs of the

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92 Loren P. Beth, Politics (1962). *The Constitution and the Supreme Court,* New York: Row, Patterson and company. p. 85.

93 Inderjit Badhwar (1996). "*Swing of the pendulum*", India Today. p.109.

94 B. G. Kolse Patil (1997). "Class-bound Judiciary", *Frontline*, Dec. 26. p.104.

95 *Supra* Note No. 36. p. 339.

time.[96] They emphasized that in a developing society judicial activism is essential for participative justice and the bureaucrats as well as the elected representatives will have to face the judicial admonition and pay the penalty if the people in misery cry for justice. How the personal attitudes and beliefs of a judge are the sources of judicial activism it can be presumed by an expression of US Supreme Court justice, Abe Fortas. During the days of the civil rights movement once he had expressed:

If I had been a Negro living in Brimingham or little Rock or Plaquemines Parish, Lousiana, I hope I would have disobeyed the state laws that said that I might not enter the public waiting room in the bus station reserved for 'whites'. I hope I would have insisted upon going into parks and swimming pools and schools, which state or city law reserved for 'whites'. I hope I would have had the courage to disobey, although the segregation ordinances presumably law until they were declared unconstitutional.[97]

While talking about the attitudes of the Indian activist *justice V.R. Krishna Iyer*, *Justice Hari Swarup* had said; *V.R. Krishna Iyer* was a born philosopher, became a humanist under socio-economic compulsions, and is a jurist by choice. He is not a man with split personalities. He cannot viewed as a lawyer sans justice, a judge sans humanism or a humanist sans philosophy. In whatever he thinks, speaks or writes, he reveals his integrated humanist personality.[98] Though mostly it is seen that the attitude (politico- legal) of a judge vindicate his judicial role, but it is not absolutely true. In USA the *Laissez-faire* court of Sutherland et al. were activist conservative, while frankfurter was a restrained liberal.[99] When Professor Frankfurter left Harvard for the bench in 1939, he was generally considered a liberal - in some quarters even a radical. But later he was accused of conservatism. Not only that there are some judges whose stand used to be differed on the basis of the merit of the cases. However it is plain fact that basically activist judges used to be guided by their

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96 *Ibid.*

97 Robert A. Carp and Ronald Stidham, (1990). *Judicial Process in America*, Washington D.C.: Congressional Quarterly inc. p.11.

98 Shailja Chander (1992). "Justice V.R. Krishna Iyer on Fundamental Rights and Directive Principles" New Delhi: *Deep and Deep Publications*. p. 9.

99 David F. Forte (1972). The Supreme Court in American Politics: "*Judicial Activism V. Judicial Restraint"* London; DC Heath and Company.

attitudes and beliefs. An activist judge cannot be guided by mere sentiments. If so, then he cannot remain consistent. At that period he cannot be termed as activist judge and the process as judicial activism.

(iii) Ability

The activist role of a judge is very much related with his personal qualities. While talking about the judicial activism one must not be misunderstood that the role of particular judge always remains active or restraint, rather it depends on the merit of the cases. Whether a judge is activist or restraint to some extent it depends on his/her personal ability. If a judge is of his qualification and of judicial competency or capability, he can be able to perform innovative function. Because the 'judges innovate are called activist'.[100] Similarly, judicial innovation means that law must adopt itself with the changing socio- economic context. It is the personal ability of the judge which not only interprets the law in a right direction, apart from this; he is remembered for his contribution in the legal field. It was due to chief justice *John Marshall's* ability that through the *Marbury V. Madison* he not only crossed the possible conflict between US president and judiciary also propounded the theory of judicial review. Likewise, Lord Denning's academic capability and his way of judicial creativity has been guiding to the justices of the world. Similarly, in India *justice Krishna lyer and CJ P.N. Bhagawati's* move on social justice has provided a new dimension to the judicial activism. Though judges are human beings… The plain fact is that only certain kinds of human beings can become justices those with the 'right' socialization, 'right' professional standing, and 'right' kind of reputation.[101] The glory of law lies in the creative abilities of judges. So the community expects the judges and administrators be 'progressive', 'activist' and 'forward looking' rather than worshippers of the traditional thinking of the justice.

3.1.6 Independence of the Judiciary

The separation of powers means that the judiciary should be independent of executive. This minimal requirement can usually be met by ensuring that the judges have security of tenure, are immune from civil and criminal liability as regards the

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100 D.A. Desai (1982). *Constitutional Values and Judicial Activism*, J.B.C.I. pp.258 - 267.

101 *Supra* Note No. 49. p. 5.

discharge of judicial functions, and that their decisions are not subject to criticism in parliamentary debate.[102] The Independent Judiciary is a crucial necessary of a free society under the rule of law. Independence here means freedom from executive or legislative interference in judicial functions. This also means that the judges must discharge their function without fears or favour. It is therefore, essential that their appointments and tenure should not depend upon the more pleasure of the government.[103] An independent judiciary is also considered as the hallmark of democracy. Judiciary is generally categorized as- committed and activist judiciary.[104] The idea of committed judiciary was no endorsement of judicial activism that is use of judicial power to articulate and enforce counter-ideologies which would adversely affect the balance of political forces governing the nation.[105]

On the issue of the independence of judiciary, there has been always tussle between executive and judiciary because executive always needed committed judiciary, whereas judiciary prefer not only to remain independent, rather to be active, if possible. In 1937, American president F.D. Roosevelt's move on court-packing plan was an effort to committed judiciary. Likewise in 1973, in India, it was claimed that independent India should have judges who are 'committed' not only to the social philosophy of the constitution but also to that of the government. This claim was upheld by Mrs. Gandhi's government when *Justice A.N. Ray* was appointed as chief justice of India, superseding three judges senior to him, *Justice Shelat, Justice Hegde and Justice Grover,* all of whom resigned. This raised a hue and cry within the country and the government was accused of tempering with the independence of the judiciary.[106] Actually independence of the judiciary is prerequisite of judicial activism.

In the United States, dual system is in operation for the selection or appointment of the judges. The judges of state courts are mostly elected by popular votes for fixed terms and the judges of the federal courts including the Supreme Court are

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102 Michael T. Molan (2001). *Constitutional Law : The Machinery of Government*, London,: (3rd ed.). Old Bakery Press, Greyhound p.73

103 B.R. Sharma (1990). *Constitutional Law and Judicial Activism*, Delhi: S.B. Nagia, pp.74-75.

104 Rajiv Dhavan, (1996). "The Judiciary Cannot Stand Idly "by, *The Sunday Review* Oct. 27.

105 *Supra* Note No. 50. p. 13.

106 B.R. Sharma, (1990). *Constitutional Law and Judicial Activism*, Delhi: S.B. Nagia, p. 83.

nominated and appointed by the president with the advice of and consent of the senate.[107] In India, before 1993, power of the appointment of judges was exercised by the president with the aid and advice of the government. Though in the constitution, there was also, the provision to take consultation with the justices of the Supreme Court in case of the appointment of the judges of Supreme Court and of the high court in the state and in cases of appointment of a judge other than the CJ, the consult with chief justice was made compulsory.[108] Utilizing this provision in her favor Indira government by urging committed judiciary superseded twice-once in 1973 and again in 1977, senior judges in appointment of the chief justice. This issue became a question of her debate within and outside the judiciary. In 1982, in the case, *S.P. Gupta V. Union of India*, popularly known as judges transfer case, the court held, consultation must be effective, and implies exchange of views after examining the merits, but does not need concurrence.[109]But latter in 1993, in the *Advocates on Record Association V. Union of India,* the court overruled its earlier view and held that; Art 124 of the Constitution which requires a process of 'consultation' with the CJI, in effect meant that concurrence was essential before the president could appoint a judge to the higher judiciary. The chief justice also should take into account the views of a number of his senior colleagues on the bench, or the judges from the high court's concerned.[110] Since that period, Supreme Court has its hand in the appointment and transfer of a judge.

In the context of Nepal, on the recommendation of Constitutional Council, the President shall appoint the Chief Justice of the Supreme Court, and on the recommendation of the Judicial Council, the Chief Justice shall appoint other Judges of the Supreme Court. The tenure of office of the Chief Justice shall be six years from the date of appointment. Any person who has worked as a Judge of the Supreme Court for at least three years shall be eligible for appointment as the Chief Justice of the Supreme Court.[111] Likewise, the Chief Justice shall appoint any Chief Judge and Judges of the Appellate Courts and any Judges of the District Courts on

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107 Article 11 Sec. 2 of the Constitution of the United States.
108 *Article 124 of the Constitution of India.*
109 AIR, 1982, SC. 149.
110 AIR, 1994, SC. 344.
111 *Interim Constitution of Nepal, (2007) Art*. 103/105.

the recommendation of the Judicial Council. Any citizen of Nepal who has a Bachelor's Degree in law and has worked as a Judge of a District Court or in the post of Gazetted First Class of the Judicial Service for at least seven years or has practiced law for at least ten years as a law graduate advocate or senior advocate or who has taught law or done research thereon or worked in any other field of law or justice for at least ten years shall be considered eligible for appointment as the Chief Judge or a Judge of an Appellate Court[112].

Independence of judiciary means it should be free from other organs of the state particularly executive and legislative. It must be free from power, pressure and other things, independence means that the freedom of judges to decide cases, fairly and impartially, relying only on the fact and law.[113] Simply, judicial independence is the ability of a judge to decide a matter free from pressure or inducements. Additionally, the institution of judiciary as a whole must be independent by being separate from government and other concentration of power. The principal role of an independent judiciary is to uphold the rule of law and ensure supremacy of law. If the judiciary is to exercise a truly impartial and independent adjudicative function, it must have special power to allow it to "keep its distance" from other governmental institutions, political organizations and other nongovernmental influence, and to be free of repercussion from such outside influence.

The independence of the judiciary is sought because positive judicial activism is possible only when the judiciary can disintegrate itself from the ruling bloc and position itself on the side of the common people. This process will help to strengthen the struggle of the people for a just and equitable socio-economic political order, for the greatest good of the largest number.[114]

3. 2 Major Techniques of Judicial Activism

The remuneration of the outline of judicial activism particularly can be seen in reference to judicial review and public interest litigation. So this can be taken as major techniques of judicial activism.

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112 *Ibid.* Art. 109.

113 Tek Narayan Kunwar (2007)."*Global Standards of Judicial Independence* "NJA Law Journal, vol. 2, National Judicial Academy Nepal. p. 73.

114 *Supra* Note No. 94.

3.2.1 Judicial Review

The notion of rule of law says Jeffrey Jowell and Down Oliver are enforced through judicial review. [115] Thus, the system of judicial review is always directed against despotism, and its sole objective is to protect the Constitution from the undue encroachment of the government and establish a just society.

In general, judicial review is defined as the process where the supreme judicial body of the state examines the decisions given by their inferior judicial body in order to establish whether or not they are under the process of due law. In the context of constitutional law, the term judicial review is, however, used differently. It has a wider as well as a narrower sense. In a wider sense, it is simply used to mean a final consideration and decision by a court of law that may be of dispute between private parties or between the private party and the state or a public authority. It would include even appeals on the merits of a decision which may be of an administrative authority or even of a civil court. All questions of fact and law, that is, the merits of the whole cases would be open to review. [116]In its proper and technical narrow sense, judicial review is essentially collateral and not vertical at all. It does not go into the merits of the impugned decision but on the contrary examines only the constitutionality or the basic legality of it. The attack is collateral. The contention is not that on merits of the impugned decision that it was wrong. On the other hand, the contention is that the decision was given either without jurisdiction or that it was contrary to the fundamental provisions of a statute under which the administrative authority was acting.[117]

Judicial review of administration is, in a sense, the heart of administrative law. It is the most appropriate method of inquiring into the legal competence of a public authority. The aspects of an official decision or an administrative act that may be scrutinized by the judicial process are the competence of the public authority, the extent of a public authority's legal powers, the adequacy and fairness of the

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115 Jeffery Jowell (1994). "The Rule of Law Today". *The Changing Constitution,* (3rd ed.). Oxford: Clarendon Press. p. 57.

116 V.S. Deshpande (1977). *judicial review of legislation,* Lucknow : Eastern Book Company. p.13.

117 *Ibid*. p. 14.

procedure, the evidence considered in arriving at the administrative decision and the motives underlying it, and the nature and scope of the discretionary power. An administrative act or decision can be invalidated on any of these grounds if the reviewing court or tribunal has sufficiently wide jurisdiction. There is also the question of responsibility for damage caused by the public authority in the performance of its functions. Judicial review is less effective as a method of inquiring into the wisdom, expediency, or reasonableness of administrative acts, and courts and tribunals are unwilling to substitute their own decisions for that of the responsible authority.

Judicial Activism is understood in the context of the extent and the vigor and the readiness with which courts exercise their power of judicial review. Courts interventionist role witness the phenomenon of judicial activism. When the judiciary exercises self- restraint in exercising the power of the judicial review and limits its role there is absence of judicial activism. But the pendulum of judicial review is never static and judicial activism, or the lack of it, is a variable phenomenon.[118]

Judicial review of administration varies internationally. Sweden and France, for instance, have gone as far as subjecting the exercise of all discretionary powers, other than those relating to foreign affairs and defense, to judicial review and potential limitation. Elsewhere, a preoccupation with procedure results in judicial review deciding only whether the correct procedure was observed rather than examining the substance of the decision.

Judicial review may be of two kinds; judicial review of administrative action and judicial review of legislative action depending on the nature of the state action against which it is directed. If it is against administrative action, then it is directed against the executive department of the state or the administrative authorities of the state. It seeks to review administrative action, which is called judicial review of administrative action. On the other hand, it is directed against a statute of legislature or subordinate legislation made under a statute by an administrative authority in the nature of rules, regulations, byelaws, etc., and then it is directed against the law

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[118] Soli J. Sorabjee, (1998) *'The Indian Experience',* Essay on Constitutional Law, vol. 26, Nepal Law Society. p. 66-67.

making action of the legislature or of the executive. Since it seeks to determine the validity of legislation, it is called judicial review of legislation.[119]

The theoretical foundation of the doctrine of judicial review is that in case of conflict between the constitution and a legislative statute, the court will follow the formal, which is the superior of the two laws, and declare the latter to be unconstitutional.[120] Similarly, in the view of Lord Diplock, 'administrative law requires a decision maker not to act irrationally, not to act with procedural impropriety and not to act unlawfully[121]. Hence, there are three principal grounds of judicial review- review for 'illegality', for 'procedural impropriety' and for 'irrationality' or (unreasonablity). The implementation of each of these grounds involves the courts in applying different aspects of the rule of law.[122]

Christopher Wolfe, in his book 'The Rise of Modern Judicial Review, from Constitutional Interpretation to Judge made Law', has divided the history of judicial review in America into three stages. According to him, modern judicial review came into being when Supreme Court justices not only engaged in judicial activism, but did so, on the basis of his theoretical understanding of judicial power that legitimized judicial legislation. Even though, the judicial review also is not beyond criticism. Harold J. Laski bitterly criticizing judicial review wrote;

The Judges spare no pains in attacking parliamentary decisions; it is not their function to criticize….. They interpret the rule of law as though they are themselves the masters of a 'higher law' than that of a sovereign legislator, the consent of which they themselves decide. [123] It is at least not excessive to say that they bring to the interpretation of the modern state and its process habits of interpretation which at least by implication deny the validity of many of the ends to which its power is devoted.

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119 *Supra* Note No. 115. p. 15.
120 *Supra* Note No 1. p. 1694.
121 Joshua Rozenberj (1994). *The Search for Justice: An Anatomy of the Law*, London : Hooder and Stoughton Ltd. p. 197.
122 *Supra Note No*. 114. p. 73.
123 T. K. Tope, (1982). *Constitutional Law*, Lucknow; Eastern Law Company. p. 434.

In the same way, Alexander Bickel criticizes judicial review in the following words; judicial review runs so fundamentally counter to democratic theory, that in a society which in all other respects rests on that theory. Judicial review cannot ultimately be effective.[124] Apart from this, modern criticism of judicial review, which started with Thayer, has expended more effort in trying to eliminate judicial review's policy component or at least to bring it in line with that which we are comfortable in ordinary law. Judicial review is considered as a major technique of judicial activism. Judicial review, like the constitution itself affirms as well as negates; it is both a power- releasing and power breaking function.[125] It is itself a limitation on government. Judicial review has helped the court to play a major role in policy making.

3.2.2 Public Interest Litigation

Public Interest Litigation is a strategic arm of the legal aid movement intending to bring justice within the reach of the poor masses. It is different than the traditional litigation which is essentially of an adversary character involving a dispute between two litigation parties i.e., one making a claim or seeking relief against the other and that other opposing such claim or resisting such relief.[126] Public interest means something in which the public the community at large, has some pecuniary interest or some interest by which their legal rights or liability are affected.[127]

Supreme Court of Nepal, in *Radhashyam Adhikary V. Cabinet Secretariat of Government of Nepal and others* defined the term public interest litigation as, a dispute of public interest litigation signifies a dispute related to the collective right or concern of the general public or any class of people. In order to enter any dispute as a public interest in the apex court that dispute must be based on the constitution or law and should be worthy of judicial resolution. Thus the concept of PIL which has been and is being fostered by judicial activism has became an increasingly important one setting up valuable and respectable records, especially in the area of constitution and legal treatment for the unrepresented and under represented.[128]

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124 Alexander Bickel (1962). *The Least Dangerous Branch : The Supreme Court at the Bar of Politics*, Indianapolis Bobbs, Merrill. p. 23.

125 Alpheus Thomas Mason (1963). "The Warren Court and the Bill of Rights", David F. Forte. p. 29.

126 *People's Union for Democratic Rights V. Union of India*, AIR, 1982 SC 1473.

127 *Supra* Note No. 9. p. 336.

128 *Ibid.*

Social Action Litigation or PIL, departure from the traditional approach may appear strange to a person trained totally in the background of common law system, but through this technique the courts are emerging as an important rationalizing and stabilizing force by seeking to impart social justice to the needy underprivileged citizens, thus, bringing a social change, within the country, Similar trend has been developed in different countries i.e., USA, UK, Australia, New Zealand and others.[129] The PIL movement in the United States involved innovative uses of the law, lawyers and courts to secure, greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society.[130] The concept flourished very well in Indian legal system. *Justice V. R. Krishna Iyer*, early in 1975, for the first time in the case Bar *Council of India V. M. V. Dabholkar*[131], advocated liberal interpretation of *locus standi* in public interest litigation. It was the judge's case[132] where the SALwas developed in an institutional form, through the judgment of *justice P. N. Bhagawati* to which all other judges of the bench broadly concurred. Liberal Interpretation of *Locus Standi* is the basis of public interest litigation, throwing light on the cause of extending doctrine of *locus standi, justice Bhagawati* expresses;

> We…. expanded the doctrine of *locus standi* in the judges appointment and transfer case laid down that where a legal wrong is done or a legal injury is suffered by an individual or a class of individuals, who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a court of law for justice, any public-spirited individual or any social action group acting bonafide should be able to file an action in the high court or the supreme court for seeking redress for that wrong or injury done.[133]

Not only that, in the process of liberalizing *locus standi* the Indian Supreme Court, has devised a unique form of epistolary jurisdiction through which public citizens or groups can activate the court for violation of fundamental rights of ethnic and other

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129 K. P. Singh (1990). "*Social Action Litigation : An Activity of Social Change in India*", *Deep & Deep Publication*, New Delhi. p. 355.

130 *Supra* Note No. 36. p. 389.

131 AIR, 1975 SC 2092.

132 *S. P. Gupta V. Union of India*, AIR 1982 SC 149.

133 Justice P. N. Bhagwati's interview in, Frontline, January 11-24. (1986). p. 9.

minorities in Indian society. Any citizen may now activate the court by means of a letter which is treated as writ petition: the traditional law relating to *locus-standi* has thus undergone cataclysmic innovation.[134]

Viewing court's performance, often there is expressed the possibility of confrontation with the government, for this the court said that public interest litigation was not in the nature of adversary litigation but a challenge and opportunity to the government and its Officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social, economic and political justice.[135] It is not that the court was always active in dealing PIL cases, there was also the voice emphasizing on an urgent need to outline the correct parameters for entertainment of PIL. The high court of Madhya Predesh in the case *P. N. Dubey V. Union of India*, observed:

If the courts do not restrict the free flow of such cases in the name of public interest litigation, the traditional litigation will suffer, and the court of law, instead of dispensing justice, will take upon themselves administrative and executive functions.[136]

Justice R. S. Pathak (as he then was) alongwith *justice V. D. Tulzapurkar* and S. Mukherjee has favored a very cautious approach in dealing with PIL petitions. These judges believe that the court should issue only those directions which are capable of being effectively implemented. While issuing directions the court should also consider the likelihood and degree of response from the agencies on which the implementation will depend.[137]

In Nepal, the right to public interest litigation[138] in one side is incorporated as the constitutional provision, on the other; court was prompt to lay down restrictive doctrine with a view to check over flooding of such petitions. For that, the court has emphasized on 'meaningful relation' of a petitioner with dispute of public interest to

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134 *Supra* Note No 39. p. 265.

135 Bandhuwa Mukti Morcha V. Union of India, AIR 1984 SC 802.

136 Permananda Singh (1989). "Public Interest Litigation", *Annual Survey of Indian Law*, Reprint-Indian Law Institute. p. 60.

137 *Supra* Note No. 37. p. 505.

138 Article 107 (2) of *The Interim Constitution of Nepal 2007* has adopted the term 'dispute of public interest or concern' instead of public interest litigation.

have a *locus standi*.[139] The parameter devised for *locus standi* in public interest litigation by the court's decision was criticized by some member of the legal profession. The awareness of justices about this resentment of legal profession may have perhaps guided the court to abandon its rigidity as regards to the requirement of meaningful relationship in immediately succeeding decision. Nepalese judiciary is moving ahead by error and trial, which will be the subject of subsequent chapter. PIL is the best way to play an active role for a judiciary.

3.2.3 Fundamental Rights and Constitutional Doctrine

Constitution, fundamental rights, judicial review and judicial activism are interrelated and interdependent. Constitution and fundamental rights cannot be separated from judicial review and activism. Nor can judicial review and judicial activism be separated from fundamental rights and constitution. That is why, it is said that there will be no constitution without fundamental rights, no fundamental rights without judicial review and judicial activism, and no judicial review and judicial activism without competent, impartial and independent judiciary.

3.2.4 The Concept of Constitution

For an understanding of the system of judicial review and judicial activism, it is important to understand the Constitution. Different people understand Constitution in different ways; some regard Constitution as the whole body of fundamental rules, written and unwritten, according to which a particular government operates.[140] Constitution is the fundamental law by which sovereign powers of the government are established, distributed, limited, confined and regulated. The Constitution is the heart of a national life and it is an instrument from which approach the power to govern.[141] It is the expression of the will and aspirations of the people. It states principles rather than rules; and the principles, written in general term, are designed not for one era but only for the vicissitudes of time. It is a compendium, not a code; a declaration of faith, not a compilation of law and etc.[142]

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139 *Nepal Kanoon Patrica,* No. 12. (1991). p. 818.
140 Austin Ranney (1958). *The Government of Men* 77, Henry and company, New York.
141 Justice William O. Douglas (1961). *A Living Bill Of Rights* 10, Doubleday and Company.
142 *Ibid.*

For the British model of Constitution, a Constitution is also defined as consisting of institutions and not of the paper that describe them. If it true then the British Constitution has not been made but has grown- and there is no paper[143] It is also a saying that written Constitution are based on theories or principles of government; but theories are suggested by experience.

However, it is accepted that in a democratic state, the Constitution is the essential frame of a government which defines, prescribes and limits the rights, duties and functions of the chief organs of the state. It is the body of both doctrines and practices that form the fundamental organizing principles of a political state. In some cases, such as the United States, the Constitution is a specific written document; in others, such as the United Kingdom, it is a collection of documents, statutes, and traditional practices that are generally accepted as governing political matters. States that have a written Constitution may also have a body of traditional or customary practices that may or may not be considered to be of Constitutional standing. Virtually every state claims to have a Constitution, but not every government conducts itself in a consistently constitutional manner.[144]

3.2.5 Constitution the living Organism

Some people perceive Constitution as a living organism. The rationale behind such perception is related to the essential ingredient of a good Constitution, the Constitution adaptable to the changing conditions of life. The well known author of constitution Bagehot says that the living constitution- A constitution that is in actual work and power.[145] The USA constitution can be taken as an example of living organism. In the USA constitution twenty-seven amendments have been added since 1789. In addition to these, thus other far-reaching amendments include the sixteenth (1913), which allowed congress to impose an income tax; the seventeenth (1913), which provided for direct election of senators; the nineteenth (1920), which amended women suffrage; and the twenty-sixth (1971), which granted suffrage to citizens completing 18 years of age. Thus, in more than two centuries of operation, the

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143 Sir Ivor Jennings (1959). *The Law and The Constitution* 8, The English Language Book society and University of London Press Ltd p.104

144 *Encyclopedia Britannica 2007.*

145 Walter Bagehot (1963). *The English Constitution*, WM. Collins Sons and Co. Ltd. p.268

United States Constitution has proved itself a dynamic and living document. It has served as a model for other countries, its provisions being widely imitated in national constitutions throughout the world. Although the constitution's brevity and ambiguity have sometimes lead to serious disputes about its meaning, they also have made it adoptable to changing historical circumstances and insured its relevance in ages far removed from the one in which it was written.[146]

There are few basic prerequisites of a constitution as a living organism:

- Concerning constitution to all future and changing conditions is its fundamental virtue.
- A constitution must possess dynamic force to survive.
- The court, being the real participant in the living stream of national life, applies the tenets of the constitution to the changing condition of life.
- The constitution which is concise and less worded possesses larger scope for adaptation then one which is elaborate and prolific.
- A good judge possessing large vision and sound judicial mind is a greater asset to the nation for making the constitution a living institution.
- The judicial review, judicial activism, adaptability of the constitution is the guiding factor, and judicial review, judicial activism cannot be successful if the constitutional judge takes a narrow and stinted view of the constitution and fails to apply the constitution to life.

3.2.6 The Effective Constitution

John Rawls advocates for the effective Constitution that should be chosen by the people, which satisfies the principle of justice. The effective Constitution leads to just and effective legislation. He highlighted three basic principles of justice, he calls them equality.[147]

(a) The first principle of justice i.e. equal liberty, The main requirements of this principle are that the fundamental liberties of the person and liberty of

146 *Supra* Note No. 37.
147 John Rawla (1973). *A Theory of Justice* 199, Oxford University Press p. 211.

conscience and freedom of thought be protected and that the political process as a whole be a just procedure. Thus, the Constitution establishes a secure common status of equal citizenship and realizes political justice.[148]

(b) The Second principle relates to the stage of the legislature. It states that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity, subject to the equal liberties being maintained. At this point the full range of general economic and social facts is brought to bear. Thus, the priority of the first principle of justice to the second is reflected in the priority of the Constitutional convention to the legislative stage.[149]

(c) The third Principle emphasizes on the application of rules to particular cases by judges and administrators, and the following rules by citizens generally. At this stage everyone has complete access to all the facts. No limits of knowledge remain since the full system of rules has now been adopted and applies to persons in virtue of their characteristics and circumstances.

3.2.7 The Concept of Fundamental Rights

Fundamental rights have prominent role in modern democratic values. It protects individuals against the excesses of the state. The fundamental right represents an attempt to protect the individual from oppression and injustices. It is widely accepted that the right to liberty is the very essence of a free society and it must be safeguarded at all times.[150] Inclusion of the fundamental rights in the Constitution also binds the legislature and executive.

The enforcement of human rights is a matter of major significance to modern constitutional jurisprudence. The incorporation of Fundamental Rights as enforceable rights in the modern constitutional documents as well as the internationally recognized Charter of Human Rights emanate from the doctrine of natural law and natural rights.[151]

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148 *Ibid.*
149 *Supra* Note No.147.
150 *Supra* Note No.1. p. 897
151 *Ibid.*

Human rights are naturally inherent in human beings by virtue of their birth, whereas, the fundamental rights are correlated with the freedoms and rights which a man is entitled to by virtue of his/her association with the state as its citizens. They are mare product of the country constitution.[152] The fundamental rights are the real basis of judicial review and activism. The Constitution makers considered it necessary to recognize the right of judicial review in order to control the legislative actions of the state to take away the guaranteed rights without jurisdiction.

The evolution of the concept of fundamental rights in Nepal is rather a delayed phenomenon. During the 104-year long absolute dynastic rule of the Ranas, there was no scope for recognition of the rights of the Nepalese people. However, it is historical irony that the concept of fundamental rights in Nepal started with the promulgation of the *Government of Nepal Act 1948,* the first- ever constitutional document of Nepal which was granted by none other than a Rana Prime Minister- *Padma Shamsher*. It is different matter that this Constitution could not be enforced.

It was only after Nepal's tryst with democracy in 1951 that the avenues for the realization of the fundamental freedoms and liberties of the Nepalese people could be opened. The promulgation of the Interim Government of Nepal Act, 1951 and the Constitution of the Kingdom of Nepal, 1959, which can be treated as the Constitutional milestones in the political history of Nepal, marked important stages in the development of fundamental rights. However, the political coup staged by late *King Mahendra* put the evolution of fundamental rights in the reverse gear.

It look the Nepalese people thirty-years of constant struggle and countless sacrifices to dismantle the authoritarian Panchyat rule and restore democracy in Nepal through the historic people's revolution of 1990. The Constitution of the Kingdom of Nepal 1990, an outcome of tripartite agreement between the King, Nepali Congress and the Leftist Alliance, is by far most democratic Constitution Nepal has ever had. It carries an elaborate and comprehensive statement of fundamental rights as well as the provision for the right to Constitutional remedies.

The Interim Constitution of Nepal, 2007 seems more liberal in guaranteeing the

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[152] Bhimarjun Acharya, (2002). "*Human Rights, Democracy and Good Governance*," NYAYADOOT 76, Nepal Bar Association p. 121.

Fundamental Rights to the people than that of the Constitution of 1990. It has expanded the degree of rights in particular, on the part of women, children and back-warded classes and communities.

3.2.8 Fundamental Rights and Directive Principles

The Fundamental Rights are defined as the basic human rights of all citizens. Fundamental Rights set out in the Constitution are enforceable by the courts, subject to specific restrictions whereas, the Directive Principles of State Policy are guidelines for the framing of laws by the government, these provisions, set out in the Constitution, are not enforceable by the courts. The principles based on Directive principles are fundamental guidelines for governance that the State is expected to apply in framing and passing laws.

The Fundamental Rights, embodied in Part 3 of the Interim Constitution, 2007[153] guarantee civil rights to all Nepalese citizens, and prevent the State from encroaching on individual liberty and it has an obligation to protect the citizens' rights.

The purpose of the Fundamental Rights is to preserve individual liberty and democratic principles based on equality of all members of society as well as to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The fundamental Rights act as limitations on the powers of the legislature and executive and in case of any violation of these rights the Supreme Court of Nepal has power to declare such legislative or executive action as unconstitutional and void.[154] These rights are largely enforceable against the State. The purpose of directive principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the Constitution seeks to fulfill the basic needs of the common men and to change the structure of the society.[155]

The Directive Principles have been used to uphold the Constitutional validity of legislations in case of a conflict with the Fundamental Rights. The Fundamental Rights and Directive Principles have also been used together in forming the basis of

153 *Interim Constitution of Nepal*, 2007, Part III.

154 *Interim Constitution of Nepal,* 2007, Article 107.

155 Justice K.S. Hegde (1972). lecture delivered in the memory of B.N. Rau on *The Directive Principles of State Policy in The Constitution of India,* National publishing House, Delhi, published for The Institute of Constitutional and Parliamentary Studies p. 17.

legislation for social welfare. The Supreme Court of India, after the judgment in the *Kesavananda Bharati* case, has adopted the view of the Fundamental Rights and Directive Principles being complementary to each other, each supplementing the other's role in aiming at the same goal of establishing a welfare state by means of social revolution.[156]

The philosophy underlying with fundamental rights and directive principles was evolved from the experience of momentous events of the world in general and Nepal in particular, during the last one century. If there are any parts in the Constitution, in particular the Constitution of Nepal, which are transcendental and require a careful and imaginative approach and faithful adherence, they are parts III and IV. They contain the philosophy of the Constitution. They have their roots in the history of the last several decades. They are assigned an important place in our Constitution in the hope and expectation that in the near future the tree of true liberty would bear fruit in Nepal. They connect Nepal's future, present and past and give strength to the pursuit of the social revolution in our great and ancient land.

Fundamental Rights are enforceable in the courts. Such Rights are meant for the citizen and has individualistic nature so that individual can move to the court seeking legal assistance if Fundamental Rights are usurped by force. Further, courts are bound to declare as void (with few exceptions) any law that is inconsistent with any of the Fundamental Rights. Fundamental Rights seek to establish political democracy having political in character. These rights guarantee some democratic rights to the citizen. The Fundamental Rights are in the nature of denial of certain authority to the government. They are, therefore, negative in nature.

Directive Principles of State Policy are meant for the State having socialistic and economic in nature and want to establish equality and justice in the society as well as to ensure social and economic security of the people. It seeks to establish social and economic democracy. Directive Principles of State Policy are not enforceable and no one can go to the courts to compel the State for their proper implementation.[157] The courts can not declare as void any law which in conflict with any of the Directive

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156 *Kesavananda Bharati V. State of Kerala,* AIR 1973 SC 1461.

157 *Interim Constitution of Nepal,* 2007, Article 36.

Principles. It needs legislation or policy intervention for their proper implementation so long as there is no law carrying out the policy laid down in the Directive Principles. Almost all Directive Principles are positive in character as they are like positive directions that the government at all levels must follow to contribute to the establishment of social and economic democracy in Nepal.

Interim Constitution of Nepal, 2007 has mentioned that the Fundamental Rights of the citizens remain suspended during national emergency.[158] But the question of suspension of Directive Principles does not arise during emergency or in any time. Fundamental Rights are not absolute and citizens are subject to reasonable restrictions. On the other hand, Directive Principles are not subject to any constitutional limitations. Based on political will the government may or may not implement them.

Fundamental Rights are more precise and concrete while Directive Principles are more of general nature and are of wider significance. Despite so many differences, Fundamental Rights and Directive Principles are closely connected to each other. Both concepts constitute an indispensable part of the Constitution and are fundamental for proper development of our country.

It shall be the duty of the state to follow the directive principles both in the matter of administration as well as in the making of laws. They embody the object of the state under the democratic Constitution, namely, that it is to be a *welfare state* and not a mere *police state*. Most of the directive principles aim at the establishment of economic and social democracy. Our Constitution through the embodiment of directive principles aims to *establish a socialistic pattern of society not socialism*. It is in that context the goal of the Nepalese polity is not *laissez faire* but *a welfare state,* where the state has a positive duty to ensure to its citizens social and economic justice and dignity of the individual.

In case of conflict between Fundamental Rights and Directive Principles, the former gets supremacy in the court. The question of priority in case of conflict between fundamental rights and directive principles has frequently been arisen in the

158 *Interim Constitution of Nepal*, 2007, Article 143(7), (8).

Constitutional law.

In the pattern of the Constitution, the fundamental rights guaranteeing the right to equality, the right to freedom, to property etc. have been supplemented with the directive principles of state policy. It is because a single political right of the citizen cannot ensure all-round development of the citizen. Along with this, there should be a combination of social and economic rights too. The private benefit and public good, the personal right and the public well-being are, therefore, to be harmonized. The fundamental rights and directive principles of state policy are not derogatory of each other but are a correlation of the rights of person and his duties to the public. If the state can ensure the one, it should be conceded that it can also enforce the other. It is in this way alone that the Police state can be converted into a welfare state.

While determining the ambit of fundamental rights, the court should not ignore the directive principles, but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible. This is the best demand and necessity of the present state. The court in India has transformed this necessity into a living reality. The decision in *Kerala Education Bill*[159], C.B. *Boarding and loading V. State of Mysore*[160], *Minerva Mills V. India*[161], *Bandhuwa Muktmorcha V. India*[162] etc. are its examples.

In Nepal, the Court has also attempted to make the harmonious relation between fundamental rights and directive principles of state policy. The *Godabari_Marble*[163] and *Yogi Naraharinath*[164] cases are its examples. Nevertheless, this is not best held unless the state creates a number of administrative bodies and enacts laws in order to enforce them. In these circumstances there may be misunderstanding about the scope of powers and sometimes also a misuse of power.

3.2.8.1 Fundamental Rights (The Proposed draft Report of CA 2014)

Proposed new Constitution of Nepal has been drafted by first Constituent Assembly

159 *Kerala Education Bill*, AIR 1957 sc 956.
160 *C.B. Boarding and loading V. State of Mysore*, AIR 1970 sc 2042.
161 *Minerva Mills V. India,* AIR 1980 sc 1789.
162 *Bandhuwa Muktimorcha V. India*, AIR 1984 sc 802.
163 *Surya Prasad Dhungel V. HMG*, 1992 NLR at 169.
164 *Yogi Naraharinath V. Girija Prasad Koirala*, 1996 NLR at 33.

and now the second constituent Assembly carryout the constituent making process and discuss on the pervious draft. The Committee has expanded the 20 fundamental rights as mentioned in the Interim Constitution of Nepal, 2063 and identified 31 rights as fundamental rights, and proposes the same in order to guarantee and safeguard the highest rights of the citizens against the state by the constitution and ensure it constitutionally. [165] The rights include the right to live with dignity, right to freedom, right to equality, right to mass media, right to justice, rights for criminal victims, right against preventive detention, and right against torture. Also in the list are rights against racial discrimination and untouchability, right to property, right to religious freedom, right to information, right to privacy/secrecy, right to environment, and right against exploitation, right to education, right to language and culture, right to employment, right to labour, right to health, right to food, right to shelter, women's rights. Besides these, rights regarding children, rights of Dalit communities, right to senior citizens, right relating to family, right to social justice, right to social security, right to consumer, right against exile, and right to implementation of fundamental rights and constitutional remedies are proposed by the Committee.

The Committee has proposed a right that is different from the ones included in the Constitution of 1990 and Interim Constitution 2007. The proposed draft mentions that every Nepali has right to live with dignity. The Committee argues that in the absence of the right to live with self-respect and dignity, all other rights are meaningless. Therefore this right has been guaranteed. The new rights introduced by the Committee are right to food, shelter, consumer's rights, right to family, senior citizen's rights.

3.2.8.2 Fundamental Duties and Directive Principles of the State (Proposed Draft Report of CA 2014)

Under citizen's duty under the right to fundamental duties, every citizen should be faithful to his nation, should defend and protect nationality, sovereignty of state and integrity of the country, should keep national secrets, should abide by the law and

[165] Report of agreed Subjects of Constituent Assembly, Committee for Fundamental Rights and Directive Principles (2014). Singhdurbar, Kathmandu.

constitution of the country, should serve compulsorily for the nation when the nation demands, and should pay tax according to the law. Similarly, to respect labour, to respect father, mother, children, elderly people, women, helpless and disabled people or community are other fundamental duties.[166] To protect public and national property, to exercise one's rights and freedom without infringing on the rights of other people, community or citizen, and to protect and promote natural, cultural and historical heritage, and to work for environment conservation are also fundamental duties.

The Committee holds that the rights and duties complement each other and, therefore, a citizen's observation of his or her duty facilitates another citizen to enjoy and exercise her or his rights. And then the citizen finds some basis to exercise her or his fundamental rights. Also, the awareness of her or his duty makes the citizen disciplined, dignified, moral and righteous and more dutiful and faithful to the nation. This is the justification of the Committee to make provision of the fundamental duties in the draft report.

As for the directive principles, policies and accountability towards the state, the draft states that "the political objective of the state will be to establish the federal democratic republic system by keeping the country's sovereignty, independence and integrity with utmost priority, by protecting every citizen's life, property, freedom and equality, by maintaining the just rule in all aspects of national life by following the principle of rule of law, fundamental rights and human rights and values, inclusiveness, participation, and social justice and thereby establishing the welfare state, by establishing the smooth relation among the federal units through the principles of mutual cooperation and federalism and thus ensuring people's participation in proportional basis in decentralization and self-governance and by guaranteeing the system where people can reap the benefits of democracy".[167] The report of the Committee states that the policies regarding the national defense and national unity, policy regarding the politics and government, policy regarding social and cultural transformation, economic and business policy, development polices and

166 *Supra Note* 166.
167 *Ibid.*

others will be the policies of the state.

3.2.9 The Doctrine of Ultra Vires

The doctrine of *ultra vires* is the core of the judicial review of legislation and administrative action. The literal meaning of the phrase *ultra vires* is beyond the power. An Act which is for any reason in excess of power is *ultra vires*.[168] It is the basic doctrine in administrative law and the foundation of judicial power to control actions of the administration.[169] When the power is conferred on the administrative body, the instrument conferring the power may itself provide for restrictions on the exercise of the power. If the administrative body goes beyond such restrictions imposed on it, in the exercise of power, it is treated *ultra vires*. The Supreme Court of India in *Uttar Pradesh V. Renusagar Power Co. expressed*[170]. If the exercise of power is in the nature of subordinate legislation, the exercise must conform to the provisions of the Statute. All the conditions of the Statute must be fulfilled. Yet in an another case, *Greater Bombay Municipal Crop. V. Nagpal Prin Ating Mills*[171], the Court emphatically stated that delegated legislation repugnant to, or inconsistent with, or in contravention of, or in excess of, or overriding the provisions of the Parent A is *ultra vires*.

A. Constitutionality of the Empowering Statute

Constitution, legislation of any form, made under Statute of the authority would be void if the empowering Statute is *ultra vires*. Constitution prescribes the boundaries within which the legislature likely to act. If the Act itself exceeds the boundaries of the Constitution, the other sort of legislation framed hereunder will be *ipso facto* invalid, the enabling Statute may be unconstitutional if it goes beyond the expressed provisions of the Constitution, violates or breaches the fundamental rights of the citizen guaranteed under the Constitution. The Constitutionality of the enabling Statute can also be tested on the ground of excessive delegation as it is an implied constitutional limit on the enabling Statute as laid down *In re Delhi Laws Act.*[172] The

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168 C. K. Thakker (1999) *Administrative Law* 108, Estern Book Co., Lucknow .
169 M. P. Jain (1996), *Treatise on Administrative Law* 95, Nagpur: Wadhwa and Co.
170 AIR 1988 SC 1737, 1761.
171 AIR 1988 SC 1010.
172 AIR 1951 SC 332.

limit is that essential powers of legislation cannot be delegated. The essential legislative power consists of determination or choice of legislative policy and of formally enacting that policy into a binding rule of conduct. The legislature, therefore, may not delegate its function of laying down legislative policy to an outside authority in respect of a measure and its formulation as a rule of conduct.[173]

The Constitutionality of the enabling Statute is tested by the Supreme Court on grounds of the direct provisions of the Constitution, particularly on grounds of fundamental rights of Part 3 of the Constitution. The reason for this is that the petitioners go to the Court for justice by contemplating; mainly the fundamental rights provisions of the Constitution.

In Advocate *Basundhar Thapa V. HMG, Council of Ministers*,[174] the petitioner challenged Provisio Clause of Sec. 7 (3) of the Schedule-tribe Schedule-caste (Adivasi Janjati) Development National Academy Act, 2001, on the ground of its inconsistency with Art. 11(1),(2) and (3) of the Constitution. The Petitioner stated that the alleged Section was illogical, baseless and without measurement as it had made a clear-cut discrimination between men and women in the application of law on the ground of sex. The impugned provision of the Act had kept the women[175] in the de-gradational situation instead of protecting and advancing the same and thus had disrespected the Constitutional right to equality of the Petitioner guaranteed under Article 11(1),(2) and (3) of the Constitution. Section 7(3) of the Act had fixed the tenure of the nominated male member of the Managing Council for four years and there was the provision of denomination of the same. Not in conformity with this provision, Proviso to Sec.7 (3) above had fixed the tenure of the nominated female member only for two years. In addition under the alleged provision, there was also a clear cut bar/restriction for not denominating the same. The Petitioner contended that it was a gross violation of the right to equality and requested before the apex judicial institution for its invalidation.

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173 M. P. Singh (1994). *V. N. Shukla's Constitution of India,* 639. Lucknow, Eastern Book Co.

174 NLR 2004 at 389

175 Proviso to Article 11 contemplated the special provisions to be made by law for the protection and advancement of the interest of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.

The Court observed the alleged Proviso Clause of the Act evidently discriminatory as it had made a clear discrimination of tenure between the nominated members of equal status and put the female members in degradation situation by imposing restriction through the fixation of tenure. The Court expressed that the impugned Clause had made the representative status of women in the secondary position and therefore, clearly discriminatory. The Court further emphasized the importance of the Universal Declaration of Human Rights, 1948, Which has prohibited gender discrimination and Article 2 of the International Covenant on Civil and Political Rights (ICCPR), 1966 which has forbidden any type of discrimination against any person on grounds of race, color, sex, language, religion, political or other opinion whatsoever and the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979, which has taken the objective of eliminating all types of discrimination between women and men and make them equal in every respect. Taking all these things into account, the Court, finally declared Proviso Clause of Sec. 7 (3) of the said Act void as it was inconsistent with Article 11 of the Constitution of the Kingdom of Nepal 1990.

Whether the constitutionality of a bill can be tested by the Supreme Court under its power of judicial review or not, was clearly stated by the Supreme Court in *Advocate Sitaram Agrawal V. HMG, Secretariat of the Council of Ministers.*[176] The Court expressed that only law; legislation or legal provision whatsoever may be the form, can be made the subject matter of judicial review under Clause (1) of Art 88 of the Constitution. Except the subject-matter of law, other subject-matter cannot be tested by the Court to see its consistency or inconsistency with the Constitution or on any other grounds. The Court reasoned that a bill is simply a draft of an Act tabled on or submitted to Parliament and therefore, cannot be treated as law. The Court further stated that a bill requires fulfilling or has to fulfill several procedural requirements to be a law. If it does not fulfill the procedural requirement, it is not at all a law, therefore in such a situation it cannot be the subject-matter of the scrutiny of the Court under Art. 88(1) of the Constitution. The Court did not entertain the Writ

176 NLR 2003 at 604.

Petition of the Petitioner and made a clear distinction between a bill and a law and excluded itself from testing the Constitutionality of a bill.

In Advocate Mira Dhungana V. Secretariat of the Council of Ministers[177] the Petitioner challenged No. 12a of the Chapter relating to Inheritance of the Country Code (Muluki Ain) as it was in contravention of the Constitutional rights to equality guaranteed to the citizen of Nepal under Art 11 of the Constitution. The impugned provision relating to inheritance had made the discrimination between the son and the daughter on the ground of the sex and had put the son in the privileged situation in comparison to the daughter. It had also made discrimination between an unmarried daughter and married daughter so far as the right to inheritance was concerned. According to the alleged provision, a daughter was liable to turn back the property achieved through the process of inheritance to her father's family if she was tied with the bond of marriage.

The Court observed that 'Share' (through partition) and 'inheritance' are two distinct things and are likely to be treated distinctly. They are of different types so far as their legal arrangements, nature, purpose and procedures are concerned. They cannot be treated as the subject-matter of single concept and therefore, they cannot be assimilated on a single footing. The Court further stated that the property achieved through inheritance prior to marriage, if turned back to the original family after marriage, through a legal a legal provision, is contrary to the provisions of convention treaty and agreement in which Nepal has remained a party and ratified the same for execution or implementation. The Court finally ruled that the alleged No 12a of the Chapter on Inheritance of the National code was against the accepted principles of Human rights and in contravention of the right to equality guaranteed under Art 11 of the Constitution, as it had differently treated a son and a daughter in connection with the inheritance of property. The Court declared such provision *ultra vires* the right to equality from the date of its decision and discouraged the practice of gender discrimination.

In Advocate *Chandra Kanta Gyawali V. HMG Secretarial of the Council of*

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177 NLR 2005 at 377.

Ministery, Singh Durbar [178], the Petitioner challenged Clause (1) and (2) of Art. 9 of the Constitution[179]. The plea of the Petitioner was that clause (1) and (2) of Art. 9 was discriminatory as they had provided the grounds for acquisition and termination of citizenship by providing sole importance to the father of a child and had totally ignored the very importance of the mother of a child. The Petitioner contented that it was gross violation of the fundamental right to equality which guarantees the equality of all citizens before the law and does not discriminate between man and women on grounds of religion, race, sex, caste, tribe or ideological conviction or any of these[180].

The Court held that it has the extraordinary jurisdiction under Art. 88 (1) of the Constitution to test the Constitutionality of any law enacted by the legislature or by any other body under the delegation of legislative power, if a law imposes an unreasonable restriction on the enjoyment of fundamental rights conferred by this Constitution, or on any other grounds. The Court stated that by exercising such power of judicial review the Court can declare any law void, if it is inconsistent with the Constitution. The Court further stated that in the existing case it had no jurisdiction to see the Constitutionality of Art. 9 (1),(2) on the ground of right to equality of a citizen guaranteed under Art. 11 of the Constitution. The Court explained the limits of its jurisdiction and emphatically stated that the Court has no power to see the Constitutionality of any Article on the ground of another Article of the Constitution as they carry the equal and independent status and importance. The Court thus highlighted the equal importance of the Article in dispute and did not entertain the plea of the petitioner by restricting itself within the Constitutional limit.

In Sapana Pradhan Malla V. Secretariat of the Council of Ministers[181] the Court highly concentrated upon the Constitutional provisions relating to rights to equality guaranteed under Art 11 and equated the same on grounds of international instruments which are approved and ratified by the Kingdom of Nepal. The Court

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178 NLR 2001 at 615.

179 Article 9 (1): A person who is born after the commencement of this Constitution and whose father is a citizen of Nepal at the birth of a child shall be a citizen of Nepal by decent.

180 Article 11 (1): All citizens shall be equal before the law. No person shall be denied the equal protection of laws.

181 NLR 2005 at 387.

emphatically stressed the importance of the international instruments and said that Nepalese law or any part thereof inconsistent with the provision of a treaty, will be void and the provision of a treaty will prevail over the Nepalese law and such provision of the treaty will be applicable in Nepal like a part of Nepal law. The Court further expressed that since this arrangement is duly accepted by Nepal as a democratic country, therefore, the gradual application of the matters relating to treaty, agreement, protocol or whatsoever, in which Nepal has been a party state and duly ratified the same, cannot be ignored in any way.

The Court, in this case, observed the necessary requirement of a committee of experts to investigate into the subject-matter of laws relating to family matters and property rights and sees whether they are inconsistent with or contrary to, or in contravention of the provision of Art 11 of the Constitution and treaty, or agreement or convention ratified by Nepal. The Court issued a directory order in the name of Prime Minister and the Office of Council of Ministers to form a committee of experts by consulting the National Human Rights Commission, if possible, under the convernorship of the Secretary of the National Human Rights Commission, a representative of the Ministry of Women, Children and the Social Welfare, having the knowledge of the subject-matter in question, a representative of the Ministry of Law, Justice and Parliament affairs, having the knowledge of the concerned subject-matter, a sociologist and a representative of the social organization relating women, to exhaustively see the provisions of law relating to family and property rights raised by the Petitioner to provide concrete solution of the same.

B. The System of Judicial Remedies

In general, the system of judicial remedies is divided into two categories; ordinary private law remedies, such as; damages, injunction and declaration, and public law remedies, such as; certiorari, prohibition and mandamus collectively known as the prerogative remedies. These three prerogative orders are always discretionary. The judicial safeguards in administrative proceedings are certiorari, prohibition, mandamus, quo-warranto and habeas corpus.

A system of judicial remedies for the supervision of administrative action should

strive for three objectives: *comprehensiveness, simplicity*, and *predictability*.[182] It is derived from two main sources; first is a group of statutes which establish an agency and incorporate provisions for the review of its actions, second is a brace of remedies which have developed by the combined action of the common law and statutes consolidating, simplifying, or in some other way reforming the common law remedies. These remedies are certiorari, mandamus, prohibition, habeas corpus, quo-warranto (the so-called prerogative writs), damage suits, the bill in equity, and defense to enforcement proceedings. To them, modern statutes have added the declaratory judgment procedure.[183] These remedies are available where no specific review has been provided for or where the specific review provisions have been drafted in such a way as to make them unavailable for the review of certain decisions of the agency.

The systems of judicial remedies are not similar in all the countries. The same administrative action may be controlled in one state by a specific statutory provision, in another by certiorari, in another by mandamus, in a fourth by injunction, and in a fifth it may be doubtful whether it is subject to control at all. Thus, based on the availability of any relief, the remedies may be both *complementary* and *supplementary.*[184] Nevertheless, all of the systems are based on the system developed by English judges and parliaments. There is a common underlying ideology despite variations in its expression.[185]

Judicial review relates to the granting of the prerogatives orders of certiorari, mandamus and prohibition. These prerogatives powers were historically used by the Council of the King (in England) to supervise the work of justices of the peace who had both judicial and administrative responsibilities within localities. With the growth of the administrative state these supervisory powers, which were now in the hands of judges of the Queen's Bench Division, started to acquire ever-increasing

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182 Louis L. Jaffe, (1965). *Judicial Control of Administrative Action* Little Brown and Company, Bosten Toronto. p. 152.
183 *Ibid*. pp. 152 - 153.
184 *Id.*
185 *Id.*

importance.[186]

i. Certiorari

The writ of certiorari is issued to quash a decision after the decision is taken by a lower court/tribunal. The Supreme Court has emphasized a writ in the nature of certiorari is a wholly inappropriate relief to ask for when the Constitutional validity of a legislative measure is being challenged. Certiorari can be issued even if the *lie* is between two parties. The law has always been, that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine question affecting the rights of subjects and obliged to act judicially. Since the writ of certiorari is directed against the act, order or proceedings of the sub-ordinate court, can issue even if the *lie* is between two private parties.[187]

An order of certiorari quashed a decision of an inferior tribunal, mandamus compelled an inferior tribunal to carry out its duties, and prohibition prevented an inferior tribunal acting unlawfully or in excess of jurisdiction.

Certiorari and mandamus are the two most serviceable of the common law remedies. Certiorari is more or less the progenitor of the modern statutory review. According to the usually stated formula, certiorari lies to review *judicial* or *quasi-judicial* action.[188] Ordinarily it was used to review the actions of lesser judicial officers, but there are very early instances of its being directed to tax levies by drainage or sewer commissioners, action which would today be classified as *legislative*.[189]

In the earlier time, certiorari was limited only to the judicial actions.[190] Some later English and American cases, however, have created refined distinctions between

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186 Andrew Beale (1994). *Essentional Constitutional Law* Cavendish Publishing Limited, London p.77.

187 *Supra Note*, No 1. p.471

188 *Supra Note* No. 182. p. 166

189 *Ibid*.

190 Certiorari, as it finally developed in the English system, was limited to jurisdictional error. It did not and does not now in England reach a mere error of law unless it appears on the face of the record. But for the most part the American common law, if it ever accepted so limited an office for the writ, outgrew the limitation in the 19th century. A remnant of the limitation is, however, preserved for example; in Pennsyvania supreme court which has a broad certiorari and a narrow certiorari i.e. certiorari to test jurisdiction and procedural regularity is derived from the Constitution and cannot be disobeyed by the legislature.

judicial on the one hand and *administrative* or *id: legislative* on the other, thus somewhat impairing the availability of the writ.[191] In the *Cardiffe* Bridge case (K. B. 1700) the Court said: whenever any new jurisdiction is erected, be it by private or public act of parliament, they are subject to the inspections of this court by writ of error, or by certiorari and mandamus.[192]

ii. Prohibition

The object of prohibition is prevention rather than cure, for example the Supreme Court can issue prohibition to restrain a tribunal from acting under an unconstitutional law. Prohibition prevents the administrative bodies/ agencies/ authorities from continuing their proceedings in excess or abuse of their jurisdiction or in violation of the principles of natural justice or infringement of the fundamental rights or fraud or in contravention of the law of the land. It is a writ of right and can be issued in anticipation of any of the grounds mentioned above in certiorari. The only fundamental differences between the two is that certiorari is issued when the administrative authority has already determined the action and handed down the decision; whereas prohibition is issued when the proceedings are in progress to forbid or prohibit the administrative authority\body\ agency from continuing the proceedings[193].

iii. Mandamus

Mandamus is a command issued by a Court commanding a public authority to perform a public duty belonging to its office. Mandamus is issued to enforce performance of public duties by authorities of all kinds. For example, when a tribunal omits to decide a matter which it is bound to decide, it can be commended to determine the questions, which it has left undecided. Although the Court ordinarily is reluctant to assume the functions of the statutory functionaries it will step in by mandamus when the state fails to perform its duty[194].

Mandamus in its most usual definition commands an officer to perform a duty which

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191 *Nakkuda Ali V. Jayaratne* (1951). A.C. 66, 78(revocation of license not judicial because license is merely a privilege).

192 *Supra Note No*. 182. p. 166.

193 *Supra Note No*. 20. p. 142.

194 *Supra Note* 1, p. 464

he has refused to perform[195]. In modern practice, mandamus is often used to review final action of an affirmative character which for one reason or another cannot be reviewed by certiorari or statutory appeal.[196]It is also often said that mandamus is not available unless there is no other adequate remedy at law as, for example, statutory appeal or certiorari. Provided, in Rex V. Barker[197]. Lord Mansfield said of the writ: 'It was introduced to prevent disorder from a failure and defect of the police. Therefore, it ought to be used for all occasions when the law has established no specific remedy, and where in justice and good government there ought to be one.'

Historically, mandamus was one of the prerogative writs. The writ began to develop first under Coke at a time when the common law courts interpreted the age-old actions against the King's officer as deriving from a power in the courts to guarantee the rule of law.[198] The King, through his judges of the King's Bench, exercised a supervisory jurisdiction over his officials. But one view of the American theory of separation of powers it may be argued that since the executive, the legislature and the judiciary are coordinate, neither can command the other.

There are two schools of thoughts in this regard. The first being the pronouncement of Justice Marshall in the *Marbury V. Madision* which deals with the characteristics of the writ of mandamus and perhaps the first case in which the writ of mandamus was applied for the first time in the Constitutional jurisprudence. In this case Marshall held that whenever an officer is *directed by law to do a certain act affecting the absolute right of individual*, the officer may be directed to act. Marshall was, however, careful to point out that the judges would not compel the exercise of functions which are in political in nature. The second being the pronouncements held in *Kendall V. United States*[199] and *Decatur V. Paulding*. In these cases the Taney Court was much more guarded. The majority in the *Kendall case* ordered the postmaster to settle an account because it was a mere ministerial act, but it spoke at great length about the separation of powers. It concluded that mandamus could be issued only where Congress had conferred on an officer a limited power not subject

195 *Supra Note No*. 182. p. 176
196 *Ibid*. p. 177
197 *Id*. p. 178.
198 *Id*. p. 179.
199 *Supra Note No.* 180. p. 178.

to presidential control; and Taney led a dissent not disagreeing with this holding but bases on the proposition that the Courts of the District of Columbia did not in the absence of Congressional grant have the mandamus power since they did not as did the King's Bench, represent the royal prerogative.

The scope of mandamus, however, fairly limited. It is appropriate where jurisdiction is wrongly refused, but not where the authority accepts jurisdiction and then allegedly makes a mistake in the exercise of that jurisdiction.[200] In brief, mandamus may be used to compel proper consideration of whether to exercise a discretionary power, but not, generally speaking to compel the actual exercise of it.

Court cannot issue a writ in the nature of mandamus to the government to bring a statute or statutory provisions into force when according to the statute the date on which it should be brought into force is left to the discretion of government. The ground for the grant of mandamus is the same on which certiorari and prohibition can be issued. However, the conditions for the issuance of mandamus are:[201] Public duty includes the performance of ministerial duty and mandamus shall be issued if there is non-performance of ministerial duty.[202] There must be public or common law duty viz duty which is public in nature created either by a statute, the Constitution, or by some rule of common law.[203] A duty private in nature and arising out of a contract was not enforceable.[204] Now, recently the mandamus has been issued for the specific performance of a contract to advance money.[205] There must be a specific demand for the fulfillment of duty and there must be specific refusal by the administrative authority/body/agency.[206] There must be a clear right to compel the performance of some duty cast on the authority.[207]

Similarly, the purpose of issuing the writ of mandamus may be as follows:

- To enforce the fundamental rights;

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200 Blackston's (1995). Criminal Practices 1572, Blackstone Press Limited.
201 *Supra Note No*. 20. p. 142.
202 *Ibid* p. 142.
203 *Bengal Immunity Co. Ltd.v. State of Bihar*, AIR 1955, SC 661.
204 *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust V. V.R. Rudani,* (1983). 3 SCC 379.
205 *Gujrat State Financial Corp. V. Lotus Hotel,* (1983) 3 SCC 379.
206 *Praga Tools Crop. V. Imanual*, AIR 1969 SC 1306.
207 *Kalyan Singh V. State of U.P.,* AIR 1962 SC 1183.

- To enforce the performance of a statutory duty where a public officer is obliged to perform under the law or Constitution;
- To compel any person to perform his public duty where the duty is imposed by the Constitution or a statute or statutory instrument;
- To compel a court or judicial tribunal to exercise its jurisdiction when it has refused to exercise it;
- To direct a public official or the government not to enforce a law, which is unconstitutional.

iv. Quo-warranto

The writ calls upon the holder of a public office to show to the Court under what authority he is holding that office. The Court may oust a person from an office to which he is not entitled. It is issued against the usurper of an office and the appointing authority is not a party. It protects a citizen from being deprived of a public office to which he has a right. It also cares to entertain pro bono public because they are interested that right persons occupy public office.[208] The conditions for the issuance of quo-warranto are:

- Office must be a public office.
- Public office must be substantive in nature, viz, office which is permanent in character and is not terminable at will.
- The person must be in actual possession of the public office.
- The public office must be held in contravention of law.

It is a discretionary remedy which the court may grant or refuse according to the facts and circumstances of each case. A writ of quo-warranto may, thus, refused where it is vexatious or where it would be futile in its result or where a petitioner is guilty of laches or where there is an alternative remedy for ousting the usurper. Quo-warranto is thus a very powerful instrument for safeguarding against the usurpation of public offices[209].

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208 *P.L. Lakhanpal V. A. N. Ray*, Chief Justice of India AIR 1975 Del. 66.

209 Dr. D.D. Basu, (2005). Commentary on the Constitution of India, India: Universal Book Traders. p. 130.

v. Habeas Corpus

The writ of Habeas Corpus secures the release of a person who is confined by any public or private agency/body/authority illegally or without any legal justification. The great value of the writ is that it enables an immediate determination of a person's right to freedom. Detention may be unlawful if *inter- alia* it is not in accordance with law, law has not been strictly followed in detaining a person, or there is no valid law to authorize detention or law is invalid because it infringes a Fundamental Rights.[210] The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. The writ aims at[211] testing the regularity of detention under preventive detention laws and any other law; securing the custody of minor; securing the custody of a person alleged to be lunatic; securing the custody of a marriage partner; testing the regularity of detention for a breach of privilege by the House; testing the regularity of detention under court-martial; testing the regularity of detention by executive during emergency, etc.

The writ of habeas corpus is, however, not issued in the following cases:[212]

- Where the person against whom the writ is issued or the person who is detained is not within the jurisdiction of the court;
- To secure the release of a person who has been imprisoned by a court of law on a criminal charge;
- To interfere with a proceeding for contempt of court by a court of record or by parliament.

3.2.10 Models of Constitutional Review

(a) American Model of Constitutional Review

In American model there is written Constitution, but there is a marked absence of any specific provisions for judicial review. The Constitution does not expressly provide that the federal judiciary has the power of judicial review. Rather, the power to declare laws unconstitutional has been deemed an implied power, derived from

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210 *Supra* Note 1. p.460.
211 *A.D.M. Jabalpur V. Shivkant Shukla*, AIR 1976 SC 1276.
212 *Supra Note No*.207. p. 127.

Article III and IV.[213]

The provisions relating to the federal judicial power in Article III state:

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have Appellate Jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The Supremacy Clause of Article VI states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . . Executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.

The power of judicial review has been implied from these provisions based on the following reasoning. It is the inherent duty of the courts to determine the applicable law in any given case. The Supremacy Clause says "this Constitution" is the "supreme law of the land." The Constitution therefore is the fundamental law of the United States. Federal statutes are the law of the land only when they are "made in pursuance" of the Constitution. State constitutions and statutes are valid only if they are consistent with the Constitution. Any law contrary to the Constitution is void. The federal judicial power extends to all cases "arising under this Constitution." As

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[213] While the Constitution does not explicitly authorize judicial review, it also does not explicitly prohibit it, as did the Virginia Constitution of 1776. That Virginia Constitution said: "All power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." Virginia Constitution of 1776 via Avalon Project at Yale Law School.

part of their inherent duty to determine the law, the federal courts have the duty to interpret and apply the Constitution and to decide whether a federal or state statute conflicts with the Constitution. All judges are bound to follow the Constitution. If there is a conflict, the federal courts have a duty to follow the Constitution and to treat the conflicting statute as unenforceable. The Supreme Court has final appellate jurisdiction in all cases arising under the Constitution, so the Supreme Court has the ultimate authority to decide whether statutes are consistent with the Constitution.[214]

The Supreme Court's landmark decision regarding judicial review is *Marbury V. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Marbury* was the first Supreme Court decision to strike down an act of Congress as unconstitutional. Chief Justice John Marshall wrote the opinion for a unanimous Court.

The case arose when William Marbury filed a lawsuit seeking an order (a "writ of mandamus") requiring the Secretary of State, James Madison, to deliver to Marbury a commission appointing him as a justice of the peace. Marbury filed his case directly in the Supreme Court, invoking the Court's "original jurisdiction", rather than filing in a lower court.[215]

The constitutional issue involved the question of whether the Supreme Court had jurisdiction to hear the case.[216] The Judiciary Act of 1789 gave the Supreme Court original jurisdiction in cases involving writs of mandamus. So, under the Judiciary Act, the Supreme Court would have had jurisdiction to hear Marbury's case. However, the Constitution describes the cases in which the Supreme Court has original jurisdiction, and does not include mandamus cases.[217] The Judiciary Act therefore attempted to give the Supreme Court jurisdiction that was not "warranted by the Constitution."[218]

Marshall's opinion stated that in the Constitution, the people established a government of limited powers: "The powers of the Legislature are defined and

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214 *Marbury V. Madision*, 5 U.S. at 175–78.

215 *Ibid.*

216 *Marbury*, 5 U.S. at 175–176.

217 Article III of the Constitution says: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases . . . the Supreme Court shall have appellate jurisdiction.

218 *Marbury*, 5 U.S. at 175–176.

limited; and that those limits may not be mistaken or forgotten, the Constitution is written." The limits established in the Constitution would be meaningless "if these limits may at any time be passed by those intended to be restrained." Marshall observed that the Constitution is "the fundamental and paramount law of the nation", and that it cannot be altered by an ordinary act of the legislature. Therefore, "an act of the Legislature repugnant to the Constitution is void."[219]

Marshall then discussed the role of the courts, which is at the heart of the doctrine of judicial review. It would be an "absurdity", said Marshall, to require the courts to apply a law that is void. Rather, it is the inherent duty of the courts to interpret and apply the Constitution, and to determine whether there is a conflict between a statute and the Constitution:

It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If than the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply....

The court adopted the power of judicial review, so American system is entirely based on the judicial system, which is exercised by the entire court system. The Courts do not have power to refuse to enforce a statue on account of its supposed unconstitutionality. Nor can a court declare a statute unconstitutional and void when the objection to it is merely that it is unjust and oppressive, and violates the privileges of the citizen, unless it can be shown that such injustice is prohibited or rights and privileges are guaranteed by the Constitution. The system of judicial

[219] *Marbury*, 5 U.S. pp. 176–177.

review in USA has been most effective than other countries though it is not explicitly mentioned in the US Constitution, which can be seen in the case of *Marbury V. Madison* (1803). The model is the *"decentralized"* type, which gives the power of control to all the judicial organ of a given legal system.

(b) Continental Model of Constitutional Review: European model is of centralized type, which confines the power of review to one single judicial organ.[220] It is common in Europe to differentiate among categories of litigation (administrative, civil, criminal, commercial etc.) and to have them decided by different courts. The typical civil law system contains separate sets of courts for administrative and private law matters. Constitutional litigation too, is distinguished from other litigation and is dealt with separately. In Europe, justifications for Judicial review of legislation other than that of logical necessity were put forward in particular by way of response to the familiar argument that judicial review/activism of legislation is "*anti-majoritarian*" or "*anti-democratic*" process.[221]

Judicial control of legislative act appeared in Europe after the First World War in the Austrian Constitution of 1920 and, to a more limited extent, elsewhere. Its first great expansion came, however, after the Second World War, most notably in Austria, in Germany and Italy. [222] In France, by contrast, it was almost certainly not the intention of the Constitution of 1958 to introduce judicial review.

The Federal Republic of Germany, which has had the Constitution since shortly after the Second World War, gave it additional scope by a Constitutional amendment in 1969. In France, by contrast, it was almost certainly not the intention of the Constitution of 1958 to introduce judicial review.[223] And its existence in France today is largely due to the land mark decision of *Conseil Constitutional* of 16 July 1971; what may be seen as its confirmation in the constitutional amendment of 1974 is implicit rather than explicit.

In Italy and Germany the judicial power to review legislation not only exists but is

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220 Louis Henkin and Albert J. Rosenthal (1990). *The Constitutionalism and Rights: The Influence of the U.S.A. Constitution* 40-41, COLUMBIA University press, New York p. 222

221 M.A. Glendon (1985). M.W. Gordon and C. Osakwe *Comparative Legal Traditions*, West Publishing Company p. 218.

222 *Ibid.*

223 The Fifth Constitution of The Republic Of France (1985).

actively exercised by the courts. In this context, so far as judicial review is concerned, France and England would appear to fall within one group of countries where its existence in a technical sense is denied, while Italy, Germany and the U.S.A. come within another group where judicial power to review legislation is actively exercised by courts.

Judicial control of the constitutionality of legislation does not mean only judicial control of the constitutionality of parliamentary legislation; it may extend to or be restricted to subordinate legislation. Nevertheless, practices of the most countries are limited within the judicial control of the acts of the legislature.

3.2.11 Model of Constitutional Review in Nepal

Nepalese Model of Constitutional Review is close to that of American Model, but there are some new and specific provisions for judicial review in Nepalese Constitution that has made Nepal different from America. The Supreme Court has extra-ordinary jurisdiction for the purposeful justice with power of judicial review in Nepal. The Constitution of Kingdom of Nepal 1990 Article 88 and the the Interim Constitution of Nepal 2007, Article 107 has vested the exclusive jurisdiction to the supreme court to determine all questions relating to the Constitutional validity of laws and to issue order for the settlement of any Constitutional or legal question involved in any dispute of public interest or concern. The present Nepalese Constitution has explicitly mentioned the provision of public interest litigation which is very much latest to that of Indian and American Models. In India and America there is a practice of PIL, but they have not explicitly mentioned the same in the Constitution. The Constitution has left the unlimited ground of *locus standi.* Any Nepalese citizen can file a writ petition asking the court to declare the legislative act void to the extent of inconsistency with the Constitution.

The nature and ambit of the power of extra-ordinary jurisdiction of Supreme Court is both administrative (i.e. Superintendence jurisdiction) and judicial (i.e. judicial review). The court shall exercise this power in a very wide way, for example;

- To prevent grave miscarriage of justice;
- To prevent flagrant violation of law;

- To prevent violation of jurisdiction, namely, lack of jurisdiction, excess of jurisdiction, abuse of jurisdiction;
- To prevent violation of the principles of natural justice;
- To prevent error of law apparent on the face of record and so on.

Article 107 of the Constitution, in fact, has guaranteed the right to approach to the court in case any right of a person, including the rights other than the basic rights, is violated by any public authority.

It is normally a pattern of the written Constitution that under which the courts have generally the grounds for judicial review in the three conditions;

- If a statute or executive action is repugnant to the Constitution.
- If a statute or executive action violates the fundamental rights that are guaranteed in Constitution.
- If there is a legal question involved in any dispute of public interest.

A. Model of Constitutional Review (the Proposed draft Report of CA 2014)

The Provincial High/Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal rights for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such right or settle the dispute. For these purposes, the Provincial High/Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writes including the writes of habeas corpus, mandamus, certiorari, prohibition and quo warranto.[224]

Constituent Assembly has purposed the exclusive jurisdiction to the Provincial High

[224] Conclusion Report on agreed subjects of Judicial System Committee, Constitutional Record Study and concluding Committee, (2014) of Constituent Assembly, Singhadarbar, Kathmandu.

court/ the supreme court to determine all questions relating to the Constitutional validity of laws and to issue order for the settlement of any Constitutional or legal question involved in any dispute of public interest or concern. Provided that, except on the ground of absence of jurisdiction, the Provincial High/ Supreme Court shall not, under this clause, interfere with the proceedings and decisions of the Federal as well as Provincial Legislature concerning violation of its privileges and any penalties imposed therefore.

3.3 Judicial Review and Constitutional Doctrine

3.3.1 Doctrine of Severability

The doctrine of severability is a solution to one important question of constitutional interpretation. In deciding the constitutional validity of any law the court needs to decide which provision(s) of the law is inconsistent part deserves to be declared void and not the entire statute. The principle of separating inconsistent part with the consistent part is known as doctrine of severability. This doctrine says that it is to be saved if a portion of a particular provision which is not in infringement of a Constitutional provision and is separable. This doctrine has been founded on considerations of equity and prudence. If the valid and invalid parts are so inextricably mixed up that they cannot be separated the entire provision is to be declared void. In determining the legislative intent the court may take into account the history, object, title and also preamble of the Constitution. The court in Nepal has applied this doctrine in Bal Krishna case and others.[225]

The supreme court of India discussed the doctrine of severability in greater detail in R.M.D.C. V. Union of India[226] and laid down the following rules:

- If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in it's entirely. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.

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225 *Bal Krishna Neupane V. HMG,* NLR 1993 at 450.

226 AIR 1957 SC 628.

- In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.
- Even when the provisions which are valid or distinct and separate from those which are invalid, if they all from part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Likewise, when the valid and the invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature then also it will be rejected in its entirely.
- The severability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different section; it is not the form but the substance of the matter that is material and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.
- If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void as otherwise it will amount to judicial legislation.

In determining the legislative intention on the question of severability it will be legitimate to take into account the history of the legislation, its object, title and the preamble to it.

3.3.2 Doctrine of Harmonious Interpretation

Doctrine of Harmonious Interpretation emphasizes on that the Constitution should be harmoniously interpreted. While interpreting one article of the Constitution, other article should not be made worthless. The Constitution should be so interpreted by giving equal value to all its parts. The presumption is that no conflict or repugnancy

was intended between the various provisions of the Constitution. Accordingly, it has been laid down that if certain provisions in the Constitution appear to be in conflict with each other, these provisions should be interpreted so as to effect a reconciliation between then so that, if possible effect could be given to all. Our court has held this principle in parliament dissolution case.

3.3.3 Doctrine of Common Right and Reason

This doctrine was evolved by chief justice Coke in England. It had its foundation in Magna Charta of 1215 A.D., which was a document imposing limitations on the monarchical powers. The whole substance of the doctrine is that a law or custom which is arbitrary and against reason is void. Coke enunciated this doctrine in Bonham's case in 1910.[227]

3.3.4 Doctrine of Pith and Substance:

"*Pith and Substance"* means true nature and character. This doctrine was evolved by the Privy Council to ascertain the Constitutionality of Canadian and Australian statutes regarding the violation of the rules of the distribution of powers.[228] This doctrine relates to the violation of Constitutional delimitation of legislative powers in a federal state. Under it the court ascertains whether the alleged encroachment is merely incidental or substantial.

3.3.5 Doctrine of Fraud on the Constitution

This doctrine means that if the value, spirit, letter and principles of the Constitution turn out weak, then it will be fraud on Constitution. In other word, if any legislative act is done that the Constitution does not permit to do shall be said as fraud on the Constitution. The distinction between the fraud on power and the fraud on Constitution is that the former is applicable when the legislature has power to enact but does not exercise that power. The latter is applicable when the legislature has no

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227 Dr Bonham, 8 Rep. 114 a 1610 (UK).

228 Dr. Chakradhar Jha (1974). *Judicial Review of Legislative Acts,* India: N. M. Tripathi Pvt. Ltd. p. 439.

power, but in spite of it makes enactment in pretence of its power. Nevertheless, the result in both cases is the same and the legislative enactment is void.[229]

In the context of Nepal, doctrine of fraud was attracted in the endless extension of the term of the Constituent Assembly. The court has power to check on the procedural misuse of the power by the House as the House gets such power delegated from the Constitution.

3.3.6 Doctrine of Constitutional Silences or Implied Restriction

Constitution has sometime embodied certain restrictions and limitations, which can be interpreted by the court of law and they may be called Constitutional silences or implied restrictions. In Nepal, the court has explained the doctrine of implied restriction in the parliament dissolution II case, and others where the court held that there was implied condition for Prime -Minister to exercise the power of Art. 53 (4).[230]

3.3.7 Doctrine of Political Question

Generally, judicial review is principally limited within the legal or Constitutional questions. Political, directive principle cannot come under the scrutiny of judicial review. The recognition of a foreign state, the matters relating wars and treaties etc. are instances of political questions in respect of which the court generally avoids deliberation. The court does not decide political question but in a broader and realistic view, the court decides many political matters. For example in Nepal, the court has reviewed the litigation regarding political matters.

The Tanakpur Barrage,[231] parliament dissolution,[232] and Radheshyam,[233] cases are its unique examples, where the court has also held the justification of political matters.

3.3.8 Doctrine of Natural Justice

The doctrine of natural justice is ancient conception in the history of human

229 *D.C. Wadha V. State of Bihar*, AIR 1987 SC 579.
230 *Sher Bahadur Deuwa V. Man Mohan Adhikari* (1995).
231 *Bal Krishna Neupane V. Girija Prasad Koirala,* (1992). Supreme Court Bulletin, No. 11.
232 *Hari Prasad Nepal V. Girija Prasad Koirala*, NLR (1994).
233 NLR (1991).

civilization. This doctrine finds its place in Magna Charta in 1215 A.D in England. In the seventeenth century chief justice Coke interpreted on Magna Charta, where it was held that justice cannot be sold, justice or right cannot be denied and justice or right cannot be deferred. In America this doctrine became prominent due to the evolution of "due process" in the judicial arena and it was specifically brought into operation by the 14th amendment of 1868. Nepal has also embodied this doctrine in its Constitution and has been enforcing it particularly through writs of certiorari.

3.3.9 Doctrine of Inherent Power

The Doctrine of Inherent Power concerns whether the executive can ever assume Constitutional making or legislative function even in the case of any national urgency. The Supreme Court of America held that the president in no case can assume legislative function when it is not provided in the Constitution. In India, the Supreme Court has also settled the point decisively that the president of India being the executive head has no power to exercise Constitution making or legislative function under inherent power unless there is specific provision for it in the Constitution.[234] In Nepal, the court has also tried to adopt the similar idea to that of India and America in this regard.[235]

3.4 Judicial Review and Concept of Unconstitutionality

The word unconstitutional is used with reference to the invalidity of the legislative Acts and also with reference to the invalidity of the executive and administrative orders and actions. The term unconstitutional in Nepal refers to the invalidity of the legislative Acts and also to the invalidity of the executive action. Art 107 of the Interim Constitution of Nepal has vested the exclusive powers to the supreme judiciary of Nepal to determine all questions relating to Constitutional validity i.e. legislative Acts or administrative actions.[236] A statute which is not within the scope of legislative authority, or which offends some Constitutional restriction or prohibition is unconstitutional and hence invalid.

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234 *Madhav Rao Sindia V. India* AIR 1971 SC 530.
235 *Radheshyam case*, NLR 1991.
236 *The Interim Constitution of Nepal* 2007, Article 107.

Unconstitutionality can be determined on the following ground:

- Due to legislative incompetence arising out of the distribution of powers
- Due to delegation of essential legislative function by the legislature to the executive
- Due to violation of the fundamental rights guaranteed in the Constitution
- Due to the violation of other Constitutional restrictions and limitations affecting legislative competence and jurisdiction
- On account of infringement of the principle of natural justice

For the determination of the question of unconstitutionality of a legislative Act it is vital and has great relevance to the method and approach to make distinction between the two kinds of unconstitutional laws; namely the law which is Ultra-vires, and the law which is repugnant. The doctrine of ultra-vires with reference to the legislative Act is that the Act is enacted in excess of the powers possessed by the particular legislature.[237] This doctrine proceeds on the basis that the legislature has limited powers under the Constitution. In the case of repugnancy the law is in respect to any matter assigned to the legislature, but its provisions disregard Constitutional prohibitions. Here, once the provisions are removed, the law will become effective without reenactment.[238]

3.4.1 Duty and Obligation of the Court: When Unconstitutionality is raised

The Constitutionality of a legislative Act can be determined by the court to decide the case.[239] The court has first to determine whether the legislature in enacting the impugned statute had legislative competency according to the distribution of legislative powers. The Court has also to consider if the statute has infringed fundamental rights guaranteed in the Constitution. In addition, if it be a statute having extra-territorial operation, it has to be considered whether it possesses territorial nexus.[240]

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237 *P. Janardan V. India*, AIR 1970 Mus. 171.
238 *Sundraramier Co. V. state of Andnra Pradesh,* AIR 1958 SC 468.
239 *Bal Krishna Neupane V. HMG* NLR 1992.
240 *State of Bombay V. R.M.O. Chamarbaugwala*, AIR 1957 SC 699.

The Indian supreme court has laid down the following tests to determine the Constitutionality of a legislative Act;

i. Whether the legislative Act is within the legislative power assigned to the particular legislature.
ii. If the Act is passed by a state legislature and its operation extends beyond the boundaries of the state, in that case whether it has territorial nexus.
iii. If there is any other Constitutional restrictions or limitations which put fetters on the legislative power of such legislature.[241]

In India, the court takes the reference of Constitutional grounds in scrutinizing the Constitutionality of the statute. But there is lack of specific guidelines in this regard. The court has to expound the essential rules for the test of the statute. The judicial function of assessing the Constitutional legitimacy of legislation is both delicate and responsible.[242] To declare a statute unconstitutional places an onerous burden on the courts, for a statute is enacted by an elected legislature which is conversant with the needs and aspiration of the people. The courts, therefore, don't hold legislation unconstitutional in a light vein. They have to draw a balance between the "felt necessities of the time" and Constitutional fundamentals. As has already been stated, the courts impose on themselves a good deal of self-restraint in performing their task of judicial review of legislation. The courts will hold a statute unconstitutional only as a last resort. The courts do not cavil at legislation but go to great lengths to uphold legislation impugned before them.

A. Effect of Unconstitutionality

The law has no effect and is unenforceable, if a law is enacted in violation of Constitutional provisions. In an American case, regarding the effect of unconstitutionality, the court held that an unconstitutional Act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is in legal contemplation, as inoperative as through it has never been passed.[243] A similar

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241 *Ibid.*
242 M.P. Jain, (2003). *Indian Constitutional Law*, India: Wadhwa and Company. p. 856.
243 *Norton V. Shelby county*, 118 V.S. 425, 442 (1886).

theme is present in certain observations of Mahajan J. in Keshavan case[244], where the court held that an unconstitutional statute is void since its inception and anything done under it is void and illegal; even convictions made under it are set aside; anything under it, whether closed, completed or inchoate is wholly illegal and the person affected is entitled to relief in one shape or another.

Despite of this, the effects of unconstitutionality can be listed in a precise from[245];

- The virtual effect thereof is that the decision operates as a judgment inert against all persons who many seek relief subsequently and it is not necessary for them to establish the unconstitutionality of the statute again.
- The courts are bound to ignore an unconstitutional law.
- As the doctrine of severability applies, the invalid portion is to be ignored when the law is declared invalid partially.
- If the unconstitutional portion is severable from the Constitutional, then only the former is affected; the statute is not regarded unconstitutional portion stands.
- If a person is prosecuted for contravening a section, a part of which has been decaled unconstitutional onus is cast on the accused to prove that his case falls under the unconstitutional portion.

In Indian context. The court in Sundaramier[246] applying the doctrine of eclipse held that the portions of a statute declared bad under Art 286 were revived when the Art was amended so as to remove the Constitutional quencher. But this principle is not applied to a statute which may be invalid because of excessive delegation. A law was challenged before the court on this ground. Pending the court's decision, an amending Act was enacted to remove the defect. The Court ruled by a majority that when an Act is bad on the ground of excessive delegation it is void and still-born and it cannot be revived by an amending Act seeking to remove the vice. It means that the whole Act has to be re-enacted in the modified form.[247]

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244 *Keshavan Menon V. India*, AIR 1951 SC 128.
245 *Supra* Note No. 7 pp. 96-97.
246 *Sundaramier V. India*, AIR 1958 SC 468.
247 *Shama Rao V. Union Territory,* AIR 1967 SC 1480.

Chapter - IV

Concept and Development of Human Rights Jurisprudence

4.1 Introduction

Human Rights may be regarded as those fundamental and inalienable rights which are essential for life as human beings. Human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex, etc. simply because he or she is human beings. Human rights thus, those rights which are inherent in our nature and without which one cannot live as human beings. The United Nations Charter *reaffirmed faith in fundamental human rights, and dignity and worth of the human person* and committed all member states to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[1] *"Whereas recognition of the inherent dignity of the equal and inalienable rights of all members of the human family is the foundation of the freedom, justice and peace in the world".*[2] We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Everyone has the right to life, liberty and security of person.[3]

Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents, and conscience and to satisfy our physical, spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection. "Human rights are sometimes called fundamental rights or basic rights or natural rights. As fundamental or basic rights they are rights which cannot, rather must not, be taken away by any legislature or any act of the

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1 *Preamble of the UN Charter.*
2 *Preamble of UDHR.*
3 *Ibid,* Art 3.

government and which are often set out in a Constitution[4]. Human rights are also equal rights, they are inalienable rights,[5] and are also universal rights.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups. *"Human rights are not just abstract values such as liberty, equality, and security. [6] They are rights, particular social practice to realize those values. Human rights thus should not be confused with the values or aspirations underlying it or with enjoyment of the object of the rights".*

John Locke was the chief exponent of natural rights theory. According to John Locke, human beings existed in a state of nature where men and women were in a state of freedom, able to determine their actions and also in a state of equality. Locke further imagined that in such a state of nature, no one was subjected to the will or authority of another. Subsequently, in order to avoid certain hazard and inconvenience of the state of nature they entered into a contract, some sort of social contract, whereby they mutually agreed to form a community and set up a body of politic. But they retained certain natural rights, such as, rights of life, liberty and property. [7] It was the duty of the government to respect and protect the natural rights of its subjects.

According to John Rawls "Justice is the first virtue of social institutions." In his view, the role of justice is crucial to the understanding of human rights. Indeed human rights are an end of justice. The principles of justice provide a way of assigning rights and duties in the basic institutions of society and also define the appropriate distribution of the benefits and burdens of social cooperation.[8] The

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4 M.S. Rajan (1982). *The Expanding Jurisdiction of the United Nations,* Oceana Publications Bombay : p. 117.

5 Jack Donnelly (2005). *Universal Human Right in Theory and Practice* (2nd ed.) p. 10.

6 *Supra* Note No.5.

7 Dr. S.K. Kapoor (1990). *Human Rights under International Law & Indian Law* (4th ed.). Nehru Road, Allahabad, India: Central Law Agency. p. 4.

8 *Ibid.*

general conception of justice behind the principles of justice is one of fairness. The concept of fairness throughout in theories based on justice, the concepts of fairness and justice help to determine all social primary goals, such as, liberty and opportunity, income and wealth and leases of self -respect which are to be distributed equally unless an exception is made for the benefit of least forward.

Every government had to perform its functions through three branches i.e., legislature, executive and judiciary. Each branch performs only the function which is assigned to it. It never encroaches the jurisdiction of other organs rather each of them check each other and compel only to perform their own tasks. This functional aspect of the government is dealt through the doctrine of the separation of powers and checks and balances. The main objective of the doctrine is to regulate the organs of the government in a positive direction and to protect and preserve political liberty. M.J.C. Vile has given a reasonable interpretation of the doctrine;

'It is essential for the establishment and maintenance of political liberty that the government be divided into three branches of departments, the legislature, the executive and judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive or judicial. Each branches of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.[9] In this way, each of the branches will be a check to others and no single group of people will be able to control the machinery of the state.

Most of the constitutions of the world have accepted the doctrine and are using it as an effective technique of democratic process. That is the reason the doctrine of the separation of powers with checks and balances is considered as an important characteristics of western liberal constitutionalism. The best expositors of the doctrine are the Locke and Montesquieu and the United States is the frontrunner follower of the doctrine. In the words of Ogg and Ray;

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[9] M.J.C. Vile (1967). *Constitutionalism and the Separation of Powers*. Oxford: Clarendon Press. p. 13.

'…no feature of the American government system is more characteristic [10] than the separation of powers, combined with precautionary checks and balances.'

4.2 Historical Development of Human Rights

Human rights has a long history, but the rules and machinery for the legal protection of the rights and machinery for the legal protection of the rights and freedoms of the individual are to a large extent, a post Second World War development. Almost all the international and regional instruments for the protection of human rights have been enacted and brought into existence only during this period. Human rights are those minimal rights, which every individual must have against the state or other public authority by virtue of his being a member of the human family irrespective of any other consideration. Though the concept of human rights is as old as the ancient doctrine of natural rights founded on natural law, the expression human rights is of recent origin, emerging from post Second World War international charters and conventions.[11]

The dignity and rights of man, a dominant theme in the political philosophy of the 18th century, flowered into practical significance with such instruments such as the Virginia Declaration of Rights, 1776; the American Declaration of Independence 1776; the French Declaration of the Rights of Man and of the Citizen 1789; [12] and of more lasting importance the series of Amendments to the United States Constitution adopted in 1791 as the American Bill of Rights.

4.2.1 The International Bill of Human Rights

At the 1945 San Francisco Conference held to draft the Charter of the United Nations, a proposal to embody a "Declaration on the Essential Rights of Man" was put forward, but was not examined because it required more detailed consideration than was possible at the time. The Charter clearly speaks of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 1, para.3). The idea of

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10 J.C.Johary. (1986). Comparative Politics. (2nd ed.). India: Sterling Publishers (Pvt.) Ltd. p. 601.

11 Basu, DD (2003). *Human Rigts in Constitutional Law*; Wadwa Law House, Nagpur. p. 8.

12 J.A. Andrews and W.D. Hires (1987). *Key Guide to Information Sources on the International Protection of Human Rights* p. 117.

promulgating an "international bill of rights" was also considered by many as basically implicit in the Charter.

The International Bill of Human Rights [13]is an informal name given to one General Assembly resolution and two international treaties established by the United Nations. The International Bill of the Human Rights comprises of the following:

- The Universal Declaration of Human Rights (adopted in 1948),
- The International Covenant on Civil and Political Rights (1966) with its two Optional Protocols,
- The International Covenant on Economic, Social and Cultural Rights (1966).

The two covenants entered into force in 1976, after a sufficient number of countries had ratified them.

In the beginning, different views were expressed about the form the bill of rights should take. The Drafting Committee decided to prepare two documents: one in the form of a declaration, which would set forth general principles or standards of human rights; the other in the form of a convention, which would define specific rights and their limitations. Accordingly, the Committee transmitted to the Commission on Human Rights draft articles of an international declaration and an international convention on human rights. At its second session, in December 1947, the Commission decided to apply the term "International Bill of Human Rights" to the series of documents in preparation and established three working groups: one on the declaration, one on the convention (which it renamed "covenant") and one on implementation.[14]The Commission revised the draft declaration at its third session, in May/June 1948, taking into consideration comments received from Governments. It did not have time, however, to consider the covenant or the question of implementation. The declaration was therefore submitted through the Economic and Social Council to the General Assembly, meeting in Paris.

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13 *The International Bill of Human Rights* (1945).OHCHR Retrieved Jan. 2013,from http://www.ohchr.org.

14 *Ibid.*

a. British Magna Carta 1215

Magna Carta is known as a mile-stone in the field of human rights and justice. Magna Carta notes that- To known will we deny, to known will we sell or delay, right or justice. The Magna Carta is a document that King John of England (1166-1216) was forced into signing[15]. King John was forced into signing the charter because it greatly reduced the power he held as the King of England and allowed for the formation of a powerful parliament. The Magna Carta became the basis for English citizen's rights. The main objectives of the Magna Carta are; the church was to be free from royal interference, especially in the election of bishops, no taxes except the regular feudal dues were to be levied, except by the consent of the Great Council, or Parliament, the right to due process which led to Trial by Jury, all weights and measures to be kept uniform throughout the realm.

b. French Declaration of the Rights of Man 1789

Article 6 of the French Declaration of the Rights of Man stated that Law is the expression of the general will. All citizens have the right to take part personally, or by their representatives, and its formation. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, are equally eligible to all public dignities, places, and employments, according to their capacities, and without other distinction than that of their virtues and talents. Article 7 mentioned that No man can be accused, arrested, or detained, except in the cases determined by the law and according to the forms it has prescribed.[16] Those who procure, expedite, execute, or cause arbitrary orders to be executed, ought to be punished: but every citizen summoned were seized in virtue of the law ought to render instant obedience; he makes himself guilty by resistance.

c. American Bill of Rights 1789

The Bill of Rights is the collective name for the first ten amendments to the United States Constitution. These limitations serve to protect the natural

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15 The Magna Carta (1215) ,The Middle Ages encompass one of the most exciting periods in English History. Retrieved Jan. 2014 from http://www.middle-ages.org.uk/magna-carta.htm

16 Article 6 and 7 of French Declaration of Right of Man and the Citizen, (1789).

rights of liberty and property. [17] They guarantee a number of personal freedoms, limit the government's power in judicial and other proceedings, and reserve some powers to the states and the public.

d. The Geneva Convention 1864

The 1864 Convention was signed by twelve nations. The United States signed the treaty in 1882 by President Chester Arthur and was ratified by Congress; the U.S. was the thirty-second nation to sign the agreement. The second Convention extended protection to wounded combatants at sea and shipwreck victims. A third Convention was convened to deal with the protection of prisoners of war in 1929. [18] The fourth Geneva Convention, signed in 1949, reaffirmed the principles of the first three agreements and included in addition a section covering the protection of civilians during wartime.

The basic principles of Geneva conventions are reposing on the respect of the human being and are respecting its dignity. Individuals, who do not take direct part in hostilities as well as individuals, cannot take part in these actions due illness, wound, captivity or other reasons, are entitled to be respected and protected against conflicting sides' military operations' consequences without any unfavorable distinction whatever. Additional protocols are extending action field, concerning it to any individual, involved in a military conflict[19]. Moreover, these protocols oblige warring sides and combatants not to attack civilians and civil objects as well oblige to guarantee the providing of military operations in compliance with the generally accepted humanitarian law.

4.3 Definition of Human Rights

It is very vague to define human rights in a single word or giving a universal definition of human rights is not possible in human rights jurisprudence. There are definitions of human rights made by scholars:

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17 *United States Bill of Rights*(1789) Retrieved Jan.2013 fromhttp://en.wikipedia.org/wiki/

18 *Geneva Convention (1864) History News Network.* Retrieved Jan. 2013 from http://hnn.us/articles/586.html

19 *International Committee of the Red Cross,*Retrieved Jan. 2013 from http://www.redcross.lv/en/conventions.htm#geneva

According to John Montogomery, The matters of human rights are the matter of International concern.[20] Anatoly Movchan says- human rights are inconceivable[21]…rights and freedoms…which are provided by constitutions.

Dr. Dill Raman Regmi says that Human Right is the rights to making voice for struggle against the suppression and power of states; it was created in course of seeking equality and justice.[22]

The Declaration of American Independence, 1776, notes that- we hold these truths to be self- evident that all men are equally created and endowed by their creator with some inalienable rights-life, liberty and pursuit of happiness…government is constituted to secure these rights[23] …it is the rights and duty of people to abolish such rights.

Human rights are universal norm dealing with how people should be treated by their government; it is a moral and legal rights and high priority norms. Human rights are *ipso facto* protected by domestic and international law.

M. H. Beg,[24] (Mirza Hameedullah Beg was the 15th Chief Justice of India) former Chief Justice of India has defined human rights as follows:

"Human rights imply justice, equality and freedom from arbitrary and discriminatory treatment. These cannot be subordinated to the interests of the rulers. No one can be subjected to coercion for holding particular religious beliefs. The doctrine of national sovereignty cannot justify violation of human rights."

Dr. Justice Nagendra Singh[25] of International Court of Justice has defined Human Rights as follows:

"Respect for the human personality and its absolute worth, regardless of colour, race, sex, the very foundation of human rights. These rights are essential for the adequate

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20 Vladimir Kartashk (1989). *Human Right- what we argue about,* P. 40, progress publisher, Mascow. p. 29.

21 *Ibid*.

22 *Manab Adhikar Bulletin* (1993). Volume 5, Prakashak Manab Adhikar Samrakshan Kendra, Nepal p. 10.

23 Declaration of American Independence 1776.

24 Dr. Gokulesh Sharma, (1995). Human Rights and Legal Remedies, Deep & Deep Publications Pvt. Ltd. F-159. Rajouri Garden, New Delhi - 110027. p. 14.

25 *Ibid*. p. 15.

development of the human personality and for human happiness and progress. Human rights may therefore be said to be those fundamental rights to which every man or women inhabiting any part of the world should be deemed entitled merely by virtue of having been born a human being."

Basic human rights are the concept of non-discrimination. But if we look into the pages of the history of mankind there has always existed and continues to exist a wide gap between precept and practice, between abstract principles and their application or implementation. Human rights have been no exception but this has not deterred humanity from repeating and reiterating the principles which govern human rights.

According to Sir Hersch Lauterpacht, a noted protagonist of human rights and one of the most eminent international law jurists of post- world war era, observed,[26] "The protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international." Indeed, characteristic features of the post-world war international relation represents a revolutionary development."

"The question of human rights if looked at somewhat unconventionally is, in fact, an admixture of political expediency and legal realism marked with humane traditions. In real sense they are not the rights of an individual not be the society. However, there is nothing in itself to be derogatory in the notion of dependence. [27] There is dependence at all the levels of human existence".

4.3.1 Principle of Human Rights

Human rights have its own principles and norms that help to enable and to protect human rights and to promote human dignity for all man kinds without any type of discriminations. The principle of human rights is considered to be the international customary law also.[28] The emerging principle of human rights can be noted as followings:

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26 *Ibid*. p. 15.

27 *Supra* Note No. 25.

28 Human Rights Principles: Advancing Human Rights, UNFPA .Retrieved on Jan. 2013. from www.unfa.org/rights/principles.htm

a. Universal

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[29] Human right is basic right of people which is guided by the principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, resolutions.[30] The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.

b. Inalienable

People's rights cannot be taken away at any cost. It is inherent to all human beings by birth."Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[31] Human rights are fundamental right of people which is inevitable for human being; therefore they should not be taken away, except in specific situations and according to due process of law. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court law.

c. Indivisible and Interdependent

Political, civil, social, cultural and economic rights are equally important. They are indivisible and interdependent. One cannot be fully enjoyed without the others."Everyone has the right to life, liberty and security of person"[32]. Human rights means right of individual so that all human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement

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30 M.R. Upadhaya (2013). *Rights, Pratyush Publication*, Exhibition Road, Kathmandu. p.176.
31 *The Preamble of UDHR, 1948.*
32 *The Article 3 of UDHR, 1948.*

of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

d. Equality and Non-discrimination

All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, suffer discrimination on the basis of race, color, ethnicity, gender, age, language, sexual orientation, religion, political and other opinion, national, social and geographical origin, disability, property, birth or other status as established by human rights standards. All are equal before law and entitled to have equal protection of law. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[33] Therefore non-discrimination is a cross-cutting principle in international human rights law. This principle is followed by all the major human rights convention and which is central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Discrimination against Women. [34]"Everyone has the right to standard of living adequately for the health and well being of himself and his family, including food, clothing, housing, medical care and the necessary social services and the right to security in the event of the unemployment, sickness, disability, old age and other lack of livelihood in circumstances beyond ones control.

e. Participation and Inclusion

All people have right to participate in and access to information relating to the decision-making process that affect their lives and well beings[35]. Today, this principle has become the accepted norms of inclusive-democracy in the world.

f. Rights and Obligation

Right and duties are always correlated where there is duty, there is right, human right entail both rights and obligations. States assume obligations and duties under

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33 *The Article 2 of UDHR, 1948.*

34 K.K. Mathew (2009). *Democracy, Equality and Freedom* Estern Book Company, the University of California. p. 230.

35 *Ibid.*

international law to respect, to protect and to fulfill human rights. The obligation to respect means that State must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires State to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.[36] At the individual level, while we are entitled to our human rights, we should also respect the human rights of others.

g. Accountability and rule of law

State and other duty-bearers are responsible for the treatment of human rights. All states are obliged to respect human rights and human dignity in accordance with the rules and procedures provided by law. Individual civil societies, the media and international community play vital role in holding government accountable for their obligations to uphold human rights and human dignity.[37] So, accountability and rule of law are the means to enhancing access to human rights and full realization of human rights are the ends.

4.4 Human Rights Jurisprudence

Human Rights jurisprudence is the holistic study of human rights and its universally accepted principles, which emphasizes to enable and to ensure human rights without any kind of discrimination for all human beings. So there are some divisions of human rights that help to promote and enable human rights into three generations. The divisions of human rights are divided into three major categories or into three generations. The term three generations was initially proposed in 1979 by the Czech jurist Karel Vasak at the International Institute of Human Rights in Strasbourg. His division follows the three watchwords of the French Revolution: Liberty, Equality, and Fraternity. These rights are included in the UDHR 1948. However at present this generation approach of human rights carry no particular significance. Although three generations of human rights are as follows:

First generation of Human Rights

Civil and political rights are known as the first generation of human rights. First-

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36 *Id.*

37 *Id.*

generation of human rights, are often called "blue" rights, deal essentially with liberty and participation in political life.[38] It belongs to civil and political rights[39], such as;

- Freedom of speech and expressions,
- Freedom of assembly,
- Right to trade union
- The right to a fair trial,
- Freedom of religion.
- voting Rights,

Basically first generation human rights strongly advocates the individual's political and civil rights. The United States Bill of Rights and the Declaration of the Rights of Man and of the Citizen in the Magna Carta of 1225 and the Rights of Englishmen include in the first generation of human rights because these documents focus on the people's political and civil rights. [40] First generation rights are reflected in French Declaration of the Rights of Man and of the Citizen in the 18th Century, International Covenant on Civil and Political Rights (ICCPR) 1966, and Article 3 to 21 of the Universal Declaration of Human Rights 1948.

The Second Generation of Human Rights

Second generation of human rights are directly related with fundamental economic, social and cultural rights because after the Second World War the living standard of the people was very poor, only political and civil rights were not enough for the people. [41] These types of rights are related to equality and began to be recognized by the governments after the First World War. They are economic, social and cultural in nature such as;

- Right to food, and livelihood,
- Right to social security, and unemployment benefits,

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38 Three generation of human rights (1979) Retrieved on Jan (2013) from http://en.wikipedia.org/wiki/

39 *Ibid.*

40 *Supra* Note No. 35.

41 *Ibid.*

- Right to housing and health care,
- Right to employment,

Articles 22 to 27 of UDHR 1948 embodied these rights. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) 1966 has also included these rights into its fold.

Third Generation of Human Rights

The third generation of human rights has been proposed by countries liberated from European and American Colonies after Second World War. The third generation of human rights was proposed by Czech Jurist Karle Vasak in 1979. Who was inspired by the three coined- words of French Revolution-liberty, equality, fraternity. [42] The third generation human rights are also expressed in the 1972 Stockholm Declaration of United Nations Conference on Human Environment, the 1992 Rio Declaration on Environment and Development.

The third generation of human rights seems little bit different from other generations of human rights in the sense that it openly addresses group rights of people, which include protection of ethnic groups against genocide, and the ownership by countries of their national territories and resources. Such rights are found in the African Charter of Human and People's Rights. Article 21 of this Charter includes the rights of a group to freely dispose of its natural resources in the exclusive interest of its members and its Article 20 includes the rights of a colonized or oppressed group to free themselves from domination under the right to self-determination. [43] Such rights of this generation may also be called as soft law, such as;

- Group and collective rights,
- Right to self-determination,,
- Right to economic and social development,
- Right to healthy environment without pollutions,

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42 *Id.*

43 The term"soft Law" refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat "weaker" than the binding force of traditional law, often contrasted with soft law by being referred to as "hard Law". Traditionally, the term "soft Law" is associated with international law, although more recently it has been transferred to other branches of domestic law as well.

- Right to natural resources,
- Right to communicate and communication rights,
- Right to participation in cultural heritage,
- Right to intergenerational equity and sustainability,

4.5 International Human Rights Frame work

The concept of human rights has a long history but the rules and machinery for the legal protection of the rights and machinery for the legal protection of the rights and freedoms of the individuals are to a large extent, a post Second World War development. Almost all the international and regional instruments for the protection of human rights have been enacted and brought into existence only during that period. Human rights are those minimal rights, which every individual must have against the state or other public authority by virtue of his being a member of the human family irrespective of any other consideration

There are numerous notable human rights instruments, treaties or human rights declarations that have been developed by UNO so far for the promotion of human rights and fundamental freedoms for all. Among them are:

4.5.1 The Universal Declaration of Human Rights 1948

It is the first instrument developed by UNO on 10 December 1948. It won a wide recognition in international community. It proclaims not only civil and political rights but also economic, social and cultural rights. These are rights to life, to personal inviolability, freedom of speech and conscience, freedom of peaceful assembly. Right to work, Right to social security, Right to education and Right to participation in cultural life. It has 30 articles in which the provisions of human rights are provided. Most of the provisions of this Declaration today constitute customary international law.[44] The glance of the respect of human rights are also reflected in the four Geneva Conventions of 1949, regarding the treatment of prisoners of war and protection of civilian persons in the time of war which is called international humanitarian law. The aim of this Declaration was to set basic minimum international standard for the protection of human rights of individuals.

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[44] *Universal Declaration of Human Rights. 1948* . adopted by General Assembly resolution 217 A (III) of 10 December 1948.

4.5.2 International Covenant on Civil and Political Rights (ICCPR) 1966, and its Optional Protocol

The Covenant on Civil and Political Rights includes the following rights such as, right to life, prohibition of forced labour, freedom of arbitrary arrest, equality before the court. Freedom of thoughts, conscience and religion, right to peaceful assembly, freedoms of association, right to elect and be elected, as well as equality before law.[45] The major feature the Optional Protocol to Civil and Political rights is that any person can lodge his complaint to the concerned committee against his or her own state in accordance with the provision provided by the protocol to him or her in case of violation of human rights. So such typical provision has not been made and made available in any other covenant on human rights except it.

4.5.3 The Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)

The Covenant on Economic, Social and Cultural Rights deals with the rights to work, to just and favorable working conditions, to form trade unions, rights to social security, to medical care, to education, to take part in cultural life. These are the internationally recognized human rights instruments for the protection of human rights all over the world. Most of the countries in the world have ratified this covenant. Every UN member state is a party to one or more of the six major human rights treaties.[46] ICESCR, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, Preamble of ICESCR, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person, everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights, Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.

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45 *International Covenant on Civil and Political Rights. 1966.* and its optional protocol to civil and political rights (ICCPR) 1966. G.A. Res. 2200 A(xx), UN Dec. A/6316.

46 *The Covenant on Economic, Social and Cultural Rights.* (ICESCR) *1966.* G.A. Res. 2200 A (XXI), UN Doc. A/6316 .

4.5.4 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979

On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3rd September 1981 after the twentieth country had ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred nations have agreed to be bound by its provisions. The Convention was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote women's rights. The Commission's work has been instrumental in bringing to light all the areas in which women are denied equality with men.[47] These efforts for the advancement of women have resulted in several declarations and conventions, of which the Convention on the Elimination of All Forms of Discrimination against Women is the central and most comprehensive document.

4.5.5 Convention on the Rights of the Child (CRC) 1989

Its Article 2 states: '(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. [48] Its Article 3 states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration….'

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47 *Compilation International Human Rights Instruments*. (2010). Forum for Women Law and Development (FWLD). p. 111.

48 *Convention on the Rights of the Child (CRC*) 1989 *and it's Optional Protocols,* G.A. Res. 44/25, 44 UN GAOR, supp.(No), UN Dpc. A/44/49 at 166

4.5.6 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965

ICERD, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19. The Preamble of ICERD states: Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights [49]and fundamental freedoms for all, without distinction as to race, sex, language or religion.

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, color or national origin. Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.

4.5.7 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

CAT was Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46, of 10 December 1984, Entry into force 26 June 1987, in accordance with article 27 (1) . The Preambles of CAT states that the States Parties to this Convention, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that those rights derive from the inherent dignity of the human person, Article 1 describes, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a

[49] *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD*). 1965. G.A. Res. 2200 A (XXI), UN Doc. A/6316.

confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person,[50] Nepal acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 May 1991. The domestic law addressing the question of torture is limited to the Torture Compensation Act 1996. This law however fails to meet normative standards to prevent torture. The main objective is to compensate torture victims in a very limited way, not prosecute the perpetrators.

4.5.8 The International Court of Justice (ICJ)

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began its work in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.[51] The Court is composed of 15 judges, who are elected for the term of office of nine years by the United Nations General Assembly and the Security Council. It is assisted by a Registry, its administrative organ.

The International Court of Justice is the only international court of a universal character with general jurisdiction. That jurisdiction is twofold. In the first place, the Court has to decide upon disputes (contrition issues) freely submitted to it by States in the exercise of their sovereignty. [52] The Court's jurisdiction can also be found, in the case of a specific dispute, on a special agreement concluded between the States concerned.

4.6 National Legal Framework for the Protection of Human Rights

a. Constitutional Rights

Constitution is the main document of rule of law; it is the document of human rights. In the history of Nepal there were six Constitutions including the present

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50 *Art. 1 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).* General Assembly resolution 39/46, of 10 December 1984.

51 *The International Court of Justice (1945)* Retrieved on Jan 2013 from htt//www.icj-cij.org/court/en

52 *Id.*

Constitution, they are;

- Government of Nepal Act, 1948
- The Interim Government of Nepal Act, 1951
- The Constitution of the Kingdom of Nepal, 1959
- The Constitution of Nepal, 1963
- The Constitution of the Kingdom of Nepal, 1990
- The Interim Constitution of Nepal, 2007

The First written Constitution of Nepal was The Government of Nepal Act, 1948. That Constitution guaranteed to the citizens of Nepal; Freedom of personal liberty, Freedom of speech, Freedom of press, Freedom of assembly and organization, Freedom of religion, Equality before law, affordable and speedy justice, universal free compulsory elementary education, universal and equal suffrage for all adults, security of private property as defined by the prevailing laws and rules to be made there under.[53] Unfortunately that Constitution was not implemented.

The Second Constitution of Nepal was The Interim Government of Nepal Act, 1951. That Constitution had no any special provision of fundamental rights, but, some provisions were mentioned under the chapter on directive principles of state policy.[54] Provisions of that part was not made enforceable by any court in Nepal[55] Equality before law[56]. Fundamental principles of law[57]. Rule of law; personal liberty had been stipulated under Article 17 of that Constitution.

The third Constitution of Nepal was The Constitution of the Kingdom of Nepal, 1959. Under part three of that Constitution guaranteed fundamental rights they were; Personal liberty, Equality, Religion, Property, Political Freedom, Public Good, [58] Right to constitutional remedies.

The Fourth Constitution of Nepal was The Constitution of Nepal, 1962. Under part

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53 *Preamble of Government of Nepal Act 2004.*
54 *The Preamble of the Interim government of Nepal Act 1951.*
55 *Ibid*, Art. 2.
56 *Id*. Art. 14.
57 *Id*. Art. 17.
58 *The Constitution of Kingdom of Nepal Art. 3.*

three of that Constitution guaranteed some fundamental rights, which were; Fundamental duties of the Citizen, Right to Equality, Right to freedom, Right against exile, Right against exploitation, Right to religion, Right to property, Right to constitutional remedies,[59] restrictions on the exercise of fundamental rights for Public good.

The Fifth Constitution of Nepal was the Constitution of Nepal 1990. Part three of that Constitution guaranteed fundamental rights of people. Article 88 of it guaranteed the enforcement of the rights conferred by this Part.[60] Right to Equality, Right to Freedom, Press and Publication Right, Right Regarding Criminal Justice, Right against Preventive Detention, Right to Information, Right to Property, Cultural and Educational Right, Right to Religion, Right against Exploitation, Right against Exile, Right to Privacy, Right to Constitutional Remedy.

The sixth Constitution of Nepal is the present Interim Constitution of Nepal, 2007. Part three of this Constitution guaranteed a comprehensive list of fundamental rights. This Constitution which is called at present the basic document of human rights. Right to freedom, Right to equality[61], Right against untouchability and racial discrimination[62], Right relating to publication, broadcasting and press[63], Right relating to environment and health[64], Right relating to education and culture[65], Right relating to employment and social security[66], Right to property[67], Rights of women[68], Right to social and inclusive justice[69], Rights of the child[70], Right to religion[71], Right relating to justice[72], Right against preventive detention[73], Right against torture[74],

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59 *Constitution of Nepal part 3.*
60 *Constitution of Nepal 1990. Art. 23*
61 *Interim Constitution of Nepal 2007 Art. 13.*
62 *Ibid.* Art 14.
63 *Id.* Art. 15.
64 *Id.* Art. 16.
65 *Id.* Art. 17.
66 *Id.* Art. 18.
67 *Id.* Art. 19.
68 *Id.* Art. 20.
69 *Id.* Art. 21.
70 *Id.* Art. 22.
71 *Interim Constitution of Nepal, 2007, Art. 23.*
72 *Ibid.* Art. 24.
73 *Id.* Art. 25.
74 *Id.* Art. 26.

Right to information[75], Right to privacy[76], Right against exploitation[77], Right relating to labour[78], Right against exile[79] and Right to constitutional remedies[80] are the guaranteed rights, Article 107 of Interim Constitution of Nepal 2007 is meant for the enforcement of these fundamental rights assuring constitutional guarantee.

4.6.1 Legal Provision for Human Rights

a. Civil Rights Act, 1955

This is a very old place of civil legislation which guaranteed basic civil rights to the people. It laid down detailed procedure to enforce those civil rights.[81] The provisions of this Act are regarded very important for the development of human rights law in Nepal. Equality in the eye of law; Non discrimination on the ground of religion, caste, tribe or gender; Power of Government of Nepal to provide for special provisions to the specific class of people; Rights to freedom of speech etc; Right to religion; Personal freedom; Restriction from forced labor; Prohibition in employing children in the factory; Save from the illegal arrest; Measures against illegal detention; Power to file a case against the Government of Nepal are the basic features of this Act.

b. Education Act, 1971

Education Act came into existence to promote basic quality education in Nepal. Through various amendments/ improvements in this Act, better management in the schools all over Nepal is aimed in order to prepare competent human resource [82]for national development and to entertain better civic life of the people.

c. Compensation Relating to Torture Act, 1996

This Act is enacted in order to make provisions on compensation for inflicting physical or mental torture upon any person in detention in the course of

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75 *Id.* Art. 27.
76 *Id.* Art. 28.
77 *Id.* Art. 29.
78 *Id.* Art. 30.
79 *Id.* Art. 31.
80 *Id.* Art. 32.
81 *Preamble of civil rights act 2012.*
82 *Preamble of Education Act 1971.*

investigation, inquiry or trial or for any other reason or for giving cruel, inhuman [83] or degrading treatment to such a person.

Interim Constitution of Nepal 2007[84] guarantees the right to be free from torture and mandates that torture should be punishable by law. Nevertheless, no law criminalizing torture has yet been adopted. The right is hard to be realized owing to the failure of the justice system in the country, particularly due to the lack of development of jurisprudence relating to torture by the Supreme Court of Nepal.

The Torture Compensation Act, 1996 mandates the payment of compensation as a state responsibility and not that of the perpetrator. The legislative framework on compensation is based upon the notion of vicarious liability of the state for an act done by a state agent. Time limits prescribed for filing a complaint also defeat the purpose of the law. Section 5(1) provides a statutory limit of 35 days for filing torture compensation from the date of release from detention or from the date of infliction of torture. In addition, the amount of compensation awarded so far under this law is also negligible. The lack of understanding about the concept of torture by the legislators is visible in the statute since in a prosecution under this law, the defense counsel for the perpetrator is the state prosecutor.

There is no witness protection law in Nepal. To make matters worse, it is neither a practice of the courts in the country to ensure any form of protection to the witnesses or to the victims when an accused is released on bail in a criminal case. It is common practice in Nepal for the accused in crimes, to intimidate and threaten witnesses and victims.

d. Bonded Labor (Prohibition) Act, 2002

This Act has been enacted to make provisions in order to put a ban on bonded labor, to rehabilitate the freed bonded laborers and to uplift their livelihood from the perspectives of social justice.[85] It prohibits engaging children in factories, mines or similar risky activities.[86] It has also made necessary provisions with regard to their health, security services and facilities while engaging them in other activities.

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83 *Preamble of compensation relating to torture Act 1996.*
84 *Interim Constitution of Nepal 2007 Article 26.*
85 *Preamble of Bonded Labor (Prohibition) Act 2001.*
86 *Preamble of Child Labor (Prohibition and Regulation) Act 2009.*

e. Human Rights Commission Act, 2012

This Act has been enacted in order to make legal provisions with regard to the functions, duties, powers and procedures of the National Human Rights Commission to ensure respect, protection and promotion as well as effective implementation of human rights,[87] The National Human Rights Commission of Nepal (NHRC) was established on 26 May 2000 under the 1997 Human Rights Commission Act. The Interim Constitution of Nepal 2007 has included provisions for the establishment and functioning of the NHRC, thus elevating the institution to the status of a Constitutional body. National Human Rights Institutions (NHRIs) of this kind need to be established by Constitution or law with guarantees to their continued existence and independence. NHRC was the byproduct of 1990's political movement of restoration of multi-party democracy. Whereas its elevation to the constitutional body. Status was another by produce of people political movement of 2006 for republican state.

f. National Women Commission Act, 2006,

National Women Commission has been established under the National Women Commission Act, 2006 for the protection and promotion of the rights and interests of the women and for effectively including them in the mainstream of national development and also empowering them with the essence of gender justice.

g. National Dalit Commission Act, 2009

In accordance with the eight points' declaration and 25 years long-term planning through the then parliament for the development and empowerment of Dalit, National Dalit Commission Act 2009 was established for the protection and promotion of the rights and interests of the Dalit. National Dalit Rights Commission as a statutory body in order to secure the rights and the well being of the Dalit community, facilitate the community's step into the mainstream, strengthen this community, increase its participation in the public sphere and maintain social justice.

h. Consumer Protection Act, 1998

In order to maintain health, convenience and economic welfare of the consumers, this Act, aims to protect consumers from irregularities concerning the quality,

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87 *Preamble of National Human Rights commission Act 2012.*

quantity and prices of consumer goods or services[88] for protecting the rights and interests of consumers it devises the establishment of an agency for redressing the hardships of consumers. This Act may be taken as a milestone towards a long journey of consumers sovereignty.

i. Domestic Violence (Offence and Punishment) Act, 2009

The Domestic Violence (Offence and Punishment) Act, came into existence in order to respect the rights of every person to live a secure and dignified life; to prevent and control violence occurring within the family and for matters connected therewith and incidental thereto making such violence punishable; and for providing protection to the victims of violence. This Act defines "domestic violence" as any form of physical, mental, sexual and economic abuse perpetrated by any person to the other person with whom he has a family relationship. It also implies to the acts of reprimand or emotional abuse.[89] Pursuant to Chapter 17 of the Act, the Nepal Government has formed the Domestic Violence (Offence and Punishment) Rules, 2010, to carry out the purposes of the Act.

j. Labour Act, 1992

This Act has provided for the rights, interests, facilities and safety of workers and employees working in enterprises of various sectors.[90] Its provisions are mostly labour-friendly.

k. Press Council Act, 1992

This Act has been enacted in order to establish and make arrangement for a Press Council for the development and promotion of healthy, independent and responsible journalism by way of maintaining the highest professional ethics of journalism.[91]Pursuant to this Act, a Press Council has already been established in Nepal, which is working as a watchdog of the press.

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88 *Preamble of Consumer protection Act 1998.*
89 *Domestic Violence (Offence and Punishment) Act 2009. Chapter 2(a).*
90 *Preamble of Labor Act, 1992.*
91 *Preamble of Press Council Act 1992.*

l. Human Trafficking Transportation (Control and Punishment) Act, 2007

This Act's main objective is to control human trafficking as punish its perpetrators. It defines human trafficking as an act of selling or buying anyone person guided by any motive, using anyone in prostitution with or without benefit, extracting human organ with the exception to as stated by law. Human transportation is an act of taking a person within or outside of the country for buying or selling. Taking a person within or outside of the country from the place of residence or from a person by the use of false information, force, abduction, hostage, enticement, inducement, threat, forgery and use of power to the victim or the guardian in order to keep in custody or handover to someone else for prostitution and exploitation is human transportation. The complaint of human trafficking and transportation is registered at nearby police station. Anyone who comes to know about this offence can register the complaint and can conceal his/her identity if s/he wishes. If the victim registers the complaint, statement should be taken straightaway and should be certified in the nearest district court. Even if the case does not fall under the jurisdiction of the court, the judge should certify the statement reading it aloud to maintain precision. The statement itself can be taken as evidence despite the absence of victim in the court proceeding. Presently ten country has devised a special legal measures to countermand this crime.

4.6.2 Role of Judiciary in the Protection of Human Rights

If Human rights are claims upon society, society is required to provide means to realize them, to assure that they are respected, and to provide compensation to victims whose rights are violated.[92]International Human Rights Commission typically require State parties not only to respect the rights recognized in the treaties, but also to ensure that those rights are protected through National law.

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized or enjoined by law to decide for itself, a conclusion which is correct in the eyes of the Court. Judicial review, not being an appeal from a decision but a review of the manner in which the decision was arrived at, the court,

[92] Louis Henkin et.al.(1999). "Human Rights", University Case Book Services, New York, Foundation Press p. 491.

while exercising the power of judicial review, must remain conscious of the fact that if the decision has been arrived at by the administrative authority after following the principles established by law and rules of natural justice and the individual has received a fair treatment to meet the case against him, the court cannot substitute its judgment for that of administrative authority on a matter which fell squarely within the sphere of jurisdiction of that authority.[93]

4.6.2.1 Some Leading Cases of India: Reference cases

According to Justice *Bhagwati* Judicial Activism in India is being used for achieving distributive justice which is otherwise labeled as "Social Justice". Judicial activism follows from the failure of the executive to adhere to law. The more responsible the executive, the lesser the judicial activism, but juristic / judicial activism flows from the judges. The term judicial activism is used with reference to the judicial decisions in various fields.[94] Its areas are widening such as public interest litigations, writ petitions under Article 32' interpretations of Article 14, 19, 21 etc. Term judicial activism is interpreted in different ways.

Judicial Activism is an act of judge to fill up the gaps, doubts, because the provisions of constitution are couched normally in general terms to give them adaptability and elasticity. Judicial activism elaborates new ideas and concepts without actually suing them in deciding case in hand. It is one of the functions of the judiciary to fill up the gaps and doubts left by legislature. In India the judges of higher judiciary have to deliver the judgments on the subjects touching upon all aspects of national life. The object of judiciary is clean out all social political and national maladies of the Country.[95] The Apex court of India starts a positivist tendency, and it is strictly confined to the rule of liberalization. In the case of *A.K. Gopalan V. State of Madras,*[96] the court acted in a liberal view to interpret Article 21 of the Constitution, rather than the customized narrow construction to word such as "Personal Liberty" and "Procedure established by law". In matter of personal liberty, the Courts observed judicial restraint and legitimated the actions of the Government.

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93 Justice Palok Basu (2000). *Law relating to Protection of "Human Rights"under the Indian Constitution and allied Laws*, Modern Laws Publications, Allehabad, p. 598.

94 Manohar Rao G. (2006). *Constitutional Development through Judicial Process*, Asia Law House (1st ed.) pp. 220.

95 *Ibid.*

96 AIR. 1950 SC 27. 8.

In 1967, in the case of *Golaknath V. Punjab,*[97] Courts held that, Parliament retaliated by passing the Twenty-Fourth Amendment which explicitly stated that parliament was not limited in its power of constitutional amendment. When that amendment was challenged, the court held in *Kesawanand Bharti V. State of Kerala*,[98] that although parliament could amend every provision of the constitution, but it could not alter the basic structure of the constitution; it could not alter the basic structure of the constitution.

However in 1975 emergency was declared, the ruling party passed such drastic amendments with the help of its brute majority upon parliament's power of constitutional amendment acquired legitimacy. The Apex Court struck down in *Indra Gandhi V. Raj Narian* case a constitutional amendment which sought to validate the election of the Prime Minister, earlier set aside by the Allahabad High Court on some technical ground deemed destructive of the basic structure of the constitution. The decisions made a position reflection on the doctrine of the basic structure of the constitution. The Supreme Court pronounced that the procedure contemplated by Article 21 must be 'right, just and fair' and not arbitrary; it must pass the test of reasonableness, and the procedure should be in conformity with the principles of natural justice and unless it was so, it would not be the procedure at all and the requirement of Article 21 would not be satisfied. Responding to the changing times and aspirations of the people, the judiciary, with a view to see that the fundamental rights embodied in the Constitution of India have a meaning for the downtrodden and the underprivileged classes, pronounced in *Madhya Haskoti's* [99] *Case* that providing free legal service to the poor and needy was an essential element of the 'reasonable, fair and just procedure'.

Again in *Hussnainara Khatoon's Case*[100] while considering the plight of the under trials in jail, speedy trial was held to be an integral and essential part of the 'right and liberty' contained in Article 21 of the Constitution of India. In *Nandini Satpathy V.*

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97 AIR 1967 SC 1643.
98 AIR 1973 SC 1461.
99 AIR 1978 SC 1548.
100 AIR 1979 SC 1369.

P.L. Dani [101] case, the Supreme Court held that an accused has the right to consult a lawyer during interrogation and that the right not to make self-incriminatory statements should be widely interpreted to cover the pre-trial stage also. Again, in *Sheela Barse V. State of Maharastra case,*[102] the Supreme Court laid down certain safeguards for arrested persons. In *Bandhua Mukti Morcha's Case*[103] the Supreme Court held that right to life guaranteed by Article 21 included the right to live with human dignity, free from exploitation. The courts have, thus been making judicial intervention in cases concerning violation of basic human rights as an ongoing judicial process. The right not to be held in fetters as in *Charles Sobraj V. Superintendent Central Jail,*[104] the right against handcuffing as in *T.V. Vatheeswaran V. State of Tamil Nadu,*[105] the right against custodial violence as in *Nilabati Behera V. State of Orissa,*[106] the rights of the arrestee as in *DK. Basu V. State of West Bengal,*[107] the right of the female employees not to be sexually harassed at the place of work as in the case of *Vishaka V. State of Rajasthan,* [108] and *Apparel Promotion Council V. A.K. Chopra* [109] are just a few pointers in that direction.

An enforceable right to compensation in case of 'torture' including 'mental torture' inflicted by the State or its agencies is now a part of the public law regime in India. In many of its decisions, the Supreme Court of India started a new era of compensatory jurisprudence in Indian legal history. This newly forged weapon to help the torture victims has been sharpened in many of its decisions, like *Rudal Shah V. State of Bihar,*[110] *Bhim Singh V. State of J and K.*[111] In the case of *Nilabati Behera V. State of Orissa* [112]the Court crystallized the Judicial right to compensation, which was further reiterated in *D.K. Basu V. State of W.B.*[113] in this case the court went to

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101 AIR 1978 SC 1025.
102 AIR 1988 SCC 96.
103 AIR 1984 (1) SC 802.
104 AIR 1978 (4) SCC 104.
105 AIR 1983 (3) SCC 68.
106 AIR 1993 (2) SCC 476.
107 AIR 1997 (1) SCC 426.
108 AIR 1997 SCC 241.
109 AIR 1999 SC 241.
110 AIR 1983 SC 1086.
111 AIR 1984 SCC 504.
112 AIR 1997 (1) SCC 426.
113 AIR 1997 (1) SCC 416.

the extent of saying that since compensation was being directed by the courts to be paid by the state, which has been held vicariously liable for the illegal acts of its officials, the reservation to clause 9(5) of ICCPR by the Government of India has lost its relevance. In fact, the sentencing policy of the judiciary in torture related cases, against erring officials in India has become very strict for an established breach of fundamental rights, compensation can now be awarded in the exercise of public law jurisdiction by the Supreme Court and High Courts in addition to private law remedy for tortures action and punishment to wrongdoer under criminal law. The higher judiciary in India delivered many environment conscious judgments. By constructive interpretation of various provisions of the law, the Apex court in particular has supplemented and strengthened the environmental law. In *Ratlam Municipal Council V. Verdhi Chand*[114] the Supreme court has expanded the principle of *'locus standi'* in environmental cases and observed that the centre of gravity should shift, as the preamble to the Constitution of India mandates, from traditional Individualism of *locus standi* to the community orientation of public interest litigation. The court further observed that environment related issues must be considered in a different perspective. In *M.C. Mehta V. Union of India*[115] the Supreme Court has entertained a public interest litigation field by a social worker - cum - advocate on pollution of *Ganga River* which has affected life, health and ecology of Indo-Genetic plain.

4.6.2.2 Some leading cases of Nepal: Reference cases

In order to domesticate it, Nepal became a party to the *ICESCR* on 14 May 1991. Since the State party has the legal and moral obligation to abide by the provisions of the Covenant, Nepal has the legal basis for the justifiability of economic, social and cultural rights *(ESCRs)* which emanates from the provision of the Nepal Treaty Act, 1990. Section 9(1) of the Act provides that:

In case of the provisions of a treaty, Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as

114 AIR 1980 SC 1622.
115 AIR 1988 SC 1115.

good as Nepalese laws.

It gives Nepal the justifiability of economic, social and cultural rights which incorporates some major components for instances; legal framework, judicial admissibility and implementation, evaluation and monitoring mechanism from state level. The Constitution of the Kingdom of Nepal, 1990 provided less scope for the personal rights[116] from ESC rights perspectives. The Interim Constitution of Nepal 2007 has incorporated judicially enforceable rights in Part III as fundamental rights. Similarly, the Constitution has guaranteed the right to constitutional remedy in Art. 32.[117] These instances show that the Interim Constitution has succeeded in inscribing the *ICESCR* as fundamental rights which are judicially enforceable. From the Human Rights development perspective, this Constitution can be termed as PAPER TIGER and its strength is yet to see.

The right to food is a human right. It is the right of all human beings to live in dignity, free from hunger, food insecurity and malnutrition. The food sovereignty is protected under international human rights and humanitarian law and the correlated state obligations are equally well-established under international law. It is noteworthy that the right to food is recognized in the Interim Constitution in Art. 18(3).[118] From the jurisprudential notion, the term 'food sovereignty' covers the right-duty relation. The Supreme Court of Nepal has also largely interpreted in the light of right to adequate food and free from hunger. There are various landmark cases in which the Supreme Court of Nepal evolved new notion regarding the term food sovereignty. Like in the case of *Bajuddin Minhya and Others V. GON, Prime Minister and the Council of Ministers*[119], which was about the destruction of crops by wild animals from Koshi Tappu Wildlife Reserve in which the court explained food sovereignty, right to food and right against starvation.

The emerging Economic, Social, Cultural rights jurisprudence is too immense to summarise here, however the focus would be on jurisprudence concerning marginalised groups that has been shaped in terms of socio-economic rights,

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116 *The Constitution of the Kingdom of Nepal 1990.*
117 *The Interim Constitution of Nepal 2007.*
118 Interim Constitution of Nepal 2007.
119 Writ No: WO-0338 of the year 2011.

particularly the right to food and health.

Present Interim Constitution of Nepal guarantees to every citizen the right to food sovereignty Art. 18(3).[120] The term 'food sovereignty' is a rather novel term[121] and its content is not immediately clear, at least in the traditional sense of right-duty relation. The Supreme Court of Nepal has largely interpreted this right in terms of the classical right to adequate food and the right to be free from hunger under the *ICESCR,* which has been ratified by Nepal.[122] The Court noted these rights are also indivisibly linked to human dignity and are indispensable for the fulfilment of other rights enshrined in the Constitution and the *ICESCR* and *ICCPR*. The Court found that the State was not to remain oblivious of its responsibility of securing ESC rights on the pretext that there was no law in place. The Court appears to partly acknowledge the broader claims connected with the food sovereignty movement (e.g., domestic control over food security, decision-making and seed varieties) by observing it was the constitutional responsibility of the state to ensure food availability and absence of food shortage.

In the case of *Prakash Mani Sharma and Others*[123], the petitioners addressed that mass starvation seemed to occur in several districts of the hills in Mid and Far Western Nepal. The writ contained that food, shelter; clothing, education, health and employment are basic needs of human life in which state should be liable for its responsibility. Thus, among the various needs, the right to food is the utmost basic need acknowledged by Art. 18(3) of the Interim Constitution, 2007, guarantee the right to food sovereignty to every citizen of Nepal, Article 12 which guarantees the right to live with human dignity and Art. 13, guarantees the right against discrimination.

The petitioners then cited the report that was published in the bulletin of World Food Program (WFP)- Food Security Bulletin- 20, which states that among the 75 districts

120 Articles 33 and 35 also use the term 'food sovereignty'.

121 The global peasant movement Via Campesina developed seven principles of food sovereignty in 1996, which include accepting food as a basic human right, agrarian reform, protecting natural resources, recognizing food first as nutrition and then only as trade, ending globalisation of hunger, prohibiting food as a weapon, small farmers' control over food.

122 *Writ No: WO-0338(2011)*.

123 Writ No: WO- 149 of the 2009. decision dated September 15. 2009.

of Nepal, 32 districts face food deficit and among them, 16 face acute scarcity. They also referred various news report (national daily newspapers named as Kantipur, The Kathmandu Post and Gorkhapatra) that portray the scarcity of food, mismanagement in the distribution of food by Nepal food corporation, distribution of rotten food, various calamities resulting from or abated by mal-nutrition, in the mid and far western hill districts. They asked for the issuance of appropriate order in the name of respondents that guarantee the right to access to food by the citizens, proper arrangement regarding transport, safe custody and distribution of foodstuff in the food deficit zones, special protective measures for aged, children, and pregnant and lactating mothers, and constitution of inquiry commission against Nepal Food Corporation (NFC), necessary legal action against the culprits of the corporation.

In this case the Division Bench of the Supreme Court on 2008-09-25 (2065/6/9) issued an interim order in which it citing the report of WFP, stated that the drought hit districts of Kalikot, Humla, Mugu, Dolpa, Bajura, Achham, Dailekh, Darchula, Baitadi, Dadeldhura, Rukum and Jajrakot seem to be affected by food scarcity. It has been said that more than three million people are facing starvation.

Every citizen's right to live is a fundamental right. The legal counsels representing the Ministry of Agriculture and the Nepal Food Corporation submitted to the court that there is sufficient food stock but it has not been possible to transport food in those districts. Man cannot live without food. And unless the food scarcity is addressed immediately, irreparable loss is imminent, and later the remedy will be like availing doctor after the death of the patient. Therefore, an interlocutory order was issued by the Court against the respondents asking them to immediately transport and supply foodstuff in those districts also taking note of the fast approaching great Dashain festival of Nepalese people.

Following the Supreme Court's order, Home Ministry instructed NFC to supply food to the affected districts. The NFC made the budget of thirty – eight crore and fifty - seven million rupees, as the price of the total quantity of rice. Instantly, NFC supplied and made strategy to supply food to the *dipo.* The government introduced to supply food (only rice) in the quota basis. The government, then, realized the problem of remote districts and started the hierarchical strategic relation in between

Ministry of Finance, National Planning Commission and Nepal Food Corporation in order to fill up the shortages of food. Nepal Food Corporation started to supply food in fifty percent discount rate through helicopter to remote areas where markets, roads and transport facilities are not available.

In Sani Tandukar V. Manilal Tandukar [124] case, the Supreme Court held that the right of unmarried women who have reached 35 years of age to the part of ancestral property (Aungsa banda) is similar to that of men, neither inferior nor defective. The court held that the right of unmarried women to joint family property under section 16 of the National Code (Muluki Ain) Section of ancestral property (Aungsa Banda) entitles them to the same protection afforded to other co- parceners. This is a progressive interpretation so far as the substantive nature of the right is concerned. However, the judgment has held nothing about the many weakness in the right of unmarried daughter to family property (Aungsa).

Bhisma Kumari Maharjan V. Asha Lal Maharjan[125]*,* is a landmark judgment of the Supreme Court in which, the Court took an innovative approach for the interpretation of ancestral property (Aungsa Banda) Law. It held, the law (Section 16 of the Law on Aungsa Banda) does not restrict the granting of property to a unmarried daughter before she has reached to 35 years of age, if all co- parceners are willing to include the sister as a co parcener of the family property. This judgment validated an ancestral property (Aungsa Bunda) deed that included unmarried daughters who had not reached 35 years of age but had reached puberty or 16 years of age. This judgment should be considered as one of the most liberal interpretation of the aforesaid clause 16.

In *Raju Prasad Chapagain and Others representing Pro-Public V. HMG, Ministry of Health and Others*[126]; the petitioners filed the case in relation to the production of substituting baby food. Since the promulgation of the Breast Milk Substitutes (Control of Sale, Distribution) Act 1992, the government had not constituted a committee in regard to supervision and monitoring of production, sale and distribution of baby food aimed to substitute mother's milk. The petitioners also drew

124 *Sani Tandukar V. Manilal Tandukar,* NLR 1997.
125 *Bhisma Kumari Maharjan V. Asha Lal Maharjan,* NLR 1995.
126 Writ No: WO-2621 of the year 2003. decision dated 2004.

the attention of the court to Art, 11 of the 1990 Constitution which prescribed special protective measures for children under, Art 26(7)(8) of Breast Milk Substitutes (Control of Sale, Distribution) Act 1992 which provided for special measures for the protection of the health of the women and children. The Supreme Court issued mandamus in the name of Ministry of Health to appoint inspector in accordance with Section 13 of Breast Milk Substitutes (Control of Sale, Distribution) Act 1992. The Court also drew the attention of the concerned Ministry for the constitution of the Committee as provided under Sec. 4 of the Act and also for implementing the Act. In order to enforce the Supreme Court's order, the Breast Milk Substitutes (Control of Sale, Distribution) Act, 1992 was effectively implemented and some measures had been taken to make the committee active pursuant to Sect. 4 of the Act. [127]However, the progressive report of the second phase of the order has not yet been submitted to the Monitoring and Inspection Section of the Supreme Court.

The right to health is an inclusive right. It is a fundamental part of human rights and of the understanding of a life in dignity[128]. Regardless of age, gender, socio-economic or ethnic background, health is considered to be the most basic and essential asset of human being[129]. The right to the enjoyment of the highest attainable standard of physical and mental health, to give it its full name, is not new. Internationally, it was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The preamble further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The Universal Declaration of Human Rights *(UDHR),* 1948 also mentioned health as part of the right to an adequate standard of living[130]. The right to health was again recognized as a human right in the International Covenant of Economic Social and

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127 *Ibid.*

128 OHRC, Retrieved on Jan. 2013 from, http://www.ohchr.org/Documents/Publications/ Factsheet 31.

129 *Ibid.*

130 *Universal Declaration of Human Rights, 1948 Art. 25*.

Cultural Rights *(ICESCR),* 1966[131]. It is noteworthy that the Interim Constitution of Nepal, 2007 has also recognized the right[132] to free basic health services and social security'.

In the same path to the development of health sectors, the Supreme Court of Nepal has also moved to the novel and landmark steps. In the case, *Dilbahadur Bishwakarma V. GON, PM and Council of Ministers*[133], the petitioners filed a case against social evil practice, known as 'Chaupadi Pratha' existed in the Far Western Development Region of Nepal. During the menstruation period, women kept out of the house in a shed of most unhygienic condition as injurious to women's health.

The Division bench of the Supreme Court issued the following directive order in this case:

- Government of Nepal (GON), Prime Minister (PM) and Council of Ministers must declare the Chhaupadi System as a social evil practice forth with a month from the date of issue of the directive order.
- Ministry of Health should form a committee consisting also a medical officer and conduct a research in those districts measuring the psychological effect inflicted by the social evil on women and children. The Committee was also mandated to prepare a report and submit to the Ministry of Health as well as to the Supreme Court.
- Local self- governance committees were also required to take initiation for awareness campaign against the consequences of Chaupaudi System and its outright abondonmemt.
- GON, Ministry of Women, Children, and Social Welfare Council were also required to make guidelines within 3 months of the Courts orders and inform to the Supreme Court within that time.
- The petitioners who were the member of NGO's were also take initiation in causing to make appropriate enabling laws and other directives while parliament was absent..

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131 *International Covenant of Economic Social and Cultural Rights 1966 Art. 12*

132 *Articles 16 (2) 20(2) and 22(2) of the Interim Constitution 2007.*

133 Writ No: WO-061-3303.

In order to follow up the directives, the concerned ministries and the committee submitted a report to the GON and the Supreme Court on 2007. Hence, the effect of Court's intervention served to be positive, as the choupadi social evil started getting slowdown.

In the case, relating to right against sexual harassment in the working places like – cabin, dance restaurant and massage parlour by *Prakashmani Sharma and others V. GON, Ministry of Women, Children and Social Welfare and others*[134], several constitutive elements of Women's human rights law was raised. The petitioners advocated for the psychological and safety of health of the working women in such places. In this case, Supreme Court played a very active role, by preparing a Guideline Regulation by itself and asked the government to regulation on it disciplining such work places and making it compulsive to apply it to such work places initial it introduces an exhaustive the owners of Cabin, Dance Restaurants and massage Parlour and the places alike to refrain forthwith abusing the molest of women staff/workers and by any exploitative means, failure of which was treated having punishment against the perpetrators.

The other land mark case is *Prakashmani Sharma V. HMG, Ministry of Women, Children and Social Welfare and Others*[135], under the right to health which relates to maternity leave. The petitioners advocated in regard to reproductive role of women which is associated with several segments of the development of society. Special measures were required for the protection of maternity, of working women and employees for their safe motherhood.

The petitioners cited various laws relating to employees and working women which fix different time period for maternity leave. The Civil Service Act, 1993, and Rules 1992, Local Self Government Rules, 1999, Nepal Health Service Rules, 1998. Appeal Court and District Judges (Salary and other conditions of Service) Act, 1991, which provide for 60 days maternity leave, while the Labour Rules 1993, provide leave for 52 days, Tea Estate Labour Rules 1993, and Royal Nepal Airlines Corporation Employees Condition of Service Rules 1984 provide for 45 days leave.

134 Writ No: WO-2822 of the year 2005. decision dated Nov. 28. 2008.
135 Writ No: WO- 88 of the year 2002. Decision No: 7268.

Though, the Constitution provided special provision for the protection of rights of women and children. The petitioners justified it unscientific and against the provisions of CEDAW, CRC and ILO Conventions which provided 14 week's maternity leave for women employees.

The special bench of the Supreme Court issued a directive order on 11 September, 2003 in the name of GON, Ministry of Health to make necessary arrangements for the protection of maternity by fixing minimum period of leave for employees and also developing standard for the same, by taking note of the legal provisions prevailed under various international instrument for the protection of maternity and child health. The government seemed to have initiated measures for the execution of Supreme Court's order.

Education is a fundamental human right and essential for the exercise of all other human rights. It promotes individual freedom and empowerment and yields important development benefits[136]. The right to education was firstly articulated in the Universal Declaration of Human Rights, 1948 and then the International Covenant on Economic, Social and Cultural Rights, 1966[137]. The 1960 UNESCO Convention against Discrimination in Education also defines education under its Article 1(2) as: "all types and levels of education, (including) access to education, the standard and quality of education, and the conditions under which it is given".

The broader meaning of education was given under Article 1(a) of UNESCO's 1974 *Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms*. Which implies: "the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capabilities, attitudes, aptitudes and knowledge". The Supreme Court of Nepal has also taken note of this international development and also took steps in acknowledging this basic human rights of education of Nepalese citizens through

136 *Article 26 Universal Declaration of Human Right 1948.*

137 *Article 14 International Covenant on Economic, Social and Cultural Rights 1966.*

several cases decision.

In a case relating to right to education, *Dilbahadur Bishwakarma and Others V. Cabinet Secretariat and Others*[138] where the petitioners challenged caste-based discrimination in education under clause 14.8.6 of Tindhara Sanskrit Pathsal Hostel's By-Rule was against Art. 11 of the Constitution, The Supreme Court declared the said clause *ultra virus*. Following the Supreme Court's decision, Sanskrit Pathsala's Hostel By- Rule was amended by opening access to the hostel for non-brahmin student also. It is notable that the non-brahmin students were allowed to enroll but deprived from hostel of the school before 2008. The decision of the case brought additional responsibility to the Sanskrit Pathsala's administration. Now, some Dalits and Janajatis including female students are also studying and staying in the Sanskrit Pathsala as its hostel. It may be considered as an achievement of inclusiveness in the educational system of Nepal. However, there is no any reservation system for the intake of marginalized students in the hostels excluding regional quotas (reservation) system. Only access to shelter is not enough, certainty of having shelter for marginalized students be a must with the concept of positive discrimination.

In another case, *Pradhwosh Chhetri and others V. Office of the Council of Ministers*[139] is another case which relates to the grant of quota (reservation) to candidates belonging to marginalized communities to study graduate programmes in medicine.

Among these cases relating to right to education and right to equality and social justice, Department for Monitoring and Evaluation for the Execution of the judgements has only succeed to follow up the case of *Dilbahadur Bishwakarma V. Cabinet Secretariat and others* where the decision was taken by the Ministry of Sports and Education to amend the Act accordingly.

A glimpse of aforesaid cases reflects that Nepalese judiciary is progressing with realistic thought. Although the Supreme Court has very lately started exercising its

138 Writ No: WO-44 of the year 2005, decision dated 26 September 2005.
139 N.K.P. 2005 No 7. p. 901.

jurisdiction to execute its judgements, the jurisdiction of the Supreme Court was just limited to interpret the black letters only defaulting the winners to taste of the result of success. The very lately established "Department for Monitoring and Evaluation for the Execution of Judgements" has only succeeded to keep up only the first phase of record of the implementation of case judgements (Particularly PIL).

From the evaluation of the aforementioned cases, the state seems to be more successful in amending laws, and introducing new laws as per the interpretation of the Supreme Court, but the implementation of the fundamental rights of people particularly; Economic, Social and Cultural Rights seems to fall under the shadow of state obligation. So, prompt and effective execution of those case decisions need to be priority. So it is a misery to see such implementation and keeping record of transparency for good governance system. For instance, in the right to food and compensation case of *Bajudhin Minya*, it has not been recorded elsewhere about the compensation received by the victims. Similarly, the Utreus Prolapsed case also has not been updated in the Department of Monitoring and Evaluation for the Execution of the Supreme Court's order.

In the other petition, *Meera Dhungana*[140], challenged Section 10(2) of the Bonus Act, on the ground that it discriminated women both on the ground of sex and marriage. While this petition was pending, the law was amended, but the discrimination persisted. So the petitioner filed a supplementary petition where she challenged the amended provision. In this case the Supreme Court observed that a daughter's relation with the joint family were severed upon her marriage. Pursuant to the present provision, the status of membership of the daughter with the joint family got severed upon her marriage and had no rights and obligations. Legal relation was limited by the law relating to succession. According to the Court, this was the nature of our family law till today. The Court observed that law could not be oblivious of social practices and values. It, therefore, held that the disputed legal provision was not inconsistent with Article 13 of the Interim Constitution of Nepal 2007, or international human rights instrument and hence could not be deemed to be *ultra-*

[140] *Meera Dhungana V. Prime Minister and Office of Council of Ministers and Others Writ No. 112 of the Year 2006.*

vires and void as sought by the petitioner.

In *Achyut Prasad Kharel*[141] the Supreme Court dealt with the provision of No 28(B) of chapter on life of the National Code (*Muluki Ain*). The Petitioner claimed that the said provision provided for the abortion of fetus of maximum twelve weeks' maturity with the consent of women did not require the couple to decide the matter by evolving consensus. The petitioner maintained to the effect that the provision discriminated husband against the wife, and hence needed to be declared *ultra vires*. Rejecting the claim of the petitioner the Supreme Court observed that although on the face of it the provisions contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) that provided the rights to women seemed to be depriving man of the right to equality, but in practice it was based on spousal consent. The Court held that by taking any exceptional situation as mentioned above, the provision cannot be said to be inconsistent with Article 16(1)(e) of the CEDAW.

In *Advocate Laxmi Prasad Pokhrel, on behalf Abdul Khalik*[142] detainee Abdul Khalik claimed that, the respondents have arbitrarily infringed my fundamental rights provided by the Interim Constitution of Nepal, 2007, so I request to remove that imposition by issuing an order of *Habeas Corpus* under Article 32 and 107(2) of the Constitution including other necessary orders as may deem appropriate for my acquittal from the unlawful detention and protect my fundamental right provided by the Constitution.

Justice Ram Kumar Prasad Shah and *Justice Prof. Dr. Bharat Bahadur Karki* through their dissenting opinion opined that unless the law of Nepal is violated, or any act which amounts to be a crime is committed, it is unlawful to arrest any person and keep him in custody or a detention room. A legal provision which requires someone to live in a prescribed place if interpreted wrongly and kept in a detention room it shall be a malicious interpretation.

The high profile government officials holding in public office are required to respect the freedom of an individual and his constitutional and legal right. If he did not do so

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141 *Achyut Prasad Kharel V. Office of Prime Minister and Council of Ministers and Others.* Writ No. 3352 of the year 2004.

142 *Laxmi Prasad Pokhrel, on behalf Abdul Khalik, V. Office of Prime Minister and Council of Ministers,* Writ No. 067-WH-0089 of the year of August 2011.

and malafidely enforces law, it must be taken as the violation of person's right of freedom and human rights guaranteed by the Constitution and international instruments. Personal freedom is the most invaluable right of human life. Being a human being, such right is inherent to him/her and no one can infringe this right except as provided in law or without confirming the due process of law.

Chapter - V

Trends of Judicial Review/Activism

5.1 Evolution of the Concept

Judicial review in general is defined as the process where the supreme judicial body of the state examines decisions given by their inferior judicial body in order to establish whether or not they are under the process of due law. In a wider sense, it is simply a final consideration and decision by a court of law that is the dispute between private parties or between the private party and the state or a public authority. Judicial review is of two kinds, namely, the judicial review of administrative action[1], and the judicial review of legislative Acts. Administrative actions can be classified into four categories; (1) rule- making action or quasi-legislative action, (2) rule-decision action or quasi-judicial action, (3) rule application action or administration, and (4) ministerial action. A legislative action has four characteristics, namely, generality, prospectively, public interest, and rights and obligations flow from it. Rule making action of the administration partakes all the characteristics of the legislative action, namely, generality, prospectively, and a behavior which bases action on policy consideration and gives a right or a disability.

Judicial Activism was first originated in English courts in the form of concepts like equality natural justice at a time when there were no significant safeguards for people in statutory laws.[2] In *Dr. Bonham's case Justice Coke* had propounded the notion. A physician *Dr. Bonham* was imprisoned for nonpayment of fine. He brought an action for false imprisonment. *Sir Edward Coke* the Chief Justice of England held in 1610 that the Act was void in as much as it had made the society the prosecutor and judge at the same time which was against common law and reason. *Coke* thus asserted the power of Judicial Review even against legislation.[3]

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1 *Union of India V. Cynamide India Ltd.,* (1987). 2 SCC 720.)

2 Bhatia K.L., (1990) J*udicial Activism and Social Change,* New Delhi: Deep and Deep Publications. p.77.

3 Deshpande V.S. (1977). *Judicial Review of legislation,* India : Estern Book Company Inc. p. 16.

In America, Judicial Review first appeared in 1780, in the *case of Holmes V. Walton*[4] and *Marbury V. Madison*[5] *case* thus the American Supreme Court paved the way for Judicial Activism which was later not only flourished in American legal system but also got warm welcome to the legal system of the different countries.

5.1.1 Judicial Activism in USA

The constitutional history of USA has crossed different phases. After the first constitution was adopted, there was the push to adopt a bill of rights, a major event in its own right. Then comes the Marshall Court era, a period of nationalism and judicial review. Then comes the civil war and reconstruction, which brought a great cataclysmic reordering of the federal system, especially through the Fourteenth Amendment. The fourth period arrives with the rise of modern government, especially in the years of New Deal where the welfare state; administrative agencies and the Americans associated in particular with the Supreme Court under the leadership of *Chief Justice Earl Warren*[6]. During the activist and liberal court of the 1950s and 1960s, the role and the decisions propounded by the Warren court became the symbol of judicial activism.

Under Chief Justice John Marshall, through *Marbury V. Madition* case[7] the court not only established the principle of judicial review, but also introduced the concept that a Constitution must be a liberally interpreted document to serve, so as the changing needs of the society. The view of Marshall enunciated in the case of Marbury can be summarized as follows: the Constitution is a written document clearly defining and limiting the powers of Government; the Constitution is a fundamental law and is superior to all ordinary laws; a legislative Act contrary to the Constitution is void and is not a law and, therefore, it cannot bind the courts and parties; it is always the duty of the court to decide the conflict between the two laws; if a legislative Act is in conflict with the Constitution it is the duty and obligation of the court to refuse to apply such legislative Act; if the court shirk or fails in refusing to declare such

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4 *Austin Scott, 'Holmes V. Walton*, The New Jersey precedent' in the American Historical Review, IV. p. 456.

5 Lewis Lipstiz, (1996). *American Democracy*, New York: St. Martin's inc., p. 405.

6 A.E.Dick Howard (1985). "Why Celebrate the Constitution today" Robert S. Peck/Ralph S. Pollock, ed., *The Blessings of liberty: Bicentennial Lectures at the National Archives*. p. 3.

7 *Marbury V. Madision* (1803). 5 U.S. 137.

unconstitutional law void, the foundation of all the written Constitution would fail; and voiding the legislative Act is not the act of judicial supremacy but is a judicial necessity etc.

In *Hayburn's Case*,[8] a statute empowered federal and state courts to determine the propriety and amount of pensions for disabled veterans of the Revolutionary War. The statute provided for the Secretary of War to review the court decision and transmit his opinion to the Congress, which could, if it agreed, appropriate the necessary funds. The Circuit Court for the District of Pennsylvania refused to consider *William Hayburn's* application for a pension under the statute, and the Attorney General sought a writ of mandamus in the Supreme Court. Prior to the decision, Congress avoided a Constitutional confrontation by amending the legislation to provide other relief for the pensioners, and the Supreme Court dismissed on the grounds of mootness.[9]

In the case *McCulloch V. Maryland,* Supreme Court held that congress has the power, under the 'necessary and proper' Article 1 of Constitution, carry out its expressed powers by any means appropriate to the legitimate ends expressed in the powers enumerated. Thus congress could incorporate a bank, even though the constitution did not specifically state that it had that power[10]. But President Andrew Jackson, Voted legislation for a national bank saying he had to make his own judgment. After *Marbury,* the supreme court went over fifty years without overturning a single act of national legislation. Yet, despite such impressive restraint, the very *next reversal* was *DredScott V. Sanford*[11]. That was the case that set the stage for the civil war, holding that Dred Scott, a Negro, was not a citizen within the meaning of the constitution and thus not entitled to get the rights and privileges guaranteed by constitution to the citizen. That decision was intended to resolve the legal controversy over slavery. Instead, the level of controversy increased. The critics of Dred Scott excoriated *Chief Justice Roger B. Taney* as an incompetent and

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8 2 US (2 Dall.) 408, 1 L. ed. 436 (1792).

9 Ronald D. Rotunda (1993). Modern Constitutional Law; cases and notes 12, West Publishing Co. USA. p. 432

10 Albert P. Blaustein and Gishbert H. Flanz, (1981). *Constitutions of the Countries of the World*, New York: Oceana Publications, Inc. Nov. p. 9.

11 *Ibid.* p. 10.

denounced him as a tool of the slave power, argued the merits of the constitutional questions involved in the case, and challenged the propriety of the courts having decided the case in the first place. In the decision, the court held that the Missouri compromise, which prohibited slavery in certain territories, was unconstitutional on the grounds that congress was depriving person of their property without due process of law[12]. That decision was overturned by the Thirteenth, Fourteenth and Fifteenth Amendments to the constitution which followed the civil war [13] though the amendments emphasized on the abolition of slavery and provided civil rights and right to suffrage to the black peoples, but the court still continued narrowing the interpretation of the Fourteenth and Fifteenth amendments. For instance, in *Plessy V. Fergusan*[14] the court established the 'separate but equal' doctrine that was not thoroughly overturned until 1954.

In a series of decisions between 1935 and 1936, the court struck down government legislations, striking most of the major federal statutes that were part of the New Deal program offered by *President Franklin D. Roosevelt* to deal with the Great Depression. Following these decisions, the court was severely criticized by the President not only that after his overwhelming reelection in 1936, the President lunched a direct attack upon the court. In a special message to Congress he argued to the enactment of a bill to create new judgeship for every judge who was more than seventy years old but had failed to retire. No one doubted the true purpose behind the message. Six of the nine Supreme Court Justices were older than seventy years, including all four conservatives. By appointing six new judges, *President Roosevelt* would ensure a majority ready to uphold the constitutionality of New Deal Legislation[15]. *Roosevelt* defended the plan as a way to 'save national constitution from hardening of the judicial arteries'. But congress did not approve the proposal. Although the proposal was failed, the court also did shift its views.

The Hughs court had been criticized for its conservatism; the Warren Court was criticized for its excessive liberalism for making rather than interpreting law in the

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12 *Id*. p. 409.

13 The Constitution of the United States Information Agency (1987). pp. 50-52.

14 163 US 537 (1896).

15 Archibald Cox (1992). *Court and the Constitution*, 2nd Indian Reprint, New Delhi: Asian Book (Pvt.) Ltd. p. 149.

1930s. During that period, the court was most uniformly supportive of civil liberties and most activist in its policy making. Probably the best Known decision of that period was *Brown V. Board of Education* which invalidated the controversial decision of *Plessy V. Fergusan* and ordered a desegregation of southern school systems and began the process of supporting the rights of black Americans in Several areas of policy making.

During the 1960s, the court expanded the rights of criminal defendants in state trials, most notably in the landmark decisions on the right to police search and seizure practices, through the case *Mapp V. Ohio*[16], Yates V. United States[17], emphasized that conviction under the Smith Act required proof not just that defendants had advocated a belief in revolution in the abstract, but that they had advocated action to bring revolution about, *Shelton V. Tucker* [18] invalidated an Arkansas Statute which had 'chilling effect'[19] and *Baker V. Carr*[20] in which the court required that legislatures be apportioned according to population. These policies led to heavy criticism of the court for its liberal decisions. In the spring of 1962 senator *Estland* delivered an elaborate speech in which he cited;

'the enormous total of seventy cases or more involving communists or subversive activities in one form or another heard by the Warren court in its first seven half years. 'Forty six' of the decisions have sustained the position advocated by the communists, and twenty four have been to the contrary[21]

During the Warren era the court was both highly controversial and highly revered. It was controversial in part, because specific decisions produced opposition, for example, a 1966 public opinion poll revealed a 65 percent negative response to the *Mirinda* decision[22] requiring that those arrested be informed of their rights. Even from presumably more moderate groups such as the American Bar Association and

16 367 US 643 (1961).
17 354 US 298 (1957).
18 364 US 479 (1960).
19 That is, a law may be held unconstitutional if its mere existence 'chills' or impairs, the exercise of First Amendment Rights.
20 369 US 186 (1962).
21 William F. Swindler, (1970). Court and Constitution in the Twentieth Century- The New Legality 1932 - 1968, New York: The Robbs Merril company Inc. p. 292
22 William C. Louthen, (1991). *The United States Supreme Court: Law Making in the Third Branch of Government*, New Jersey: Prentice Hall Inc. p. 5.

the conference of state Chie f Justices, there came criticism of the Warren Court's 'political activism' and its exercise of essentially legislative powers[23].

It led the Supreme Court emerged as a powerful organ of the government. Unlike the critics of the Warren Court, Supporters of the court viewed it as a key agency for initiating change for the far-reaching alterations in American life.

After retirement of *Chief Justice Earl Warren* in 1969, President *Nixon's* appointee *Warren Burger* became the new Chief Justice of USA. By the mid 1970s, changes in the court's direction and overall philosophy were increasingly apparent. The *Burger* court of the 1970s early 1980s is perceived as restrained by some because its decisions generally were less innovative and more conservative that those of the warren court. Liberals had criticized the Burger court for its backpedaling on civil liberties and civil rights issues. For instance, though the decision of *Mirinda* was not overturned but was weakened by a ruling that confessions obtained without warnings could be used to impeach a witness's testimony at trial[24] .

The U.S. Supreme Court found in *Roe V. Wade* that a woman is entitled by the Constitution to obtain an abortion freely, after consultation with a doctor in the first trimester of pregnancy and in unauthorized clinic in the second trimester. No European Constitutional court has gone that far in recognizing freedom of abortion as part of the women's right to privacy. The Italian court held in 1975 that voluntary abortions cannot be punished if performed in view of saving the life and health, both physical and emotional, of the women. The Austrian Court (1974) and the French Constitutional Council (1975), without tackling the problem of a women's Constitutional right to interrupt pregnancy, have validated statute that provide in liberal terms for the possibility of voluntary abortions. The West Germany Court, instead, quite alone in Europe, ruled in 1975 that the Constitution, by declaring the life of persons inviolable, implicitly wants also the life of fetuses protected and that an adequate protection is afforded by the state only if voluntary abortion is made a crime by law. But the law of East Germany was much more permissive, and, a few years after the reunification of the two German states (1990), the Constitutional

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23 Bernard Schwartz, (1983). *Super chief: Earl Warren and His Supreme Court*, New York: New York University Press. pp. 280-81.

24 *Harris V. New York*, 401 US 222 (1971).

Court, while reaffirming that on principle the fetus must be protected, held that the protection must be achieved not by punishing but by counseling and other measures aimed at influencing a women to decide freely to carry her pregnancy to term.

The Federal Supreme Court of the U.S.A. has decided a number of cases by exercising the power of judicial review of legislation. *Thomas M. Cooley* writes[25] not only in the century and half of its national existence have only 53 Acts of Congress been declared unconstitutional and refused enforcement by the Supreme Court. The objectives of the judicial review in America are; to declare the laws unconstitutional which are not in conformity with Constitution; to defined the valid laws, which are, challenged to be unconstitutional; to protect and uphold the Constitution by interpreting its provision as to apply to the changing conditions of life; to save the legislative function of congress being encroached by other departments of the government; to check the action of congress and the state legislative from delegating the essential legislative functions to the executive or to check in congress from delegating its legislative function to the state legislative.

In the system of U.S. judicial review, Constitutional questions can be raised only in connection with actual "cases and controversies". Advisory opinions to the government are not rendered by the courts. In American system, courts, moreover, are the guardians of the Constitution, but they are not bound to consider all the provisions of the Constitution justifiable. Under the doctrine of "political questions" the Supreme Court has refused at times to apply standards prescribed by or deducible from the Constitution to issues that it believed could be better decided by political branches of government. For instance, Article IV, 4, provides that the states must have a republican from of government. Since *Luther V. Borden* (1849) it is settled that the court will not use the provision to invalidate state laws; it is for congress and the President to decide whether a particular state government is republican in form.

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25 *U.S. V. Todd* (1993). *Marbury V. Madision* (1803). *Dred Scott V. Sanford* (1857). *Gorden V. United States* (1805). *Exparte Garland* (1867), *Reichert V. Felps* (1868). The Alicia V. U.S. (1969), *Hepbun v.Griswold* (1870), *U.S. V. Deksitt* (1870), *Justices of the sc V. Murray* (1870). *Buffington V. Fox* (1871). *U.S. V. Klein* (1872) *U.S. V. Baltimore* (1873) *U.S. V. Reese* (1876). *U.S. V. Fox* (1878). *U.S. V. Harris* (1883) *Callan V. Wilson* (1888). *Wong Wong V. U.S.* (1896). *Fairbank v. U.S.* (1901). *Rassmussen V. U.S.*(1905). *Evans v. Gore* (1920). *U.S. v. L. Cohen Grocery Co.* (1921). *Adkins V. Children's Hospital* (1923). *Keller V. Potomac Electric Co.* (1923). *Washington V. Dawson* (1924).

Many military and foreign policy questions, such as the question of the constitutionality of a particular war, have been likewise considered political and therefore non- justifiable.

5.1.2 Judicial Review / Activism in UK

As referred in the earlier paragraphs that the concept of the Judicial Review / activism in England started with the 17th century famous *Dr. Bonham's case*[26] it was Justice Coke who propounded the notion. An act of English parliament conferring the charter of the Royal College of Physicians gave the incorporated society of physician power to impose fines upon members offending against its rules. Half of such fine was to go to the crown and the other half to the society. A physician *Dr. Bonham* was imprisoned for nonpayment of fine against which brought an action for false imprisonment. The Chief Justice of England *Sir Edward Coke* held in 1610 that the Act was void in as much as it had made the society the prosecutor and judge at the same time which was against common law and reason. *Coke* thus asserted the power of Judicial Review even against legislation. 'Coke asserted that if an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void'. This was a milestone judgment in inventing the judicial review of legislative act for the first time in the Constitutional history. It was not necessarily to their thinking that the courts be independent of parliament in any absolute sense or that they have the power to invalidate legislation but it was enough at that time that legislation would be interpreted in the light of reason and common -law, that official action would be subject to legal control, and that the authority of the courts would be accepted by parliament and crown.

Coke and other justices declared the levies to be invalid, while fining and imprisoning the recalcitrant commissioners in 1614,[27] This development of writ of *Mandamus* was a remarkable development in the history of common- law system in England, it was in 1615, when Coke created the rationale on which *Mandamus* was later based practically out of whole cloth in the famous and mysterious *James*

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[26] 8 Coke 113b, 17 Eng. Rep. 646 (C.P.1610),

[27] *Hetley V. Boyer, Cro*. 336, 79 Eng. Rep. 287(K.B. 1614).

Bagge's Case.[28] A writ of *Certiorari* was used in *Commins V. Massam* in 1642. The scope of judicial review was indeed limited to the question of jurisdiction in those days. In 1700 *Cardiffe Bridge case*, Lord Holt asserted the authority to issue *certiorari or mandamus* to every jurisdiction, and in the thinking of that time jurisdiction retained a good deal of the breadth which it had in the Middle Ages.

Lord Holt's judgment in the case of *Dr. Groenvelt V. Burwell* (1699) is remarkable. Where any court is erected by statute, a *certiorari* lies to it, and in Holt's view all agencies empowered to affect property rights are court to issue certiorari; it is by the common law that this court will examine, if other courts exceed their jurisdiction.[29]

Chief Justice Coke gave a great impetus to this doctrine,[30]the law which was against public sentiment and common morality and did not appeal to the common right and reason, was void. Thus the American Constitutional writer Corwin is of the view that the initial source of judicial review is found in Bonham's case, which was decided by chief justice Coke in England in 1610.[31]

During the colonial days, the Privy Council would usually apply the canons of statutory interpretation to constitutional interpretation as well.[32] For example, the Privy Council said in *King-Emperor V. Benoari Lal Sharma,*[33] "the question whether the ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or policy.

5.1.3 Judicial Activism in India

In India, though Judicial Activism in a systematic way was the development of late 1970. But Justice *J.S. Verma* preferred to trace the history way back in 1893. He views; the judiciary has or will continue to respond to the changing needs of the times. Indian Judicial Activism has distinct face in comparison to American concept. American activism was much more concerned with civil liberties for the protection

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28 11 Coke 93b, 77 Eng. Rep. 127 (K.B.1615).

29 1 Salk. 146, 91 Eng. Rep. 135 (K.B. 1700).

30 S.E. Finer and Bernard Rudden, (1995) Comparing Constitution 40-101, Clarenden Press, Oxford.

31 Edward Corwin, the Constitution and what it means today 144, Princeton University Press (1961).

32 The high water mark of this approach can be seen in *Kariapper V. Wijesinha* (1968). AC 717.

33 (1945). 72 IA 57.

and promotion of human rights of citizens. One stream of Indian activism radiates capitalism, champions the cause *status quo* and services the rights of the vested interests, while the other stream radiates socialism, espouses the cause of social change and advances the protection and promotion of basic human rights of the poor[34].

The liberalized doctrine of *locus standi* led to the development of public interest litigation (PIL). In the Asiad case [35] a voluntary organization filed petition for protection and promotion of the rights of workers. In this connection the Indian Supreme Court has devised a unique form of *epistory* jurisdiction through which public citizens or groups can activate the court for violation of fundamental rights of ethnic and minorities in Indian Society. Any citizen may activate the court by means of a letter which is treated as a writ petition. In *Dr. Upendra Baxi V. State of U.P.* two law professors of Delhi University addressing a letter to the court were deemed to have the standing to complain about the inmates of the Protective Home at Agra where the inmates were living in inhuman and degrading conditions. Though such moves were criticized by the judges like *V.D. Tulzapurkar* saying; such a practice would result in confirming a privilege on the complaint to have a judge or forum of his own choice which is clearly subversive of the judicial process and enjoins that no litigant can choose his/her forum, moreover it will result in the erosion of the administrative powers of the chief justice[36]. But the court went a step ahead and frequently appointed 'commissions' and 'sociological committees' to investigate and collect necessary facts in various cases. Emphasizing on the usefulness of new procedural innovations, Chief Justice *Bhagawati* responded;

The constitution makers deliberately did not lay down any particular forms for enforcement of fundamental rights nor did they stipulate that such proceedings should confirm to any right pattern of or straight jacket formula … We have therefore to abandon the *laissez faire* approach in the judicial process … and forge

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34 Mohammad Ghouse, (1990) *The Two Faces of Judicial Activism*, New Delhi: Deep & Deep Publication, p. 110.

35 *People's Union for Democratic Rights V. Union of India,* AIR 1982 Sc 1473

36 Sudesh Kumar Sharma, (1983). "Public Interest Litigation : A Revolution in Judicial Process", V.D. Tulzapurkar, 'Judicary: Attacks and survival' AIR (Journal) 9. pp. 13-14.

new tools, device new methods and adopt new strategies for the propose of making fundamental rights meaningful of the large masses of people[37].

Regarding right to life[38] basically there are two distinct phases of interpretation. Prior to *Menaka Gandhi's* case, the relationship of Article 21 with other fundamental rights was not well-established. Similarly, Court's approach was very strict and purely literal and was too much colored by the positivist or imperative theory of law[39]. In the famous case, *A. K. Goppalan V. State of Madras*[40], in which the main question was the interpretation of the words 'procedure established by law', the court settled two major points in relation to Article 21. One, Article 19 and 21 and 22 were mutually exclusive and that Article 19 was not to apply to a law affecting personal liberty.

But the court later overruled the Gopalan by re-interpreting Article 21 in a landmark case *Menaka Gandhi V. Union of India*[41], since then the Supreme Court has shown great sensitivity to the protection and promotion of personal liberty. In this case, the court laid down a number of propositions seeking to make Article 21 much more meaningful than before. First, the court reiterated the proposition of that Article 14, 19 and 29 were not mutually exclusive. Secondly, the expression 'personal liberty' in Article 21 was given an expansive interpretation. Thirdly, the court reinterpreted the expression 'procedure established by law' in Article 21 and gave it a new orientation. Article 21 would no longer mean that law could prescribe some semblance of procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. With the interpretation of Article 21 of the constitution, the meaning and scope of the right to life or personal liberty was expanded to a great extent. The right to life began to be considered as not only a right against interference but also a right of recipience. In *Hussainara Khatoon V. Home Secretary, State of Bihar*[42], the court ruled, pre-trial release on personal bond should be allowed where the person to be released on bail is

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37 *Bandhua Mukti Morcha V. Union of India,* AIR (1984). Sc 802.

38 Article 21 of the Indian Constitution mentions "Life and Personal Liberty".

39 M. P. Jain (2013). *Indian Constitutional Law*, (6th ed.), Lexis Nexis Butterworths Wadhwa Nagpur, Re print, p. 1185.

40 AIR 1950 Sc 27.

41 AIR 1978 Sc. 597.

42 AIR 1979 Sc. 1360.

indigent and there is no substantial risk of absconding. In *Khatri V. State of Bihar*[43] it was asserted, an accused person at least where the charge is of an offence punishable with imprisonment is entitled to be offered legal aid, if he is too poor to afford council. In the same way, in the cases *Hussainara Khatoon V. State of Bihar*[44] and *Sher Singh V. State of Panjab*[45] court affirmed, a procedure law is void if it does not provide for speedy trail. Likewise, in the case *Permananda Kataria V. Union of India*[46], right to be treated by doctor was considered as a part of right to life. In another case, *M. C. Mehta V. Union of India*[47], the court comprehended the right to free and fresh environment as part of right to life. In the case *Olga Tellis V. Bombay Municipal Corporation*[48], the rights to live and right to work were considered as integrated and interdependent. Therefore the court emphasized; if a person is deprived of his job … his very right to life is put in jeopardy. Similarly, in the case *Unni Krishnan V. State of A. P*[49], the right to education up to the age of 14 years is considered fundamental right within the meaning of Article 21. Not only that there are many other rights which are considered as part of right to life. In the words of the then *Chief Justice P. N Bhagwati*:

> 'The word 'Life' has been interpreted by the court to mean not only physical or animal existence but also the use of every limb or faculty through which life is enjoyed, as also the right to live with basic human dignity. The Supreme Court has said that no government or public official can deprive a person of his right to live with basic human dignity except by reasonable or just procedure established by law. In fact no procedure can be reasonable, just and fair which destroys basic human dignity.'[50]

Indian Supreme Court has also exercised its activist role in the name of basic structure doctrine. This doctrine was altogether a novel doctrine innovated by the court as there is no mention of any such doctrine in the text of the constitution. Not

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43 AIR 1981 Sc. 928.
44 AIR 1979 Sc. 1369, 1377 and 1819.
45 AIR 1983 Sc. 465.
46 AIR 1989 Sc. 2039.
47 AIR 1987 Sc. 1086.
48 AIR 1986 Sc. 180.
49 (1993) 1 Sc. 645.
50 Frontline, Jan. 11-24 (1986). p. 11.

only that no such doctrine was mentioned even in the debates of the constituent assembly that gave the constitution. So, it is a superb example of juristic activism on the part of the court and the judges[51]. The Supreme Court in the case *Keshavand Bharati V. State of Kerala*, popularly known as the fundamental rights case[52], had propounded the theory of basic structure. The court by majority overruled the *Golaknath's case*[53] which denied parliament the power to amend fundamental rights of citizens. In that case the Supreme Court by majority (7 to 6) held that, the parliament has wide powers of amending the constitution and it extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the 'basic feature' or 'framework' of the constitution. Though the judges enumerated certain essentials of basic structure of the constitution, but they also made it clear that they were only illustrative and not exhaustive. They will be determined on the basis of the facts in each case[54]. Similarly, in enumerating the basic feature of the constitution, the opinion of the judges differed. However, they mentioned in common the republican form of government, secularism and separation of power as the basic structure of the constitution. The theory of the basic structure of the constitution was confirmed repeatedly in subsequent cases. In *Indra Neheru Gandhi V. Raj Narain*[55], the Supreme Court applied the theory of basic structure and the court has thus added the rule of law, judicial review and democracy which implies free and fair election[56] as the basic structure of the constitution. Again in the case *Minarva Mills V. Union of India*[57] the court held that limited power of parliament to amend the constitution, harmony and balance between fundamental rights and directive principles, fundamental rights in certain cases and power of judicial review in certain cases are the basic features of the constitution. The Supreme Court also struck down the different constitutional amendment Acts as unconstitutional, which had invited great controversy between the court and the executive. But the fact should be accepted that court's activist attitude has become

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51 Mool Chand Sharma (1995). Justice P.N. Bhagawati: Court, Constitution and Human Rights, Delhi: Universal Book Traders. p. 51.

52 AIR 1973 Sc. 1461.

53 AIR 1967 Sc. 1643.

54 Dr. J. N. Pandey (1994). *Constitutional Law of India*, 26th edition, Allahabad: Central Law Agency. p. 554.

55 AIR 1975 Sc. 2299.

56 *Ibid.*

57 AIR 1980 Sc. 1789.

successful to check other two branches of the government from behaving arbitrarily while amending the constitution.

Though the Indian judiciary has been playing an activist role but the court's such role is also not far from controversy. Members of other two branches of the government are skeptical and critical about the activist role of the court, which has resulted in bitter experience also. Basically, the period of 1967-1981 was the period of struggle for parliamentary supremacy over judiciary[58]. The Supreme Court's concept of basic structure lead to the assertion by executive for 'committed judiciary' not to bring about socio-economic changes but to get judicial endorsement of all executive action, right or wrong. As the result of which on April 25, 1973, the government appointed *Justice A. N. Ray* as the chief justice, superseding three outstanding judges, *Justice K. S. Hegde, Justice Shelat* and *Justice A. N. Grover*[59]. Again in January 1977 *Justice H. R. Khanna* was superseded by *Justice M. H. Beg* because he had given dissenting judgment in the case *A. D. M. Jawalpur V. Srikant Shukla*[60], popularly known as *habeas corpus* case. *Justice Khanna* held that in view of the precedential order dated 27th June, 1975 no person had any *locus standi* (legal right) to move any writ - petition under Article 226 before a high court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act or was illegal, or was vitiated by *mala fides* factual or legal or has based on extraneous considerations[61]. Though *justice Khanna* was not an 'activist' judge in terms of militant use of judicial power in the service of the fundamental rights but he nevertheless used all available judicial talent to descent in the *habeas corpus* case during the emergency. On the other hand, justices who fancied themselves as human rights activity relapsed into a regime specific restraintivism[62]. It compels to think that judicial activism can be case activism or issue specific or even regime specific activism.

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58 S. K. Agrawal (1990). Whither Indian Democracy, (1st ed.). Delhi: UDH Publishing House, p. 43.

59 *Ibid.* p. 48.

60 AIR 1976 Sc. 1207.

61 *Ibid.*

62 Upendra Baxi (1985). *Courage, Craft and Contention* : The Indian Supreme Court in the eighties, Bombay : N.M. Tripathi, (Pvt.) Ltd. p. 7.

In India, there is a great controversy on judicial activism. The controversy lies in both the areas, within and outside the judiciary. Within the judiciary, the controversy arises between activist and restraint judges, *Justice V. R. Krishna Iyer, P. N. Bhagwati, J. S. Barma, Justice Kuldeep Singh, B. P. Jeevan Reddy* and *S. C. Aggrawal* are considered strong proponents of the judicial activism. On the other *Justice H. R. Khanna, Justice V. D. Tulzapurkar, Justice K. Ramaswamy, R. S. Pathak* and *A. M. Ahmadi* have the restraint vision. *Justice Ahmadi, C. J* the then was of the opinion that judicial activism which levels judges as activist, liberal or conservative, tends to create individual distinctions among judges which is not healthy for the judicial system as a whole[63]. But such kinds of division always did not seen to be true. Where *Justice P. N. Bhagwati* who bore strong activist career, had favored status quoits stand on *habeas corpus* case at that place, a restraint judge *H. R. Khanna* had demonstrated dissenting opinion. Likewise, another activist judge *J. S. Verma*, in the Maharastha *Chief Minister Manohar Joshi's* promise to set up a 'Hindu State' there did not necessarily found an appeal for votes on religious lines[64]. Outside the judiciary also the issue of judicial activism has become the question of hot debate. The politicians, basically the MPS were more critical about judicial activism. *Subroto Mukherjee*, West Bengal Congress leader expressed his dissatisfaction, 'the judiciary' has become a superpower. Military coups are common in neighboring countries. In India, the judiciary has staged a neat coup and snatched the reins of power from the parliament[65]. Similarly, *S. Jaipal Reddy, Janata Dal leader*, comments in the tune of *Mukharjee,* 'we have reached a stage where parliament does not know what can be amended or not with several constitutional amendments being struck down by the Supreme Court. But parliament cannot be subordinate to the judiciary[66]. Not only that earlier in April 1982 had a member of *Rajya Sabh* made highly derogatory references to SAL. He saw in it, nothing less than a foreign conspiracy to destabilize the Indian government through the activation of the Supreme Court[67]. In India, the dispute on judicial activism was in so height

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63 *The Times of India*, July 30, 1996.

64 *Frontline,* May 3, 1996, p. 103.

65 The Sunday Times of India Dec. 1, 1996.

66 S. Jaipal Reddy (1996). "Parliament is not Subordinate to the Judiciary", *The Sunday Review*, Oct. 27.

67 Upendra Baxi (1988). "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, Law and Poverty, N. M. Tripathi (pvt) Ltd.

that some MPs demanded a special session of parliament to discuss the matter. They had written a letter to the prime minister saying that recent acts of judicial activism have created the impression of superiority of the judiciary over the legislature[68]. But this move was not succeeded; *Altal Bihari Vajpayee* rejected the proposal saying there was no need to convene a special session of parliament to discuss 'Judicial Activism' because the House had failed to act as far as the corruption cases were concerned[69]. Similarly, the then *Lok Sava Chairman P. A. Sangma* also rejected the proposal saying judicial activism ok and parliament cannot be an investigation agency[70]. Nevertheless the critics of judicial activism often blame the court seeking to govern India. But the supporters of Judicial Activism reacted the blame politically motivated and a result of media hype[71].

In India, judicial activism emerged in two distinct phases. First as it emerged in the 1980s, was pro-poor: it affairmate the rights of bonded labors, the landless, the mentally unwell, the politically persecuted and others who could not represent their cause. But through 1990s according to *Dr. Parmanada,* public interest litigation has been hijacked by middle class concerns. The courts have set about dealing with executive accountability, with the way municipalities handle garbage, with housing facilities for government servants. This subverts the original agenda of public interest litigation[72]. In its recent development, Indian Supreme Court has centered its activist role in the field of the prevention of corruption. Court's rulings on *Hawala, S. T. Kitts* and *Fodder Scam* have been creating great sensations in favor and against the court. In *Hawala case*, in which the then prime minister *P. V. Narasimha Rao* was also facing accusation, the Supreme Court freed the central bureau of investigation (CBI) from the control of PM[73], court's such role was not only criticized by the politicians, but also criticized by legal experts. Former *S.C. judge H. R. Khanna* warned the court saying;

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68 Priyaranjan Das Munshi and Vayalar Ravi were those two personalities.

69 *The Sunday Times*, Oct. 6, 1996.

70 *The Times of India*, Dec.7, 1996.

71 Rajiv Dhawan's Response with Praven Swami, *Frontline* May 3, 1996, p.-105.

72 Permanada Singh (1989) *Public Interest Litigation* : Annual Survey of Indian Law, Reprint, Indian Law Institute, p.60.

73 The Times of India, March 2, 1996.

'The judiciary has made investigating agencies work against corrupt politicians but judges should not take over the country's governance. This can disrupt constitutional balance and end in a disaster.'[74]

However, the court's activist role was criticized mostly by the politician's and experts, but majority of the people endorsed judicial activism. In a Times- Mode poll conducted in nine metropolitan cities, 78 percent of the respondents say the Supreme Court has only done its job in entering the picture and forcing the governmental authorities to take action when the government has been negligent in implementing existing laws and regulation[75]. In this way, Indian court's activist posture is supported and backed by the large masses of general people. Indian court has remained as the lamp of last hope for Indian people. But in this connection, the equally remarkable thing is that the focus of judicial activism has been shifting and there is always fear of the court being diverted from its ultimate responsibilities. This sentiment is expressed by the Indian court in the words, 'Judicial activism gets its highest bonus when its order wipes some tears from some eyes'[76]. It should be the motto of Indian judicial activism in actual sense.

To the question of applicability of Article 21 to non-citizens, the Supreme Court has emphasized that even those who come to India as tourists also "have the right to live, so long as they are here, with human dignity, just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens"[77] In the *State of Kerala Scheduled Tribes case*[78] the Supreme Court considered the issue as to whether a law which provided that the Tribals should be rehabilitated in their own habitat when a prior alienation by the Tribe was or is illegal violating Art. 21 of the Constitution at the instance of the alien; while considering the question the Court considered the disadvantage, social and economic status of the Tribals and concluded that having regard to the studies conducted by the State Government and as a balance of interest between tribals and non-tribals, there was no transgression of Art. 21.

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74 The Times of India, Jan. 13, 1997.
75 The Times of India, March 2, 1996.
76 *Rickshaw Puller's Union V. State of Punjab*, AIR 1982 Sc 14.
77 *Chairman, Railway Board V. Chandrima Das*, AIR 2000 SC 988 at 998: (2000) 2 SCC 465.
78 (2009). 8 SCC 46, 95: AIR (2009). 9 JT 579.

On expression "*personal liberty*" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct Fundamental Rights and given additional protection under Art. 19. Right to personal liberty also means the life free from encroachments unsustainable in law. Any law interfering with personal liberty of a person must satisfy a triple test (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the Fundamental Rights conferred under Art. 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Art. 14.[79]

In 2009 a judgment reasserts that strict boundaries of *'personal liberty'* cannot be identified but at the same time mandates that such liberty must also accommodate public interest. A women's right to make reproductive choices has been held to be a dimension of *"personal liberty*" within the meaning of Art. 21.[80] *Suchita Srivastava,* an orphan women of age 19-20 years and already suffering from mild mental retardation, was found pregnant (allegedly of having raped) while staying in a government - run Welfare Institution. The Punjab & Haryana High Court based on the report of an Expert Committee directed termination of the pregnancy under the provisions of the *Medical Termination of Pregnancy Act, 1971*. The victim, however, had desired for continuation of her pregnancy. One of the questions before the Supreme Court was whether in applying the 1971 Act the Fundamental Right of the victim under Art. 21 had been violated. The Supreme Court answered the question in the affirmative.

The Court said:

> "There is no doubt that a women to make reproductive choices is also a dimension of "personal liberty" as understood under Art. 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a women's right to privacy, dignity and bodily integrity should be respected." The Court, however, considered that there is

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79 *District Register and Collector V. Canara Bank* (2005). 1 SCC 496: AIR 2005 SC 186.

80 *Suchita Srivastava V. Chandigarh Administration* (2009). 9 SCC 1.

> also "compelling State interest" in protecting the life of the prospective child and, therefore, the termination of the pregnancy could only be permitted under the conditions specified in the 1971 Act which are to be viewed as reasonable restrictions placed on the exercise of reproductive choices.

Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, since a person's greatest of human freedoms of personal liberty, is deprived, the laws of preventive detention are strictly construed. Further a meticulous compliance with procedural safeguard, however technical, is mandatory. Personal liberty protected under Art. 21 is so sacrosanct and so high in the scale of Constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law.[81] Right of accused to be defended by a legal practitioner of his choice is protection, and any interfere would be violation of Art. 21.[82]

Article 21 envisages a fair procedure and fair investigation. By reason of such a right alone the appellant was entitled not only to be informed about his fundamental right and statutory rights but it was obligatory on the part of the Special Public Prosecutor to place on record the requisite materials before the Designated Judge to show that the appellant, after his arrest in Delhi case on 23-7-1993 was not an absconder and thus the provisions of Section 299 of the Code was not attracted.[83]

Such right extends not only to actual proceedings in court but also includes within its sweep the preceding police investigation as well.[84]

Although free and fair trail is *sine qua non* of Article 21, the apprehension of denial must be reasonable and not imaginary. Reasonableness would obviously depend on the facts and circumstances of a case and their evaluations by the Courts.[85]

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81 *Union of India V. Chaya Ghoshal* (2005). 10 SCC 97: AIR 2005 SC 428.
82 *Sri Jayendra Saraswathy Swamigal V. State of TN* (2005). 8 SCC 771: AIR 2006 SC 6.
83 *Jayendra Vishnu Thakur V. State of Maharashtra*, (2009) 7 SCC 104: 92009) 8 JT 75.
84 *Vakil Prasad Singh V. State of Bihar* (2009) 3 SCC 355: AIR 2009 SC 1822.
85 *DLF Power limited V. Central Coalfields Ltd.* (2009). 6 SCC 258: AIR 2009 SC 2189.

The Court has now expressly said that arrest is not a must in all cases of cognizable offences.[86] The arrested man has certain rights, viz., he has a right that a relative/ friend of his be informed about his arrest and the place of his detention; he has a right to consult a lawyer privately.

Conducting a fair trial for those who are accused of criminal offences is the cornerstone of democracy. Conducting a fair trial is beneficial both to the accused as well as to the society. A conviction resulting from an unfair trail is contrary to our concept of justice.[87]

Fair trail obviously would mean a trail before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trail means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.[88]

Right to have a fair trial strictly in terms of the Juvenile Justice Act which would include procedural safeguard is a Fundamental Right of the juvenile.[89]

Speedy trial as such is not mentioned as a specific Fundamental Right in the Constitution. The Criminal Procedure Code does not guarantee specifically any right to speedy trial. Nor is there any provision prescribing the maximum period for which a magistrate can keep an under trial in jail without trial. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances and determine in each case whether the right to speedy trial has been denied in a given case. The Court noted that the prosecution had failed to show any exceptional circumstance which could possibly be taken into consideration for condoning callous and inordinate delay of more than two decade in investigations and the trial and in particular noted that even till date of the judgment the State is not sure whether a

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86 *Lal Kamlendra Pratap Singh V. State of Uttar Pradesh,* (2009) 4 SCC 437: (2009) 7 JT 327.
87 *State of Punjab V. Baldev Singh, AIR (1999). SC* 2378: (1999) 6 SCC 172.
88 *Zahira Habibulla H. Sheikh V. State of Gujarat*, (2004) 4 SCC 158: AIR 2004 SC 3114.
89 *Pratap Singh V. State of Jharkhand* (2005) 3 SCC 551: AIR 2005 SC 2731.

sanction for prosecuting the appellant is required and if so, whether it had been granted or not.[90]

Quick justice is now regarded as *sine qua non* of Art. 21 .The prosecutions should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.[91] Speedy trail is a fundamental Right implicit in the broad sweep and content of Article 21. The article confers a Fundamental Right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law. It is conceded that some amount of deprivation of personal liberty cannot be avoided, but if the period of deprivation pending trial becomes unduly long, fairness assured by Art. 21 would receive a jolt.[92]

The Supreme Court has laid great emphasis on speedy trial of criminal offences, and has emphasized: "It is implicit in the broad sweep and content of Art. 21.[93] A fair trial implies a speedy trial. No procedure can be 'reasonable, fair or just' unless "that procedure ensures a speedy trial for determination of the guilt of such person."

The Supreme Court has observed:

> "No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just' and it would fall foul of Art. 21. There can, therefore, be no doubt that speedy trial and by speedy trial we mean reasonably expeditious trial, is an integral and essential part the fundamental right to life and liberty enshrined in Art. 21".

In Kartar Singh V. State of Punjab The Supreme Court has observed:[94]

> "The concept of speedy trial is read into Art. 21 as an essential part of the Fundamental Right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages,

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90 *Vakil Prasad Singh V. State of Bihar* (2009). 3 SCC 355: AIR 2009 SC 1822.
91 *Ibid.*
92 *Surinder Singh V. State of Punjab* (2005). 7 SCC 387: AIR 2005 SC 3669.
93 *Hussainara Khatoon V. Home Secretary, State of Bihar* (I), AIR 1979 SC 1360: (1980) 1. SCC 81.
94 (2007) 14 SCC 357: AIR 2008 SC 471.

namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averred."

In T.M.A. Pai Foundation V. State of Karnataka[95] in respect of private unaided educational institutions the verdict of the Court was:

> "The scheme has the effect of nationalizing education in respect of important features viz, the right of a private unaided institution to give admission and to fix the fee."

The scheme relating to the grant of admission and the fixing of the fee framed in *Unni Krishnan,* has been replaced by another judicially evolved scheme, albeit as a temporary measure in *T.M.A Pai* as elaborated on in *Islamic Academy of Education V. State of Karnataka*[96] and *P.A. Inamdar V. State of Maharashtra*.[97] Confusion as to the say of the Government particularly in the matter of admission and fee fixation in private unaided educational institutions continues, with courts resorting to a certain amount of adhocism in resolving disputes.[98]

The Court delivered its verdict as; keeping the objective of Art. 21- A in mind its provisions have been liberally construed allowing teachers[99] and educational institutions[100] to obtain benefits thereunder. The underlying logic is that the grant of benefits to those involved in the process of education would also indirectly benefit those for whom the Article was primarily intended. The same logic persuaded the court to hold that the services of the teachers may not be requisitioned on the days on which the schools are open.[101] However, claims based on Art. 21- A to compel the

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95 (2002) 8 SCC 481, at 539: AIR 2003 SC 355.
96 (2003) 6 SCC 697: (2003). 5 JT 1.
97 (2005) 6 SCC 537: AIR 2005 SC 3226.
98 *Cochin University of Science & Technology V. Thomas P. John*, (2008) 8 SCC 82: AIR 2008 SC 2931: *Modern Dental College and Research Centre V. State of M.P*. (2009) 7 SCC 751 : AIR 2009 SC 2432.
99 *State of Rajasthan V. Senior Higher Secondary School* (2005) 10 SCC 346 at 352: AIR 2005 SC 3543.
100 *State of Rajasthan V. Senior Higher Secondary School.*
101 *Election Commission of India V. St.Mary's School,* (2008) 2 SCC 390, at 403: AIR 2008 SC 655.

State to give grant in aid[102] to control fees charged by private unaided schools[103]or to challenge conditions for grant of recognition[104]have been negative by High Courts.

Article 21-A read with Article 19(1) (a) has been construed as giving all children the right to have primary education in a medium of instruction of their choice.[105] Art.21-A has also been construed as the fundamental right of each and every child to receive education free from fear of security and safety so that children have a right to receive education in a sound and safe building.[106]

In 2001-2002, the Government launched *Sarva Shiksha Abhiyan* to make elementary education free. However no Central Legislation was enacted to make the right a reality despite the Court noting in *P.A. Inamdar* that it was for the Central Government, or for the State Governments, in the absence of a Central legislation, to come out with a detailed well- thought-out legislation on the subject and that such a legislation was long awaited. In 2008, *Dalveer Bhandari, J* in *Ashoka Kumar Thakur V. Union of India,*[107] directed "the Union of India to set a time-limit within which this article is going to be completely implemented. This time- limit must be set within six month.

The Supreme Court stated,…"the protection under Arts. 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitute an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion".[108]The Constitutional validity of the imposition of Marathi language as a compulsory study in school run by linguistic minorities was questioned in *Usha Mehta V. State of Maharashtra*.[109] The Court relied on the "three-language formula" and held:

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102 *Keraleeva Samajam V. State of Maharashtra* 2004 (1) ALL MR 375: 2004 (3) Bom CR 723.
103 *Vinay N. Pandya V. Union of India,* Guj. High Court Unreported judgment dt 4, 10 2005.
104 Director of School Education, (2008). 2 Cal LT 530: 2008 (3) CHN 850.
105 *Associated Managements of Primary and Secondary Schools in Karnataka V. The State of Karnataka by its Secretary, Department of Education and Others*. ILR 2008 KAR 2895: (2008) 4 Kar LJ 593.
106 *Avinash Mehrotra V. Union of India* (2009). 6 SCC 398: (2009) 5 JT 363.
107 (2008) 6 SCC 1: (2008) 5 JT I.
108 *N. Adithyan V. Travancore Devaswom Board,* (2002) 8 SCC 106.
109 (2004) 6 SCC 264, at 279: (2004) 5 SC ALE 800.

"It is difficult to read Article 29 and 30 in such a way that they contain the negative right to exclude the learning of regional language. *Ipso facto* it is not possible to accept the proposition that the people living in a particular State cannot be asked to study the regional language".

There was no requirement that the medium of instruction should be in the regional language. The right of minorities to establish and administer educational institutions of their choice under Article 30(1) read with Art. 29(1) would include the right to have choice of medium of instruction in imparting education. Consequently a Government Order insofar as it directed minority educational institutions to convert the medium of instruction from English to Kannada was struck down by the Karnataka High Court.[110]

The Constitutional right to property under Article 300A is not a basic feature or structure of the Constitution.[111]After the Forty-fourth Amendment of the Constitution right to property is a human right and a constitutional right but not a Fundamental Right. The Court further held that control of property short of deprivation does not entail payment of compensation.[112]

Right to transfer land is incidental to right of ownership of the land and cannot be taken away without authority of law. Ownership of land jurisprudentially involves a bundle of rights. One of such rights is the right to transfer.[113] An owner of a property, subject to reasonable restrictions which may be imposed by the legislature, is entitled to enjoy the property in any manner. The statutory interdict of use and enjoyment of the property must be strictly construed.[114] The right to property is now considered to be not only a constitutional right but also a human right. The Declaration of Human and Civic Rights of 26-8-1789 enunciates under Article 17 :

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110 *Associated Managements of Primary and Secondary School in Karnataka V. The State of Karnataka*, 2008 (4) Kar LJ 593.

111 *Jilubhai Nanbhi Khackar V. State of Gujarat*, AIR 1995 SC 142: 1995 Supp (1) SCC 596; S.B. *Narayancharya Public Trust V. State of Gujarat*, AIR 2001 Guj 208, at 221.

112 *Indian Handicrafts Emporium V. Union of India*, (2003) 7 SCC 589: AIR 2003 SC 3240

113 *DLF Qutab Enclave Complex Educational Charitable Trust V. State of Haryana*, (2003) 5 SCC 622: AIR 2003 SC 1648.

114 *Bhavnagar University V. Palitana Sugar Mill* (P) Ltd. (2003) 2 SCC 111: AIR 2003 SC 511.

"Since the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it and just and prior indemnity has been paid".

Under Article 17 of the Universal Declaration of Human Rights, 1948 dated 10-12-1948, adopted in the United Nations General Assembly Resolution it is stated that: (i) Everyone has the right to own property alone as well as in association with others, (ii) No one shall be arbitrarily deprived of his property.

Earlier human rights were more or less confined to and the claim of individuals right to health, right to livelihood, right to shelter and employment, etc, but now human rights have started gaining a multifaceted approach. Now property rights are also incorporated within the definition of human rights. Even claim of adverse possession has to be read in consonance with human rights.[115] Article 300A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law made by Parliament or a State Legislature, a rule or a statutory order having force of law. It is inherent in very sovereign State by exercising its power of eminent domain to expropriate private property without owner's consent.[116]

Article 31(1) laid down that no person can be deprived of his property without the authority of law. Art. 31(1) has been repealed and Art. 31(1) re-appears as new Art. 300A saying that no person shall be deprived of his property save by authority of law. Thus, a law will be necessary to deprive a person of his property. To ensure that a person is not deprived of his property without the authority of law, it does not matter whether it is a Fundamental Right or a constitutional guarantee, for in either case a law is needed to deprive a person of his property.

Supreme Court takes a liberal view of *locus standi* to file a writ petition under Art. 32. The concept of *locus standi* has been very much expanded and the Supreme Court has come to adopt a flexible view on the question of a person's entitlement to file a writ petition to challenge an executive order as *locus standi*. The Supreme

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115 *Chairman, Indore Vikas Pradhikaran V. Pure Industrial Coke & Chemicals Ltd.* (2007) 8 SCC 705: AIR 2007 SC 2458.

116 *Ibid.*

Court proceeded to consider the question on its merits whether an order made by the Excise Commissioner was legal or not without going into the question whether the petitioner challenging the order had *locus standi* to do so or not with the remark that if the impugned order was in violation of law "We do not wish to nip the motion out solely on the ground of *locus standi*". If the executive had no authority to pass the order impugned, "it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no *locus standi* .

In *Union of India V. Association for Democratic Reforms*,[117] the Supreme Court issued certain directions to the Election Commission. Justifying this, the Supreme Court observed:

> "… It is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules."

However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.[118]

A PIL would only be entertained if a segment of the public is interested, and the petitioner is not aggrieved in his individual capacity alone. And, it is not a charter for ignoring or supplanting an applicable statutory provision.[119]

The grievance in a public interest action, generally speaking, "is about the content and conduct of governmental action in relation to the constitutional or statutory rights of segments of society and in certain circumstances the conduct of government policies". To facilitate filing of such cases by public minded citizens, the Court has

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117 (2002) 5 SCC 294: AIR 2002 SC 2112.

118 *Ibid.*

119 *Guruvayoor Devaswom Managing Committee V. C.K. Rajan* (2003) 7 SCC 546: AIR 2004 SC 561.

lowered the "*locus standi* thresholds".[120] The dispute is not comparable to one between private parties and the relief is generally "corrective" rather than "compensatory". It is wrong on the part of a High Court to allow a writ petition without taking into consideration the *locus standi* of the writ petitioners having regard to the specific plea of the respondent state authority.[121]

The range and scope of public interest litigation is vast as it is a mechanism to agitate any socio-economic public issue before the Court which can be brought within the legal and constitutional mould.[122] PIL is the result of judicial activism. The basic reason for the growth of PIL in India is bureaucratic unresponsiveness to public needs. No effective mechanism has been established as yet for the redress of public grievances against the Administration. The result is that any person having a grievance against the Administration has no alternative but to take recourse to the courts for the redressed of his grievance against the Administration.

PIL has flourished in India mainly because of the lack of any sense of accountability and responsibility on the part of the government. Had the Administration discharged its role faithfully and effectively, there would be no need for people to knock at the doors of the courts to assert their rights and ensure that the Administration acts according to law. Many statutes remain on the statute book without the Administration taking any steps to implement the same. On the other hand, the courts have played their role in a constructive manner with a view to promote the welfare of the people and strengthen the democratic fabric in the country.

At the same time, the increase of the inflow of public interest litigation and the abuse thereof has prompted the Supreme Court to sound a precautionary note:

"Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well as to enrich themselves. Often they are actuated by a desire to win

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120 *Ranji Thomas V. Union of India* (2000) 2 SCC 81: 200(7) Supreme 264. Chairman & M.D, BPL Ltd. V. S.P. Gururaja (2003) 8 SCC 567: AIR 2003 SC 4536.

121 *Chairman & MD, BPL LTD. V. S.P. Gururaja* (2003) 8 SCC 567.

122 Some of the important PIL cases which have come before the High Courts and the Supreme Court are, *Rural Litigation & Entitlement Kendra, Dehradun V. State of Utttar Pradesh*, AIR 1985 SC 652: (1985) 2SCC 431; *Narmada Bachao Andolan V. Union of India* (2002) 10 SCC 664.

notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs"[123].

5.1.4 Evolution of Judicial Activism in Nepal

The evolution of judicial system and judicial activism in Nepal can be studied at two parts; (1) the judicial system of traditional era, (2) The judicial system under Modern Era,

(1) Judicial System of Traditional era

In Lichhchhavi era *Dr. Jagadish Chandra Regmi* writes[124] the legal system was based on *Dharmashastra*, including religions, myths and realities. The first Lichchhavi king of historical importance was Manadeva I. He emerges from the inscriptions as a powerful and a determined monarch. His structural reforms were Mangriha (the first royal palace at Gokarna), Changu Narayan. His other reforms were "Mananka", the first money and Tape for measuring Land Distances. Another important Lichchhavi monarch was Anshuverma who opened trade routes to Tibet.

Narendradeva, another Lichchhavi king and son of Udayadeva, initiated friendly relations with China and his successors laid the foundations of friendship with India by entering into matrimonial alliances with the Indian royal families. He build "Bhadradhi Bas" Palace. He ruled the country during 645 BC to 679 BC. So far as the administration of justice was concerned the rulers in lichhchhavi era had paid sufficient attention towards the development of well-managed justice system.

There were different branches of judiciary, namely, the *panchali,* the *Adhikaran* and the *Antarasan* and *Parmasan*.[125] The *Panchali* was empowered to hear the preliminary cases and decide them. It was somewhat like our trial Courts of modern time. The *Adhikaran* was divided into seven different branches subject to the nature of the litigation. Of them, the *Kuther Adhikaran* was empowered to hear the cases relating to tax, the *Shuli Adhikaran* relating to cases called five named crimes, namely theft, adultery, murder, sedition and abetting habitual criminal. The *Lingwal*

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123 *T.N. Godavarman Thirumulpad V. Ashoke Khot* (2006) 5 SCC 1 : AIR 2006 SC 2007.

124 *Id.*

125 Gyaindra Bahadur Shrestha (1992). *Hindu Jurisprudence and Nepalese Legal System,* 182-190, Pairavi Prakashna.

Adhikaran was given power to hear cases relating to canal water, tap etc. The *Pashchimadhikaran* was for the settlement of disputes relating to temple and religions and the *Purbadhikaran* was set up in the palace and had to look after justice dispensation.[126]

The *Antarasan* and *Parmasan* were high level Courts formed in Royal palace. The nature of these Courts was like a review Court. This gives some sort of impression of the inclusion of the doctrine of judicial activism in the lichhchhavi era.

In the Malla era, the Kingdom of Nepal was primary divided into two provinces, namely, *Karnali Pradesh* and *Gandak Pradesh*. The ruling system and administration system was different in those provinces. Yet the common feature between these principalities system was the recognition of *Dharmasastra* as the main source of their laws.

For the purpose of dispensing speedy and fair justice to the people, the Malla had established the Court system in accordance with the nature of cases. There were *Kotiling Adalat* and *Itachapali Adalat.* The Jurisdiction of the former was confined to the civil cases and the latter to criminal cases.[127]Despite of this, the King was final authority of executive, judicature and legislature. By this system, it can be presumed that the final authority of judicial activism was empowered to the king.

The Shah Era (Prior to 1742-75): The judicial system in this era was very much nearest to the judicial system of continental legal system. The investigation of the criminal cases was made by a police appointed by the Court. The Court system existed in Malla era was given continuation in this era. During the Prithivi Narayan regime, the Court system was developed also extending to outside the valley. A High Court was established in the valley. It had dual jurisdiction. It was not only empowered to decide the preliminary cases within the territory of Kathmandu valley but also to review the cases decided by the Court established outside the valley. This system gives some realization of the power of judicial activism of Courts.

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126 *Ibid.*
127 *Id.*

(2) Judicial system under Modern era

The Judicial System in Rana Period: The judicial system in Rana period had not followed the precepts of rule of law and independent judiciary. All executive, legislative and judicial powers were vested in *Shree Teen Maharaj*. *Shree Teen Maharaj Judha Shamsher* wanted to show that he was not a despotic ruler, for this he wanted to separate the function of the Judiciary from the Executive and Legislature. With this sprit, in 1952 *Pradhan Nyayalay* was established. It was an apex Court of Nepal. It was independent of the legislative and executive branches. Government of Nepal Act, 1948[128], the first written Constitution of the Kingdom though not come into force continued the *Pradhan Nyayalaya.* Clause I of Article 29 of the Govt. of Nepal Act, 1948 established the *Pradhan Nyayalaya* as the Apex Court of the land.[129]

The Judicial System in the period of 1951 to 1960: This was a period for the development of judicial system in Nepal. In this era, the Interim Government Act, 1948 was promulgated which recognized the *Pradhan Nyayalaya* as the apex Court of the Country.[130] The *Pradhan Nyayalaya* Act was enacted in 1952. Which made several provisions regarding its jurisdictions. For the first time in the legal history of Nepal this Act under its Section 30 conferred the *Pradhan Nyayalaya* the writ jurisdiction with the power of judicial review. By exercising this power, the full bench of the *Pradhan Nyayalaya* in *Bisheshwor P.Koirala V. Commissioner Magistrate* case declared Section 1(a) of Commissioner Magistrate void as being contrary to Section 30 of the Pradhan Nyayalaya Act, 2052[131].

In 1954, through second amendment to that Act, the *King Tribhuvan* abrogated all power of *Pradhan Nyayalaya* particularly to stay the order on writ petition and to declare the administrative and legislative actions null and void. He dismissed Section 30 of the Pradhan Nyayalaya Act that had empowered Nyayalaya the exclusive power of review. After the demise of King *Tribhuvan,* his son *King Mahendra* again restored the power of *Pradhan Nyayalaya* and revived the section 30 in 1956 due to

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128 *Government of Nepal Act, 1948.*
129 *Ibid. Art.20 (1).*
130 *Id. Art. 29(1).*
131 *Bisheshwor Prasad Koirala V. Commissioner Magistrate* (1959) NLR 123.

political pressure but, in 1957, he totally scrapped the Pradhan Nyayalaya Act and enacted a new Act called Supreme Court Act 1957. The Supreme Court Act, 1957 established the Supreme Court as a Court of Record of the land.[132] The Act made a new hierarchy of Court, which included:

(a) Supreme Court,

(b) Appellate Court,

(c) Amini Court (District Court)

5.1.4.2 Constitutional Development in Nepal

(a) Government of Nepal Act 1948

Government of Nepal Act, declared in 1948 by the then *Rana Prime Minister Padma Samsher*, was the first written Constitution of Nepal. It consisted of 6 chapters, 68 Articles and 1 annex. It had, for the first time, inserted the list of fundamental rights under Chapter-two which included.[133]

- Right to personal liberty;
- Right to freedom of expression;
- Right to freedom of publication;
- Right to freedom to form association or organization;
- Right to freedom of religion;
- Right to complete equality in the eye of law;
- Right to cheap and speedy justice;
- Right to free compulsory elementary education;
- Right to vote; and
- Right to property.

Though the Constitution inserted the provision of judiciary called Administration of justice and provisioned for the institution of a *Pradhan Nyayalaya* in Nepal under Chapter-five, it had not mentioned any provision for the system of judicial review.

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132 Supreme Court Act, (1957).

133 Government Of Nepal Act, 1948, Article. 4.

Because of this the mere provisions of fundamental rights inserted in the Constitution had no meaning at all.[134] Article 54(b) of the Constitution read that judges of the *Pradhan Nyayalaya* may only be dismissed from the job if the motion of impeachment for that purpose was passed by the session of both Houses.

This Act was framed with the delegated power conferred by the *Prime Minister Shree Teen Padma Shamsher*, this Act is regarded as the first written Constitution of Nepal.

The provision of the judiciary was incorporated in Chapter 4 of the Act under the title "Administration of Justice".[135] Cheap and speedy justice was expected. Article 53 (a) of the Act has made the provision of High Court that could be *Pradhan Nyayalaya*[136]. The Act deals as follows;

"There shall be a high Court for Nepal (Pradhan Nyayalaya), it consists of a Chief Justice and such other Judges, not exceeding twelve in number as High Highness, may from time to time deem it necessary to appoint. Provided that High Highness may, on the recommendation of the chief justice, appoint to act as additional judges of the High Court for such period not exceeding two years as may be required, and the judges so appointed shall, while so acting, have all the powers of a judge in the Court.[137] Article 55 of the Act had recognized the High Court as a Court of record with such jurisdiction, but the power and authority given to it or the administration of justice could be exercised as prescribed in the law.[138] The High Court was vested with the power to supervise over all the Courts for the time being subject to its jurisdiction.[139] The Act was, however, silent about empowering the judiciary with the power of judicial activism/judicial review. The Court was not independent; it was accountable to Rana rules and could not go beyond the will of Ranas. Similarly, fundamental rights and duties of people were contained in section II of the Act called directive principles of the state policy without being guaranteed in the Constitution. The people could not enjoy any Constitutional remedy in case of the violation of

134 *Ibid.* Article. 5.
135 *Id.*Chapter 4.
136 *Ibid*. Article. 53(a).
137 *Id.* Article. 53(a).
138 *Id.* Article. 55.
139 *Id.* Article. 56.

their rights.[140]

(b) Interim Government of Nepal Act 1951

Government of Nepal Act, 1948 collapsed without being enforced. As a result, on the 10th April, 1951 *King Tribhuvan* promulgated an interim Constitution known as the Interim Government of Nepal Act, 1951, pending the framing of a democratic Constitution by a Constituent Assembly elected by the people. As the proposed Constituent Assembly was not elected, the Interim Constitution remained in force until 1959 when it was replaced by the Constitution of the Kingdom of Nepal, 1959.

The provision of the judiciary was incorporated in Part III of the Constitution 1951. And the *Pradhan Nyayalaya* was accepted as the Apex Court of Nepal under the clause (i) of Article 29 of the Constitution 1951. The Constitution was, however silent on the power of judicial review to the judiciary. Similarly the fundamental rights were incorporated under the provisions of the directives principles and policies of the state in Article II of the Constitution 1951. They were merely directives to the Government in the Governance of the state, but not guaranteed in the Constitution. The violation of such rights could not be questioned in the Court of law.

That was the second written Constitution of Nepal, 1951 comprised 7 Parts, 47 Articles (at the time of first promulgation) and after amendment with 73 Articles and 1 annex, it was amended for six times. The Interim Government of Nepal Act, was declared in 1951 by the then *King Tribhuvan*. It had inserted a list of citizen's basic rights (i.e. fundamental rights) under Article 16 which was contained under the Directive Principles of the State Policy. Citizen's rights inserted under the Directive Principles of the State Policy were as follows:[141]

- Freedom of speech and expression;
- Freedom of peaceful assemble;
- Freedom to form association or organization;
- Freedom of free movement within the territory of the Kingdom;
- Freedom to reside and settle down at any part of the Kingdom;

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140 *Id.* part, II.

141 *Interim Government of Nepal Act, 1951, Article 16. (The First Declaration).*

- Freedom to acquire, enjoy and sell the property;
- Freedom to practice any trade, business, occupation or profession;

Rights regarding criminal justice system such as right against the use of *ex-post facto* laws, right against double jeopardy and right against self-incrimination were also enshrined under Article 17 of the Act.[142] Article 18 read that: no person shall be deprived of his right to life or liberty save in accordance with the procedure established by Act or rule enacted by His Majesty Government for the purpose of maintaining public interest, peace or security.[143] The right of a child below 14 years was also guaranteed against risky hazardous and dangerous employment such as in mines or industry where chemical substance is used.[144] Despite the constitutional measures, since all the rights enshrined there were under directive principles of the state policy; they were not enforceable by the court of law in case they were denied to enjoy by the people or violated or encroached by the government.

The provision of judiciary (administration of justice) was ensured by the Constitution. It had a provision of *Pradhan Nayalaya* as the Apex Court, but it never granted the power of judicial review to it.[145]

After the amendment, some new provisions were inserted in the Constitution in regard to rights of the citizen and institution of judiciary. Rights of the citizen enunciated thereon were as follows:

- Equality before law and equal protection of law;[146]
- Right against discrimination on grounds of religion, race, caste, sex, place of birth or any of them;[147]
- Equality of opportunity for all citizens in matters in relation to employment or appointment to any office under His Majesty's Government;[148]

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142 *Ibid. Article 17.*
143 *Ibid.*
144 *Id. Article. 20.*
145 *Id. Article. 301(1).*
146 *Id. Article, 14*
147 *Ibid.* Article. 15 of the amended Constitution. Clause (2) of this Article had also made provision for positive discrimination on the Article of women and children.
148 *Id.* Article. 14 of the amended Constitution.

- Right against levying or collecting tax except under the authority of law;[149]
- Rights to freedom of speech and expression; to assemble peaceably and without arms; to form associations and unions; to move freely throughout the territory of Nepal; to reside and settle in any place of Nepal; to acquire, hold, and dispose of property; and to practice any profession or to carry on any occupation, trade, or business;[150]
- Rights against the use of *ex-post facto* laws, right against double jeopardy and right against self-incrimination;[151]
- Right to life and personal liberty; to which the Constitution read that: no person shall be deprived of his life or personal liberty except according to procedure established by law or rules made by *the Government* for the public good, or for the maintenance of public order or the security of the state;
- Right against traffic in human beings and beggary and other similar forms of forced labour;[152]
- Right of the children below the age of fourteen years, not to be employed to work in any factory or mine or engaged in any other hazardous employment.[153]

Although the provision of judiciary (administration of justice) was kept up in by the Constitution even after its several amendments, it never granted the power of judicial review to the apex Court.[154]

However, the *Pradhan Nyayalaya* had displayed judicial creativity of a high order in this period. *Bed Krishna V. Secretary Udyog Banijya* is a unique example of this, where the Court held that the doctrine of the rule of law was an essential part of the Constitution and the doctrine could be enforced only though the power of Judicial Review.[155] Likewise in *Bisheshwor Prasad* the full bench of *Pradhan Nyayalaya* declared the Section 1(xxx) of commissioner magistrate void as being contrary to the

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149 *Id.* Article. 17(1) of amended Constitution.
150 *Id.* Article. 17(2) of amended Constitution.
151 *Id*. Article. 18 of amended Constitution under this Article HMG had ensured the rule of law to all the citizens.
152 *Id*. Article. *20 of amended Constitution 1959.*
153 *Id*. Article. 20 *of amended Constitution.*
154 *Id. Article. 32 of amended Constitution.*
155 *Bed Krishna Shrestha V. Secretary Udyog Vanijya,* NLR 1959 at 234.

Section 30 of the Pradhan Nyayalaya Act, 1952.

Therefore, the *Pradhan Nyayalay* seems to have asserted the power of judicial review of legislation in the tenure of this Constitution for the first time in the legal history of Nepal.

(c) The Constitution of the Kingdom of Nepal 1959

In 1959, with the supervision and guidance of famous Constitutional Jurist of the United Kingdom Sir Ivor Jennings, this Constitution was framed. That Constitution is seemed more democratic and liberal to that of the previous Constitutions, namely, the Government of Nepal Act 1948 and the Interim Constitution 1951.

For the first time that Constitution had introduced the form of representative Government in Nepal. The general elections were held on the 18th February, 1959 to elect the first parliament. Besides, the Constitution was regarded as the fundamental law of the land and all laws in consistent with it would to the extent of such inconsistency be void under Article 1(1) of the Constitution.[156]

Promulgated by the then *King Mahendra* with the exercise of royal (state) power and privileges inherent in the King, and with a desire to guaranteeing fundamental rights to the people (as was claimed and expressed by the King through preamble), that was the first Constitution to guarantee fundamental rights and ensure power of judicial review to the judiciary.[157] In addition to, Article 1 of the Constitution also ensured that Constitution was a fundamental law of Nepal and all laws inconsistent with it, to the extent of such inconsistency, would be void.

The Constitution guaranteed fundamental rights to the people under Art. 3. Important rights, among others, were as follows:

- Rights to life and personal liberty;[158]
- Right against human trafficking, slavery and forced employment;[159]
- Rights against the use of *ex-post facto* laws, right against double jeopardy and

156 *The Constitution of The Kingdom of Nepal*, (1959), Article. 1(1).
157 *Ibid. at preamble.*
158 *Id.* Article.3(1).
159 *Id.* Article. 3(2).

right against self-incrimination;[160]

- Right to be informed of the grounds for arrest; and right to consult and be defended by a legal practitioner (in case he/she is detained in custody);[161]
- Right to be produced before a judicial authority within a period of twenty-four hours after arrest;[162]
- Right against preventive detention;[163]
- Right to equal protection of law and right against discrimination on grounds of religion, race, caste, sex, place of birth or any of them in the application of general law. [164]
- Right to religion;[165]
- Rght to property;[166]
- Right to political freedoms, namely, expression and publication; assemble without arms; from unions and associations; and move throughout the Kingdom and reside in any place thereof;[167]

Likewise, the Constitution, for the first time in the history of Nepalese Constitutional law, guaranteed the rights to remedy as a fundamental right of the people.[168] To this provision, the Court had power to issue necessary and appropriate orders and writs including the writs of *habeas corpus, mandamus, certiorari, prohibition* and *quo-warranto* for the enforcement of right conferred by the Constitution.

An additional and significant provision outlined by the Constitution was Article 54 which ensured that any person who claimed the whole or some Article of any Act or law being inconsistent with the Constitution, shall have right to move to the Supreme Court to make such law declared void. That provision was maintained under the

160 *Id.* Article. 3(3), (4) & (5).
161 *Id.* Article. 3(6).
162 *Id.* Article. 3(7).
163 *Id.* Article. 3(9).
164 *Id.* Article. 4.
165 *Id.* Article. 5.
166 *Id.* Article. 6.
167 *Id.* Article. 7.
168 *Id.* Article. 9.

chapter- legislative powers. [169] Thus, in that Constitution the power of judicial review seemed to have vested in the Supreme Court though it was not explicitly mentioned in any provision. Provided the Constitution gave very wide emergency powers to the King including the power to suspend Articles III, IV and V of the Constitution, which dealt respectively with fundamental rights, executive Government and parliament and to assume to himself all the powers vested in the parliament or any other organ of the Government. With this emergency power, most of the provisions of Articles III, IV and V were actually suspended and that Constitution was eventually abrogated in 1962 by a Royal proclamation as result of royal crop.

In the ownership of this Constitution a writ petition regarding the Judicial Review of legislation was filed in the Supreme Court on the ground that the section 10 of civil Service Act, 1956 and Sections 19 and 20 of Citizens Right Act, 1955 were inconsistent with the provision of the Constitution. But the Court discharged the petition without any reasonable grounds.[170] The Constitution had a separate provision for judiciary under Article 4. The Constitution had also provided that justices including the chief justice of the Supreme Court were appointed by His Majesty the King at his own discretion.[171]

(d) The Constitution of Nepal 1962

Late *King Mahendra* suspended the Constitution of the Kingdom of Nepal, 1959 dissolving the Parliament and promulgated a new Constitution in 1962, based on non-party system the Constitution of Nepal, 1962. The Constitution was promulgated by the King exercising his absolute state powers and privileges inherent in him.[172]

That Constitution also provided that it was the fundamental law of the land and all laws inconsistent with it would be void.[173] But no any clause or Article of the Constitution stated that the power of judicial review/ activism was vested in the

169 *Id.* Article. 54.
170 *Gajendra Bahadur Pradhanang V. HMG*, NLR 2017 at 30.
171 *The Constitution of Nepal 1962, Art. 57.*
172 *The Constitution of Nepal 1962, Preamble.*
173 *Ibid.* Art. 1(1).

Supreme Court. In fact the Court had very limited power. All executive, legislative and judicial power including the residuary one was inherent in him, all these powers emanated from him, as he was the ultimate power of state powers. Some fundamental source rights and duties were incorporated in the Constitution, among others, the fundamental rights included in the Constitution were:

- Right to equal protection of law, and right against discrimination on grounds of religion, race, caste, sex, place of birth or any of them in the application of general law;[174]
- Right to life and personal liberty;[175]
- Right to freedom of expression and publication; to assemble peaceably and without arms; to form unions and associations; to move throughout the Kingdom and reside in any place thereof; and to acquire, own, sell and otherwise dispose of the property;[176]
- Right against exile;[177]
- Right against exploitation;[178]
- Right to religion;[179]
- Right to property;[180]
- Right to Constitutional remedies;[181]

Even though guaranteeing some fundamental rights to the people, the Constitution had a blunder that was Article 17 which provisioned for the purpose of the public that the law could, for the purpose of public interest, be enacted in order to restrict or maintain the exercise of the rights conferred by the Constitution under chapter three. It was anti- thesis of Constitutional jurisprudence to make general law to be prevailed over the Constitution. This provision was also contrary to Article 1 of the Constitution. To this provision, fundamental rights guaranteed by the Constitution could be restricted, curtailed or suspended at any time by the enactment of ordinary

174 *Ibid.* Art. 10.
175 *Id.* Art. 11(1).
176 *Id.* Art. 11(2).
177 *Id.* Art. 12.
178 *Id.* Art. 13.
179 *Id.* Art. 14.
180 *Id.* Art. 15.
181 *Id.* Art. 16.

laws.

The Constitution had provision for the judiciary, but the Court was not independent of the executive. Justices including the chief justice of the Supreme Court were appointed by His Majesty the King if he thought it necessary.[182]

The Supreme Court had extra-ordinary power to issue necessary and appropriate orders and writs including the writs of *habeas corpus, mandamus, certiorari, prohibition and quo-warranto* for the enforcement of right conferred by the Constitution.[183]

However, the Supreme Court had displayed the power of judicial review in this era. The Court declared the provisory note of Section 21(2) of the Manual of *District Panchyat,* void in Mul Chand Azad case.[184] Similarly, giving the dissenting opinion against the majority decision justice *Bishwonath Upadhyay* declared the Section 20 of the Land Reform Act (first amendment),1965 void, because of its inconsistency with Article 11(2) of the Constitution.[185] The full Bench of the Supreme Court had also laid down many principles in favour of the Constitution in *Sarvagya Ratna Tuladhar* case. In this case the Court clearly claimed that it had the power of judicial review and it could declare any law or any part there of void on the ground of inconsistency with the Constitution.[186] The Court discharged the petition without stating any reasonable grounds. Jurist commented that this incident was an adverse one for the development of legal history.[187] The Court in that era had also effectively exercised the power of judicial review of legislation, in particular, the cases of *Purna Chaitanya*[188], *Jagandas*[189], *Shankar Prasad*[190] and etc.

(e) The Constitution of the Kingdom of Nepal 1990

This Constitution was the noticeable distinction to all the preceding Constitutions of

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182 *Id*. Art. 69.
183 *Ibid.* Art. 71.
184 *Mul Chandra Azad V. Special Court*, NRL 1966 at 322.
185 Raghuraj V. HMG, NLR 1975 at 54.
186 *Sarvagyarantna Tuladhar v. Chairman, Parliament*, NLR 1978 at 322.
187 *Madindraraj Shrestha V. Administrative Chief Bagmati Zone*, NLR 1964 at 49.
188 *Purna Chaitanya Brammachari V. HMG,* NLR 1987 at 1075.
189 *Jagandas Baishnav V. Dhanusha District Office*, NLR 1987 at 1211.
190 *Shankari Prasad Marwadi V. Janakpur Zone*, NLR 1988 at 963.

Nepal. It was, as compared to other Constitutions, considered both as a democratic and liberal Constitution. It had incorporated some basic structures in the preamble as the core values of the Constitution. It had included-parliamentary democracy, adult franchise, Constitutional monarchy, independent judiciary and multi- party system as the basic structure of the Constitution. It also envisages that the King is bound to cabinet; the cabinet to the parliament; the parliament to the people; and the people all in all- sovereign.[191]

The Constitution of 1990 outlined the framework and organization of the political and social order that suited Nepal. It articulated the structure of government, procedures for selection and replacement of government officials, and distribution and limitations of their powers. It held some unique features which include as follows:[192]

- It was the first Constitution in Nepal's history to have drafted by the leaders of a mass movement, with popular consent and with the acquiescence of the monarch.
- It was the first document to turn the rule of law into a reality in Nepal so that no body not even the King was above the Constitution.
- It was the first Constitution in Nepal's history to declare that the sovereignty of the kingdom lies in the people.
- It was also the first document to entrench fundamental rights to the people and to give the Supreme Court exclusive jurisdiction to determine all questions relating to the constitutional validity of executive action and laws in force in the territory of Nepal, and to issue order for the settlement of any Constitutional or legal question involved in any dispute of public interest or concern.

For the first time in the constitutional history of Nepal, the right to press and publication right regarding criminal justice; right against preventive detention; right to culture and education; right to information; and right to privacy were incorporated

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191 Bhimarjun Acharya, (2003). Constitutional Crisis in Nepal, LIBERAL TIMES, The Friedrich-Naumann - Stiftung, Regional Office, South Asia, Delhi

192 Surya Prasad Sharma Dhungel and others., (1986). "Judicial Activism: The Burning Issue of Today", Nayadoot, Vol. 45, p. 43

in the Constitution. The most striking feature was that the twin fundamental rights, namely, right to information and right to privacy were a unique and unparalleled feature of the Nepalese catalogue of fundamental rights, as these rights were not specifically available even to the citizens of the democratic nations such as the USA, India, Germany, France etc. In addition to these rights, the Constitution also guaranteed- right to equality and equal protection of law; right against discrimination in the application of general laws on grounds of religion, race, sex, caste, tribe or ideological conviction or any of these; right against capital punishment; freedom to form unions and associations; right against closing or seizing any press for printing any news, Articles or reading materials; right against cancellation of the registration of any newspapers or periodicals for publishing any news, Articles or reading materials; right against the application of *ex-post facto* laws; right against double jeopardy; right against self -incrimination; right against physical or mental torture, or cruel, inhuman or degrading treatment; right to be informed of the grounds for arrest; right to consult and be defended by a legal practitioner (in case he/she is detained in custody); right to be produced before a judicial authority within a period of twenty-four hours after arrest; right regarding culture and education; right to religion; right against exploitation; and right against exile as fundamental rights of the people which were not suspended even at the time of emergency.[193]

Of the rights guaranteed by the Constitution, following rights were categorized as derrogable rights pursuant to clause (8) of Article 115 of the Constitution for as the proclamation of emergency is in operation:

- freedom of opinion and expression;
- freedom to assemble peaceably and without arms;
- freedom to move throughout the Kingdom and reside in any part thereof;

- freedom to practice any profession, or to carry on any occupation, industry or trade; (though this right is suspendable, it was not suspended for as long as the emergency was in operation in Nepal);

[193] Bhimarjun Acharya, (2003). legal aspect, Nepali Press During State of Emergency, Federation of Nepalese Journalists (FNJ)

- right against pre-censorship on any news, articles or reading materials;
- right against preventive detention;
- right to information;
- right to property; and
- right to Constitutional remedy (except for the remedy of *habeas corpus*)

The Constitution provided unique provision, for the existence of a Constitutional Council for making recommendations to the King on the appointment of officials to Constitutional Bodies. The Council consisted of the Prime Minister as chairperson, the chief justice, the speaker of the House of Representatives, the chairman of the National Assembly, and the leader of the opposition in the House of Representatives as members.

The Constitution of 1990 structured a three-tier judiciary as endorsed by the later Interim Constitution of Nepal 2007, such a structure still continues. The district Courts are the Courts of first instance and are located in all 75 districts of the country.[194] They have jurisdiction over both civil and criminal matters. At the second level, there are 16 appellate Courts established in various regions of the country.[195] The Supreme Court is the Apex Court in the judicial hierarchy. All other Courts of Nepal and other institutions exercising judicial powers, except the military Court, is under this Court.[196] It is a Court of Record and can initiate proceedings, impose punishment in accordance with law for contempt of itself and of its subordinate Courts of judicial institution.[197] It has power of original and appellate jurisdiction. It can Inspect, supervise and give direction to its subordinate Courts. It required to report to His Majesty, its opinion there on any complicated legal question of interpretation of that Constitution or of any other law.[198] The Court had exercised

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194 District Court is the Court of first instance. It is a trial Court and has an enormous burden of works. It has power to decide all matters such of question of fact and question of law. There are 75 District Courts for every district of the country, and 120 judges are employed over there.

195 Appellate Court is the second tier in the organization of courts. It has appellate jurisdiction over the decisions of District Courts and other subordinate or quasi-judicial bodies. It has also original jurisdiction. It can issue writs such as Habeas corpus, Mandamus and injunction. It has also power to inspect supervise and give direction to its Subordinate Courts.

196 *The Constitution of Kingdom of Nepal 1990.* Art. 86(1)

197 *Ibid.* Art. 86(2)

198 *The Constitution of Kingdom of Nepal 1990*Art. 88(5).

this power several times, for example in the DasDhunga Accident and Parliament Dissolution cases are its examples. Likewise, the Court was vested with the extra-ordinary power of judicial review to scrutinize the Constitutional validity of legislation and administrative action under Article 88.[199] Apart from the general Courts, there are also specialized tribunals and Courts for specific types of cases.

The Constitution had advanced the mechanism called judicial council to make recommendations and give advice concerning the appointment of, transfer of, disciplinary action against and dismissal of judges and other matters of the district Courts and appellate Courts and the appointment of justices of the supreme Court, and the mechanism called Constitutional Council to make recommendations for the appointment of the chief justice of the supreme Court.[200] Such a system still constitutes pursuant to the 2007 Constitution.

Legal system of Nepal has developed under the influence of the common law traditions of the United Kingdom. The nation's judiciary has been entrusted a central role in defending and promoting the rights of the people. Articles 23 and 88 of the Constitution had given exclusive powers/responsibilities to the Supreme Court to test the Constitutional validity of any legislative and administrative action for the sake of enforcing fundamental rights contained in part III of the Constitution of 1990.

The strength of the Constitution as articulated in the preamble was to establish an independent and competent system of justice as an institution to transform the concept of the rule of law into a living reality.[201] The Constitution had presumed the judiciary not only the protector of fundamental rights but also the guardain of the Constitution. The judiciary had, under Article 88, been empowered with the special power to examine the legislative Act and administrative action, and declare null and void to the extent that the action was contrary to the Constitution.[202]

These expansive powers and responsibilities granted to the judiciary by the Constitution made the Court of Nepal more powerful and responsible as compared to other co-ordinate branches of Government. The role of judiciary has been very much responsible and serious. The state may sustain grave injury or damage or face great

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199 *Ibid.* Art.88.
200 *Id.* Arts. 93 and 117.
201 *Id.* preamble.
202 *Ibid.* Art. 88

crisis if the judiciary becomes irresponsible or does not perform its functions duly.

(f) The Interim Constitution of Nepal 2007

The Interim Constitution of Nepal is the product of people's movement II. On February 1, 2005 after the royal takeover the *King Gyanendra* appointed a government led by him and at the same time enforced marshal law. The King argued that civil politicians were unfit to handle the Maoist insurgency.[203]

Extensive alliance against the royal takeover called the Seven Party Alliance (SPA) in December signed a 12-point understanding with the Maoists. SPA, for their part accepted the Maoist demand for elections to a Constituent Assembly.

SPA called for a four-day nationwide general strike on April 5-9. The Maoists called for cease-fire in the Kathmandu valley. The general strike saw numerous protests. A curfew was announced by the government on April 8, with reported orders to shoot protestors on sight.

Protests continued in the following days, with crowds increasing to sizes estimated at 100,000 to 200,000 in Kathmandu in various estimates, more than 10% of the city population. On April 21, opposition sources claim that about half a million took part in the protests in Kathmandu. More conservative estimates talk about 300,000.

Afterward the same evening, *King Gyanendra* announced that he would return political power to the people and called for elections to be held as soon as possible. He called on SPA to nominate a new Prime Minister of Nepal in a state-owned television station, saying, "We return the executive power of the country to the people. We request the seven-Party alliance to recommend a name for the post of prime minister who will have the responsibility to run government".

Though, the royal proclamation was rebuffed by the opposition. At 3 p.m. the next day, the leaders of SPA met in the capital, and staked out three demands, namely: reinstitution of the old parliament; formation of an all-party government; and elections to a Constituent Assembly that will draft a new constitution.

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[203] Dr. Bhimarjun Acharya (2012). *Comparative System of Judicial Review*, A.K. Books and Educational Pvt. Ltd. Nepal Law Campus Complex, Kathmandu, Nepal.

In a nationwide broadcast address, *King Gyanendra* reinstated the old Nepal House of Representatives on April 24, 2005. The King called upon the Seven Party Alliance to bear the responsibility of taking the nation on the path to national harmony and prosperity, while ensuring everlasting peace and safeguarding multi-party democracy. The SPA accepted the reinstatement of Parliament.

On 27 April, 2005 though, the Maoist insurgents responded to demands head by *Girija Prasad Koirala* and announced a unilateral three-months truce in the Nepal Civil War. On May 2, 2005 G.P. Koirala announced a new cabinet. On May 18, 2005 the Parliament unanimously passed a proclamation, what they called it an historical and significant event of the movement. On January 15, 2007 the Interim Constitution was promulgated as a device to arrange the interim periods and govern the country with basic legal orders.

The agreement between seven party alliances (SPA) and Maoist in different dates paved way for Constituent Assembly (CA) election to determine the course of country's political system. Presently, Nepal is in a transitional phase after the settlement of a decade - long internal political conflict. The government has already accomplished the first Constituent Assembly election on 10th April 2008 and has declared that the new constitution shall be made within 2010 by member of CA.

Nepal is already a state party to 24 international human rights instruments as of 2014.[204] These instruments should be taken as a standard while reviewing or analyzing the present situation of human rights in Nepal. Equal importance need to be given to the Comprehensive Peace Agreement (CPA), of November 21, 2006, the Interim Constitution of Nepal 2007 and other agreements and understandings of 2006, because a number of human rights issues are embedded also with the 10-year long armed insurgency and the six-year long peace process.

The decade-long armed conflict which began in 1996 came to a formal conclusion on November 21, 2006 with the signing of the CPA between the then rebel CPN-Maoist and the Government of Nepal. However, the human rights situation of the country did not improve as expected even during these long eight years since the signing of

[204] INSEC(2013). *Nepal Human Rights Year Book* . Kathmandu. Informal Sector Service Centre. p.

the CPA.

The Government, which is responsible to protect human rights and resolve various other problems of the country, seemed apathetic towards its responsibilities. As a result even the international community is criticizing the Government expressing their concerns over the possible crisis Nepal could face in the future due to the apathy. Several decisions made by the Government have been challenged by the human rights activists for not containing the state of impunity. The government, whose legitimacy was called into question, decided to withdraw *sub-judice* cases including the criminal ones. The judiciary invalidated the impugned decisions. The competence of the Apex Court was also questioned as only one-fourth of total number of judges remained in their posts by the end of April 2014 time. However, the courts did make several important and remarkable verdicts this year[205].

Formed with a two-year mandate to write a new constitution, the CA failed to deliver its function whereas its tenure was extended by two more years. The Constituent Assembly failed to finalize a constitution by the 2010 deadline, but voted to extend its own term four times. The entire period has been one of political turmoil with four unstable governments in four years.

Initially, the 601-member CA, which was elected on 10 April 2008, was mandated to complete the task of constitution-writing in two years, but due to sharp political polarization, especially over the power, and lack of deliberations on the statute the parties failed to get anywhere closer to preparing even a preliminary draft although a number of issues related to the constitution had been settled. The House that doubled as legislature parliament amended the Interim Constitution and extended the deadline four times.

On November 25, 2011, giving its final verdict on a writ petition challenging repeated extension of the CA's tenure, the Supreme Court stated that the CA's term could be extended only one more time and that the Assembly will be defunct if the constitution is not promulgated within the extended term. On May 22, 2011, the

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205 *Ibid.*

government registered 13th constitution amendment bill in the parliament to pave the way for three-month extension of the term of the Constituent Assembly irrespective of the apex court's November 25, 2011 verdict. However, responding the writ petitions filed against the government move, the Court on May 24, 2012 issued a ruling to the government, asking it not to proceed with its decision to extend the term of the CA that ended the possibility of the CA term extension[206].

Though the Interim Constitution 2007 mentioned that the tenure of the CA was for two years, it was extended by another two years through political agreements. As the CA could not function as expected though its tenure was extended the fourth time, the Supreme Court, responding to a writ filed against the extension of the CA tenure, capped CA's tenure for the next six months on November 24, 2012. Before this, the extended three month of the CA was expiring on August 30, 2012 but, the tenure was extended by three months by amending the constitution before November 24, 2012. The three-month extension of the CA was expiring on November 30, 2012, however, the Supreme Court on November 24 ordered the CA to extend its term only for six months. The Supreme Court had already restricted that, further extension of CA was not possible after May 27 and there were no preparation of promulgating constitution in the given time frame, the CA was dissolved by the Government without leaving any options. Constitutional amendment could have been an option but *PM Bhattarai's* unilateral decision to dissolve the CA blocked the process of election as well. Though the opposition parties were equally responsible for the dissolution of the CA, the Government was morally responsible for the situation.

The assembly turned defunct after the major parties that were engaged in hectic negotiations failed to arrive at a consensus on the thorny issue of state restructuring, particularly the number of the provinces and the basis of creating them. There were several rounds of bilateral and multilateral talks at Prime Minister's Baluwatar residence and in the Speaker's chamber in Singha Durbar, but the whole exercise proved futile. Till the last moment, leaders involved in the talks were intermittently telling media persons that the talks were moving in positive direction. Key dialogue took place mostly outside of the CA, including the last-minute talks between the

206 *Id.*

major political forces – UCPN (Maoist), Nepali Congress, CPN-UML and United Democratic Madhesi Front – despite the CA members demanding that the House be allowed to take a decision whether to extend its term. There were angry protests outside the CA building, Naya Baneshwor, while the top leaders engaged in talks. The CA members also staged demonstration at the CA premises, demanding that the CA session start and allow the house to decide the course. However, the session never got underway. *CA chair Subas Nemwang* as well as the top leaders of the parties did not show up as the assembly awaited an unceremonious demise. The formation of the CA for the first time in the history of Nepal was the key agenda of the popular movement of 2007 that put 240-year-old monarchy to an end and turned the country into a federal democratic republic.[207]

Prime Minister Dr. Baburam Bhatarai announced dissolution of the CA just 15 minutes before its deadline on May 27, 2012 just before midnight without delivering the new constitution after witnessing four years of political bickering and brinkmanship leaving no options ahead.[208] *President Ram Baran Yadav* declared that dissolving the Constituent Assembly was "a matter of serious concern", but agreed to an interim government led by Bhattarai. Sixteen parties led by Nepali Congress and the CPN-UML met Yadav to pressure him to end the caretaker regime and form a "national consensus government"[209].

The opposition parties insisted that they do not want an election under a Maoist led government and will intensify their protests. The Nepali Congress has declared that it will boycott such an election. Three of Bhattarai's allies, including the ethnically-based United Democratic Madhesi Front (UDMF), quit his government. Political crisis further compounded by a potential split in the UCPN-M by a so-called hard-line faction headed by the party's vice-chairman Mohan Baidya. He announced he would form a new party. Baidya blamed Bhattarai for the dissolution of the Constituent Assembly and called for the formation of a national unity government.[210] Damand for holding election to a new (Second) C.A. was also governing ground.

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207 *The Kathmandu Post*. March 19, 2013.
208 *Ibid.*
209 *Id.*
210 *Id.*

The main obstacle to a new constitution has been the demand by the Maoists and regionally-based ethnic parties for a federal system with 14 autonomous provinces. Nepali Congress and the CPN-UML have bitterly opposed to it. Nepali Congress and the CPN-UML were blamed by Maoists for defending the interests of the country's traditional elites, which, under the monarchy, exploited ethnic differences to maintain their rule over the rural poor who comprise the majority of the population. Their fear is that a federal system will undermine their grip on power.[211]

The Interim Election Government was formed on March 13, 2013, headed by Chief Justice Khil Raj Regmi, who announced November 19, 2013, as the date for holding fresh Constituent Assembly (CA) elections. Chief justice was named head of an interim government in an attempt by the country's main political parties to cure the paralysis and infighting that have blocked elections for months. Supreme Court *Chief Justice Khilraj Regmi* was sworn by *President Ram Baran Yadav*, and his choices of former bureaucrats *Madhav Ghimire* as home minister and *Hari Prasad Neupane* as law minister took the oath of office with him. [212]

An agreement was signed by leaders of Nepal's four main political parties saying Regmi will have an 11-member Cabinet and the interim governments sole mandate will be holding elections for new C.A.[213] by June 21.2013. Besides, Regmi will set aside his court duties but will return as chief justice when his tenure leading the government ends. His title will be chairman of the interim election government. The interim election government successfully held the Constituent Assembly election within the stipulated time. After completion of result of election the Chairman of the Council of *Ministers Khil Raj Regmi* summoned the first meeting of the Constituent Assembly on January 22, 2014, reported his successful completion of the sole mandate and called for the formation of a new government in the light of having a new legislative Parliament. The Election Commission submitted the CA results to President *Ram Baran Yadev* on January 2nd 2014.[214]

Constituent Assembly meeting decided to hold election for the CA chairman, in the

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211 *Id.*
212 *Id.*
213 *Id.*
214 The Himalayan, Kathmandu, 14 January 2014.

seven point agreement reached on February 10, 2014, the NC and UML had agreed to share two key positions, prime minister and CA Chair, respectively. Finally, CPN-UML Leader *Subash Chandra Nembang* was elected the chairman of the CA[215] and NC President and Parliamentary party leader *Sushil Koirala* was elected PM with the UML's backing. [216] Government Chairman *Khil Raj Regmi* has decided to resign from the post of chief justice. The Nepal Bar Association(NBA), an umbrella organization of lawyers, had resisted his re-entry to the Supreme Court, because he was accusing by it for breaching the principle of independence of judiciary and the separation of powers and checks and balances by accepting the post of government chairman by living the Supreme Court paralyzed at the juncture of transition. Regmi had assumed the post of chairman of interim council of ministers on March 14 as per the request of the major political parties to hold the election to the Constituent Assembly despite NBA's protest.However, *Regmi* led government was publicly acclaimed for successfully hold CA election on November 19, 2013 as determined by the political parties and running the government tactfully. [217] The second CA is now deliberating on making a new Constitution by itself within Janaury 22, 2015. However, it has taken ownership of the most of the settled issues of the previous CA. These are very few but mostly very controversial issues from the political point of view are outstanding, lacking political consensus between the 2/3 majority holding ruling parties (Nepali Congress and CPN-UML) and the minority (UCPN-Maoist, Madhesi Parties and others as 22 party alliance). Now the basic outstanding issues are : rationality of the division of province and number of province for the federal republic, form of government and Judicial system. Majority went to proclaim the Constitution within majority in CA, consensus, whereas the minority demands from the majority equal sharing of ownership in the decisions making the new Constitution setting no matters what votes it had. But the common people's interests are to have a new Constitution for a federal democratic republic Nepal at the earliest. But the situation of Nepal is very painful political transition.

On April 11, 2014, President Ram Baran Yadav today appointed Acting Chief

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215 *Ibid.* Feb.18 2014.
216 *Id.* Jan 11, 2014.
217 *Id.*

Justice Damodar Prasad Sharma as Chief Justice after the Parliamentary Hearing Special Committee approved his name for top judicial post.[218] The same day one-year term of five adhoc Supreme Court judges was ended as the Judicial Council did not take any decision regarding their retention for that Judicial Council was criticized publically for being unfair that was the second time the five ad hoc judges; Prakash Osti, Baidhyanath Upadhayay, Tarka Raj Bhatta, Gyanendra Bahadur Karki and Prof. Dr.Bharat Bahadur Karki have retired from the apex court as these judges were considered very good judges from any standard; that's why the then media captured "Justices suffered injustice".

5.1.4.3 Judicial Review in the Constitution

Interim Constitution of Nepal, 2007, under clause (1) of its Article 107, gives exclusive jurisdiction to the Supreme Court to determine all questions relating to the constitutional validity of any law. For the purpose of Article 107, any Nepali citizen can file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with the Constitution.[219] This provision of the Constitution is a fundamental charter of our Constitution. With this provision, Nepali citizens can move to the Court for the enforcement of their rights that are conferred on by the constitution. The Court's power in this regard is unrestricted by any concept of Justifiability. This is an important feature of Article 107(1). The power granted by Article 107 for example, is made subject of the doctrine of justifiability in accordance with which a petitioner seeking to invoke the jurisdiction of the Court must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. Similarly, the doctrine of ripeness is not relevant to Article 107(1).

Under this provision of the Constitution, the Court has generally the following two grounds for judicial review of legislation:[220]

- If a statute or legislative enactment violates or makes unreasonable restrictions

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218 *Id.* 12 April 2014.

219 Article 107 is very liberal in its wording since it allows any Citizen to challenge a law although there is no actual controversy pending, and it is not necessary for a person to convince the Supreme Court that he is personally affected by such a law.

220 *Ibid.*

on enjoyment of fundamental rights that are guaranteed in Part III of the Constitution, or,

- If a statute or legislative enactment is inconsistent with any provision of the Constitution.

For the purpose of judicial review of legislation, an Act of parliament, including ordinance, or set of Rules framed under powers delegated by Parliament or by other competent authority can be challenged as being inconsistent with the Constitution. In response to, any such law or rule in conflict with any provision of the Constitution can be declared by the Supreme Court as being void as a whole or as any Article thereof.

The Reasonable Restriction Doctrine

The Constitutional provision of Nepal, has given full rights of citizen regarding file a writ petition in the Supreme Court on the ground of the violation of their rights that are guaranteed in the Constitution. This provision is however, not absolute and the petitioner is not allowed to move the Court's door in all conditions. As no right can be absolute, the legislature can impose reasonable restrictions on the exercise of such rights subject to the provisions of the Constitution. Such restrictions may bar the rights of the people, in that situation; the people cannot claim their rights to be reviewed. However, such restrictions must be fair and reasonable.

The Indian writer M.P. Jain observes three significant rules for reasonable restriction:

- A restriction must be under the authority of law; this implies that the restriction under the rights can be imposed only by or under the authority of law. No restriction can be imposed by executive action alone without there being a law to back it up.
- Each restriction much be reasonable; and
- A restriction must be related to the purposes mentioned in Constitution.

The standard of reasonableness is to be judged with due reference to the subject matter of the legislation. The directive principles of state policy are also relevant in considering whether a restriction on a fundamental right is reasonable or not. A restriction, which promotes a directive principle, is generally regarded as reasonable.

It is the responsibility of the state that it has to justify that the restriction imposed on any fundamental right quarantined in the Constitution is reasonable under the same Constitution provision that provides the authority to make certain restrictions of fundamental rights.

5.1.4.4 Trends and Practices of Judicial Review/Activism

This study has intended to observe the judicial trends and practices in lights of judicial pronouncements made by the Supreme Court of Nepal in following time period:

(a) During 1954 to 1989

Bed Krishna Shrestha V. Secretary, Department of Industry, Commerce, Food and Civil Supplies [221] is considered as first case in the judicial history of Nepal where the Court, for the first time, asserted the power of judicial review. The Court held it was the judiciary to check whether or not the state action was carried out in accordance with the law. In a democratic state, judiciary was conceived as a guardian of the Constitution, and Section 30 of the Pradhan Nyalaya Act, 1952 was designed on this democratic principle, held the Court.

Issuing the writ of prohibition, the Court held that in the reign of rule of law no one is above law. All the people including His Majesty are under the law. No special law and special tribunal are referred to the employees of government. General Law is applicable even to the government employees. This landmark decision of the Apex Court clearly upheld one of the basic prerequisites of rule of law- equal subjection of all classes of people to ordinary laws and Courts.

In *Mrigendra Shamsher J.B. Rana V. Kathmandu Magistrate* [222] the Court held that it had, by virtue of Section 4 of the Personal Liberties Act, 1950 power to test the legality of action done by Magistrate under Public Security Act, 1949 if the question was arisen whether the act was done in accordance with law or not. This case invoked for the writ of *habeas corpus* and established that the court had power to issue such writ in case the personal liberty of an individual was in threat or under

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221 NLR 1959 at 171 published by Saman Prakashan Pvt. Ltd. Putali Sadak, Kathmandu under the authorization of Supreme Court of Nepal.

222 *Ibid.* NLR 1959 at 134.

attack.

Mrigendra Shamsher J.B. Rana V. Inspector General of Police [223] was the first case in judicial history of Nepal where the Court had issued directive order to HMG to bring an immediate amendment to State Affairs Act, 1886 (Raj Kaj Ain,) the Act relating to offence against Crown.

Similarly, *Pitamber Prasad Mudwari v.Riddi Bikram* and others [224] may be taken as first case of judicial Activism of administrative action in Nepal. In *Bishwashwor Prasad Koirala V. Prime Minister of Nepal Government* (1957)[225] the petition was filed under Section 11 of the Supreme Court Act, 1957 where the Court held that the citizens including the Prime Minister had right to freedom of opinion as ensured by Section 6(1) of the Civil Liberties Act 1956. The judgment pronounced that the PM had dual capacities i.e. the capacity of a Prime Minister and the capacity of an ordinary citizen, and as a citizen he had right to enjoy the freedom of opinion and expression like other citizen under Section 6(1) of the Act.

It held that the Supreme Court had power to issue appropriate orders and writs including the writs of *habeas corpus, mandamus, quo-warranto, prohibition and certiorari* for the enforcement of rights conferred by the current laws for which no other remedy had been provided.

Interpreting the purpose of prerogative writ, the Court held that the writ of prohibition could be issued to the parties of cases or to the body which exercised judicial functions; writ of *certiorari* to the body or person who exercised judicial or quasi- judicial functions; writ of *habeas corpus* to the (illegal) detention; similarly writ of *quo-warranto* could be issued to hold an inquiry about the capacity of designation; and the writ of mandamus be issued if the legal duty imposed by the law to the authority had been disobeyed or ignored. The Court also held that these writs could not be issued to the Prime Minister (who exercised merely the administrative functions).

Scope and limitation of *certiorari*:

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223 *Id.* NLR 1959 at 95.
224 *Id*. NLR 1959 at 256.
225 *Id*. NLR 1959 at 215.

- Functions performed by any person or body must be judicial or quasi - judicial in nature.
- The writ cannot be applied if the function is an administrative or of administrative nature.
- This writ cannot be applied to the executive and legislature.

It is effective: for judicial functions; for quasi - judicial functions; for administrative functions; and for legislative functions.

This case may be taken as the first case in the Supreme Court seeking remedy on the enjoyment of right to information. In this case the Court also issued a directive order to HMG to notify the laws or rules which were claimed by the petitioner as incomplete in their making process as soon as it was possible, and drew attention of the government to enact laws by abiding by all the procedures required thereby. The petitioner, in this case, had challenged the status of some laws which were published in Nepal Gazette without authenticated by Royal Seals.

In *Secretary, Ministry of Forest V. Gajendra Bahadur Pradhananga* [226], the Court held that it had power to issue any appropriate orders or writs against His Majesty's Government by virtue of powers conferred on it by Section 30 of the Pradhan Nyayalaya Act 1952 and Section 11 of the Supreme Court Act 1856. The Court also held that the writ was issued to control arbitrary action of the executive.

In these cases, the petitioner who was suspended from his job by HMG challenged the government action in the court. Responding to the petition the Court declared the act of suspension illegal. Though the final verdict was given by the Court in the name of respondent, the Secretary to take necessary action, but the Ministry did not intend to enforce it. The petitioner then filed the writ of *mandamus* seeking order to implement the Court's decision by HMG and take necessary action on the Contempt of Court. The writ was finally cancelled.

In *Chiranjibilal Marwadi V. S.P. Tek Bahadur Rayamajhi* [227] the Court once again asserted that it had, by its very nature, residual power to issue the writ of *certiorari*

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226 *Id.* NLR 1959 at 21.
227 *Id.* NLR 1958 at 42.

for the enforcement of citizens' rights provided the current laws of Nepal explicitly provide the same.

It also held that the Court, pursuant to Section 11 of the Supreme Court Act, could exercise the power of judicial activism and issue certiorari for the enforcement of people's rights if no other remedy had been provided thereby.[228]

Shankerman Amatya v. His Majesty's Government, Ministry of Home[229] was another landmark case where the Supreme Court held that it could exercise extra-ordinary jurisdiction in two conditions:

- If the rights of the citizens or any persons conferred by the current laws were infringed; and
- If no any provision for alternative remedy for the enforcement of such rights was provided for by other laws.

The Court also held that no writ could be issued in case any alternative remedy was available in any other law.

In *Gajendra Bahadur Pradhananga V. Attorney General Shambhu Prasad Gyanwali*[230] elaborating the scope of judicial review as was set in the previous judgments, the Court held that it could, under Section 11 of the Supreme Court Act, exercise extra-ordinary jurisdiction if the following conditions were satisfied:

- First citizen must have some rights conferred on by the current laws;
- Secondly, someone must have been restricted from the enjoyment of such rights; and
- Thirdly, there must not be any other alternative remedy provided for the enforcement of such rights.

This case can be taken as the first (reported) case of Judicial activism of legislation where the petitioner had challenged the legality of Section 10 of the Civil Service

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228 Section 11 the Supreme Court shall, in case no provision for alternative remedy has been provided for the enforcement of rights conferred on to the citizens or to any persons by the current law, have power to issue appropriate orders or writs including the writs of habeas corpus, mandamus, prohibition, quo-warranto and certiorari.

229 *Id*. NLR 1959 at 127.

230 *Id*. NLR 1960 at 35.

Act 1956 as being inconsistent with Section 19 & 20 of the Civil Liberties Act 1955.

Interpreting the significance of judicial review, the Court held that legality of a provision of an Act could not be challenged on the ground that it was inconsistent with the other provision of an Act with similar status and made from the same source.

In *Maniraj Upadhyaya V. Magistrate Amritman*[231] the court for the first time, upheld the doctrine of laches of time in the writ jurisdiction, and the writ was also cancelled on the same ground.

Editor and publisher of the *Samaj Patrika Maniraj Upadhyaya* had filed the petition in the supreme Court under section 11 of the Supreme Court Act 1956 challenging the order of Magistrate which asked Updhyaya to close the publication until he had submitted Rs.1000 as a deposit on the charges that he had violated the provision contained in section 5(d) of the Press and Publication Act 1953.

In *Kishori Nandan Singh V. Acting Secretary Krishna Bahadur Deuja, HMG, Ministry of Industry and Commerce*[232] the writ was issued on the ground that the petitioner was deprived of the enjoyment of right to hearing, i.e. right to natural justice. The Court held that since the petitioner was not given due chance to be heard, HMG's decision to provide exit was void.

In *Pushkernath Updhyaya and Others V. HMG,*[233] the court established a principle that the doctrine of judicial activism/ review could not be effective in advance or prior to have occurrence of actual event. In *Uttam Shamsher and Others V. HMG,* [234] the petitioner had challenged the legality of rule 15(2) of the Nepal Administration Service Organization Rule on the ground that it was inconsistent with sub-rule 1 of rule 15. (Rule V. Rule). The Court held that a rule would become void if it was framed beyond the scope of enable Act. It also held that no rule had retrospective effect.

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231 *Id.* NLR 1960 at 44.
232 *Id*. NLR 1960 at 40.
233 *Id*. NLR 1960at 76.
234 *Id*. NLR 1960 at 82.

In *Uttam Shamsher and Other V. Commissioner of Public Service*,[235] the court held that a civil servant would deserve the titles and facilities in the capacity of a government official only when his appointment was lawful. Unlawful appointment did not deserve powers and facilities to be entitled to a civil servant.

Confirmation of the job of an employee who is under probation period rest at the discretion of HMG and Commission of Public Service. Distinguishing the question of fact from the question of law, the court held that the doctrine of stopple was effective only on the question of fact.

The Court categorically interpreted the nature of *mandamus* and held that:

- Writ of *mandamus* is issued to government employees in order to make them perform their legal duties as prescribed by the law.
- It is issued if the respondent has legal duty to be accountable to the people.

The Court also held that while issuing the writ of *mandamus*, the petitioner must be an aggrieved party.

In *Mukti Sharma V. S.P. Tek Bahadur Rayamajhi and Others*[236], the Court by differentiating the functions between judicial, quasi-judicial and administrative held that functions those relating to the administration of justice were known as the judicial functions; functions those to be performed by the executive relating to directive principles of the state policy were known as the executive functions; and functions those to be performed by the administrative officials in a manner the Court performs were known as the quasi-judicial functions.

- Judicial functions - by judiciary
- Quasi-judicial functions- by administrative authority/official
- Administrative functions - by executive

Of them, functions of the Courts are followed by the due process of law. The Courts must abide by the procedures established by the law. There is no room for self -will of the Court. However, the administrative official is not under obligation to abide by

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235 *Id.* NLR 1960 at 85.
236 *Id.* NLR 1960 at 110.

the prescribed procedures to reach into a decision. Administrative functions are performed by the authority based on policy or appropriateness as determined by circumstances. Therefore, there may be more chance of discretion in the administrative functions. Similarly, there is inevitably the presence of discretionary will in the quasi- judicial functions. But there is the least degree of discretion in the judicial functions. In addition to least degree of discretion, judicial decisions must be backed by the prescribed procedures, rather than by self -will. The Court also held that the function of Court is to provide justice and this function of the Court is generally known as judicial functions.

It was a landmark decision of the contemporary time. It very strongly pronounced that the court had no self -will at all. It further observed judicial functions must be backed by judicial reasoning whereas administrative functions need not necessarily be backed by reasoning and procedures. To this verdict, the writ of certiorari could not be issued if the very function was not (judicial) or quasi- judicial. It could be issued only when the function was administrative one. Writ jurisdiction is the final and special means of legal remedy. It is effective only when no other alternative remedy is available in other laws, held the Court.

The Court in *Tika Prasad Thakali V. Secretary Bhavnath Sharma and Others*[237], held that any person who is arrested and detained in custody should be produced before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority.

In *Bharat Shamsher V. Secretary Presh Narsingh, HMG, Ministry of Home*[238] the Court held that the writ of *habeas corpus* could be effective on the basis of legal rights of a citizen even at the time of emergency where the right to constitutional remedy was suspended. It observed *habeas corpus* was not just for the enforcement of constitutional rights, it was also available for the enforcement of legal rights. In this case, the Court also pronounced writ of habeas corpus was ever a non - suspendable right of citizen.

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237 *Id.* NLR 1960 at 6.
238 *Id.* NLR 1960 at 130.

In *Kritibeer Pal V. Bada Hakim Uttam Keshar and Others*[239], the peasants' rights was protected from the landlords. In the observation of court the very objective of the Land Reform Act was to protect the rights of the peasant rather than to the landlords. Similarly, in *Rudranath Upadhyaya V. Chief Police Officer Tek Bahadur Rayamajhi* [240] the Court held that the writ of prohibition could be issued against the Court or authority that exercised the excessive power.

Gede Bhola V. Pushkernath and Others[241] was the case of judicial review of personal law issue in which the act of enforcement on private land was challenged in the Court. Provided the issue protected by personal law, the writ was issued in favour of the petitioner. The *Ghurchandra Prakash V. HMG and Others*[242] pronounced established power of an authority is sufficient to deliver any decision. In ***Purna Das Shrestha V. Judge Krishna Prasad Chapagain and Others***[243] the Court held that the writ of prohibition cannot be issued if the appeal was available for the impugned dispute. It also held that there could be no scope of judicial review in case the dispute was *sub-judice* in other Courts. It also cleared that the petitioner had to present very clearly and precisely the issues or demands he claims from the Court.

In *Thakurramraj Vaidya and Others V. Nepal Bank Ltd.*[244] the Court held that the writ of *mandamus* can be issued to enforce only established rights. Rights which are in doubt or are imperfect cannot be enforced from the writ jurisdiction. The Court also pronounced that the writs are not issued to settle the question of fact and nor can these be issued to establish the title on property.

In *Janak Singh Sahagal V. Dwarika Prasad Aryal*[245] distinguishing the injunction from prohibition, the Court held that though there are similarities in the objectives of issuing injunction and *prohibition*, the injunction is generally not issued instead of the prohibition. Injunction has two forms. The former is issued to do a particular act whereas the latter is issued to refrain from doing a particular act. In this sense, some

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239 *Id.* NLR 1961 at 132.
240 *Id.* NLR 1961 at 52.
241 *Id.* NLR 1961 at 69.
242 *Id.* NLR 1961 at 221.
243 *Id*. NLR 1962 at 31.
244 *Id.* NLR 1963 at 13.
245 *Id.* NLR 1962 at 60.

characters of *mandamus* and *prohibition* seem to have reflected in injunction, but injunction unlike the orders of *mandamus* or *prohibition* through extra-ordinary jurisdiction is a shorter and strong alternative.

Injunction is an interim provision of resolving the immediate problems, there can be an appeal to the superior Court against the order of injunction.

In *Rameshwor Prasad Sonar V. Special Police Department*[246] the Court was in favour of the personal liberty of the detainee. The Court held that any person detained in the (police) custody had to be produced before the competent judicial authority within a period of 24 hours after such arrest. The ruling established in *Sridhar Prasad Timelesena V. Governor Laminate Guam* [247] *w*as that decision conflicting to the law and violative to the rights of the people can be declared void through writ.

In *JagatMohan Karmacharya V. HMG, Ministry of Finance*[248] the writ of certiorari was denied until the petitioner, in a *prima faciae*, case proved that all other legal alternatives in regard to the dispute were exhausted. In this case, the Court also held that the writ was not issued in advance before occurrence of actual event. In *Hiralal Bhandari V. Kathmandu Magistrate Balaram Pyakurel* [249] the Court reiterated that the act of keeping a person in detention without furnishing any warrant slip under the procedure established by the law was unlawful.

In *Ananga Man Shrestha V. Chief Engineer*[250] writ was rejected on the ground of having alternative remedy. In *Singh Bahadur Joshi V. HMG, Ministry of Finance (1963)*[251] though the petitioner had sought for *certiorari* the Court issued *mandamus* as per the necessity of the case. The Court established the verdict that if the writ demanded by the petitioner did not seem to be appropriate, the Court could issue any other appropriate order even beyond the demand of petitioner. In *Indra Prasad Singh V. Office of the Revenue* [252] distinguishing the writ jurisdiction from appeal, the

246 *Id.* NLR 1962 at 1.
247 *Id*. NLR 1963 at 28.
248 *Id.* NLR 1963 at 88.
249 *Id.* NLR 1963 at 92.
250 *Id*. NLR 1963 at 16.
251 *Id.* NLR 1963at 173.
252 *Id.* NLR 1963 at 188.

Court held that the writ was not issued if there had been provision of appeal in the law or any alternative remedy was available.[253]

In *Ram Prassd Panday V. T.U.* the writ of *mandamus* was rejected on the ground that no fundamental rights or legal rights of the petitioner was violated. In *Ratnalal Shrestha V. Lalitpur Municipality and others*[254] the Court held that extra-ordinary jurisdiction could be exercised only when no any other remedy was provided for the enforcement of impugned rights.

In *Shiv Prasad Upadhyaya V. Bidya Prasad Acharya and Others*[255] The Court held that in the exercise of extra-ordinary jurisdiction it could declare the act void if it was done by any judicial or quasi -judicial authority in excess of jurisdiction or in exercise of colorable power. In *Krishna Prasad Upreti V. HMG, Ministry of Finance*[256]. The Court issued writ of *certiorari* for the enforcement of rights enumerated in the Constitution or for such rights in which no any alternative remedy was available.

K.I. Singh V. Kathmandu Special Court [257]is one of the most talked case in judicial history of Nepal. Responding to the *habeas corpus* issue, the Court held that person who was imprisoned under the decision of the Court could not be released from the writ of *habeas corpus*. The significance of the verdict is that it differentiated judicial custody from the police custody. In *Krishna Bahadur Basukala V. Bhaktapur Nager Municipality*[258] writ of prohibition was issued in the name of municipality on the ground that it committed an authorized act. *Mahendra Prasad V. District Court* [259] is the case where the Court pronounced that detention endorsed by judicial authority cannot be challenged by *habeas corpus*.

In *Chauddhd Ahir V. Nanda Bhadur Malla and Others* [260] upholding the doctrine of *laches* in the writ jurisdiction, the Court held that extra-ordinary jurisdiction was not

253 *Id*. NLR 1963 at 178.
254 *Id.* NLR 1963 at 182.
255 *Id.* NLR 1964 at 31.
256 *Id*. NLR 1964 at 97.
257 *Id.* NLR 1964 at 115
258 *Id.* NLR 1964 at 126.
259 *Id*. NLR 1964 at 182.
260 *Id.* NLR 1965at 26.

applicable to the writ which came a front after a long delay of cause of action. In this case, the writ was rejected on the ground that it was filed after 2 years of the dispute arisen.

Banarasi Mahato V. Secretary, HMG, Ministry of Panchyat and Others [261] was the first case considered as a case of public interest litigation. Widening the scope of *locus standi,* the Court held that any person who had substantial interest with the matter could have *locus standi* to file petition on public interest. In *Charitra Jogi V. Assistant Section Officer Bal Krishna Shrestha*[262] the Court pronounced that power conferred to a particular officer to detain a person cannot be delegated to the inferior officer provided that the law permited to do so.

Sagarmal Samthaliya V. Zonal Officer Sher Bahadur Shahi and Others[263] was the pronouncement for the enforcement of *mandamus* in case the authority did not perform his/her legal duties. The Court also held that *mandamus* was not issued if the petitioner could not prove his/her legal right to have such duty from the authority. In *Advocate Gajendra Bahadur Pradhananga V. Kathmandu Magistrate Balram Pyakurel and Others* [264] the Court validated the exercise of power which was conducted with a good intent.

In *Birendra Keshari Upadhyaya V. HMG* [265] the Court pronounced that if rights enumerated in the Act were violated, its remedy had to be found within the same law. In *Krishna Prasad Pudasaini V. CDO, Kathmandu District* [266] is the pronouncement in favour of the personal liberty of a person. In this case, the Court gave impetus to the compliance of due process of law while detaining any person.

Baleshwor Barai V. Lumbini Zonal Office[267] was a case of judicial review of civil law matters. The writ was rejected on the grounds that the provision for appeal was available.

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261 *Id.* NLR 1965 at 146.
262 *Id*. NLR 1965 at 85.
263 *Id*. NLR 1965 at 90.
264 *Id.* NLR 1965 at 169.
265 *Id.* NLR 1966 at 91.
266 *Id*. NLR 1966 at 27.
267 *Id*. NLR 1968 at 193.

In *Raghu Kumar Yadav v. Land Reform Special Court Rajbiraj and Others*[268] *mandamus* was issued to the respondent to provide appeal jurisdiction to the petitioner. Similary, in *Dr. Pinaki Prasad Acharya V. Election Commission, Putali Sadak, Kathmandu* [269] mandamus was issued in the name of Election Commission to postpone the scheduled date for election.

In *Phalkudatta Dhital V. Jaguram Tharu*[270] *mandamus* was issued to the district Court to deliver the decision as per the law after collecting the relevant evidences. In *Madanlal Agrawal and Others V. HMG, Ministry of Finance and Others* [271] pronounced that the writ petition to be produced before the Court must have filed separately and the claims sought in a petition by joint petitioners could not be settled through a single petition. In this case, at least 23 petitioners had approached the Court with a single petition, where the Court responded only one petitioner whose name was out on the top of the petition.

In *Biraj Chandra Bahadur Thapa V. Kathmandu Nagar Panchya* [272] the Court held that writ petition filed for the enforcement of fundamental right cannot be resumed by the successor in case the petitioner was passed away. One's rights are limited within oneself. When a petitioner is passed away, his fundamental right cannot be transferred to others. In *Netraraj Upadhyaya Pandey V. HMG, Department of Industry and Others* [273] the Court held that land acqaired by HMG from individual cannot be used for the benefit of others other than the welfare of ordinary people. The benefit of the people shall mean a direct enjoyment of people, pronounced the Court.

In *Mulchandra Azad V. Election Officer Madan Mohan Joshi and Others* [274] the Court held that right to be a candidate in election was a legal right rather than a constitutional right. Right to participate in election is legally created right observed

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268 *Id.* NLR 1968 at 59.
269 *Id.* NLR 1967 at 70.
270 *Id.* NLR 1968 at 234.
271 *Id.* NLR 1968 at 237.
272 *Id*. NLR 1968 at 261.
273 *Id*. NLR 1968 at 268.
274 *Id.* NLR 1968 at 281.

the Court. In *Vidyanandan Prasad Shah V. Bhagwanpur Gaun Panchyat* [275] the Court held that no post could be created through the writ of *certiorari*. In this case, the petitioner had claimed to reinstate with post (elected Pradhan Panch) since he was dismissed from the job.

In *Office of the Land Administration and Others V. Tikicha Jyapu*[276] applying the doctrine of severability, the Court held that only the invalid portion of a decision could be void in case in a decision the remaining portion was valid.

In *Bhola Kumar Sherchan V. Chitwan District Court and Others*[277] a question was consideration whether the petition was in under the rule (format) as prescribed in the proviso to rule 47(a) of the Supreme Court Rule 1962. The Court held the petition was under the rule and format. *Gangalal Shrestha V. Land Administrator, Kathmandu*[278] pronounced that person enjoying the delegated authority could not have power to dismiss other person from the job.

In *Shiv Kumar Khadka V. D.S.P. Office, Kathmandu and Others*[279] the Court held that the writ of *Habeas Corpus,* not signed by the plaintiff, and filed by other person on behalf of detainee was considered to have followed the due process.

Yagyamurti Banjade V. Durgadas Shrestha, Bagmati Special Court, Singhdarbar and Others [280] is a landmark decision of the Court. The Court in this case held that degree of freedom in a democratic system was greater than in an autocratic regime. Compliance of both the substantive and procedural laws was compulsory to the authority while curtailing the right of personal liberty.

The Supreme Court has exercised power to issue any writ or order if it observes necessary even at a time where there is a demand of another type of writ. Under Article 71 at Constitution, the orders of *certiorari mandamus* and *habeas corpus* are issued respectively against the decision of judicial/ quasi-judicial authority, administrative authority and against the authority who keeps person in illegal and

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275 *Id.* NLR 1969 at 282.
276 *Id*. NLR 1969 at 288.
277 *Id*. NLR 1970 at 1.
278 *Id.* NLR 1970 at 14.
279 *Id.* NLR 1970 at 113.
280 *Id*. NLR 1970 at 134.

unauthoritative detention. In other contexts, it is the discretion of the Court whether or not to issue a particular writ order. But eachdiscretion is exercised if the appropriate grounds are established. It depends on the fact in issue, which type of order to be issued whether varying or and mixture or saverably without entering to merits. But *habeas corpus* is a strong means to protect personal liberty. No doors are closed for this writ. The Courts, unlike in other writs, can have no discretionary powers on this writ. If the petitioner justifies/ shows appropriate grounds to issue the order, it is issued as a right/ claim of a petitioner. An order of *habeas corpus* is mostly issued if the detainee is seemed to have been under an illegal unauthorized detentions without distention whether judicial or administrative.

In *Gangaram Boki V. Durgadas Shrestha, Bagmati Special Court, and Others*[281] the Court differentiated between the proviso and sub-clause and observed that the former may limit, exclude or discharge to the meaning of main Section, whereas, the latter may supplement to the main clause. In *Jagannath Gyawali V. District Land Reform Authority, Kailali* Judicial decision held by an administrative authority was observed as quasi -judicial decision, while holding such decision, proof and evidences have to be examined by applying the laws related to facts, held the Court.

In *Lal Bahadur Tamang and Others V. HMG*[282] the Court held that if the authority had option to choice, it was up to the authority to decide what law was appropriate to the relevant facts. In *Omkar Prasad Shrestha V. Jailor, Central Jail and Others,* observed that in case the provisions of former and later Acts are inconsistent with each other, it is meant that the legislator, to the extent of such inconsistency, had intention to maintain the provisions of later Act by ending the former one.

In *Gorkha Bahadur Kathet Kshetri and Others V. Polling Officer Riddiman Bajracharya and Others*[283] the decision contrary to the doctrine of natural justice or held in the lack of jurisdiction was declared void through *certiorari*. Wrong and erroneous act will be void abinitio, held the Court.

In *Nepal Synthetic Industries Company Pvt. V. HMG, Department of Industry,*

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281 *Id.* NLR 1970 at 128.
282 *Id*. NLR 1971 at 32.
283 *Id.* NLR 1971 at 50.

Kathmandu[284] the writ petition was filed on behalf of a private Company challenging the Act of Department of Industry cancelling license of the company. The Court upholding the *locus standi* of private company issued the petition in line with the demand of petitioner.

In *Ramchandra Mahato V. Dhanusa Land Reform Authority Padma Bahadur Karki*[285] the Court held that any final decision held by the Supreme Court in response to a particular case would not be binding precedent to the latter case in case the facts of the former case was distinct to the latter.

In *Krishnadharananda Rajopadhyaya V. Board of Directors Trust Cooperation and Others*[286] the question was arisen whether the title of priest was a right to property or not. The Court held that it was not the right to property of a priest.

Dayaram Bhakta V. Secretary, HMG,[287] reiterated that dispute /claim could be settled by the writ jurisdiction, merit or demerit or rationale of the decision is not scrutinized in the writ, it simply reviews whether there are legal grounds asserted in the decision or whether it is carried out under due process of law or not.

In *Advocate Lavdev Bhatta V. Rupandehi District Court and Others*[288] the Court observed that legal practitioner has power to take order of presence to Court (tarekh) and do all other necessary things with regard to the dispute for which he is appointed by his client. In *Kebal Datta V. Jagesar Chamar and Others*[289] the Court observed that the Court cannot exercise *suo motto* jurisdiction.

In *S.K. Ghos V. HMG, Ministry of Forest*[290] the Court held that it can grant relief to the petitioner under Article 71 of the Constitution even if there is alternative remedy for that purpose. This ruling was just contrast to the most of previous rulings where the Court had held that it could not inter into the merit of the case and grant relief to the petitioner if the alternative remedy was available.

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284 *Id.* NLR 1971 at 235.
285 *Id.* NLR 1971 at 311.
286 *Id*. NLR 1971 at 359.
287 *Id*. NLR 1972 at 326.
288 *Id*. NLR 1973 at 186.
289 *Id*. NLR 1973 at 286.
290 *Id*. NLR 1973 at 143.

In *Mulchand Azad V. Lalitchand*[291] the Court held the Election Special Court had a capacity as well as duty to look after the cases on election offence even those acts carried out prior to fixation of election date. Illegal actions so committed even prior to the date of election can be reviewed by the Election Court.

Parmananda Prasad Singh V. HMG, Ministry of Home Panchyat and Others[292] ruled that the rules of *laches* are not the rules of law. They are the principles established by Courts provide equitable justice to disputes. The Courts can help those persons who are careful of /to their rights. The Courts cannot help those who become unreasonably late to seek remedy in case the other person's right is affected to provide the remedy sought by such persons. But, if the Party is cautious in his rights and has not done late deliberately, he must not be deprived of getting equitable justice merely on the ground that he was being late to seek the remedy. One has not to bear the consequence of one's negligence. The rules of *laches* are not the principles of limitation. Time *contagion* is not applied in laches. Time factor is inevitably crucial in *laches*, but it is not a sole decisive factor.

In *Govinda Krishna Shrestha and Others V. Commission of Public Service, Nepal* [293] also the decision held without furnishing opportunity to express one's statement before taking any decision to dismiss from the permanent job was declared inconsistent with the rules of natural justice. *Amber Singh Sunar V. Kalabu Tharu and Others* [294] observed that the principle of natural justice and judicial mind were of utmost important. Decision held by applying neither one of these principles cannot be valid.

In *Amrita Rai V. Office of the Vice Chanceller, T.U. and Others*[295] the decision to cancel the certificate of a student was quashed on the ground that its process was contrary to the rules of natural justice. An order of *mandamus* was issued against the vice chancellor to compel him to act as per the law.

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291 *Id.* NLR 1973 at 342.
292 *Id.* NLR 1974 at 346.
293 *Id.* NLR 1976 at 87.
294 *Id.* NLR 1976 at 149.
295 *Id.* NLR 1976 at 18.

In *Jaganlal Amatya V. HMG*[296] the Court pronounced that a person who was detained must be informed of the cause of his arrest and he must be produced before judicial authority within 24 hours.

In *Giridhar Sharma V. Secretary, Home Ministry*[297] identity card of an individual was declared as not the certificate of citizenship, nor the declaration of such card invalid was meant the lapse of citizenship. Here the government decision to quash citizenship was declared invalid through writ of *certiorari*. *Ramkaji Pradhananga V. Hemraj Bajracharya and Others*[298] the Court observed that there was no judicial review of the sub-judice case.

Balram Shrestha V. Kathmandu Valley Municipality Development Planning and Others[299] was the first case in the judicial history of Nepal sued for seeking protection of the right to fresh environment. Unfortunately, the Court rejected the petition on the ground that it was not entertainable for want of law relating to collective health of the community.

In *Ram Sundar Thakuri and Others V. National Election Commission for Referendum*[300] the Court observed that it was a valid provision of law to confer political rights only to the adult. The petitioner challenged government action to fix 21 years of age for voting right to referendum while the law had fixed 16 years of age adult suffer for the purpose of general election.

Reshmiraj Pandey V. Sugal Chaudhari[301] observed that the respondent must have time to defend allegation charged against him. Decision held without hearing the defendant is void.

In *Hem Bahadur Thakuri V. Commission for the Prevention of Abuse of Authority*

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296 *Id.* NLR 1976 at 215.
297 *Id*. NLR 1977 at 299.
298 *Id*. NLR 1987 at 10.
299 *Id.* NLR 1978 at 29.
300 *Id.* NLR 1979 at 119.
301 *Id*. NLR 1982 at 73.

and Others[302] asserting the power of judicial review for the enforcement of fundamental rights the Court pronounced that the Supreme Court was entitled to issue any kind of order in order to enforce the fundamental rights of the people. In *Shiv Giri V. Butawal Municipality and Others* [303] the Court pronounced that the right so claimed must be undisputed in order to enforce it through extra-ordinary jurisdiction of the Supreme Court.

In Pashupati Giri V. Brijendra Bahadur Basnet and Others[304] the Court pronounced that it was not necessary for an institution or group to be legally constituted in order to possess the legal personality. It was held that in any state, the current Constitution was a fundamental law of the land and it was the sources of all other laws. The Court also pronounced that the law was meant by Act or rule framed under the Constitution, or any bye-law/ regulation or order or notification framed under the delegated power of such Act or rule. In addition to, the held that the interpretation or any legal principle established by the Supreme Court in response to the particular dispute was also known to as the law.

The order under the extra-ordinary jurisdiction is issued only for the enforcement of Constitutional legal rights. The person who seeks remedy under extra-ordinary jurisdiction must show that his legal or Constitutional rights are violated.

So far the Memorandum or Articles of Association of any institution (Company) cannot be regarded as current Nepal law; the writ petition cannot be filed on the grounds that rights so conferred by such documents are violated.

(b) During 1990 to 2009

In *Chaitanya Brahmachari V. HMG and Others*[305] the Court held that it was a legally binding provision to produce a person who was arrested before a judicial authority within 24 hours from the date excluding the time to journey. The detention beyond 24 hours without the judicial order was automatically illegal. This was the responsibility of the Supreme Court to protect the personal liberty, a valuable right of

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302 *Id.* NLR 1987 (B) at 25.
303 *Id.* NLR 1987 (C) at 205.
304 *Id*. NLR 1989 vol. 2, at 194.
305 NLR 1991 vol. 2, 3, 4, at 60.

any person, held the Court.

Amber Bahadur Gurung V. Tribhuvan Viman Security Guard Office, Kathmandu and Others[306] is one of the land marked cases delivered by the Court in post 1990 Constitutional development. In this case the Court held that: the act to detain a person in the custody by a police without producing such person before the competent authority within 24 hours from the date of such arrest is not valid.

It is the duty of all to obey and respect the law. The rule of law and fundamental rights cannot be upheld and protected if the person holding the public responsibility does not comply with the Constitution.

The matters such as how and when the prerogative writs are issued are not dealt with under any particular law or rule. They are the matters of principles. The terms and conditions to enforce the extra- ordinary jurisdiction remain as principles. The writ of *habeas corpus* is the panacea of all kind of illegal detentions.

The past or antecedent illegality cannot be the ground of releasing the detainee in habeas corpus. Neither does this a remedy of anticipatory bail. It concerns with the present status of a detainee whether he/she is in illegal detention at the time of proceedings.

The police custody and judicial custody are entirely different and directly and substantially irrelevant condition. They are separate and independent to each other.

In Chhavi Peters and Others V. Chief District Office, Kathmandu and Others[307]. The Supreme Court spoke that as per Article 8 of the Constitution of the Kingdom of Nepal, 1990 and Section 3(1) of the Nepal Citizenship Act, 1963, the father of a child must be a Nepali citizen at the time they are born in order to acquire the Nepali citizenship. In this petition, Section 3(1) of the Nepali Citizenship Act was challenged as being contrary to Article 10 (2) of the Constitution of Nepal 1962. However, the Court observed that the impugned Section was not inconsistent with the Constitution.

This was the first case of the judicial review of legislative act challenged before the

306 NLR 1992 vol. 1, at 31.
307 NLR 1992 vol. 5, at 443.

Supreme Court after the promulgation of the 1990 Constitution.

Annapurna Rana V. Kathmandu District Court[308], the Court delivered its landmark decision in favor of the petitioner. The Court invalidated "Virginity Test Order' relying on the ground that the order violated constitutionally guaranteed right to privacy. It was held that gynecologic examination of the private reproductive organ of the petitioner constitutes an interference with the right to respect for privacy under the Art 22 of the Constitution of the Kingdom of Nepal 1990. Significance of the decision also lies in holding state institutions including Court accountable towards the observance of fundamental human rights of individual.

According to the judgment, even judicial authority cannot enable itself to supersede the fundamental rights of an individual by administrating virginity test in the name of collecting evidences.

The Court went on to say that having promiscuous sexual relationship, cohabitation and bearing of child too does not amount to marriage and all these facts do not affect or alter the legal status of a woman. The Court further interpreted that mere sexual relationship does not create any change on the legal status of a woman girl. Before marriage, they may practice cohabitation for years. It emphasized that this *ipso facto* does not establish matrimonial relationship between them. The crucial interpretation of the Court is that sexual relationship before marriage does not tantamount to marriage. Also this decision boldly challenged the patriarchal social norms and values that ignore women's sexual autonomy.

Bishwombharnath Pandey V. Office of the Rapti Zone and Others[309] was also pronouncement of the Court after the enactment of 1990 Constitution. Held, that the rules of natural justice are not the principles based on merely formality and technicality, they create substantial rules to provide substantive justice. The rules of natural justice have been transformed into the binding rules of law.

Iman Singh Gurung V. Secretariat, Council of Ministers and Others[310] is a land mark verdict of the Supreme Court on the development of judicial review of legislation.

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308 Annapurna Rana V. Kathmandu District Court, NKP 1999, Vol. 8, p. 476.
309 NlR 1992vol. 7, at 616.
310 NLR 1992 vol 8, at 710.

The Court in this case, among others, held that the provision of judicial review of legislative action was not merely limited within the process or procedure; it was rather a fundamental right of the people to approach the Court to declare the law null and void on the ground that it was inconsistent with the Constitution.

The Court in *Iman Singh* after the advent of 1990 Constitution, for the first time, declared clause (d)of Section (3) (1) of the Military Act, 1959 void from the date of decision, as being contrary to Article 11(1) of the Constitution. In this case, the Court held that Constitution has made restriction on the power of the Court in interfering the proceedings and decision of the Military Court, however, it did not mean that the Military Court could do whatever it liked and wished. The judiciary could scrutinize the action and decision taken even by the Military Court if such actions or decisions were inconsistent with the Constitution. This verdict of the Court has accepted that the parliament is a Supreme law making body and the function of the Court is merely to interpret it and not to amend or enact it.

Mana Bahadur Bishwokarma V. His Majesty's Government, Ministry of law, Justice and Parliamentary Affairs and Others[311] is an another landmark case decided by the Supreme Court after the reinstatement of democracy in which the explanatory note of No. 10(A) of the Chapter on Adal of the Muluki Ain (the Country Code) was declare void from the date of its decision as it had contravened Article 11(4) including the letter and script of the Constitution. Article 11(4) prohibits discrimination on the basis of caste and treats untouchability as an offence. Denial of access to any public place or deprivations of the use of public utilities are made punishable by law. No.(A) of the Chapter on Adal of the Muluki Ain also carries the same sense. However, the explanatory provision of 10(A) had legitimized the practices traditionally adhered to in any temple or religious places as non-discriminatory. The Court stated that the explanatory note, which is sometimes, added with the actual provision, is part and parcel of the Section, as it clarifies the relevant Section. Explanatory clause is meant for the removal of dilemma and ambiguities, if any, under the actual provision of law. The explanation, therefore, cannot restrict nor can it widen the ambit of the actual provision of law. Hence, No. 10(A) of the Chapter on

311 NLR 1991 Vol 12, at 1010.

Adal of the Muluki Ain was restricted by the explanatory clause as if it were the proviso of the general provision. The Court observed that if the explanatory provision were allowed to remain in existence and operation, as it is, then the fundamental character of the Constitution as the Supreme law was to disappear and the general law could previl over the fundamental law of the land, and therefore, it must not be left in operation.

In *Nanda Kumari Rawal V. HMG, Ministry of Industry and Others*[312] the writ petition was filed on the ground that the land receipt Act 208 and 1977 were inconsistent with Article 11(2)(e) of the Constitution of Nepal 1962. The Court discharging the petition held that the state can acquire the property of the individual by paying the reasonable compensation. The Court also held that developing the concept of absolute property right is not just even from practical standpoint.

In *Bal Krishna Neupane V. Parliamentry Secretariat and Others*[313] the Court held that the second statement "….Priority shall be given to Nepalese citizen of Section 4(i) of the Labour Act, 1991 was declared *Ultra vires* as being contrary with clause (e) of Article 12(2) of the Constitution, from the commencement of the Constitution by the special bench of the Supreme Court." The Court held the rule enacted under the delegated power of the Act cannot go beyond the limitation and objective of the Act. The rule is needed to be consistent with the Act as the Act is within the Constitution. The right not conferred in the Act cannot be conferred in the rule. The state has rested to the parliament, which consists of elected representatives of the people, the responsibility to enact laws. The function the Court is merely to interpret the laws. Similarly, the Court should always keep the positive regard that the parliament- made- law is consistent with the Constitution until the unconstitutionality of such law is directly proved. The Court also held the Court generally does not want to interfere in the legal validity of state made law. Applying the doctrine of severability of law, this Court held when the law is partially valid and partially invalid the Court has to declare *ultra vires* to the invalid part are declare the valid part to be valid. The parliament cannot enact the law so to be inconsistent with the

312 NLR 1992 Vol 4, at 180.
313 NLR 1993 Vol 8, at 450.

Constitution because the inconsistent law is always void.

In this Case Constitutional validity of Sec. 4(1) of the Labour Act, 1991 was challenged by the petitioner as it had violated the constitutional provision embodied under Article. 12 (2) (e) of the constitution, which guarantees the freedom to practice any profession, or to carry on any occupation, industry or trade of a citizen. The petitioner claimed that Parliament had no right to enact any law granting such right to the foreign citizens[314].

The Court declared the second sentence of the alleged See 4(1) while making such appointments priority shall be given to the Nepalese Citizens null and void ab initio pursuant to Article 88(1) of the Constitution.

Meera Gurung V. Central Immigration Department and Others[315], Meera Gurung, a Nepalese national, married an Iranian national and gave birth to a son in Philippines. Her husband had a student visa for one year to stay in Nepal. However, the Immigration Department refused to grant him a spousal visa for a period beyond four months in a year, on the basis of clause 8(4) of the Immigration Regulations. Meera Gurung made a plea to the Supreme Court, stating that the Immigration Regulations discriminated against women, as they allowed only the foreigner wives of Nepalese men to obtain visas for an indefinite period of time. Hence, the refusal of a visa for the foreign husband of Nepalese wife was made on the basis of sex of his wife. The petition lodged at the Supreme Court demanded that the Immigration Regulations be declared unconstitutional. The case was referred to the bench of three justices.

The Supreme Court in this case held that according to sub clause 3, of Immigration Regulations, a foreign woman marrying a Nepalese man is entitled to stay in Nepal without any visa while her marriage is intact, and three months after the period of its termination. It provides that she need not obtain a renewal of her visa once it is obtained, as long as the marriage is intact. However, according to sub clause 4, of Immigration Regulation, a foreign man marrying a Nepalese woman is entitled to only four months visa a year. These provisions therefore operate differently

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314 NLR 1993 at 450.

315 *Meera Gurung V. Central Immigration Department and Others,* NLR 1995, sec. 2, p. 68, Decision No. 4858.

according to the sex. Thus, these provisions are distinctly discriminatory in nature. On the basis of sex, they allow the differential treatment of Nepalese women and men. Nepalese men are privileged through the favorable treatment of their foreign wives in matters regarding visas. A foreign spouse is entitled to preferential treatment in the issue of a visa simply through her marriage to a Nepalese man. However, the same privilege is not granted to the foreign husbands of Nepalese women, who are not able to obtain a residential visa. Hence, the said clauses of the immigration regulations being discriminatory and as such inconsistent with Article 11 of the Constitution of the Kingdom of Nepal 1990 are declared null and void. The petitioner's husband is therefore entitled to obtain a residential visa to stay with his wife in Nepal.

Benjamin Peter V. His Majesty Government, Ministry of Home and Others,[316]*,* in this case Swiss national Benjamin Peter was married with a Nepalese girl Meena Kumari. Meena Kumari claimed that there is discrimination between the men and women in the Regulation relating to Foreigners, 1998. Rule 14(3) of that Regulation provides that the foreign women marrying with Nepalese national shall not have to extend the visa to stay in Nepal whereas sub-rule 13 of rule 14(4) of that Regulation provides that a foreign man marrying with a Nepalese women can obtain the non- tourist visa up to maximum 4 months in one year. The petitioner claimed that such provision is discrimination against the men and contrary to Article 11 of the Constitution of the Kingdom of Nepal, 1990 which has guaranteed right to equality.

The Supreme Court in this case held that the Constitution of the Kingdom of Nepal, 1990 under its part 2 has provided that the provision relating to citizenship is the special provision hence it not required to be as per the normal provision. The Government of Nepal cannot make any agreement against this provision and if any agreement is made such shall be void. Hence, the Supreme Court refused to declare the alleged provision void.

316 *Benjamin Peter V. His Majesty Government, Ministry of Home and Others*, NLR, 1990, sec. 11, p. 749, Decision No. 4413.

In Baburam Poudyal V. HMG, Council of Ministers and Others,[317] This Court interpreted the discretionary power and held that it was not an uncontrolled power. It was neither unlimited nor out of scope. It must be exercised fairly and reasonably. Fairness and good faith were the standards of discretionary power. Arbitrariness was the anti-thesis of rule of law. The necessity of rule of law was to control the arbitrariness.

The Court observed that Article 88 of the 1990 Constitution had given an exclusive power to the Supreme Court to issue any appropriate order to provide appropriate remedy with full justice. The decision relating to retirement was subjected to judicial review under Article 88 of the Constitution.

Doctrine of pleasure was not meant to disobey the rules. It was either not meant to arbitrariness. The doctrine of surrender was not applicable in the case of constitutional and legal questions. It depended upon facts, position and circumstances of the case.

Absolute equality is not possible. To say there is discriminatory law or to use the law in a discriminatory way is not the same thing. Equality means equal application of law among equals.

In this case, the Court was called upon to decide whether clause (2) of Section 24(d) of the Civil Services Act, 1992 (First Amendment) Act, 1992 and rule 81 of the Civil Services Rules, 1993 were violative of Article 11(1) of the Constitution of 1990. These legal provisions provided that where the minimum qualification prescribed for any post was graduation or its equivalent, if any employee had, after completing his Intermediate examination, directly obtained a Master's Degree or its equivalent, he shall get the marks only for the minimum qualification and shall not be entitled to get marks meant for the additional academic qualification. The petitioners who had gone directly after completing their Certificate level, to study Master's in law in a University of the then USSR on Government Scholarship, had completed five years

317 NLR 1993 Vol 3, at 143.

of study, passed the State examination and fulfilled the dissertation requirement as per the Protocol signed between the Ministry of Education, HMG and the then USSR on Jan 9, 1970 to fulfill the condition required for completing a Master's degree.

A three judge Special Bench of the Apex Court held that equality could not be absolute and that just and reasonable classification could be made by law. There might also be differences between the people belonging to such classes. But the only requirement is that such a classification ought to be comprehensible and justifiable. However, any act indirectly downgrading a person who had received a Master's degree to a Bachelor level could not be deemed as reasonable and just. The legal provision regarding awarding marks only for Bachelor's degree to a person who received a Master's degree, which had been already recognized by the authorized institution, obviously appeared to be controversial and unreasonable. The learned judges held that since such a classification about the qualification of the petitioner was apparently unjust, it was tantamount to imposition of unreasonable restrictions on their qualifications in regard to the opportunities for promotion and, hence, it was declared *ultra vires* to the extent of inconsistency with the Constitution.

In *Lalit Bahadur Bom V. HMG, Council of Ministers and Others*,[318] the Court held that Article 23 of the Constitution had adopted the doctrine of *ubi jusibi remedium,* (no right without remedy) and there was Article 88 of the 1990 Constitution with remedy to materialize the doctrine enshrined in Article 23. The order under Article 88(1) would merely be a declaratory type subject to very circumstance, but the order was remedial one in response to writ petition seeking the remedy on the ground that there had been unreasonable restriction on the fundamental rights.

Basant Bahadur Shrestha V. HMG, Council of Ministers and Others[319] pronounced that rules were not self -evident in themselves. They could not be in excess of the scope of Act. The rules could not formulate provisions which were not intended by the legislature. Rules 120(1) of the Education Rules, 1992 were contrary to fundamental rights guaranteed by Article 11 of the 1990 Constitution and were invalid from the date of enactment.

The Court under the authority of Article 88(1) of the Constitution declared the rule

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318 NLR 1994 Vol. 8, at 599.

319 NLR 1994 vol 8, at 609.

120 (1) of Manual of education void as being contrary with Article 11, 11(2) of the Constitution. The Court held the executive can enact laws only to enforce the Act under the delegated power of the legislature. It cannot go beyond the will of the legislature expressed in the Act. Manual cannot be independent and free from the Act. It has to be consisted with the Act where from it derives the legal validity.

In *Advocate Bal Krishna Neupane V. HMG, Council of Ministers and Others*[320] a petition was filed in the Supreme Court to declare the binding provision of the sub-rule (a) (b) of Rule 3(4) of the Citizenship Rules, 1992 Ultra-vires to the Citizenship Act, 1963 and the relevant provision of the Constitution pertaining to Citizenship. The Court held the rule was contrary to the Constitutional provision, namely Articles, 8 and 9, and sections 3 and 16 of the Citizenship Act, 1963.

In *Advocate Keshav Prasad Bhattari V. HMG, Council of Ministers and Others*[321] the Court held that there were certain standards or basis to resolve the question whether any post was of 'public responsibility' or not. For example, (1) the officials of public responsibility post should have to be given certain responsibilities towards the people by the Constitution or other current law. (2) such officials should have power to exercise executive, legislature or judicial functions within the limitation of given capacity, and (3) such officials should have to be independent under the law to exercise such power freely subject to know any order or direction of superior authority/ official.

The post of chief secretary or secretary of HMG is not the post established or created by Constitution or legislation. Such post is created under the decision of HMG as it deemed necessary. It is thus they cannot exercise any power freely, they exercise the powers delegated to them subject to directives and policies of HMG. Such post though may be a public employment; the legality of the appointment of such post cannot be scrutinized by *quo-warranto.*

320 NLR 1994 Vol 9, at 675.
321 NLR 1995 Vol. 4, at 306.

In *Yogi Narharinath and Others V. PM Girija Prasad Koirala and Others*[322] the Court held that though it had no power to enforce the directive principles and policies of the state, it could intervene the government actions or decisions if they were contrary to the set directive principles and policies of the state.

This exercise of power of judicial review helped to protect directive principles and state policies. The issue raised by the petitioner in this case was relating to protection of public property by the state.

In *Krishna Prasad Shivakoti V. HMG, Council of Ministers and Others*[323] the petitioner prayed to the Court to declare certain laws void and ineffective which had provision capital punishment even after the promulgation of 1990 Constitution, which prohibited capital punishment with immediate effect. The laws which had provisions of capital punishment under sections 27 and 152 of Military Act 1959, Section 13 of Succession to the throne Act 1987 (Rajgaddi Utaradhikari Sambhandhi) and section 2 of Offence against State and Punishment Act 1989.

The Court by interpreting difference between Article 131 held that Article 1 was there for declaring any law null and void to the extent it is inconsistent with the Constitution whereas Article 131 made any law *ipso facto* ineffective within one year if such law was inconsistent with the Constitution.

According to the Court, the law which becomes automatically ineffective needs not to be declared void under Article 131. The rules of nullity are applied only to the case of effective law.

The Court also held that it was up to the legislators to repeal or amend the law which was inconsistent with the Constitution under Article 131. The one year period of time was for legislators to think about and decide that whether such law needed to be repealed or amended. And in case such inconsistent law was not adjusted then the law would become automatically void within one year.

The Court observed that the terms null and void expressed in Article 88(1) and the term ineffective contained in Article 131 were not identical as the two terms

322 NLR 1996 Vol 1, at 33.
323 NLR 1997 Vol. 6, at 295.

connoted two different meanings. Thus, the central focus of the verdict of the Court was to observe that Article 88(1) was for testing the validity of post constitutional laws whereas Article 131 was for testing the validity of pre-constitutional laws.

The Supreme Court in *Sita Singh Poudel V. Public Service Commission*[324] with reference to state obligations arising from Article 3 and 4(1) (2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the provision to Article 11(3) of the Constitution of the Kingdom of Nepal 1990 held that the second amendment to the Civil Service Act which reduced the probation period of women employees from one year to six months was a positive discrimination envisaged in line with the Constitutional and international law schemes. To the Court, the provision of probation period contained in Section 18 of the Nepal Health Service Act, the real issue of the petition, was applicable only to the male employees. This was one of the judgments delivered by the Supreme Court of Nepal giving due consideration to the provisions of CEDAW.

In *Reena Bajracharya V. HMG and Others*[325] the Supreme Court, for the first time, examined the concept of gender justice and its application in Nepalese legal system. In this case, Rule 16.1.3 of the Service Rules of Royal Nepal Airlines Corporation Employees was challenged on the ground that the Rule had fixed different periods of service age for compulsory retirement to air steward and air hostess. Twenty eight air hostesses employed at the Royal Nepal Airlines Corporation (RNAC) challenged the Rules as discriminatory and violative of their right to equality as it forced an air hostess to be relieved of her service if she attained the age of thirty or completed a total period of ten years in her job whereas the male crew members were allowed, as per rule 16.1.1 to continue their service until they reached fifty five. The petitioners pleaded that both air hostesses and stewards belonged to the crew service, and yet the airhostesses were subjected to blatant discrimination and forced to get early retirement merely on the ground of sex.

Addressing the question of gender equality forcefully raised by the petitioners, a Special Bench held that although other provisions of the Service Rules concerning

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324 NLR 2000 at 434.
325 NLR 2000 at 376.

provident fund, other benefits and leaves were similar in case of both the air hostesses and the stewards, the impugned provision embodied in rule 16.1.3 appeared to be discriminatory and violative of the spirit of the Constitution. The Supreme Court also observed that the concept of equal pay for equal work guaranteed by Article 11 (5) for both sexes was the fundamental source of all other guarantees regarding their service facilities and securities. And, if there was equality in regard to the fundamental issue, it was but self-evident that the other related benefits, which flowed there from, such as, tenure of work, and the resultant benefits, must also be equal. As a result, it stressed the need for assurance of equal benefits and security to every employee.

The Supreme Court further opined that the provision enshrined in Article 11(2) and (3) of the Constitution had embodied and assimilated the noble vision of elimination of sex discrimination between the opposite sexes and implementation of the culture of equal treatment in equal situations. The impugned rule 16.1.3 was also held to be in apparent contravention of the State Policy enshrined in Article 26(7) of the Constitution which directed to pursue a policy of making the female population, to a great extent, in the task of national development by making special provisions for their education, health and employment.

Impartiality, independence and competence are the backbone of judicial process. Access to justice together with the delivery of an impartial and prompt hearing in the courts prospers the belief of the citizenry in effective judicial process. For the independent functioning of any authority, no outside pressure or interference should be felt.

(c) During 2009 to 2013

Amber Bahadur Raut V. Ministry of Home Affairs and others[326]. Keeping judicial bodies, which have the responsibility to decide on issues such as people's lives, freedom and rights under external interference, pressure or influence may serve to deviate the judicial process. So, there is the indispensability of judicial independence, not for the interest of judicial bodies and authorities but for the guarantee and respect

[326] *Amber Bahadur Raut V. Ministry of Home Affairs et. al.* writ no. 066-ws-0043, Supreme Court Bulletin, September 18-October 2, 2011, Supreme Court.

of people's right to justice. The concept of judicial independence is directly linked to the rule of law and democracy. In order to maintain a practical democratic system and rule of law, judicial bodies must be kept independent from the Executive, Legislature Parliament and the other bodies and authorities of the state.

The policies for transitional justice are determined by the Executive and Legislature Parliament normally. Courts are also provided roles to solve the debates that arise while implementing the policies. In the present situation of Nepal, the Judiciary, has attempted to outline transitional justice even in the absence of clear policies of the Executive and Legislature Parliament. Even in the absence of legislation, the Supreme Court of Nepal seems to have contributed, through its verdicts, to addressing violations of human rights committed during the conflict.[327]

The Supreme Court has operated effectively at a time when law enforcement agency are in a dilemma as to whether or not cases of human rights violations committed during the conflict can be addressed with the assistance of already available criminal justice related mechanisms. The petition filed by Rita Giri stated that the investigatory bodies did not carry out their roles and pleaded the Appellate Court to issue *mandamus*. Citing point 5.2.5 of the Comprehensive Peace Agreement (CPA), the Appellate Court stated that it was not necessary to issue mandamus as the CPA talks about a separate provision to look into the incidents of rights violations committed during the armed conflict. However, the Supreme Court issued an order to proceed with the process and stated that one should not be deprived of utilizing the existing legal processes, even if the case should have been the responsibility of the would -be-formed Truth and Reconciliation Commission.

In other cases *Devi Sunar V. District Police Office Kabhrepalanchok and Others*[328] similar to the Giri case, the Supreme Court also ordered the prosecution of cases based on the existing laws of the country.

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327 'Sankramankalin Nayama Sarbochha Adalatka Phaisalaharu', NayadhishSamaj.2011. p. 28.

328 *Writ no. 2006-0641, and Kedar Chaulagain V. District Police Office Kabhrepalanchok et al. 2008-0339.*

Keshab Rai V. Secretariat of the Council of Ministers[329] A petition was filed by alleged perpetrators claiming that the ongoing legal decision process regarding the incidents of crimes committed during the conflict was against the CPA. The petitioner also demanded the process be stopped. The Supreme Court, upon hearing of the petition, issued an interim order and ruled the adjournment of the process. In Rai's case, the interim order of the Supreme Court interdicted the warrant issued by the District Court relating to crimes committed during the conflict. This has created doubt, to some extent, that addressing past crimes through the existing criminal laws of the country will end. It is noteworthy here that transitional justice related mechanisms have not been established in the country. It is therefore necessary that the Supreme Court harmonized its paradoxical decisions.

Victims expressed their grievances that dissimilar decisions were reached by the courts in similar cases. Giving dissimilar decisions in similar heinous crime[330] is likely to increase impunity in the country. Hence, it is desirable that courts use their judicial independence in a just and logical way.

Ramsharan Varma V. Office of the Prime Minister and Council of Ministers and others[331] A petition was filed at the Supreme Court pleading that in the absence of appropriate management as per the provisions of different international documents, the Interim Constitution of Nepal 2007 and the Senior Citizen Act, 2006, senior citizens are deprived from protection of their constitutional and legal rights. The Supreme Court issued *mandamus* on April 7, 2011 confirming that the legal provision of article 9(2) of the act had not been implemented. The *mandamus* ordered the Office of the Prime Minister and Council of ministers to formulate rules and regulations alongwith setting up follow up mechanism to implement the constitutional and legal provisions without delay

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329 Writ no. 2011-0532 and Anita Ghimire V. Secretariat of the Council on Ministers writ no. 2011-0584.

330 The decisions of the Supreme Court to acquit a Maoist leader accused of killing a teacher in the Okhaldhunga district Guru Luintel and punishing army personel accused of Maina, a student in the Kabhre district are paradoxical due to dissimilar decisions in similar cases, 'Dwandawakalma Hatyabare Sarbochhako Ades Sachyauna Mag. *Kantipur dainik* January 11, 2011.

331 *Ramsharan Varma V. Office of the Prime Minister and Council of Ministers et al writ no. 2011 - 0109.*

Deepak Bhattari et al V. Office of the Prime Minister and Council of Ministers[332]. The Supreme Court issued an order on January 31 in which the Government was instructed to take necessary steps towards implementing welfare provisions for persons with visual impairments. Stating that it is necessary to have special provisions for persons with visual impairments, as the provisions granted to persons with disabilities in general may not address the specific requirements of persons with disabilities to visually impaired people; the Government was ordered to adopt a policy and package of providing integrated social security to them alongwith facilities such as communication and information, skill enhancing trainings, text books in braile Script, safety, health, accommodation and food, among others. The Government was also ordered to collect data of all the persons with visual impairments located throughout the Country.

In Saroj Raj Pyakurel et al. V. Office of the Prime Minister and Council of Ministers[333] a decision was handed down on February 7 in a case regarding Electoral Roll. The case held that only those in possession of citizenship identity card could register their names in the electoral roll was illegal. The Supreme Court said a person was required to possess a citizenship identity card to vote in elections. The petitioner argued that one did not need a citizenship identity card for casting a vote in elections as the Citizenship Regulation required that those possessing a land ownership certificate and identity cards issued by the local Government bodies, the educational and other Government owned institutions, could be included in the electoral roll. Given that the constitution of Nepal contains a clear provision that one needs to possess citizenship to cast a vote in elections, the Supreme Court, however, decided such a political right could not be provided. The order from the court said that some points in the regulation were inconsistent with the Constitution itself and could therefore not be implemented. The order also called for the implementation of Citizenship Regulation on a par with the International Covenant on Civil and Political Right.

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332 *Deepak Bhattari et al V. Office of the Prime Minister and Council of Ministers* et al. writ no. 1310, 2011.

333 *Saroj Raj Pyakurel et al. V. Office of the Prime Minister and Council of Ministers. Writ no. 267-WS-0017. February 7, 2011*.

The Supreme Court was requested to issue an order in response to an incident of Rape committed by army personnel during the armed conflict in Narayan Municipality in the Dailekh district. The Court rejected the petition on 27 December, 2011[334] referring to Rape Section of the National Code, 2020 B.S. and pointing out that a petition for this purpose needed to reach to the court within 35 days from the day of the incident. The request was made to the court as a result of rape and torture perpetrated by the then *Lieutenant Jibes Thapa,* alongwith other four persons of *Bhawani Box Battalion*, of a women, of Narayan Municipality on November 23, 2004 who was alleged to be a supporter of the Maoist party.

In Jyoti Lamshal Poudyal V. Respondent: Council of Ministers and others, [335] Petitioner Advocate Ms Jyoti Lamshal Poudyal brought forward a writ petition, before the court, requesting to protect the human rights of women with response to Article 32 and 107(1) of the Interim Constitution of Nepal 2007, as the matter of public Interest Litigation against the dowary system. Which still prevailed despite its outlawed long before.

The petitioner pleaded in this case that dowry system in Nepal is the root cause for the violation of women's human rights. In some Nepalese law there has been reference of the existence of dowry system. Accordingly section 4 of the chapter Istri Amshadan, of National Code (Muluki Ain) which allows the relatives of women to give movable or immovable property from womens meternal relatives or from the relatives of her husband side can be defined as dowry. Section 3 of the Social Practices Reform Act, 1976 which prohibit giving as taking of dowary (Tilak) at the same time pursuant to its section 5(2) if the people like to give the dowry as a gift to the bridegroom that should not more than 10 thousand as a rupees. This is of course a legal dilemma.

In respect to this issues a research report was published by the Consortium for Women Rights and National Women Right Forum, which found that due to the

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334 Concluding that 35 days deadline to resolve the disputes related to sexual violence and rape, among others, was insufficient, the Supreme Court issued an order in the name of Parliament to amend law in such a way that international standards and the gravity of crime could be addressed by the amendment. However, the order has not yet been implemented.

335 NKP 2012 sec.55. Decision No. 8883. p. 1315.

illegal practice of dowry a large rate of violence against women have been occurring the guide relating of the society.

So, Section 5(2) of the Chapter of Country Code (Istri Amshadan) which is in contravention to Article (2) of CEDAW and also Art 20 (3) of the Interim Constitution Of Nepal 2007 should be amended is the claim of the petitioner.

The Court held that, dowry system is one of the main social problems of the society which only cannot be controlled alone by state or the state institution and for this there should be a combined effort of Civil society, National government organization, Communication Sector, and the individuals to control it.

In Inhurent International and others, v Respondent: Prime Minister and Council of Ministers and others, [336] In every year of new academic session all the private schools established within the country distributed course books and educational materials within the premises of the schools and forced the guardians of the students to purchase them in high prices is exploitative, so it should be stopped immediately reported the media. Taken cue of this the petitioner challenged it as against the Education Act, Regulation and prevailing law of the state. The Petitioner claimed that the private schools are cheating the guardians and students because of their low income. They cannot afford the exploitative high prices as costs such private schools are imposing increasingly each year. So, people are in the shadow to enjoy their right to education as a fundamental right. This is the claim made by the Petitioner to protect the education right.

The Court held that, the primary, secondary and other private School, are becoming costly day by day, where the guardians are unable to pay. Internalizing these above fact, the Education Act, 1971 and Education Regulation 2003 which provide various responsibilities to those who bear its duty have to fulfill their responsibility. Hence, court issue directive orders to the government, prime Minister and Council of Ministers as well as the Ministry of Education to make changes in law so to address such problems, and bring about timely reforms in the overall educational sector at the best interest of the people as the country.

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336 NKP 2012 sec. 55. Decision No. 8922. p. 1701.

In Meera Kumari Dhungana V. PM et. al.[337] the petitioner challenged the validity of the Section 15(6) of the Human Trafficking and Transportation (Control) Act, 2007 which states that if, in the course of proceeding of the case, a person involved in reporting the offence under Section 5 of this Act gives contrary statement to that of the statement giver earlier or if he/she does not appear before the court on its notice or does not assist to the court, shall be liable for three months to one year of imprisonment. Therefore, if such person changes the statement of offence during the trial or if do not help during the court proceedings then it disrespects the victim Justice system. It creates a situation for denial of truthful and correct testimony in the case of transportation and trafficking cases if state implement such provisions without effective protective system for victim's witness. The victim gets re-victimized if the witness cannot show its presence due to coercion, threat or greed or the victim itself changes the statement. Section 5 of the Act creates a situation to report the statement which indeed under Section 6 proves that it is not necessary to re-testify the statement in the court for the testimony under and it is taken as proof. Hence, the provision to punish the victim as per Section 15(6) has no meaning.

The Petitioner also the highlight the provision under section 26 of the Act though had provision for protection of witness it has yet not been implemented. In the serious offence of Human trafficking and Transportation if a victim or the reported person changes their statement or cannot show presence in the judicial proceedings then in one hand it discourages the objective of the state to punish the offender and in other hand, in such serious offence without any reason one files the charge but increases the possibility to drive away from the judicial proceedings. Victim further gets victimized and creates situation where victim deprives from justice. As a result it creates situation where victim may not give information or cannot give information of the case.

According to section 15(6) of the Human Trafficking and Transportation (Control) Act, 2007 which states that if, in the course of proceeding of the case, a person involved in reporting the offence gives contrary statement to that of the statement giver earlier or if he/she does not appear before the court on its notice or does not

337 Meera Kumari Dhungana V. PM et. al., (2006) 8973. p. 326.

assist to the court, if under pressure or due to unforeseen circumstances changes the statement then such situation is created where the victim or such person is punished. If the provision affects the victim and the hostile witness of the victim then such provision is considered as unreasonable and incorrect. If the state cannot provide or initiate for providing compensation to the victim under section 17 of the Human Trafficking and Transportation (Control) Act, 2007, then it creates situation where the victim cannot feel justice.

According to Section 26 of the Act, providing security to the victim is equally important. The effective implementation of all the provisions of the Act helps the proceedings of the court Section 15(6). Under Section 15(6) cannot be considered reasonable and correct unless all the liability shifts to the victim or person reporting the offence.

The Supreme Court issued interim order to the Government and Court directed to amend and review the existing law of Human Trafficking and transportation (Control) Act, 2007 and punish only if the person has charged the case with *malafide intention* or if do not support during the legal proceedings. In the case of human trafficking and transportation, victim should be informed about the investigation and details about charge sheet and decision should be compulsorily provided through Prosecutor. Where the court have directed the victim to be compensated under Section 17 of Human Trafficking and Transportation (Control) Act, 2007 without delay to create fund such amount should be allocated by releasing budget in the fiscal year 2013/2014 and urge to co-ordinate with the police personnel and provide compensation to the victim. Government to release budget on fiscal year 2013/2014 to pay the expenses for Government witness who have helped in the judicial proceedings in the offense related to Human Trafficking and Transportation. To pay expenses to the Government witness prior to their presence in the court for testimony in the ongoing cases and such supporting of financial support should be recorded. If a victim or person who has notified the incident demands security as per Human Trafficking and Transportation (Control) Act, 2007 under Section 26 then such person should be provided with necessary security from police.

Poonam Nepali V. Police Department, [338] On February, 2012 four persons approached to the Applicant and her husband Amar Nepali and asked Amar Nepali to go with them to discuss about finance. They tried to resist and asked for identification where they were informed that they were police personnel's and are in duty at Central Investigation Bureau, Maharajgunj, Kathmandu. Later when the applicant tried to find her husband she was inform that her husband is in ongoing investigation and cannot be released. Later the applicant was informed that her husband is detained by the notice sent from Kathamndu District Court. Kathmandu District Court gave decision and since her husband was in trial, he was on the process to file application in the appellate court as there was time for application in the appellate court given on September, 2012.

Since for what purpose ? where? and how? The detention was made is not clear by the authority, defendant encroached the right to freedom, fair trial, judicial rights and other constitutional and legal rights. Thus, the applicant filed the case of Habeus Corpus.

- In a criminal case where a person is convicted and sentenced to imprisonment, and sentenced to fine or gurantee and if cannot give such amount then according to legal provision such punishment should be converted into imprisonment. And even if the court has not convicted or has not gone for appeal, then according to section 194 Chapter of the Government Procedure and Chapter on Punishment of National Code one can be held for imprisonment after the judgment from the trial court.
- Application for *Habeus Corpus* for the deprivation of the dignified and legal rights is inconsistent to law when it disregards the provisions of Section 23 of the Chapter on Punishment and Section 194 of the Chapter on Court Procedure of National Code.
- It is the obligation of the court to punish the offender who is convicted. If such judgment is not implemented it not only increases impunity rather such judgments become passive and rule of law cannot be maintained.

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338 Poonam Nepali V. Police Department, (2012) 8977. p. 375.

In Advocate Bhuwan Prasad Nirula V. Constituent Assembly and Legislature Parliament & Others,[339] the petitioner argue, the Interim Constitution of Nepal 2007, in its preamble, has expressed its full commitment towards independent judiciary and the concept of rule of law; and in its Clause (1) of Article 100, it has expressed that all the judicial powers in Nepal shall be exercised by the Courts and other judicial authorities pursuant to this constitution and other laws and principles of justice, and Clause (2) of the same Article has provided that concept and values of independent judiciary shall be incorporated. Similarly, Clause (2) of Article 101 has expressed that other courts, judicial authorities and tribunals could be established pursuant to the law for the hearing and adjudication of special nature of cases (2) of Article 102 of the constitution has provided that all the courts and judicial authorities, except Constituent Assembly Court, shall remain in subordination of Supreme Court, it is seen that Court Martial in Nepal also remain under the judiciary. Article 13 has ensured that all citizens shall be equal and no one shall be deprived of the equal protection of law; Article 12(2) has ensured that the individual liberty of every person shall be inviolable except as per the law; Article 24 has ensured that any person shall not be deprived of the right to be counseled and represented by lawyer from the time of arrest, and every individual shall have right to fair trial before the competent court or judicial authorities.

Section 67 of Military Act, 2006 has the provision of four types of Court Martial. All the officials of such courts are under the order of precedence of the military organization and adhere to the orders of their senior military officials. If any accused of the military offense requests before the Defence Section of the Judge Advocate General Department to designate any Legal Official of his/her choice for his representation before the Court Martial, Judge Advocate General Department shall designate such official as per the request. Such provision is completely inconsistent with the constitution. The petitioner also had a claim that the said provision of the Rules has violated the various international treaties, conventions and protocols to which Nepal is a signatory. Such provision is completely inconsistent with the constitution. The petitioner has claimed for the nullification of certain sections of

339 Writ No. 065-WS-0010(2009).

Military Act with arguments that those sections are inconsistent to the constitution.

The Supreme Court, Special Bench, *Justice Khil Raj Regmi, Justice Kalyan Shrestha, Justice Krishna Prasad Upadhyaya* had issued directive order in the name of Government of Nepal, Office of the Prime Minister and Council of Ministers, Ministry of Defense and Ministry of Law and Justice, for the arrangement of necessary reforms as required, by reviewing the existing provisions related with military justice in Military Act, alongwith adequate consultation with experts working in the area of law and justice, military personnel of all ranks, security sector of the government, civil society and human rights activists, after constituting a Task Force with representation of Law, Justice and Security sectors, within six months from the date of receipt of this order.

In Advocate Laxmi Prasad Pokhrel, on behalf of Abdul Khalik V. GON, Office of the Prime Minister & Council of Ministers,[340] the petitioner in his petition has made a claim that in a narcotic drugs case run between Government of Nepal and Mr. Abdul Khalik, the petitioner after releasing from jail and clearing all the dues as decreed by the court, was arrested again by the Department of Immigration without giving letter of conviction pretending that he was called in the course of regulating the visa documents etc and has been kept in detention till June, 2012. The petitioner filling a writ of *habeas corpus* requested his release from unlawful detention.

The Supreme Court had ordered through a writ petition of *habeas corpus* filed in this court, to the Respondent to be present alongwith the detainee submit a written reply, and the case was sub-judice. But the respondent Department of Immigration, without notifying the court had transferred the detainee in another place. Since it was the duty of Director General of that Department to present the detainee as per the order of the court, however he did not do so but, without the knowledge and permission of the court transferred and deported him. Such act of the respondent was against Rule 37 and 39 of the Supreme Court Rules, 1992.

The Supreme Court, Division Bench comprising, *Justice Ram Kumar Prasad Shah and Justice Prof. Dr. Bharat Bahadur Karki,* issued directive order in the name of

340 Writ No: 067- WH-0089(2010).

respondent Ministry of Home, to initiate Departmental action against Mr. Janmajaya Regmi, the Director General of the Department of Immigration within three months from the date of receiving this order for deliberate disobedience of law and for non-compliance of his duty and responsibility and also giving him a warning for not repeating such unlawful act again and report thereof the action initiated in relation to the execution of the Court order to the Judgment implementation Directorate of this Court.

Advocate Amar Bahadur Raut V. Government of Nepal, Ministry of Home,[341] The petitioner demanded only limited judicial authority be vested to Chief District Officer (CDO) instead the existing full judicial authority conferred to him by different laws should be declared null and void. The petitioner has raised a question of public interest and concern that issues related to handing over judicial power of sentencing maximum jail term to offenders in serious criminal cases to an administrative officer like CDO is against the norms, spirit and provision of the Constitution. In the course of pleadings, the issues have been raised that judicial rights delegated by law to the Chief District Officer and other administrative officers to hear serious criminal cases, is against the concept of independent judiciary, and that contravenes the constitutional provisions. While looking at provisions in other Acts relating to this, Forest Act, 1993 has handed over District Forest Officer to fine upto Rs. 10,000 and punish one year jail term, similarly, National Parks and Wildlife Conservation Act, 1972 has handed over judicial power to concerned officer to fine upto Rs. 100,000 and sentence up to 15 years of jail term sounds not fair. Chief District Officer to hear serious criminal cases is against the principles of constitutionalism and the theory of separation of power in the context of differences while exercising judicial and quasi-judicial authority.

The Supreme Court's, Special Bench, comprising *Justice Kalyan Shrestha, Justice, Girish Chandra Lal, Justice Sushila Karki,* issued directive order in the name of Government of Nepal, Office of the Prime Minister and the Council of Ministers and Legislature Parliament to constitute a study committee by including specialists from law. It shall be against the spirit of the provision of Articles 24, 100 and 101 of the

[341] Writ No. 066- WS-0043(2010).

Constitution to hand over such responsibility to such administrative authorities who exercise judicial power without having knowledge of related subject-matter and judicial process, so to avoid such amnesty. The existing system should be stopped immediately. Necessity has been there to create infrastructure to perform judicial work in an effective, impartial and competent manner at the practical level. Given such responsibility need to be given to competent individuals by selecting among the persons having at least graduate degree in law and having masters degree in concerned subject with experience of related field or having other above mentioned qualifications, but, regarding individuals of not having such qualifications minimum three- months training from national Judicial Academy or recognized training institute on the concerned subject related to law and judicial process. Implement and cause to make implemented compulsorily the order of the court within one year by making necessary arrangement in this regard ordered the court by issuing a *mandamus* order in the name of defendants including Government of Nepal, Office of the Prime Minister and Council of Ministers, and Home Ministry.

In Advocate Sunil Ranjan Singh V. Office of the Prime Minister and Council of Ministers,[342] the petitioner argued, Madhesi communities have their own language, traditions and culture to reflect their identity. All the Nepalese races have the language traditions and culture of their own. The preamble of the Interim Constitution of Nepal 2007, have dreamt for a moderate state restructuring in order to address the problems based on class, tribe, region and gender. The Article 17 of this Constitution guarantees the right relating to education and culture as a fundamental right. Article 17(3) has provided to every community living in Nepal with right to preserve their language, script, culture, civilization and the heritage.

Ministry of Home on 2011 published in Nepal Gazeettes Vol. 60, No. 19, part V, that Nepali dress shall mean in the case of women their formal wears may that be a Choli, Sari along with shoes, notwithstanding their style; and for men a Labeda, trouser and coat alongwith a cap of Nepali style. The notification further stated that this notification has been issued for the knowledge of all concerned about the dress and decoration required to be worn by the civil servants, Nepali Army, Nepal Police, the

342 Writ No. 2011-WS-0020(2010).

Armed Police Force and other individuals conferred with decorations while attending in the national ceremonies and festivals. This notification which defines the Nepali dress contradicts with the preamble and the Article 3, 13, and 17(3) of the Interim constitution of Nepal, 2007 and has left a serious effect to those Nepales people who do not wear Daura, Suruwal, Cap and as well as Choli, Sari and Shoes. There is a possibility of abolishing the traditional attire and culture of various castes of people living in Nepal. The said notification published in exercise of the power granted by Rule 38 of the Decorations Rules, 1999 to infringe the fundamental rights of preserving one's own tradition and culture, contrary to the constitution. Hence, the definition made in regard to the Nepali dress as above and the said Rule 38 is subject to annulled. Nepal has been the signatory of international instruments like; The Universal Declaration of Human Rights, 1948, International Convention on Economic and Social Rights 1966, International Convention on the Elimination of all forms of Racial Discrimination 1965 and others have prohibited to discriminate, exclude, restrict or to give priority on the ground of region, tribe, colour, descent or on the ground of ethnicity and of the tribal origin. These International instruments have binding effect as the national law of Nepal in pursuance to Section 1(2) of the Treaty Act, 1991.

Therefore, the definition made in Rule 38 of the Decorations Rules has violated the Articles 1(1), 3, 13 and 17(3) and the preamble of the Interim Constitution of Nepal 2007. Hence, an order of *certiorari* be issued to invalidate the given notification and also an order of *Mandamus* be issued for an interim order not to forward any action proceedings in accordance with that notification until the writ petition is finally disposed of.

The Supreme Court, Special Bench, Justice *Prem Sharma, Justice Grish Chandra Lal, and Justice Prof. Dr. Bharat Bahadur Karki* has given verdict; The state shall have power and privilege to prescribe national dress code, award medals and decorations to any individuals and set out the decorum of state level functions and ceremonies. The executive shall have power to effect necessary changes in them, indeed. Hence, determining the dress by the executive, in view the decorum and the significance of the national festivals and the occasions targeted only to the officials and individuals conferred with decorations and are required to attend in such

festivals and occasions cannot be the subject of judicial intervention. In addition to this, it will not be reasonable for this court to issue directive or speak about whether the dress specified by the executive decision for the officials and the individuals of the above ranks and files is appropriate or not. Now therefore, there is no sufficient ground available to materialize the claim of the writ petition nor there a need to hold further discussion since the petitioner has no *locus standi* to file it and thus the writ petition is hereby cancelled.

Justice Grish Chandra Lal while delivering his dissenting opinion opined that; the notification of 2008 published by the Home Ministry, Government of Nepal in Nepal Gazette Vol. 60, No. 19, Part V as per the decision of Council of Ministers by exercising the power conferred by Rule 38 of the Decorations Rules which prescribed Nepali dress and the definition of Nepali dress given in the 'Note' of that notification is not only contrary to the constitutional provision but also against the norms and values internalized by our Constitution. The said provision of Nepali dress and the Rules thereunder is hereby declared null and void by the order of the writ of *certiorari* from the very date of its commencement. Now it is also decided so as to issue an order of writ of *Mandamus* in the name of the respondents to bring a new provision in that relation keeping in view the multi-ethnic, multi - religious, multi-lingual as well as multi-cultural fiber of our society established by the constitution and constitutional system. As I could not concur with majority decision of vacating the writ petition, I have made my own judgments of things.

In Advocate Raj Kumar Rana and others, Advocate Krishna Neupane, Bharatmani Jangam and Others V. Prime Minister and the Office of the Council of Ministers,[343] a Writ petition with writ No. 068-ws-0014 filed in regard to extension of term of the Constituent Assembly (CA) by 3 months effecting amendments to Article 64 through the Tenth Amendment to the Interim Constitution of Nepal, 2007, has, besides other things, issued an order in November, 2012 in the name of the Chairman of the Constituent Assembly, Prime Minister and the Council of Ministers to ascertain the actual time period really needed for the accomplishment of the task of constitution writing within the stipulated time for the last chance as envisaged in the restrictive Clause of Article 64 of the Interim Constitution, 2007 and, if it could not be done or

[343] Writ No.068- WO-1085, 1086, 1087, (2012).

committed as above, to conduct referendum under Article 157 or for the fresh polls of Constituent Assembly under Article 63 or to make provisions in regard to forward other necessary action proceedings as may deem appropriate therefore since the term of Constituent Assembly has to be *ipso facto* terminated thereafter. Petition filed by the respondents requesting the review of the order of court has been repudiated by court, which in accordance with Article 116 is the final and therefore has binding effect to all else including the respondents. Likewise, since the respondents are found to have extended the term of CA for 6 months effecting Eleventh Amendment to the Interim Constitution as directed by the said order of this court, so, its first and foremost duty is to complete the task of promulgating the constitution within the said deadline is 2013.

Supreme Court, Single Bench, *Chief Justice Khil Raj Regmi,* pronounced that the rule of law and good governance will be strengthened only through the independent judiciary and the constitutional supremacy. The act of proceeding the Constitution Amendment Bill by reaching a decision of extending the CA term for next 3 months as was done previously in course of amending the constitution assuming as if that this court has made no order in this regard hereinbefore, is the gross violation of the order of this court together with the Article 64 and Article 116 of this Constitution. Since the decision made by the respondents Council of Ministers in 2013 in regard to the extension of the term of CA is erroneous on the face of it and contrary also to the final order of this court and constitutional provisions mentioned above, now therefore, in view the balance of convenience, this interim order has been issued in pursuance to Rule 41 of the Supreme Court Regulations, 1992 in the name of respondents Prime Minister and the Council of Ministers as well as the Chairman of the CA directing them not to execute their said decision and stay the proceedings of Thirteenth Amendment Bill of the Interim Constitution, 2007.

In Sanjay Kumar Sah V. Rt. Hon'able Chairman, Mr. Subas Chandra Nembang[344]*,* Constituent Assembly, Legislature Parliament and Secretariat of Constituent Assembly and Legislature Parliament, the petitioner, a member of the Constituent Assembly, requested Rt. Hon'ble Speaker for giving permission to convey and speak

[344] Writ No. 068-WO-0652 (2012).

about the death of 50 people as well as the sickness of the poor, old people and children due to winter related effects like cold, thick fug with the start of winter in the session of Constituent Assembly and legislature-Parliament dated 22/12/2011. An arrangement was made in the session to speak by any Constituent Assembly Member of any party on the aforesaid day. After completion of presentation of the views by different honorable Members in the session, too demanded time to speak, but without giving permission to speak the speaker informed the adjournment of session. Two delegates microphones have been damaged due to my mental imbalance, as I could not endure anger which arose because of not providing me opportunity to speak in the Tenth Session No. 82 of the Legislature- Parliament dated 22/12/2011. Thereafter, I went out the Constituent Assembly Hall with the order of Rt. Hon'able Speaker. I have exhibited indiscipline, indecency and disruptive behavior in the session which is found mentioned in the report of Constituent Assembly Notice 4 dated 22/12/2011, because of such behavior the notice relating to the order of Rt. Hon'able Speaker expelling me for 10 days effective from the today's date pursuant to Rule 46 of the Constituent Assembly Regulation, 2008 and rebating the amount from my remuneration calculating the amount of damages occurred by the technician. This act is arbitrary decision of recovering monetary recovery from the remuneration without providing opportunity to clarify in the absence of the provision in the Regulation is not lawful. Previously, no Constituent Assembly Member has faced any legal action of similar nature of event in the Constituent Assembly, but to carry out legal action against me is contrary to the right to equality as provided by the Constitution.

The Supreme Court, Division Bench, comprising *Act. Chief Justice Damodar Sharma and Justice Prakash Osti,* orderd to observe rule of law perform every action according to law. No fine and punishment should be imposed going beyond the authority of law. An Interim Order was issued in that petition ordering not to carry forward the proceeding to recover damages rebating from the remuneration of the petitioner. Financial liability of Rs. 90,000/- has been caused upon the petitioner by the decision of speaker to deduct the amount from the remuneration of the petitioner so the Court issued a writ of *mandamus* in the name of Legislature-Parliament

Secretariat directing to give back the aforesaid amount of Rs. 90,000/- to the petitioner Mr. Sanjay Kumar Sah.

In Advocate Rishi Ram Ghimire V. Government of Nepal, Office of the Prime Minister and Council of Ministers and others [345], a Writ petition was registered as a case of public interest litigation under Article 88(2) of the then Constitution of the Kingdom of Nepal 1990. The writ petitioners stated that terrible problem may come in Nepal due to HIV/AIDs, therefore the petitioners have raised the issue stating that it is necessary to make a law covering various aspects relating to HIV/AIDS for controlling HIV/AIDS. Petitioners' main goal is to fight for equality, freedom, right to treatment and get rid of discrimination and blame. They wanted a law be enacted against discrimination. The demands are based on right to freedom, right to equality, right to health and right to constitutional remedy and therefore the petitioners sought issuance of directive order in this regard. Article 13 of the Interim Constitution of Nepal, 2007, has not granted exemption to any person or body to treat the HIV/AIDS infected persons in a discriminatory manner. Human rights related jurisprudence; The Universal Declaration of Human Rights, 1948, International Convention on Economic and Social Rights 1966, International Convention on the Elimination of all forms of Racial Discrimination 1965 and other international instruments have prohibited discrimination. Therefore, the principle of right to equality and the related philosophy are emerged on the principle that all persons have equal right to live with self- respect.

Supreme Court, Division Bench comprising, *Justice Kalyan Shrestha and Justice Sushila Karki*, has observed, mere incorporation of legal provisions in statute without making their implementation guaranty would bear no meaning for the enjoyment of various personal rights as right to privacy, right to equal status and the rights related to social security and similar other privileges. The directive order is issued in the name of respondents including Ministry of Law, Justice and Parliamentary Affairs and Ministry of Health and Population to frame sufficient legal provisions with priority and thereby submit to the Legislature Parliament without any delay comprising miscellaneous aspects of HIV/AIDS, putting the right of the affected class at the center and also consulting with the specialists and affected class and also

345 Writ No: 0287 of year 2007.

clarifying their liability and considering the problems of the victims so as it would be necessary and proper in order to wipe out the lacking in their facilities considering miscellaneous aspects of social, economic and health related issues for the purpose of guaranteeing access to public service or facility and for prohibition to those who show discriminatory and improper behaviors, and for the protection of legal rights of such persons.

In Mr. Sewa Ram V. Regional Administrative Office, Eastern Region and Others[346], the writ petition is written in English and addressed to the Chief Justice and sent by post from India by the petitioner Mr. Sewa Ram. The Private Secretariat of Chief Justice got it translated into Nepali and the draft translation was sent to the Cases and Writs Division for filing. The Petitioner Mr. Sewa Ram wrote a letter in English from abroad in the form of writ and has also revealed matters such as who has detained the person from when and on what pretext, whether the detainee is kept without food or is subject to mental or physical torture or not and the like, as required by Rule 31(1) of the Supreme Court Rule, 1992. Rule 25 of the same Rules have provided for various due processes for general writ petitions and it has also laid down that the applications written without due process shall not be filed. However, the Court cannot always restrain itself in the procedural aspects of whether the due requirements are met or not while drafting the documents in course of litigation each time and under every circumstance. When a written notice is obtained informing about the grave violation of an individual's right to freedom by detaining someone in an unlawful manner, the Court is able to take action in such case resorting to judicial activism.

As the writ of *habeas corpus* is generally issued to liberate persons who are unlawfully detained, it is directly related to the protection of individual liberty and human rights. The petitioner Sewa Ram has submitted an application from India on behalf of detainees without being present in this Court Still, the Court is capable enough to take necessary action including hearing in the issues of blatant violation against the individual freedom of a person in case he or she is unlawfully held in captivity.

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346 Writ No: 069-WH-0044 (2013).

The persons including the writ petitioner were engaged in making of bricks in the brick kiln located at Belhakatti village of Siraha district which manufactures bricks under the brand 'Om'. It was mutually agreed with the directors of kiln that Rs. 1400 shall be paid for each 1000 raw bricks that they produce. The writ petitioner in his petition has prayed that: The respondent directors of brick klin have denied payment of the works done by the laborers, blocked their return to homes and held them in hostage like situation forcing them to work without pay and when the local administrative agencies were moved in this regard, they paid no attention, Hence, he has sought an order to conduct an site inspection of the brick klin, free the bonded laborers held there as well as to pursue necessary criminal inquiry and prosecution against the respondent brick kiln directors and the contractor as per the law.

The facts of petitioner are the contractor receives payment on behalf of works but he/she does not pass on the payment to the laborers, the directors of brick kiln to provide even the minimum facilities of food and shelter to the laborers, the minors are also caused to work, women laborers are subject to sexual abuse, the laborers are deprived even to return to their home, they being forcibly put to work in hostage like condition, being treated like bonded laborers, no provisions for health and medical facilities for them and the laborers are often denied payment for their works done.

The Supreme Court, Division bench *Chief Justice Khil Raj Regmi and Justice Sushila Karki* gaven the verdict; "When a written notice is obtained informing about the grave violation of an individual's right to freedom by detaining someone in an unlawful manner, the Court is able to take action in such case resorting to judicial activism."

The Supreme Court issued directive order to the Ministry of Labour and Employment, Government of Nepal. The abusive activities meted out against the laborers are not only violation of human rights but are also contrary to the international treaties and conventions to which Nepal is a party, the Interim Constitution of Nepal, 2007 and the prevailing labor statutes. As analyzed above, the powers of Factory Inspector and Chief Factory Inspector are laid down in Section 67 of the Labour Act, 1991 as well well Rule 54 of the Labor Rules, 1993. In case the Factory Inspectors are appointed and if they regularly conduct monitoring and

inspection as regards whether the laborers are deployed in work at the plants including brick kilns as per the labor laws or not and in case efficient action is taken as required in case breach of law is found, then the unlawful activities as found in the respondent brick kiln that manufactures bricks with the brand name 'Om Bricks', could be efficiently curbed. This is an essential matter as well as liability of the State. Hence, in case the Factory Inspectors are not appointed as per Section 66 of Labor Act, 1991, till now, a directive order is issued hereby in the name of Ministry of Labor and Employment, Government of Nepal that they have to be appointed with immediate effect and in case they have already been appointed, to conduct regular monitoring and inspection in an efficient manner as to whether the provisions of Section 67 of Labor Act, 1991 and Rule 54 of the Labor Rules, 1993 as well as the other relevant labor legislations have been complied with or not, and in case of breach of labor legislations, to initiate necessary action as required.

The Chairman of the Milantole Sudhar Samiti V. Legislature Parliament Secretariat and Others,[347] The petitioners are the clints of Kathmandu Valley Division Office of Nepal Drinking Water Corporation. The Interim Constitution of Nepal, 2007 have made provision in its Article 33(h) (m) (n), 34 (1) and (10) on the state policy and responsibility. According to which the state policy of education and health right to all and respond economic prosperity. Article 19(1) has provided every citizen right to live in a healthy environment, whereas 16(2) guarantee free of cost medical treatment. Like manner, Article 11 of the International Protocol on Economic, Social and Cultural Rights, 1966 enshrines that everyone shall have enough food, clothes and residence for life. The protocol has recognized the person's right of water for drink as a necessary precondition. Article 12 of the same gives special emphasis on the guarantee access to the use of enough quality water and an indiscriminate provision on physical infrastructure, financial access. In the past the drinking water system was operated through Nepal Drinking Water Corporation formed under Nepal Drinking Water Corporation Act, 1989. With the third amendment to that Act in 2007 a new provision is added in regard to handover of the Drinking Water Management Board, 2007. Drinking Water Management Board granted the sple

347 Writ No: 068-WS-0009 (2012).

authority to the Kathmandu Upatyaka Khanepani Limited, a private company established under the same board. The profit earning company has created a situation that the people with low income like us will be prevented also from the basic service like water because of the increase in the cost in the future. While operating under Nepal Drinking Water Corporation Upatyaka division, it was charged Rs 1200/ for supplying drinking water in a half inch pipe which now has reached 9000/-. The commission formed for the determination of tariff with the privatization of Nepal Drinking Water Corporation also should be dissolved.

The petitioners have made the claim that third amendment 2007 as well as the Nepal Drinking Water Management Board Act, 2007 are contradicting to Article 16 of the Constitution, therefore, be declared both the enactments void *ab initio*. Likewise, the action proceedings along with the cabinet decision of the Nepal government on 2008 which hands over the assets and liability of Nepal Drinking Water Corporation, Kathmandu Valley Division to Kathmandu Upatyaka Khanepani Limited also should be invalidated. Although petitioners have raised the question of validity of all the legal provisions contained in the third amendment of Nepal Drinking Water Corporation Act, 1989 and the Nepal Drinking Water Management Board Act, 2007 and have made claim for their invalidation under Article 107(1), however, in substance, they are found to have raised question of validity of both the amendments stating that drinking water service was not to be privatized in that manner by virtue of a decision of the government of Nepal, the Council of Ministers in regard to handover of the management of drinking water operated by the Nepal Drinking Water Corporation to the Drinking Water Management Board.

Supreme Court, Special Bench, Justice Kalyan Shrestha, Justice Girish Chandra Lal and Justice Sushila Karki, observed; After a public interest litigation is registered, it is the duty of the court to make sure that the social justice have been guaranteed by legally and constitutionally striking the fundamental issue involved in the case and have preserved interest and welfare of the stakeholders or of the general public, or any particular class or group of people. The scope of *locus standi* available to the petitioner to file the petition under Article 107(2) of the Constitution is founded on the notion that the intellectual faculty of the society deserves higher level of

understanding than that of the ordinary mass and can represent their interest. Hence, the petition of such a kind is accepted by court and delivered justice accordingly.

Trend of exercising extra-ordinary jurisdiction may create also a situation of reaping personal benefit and satisfying one's own intellectual curiosity which in other way, safeguards the narrow interest of a particular class or group of individuals not the interest of the large public. Further, this may invite a situation of sustaining negative impact on the rights and interest of the targeted community. Therefore, while making judicious settlement of any issue of public interest under the power of judicial review, Article 107(1) of the Constitution has entrusted to this court the responsibility of enhancing serial justice and constitutionalism and under Article 107(2) for the effective settlement of the issues involving constitutional and the legal question.

This directive order is hereby issued in the name of the Registrar of this court directing him to take steps to bring necessary amendments to the Supreme Court Rule, 1992 and incorporate other relevant provisions to be adopted while registering and hearing petitions under Article 107(1) and (2) of the Constitution.

Chapter - VI

Judicial Activism in the Protection and Promotion of Basic Human Rights in Nepal

6.1 Introduction

Nepal has a long history of its legal system, during its legal development there emerged some rulers who got most popularity for their devotion and contribution to the impartial delivery of justice[1], but the matter of independence of judiciary is a recent origin. Basically, the political change of 1951 resulted the significant change in the field of judiciary. Before that, the Rana Prime Minister exercised Supreme power even over the judiciary in the matters of appointment and dismissal of judges in the courts. He used to act as the highest appellate authority in the performance of his judicial role. In the exercise of his powers, he was able to review, revise and nullify any decision of the court. The institution of the judiciary was, thus subordinate to the executive authority of the state.[2] In the year 1948 *Prime Minister Padam Shumsher JBR* promulgated 'Government of Nepal Act'. The part V of the act dealt about the administration of justice[3]. Article 48 of the Act had promised; Justice shall be cheap and speedy[4]. Articles 53, 54, 55 and 56 were concerned with compensation, jurisdiction, appointment and dismissal of high court and the justices of the same court.

But that Act did not come into implementation rather Prime Minister *Padma Shumsher* was compelled to be exiled. Thus, the prospect of independence of the judiciary was delayed. After three years of this incident, the change in political scenario brought about changes in the field of judiciary also. *King Tribhuvan* promised to the people to promulgate, a constitution be drafted by the elected

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1 King Jayasthiti Malla of Patan and the King Ram shah of Gurkha were those rulers.

2 Ganesh Raj Sharma (Nov. Dec. 1997, Jan -1998) *'Independence of Judiciary: An Experiment in Nepal'*, Essay on Constitutional Law, Vol. 26.

3 *Government of Nepal Act, 1948.*

4 *Ibid.,* p. 34.

representatives of the people within two years. Until then, an Interim Constitution was promulgated by the name of Interim Government of Nepal Act, 1951.[5] This development broadened the prospect of having an independent Nepalese judiciary, which is under discussion below.

6.1.1 Preliminary Period

From 1951 the Interim Government of Nepal Act came into force. Chapter III, Article 32 of the Act incorporated the Institutional provision of *Pradhan Nayalaya* with its composition power and functions to be determined by law[6]. On the basis of this provision, Supreme Court (*Pradhan Nayalaya*) Act, 1952 was established. Section 30 of the Act provided writ jurisdiction to the Supreme Court. Accordingly the Supreme Court got the authority to issue writs of *Habeas Corpus, Mandamus, Prohibition, Quo-Warranto* and *Certiorari* for the enforcement of the rights conferred by the Constitution people.[7] *Hari Prasad Pradhan* was appointed as the first chief justice of the interim period. *Mr. Pradhan* not only led the Supreme Court effectively, but also delivered bold decisions in different cases which can be viewed as milestones in the judicial history of Nepal. Not only that Justice *Pradhan's* pro-people attitude had led the confrontation between Supreme Court and the Government. *CJ Pradhan* was of the opinion that, 'Government is an eagle which surrounds the sky violently, citizens are the chickens and the eagle is always looking chance to capture them. Court is the mother of those chickens which protects the chickens by opening her feathers if eagle tries to attack them'[8].

In *Bed Krishna Shrestha V. Department of Industries, Commerce Food and Civil Supply*[9], the court declared;

> 'It is the duty of judiciary to find out whether state is operating according to law or not. In a democratic country, judiciary is considered as the guardian of laws of the state.' Section 30 of the Supreme Court Act was formulated on the basis of this principle.

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5 *Supra* Note. 2. p. 9.

6 P. Neupane (1969). *The Constitution and Constitutions of Nepal, Kathmandu*: Ratna Pustak Bhandar, p. 154.

7 Nepal Gazette, Part- 2, No. 18, 8th Poush 1953.

8 Kasi Raj Dahal (1992) *'Hari Prasad Court to Uppadhya Court : An appraisal'*, Law Bulletin, Vol. 52, 1992. p. 53.

9 NKP., Vol. 2, 1959. p. 234

Judicial activism started in this arena, the government reacted very strongly against the activist trend followed by the decision[10]. Similarly, in another case *B.P. Koirala V. Home Secretary*[11] the court gave the very first decision on judicial review. In that decision, the court observed;

> "Though the Constitution and the Royal proclamation have established an independent judiciary, it is the duty of judiciary to declare any act unconstitutional if it is made contrary to the provisions of that constitution. According to this legal principle, sub-section (b) of section 1 of the Magistrate's *Sawal* being contrary to section 30 of the Supreme Court Act under the legal principle of Interim Government Act and so is declared unconstitutional".

The executive body was shocked by these decisions and was in favour of curtailing the jurisdiction of Supreme Court. The Royal proclamation of 1954 made third amendment to the Interim Government Act. which among others amended Articles 2 and 29 repealed Articles 30, 31, 32 and 33 and the provision of the Supreme Court was placed under Article 30 of that Constitution[12]. All these changes demolished the supreme judicial position of the Supreme Court. The said amendment to the Interim Government Act is considered as the retroactive amendments to make judiciary ineffective.[13] Similarly an amendment to the Supreme Court Act made all the powers of the Supreme Court subject to royal prerogatives which had not been statutorily defined, and the eventual deletion of section 30 of that Act removed the Supreme Court's power to issue writs and left the people without any possibility of being granted any effective remedy from the judiciary.

Despite of it, the Supreme Court gave many bold decisions in the cases *Mrigendra Shumsher V. IGP*[14], *Chakra Man Shakya V. Nepal Government*[15], *Randhir Subba V. Kathmandu Magistrate*[16] *and Janak Man Shreshta V. Kathmandu Magistrate*[17]. In

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10 *Supra* Note. 2. p. 11
11 NLR, Vol. I, 1959. p. 15
12 Tope Bahadur Singh, (1989). *Constitution and Constitutionalism of Nepal,* 3rd Edition, Kathmandu : Ratna Pustak Bhandar. p. 681.
13 *Supra* Note. 9. p. 54.
14 F. No. 25/2011 (Date of decision 1955).
15 F. No. 46/2010 (Date of decision 1954).
16 F. No. 39/2011 (Date of decision 1955).
17 F. No. 127/2011 (Date of decision 1955).

1956, a new Supreme Court Act was enacted. The nomenclature was changed from the existing Pradhan Nayalaya to the Supreme Court. In the words of *Bharat Raj Upretti*;

> It was a very willful legislative tricks used for removing the *Chief Justice Mr. Hari Prasad Pradhan*. All the judges were retained in the new Supreme Court except the chief justice. One of the puisne judge *Mr. Aniruddha P. Singh,* who was not even law graduate, was appointed chief justice on probation. This was the first time in judicial history that Nepal had chief justice on probation. The government was happy with tamed judiciary. This situation continued for a quite long time during very short judicial history of Nepal[18].

However during that period, the court had played activist role by declaring some provisions of law void and nullifying the reasonable and arbitrary actions of the government. Court such split is hardly seen in the subsequent 47 years.

6.1.2 Period of Parliamentary Experiment

The Constitution of the Kingdom of Nepal was promulgated by *King Mahendra* on February 12, 1959, which was based on parliamentary model and was framed with the help of British constitutional expert, *Sir Ivor Jennings*. Article 1 of the Constitution declared, 'this Constitution is the fundamental law for Nepal and all laws inconsistent with it, shall to the extent of the inconsistency, and subject to the provisions of the Constitution, be void.[19] Part VI of the Constitution established the Supreme Court of Nepal, and Article 57 and 58 of the same part dealt with the setup, tenure and jurisdiction of the court. Alongwith that, Article 54 provided the Supreme Court the power to declare any law to be invalid to the extent of its inconsistency[20]. Similarly, part III of the Constitution guaranteed various fundamental rights, including the rights to personal liberty, equality, religion, property and political freedoms. Article 9 guaranteed the right to file a petition in the Supreme Court for appropriate proceedings for the enforcement of the right conferred by this part. For

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18 Bharat Raj Uprety (Sept. Oct 1994). Functioning of Judiciary in Nepal and Impact of its Decisions, Nyayadoot, Vol. 6. p. 14.

19 *Supra* Note. 7. p. 88.

20 *Supra* Note. 7. p. 125.

the fulfillment of that purpose, the Supreme Court was provided the power to issue directions or orders or writs in the nature of *Habeas Corpus, Mandamus, Prohibition, Quo-Warranto* and *Certiorari,* whichever may be appropriate for the enforcement of rights[21]. Despite these provisions, the Supreme Court had to face difficulties in the process for the enforcement of the fundamental rights. Because Article 8 of the Constitution had imposed the restriction in the name; nothing in this part shall affect the validity of-

(a) Any law made before the appointed day which, with or without modification or adoption, is certified by His Majesty to be necessary for any purpose specified in clause (2); or

(b) Any law made after the appointed day which is expressed to have been made for the public good.[22]

In this manner, the Supreme Court was helpless when faced with a statement in the preamble of any act that has been made 'for the public good' because it was there by prohibited from adjudicating upon the validity of the Act or any of its provisions. The realization of any right largely depended, therefore, upon the political environment and the strength of the judicial institutions[23].

Throughout that period, the Supreme Court was headed by Chief Justice *Mr. Anriruddha Prasad Singh*. Though there were no remarkable decisions made by the court as were at the period of *Hari Prasad Pradhan,* but at these beginning of that period in Ministry *of Forest V. Gajendra Bahadur Pradhanang*[24], the court observed;

> Fundamentally law searches for the certainty and security of the right. The popularity, glory and dignity of the law should be apparent and it must be demonstrated to the executive that how far its judicial limitation is, and how it must be restrained while violating that limitation. Only then people's rights can be protected from the arbitrariness of the executive. In democratic countries the

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21 *Ibid*. p. 93.

22 Sub Article (2) of Article 8 had laid the conditions on which a law shall be deemed to be made for the public good, if it is expressed in the preamble.

23 Surya Dhungel and others (1998). Commentary on the Nepalese Constitution, Kathmandu: DeLF, p. 27.

24 NLR No. 3. 1959. p. 91.

court has been issuing the writs in order to prevent arbitrariness of executive, and such matter is being helpful for the development of democracy.

But in the subsequent period, the court became unable to maintain its consistency.

6.1.3 Period of Partylessness

King Mahendra promulgated the 'Constitution of Nepal' through a proclamation addressed to the people of Nepal, on 16th December 1962 saying;

…. whereas, the parliamentary system could not prove suitable on account of the lack of education and political consciousness to the desirable extent and on account of its being out of step with the history and traditions of the country and the wishes of the people[25].

The preamble of the Constitution expressed the conviction that,

'it is desirable in the best interest and for all all-round progress of the kingdom of Nepal and of the country in consonance with the popular will; and whereas we are firmly convinced that such arrangement is possible only through the partyless democratic Panchayat system rooted in the life of the people in general, and in keeping with the national genius and tradition and as originating from the very base with the active co-operation of the whole people, and embodying the principles of decentralization[26].

Article 1 of that Constitution stated that this constitution is the fundamental law of Nepal and all laws inconsistent with it shall, to the extent of such inconsistency, and subject to the provisions of this Constitution, be void[27]. Likewise, part III of the Constitution provided fundamental duties and rights to the citizen. Basically Article 16 guaranteed those rights mentioning, right to proceed in accordance with Article 71, for the enforcement of the right conferred by this part is guaranteed[28]. For that purpose Article 71 mentioned; the Supreme Court shall have power to issue directions, order or writs including writs in the nature of *Habeas Corpus, Mandamus, Prohibition, Quo- Warranto* and *Certiorari* for the enforcement of rights conferred by part III, subject to the provisions of this Constitution or for the enforcement, in

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25 *Supra Note.* 7. p. xi.
26 Inserted by the first amendment of the constitution.
27 The Constitution of Nepal, Kathmandu: 1962,
28 *Ibid*. p. 8

cases where no other remedy is provided, of rights conferred by any other law for the time being in force[29].

Apart from this, the Constitution stipulated that the Supreme Court shall be a court of record with power to impose punishment as prescribed by law for contempt of itself or of courts sub-ordinate to it. Article 71 conferred extra-ordinary jurisdiction to the court, but it was required to revise any of its decision in case the King issued a command for revision on the recommendation of Judicial Committee. Similarly, the power of judicial review of legislation was deemed by the panchayat system to be undemocratic because if gave the limited number of judges the power to veto legislation enacted by the representatives of the Country and because it thereby placed an unfair burden on the judiciary[30]. However, the Supreme Court within the framework of that Constitution gave bold decisions in some cases.

The Supreme Court in the case, *Tung Shumsher JBR V. Indian Airline Corporation*[31] held that, the Supreme Court has power to nullify the legislative enactment which is repugnant to the Constitution. In *Mul Chand Azad V. Election Officer*[32], the Supreme Court held the provision of sub-rule (2) of rule (21) of the District Panchayat Election Rules has been deemed contradictory to the section 3 of District Panchayat Act 1962, hence void. The Court also held inspite of rules regulations and orders, the legislative enactments deemed repugnant to Article 1 of the Constitution shall be *ultra vires*. Likewise, in *Hrishikesh Shah V. Joint Zonal Commissioner*[33], the court ruled that the officer who uses the Public Security Act, exercises extra-ordinary power depriving the valuable right like personal liberty, must use such right in a careful and clear manner.

In the same way the *Yagya Murti Banjade V. Bagmati Special Court*[34] the Supreme Court held that, to deprive one's life or personal liberty, both the substantive and procedural acts must be followed literally, and it must be observed very carefully and consciously. *Sarvagya Ratna Tuladhar V. Chairman National Panchayat and*

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29 *The Constitution of Nepal,* 1990 p. 44.
30 *Supra* Note. 25. p. 31-32.
31 NLR Vol. 10. 1967. p. 220.
32 NLR Vol. 10, 1968, p. 32.
33 NLR Vol. 11, 1969. p. 352.
34 NLR No. 7, 1970. pp. 159-69.

others[35] was another leading case in which *Justice Bishwo Nath Upadhaya* expressed the majority opinion, stating; the Supreme Court has power to invalidate the legislative enactments repugnant to the constitution. He also emphasized, the function of the legislature is to legislate, not to interpret. Similarly in the case*, Hem Bahadur Malla Thakuri V. Prevention of Abuse of Authority Commission*[36], the court stated, it cannot be considered that Article 67 (e) has prohibited the Supreme Court to question and conduct hearings according to Article 71 on the proceeding conducted under Article 16 of the Constitution as to the functions performed and proceeding initiated by the Prevention of Abuse of Authority Commission.

6.1.4 Restoration of Parliamentary System

The People's Movement of 1990 succeeded to over throw 30 years old partyless autocratic Panchayat regime, and restore parliamentary system which was dissolved in the past during that regime. A new constitution was drafted by a Constitution Recommendation Commission headed by Supreme Court *justice Bishwanath Upadhaya*.

Though the political leaders often try to interpret the constitution, as the document of trust. But the critics preferred to call it a document of mistrust. In the words of a constitutional lawyer, Richard Stith;

> An observer at the meeting in which the final version of the constitutional text was drafted, has stated that 'ours is a constitution of suspicion'. Mistrust among the three most powerful actors in the constituent process the king of Nepal, congress party and the united left front (ULF) lead them to turn to the Supreme Court as their 'Savior'. Because they could not trust each other, they decided to trust the court[37].

The preamble of the Constitution has clearly mentioned its objectives (or basic structures) in the words:

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35 NLR No. 9, 1977. p. 180.

36 NLR No. 5. 1987. p. 452.

37 Richard Stitch (1995). *'The extra ordinary Counter - Majoritarian : A power of the new Supreme Court of Nepal'*, Asia Law Review, Spring. pp. 38-45.

'… it is expedient to promulgate an enforce this Constitution, made with the widest possible participation of the Nepalese people, to guarantee basic human rights to every citizen of Nepal; and also to consolidate the adult franchise, the parliamentary system of government, constitutional monarchy and the system of multi-party democracy by promoting amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality; and also to establish an independent and competent system of justice with a view to transforming the concept of the rule of law into a living reality[38].

The Constitution with other objectives has the basic objectives of guaranteeing basic human rights to every citizen, and to transform the concept of the rule of law into a living reality. It is only possible when judiciary is made independent and competent. For that purpose the constitution has adopted efficient and effective measures. Not only that, constitution has greater expectations with the judiciary for the fulfillment of its objectives. The Constitution of 1990 had paved ample grounds for judicial activism (or activist judiciary) through it short lived for only 17 years giving space to the present Interim Constitution of Nepal in 2007.

Nepali people always struggle for the democracy, peace and progress from time to time since 1951 to till date through the historical movement and people's movements. People's movement of 2006 was succeeded to over throw the rule of monarchy and was able to endorse sovereignty and state authority to Nepalese people. The Interim Constitution of 2007 states that sovereignty and the state authority of Nepal shall be vested in the people of Nepal[39]. The Interim Constitution, 2007 was drafted by a Constitution Drafting Committee, through political consensus for an interim period until a new constitution has not been drafted by the constituent assembly.

The preamble of the Interim Constitution, 2007 has clearly mentioned its objectives (or basic structures) in the words:

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38 Para 3 of the preamble of the *Constitution of the Kingdom of* Nepal 1990.

39 Part I Article 2 of *Interim Constitution* 2007.

'… it is expedient to promulgate an enforce this constitution, pledging to accomplish the progressive restructuring of the State in order to solve the problems existing in the country relating to class, ethnicity, region and gender; and guarantee the basic rights of the people of Nepal to make a constitution for them on their own and to take part in a free and fair election to the Constituent Assembly in an environment without fear; Putting democracy, peace, prosperity, progressive socio-economic transformation and sovereignty, integrity independence and prestige of the country in the center; and also expressing the full commitment to democratic values and norms including the competitive multi-party democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, complete freedom of the press, independent judiciary and concepts of the rule of law.[40]

6.2 Constitutional and Legal Provisions

The Interim Constitution of Nepal, 2007 has provided enormous powers to the Supreme Court. On the basis of which, there are greater possibilities of playing activist role by the Supreme Court.

The preamble emphasizes on establishing an independent and competent system of justice with a view to transforming the concept of the rule of law into a living reality[41]. Likewise, Article 1 of the Constitution says; this Constitution is the fundamental law of Nepal and all laws consistent with it shall, to the extent of such inconsistency be void.[42] Part III of the Constitution provides fundamental rights and these rights are guaranteed by the Article 32 of the same part. The Article states; the right to proceed in the manner set forth in Article 107 for the enforcement of the rights conferred by this part is guaranteed.[43] For the enforcement of these rights Article 107 of the Constitution has provided extra ordinary jurisdiction to the Supreme Court. Article 107 confers upon the Supreme Court extra ordinary jurisdiction commensurate with its status in the constitutional system, and to allow it to enforce fundamental rights and respond to the directive principles and policies of

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40 *Preamble of the Interim Constitution of Nepal, 2007.*
41 *Ibid.*
42 *Article 1 of the Interim constitution of Nepal, 2007.*
43 *Article 32 of the Interim constitution of Nepal, 2007.*

the state. With the rights and respond to the directive principles and policies of the state. Article 107 sets out two broad powers of the Supreme Court, the first of which is the power to judge the constitutionality of a given law as a function of the supremacy provision in Article 1 of the Constitution.

The second power (the power of issuing writs based on those that originated in English law) is subsidiary to the first and exists to allow the court to exercise a general supervisory function and to enforce observance of the constitution and compatible laws by officials and authorities, whether they are performing judicial or non-judicial functions. In this way Article 107 of the constitution incorporates both the techniques of judicial activism i.e., judicial review and public interest litigation.

In the same manner, Article 100 facilitates the court and other judicial institutions to exercise power relating to justice in accordance with the provisions of the constitution, the laws and the recognized principle of justice.[44] For the successful implementation of the Constitution, the Constitution has itself made the provision that any interpretation given to a law or any legal principle led down by the Supreme Court in the course of hearing of suit shall be binding on Nepal government and all offices and courts.[45]

The Constitution not only provided jurisdiction to the Supreme Court. But also made provisions in order to maintain independence of judiciary. For that purpose, Article 102(3) states; the Supreme Court shall be a court of record. It may initiate proceedings and impose punishment in accordance with the law for contempt of itself and of its subordinate courts or judicial institutions.[46] Not only has that constitution adopted different provisions which assist to maintain independence of the judiciary. For instance, different articles of the Interim Constitution are concerned with appointments, qualifications and conditions of service of the judges of different tiers of judiciary. Similarly, the establishment and management of appellate and district courts also are covered within different Articles of part 10 of the Interim Constitution. Pursuant to the constitutional provisions of Judiciary, Supreme Court Act, 1991, Justice Administrative Act, 1991 and so many other Acts

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44 Article 100 *of* the *Interim constitution of Nepal*, 2007.

45 Article 116 of the *Interim Constitution of Nepal*, 2007.

46 Article 102(3) of *the Interim Constitution of Nepal, 2007.*

and Regulations are enacted and formulated to activate such constitutional provisions.

Along with these provisions, Article 113 of the Interim Constitution deals about the Judicial Council. The Council is especially constituted to make recommendation and give advice in accordance with the Constitutions provisions concerning the appointment of, transfer of, disciplinary action against, dismissal of judges and other matter relating to judicial administration[47]. In order to maintain independence of the judiciary, further provisions are also made. Particularly, Article 60(1) of the Interim Constitution in order to judicial independence, it has stipulated that no discussion shall be held in the house about anything done by a judge in the course of performance of his duty regarding a case which is under consideration in any Court of Nepal[48]. Another important provision in the Interim Constitution is the provision of Constitutional Council[49], which may be an effective mechanism to provide a check against the power of the executive while making recommendation for the appointment of constitutional bodies. The provisions of the Judicial Council and the Constitutional Council if implemented properly might be helpful to solve the problem relating to the appointment of Chief Justice and the justices of the Supreme Court. Thus, the present Interim Constitution of Nepal has paved the ground for an effective judiciary.

Apart from the constitutional provisions, there are certain laws which lay ground for effective judicial system. Among such laws, the Supreme Court Act, 1991 solely concerns about the matters which are necessary for the successful functioning of the Supreme Court. Section 11 of the Act confers right to the Supreme Court to make necessary regulation in order to exercise its jurisdiction and regulate procedures.[50] Section 8 of the Act requires the Chief Justice to take oath before the president and other Justices shall take oath of the office before the Chief Justice as specified in the schedule. The oath will be taken in the format;

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47 Article, 113 of the *Interim Constitution of Nepal, 2007.*
48 Article 60 (1) of the *Interim Constitution of Nepal, 2007.*
49 Article 149 of the *Interim Constitution of Nepal, 2007.*
50 Article 11 of the *Supreme Court Act, 1991.*

I.....swear affirm in the name of god/promise with truth and loyalty that I shall discharge the responsibility of the post of the Chief Justice/Justice benevolently with full loyalty to the Interim Constitution of Nepal, 2007; faithfulness to the nation, without any fear, bias, affection or malice.[51]

Section 31 of the Judicial Administration Act, 1991 has given power to the Supreme Court to formulate regulations in order to fulfill the objectives of the Act.[52] Accordingly the Supreme Court has formulated Supreme Court, Appellate Court and District Court regulations. All these legal provisions not only guarantee the independency of the judiciary, but also empower the Supreme Court to perform its function autonomously, independently and actively. Alongwith these legal provisions, there is also a provision in the National Code (*Muluki Ain)* under its Section 10 which concerns with the cases of public interest or concern. But it is narrow in the matter of *locus standi,* because common people have to take permission with the concerned District Court before filing a case in an issue.[53] Though that provision was prevalent at the time of the Constitution of Nepal, 1962, but the Supreme Court never felt it necessary to make its liberal interpretation. At present, the Constitution itself has incorporated liberal provisions regarding PIL. So that provision of the said Section 10 has now turned redundant.

6.3 Human Rights and Court Practices for the protection of Human Rights

For the protection and promotion of basic human rights since restoration of democracy in 1990, the judiciary has been playing activist role. The Constitution of Kingdom of Nepal, 1990 provided wide jurisdiction, to the judiciary as adequate and necessary to the modern independent judiciary. Interim Constitution of Nepal 2007 has also guaranteed the provision of independence of judiciary.

Promoting the rule of law by ending the situation of impunity and towards protecting and respecting human rights, the Judiciary took some positive steps. The Supreme Court issued remarkable orders regarding issues such as right to equality, property

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51 Schedule of the Supreme Court Act, 1991.
52 Article 31 of the Judicial Administration Act, 1991
53 No. 10 Court Procedure of *National Code (Muluki Ain), 1963*.

right, reproductive rights, Citizenship, ending of impunity, inclusion in state mechanisms, eradicating untouchability, rights of third gender, rights of the senior citizens, right to education, right to health, the right to employment, impartial investigation of the incidents which occurred during the armed conflict, improvement in electoral roll, among others.

Fairness, independence and capability are the backbone of judicial process. Access to justice together with delivery of an impartial justice, and prompt hearing by the courts prospers the belief of the citizenry in effective judicial process. For the independent functioning of any authority, no outside pressure or interference should be felt.

The concept of judicial independence is directly linked to the rule of law and democracy. In order to maintain a practical democratic system and rule of law, judicial bodies must be kept independent from the Executive, Legislature and the other bodies and authorities of the state.

Courts are provided roles to solve the issues that arise while implementing the policies. Policies for transitional justice are determined by the Executive and Legislature Parliament. In the present situation of Nepal, the Judiciary, has attempted to outline the framework of transitional justice even in the absence of clear policies of the Executive and Legislature Parliament. Even in the absence of legislation, the Supreme Court of Nepal seems to have contributed, through its verdicts, to address violations or abuses of human rights committed during the conflict.[54]

The Supreme Court has operated effectively at a time when law enforcement agency was in a dilemma as to whether or not cases of human rights violations committed during the conflict can be addressed with the assistance of already available criminal justice related mechanisms. The petition filed by *Rita Giri* stated that the investigatory bodies did not carry out their roles and pleaded the Appellate Court to issue *mandamus*. Citing point 5.2.5 of the Comprehensive Peace Agreement (CPA), the Appellate Court stated that it was not necessary to issue *mandamus* as the CPA speaks about a separate provision to look into the incidents of rights violations

[54] 'Sankramankalin Nayama Sarbochha Adalatka Phaisalaharu', NayadhishSamaj.2011. p. 28.

committed during the armed conflict. However, the Supreme Court issued an order to proceed with the process and stated that one should not be deprived of utilizing the existing legal processes, even if the case should have been the responsibility of the would -be-formed Truth and Reconciliation Commission. In other cases[55] similar to *Rita Giri* case, the Supreme Court also ordered the prosecution of cases based on the existing laws of the country.

A petition was filed by alleged perpetrators claiming that the ongoing legal decision process regarding the incidents of crimes committed during the conflict was against the CPA. The petition also demanded the process be stopped. The Supreme Court, upon hearing of the petition, issued an interim order[56] and ruled the adjournment of the process. In *Rai's case* an, interim order of the Supreme Court interdicted the warrant issued by the District Court relating to crimes committed during the conflict. This has created doubt, to some extent, that addressing past crimes through the existing criminal laws of the country will end. It is noteworthy here that transitional justice related mechanisms have not been established in the country. It is therefore necessary that the Supreme Court harmonized its paradoxical decisions.

Victims spoken their grievances that dissimilar decisions were reached by the courts in similar cases. Giving dissimilar decisions in similar heinous crime[57] is likely to increase impunity in the country. Hence, it is desirable that courts use their judicial independence in a just and logical way.

The petition filed in the Supreme Court against the term extension of the CA, the court issued a directive on November 25, 2011 ordering the extension of the term for the final time, after considering beforehand how much time it should take to write a Constitution. The order also said that the CA would be automatically dissolved if the constitution could not be written within the extended period. In the case that the

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55 *Devi Sunar V. District Police Office Kabhrepalanchok et al.* writ no. 2006-0641, Kedar Chaulagain V. District Police Office Kabhrepalanchok et al. 2008-0339.

56 *Keshab Rai V. Secretariat of the Council of Ministers et. al.* writ no. 2011-0532 and *Anita Ghimire V. Secretariat of the Council on Ministers* writ no. 2013-0584.

57 The decisions of the Supreme Court to acquit a Maoist leader accused of killing a teacher in the Okhaldhunga district Guru Luintel and punishing army personel accused of Maina, a student in the Kabhre district are paradoxical due to dissimilar decisions in similar cases, 'Dwandawakalma Hatyabare Sarbochhako Ades SachyaunaMag. *Kantipur dainik* January 11, 2011.

constitution could not be written the extended time, it was told to be clear on whether to go for plebiscite or another election for the CA. The decision of the Supreme Court given on August 30, 2011 also stated that extending the term of the CA on the basis of the theory of necessity was not a usual occurrence. It was therefore told to work seriously towards accomplishing constitution writing responsibility within the extended time -frame.

The Supreme Court validated the previous term extensions of the CA because there were genuine reasons for the extension. The CA cannot extend its term time and again based on the previous reasons which allowed for the extension. The decision of the Supreme Court clearly states that it can raise questions over any term extension of the CA. The Supreme Court's decision meant to say that the term of the CA should not be repeatedly extended with the excuses such as 'it was necessary' and 'could not be completed despite involvement in writing.[58] If the Constitution writing task faces continued uncertainty, the ongoing transitional period cannot be managed and this will eventually invite further uncertainties. This was not what the Interim Constitution envisioned. The Supreme Court is of the view that disregarding the principle inherent in article 64 of the Interim Constitution [59]and interpreting it in a manner that allows the term of the CA to be extended for any length of time through amendments in the constitution will dampen the fundamental expectation and expressions of the CA members who are in favour of producing a new constitution in good time.

The Supreme Court of Nepal has delivered many decisions relating to human rights issues; major decisions of which are analyzed in the following sub headings.

(i) Right to equality and Principle of Non -discrimination

Right to equality before the law and equal protection of the laws guaranteed by Article 11 of the Constitution of the Kingdom of Nepal, 1990 embodied the

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58 *Bharatmani Jangam V. Constituent Assembly Secretariat, et al*. Special Writ. 066 WS-0056 May 15,2011.

59 According to article 64 of the term of the constituent Assembly will be of 2 years and in case of emergency the term can be extended by six months. A writ petition was filed pleading that extending the term of the CA by three months even after its term completed on May 28 was unconstitutional.

fundamental principle of equality and its integral relationship with justice. Clause (2) of that Article prohibited any kind of discrimination on grounds of religion, race, sex, caste, tribe or ideological conviction. The Supreme Court of Nepal has constantly spoken in favour of the right to equality over the years and developed some trends on judicial activism.

In Meera Dhungana and others[60] The petitioners challenged clause (1) of Section 1 of the Chapter on Husband and Wife of the National Code (Muluki Ain) 1963 which allowed the husband to seek dissolution of conjugal relation 'if it is certified by a medical board recognized by His Majesty's Government that no child was born within 10 years of the marriage due to infertility of the wife'. The Petitioners claimed that it was discriminatory against women because the law does not even presume that a child may not be born even due to a male person. Here, the Respondent had maintained that since the law also allowed the wife to seeks dissolution if the husband was impotent, the provision was not discriminatory. The court distinguished lexical meaning of infertility and impotency and took the view that separate treatment was meted to husband and wife on the same issue. The court found the impugned provision of section 1(1) of the chapter 'on Husband and Wife' discriminatory against women and inconsistent with the principle of equality enshrined in Article 11 of the 1990 Constitution and International Human Rights Instruments and declared it *ultra vires*. The Court also issued a directive order to the Respondents including the office of the Prime Minister and the Council of Ministers to make appropriate provisions which are equally applicable to Husband and wife's on the basis of equality and also not inconsistent with the Constitution of the Kingdom of Nepal, 1990 and the provisions of the International Covenants.

In another case, Meera Dhungana[61] the Petitioner claimed that section 4 of the Social Practice Reform Act, discriminated those who give and demand dowry when it came to imposition of punishment. The Court observed that unless two parties agreed to take and give dowry the commission of said offense would not be possible.

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60 *Meera Dhungana and other V. office of the Prime Minister and others,* (writ No. 64 of the year 2005.

61 *Meera Dhungana V. office of the Prime Minister and Council of Ministers and others* (writ No. 131 of the year 2007).

No reasonable criteria existed to discriminate the bride and the groom side simply on the ground that one side paid and other side asked for. The court found the said legal provision to be inconsistent with the rights to equality as enshrined in Article 11 of the Constitution of the Kingdom of Nepal, 1990. It issued an order in the name of Office of the Prime Minister and Council of Ministers of the Government of Nepal directing it to make the appropriate legal arrangement based on the principle of equality.

In *Sapana Pradhan Malla and Others*[62], the Petitioners challenged Section 4 (3) of the Marriage Registration Act,1971 which prescribed different age for men and women (i.e. 22 and 18 years respectively) for solemnizing the marriage which was against the provision of the Constitution and international human rights instruments that guaranteed the right to equality and proscribed discrimination on the basis of sex. The Petitioner cited a report prepared by the UNICEF[63] which showed the danger of earlier marriage. She further claimed that the provision in the Marriage Registration Act also did not correspond to the provision of the National Code that prescribed a common age for both men and women[64]. Accepting the contention that there seemed to be no consistency between the provisions enshrined in Section 2 of the Chapter on Marriage in the National Code and Section 4 (3) of the Marriage Registration Act, 1971 the Supreme Court called upon the government to effect amendment to the relevant laws in order to bring about consistency and uniformity between them. The Court did not declare the provision of the Marriage Registration Act *ultra vires* but issued a directive order to the government to introduce amendments to the relevant laws with a view to acquiring consistency and uniformity between them.

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62 *Sapana Pradhan Malla and Others V. office of Prime Minister and Others* (writ No. 98 of the year 2006).

63 The UNICEF report termed as Innocent Digest No. 7, March 2001 and Early Marriage of Child Spouses. This report showed that whereas the maternal death rate among the pregnant young girls between 15 to 19 years was 20 times higher than the maternal rate among the pregnant women belonging to the age group 20 to 24 years, the maternal death rate of pregnant young girls aged below 15 years was 500 times higher.

64 No 2 of the Chapter on Marriage of the National Code provided required the candidate to be above 18 years with the consent of parent and 20 years where the consent of the parent is wanting.

In another case, Sapana Pradhan Malla[65], which pertained to the right to privacy of children, women victim of rape, HIV/AIDS infected people, the Court, issued a directive order to the Respondent Prime Minister and the Office of the Council of Ministers as well as the Ministry of Law, Justice and Parliamentary Management to make a law comprising provisions which describe the rights and duties of the concerned parties and maintain the level of privacy as prescribed (by the law) in some special type of law suits which victim women or children or HIV/AIDS infected persons are involved as a party. The Court ordered privacy had to be maintained right from the time of registration of the case in the police office or its direct registration in the law court or in other bodies till disposal of the case or even in a situation following the disposal of that case. The Court also issued the guidelines for the interim period till the law is enacted which required to be followed in all proceedings.

Jeet Kumari Pangani (Neupane) and others[66], is a case where the Petitioner's husband had indulged in forceful sexual relationship wherein he had asked the Petitioner to perform fellatio, and when the petitioner disagreed, the husband resorted to battery and perpetrated sexual violence against her. The Petitioners claimed that prevailing laws were insufficient to deal with such inhumane act and that the amendment provision of clause 6 of No. 3 of the chapter on Rape, of National code brought up by the Act Relating to Amendment to Some Nepal Act, 2007, which subjected the rapist husband only to imprisonment for a period of 3 to 6 months (vis-à-vis other rapists) was discriminatory. In this case, the court observed that where a spouse is considered as means of recreation and exploitation, and contrary to her desire, health and needs, is raped by the closest person, then such a person committing such an offensive act, cannot be entitled to rebate in punishment merely because of his relationship with his spouse, and there is no jurisprudential basis with regards to such rebate in punishment. The court further observed that there was no rationality in differentiating between marital and non-marital rape. … The rebate on punishment to be provided pursuant to the status of the actor would deem to be

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65 *Sapana Pradhan Malla V. Office of Prime Minister and Council of Ministers and Others.* Writ No. 3561 of the Year 2006.

66 *Jeet Kumari Pangani (Neupane) and Others V. Prime Ministers and Council of Ministers and others* (writ No. 064-0035 of the year 2007).

inconsistent with the right to equality as envisaged by the Constitution[67]. The court, referring to the principle of equality, issued a directive order in the name of the Ministry of Law, Justice and Parliamentary affairs asking it to make provisions so as to create harmony between the discriminatory sentencing policies between marital and non-marital rape and ensure that the principle sentence is not less than the additional sentence[68].

Punyabati Pathak[69] pertained to a case where women pursuant to the decision of the cabinet were asked to produce a letter from their guardians which contained a statement that in case any untoward incident happens to her when she went abroad in that organized foreign tour the guardian issuing the letter would assume all responsibility. The petitioners claimed that the additional requirement which was not there in the Passport Act and Regulation discriminated women. The Supreme Court observed that the Executive was not vested with the right to render Executive decisions that may encumber the enjoyment of the fundamental rights and freedoms or create discriminations between males and females. It, therefore, held the decision on 1995 was contrary to the right to equality.

In *Advocate Sapana Pradhan Malla V. HMG and Others*[70] relating to the issue of rape of prostitutes, the petitioner challenged the constitutionality of No. 7 of the Chapter on Rape of National Code. The impugned No. 7 provided that rape committed on a prostitute without her consent was punishable with a maximum penalty of upto Rs. 500/- or imprisonment up to one year whereas Section 3 of the Chapter on Rape provided a more stringent punishment for an offence of rape committed on women other than prostitutes with imprisonment ranging from six to ten years in case of the rape of a women below 14 years of age and imprisonment ranging from three to five years in case of the rape of a women above 14 years. The Petitioner contended that it was contrary to the principle of criminal justice and

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67 The court in the background also refers to *Meera Dhungana V. Ministry of Law, Justice and Parliamentary Affairs*, Re: writ petition No. 55 of the year 2002 which called upon the government to enact law on marital rape. It also refers *Sapana Pradhan Malla V. Ministry of Law, Justice and Parliamentary Affairs, et. al*. writ no. 56 of the year 2002 date of order 2003.

68 In this case Justice Balaram K. C wrote the dissenting judgment.

69 *Punyabati Pathak and Others V. Ministry of Foreign Affairs and Others.* Writ No. 3355 of the Year 2004.

70 Writ N0 56 of 2002.

CEDAW to make varying provisions of punishment for the same criminal act on the basis of the status of victims and, therefore, it infringed the fundamental rights guaranteed by Articles 11, 12(1) and 20 of the Constitution.

The Special Bench observed that rape was a criminal and inhuman act which directly undermined the individual freedom and the right of self-determination to women. It was a crime not only against the victim lady rather also against the whole society. The physical suffering and mental trauma caused by this heinous crime are of the similar nature, irrespective of the fact whether the victim was a married or unmarried women or a prostitute. A prostitute is also a human being and she possesses all human rights by virtue of being a human being. She has also got, like any other human being, the right to self-dignity, self-determination and independent existence. Forcing, therefore, a women to surrender herself against her wishes for use by somebody constituted a grave violation of her right of leading a dignified life and self-determination and it also amounted to an insult to the human right of women.

The Supreme Court further observed that the Constitution has adopted the principles of non-discrimination whereby no body shall be deprived of equal protection of laws. Although equality means equality among the equals, however, depending on the prevailing conditions and circumstances sometimes just and reasonable classifications could also be made. Although Article 11(3) of the Constitution has given the scope for making positive discrimination, nonetheless it has not visualized for making negative discrimination. Hence, it is impossible to buy the discriminatory view that our Constitution has made any type of discrimination against prostitute women. As the Constitution has not made any such discrimination, the discriminatory provisions made by law by classifying women into prostitutes and other women could not be treated as just and reasonable. The legal provision of lesser punishment for rapists of prostitutes tended to downgrade prostitutes, without any just or reasonable basis, to the position of women of lower status and made discriminatory treatment. The belief that there should be variations in punishment to be imposed to the convicts of crime committed against a particular category of people on the basis of their profession or their character would not be held as just or reasonable. The Justices were also of the opinion that if such a discriminatory legal

provision were allowed to continue that would indirectly help encourage the rape of prostitutes.

The Supreme Court further opined coercion; threat and use of force constituted the core of the crime of rape. The *means rea* and *actus reus* of the criminals were always similar in an act of rape committed on the women, irrespective of their class. A legal provision for awarding lesser or greater punishment to criminals on the basis of the character or profession of the victims seemed to be discriminatory in view of the spirit of the Constitution, various International Covenants concerning women and human rights and the recognized principles of justice. Hence, the Special Bench, issuing the writ, declared the impugned Section 7 as inconsistent with Article 1 of the Constitution and declared it void under Article 88(1) of the Constitution.

(ii) Regarding Right to Employment

In *Sabin Shrestha & Others V. Ministry of Labour & Transport Management & Others*[71] where Section 12 of the Foreign Employment Act, 1985 was challenged as inconsistent with Article 11, 12(e) and 17 of the Constitution of Nepal, 1990 the Petitioner contended that since the impugned Section 12 stipulated that no employment agency should provide foreign employment to a women without prior permission of her concerned guardian as well as of His Majesty's Government it was discriminatory towards women because it imposed unreasonable restrictions on their freedom of practicing any profession or carrying on any occupation. Responding to the writ petition, a Special Bench observed that the legal provision of Section 12 of the Foreign Employment Act, 1982 did not impose any restriction that a woman could never go out on a foreign employment or an authorized agency could never provide a foreign employment to a women. Rather it simply created a procedural condition while granting foreign employment to a woman. The Bench held that it was the duty of every Welfare State to provide special protection to the interests of women, children and the aged and our Constitution too was committed to this end by providing scope for making protective discrimination in Article 11(3) of the Constitution. Hence, it was not proper to develop a negative perception of a particular law which had been formulated with an objective to protecting such

[71] Supreme Court Bulletin, No. 19, F. N. 229, at 4 (2002).

women, going on foreign employment, against prospective exploitation or fraud in the foreign countries.

The Bench further held that it was a well -recognized principle of interpretation that in regard to interpretation and application of any law so far as the question of priority of the central provision and its proviso was concerned, it was the latter which took precedence over the former. And, the central provision alone could not be viewed independently and separately. Hence, the central provision of Article 11(3) of the Constitution ought to be viewed in the context of the impugned Act intended to protect the special interests of women by imposing some restrictions on the authorized employment agencies, it was erroneous to treat it as discriminatory on the ground of sex.

The Supreme Court furthermore held that the proviso to Article 12 (2)(e) of 1990 Constitution empowered the State to make laws prescribing conditions for practicing any profession or carrying on any occupation. Prescribing such condition could not be deemed as imposing restrictions on the enjoyment of the fundamental freedom guaranteed by Article 12 (2)(e) of the Constitution. Likewise, the right to property guaranteed by Article 17(1) was available to the Nepalese citizens subject to the existing law. The procedural requirement imposed on an authorized foreign employment agency did not make any discriminatory treatment to women in regard to their right to acquire, own, sell or otherwise dispose of property. Hence, the Supreme Court unanimously rejected the writ petition. In view of the socio-economic conditions of a developing country like Nepal and the lower level of literacy, particularly female literacy, this decision of the Court is indicative of the fact that our apex Judiciary is guided by the ground reality of the Nepalese society and is pragmatist and realistic in its approach. The Judiciary did well not allow itself to be swept off by the modern sweeping currents of neo-feminism which sometimes, in it's over zealousness, seems to threaten the interests of women themselves.

The Supreme Court in *Sita Singh Poudel V. Public Service Commission* [72] held reference to state obligations arising from Article 3 and 4(1)(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to which

[72] NLR 2002 at 434, No. 5.

Nepal is a party and the proviso to Article 11(3) of the Constitution of the Kingdom of Nepal 1990 that the second amendment to the Civil Service Act which reduced the probation period of women employees from one year to six months was a positive discrimination upheld in line with the Constitutional schemes. With this interpretation, the Court held that the provision of prohibition period contained in section 18 of the Nepal Health Services Act was applicable only to the male employees. This was one of the judgments delivered by the Supreme Court of Nepal responding to the CEDAW.

Prem Bahadur Khadka V. Office of Prime Minister and Council of Ministers, Government of Nepal and Others[73]. In the context of low representation of deprived class, region or sex in public offices, the state policies relating to employment are required focus on the increase of qualitative and quantitative representation of these classes of people and community. For the protection of women's right, state must focus on, easy access to equal employment opportunity as well as women-friendly working environment and women empowerment for obtaining employment.

Though there are different fundamental rights which are specific and correlated as well as interdependent with each other. So no right can be underestimated by forming hierarchy of fundamental rights. While focusing on execution of any specific fundamental right, it shall be analyzed the fact that how the other rights are integrated and correlated. When implementing such specific rights, it is necessary to consider the importance of all other rights.

Though the human rights can be classified, in accordance with their nature however, in essence, it is not reasonable to think as complacent and irresponsibility, that by making the essence of human rights secondary; by making one immediately useable and the other opposite to it.

Among all the economic, social and cultural rights, the right to employment is important one and it is important also for successful utilization of civil and political rights. So its importance cannot be lessened by putting it in a class that State gradually implements them according to the State's resources and means.

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[73] *Prem Bahadur Khadka V. Office of Prime Minister and Council of Ministers, Government of Nepal and Others,* Writ No. 064-WO-0719.(2008).

Every state party has discretionary power about to adopt legal as well as other measures, according to the specific condition of individual state, for realization of right to employment; in the name of discretionary power no state party can derogate the right to employment. The states parties must remain sensitive to make measures for the elimination of the problem of employment and ensure the right to employment to every individual immediately.

If the state is being unenthusiastic to the obligation of realization of right to employment by showing the ground of insufficiency of resources, such rights can never be realized. Hence, analysis of state resources cannot lie beyond the ambit of judicial review.

In fact, the human right commission not only to be limited to the illegal custody, but also it can help in all issues of human rights as an initiator, monitor, inspector, advisor, evaluator and critic. The meaning to include particular rights in the fundamental rights is to activate the right immediately, and it is also said to that there is remedy for situation of violation or not implementation of such rights.

No institution is free not to fulfill its any of the constitutional responsibilities and if intent not to fulfill such responsibility, it may be the expression of disrespect towards the written constitution, there is no place of such logic in the present constitution. Fundamental rights are directly and immediately implementable rights of the people. So they are not depending on intention of any institution, even the legislature, and cannot make such rights uncertain or not implementable on the ground of insufficiency of resources.

(iii) Decision regarding right to receive equal facilities:

In *Advocate Chandra Kant Gyawali & Others V. HMG and Others*[74] a Special Bench of Supreme Court delivered a landmark judgement- invalidating clause (1) of rule 21 of the *Prison Rules, 1963* as violative of the equality clause (Article 11(3) of the Constitution. That rule provided for classifying prisoners in to class A and B on the basis of their level of education and social and economic status. There was greater difference in respect of daily allowances and other facilities to be provided to the

[74] *NLR 2002 at 5.*

prisoners belonging to class A and class B. The Justices rightly observed that as the law does not determine the quantum of punishment on the basis of the level of education of the accused rather on the basis of the gravity of the offence, the convicts should not be classified into different groups on ulterior considerations, like their level of education and status. Every person condemned to punishment according to the nature of the crime committed by him must be made to undergo the punishment in the similar manner. Higher education or higher living standard of a convict could not be a valid factor to detract from the punishment handed out to him. The justices further observed that our Constitution did not permit such waiver, relaxation or special privilege to the people belonging to higher social status. It would tend to be discriminatory to differentiate between the people solely on the grounds of higher or lower status and also contrary to the spirit of the Constitution guided by the objective of the creation for an egalitarian society. Hence, the Supreme Court unanimously held the impugned provision contained in clause (1) of rule 21 of the Prison Rules, 1963 as repugnant to Article 11(3) of the Constitution and rendered it derecognized and ineffective in view of the provision of Article 131 of the 1990 Constitution.

In *Ishwari Prasad Sangraula V. the Britain Nepal Medical Trust*[75] the Supreme Court held that no right (including the Right to Equality) could be created by resorting to the means of a prerogative writ. On the contrary it is only a right already established under law that could be enforced by the means of writ. The petitioner who had hired by the respondent BNMT as a training coordinator for a fixed period of three years on a monthly salary of Rs. 24,000/- had subsequently sued the BNMT for discriminating against him in respect of remuneration as compared to other foreign trainers who were paid higher salaries. Dismissing the writ petition, the Division Bench held that since the petitioner had entered into the service of the Trust by willingly accepting the terms and conditions of the contract he had no legal ground to claim that he had been subjected to inequality and discrimination in respect of monthly remuneration as compared to his foreign counterpart employed by the Trust.

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[75] *Supreme Court Bulletin No. 208, at 14 (2001).*

Meera Dhungana[76] raised the issue of sexual discrimination. The first petition related to Royal Nepalese Army (pension, gratuity and other facilities) Rules, 2005 Section 10 of the Rules discriminated married daughters against unmarried daughters and sons with regard to the family pension and educational benefits that would accrue to her as dependent. It also provided that such benefit would accrue to dependent he attained the prescribed age or joint government service. However, the proviso to the same section stated, "provided that, in case of a daughter she shall not be entitled to receive such pension or allowance after her marriage if she gets married prior to attaining the age as prescribed by the said Rules". This was, according to the Supreme Court discriminatory and hence inconsistent to Article 11 of the Constitution another petition, *Meera Dhungana*[77] challenged Section 10 (2) of the Bonus Act, on the ground that it discriminated women both on the ground of sex and marriage. While that petition was pending, the law was amended, but the discrimination persisted. So the petitioner filed a supplementary petition where she challenged the amended provision. In that case, the Supreme Court observed that a daughter's relation with the joint family was served upon her marriage. Pursuant to the present provision the status of the membership of the daughter with the joint family got served upon her marriage and had no rights and obligations. Legal relation was limited by the law relating to succession. According to the Court, this was the nature of our family law till today. The Court observed that law could not be oblivious of social practices and values. It therefore, held that the disputed legal provisions was not inconsistent with Article 13 of the Interim Constitution of Nepal 2007 or International Human Rights Instrument and hence could not be deemed to be *ultra-vires* and void as sought by the petitioner.

(iv) Decision on Cultural Rights:

Som Prasad Paneru and Others[78], the petitioners drew the attention of the Supreme

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[76] *Meera Dhungana V. Office of the Prime Minister and Council of Ministers and others*, (writ No. 01 063-00001 of the year 2006; *Meera Dhungana V. office of the Prime Minister and Council of Ministers and others,* writ No. 112 of the year 2005).

[77] *Meera Dhungana V. office of the Prime Minister and Office Council of Ministers and others*, (writ No. 112 of the year 2006).

[78] *Som Prasad Paneru and Other V. Office of Prime Minister and Council of Ministers and Others*, (writ No. 3215 of the year 2005).

Court to the practice of 'Kamlari' which subjected young, school-going-aged-girls, of Far-west and Mid-West of Nepal to work as bonded labor. The petitioners claimed that the practice was against the provisions of bonded labor (prohibition) Act, 2002, Child Labor (Prohibition and Regulation), Act, 2000 and Human Rights Instruments including several provisions of the Convention on the Right of the Child, 1989. While agreeing with the petitioners that such a practice needed to be stopped, the majority Justices in this case issued a directive order in the name of the respondents viz. the Council of Ministers and the Ministry of Education to incorporate in the curricula of the School child in the contents of human rights related International Conventions, such as the Conventions on the Rights of the Child, 1989, International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966, to which Nepal is a party, and which covered all aspects of human rights. Justice *Balaram K.C*, through his dissenting opinion, called upon the government to bring out a comprehensive legislation banning the practice of keeping domestic servants and other forms of exploitation of children, advance the economic package to empower and ensure the social security of women and children affected by the practice of Kamlari.

In *Tek Tamrakar and Others*[79] the petitioners brought up the plight of the people belonging to Badi community to the notice of the Supreme Court. People of this community, mostly inhabiting in Banke, Bardia and Dang districts of Mid-West Nepal, were seeking out a precarious living. Women of this community were also compelled to be engaged in sex trade for survival. Because of this trade many children were born whose fathers could not be identified to that extent the legality of the vital Registration Act, 1976 and Section 3(1) under the Children Act, 1991, which according to petitioners was inconsistent with Art 11 of the Constitution of 1990. As the problems raised were many which required deeper study, the Supreme Court constituted a committee to study the matter and report to it within two months. And then, when the matter finally came before the bench for hearing, the Court declared that "the Badi people are vested with the right to live an honorable life pursuant to the Constitution of the Kingdom of Nepal, 1990, prevailing laws and

[79] *Tek Tamrakar and Others V. HMG Cabinet Secretariat and Others* Writ No. 121 of the Year 2004.

pursuant to the international treaties relating to human rights to which Nepal is a party". It further observed that "for the purpose of establishing a just society based on fraternity, bond and social solidarity, the economic, social and political problems of the women and children of the Badi community should be resolved so that women and children of the Badi community and every one can lead a respectable life". The Court held Section 4(1) of the vital Registration Act, 1976 which required that the notice of birth to be given "from among male" as inconsistent with Art 11 of the Constitution. It applied the doctrine of severability and declared this expression as "defunct". It did not however agree with the Petitioners that section 3(1) of the Children Act was *ultra-vires* the Constitution. More importantly, the Court reviewed the report of the Committee which revealed that the people of Badi community faced problems such as poverty, illiteracy and health related problems. According to the Committee the registration of birth and acquisition of citizenship, untouchability, racial discrimination and unemployment were serious issues and the people of this community had been the victim of political pressure and the armed conflict. The report had advanced a number of measures for the upliftment of Badi community. Since the government agreed to the suggestions advanced in the report, the court issued the directive to the government to implement the same.

Pun Devi Maharjan[80] the Petitioner brought up the issue of the Kumaris (designated living goddesses) of Kathmandu Valley to the notice of the Supreme Court. Kumaris, young girls between the age of 4 to 12 belonging to the Sakhya community, are chosen through a religious process and worshiped as living goddesses by the people of Hindu and Buddhist faith in the Kathmandu Valley and surrounding areas since the medieval period of Nepali history. But many aspects regarding the upbringing of Kumaris such as their education, health care and fooding got affected and neglected due to wrong belief of the people. The petitioner chiefly raised the issue of the protection of the human rights of the girls who became Kumaris and those girls and women who have acted as Kumaris in the past both needed guarantee of social security. The court in this case employed a very versatile method for the collection of data. It constituted a committee to study the matter and also allowed many people

[80] *Pun Dei Maharjan V. GoN, Office of Prime Minister and Council of Ministers and Others*, writ No. 3581 of the year 2006 B.S.

including the petitioner to file a rejoinder. When the matter came before the bench for hearing, it reviewed the contention that the practice contravened the rights guaranteed to the Kumaris by the constitution and international human rights instruments the court acknowledged the practice of Kumari as a long cherished religious custom of Nepal. It rejected the claim that Kumaris were exploited. It observed that "because the Kumaris do not have to be engaged in physical work so it is not proper to say that the custom of Kumari is a custom prevailing in contravention of the children's right guaranteed by Art. 22, the right against torture enshrined in Art. 26 and the Right against Exploitation embodied in Art. 29 of the Interim Constitution of Nepal, 2007. The custom of Kumari appears to exist as an integral part of the religious, social and cultural rights of the Nepali people belonging to the Hindu and Buddhist religious faith". Taking note of the divergent practices as to the education of Kumaris, the court observed that the fathers and guardians of Kumaris "do not seem to face any obstacles in sending them to the schools to get education provided that the former so desire". The court further observed that "no law seems to have imposed any restriction on Kumaris preventing the enjoyment of all the fundamental and legal rights including the freedom of movement and visit to their families and the freedom of residence guaranteed by the Convention on the Rights of the Child and the Interim Constitution of Nepal, 2007. Therefore, it is clear that Kumaris can go to school to study and acquire education". The court held that "so long as the custom of Kumari does not infringe the rights of children guaranteed by the constitution and the international conventions, it should be treated as an integral part of the religious and cultural rights of its followers. The court also called upon the state to give thought to granting facilities like social security or pension benefit to the ex-Kumaris who had been deprived of their fundamental rights as well as their human rights to education in their childhood. It issued a directive to the government to constitute a committee within a framework it stipulated, and also issued a *mandamus* to the government to implement the report of the committee once submitted to the government. In other words, it issued a *mandamus* to implement a report which was yet to be prepared, an as interesting strategic detour.

The case of *Tara Devi Poudyal V. the Cabinet Secretariat & Others*[81] is something an indicator of the cautious hesitation of the Supreme Court of Nepal not to disturb the social and cultural values prevailing in the Nepalese society. In this case, the petitioner had challenged the Constitutionality of No. 4 of the Chapter on Incest of the Country Code as being inconsistent with Articles 11(1)(2) and (3) of the 1990 Constitution. The petitioner, the widow of a soldier in the Indian Army, claimed that she had married the younger brother of her dead husband in order to be eligible to claim the family pension under the Indian Army Pension Regulation Act, 1961 which provided that in the event of the death of a soldier if his widow got married to his younger brother she would be entitled to the family pension. She was being tried for incestuous marriage under a plaint filed by someone who was not an heir-copartner. The petitioner contended that since there was no legal prohibition on the marriage of a widower with the sister of his deceased wife, the penal provision of No. 4 of the Chapter on Incest was discriminatory between men and women.

Responding to the writ petition, a five member Special Bench ruled that since the sister of a deceased wife was not a member of the family of the husband nor was she agnostic to him, it was not proper to treat a widower and a widow as being on the same footing in this regard. The right to equality means the equal application of law among the equals and not equal application and equal protection of the law among the unequal.

The Bench further observed that a study of the Preamble to the Country Code revealed that some of its provisions had been influenced by the Hindu Dharmshastras. So as Article 19 of the Constitution of Nepal granted every person freedom to profess and practice his own religion as handed down to him from ancient times, having due regard to traditional practices, No. 10(A) of the Chapter on Incest permitted incestuous sexual relation or marriage between relations whose caste or racial practices had permitted such incestuous intercourse. But the purpose of the prohibiting provision of the impugned No. 4 of the Chapter on Incest was to control adultery in the society and, therefore, it was not deemed proper to interfere with the wisdom of the legislature in regard to such matters. The Bench further opined that

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81 *Supreme Court Bulletin, Vol. 230, at 1 (2003).*

under the Nepalese legal system after the death of a husband his assets and liabilities succeed to his widow who becomes a copartner in the family property. So long as she remained chaste to her husband and did not lose her chastity her relation with her dead husband continued to be the same as it was before, it was not lawful to say that her previous relationship of sister-in- law with the younger brother of her deceased husband did not continue to exist. The Supreme Court, therefore, ruled that the impugned Section 4 did not seem to impose any unreasonable restriction on the fundamental right of the petitioner and thus it was not discriminatory.

This unanimous decision of the Supreme Court may be laudable from a traditional Hindu viewpoint. But strong reservations can be put forward in regard to the appropriateness and suitability of the conservative value inherent in the ratio of the decision. In the modern times, the social reformers have been strongly advocating for eradication of the social evil of forcing a widow, even though she was young, not to get remarried. It is high time the willing widows were allowed to get married even to the brothers of their deceased husbands. Such a practice may also help further reintegration of the exiting family bond.

(v) Regarding on Reproductive Health Rights

The Supreme Court is charged with an obligation and is also empowered to ensure complete justice through enforcing fundamental freedoms and rights at individual as well as collective level under Art 102 of the Interim Constitution, 2007.[82] The Supreme Court of Nepal has also moved to the novel and landmark steps to the development of health sectors and protection of reproductive health and rights of women. Supreme Court has made decisions on various public interest litigation cases concerning reproductive rights enforced, which are as follows;

In Sarmila Parajuli for Pro Public V. HMG[83]*,* response to Sharmila Parajuli for Pro Public V. HMG et al, the Supreme Court issued a directive order to the Government to enact a comprehensive legislation in order to ensure women's right to freedom from sexual harassment in work places and public places as well.

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82 *Interim Constitution of Nepal 2007*, Art 102

83 *Sarmila Parajuli for Pro Public V. HMG et al,* WPN 88, (decided on 2004).

In issuing such a directive, judges though implicitly, relied upon the state obligation under Art 2 of the CEDAW that requires adoption of appropriate measures including legislation to eliminate all form of discrimination. The Court recognized the sexual harassment as a sexual violence against women that results in violation of the right to dignified life.

In *Mira Dhungana for FWLD V. Ministry of Law and Justice and Others*[84]*,* the Court issued a radical judgment that stands for women's right to self-determination in deciding whether or not to have sexual intercourse with the husband.

A Public Interest Litigation was filed at the Supreme Court stating that No. 1 of the Chapter on Rape failed to criminalize rape of a wife committed by her husband using force, threat, fear and duress thereby provided penal exemption to the offenders. Petitioner also contended that such exemption was contrary to right to equal protection of law irrespective of marital status protected under the CEDAW Convention.

Upholding the right to a dignified life for women the Court held that marital rape is unconstitutional, which denies the husband's ownership over the sexuality of women. Stressing on the implication of 'free and full consent' as a recognized ground of marriage upon conjugal life, the Court ruled that there must be mutual consent between husband and wife for the sexual intercourse after marriage.

The Court further noted that to compel woman for letting other to use her organ or body resulted in violation of her right to live with dignity and her right to self-determination; that is why, right to privacy has been guaranteed under the Constitution.

Finally the Court issued a directive order to introduce a Bill for providing immediate relief by allowing the wife to live separate from or to divorce the rapist husband; prescribing the degree of offence in rape committed in the circumstance of child marriage, and for making complete legal provisions for justifiable and appropriate solution in an integrated manner with regard to marital rape taking into account the special circumstances of marital relationship and position of husband.

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[84] *Meera Dhungana V. Ministry of Law and Justice et al* (2007).

In Laxmi Dhikta and others V. Government of Nepal[85]*,* the Supreme Court of Nepal ruled that the country's government should make abortion accessible by setting up a fund for poor and rural women and investing resources to meet the demand for safe abortion services. In addition, the Court also directed the government to ensure that all women are well aware that abortion is no longer a crime and that there are safe services available to them.

Importantly, the court recognized the right to abortion as an essential component of reproductive rights, indicating that a government cannot recognize reproductive rights generally and yet deny access to abortion. The court boldly addressed specific arguments that seek to negate women's reproductive rights:[86] (a) A fetus does not have the legal status of a human life; (b) The right to abortion is central to the right to equality and non-discrimination; (c) A woman has a right to privacy when deciding to have an abortion; (d) A comprehensive abortion law is needed to fully protect women's rights; (e) Compensation is warranted when a woman is forced to continue an unwanted pregnancy.

Prakashmani Sharma V. HMG, Ministry of Women, Children and Social Welfare and Others[87] The petitioners advocated in regard to reproductive role of women which is associated with several segments of the development of society. Special measures were required for the protection of maternity. Moreover, working women and employees should be observed and pay more attention for safe motherhood.

The petitioners cited various laws relating to employees and working women which fix different time period for maternity leave; for instance, the Civil Service Act 1993 (2050), Rules 1992, Local Self-Government Rules, 1999, Nepal Health Service Rules, 1998. Appeal Court and District Judges (Salary and other condition of Service) Act, 1991, which provide for 60 days maternity leave, while the Labor Rules 1993 provide leave for 52 days, Tea Estate Labour Rules 1993 and Royal Nepal Airlines Corporation Employees Condition of Service Rules 1984 provide for 45 days leave. Though, the Constitution provided special provision for the protection

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85 *Laxmi Dhikta and others V. Government of Nepal,* writ filed on year 2008, decided on May 2009.

86 Supreme Court, Retrieve Jan. 2013 from: http://reproductiverights.org/en/feature/nepal-supreme-court-abortion-is-a-right.

87 *Prakash Mani Sharma V. Council of Ministers et.al*, NKP 2004 No.9/10 p. 726.

of rights of women and children. The, petitioners justified it as unscientific and against the provision of CEDAW, CRC and ILO Conventions concerning maternity protection, as those instruments mentioned 14 week's maternity leave for women employees.

The special bench of the Supreme Court issued a directive order on 11 September, 2003 to the Government of Nepal, Ministry of Health to make necessary arrangement for the protection of maternity by fixing minimum period of leave for employees and developing standard for the same, by taking note of the legal provisions of international instruments for the protection of maternity and child health.

Prakash Mani Sharma and Others v GON, Office of Prime Minister and Council of Ministers and Others[88], concerning uterus-prolapsed, the petitioner petitioned that prime productive age women were suffering from the problem of uterus prolapsed specially in the hilly districts. From the research work done by Motherhood Network Federation, 2005 in ten districts namely Dhankuta, Siraha, Bara, Nuwakot, Kapilvastu, Baglung, Banke, Surkhet, Kanchanpur and Baitadi, it was found that 4,518 women came to the health camps and from among these women, 415 suffered from the problem of uterus prolapsed. [89] Pro-public petitioned the court via PIL in issue an effective order for the protection of the rights of women suffering from the problem of uterus prolapsed.

The Supreme Court issued a directive order in the name of the Prime Minister and the Office of the Council of Ministers to hold consultation as per necessary with health related experts and representatives of the society and to draft a Bill and submit it before the Legislature-Parliament as soon as possible. It also issued an order of *mandamus* in the name of the Ministry of Women, Children and Social Welfare and Ministry of Population and Health to prepare special work plans and to provide free consultation, treatment, health services and facilities to the aggrieved women and to set up various health centres and to initiate effective programs with the aim of raising public awareness on problems relating to reproductive health of women and the problem of uterus prolapsed.

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88 Writ No: WO- 0230 of the year 2008.

89 Justifiability Economic and Social, Retrieved from Jan. 2013 http://legalnp.blogspot.com/ 2011/06/ justiciablity-of-economic-social-and.html

The problem had aggravated due to the lack of nutritious food at the time of pregnancy, lack of care and health services for lactating mothers, social and family discrimination[90]. The petitioner claimed that reproductive health, being part and partial of the right to health, was protected by Article 12 of ICESCR and Art. 10 and 12 of CEDAW the Court observed that the right to live a dignified life is also a basic right of life. Where the state did not provide the basic facilities for the protection of health of a human being, then proper protection of the right to life could not be achieved.

Kamal Niale V. Office of the Prime Minister and Council of Ministers & Others, The Supreme Court issued a directive order to the Government on the 7 April, 2011 concerning the right to health[91] . The order stated that a citizen has to be understood as sick and as a client at the same time and if they die as a result of illness without having received medicine or health services, the Government must claim responsibility for the death. The Court further stated in the order that under the right to live a dignified life, each citizen is entitled to receive medical services and it is the duty of Government hospitals to provide such services and entitlements. The Government, which has a constitutional duty in this regard, and hospitals must therefore remain alert at all times and be prepared to tackle any type of seasonal epidemics that break out sporadically in different parts of the country, the order mentioned.

(vi) Decision on Dalit Rights (untouchablity)

In *Mohan Kumar Karna & Others.* V. *Ministry of Education and Sports*,[92] the petitioners argued that Rule 109 of the Education Rules 1992, which allowed a school management committee to levy fees beyond the monthly and re-admission fees, violated the right to equality, educational, cultural and privacy rights under the 1990 Constitution. The Supreme Court observed that education was a matter to be

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90 The petition cites a study conducted by in 2005, safe motherhood network federation, Nepal in 2005 in 10 districts namely Dhankuta, Siraha, Bara, Nuwakot, Kapilbastu, Baglunj, Banke, Surkhet, Kanchanpur and Baitadi. The study Report underlines that 4518 women has come to the health camps and from among these women, 415 suffered from the problem uterus prolapse.

91 Kamal Niale V. Office of the Prime Minister and Council of Ministers et. al. Writ No. 2011-0109.

92 SCN, March 2003, NLR. 2004 No 7/8 p 551.

realised subject to the availability of economic resources. Thus, permitting a school committee to charge some additional fees when required was not inconsistent with the Constitution and prevailing law. The Court observed that books were being provided to students in these schools and that free education of the students from families below poverty line and from Dalits, ethnic communities and girl student's upto lower secondary and secondary level was being implemented.

What is interesting that more than half of these leading equality rights cases concern persons with disabilities[93] as well as the rights of women and children.[94] This raises some questions. Has the court been less sensitive to the ethnic, linguistic and religious group-based concerns? Or are these other equality issues of a more pressing nature? Or has the Court showed an even balanced approach to addressing equality issues as they arise. The following paragraphs will concentrate on a number of cases largely concerning discrimination based on ethnicity, caste, religion and language.

Mohan Sashanker V. GoN, Prime Minister and Council of Ministers & Others[95]*,* was the case concerned with the denial of access of non-Upadhyaya Brahmin caste students to Nepal Veda Vidyasharm, a Sanskrit education school in Kathmandu which received grants from the State through the Trust Corporation and the Pashupati Area Development Trust. The Court determined that the School was a 'public institution' by virtue of its funding support and observed that any form of distinction affected the enjoyment of right amounted to discrimination. It considered the restrictions as discriminatory and monopoly which was inconsistent with the right

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93 *Sudarshan Subedi & Others.* V. *Govt of Nepal, Council of Ministers & Others.,* SCN, November 2003, Writ No. 3586 of 2001 (directive order for free education to blind, deaf, disabled and intellectually disabled students in public schools, universities and training centres); *Prakash Mani Sharma & Others. V. GON, Office of the Prime Minister and Council of Ministers & Others.*, 16 April 2008, Writ No. 0283 of 2007 (State must make necessary and appropriate arrangements for higher education of the deaf persons as it does for normal persons with specific orders on provision of teachers and course materials); *Raju Prasad Chapagain & Others.* V. *Prime Minister and Council of Ministers*, SCN, October 2008, Writ No. 129 of 2007, NLR 2010 no 1 p 34 (Provision of the National Code and other laws that allowed imprisonment of the mentally ill persons declared *ultra vires* and authorities ordered to develop action plan for the medical treatment of such persons and transfer persons presently held in the Kavre prison to medical centres and until such arrangement was made make provision for their medical treatment in the prison by expert medical doctors).

94 *Raju Prasad Chapagain & Others. (on Behalf of Pro Public)* V. *Prime Minister and Council of Ministers & Others.*, SCN, November 2008, Writ No. 63-WS-0031 (educational institutions are liable for deaths of children and National Code provision declared *ultra vires* on the grounds of a number of constitutional rights).

95 *Mohan Sashanker* V. *GoN, Prime Minister and Council of Ministers & Others.*, SCN, June 2009, Writ No. 3416 of the year 2007, *see* 3 NJA L.J. 247 (2009).

against untouchability and racial discrimination, the right to religion and the right to social justice. The Court noted:

Education is to be acquired by human beings, not by a particular caste. The prestige of Sanskrit language does not diminish when acquired by persons of a particular caste and increase when pursued by persons of another caste…such a distinction only promotes inequality in society.[96]

In Pradhwosh Chhetri and Others[97] contained a challenge to educational quotas. Following the initiation of the policy in 2003,[98] Tribhuvan University Council asked the Institute of Medicine to reserve 10% of places to Dalits, 15% to ethnic communities and 20% for women. The petitioners contended that the reservation by the Council violated the right to equality and other rights in the 1990 Constitution and, moreover, that a law must be in place authorising such reservations as required by Section 11(3) of the Constitution. The Court disagreed with the first claim and instead criticised the Government for not taking special protective measure for marginalised groups at an earlier stage; 14 years had passed since the promulgation of the Constitution. However, it agreed with the second claim that protective measures could not be implemented without making laws and thus quashed the decision of the Council. Nonetheless, it issued a directive order to the Cabinet to enact a law for the protection of women, children, aged, physically and mentally incapacitated persons, and educationally and socially backward community, within the same fiscal year.[99]

In *Prem Bahadur Khadka & Others. v Government of Nepal & Others* [100] where the Court interpreted the right to employment guaranteed by Art 18 of the Interim Constitution as part of the right to live with human dignity and linked it with the

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96 *Ibid.* p. 259.

97 SCN, *Date of Decision*, NLR 2005 No 7. p. 901.

98 Budget speech of the Minister of Finance in the Parliament for Fiscal Year July 2002/June 2003.

99 Interestingly, the Court also asked the respondents to clearly lay down grounds for determining who was educationally and socially backward.

100 *Prem Bahadur Khadka & Others. V. Government of Nepal & Others*, SCN, January 2009, Writ No. 066-WO-07193. *See also Liladhar Bhandari & Others. V. Government of Nepal & Others,* SCN, 7 December 2008, Writ No. 0863 of the year 2064 (case relating to violation of property rights of the displaces due to conflict).

right to equality, the right against untouchability and racial discrimination, the right to environment and health, the right to education and culture, women's rights, the right to social justice and the right of the child.

In *Kamanand Ram and Others V. HMG and Others*,[101] the petitioners alleged that the respondents who were obligated to carry out the obligations of the State did not undertake their duties of providing administrative support and initiatives in eliminating untouchability and discouraging such malpractices in the light of the Constitution and ICERD. The petitioners who belonged to the Dalit community of Siraha and Saptari districts were allegedly forced by the people belonging to the so-called upper class of Hindus to do the menial service of disposing corpses (dead bodies) of animals. On their refusal to oblige they were subjected to social and financial boycott and segregation. Responding to the writ petition, a Division Bench held that in view of the Constitutional commitment towards eradication of the malpractice of untouchability and discrimination on the ground of caste it was not appropriate for Government offices like District Administration Office and District Police Office and local bodies like District Development Committees, Municipalities and Village Development Committees to display apathy and negligence in carrying out their legal obligations. Those offices and institutions were duty bound to work towards eradication of untouchability and discrimination as enjoined by No.10(A) of the Chapter on Miscellaneous Arrangement (Adal) of the Country Code. The Supreme Court issued a directive order to the respondents instructing them to always remain active and alert in carrying out their legal obligations in this regard.

In *Krishna Prasad Siwakoti V. HMG and Others*,[102] the petitioner argued that Section 10 of the Chapter on Miscellaneous Arrangement (Adal) contravened the Constitutional provision of the right against discrimination guaranteed by Article 11(4) of the Constitution and sought the Supreme Court to declare it *'ultra vires'* of the Constitution. The petitioner also prayed it to issue a writ of *mandamus* to the respondents to make a law for the upliftment, protection and welfare of the Dalit community as well as another penal law for awarding punishment to the perpetrators

101 Writ No. 3643 of 2001 B.S.
102 Supreme Court Bulletin, Vol. 236, at 4 (2003).

of discrimination on the basis of caste. A Special Bench observed that Section 10 of the Chapter on Miscellaneous Arrangement (Adal) provided that no one shall do or cause to do any work by misleading or coercing others, thereby disturbing or damaging the social custom and practices of the others. This legal provision simply prevented the act of disturbing social customs and practices. This provision seemed to be guided by the principle of not adversely affecting the rights and freedoms of others while exercising one's own rights. Articles 18 and 19 of the Constitution, had also granted every person and denomination the right of protecting and promoting their culture, religion and tradition. The interference in the customs and practices of others could not be acceptable. The Special Bench, therefore, opined that the impugned Section 10 did not contravene the right against discrimination embodied in Article 11(4) of the Constitution.

So far as the second question of making laws in accordance with Article 11 (3) and (4) was concerned, the Supreme Court held that the Constitution had entrusted responsibility to the Executive and the Legislature which could make protective legislation for the protection and promotion of the interests of women, children, the aged, the physically or mentally incapacitated persons or socially or educationally depressed classes or people. The Court opined that it shall be, therefore, neither appropriate nor constitutional to issue instructions to make a special type of law in a situation where such a law was yet to be enacted.

In *Durga Sob V. HMG and Others*,[103] dealing with almost an identical issue relating to the alleged unconstitutionality of Section 10 of the Chapter on Miscellaneous Arrangement (Adal) and the demand for framing of special law relating to the creation of a National Commission for Dalits, a special Bench reaffirmed the principles initiated earlier in the preceding case of Krishna Prasad Shiwakoti, and dismissed the plea of the petitioner that the impugned Section 10 was unconstitutional. The learned Justices, as in the earlier quoted case, refused to interfere in the functioning of other organs of the State by dictating the Legislature to enact a particular type of law. The Supreme Court also held that it was the power and obligation of His Majesty's Government to decide whether there was a need for

[103] *Supra Note*. 114, Vol. 235, at 3.

setting up a Commission for the protection of the interests of the Dalit community. However, the Supreme Court preferred to issue a directive to His Majesty's Government to remain constantly vigilant and active towards discharging its duty of directing its responsible organs to undertake their duties and obligations enjoined by the laws framed under the Right to equality. It is inexplicable why the Special Bench expressed its limitation in these two cases in regard to issuing instruction to His Majesty's Government for framing a particular type of law to address the malady of discrimination.

In *Prabinata Wosti et al. V. Office of the Prime Minister and Council of Ministers and Others*[104]. The Supreme Court issued an order on January 20 to create a contemporary management plan in which the provisions guaranteed under the Right to Social Justice, such as that "women, Dalits, indigenous tribes, the Madeshi community, oppressed groups, the peasantry and laborers, who are economically, socially or educationally backward, shall have the right to participate in state mechanisms on the basis of proportional inclusive principles" be adhered to. The formation of study committee was ordered for the above purpose. Also ordered was to reform the civil service acts and regulations based on the study report so as to guarantee social justice is felt by the backward class.

Uttar Tamata V. Nepal Government, Office of the Prime Minister and Council of Ministers and Others[105], The writ petitioners stated that though the *Kamaiya or Bandhuwa Labour (including Haliyas)* were abolished in principle by the Constitution of the Kingdom of Nepal, 1990, in practice it is still in existence. Therefore, the respondent government declared emancipation of *Kamaiya* on 2000 and Act on *Kamaiya Labour* Prohibition was enacted in 2001 for the enjoyment of fundamental rights guaranteed by the Constitution, Section 2(b)of the Act defined the *'Kamaiya Labour'* including *Haliya labour* as bonded labour.

The main duty of state is to adopt and implement special economic programs and policies and enacting special provision of law for the protection, empowerment and

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104 *Prabinata Wasti et al. V. Office of the Prime Minister and Council of Ministers et al. writ no. 2004-WS-0031.*

105 *Uttar Tamata V. Nepal Government, office of the Prime Minister and Council of Ministers and Others, Writ No. 3209 of the year 2005.*

development of all *ex-Kamayas*. It seemed to form a committee for empowerment, development and rehabilitation of ex-Kamaya without any discrimination on the basis of specific caste.

Even the constitution and law rendered liberation of Kamaya practice, *ex- Kamayas* have not been able to enjoy the rights and freedom because they have been exploited and deprived of their rights and right to education for hundreds of years, they should be protected from the state for certain period. In keeping this matter in mind, the proviso Clause of Article 11 of the Constitution and Article 13 of the present Constitution have stipulated to have special provisions for the interest of all groups of *ex-Kamayas* as specially protected categories by the state. Therefore, a directive order of *Mandamus* was issued to the respondents to take necessary action as per protection granted by the Constitution for the promotion of the groups and castes by formulating committee in other remaining parts of the country to include all groups in all districts including hill districts without any discriminations against caste and *Kamayas* to achieve the objectives of the Constitution and statutory provisions as contended by the petitioners.

(vii) Decision on Right to Food

The emerging Economic, Social, Cultural rights jurisprudence is too immense to summarise here and we will restrict our focus to jurisprudence concerning marginalised groups that has been shaped in terms of socio-economic rights, particularly the right to food and health hereunder.[106]

The Interim Constitution of Nepal 2007 guarantees to every citizen the right to food sovereignty (Art. 18(3)).[107] The term 'food sovereignty' is a rather novel term[108] and its content is not immediately clear, at least in the traditional sense of right-duty relation.[109] The Court noted that these rights are also indivisibly linked to human

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106 For analysis of other cases, Byrne and Hossain, and M. Langford, A., Bhattarai and L. Sharma, *The Socio-Economic Rights Jurisprudence of Nepal*, Working Paper (on file with authors).

107 Articles 33(h) and 35(1) also use the term 'food sovereignty'.

108 The global peasant movement Via Campesina developed seven principles of food sovereignty in 1996, which include accepting food as a basic human right, agrarian reform, protecting natural resources, recognizing food first as nutrition and then only as trade, ending globalisation of hunger, prohibiting food as a weapon, small farmers' control over food.

109 For an analysis on how the concept relates to human rights, see S. Ratjen, S. Monsalves, and F. Valente, *The Human Rights Way Towards Food Sovereignty* (FIAN International, Heidelberg,

dignity and are indispensable for the fulfilment of other rights enshrined in the Constitution and the ICESCR and ICCPR. The Court found that the State was not to remain oblivious of its responsibility of securing ESC rights on the pretext that there was no law in place. The Court appears to partly acknowledge the broader claims connected with the food sovereignty movement (e.g., domestic control over food protection, decision-making and seed varieties) by observing it was the constitutional responsibility of the state to ensure food availability and absence of food shortage. The issue of mass starvation has come to the court at least two times[110] and has followed a similar trajectory to the right to food cases in India.[111]

In *Madhav Kumar Basnet V. Prime Minister & Others,*[112] in the pre-2007 and in *Prakash Mani Sharma & Others.* V. *Government of Nepal,*[113] the Division Bench of the Supreme Court issued an interim order on 25 September 2008, while recognising every citizen's fundamental right to live with human dignity order the respondent authorities to immediately transport and supply foodstuff in affected districts. See, Chapter five regarding the case detail.

In Jagannath Mishra for consumer protection forum V. Prime Minister and Council of Ministers et al,[114] this writ filed pursuant to Article 32 and 107(2) of the Interim Constitution of Nepal, 2007 the petitioner has diverted the attention of the Judge to clause 1(d), 2(d), 15, 23 and 20 of Social Offences and Punishment Act, Section 8 and 10 of Consumer Protection Act 1999 and rule 10 of Consumer Protection Regulation and requested for the issuance of order of *mandamus* as the respondents has not fulfilled their duty to frame a rule and form a price fixation advisory committee within the date fixed by the Court for the accomplishment of responsibility to protect the consumer right by publishing a notification in Nepal

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2007).

110 Other cases have also addressed the right to food: e.g. *Raju Prasad Chapagain & Ors.* V. *HMG, Ministry of Health & Others.*, November 2004, Writ no. 2621 of 2059 (State failed to implement 1992 law on breast milk substitutes, in particular to ensure supervision and monitoring); *Babujuddin Minhya & Others.*(State failed to provide support to petitioners who suffered serious destruction of their crops by wild animals every year).

111 Order dated November 28, 2001 in W.P.(C) No. 196/2001 (*People's Union for Civil Liberties V. Union of India*).

112 SCN, October 1998, Writ No. 3341 of 1998.

113 Case filed on 15 September 2008, Writ no. 065-w0-149.

114 *Ibid.*

gazette. By issuing an order of *mandamus* the Supreme Court opined that;

It's a duty of legislature to pass a bill while the duty and responsibility to implement such law is vested to executive. If the executive turns irresponsible and fails to address an act formulated by legislature an effective implementation of it cannot be expected. In reality the provision embodied in such Act won't be recognized as a meaningful provision.

It can't be said otherwise to an Act, enacted for the purpose of protecting the right and interest of the consumer, it's a duty of government head to implement such law created by legislature addressing to the issue directly related to the protection of consumer's health.

It is a duty and responsibility of the Government to formulate action plan in connection with monitoring,, prevention and control of unfair trade practice which are likely to harm the, health and interest of consumer. If such Government mechanism failed to hold the responsibility to address the situation than the judicial body, the only hope of the people should not stay idle pointing that as a duty of government.

(viii) Regarding Child Rights

In *Tilottam Paudel V. Ministry of Home and Others* [115], the full bench of the Supreme Court had rendered significant interpretation of child right in the writ No. 147 of the year 2001 filed against the decision of the Ministry of Home that refused application to register an organization named Jagriti Children Club initiated by children of Pragati nagar of Nawalparasi district. The Ministry of Home had disqualified children, as minors of below 16 and thus not competent pursuant to the existing law, to establish an organization. In this case, the Supreme Court established a progressive principle in favour of children opening that the right to organization has been ensured by Article 15(1) of the Convention of the Rights of the Child, 1989 ratified by Nepal, which was not restricted by the Children's Act, 1991, and Article 12(2)(c) of the Constitution of the Kingdom of Nepal, 1990, therefore, it was not

115 *Tilottam Paudel v. Ministry of Home et.al. NLR. 2002, No. 7/8. p. 423.*

appropriate to deprive children from the fundamental right to organization only because they are minors. This interpretation is a burning example of a best practice, which has recognized the right of child to form organization and institution by making a positive analysis of the Convention and Constitution, even though the Act had no clear provision.

In *Advocate Raju Prasad Chapagain and Others, V. Office of the Prime and Council of Ministers and Others*[116] the issue of torture was raised in the writ No. 063-WS-0031. In this writ, the petitioner had challenged the constitutionality of No. 6(3) of the Chapter of Homicide of National Code (Muluki Ain) 1963, which had provided that any accidental loss of life of a child due to an assault by a teacher or guardian in the name of protection and education will be excused. The petitioner challenged the provision on the ground that it encouraged assault against children and was against Articles 12(1), 13 and 22 of the Constitution and Articles 19(1), 28(2) and 37 (a) of the Convention on the Rights of the Child. The Supreme Court also agreed to the petitioner's application and declared the provision *ultra vires* from the date of the decision by holding the provision as provocative towards torture against children. Alongwith this, a directive order was also issued in the name of the respondents to establish an effective mechanism to enact laws, to develop legal instrument and implement them in order to prevent physical or mental torture or misbehavior against children and to include the provision of disciplinary action against the teachers conducting such offences.

Advocate Meera Dhungana V. Office of Prime Ministers and Council of Ministers and Others[117] where the issue was raised regarding section 3 (1) of the Children's Act 1991 which had provided that child must be named as per his/her religion, culture and rituals by his/her father, or if father is not present, by mother or in the absence of both present by any other member of the family. The petitioner argued that the provision must be declared *ultra vires* pursuant to Article 11 of the Constitution, since it discriminated women and that the provision ranked women as second class citizen. The Supreme Court rejected the writ on the ground that the issue of section

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116 *Advocate Raju Prasad Chapagain et.at V. Office of the Prime and Council of Ministers et. al., (Year of decision: 2009).*

117 *Advocate Meera Dhungana et. al. V. Office of Prime Ministers and Council of Ministers et. al. (Year of Decision: 2007).*

3(1) of Children's Act, 1991 raised by the petitioner was just a procedural matter which could be amended timely and thus was not necessary to declare the provision *ultra vires*.

In Sabita K. C on behalf of petitioner Prathana Rayamajhi V. Ram Bahadur Rayamajhi[118]*,* in the matter of guardianship of children, when the issue of priority was raised in the case of *habeas corpus* in criminal appellate No. 3 of the chapter on Husband and Wife of National Code and the children's Act 1991 holding that the mother is the natural and legal guardian, thus, no one is entitled to claim the guardianship until the mother is present[119]. In the case No. MS-0015 of *habeas corpus* of the year 2010, where the similar issue was involved, the requested order was issued by the court stating that the children have right to be nurtured with maternal care and that lactation is an inherent right of any child, which is related to the right to life and thus clause 1 of No. 3 of the Chapter on Husband and Wife of the National Code (Muluki Ain) could not be undermined, in case father and mother of such child has to be separated because of any reason.

In *Aashish Adhikary* on behalf of *Keshav Khadka V. Dhankuta District Court & Others* [120] a Division Bench held the detention of a minor, Keshav Khadka, in prison, as illegal, and directed the concerned authorities of His Majesty's Government to make necessary arrangements for his stay in some Child Reform House. Section 15 of the Act Relating to Children, 1991 provides that a minor sentenced to imprisonment must not be placed in the prison alongwith the adult prisoners. Rather such a minor must be kept separately in Child Reform House as required by Section 42 of the Act so long as such a Child Reform House was not set up, minors may be temporarily entrusted to the care of Child Welfare Centres, orphanages or the like, privately run by other people.

In *Tarak Dhital & Others V. Chief District Officer of Kathmandu & Others,* [121] the Supreme Court displayed its concern and sensitivity towards exploitation and torture

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118 Sabita K. C on behalf of petitioner Prathana Rayamajhi V. Ram Bahadur Rayamajhi et. al. (Date of Decision: 2011).

119 Minor Bibek Chalise et. al. V. Satyawati Chalise et. al., NLR, 2005, Decision No. 7391.

120 Supreme Court Bulletin, Vol. 216, at 10 (1999).

121 Supreme Court Bulletin, Vol. 216, at 12 (1999).

meted out to minors and the infringement of their rights embodied in the Act Relating to Children, 1991. It is worth recalling that a few years back the national dailies caused a shocking sensation by headlining and revealing news of exploitation of a twelve year old child named Dheeraj K.C. who had been forcibly kept as a domestic servant by Madhusudan Nakarmi who used to keep the poor child all fettered in chains and locked him inside his department when he used to be out to attend his office. The Justices directed Kathmandu District Court to re-register the case kept dormant quite for some time and to give priority in disposal of that case.

In *Chandra Nath Sapkota V. Home Ministry & Others (2002)*[122] the petitioner alleged that the respondent Home Ministry had cancelled the registration of Child Awareness Group in contravention of Article 12 (2) (c) of the Constitution of the Kingdom of Nepal 1990 and Article 15(1) of the UN Convention on the Rights of the Child. 1989. Responding to the writ petition, a Division Bench observed that citizen's freedom to form union and association guaranteed by Article 12(2) (c) of the Constitution could be reasonably restricted only under laws made under proviso to that Article. Nonetheless, the State could not impose restrictions on such a freedom without making a law to that effect. The freedom of forming unions or associations was available to every Nepali citizen. And the word "citizen" mentioned in Article 12(2) did not discriminate between a minor boy and a minor girl nor did it deprive a minor of his /her right to form a union or association. Whereas Article 11 (3) of the Constitution had enjoined on the State to make special protective provisions for the protection and development of children, it was not at all proper to cancel the registration of the above mentioned Child Awareness Group, which had been already set up by the children themselves and even renewed for the promotion of the interests and welfare of children, only because its membership comprised of minors.

The declaration of the state of emergency on November 26, 2001 throughout the country result the suspension of the fundamental rights enshrined in Articles 12 (a) (b) and (d), 13(1), 15, 16, 17, 22 and 23 (except the right to the remedy of *habeas corpus*). The suspension of Article 23 (the Right to Constitutional Remedy) of the Constitution confronted the Supreme Court with a question whether the writ petitions

122 *Ibid,* 20, F.N. 230, at 6 (2000).

already filed in the Supreme Court under Article 23 before the declaration of emergency could be further proceeded with.

In *Mithilesh Kumar Singh V. the Prime Minister & Others* the petitioners challenged the Constitutionality of section 5(2) of the Labour Act, 1991 and bye-laws 3(1) and 39(1) of the Labour Rules, 1993 as violative of Article 20(2) of the Constitution of 1990 which guaranteed against the employment of any minor in any factory or mine or this engagement in any other hazardous work. A Special Bench held that the Constitution did not define the term minor but Section 2 of the labour Act, 1991, defined minor as a person who had attained the age of 14 but not crossed the age of 18. Section 17 of that Act prohibited the engagement of a minor below the age of 14 as a labourer but relaxed the provision in case of a minor having crossed 14 years of age who could be engaged in certain conditions as a labourer except between the period of 6 p.m. to 6 a.m. and not against his wishes. Hence, the learned judges held that the impugned laws were not violative of the spirit of the Right against Exploitation as guaranteed by Article 20 of the Constitution.

(ix) Regarding the Rights of Senior Citizen

In Ramsharan Varma V. Office of the Prime Minister and Council of Ministers and Others[123]*,* an appeal was filed at the Supreme Court pleading that in the absence of appropriate management as per the provisions of different international documents, the Interim Constitution of Nepal 2007 and the Senior Citizens Act 2006, senior citizens are deprived from protection of their constitutional and legal rights. The Supreme Court issued *mandamus* on April 7, 2011 confirming that the legal provision of Article 9(2) of the Act had not been implemented. The *mandamus* ordered the Office of the Prime Minister and Council of ministers to formulate rules and regulations alongwith setting up follow up mechanism to implement the constitutional and legal provisions without delay.

Advocate Chandra Kanta Gyawali V. Office of the Prime Minister and Council of Ministers and Others[124] the leading cases which advocate for the interest of senior

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123 *Ramsharan Varma V. Office of the Prime Minister and Council of Ministers* et al writ no. -0109, 2011.

124 *Advocate Chandra Kanta Gyawali V. Office of Prime Minister and Council of Ministers and Others*, Writ No. 3342, 2004.

citizens. All senior citizens aspire for safer life from the State and expecting such security and claiming or demanding the same from the nation is a matter of their judicious and perennial right. As the senior citizens are eligible right-holders of benefits from the State side, it cannot neglect them nor can overlook their legitimate rights and interests. The prohibitory clause in Article 11(3) itself has accorded recognition for the aged people as having a separate existence. Apart from these, by looking at the special facilities, concessions and treatment made available to them by the state, it is confirmed that the old belong to them by the State, it is confirmed that the old belong to a separate class. In this regard, the lack of legislation corresponding to the rights, interest and welfare of this exclusive class cannot be said as appropriate.

The old-aged people are not burden but are national assets. There could be a reciprocal relation between the State and the elderly people. The know-how, skill and abilities of the aged earned after a long experience can be utilized in the interest of the society and nation. In the same manner, by fulfilling the obligations towards these people, their remainder of life can be made respectable, blissful and secured; thereby even the old aged can be made productive and has to be employed in nation's gain. This is the task that every rational and forward -looking country has to do.

The law which creates power generates duties also. Duty is not a matter of charity. It is not a matter of discretion because duties should be such that they can be enforced through courts. Hence, even going through the statements of the respondents, it is the duty of the State to enforce such duty and to create rights for senior citizens, so law is inevitably required.

To ensure that the order issued in the present decision to formulate appropriate law for senior citizens does not meet with the same fate, to prevent this order from becoming a shred of paper dumped in the case-file, and to facilitate effective execution of these directory orders, the Court issues Order in the name of the Register of Supreme Court to adopt the some measures by duly including them in the Supreme Court Rules, 1992.

(x) Regarding the Rights of Disabled Persons

In Deepak Bhattari V. Office of the Prime Minister and Council of Ministers & Others[125]*,* the Supreme Court issued an order in which the Government was instructed to take necessary steps towards implementing welfare provisions for persons with visual impairments. Stating that it is necessary to have special provisions for persons with visual impairments, as the provisions granted to persons with disabilities in general may not address the specific requirements of persons with disabilities to visually impaired people; the Government was ordered to adopt a policy and package of providing integrated social security to them alongwith facilities such as communication and information, skill enhancing trainings, text books in braile Script, safety, health, accommodation and food, among others. The Government was also ordered to collect data of all the persons with visual impairments located throughout the Country.

In Advocate Sundarshan Subedi V. GON, Office of the Prime Minister and the Council of Ministers[126] the petitioner has made plea for the arrangement of the required scale of physical structures for disability homes and their operation, a wheel chair for the excess to all government and public offices as well as in public transport and road, and separate track road for its easy movement. Demands are made also for regular allowance for extremely disabled person and a subsistence allowance for the livelihood of his attendant. Access to education, health, employment of the disabled person and such other things are requested in the writ petition. In order to meet all these needs, if it is viable for the state only to the extent of means and resources be made available for which necessary policies be formulated.

The Supreme Court, Division Bench, comprising Justice Tahir Ali Ansari and Justice Kamal Narayan Das, observed in case, People with disability are entitled to receive extra and special care from the home and state both. Disable-friendly access to government offices and easy transportation facility has been the major issues of the day. Therefore, a writ of *mandamus* has been issued in the name of the respondents Government of Nepal, Office of the Prime Minister at the Council of Ministers, the Ministry of Women, Children and Social Welfare and Ministry of Finance directing

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125 *Deepak Bhattari et al V. Office of the Prime Minister and Council of Ministers et al*. writ no. 1310, 2010.

126 Writ No: 2012-WO-0188S.

them to carry out the essential activities as demanded by the petitioner seriously and with responsibility.

(xi) Regarding the Electoral Roll

Saroj Raj Pyakurel et al. V. Office of the Prime Minister and Council of Ministers & Others[127], it was held that only those in possession of citizenship identity card could register their names in the electoral roll. The Supreme Court said a person was required to possess a citizenship identity card to vote in elections. The petitioner argued that one did not need a citizenship identity card for casting a vote in elections as the Citizenship Regulation required that those possessing a land ownership certificate and identity cards issued by the local Government bodies, the educational and other Government owned institutions, could be included in the electoral roll. Given that the Constitution of Nepal contains a clear provision that one needs to possess citizenship to cast a vote in elections, the Supreme Court, however, decided such a political right could not be provided. The order from the court said that some points in the regulation were inconsistent with the Constitution itself and could therefore not be implemented. The order also called for the implementation of Citizenship Regulation at par with the International Covenant on Civil and Political Right (ICCPR).

(xii) Regarding Right to property

In Meera Dhungana V. Government of Nepal, Ministry of Law, Justice and Parliament Affairs and Others[128], the writ petitioner in this case demanded that the National Code under Section 16 of the chapter of partition of the ancestral property, of the National Code has provided that unmarried daughter who has attained the age of 35 years shall have to return the parental property after deducting the expenses of marriage, which is inconsistent with article 11(1)(2)(3) of the Constitution of the Kingdom of Nepal, 1990. Hence the provision of section 16 under the chapter of

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127 *Saroj Raj Pyakurel et al. V. Office of the Prime Minister and Council of Ministers.* Writ no. 267-WS-0017. February 7, 2011.

128 *Meera Dhungana V. Government of Nepal, Ministry of Law, Justice and Parliament Affairs and Others* NLR 1995, sec.6. p. 462, decision no.6013.

partition of joint family property of National Code shall have to be declared void to the extent of such inconsistency and the word 'son' mentioned in section 1 and 2 shall also have to be declared void.

The respondent on their rejoinder mentioned that if the alleged provision of civil code is declared void as per the demand of the petitioner than a condition will be created whereby an unmarried daughter will acquire property from both of her husband and father. This shall again be against the principle of equality. They have further contended that Nepalese law has not made any discrimination regarding property rights of women but the provision regarding the legal heir to the property has been made considering the social condition of both men and women.

The Supreme Court while giving its judgment said that before declaring clause 16 of the law on ancestral property (Aungsabanda) unconstitutional and making provision for the same entitlement of a daughter to partition share as that of son, the negative aspects of this change or its implication on society should also be taken into account. Such change would result in a great impact on the structure of a patriarchal society like ours, handed down from ancient times. A daughter would not be compelled to get married and go to her husband's house after marriage. Declaring clause 16 unconstitutional and making provisions entitling a daughter to get partition share from the properties of both her father and husband, whereas a son would be entitled to get partition share only from the property of his father. This will give a married daughter a greater right to partition share than a son, which will discriminate against men. This will affect the laws of the country made in regard to property rights. Hence, the Court refused to declare the alleged provision void and gave directive to then His Majesty's Government to propose an appropriate bill after the consultation with the sociologists, legal experts and NGO'S.

Though the judgment was appreciated as the landmark in the history of judicial interpretation of law it contained some regressive opinions. Supreme Court officially declared that the Nepalese society is the patriarchal society based on the Hindu values. Very regressively, it has mentioned that the property laws were tradition handed down in society from the ancient times and hence refused to change those laws. It was of the opinion that the change would invite negative effect in the society.

The unconstitutionality of clause 16 was based on the ground that it provides different treatment to son and daughter on the basis of sex. However the Supreme Court asserted that it was an outcome of the tradition of the Nepalese society and hence refused to declare the alleged provision unconstitutional. The alleged provision has provided such a situation that the women need to be deprived from the right to marriage in order to exercise the right to property. However, this serious question was unanswered by the Supreme Court and was neglected.

The driving force of change was not the greed of daughter for property of their fathers and husbands, but a common recognition of the inequality of laws existing in contradiction to the constitution. However, the Supreme Court defended the rights of sons to Aungsa as a matter of patriarchal traditions. Thus it neither protected the exclusive rights of parents to their property, nor recognized the daughter's right to equality instead upholding the sanctity of the patriarchy. However, the Supreme Court has issued a directive to then His Majesty's Government to introduce an appropriate bill within 1 year with necessary consultation with sociologists, legal experts and NGO'S.

In Prakash Mani Sharma V. Office of the Prime Minister and Council of Ministers and Others [129]*,* the writ petitioner in that case demanded that explanatory clause No. 16 of Chapter of ancestral property (Ansa Banda), National Code has provided that the property of the daughter who has already acquired the parental property shall become of that of parents after her marriage. This provision is inconsistent with the Article 11 of the Constitution of the Kingdom of Nepal 1990, Articles 15, 16 of CEDAW, Articles 16, 17 of UDHR and Article 3 of ICCPR. As this provision creates such a situation whereby a women shall have to be deprived of property rights because of exercising her right to marriage. Hence the said provision shall have to be declared void as per Article 88 of the Constitution of the Kingdom of Nepal, 1990.

The respondents in their rejoinder claimed that marriage shall create property rights in the property of her husband. Hence, if the alleged provision is declared void than

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129 *Prakash Mani Sharma V. Office of the Prime Minister and Council of Ministers and Others,* NLR*, 2006, Sec. 8, p. 931, Decision No. 7577.*

the daughter shall get property both from her husband and parents whereas the son will get property only from his parents. This will again create discrimination against men. The intention of gender equality is not to create discrimination against men. The alleged provision has not deprived women from the property rights as she shall have the property rights on her parent's property before her marriage and over the property of husband after marriage. Hence the alleged provision shall not be declared void as it can't be said that there has been discrimination between men and women.

As the alleged provision has provided that the married women shall have to return the acquired property to her parents, it has created an obstacle in the continuous exercise of the property rights of the women. Since the property acquired before the marriage shall have to be returned after the marriage it may provoke the women to spend all the properties before marriage. At the same time the parents may give pressure to the daughter for marriage as the property shall be returned to them after the marriage. This may create discrimination against the women and may be unhelpful to section 10 of the chapter of ancestral property (Aungsa Banda) and may also create the situation of discrimination as per the definition made by CEDAW in its Article 1. Hence, it deems necessary to reconsider the alleged provision in the context of Article 11 of the Constitution of the Kingdom of Nepal, 1990, Articles 1, 2,3,15 and 16 of ICCPR, and Articles 2 and 3 of ICESCR. Finally, Supreme Court issued directive to then His Majesty's Government to reconsider the provision of section 16 of the Chapter of ancestral property (Aungsa Banda) with necessary consultations with the concerned agencies and communities.

This case is also similar with the previous case of Meera Dhungana. And the judgment given by the court is also similar in many respects. Basically, the provision made by the alleged section created the situation whereby the daughter need to return the acquired parental property after her marriage. It created an option to the women whether to marry or to exercise property rights. As right to marry and right to property are two fundamental rights of the women, they should be allowed to exercise those rights without any option and choice. But the said provision has created a situation of choice. If you want to marry than you will not get the parental property is the situation created by the said provision. This has created the

discrimination between the son and daughter and also between the unmarried daughter and married daughter. But very surprisingly the court has been reluctant to declare the said provision void. However, it has issued a directive to the government to reconsider the alleged provision with necessary consultations with the concerned people. In this respect the judgment given by the court in this case is similar to the judgment in the Meera Dhungana Case. But like in the previous case the court has not declared the Nepalese Society as a patriarchal society.

Dr. Chanda Bajracharya V. HMG, Parliamentary Affairs and others,[130] The writ petitioner here claimed that section 12 of the Chapter of ancestral property (Aungsa Banda) of National Code (Muluki Ain) has made a discrimination. Section 2 of the Chapter of intestate succession (Aputali) has provided that daughter shall not get intestate succession (Aputali) until there is a son. Section 5 of the Chapter of Adoption of National Code has provided that the husband can adopt son without the consent of wife whereas Section 9(a) of this same chapter has provided that wife can't adopt daughter if the husband exists.

The court in the given case held that as the laws and rules of any country are based on the culture, tradition and values of that country, if change is to be made on the traditions which has already been accepted by the society it is necessary to consider that whether the society can adopt that change or not. If even a little condition arises which shall not match with our traditions and cultures that may disturb our social structure. The nature of issues raised by the petitioner in the given case demand consideration in the context of Article 11 of the Constitution of the Kingdom of Nepal, 1990. As certain period of time is required for doing so a directive was issued to the government to introduce appropriate bill in the legislative parliament by making necessary consultation with all the concerned persons, agencies, organizations and sociologists.

In Lily Thapa and others V. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others[131], the writ petitioner in this case claimed that the

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130 *Dr. Chanda Bajracharya V. HMG, Parliamentary Affairs and others* NLR 1996, Decision No. 6223.

131 *Lily Thapa and Others V. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others*, NLR 2006, sec. 9. p. 1054, Decision No. 7588.

provision of Section 2 of the Women's Property in the National Code is inconsistent with Articles 12(1) and 17 of the Constitution of Kingdom of Nepal, 1990 as it has provided that a separated daughter, or wife or widow can use or dispose her whole moveable property and half of her immoveable property as per her own wish, but she shall have to take the consent of her son or unmarried daughter in order to use or dispose the remaining half of her immoveable property. The petitioner argued that such provision has laid restriction to use or disposal of the women's exclusive property. The petitioner also cited that CEDAW under Article 1 has defined the term discrimination and under Articles 2 and 3 of it has provided that it shall be the responsibility of the state to amend the discriminatory laws.

The concept of ownership includes the right to control, use and apply. Property has an indispensable relationship with the ownership. The owner of the property shall have to be free in the use of the property. As unmarried daughter, wife or widow becomes the owner of the property, they become the owner of such property and the legal provision restricting the ownership cannot be enacted. It shall be against the right to equality and right to property if the consent is to be taken of somebody to use or dispose such property. If the women's property right is restricted or if the decisive role is not given to the owned property it shall restrict the women's right to property. Supreme Court declared such provision as inconsistent with Article 26 of ICCPR, Article 2 of ICESCR, Articles 1, 2, 3 and 15 of CEDAW, and Articles 12(1) and 17 of the Constitution of the Kingdom of Nepal, 1990 and hence declared void.

In Meera Kumari Dhungana V. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others[132], the petitioner in this case claimed that section 12 a of the chapter of intestate succession (Aputali) of the National Code is inconsistent with Section 11 of the Constitution of the Kingdom of Nepal as it has provided that the intestate succession (Aputali) acquired by the daughter shall have to be returned to her parents after her marriage. The petitioner argued that this provision has made such an arrangement that one shall have to be deprived from the right to parent because of her marital condition. Hence, the said provision is

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132 *Meera Dhungana V. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others,* NLR*, 2005, sec. 4. p. 377, Decision No. 7357.*

inconsistent with the Article 11 of the Constitution of the Kingdom of Nepal, 1990 which has guaranteed the right to equality. And also inconsistent with the various Articles of CEDAW including Article 1 and hence demanded that the said Article shall have to be declared void according to Article 88 of the Constitution of the Kingdom of Nepal, 1990.

The Supreme Court in this case held that right to marriage is a fundamental right of the human being. Hence the marital condition cannot be the condition for returning the Intestate Succession (aputali). This type of provision shall be against the international human rights conventions of which Nepal is a party. Intestate Succession (Aputali) is also acquired by the person because of the care and assistance done by him/her to the particular person. This kind of Intestate Succession (Aputali) if is to be returned back because of the marriage, it shall be against the law, justice and traditions. If a unmarried daughter is obliged to return Intestate Succession (Aputali) because of her marriage, it shall be a discrimination between a son and daughter. Hence the Supreme Court declared that the alleged provision is inconsistent to the Article 12 A of the Constitution of the Kingdom of Nepal, 1990 and hence declared void.

(xiii) Regarding right to marital relationship

In Sapana Pradhan Malla V. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others case, [133] *the* writ Petitioner contended that section 9 on the Chapter of Marriage under the National Code (Muluki Ain) which has the provision that husband can marry another woman or keep a woman as his spouse provided that if his spouse suffered from incurable contagious sexual disease, if the spouse is incurably unsound mind, paralyzed, blind in both eyes and has been certified by the medical board recognized by the Government of Nepal that such wife is barren. Petitioner claimed that such provision is in contrary to Articles 12, 13, 16, 18(2), 20(1) (2) and (3) of the Interim Constitution of Nepal, 2007. They further claimed that such provision is in contradiction with UDHR, ICCPR, ICESCR and Articles 1, 2, 3,4,15, 16 of CEDAW.

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133 *Sapana Pradhan Malla V. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others,* NLR 2009, sec. 8. p. 917, Decision No. 7997.

In this case the Supreme Court of Nepal held that Interim Constitution of Nepal has prescribed for equality between female and male such has provided a strong basis for gender justice whereas CEDAW has also created some obligations to the state parties. The Government of Nepal should be strongly committed towards the commitment expressed by the Constitution and the international conventions to which Nepal is a party. The Supreme Court further held that where a spouse suffers from an incurable contagious disease or is incurably unsound of mind, or is barren or is paralyzed and unable to walk and is blind in both eyes, the spouse under these circumstances requires love, assistance and cooperation and it should be the duty of the husband to fulfill certain duties. No civilized society would envisage the provision of laws where a spouse would terminate her marital relationship due to her health and being incurably sick. Supreme Court further held that Government of Nepal has shown its commitment towards formulating gender friendly laws and has also the state's policy not only to sensitize and empower women on the legal aspect but also on the economic, social and political field and therefore rather declaring the legal provisions void, the court should perform the role of catalyst and invite the state towards fulfilling commitment made therein.

Therefore, the Supreme Court issued a directive order against the Prime Minster and Council of Ministers directing the respondents to see that the provisions prescribed under section 9 and 9(a) on the Chapter of Marriage of National Code are consistent with the Interim Constitution 2007 and with the provisions prescribed in the CEDAW and to amend law and to make arrangement for appropriate laws.

(xiv) Regarding Right to Identity

In Achyut Prasad Kharel V. Office of the Prime Minister and Council of Ministers & Others[134], the writ petitioner claimed that Article 9(2) of the Constitution of the Kingdom of Nepal, 1990 provides that children who are found within the territory of Nepal and whose father has not been identified shall be granted with Nepali citizenship. Hence, a child who is born from unmarried mother shall have to be granted Nepalese citizenship. Writ Petitioner demanded that an order of mandamus

134 *Achyut Prasad Kharel V. Office of the Prime Minister and Council of Ministers & Others, NLR 2006, sec. 4. p. 512, Decision No. 7533.*

shall have to be issued in order to grant citizenship to such children.

The Supreme Court in this case held that the provision relating to citizenship has been provided by Articles 8, 9 and 10 of the Constitution of the Kingdom of Nepal, 1990. Accordingly Article 9(1) has provided that any person born at the time when his/her father was Nepalese citizen shall obtain Nepalese citizenship. Similarly Article 9(2) has provided that any child found within the territory and whose father has not been identified shall obtain Nepalese citizenship until his/her father has been identified. The same provision has also been made under clauses 3(1) and 3(4) of the Citizenship Act, 1964. The Supreme Court held that such constitutional and legal provision has accepted the principle of acquiring the citizenship on the basis of patriarchy and not on the basis of matriarchy. Hence, the child born from the unmarried women shall have to be given the citizenship until the father is identified and when the father is identified citizenship shall be granted on the basis of the nationality of the father.

Nakkali Maharjan V. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others [135], in this case Nakkali Maharjan was married with Gopal Lama and a son was born from their marital relationship. After the birth of her son, her husband disappeared. Nakkali while making a request for acquiring citizenship was denied to get citizenship, citing the reason that married women can't acquire citizenship on the name of her father. She claimed that her fundamental right to acquire citizenship has been violated. She further claimed that her right to equality, right to profess and right to freedom granted by Articles 11, 12 and 17 of the Constitution of the Kingdom of Nepal, 1990 has been violated because of the denial to grant citizenship.

In this case, the Supreme Court held that all persons shall have the right to acquire citizenship. It has further held that as per the Interim Constitution of Nepal, 2007 under its Article 8(3) and Citizenship Act, 2007 a person whose father or mother is a Nepalese citizen at the time of his/her birth shall be a Nepalese citizen. Hence, the

[135] Nakkali Maharjan V. *Government of Nepal and Office of the Prime Minister and Council of Ministers & Others,* year 2007 Writ No. 0089, Decision 2008, (unpublished).

work of Kirtipur Municipality to refuse to grant recommendation letter for citizenship on the basis of sex and marital status is void. The Supreme Court also issued the order of *Mandamus* to the Kirtipur Municipality to issue recommendation letter for citizenship certificate to the petitioner by issuing either of the her parents name**.**

In Sabina Damai V. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others[136]**,** the Supreme Court made a decision on February 27, 2011 that a person who is ineligible for Nepali citizenship as per the legal and constitutional requirement remains ineligible regardless of the period of time he/she has spent in the country. However, the court's decision said that one who attains his/her required age can can obtain citizenship if any one of his/her parents is a Nepali citizen. The Court ordered a circular to be dispatched to all 75 offices of the CDO in which it was to be stated that anyone willing to obtain citizenship by the name of his/her mother be given citizenship certificate without inquiring about their father. An appeal was filed at the Supreme Court on January 24, 2011 seeking to guarantee the right provisioned in the Interim Constitution that citizenship certificate could be obtained by using either of the parent's name. The petition was filed when Sabina Damai, who was unmarried and whose father was unknown, was denied citizenship. Deciding that the tradition of inquiring about the father at the time of issuing citizenship as an improper practice, the decision of the court also ordered the initiation of educational campaign to eradicate such practice.

In Shiva Maharjan V. District Administrative Office, Lalitpur District and Others[137], the Petitioner registers an application form for citizenship at Lalitpur District Administration Office (DAO), the application form remained pending at DAO without any reason. The Petitioner claimed right to information to know whether the citizenship as sought by the petitioner is granted or not. At this the Supreme Court issued a directive Order to the DAO to decide whether citizenship certificate will be issued to the petitioner applicant or not.

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136 *Sabina Damai et al. V. Government of Nepal and Office of the Prime Minister and Council of Ministers et al.* writ no. 2011-WS-0703.

137 *Shiva Maharjan V. District Administrative Office, Lalitpur District and Others,* 2011-WO-0122.

(xv) Regarding Family Meeting at Jail

In Janga Bahadur Singh and Others V. Office of the Prime Minister and Council of Ministers & Others, the petitioner stated that those prisoners who are inside the jail are required to follow the Jail rules and observe code of conduct. The existing laws allow only the husband and wife to engage in sexual relationship. Article 20 (2) of the Interim Constitution of Nepal 2007 provide that, every woman shall have the right to reproductive health and engage in reproduction. So the petitioner claimed that they should be provided facilities of meeting with their spouses within the jail. In this case both the petitioners are husband and wife and both are in jail. But inside the jail there is no separate room for family meeting. The Supreme Court issued an order to the respondent to conduct a study about the foreign law as practices in such issues, as based on such study if needed amendment of existing laws be made by providing facility of family meeting for the prisoners.

(xvi) Regarding the Appointment of Agni Sapkota as Minister for Information and Communication[138]

A writ was filed at the Supreme Court against the appointment of Agni Sapkota to the post of Minister for Information and Communication, who was accused of human rights violations by his involvement in extrajudicial killings and was issued arrest warrant, the petition demanded an order of *certiorari* be issued and be held that such an appointment could result in the destruction of proofs, undue influence an personnel by abusing power and position, make decisions in his favor, and victims could therefore be deprived of justice as a result of his appointment.

Referring to the unavailability of national legal provisions as to whether or not a particular parson is ineligible to hold a public post or whether or not s/he is ineligible to be appointed to a particular post, the court decided that it was not lawful to prohibit him from working. The court also ordered for the investigation into the murder case filed by Purnimaya Lama to continue according to existing law and said that the court could not remain indifferent to the supremacy of rule of law, fundamental norms and values of human rights, impunity and justice to victims. The

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138 *Sushil Pyaakurel V. PM Jhalanath Khanal,* et al. writ no. 1094, 2011.

decision also ordered that they be presented with details related to the use of influence, pressure or non-cooperation, if found any, every 15 days through the Office of the Attorney General until the finalization of the case. The order was issued to the defendant District Police Office, Kabhrepalanchok, among others, on June 21, 2011 to comply accordingly.

(xvii) Regarding Incidents of Rape Committed during the Armed Conflict

The Supreme Court was requested to issue an order in response to an incident of Rape committed by army personnel during the armed conflict in Narayan Municipality in the Dailekh district. The Court rejected the petition on 27 December, 2011[139] referring to Rape Section of the National Code and pointing out that a petition for this purpose needed to reach the court within 35 days from the day of the incident. The request was made to the court as a result of rape and torture perpetrated by the then Lieutenant Jibes Thapa, alongwith other four persons of Bhawani Box Battalion, to a women, aged 40, years of Narayan Municipality on November 23, 2004 who was alleged to be a supporter of the Maoist party.

Suntali Dhami V. Office of the Prime Minister and Council of Ministers[140], the petitioner, Suntali Dhami is a women police staff of Acham District, When she was in duty station, at that time she was gang raped by her male staff police. The Supreme Court observed the seriousness of the case and the date of limitation of 35 days to file a case against rape under section 11 of the Chapter on Rape of National Code was not allowed in this case. The directive order of Supreme Court include, for the protection of women's right the law regarding date of limitation of 35 days should be amended for justice of raped women, there should be a consultancy committee, formed to study as report on the issue. Preference for hearing in rape cases in court process be given through law.

(xviii) Regarding the civilians killed by Army during armed conflict period

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139 Concluding that 35 days deadline to resolve the disputes related to sexual violence and rape, among others, was insufficient, the Supreme Court issued an order in the name of Parliament to amend law in such a way that international standards and the gravity of crime could be addressed by the amendment. However, the order has not yet been implemented.

140 Supreme Court Order, date: 2011.

In Devi Sunar V. District Police Office, Kavrepalanchowk and Others[141] the apex court observed that after filling of the FIR against the army officials working at the Army camp Panchkhal namely, Lieutenant Colonel Babi Khatri, Captain Sunil Adhikari, Major Amrit Pun and Major Niranjan alleging them to have committed the murder of an innocent minor girl after taking her into illegal detention seeking punishment against them in accordance with Sections 1 and 13(3) of the Chapter on homicide of the National Code, and in view of the fact that the offence of homicide was included in Schedule 1 of the State Cases Act, 1992, the respondent District Police Office Kavrepalanchowk should have forwarded the case file to the District Government Attorney Office Kavrepalanchwok with its findings pursuant to section 17 of the aforesaid Act stating whether the accused should be prosecuted and after receiving the case file the Government Attorney should have made a decision, after going through the case file, wheather the charge sheet should be filed in the court. In case there was ground for going ahead with the prosecution as per Section 18 of the aforesaid Act, the Government Attorney should have prepared the charge sheet and filled it in the court on time in this regard.

It was a legal duty of the District Police Office to make effective investigation about an alleged crime in accordance with the provisions made by the State Cases Act, 1992, and to recommend for filling the charge sheet as per the law related to the particular offence, and if there was no ground for filling the case, to adopt the procedure as mentioned in the relevant Act. Besides, as the allegation about the commission of crime of homicide by some responsible officers of the Nepal Army was extremely sensitive in itself such an allegation should have been investigated with much promptness and in a responsible and effective manner.

In view of the fact that it has been clear from the observation made on page 9 of the available copy of the verdict delivered by the Military Court on 2006 that the death of Maina Sunuwar had been caused by a wrong procedure and technique adopted by Nepal Army in the course of her interrogation due to its negligence, over enthusiasm and irrationality it was in the fitness of things to conduct investigation about the incident of murder, no matter whosever official was behind that murder, to find out

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141 *Devi Sunar V. District Police Office, Kavrepalanchowk and Others*, writ No. 0641, 2007.

wheather or not the death had occurred as a result of any criminal activity and wheather or not there was merit in the case for filling the charge sheet. But instead of filling the charge sheet in accordance with the provisions of the State Cases Act, 1992 if there was merit in the case for going ahead with the act of prosecution it appeared from the facts of the case that even after lapse of such a considerable period of time no effective investigation had been made in connection with the FIR lodged on 2006. The apex court, therefore, issued an order of *Mandamus* to the respondents asking them to complete the process of investigation within three months of receiving the order.

(xix) Regarding the third gender's Rights

Sunil Babu Pant V. Government of Nepal, Office of the Prime Minister and Council of Ministers and others[142], in this case the petitioners stated that, the Petitioner are based on sexual orientation and are fighting for gender identity, being minority in number, they are denied of enjoyment of the rights guaranteed by the Constitution and international human rights laws so they are compelled to live as a second class citizen.

The Supreme Court observed that the State should recognize the existence of all natural persons including the people of third gender other then the women and men. It cannot deprive the people of third gender from enjoying the fundamental rights provided by part III of the Constitution. The gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural. When an individual identifies her/his gender identity according to the self -feelings, other individuals, society, the state or law are not the appropriate ones to decide as to what type of genital s/he should have, what kind of sexual partner s/he needs to choose and with whom s/he should have marital relationship. Rather, it is a matter falling entirely within the ambit of the right to self-determination of such an individual.

Further the Court said any provision that hurts the reputation and self-dignity as well as the liberty of an individual is not acceptable from the human rights' point of view.

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142 *Sunil Babu Pant V. Government of Nepal, Office of the Prime Minister and Council of the Minister*, writ No. 917 of the year 2008.

The fundamental rights of an individual should not be restricted on any grounds such as religion, culture, customs, values and the like. If any legal provision exists which restricts the people of third gender from enjoying fundamental rights and other human rights provided by Part III of the Constitution and international conventions relating to the human rights which Nepal has already ratified and applied as national laws, with their own identity, such provision shall be considered as arbitrary, unreasonable & discriminatory.

The law which does not allow the people to enjoy their fundamental rights and freedoms retaining their own identity may be considered as discriminatory. As provided by Section 9 of Nepal Treaty Act, 1991, the ICCPR and the ICESCR should also be considered as the national laws of Nepal, it seems to us that the LGBTI should be allowed to enjoy the rights guaranteed by Nepalese law without discrimination and with their own identity like other individuals.

Therefore, this directive order is hereby issued to the Government of Nepal to make necessary arrangements towards making appropriate law or amending existing law for ensuring the legal provisions which allow the people of different gender identity and sexual orientation in enjoying their rights as other people without any discrimination following the completion of necessary study in this regard. It is an inherent right of an adult to have marital relation with another adult with her/his free consent and according to her/his will. The same sex marriage should be viewed from the view point of interest and rights of the concerned people as well as that of the society, family and all others.

(xx) Regarding Fast Track Court:

Jyoti Paudel V. Government of Nepal, Office of the Prime Minister and the Council of Ministers[143], the petition appears to be filed pursuant to Article 32 and 107(2) of the Interim Constitution of Nepal 2007, as a Public Interest Litigation, as the petitioners Rita Devi Mahato and Sadina Khatun seem to be victim of domestic violence. As the petition is related to women's right and domestic violence against women as it can be seen as a private interest litigation and public interest litigation

[143] *Jyoti Paudel V. Government of Nepal, Office of the Prime Minister and the Council of Ministers*, Writ No. WO-0424, 2008.

both. The Petitioners Sadina Khatun and Rita Devi Mahato from among the petitioners being victims of domestic violence as their husbands pour acid upon them demanded order from the Court for the following:

a) Women are being discriminated against the provisions of Convention on the Elimination of Discrimination against Women (CEDAW) and women have been the victim of domestic violence.

b) Sadina Khatun and Rita Devi Mahato from among the petitioners, whom the acid was poured upon, went to the police asking for action, punishment against the perpetrators and compensation for them, but the police remained indifferent to them.

c) Acid was poured upon victim Sadian Kahtun, one of the victims of acid Rita Devi Mahato also lost one of her eyes, she was a symbol of hate by all, as her face was ugly and the punishment was not sufficient for the cruel crime of pouring acid.

d) Women are being victims as there lack of enough laws for legal action against those perpetrators of heinous crime like pouring acid, the petition asserts for the order requiring making of law with provision of enough punishment against the perpetrators who pour acid and for compensations for the victim women.

The main demand of the petitioner seems that women are being victims of domestic violence, physical, mental, and sexual and economic torture due to insufficient and inadequate legal provisions to punish the perpetrators, and therefore, Order including *mandamus* should be issued in accordance with Article 107(2) of the Interim Constitution of Nepal 2007 to amend or make law pursuant to section 2(b) of CEDAW.

The Supreme Court observed regarding the demand of order sought by the petitioner to make or amend laws pursuant to section 2(b) of the Convention on the Elimination of Discrimination Against Women (CEDAW), it needs to look into the provisions of CEDAW whether the government has fulfilled its commitment as a party to CEDAW with respect to protection of right and interest of Nepali women and elimination of discrimination against women.

There is primacy of treaty obligation as Section 9 of the Treaty Act, 1990 provides for that any provision of a treaty or convention of which Nepal is a party happens to be inconsistent with a provision of Nepal law, the Nepal law will not come into force to the extent of inconsistency and the provision of the treaty or convention will come into force, and whereas, our unique legal system does not have anything in the latest Act of Domestic Violence (Offence and Punishment) Act, 2010 with respect to investigation, prosecution and related issues of a complaint filed by a victim of domestic violence; and there is not an effective punishment against the perpetrator, and whereas there is no separate arrangement to settle such kinds of serious cases speedily in order to provide justice to the victim, and there is no provision for rehabilitation and relief of the victim; it seems that Nepal has not fulfilled its treaty obligation, it seems that this court, as the guardian of the fundamental right of the citizen, can issue appropriate order in the name of the government.

The District Court assumes jurisdiction also in dispensing justice from cases arising from domestic violence against women. Though section 7 of Domestic Violence (Offence and Punishment) Act, 2010 has provision of hearing such cases in a camera court (closed bench) however, its proceeding takes place in the open court and the a grieved women are barred from receiving speedy, fair and affordable justice. Hence, as far as possible, a fast track court presiding by a women judge is desirable in the cases of such nature. So was the case but the time being it would not be possible because the number of women judges is very small. If the government is to comply with its duty, a court as provided in Article 14(3) of the Constitution is required to be constituted in order to safeguard the fundamental right of women mentioned in Article 20. Women and Children are the most critical class of people. They need government patronage. All case of women victim and particularly the cases involving domestic violence against women, if tried in general court as other cases, women should feel humiliation though they may get justice despite unexpected delay. So, a separate fast track court for all criminal cases involving women and particularly the cases arising from the domestic violence shall be expedient to be formed for which the Ministry of women, children and social welfare is called upon.

To form a fast track court to hear the criminal cases involving only women requires

appropriate law. It also demands for adequate manpower, fund and physical infrastructure about which a preliminary study must be carried out. For which a 4 member committee should be formed for such study and report through difficulties may arise while implementing the recommendations furnished by that committee throughout the country at a time. To form a fast track court to hear the criminal cases involving only women requires appropriate law.

(xxi) Right to Personal Liberty & Right against Preventative Detention

In *Kalpana Subedi V. HMG and Others,*[144] *Hasta Bahadur BK V. HMG and Others,*[145] U*mesh Kumar Sah V. HMG and Others,*[146] the Supreme Court held that so long as there were not sufficient grounds to prove as to which acts of the detainee caused immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal, he could not be deprived of his precious personal liberty. For the lack of sufficient grounds the Apex Court held those detentions as illegal and violative of Art. 12 (1) of the Constitution.

In *Rameshwar Chaulagai & Others V. District Administration Office of Sindhupalchowk,*[147] a Division Bench of the Apex Court declared the detention of the petitioner as illegal because, although charged with an offence under the Arms and Ammunition Act, 1962 punishable with a maximum imprisonment of two years and a fine up to Rs. 1,200/-, he had been kept in judicial custody pending trial of his case, for more than two years and four months obviously a period longer than the one prescribed by the law even in case of his possible conviction. There are lots of many cases on Habeas Corpus in which such rights have been invoked and the Courts (The Supreme Court, Courts of of Appeal and District Courts) have upheld them litrally.

(xxii) Regarding Speedy Trial

In Government of Nepal V. Mr. Shanker Shah,[148] the Supreme Court of Nepal issued landmark decision on the meaning of the right to a speedy trial in quasi-judicial proceedings. Mr. Shanker Shah was arrested on September 21, 2008, and charged by

144 Supreme Court Bulletin, Vol. 218, at 10 (2002).
145 Supreme Court Bulletin, Vol. 213, at 18 (2000).
146 Supreme Court Bulletin, Vol. 208, at 2 (2000).
147 *Ibid*., Supreme Court Bulletin, Vol. 208, at 9.
148 Retrieved on Jan. 2013 from http://theilf.org/ilf-nepal-case-notes-nepali.

the Chief District Officer (CDO) in Janakpur with a violation of the Arms and Ammunition Act. He faced a possible sentence of three to five years and a fine. He had been detained for almost two full years without a trial.

In Nepal, detainees are guaranteed a speedy trial under the State Cases Act, the International Covenant on Civil and Political Rights (ICCPR), and the Interim Constitution. The right to a speedy trial is an essential part of any fair trial guarantee because with time, evidence is lost and memories fade. Justice delayed is justice denied.

The statutory speedy trial scheme is set forth in Nepal's State Cases Act (SCA) and Rule 14 guarantees a defendant the right to a speedy trial by requiring that courts reach a decision within 12 months of the filing of the charge sheet. SCA Rule 15 provides that the district court may seek permission for more time from the appellate court if needed. A statute permitting an extension of time, such as SCA Rule 15, is generally read to mandate that the request be made before the time limit has passed. Therefore, under Rules 14 and 15, if the district court needs more than 12 months to decide a case, it must ask the appellate court for more time before the 12 months have elapsed. Articles 9(3) and 14 (3) of ICCPR guarantee a fair and speedy trial. The Interim Constitution of Nepal 2007 under its Article 24(2)(4)(10) guarantees a right to a fair trial.

In this case, the prolonged detention of the defendant violated all these speedy trial guarantee provisions. In a lengthy decision, the Supreme Court reasserted the constitutional and statutory right to a speedy trial. While it declined to exercise its extraordinary power to grant a *habeas corpus* petition because the original detention letter was legal, it expressly criticized District Administration Officers, writing:

"Apparently quasi-judicial bodies, such as the CDO, have not paid attention to their legal obligation to the cases filed in their offices, creating a situation where the alleged defendants are detained for a prolonged time pending trial not abiding by the stipulated statutory time limitation following the stipulated procedure for a speedy and effective adjudication in accordance with law. Therefore a directive order has been issued by the

Supreme Court to the Secretary of the Home Ministry of Nepal Government to pass a circular and necessary directive alongwith an attached copy of this decision to all the District Administrative Offices to pay appropriate attention to proceedings and resolving and getting resolved all cases with a similar nature promptly and to inform this court thereafter."

The court ordered that a trial be held within one month. The court rejected the argument on the grounds that the CDO had no notice that the accused had no counsel. This issue will be pursued further because in district courts, a defendant must be appointed counsel at the time of the charge sheet. This provision does not exist in quasi-judicial proceedings. It clearly should but it also means that in a speedy trial violation in a case pending in front of the district court, the Supreme Court supports granting a *habeas corpus* petition for violation of the right to counsel. While the case of Mr. Jha was pending before the Supreme Court, ILF-Nepal was trying to assert the speedy trial rights of 21 defendants held in Chitwan under a detention order of the warden of the Chitwan National Park.

6.4 Judicial Activism and Treaty Law in Nepal

The International treaties of which Nepal is a party are treated law of Nepal. Section 9(1) of the Nepal Treaties Act 1991 reads-Where there is inconsistency of a provision of a treaty, of which His Majesty's Government or the Kingdom of Nepal is a party after ratification of or approval of or accession to is done by the Parliament, with any provision of law in force the provision of the treaty shall prevail.

In *Meera Dhungana* case on marital rape, the Supreme Court didn't hold a legal provision ineffective because of being inconsistent with international conventions. But the Court indirectly applied the provisions through liberal interpretation of legal provision. The petitioners had claimed that the provision has discriminated among married and unmarried women on the ground that the same act is considered as crime when committed against an unmarried women and not a crime when committed against a married women by her husband. The Court held rape is a heinous crime and where marital rape is not given special and clear immunity, Section 1 of Chapter of Rape of the National Code (Muluki Ain) requires interpretation in the context of

international law that is in the form of international treaties and legal principles. The Court took help of the provision of international conventions to interpret, Article 1, of CEDAW, has define discrimination against women in the sense that the differential treatment of women on the basis of their marital status also discrimination. Article 2 of the United Nations Declaration on Elimination of violence against Women *inter alia* includes rape committed within marital relation as violence against women.

Section 9 of the Treaty Act, 1991 has made clear that the referred international treaties are to be accepted as law. The position of the treaties of which Nepal is a party is superior because in case of inconsistency between the treaties and Nepal law the provisions of the treaties prevail. While constructing the meaning of rape the provisions of the treaties and spirit of the Constitution should be kept in mind.

Right to equality under the Constitution, international human rights instruments that Nepal has approved and timely changes undergone in family and criminal law to define marital rape is included in the definition of rape under the prevailing law. The writ petition was dismissed on this ground. The Court felt that there is difference in degree of seriousness of rape committed by husband and other outsider women needs special treatment in the matter of divorce and judicial separation in these case, and in certain case the degree is to be determined keeping in mind the special relation of marriage and position of the husband. The Court issued a directive order to the government to introduce a bill in the parliament to provide solution in these matters.

The Court has felt necessary to amend other legal provisions also to treat marital rape a crime instead of holding that marital rape also is a punishable crime and be dealt similarly with rape committed by outsider. The marital rape also would fall in the category of crime.

In *Suntali Dhami V. Prime Minister and Council of Minister et al a* writ petition pursuant to Article 32 and 107(2) 0f the Interim Constitution of Nepal 2007, the petitioner who was gang raped by her male college policemen requested for the issuance of the order of *mandamus* directing the Respondent to arrest the rest of the accused police officer who remain scot-free even after they were charged while the

other three rapists holding the junior post were charged and found guilty. The Supreme Court issuing an order of *mandamus* in the name of district prosecutor office, voids the decision of the office of attorney general and threw a verdict that:

Article 107(2) of the Interim Constitution of Nepal 2007 confers that the supreme court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for whom no other right has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional and legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such right or settle the dispute. As embodied in this constitutional provision, for the complete justice, this court has the jurisdiction to review any judgment done by the institution or officials.

According to the constitutional provision embodied in Article 116 of the Interim Constitution of Nepal 2007 any legal principle laid down by the Supreme Court's order or decision is binding to the Government of Nepal, to all of its public offices and the court.

In the context of the decision made by the Supreme Court full bench, it is binding to the lower bench to follow the same decision while convicting on the issue of same nature but if the subject of issue is different and the decision is per *incuvam* than the decision is not binding to the lower bench.

Till the end, the government itself defends the case on behalf of the victim. In our context the victims can't file the cases by themselves. Their value remains only as a proof. They have to depend on the crime investigator police officials or the prosecutor. If the government lawyer decided not to proceed the case any further even after the victim has filed FIR with proof then the situation arise where the victim is denied from exercising the fundamental right to justice.

Except in the situation where the provision embodied in Article 107(2), above having the right to exclude and limit the jurisdiction of court to judicial review, where there is a subject of political question, process, management and decision of parliament and the final decision by the supreme court stepping on the ground of provision embodied in the Article 107(3) of the Interim Constitution of Nepal 2007, following

the theory of writ against judiciary, in any other situation or subject the decision made by any officials of the executive can be judicially reviewed. The decision taken by the attorney general can be final decision only to the government institution. Even though the provision embodied in Article 135 of the Constitution has addressed the right of attorney general this very article cannot limit, minimize, shrunk or control the extraordinary jurisdiction of the Supreme Court.[149]

In Pro-public V. Ministry of Law and Justice, This writ petition which has been filed pursuant to Article 107(1) of the Interim Constitution of Nepal 2007 the Petitioner claimed that Section 2 of Chapter on Marriages of National Code inconsistent with the fundamental right embodied in Articles 12(1), (2) and 13(1) guaranteed by the Constitution, and requested for the order of *mandamus* to void such inconsistent law which is against the right to live with dignity, equal protection of law and freedom of opinion and expression.

Supreme Court observing that the petition does not seem contradictory with the fundamental right guaranteed by the Constitution as said by the petitioner held that;

The reason for believing to a guardian as a responsible person for the best interest of the related person is because of the family structure and interrelated social and cultural value and customs of Nepal. Joint family system has been customary especially of Nepalese society and in such family structure the role of the guardian is very important. It is observed that a guardian in a makes of as the family discipline and he/she has the right to hold responsibility on the best interest of the family members.

Whenever the subject matter of marriage arises, firstly there always comes a freedom and consensus of the related couple as the pre-condition for their marriage. In the context of male and female below 18 years of age their consensus and freedom is also the precondition, firstly followed by the permission of the guardian, secondly. the provision of section 2 of the Chapter on Marriage as the provision which is against the interest of the couple imposing any restriction in their freedom and consensus. On issues of marriage like when, how, with, whom to marry or not

[149] NLR 2012, sec. 53. p. 112, Decision No. 8541.

section 2 of Chapter on Marriage of National Code does not see to differentiate the marriageable age between the male and female of 20 years of age is indicated as the marriageable age whereas with the permission of the guardian the marriage could be held at the age of 18. So, it cannot be said that neither the right to equal protection of law embodied in Article 13(1) of the Constitution has been deprived nor the very provision has discriminated on the ground of gender.[150]

Advocate Raju P. Chapagin for Pro public V. Nepal Government Ministry of Forest, [151] the petitioner has requested for the issuance of an order of *mandamus* to protect the wildlife stepping on the ground of provision embodied in Articles 33(15) and 35(4) of Interim Constitution of Nepal 2007. Articles 26(3) or (4) of the Constitution of Nepal 1990, Wild Life Protection Act, 1958 and sections 4, 5 and 11 of National Park and Wild Life Conservation Act, 1972. The Supreme Court issuing a directive order to government observed that;

The reason behind illegal hunting of rhinos is because of illegal transportation of the skin, bone, horn tusk in the international market. For the control of such crime there should be strict law and punishment and the effective implementation of such law. The preventive measures are very important for the protection of wildlife and the reserve area. The provisions of Sections 4,5 and 11 of National Park and Wildlife Conservation Act, 1972 should be strictly followed and the implementation of those Sections can be possible only when it is restricted to enter into the national park or reserve without out obtaining an entry permit from the authorized official, prohibited completely to hunt wildlife without license, and restricted to entry into the reserve area to any unrelated person except the government persons or who have the privilege of right of way into national park or reserve.

Article 33 of interim constitution of Nepal 2007 has provided that it would be the responsibility of state to use existing natural resources including water resources of the country for the interest of the nation. So far the preservation and protection of the wildlife, the reserved area should be regularly patrolled and immediate action should be taken against the illegal trespass or illegal huntless.

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150 NLR 2012, sec. 53. p. 900, Decision No. 8628.
151 NLR 2012, sec. 53. p. 235, Decision No. 8556.

In *Gyan Rai*[152] a genuine question was raised - whether or not there can be judicial review of treaty law. In this case, a Nepalese citizen who was retired from British Army alleged that there was discrimination and wide disparity between British Citizens and Nepalese citizens in the matter of promotion, pension and other facilities. The basis of recruitment of Nepalese citizens in the British Army is a treaty concluded between Nepal, Britain and India on 9 November 1947. In the said treaty *inter alia* a treaty concluded between Britain and India on 7 November 1947 was annexed. The annexed treaty has made a provision of application of Indian Pay Code to the Nepalese citizens working in the British Army. The petitioner has claimed that the provision of treaty is adversely affecting to the Nepalese nationality and the state has filed to provide equal treatment to the citizens working in the British army..

He demanded the Court that the discriminatory treatments are based on treaty and any treaty entered by Nepal is applicable, as Nepal law and the provision be declared void on the ground of inconsistency with the Constitution. He further demanded issuing of an order to the government for making necessary legal and diplomatic efforts to provide equal treatment to the petitioner and other Nepalese citizens on the same footing. However, the Supreme Court without entering into the merit of the case held that though the provisions of treaty were applicable as Nepal Law by virtue of the Treaty Act, it did not mean that the provisions of the treaty were same as to Nepal Law in all respects. It is a different thing to become any law applicable and to test the Constitutionality of such law. The procedures and competency of parliament to approve a treaty and to enact a law are different. The provisions of treaty cannot be unilaterally altered and amended and repealed by a contracting party of the treaty as the law is enacted. So, the Constitutionality test of a law under Article 88(1) of the Constitution is not applicable to a treaty or a provision thereof. Secondly, the Court ruled that an order of a Court might be issued to discharge a legal duty of the government, whereas, the matter of treaty is subject of foreign and diplomatic relation and that comes into the domain of executive function and Court restrains itself to make any order in this mater. The issue raised by the petitioner is of a diplomatic nature that may not necessarily be solved through legal efforts.

[152] Decided on 2001/12/28.

Furthermore, the issue of any order made by a Court of any contracting party does not invalidate the provision of a treaty to be applicable in another contracting state. If any order is made that is futile, held the Court.

It is quite natural that a ruling of a Court of one country cannot alter a treaty that is concluded between two or more countries. But, there are different treatment in international law between law making treaty and contract treaty. Nepal Treaty Act has also categorized treaties into two groups in Section 9(1) and) (2) respectively. The treaties to which parliament ratifies, approves or accesses shall have superseding effect over ordinary law. Other treaty to which parliament has ratified nor accessed nor approved, and Nepal is a party of that treaty, has no such effect.

6.5 Status of implementation of Supreme Court directive orders and Human Right Cases

The law laid down by the Supreme Court is the law of the land and binds everyone. Respect for human rights lies at the heart of good governance. In a democratic society, it is the responsibility of the State to protect and promote human rights. All State institutions whether they are the police department, the army, the judiciary or civil administration have a duty to respect human rights, prevent human rights violations, and take active steps for the promotion of human rights.

The role of the police is especially significant in this respect. The police is charged with the responsibility of maintaining order and enforcing laws. Therefore, the onus of bringing those who break the law, including laws which protect people's human rights before the criminal justice system lies on the police.

Unfortunately, many a time, while discharging this duty, actions of the police conflict with human rights. Police officers are pressured to get quick results, often with unofficial guarantees that they may use any means possible to accomplish the task at hand.

However, the police as protectors of the law have both a legal duty and a moral obligation to uphold human rights standards and act strictly in accordance with the law and the spirit of our Constitution. The Constitution the supreme law of the country - entitles everyone living in Nepal to protection of their human rights. Part

III of Interim Constitution 2007, the chapter on Fundamental Rights, which is referred to as the heart of the Constitution, guarantees basic human rights to all. It pledges that the State will safeguard human rights and will protect citizens from undue invasions on their liberty, security and privacy. The Supreme Court has over the years, explained and elaborated the scope of Fundamental Rights. They have strongly opposed intrusions upon them by agents of the State, by asserting that the rights and dignity of individuals must always be upheld. The Court has laid down certain directives for law enforcement. These directives deal with various aspects of police work at the station house or cutting edge level, such as registration of a case; conduct of an investigation; carrying out of an arrest; treatment of an arrested person; grant of bail; questioning of a suspect; and protection of the rights of women, poor and the disadvantaged.

Amendment of Country Code, directive order of Supreme Court on Meera Dhungana's case, the Government of Nepal has taken into consideration and drafted the appropriate bill and submitted to the Parliament and after long discussion in parliament 11th amendment of Country Code was succeed, which covered gender issue and amendment of discriminatory provision on gender equality.

To maintain Gender Equality, Some Nepalese Law Amendment Act 2007 has been enacted for amendment of gender based discriminatory legal provision of Country Code and other Acts.

Establishment of Disable Friendly Facility, The Government of Nepal has circulated disable friendly facility in public office, hospitals, schools, vehicle for the protection and promotion of their rights.

Positive Discrimination on Employment, Civil Service Act has been amended for the increment of participation of women, janajati, madhesi, dalit, backward community and disable person.

Scholarship for Higher Education, The Government of Nepal has made special provision of scholarship for higher education for women, janajati, madhesi, dalit, backward community and disable person.

Abolition of Cultural and Social Malpractice, The Government of Nepal has

abolished the cultural practice of 'Kamlari' which subjected young, school-going-aged-girls, of Far-west and Mid-West of Nepal to work as bonded labor. Badi community; women of this community were also compelled to be engaged in sex trade for survival. The Government of Nepal has made policy for the abolition of Chhaupadi and circulated to district level authority for the effective implementation of the policy.

Reproductive Rights, The Government of Nepal has made provision of maternity leave facility to make necessary arrangements for the protection of maternity by fixing minimum period of leave for employees and developing standard for the same, by taking note of the legal provisions for the protection of maternity and international instrument for the protection of maternity and child health. Government of Nepal has made policy for the protection of reproductive rights and health.

National Human Rights Commission (NHRC), It was established in the year 2000 as a statutory body under the Human Rights Commission Act 1997. The Commission was created in response to 1991 UN-sponsored meeting of representatives of national institutions held in Paris, which laid down a detailed set of principles on the status of national institutions - commonly known as the Paris Principles.

The Interim Constitution of Nepal, 2007, elevated it to the constitutional body from the earlier statutory status. The provision of NHRC, Nepal has been mentioned Articles 131, 132 and 133 of the Interim Constitution of Federal Democratic Republic of Nepal. Primarily, the Commission is responsible for the protection, promotion, respect for and enforcement of human rights in Nepal.

It has a separate sphere of responsibilities in the constitutional legal system of the country. These responsibilities complement the responsibilities of the normal machinery of the administration of Justice, the Supreme Court, the Office of the Attorney General, the Commission for the Investigation of Abuse of Authority, and other existing executive, quasi-judicial or judicial bodies performing in the legal system of Nepal. After the appointment of new commissioners in September, 2007, the Commission has been accredited to an “A” grade status by the International Coordinating Committee of NHRIs.

Its Goal is to contribute for the enhancement of the rule of law, and protection and

promotion of human rights and peace by monitoring the effective implementation of the national laws and international human rights instruments to create an environment where justice will be imparted to the victim and, where people enjoy rights and freedom incorporated and expanded in the human rights friendly new constitution through a participatory and inclusive process.

Ending the culture of impunity: Impunity is a serious problem that the country has been facing for a long period. Lack of fear of punishment, inadequate laws, politics of power and ineffective law enforcement mechanisms are the major causes behind the persistence of the state of impunity. During the armed conflict situation, thousands of people lost their lives and millions suffered due to displacement, disappearance, and torture. The government has planned to establish the Truth and Reconciliation Commission and Peace and Reconstruction Commission to address the grievances involved and bring the perpetrators of the past human rights abuses to justice as per the CPA. The Commission plans to actively involve through the effective monitoring of activities directed to end the state of impunity.

According to an estimate approximately 13 thousand people died during the decade long violent conflict. Many more have been the victims of injury, enforced disappearances, abduction, torture, among other atrocities. The exact figure of victims such as the widows, orphans and cases of internal displacement caused by conflict is hardly available yet. In the recent days, the process of victimizing has indeed declined in figures, but not ended, even after commitment shown through CPA done between GoN and CPN (M).

Establishment of right to life, liberty and security of the people: Despite the Peace Accord between the Government of Nepal and the then rebel CPN (M) and the victory of CPN (M) in the CA election, life, liberty and security of the people are under severe threat in different parts of the country. NHRC has been frequently receiving complaints that various ethnic, criminal and armed outfits are largely involved in killing, abduction, torture, extortion, forced eviction, and disappearance in the central and eastern part of the Tarai and eastern hill region. NHRC has shown grave concern on the degrading condition of human rights violations and has frequently monitored the situation and recommended to the Government of Nepal to

restore law and order in the country.

Establishment of the truth about disappearance, internally displaced persons (IDPs) and victims of conflict and give justice to the survivors and their families: The Comprehensive Peace Accord and 23-point agreement signed between GoN and CPN (M) has mandated the NHRC to monitor the implementation status and ensure realization of enjoyment of right to acquire, own and dispose of the private property. However, NHRC is of the opinion that both the parties are found less serious in making the names and whereabouts of the missing persons. The Commission therefore asks the former conflicting parties to make public the whereabouts of these individuals and provide interim relief and compensation to the victims' families and to make the perpetrators accountable for the crimes committed. The Commission has identified seven strategic objectives and corresponding areas of interventions. Of the seven objectives, the first objective deals with the concerns of IDPs in Nepal. And strengthen the rule of law, culture of human rights and peace to end impunity and the violation of human rights. The Commission has given priority to IDP problem and included it as the first strategic objective for the protection, promotion, respect for and fulfillment of human rights of the people of Nepal. NHRC endeavors to comply and consider these values in a wide range of its activities in order to protect the rights of every individual, including those of IDPs.

National Dalit Commission: The political and social organizations of Dalit community continuously raised voice and waged peaceful movement against this situation. Considering the fact, the elected prime minister from Nepali Congress Sher Bahadur Deuba, relating the context of International Day for Elimination of all Forms of Racial Discrimination, announced the establishment of National Dalit Commission with 10 members, for the first time, under the chairmanship of Padam Singh Bishwokarma on March 19, 2002.

In accordance with the eight points' declaration and 25 years long-term planning through then parliament for the development and empowerment of Dalit, women and other backward community and class, National Dalit Commission and National Women Commission were established. With the provision of two- year's tenure for

the board, the fourth board has been formed on January 6, 2010 under the chairmanship of Bijul Kumar Bishwokarma with 16 members.

National Women Commission: National Women's Commission was established on 7th March 2002 in order to address the voices that were raised against injustice and discrimination. This Commission basically works in empowering, motivating and mobilizing women for equal justice so that they can have an independent existence. To address gender issues National Women's Commission Act 2007 and its Regulation 2009 came into place and the main objective of the commission is to protect, promote, and safeguard the interest and rights of women and upholding justice through overall development of women.

Policies and Action Plans: Different policies and action plans adopted by the Government of Nepal have directly or indirectly made an attempt to incorporate issues pertaining to the security of women. Key among the existing policies and action plans are the National Plan of Action against Gender Based Violence, the National Plan of Action on the Implementation of the Convention on the Elimination of All Kinds of Discrimination Against Women, the National Plan of Action on Gender Equality and Empowerment of Women, the Three-Year Human Rights National Action Plan and the terms of reference of the Local Peace Committees.

Three Year Human Rights National Plan of Action [2010/11 – 2012/13]: The three-year Human Rights National Plan of Action prepared by the Government of Nepal has made significant provisions for the rights of women and children. It has introduced special motivational programmes for children from the poor, deprived, marginalized and the sexual and gender minority communities who have not enrolled in schools or have dropped out from schools. Such programmes range from promoting school enrollment as well as retention; programmes for ensuring reproductive health; conducting safe motherhood and infant child care programmes; and programmes like Gender Mainstreaming and Social Inclusion (GESO). Similarly, emphasis has been given to programmes like providing scholarships to conflict-affected children, guaranteeing the inclusive, equal and meaningful participation as well as security of women at all stages of the peace process and conflict transformation; equipping women with income generating skills; making the

school environment child-friendly and gender-friendly by emphasizing on good-governance in schools; making all training programmes gender-friendly; promoting the human rights, civil rights and constitutional and legal rights for ensuring social justice of rural, marginalized and destitute women who are economically disadvantaged; and strengthening the National Women's Commission for the protection and promotion of women's rights.

Three Year National Plan - Approach Paper [2011/12 – 2013/14]: The Government of Nepal while giving continuity to the social reunion for peace, reconstruction and rehabilitation under the heading 'Peace, Rehabilitation and Inclusive Development' in the Approach Paper of the Three-year National Plan has set the objective of establishing lasting peace in the country by providing relief and reparation to the conflict-affected people as per the set standard. Under this provision it is stated that a national plan of action for the relief and rehabilitation of the conflict-affected children will be formulated and implemented. Similarly, there is a programme for institutional capacity development for effective implementation of peace, reconstruction, rehabilitation and reintegration programmes. Likewise, the objective of the Approach Paper for promoting gender equality and women's empowerment is to put an end to different types of gender-based violence and discrimination against women through social, economic and political empowerment of women from all classes and regions.

Conducting campaigns for the prevention and control of different types of violence and discrimination against women and ensuring the meaningful participation of women in conflict resolution and peace building are some of the strategies that are included in the Plan. Similarly, the plan also includes specific actions for women's empowerment, capacity building and for taking forward the sectoral gender mainstreaming and inclusion policy. It also aims to increase women's representation in every structure of the State beyond 33% by consolidating the achievements made so far in the realm of protection, promotion and practice of the political, economic and social rights of women. Likewise, it is stated that a mechanism will be developed for addressing gender-based violence by encouraging legal aid, social protection and community mobilization for the prevention and control of different forms of gender-

based violence and discrimination against women; programmes for the employment and social security for the empowerment of single women will be introduced; women's presence and role in the leadership positions of the private sector and the non-governmental sector in collaboration with these sectors will be strengthened. In this way, action plans have been devised for enabling and strengthening the role of women in the establishment of sustainable peace and development through social, economic and political empowerment of women.

National Plan of Action against Gender-Based Violence 2004 [153]: The National Plan of Action Against Gender-based Violence prepared by the Government of Nepal, Office of the Prime Minister and Council of Ministers, states that gender-based violence will be controlled and security and protection will be provided to women and children victims of violence. The plan of action has set the objectives to undertake legal and institutional reforms for ending gender-based violence, ensuring the access of persons affected by gender-based violence to justice, establishing and strengthening community-based village-level mobile services for providing protection to victims of gender violence, strengthening the health sector for effectively addressing gender-based violence, raising public awareness and promoting zero tolerance against gender violence, facilitating the economic and social empowerment of women and children for combating gender violence and ensuring coordination, communication and monitoring works among the stakeholders involved in the implementation of the plan.

National Plan of Action for the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 2004[154]: The Nepal Government's Ministry of Women, Children and Social Welfare, has issued the National Plan of Action for the Implementation of the Convention on the Elimination of All forms of Discrimination against Women, 2004. This Plan of Action specifically calls for the amendment of discriminatory laws and formulation of appropriate laws, increasing women's participation at all public, political and policy-making levels, elimination of causes related to trafficking in women and girls,

153 National Plan of Action against Gender-Based Violence, MOPOM, Nepal, 2002.

154 National Plan of Action for the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), MOWCSW, Nepal, 2002.

enhancing legal capacity for the protection of women's rights, strengthening the responsibility of the Parliament and the Parliamentary Committees for gender equality and identifying different activities for raising public awareness and information dissemination on all forms of violence against women. .

National Plan of Action on Gender Equality and Empowerment of Women 2005[155]: Nepal Government's Ministry of Women, Children and Social Welfare has adopted the National Plan of Action on Gender Equality and Empowerment of Women, 2005 for implementing the Beijing Declaration and Plan of Action passed by the Fourth World Conference on Women held in Beijing from 4-15 September, 1995. This Plan of Action has proposed different activities under the 12 critical areas of concern identified in the Beijing Declaration. Activities like protecting women from the impact of conflict, establishing access for conflict-affected women to justice and making arrangements for proper relief and rehabilitation which are included under the Article 'Women and Armed Conflict', in the Beijing Declaration, have been included in that national plan of action.

Third Five years Strategic Plan of Judiciary (2071/72-2075/76 fiscal Year)[156]: This Strategic Plan have slogan "All for justice Fast and Accessible Justice". This Strategic Plan have seven sections. The fourth section expresses how to make speedy justice procedure and make fast and accessible Justice for all, how to make monitoring mechanism of justice procedure, how to develop people's trust to judiciary, and supportive strategy. Section five, overlooks pervious decisions of Courts and the implementation status. It also made strategics for implementation of strategic plan. Section six has mention regarding the risk of implementation of strategic plan and minimization of risk factors.

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155 National Plan of Action on Gender Equality and Empowerment of Women, MOWCSW, Nepal, 2005.

156 Third Five years Strategic Plan of Judiciary (2071/72-2075/76 fiscal Year), (2014) Supreme Court, Nepal.

Chapter - VII
Finding, Conclusion and Suggestions

7.1 Findings

The Ph.D. thesis highlights a number of crucial findings about the current state of the judicial activism in the protection and promotion of human rights in Nepal. The findings of the study are put in a nutshell as follows:

- Article 107 of the Interim Constitution of Nepal, 2007 is the sole device and soul of judicial review of legislation and of administrative action. It invests the Supreme Court of Nepal with the power of superintendence over legislature, administrative agencies/bodies/authorities/tribunals/quasi-judicial bodies exercising adjudicatory powers. The nature and ambit of this power is both administrative and judicial.
- Articles 32 and 107 of the Constitution, which are only the basis of judicial review of legislation and administrative actions, envisage that any Nepali citizen can file a petition in the Supreme Court to have any law or any part thereof declare void on the ground of inconsistency with the Constitution. The Constitution does not require any more objective grounds or experiment of such law before challenging it before the court of law. The process of challenging the constitutionality of law before its real experiment is considered as an anti-democratic process.
- The Court derives the power of judicial review from not any other sources but the Constitution. So, the doctrine of judicial review applies only outside the Constitution. The Court cannot judge the constitutionality of the Constitution itself. Such problem has been settled in Indian context. But in Nepal since such question is not arisen till in the Court as the issue is yet to be seen.
- Article, 32 and 107 of the Interim Constitution confer power on Supreme Court to issue certain writs for the enforcement of the rights conferred by part III of

the Constitution or for any other purpose, as part of its general jurisdiction. Article 32 provides guaranteed remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in part III above. The Supreme Court is thus constituted as the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain petitions seeking protection against infringements of such rights on flimsy grounds. The remedial right given to the citizen to move the Supreme Court by a petition under Article 107 and to claim an appropriate writ against any constitutional infringement of fundamental right is itself a guaranteed fundamental right.

- The Constitution has incorporated the list of fundamental rights under Articles 12 to 32 of the Constitution. However, the list of fundamental rights cannot be claimed to be exhaustive. For an instance, marriage is the most intimate natural right of a man and a woman. It has not been inserted in the Constitution. This is the case of Constitutional silence.
- International Human Rights treaties basically, CEDAW , CRC, and Convention on the Rights of Persons with Disabilities enumerate very significant provisions for protection and promotion of human rights. Similarly, the Government of Nepal has also participated in several key international conferences and has endorsed the development goals and human rights principles contained in the resulting consensus documents, which include 1993 Vienna Declaration and Program of Action, 1994 ICPD, 1995 Beijing Declaration and Platform of Action. Treaty Act, 1992, provides that provisions under the international instrument to which Nepal is a state party, are equally applicable to prevailing Nepalese laws within the territory of Nepal.
- Supreme Court and other state agents have established in 2005 a "Department for Monitoring and Evaluation for the Execution of the Cases" which will look into the cases registered in accordance with Article 107(2) i.e; Cases relating to Public Interest Litigation of the Constitution. The Department has succeeded to keep only the first phase of record of the implementation of cases. There was no proper categorization of the cases in accordance with the issues and priority

to the urgent need of implementation. However, this Department is working on its agenda.

- Through the evaluation of the aforementioned cases, the state became successful in amending laws, and introducing new laws as per the interpretation of the Supreme Court whereas, in most of the cases, interpretation of Supreme Court is not properly implemented by the state in its policies.
- Looking at the number of suits brought against legislature and executive, in almost every respect judicial review has played prominent, effective as well as efficient role in Nepal. People feel safe at the hands of the judiciary in getting redress to their grievances not because the Constitution provides judicial review against legislative acts and administrative actions, but on account of the fact of the independence of judiciary which looks into the fairness of procedure followed.
- The Constitution of Nepal has made a compromise between parliamentary sovereignty and a written Constitution with a provision for judicial review, which is very much unique as compared to Constitutions of other countries. An absolute balance of powers between the different organs of government is an impracticable thing and, in practice, the final say must belong to some one of them. This is why it is judiciary in Nepal which has final say with regard to interpretation of the law and Constitution, and, this duty is performed by the Court through the power of judicial review.
- In exercising the power of judicial review, the Court has concerned with the legality of procedure followed and not with the validity of the order.
- The fundamental necessity of human beings i.e; Economic, Social and Cultural Rights seems to fall under the shadow of state obligation. The prompt and effective execution should hold of those cases whether that is of majority needs or the minority needs must address immediately. However, the fact is that either the Department for Monitoring and Evaluation or any other associate department of concerned ministry is succeeding to follow up the

implementation and keep record for transparency of good governance system. For instance, in the right to food and compensation right case of *Bajudhin Minya,* it has not been recorded elsewhere about the compensation received by the victims. Similarly, the latest development of the Ministry of Health charged by *Prakashmani Sharma* and others of Uterus Prolapsed maternity leave case, *Dil Bahadur Bishwokarma and others of chhaupadi* case, also has not been updated in the Department of Monitoring and Evaluation for the Execution of the Supreme Court's order.

- In recent years Judicial activism has entered into a new dimension in Nepal. It has been used to examine the constitutionality of law and dissolution of parliament as well as the constituent Assembly. It has been frequently used to compel the government to fulfill its commitments to uplift the weaker section of society and maintain social control and public harmony.
- Although Nepali judiciary has only a short constitutional history in respect of exercising the power of judicial activism in protection and promotion of basic human rights. The Judiciary in general and the Supreme Court in particular act as the vanguard of Constitution and the ultimate protector of citizens' rights while exercising its power to interpret the provisions of the Constitution for the protection of the citizens' rights well beyond the letter of law.
- Nepal has adopted the doctrine of separation of power as a strong measure of democratic process, by the help of which no organ of the government is allowed to encroach in the area of other organ. However, at the present context, the issue of separation of power became debatable while the Chief Justice Khilraj Regmi is the chairman of the interim election government for holding second election of Constituent Assembly.
- Now, the constitution making process has prolonged because of some vital debatable issues such as, Structure of Government, Structure of Judiciary and election process. Who will be a executive head of the state; Prime Minister or President? Which Election procedure will be followed for the election of President and Prime Minister? Structure of Federal state legislation and member of legislation, Which Election system of federal state should be

followed and how to ensure the representation of minority groups like Dalits, women, Madhesi, Janajati, Muslims and people from backward regions, How many federal state will be planned and the name and boundary of the federal state, Political rights. The last interpretation of Constitution will be given to Supreme Court or not or to the constitutional court? Who will appoint the Judges of Federal High Court? whether by Central body or federal body? Aspects of Amendment of the Constitution principle of basic structure (reservation of some provision of constitution for not amendment).

7.2 Conclusion

Human rights means rights of individuals so that all human rights are rights of individuals, whether they are civil and political rights, such as the right to life, equality before the law, and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination such rights, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, suffer discrimination on the basis of race, color, ethnicity, gender, age, language, sexual orientation, religion, political and other opinion, national, social and geographical origin, disability, property, birth or other status as established by human rights standards. All are equal before law and entitled to have equal protection of law. Therefore non-discrimination is a cross-cutting principle in international human rights law.

All people have right to participate in and access to information relating to the decision-making process that affect their lives and well beings. Today, this principle has become the accepted norms of inclusive-democracy in the world.

Right and duties are always correlated where there is duty there is right, human right entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to

respect means that State must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires State to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled to our human rights, we should also respect the human rights of others.

State and other duty-bearers are responsible for the treatment of human rights. All states are obliged to respect human rights and human dignity in accordance with the rules and procedures provided by law. Individual civil societies, the media and international community play a vital role in holding government accountable for their obligations to uphold human rights and human dignity. So, accountability and rule of law are the means to enhancing access to human rights and full realizations of human rights are the ends.

Human Rights and Fundamental Freedoms are the birth right of all Human beings. In the new emerging world order, Human Rights are the ultimate norm of politics. The issue of Human rights has assumed increased prominence and has come interdependent and mutually reinforcing. The protection of Human Rights should be accepted by all as a Universal Principle transcending all political, economic, social, cultural, legal, religious and civic systems to make it effective. The promotion and protection of human rights is a matter of priority for international community.

Respect for human rights without distinction of any kind is a rule of International Human Rights Law. Human Rights recognize the inherent dignity and fundamental freedoms of all members of human family. The equality of civilization of a country is measured by the respect it shows for the protection, promotion and implementation of human rights. In our modern justice system accused persons are not by mere charge of an offence, denuded of all the human rights and fundamental freedoms, which they otherwise possess. Now it is universally recognized in the legal and political fields that an accused have the basic freedoms and human rights even in custody.

Human Rights are based on demand for life in which the inherent dignity of human

being aspires for respect, protection and dignity. Human rights are innate individual and are of an intrinsic factor in the quality of human persons. Human Rights can be defined as those basic rights, which are inherent in our nature and without which we cannot live as a human being. Fundamental freedoms and human rights help us to develop and use our intelligence, qualities, talents and conscience to satisfy our mundane and spiritual needs by the respect of human rights. The respect for human rights and human dignity is the foundation of freedom, justice, fraternity and peace in the world.

Human rights are Universal and are applicable to all without discrimination. Human rights are sometimes called 'Natural rights', Basic rights' and 'Fundamental rights'. The Fundamental rights are recognized as the basic rights of individuals. These also promise the removal of all kinds of inequities from the lives of people.

There has been a shift in the attitude of the Indian judiciary towards socio-economic rights. Basically, the directive principles intend to promote social welfare in consonance with basic objects of the human rights which acclaim global perspective and are enforced at national level.

Nepal is a party to several International Human Rights treaties including, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognize numerous rights. In addition, Elimination of All Forms of Discrimination against Women (CEDAW) and the United Nations Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities enumerate very significant provisions of basic human rights. Treaty Act 1992 provides that provisions under the international instruments to which Nepal is a state party, are equally applicable to prevailing Nepalese laws within the territory of Nepal. As a result, the Government of Nepal addresses the reproductive health issues through a variety of complementary and sometimes, contradictory laws and policies. The manner in which these issues are addressed reflects a government's commitment to advancing basic human rights.

Nepal acceded to the Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment on 14 May 1991. The domestic law addressing the question of torture is limited to the Torture Compensation Act 1996. This law however fails to meet normative standards to prevent torture. The main objective is to compensate torture victims in a very limited way, not prosecute the perpetrators.

Article, 26 of the 2007 Interim Constitution of Nepal guarantees the right to be free from torture and mandates that torture should be punishable by law.

Nepal had suffered 10 years long conflict. During conflict period, lots of human rights violation occurred. People were displaced, disappeared, killed and women and girls were victimized of sexual violence from both the security force and Maoist. The decade-long armed conflict which began in 1996 came to a formal conclusion on November 21, 2006 with the signing of the CPA between the then rebel CPN-Maoist and the Government of Nepal. The April 2006 peaceful revolution proved that people are the sole harbinger of change and they are the source of political power. This has been further recognized by the adoption of a new constitution in 2007. That Interim Constitution of Nepal, 2007 is the turning point in terms of declaring and guaranteeing a comprehensive bill of fundamental rights to the Nepalese people. However, the human rights situation of the country did not improve as expected even during seven years since the signing of the CPA.

The 601-member CA, which was elected on 10 April 2008, was mandated to complete the task of constitution-writing in two years, but due to sharp political polarization, especially over the power, and lack of deliberations on the statute the parties failed to get anywhere closer to preparing even a preliminary draft although a number of issues related to the constitution had been settled. The House that doubled as legislature parliament amended the Interim Constitution and extended the deadline four times.

On November 25, 2011, giving its final verdict on a writ petition challenging repeated extension of the CA's tenure, the Supreme Court stated that the CA's term could be extended only one more time and that the Assembly will be defunct if the constitution is not promulgated within the extended term. On May 22, 2011, the government registered 13th constitution amendment bill in the parliament to pave the

way for three-month extension of the term of the Constituent Assembly irrespective of the apex court's November 25, 2011 verdict. However, responding the writ petitions filed against the government move, the Court on May 24, 2012 issued a ruling to the government, asking it not to proceed with its decision to extend the term of the CA that ended the possibility of the CA term extension. Prime Minister *Dr. Baburam Bhatarai* announced dissolution of the CA just 15 minutes before its deadline on May 27, 2012 just before midnight without delivering the new constitution after witnessing four years of political bickering and brinkmanship leaving no options ahead.

After that, the Interim Election Government was formed on March 13, 2013, headed by *Chief Justice Khil Raj Regmi,* who announced November 19, 2013, as the date for holding fresh Constituent Assembly (CA) elections. An agreement signed between the leaders of Nepal's four main political parties to that effect said *Regmi* will have an 11-member Cabinet and the interim government will hold elections earliest by June 21.2013. *Regmi* will set aside his court duties but will return as chief justice when his tenure leading the government ends. His title was chairman of the interim election government. The priority and the main task of that government had to hold elections.

Although, Nepal has adopted the doctrine of separation of power as a strong measure of democratic process, by the help of which no organ of the government is allowed to encroach in the area of other organ. It has been observed that the issue of separation of power became debatable as our Supreme Court Chief Justice *Khilraj Regmi* was the chairman of the interim election government. The election Government has successfully accomplished the Constituent Assembly election within the deadline given and Mr Khil Raj Regmi handed over the government to the new elected government headed by Prime Minister Mr. Sushil Koirala. The new CA pursuant the work of Constitution making from the using a point, which it was stopped in the previous CA. However, to enact of new Constitution few basic issues which were debatable between the political parties needed further nourishment. The government is trying to cope the issues and make consensus between diverse agenda. The second elected CA has been contributing for enactment of a new Constitution with full

consensus of all the political parties. Though, the Constitution making process has prolonged because of various debatable issues still remained the resolved on the structure of State, form of government, system of election, and the structure of judiciary.

The role played by the Indian and American judiciary, in particular, in the area of judicial activism so as to protect and promote the basic human rights of individuals and basic needs of the society by exercising judicial review as a tool to achieve the goal has been a sound theoretical basis for Nepal's experiment with judicial review and judicial activism to protect and promote the basic human rights are practicing and emerge day by day.

Judicial activism is usually considered to have begun with the assertion by John Marshal, Chief Justice of the United States, in Marbury v. Madision in 1803, of the power of the Supreme Court to invalidate legislation enacted by Congress. The Supreme Court of the USA through this case first claimed that it had the power to review legislative decisions against constitutional standards. The court argued that since the Constitution provides that the Constitution shall be the supreme law of the land, the Courts in general, and the Supreme Court in the end, must have power to declare statutes void that offend that Constitution.

In order to secure social, economic and political justice or to ensure liberty of thought, expression, belief, faith and worship or to establish equality of status and opportunity to all its citizens, it is essential that limitations should be prescribed upon the agencies of government so as to protect basic liberties against excessive social control or legislative and executive despotism and also to secure justice and equality. In this connection some authority must be given the power to uphold the Constitution and principles enshrined therein to enforce them effectively so as to secure compliance with them and punishments for their violation. The agency under the Constitution which has been vested with the power and authority to uphold and enforce the Constitution is predominantly the Court and its power of judicial review.

It is the duty of judiciary to ensure that all the laws are in conformity with the provisions of the Constitution. The power to scrutinize laws and executive actions

and to test their conformity with the Constitution and to strike them down, if they are found to be inconsistent with it, is generally described as the power of judicial review. For the effective use of this power, the judiciary must be independent, impartial and competent. It would not be otherwise to state that the system of judicial review requires the judiciary with these stated basic characteristics.

In a rule of law, no member of the executive can interfere with the liberty or property of an individual except on the condition that he can support the legality of his action before a Court of law/justice. The Constitution of Nepal has incorporated this principle in three specific provisions which say that (a) no person shall be deprived of his life and personal liberty except in accordance with law; (b) no tax shall be levied or collected except by the authority of law; and (c) no person shall be deprived of his property save by the authority of law. And, these basic principles of the Constitution can be maintained and upheld by the system of judicial review.

Court's activist tendency is not out of criticism. Basically those who are in favor of judicial restraint, criticized judicial activism using various terms i.e., ' judicial populism', 'over activism', 'judicial heroics', 'expansionism', and 'despotism'. Still the critics of the judicial activism do not remain silent. They charged the judiciary being over active and also argue that the exuberance of judicial activism claiming monopoly over justice dispensation by heroic extension of remedies, will only lead to judicial despotism allowing individual philosophies to dominate the adjudicatory system. Not only that, it is also alleged; the over activism is not only undermining the people's faith in judicial institutions, but also causing internal antagonism within the courts. To this, the activists react by calling the legalists as 'judicial feudalists', 'judicial terrorists', 'forensic colonialists' and so on.

Judicial activism and restraint in judicial behavior are two mutually exclusive alternatives. On the contrary, they are the two poles of wide purview of possible judicial behavior. The court exercises restraint when it accepts the policies of other decision makers. In this light ' judicial (self) restraint' is often termed as 'judicial conservatism' - not political conservatism, but a conservative view of the nature of the judicial process. Advocates of judicial restraint believe that the courts should interpret law rather than make law. Because the justices are not elected and the

Supreme Court is not a democratic organ, proponents of restraint fell that members of court should not exercise their values and attitudes in decision making.

It is common that modern democratic Constitutions incorporate the mechanism of checks and balances with the principle of separation of powers. Such mechanism may or may not be efficient, this is a separate question, but there are ample measures within a constitution for the restriction of court power. In general the ways of imposing restraints upon judiciary are: (i) Restraints imposed by congress (ii) Restraints imposed by executive, and (iii) Restraints imposed by the court itself or self restraint.

Judicial Activism is a concept inspired and shaped by many factors. These factors may be both subjective and objective. The factors which contribute for judicial activism are;

Socio-Economic and Political Condition

Socio-economic and political conditions of any society plays a dominant role for the application of law. Activist judges accepting the humanist ideology of the constitution is the need of the time. Social Activism of the justices has to operate to fight the menace of the epoch- tyrannies of religious and political majority. In this direction, US Supreme Court, apart from the historical decision *Marbury V. Madision,* delivered many striking decisions- *Powell V. Alabama, West Virginia Board of Education V. BarnetleBrown V. Board of education, Mirinda V. Arizona, and Nixon V. Herdon.*

These decisions not only reflected courts activist tendency, also guaranteed US citizen's Socio-Political and Civil rights. Likewise, the Indian constitution, in its preamble clearly has set its objective to secure to its entire citizen - social- economic and political justice. In the same way, the Constitution of the Kingdom of Nepal 1990 has incorporated the objective of securing to the Nepalese people social, political and economic justice long into the future. Not only that Indian supreme court has completed a long and courageous journey to that direction adopting the activist working style. Nepal also is on the threshold, and stepping ahead very cautiously. Nepalese leading cases relating to judicial activism at different period:

During 1954 to 1989 period; landmark decision of the Apex Court in *Bed Krishna Shrestha v. Secretary, Department of Industry, Commerce, Food and Civil Supplies* is considered as first case in the judicial history of Nepal where the Court, for the first time, asserted the power of judicial review. In *Pitamber Prasad Mudwari v. Riddi Bikram* and *Bishwashwor Prasad Koirala v. Prime Minister of Nepal Government* and others are the leading case of judicial activism of administrative action in Nepal.

Similarly, in *Gajendra Bahadur Pradhananga v. Attorney General Shambhu Prasad Gyanwali*, the Court elaborating the scope of judicial review as was set in the previous judgments interpreting the significance of judicial review. Case on *Uttam Shamsher and Other v. Commissioner of Public Service*, *Mukti Sharma v. S.P. Tek Bahadur Rayamajhi and Others and Chiranjibilal Marwadi v. S.P. Tek Bahadur Rayamajhi case,* are other landmark decisions of that period.

In the Period of 1990 to 2013; some leading cases such as; *Chaitanya Brahmachari v. HMG and Others,* the Supreme Court to protect the personal liberty, a valuable right of any person, held the Court. *Amber Bahadur Gurung v. Tribhuvan Viman Security Guard Office, Kathmandu and Others* was one of the land marked cases delivered by the Court in post 1990 Constitutional development. *Iman Singh Gurung v. Secretariat, Council of Ministers and Others*, was land mark verdict of the Supreme Court on the development of judicial review of legislation. *Mana Bahadur Bishwokarma v. His Majesty's Government, Ministry of law, Justice and Parliamentary Affairs and Others,* was another landmark case decided by the Supreme Court after the reinstatement of democracy. In *Yogi Narharinath and Others v. PM Girija Prasad Koirala and Others* this exercise of power of judicial review helped to protect directive principles and state policies.

In this way it is hoped by all that the courts can serve as a source of power for those who are too weak to exercise the right provided by the constitution. But all these depend on the political philosophy of the judges, their feeling for democratic life, and their willingness to risk controversy. Apart from this, it is equally remarkable that the constitutional mandate to the judges is that while discharging their duties they should keep in view the objectives which the constitution seeks to protect, promote and

provide as embodied in the law.

Rule of Law

Judicial Activism and Rule of Law are close concepts. Rule of Law is a concept which aims to protect individual liberty limiting arbitrary power of the government within the prescribed legal framework. Dicey's concept on rule of law got strong support in the field of law and justice, side by side his concept got remarkable modifications also. Likewise European Convention on Human Rights (1950) emphasized that European Countries have a common heritage of political traditions, ideals, freedom and the rule of law and sought to create machinery for protecting certain human rights.

Similarly Delhi Congress of the International Commission of Jurists, held at in 1959 formally declared that the rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. The commonwealth meeting held at Harare in 1991 also expressed the support for the rule of law. It linked the rule of law, the independence of judiciary and the protection of human rights with democratic processes and institutions. Besides these institutional efforts made in favour of the rule of law, different legal scholars have contributed a lot for the positive development of the rule of law.

Rule of law has been recognized as the cornerstone of democratic principle. Most of the constitutions of the modern world are the manifestations of the rule of law. That is the reason, it is also claimed that modern governments are the ' government by law and not by men. Judicial Activism in this context is a possible peaceful means to solve the problem.

The judiciary in Nepal, after the restoration of multiparty democratic system, the then incorporated Constitution in 1990 had posited the supreme court as an effective component of the state mechanism that had role test the constitutionality of the executive as well as legislative actions. In these context, human rights activists had intensively campaigned in order to reform the discriminatory provisions of the existing laws through the instrument of public interest litigation against the government before the Supreme Court. In some cases judiciary has played vital role

to some extent of judicial activism.

Right to Equality Issues, in *Meera Dhungana and others* The petitioners challenged clause (1) of Section 1 of the Chapter on Husband and Wife of the National Code (Muluki Ain 1963) which allowed the husband to seek dissolution of conjugal relation 'if it is certified by a medical board recognized by His Majesty's Government that no child was born within 10 years of the marriage due to infertility of the wife'. The court found the impugned provision was discriminatory against women and inconsistent with the principle of equality enshrined in Article 11 of the 1990 Constitution and International Human Rights Instruments and declared it *ultra vires*. *Rama Panta Kherel and others, Sapana Pradhan Malla and Others, Jeet Kumari Pangani (Neupane) and others are the landmark* decisions regarding right to equality. The Supreme Court of Nepal has constantly spoken in favour of the right to equality.

On Right to Employment issues, in *Sita Singh Poudel v. Public Service Commission* this was one of the judgments delivered by the Supreme Court of Nepal responding to the CEDAW. In *Reena Bajracharya* the Court found that the petitioners are in same position to their male counterparts and the legal provision contrary to gender equity and inconsistent with the Constitutional provision and held void *ab initio. Prem Bahadur Khadka v. Office of Prime Minister and Council of Ministers, Government of Nepal and Others, i*n *Sabin Shrestha & Others v. Ministry of Labour & Transport Management & Others, the Court* observed that the states parties must remain sensitive to make measures for the elimination of the problem of employment and ensure the right to employment to every individual immediately.

On Cultural Rights issues, *Som Prasad Paneru and Others*' case the majority Justices in this case issued a directive order in the name of the respondents needed to be stopped, Kamlari' as bonded labor. ***Tek Tamrakar and Others*** Women of Badi community were compelled to be engaged in sex trade for survival, the Court held Section 4(1) of the vital Registration Act, 1976 which required that the notice of birth to be given "from among male" as inconsistent with Art 11 of the Constitution. Court declared that "the Badi people are vested with the right to live an honorable life.

On Reproductive Rights issues, *Annapurna Rana V. Kathmandu District Court,* the

Supreme Court delivered its landmark decision in favor of the petitioner. The Court invalidated "Virginity Test Order' relying on the ground that the order violated constitutionally guaranteed right to privacy . *In Sarmila Parajuli for Pro Public v. HMG,* the Supreme Court issued a directive order to the Government to enact a comprehensive legislation in order to ensure women's right to freedom from sexual harassment in work places and public places as well. *In Laxmi Dhikta and others v. Government of Nepal* the Supreme Court of Nepal ruled that the government should make abortion accessible by setting up a fund for poor and rural women and investing resources to meet the demand for safe abortion services. *Dil Bahadur Bishwokarma v. HMG Office of Prime Minister and Council of Ministers and Others,* the Supreme Court issued *mandamus* to the government to take pro-active intervention including the creation of awareness to eliminate *chhaupadi* tradition from society. *Prakash Mani Sharma and Others v GON, Office of Prime Minister and Council of Ministers and Others*, concerning the women suffering from the problem of uterus prolapsed, the Supreme Court issued a directive order in the name of the Government to draft a Bill and submit it before the Legislature-Parliament as soon as possible and also issued an order of *mandamus.*

Dalit Rights (untouchablity) issues, in *Mohan Kumar Karna & Others.* v. *Ministry of Education and Sports*, the Court observed that books were being provided to students in these schools and that free education of the students from families below poverty line and from Dalits, ethnic communities and girl students upto lower secondary and secondary level was be considerd implemented. *Mohan Sashanker v. GoN, Prime Minister and Council of Ministers & Others,* the restrictions as discriminatory and monopoly which was inconsistent with the right against untouchability and racial discrimination, the right to religion and the right to social justice. *Kamanand Ram and Others v. HMG and Others,* the Supreme Court issued a directive order to the respondents instructing them to always remain active and alert in carrying out their legal obligations in this regard.

Right to Food issues, mass starvation has come to the court at least two times; in pre-2007 *Madhav Kumar Basnet v. Prime Minister& Others,* and in 2008 in *Prakash Mani Sharma & Others.* v. *Government of Nepal,* the Supreme Court issued an

interim order recognising every citizen's fundamental right to live with human dignity order the respondent authorities to immediately transport and supply foodstuff in affected districts.

Child Rights issues, in *Tilottam Paudel v. Ministry of Home and Others case,* the Supreme Court established a progressive principle in favour of children opening that the right to organization has been ensured, Similarly, in *Advocate Raju Prasad Chapagain and Others, v. Office of the Prime and Council of Ministers and Others* the Supreme Court issued an order in the name of the respondents to establish an effective mechanism to enact laws, to develop legal instrument and implement them in order to prevent physical or mental torture or misbehavior against children. In *Tarak Dhital & Others v. Chief District Officer of Kathmandu & Others,* the Supreme Court displayed its concern and sensitivity towards exploitation and torture meted out to minors and the infringement of their rights embodied in the Act Relating to Children, 1991.

Rights of Senior Citizens issues, i*n Ramsharan Varma v. Office of the Prime Minister and Council of Ministers and Others case, the* senior citizens are deprived from protection of their constitutional and legal rights, so the Supreme Court issued *mandamus* for implementation of constitutional and legal provisions without delay. *Advocate Chandra Kanta Gyawali VS Office of the Prime Minister and Council of Ministers and Others* the leading cases which advocate for the interest of senior citizens.

Rights of Disabled Persons issues, *in Deepak Bhattari v. Office of the Prime Minister and Council of Ministers & Others,* in this case the Supreme Court issued an order in which the Government was instructed to take necessary steps towards implementing welfare provisions for persons with visual impairments. *In Advocate Sundarshan Subedi v. GON, Office of the Prime Minister and the Council of Ministers, the Supreme Court observed,* people with disability are entitled to receive extra and special care from the home and state both. Disable-friendly access to government offices and easy transportation facility has been the major issues of the day.

Right to property issues, *in Sani Tandukar v. Manilal Tandukar,* the court held that

the right of unmarried women to joint family property under Section 16 of the National Code (Muluki Ain) Section of Inheritance Property (Aungsa Banda) entitles them to the same protection afforded to other co- parceners. Similarly, *in Bhisma Kumari Maharjan v. Asha Lal Maharjan,* is a landmark judgment of the Supreme Court in which, the Court took an innovative approach for the interpretation of Inheritance Property (Aungsa Banda) Law. *In Meera Dhungana v. Government of Nepal, Ministry of Law, Justice and Parliament Affairs and Others* the Court refused to declare the alleged provision void and gave directive to then His Majesty's Government to propose an appropriate bill after the consultation with the sociologists, legal experts and NGO's.

Right to identity issues, in *Achyut Prasad Kharel v. Office of the Prime Minister and Council of Ministers & Others,* the Supreme Court issued an order, the child born from the unmarried women shall have to be given the citizenship until the father is identified and when the father is identified citizenship shall be granted on the basis of the nationality of the father.*Nakkali Maharjan v. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others,* the Supreme Court also issued the order of *Mandamus* to the Kirtipur Municipality to issue recommendation letter for citizenship certificate to the petitioner by issuing either of the her parents name. *In Sabina Damai v. Government of Nepal and Office of the Prime Minister and Council of Ministers & Others,* the Court ordered a circular to be dispatched to all 75 offices of the CDO in which it was stated that anyone wishing to obtain citizenship by the name of his/her mother be given citizenship certificate without inquiring about their father.

Issue of Rape Committed during the Armed Conflict, in *Suntali Dhami VS Office of the Prime Minister and Council of Ministers* the directive order of Supreme Court for regarding date of limitation of 35 days should be amended for justice of raped women, there should be a consultancy committee, formed to study as report on the issue.

Third gender's Rights issue, *Sunil Babu Pant vs Government of Nepal, Office of the Prime Minister and Council of Ministers and others,* the Supreme Court, issued an order to the Government of Nepal to make necessary arrangements towards making

appropriate law or amending existing law for ensuring the legal provisions which allow the people of different gender identity and sexual orientation in enjoying their rights.

Regarding Fast Track Court issues, *Jyoti Paudel v. Government of Nepal, Office of the Prime Minister and the Council of Ministers* To form a fast track court to hear the criminal cases involving only women requires appropriate law, a time. Therefore, a directive order hereby issued, so as to implement in due course of time.

The judges have to play constructive role where they can take initiation for the elimination of gender discrimination, caste discrimination, disability rights, and child rights violation through abrogating the traditional social baggage.

The evolution of the concept of fundamental rights in Nepal is rather a delayed phenomenon. During the 104-year long absolute dynastic rule of the Ranas, there was no scope for recognition of the rights of the Nepalese people. However, it is a historical irony that the concept of fundamental rights in Nepal started with the promulgation of the *Government of Nepal Act, 1948,* the first- ever constitutional document of Nepal which was granted by none other the then Rana Prime Minister-Padma Shamsher. It is a different matter that Constitution could not be enforced.

It was only after Nepal's tryst with democracy in 1951 that the avenues for the realization of the fundamental freedoms and liberties of the Nepalese people could be opened. The promulgation of the Interim Government of Nepal Act, 1951 and the Constitution of the Kingdom of Nepal, 1959, which can be treated as the Constitutional milestones in the political history of Nepal, marked important stages in the development of fundamental rights. However, the political coup staged by late King Mahendra put the evolution of fundamental rights in the reverse gear.

It look the Nepalese people thirty-years of constant struggle and countless sacrifices to dismantle the authoritarian Panchyat rule and restore democracy in Nepal through the historic people's revolution of 1990. The Constitution of the Kingdom of Nepal 1990, an outcome of tripartite agreement between the King, Nepali Congress and the Leftist Alliance, is by far most democratic Constitution Nepal has ever had. It carries an elaborate and comprehensive statement of fundamental rights as well as the provision for the right to Constitutional remedies.

Article 88 of the 1990 Constitution and Article 107 of the present Interim Constitution of 2007 vested the exclusive power of judicial review in the judiciary. The judiciary with this power can examine the constitutionality of a legislative Act and administrative action and declare null and void to the extent that the Act or action is contrary to the Constitution.

The Constitution of Nepal has made a compromise between parliamentary sovereignty and a written Constitution with a provision for judicial review, which is very much unique as compared to Constitutions of other countries. An absolute balance of power between the different organs of government is an impracticable thing and in practice, the final say must belong to some one of them.

Interim Constitution of Nepal, 2007 has provided enormous powers to the Supreme Court. On the basis of which, there are greater possibilities of playing activist role by the Supreme Court. That is the reason, it is also pronounced that, present constitution emphasizes on judicial supremacy. Article 107 of the Constitution incorporates both the techniques of judicial activism i.e., judicial review and public interest litigation. In the same manner, Article 100 facilitates the court and other judicial institutions to exercise power relating to justice in accordance with the provisions of the Constitution, the laws and the recognized principles of justice.

The Constitution not only provided the jurisdiction to the Supreme Court. It also makes provisions in order to maintain independence of the judiciary. For that purpose Article 102(3) states; the Supreme Court shall be a court of record. It may initiate proceedings and impose punishment in accordance with the law for contempt of itself and of its subordinate courts or judicial institutions. Courts are also provided roles to solve the debates that arise while implementing the policies. If one looks into the present situation of Nepal, the Judiciary, it seems, has attempted to outline transitional justice even in the absence of clear policies of the Executive and Legislature Parliament.

Although the Interim Constitution and the Comprehensive Peace Agreement (CPA), among others, refer to the adoption of measures to implement a transitional justice framework, no mechanisms or bodies are formed, yet as stipulated. The Supreme Court has operated effectively at a time when law enforcement agencies are in a

dilemma as to whether or not cases of human rights violations committed during the conflict can be addressed with the assistance of already available criminal justice related mechanisms.

The Judiciary took some praiseworthy steps towards promoting the rule of law by ending the situation of impunity and towards protecting and respecting human rights. The Supreme Court issued remarkable orders regarding issues such as Right to equality, Property right, Reproductive Rights, citizenship, the end of impunity, inclusion in state mechanisms, untouchability, rights of the senior citizens, education, health, the right to employment, impartial investigation of the incidents which occurred during the armed conflict, electoral roll, among others.

Impartiality, independence and capability are the backbone of judicial process. Access to justice together with the delivery of an impartial and prompt hearing of the courts prospers the belief of the citizenry in effective judicial process. For the independent functioning of any authority, no outside pressure or interference should be felt.

The concept of judicial independence is directly linked to the rule of law and democracy. In order to maintain a practical democratic system and rule of law, judicial bodies must be kept independent from the Executive, Legislature Parliament and the other bodies and authorities of the state.

The policies for transitional justice are determined by the Executive and Legislature Parliament normally. Courts are also provided roles to solve the debates that arise while implementing the policies. If we look into the present situation in Nepal, the Judiciary, it seems, has attempted to outline transitional justice even in the absence of clear policies of the Executive and Legislature Parliament. Even in the absence of legislation, the Supreme Court of Nepal seems to have contributed, through its verdicts, to addressing violations of human rights committed during the conflict.

The Supreme Court has operated effectively at a time when law enforcement agency are in a dilemma as to whether or not cases of human rights violations committed during the conflict can be addressed with the assistance of already available criminal justice related mechanisms. Supreme Court issued an order to proceed with the

process and stated that one should not be deprived of utilizing the existing legal processes, even if the case should have been the responsibility of the would -be-formed Truth and Reconciliation Commission.

Court has a crucial role to play in establishing and promoting the rule of law in the country. A judiciary exists in every country as an institution and national mechanism which delivers justice to the people. Courts, as judicial institutions, resolve disputes in addition to providing justice by protecting people's rights. Court has a fundamental role to play in establishing the rule of law and in making the Government accountable to the people. So, courts are in a significant position to protect and promote human rights.

Protecting the human rights is the paramount duty of the Supreme Court and other bodies of the State. The Supreme Court has the constitutional responsibility in the protection and promotion of human rights and cannot deviate from its duty. Cooperating with the judiciary is helpful towards implementing the decisions of the courts and working continuously towards the establishment of its independence and impartiality are the responsibilities of the other two organs of the state, the executive and Legislative.

The Courts are at the center of granting justice equally amongst the people. Courts must deliver equal and impartial justice to all based on national and internationally accepted principles. Courts remain active in carrying out legal practice based on the norm of an independent judiciary rather than on the basis of political affiliation or political ideology. It is necessary now to minimize possible political interference with the operation of the courts and to appoint capable and impartial figures in the longstanding vacant posts as the Justices as soon as possible for creating an environment conducive to fair and impartial adjudication.

The Supreme Court has laid down certain directives for law enforcement. These directives deal with various aspects of police work at the station house or cutting edge level, such as registration of a case; conduct of an investigation; carrying out of an arrest; treatment of an arrested person; grant of bail; questioning of a suspect; and protection of the rights of women, poor and the disadvantaged.

With the directive order of Supreme Court, the Government of Nepal, has made different plans and policies so far in the sector of health and reproductive health, education, employment, increment in the participation of women, madhesi, janajati, dalit, backward community and disabled people in civil service through the reservation and through the quota system in politics. The Government of Nepal has abolished the cultural practice malpractices as well.

Similarly, National Human Rights Commission, National Women Commission, National Dalit Commission and Federation of indigenous people has been established for the protection and Promotion of human Rights.

7.3 Suggestions

On the basis of the study and findings, the researcher would like to give suggestion as follows:

- There must be effective Monitoring implementing mechanism for evaluation of the implementation of the cases. And associating agents or the departments must update their progress to the central department periodically. The central department also must have effective guidelines and procedural mechanism to look over the acts of the state agents in relation to the implementation of the cases. The other state agents must have the chain of working relation with the Department of Monitoring and Evaluation for the Execution of Cases.
- The academicians, researchers, judges, lawyers must give priority to conduct research on the execution part of the cases rather than just interpreting the words of the constitution, laws and the conventions and briefing the details of the cases.
- The technology is a very helpful tool for the development and reform of legal system. The traditional method of case management, case analysis and Court practice cannot give sufficient input in the inevitable necessity of modern judicial administration. Therefore, it is equally essential in our context to develop a new jurimetrics system in the Court practice.

- In many countries the process of direct public participation for the resolution of disputes has been recognized as inevitable content. England has developed the Jury System. The Apex Court or Constitutional Bench/ Court to be set up within or outside the hierarchy of general Courts, which should be confined with the jurisdiction of Constitutional issues.
- The Court interpreting a Constitution often encounters vague language and abstract principles whose application in a particular case is uncertain. The Court should apply liberal as well as dynamic interpretation. So far as the scope of interpretation is concerned, it depends on the nature of a Constitution and of a case.
- Judiciary needs to undertake judicial activism to protect citizen's rights as and when required. Subject to the constitutional provisions, some questions are yet to be responded analytically and researchfully in Nepal. They include: is judicial activism good idea? Has Nepalese judiciary assessed the system in line with the intention of the Constitution? How Nepalese judiciary assessed to protect and promote the basic human rights of people? These are a few but moot questions concerning with the system of judicial activism, which need to be critically and duly studied, analyzed and responded.
- The state seems to be more successful in amending laws, and introducing new laws as per the interpretation of the Supreme Court, but the limitation of the fundamental rights of people particularly, Economic, Social and Cultural Rights seems to fall under the shadow of state obligation. So it is a misery to see such implementation and keeping record of transparency, good governance. For instance, in the right to food and compensation case of *Bajudhin Minya*, it has not been recorded elsewhere about the compensation received by the victims. Similarly, the Utreus Prolapsed case also has not been updated in the Department of Monitoring and Evaluation for the Execution of the Supreme Court's order.

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