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# Chapter 2

## 2.1 State and Human Rights **Judiciary**

## 1. Background

The year 2018 has remained a very crucial year not only from the constitutional implementing perspective but also from the implementation of law that regulates the everyday life of the people as Muluki Civil (Code) Act, 2074 (2017), Muluki Civil Procedure (Code) Act, 2074 (2017), and Muluki Criminal (Code) Act, 2074 (2017), Muluki Criminal Procedure (Code) Act, 2074 (2017) and Sentencing Act, 2074 (2017) and other acts to translate them into practice came into force that the Legislative had adopted last year. So is the case with the Judiciary of Nepal as well since it is the ultimate guardian of the right of the citizens. Judiciary has always remained as the ultimate custodian of citizens' fundamental rights, constitutional rights recognized by the Constitution of Nepal, and other legal and human rights as well. "The rule of law is possible only through the establishment and uninterrupted functioning of independent and fair judiciary."<sup>1</sup> Without institutionalizing rule of law and independence of judiciary, rights become just cosmetic one. Hence, the Constitution of Nepal (2015) has envisaged the Judiciary as the custodian of the citizens' rights. Protection of civil liberty is possible only when there is efficient and independent judiciary.

Performance of Nepalese Judiciary in 2018 that it carried out based on constitutional and other statutory mandates and also on the basis of general principles of law has been analysed in this Chapter. The reporting period (1<sup>st</sup> of Jan 2018 to 31<sup>st</sup> of December, 2018) is the completion of three years after the promulgation of the Constitution by the Constituent Assembly II of Nepal and the final fiscal

year of the Third Strategic Plan (2014/15-2018/19) of the Judiciary itself. Under the different targets and objectives set by the strategic plan of the judiciary, it has set the goals based on number of cases to be dispensed and time period for such justice dispensation by the different courts and tribunals to ensure easy access to the court and speedy justice of the people.<sup>2</sup> Similarly, it has also prescribed different standards for reduction of cases lodged at the courts.<sup>3</sup> Prescribing the standards and adopting the programmes alone is not sufficient to ensure access to justice and speedy justice dispensation, rather it is equally ardent to analyse the causes or factors contributing in not realizing the goals and address these causes in adopting the further programmes.<sup>4</sup> Only the set goals and objectives are possible to realize by objectively analysing such causes and making the proper timely changes in the policies and programmes and approaches. As Judiciary is the final institution of people's trust for safeguarding their rights, it has to be always conscious in these regards as it has garnered its credit even during the decade long armed conflict of Nepal.<sup>5</sup> Hence, it has been able to preserve its credit as an ultimate guardian of the civil liberty even in the very hard times.

The Judiciary, as discussed in the earlier paragraphs, has remained as the last resort for restoring not only the fundamental rights of citizens when violated but also all human rights of all when violation of such rights has occurred or is almost sure to occur of such violation or obstruction in realizing such rights by issuing different orders through its ordinary and extra-ordinary (writ) jurisdictions,

1. Tejman Shrestha, "Judiciary in 2017 in Nepal", Nepal Human Rights Year Book, (INSEC: Kathmandu) p 26
2. Preface, Supreme Court Annual Report, 2074/075 BS (2017/018 AD)
3. Id
4. Tejman Shrestha, "Judiciary in 2016" *Nepal Human Rights Year Book*, 2016 (Kathmandu: INSEC, 2016) p. 50
5. Id (in case in different page use please Shrestha, Supra note 5 at 50

hence people have faith on state institution for justice delivery i.e. the Judiciary as the last resort for protection of their rights. Despite people faith on the Judiciary, some unusual incidents such as outgoing of the Chief Justice Gopal Parajuli, rejection of his successor Deepak Raj Joshi, who headed judiciary as an acting CJ for a couple of months, by the Parliamentary Hearing Committee, has raised the suspicion whether it has really that kind of the efficiency to perform its role as a last custodian of the rights. Along with these incidents, role of Supreme Court in safeguarding civil liberties of the citizens (both issuance of final order and interim order), ratio between number of cases lodged at the courts and the number of judges, hearing schedule of cases and functioning of the local judicial body after the election of such bodies and their effectiveness in justice dispensation have been analysed in this write up.

## 2. Constitutional Mandate

In part 11 of the Constitution under “Judiciary” there is constitutional provision on rights and duties of the Judiciary. Article 126 (1) clearly states that Powers Related to Justice will be exercised only by the Judiciary.<sup>6</sup> Similarly, sub-article (2) reads as “All should abide by the verdicts or decisions on cases given by the courts.” This shows that the verdict of the courts is equally binding the government institutions as well not only for the people alone.

Right to constitutional remedies for implementation of fundamental rights has been arranged both in the (federal) Supreme Court in the manner set forth in article 133 or and in the Province High court as per the article 144 “for the enforcement of the rights conferred by this

Part.”<sup>7</sup> So, constitutional provision itself had mandated to use the extraordinary jurisdiction by Supreme Court and High Courts for enforcing fundamental rights. However, writ jurisdiction of as habeas corpus and injunction has also been delegated to the district courts as well.<sup>8</sup> Thus, the extraordinary jurisdiction has been provided to the trial court as well when the right to life or other fundamental rights are threatened.

## 3. Performance of the Judiciary

Measuring of performance of the courts or other judicial/quasi judiciary bodies is measured mostly based timely finalizations of the cases lodged at in a fair way. Only statistics of case finalization should not be considered as the sole basis for performance, rather whether the victims have got justice or not should be equally considerable fact. However, because of limitation, this factor has not been discussed in this section. It has been discussed the trends of case finalization in the fiscal year (FY) 2018 registered in the current fiscal year and the back logged cases transferred from the previous fiscal years.

### 3.1 Case Record and Finalization of Cases: Prevalence of High Gap

There was considerable pressure in finalizing the complaints registered at all three tiers of courts i.e. the Supreme Court, High Court and District Court of Nepal in this reporting period. In the fiscal year of 2074/075 BS (2018 AD), 32,717 cases were record at the Supreme Court (SC); out of them only 37.96 % cases were settled. Hence nearly 62% cases were backlogged. However, compared to the previous fiscal year (2017AD), the case finalization has been increased by 4.9%.

6. The provision reads as “Powers relating to justice in Nepal shall be exercised by courts and other judicial bodies in accordance with the provisions of this Constitution, other laws and the recognized principles of justice.

7. Article 46

8. Supreme Court Annual Report, 2072/073 BS (2015/016 AD) page 3

<b>Table No. 1</b>						
FY	Cases transferred from previous FY	New Registration	Total Cases	Concluded cases in %		Due %
				in Number	in %	
2015/016	23,334	11, 835	35,169	11,175	31.78	68.22
2016/017	23,717	10640	34,353	11,321	33.05	66.95
2017/018	21,829	10,888	32,717	12,419	37.96	62.04
<i>Source: Supreme Court, Annual Report, 2017/018; 2016/017 and 2015/16</i>						

In the fiscal year of 2072/073 (2016AD), the SC had 31.78 % cases.<sup>9</sup> Thus, as the Court could make the final hearing only on nearly the 32% cases, there remained more than 68% cases or more than 25,000 cases as a pending or back log cases. On the one hand as thousands of Nepalese people have been deprived of their fundamental rights of getting just in time as justice delayed is justice denied and on the performance on case settlement has increased though very slightly.

### 3.2. Trend of Case Overdue

The Supreme Court has submitted the Annual Report of FY 2017/2018 as per the constitutional mandate of submitting the report to the President of Nepal including the detail of all activities of its own and its subordinate courts and the Judicial Council as well. Based on three fiscal years, the case overdue is continuing; however, the percentage of case finalization has been gradually increasing and number of record of the cases as well has slightly decreased as per table 1.

While comparing the performance of the Supreme Court in this fiscal with the previous fiscal years, in every three years it is common that there is heavy overdue of the cases at the Supreme Court awaiting for final hearing at the end of each fiscal year despite the fact that the

overall performance of the Court has become better every year.

### 3.3 Management of Case

There was considerable pressure in finalizing the complaints registered at all three tiers of courts including the Supreme Court of Nepal in this reporting period. In the last fiscal year of 2074/075 BS (2017/018), nearly 38% cases were finalized.<sup>10</sup> Thus, as the Court could make the final hearing only on nearly the 32% cases, there remained nearly 62% cases or 20,298 cases as a pending or back log cases. It is nearly twice of the newly registered cases at the Supreme Court in the same fiscal year. Hence thousands of Nepalese people have been deprived of their fundamental rights of getting just in time as justice delayed is justice denied. One of the main reasons behind the low percentage of concluded cases is due to the fewer number of the judges in comparison to the number of cases.<sup>11</sup> But, because of constitutional provisions it is not possible to increase the number of the sitting judges at the Supreme Court of Nepal.<sup>12</sup> Not only the finalization of the cases is a big problem, equally not being heard of the large number of cases though they are scheduled every day to be heard is another problem as it consumes the times of hundreds of defence lawyers and thou-

9. Supreme Court Annual Report, 2072/073 BS (2015/016 AD) page “ka”, Table 1

10. Supreme Court Annual Report, 2074/075BS (2015/016 AD)page “ka”, Table 1

11. Tejman Shrestha, “Judiciary in 2017” Nepal Human Rights Year Book, 2017. Kathmandu: IN-SEC, p. 37

12. Id

**Table No. 2**

S. N	Province	Number of the studied district	Number of the studied Local Government	Number of complaints	Number of decided cases	Percent of performance	
1	1	4	50	3056	1805	59.06%	
2	2	3	4	423	161	38.06%	Lowest
3	3	4	16	444	301	67.92%	
4	Gandaki	4	4	196	167	85.2%	Highest
5	5	4	16	1231	740	60.1%	
6	Karnali	3	3	104	86	82.69%	
7	7	3	7	378	237	62.79%	
<b>Total</b>		<b>25</b>	<b>100</b>	<b>5832</b>	<b>3497</b>	<b>59.96%</b>	

sands of people as a party to the case have impatiently been waiting for the final verdict on their cases.

In a decade from fiscal year 2065/066 (2008/009) to 2074/075 (2017/018), the record of the cases has been more than double. In the fiscal year 2008/009, the case record was 114,518 where as in the fiscal year 2017/18 it has been recorded as 276,147.<sup>13</sup> In this fiscal year, out of 276,147 cases the Judiciary finalized 94,536 cases.<sup>14</sup> Thus, the number of back log cases has remained more than half which is not good indicator for good governance or getting timely justice.

#### 4. Local Judicial Committee

Though there are three tiers of courts in Nepal i.e. Supreme Court, High Court, and District Court as per the provision of the article 127 (1) of the Constitution, sub article (2) of the same article reads as “In addition to the courts under clause (1), judicial bodies may be formed at the Local level to try cases under law or other bodies as required may be formed to pursue alternative dispute settlement

methods.” Thus, as per the provision of this article, there are local judicial committee as every local level government.

The Judicial Committee of the Local Government can settle the cases either by mediating or by hearing on the merits; however, the Committee has to pay their sincere effort for mediation before making the final decision by hearing. “They can make final decision only after their effort of mediation is not worthy.”<sup>15</sup> Thus, the local judicial committee has dual function of finalizing the complaints registered at their office. They can hear on the merits of the cases or they can mediate; but they can’t go for hearing without making efforts for mediation. For the purpose of the study, it has been observed the performance of some Local Judicial Committee in the fiscal year of 2017/018 which has been furnished in Table no 2.<sup>16</sup>

Based on this available data, administration of justice by local judicial committee seems much more satisfactory than the courts. As the study report shows that 100 local judicial committees of 25 districts from all 7 provinces have

13. Supreme Court Annual Report, 2074/075, p 6

14. Supreme Court Annual Report, 2074/075, p 6

15. Local Government Operation Act, 2074, Section 49 (2), Satish K Sharma, “Judicial Mandate of the Local Level and Mediation”, Kantipur National Daily, published on 1st Jestha, 2075

16. These all data were made available to the researcher by different offices of INSEC Nepal with the coordination of Madan Paudel, Editor in chief of Nepal Human Rights Year Book.

**Guma Devi Acharya, Co-ordinator, Judiciary Committee and Deputy Mayor, Butwal Sub-metropolitan, Province No. 5**

I thought, the issue of providing or ensuring justice in the local level was challenging in the initial days. The parties with conflict used to be the familiar person and they, instead of trying to understand the reality, used to think that they are their own villagers and neighbours and they seemed to be uncomfortable to come. The scenario has been slightly changed now. Total one hundred and thirty-five cases were registered in the judiciary committee before the procedure made for Butwal Sub-metropolitan city. In the fiscal year 074/ 075 total 16 (sixteen) and in 074/075 total 7 (seven) cases were decided. Nine running cases were transferred from the previous fiscal year and in this year, total 13 cases are registered and three cases were referred to the court.

finalized nearly 60% of complaints registered at their office. However, there is fear whether the politically elected members of such committee do have the judicial mind and may dearth fairness as they may have some inclinations to their supporters. Moreover, professional capacity enhancement for them is equally challenging.

**5. Outgoing of the Head of the Judiciary and Legal and Moral Questions**

**Prestige of the Court**

In the beginning of the reporting period, the Judiciary was headed by the then Chief Justice Gopal Parajuli who was dragged to controversy when news on his date of birth was questioned as it was reported that he had used different dates in his different replica of citizenship certificate.<sup>17</sup> He was alleged of correcting his birth date when getting the replica of citizenship certificate. When the media were reporting about his date of birth, there was contempt of court case registered at

the Supreme Court. As the CJ is responsible for allocating the bench for hearing, he scheduled the case in his own bench.<sup>18</sup> Hearing own case is against the principle of natural justice as no one is supposed to be judge in his own case. However there are certain examples of hearing own case.<sup>19</sup> Contempt of court should not be considered as an easy tool for safeguarding the judges' moral. It should be only used when there is created obstacles in administration of justice.

The strength of the court remains in its institutional prestige. "Denied the power of the sword or the purse, the Court must cultivate its institutional prestige. The power of the Court lies in the persuasiveness of its rulings and ultimately rests with other political institutions and public opinion."<sup>20</sup> The Court itself must regain its power through its judgement.<sup>21</sup> Hearing the case, though contempt of court, by he himself, does not create the moral value, rather erodes whatever it is there. So was the case with CJ Parajuli as well. The leader of the Judiciary is also

17. See Nagarik National Daily and Kantipur National Daily.

18. "Lesson Learned from Parajuli Episode" Kantipur editorial published on 2nd Chaitra, 2074 (March 16, 2018), available at <<https://www.kantipurdaily.com/opinion/2018/03/16/15211658919028219.html>> last accessed on 1 Feb 2019

19. It is very rare to be judge in own case. However, in some Indian cases it has been found so. Though, there is no any hard and fast rule in this regard, judging own case can't ensure impartiality.

20. David O'Brien, "The Court and American Life," From Storm Center: The Supreme Court in American Politics" in *The Enduring Debate: Classic and Contemporary Readings in American Politics* (W.W. Norton & Company, New York, 6th Ed Example 2011), p 291

21. Tejman Shrestha, "Judiciary", Nepal Human Rights Yearbook, 2016

equally responsible for maintaining the credibility of the Judiciary. The contempt of court should not be cheaply used while exercising freedom of press. Obviously, the freedom of press is for the common people, not for the press themselves as the US Supreme Court has interpreted that “freedom of press and speech is not for the welfare of the press, rather for the welfare of the people”<sup>22</sup> In Indian experience as well, “the constitutional right to freedom of speech does not prevent the courts from punishing for their contempt spoken printed words or any other expression calculated to have effect.”<sup>23</sup> However, the Court should be very cautious while punishing in contempt of court. It should never consider it as an easily available protective shield for itself. Without bold but fair comment it gets from the people, the Judiciary can’t ensure that it has been moving ahead in the right track.

There should not be conflict between media and the judiciary as the media can change the course of nation by making opinion in a strong way whereas the court may be powerless in such situation. This inability of court has been depicted by Robert Dahl as he observes as “By itself the Court is almost powerless to affect the course of national policy.”<sup>24</sup> Gerald Rosenberg goes much farther, in claiming that “courts can almost never be effective producers of significant social reform.” “Brown and its progeny stand for the proposition that courts are impotent to produce significant social reform.”<sup>25</sup> The use of media for replicating the judiciary as a weak body can’t be countered by the court through the contempt of court rather by trying to dispensing justices in

more fair way.

The controversy was not limited up to birth date; it went even further up to his ousting or resigning from the Judiciary. This episode must be linked with the attack at or control over judiciary. The Judiciary was not only controlled and attacked by the Executive, but also equally attacked by the some big media as well instead of depicting of true replica of the Judiciary. The letter of Judicial Council stating that the Chief Justice Gopal Parajuli was removed from his post was widely published, telecasted or broadcasted. His resignation from the post next day after the issuance of that letter did not get enough coverage in comparison to the issuance of said letter. If he was removed from the post by that letter, how could his resignation be legal?<sup>26</sup> It is not only legal question alone but also moral question as well. It should have been equally communicated by such powerful Medias. Only then it could contribute for strengthening the Judiciary and increase the credibility of both the Judiciary and Office of the President. Every citizen has right to know about the activities of the CJ, but only knowing on the discretion of media does not ensure right to know the truth. At the same time, the CJ also must respect the social values how people have been observing him.

## **6. Appointment of the Chief Justice and Parliamentary Hearing Committee**

Nepal has continued the parliamentary hearing of the Chief Justice along with other key constitutional posts. This provision was more a trial with the

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22. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The case was decided by 5:4 majority decision.

23. *L R Frey v R. Prasad*, AIR 1958 ; Mahendra P. Singh. *VN Shukla's Constitution of India*. Delhi: Eastern Book Company, 2010, p. 192

24. O'Brien, *Supra* note 21 p 298

25. *Id*

26. “Gopal Parajuli Submitted his Resignation from the Post of CJ to the President”, published on 1st Chaitra, 2074, available at < <https://www=onlinekhabar=com/2018/03/665606>> last accessed on Feb 5, 2019;

Judiciary than the check and balance. One of the retired justices of Supreme Court of Nepal becomes sceptic on fairness of the proceeding of the Committee, “The Hearing Committ must be free from any prejudice. They should have decided on their own by questioning the proposed candidate for the post of CJ instead of waiting for the order of their respective political parties. They should not compel Mr Joshi resign by making him weak by not making decision in time in his appointment process; it will degrade the entire system.”<sup>27</sup> Instead of working independently, the members of the Committee was instructed by their party leaders. Moreover, the post of CJ was vacant for more than five months<sup>28</sup> whereas article 284 (3) of the Constitution has mandatory provision of recommending the name of the person for such appointment one month earlier before the post falls vacant: “The Constitutional Council must make a recommendation for appointment under this Constitution before one month of the vacation of the office of the Chief Justice or a chief or official of a Constitutional Body.”<sup>29</sup>

Thus, the Council breached the constitutional provision. The members of the Committee are completely guided by the party politics rather than doing their business as the member of the sovereign parliament. “The members of the Committee have been waiting clear instructions from the party and government leaders

for whether to accept or reject Deepak Raj Joshi as the Chief Justice even just two hours earlier of their scheduled meeting for the said purpose.”<sup>30</sup> It shows that the hearing of the recommended names by the Constitutional Council who is chaired by the Prime Minister he himself, is no more than controlling the person being heard rather than truly testing his calibre for the post. Thus, Judiciary has become more like a trapped deer in the hands of hunters.<sup>31</sup> Thus, judiciary has become an institution for hammering at by the Executive and testing by the Parliament.

This is not the first that Parliamentary Hearing Committee has been shadowed by the party doctrine. In the past too when the influential party leader and members of cabinet were the members of such Committee, the credibility of the Committee was questioned.<sup>32</sup> It can't serve the purpose of separation of power as envisaged and as truly exercised in the countries exercising presidential system. Rather, in the name of such hearing, it has been compromised the independence of judiciary. In the constitution with predomination of parliamentary sovereignty, there must be sufficient interplay between the three organs of the government.<sup>33</sup> Such hearing eases for the interplay between the Legislature and Judiciary. But, when any committee within the Parliament itself is controlled by the Executive, the Judiciary can't be truly independent in such interplay as well. In the case with

27. Balam KC. “The Hearing Committee must be free from any prejudice” *Nagarik National Daily*, published on 16th Sawan 2075

28. *Id*

29. Article 284 (3)

30. Durga Khanal, “The Meeting of the Hearing Committee is Going to Take Place : However, the Members of the Committee still Indecisive on Chief Justice” v14th Srawan, 2075 (July 30, 2018); available at <https://www.kantipurdaily.com/news/2018/07/30/153293210509163949.html>, last visited Feb 5, 2019

31. Binod Mohan Acharya, “Deviation in Culture of Justice”, *Kantipur National Daily*, Marg 9, 2075

32. Chandra Shekhar Ahikari, “Three Ministers as the Member of Hearing Committee” published on 22 Falgun 2073, available at <https://www.kantipurdaily.com/news/2017/03/05/20170305072917.html> > last accessed on 1 Feb 2019

33. Hilaire Barnet. *Constitutional and Administrative Law*. London, Sydney, Portland, Oregon: Cavendish Publishing Limited: 2004, 4th Ed. p 99

Mr Joshi as well, he presented himself as a defeated player besides the Committee not following natural course of law; both sides do not contribute for heightening the image of judiciary.<sup>34</sup> The leader of the Judiciary is also equally responsible for maintaining the credibility of the Judiciary.

## 7. Protection of Fundamental Rights

Pursuant to the Supreme Court's extra ordinary jurisdiction based on which the remedy for violation of fundamental rights guaranteed under the constitution can be sought, this part sheds light on such orders of the Supreme Court which concerns with the implementation of such rights of the citizens. Primarily rights relating to property, right to demonstrate, right to assemble peacefully, right relating to health, right related to get government service, voting right and so on has been analysed here.

### 7.1 Exercising of Citizen's Freedom of Protest, Transit Facility from India and State Responsibility<sup>35</sup>

In course of deciding a writ petition seeking the writ of certiorari concerning the violation of rights of common people while exercising the civil and political rights, the Supreme Court of Nepal decided an important directive order, though it did not issue the writ. The petition of certiorari was concerned with the subject matter of serious disturbances in people's lives owing to the scarcity of petroleum products, cooking gas, medicines and other essential commodities as such, caused by the strike at border of Nepal to India in the South called by the political parties

who have influence over the region. The result of the strike was like a situation of a trade embargo though not officially declared by India. Although the writ petition was quashed and the writ was not issued; the Court issued directive order in the name of the government to take necessary precautionary measures to protect the rights of the other people affected by such exercise of civil political rights by one group. The order has included content which suggested that in course of exercise of one's fundamental rights others rights ought to be equally respected. The order reads as:

"Freedom is never absolute; the restrictive clause of rights relating to freedom itself establishes that freedoms guaranteed in the form of fundamental rights are not absolute."<sup>36</sup>

Likewise, the same decision also includes the following contents:

"In light of existence of legal provisions aimed towards stopping the unwanted conducts of strikes strongly implement the existing legal provision, take necessary measures to bring such offenders under the law who intervene in the ordinary function of general public by issuing suitable orders to subordinate mechanisms, likewise the issue raised by the applicant having been concerned with the transit between Nepal and India, the Court cannot negate the gravity and severity of the said issue."<sup>37</sup>

In regards to state's liability created by the international conventions and agreement that Nepal is a party to the decision the directive order reads that it is obvious to expect that civilized nations would comply with the liabilities created

34. Tejman Shrestha, "Shadow of Executive in the Judiciary" Annapurna National Daily, available at <http://annapurnapost.com/news/104573>, last visited Feb 4, 2019

35. Adv. Parashmani Bhattarai, et al. v. Office of Prime Minister and Council of Ministries, et al; Writ no. 072-wo-0287, decision no. 9984 (certiorari), NKP Part 60, 2075 vol. 3, decided on 2074/10/15, Supreme Court, division bench, Hon. Justice Purshottam Bhandari and Hon. Justice Bam Kumar Shrestha

36. *Id.* Para 5

37. Adv. Parashmani Bhattarai, et al. v. Office of Prime Minister and Council of Ministries, et al; Supra note 37, para 8

- ▶ Rights are never absolute; it is always relative with a duty, is a jurisprudential notion and is the same idea is also upheld by the Interim Constitution of Nepal 2063 and the present constitution of Nepal. Article 42 'Citizens' Duties' also elucidates the very idea
- ▶ The Constitution has not imposed restrictions of controlling such conducts which infringes other people's rights in course of exercise of one's rights
- ▶ It is necessary at this point to strictly implement the existing laws and strengthen and expand laws so as to prevent and control *bandhs* and the same has not been restricted by the constitution
- ▶ Necessary directions to be given to concerned authorities to detain and take necessary measures against offenders who indulge in unwarranted activities and curtail others' freedoms
- ▶ The issue being concerned with transit facilities between Nepal and India, the Court needs to consider the matter sensitively. It is obvious that the states are deemed to be obliged by the liabilities created by the international agreements and conventions that it is a party to
- ▶ If in course of implementation of international obligations, due consideration is not provided to the constitutional provisions, provisions relating to related laws, other provisions of international laws then such obligations cannot be completed in a complete manner
- ▶ Since embargo causes curtailment in articles 4, 5, 16, 44 and other fundamental rights, the legislature ought to establish necessary legislative instrument to ensure the same.
- ▶ Thus, directive order shall be issued in the name of respondent to create environment for implementation and review of international obligations and instruments

by international conventions and agreement that a state is party to. "There cannot be any differences in regard to the fact that implementation of such conventions and agreements needs to be done with consideration to necessity, available means and resources and capabilities respectively."<sup>38</sup> Thus, though, no writ was issued making state immediately accountable in addressing the suffering of common people caused by strike called by certain region based political parties; the Court has duly considered the rights of other people as well while enjoying one's rights and claims and state obligations to be adhered by the government created by virtue of being party to such conventions.

## 7.2 Regarding Fragmentation of Land and Right to Profess<sup>39</sup>

This directive order revolves around between control of fragmenta-

tion of land and housing, and establishment of projects as such and striking and right to profess. The order concerns with the fundamental right of right relating to property under which the right to acquire, own, sell, dispose, acquire business profits from, and otherwise deal with, property has been provided. The order establishes that "right relating to property is not completely absolute and is subject to a certain level of supervision".

The order also elucidates that tall building established for commercial purpose ought to pay compensation of other homes if it causes harm to other buildings nearby.

The state ought to duly consider the fact that when making decrees relating to construction of buildings attention need to be given to the protection and security of other neighboring settlements nearby. Compensation mechanism to ensure the

38. Id; Supra note 37

39. Adv. Jagadish Acharya v. Gopal Dahit, Minister of Land Reform and Management and et al.; NKP 2075, vol 1, Decision no. 9933

- ▶ Necessary arrangement needs to be made in the local level and urban areas so as to regulate the buying and selling of land, its plotting, construction of multi storied buildings and other infrastructures
- ▶ In course of creating such regulation consideration needs to be made in regards to the width of the roads, proper arrangement of drainage, minimum requirement in buildings that are to be constructed, etc.
- ▶ If cultivable land are made subject to fragmentation for housing, industrial and professional areas, the effect of it will cause environmental impact which affects the people residing in such areas, this ought to be avoided
- ▶ Arrangements need to be made in such a way that the voice local people in regards to construction of such projects is heard and the local people receive a share of consideration from such projects
- ▶ Projects that operate without consideration towards environmental protection, intergenerational equity of people, consensus of local people and inefficient basic infrastructures needs to be prohibited by the policies of the state
- ▶ Different directives issued in order to regulate the housing, industrial and professional projects like Construction decrees and other decrees as such needs to be effectively implemented so as to prohibit the construction that is in conflict with such decrees

safety and security of neighbouring buildings nearby posed due to construction of tall buildings needs to be guaranteed in policies and properly implemented.

### 7.3 Regarding voting rights of Nepalese citizens residing in foreign nation<sup>40</sup>

The Supreme Court in its historical verdict has pronounced that the inability of Nepalese citizens residing in foreign nation to vote has resulted in questions regarding the impartiality and purity of elections and its outcomes. Election conducted in absence of a large number of Nepalese citizens in the one hand curtails such individuals' voting rights and on the other hand the result of such election does not carry the true spirit and opinion of the citizens, the verdict elucidates.

The court interprets "An election which it fails to allow a large part of the population from exercising their voting rights cannot be considered as mandated by the people in its entirety." The Supreme Court has issued directive orders

in the name of government by discretely highlighting six major issues so as to secure the voting rights of every citizens of Nepal.

### 7.4 Regarding Right relating to Freedom of Speech and Freedom to Assemble Peacefully

The Supreme Court has issued an interim order in the name of the government to "not to enforce the decree of District Administration Office (DAO) declaring Maitighar Mandala as a restricted area" after advocate Dinesh Tripathi filed a writ petition against the government claiming that that decree of DAO Kathmandu curtailed the right to peacefully assemble where number of civil societies and people have used that place for exercising their right to assemble peacefully.<sup>41</sup> The decree of the government was not only against the fundamental rights guaranteed by the Constitution of Nepal but also against the provisions of UN International Covenant on Civil and Political Rights, 1966. The Court by issuing the in-

40. Prem Chandra Rai v. Nepal Government, 073-wo-1149; Durga Dulal "Supreme Court's decision on voting rights of Nepalese citizens residing in foreign nation", published 2075, Bhadra 17

41. Adv Dinesh Tripathi v. District Administration Office Kathmandu, et al., Kantipur Ashar 22, 2075

terim order has met its obligation by limiting the government's arbitrary exercise of authority and protecting the people's fundamental rights.

### 7.5 Regarding Practice of Profession, Property and Interim Order

Global commercialization and globalization has created a scenario where trade and commerce is not limited to a certain particular area. Foreign individuals and foreign companies have made investments in production and other sectors in Nepal as well. Nepali citizens also have made investments in such businesses along with those foreign nationals. Legal questions often are raised in number of issues in regards to investment such as profit from investment, taxes, insourcing and outsourcing foreign investments, etc. Recently, the bank account of Ajay Sumargi, an industrialist and a businessman which was halted was reopened by an interim order of the Supreme Court and he immediately withdrew his deposit after the order was issued. However, after a very short time again another order was given by the Supreme Court which made the earlier interim order ineffective.<sup>42</sup> Hence, there is not clear policy and practice in issuance interim order on such crucial issue.

In the one hand, the freezing of bank accounts results in inability of investment of deposits made in such accounts and on the other hand the interim orders waiving off such stoppage encourages individuals who have made earnings from illegal means. The process of delivering interim order needs to be effectively reconsidered by study of such orders from learned groups so as to balance the effective justice delivery process and loss that

The following directive has been issued so as to bring into the application of state policy regarding management and control of cultivable land:

- ▶ Regarding categorization of land and balance between the land categorized for housing, industrial and agricultural use by making necessary legal arrangements
- ▶ Control in fragmentation of land by enabling land owners to plot their land only once a year
- ▶ Regulation of process of granting permission to plot lands and land planning business with due consideration to state policy and security of investment of persons in such service sector
- ▶ Effective implementation of construction directives and decrees by the local authorities and compensation mechanisms

state incurs in such cases. Nepalese judiciary comprises of two groups of justices, one is traditional who does not want to issue order in the cases even when it requires and on the other willing to issue even when it is not necessary.<sup>43</sup> So, it is very ardent to have a common approach in issuance of such interim order and make a harmonious balance between the rights of individual to use their property and discourage the tendency of not to misuse the loopholes of the law in avoiding the tax paying.

### 7.6 Violation by Act of Omission and Implementation of Laws Concerning Study of Medical Science, Skill Enhancement<sup>44</sup>

In a writ petition filed against the unjust treatment done to the senior doctors of Bir Hospital under National

42. Janak Nepal, "Who Has Dare to Stop Order of the Justice of the Supreme Court?" *Nepal*, Magh 13, 2018 (Jan 27, 2019), pp 21-23

43. Senior Advocate Shree Hari Sharma, *Nepal*, Magh 13, 2018 (Jan 27, 2019)

44. Dr. Dipendra Shrestha v. Government of Nepal, Ministry of Health, et al. NKP 2072, vol 3, p445 Decision no. 9968

### Six Directives Issued by the Government

1. Make necessary arrangement for participation of Nepalese citizens residing elsewhere without discrimination between those involved in foreign employment, abroad studies, foreign trade and commerce so that all Nepalese can participate in elections, the super carnival of democracy so that their opinion finds a place in formation of the government
2. Secure External Voting Rights of Nepalese citizens residing elsewhere who have not acquired foreign citizenship or have not given up their Nepalese citizenship and those who are qualified to vote by duly registering themselves as voters based on the record maintained by Nepalese foreign mission on foreign nations
3. Make necessary arrangement regarding the process and method of election to be applied in conducting election in foreign nation with due consideration to the activities of political parties, the type of election method to applied, etc. so that the election can be made free and fair; by making necessary consultations with the political parties, civil societies, applicant organization and other related bodies
4. Make necessary diplomatic arrangements between the foreign host countries so as to ensure the voting process of Nepalese citizens residing there, since lack of legal arrangement to allow foreign nationals to participate in elections can be different from country to countries
5. Directive order in the name of Office of the prime minister and council of minister to present necessary legislations in the legislative parliament to legally guarantee voting rights to Nepalese citizens residing elsewhere. Make substantial scenario in upcoming elections for possibility of participation of Nepalese citizens residing elsewhere in elections
6. Duly collect and update the statistics of Nepalese citizens residing elsewhere so that an environment can be made for their participation in the upcoming elections

Academy of Medical Science (NAMS) in skill enhancement by the NAMS administration and ultimately by government authorities negating the existing legal provisions, the Supreme Court has delivered a verdict elucidating that medical science is not only a profession but also a matter concerned with people's right to live; so study and teaching of medical science needs to be directed by a certain decree. The verdict also pronounces and gives directive order to Ministry of Health and Population that the government bodies ought not to indulge in any deceit in course of implementation of legislations that have already been made. However no writs were issued in this decision. A writ should have been issued in a case of this nature so as to make the government obliged. Only then the tendency of avoiding the implementation of the existing legislation would be discouraged as violation of right of people of by act of omission

is equal to violation of by act of commission.

#### 7.7 Regarding Gender Justice: No Excuses in not Granting Citizenship by Birth to Individuals who Are Qualified to Receive Citizenship Born of a Marriage without Marriage Registration

In the case of Bobby Thapa v. Government of Nepal where the applicant Bobby Thapa who after a love marriage had given birth to a daughter named Iva, to who citizenship was denied because of the inability to produce marriage registration certificate before the District Administration Office despite of affidavit of Bobby Thapa and the municipal office; the Supreme Court issued a writ of Mandamus. The Court also issued an order in regards to accountability of public bodies which has been presented as follows,



“Excuse and delay made my public official assigned with a legal duty and responsibility despite of fulfilling all required legal requirements in regards to a particular matter cannot be considered judicious and lawful.”

The order can be expected to restrain public bodies and public official from making delays and excuses in course of giving services to the general public who have been deprived of acquiring citizenship due to their parent’s inability of making a marriage registration certificate as a result of disturbed marriage. The decision is eminent from gender justice perspective as well.

### **7.8 Regarding Fundamental Right to Practice Profession and Constitutional Right of Dual Citizenship**

The Constitution has made provision of citizenship to non-Residential Nepalese (NRN) according to the federal law which will enable them to exercise social and economic rights. Article 14 of the Constitution ensures this provision to NRNs who reside elsewhere from South Asian states. However no legislation has been made in regards to this provision so far.

In a writ petition filed by Surendra Bahadur Shrestha and Govinda Belbase where the applicants prayed to get section 10 of Citizenship Act, 2063 be repealed as it was in conflict with the aforementioned constitutional provision, the constitutional bench of the Supreme Court held that the said section was not ultra vires.<sup>45</sup> Instead the verdict interpreted that citizens belonging to the states members of WTO have not been restrained from participating trade and commerce within the rules set by the WTO. The verdict further

added that due consideration ought to be made to WTO rules when making legislations concerning NRNs.

### **10. Conclusion**

The Judiciary had witnessed so many ups and downs this year. Despite the difficulties and challenges, it has been equally credited for protection of fundamental rights of the citizens and limiting the Executive and its sub-ordinate agencies. The achievements it had made and the challenges it witnessed have been presented as the followings:

1. Civil liberties such as issuance of interim order to ensure freedom to assemble peacefully, mandamus order to ensure the right to cast vote of the Nepalese citizens abroad for different purposes such as foreign employment and the further study; act of omission of the governmental agencies to carry out the duties entrusted to them by law such non-issuance of citizenship certificate whereas the beneficiary has completed all the necessary procedures to acquire it, linking medical profession with right to life are landmark
2. This study (reporting) period was not so good for the Judiciary as it became victim of tussle between Executive, Legislative while exercising the doctrine of separation of power and check and balance. The Parliamentary Hearing Committee, basically, comprised of such parliament members having their expertise related to the work of such respective committee, was supposed to decide themselves on appointing the proposed head of the judiciary after the formal hearing procedure was over; instead they were waiting for the instruction of the ex-

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45. Surendra Bahadur Shrestha v. Office of the Prime Minister and Council of Ministers and Others, Writ No 72-WO-007; Govinda Belbase v. Office of the Prime Minister and Council of Ministers and Others, Writ No 72-WO-008

ecutive head, who is also the leader of their political party in the Parliament. The integrity of the proposed head of the judiciary was compromised by this Committee. Instead of judging the candidate fairly, it was smelted that the committee members were more guided by the political doctrine and mathematical calculation. Hence, it has been concluded that where there is no separation of power, there is no independent judiciary. So was the fate of judiciary of Nepal this year.

3. It won't be an over statement to say that the judiciary was controlled and directed by the Executive. Even more, it was like a trapped deer in the hands of hunters. Thus, maintaining the independence of judiciary has become more challenging.
4. The Judiciary was not only controlled and attacked by the Executive, but also equally attacked by the some big media as well instead of depicting of true replica of judiciary. The letter of Judicial Council stating that the Chief Justice Gopal Parajuli was removed from his post was widely published, telecasted or broadcasted. Whereas his resignation from the post next day after the issuance of that letter did not get good coverage. If he is removed from the post, how can his resignation be legal? It should have been equally communicated by such powerful Medias. Only then it could contribute for strengthening the judiciary and increase the credibility of both judiciary and office of the President.
5. This period seems discouraging in terms of case hearing schedule management. In the fiscal year of 2065/066BS (2008/009AD), 114,518 cases were recorded both newly registered and back logged one where as in the last fiscal year 2074/075 (2017/018AD) the case

record has reached to 276,147. Thus final hearing of cases for the parties to the conflict has become very costly. 94,536 cases have been transferred to the current fiscal year of 2018/019. Hence, it is quite discouraging situation. At Supreme Court alone, the case finalization ratio has remained 38% this year, slightly increased from the previous years. As justice delayed is justice denied, timely settlement of the cases is a must.

6. However, the administration of justice by Local Judicial Committee seems much more satisfactory than the courts. As the study report shows that 100 local judicial committees of 25 districts from all 7 provinces have finalized nearly 60% of complaints registered at their office. However, there is fear whether the politically elected members of such committee do have the judicial mind and may dearth fairness as they may have some inclinations to their supporters. Moreover, professional capacity enhancement for them is equally challenging.

Finally, the year was not so good for the Nepalese Judiciary. Hence, it is concluded with the note that it has been attacked in the doctrine of independence of judiciary as the head of the executive was influential in the decision of the parliamentary hearing committee, and another chief justice also was reported of ousted by the letter of a secretary of Judicial Council whereas his resignation was approved by the President. Hence, the Judiciary was both attacked at and tested for supremacy of parliament and directing judiciary by the Executive and Parliament. However, for protection of civil liberty, it has remained credible. Last but not the least, the local judicial committee has been attributing for timely justice.

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