

The National Judicial Academy (NJA), a member of International Organization for Judicial Training, was established in 2004 to serve training and research needs of the judges, government attorneys, government legal officers, private law practitioners and others who are directly involved in the administration of justice. Originally established by an Ordinance, it is now governed by the NJA Act, 2006. The NJA works under the broad policy guidelines of the Sixteen Members Governing Council headed by the Chief Justice. Executive Director heads the Executive Board.

#### Vision

To promote an equitable, just and efficient justice system through training, professional development, research and publication programs which address the needs of the judges, government attorneys, government legal officers, private law practitioners and others who are directly involved in the administration of justice.

#### Objectives

- Enhancement of knowledge and professional skills of judges, judicial officers, government attorneys and private law practitioners and bring about the attitudinal change that enhance competence.
- Undertake research in the field of law and justice and to make available legal literature of scholarly and practical significance to judges, judicial officers and others who are involved in administration of justice.

#### Partners

- Supreme Court and Subordinate Courts
- Office of the Attorney General
- Ministry of Law, Justice, Constituent Assembly & Parliamentary Affairs
- Nepal Bar Association
- Judicial Council
- Donor Agencies: UN Specialized Agencies, INGOs and NGOs

#### Training Activities

The NJA believes that training should contribute to overall personality development of the learners. It should facilitate the enhancement of knowledge and skills that positively impact on the promotion of effective, efficient and accessible justice. NJA designs, organizes and conduct trainings seminars, conferences, symposia and related programs for its target communities.

#### Research and Dissemination of Information

- Carry out research and produce publications, reports and recommendations in respect of reforms to relevant aspects of the law and administration of justice.
- Inform the judiciary and the wider community of new technology and its use in the administration of justice.
- Disseminate web-based information

#### Promotion and Co-ordination

- Promote training as an integral part of career development for judges, judicial offices and law practitioners.
- Liaise with other judicial training institutions to develop training programs which are of internationally recognized standard.
- Liaise with Government of Nepal and international donor agencies in respect of judicial training programs within the justice sector.

NJA LAW Journal  
2012

National Judicial Academy



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Nepal

# NJA LAW Journal

Special Focus on Access to Justice for the Poor and Marginalized Groups in Nepal

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Special Issue 2012

# NJA LAW Journal

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Special Focus on Access to Justice for the Poor and Marginalized Groups in Nepal

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SUPREME COURT, NEPAL



**KHIL RAJ REGMI**  
CHIEF JUSTICE

Ref. No. :

25<sup>th</sup> February 2013

### Message

I am pleased to know that National Judicial Academy (NJA) is publishing *NJA Journal* 2012 with special focus on access to justice for the poor and marginalized groups in Nepal, in cooperation with International Commission of Jurists-Nepal (ICJ-Nepal). I am of the belief that these types of publications will be contributory to enrich Nepalese legal literature.

The concept of *access to justice*, though, seems to be a modern concept has its considerable historical background in terms of ensuring justice to the people. There is a broader consensus among the stakeholders of justice that *access to justice* is a fundamental prerequisite for effective dispensation of justice in democratic regimes. In recent days, judicial reform process has also been overwhelmingly revolving and engaging on the advancement of situation of *access to justice* of the people. Nepal, having its unique socio-economic and geo-political context, and legal and judicial arrangements, has greater concerns on the matters pertaining to the *access to justice*. In this milieu, I have acknowledged this publication as very relevant and useful to our situations.

I have observed that the Journal possess research-based academic articles and write-up developed in consultation with various research materials, which has brought persuasive ideas and conclusions for ensuring access to justice of the people in Nepali justice system. Moreover, the publication has also been able to retain itself in the level of contemporary journals of the law and justice sector. I hope, this publication will be useful to Judges, Prosecutors, Lawyers, Academicians, Judicial Officials, Administrators, Police, Law Students and anyone who are eager to pursue their study and conduct research in various areas and themes of access to justice.

I would like to express my thanks to National Judicial Academy (NJA) and International Commission of Jurists (ICJ) for its initiative to publish this Journal. Here, I also extend my sincere thanks to the editorial team and laborious authors of the publication who have contributed their efforts to develop scholarly articles related with access to justice despite busy schedules of their professional duties. My cooperation is always with National Judicial Academy for future events; hence, I express my best wishes for the success of this publication and look ahead for the continuity of these types of activities in future.

**Khil Raj Regmi**

**Chief Justice, Supreme Court**

*Ex Officio* Chair - Governing Council, National Judicial Academy, Nepal





राष्ट्रिय न्यायिक प्रतिष्ठान, नेपाल  
National Judicial Academy, Nepal  
(Estd. under the National Judicial Academy Act, 2006)

".....committed to Excellency of Nepalese Law and Justice Sector."

प.सं.  
Ref.

**Message**

I am delighted to note that the NJA has been able to bring out NJA Journal as a special issue focuses on access to justice for the poor and marginalized groups in Nepal. We assume this publication is an assessment of the judicial reform in need of focus to the marginalized and the poor communities in Nepal.

I take special privilege to thank our partner International Commission of Jurists, Nepal to bring out this issue published. Our special thanks go to immediate past Country Representative Mr. Frederick Rawski, ICJ Nepal, Mr. Ben Schonveld, Country Representative, ICJ Nepal and Senior Judicial Reform Advisor Dr. Livingston Armytage, ICJ Nepal for their cooperation.

I express gratitude to the Right Honorable Chief Justice Mr Khil Raj Regmi and appreciate his message for the Journal. In addition, I thank the editors Mr. Lekhnath Paudel, Registrar at the NJA Mr. Shreekrishna Mulmi, Research Officer at the NJA and Mr. Ratna Kaji Shrestha, National Legal Advisor at ICJ Nepal for their hard work bringing this issue possible. In the meantime, I thank to other staffs at the NJA too for their hard works. Similarly, I wish to thank our well wishers and contributors enabling us to make this publication.

We are hopeful that this issue will receive an equally warm response from its readers as did the preceding issues.



  
Raghab Lal Vaidya  
Executive Director

February 2013





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Ensuring justice to all is central to the protection and promotion of the rule of law. The International Commission of Jurists (ICJ) is devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. In this context, it is my pleasure to write this foreword on behalf of the ICJ, Nepal for this special volume of the NJA Law Journal focused on access to justice.

Beginning in 2010, the National Judicial Academy and the ICJ embarked upon a partnership aimed at enhancing the effectiveness of the judiciary to bridge the existing gap between citizens and justice service providers in Nepal. This volume is one result of that partnership. It compiles a series of articles from senior jurists that together offer a new way of thinking about justice reform.

The contributing authors seek to challenge and depart from the less than successful approaches to strengthening 'rule of law' (or 'legal and judicial reform') during the last 20 years in Asia that have focused on top-down policy prescriptions with little reference to improving the wellbeing of citizens as the primary beneficiaries of the justice system. Through this volume, the NJA, with the support of the ICJ, seeks to enhance the Supreme Court and the National Judicial Academy's already substantial leadership role in promoting new thinking about justice sector reform, and related efforts to increase public confidence in the justice system in order to catalyze wider justice sector reforms that will benefit all disadvantaged groups, and the population as a whole.

Despite constitutional and legislative guarantees to protect their rights, women, the poor and the marginalized are often unable to secure their rights in practice, posing serious challenges to the rule of law. The Supreme Court, through various landmark decisions, has reinforced their rights including their right to access to justice in a bid to making justice easily and promptly available. However, the situation remains poor. There remain very significant gaps between justice service providers and their users. In response, the Nepali judiciary, in accordance with its second strategic plan, has initiated interventions in two areas: strengthening stakeholder communication including meaningful participation of the community, and promoting access to justice through judicial community outreach.

In this volume, Dr. Livingston Armytage sets the global context, presenting a critique of over fifty years of failed justice sector reform efforts in the region, and offers a new approach for reform based on the notion of promoting justice as fairness and equity. Building upon this theoretical foundation, the contribution by Shreekrishna Mulmi and Ratna Kaji Shrestha describe some of the court-led initiatives to implement this new model by building public trust in the judiciary through innovative new outreach and dialogue initiatives at the local level.

The volume then explores in rich detail ways in which economic, social and cultural rights – and particularly those most affecting women – can be justiciable in Nepal, with particular attention to the links between notions of ESCR and understandings of substantive equality. The Hon. Justice Ananda M. Bhattarai examines how courts have addressed social and economic justice in five South Asian countries. The Hon. Judge Narishwar Bhandari then analyzes the jurisprudence around affirmative action in order to assess whether these efforts have contributed to improving substantive equality. Using the example of the right to health, Joint Registrar Nahakul Subedi makes an important distinction between ‘access to the judiciary’ and ‘justice to victims’ in the Nepali context.

Many of the chapters focus directly on addressing obstacles confronting women seeking a remedy from the justice system in Nepal, particularly for acts of violence committed against them. The Hon. Supreme Court Justice Sushila Karki writes about the development of jurisprudence on gender justice by the Supreme Court, and its relationship to international law. Mohan Kumar Karna describes a new approach being tested in Nepal aimed at improving the well being of women victims of violence by ensuring that they can receive an effective remedy from the judicial system. Advocate Raju Chapagai contributes a chapter on the impunity that results from the short 35-day statute of limitations for rape, and Rajesh Kumar Katuwal reviews existing national and international law regarding rape, with particular attention to the role of the judiciary. Evelyn Schmid offers a vision of transitional justice that can effectively address issues of gender inequality.

This volume is the result of the hard work and dedication of many people. First and foremost, I would like to thank all of the authors for their contributions, and to take this opportunity to extend my gratitude to the advisory committee that helps to guide the NJA/ICJ partnership, including Honorable Justice Kalyan Shrestha of the Supreme Court, Honorable Chief Judge, Kehsari Raj Pandit, of the Patan Court of Appeal, Honorable Raghav Lal Vaidya, Executive Director of the NJA, and Honorable Judge Til Prasad Shrestha, Faculty of the NJA. Last but not least, on behalf of the ICJ, I would like to thank all of the NJA staff for their collaboration and support.



Frederick Rawski  
Country Representative for Nepal



February 2013

## **Note from the Editors**

National Judicial Academy (NJA), since its inception, has been engaging in the training and education of judges, court staff, government attorneys, private lawyers and other judicial employees. Further, it has equally contributed in the policy development through research that includes judicial reform towards enhancing access to justice of the poor and marginalized groups.

In Nepal, the courts recognize the need to promote access to justice for the poor and marginalized, such as women and victims of violence, as part of judicial reform. The NJA is collaborating with the International Commission of Jurists (ICJ) to enhance access to justice for these groups. This publication explores current initiatives in Nepal to improve civic well-being and to provide greater access to justice. We hope these initiatives contribute to building a better justice system in Nepal.

This publication comprises a number of well researched papers. The first: access of the poor to justice: the trials and tribulations of ESC rights adjudication in South Asia is an article by the Hon. Justice Dr Ananda M. Bhattarai. This article describes how the courts in South Asia have interpreted the constitutional promise to secure social and economic justice, and how judicial activism has fared. The author looks first at the constitutional rights landscape in Nepal, India, Pakistan, Bangladesh and Sri Lanka. It reviews strategies and tools developed by judiciary to promote jurisprudence. Finally, it critically assesses the decisions in terms of delivery, and examines whether these decisions have been populist and a “hollow hope,” or whether they create serious prospects for reform.

Affirmative action in Nepal is nascent, but initial results suggest cause for hope. In the second paper on affirmative action as an effective tool for ensuring substantive equality in Nepal, the Hon. Judge Narishwar Bhandari evaluates the impact of affirmative action programs in achieving substantive equality. In the first part of his article, the author canvasses the concept and theories of equality [formal, substantive and new vision]; the origin and practice of 'Affirmative Action' and its position in international human rights law. In the second part, he links these principles to the Nepali context, the provisions of the constitution, law and policy, the judicial role, including the proposition for a new draft constitution. He concludes that substantive equality can minimize discrimination. He concludes that Nepal should follow international human rights law and jurisprudence to establish a new vision of equality.

Mr. Nahakul Subedi, Joint Registrar of the Supreme Court discusses a normative dilemma on access to justice: much emphasis on ACCESS and little on

JUSTICE. In this article, the author discusses obstacles in access to justice. He differentiates between access to the judiciary and justice to the victims arguing that they are very different things. The author presents normative aspects of a framework of access to justice in line with international human rights laws, and presents a case study of health rights in the context of access to justice in Nepal. He concludes that where a significant number of people are deprived of access to food, healthcare and education, without enhancing their capacity to claim those rights any promise of equal access to rights appears to be without basis.

Next, the Hon. Justice Ms. Susheela Karki discusses the responses of Nepali judiciary to gender justice in Nepal. Within the context of the Nepali socio-legal system, the author discusses the jurisprudence of the Supreme Court of Nepal on gender justice. In this discussion, she articulates the principles of gender equality, property rights of women, the right to protection from superstitious belief, the right to profession, rights to reproductive health, the right against marital rape, and the right to privacy etc. The author concludes that the court has provided leadership and direction to the executive and legislative bodies to enact gender based laws congruent with the provisions of the Convention on Elimination of all Forms of Discrimination Against Women [CEDAW].

Women's freedom from want after armed conflicts: does the inclusion of economic, social and cultural rights in transitional justice help women is another topic for discussion in this publication. Evelyne Schmid, lecturer at the Bangor Centre for International Law at Bangor Law School in North Wales, United Kingdom, discusses whether the inclusion of Economic, Social and Cultural Rights (ESCR) in law helps women in the transitional justice context. This article analyses the relationship between civil society actors and gender in the context of conflict. The article suggests four avenues for civil society and donors to positively influence the prospects of transitional justice to foster gender equality.

In the next article, Advocate Raju Chapagai writes on thirty five day limitation clause: statutory barrier to access justice by victim of rape. This article examines Nepal's statutory limitation of 35 day for reporting rape. This has denied justice to innumerable victims of rape. The study underlines serious flaws in existing legal provisions. These flaws have enabled impunity for rape. Chapagai notes that the Supreme Court has ordered the review of the statutory limitation and has ruled that it stands as a major barrier to access to justice.

Mr. Rajesh Kumar Katuwal, in his article on access to justice for the rape victims: a brief study in Nepali perspectives, examines the definition of access to justice. He underlines three prerequisites to ensure access to justice: substantive legal framework, institutional infrastructure and knowledge and attitude of the concerned stakeholders. He also reviews the national and international legal

provisions that ensure access to justice for the victims of rape and assesses the role of judiciary. He analyses the provisions relating to ensuring access to justice during three phases; investigation, prosecution and adjudication. He look at their application in practice. He recommends need to review of the existing law and institutional mechanism to make it more victim-friendly.

Dr. Livingston Armytage of the ICJ then writes on the imperative to realign the rule of law to promote justice. This article provides a critique of the global context for justice reform and presents a new vision and approach for justice reform in Nepal. The global approach to promoting 'the rule of law' in official development assistance (ODA) – foreign aid - over the past fifty years for the purpose of improving the judicial reform approach. The article argues that international efforts to promote justice and the rule of law have failed and that the rule of law enterprise is now poised on the brink of development failure. At its essence, the unmet challenge of development is to address mounting concerns about equity and distribution. Building on research and new evidence based in Asia, Dr Livingston Armytage argues that there is an immediate imperative to reposition justice more centrally in evolving notions of equitable development. This will require the international community to realign its endeavors to support Nepal in promoting justice as fairness and equity.

Mr. Mohan Kumar Karna discusses community engagement in judicial reform for improving women's access to justice. This article describes a new approach to justice sector reform in Nepal which aims to improve women's well being by ensuring an effective right to remedy for victims of violence. He situates his work in the current global and national context of justice sector reform. The author refers to the global context, its goals, successes and challenges in the introduction. He then summarizes the experience of judicial reform in Nepal. In the third part, he describes this judicial reform initiative which aims at improving human well being by strengthening the relationship between the community and judiciary, and outlines some lessons learned from that experience. Finally, the author identifies the main issues to be addressed as part of ongoing and future justice sector reform initiatives.

Finally, Mr. Shreekrishna Mulmi and Mr. Ratna Kaji Shrestha jointly discuss judicial community outreach in Nepal as an alternative to promoting public trust towards judiciary and access to justice to the courts. The authors explore an initiative for promoting public trust and access to justice in the court system through judicial community outreach programs. They research the notion of judiciary outreach in other jurisdictions and identify some practices and issues for consideration in Nepal. They offer recommendations to make judicial outreach more effective and better coordinated.

For this issue, we have received invaluable co-operation and assistance from many sources. First, we would like to thank all of the authors for their great effort in writing the articles. We thank the Hon. Justice Kalyan Shrestha of the Supreme Court for his guidance on the publication of this Journal. Likewise, we owe our sincere thanks to Honorable Chief Judge, Mr. Kehsari Raj Pandit, Court of Appeal, Patan. We give sincere thanks to our Executive Director, Mr. Raghab Lal Vaidya, NJA, for entrusting this task to us as editors, and for his support and encouragement for the issue. We place on record our appreciation to Judge/Faculty Member Honorable Justice Mr. Til Prasad Shrestha, for his efforts and guidance. Similarly, we also extend our thanks to immediate past Country Representative Mr. Frederick Rawski, Country Representative Mr. Ben Schonveld ICJ, Nepal and Dr. Livingston Armytage for their generous support. We extend our thanks to Ms. Pamela Poon, an Attorney and Mediation Expert from the US for her untiring language editing of some of the articles. Finally, we want to thank Joint Attorney Dr. Tek Bahadur Ghimire, immediate past Faculty Member at NJA, Deputy Registrar Mr. Danda Pani Sharma at NJA, Mr. Rajesh Katuwal, Deputy Attorney at the NJA and to the entire NJA family. As with previous issues, we hope that this issue will stimulate the interest and appreciation of our readers.

**- Editors**



# ARTICLES





# Access of the Poor to Justice: The Trials and Tribulations of ESC Rights Adjudication in South Asia

Ananda M. Bhattarai\*

## Abstract

*Today, there are more than 500 million poor people in South Asia who earn less than \$1.25 a day. Among the pockets of prosperity are vast swathes of poverty where teeming minions struggle to meet their daily needs such as food, shelter, clean drinking water, basic medicine and health care services. It is against this backdrop that the socialist ideals of constitutions of South Asian countries should be operationalized. How have the courts in South Asia taken the constitutional promise to secure social and economic justice, how has judicial activism fared to achieve its goal of securing justice to the poor and the voiceless, protect, respect and ensure realization of economic, social, and cultural rights is a general inquiry of the article. Author looks first at the constitutional landscape of rights in five key jurisdictions - Nepal, India, Pakistan, Bangladesh and Sri Lanka, the judicial framework in which the judiciaries are operating. It then proceeds to review strategies and tools evolved by the judiciary in these countries for promoting the right jurisprudence. In the final part, it critically reviews the decisions in the light of trials and tribulations of the poor in seeking justice, their achievements and shortcoming, and presents views on whether the decisions have been populist, and just present a "hollow hope," or whether they merit serious consideration and further shaping and championing for securing justice to the poor.*

## 1. Introduction

If the news reports appearing occasionally are to be believed, South Asia is home to half of the world's poor people who hold a precarious living. Despite impressive economic growth, poverty blights prosperity in the region; and despite significant efforts, the challenge of tackling poverty still seems daunting. Today, there are more than 500 million poor people in South Asia who earn less than \$1.25 a day. South Asia hosts 330 million undernourished people, more than the population of sub-Saharan Africa. Over 30 million children still do not go to school in South Asia. Gender discrimination remains a scar where women are subjugated by their

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\* Judge, Court of Appeal, Nepal. Author was one of the founding core faculty members of the National Judicial Academy, Nepal.

husbands, families, society and the state.<sup>1</sup> Among the pockets of prosperity are vast swathes of poverty where teeming minions struggle to meet their daily needs such as food, shelter, clean drinking water, basic medicine and health care services. The UN Millennium Development Goal indicates that 76 percent of people in rural areas do not use improved sanitation facilities, while in urban areas the figure is 34 percent.<sup>2</sup> The challenge of South Asia is not just the lack of basic infrastructures such as education, food, work or health services, but also the lack of good governance and accessible justice. It is against this backdrop that the initiative of the South Asian courts on economic, social, and cultural rights (ESC rights) adjudication should be examined. The paper first looks at the constitutional landscape of rights in five key jurisdictions - Nepal, India, Pakistan, Bangladeshi and Sri Lanka and the judicial framework in which the judiciaries are operating.<sup>3</sup> It then proceeds to review strategies and tools evolved by the judiciary in these countries for promoting the right jurisprudence. The contribution of the judiciary in major areas of ESC rights such as the rights to education, health, work, food, water and housing, forms the core content of the paper. In the final part, it critically reviews the decisions, their achievements and shortcomings, and presents views on whether the decisions have been populist, and just present a “hollow hope,”<sup>4</sup> or whether they merit serious consideration and further shaping and championing for securing justice to the poor.

## 2. The Constitutional Landscape

The countries under review may take pride in having democratic Constitutions in place. They seem to be guided by a socialist vision of securing for their people “economic social and political justice”.<sup>5</sup> All of the Constitutions embody a framework of rights and have in place a more or less independent system of justice. Basic rights such as the right to life, equality and non-discrimination, the right against exploitation, the right to freedoms, etc., find place in all the of Constitutions. Where the bane of racial, religious enmity or caste-ism has harmed the society and pushed people to the extreme--countries have proscribed caste-based or racial, religious discriminations by inscribing clear provisions.<sup>6</sup> The Constitutions have also provided for mainstreaming marginalized sections through reservations in education, employment and political representation.<sup>7</sup> They have also inserted a few

1 Rising Tide Raises Some Boats More than Others, <http://blogs.worldbank.org/endpovertyinsouthasia/rising-tides-raise-some-boats-more-others> [accessed Nov 3, 2012]

2 Data made available in 2005, [http://www.wateraid.org/documents/plugin\\_documents/sacosan\\_2\\_reginal\\_wa\\_paper.pdf](http://www.wateraid.org/documents/plugin_documents/sacosan_2_reginal_wa_paper.pdf), [accessed Nov 3, 2012]

3 Bhutan, Maldives and Afghanistan, though fall in South Asia and are members of SAARC, left out here for unavailability of relevant case laws. Therefore, for our purpose wherever the term “South Asia” is used, though not geographically very correct, it refers to these four countries.

4 The expression echoes Gerald Rosenberg, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1991, Univ. Chicago Press)

5 See preambles IND. CONST.; SRI LANKA CONST.; PAK. CONST.; B'DESH CONST.; NEP. INTERIM CONST.

6 See IND CONST. Art 15, 16; NEP. INTERIM CONST. Art 14. SRI LANKA CONST Art 12[3]; B'DESH CONST. Art.28[3]

7 See SRI LANKA CONST ART 12[4]; B'DESH CONST Art. 28[4]; 29[3]{a}; IND. CONST. Art 15[4]{5}; 16[4, 4-A, 4-B]{5}

rights through constitutional amendments. For instance, the right to education, a constitutive ESC right, was inserted in the Indian and Pakistani constitutions,<sup>8</sup> and the right to information in the Pakistani constitution<sup>9</sup> through amendments.<sup>10</sup> The Directive Principles and State Policies (DPSPs), though “fundamental in the governance”<sup>11</sup> and which provide guidelines while discharging state function<sup>12</sup> are nevertheless not enforceable by the courts.<sup>13</sup> However, when a new Constitution is drafted a fresh approach to rights is taken in terms of internalization of more human rights as enforceable rights. This was witnessed in Nepal where the 1990 Constitution embraced a broader canvas by inscribing rights such as the right to information (Art 16), the right against torture, (Art 14), the right against exploitation (Art 20), the right to privacy (Art 22), etc. And when a new Interim Constitution was issued in 2007, it set up a very bold framework of enforceable rights that closely echoes many ESC rights. The following table will explain it further.

Interim Constitution of Nepal		ICESCR	
Art 13	Right to equality and non-discrimination	Art 2(2), 3	Right to equality and non-discrimination
Art 16(1)	Right to healthy environment	Art 12(2) (b)	Right to environmental and industrial hygiene
Art 16(2)	Right to get free health service	Art 12(1)	Right to highest attainable standard of physical and mental health.
Art 17	Right to education and culture (Right to free education up to secondary level)	Art 13	Right to education (compulsory and free primary education)
Art 18, 29	Right to employment and social security, right against forced labor, slavery, servitude and trafficking	Art 6, 7, 9	Right to work, gainful employment, right to just and favorable conditions of work, right to social security and social insurance

8 IND. CONST. Art. 21-A (2005); PAK. CONST. Art 25-A (2011)

9 PAK. CONST. Art 19-A (2010)

10 By way of constitutional design however, the approach taken by the Indian Constitution, the oldest in the region, that inscribed civil and political rights as enforceable rights and lumped the ESC rights in the Directive Principles of the State Policies (DPSPs), is broadly followed in the Constitutions of Bangladesh (1973), Pakistan (1973) and of Sri Lanka (1977).

11 IND. CONST. Art 37; BDESH CONST. Art.8(2)

12 PAK. CONST. Art. 29(1); SRI LANKA CONST. Art 27(1)

13 See SRI LANKA CONST. Chapter IV. Part VI; BDESH CONST. Part II, PAK. CONST Chapter 2 Part 2,

Art 18(3)	Right to food sovereignty	Art 11	Right to food, clothing, housing, right to be free from hunger
Art 20(2)	Right to reproductive health and reproduction	Art 10(1)(2)	Right to marriage, protection of mother and child
Art 22, 29	Right of the child to nourishment, basic health and social security, right against exploitation.	Art 10(3)	Right of the child and young persons to protection and the right against exploitation.
Art 22(5)	Right to be protected from hazardous work.	Art 10(3)	Right to be protected from harmful and dangerous employment.
Art 30	Right to form trade union, carry out collective bargaining.	Art 8(1)(a)(d)	Right to form and join trade union, right to strike.
Art 17(3)	Right to preserve and promote, language, script, cultural civilization and heritage	Art 15	Right to cultural life, protection of scientific, literary and artistic production.

In addition to the fundamental rights, all five Constitutions have inscribed Directive Principles of State Policies, variously named. The DPSPs are generally considered as programmatic rights, to be implemented through executive decision or legislation in phases subject to the availability of resources. Initially, the Indian Supreme Court held that DPSPs had to conform to the fundamental rights and be subservient to them,<sup>14</sup> but this view was later discarded. In *Minerva Mills Ltd v Union of India*,<sup>15</sup> the Indian Supreme Court held that “harmony and balance between fundamental rights and DPSPs is an essential feature of the basic structure of the Constitution”. In the last thirty years or so, reference to them has been made in judicial decisions. It has been a practice of Indian Court to refer to DPSPs while handing out decisions in extrapolating enforceable rights, say the right to education, or the right to shelter, or environment.<sup>16</sup> A similar approach is taken by other South Asian courts. For instance, the Sri Lankan court in *Seneviratne*, referring to an Indian decision, held that the provisions of DPSPs “are part and parcel of the Constitution and the Court must take due recognition of these and make proper allowance for their operation and function”<sup>17</sup>. Similarly, Bangladeshi court has, of late, emphasized that the Federal Principles and State Policies (FPSPs) can guide the interpretation of constitutional provisions”,<sup>18</sup> and non-justiciability does not mean that the State can

14 *State of Madras v Champakam Dorairajan*, AIR 1951 SC 226

15 [1980] 2 SCC 59 [per Chandrachud J.]

16 *Unnikrishnan J.P. v State of Andhra Pradesh*, [1993]1 SCC; *Olga Tellis v Bombay Municipal Corporation* [1985] 3 SCC 546; *MC Mehta v UOI* [1998]6 SCC 63.

17 *Seneviratne v University Grants Commission* [1979-79-80] 1 SRI.LR 182

18 *A.Wahab v Secretary, Ministry of Land and Others*, 1MLR(HC)[1996] 338.

continue to ignore them indefinitely.<sup>19</sup> Similarly, the Nepali Supreme court has been categorical in stating that DPSPs “are not vacuous jargons”, the government may be required to give effect to them.<sup>20</sup> Partly because of the judicial approach, initiative to enforce ESC rights through legislative enactment is also witnessed in South Asia. The cases in point are Compulsory Primary Education Act of 1990 (Bangladesh) Rural Employment Guarantee Act of 2005 (India), The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (India), The Right of Children to Free and Compulsory Education Act or Right to Education Act 2009 (India), the Right to Information Act (India 2005 and Pakistan, 2010), and the Right to Free and Compulsory Education Act of 2011(Pakistan), to name a few, which have tried to further operationalize DPSPs.

Also to be noted in the context of ESC rights adjudication is that, either owing to colonization or physical, educational and cultural proximity, all the countries under review, except Sri Lanka, follow the common law model of adjudication.<sup>21</sup> They have similar court systems, where the highest courts are vested with the power of judicial review. The power to entertain public interest petitions either by constitutional design (in the case of Nepal) or by judicial maneuver, has been vested in the highest courts. All five countries are parties to major human rights instruments including the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>22</sup> All these factors have shaped the evolution of similar judicial approaches to rights.

### 3. The Judiciaries and the Right Jurisprudence

It would perhaps be correct to state that the South Asia region is Indo-centric. This is not so because of the physical size of India, or the size of her Constitution, or common historical, and cultural legacies, but because of the leading role played by the Indian courts in developing the right jurisprudence. If South Asia today is seen as a terrain with a strong and activist court system, the credit for initiating the activist discourse goes to Indian courts. Now, this discourse has become a common vocabulary of all in South Asia, especially in the countries under review. In appropriate situations, the courts of the region have the practice of citing Indian case law and the case law developed in neighboring jurisdictions. In the case of Nepal, the Indian experience has been institutionalized in the constitutional system by inserting in the Constitutions provisions regarding recourse to judicial review and public interest petition.<sup>23</sup>

19 *Masdar Hossain (Md.) and Others v Bangladesh*, 2 BLC (1999) 444. Para. 37.

20 *Yogi Naraharinath et al. v PM Girija Prasad Koirala and Others*, NKP 2053 decision 6127, p 33. (re-protection of environmental heritage)

21 Sri Lanka follows a mixture of English common law, Roman-Dutch, Sinhala and Muslim and customary law.

22 Pakistan has only signed the ICESCR, see Ian Byrne and Sarah Hossain, *Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW*, (Malcolm Langford ed.) Cambridge, 2008 at p 125, 126

23 See NEP. CONST. 1990 Art 88; INTERIM NEP. CONST. 2007 Art 107

Even though India started with a democratic Constitution, perhaps due to overtly socialist orientation, she did not explicitly incorporate the “due process clause” in her Constitution, nor did she vest the judiciary with the power of judicial review. In *AK Gopalan*,<sup>24</sup> the Supreme Court declined to review whether the Preventive Detention Act was against Articles 13, 19, 21, and 22 of the Constitution. It gave a narrow interpretation of “law” as the law enacted by the Legislature and held to the effect that if the law established a procedure and said procedure was fulfilled, it was not necessary to go into questioning the law, for unlike the American Constitution, the Indian Constitution did not subscribe to the values of “due process of law”. This skeletal approach to law was reversed in *Maneka Gandhi*<sup>25</sup> after nearly 28 years, where the Court embracing a wider view held that the “procedure established by law” in Art 21 did not mean only procedure laid down by the Legislature but it meant “a fair, just and reasonable procedure.” The court, thereby, brought into focus the “principle of reasonableness” in the constitutional discourse. Following the decision in *Maneka Gandhi*, the Supreme Court now looks into the reasonableness of all legislative and executive actions. The concept of reasonableness and non-arbitrariness pervade the entire constitutional scheme of India and is now considered as a golden thread running “through the whole of the fabric of Constitution.”<sup>26</sup> Accordingly, “every state action whether it be of the legislature or of the executive or of an authority under Art 12’ can be struck down by the Court if it does not comply with the requirement of reasonableness.”<sup>27</sup>

A concomitant development of the 1970s is the expansive interpretation of the right to equality. Towards the end of 1973, Bhagwati J, in *E.P. Royappa v State of Tamilnadu*<sup>28</sup> expounded on the concept of equality inscribed in Article 14 as follows:

*“Equality is a dynamic concept with many aspects and dimensions and it cannot be “cribbed, cabined and confined” within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Art 14.”*

From the perspective of the right jurisprudence the most significant contribution made by the Indian judiciary is the expansive interpretation of “the right to life” in

24 *AK Gopalan v State of Madras*, 1950 AIR 27

25 *Maneka Gandhi v Union of India*, [1978]1 SCC 248

26 *Id*

27 *Id*

28 *AIR 1974 SC 555*.



the 1980s, and opening up of the possibility of filing representative suits through public interest litigation (PIL). In *Francis Coralie Mullin v The Administrator*<sup>29</sup> the Supreme Court observed:

*“The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human being. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.”*

While extrapolation of the right to life brought into its sweep many ESC rights such as the right to food, clothing, shelter, education, and healthy environment, easing of the *locus standi* rule opened up access to justice to the voiceless minions in low visibility areas of society, who were not able to use the courts due to economic and social disabilities. With these developments the Indian Court thus “dismantled the insurmountable wall of procedure and opened the door for issues that had never reached there before.”<sup>30</sup>

The innovation made by the Indian court on the rule of reasonableness, expansive interpretation of the right to life, and broadening of the *locus standi* rule was positively taken by courts of the region to further equality and ESC rights jurisprudence in the same and following decade. For instance, the Nepali Supreme Court in *Godavari Marble* case expanded the “right to life” to include the right to a decent environment.<sup>31</sup> A similar approach was taken by the Pakistani Supreme Court in *Shehla Zia*, where taking into cognizance the possible health hazards of electromagnetic transmission, the Court declared that the right to live in a clean environment was based on the constitutional right to life and dignity.<sup>32</sup> In *Akbar Ali* the Court further declared that every citizen had the right to justice and could directly approach the Court.<sup>33</sup> In Bangladesh, the Supreme Court accepted a public interest petition in the 1990s and gave a similarly expansive interpretation of the right to include the right to livelihood and property.<sup>34</sup> In another case, the Court observed:

29 [1981] 2 SCR 516

30 S Muralidhar, The Expectation and Challenge of Judicial Enforcement of Social Rights, in *supra* note 22 p 102, 109

31 *Surya Sharma Dhungel v Godavari Marble Industries*, NKP 2052 (1995) Golden Jubilee Special Volume p 169

32 *Shehla Zia v WAPDA*, PLD 1994 SC 693 ( case relating to the construction of electricity grid- where the court asked the government to set up a scientific commission to examine health risks.

33 *Akbar Ali v State* 1991 SCMR 2114.

34 *Dr Mohiuddin Farooque and Another v Bangladesh and Others*, 49 DLR(AD) 1 and 50 DLR(1998)84.

*“Article 31 and 32 guarantee a right to life. This expression of life does not mean merely an elementary life or sub-human life but connotes the life of the greatest creation of the Lord who has at least a right to a decent and healthy way of life in a hygienic condition. It means a qualitative life among others, free from environmental pollution.”<sup>35</sup>*

The general approach of the courts in ESC rights adjudication has been to look at them holistically and organically based on the provision of the Constitution. The Nepali Supreme Court in several cases has seen linkage among various rights. For instance in *Prem Bahadur Khadka*<sup>36</sup> the Court interpreted the right to employment as part of the right to equality, the right against discrimination, the right to health, the right to education and culture and the right to social justice.

The reference to international laws in ESC rights adjudication is mostly guided by domestic constitutional obligation and initiatives. Most of the countries other than Nepal adopt a dualist approach to international law<sup>37</sup>, but even then the states are called upon “to foster respect to international law and treaty obligation”<sup>38</sup>. International law standards are referred to in such a way that they add force to the rights guaranteed in the Constitution. The trend to refer to international law is growing. For instance, in *Vishakha*<sup>39</sup> the Indian Supreme Court and in *Prakash Mani Sharma*<sup>40</sup> the Nepali Supreme Court adapted many provisions of CEDAW while formulating guidelines that would remain in force until Parliament enacted an appropriate law. International law is also referred to internalize the value of substantive equality. For instance, in *Mohan Sashanker*,<sup>41</sup> the Nepali Supreme Court, echoing CEDAW, defined discrimination to include prohibitions, exclusions and restrictions leading to denial and nullification of rights. Viewing inequality and discrimination from a broader perspective is necessary for embracing the values of substantive equality. Emphasizing the need to transform equality from formal to substantive equality, the Nepali Supreme Court in *Prakash Mani Sharma* while addressing the issues of the deaf persons, observed that experiences of different groups and communities needed to be adjusted to ensure equal benefit of the right to education.<sup>42</sup> For this reason perhaps, the Court in Nepal has slowly and gradually begun to refer soft law instruments such as general comments, resolutions and decisions of the regional

35 *Dr Mohiuddin Farooque and Others v Bangladesh and Others*, 55 DLR[2003] 609, para 53, cited in Ian Byrne and Sara Hossain, supra note 22 at 135.

36 *Prem Bahadur Khadka and Others v GoN, Office of the Prime Minister and others*, Writ no 066-W0-07193 decision dated 2065/9/23

37 Nepal by virtue of the provision in S 9(2) of the Nepal Treaty Act, takes a middle ground.

38 IND CONST. Art 51.

39 *Vishakha v State of Rajasthan* [1997] 6 SCC 241

40 *Prakash Mani Sharma and Others v Ministry of Women, Children and Social Welfare and Others in Human Rights and Gender Justice* [Supreme Court, Vol. 3 No 2, 2066] p. 414

41 *Mohan Sasankar v Prime Minister and Council of Minister and Others*, Writ no 3416 of the year 2063, decision dated 2066/3/3 see 3NJA L.J. 247[2009]

42 *Prakash Mani Sharma and Others v Office of the Prime Minister and Others*, Writ no 0283 of the year 2063, decision dated 16 April 2008.

human rights tribunals and other courts.<sup>43</sup> This is also witnessed in India, where the court has begun to dig further into the soft law instruments such as UNSMR for administration of justice, and UNSMR for the protection of juveniles.<sup>44</sup>

Given that many ESC rights require advance policy determination and formulation along with a budget to implement them, the courts in South Asia have further sharpened the PIL adjudication in the form of dialogic appraisal. In Nepal the courts have issued directive orders calling upon the executive to do some homework for the formulation of legal policies and laws.<sup>45</sup> The Court has also constituted committees to study the matter and report back to it, and in appropriate cases, has issued orders on the basis of such reports and recommendations.<sup>46</sup> In India, the Court has taken various approaches such as issuing declaratory orders, mandatory orders, continuing mandamus, appointment of amicus curae in addressing the issue, and appointment of commissioners to verify facts and submit the report.<sup>47</sup> Where scientific issues are involved or where expert advice is required, the Court usually requests an expert or specialist body, such as the NERI, to ascertain facts and submit a report together with recommendation on possible corrective measures.<sup>48</sup> The Court then hears objections to the report before deciding to either accept or reject it.<sup>49</sup> In complex cases like the right to food case or the forest case, assuming some of the overtly executive functions, the Court appointed commissioners (and a host of officers to assist them) to monitor implementation of interim orders, handle grievances, and report back to the court.<sup>50</sup> When exigencies require, the Court has issued forewarnings on disobedience or non-implementation of its orders.<sup>51</sup> The issuance of a continuing mandamus, and keeping the file live in its docket for several years are other strategies adopted by the courts to ensure implementation<sup>52</sup>.

43 *Rajendra Dhakal and Others v Govt of Nepal* [Disappearance case] (2007) 1 NJALJ p 301; *Sunilbabu Panta and Others v. Govt. of Nepal and Others* [LGBTI right to equality] (2008) 2 NJALJ p 261; See also Kalyan Shrestha and Ananda M Bhattarai, *The Role of the Judiciary in the Enforcement of Economic, Social and Cultural Rights*, in *HUMAN RIGHTS AND CONFLICT* (Ineke Voerelijn et al eds) Cambridge, Intersentia 2011) at p 429, 433

44 *Pratap Singh v State of Jharkhand* (2005) 3 SCC 551.

45 *Reena Bajracharya v Royal Nepal Airlines Corporation and Others*, NKP 2057 No 5 P 376 (air hostess case); *Sapana Pradhan Malla and Others v Ministry of Law and Others* NKP 2053 no 2 p. 105 (women's' right to property case); *Sharmila Parajuli and Others v Cabinet Secretariat and Others*, NKP 2061 no 10, p 1312 (sexual harassment case)

46 *Tek Tamrakar v Cabinet Secretariat* Writ no 121 of the year 2060 ; *Pun Davi Maharjan v Office of the Prime Minister and others*, NKP 2065 decision no 7981 at p 344. *Prakash Mani Sharma and Others v Prime Minister and Others* (indecent portrayal of women in advertisement, Writ no 0723 of the year 2063, decision dated 2065/5/16/2.

47 *MC Mehta v UOI* (1994) SCALE 8, where a lawyer was requested to verify facts concerning the threat posed by pollution to Taj Mahal by units in the vicinity.

48 *In Re Bhavani River-Shakti Sugars Ltd* (1998) 6 SCC 335 and *Indian Council for Enviro-legal Action v Union of India* (1996) 3 SCC 212

49 See *Muriladhar*, supra note 30 at p 110

50 *PUCL v UOI* (2001) 5 SCALE 303; ; *TV Godavarman Thirumalkpad v UOI* (1997) 2 SCC 267

51 *MC Mehta v UOI* (1998) 6 SCC 63

52 *In India the forest Case of TV Godavarman Thirumalkpad v Union of India* (1997) 2 SCC 267 which was filed in 1995 and the Right to food case i.e. *Peoples Union for Civil Liberties v UOI* (2001) 5 SCALE 303, which was filed in 2001 are still pending in the Supreme Court.

## 4. Specific ESC rights and Judicial Response

The judicial decisions on specific ESC rights are based on the Constitution, laws of specific countries, and relevant international human rights standards. Where specific rights, say the right to food, education or shelter are guaranteed as enforceable rights the courts invoke those rights, but where this is not the case, a combined reading of the fundamental right to life along with relevant DPSP is made. The ESC rights cases are also examined from the perspective of equality and non-discrimination. This seems a common springboard from which the ESC rights adjudication takes its course. For instance, where access to institutions imparting Sanskrit education is denied to a *Dalit* student, it is a matter pertaining to equality and non-discrimination as well as the right to education. Reservation in education has been examined from the angle of rectification of discrimination as well as being a measure to ensure substantive equality in education.

### 4.1 The Right to Education

The approach of the courts on equality and non-discrimination is very much prevalent in cases that raise issues relating to the right to education. The constitutional provisions on positive discriminations have influenced the discourse on the right to education. For instance, the Indian Constitution opens up the possibility of putting special provisions in place “for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes.”<sup>53</sup> This has now been further expanded to ensure admission of the backward communities “to educational institutions including private educational institutions, whether aided or unaided by the State”.<sup>54</sup> Other Constitutions of the region, though contain provisions regarding positive discrimination, are not as categorical as the Indian Constitution appears. The plethora of Indian case laws on reservation in education explain how the constitutional and legal provisions have been operationalized.<sup>55</sup>

In not all the Constitutions in South Asia is the right to education guaranteed as an enforceable right. However, Nepal, India and Pakistan have inscribed the right to education in the fundamental rights chapter of their Constitutions.<sup>56</sup> In Bangladesh and Sri Lanka, provisions on education are inscribed in DPSPs and taken further by respective laws. Many issues pertaining to the right to education have been taken to the courts in South Asia, and the latter has handed down progressive decisions.

53 IND CONST. Art 15(4), added in 1951.

54 Id Art 14(5), added in 2005.

55 Among them is *Indira Sawhney v Union of India* AIR 1997 SC 597- which among others fixed an overall quota of 50 percent reservation in public services and excluded reservation in areas of super-specialties, is said to have resolved most nagging questions regarding affirmative action vis-à-vis the right to equality and meritocracy.

56 NEP INTERIM CONST. Art 17. IND CONST Art 21-A, PAK CONST. Art 25-A, all the constitutions visualize the free and compulsory education up to secondary level.

In fact the judicial initiative has propelled the government to shoulder it as a “core obligation” and consider education as an enforceable right. *Unnikrishnan*<sup>57</sup> is a representative example of this type, where the Indian Supreme Court by resorting to a combined reading of Art 21, Art 41, Art 45, and Art 46 of the Constitution, held that the right to education is implicit and flows from the right to life under Art 21.” This interpretation and the need to promote education compelled the legislature to declare primary education as free and compulsory. The decision in *Unnikrishnan* has also been employed by the Indian court in formulating broad parameters for eradicating child labor.<sup>58</sup>

The Courts in South Asia have addressed various issues pertaining to education. For instance, in Bangladesh disqualification of student on the grounds of age was brought to the judicial scanner, where the High Court held that disqualification of a candidate in obtaining an admit card to participate in the examination was discriminatory.<sup>59</sup> In Pakistan, the Court struck down a government policy which allowed free migration from one medical college to another on the ground that it violated the right to education of students at an over-crowded college.<sup>60</sup> The Court upheld reservation for persons from backward areas,<sup>61</sup> and affirmed the right to education of a student who was not allowed to continue his studies.<sup>62</sup> In Nepal, the Supreme Court in *Pradhwosh Chhetri*, referring to the provision of the Constitution that allowed positive discrimination<sup>63</sup>, directed the Council of Ministers to enact a law for the protection of women, children, aged and physically and mentally incapacitated persons, and educationally and socially backward communities within a year, and requested them to determine who were educationally and socially backward.<sup>64</sup>

Another set of cases relates to persons of disability. When blind students enrolled in various colleges in Kathmandu sought judicial intervention for fee waivers and special reading material in Braille script, the court issued a directive to the government to provide free education to blind, deaf, disabled and persons of

57 *Unnikrishnan J.P. v State of Andhra Pradesh*, [1993]1 SCC 645

58 *MC Mehta v State of Tamilnadu* [1996] 6SCC 772. (case relating to child labor in fire cracker industries in Tamilnadu.)

59 *Dr Manzoor Rasheed Chowdhury v The Principal, Dhaka Medical College* 22 BLD [HCD] (2002)6.

60 *Aneel Kumar v University of Karachi*, PLD 1997 SC 377

61 *Abdul Baqui v Mohamad Akram*, PLD 2003 SC 163. *Mstt Attiya Bibi v Federation of Pakistan*, 2001 SCMR 1161; and *Shiren Raza v Federation of Pakistan* 2002 SCMR 1218.

62 *Shah Alam Khan v Vice Chancellor, Agriculture University*, PLD 1993 SC 297

63 NEP CONST. 1990 Art 11 [3] clause reads: Provided that special provisions may be made by law for the protection and advancement of the interests 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.

64 *Pradhwosh Chhetri and Others v Office of the Council of Ministers* NKP 2061 No 7, p. 901 [this case challenged the reservation of quota in medical studies without a law being in place.]

retarded mind in public schools, universities and training centers. It also ordered the respondents not to levy any service fee from such physically challenged persons.<sup>65</sup> In one of such cases, the court observed:

*"..the right to get education in sign language is the birth right of the deaf... if sign language is not linked to education, the education of this group is.. almost impossible. Therefore, the right of the petitioners to sign language, its process... and the establishment of schools for the said purpose should be taken as a human right of the people affected by deafness."*<sup>66</sup>

The Court in this case issued multiple orders and called upon the state to identify schools and colleges which could impart education to deaf students and make arrangement for interpreters or teachers trained in sign language, and to translate the course material into sign language and make them available to the students enrolled. The Court also ordered immediate commencement of the training of teachers that would make them competent to impart education in sign language. The Court finally ordered the respondents to report back within six months for follow up directions.

In many countries, the practice of using corporal punishment on children by teachers on the pretext of imparting education continues. In Nepal it was legitimized through a legal provision, which went to the extent of stating that if a child died due to simple battery or any act of the person responsible for the protection and education of the child, then the act shall be construed as *bhavitabya* (an act of no fault) and the person would be liable to receive a simple punishment of up to fifty rupees (i.e. around 75 cents).<sup>67</sup> When this law was challenged, the Court declared the law *ultra vires* on the ground that the person providing education and security could not be allowed create terror, commit physical and mental torture, spank the child, or beat him/her in a way that could lead to death, for such a provision legitimized torture against the child at home and in the school. The Court also issued a directive order to the respondent to prevent physical and mental torture or abuse of the child in whatsoever manner, enact laws that would give recourse to children and provide for disciplinary or other actions against teachers or other such persons who were involved in abusing or torturing children in the name of imparting education or providing security.<sup>68</sup>

65 *Sudarshan Subedi and Others v Council of Ministers and Others*, Writ no 3586 of the year 2057, decision dated 2060/7/28 BS

66 *Prakash Mani Sharma and Others v Office of the Prime Ministers and Others*, (right of the deaf people to education) Writ no 0283 of the year 2063 decision dated 16/04/2008 AD. [per Kalyan Shrestha J.]

67 No 6 of the Chapter titled "Of Life" of the National Code.

68 *Raju Prasad Chapagain and Others v Prime Minister and Others*, Writ no 63-WS-0031, decision dated 2065/7/28 BS.

The caste-based discrimination in education is another practice perpetuating the marginalization of Dalits. A practice of not allowing Dalit students to Sanskrit educational institutions or residential dormitories continued despite the Constitution proscribing caste-based discrimination. In *Dilbahadur Bishwakarma*<sup>69</sup> the Nepali Supreme Court declared a by-rule of Sanskrit Hostel that denied entry to persons who had not undergone the so called “thread ceremony” and was not under 24 years of age. In *Mohan Sasankar*<sup>70</sup>, the Court struck down a Rule that denied access to students of caste groups other than “Upadhyaya Brahmin” to Sanskrit education in a government-aided school. Decrying the folly of the Rule the Court observed:

*“All human beings want to move from darkness to light; from pain to pleasure. In this process all the streams of education, especially Sanskrit education cannot in any sense discriminate those who want to pursue it. Whosoever acquired it, the sunlight is bright and warm; education is like that... Education is to be acquired by human beings, not by a particular caste. The prestige of Sanskrit language does not diminish when acquired by a person of a particular caste, and increase when acquired by a person of another caste... such a distinction only promotes inequality in the society.”*

The Court in this case held that such a discriminatory practice which excluded people who were from castes other than the Brahmin caste was inconsistent with the right against untouchability and racial discrimination, the right to religion and the right to social justice guaranteed by the Interim Constitution of Nepal.

#### **4.2 The Right to Work**

The right to work in the South Asian context should be understood more in terms of provisions that provide positive discrimination by reserving jobs for marginalized sections, than as a direct obligation of the State to provide jobs to everyone<sup>71</sup>. In other words, what is enforceable is the “right in work” and not the “right to work”. The Constitutions under review have embodied provisions that allow the state to enact laws for the advancement of economically and socially backward communities. The Indian Constitution is more forthright in this regard. From the 1950s, it inscribed provisions that reserved jobs for backward groups of peoples, castes and tribes

69 *Dilbahadur Bishwakarma and Others v Cabinet Secretariat and Others*, Writ no 44 of the year 2062, decision dated 06/10/2062.

70 *Mohan Sasankar v Prime Minister and Others*, Writ no 3416 of the year 2063, decision dated 03/03/2066. See also 3 N.J.A.L.J. 247 (2009)

71 The right to work as such is inscribed in DPSPs. See IND. CONST. Art 41 [securing right to work], Art 42 [securing just and human conditions of work] Art 43 [living wages, decent standard of living].



scheduled in the Constitution.<sup>72</sup> This has now been understood to include reserved quotas in jobs at the entry point and at higher posts in career path. There is a plethora of case law on these issues. It is beyond the scope of this paper to discuss them. Here, we look into cases where the courts have reviewed the provisions of the DPSPs and given their perspective on the right to work.

One of the early case is the large-scale abolition of posts of Village Officers in Tamilnadu. Here, the Court declined to intervene, citing reason that “the question whether a person who ceases to be a government servant according to law should be rehabilitated by giving an alternative employment is, as the law stands today, a matter of policy on which the court has no voice.”<sup>73</sup> When such a huge number of people did lose their employment, some felt that instead of shying away, the Court should have asked the government to create an alternative or provide transitional support until such people could find other employment or means of earning.

One of the baneful practices in employment is “forced labor.” All the Constitutions under review have proscribed forced labor, slavery and servitude. In the *Asiad Case*<sup>74</sup> where the middlemen (*Jamadars*) exploited the workmen employed in various *Asiad* projects in such a way that workmen were deprived of even the minimum wage guaranteed by law, the Indian Supreme Court held that “the contractors are liable to pay the minimum wage to the workmen employed by them under the Minimum Wage Act 1948 but the Union of India, the Delhi Administration and the Delhi Development Authority who have entrusted the construction work to the contractors would equally be responsible to ensure that the minimum wage is paid to the workmen by their contractors.” In *Bandhuwa Mukti Morcha*,<sup>75</sup> where deplorable conditions of bonded labourers in a quarry in Haryana was brought to the consideration of the Court, it declared bonded labor a crude form of forced labor prohibited by Article 23. The Court also held it as the obligation of the State to identify bonded labourers, to release them from their bondage and to rehabilitate them as envisaged by Articles 21 and 23. Similarly, in another employment related case, where the daily and casual workers were paid less than permanent employees by the government, the Court observed that “the classification of employees into regularly recruited employees and casual employees for the purpose of paying less than minimum pay payable to

72 IND CONST. Art 16 [4]: “Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.” Now through Art 16(4-A and 4-B) have been added to include in reservation in promotion and carry-over of the unfulfilled seats for the employees of backward communities in the subsequent year. India also constituted two commissions Two commissions constituted to study backwardness – Kaka Kalekar Commission in the 1953 and B.P Mandal Commission in the 1978 – to study the situation of backwardness.

73 *K Rajendran v State of Tamil Nadu* [1982]2 SCC 273, at p 294

74 *People's Union for Democratic Rights V UOI* [1982]3SCC235.

75 *Bandhuwa Mukti Morcha v UOI* 3 SCC 161.

employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scale are lowest is not tenable.”<sup>76</sup>

The approach of the Indian Supreme Court on the right to work has been indirect. It has not directly stated that the citizens have a fundamental right to work. It has rather tried to ensure that the conditions of work are humane and that employees are paid at least minimum wages and have a say in the management of industries. However, now owing to liberalization, a reverse trend seemingly appears in the offing. Whereas in the 1980s the Court had emphasized the participation of workmen in the management of industries (vide Art 43A), by 2001 when the employees challenged the government decision to divest its share held in a public sector undertaking in favour of a private party, the Court refused to recognize any right in the workers to be consulted.<sup>77</sup> The SC held that “prior notice and hearing to persons who are generally affected as class by an economic policy decision of the government & the dis-investment policy cannot be faulted if as a result thereof the employees lose their rights or protection under 14 or 16.”<sup>78</sup> Having said this, one should not forget to mention the massive initiative of the government that tries to guarantee employment in the rural and unorganized sector. In August 2001 the Indian government launched a *Sampoorna Grameen Rozgar Yojana* (SGRY), an employment scheme that would give the people minimum employment. It officially aimed at generating 100 crore person-days of employment each year. The Supreme Court took it as a viable strategy to improve the livelihood of the people. In the Right to Food case, in May 2003 it therefore asked the government to double the scale of SGRY. The entitlement thus created judicial backing. In 2005, India enacted the National Rural Employment Guarantee Act 2005. Under this Act, anyone who was willing to do unskilled manual labour at the statutory minimum wage was entitled to being employed on public works within 15 days (subject to a limit of “100 days per household per year”), or failing that, to an unemployment allowance. Recently, the Indian Prime Minister went on record to claim that 80 million (eight crore) people have benefited from the Act.<sup>79</sup>

In Nepal, the “right to work” has not been explicitly recognized but it exists in government plans and programs in the form of minimum employment guarantees to the people of remote hilly regions. In addition, the livelihood right to old people, widows, single women and physically challenged persons is respected through government benefit schemes. The “right in work” has been addressed by the court in non-discrimination and employment related cases such as early retirement of air-hostesses, maternity leave, sexual harassment in the work place, etc.

<sup>76</sup> *Daily and Casual Labour Employed under P&D Department v UOI* [1988]SCC 122 at para 7.

<sup>77</sup> *BALCO Employees Union v UOI* [2002] 2 SCC 333.

<sup>78</sup> *Id.*

<sup>79</sup> Dr Manmohan Singh claimed this in Nov 3. See Times of India on Nov 4, 1012,.

### 4.3 The Right to Health and Water

The right to health in the South Asian Constitutions except that of Nepal, have been enumerated in the DPSPs. However, this has not inhibited the Courts from declaring the right to health as a constitutive and integral part of the right to life. The issue of right to health has figured in the South Asian courts in varied forms, such as the right to medical attention and emergency care, insurance from health hazards, misleading and harmful advertisements, accessibility and affordability of medical drugs, clean water and environment, protection from radiated milk, mislabeling of food, relocation of industries discharging health hazards etc. The courts of the region have addressed the issue in an innovative manner.

One of the early cases on the right to health in India pertains to an agricultural laborer who fell from a running train in Calcutta.<sup>80</sup> He was taken to seven different hospitals for treatment but all of them refused to admit him on the pretext of vacancy of seats. In this case, the Supreme Court of India declared the right to health a fundamental right, and asked the West Bengal Government to pay compensation for the loss the poor farmer suffered. It also directed the government to formulate a policy for primary health care with due attention to treatment of patients during an emergency. The Court in this case observed:

*“The government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance to preserving human life. Failure... to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Art 21.”*

Similarly, the plight of mentally diseased persons was brought to the attention of the Nepali Supreme Court in *Raju Prasad Chapagain*<sup>81</sup> where the petitioner contended that a significant number of mentally diseased persons, instead of being treated in the hospital, were imprisoned in a jail on the outskirts of the Kathmandu valley.<sup>82</sup> The petitioner challenged legal provisions that allowed incarceration of such persons. Instead of them being treated in the hospital, the law allowed their imprisonment, which according to him was inconsistent with Article 11(3) and Article 26(9) of the 1990 Constitution.<sup>83</sup> In this case, the Supreme Court viewed it as the obligation of the state to provide medical treatment and make mentally or physically diseased persons capable of enjoying their ESC and political rights. The Court declared expression in No. 6 of the Chapter “Of Treatment of the National Code that allowed “shackling and putting in jail” and also S. 16(2) of the Disabled Persons

80 *Paschim Banga Khet Majdoor Samity v State of West Bengal* [1996] 4 SCC 37.

81 *Raju Prasad Chapagain v Prime Minister and Others* NKP 2066 no 1 p 34.

82 In fact their number was 27 in Kavre Jail.

83 No 6 of the Chapter “Of Treatment” of the National Code and S 16(2) of the Disabled Persons Protection Act 2039 allowed imprisonment of mentally ill persons.

Act *ultra vires*. It asked the government to enact a comprehensive law that included all necessary provisions with regard to mentally diseased persons, make a survey of mentally diseased persons, hospital beds available in the country for such persons, and to determine if any plan of action existed for their treatment. It also ordered shifting of such persons languishing in jail to medical centers, and until such time, making provisions for their treatment in the prison by expert medical doctors. A similar case in India is *Sheela Barse*. In this case the Indian Supreme Court issued an order which consisted of seeking cooperation of NGOs to assist in the task of rehabilitating physically and mentally retarded and abandoned children who were jammed in safe custody prisons.<sup>84</sup>

Another case on the right to health pertains to the uterine prolapse of women, a huge health problem being faced by Nepali women especially in the mountain and hill districts.<sup>85</sup> In this case the Supreme Court of Nepal held that the right to reproductive health and other rights were important aspects of economic and social justice. It ordered the respondents to consult health experts and representatives of that social group, enact a law addressing the problem of uterine prolapse at the earliest, arrange for free consultation, treatment and other related health services to aggrieved women by setting up health centers, and conduct programs to raise public awareness regarding the problem relating to reproductive health of women and, more specifically, on uterine prolapse.

Health insurance of workers in hazardous industries is one relevant issue pertaining to the right to health. The Indian Court in the RERC case<sup>86</sup> dealt with the plight of workers who due to long engagement in asbestos industry were vulnerable to asbestosis. Here the court ordered mandatory health insurance for every worker.

The quality of medical service is another issue related to health. The courts in South Asia have addressed this issue variously. In India, the Supreme Court, after getting a report stating the sordid conditions of the Mental Hospital in Ranchi (then in Bihar State) ordered the involvement of the West Bengal and Orissa governments in providing proper management of the hospital, and for that purpose constituted "a Committee of Management for the Mental Hospital and gave directions regarding the financial contribution from the participating States, and also laid down guidelines regarding the functioning and management of the hospital. The Court further directed that the Committee to take expeditious steps to explore the possibility of transforming the hospital into the pattern obtaining in the hospital run by NIMHANS at Bangalore<sup>87</sup>.

84 *Sheela Barse v UOI*, JT 1986 136, 1986 SCALE {2}230.

85 *Prakash Mani Sharma v Office of the Prime Minister and Others*, Writ no 064-WO-0230. NKP 2065 Decision no 7931 at p 178

86 *Consumer Education and Research Center v Union of India* {1995} 3 SCC 42.

87 *Rakesh Chandra Narayan v UOI*, 1991 Supp {2} 626, 1989 Supp. {1} SCC 644, 1994 Supp. {3} SCC 478; *Supreme Court Legal Aid Committee v State of Madhya Pradesh* {1994} 5 SCC 2

Regarding the possible impact on the price of a drug by a piece of legislation, the Sri Lankan Supreme Court examined the Intellectual Property Bill designed to secure compliance with the TRIPS agreement. The Court agreed with the petitioners that, in the absence of the mitigating measures incorporated into TRIPS, this would result in the increase of the price of such medicine in the market and affect the people of Sri Lanka from obtaining medicines at the cheapest available price and from a source of their choice. Such a situation, according to the Court, would violate the right to equal protection under the law under Article 12(1) of the Constitution.<sup>88</sup>

Bangladeshi and Pakistani Courts have handled the advertisement of tobacco on television and radio. The Pakistani court in a case filed by *Pakistan Chest Foundation* accepted the contention of the petitioner that advertisements for cigarettes on radio and television was detrimental to the right to life. According to the Court, such ads encouraged smoking and caused deleterious effects especially amongst the youth.<sup>89</sup> Similarly, the Bangladeshi Court in *Nurul Islam*, which challenged tobacco advertisement, laid down detailed rules which stopped the advertisement of tobacco, halted its production, prohibited import for a set period and banned smoking in public places.<sup>90</sup>

Mislabeled food, and sale of infected and contaminated food items are other issues the South Asian Courts have handled. For instance, the Pakistani Court addressed the issue of mislabeling of food<sup>91</sup>, and also halted the sale of infected food. Similarly, the Bangladeshi Court had to step in when the government wavered on taking action against the import of powdered milk contaminated with radiation following the Chernobyl disaster.<sup>92</sup> Since the case involved many scientific and technical details, the Court could not decide the case on its merits. It ordered the submission of more evidence, and also directed the government to implement effective testing. The Court observed it to be “the obligation of the State to raise the level of nutrition and the improvement of public health by preventing the use of contaminated food, drink etc ... the right to life, being a fundamental right can be enforced by the court to remove any unjustified threat to the health and longevity of the people.”<sup>93</sup>

A connected issue of health is clean, pollution-free and accessible drinking water. This issue has come to South Asian Courts in a number of cases. For instance, both

88 *Re: A Bill bearing the title “Intellectual Property” in the matter of petition under Art 12(1) of the Constitution* [SC Special Determination 14/2003]

89 *Pakistan Chest Foundation v The Govt. of Pakistan*, 1997 CLC 1379.

90 *Prof. Nurul Islam and Others v The Govt. of Bangladesh and Others*, [2000] 52 DLR 413.

91 *Karachi Metropolitan Corporation v Qarshi Industries Ltd* 2002 Sup. Ct.- 439

92 *Dr Mohiuddin Farooque v Bangladesh* 48 DLR [1996] 438.

93 *Id.* Para 20-21.

the Nepali and Pakistani Supreme Courts have upheld the right to clean potable water as an integral part of the right to health, and the right to life.<sup>94</sup> The courts have been very concerned about arsenic pollution. For instance, the Bangladeshi Court in *Rabia Bhuiyan* has held the government responsible for violation of the right to life, due to failure to comply with duties to provide access to safe and potable and arsenic-free water.<sup>95</sup> Similarly, the Nepali Supreme Court in *Prakashmani Shrama*<sup>96</sup> addressed the issue of arsenic pollution. In this case the petitioners cited the report prepared by WHO which mentioned that the life of around 40 to 60 million people in South Asia was threatened due to arsenic pollution. He also cited the report of the National Arsenic Direction Committee which had collected samples from four Terai districts revealing skin diseases in people caused by over exposure to arsenic-polluted water, and prayed for the issuance of mandamus compelling the respondents to adopt preventive and therapeutic methods in arsenic hit districts. Accepting the contention, the Court observed that “water is an essential commodity for maintaining and sustaining life. It is the duty of the state to supply safe and pure drinking water to citizens...safe and pure water is a matter concerned with the health and so linked to the right to life. Every citizen possessed the right to safe, pure and pollution free water”. The Court acknowledged that some work was being done, but asked the government to develop an effective plan and program at the national and local level and supply arsenic-free water in the affected areas.

#### **4.4 The right to shelter/housing**

The right to shelter which forms part of the right to an adequate standard of living under Article 11 of the ICESCR, finds no corresponding expression in South Asian Constitutions in the form of an enforceable right.<sup>97</sup> In the absence of a positive declaration, the right to housing still remains an aspiration. The Courts have never really acknowledged a positive obligation of the state to provide housing/shelter to the homeless.<sup>98</sup> However, eviction from home/shelter finds constitutional protection in two ways. First, the Constitutions guarantee the freedom to choose a residence, which, in other words, means not to be arbitrarily displaced from the residence. Secondly, the right to life guaranteed in the Constitutions has been interpreted by the Court to encompass the right to livelihood of which shelter forms the basis. The Indian Supreme Court in *Olga Tellis*<sup>99</sup>, in which the forceful eviction of pavement dwellers in Mumbai was challenged, declared that the right to life included within its

94 *Nimimaya Maharjan v HMG*, Nepal NKP 2053 no 8, p 627; General Secretary West Pakistan Salt Miners Labor Union, Khewra Jhelum v Director, Industries and Mineral Development, Punjab, 1994 SCMR 2061.

95 *Rabia Bhuiyan v Ministry of Local Government and Others* 59 DLR[2007] (AD) 176.

96 *Praksah Mani Sharma and Others v Council of Ministers*, Writ no 3447 of the year 2060, decision dated 1/9/2066 (16 Dec 2009)

97 Art 25 of the UDHR or Art 11 [1] of the CESCR, or the provision of CEDAW, or CRC or General Comment no 4 and 7

98 S. Muralidhar supra note 30 at p 112

99 *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 546.

sweep the right to livelihood. According to the Court “no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.” The Court further observed that “the State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.”

Even though the Court in this case did not recognize the right of the pavement dwellers to “make use of a public property for a private purpose without the requisite authorization, or “encroach upon pavements by constructing dwellings thereon”, it acknowledged the compulsion of those who swarmed the public places of Mumbai in search of a living. It therefore called upon the State to give alternative sites for resettlement of those dwellers who were residing in the said locality for a long time [whose names figured in the 1976 census] at some convenient places not farther away in terms of distance. *Olga Tellis*, despite shortcomings vindicates the right of the pavement dwellers to alternative sites, and notification and time before eviction. However, later research indicates that very little has been done to give alternative sites to the pavement dwellers. On the contrary, non-recognition of the right of the pavement dwellers to stay on the site of their shanty has been taken to absolve the state from any obligation to provide alternative shops/dwellings to them.<sup>100</sup> This is really regressive.

Though *Olga Tellis* was not logically expanded in India, it found a reliable partner in Bangladesh, where the High Court in *ASK*<sup>101</sup> case, taking resonance from *Olga Tellis*, concluded that although the right to livelihood and shelter were not judicially enforceable, they were part and parcel of the right to life. It called upon the state to “secure the right to life, living and livelihood.” In this case the Court laid down guidelines for the rehabilitation of slum dwellers, and observed that the dwellers should be evicted in phases, and only when the government provided them with alternative arrangement for their residence.<sup>102</sup> The Court took this further in subsequent cases. In *Aleya Begum*, it held that even those trespassing on land could not be evicted forcibly without notice. They should have the opportunity to leave at their own free will.<sup>103</sup> Similarly, in *Kalam*, the Court stopped forced eviction of slum dwellers without prior notice who were living in shanty houses in Dhaka for more than 30 years. The Court observed that all persons enjoyed the same set of

100 *Municipal Corporation of Delhi v Gurnam Kaur*, (1988)1 SCC 101; *Sodan Singh v NDMC*, (1989) 4 SCC 155.

101 *ASK v Government of Bangladesh*, 19 BLD (1999) 488.

102 *Id.*, para 9 and 17.

103 *Aleya Begum V Bangladesh and Others*, 53 DLR (2001) 63, para 37.

constitutional rights based on social justice, fairness and dignity, irrespective of whether they were rich or poor and marginalized.<sup>104</sup> In another case the Bangladeshi Court ruled that forced eviction of sex workers and their children violated their right to life which included livelihood.<sup>105</sup>

In Nepal the slum dwellers cases have now begun to come to the Court. In one instance the Court of Appeals of Patan issued an interim order halting the forcible demolition of slums for a short period. The case is still sub-judice.

The Court in India does not seem to be very assertive when the right to livelihood and shelter is contrasted with other rights such as the right to water or the right to the environment. In the *Narmada* case,<sup>106</sup> the right to livelihood and shelter of 41, 000 families was contrasted with the right to water of the starving Gujarat and Rajasthan states. There the petitioners prayed for halting the increase in the height of the dam because it would result in the displacement of more families, and due to the huge costs and the seismic hazard it would pose to the people. The Court declined to intervene citing this reasoning-- "when a decision is taken by the government after due consideration and full application of mind, the Court is not to sit in appeal over such decision".<sup>107</sup> The Court further observed that "if a considered policy decision has been taken, which is not in conflict with any law or is not malafide, it will not be in public interest to require the Court to go into and investigate those areas which are the functions of the executive". It also stated "whether to have an infrastructural project or not and what is the type of the project to be undertaken and how it is to be executed are part of the policy-making process and the court are ill-equipped to adjudicate on policy decision so undertaken."<sup>108</sup> Regarding displacement, though the Court agreed to look into the issue, it relied on the promise of the government to "becomes necessary to harvest a river for the larger good."<sup>109</sup> The Court rejected the petition hoping that "at the rehabilitation site they [the oustees] will more and better amenities than those enjoyed in tribal hamlets. The gradual assimilation in the mainstream of society will lead to betterment and progress"<sup>110</sup> in the parlance of indigenous people--an assimilationist logic taken by an elitist court.

104 *Kalam and Others v Bangladesh and Others* 21 BLD (HC) [2001] 446.

105 *Bangladesh Society for the Enforcement of Human Rights and Others v Government of Bangladesh* 53 DLR [2001]1. This case pertained to the eviction of 2,667 permanent and 300 casual residents of Nimtali and Tanbazar in Narayangunj who were forcibly evicted by police and handlooms.

106 *Narmada Bachao Andolan v UOI* [2000] 10 SCC 664. The case pertains to construction of dams and reservoirs in hundreds over river Narmada in central India.

107 *Id* at p 764

108 *Id* p 762.

109 *Id* at p 765

110 *Id* at p 702-03



The judicial hands-off was also followed in subsequent decisions by the Indian Supreme Court, in the *Tehri Dam* case,<sup>111</sup> where displacement, possible seismic hazards, and irreversible environmental effect were the issues, the Court declined to intervene by saying that:

*“When the government or the authorities concerned after due consideration of all view points and full application of mind took a decision, then it is not appropriate for the court to interfere. Such matters must be left to the mature wisdom of the Government or the implementing agency. It is their forte... the consideration in such cases is in the process of decision and not in its merits.”*<sup>112</sup>

On the issue of displacement and rehabilitation the majority in the *Tehri Dam* case also relied on the submission of the government that there was “substantial compliance with all the conditions.” The Supreme Court directed the High Court in Uttaranchal to monitor rehabilitation and see that the government complied with its obligations on rehabilitation and environmental clearance.

In the *Tehri Dam* case, the dissenting judge caught a different note, and argued that the project should be examined holistically. He observed that “there are economic as well as social costs and environmental costs involved in the project of construction of a large dam. The social cost is also too heavy. It results in widespread displacement of local people from their ancestral habitat and loss of their traditional occupations. The displacement of economically weaker sections of the society and tribals is the most serious aspect of displacement from the point of view of uprooting them from their natural surroundings. Absence of these surroundings in the new settlement colonies shatters their social, cultural and physical links.”<sup>113</sup> The learned judge further observed, “when such social conflicts arise between the poor and more needy on one side and rich or affluent or less needy on the other, prior attention has to be paid to the former group which is both financially and politically weak. Such less-advantaged group is expected to be given prior attention by a Welfare State like ours, which is committed and obliged by the Constitution, particularly by its provisions contained in the preamble, fundamental rights, fundamental duties and directive principles, to take care of such deprived sections of people who are likely to lose their home and source of livelihood.”<sup>114</sup>

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111 N.D. Jayal v Union of India (2004) 9 SCC 362

112 *Id* p 380

113 *Id* p 409

114 *Id* p 418

Another case relating to the right to life and livelihood, is the *TV Godavarman*<sup>115</sup> case, where the Supreme Court issuing a series of interim orders gave wide-ranging directions, including a complete ban on felling of trees all over India, and imposing penalties for violation of its order. This affected those forest dwellers, pastoralists, and tribal peoples whose life was inexorably linked with the forests. Now, after several years their right to live in the forest and exercise usufruct has been recognized in the Forest Dwellers Right Act,<sup>116</sup> a central piece of legislation. The Act may not be the direct product of the decision of the Supreme Court, but owes to it for bringing the concept of livelihood and environment face to face.

There are many other aspects of the right to housing. Now, a rich literature is available in international human rights law on affordable, habitable, accessible, culturally appropriate and safe housing and other attendant rights. If the right to shelter forms a constitutive right of “the right to life” there is a strong reason for the courts to look into various dimensions such as the legal security of tenure; availability of services, materials, facilities and infrastructure; and affordability; habitability; accessibility; location and cultural adequacy aspects of the right to housing in the coming days.

#### **4.5 The Right to Food**

Given the mass poverty that exists in South Asia, the right to food is of seminal importance. The right to adequate food and the right to be free from hunger and malnutrition are indivisibly linked to the inherent dignity of the human person and their social security. They are indispensable for the fulfillment of other rights in the constitutions and international bill of human rights to which the South Asian states are parties. Elaborating on the framework of the right to food the CESCR explains:

115 *TV Godavarman Tirumulkpad v UOI* [1997]2 SCC 267; [2000]6 SCC 413. The case is still pending in the SC.

116 Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, Section 3(1) of the Act now recognizes a number of rights including the right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers; Community rights such as nistar, by whatever name called, including those used in erstwhile Princely states, Zamindari or such intermediary regimes; Right of ownership, access to collect, use, and dispose of minor forest produce[ includes all non-timber forest produce of plant origin] which has been traditionally collected within or outside village boundaries; Other community rights of uses or entitlements such as fish and other products of water bodies, gazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities; Rights including community tenures of habitat and habitation for primitive tribal groups and pre-agriculture communities; Rights in or over disputed lands under any nomenclature in any State where claims are disputed; Rights for conversion of Pattas or leases or grants issued by any local authority or any State Govt. on forest lands to titles; Rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forest, whether recorded, notified or not into revenue villages; Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use; Rights which are recognized under any State law or laws of any Autonomous Dist. Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State; Right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity.

*“The right to adequate food is realized when every man, woman, and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with minimum package of calories, and other specific nutrients... states have a core obligation to take the necessary action to mitigate and alleviate hunger.”<sup>117</sup>*

The CESCR further clarifies that the right to food includes the availability of food in quantity and quality sufficient to the dietary needs of individuals, free from adverse substance and acceptable within given culture. The right to food imposes three types of obligation on the state--the obligations to respect, to protect and to fulfill. The obligation to fulfill includes both an obligation to facilitate and provide. Where the right to food is violated the person affected would have access to effective and other appropriate remedies at both national and international levels.<sup>118</sup>

The Interim Constitution of Nepal guarantees to every citizen the right to food sovereignty. The term “food sovereignty” is not a very clear term at least in the context of right-duty relation. Sovereignty as such is not a concept generally used in guaranteeing rights.<sup>119</sup> However the Supreme Court has explained this right to mean the right to food security and the right to be free from hunger.<sup>120</sup>

The right to food came into focus in two cases heard by the Nepali Court relating to mass starvation. In *Madhav Kumar Basnet*,<sup>121</sup> the petitioner contended that a situation of mass starvation was being faced by the people in seven remote districts of Nepal, due to which many people had died. In this case the Court acknowledged that the protection of life and property of the people was the obligation of the government. However, relying on the submission of the government that it was supplying foodstuff to prevent starvation and national calamity, the Court declined to issue any order. Nearly a decade later, mass-starvation was reported in several hill districts of Mid-Western Nepal where many people died due to diarrhea and even cholera. The epidemic caught poor people more as they were facing the scarcity of foodstuffs. *Prakash Mani Sharma and Others*<sup>122</sup> drew the attention of the Supreme Court where they claimed that scarcity of food, mismanagement in the distribution of foodstuff, and the quality of food, wherever distributed, had led to the calamity

117 General Comment no 12, E/C/12/1999/5 [General Comments] 12 May 1999 para 4.

118 *Id* para 8, 13, 15, 32.

119 Kalyan Shrestha and Ananda M Bhattarai, *supra* note 42 at p 436

120 *Bajjuddin Minhya and Others v Prime Minister and others* Writ no W0-0338 of the year 2064 decision dated 05/11/2065 BS.

121 *Madhav Kumar Basnet v Prime Minister and Others*, Writ no 3341 of the year 2065, decision dated 27/06/2055.

122 *Praksah Mani Sharma and Others v Prime Minister and Others* NKP 2067 decision no 8540 p 97

abetted by mal-nutrition. They therefore prayed for the supply of quality food, proper arrangement regarding transport, safe custody and distribution of food stuffs in the food deficit areas. They also prayed for special protective measures to be in place for the protection of the aged, children and pregnant and lactating mothers. In view of the gravity of the problem created by mass starvation and the epidemic of cholera that was affecting 300,000 people, the Supreme Court issued an interim order for immediate supply of foodstuffs in the affected areas. Following this, the Court in the final order called upon the government to make robust arrangements for the supply including air lifting of foodstuff in case of an emergency. The Court held that it was the obligation of the government to feed its people even if it required importation of food from other countries.

Another case tells the story of park versus people. In the area surrounding a wildlife park in eastern Nepal, the local people suffered serious destruction of their crops by wild animals. A PIL was filed seeking compensation for the loss.<sup>123</sup> Upholding their claim, their right to food, to be free from hunger, and their right to compensation for the loss of crops, the Court ordered the constitution of a permanent committee for processing the claims of affected people. It also issued guidelines until there is a law for processing claims and awarding compensation is in place.

As in the case in Nepal, the response of the Indian Court to mass starvation and famine has been mixed. In *Kishan Patnayak*<sup>124</sup> the death of people due to starvation in some of the poorest districts of Orissa was brought to the attention of the Supreme Court. Here, sadly, the Court took a deferential approach and relied on a subjective opinion of the government that the situation was being tackled effectively. However, after a decade or so the Supreme Court began issuing a series of interim orders in *People's Union of Civil Liberties*<sup>125</sup>, one of the most celebrated PIL cases in India. Since the case was epoch-making, in what follows we will discuss the fact and major orders of the Court issued in this case.

In April 2001, People's Union for Civil Liberties (PUCL) filed a "writ petition" on the right to food in the Supreme Court. This petition was filed at a time when the country's food stocks reached unprecedented levels while hunger in drought-affected areas intensified. Initially the case was brought against the Government of India, the Food Corporation of India (FCI), and six State Governments, in the context of inadequate drought relief. Subsequently, the case was extended to the larger issues of chronic hunger and under-nutrition, and all the State Governments were added to the list of "respondents"

123 *Bajuddin Miya and Others v Prime Minister and Office of the Cabinet Secretariat and Others*, NKP 2066 BS, Vol. 6, p. 961.

124 *Kishan Patnayak v State of Orissa* [1989] Supp. [1] SCC 258.

125 *PUCL v UOI* [2001] 5 SCALE 303; [2001] 7 SCALR 484; [2004] 8 SCALE 759. The right to food case is a massive and complex case still continuing in the Supreme Court of India.

The basic argument made in the petition was that, since food is essential for survival, the right to food is constitutive of the fundamental “right to life” enshrined in Article 21 of the Indian Constitution. The petition argued that Central and State Governments had violated the right to food by failing to respond to the drought situation in the six States. There was dumping of huge amounts of food grains (rice and wheat) in warehouses while people went hungry. The petition highlighted two specific aspects of state negligence: the breakdown of the public distribution system (PDS) meant for the people below poverty line, and the inadequacy of drought relief works. In the final “prayer”, the petition requested the Supreme Court to issue orders directing the government: (a) to provide immediate open-ended employment in drought-affected villages; (b) to provide “gratuitous relief” to persons unable to work; (c) to raise food entitlements under the PDS; and (d) to provide subsidized food-grain to all families and the central government to supply free food-grain to these programs.

The first major interim order in this case was issued on 28<sup>th</sup> November 2001. This order focused on eight food-related schemes:

- the Public Distribution System (PDS);<sup>126</sup>
- Antyodaya Anna Yojana (AAY)<sup>127</sup>
- the National Programme of Nutritional Support to Primary Education, also known as “mid-day meal scheme”,<sup>128</sup>

126 With regard to PDS system the Court in 2001 directed the States to see that all the PDS shops, if closed, are re-opened and start functioning within one week and regular supplies made. In May 2002, the Court further required that the ration shops remain open throughout the month, during fixed hours and the details of which would be displayed on the notice board.

127 Under the Antyodaya Anna Yojana case the Court set standard for distribution of food grains to the Antyodaya cardholders to the tune of 35 kg of grain per month at Rs 2/kg for wheat and Rs 3/kg for rice. Initially, the Antyodaya scheme covered 10 million families, but this was later expanded to 15 million families and then 20 million families. On 2nd May 2003, the Supreme Court declared that all households belonging to six “priority groups” would be entitled to Antyodaya cards. More precisely, the Government of India was directed “to place on AAY category the following groups of persons: a) Aged, infirm, disabled, destitute men and women, pregnant and lactating women, destitute women; b) widows and other single women with no regular support; c) old persons (aged 60 or above) with no regular support and no assured means of subsistence; d) households with a disabled adult and assured means of subsistence; e) households where due to old age, lack of physical or mental fitness, social customs, need to care for a disabled, or other reasons, no adult member is available to engage in gainful employment outside the house; f) primitive tribes.”

128 In 2001 the Court directed: “The State Governments /Union Territories to implement the Mid Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days. In 2004 it further ordered: The Court then directed the Central Government to provide financial assistance of “one rupee per child per school day” to meet cooking costs. The Court also clarified that the responsibility to monitor the implementation of the mid-day meal scheme “essentially lies with the Central Government. Today, 120 million (twelve crore) children have benefited from mid-day meal programme, said Manmohan Singh, the Indian PM in Nov 3, See the news in Times of India, Nov. 4, 2012.

- the Integrated Child Development Services (ICDS)<sup>129</sup>; and
- Annapurna<sup>130</sup>
- the National Old Age Pension Scheme (NOAPS)<sup>131</sup>
- the National Maternity Benefit Scheme (NMBS)<sup>132</sup> and the National Family Benefit Scheme (NFBS)<sup>133</sup>.

For monitoring and ensuring proper implementation of its orders, the Court appointed commissioners who would be assisted by their staff. The Court further asked the Central and state governments to properly implement the court orders. The Court in 2002 made it clear that *"It is the duty of each States/Union Territories to prevent deaths due to starvation or malnutrition. If the Commissioner reports and it is established to the satisfaction of the Court that starvation death has taken place, the Court may be justified in presuming that its orders have not been implemented and the Chief Secretaries... may be held responsible for the same."*

129 ICDS is the only major national programme that addresses the needs of children under the age of six years. It seeks to provide young children with an integrated package of services such as supplementary nutrition, health care and pre-school education. Because the health and nutrition needs of a child cannot be addressed in isolation from those of his or her mother, the programme also extends to adolescent, pregnant women and lactating mothers. These services are provided through ICDS centres, also known as "anganwadis". Today there are 7 lakh anganwadis in India, covering 40 million children. This is less than one fourth of all children in the 0-6 age group. Under the program (a) Each child up to 6 years of age to get 300 calories and 8-10 gms. of protein; (b) Each adolescent girl to get 500 calories and 20-25 grams of protein; (c) Each pregnant woman and each nursing mother to get 500 calories & 20-25 grams of protein; (d) Each malnourished child to get 600 calories and 16-20 grams of protein; (e) Have a disbursement centre in every settlement." In 2004 The Supreme Court directed the Government of India to increase the number of anganwadis from 6 lakh to 14 lakh habitations.

130 The Annapurna Scheme was launched on 1st April 2000. The target group consists of "senior citizens" who are eligible for an old age pension under the National Old Age Pension Scheme (NOAPS), but are not actually receiving a pension. The beneficiaries, to be identified by the Gram Panchayat after giving wide publicity to the scheme, are entitled to 10 kgs. of grain per month free of cost through the Public Distribution System (special ration cards are issued to them for this purpose).

131 This scheme was launched in 1995 to provide "old age pensions" to senior citizens (aged 65 years or more). It is part of the National Social Assistance Programme, which also includes two other schemes: the National Family Benefit Scheme (NFBS) and Annapurna. On this the court ordered: 1. State governments have been directed to complete the identification of persons entitled to pensions under NOAPS, and to ensure that the pensions are paid regularly. 2. Payment of pensions is to be made by the 7th day of each month. 3. The scheme must not be discontinued or restricted without the permission of the Supreme Court.

132 This scheme is a timid attempt to introduce "maternity benefits" in India's social security system. It was introduced in 1995 as part of the National Social Assistance Programme, and later transferred to the Health Ministry. Under NMBS, pregnant women from BPL families are entitled to lump-sum cash assistance of Rs. 500, up to two live births. As with other food-related schemes, the Supreme Court order of 28th November 2001 calls for prompt implementation of the National Maternity Benefit Scheme the number of women who actually received cash payments under NMBS in 2003-4 was as low as 4.3 lakhs - less than 2 per cent of the total number of births in that year. On 9th May 2005, the Supreme Court refused to allow the Government of India to phase out NMBS and provide maternity benefits under a new scheme, Janani Suraksha Yojana (JSY).

133 This scheme, like NOAPS, is part of the National Social Assistance Programme. It provides for lump-sum cash assistance of Rs. 10,000 to BPL families on the death of a primary breadwinner, if he or she is aged between 18 and 65 years. As with other food-related schemes, the Supreme Court order of 28th November 2001 calls for prompt implementation of the National Family Benefit Scheme.

The court order empowered Gram Sabha to conduct “social audits” of all food-related schemes; held the CEO/Collector responsible for ensuring compliance with the Court orders within the District; made the Chief Secretary accountable for the implementation of Court orders in the state; gave the Commissioners extensive powers to monitor the implementation of Court orders throughout the country; and directed all concerned officials to “fully cooperate” not only with the Commissioners but also with individuals or organisations who have been nominated by the Commissioners to assist them. By all account it is a massive initiative of the Court, perhaps the most ambitious one in ESC adjudication.

## 5. The Trials and Tribulation of ESC adjudication: Achievements and Challenges

The ESC adjudication in South Asia is a logical extension of the social justice movement in the form of public interest litigation (PIL) initiated in the late 1970s and 80s. The sheer turn of events in India made some sensitive judges in the Indian Supreme Court realize the need to rectify the denial of access to justice to a huge section of the population who due to economic, social, political, cultural and legal barriers were not able to come to the court with complaints. The PIL movement in the words of Bhagwati J, therefore, *“intended to promote and indicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed.”*<sup>134</sup> The courts began to take public interest petitions by widening locus standi, opening jurisdiction for representative suits and letters, legal aid, and design of several annotative tools for remedies and reporting mechanisms. The Indian Judges made a seminal contribution in developing constitutionalism, and constitutional jurisprudence on the principle of reasonableness and on a repertoire of equality and right. Judicial activism also began a new conversation on rights, justice and governance, and created a dialogic constitutional culture in India. Through this, the Supreme Court of India tried to transform itself as the Supreme Court of Indians. The discourse got a very welcome impact in South Asia, among academia, civil society and the courts. In the decade that followed and beyond, Bangladeshi, Pakistani, Nepali and Sri Lankan judges and the legal community have begun to speak the same language of social justice. Interestingly, they have also tried to emulate each other in many areas.

Though judicial activism in South Asia was never a single narrative, with the ESC adjudication, it brought into existence a new polemics of contradictions, of engagements and deference, of normative progressivism and pragmatism on one side and reactionary activism on the other. It has entered into a new phase of

<sup>134</sup> PUDRV UOI [1982]3SCC 235 at p 458

polemics of contradiction. At one end of the spectrum one finds judicial initiatives trying to make governments accountable for shouldering basic human rights obligations such as the right to food and livelihood- as seen in the right to food case (India) or the slum dwellers case (Bangladesh), at another level, the courts seem adopting the politics of deference when it comes to mega projects such as the Narmada dam or the Tehri Dam case, nuclear power projects (India), irradiated milk (Bangladesh), the electro-magnetic effects of a power grid (Pakistan) or other larger issues of governance and development. On the one hand the courts seem inclined to close polluting tanneries that pollute the Ganges, or shift industries that affect the Taj Mahal, while on the other they seem disinclined when they are asked to protect “the right to residence” of the project oustees or the right to life and the basic right to natural justice (right to be heard) of the victims of the Bhopal Gas disaster. Amidst these contrasting narratives the judges now need to define and redefine their role under the Constitution.

The anecdotal evidence produced by case law above vividly portrays that judges have long ago shed their traditional role of norm interpretation and embraced a norm-making function. Now, after nearly forty years of activism, judges have to ask themselves once again what it means to be “an activist judge” in contrast to “an active judge.”<sup>135</sup> This is essential for two reasons. First, the ESC adjudication has to face head-on very strong adversaries, namely, the national and international industrial and trade lobby, the forces of globalization, the upper middle class in various manifestations, generally bent upon ways to meet their greed in violent disregard of the millions of people craving a life of dignity and their entitlement to the bare necessities of life. The retreat of the government of the day in all the countries under review from their formal constitutional position of a Welfare State has made ESC adjudication even more contentious. Second, unlike in the sphere of the civil and political rights, the ESC rights adjudication does not get sufficient normative support from the dominant judicial discourse of the North. Nor does ESC adjudication get adequate support from international human rights discourse. The Northern discourse despises judicial activism in South Asia as a left-over of American activism of yester-years or a regional deviance. Dominant international human right discourse seems to be frowning upon the perceivably “over-judicialization of rights”. While taking further ESC adjudication, the only option left to the judges, therefore, is to look at their own gurus--the first generation justices,<sup>136</sup> their progressive and

135 Professor Baxi has very nicely distinguished the two. According to him, “an active judge regards herself...a trustee of state power and authority, usually defers to the executive and legislature and shuns policy making”, while on the other an activist judge “regards herself as holding judicial power in fiduciary capacity for the civil and democratic rights of the people, especially the disadvantaged, disposed and deprived. Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [in]justice*, in *FIFTY YEARS OF THE SUPREME COURT OF INDIA* (S.K. Verma and Kusum eds. OUP, Delhi 2000) 156, 165-66

136 Judges such as Krishna Iyer, Bhagwati, Chinnappa Reddy, Desai (India) or Justice Najib Hasan Shah (Pakistan) or Bishwanath Upadhyaya (Nepal).



pragmatic stimuli and dispositions, reorient with the values these gurus have espoused, and recast themselves against the vicissitudes of current times. The messiahs of judicial activism were no less confronted with the challenges than their contemporary brethren are. In front of them was a long history of judicial sub-servience, positivist doctrinaire orientation that emphasized norm interpretation, and hindrances created by their own constitutional premises which gave only limited space for the judges to maneuver. They broke all this, overcame all this, buried the old cloak and discarded mimicry. To use the words of Justice Bhagwati like “creative artists” they moulded law, gave it life, created new-normative values of democracy, rule of law and human rights. The judges of today need to keep in mind the diachronic progression of judicial activism, and its achievements against the vagaries of the time.

The judges of our times, especially those engaged in ESC rights adjudication, also need to be clear that there is no global notion of justice; there are only perspectives; and which perspective they take depends on the choice they make. The gurus of judicial activism in South Asia very boldly developed the southern perspective of justice. Now as the ESC adjudication recasts and reinvents that perspective, one may not find its Northern correlative. Of course, there are trickles in comparative jurisprudence of human rights adjudication, and these may help them to some extent. Even these may not be very relevant in the particular context of the case he/she is seized upon to dispose and the issues he/she is seized upon to resolve. Given the similarity of problems and challenges, the nearest correlative of South Asia seems South Asia alone. It is in this soil the judges need to search for inspiration.

The Northern jurists who frown upon “judicialization of rights” continue to hold traditional notion of justice. This notion restrains judges taking up issues pertaining to governance. They view justices as un-elected state officials and therefore, they should leave the policy issues that ESC adjudication now deals with, to “elected representatives” of the people. However, while saying this they do not compare and contrast the economic, social and political milieu of the North and the South. The North in general houses stable democracies with two or three parties deeply rooted in society, an enlightened media that resists every temptation of regime control, prevalence of a high degree of public participation in policy making, a strong civil society movement, a vibrant, independent and autonomous Bar--very less politically blighted. The countries of the North are continuously painted blue by Transparency International in the corruption index. The law enforcement agencies are efficient, autonomous, high-tech and sufficiently invested to check every kind of impunity of the state officials or the people. The judges in the South should factor all these in while comparing their systems and determining trajectories for themselves. In the context of South Asia, the question is not who is elected or who is not; rather

the question is: who are the real sovereigns and in what way has the Constitution devised the use of sovereign power, and whether or not what is supposed to be done in the name of sovereign people is properly done, or done at all. The judges are called upon to pause and ponder the trial and tribulations that the consumers of ESC rights are facing, examine the logic and counter logic of the ESC rights discourse into consideration and provide more coherence and logical consistency to the ESC jurisprudence. If they do that, they can effectively check the reversal and reactionary tendencies witnessed among some of the judges in South Asia.

As mentioned above the judicial activism in South Asia is not a single narrative. There are as many narratives as there are varieties of cases, the narratives of success and failure, of achievements and betrayals. Amidst them, there are decisions of historical significance. Many of these decisions are either partially implemented or not implemented at all. This is the flip side of judicial activism in South Asia. The executive or legislative apathy or defiance is manifested in the form of non-implementation. This is more so in the realm of ESC adjudication. When decisions go un-implemented, the judges develop proclivity to self-censorship. The actors in ESC adjudication—the judges, lawyers and the civil society-- should therefore collectively create an environment where judicial decisions are implemented. Instead of banking on and resorting to contempt proceedings, they should collectively devise dialogic logic and language that makes implementation easy and less cumbersome. Of late, this seems to be emerging in the form of dialogic appraisal and issuance of orders. Though not yet at satisfactory level, a collective enterprise seems to be emerging in all countries of the region. This enterprise is trying to make education and health services more accessible and affordable to the poor and physically challenged, and to provide social security and benefits to the destitute. The right to livelihood seems improving in the form of a minimum guarantee of employment through legislative initiatives.

With the ESC adjudication the Court seems more involved in policy formulation and implementation. In several cases such as the right to food, and forest case the courts have even taken over the administration to implement their orders. These cases are continuing for decades. This has invited more criticism, and arguably to a certain extent, disturbed the constitutional scheme of checks and balance. But an equally strong counter argument in this regard is that the judiciary has stepped in only when nothing has been done or done too badly to meet constitutional aspirations of securing social economic and political justice to the people. Truly, if social justice is the signature tone of the constitutions then State institutions, including the judiciary, cannot shy away from fulfilling their responsibilities. And from that perspective, the judicial initiatives should be viewed not as intrusion or

interference in the constitutionally ordained functions of the coordinate branches but mechanisms to supplement the discharge of their constitutional obligations.

Given that there is no active resistance to judicial decision by coordinate branches, their approach should be taken in positive light. This is not to say that the ESC adjudication has solved all the problems or that the judicial initiatives do not have shortcomings. There are shortcomings, sometimes very glaring and far removed from prudent reality of time. In spite of them all, entitlement for millions of people to basic necessities such as food and education, basic emergency services, which judicial decisions have granted are no mean achievements. What the judges in South Asia have done does not encompass the full story of human misery, there are still many untold stories, and the discourse has come only this far, and there are constitutional promises to keep. The discourse of ESC adjudication has begun to meet the rational expectation of the toiling masses; and whether the judges take it further to create human happiness or keep it at the mercy of a slumbering and deviant leviathan, is up to them.

## 6. Conclusion

The exercise began by presenting the constitutional landscape of rights in the five key South Asian countries namely, Nepal, India, Bangladesh, Pakistan and Sri Lanka. It also recounted the contribution of the judiciary in promoting the right jurisprudence. This is followed by an anecdotal account of judicial contribution in the areas of education, work, health, water, shelter, and food. As the survey reveals, the Courts have variously addressed the issue of ESC rights. Some have been superficial, populists, and insubstantial. But others have been in-depth, down-to-earth, and realistic as well as futuristic. Notwithstanding several weaknesses, the decisions have changed the South Asian landscape, transformed the thinking of the people, and highlighted the economic and social objectives of the Constitution and tried to ensure good governance. Over and above, they have asserted the role of the judiciaries as a champion of social justice, and thus taken the judges to higher pedestals of social appreciation.

Despite overwhelming support and appreciation of the public and local academia, in many instances one feels that precious little has been done in specific areas such as the right to housing, or arbitrary displacement. Much desirable seems yet to happen. This might be because there is no direct communication between the judicial actors and the consumers of their services. The consumers are represented by public interest lawyers and other professional and social groups, mainly hailing from the middle class. Sometimes the mask of public interest is created for adventurist publicity interest or political and even industrial interest. If such things are allowed to happen they erode the whole objective of activist jurisprudence.

In many instances, the judicial approach still seems parochial and stilted. This is more so in cases relating to mega projects in which the judiciary still [mis] understands development with the project. The relationship of human rights to development as a “comprehensive, economic social and cultural process”, where there is stakeholder participation in decision-making and benefit-sharing is yet to inhabit the judicial repertoire. However, the avenues that the judiciaries have opened up keeps sufficient space for new logic of development to unveil.

The ESC rights adjudication, as in the case of other rights adjudication, seems much guided by the vision of individual justices. This is both a boon and a bane. The innovative judges set the benchmarks for posterity to follow. But it is not always that such the milestones are taken into consideration by succeeding generation of judges. Since justice is a human process it has to face the pitfall of individual orientation of justices and the social baggage they carry on the bench. Given the nature of the split bench in which the Courts in South Asia operate, it sometimes allows the judges to create discordant notes. At times, the decisions give the impression of several Supreme Courts concurrently operating in one country. This hinders the normative development of ESC rights jurisprudence.

Many a time, the judges seem to be pushing the judicial monologue out of tune with social reality. Because of the structural and procedural hindrances, the judiciary still seems unable to feel the public pulse. As pointed out by Professor Baxi, the judicial process needs to devise modes of production of new spaces by a more direct access to authentic voice of suffering than is currently made available by cause lawyering.<sup>137</sup> This said, the macro picture of ESC adjudication gives the impression of the judiciary fairly in the grip of its constitutional role, and duly focused toward the “subject of justice”, the people in low visibility areas of economy. Through ESC adjudication, the judiciary seems to be carrying the agenda of social transformation. This is at least what the people hope.

Given the qualitative change that ESC adjudication has begun to bring about in the life of people, it will not be appropriate to call it a hollow hope.<sup>138</sup> But it is also true that judicial activism in South Asia has promised more than it has actually delivered. Much needs to be done to make the judicial mechanism deliver properly and in time here and now. Given the enormous task that requires to be taken in ensuring realization of ESC rights, the judges at the normative level should look into the rationale behind development of constitutional jurisprudence on rights, reinvigorate

137 Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [in]justice*, in *FIFTY YEARS OF THE SUPREME COURT OF INDIA* [S.K. Verma and Kusum eds. OUP, Delhi 2000] 156,208.

138 The expression echoes Gerald Rosenberg, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1991 ,Univ. Chicago Press)

its normative foundation and develop new vocabulary, use the existing ESC rights glossary to make it in good tune with existing international human rights law, and evolve a praxis for themselves and for the posterity. A more intense collaboration of responsible state agencies and other stakeholders is required in the coming days to fulfill what justice Bhagwati termed the “solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community”.<sup>139</sup> Finally, if the ESC rights are meant to be realized, the ESC rights adjudication merits further championing not just by the judiciaries but also by all relevant stakeholders--lawyers, academic, civil society and political and economic forces of the respective countries. This said, the prime responsibility lies with the judges; they should constantly seek to renew and reinvigorate the faith of the people in the Constitution by not just administering but securing social, economic and political justice to them. Besides, as the discourse is still unfolding, the judiciary and other coordinate branches should join hands in addressing socio-economic challenges that the countries and people of South Asia are facing.

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139 PUDR V UOI (1982)3SCC 235, 458(the Asiad Case).

# Affirmative Action as an Effective Tool for Ensuring Substantive Equality in Nepal

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## Abstract

*The practice of affirmative action in Nepal is in an initial stage but trends are more enthusiastic and positive. The time has not yet come to evaluate the impact but there is an urgent need for a massive application of affirmative action programs to achieve substantive equality. In the first part of this article, the author has tried to cover the concept and theories of equality [formal, substantive and new vision]; and the concept, origin, and practice of 'Affirmative Action' and its position in international human rights law. In the second part, the author has tried to link these principles in the Nepali context and an attempt has been made to mention the provisions of constitution, law and policy, the judicial role, and a proposition for a draft of a new constitution as well. He has tried to state the impact of applications and emerging issues and problems. He has set forth suggestions on how to make affirmative action a more effective tool to achieve substantive equality. He concludes that substantive equality with a new vision is a time being agenda of minimizing the level of discrimination. We have strong international human rights law and jurisprudence. Nepal needs to follow international human rights law and jurisprudence to form a new vision of equality. Affirmative Action may be an effective means to achieve the goal of substantive equality. Extensive application of AA may produce positive results in Nepal.*

## 1. General Introduction

Equality, liberty and fraternity are fundamental values of civilized society. If we cautiously review our world history, there we find many struggles are made to achieve these esteemed values. The significance and relevance of these values is enhanced with the due course of time. These values are seen as essential and inalienable for the overall development of human society. So it is urgent to study their core dimensions for attaining a better life for humankind, society and the world. Among the pile of diverse values, the significance and utility of equality is higher than others. For this reason only, we are going to discuss here the notion

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and substantive theory of equality and an important measure “affirmative action” to achieve equality in a real sense. There are different measures of achieving this type of equality but here we will focus on affirmative action as an effective means.

The concept of affirmative action was developed simultaneously with the emergence of substantive equality. It is more relevant for emerging developing countries rather than developed countries. Nepal is one of the emerging developing countries. This research aims to study the relevance and application of affirmative action in Nepal and to suggest some options for new constitution-making and implementing authorities as well.

## 2. Notion of Equality and Theories

The most basic concept of equality is that likes should be treated alike.<sup>1</sup> It means that the same treatment is to be provided to a same category of persons. Equality is the antithesis of discrimination. It is a fundamental human right. The right to equality is enshrined in numerous international human rights instruments and widely embodied in the constitutions of jurisdictions around the world.<sup>2</sup> Universally accepted theories are basically two in number. We will deal these theories as below. At the same time we will add some new visions developed in equality as well.

### 2.1. Formal Equality and the Traditional Approach

The idea of formal equality can be traced back to Aristotle and his dictum that equality meant “things that are alike should be treated alike”.<sup>3</sup> This is the most widespread understanding of equality today. Formal equality promotes individual justice as the basis for a moral claim to virtue and is reliant upon the proposition that fairness (the moral virtue) requires consistent or equal treatment.<sup>4</sup> The formal approach to equality and non-discrimination supports the position that a person’s individual physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some social benefit or gain. At the heart of most protagonists’ defense of this model is the principle of merit. The liberal argument sets out that formal equality is necessary if the principle of merit<sup>5</sup> is to be maintained in a democratic society.

Formal equality assumes that equality is achieved if the law treats all persons alike. However, when individuals or groups are not identically situated (for example a

1 Sandra Fredman, “*The Future of Equality in Britain*”, Working Paper Series No.5 (UK Equal Opportunities Commission, 2002), p 4.

2 *Secretary for Justice v Yak Yuk Lung & Another* [2007] 3 HKC 550.

3 Aristotle, *Ethica Nicomachea*, V.3, 1131a-1131b, Ackrill, J. L. and Urmson J. O. (eds.), W. Ross. Translation, [Oxford University Press, 1980], pp 112-117.

4 Wesson, Murray, “*Equality and social rights: an exploration in light of the South African Constitution*”, [Public Law, 2007], p751.

5 Mc Crudden, Christopher, ‘Merit Principles’, [1998] Oxford Journal of Legal Studies, Vol. 18, No 4, pp543– 579.

black woman versus a white man], the formal equality model tends to perpetuate discrimination and inequality, because it cannot address real inequality in circumstances.<sup>6</sup> In fact, by treating different individuals as equals despite unequal access to power and resources, formal equality creates an illusion of equality while allowing real economic, legal, political and social disparities to grow.<sup>7</sup>

One well documented drawback to formal equality is that it requires comparison. The comparator<sup>8</sup> predominantly applied in the UK in proving direct discrimination is white, male, Christian, able-bodied and heterosexual. This rule assumes the existence of a 'universal individual' which can neglect the variety and diversity of modern society.

## **2.2. Substantive (Real) Equality**

The concept of substantive equality represents a departure from the traditional notion of formal equality. It is partially based on a redistributive justice model which suggests that measures have to be taken to rectify past discrimination. It emphasizes both equality of opportunity and equality of outcomes or results. This concept of equality manifests itself through a spectrum of policies and legal mechanisms in various jurisdictions. Reverse discrimination, positive discrimination<sup>9</sup> and affirmative action<sup>10</sup> are just a few which have been put forward to represent this concept.

Achieving substantive equality requires that the effects of laws, policies, and practices, be examined to determine whether they are discriminatory<sup>11</sup>. Substantive equality requires that the roots of inequality be identified, the goal of equality of opportunity be established, and that a legal mechanism be established that will achieve this goal in a principled way. "Substantive equality" (i.e., equality of opportunity) is different from "equality of results" in that the mechanism for achieving the goal involves removing the barriers associated with the group's "special characteristics" rather than securing an equal result. Substantive equality provides no guarantee that members of a particular group will achieve equality of results, only that they will have the opportunity. In other words the role of individual merit and initiative is not displaced.<sup>12</sup>

6 Day, S., and Brodsky, G., *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs*, [March 1998], Chapter 2, "Women's Equality: The Normative Commitment", available at: [http://www.swc-cfc.gc.ca/pubs/0662267672/index\\_e.html](http://www.swc-cfc.gc.ca/pubs/0662267672/index_e.html), [accessed 25 October 2011].

7 See *Factum of the Intervenor Canadian Council of Disabilities*. Available at: <http://www.ccdonline.ca/law-reform/Intervention/andrews%20factum.htm>.

8 Which can be either real or hypothetical?

9 The term is used in certain European contexts.

10 The term is commonly used in the context of the USA.

11 See n 6 above at 1.

12 Ibid, at p2.



### **2.3. A new vision of equality**

In the course of time, new ideas developed beyond earlier principles of equality. Specifically, Sandra Fredman, a veteran expert cum jurist on equality and non-discrimination, has opined that “instead of neutral, individualistic notion, which assumes that individuals can be treated in abstract from their group membership, equality ought to encompass four central aims. First, it should break the cycle of disadvantage associated with out-groups. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group. Third, it should entail positive affirmation and celebration of identity within community, and, finally, it should facilitate full participation in society”<sup>13</sup>.

At the same time, she has emphasized that a new concept of equality cannot function solely within the traditional strictures of anti-discrimination law, which assume that discrimination consists of individual acts of prejudice perpetrated against individual victims, to be remedied by litigation in court to produce compensation for the victim. Societal discrimination extends well beyond individual acts of prejudice. This means that the duty should not be confined to compensating identified victims. It should extend to the restructuring of institutions. Integral to the new vision therefore is the positive duty to promote equality, through such strategies as mainstreaming and positive action. It should not be confined to employment and vocational training as EU directives but in social fields, especially education, health care, services or in society as a whole and with the shared responsibility of many actors, both public and private.<sup>14</sup>

## **3. Affirmative Action**

### **3.1. Meaning and Development**

Affirmative action has been defined differently in different forms and contexts: a policy or a program that seeks to redress past discrimination through active measures to ensure equal opportunity, as in education and employment<sup>15</sup>; a policy or program designed to counter discrimination against minority groups and women in areas such as employment and education<sup>16</sup>; and, a policy designed to redress past discrimination against women and minority groups through measures to improve their economic and educational opportunities<sup>17</sup>. Affirmative action can mean a wide range of positive measures taken to ensure true equality for individuals and groups

<sup>13</sup> See no 1 above at 10.

<sup>14</sup> Ibid.

<sup>15</sup> Dictionary of the English Language, Fourth Edition, [Updated in 2009, Houghton Mifflin Company].

<sup>16</sup> Collins English Dictionary, [HarperCollins Publishers, 2003].

<sup>17</sup> Based on WordNet 3.0, Farlex clipart collection [2003-2008 Princeton University, Farlex Inc.].

who have been disadvantaged in the past. It is a way of achieving social justice.<sup>18</sup> The origin of affirmative action was in United States of America. Former U.S. President John F. Kennedy used the phrase “affirmative action” in 1961, through an executive order, requiring federal contractors to “take affirmative action to ensure that applicants are employed without regard to their race, creed, color, or national origin.” In 1965, President Lyndon Johnson issued an order that used the same language to call for nondiscrimination in government employment. He issued another executive order on October 13, 1967 which expanded his previous order and required the government’s equal opportunity programs to “expressly embrace discrimination on account of sex” as they worked toward equality.<sup>19</sup> Later, the affirmative action debate shifted away from the workplace and toward college admissions decisions. U.S. Supreme Court decisions have examined the affirmative action policies of competitive state schools such as the University of California and the University of Michigan. Although strict quotas have been struck down, a university admissions committee may consider minority status as one of many factors in admissions decisions as it selects a diverse student body.<sup>20</sup>

In the United Kingdom, affirmative action has been used as positive action. It describes measures targeted at a particular group that are intended to redress past discrimination or to offset the disadvantages arising from existing attitudes, behaviors and structures.<sup>21</sup> The law protects employees against discrimination - either direct or indirect - on a number of grounds i.e., race, sex, sexual orientation, religion or belief, age, and disability. Employers also need to comply with legislation relating to equal pay, positive action, recruitment and promotion, dismissal, harassment and victimization. Employers may be liable to pay damages if a court or employment tribunal finds them guilty of discrimination. There are no upper limits for damages in discrimination cases.<sup>22</sup>

In South Africa, this concept is incorporated in the new constitution. Section 9 (2) states : “ To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”<sup>23</sup> Similarly, Section 9 (3) indicates that “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or

18 Jill Cottrel and S. Ghai, *Human Rights, Diversities and Social Justice in Nepal* (UNDP, 2008), p. 63.

19 Available at: [http://womenshistory.about.com/od/affirmativeaction/a/affirmative\\_action\\_overview.htm](http://womenshistory.about.com/od/affirmativeaction/a/affirmative_action_overview.htm), [accessed 30 October 2011].

20 Ibid.

21 Available at: [http://www.diversitytoolkit.org.uk/glossary/\\_P/](http://www.diversitytoolkit.org.uk/glossary/_P/), [accessed 30 October 2011].

22 Available at: <http://www.diversitytoolkit.org.uk/workinginfilm/employmentlaw/discriminationlaw/>, [accessed 30 October 2011].

23 Constitution of the Republic of South Africa, Act No.108 of 1996, chapter 2, section 9(2), available at: <http://www.info.gov.za/documents/constitution/1996/index.htm>, [accessed 30 October 2011].

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>24</sup> Section 9 [5] makes clear that, in some cases, discrimination may be considered “fair”; and the 1998 Employment Equity Act confirms that “affirmative action” measures by “designated employers” *vis-a-vis* members of “designated groups” fall under this rubric.<sup>25</sup>

Affirmative action began in India under British colonial rule as a set of programs designed for the advancement of the Untouchables, first in the field of education as early as 1892, then in civil service and political office. After the country gained independence, the 1950 Constitution of India mandated that a proportional number of seats be reserved for members of SCs in federal and state legislative assemblies. The Constitution also enabled states to set aside a population-linked share of government jobs and places in educational institutions for those groups’ benefit. Furthermore, it authorized the potential extension of quotas to groups other than SCs and STs in Article 15 [4], which explicitly allows the states to “make any special provision for the advancement of any socially and educationally backward classes of citizens.”<sup>26</sup>

### **3.2. Affirmative Action and International Human Rights Law**

The evolution of international human rights law has seen significant progress in “Affirmative Action” as an effective tool and technique to downsize the discrimination prevalent in the jurisdiction of member states. Though the Universal Declaration of Human Rights, 1948 has ensured the right of equality and non-discrimination, but there were no provisions how to minimize the conditions of discrimination. After the advent of the International Covenants on Civil and Political Rights (ICCPR)<sup>27</sup> and Economic, Social and Cultural Rights (ICESCR)<sup>28</sup>, International Conventions on Elimination of All Forms of Racial Discrimination (ICERD)<sup>29</sup>, and Discrimination Against Women (CEDAW)<sup>30</sup>, and Conventions on Child (CRC)<sup>31</sup> and Rights of Persons with Disabilities (CRPD)<sup>32</sup>, there have been enough provisions to ensure equality and non-discrimination as being under the obligation of member states. Through their general comments, communications/views and general recommendations of implementing mechanisms (Committees), member states are obligated and guided to implement them in their jurisdiction.

24 Ibid, Section 9[3].

25 Employment Equity Act, No. 55 of 1998, section 6 [2], available at: [http://www.workinfo.com/Free/Sub\\_for\\_legres/data/equity/Act55i998.htm](http://www.workinfo.com/Free/Sub_for_legres/data/equity/Act55i998.htm), [accessed 30 October 2011].

26 Sabbagh, Daniel, Affirmative Action: The U.S. Experience in Comparative Perspective, available: [http://findarticles.com/p/articles/mi\\_qa3671/is\\_201104/ai\\_n57428788/](http://findarticles.com/p/articles/mi_qa3671/is_201104/ai_n57428788/), [accessed 6 November 2011].

27 International Covenant on Civil and Political Rights, 1966, Articles, 2[1], 3, 4, 14[1][3], 25 and 26.

28 International Covenant on Economic, Social and Cultural Rights, 1966, Article, 2[2].

29 International Convention on Elimination of all Forms of Racial Discrimination, 1965, Article, 1[4].

30 International Convention on Elimination of all Forms of Discrimination Against Women, 1979, Articles, 2,3,4,5,6,7,8,10,11,12,13,14 and 16.

31 International Convention on the Rights of the Child, 1989, Article 2.

32 International Convention on the Rights of Persons with Disabilities, 2008, Article 4.

The Human Rights committee under ICCPR, on General Comment No. 18, has interpreted that states parties may take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the covenant.<sup>33</sup>

Similarly, The Committee on Economic, Social and Cultural Rights under ICESCR, on General Comment No. 20, has clarified the Committee's understanding of the provisions of Article 2(2), including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).<sup>34</sup> In this comment, inter alia, the committee focused on special measures as a form of affirmative action, that "In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health care facilities"<sup>35</sup>.

The General Recommendation of the Committee on the Elimination of Racial Discrimination under ICERD has especially highlighted the meaning and scope of "special measures" as it is an updated practical guidance to state parties in discharging their obligation to ensure non-discrimination in their jurisdiction.<sup>36</sup> It has clearly interpreted that there should not be any confusion about different terminologies used in this regard. The committee states "The term 'special measures' includes also measures that in some countries may be described as "affirmative measures", "affirmative action" or "positive action" in cases where they correspond to the provisions of articles 1(4) and 2(2) of the Convention"<sup>37</sup>.

General Recommendation No. 25 of CEDAW is another important and relevant document in this regard. Basically, it has interpreted article 4(1) of CEDAW on temporary special measures.<sup>38</sup> It has also made clear the confusions that it can

33 Human Rights Committee, General Comment No.18; Non-discrimination: in UN Doc HRI/GEN/1/Rev.610, November 1989, paragraph 10.

34 Committee on Economic, Social and Cultural Rights, General Comment No. 20, [art.2, para2], E/C.12/GC/20, 10 June 2009.

35 Ibid, para 9.

36 The UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, UN Doc CERD/C/GC/32, August 2009.

37 Ibid, para12.

38 See in detail, the UN Committee on CEDAW, General recommendation No. 25: Temporary Special Measures (article 4, paragraph 1, of CEDAW), UN Doc A/59/38,2004.

be used and understood as different terminology. It is categorically stated in this document that “The Committee itself, in its previous general recommendations, used various terms. States parties often equate “special measures” in its corrective, compensatory and promotional sense with the terms “affirmative action”, “positive action”, “positive measures”, “reverse discrimination”, and “positive discrimination”. These terms emerge from the discussions and varied practices found in different national contexts.”<sup>39</sup>

Likewise, the Committee on the Rights of the Child has interpreted Articles 4, 42 and 44(6) of the convention and highlighted to be followed General Comment No. 20 of HRC in taking special measures to diminish or eliminate conditions that cause discrimination<sup>40</sup>. There are many provisions which obligate states parties in taking appropriate measures to diminish or eliminate discrimination of persons with disabilities but no special interpretation has been done as yet.

## 4. Substantive Equality, Affirmative Action and Nepal

### 4.1. General Introduction

Nepal is situated in South Asia between the Republic of India and the People's Republic of China. It is a land-locked state, with an area of 147,181 square kilometers. Its population is 23,151,423, with an annual growth rate of 2.25 percent. Senior citizens above 60 years account for about 6.5 percent, children below 16 years, 40.93 percent, and women, 51 percent. Ethnic, cultural and linguistic diversity is the most characteristic feature of Nepal as a nation. Around ninety two languages are spoken as mother tongues. The Nepali language is the official language. Currently, 59 groups are recognized as indigenous/ethnic nationalities (*Aadivasi Janajati*), accounting for 37.2 percent of the population<sup>41</sup>.

Nepal endured a decade-long armed conflict from 1996 until 2006. On 21 November 2006, the conflict officially came to an end with the signing of the Comprehensive Peace Accord (CPA). The Interim Constitution of Nepal (the Constitution), promulgated on 15 January 2007, created an interim Legislature-Parliament and provided for a transitional government. The United Nations Mission in Nepal was established, vide Resolution 1740 (2007) of the UN Security Council, with the mandate to support the peace process. Election to the CA was held on 10 April 2008. Almost a third of its members (33.23 percent) are women and a record number of *Dalits* and people from various nationalities have been elected, making the CA the most reflective and

39 Ibid, para17.

40 Committee on the Rights of the Child, General Comment No. 5, UN Doc/ CRC/GC/2003/5, 27 November 2003 para12 sub para2.

41 National report of Nepal submitted to Human Rights Council, Working Group on the Universal Periodic Review, Tenth session, Geneva, 24 January–4 February 2011, A/HRC/WG.6/10/NPL/1, and p 2.

inclusive of Nepal's social diversity in its history. The CA remains primarily engaged in the process of framing a democratic constitution and also serves as the Legislature-Parliament<sup>42</sup>. It has been functioning to date.

The Interim Constitution, 2007 is the fundamental law which keeps democracy, peace, prosperity, progressive economic-social changes and sovereignty, integrity, independence and dignity of the country as the central concern and provides a political system that fully upholds, *inter alia*, the universally recognized basic human rights and establishes the rights of all citizens to education, health, housing, employment and food sovereignty. Its cardinal focus is on social and ethnic inclusion, constructive recognition of diversity and attainment of social justice through inclusive, democratic and progressive restructuring of the state<sup>43</sup>.

The Constitution with a comprehensive catalogue of fundamental rights is the basic source of human rights. It incorporates almost all the rights set forth in the Universal Declaration of Human Rights (UDHR) and the rights and obligations enshrined in human rights instruments to which Nepal is a party. Concretely, it provides for twenty-one different rights as fundamental rights<sup>44</sup> including those enshrined in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). A number of economic, social and cultural rights are also inscribed in the Directive Principles and State Policies, which include provisions for positive discrimination, reservations and other forms of special support for vulnerable or marginalized groups or communities in connection with education, health, housing, food sovereignty and employment, for their empowerment, protection and development.<sup>45</sup> Nepal has become a party to thirteen core human rights treaties including six optional protocols<sup>46</sup>. Through these instruments Nepal has taken on unavoidable and heavy obligations.

42 Ibid, p3.

43 The Interim Constitution of Nepal, 2007, Preamble and Article 33.

44 The Interim Constitution of Nepal, 2007, part 3, arts 12 through 32 [The fundamental rights are: right to freedom, right to equality, right against untouchability and racial discrimination, right relating to publication, broadcasting and press, right to environment and health, right to education and culture, right to employment and social security, right to property, rights of women, right to social justice, rights of the child, right to religion, right to justice, right against preventive detention, right against torture, right to information, right to privacy, right against exploitation, right relating to labor, right against exile, and right to constitutional remedies].

45 The Interim Constitution of Nepal, 2007, part 4, arts 33 through 35.

46 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); First Optional Protocol to the ICCPR; Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Optional Protocol to the CEDAW; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); Optional Protocol to the CRC on the involvement of children in armed conflict; Optional Protocol to the CRC on the sale of children, child prostitution and child pornography; Convention on the Rights of Persons with Disabilities (CRPD); and Optional Protocol to the CRPD.

#### **4.2. Constitutional, legal and policy provisions of the right to equality and non-discrimination**

There is strong provision for a right to equality which guarantees to all citizens equality before the law and no denial of equal protection of the laws to all persons. Discrimination is prohibited against any citizen in the application of general laws on the grounds of religion, color, sex, caste, tribe, origin, language or ideological conviction or any of these. But it is “provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, *Dalits*, indigenous peoples (*Adibasi, Janajati*), *Madhesi* or farmers, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated”. There is also a prohibition on discrimination in regard to remuneration and social security between men and women for the same work.<sup>47</sup>

There are both provisions of formal and substantive equality. Our concern is basically with substantive equality. There is identification of disadvantaged groups and provision is made that they can be specially treated by making law and it would not be a matter of discrimination. These disadvantaged groups are women, *Dalits*, indigenous peoples (*Adibasi, Janajati*), *Madhesi* or farmers, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated. For their protection, empowerment or advancement, special provisions by law can be made. Here, “special provisions” give a sense of affirmative action.

Another important provision which is directly related to affirmative action is mentioned under the Directive Principles and Policies of the State. It says that “The State shall pursue a policy of making a special provision, based on positive discrimination, for the minorities, landless people, landless squatters, bonded labors, the disabled, backward regions and communities and victims of conflict, the women, *Dalit*, indigenous people, *Madhesi* and Muslims, as well”<sup>48</sup>.

To treat specially discrimination arising from the existing caste system, a separate provision on a right against untouchability and racial discrimination has also been created. There is a strict prohibition of discriminating on the grounds of caste, race, community or occupation. Such discriminatory treatment shall be punishable, and the victim shall be entitled to compensation as determined by law. Any act belonging to any caste, tribe or origin which justifies social discrimination on the grounds of caste or race or to publicize ideology based on racial superiority or hatred or to encourage caste discrimination in any manner shall not be allowed. If any act is contrary to this provision, it shall be punishable by law<sup>49</sup>.

<sup>47</sup> The Interim Constitution of Nepal, 2007, part 3, art.13.

<sup>48</sup> Ibid, para (14) of article 35.

<sup>49</sup> Ibid, Article 14.

The present policy of the government of Nepal is to introduce a policy of inclusion in pursuit of making the society equitable through the elimination of existing regional, class and caste-based, ethnic and other disparities and discriminations.<sup>50</sup> The Tenth Plan enunciated inclusion as a strategic pillar for poverty alleviation.<sup>51</sup> The Constitution has included various important provisions on inclusive development in all sectors including economic, social, political and ecological ones so as to ensure human rights and fundamental freedoms for all castes, ethnic groups, gender, religions, regions, ages, and classes by restructuring the State.<sup>52</sup> As envisaged in the TYIP<sup>53</sup>, a series of policies and other measures are being implemented to make Nepal an inclusive nation.

As a state policy under the Interim Constitution, Article, 138(1) further envisages that there shall be a progressive restructuring of the State with an inclusive, democratic federal system of governance by doing away with the centralized and unitary structure of the State so as to end discrimination policy based on class, caste, language, gender, culture, religion and region. While talking about the legislative provisions with regard to the participation of oppressed and backward communities such as women, *Dalits*, *Madhesi*, the second amendment of Civil Service Act, 1992 ensures the political participation of marginalized communities, women, *Dalits*, indigenous-nationalities and persons from the remote and backward communities of Nepal. In addition, Section 7(7) of the Civil Service (Second Amendment) Act, 1992 provided that 45 per cent of the positions shall be reserved for various groups, thus considering it to be cent-percent (100%) of the total seats to be fulfilled through open competition viz, women (33%), adibashi/janjati (27%), *madhesi* (22%), *dalit* (13%) peoples from remote areas (5%) and disabled (4%) in making an advertisement for the recruitment of employees.<sup>54</sup> Thereafter, the provision has been in operation and the Public Service Commission has been recruiting the required human resources capable for the vacant posts through written examination, interviews and practical competitive examination.

#### **4.3. Judicial role in promotion of substantive equality**

Courts can play an important role in mainstreaming the rights of substantive equality by elaborating the content of rights, indicating the responsibilities of the state, identifying the ways in which the rights have been violated by the state, suggesting the framework within which policy has to be made and highlighting the priority of human rights. The role of courts, therefore, is seen as relatively proactive.

50 National Periodic Report, 2010, above n41, p16.

51 There were tenth five years national plans in Nepal up to 2006. After new political context of 2006, it is substituted by three years interim plan. There was implemented first TYIP for 2008-2010 in this course and now is implementing another TYIP for 2011-2014.

52 Ibid, Part four, arts 33 through 36.

53 Three Years Interim Plan, 2011-2014, National Planning Commission of Nepal.

54 See in detail, the Civil Service (Second Amendment) Act, 1992, Section 7(7).



The role of the Nepali Supreme Court is worth mentioning. There is a long list of cases in which the Supreme Court has been endeavoring to ensure substantive equality<sup>55</sup>. The Court has built a strong jurisprudence on equality and non-discrimination, especially gender issues, the issue of social exclusion, special protection for the weak and vulnerable, children, persons with disabilities, and the oppressed and marginalized sections of society.

#### **4.4. Proposed provisions on the right to equality and non-discrimination in thematic committee of Constituent Assembly of Nepal**

Nepal is now in the process of new constitution making. The Thematic Committee on Fundamental Rights and Directive Principles of State<sup>56</sup>, has submitted its thematic concept paper and proposed draft to the Constituent Assembly. They had no debate on the right to equality and non-discrimination.<sup>57</sup> The proposed provision on equality and non-discrimination is broader and more progressive than the provisions of the existing interim constitution. The proposed provision has identified a long list of disadvantaged persons and emphasized special provisions by law for their protection, empowerment or advancement. It is bottom line and substance concerned with substantive equality. Though this provision has not been approved by the full house of the Constituent Assembly, we can pin hopes that it would be endorsed. In support of endorsement, Nepal has obligations to be fulfilled under treaty bodies of international human rights, Nepal is a bonafide implementer of its international obligations, and the existing situation is vulnerable for the disadvantaged. The submissions of Civil Society Organizations are in favor of affirmative action. The report highlights:

*"The State shall identify the economically, socially, politically, educationally and health-wise backward communities or classes and make special legal provision for their preservation, development and empowerment along with compensation for past oppression and on the basis of positive discrimination"*<sup>58</sup>.

55 *Meera Dhungana and others v. Ministry of Law, Justice and Parliamentary Affairs*, NKP,462,[SC,2052 BS] [1995 AD], *Mohan Sasankar v. Ministry of Education and Sports and others*, NKP,848,[SC,2067BS][2010 AD], *Sunil Babu Pant and others v. Government of Nepal, Office of the Prime Minister and Council of Ministers and others*, NKP,485[SC 2065 BS] [2008 AD], *Prakashmani Sharma v. Office of the Prime Minister and Council of Ministers and others*, NKP, 178 [SC 2065 BS] [2008 AD], *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government, Home Ministry and Others*, NKP,169,[SC 2064 BS] [2007 AD], etc.

56 There are 43 members of Constituent Assembly representing proportionally to all political parties existed at this time, they have prepared this report and draft after surveying public opinion and extensive consultations with experts under the mandate of Constituent Assembly.

57 See in detail the proposed draft provision on right to equality and non-discrimination for new constitution of Nepal, Report of thematic committee on fundamental rights and directive principles of state, CAN, pp180-188 (Nepali) and [UNDP/ Support to Participatory Constitution Building in Nepal (SPCBN)/CCD, 28 Jan. 2010,unofficial translation, pp. 33-35.[ Pdf. *concept paper fundamental rights directive principles.ENG*]

58 *Krishna Khanal,Binay Kumar Kushiyait,A Review and Analysis of the 2009 Civil Society Public Submissions to the Constituent Assembly*,[UNDP/Nepal, September 2010], p. 14.

#### **4.5. Some Issues and Problems**

Though application of affirmative action is in its initial stages, it has left a positive impact in Nepal. But there are some issues and problems.

1. Identification disadvantaged groups: There is a long list of disadvantaged persons/groups. The long list shows that it is as a general provision of formal equality rather than substantive equality. The list needs to specify the most vulnerable groups so that state would be able to make arrangements.
2. Duplication and overlapping: An identified list mentioned in draft states that “Women, *dalits*, indigenous ethnic tribes (*adiwasis janjatis*), Madhesi or farmers, workers, oppressed region, Muslims, backward class, minority, marginalized and endangered communities or destitute people, youths, children, senior citizens, gender or sexual minorities, disabled or those who are physically or mentally incapacitated and helpless people, who are economically, socially or culturally backward.” The qualifiers of disadvantaged groups overlap each other.
3. Identification is not based on authentic and reliable aggregate data: There is another problem is that it is not based on authentic and reliable authentic data.
4. No specific law exists to safeguard substantive equality: The concept of substantive equality has been followed since 1990. No specific law has been made to mitigate substantive equality. Some provisions on seat reservation for disadvantaged groups exist in election law, civil service law and police law. But specific anti-discrimination law has not been made yet.
5. Resource constraints: Nepal is an underdeveloped nation and it is also a landlocked one. So there is a huge constraint of resources to launch new programs for uplifting the conditions of disadvantaged sections of society.

#### **4.6. The way forward**

1. An identification of disadvantaged groups is very much important to launch the program of affirmative action. Identification of disadvantaged persons or groups is to be made on the basis of their economic and social status.
2. There is an urgent need to limit the group to a minimal level not maximal so that it is manageable.

3. For sustainable development of society it is better to launch a massive empowerment package to disadvantaged groups. Temporary and retail packages cannot mitigate the goal of substantive equality.
4. To economically empower the disadvantaged, there should be launched an effective program of employment generation on a massive scale.
5. Education is an important factor of human development. It helps to prepare sound and qualified human resources for development. So a program of enhancing qualitative education should be launched.
6. Inclusion of disadvantaged groups is another most important factor to ensure substantive equality. So there is a need to include disadvantaged persons as functionaries of the state. But the criterion of inclusion must be transparent and should not intervene the core value and integrity of the institution.
7. General provisions in constitution and law are neither adequate and nor complete. To substantiate the constitutional provisions, specific legal enactments to safeguard the rights of disadvantaged groups should be made.
8. Nepal is a politically dominated society and everything depends on politics. It holds the power and legitimacy of the people. So there should be made legal provisions of maximum participation of disadvantaged persons on political institutions.
9. To implement the program of affirmative action, there needs to be a huge amount of economic and technical resources. For this purpose it is essential to mobilize international economic and technical cooperation.
10. Affirmative action is mostly related to social, economic and cultural rights. In ensuring these rights, the proactive role of the court is important. The role of the Supreme Court of Nepal is appreciable in this regard. So the supreme court of Nepal should expand its creativity and activism in further ensuring the goal of substantive equality.

## 5. Conclusion

Equality is an inherent value of human rights. It is an inalienable aspect of justice and an important component of rule of law. It has been developing since human existence began. Today, we set aside talk about the original form of equality but we are talking of equality in substance. Now it is modified with a new vision. Nepal is an underdeveloped nation with unique characteristic features of ethnic, cultural and

linguistic diversity. Economic, social, educational and geographical backwardness and vulnerability are also rampant in Nepal. To address all the evils, the concept of substantive equality with new vision should be followed. Affirmative action is an effective tool to achieve substantive equality. It doesn't matter what forms it takes, either it is positive action or positive discrimination or affirmative action. It is important to mainstream the rights of disadvantaged or marginalized sections of society. Nepal has been following the concept of substantive equality since 1990. But no significant progress has been achieved. Nepal is now at a crucial moment of constitution making. It needs to incorporate a new concept of substantive equality. Some provisions are already mentioned in the existing interim constitution, but they are not sufficient. Nepal is a state party to most of the international instruments of human rights. So it is an obligation for Nepal to follow the norms of anti-discrimination law mentioned in and evolved by treaty bodies of United Nations. At the same time, it must be considered how Nepal can best incorporate the new conceptual development. The new development on the concept of equality is "breaking the cycle of disadvantages, promoting respect for the dignity and worth of all, affirming community identity and facilitating full participation in society". Wearing the umbrella of international human rights law and standing on these four new principles of equality, would be the best way for the Nepali Constitution maker. And it is also helpful to judges to interpret and for executives to implement anti-discriminatory law and policy.

# A Normative Dilemma on Access to Justice: Much Emphasis on ACCESS and Little on JUSTICE – Need to Revisit the Socio-legal Interface

Nahakul Subedi\*

## Abstract

*In this article, the author discusses obstacles in access to justice as challenge being faced by almost all societies. This article discusses access to the judiciary and justice to the victims is different things. He further brings fore normative aspect of framework of access to justice along with international human rights laws. In the course of discussion, Mr. Subedi gives an instance a case study of health right in context of access to justice situation in Nepal. And he concludes that where a significant number of people are deprived from access to food, healthcare and education, without enhancing the capacity to claim those rights and access a remedy in the event of its breach, any promise of equal access to rights rings hollow.*

## 1. Introduction

All human beings are born free and equal in dignity and rights.<sup>1</sup> Every person should have equal access to justice when their dignity or rights are infringed.<sup>2</sup> Therefore, human dignity is always at risk if a justice system is not able to ensure equal access to justice.

Obstacle in access to justice is a key challenge being faced by almost all societies across the world, however, this problem is more serious in poor countries, and especially for the people who are living in poverty and destitute.<sup>3</sup> Impediment in the way to justice, thus, leads vulnerable and marginalized towards more vulnerability and marginalization.<sup>4</sup> Strikingly, access to justice is widely embraced and routinely violated aspects of human rights.<sup>5</sup>

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1 Universal Declaration of Human Rights (UDHR), Dec. 10, 1948, G.A. Res. 217A (III) UN Doc A/810, Art. 1.

2 United Nations Development Programme (UNDP), *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Asia Pacific Justice Initiatives, Bangkok, 2005, p. 2. See also, Francesco Francioni, *the Rights of Access to Justice under Customary international Law*, in Francesco Francioni (ed.), *Access to Justice as a Human Right*, Academy of European Law, European University Institute, Oxford University Press, 2007, p. 1.

3 Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 Loy. L.A.L. Rev. 2009 869.

4 *Supra* note 2, p. 2.

5 *Supra* note 3, p. 869.

Although access to justice movement is associated with legal aid and improving court procedures, as it will be used in this article, it refers to much more than an individual's access to courts. Access to justice, in this article, is defined, based on the United Nations Development Programmes (UNDP) Note,<sup>6</sup> as ensuring just and equitable outcomes, especially in realizing economic, social and cultural rights (ESCRs), within the broader framework of system of protection and enforcement of human rights.

## 2. Conceptual Framework of Access to Justice

The overall concept of 'access to justice' is interpretive and contextual. Since it is very vague, it has a significant number of dimensions to discuss, which is not possible to cover in one piece of research. Therefore, the discussion in this context will concentrate basically in two questions: first, whether there is an existence of substantive right to access to justice or it is a procedural right which depends on other independent substantive rights; and the second, whether the access to court or attorney can be a proxy to access to justice or it goes beyond. Before going into those two questions it is essential to achieve a working definition of "right to access to justice."

According to the UNDP, access to justice mainly refers to the:

*ability of people, particularly from poor and disadvantaged groups, to seek and obtain a remedy through formal and informal justice systems, in accordance with human rights principles and standards.<sup>7</sup>*

By the above definition, access to justice is referring toward a justice system which serves to recognize one's entitlement to redress from possible harm. It offers similar chances of obtaining similar solutions to similar kinds of problems for different groups in a society- regardless of wealth, class, race, gender, or ethnicity, with equal and just outcomes.<sup>8</sup> The UNDP further clarifies that it is a process, which enables people to claim and obtain justice or remedies, whenever conflicts of interests or particular grievances put their well-being at risk.<sup>9</sup> However, the question that whether the right to access to justice is an instrumental guarantee (procedural rights) depends upon the substantive right or is itself a substantive right, is contentious.

M. Cappelletti, a pioneer contributor, articulates this controversy using tripartite framework of access to justice. The first category encompasses legal aid and

6 UNDP, Access to justice Practice Note of 9 March 2004, available at <http://www.undp.org/governance/docs/A2J%20PN%20Final.doc>, accessed on 23 May 2011.

7 *Supra* note 2, p. 6.

8 Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY L.A. Rev. 2009 pp.949-51.

9 *Supra* note 2, p. 5.

assistance (generally, free of cost) to needy people, in recourse of the determination of criminal charges.<sup>10</sup> It is rather a narrow sense of access to justice basically indicates, towards procedural justice. In contrast, assurance of legal services does not necessarily ensure justice.<sup>11</sup> Evidence shows that state-sponsored provision of legal services has not attracted to indigent litigants who fear from a possible adverse result- a 'substantial injustice' – due to litigant's inability, essentially financial, to negotiate the judicial process.<sup>12</sup>

In the second category, as classified by Cappelletti, the right to access to justice refers to a relatively wider framework of rights, such as right to equality and fair trial in judicial proceedings.<sup>13</sup> Principally, the right to equality and fair trial gives wider implications, however, when these terms are linked to 'judicial proceedings,' it restricts the meaning and scope of access to justice mainly in procedural safeguards of right, such as, equality between opposing parties in the case and not the substantive right to equality.<sup>14</sup> The problem with this category is that it does not aim to address structural obstacles, such as poverty and discrimination, to achieve the goal of access to justice.<sup>15</sup>

The third category of access to justice is broader concept of justice which aims to realize fairness and equity as an outcome of a justice system in a society.<sup>16</sup> The third wave, according to Cappelletti, put greater emphasis on multi-disciplinary approaches to access to justice problems in which the justice system develops partnerships with other institutional sector, such as health care and social services. It is an important part of the shift towards a more citizen-centred and community-focused justice system. It offers additional redresses for poor people for which there is a little antidote available through formal judicial procedures.<sup>17</sup> Indeed, there is little point in opening the doors to the courts if litigants cannot afford to come in. Increasingly focused access, *per se*, thus, is of little value unless it facilitates and secures substantive justice.<sup>18</sup>

10 M. Cappelletti and B. Garth Milan, *The Worldwide Movement to make Rights Effective*, in Dott-A. Guiffre Editore (ed.) *Access to Justice*, A General Report, Vol. I, 1978, 1979, p.6. See also, A. Tunc, *The Quest for Justice*, in M Cappelletti (ed.), *Access to Justice and the Welfare State* (1981) 315 et seq.

11 Andrew Durbach, *the Right to Legal Aid*, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, first edition, Cambridge University Press, 2008, p. 59.

12 *Ibid.*

13 *Supra* note 11, p. 6.

14 S.Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, pp.82-87.

15 *Ibid.*

16 *Supra* note 11, p.6.

17 R. Sudarshan, *Avatars of Rule of Law and Access to Justice: Some Asian Aspects*, in Ayesha Kadwani Dias and Gita Honwana Welch (eds.), *Justice for the Poor: Perspectives on Accelerating Access*, UNDP/Oxford University Press, New Delhi, 2009, p. 589 at 599.

18 *Supra* note 12, p. 60.

A further dichotomy of the right to access to justice is concerned to whether or not the access to court mirrors the access to justice. Traditionally, access to justice has been focused on gaining access to court, normal referring to the right to seek a remedy before a court of law.<sup>19</sup> However, it has been argued that access to justice must be considered adopting a broader frame that moves beyond access to a court or to an attorney or another form of legal assistance.<sup>20</sup> In a wider perspective, it can be regarded as access to a number of institutions that are responsible for delivering public services.<sup>21</sup> Access to justice, in this context, can be determined in following four levels: i) *Physical access*: how close the users, especially poor, are to justice institutions; ii) *Financial access*: how affordable the services are to the users; iii) *Technical access*: how comfortable the users are with the procedural requirements; and iv) *Psychological access*: whether the users feel confident enough to engage with justice institutions.<sup>22</sup>

In other words, access to justice is about transparency, accountability, integrity and ethics in the delivery of public services.<sup>23</sup> It encompasses the rule of law, administration of justice, good governance, and the democratic ideals. Moreover, it symbolizes the rhetorical and doctrinal interface between legal, socio-economic, and political factors.<sup>24</sup> Therefore, the concept of access to justice cannot be limited to access to court. Here it is important to see some other arguments. Roderick Macdonald robustly claims that:

*Access to justice will never be achieved through reactive adjudicative institutions that are meant to find justice in relationships by simply restoring unjust status quo ante. Efficiency in the service of injustice is not a social good.....*<sup>25</sup>

Nevertheless, the key institution that is ultimately responsible for securing substantial justice is the judiciary. Without doubt, access to justice ought to mean more than access to court while non-access to courts amounts to denial of justice, even a full access to court may not always provide a just outcome.<sup>26</sup> Court could play a vital role in enhancing access to justice ensuring economic, social and cultural

19 *Ibid.* See also, *Supra* note 2, p. 3.

20 Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice of Individual*, 42 LOY.L.A.Rev. 2009 p. 913.

21 William C. Vickrey, Joseph L. Dunn & J Clark Kelso, *Access to Justice: A Broader Perspective*, 42 LOY. L.A.L. Rev. 2009, p. 1147.

22 Donald Rukare, *the Access to Justice Challenge in Uganda*, in Dan Banik (ed.), *Rights and Legal Empowerment in Eradicating Poverty*, Ashgate, 2008, p. 112.

23 *Supra* note 7, p. 320.

24 *Ibid.*

25 *Ibid.*

26 Upendra Baxi, *The Renascent Access Notions: Globalization and Access to Justice*, in *Justice for the Supra* note 18, p. 74.



rights, such as, by developing jurisprudence on access to food, health or education.<sup>27</sup> Furthermore, to gain access to justice, a court may require considering, as a matter of fairness and justice, the litigant's ability to navigate the system of justice.<sup>28</sup>

In spite of this, since the middle class may better captures courts,<sup>29</sup> the formal judicial system is often out of reach for those disadvantaged and marginalized section of the society who are living in poverty and discrimination.<sup>30</sup> Access to justice, therefore, is particularly concerns to them. In contrary to formal judicial system, access to justice acknowledges the importance of "the demand side" (such as, poor people<sup>31</sup>) for equitable justice and focuses to enhance their capability to claim and protect their rights and interest.<sup>32</sup> It attempts to eliminate, or at least counterbalance, the impact of inefficient or expensive systems of justice that effectively deny the fullest protection and recourse to redress to the poor and marginalized.<sup>33</sup> In addition, as enhancing access to justice endeavours mainstreaming excluded groups in a broader governance program,<sup>34</sup> it can be regarded as a central building block for economic and social reform.<sup>35</sup> Moreover, obstacles in obtaining access to justice reinforce poverty and exclusion.<sup>36</sup>

Access to justice, thus, can be used as a tool to overcome deprivation by ensuring economic, social or cultural rights. Moreover, access to justice has aim to respect for the dignity and inherent worth of the human person and focuses that it should not be weakened by poverty and lack of resources.<sup>37</sup> Since the poorest and most vulnerable members of the society suffer most from deprivations, access to justice should consider such human suffering.<sup>38</sup> In other words, the heart of the idea of

<sup>27</sup> *Supra* note 2, p. 3.

<sup>28</sup> D. Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, Seattle Journal of Social Justice, Vol. 2, [2003-4], pp. 571-607 at 573.

<sup>29</sup> Malcolm Langford, *The Justiciability of the Social Rights*, in Social Rights Jurisprudence, *supra* n. 12, p. 38.

<sup>30</sup> Commission on Legal Empowerment of the Poor (LEP), *Making the Law Work for Everyone, Volume II*, New York, 2008, p. 14.

<sup>31</sup> The term 'poor' has been used, for the purpose of this discussion, as defined by the Council of Europe—"the very poor who, for economic, social or cultural reasons, find themselves marginalized or excluded from society, are very often in such a precarious situation that they cannot assert their rights nor defend their interests before the relevant authorities." *Effective Access to the Law and to Justice for the Very Poor*, Recommendation No. R (93) 1 and Explanatory Report, Council of Europe, 1994.

<sup>32</sup> The World Bank, *Justice for the Poor Programme*, December 2006, available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/J4P0verviewDecember06.pdf>, accessed on 21/07/12.

<sup>33</sup> Ayesha Kadwani Dias and Gita Honwana Welch (eds.), *Justice for the Poor: Perspectives on Accelerating Access*, UNDP/Oxford University Press, New Delhi, 2009, p. xv.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, p. xvii.

<sup>36</sup> Commission on Legal Empowerment of the Poor (LEP), *Making the Law Work for Everyone, Volume I*, New York, 2008, p. 33.

<sup>37</sup> *Supra* note 3, p. vi.

<sup>38</sup> C. Scott, *the Interdependent and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, Osgoode Law Journal, Vol. 27, 1989 pp. 769-878, at 778.

empowering the poor, vis-a-vis enhancing access to justice should focus on the goal of improving the quality of their lives.<sup>39</sup>

Based upon above discussion, it can be concluded that there are sufficient grounds to claim access to justice as a substantive human right in conceptual level, however, it is fragile and contentious in practical level.<sup>40</sup> Furthermore, access to a court and an attorney could be a vital component of access to justice, nevertheless, access to justice has been considered in wider perspectives, not confined only on access to courts and the matter of procedural safeguards of the rights. Rather, it has been regarded as an access to a whole system of justice, in which numerous institutions are responsible for public service delivery for just and equitable enjoyment of rights.

### 3. Access to Justice in International Human Rights Law

The term, 'access to justice' as such, cannot be found expressly in most of international human rights instruments. This is mainly because of its broad implication. However, a number of provisions, such as, the notion of equality and fairness can be considered as bedrock of access to justice, which can be seen extensively in international law. Moreover, 'respect for the dignity and worth of the human person'- a fundamental threshold of the international human rights law has been ultimate goal to ensure access to justice.<sup>41</sup>

By the establishment of United Nations, its Charter<sup>42</sup> gives this notion to legal effects mainly based on respect for the principle of equal rights,<sup>43</sup> which is reaffirmed by numbers of subsequent international human rights instruments<sup>44</sup> which provide normative rules, guidelines and principles that support equality, fairness and non-discrimination in procedures of determination of rights and obligations of the person.

While considering the implications of the right to access to justice it can be inferred both in narrow and wide sense, as described in previous part of this article. In narrower sense, the right to legal aid and assistance to the needy people in course

39 *Supra* note 31, p. 14.b

40 *Supra* note 2, p. 32. See also, Kadwani Dias, *International Law and Source of Access to Justice*, *Supra* note 34, p.3 at 5.

41 *Supra* note 34, p. vi.

42 Charter of the United Nations [Charter], June 26, 1945, entered into force Oct. 24, 1945, 59 Stat. 1031, T.S. 993.

43 *Ibid*, Art. 1, para.[2].

44 See: For example, in addition to major UN human rights conventions, The Basic Principles on the Independence of the Judiciary, UNGA 40/32 of 29 November 1985 and 40/146 of 13 Dec 1985, the Basic Principles on the Role of Lawyer, adopted by UN Congress on the Prevention of Crime and the Treatment of Offenders on 7 September 1990, Havana Cuba, Guidelines on the role of Prosecutors, available at <http://www2.ohchr.org/english/law/prosecutors.htm>, accessed on 25/08/11 and Code of Conduct for Law Enforcement Officials, General assembly resolution 34/169 of 17 Dec. 1979 can be regarded as such instruments.

of determining criminal charges can be regarded at first level. Paragraph (d) of the Article 14 (3) of the International Covenant on Civil and Political Rights (ICCPR)<sup>45</sup> for example, guarantees the right to legal representation in the determination of criminal charges. It ensures the legal assistance of his/her own choice and without payment, if not having sufficient means to pay for it.<sup>46</sup> Undoubtedly, non-access to State-funded legal aid amounts to denial of access to justice, even a full access to legal aid may not always provide access to justice in true sense.<sup>47</sup>

When looked in a wider approach, the procedural guarantees of equality and fairness in judicial proceedings, in international human rights law, can be seen as next level of access to justice. International human rights law guarantees equality of all persons before the courts and tribunals. The UDHR, for example, ensures full equality to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations and of any criminal charges,<sup>48</sup> which is reaffirmed by a number of succeeding human rights instruments, including the ICCPR. Nonetheless, reference of the 'fair trial in full equality' of Article 14 can be linked to the general guarantee of non-discrimination, it particularly refers to equality of arms, a prohibition of non-discrimination between the opposing interests.<sup>49</sup>

Obviously, the principle of equal protection of law, embodied in international human rights law, suggests no discrimination towards law users. In other words, equal protection clause of the international human rights law obligates the State to respect, to protect and to fulfil the rights of its citizens, making law accessible to all<sup>50</sup> - an extremely vital approach on wider perspective on access to justice. It substantially focuses on the enjoyment of the rights and insists on effective remedy, such as, substantive rights to receive a fair and just remedy for a violation of one's rights.<sup>51</sup> As is frequently noted, a purely procedural understanding of equality and justice by no means captures the aspiration of access to justice.<sup>52</sup> In true sense, it goes beyond mere technical equality and procedural guarantee of a fair hearing. It emphasises to address the obstacles in achieving redress, such as poverty, discriminations backwardness and other social stigma, and perhaps the complexities of the procedural rules as well.<sup>53</sup>

45 UNTS 3.Vol.999, No. 14686 [herein after ICCPR /Covenant].

46 *Ibid.*, Art. 14(3)(d).

47 *Supra* note 26.

48 UDHR, Article 10.

49 *Supra* note 26, pp. 94-96.

50 Fareda Banda, *Women and Access to Justice*, in *Justice for the Poor*, *Supra* note 18, p. 129 at 131.

51 *Supra* note 11, p. 10. See also, *Global Alliance against Traffic on Women*, Access to Justice Programme, available at <http://www.gaatw.org/atj/>, accessed on 05/08/10.

52 See Eva Storskrubb and Jacques Ziller, *Access to Justice in European Comparative Law*, *Supra* note 2, p.185.

53 *Ibid.*

#### 4. A Case Study of Health Right in Context of Access to Justice Situation in Nepal

The Interim Constitution of 2007 has incorporated the right to everyone to the basic health care services as a fundamental human right.<sup>54</sup> In addition, the Constitution offers a range of additional protections of other rights which are closely linked to the right to health. The right to reproductive health and other reproductive rights for women<sup>55</sup> and the right to basic health and social security to children<sup>56</sup> are some of other constitutionally protected health related rights.

Similarly, Nepal has ratified a wide range of international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights, [ICESCR] 1966, the UN Convention on the Rights of the Child 1989 [CRC], and the Convention on Elimination of All Forms of Discrimination Against Women, 1979 [CEDAW], among others,<sup>57</sup> which ensure a number of health rights. Most of them are translated in Nepal through its constitution, laws and policies. According to the Nepali treaty law, in case of conflict between the provision of national law and the international treaty, in which Nepal is a party, the later prevails over the former.<sup>58</sup> Moreover, Nepal is committed towards various health-related goals and targets through its participation in a number of international and regional forums.<sup>59</sup> Thus, both, international and domestic law have put within its jurisdiction.

Understandings of the right to health have broadened over time. UN human rights treaty body on the right to health— the Committee on Economic, Social and Cultural Rights [CESCR] interpreted the right to health ‘as an inclusive right’ extending to freedoms, such as, the right to be free from torture and non-consensual medical treatment and entitlements, such as, the right to a system of health protection, which provides equality of opportunity for people to enjoy the highest attainable level of health.<sup>60</sup> The Committee confirmed its extension toward the right to a system of health protection which has two dimensions: first, access to health services, as spelled out in different instruments; second, the right to a social orders, which includes obligations of the State to take specific measures for the purpose

54 The Interim Constitution of Nepal, 2007, Art. 16[2]

55 *Ibid*, Art 20[2].

56 *Ibid*, Art. 22[2].

57 For full catalogue of the treaties, see: *A Compilation of Human Rights Treaties, in which Nepal is a Party*, Ministry of Law and Justice, Government of Nepal, 2007.

58 Treaty Act of Nepal, 1991, Section 9.

59 These forums include, inter alia, Millennium Summit of the General Assembly, the International Conference on Population and Development, the Fourth World Conference on Women, the World Summit for Social Development, the General Assembly special session on Children, the General Assembly special session on HIV/AIDS, and the World Conference on Human Rights.

60 ICESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, 11 August 2000, para. 8.

of safeguarding public health including underlying determinants of health, such as access to safe and potable water and adequate sanitation.<sup>61</sup>

For the understanding of the right to health, the CESCR has developed a analytical frameworks which requires the right to health in all its forms and at all levels, *i.e.*, the health services, goods and facilities, including the underlying determinants of health, contains essential elements, such as, availability, accessibility, acceptability and quality (3AQ).<sup>62</sup> This requires that health services, goods and facilities must be: available in adequate numbers; accessible without discrimination; culturally acceptable to, and respectful of confidentiality; and scientifically and medically appropriate and of good quality.<sup>63</sup> Thus, with reference to health rights, disparities in access to health facilities, goods and services are regarded as one of the key challenges to ensure access to justice.<sup>64</sup>

While examining whether and to what extent the values of access to justice is ensured in a particular society, access to health services, goods and facilities could be regarded as a proxy to values of the access to justice. Accordingly, part of this article assesses the access to justice in a wider sense, such as, fairness and equity in distribution of health facilities, goods and services in Nepali context. In fact, the right to health gives rise to a very wide range of issues including reproductive health, mental health, HIV/AIDS, child health etc, only a handful of issues of maternal health, such as antenatal care and abortion has been taken for example.

Access to antenatal care can stand as a proxy of primary care and represent access to health services.<sup>65</sup> In Nepal, the proportion of pregnant women received antenatal care from Skill Birth Attendants (SBAs), that is, from a doctor, nurse or midwife, is 44 percent, increased by 20 percent, from 1996 to 2006.<sup>66</sup> The figure shows that twenty-six percent of mothers received no antenatal care and rest of them received antenatal care from other than SBAs, such as traditional birth attendants.<sup>67</sup>

61 *Ibid*, para. 11.

62 *Ibid*, para. 12.

63 *Ibid*.

64 Commission on Social Determinants of Health. *Closing the Gap in a Generation: Health equity through action on the social determinants of health* (final report). Geneva: World Health Organization; 2008.

65 Gunilla Backman et.al., *Health System and the Right to Health: an Assessment of 194 Countries*, *The Lancet*, Vol. 372, 13 Dec., 2008 pp. 2047-85.

66 *Nepal Demographic Health Survey, 2006*, (NDHS) Ministry of Health and Population, Government of Nepal, New Era, Kathmandu, Nepal and Macro International Inc. Calverton, Maryland, U.S.A. May 2007.

The Survey defines antenatal care as to see SBAs. However, it should be defined as a proportion of women with a live birth in the last five years who, during their last pregnancy, were seen at least three times by health-care professionals, had their pressure checked, had a blood sample taken, and were informed of signs of complications. According to this criterion, only 12.9 percentages of pregnant women are seems to have proper access to antenatal care. See: Gunilla et.al. *Ibid*.

67 NDHS, Section 10.1.

The use of antenatal care was found to vary considerably by urban and rural part of the country. According to the Survey, 85 percent of urban mothers received antenatal care from SBAs, compared with only 38 percent of rural mothers. Further, about twice as many mothers living in the Western, Central and Eastern regions received antenatal care from an SBA as mothers living in the Far-western region. Antenatal care from an SBA ranged from a low of 25 percent in the Far-western hill to a high of 64 percent among women in the Central Nepal.<sup>68</sup>

Similarly, there were also significant variations in receiving antenatal care by economic and social background of mothers. Women with higher level of education, for example, are three times more likely to receive antenatal care from an SBA (90 percent) than women with no education (29 percent) and women in the highest wealth quintile were five times more likely to receive care from an SBA (84 percent) than women in the lowest wealth quintile (18 percent).<sup>69</sup>

The Survey demonstrates inequality in receiving health care assistance is persistent problem in Nepal. It shows as low as nine percent among births in the Far-Western region take place in health facility in comparison to a high of 24 percent among births in Central region. The rural-urban disparity is more apparent in this characteristic of maternal health: 51 percent births are assisted by SBA in urban area, compared with only 14 percent of births in rural areas.<sup>70</sup> The worst situation can be found in *Baitidi* District of Far-western Nepal where only two percent birth is assisted by SBAs where as it goes up to 75 percent in Kathmandu District.<sup>71</sup>

A further disparity can be seen among various caste/ethnic identities. 70 percent of *Tarai Madhesi Bramin* women are attended SBAs compared to 13 percent of Muslim women, 11 percent of *Dalit* women, and five percent of *Tarai Madhesi Dalit* women. Against the national increasing trend of trained attendance at delivery, economic disparity in terms to who has access to delivery at health facilities is striking. Little improvement has been seen among the poorest women: as of 2006, only five percent of the poorest women had trained attendance at their delivery while the corresponding figure for the wealthiest women was 58 percent.<sup>72</sup> The high low ratios (1: 0.08) have not changed over time, and reflect severe inequality in access to trained delivery care. Moreover, the differences of ratios between the poorest women delivering at home compared to the wealthiest women who deliver in health facilities, is increasing from 1.42 in 1996 to 2.11 in 2006.<sup>73</sup>

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68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 *Annual Report 2008/9*, Government of Nepal, Ministry of Health and Population, Department of Health Services (DOHS), Kathmandu Nepal, February 2010.

72 *Supra* note 66.

73 Kiersten Johnson and Sarah E.K. Bradley, *Trends in Economic Differentials in Population and Health Outcomes: Further Analysis of 2006 NDHS*, Macro International Inc., Calverton, Maryland, USA. May 2008, pp. 22-25.

Similarly, access to safe abortion services has been considered as a marked opportunity to ensure justice through realizing the right to health.<sup>74</sup> However, in Nepal, there is a dearth needs to make this service available in order to prevent mortality and morbidity from unsafe abortion.<sup>75</sup> It marks a lack of a comprehensive abortion care (CAC) that refers termination of unwanted pregnancies through safe technique with effective pain management, post procedure family planning information and service to ensure women are able to plan when to have children and avoid further unwanted pregnancies.<sup>76</sup>

Although Nepali law permits abortion under given circumstances,<sup>77</sup> mere legislative provision is not sufficient to ensure access to safe abortion services. Women's access to safe abortion has become a critical issue since available evidence shows safe and legal abortion, in Nepal, remains largely unavailable. Multiple barriers—including the government's failure to implement its own policy, prohibitive costs, and inadequate availability of abortion providers—have prevented women from accessing safe abortion services.<sup>78</sup> Moreover, access through the public health system is mainly restricted to cities. Many primary health centres only sporadically provide service either because of a shortage of trained physicians or functioning equipment.

Unsafe abortions are reportedly widespread in Nepal. Complications from unsafe abortion are estimated to account an estimated 4000 death every year, about 25 percent of all maternal deaths.<sup>79</sup> This is almost twice the worldwide yearly ratio, where complications from unsafe abortion account for about 13% of maternal deaths.<sup>80</sup> Indeed, because of social stigma associated with abortion, many incidence of abortion related complications may not be reported or reported as different cases. Moreover, 66 percent of women are not even aware that abortion is legal. The number rises up to 80 percent in rural area.<sup>81</sup>

74 David A Grimes et.al., *Unsafe Abortion: The Preventable Pandemic, Sexual and Reproductive Health-4*, WHO, available at [http://www.who.int/reproductivehealth/topics/unsafe\\_abortion/article\\_unsafe\\_abortion.pdf](http://www.who.int/reproductivehealth/topics/unsafe_abortion/article_unsafe_abortion.pdf), accessed on 16/08/10

75 *Supra* note 71, p. 93.

76 *Ibid.*

77 In Nepal, prior to 2002, abortion was illegal. In this environment, women who sought abortions and providers who performed abortion did so clandestinely. Most of the abortions that took place were unsafe, especially for poor women. Only a very small proportion of women, mostly those living in urban or semi-urban areas and able to afford the cost, had access to trained medical practitioners and safe procedures. Before the 2002 law change in Nepal, an estimated 20% of the women prisoners nationwide were in jail for charges relating to abortion. See: Shyam Thapa and S.M. Padhye, *Induced abortion in urban Nepal*, International Family Planning Perspectives, 27[3] 2001, 144-147, 151.

78 *Health Sector Reform Strategy and Implementation Plan*, (NHSP) Ministry of Health <http://mohp.gov.np/english/publication/HSSR%20Agenda.pdf>, accessed on 07/07/12.

79 *Ibid.* Centre for Reproductive Rights, (CRPR), *Court Orders Nepal to Improve Women's Access to Abortion*, available at <http://reproductiverights.org/en/press-room/court-orders-nepal-to-improve-women%E2%80%99s-access-to-abortion> access on 03/06/12.

80 *Ibid.*

81 *Supra* note 66.

According to Department of Health Services some 81,000 women received comprehensive abortion services in the year 2008.<sup>82</sup> However, there are also important disparities in access, across socio-economic background of the women. 65 percent women, for example, were from urban background to have access to abortion in comparison to 35 percent rural women. Similarly, only 15 percent women from mountainous zone were reported to have access to abortion facilities.<sup>83</sup> Recipients of safe abortions services are mostly from Central Development Region (63 percent) unlike to very low (6 percent) from Midwest and Far West.<sup>84</sup> Shockingly, while 65 percent of women belonged to wealthiest quintile have access to safe abortion services in comparison to only 15 percent of poor and disadvantaged women.<sup>85</sup>

The above data raise a number of questions which cannot be unobserved while analyzing access to justice. As previously discussed, justice is not only a corrective phenomenon; rather requires an equal distribution of equity among everyone in the society, i.e. social justice. A wide disparity in distribution of health facilities, goods and services ( by geographic regions, caste/ethnicity, and socio-economic status etc.) with marginalized and poor less likely than others to be receiving health care services contradicts to the obligations arising from the domestic and international legal regime to ensure justice for all. Unless addressing these discrepancies, any efforts in enhancing access to justice could not be perpetuate desired effects. Access to justice, in true sense, requires additional redresses for people who have little antidote available through formal judicial procedure. Indeed, there is little point in opening the doors to the courts if parties cannot afford to come in.

The National Human Rights Institutions of Nepal, in its Report to the UN (UPR) clearly articulated these disparities. In regard to accessibility of health care services the Report says:

*The access and availability of health care services to the poor people mainly living in interior parts of the country is limited. The medical profession is increasingly motivated for profits and therefore health service has been becoming unaffordable to the common people.*<sup>86</sup>

82 Health Management Information System, DOHS, Government of Nepal, 2009.

83 *An Exploratory Study of Complications from Comprehensive Abortion Care: Improvement of the Quality of Services in Nepal*, Population, Health and Development Group Nepal 2008.

84 *Ibid.*

85 *Supra* note 66, Table 10.12.

86 *The Report of the National Human Rights Institutions (NHRI) of Nepal on the UPR Process*, submitted to the Office of the High Commissioner for Human Rights, Geneva. National Human Rights Commission of Nepal, National Women Commission of Nepal, and National Dalit Commission of Nepal. 5, July, 2010, para. 27. Available at [http://www.nhrcnepal.org//publication/doc/reports/UPR\\_Report-2010.pdf](http://www.nhrcnepal.org//publication/doc/reports/UPR_Report-2010.pdf), accessed on 25/06/11



In fact, issues of thousands of preventable maternal death, for example, has not got sufficient attention in Nepal, despite the fact that it is as serious as extra judicial executions, arbitrary detentions, and prisoners of conscience.<sup>87</sup>

Similarly, the Supreme Court has noticed the situation, in many cases, which contradicts to the notion of justice and made various orders to the government to ensure access to justice through realizing fundamental human rights, including the right to health. In case of *Lakshmi Dhikta*,<sup>88</sup> for example, on May 20, 2009, Supreme Court ordered the Government to adopt a comprehensive abortion law which establishes a government fund to cover abortion procedure costs for the promotion of access to safe abortion services for all women.<sup>89</sup> Similarly, in *Dil Bahadur Bishwokarma* (on behalf of *Dalit* NGO)<sup>90</sup>, the Court not only ordered the government to declare the *Chhupadi*<sup>91</sup> as a wrong trend but also issued Mandamus to assess the possible impacts occurred by the same on women and children.

## 5. Conclusion

By above analysis, a number of problems, in regard to access to justice, both in principle and in operational level, have been found. Conceptually, the very concept of access to justice as a proxy to access to court and judicial proceedings has been substantially changed; however, it is hard to found robust efforts to pave the way to obtain social and economic justice. This dichotomy prevails in normative domain has made the right to access to justice contentious.

Amid these contentions, the discussion in previous part has demonstrated that in spite of overall development of particular issue, i.e., realization of the right to health, it masks grave inequalities and disparities within it. A large segment of population, particularly the poor and disadvantaged, are far beyond the reach of 'justice'. They are not able to enjoy their rights guaranteed by either international or domestic law. The question, how could be their access be enhanced, is very important. There will no meaning of justice be left if we prefer to mean access to justice as free legal aid and procedural equality. The fact is that, the rampant poverty is a serious challenge

87 Paul Hunt, UN Special Rapporteur on Right to Health on The Lancet, available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(07\)61179-9/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(07)61179-9/fulltext), accessed on 07/07/12.

88 *Lakshmi Dhikta et.al. v. Ministry of Health and Population et.al.*, Writ Petition No. 063-W0-0757, Supreme Court of Nepal.

89 The case was brought by a woman called *Laxmi*, who came from an extremely poor household in the rural area of western region of Nepal. As she could not afford to pay the fee charged for abortion at a public hospital, she was forced to continue an unintended pregnancy.

90 *Dil Bahadur Bishwokarma and on behalf of a Dalit NGO v. Office of the Prime Minister and Council of Ministers et.al.*, Writ Petition No.061-3303, Supreme Court of Nepal.

91 In *Chhaupadi*, women are compelled to stay in a shed located near buffalos or cows shed in unhealthy environment without having proper food during their routine menstruation and delivery. It was a prevalent social usage in most of western hilly districts.

that significantly impedes the way to justice.<sup>92</sup> In a society, where a significant number of people are deprived from access to food, healthcare and education, without enhancing the capacity to claim those rights and access a remedy in the event of its breach, any promise of equal access to rights rings hollow. The possible approach to meet their justice demand, in such a case, could be the respect for their fundamental human rights<sup>93</sup> as editors of the 'Justice for the Poor' elucidate the problem as:

*There tend to be too much emphasis on access and on removing barriers, providing access and improving the process. There tend to be little emphasis on justice and systematic and structural impediments to justice. Access is seen as end in itself, rather than as a means towards the end, which is justice.*<sup>94</sup>

92 Implementation of the ICESCR, Second Periodic Report submitted by Nepal to CESCR, UN Doc. E/C.12/NPL/2, 7 August 2006, para. 76. See also: LEP I, supra n. 36, p. 33.

93 UNDP, *Human Development Report 2000: Human Rights and Human Development*, UNDP, New York. See also, C. Chinkin, *The United Nations Decade for the Elimination of Poverty: What Role of International Law?*, in M. Freedman (ed.), *Critical Legal Problems*, Oxford University Press, 2001, p. 553 at 556.

94 Ayesha Kadwani Dias and Gita Honwana Welch (eds.), *Future Direction for Access to Justice within the United Nations (Epilogue)*, in *Justice for the Poor*, Supra note 17, p. 637.

# A Judicial Response to Gender Justice: A Bird's Eye View

Susheela Karki\*

## Abstract

*Giving background of the Nepali socio-legal system, in this article, the author tries to discuss jurisprudence laid down by the Supreme Court of Nepal on gender justice. In the discussion, she tries to articulate the principles developed on right to gender equality, property rights of women, right to protection from superstitious belief, right to profession, rights to reproductive health, right against marital rape, right to privacy etc. The author comes to a conclusion that the Court has instructed the executive and legislative bodies to enact gender based laws congruent with the provisions of the Convention on Elimination of all Forms of Discrimination Against Women.*

## 1. Background

Before the promulgation of the Country Code in 1853 A.D (1910 B.S), there was no particular written law or legal code in the Nepali Legal System. From the beginning, the Nepali judicial system was regulated on the basis of religious norms set out by the various religious scriptures--the *Manushrimiti*, *Ved*, *Puran*, *Mahabharat*, etc. In addition to those rules, Hindu pundits, who were appointed within the palace, were present during the adjudication<sup>1</sup>. Their special duties were delivering advice to the king and his council about the religious, legal, customary, and social practices in the course of civil and criminal proceedings.

During the regime of King Surendra Bikram Shah, then Prime Minister Junga Bahadur Rana had visited European countries, where he acquired experience of legal codes and structures of different nations. At that same visit he realized that Nepal had need of a comprehensive codified law—in a changing world, the concept of rule of law was gradually growing. After returning from a long tour of the then British Empire and some European countries, he gave attention to promulgating a codified law in Nepal. Rana then constituted an *Code Causal* (code drafting council) and the *Causal* prepared a comprehensive code, later named the '*Country Code*'. It had five different parts that comprised socio-economic, civil, criminal, procedural, regulatory

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\* Honorable Justice of the Supreme Court of Nepal.

1 Bishal Khanal, [2000], *Regeneration of Nepalese Law*, Kathmandu: Bhrikuti Academic Publications, p. 8

and miscellaneous provisions. All the required laws were codified in a single book which consisted of about 1400 pages in its original form. The significance of that code was that it provided a unified base throughout the country to deal with all matters according to one law (rule according to law). That code was not secular in its viewpoint of caste, religion and gender. So far as concerns gender issues, the Code derived most of its rules from the Hindu religious scripture “Manushrimiti” as well as from other religious epics, and it mentioned the customary practices of existing society.

The Country Code of 1853 legalized girl child marriage beginning at the age of seven, and there was discrimination in the age of marriage between males and females. For example, an aged man was allowed to marry a girl child, and there was no age limitation for males to marry--they could marry at any age or at any time, and they could marry a teenaged girl. Similarly, there was no restriction on polygamous marriage for a male. In contrast, widows and married women were not allowed remarriage. Rather self-immolation of widows (*Sati pratha*) was legalized, however, the old Country Code barred women from making Sati forcibly as it was against the interest of women. Under that Code, girls were banned from making a choice marriage. In the case of a girl belonging to the higher and ruling classes, if she eloped to marry her beloved, she would face severe punishment of imprisonment. Inter-caste marriage was punishable, that is, if a *sudhra* (person belonging to a low class pursuant to the Hindu class system) male were to marry an upper caste Brahmin woman, he might be liable to face capital punishment or could be expelled from the country. The quantum of punishment was determined according to the caste of the offender or victim. Lower caste persons were subject to harsh punishment, whereas upper caste persons such as *Kshetri* and *Brahmin* were subject to less severe punishment for the commission of same crime. In fact, the Code was totally caste based discriminatory law. This code was in force until 1963, when it was replaced by the new Country Code, 1963. Thus for the preceding sixty-two years, girl child marriage was valid in Nepal.

In the old days, there was a restriction on choice marriage, especially in the upper classes. In other classes, there were practices which allowed marriage with a beloved without restriction without a formally arranged marriage, or, no punishment was rendered since it was culturally permitted. Notwithstanding, Nepali society is a patriarchal society and in the joint family, male guardians were the master of the house and they determined the marriage of their offspring according to their own interests. Generally, girls were married before their first menstrual period. According to the religious beliefs, if parents offered their daughters to a son-in-law before her first menstrual period, this was pious work and, after death, such parents would have a place in heaven.

During the rituals of marriage, parents used to put the hands of the girl child in the hand of the son-in-law, saying “now this is your right, whether you pet or kill her, if you pet her, it is your piousness, if you kill her it is your sinfulness”. The impact of this old culture and past customary rules are still in existence in Nepali society. In rural, and also in some urban areas, where there is lack of education and awareness, teen marriage continues even today. Today’s guardians are still anxious about the tenderness of their daughters and they suspect their character might be ruined if they go out of the house still unmarried, so they think it is better to get relief by transferring the guardianship of the daughter to the son-in-law. As modernity is pervading society, gradually society is becoming more liberal and open. Still, some conservative people do not like a free and open society that is just like western society. They think their unmarried daughter will be ruined by the impact of western culture and as soon as they can, they marry off their daughter when she becomes of age.

During the development of the legal history of Nepal, the application of the 1963 Civil Code, the “New Country Code”, was an important first step of drastic social change. In those days, people did not expect such holistic, drastic, and sudden revolutionary changes. This was in part because before 1950, Nepal had been governed by the tyrannical rule of the Ranas, a hereditary premiership, whose ruling system was feudalistic and family based. The Ranas governed the country capriciously for a period of 104 years as a way to fulfill their own family’s vested interests. The new Country Code of 1963, however, remodeled the old Country Code of 1910 B.S., and mentioned modern concepts of women’s rights in concert with the changing environment of the world outside Nepal. But its most important effect was to bring about drastic changes in society—it abolished caste discrimination, untouchability, and polygamous marriage, and established choice marriage and determination of marriage age. Secular law was enforced in Nepal for the first time. In addition to those changes, the 1963 Code established inter-caste marriage and it introduced the system of divorce for the first time in Nepal. Further, the law prohibited child marriage, marriage by force, and unequal age marriage. The new Code legalized a limitation on the age of marriage such that the age difference between husband and wife was limited to only twenty years. In addition, remarriage for widows, divorced women and abandoned women was now legal under the new law. These legal changes have positively affected Nepali society.

In 1975 (2033 B.S.), new reformative changes were again made on the eve of the Women’s Decade declared by United Nations. For example, property rights for unmarried daughters were established-- after attaining thirty-five years of age, an unmarried daughter could receive her share from the paternal property. Similarly, married women were also entitled to a share of their husband’s property, either at

the age of 35 or after 15 years of marriage. It was her choice either to remain with her husband or to be separated from him after having received her share from the joint property. For the first time, widows were allowed to receive their share from the joint property after the age of 30, and were no longer forced to tolerate humiliation and undue restriction of the joint family on her freedom. If she needed to, a widow could spend her remaining life separate from the family according to her choice. In the past, it was very difficult for a widow to have an independent livelihood--generally families mistreated young widows and they passed the remainder of their lives in a harsh environment in accordance with traditional conservative custom and culture.

Nevertheless, the course of women's development was not significant during the *Panchayat* regime from 1960 to 1989. Nepal during this period was directly controlled by the monarch and his family. Although the new Country Code delineated great changes in the sectors of caste discrimination, untouchability and gender issues, the changes were limited to the legal structure and were not implemented in the living reality. Traditional customs and cultures continued in an intact form in society; people had not realized any changes in their lives. Even today, the government has not made a significant effort to abolish certain rampantly harmful customs within the culture which are hampering progressive development.

In fact, the provisions of the Country Code have not even been sufficient to reduce caste-based discrimination and untouchability in society. Similarly, other gender-based laws which have been updated to the latest phase are still not sufficiently palatable to exercise perfectly in the society. They are effective only in urban areas where people are aware and educated, having benefitted from changes of law. During the royal regime, there was a tyrannical form of rule from the royal family, and its female members held office as the heads of organizations everywhere. The dominating, powerful royal women enhanced their own personal influence rather than promoting the common woman's economic, social, educational and political status.

In 1990, the first peoples' movement for freedom was held in Nepal, and the new Constitution of 1990 was promulgated. The Constitution introduced public interest litigation for the first time.. The Constitution had opened the iron gate of public interest litigation to the common people; this allowed them to rise and introduce common public issues in the Supreme Court. Pursuant to this provision, any stakeholder had the right to file a writ petition on public interest issues. Social workers, lawyers, women activists and interested persons all started filing petitions raising issues of public interest and a flood of PIL litigation entered the apex court. Hundreds of petitions have been filed concerning various issues of women's rights and requirements based on gender discrimination. The Supreme Court has

considered the PIL cases and interpreted them based on the modern philosophy of gender equality and gender justice advanced by other jurisdictions in the world. Nepal ratified the CEDAW Convention of 1979 in the year 1991 and accepted its provisions without reservation.

Since the nineteenth century, the world has changed and issues of gender equality and feminism have become hot issues. The adoption of CEDAW was the culmination of a long effort in Nepal. Because Nepal is a state party to that convention, pursuant to Section 9 of the Nepal Treaty Act, which states that “the international document which ratified by Nepal, is equivalent to the provision of Nepali law”, Nepal has the obligation to furnish legal and institutional structures that are compatible with the Convention. Accordingly, the Supreme Court has interpreted many issues, and has declared ultra-vires certain legal provisions on the grounds of inconsistency with both the constitutional rights enshrined under Article 11 of the Constitution of 1990 and the CEDAW Convention. The Supreme Court, in many cases filed by activists including NGOs, has issued directive orders to promulgate new laws or to amend or repeal the inconsistent provisions of prevailing laws to reconcile them with this new instrument and new concepts accepted in the changing world.

The Eleventh Amendment of the Country Code is a consequence of multiple decisions of the apex court in this area. The significant achievement of the Eleventh Amendment was establishing the right to ancestral property of an unmarried daughter. However, this right is still not fully accepted by society, and has not been enforced in a full-fledged way. The legal provisions of partition under the chapter on ‘Partition’ of the Country Code still remain to be amended in accordance with the decisions made by the Supreme Court. The provisions in this chapter continue to specify that upon marriage, a girl should return her remaining shared property either to her father or to her brother. This provision further states that the remaining amount meant property which was saved after being expended in the unmarried status.

Another positive amendment in favor of married women, mothers and wives was made in 2007, namely, the “Gender Equality” Act. In this amendment, a full right was bestowed upon wives, mothers and unmarried daughters to acquire a share of partitioned property. Likewise, anti-witchcraft laws were enacted to eradicate this superstitious belief. However, still some lacunae remain to be filled in laws concerning gender equality. Discriminatory laws still exist in different areas of the law. Women activists are demanding reform and emphasizing the need to have gender equality in practice, not merely limited to the laws.

The United Nations has launched many programmes to enhance women’s status in the world, and it has recommended that member nations change their gender

discriminatory legal structures to establish the right to equality among males and females. To date, the Nepali Supreme Court has decided many writ petitions on women's right to equality, to freedom, to property, to health, to reproductive health, to a profession, to safe motherhood, to establish security, and to be free from marital rape. These judgments have made great contributions to the area of gender justice. In some cases the Supreme Court has issued important orders against the superstitious beliefs that hamper the life of women including witchcraft, *chhou-padi* [in the western part of Nepal there is a tradition that a woman in her menstrual period is subject to lower treatment as an untouchable, is given lower calorie meals and has to stay four days out of the home in an isolated shed without sufficient security and clothes, even in the winter] and on the issue of *Kamlari* (a kind of bonded labor practiced in western Nepal). On these issues, the apex court has either ordered the legislature to make effective laws or it has rendered an efficacious decision to bring changes to the society.

The Eleventh Amendment of the Country Code is without a doubt the culmination of those numerous decisions of gender equality rendered by the Supreme Court in which it either issued directive orders, or gave the appropriate instructions and directions to reform the discriminatory laws for the sake of a gender-friendly environment in society. Before accepting the Eleventh Amendment, the Supreme Court already played a significant role in establishing women's rights, and in eradicating the gender discrimination and inequality existing in society through PIL cases under the extra-ordinary jurisdiction enshrined in Article 88(2) of the 1990 Constitution. Public interest litigation is a popular means in Nepal of establishing the right of poor, downtrodden, marginalized groups and the handicapped or otherwise helpless women. The Interim Constitution, 2007, through Article 107(2) has continued this norm of public interest litigation as it did in the previous Constitution.

There is no question that major discriminatory laws have already changed Nepal but the main hurdle in establishing gender equality is the lack of execution of existing laws and rules. Similarly, the judgments, orders, and instructions issued by Supreme Court on the issues of gender equality and gender justice are still not executed properly and timely to make changes in the society. There has been vast discrimination between males and females in society historically, due to the patriarchal model of social norms. A major portion of the population of both males and females are illiterate and unaware and is still guided by ancient conservative thought. The Supreme Court has been striving to remodel women's society and their condition in Nepal through its judgments in accordance with the concepts of CEDAW. The Supreme Court has continued to render many decisions implicating modern theories in its judgments concerning to gender equality and gender justice. If the executive body of the state makes an effort to change society in accordance with those significant judgments, society might be rapidly changed in an exceptional manner.



After the 1990 Constitution, important landmark decisions on gender equality and gender justice were rendered by the Supreme Court of Nepal. It was not possible to render such decisions before 1990 or during the *Panchayat* system that was under direct control of the monarch. Those Supreme Court decisions are analyzed and evaluated below to identify the jurisprudence established by the case law.

## 2. Right to equality

### 2.1 *Rina Bajracharya vs. His Majesty's Government, Secretariat of Council Ministers and Others*<sup>2</sup>

This writ petition concerned an issue of discrimination between the male and female crew members in the office of the then Royal Nepal Airlines (now Nepal Airlines). One of the female crew member petitioners Rina Bajracharya filed to declare her situation to be ultra-vires under a discriminatory law. Actually this issue was raised in court after a long period of enactment of the disputed Act. But because the claim was for a violation of the right to equality, the provision of the Constitution being violated by said law, the issue of laches was not considered in this case. The Court remarked in the decision that "Since the rule 16.1.3 of Royal Nepal Airlines Act came into operation in 2031 BS (1974-75AD) while Rule 16.1.1 was amended in 2052 (1995\96 A.D), the principle of laches can not be applied on the question of violation of the constitution." However, when laws are otherwise inconsistent with the Constitution, they can be stopped from operating within one year of their enactment, according to Article 131 of the Constitution of 1990.

The Court said that since it is beyond dispute that male crew members and air hostesses are equal employees who deserve equal treatment with respect to working time, remuneration and aforesaid other facilities, it was proven that Rule 16.1.3 of the disputed Regulation is discriminatory in terms of gender perspective and against the Constitutional provisions. Hence, the discriminatory Rule 16.1,3 which is against Article 11{2}{3} of the Constitution was declared null and void *ab initio*.

### 2.2 *Sita Acharya v. His Majesty's Government*<sup>3</sup>

Section 16 of the Civil Service Act, 2049 made a special reservation for women employees, only a six month probation period, contrary to the one year probation for men. This was called positive discrimination and provision of positive discrimination is recognized by the CEDAW convention to promote women employees. The facts in this writ petition were that the petitioners were appointed for health service and after a six months-probation period they received permanent appointment

2 Dr. Ram Krishna Timalsena [ed], [2003], *Landmark Decision of Supreme Court*, Kathmandu: Supreme Court, p. 175

3 Unpublished, writ no. 3975 of the year of 2058 B.S.

letters from their office. However, their permanent letter was cancelled by the public service commission after only a few days and they were also dismissed from their jobs. The main problem was created by the Health Service Act, which was contradictory to the CEDAW Convention. In fact, this Act is still retaining the term of probation for one year for both males and females in the same way. In spite of that, the Civil Service Act had already amended its probation period to be one year for males and six months for females as positive discrimination pursuant to the CEDAW Convention. On this issue, the Supreme Court found in its decision that the CEDAW Convention was already ratified by Nepal and such treaties could be applied as a positive discrimination to further women's development. Finally, the Supreme Court in its decision remarked that "in the Civil service Act, there is a six months probation period for female employees, but in Health Service Act there is one year probation period. This difference is contrary to the right to equality, against the spirit of the constitution as well as violation of the CEDAW convention's notion of positive discrimination."

### **2.3 Vasundhara Thapa vs. His Majesty Government et al.<sup>4</sup>**

The Petitioner raised an issue about the discrimination made by Section 7(3) of the National Academy for Upliftment of Aboriginal and Ethnic Groups Act, 2058, stating that the male members' term of office is four years, with a potential for an additional two year term, whereas for female members, Section 7(1)(n) contains a provision for only a two year term with no arrangement for a second term of reappointment. These provisions of law were found to be contradictory to provision of Article 11 of the Constitution of 1990. It contained discriminatory provisions between male and female members in relation to tenure and possibility of reappointment to the same position. The Supreme Court declared that section to be *ultra vires* to this provision on the grounds of inconsistency with the fundamental right to equality enshrine under Article 11.

### **2.4 Chandrakant Gyawali vs. His Majesty Government, Council of Minister et al.<sup>5</sup>**

This petition was filed claiming women's right to equality for citizenship. The facts in this case described the discrimination of only providing citizenship through the name of the father. Only a father could provide his son and daughter with citizenship, while a mother could not obtain the same for her offspring since the existing law permitted citizenship only under the name of the father.. The petitioner wished to quash the discriminatory Rule 3(3) of the citizenship rule of 2049 B.S on the grounds of inconsistency with the constitutional provision of the right to equality under Article 11. But the lower court did not find that the provision of the rule was unconstitutional as claimed by the petitioner. The lower court stated that since the

4 NKP [2060], DN 7217, p.389

5 NKP [2058], DN 7044, p.615

constitutional provision was unchanged and intact, it meant only that under the name of father, citizenship could be given to children as a citizens of the nation. Because the rule was made under the authority delegated by the Constitution, whenever the constitutional provision is intact there is no question of declaring ultra-vires to the law and rule. However, the 1990 Constitution had already been repealed, and in 2007 the Interim Constitution was promulgated. Article 8(2) of the Interim Constitution authorized that a mother, just like a father could give citizenship to her children. A citizenship certificate could be granted on either the name of the mother or the father. In one decision, the Supreme Court said that it is the choice of the citizen whether he/she wants to receive the citizenship from the dwelling place of the mother or the father. In the case of *Ranjit Thapa*<sup>6</sup> and *Sabina Dhami*,<sup>7</sup> the apex court stated that if there is absence of recognition of the father, and if the mother is a holder of Nepali citizenship, in that situation, the petitioner can be entitled to have citizenship under the provisions of the 2007 Interim Constitution.

Though the rationales have been rendered in the decisions of the Supreme Court, local administrative authorities have withheld citizenship upon application from the residing place of the mother because the litigating parents were living separately. In addition, it is still not easy to obtain citizenship for people who are born of Nepali citizen mothers and foreigner fathers. The applicant must first of all prove that they have abandoned the citizenship of the nation of the father and that they are residing in Nepal permanently.

### ***2.5 Sapana Pradhan Malla vs. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs*<sup>8</sup>**

In this case, the Court found that reasonable grounds existed to support the policy and objectives of its application, not to mention that daughters and daughters-in-law were heirs with tenancy rights in Section 26(1) of the Land Act, 2021, the impugned section was not seen as inconsistent with the right to equality of Article 11 of the Constitution, and therefore could not be declared as ceased to operate ipso facto. Based on those stated grounds, Section 26(1) of the Land Act 2021 need not be declared as null and void under Art 88(1) of the Constitution. The Court also stated, however, that if there existed a condition to change Clause 26(1) as per the order issued by the larger special bench dated on 2052-4-18 (Writ no. 3392 of the year of 2050), a directive order was issued in the name of His Majesty's Government to produce an appropriate Bill at Parliament. This writ petition could not became successful due to the land reform act, where it was not transferring the right to tenancy after a husband died to wife and son and not to others. The law prohibited

6 *Ranjit Thapa vs Government of Nepal et al.* 065-wo-0035

7 *Sabina Damai vs Government of Nepal et al.* 067-wo-0703

8 Dr. Ram Krishna Timalsena [ed], [2003], *Landmark Decision of Supreme Court*, Kathmandu: Supreme Court, p. 233

selling and transferring to another party. But the apex court issued the instruction to the government to consider gender equality during the course of making laws on tenant rights. Consequently the amended law of 2053 enshrined the tenant rights of women in Nepal. As the son receives the right, in the same way a single daughter and daughter in-law are also entitled to tenant rights.

## ***2.6 Sapana Pradhan Malla vs. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs<sup>9</sup>***

In this writ petition, the petitioner claimed that No. 7 of the Chapter on Rape of the Country Code was discriminatory since this provision awarded varying punishment to the rape offender based on the status of the victim. Under this provision, if a rapist rapes an ordinary woman, he is liable to be punished more severely, including imprisonment, than if he rapes a prostitute, where his punishment comprises only a fine. The petitioner claimed that this was a gross violation of the right to equality enshrined by Article 11 of the Constitution of 1990 (repealed), because there is no difference between an ordinary woman and a prostitute. Both are human beings and there is no difference in the constituent elements of the crime of rape. Therefore, on the issue of rape, the law should not discriminate between two women if one is an ordinary woman and the next is a prostitute, in both cases crime is crime and in both cases there is an application of violence. In fact, an ordinary woman and a prostitute are both women, thus there is no question of discrimination. On the grounds of inconsistency with Article 11 of the Constitution of 1990, the Supreme Court nullified provision No. 7 of Chapter on "Rape" of Country Code from the date of decision.

## ***2.7 Mira Kumari Dhungana v. Prime Minister and Council of Ministers et al.<sup>10</sup>***

Rule 10 of the Nepal Army (pension, and facilities) Rule, 2033 had a discriminatory provision for providing facilities between married and unmarried daughters of army personnel, and also between sons and daughters. Petitioner had filed to nullify Rule 10 on the grounds of inconsistency with Article 11 of the Constitution of 1990. After a long discussion, the apex court found this provision to be discriminatory against women and daughters since the Army's personnel rule provided more facilities to the sons of army personnel, and it provided lesser facilities to the daughters of army personnel. Similarly the Rule gives all facilities to a married son but less facilities to a married daughter of army personnel. In this case the Court declared ultra-vires Rule 10 of the Nepal Army (pension, and facilities) Rule, 2033, on the grounds of inconsistency with the constitutional right of equality under Article 11 of the Constitution of 1990.

<sup>9</sup> Writ no. 56 of the year of 2058 (Unpublished)

<sup>10</sup> NKP (2064), DN 7854, p.699

### **2.8 Punyawatee Pathak vs. His Majesty Government, Ministry of Foreign Affairs et al.<sup>11</sup>**

Since the era of the Ranas (before 1950), restrictions had been placed on Nepali women against travel not only to overseas destinations, but also to the neighboring country of India. Despite that, family members could request permission from the local authority for their female relatives to visit foreign nations. However, after the revolution of 1950, traveling to India for women became easy, where there was still no compulsory requirement for a passport and visa. But that restriction did continue for travel to other nations as an old legacy, especially for women, pursuant to the Immigration Act of Nepal. According to a provision of the Act, permission from either a husband or father was mandatory to apply for a passport--which was inconsistent with Articles 11 and 12 of the Constitution, rights to equality and right to freedom, respectively. Due to this Act and its rules, His Majesty's Government had specifically placed this condition only upon women, barring them from applying for a passport without the consent of a male guardian, either a father, brother, or son. Therefore, it appears that the conditions set forth by the decision of the Council of Ministers on 2052/06/10 B.S. were found to have been made without giving due consideration to constitutional and legal provisions. Consequently, in the Supreme Court's decision, it said that any executive decision providing services and facilities which puts women into hardship will be considered to be against the established principles of rule of law and discriminatory, as well as an excess of power and arbitrary, even if the decision was enacted using maximum bona fide intentions. If women are denied application for passports, such unreasonable restrictions should not be laid upon women in the exercise of these freedoms. Without the authority of law, no executive shall have the power to reach a decision which results in depriving women of the exercise of those freedoms.

### **2.9 Sapana Pradhan Malla vs Prime Minister and Office of the Secretariat of Council of Ministers et al.<sup>12</sup>**

In this case the writ petitioner raised the issue that Nos. 9 and 9(A) of the Chapter on 'Marriage' of the Country Code are not permitted by the provisions of the Constitution and the CEDAW. According to the petitioner, it is necessary to amend these discriminatory laws and to establish national laws and rules according to the spirit of the international Convention and of the spirit of the Interim Constitution. Petitioner claimed that the order of direction should be issued in the name of the government to amend the discriminatory laws. In this issue, the apex court stated that the Court has the right to judicial review, to fill a vacancy or gap in the laws and to explore other ways to fulfill the spirit of the Constitution, further, the international promises and aspirations should not be undermined by the state. Therefore, the Supreme Court ordered a direction to create a non-discriminatory law concerning Nos. 9 and 9(A) of Chapter on 'Marriage' of Country Code.

11 Dr. Ram Krishna Timalaena (ed), [2010], *Landmark Decision of Supreme Court*, Kathmandu: Supreme Court, p. 78

12 NKP (2065), DN 7997, p.917

### 3. Property rights of women

#### 3.1 *Mira Dhungana Malla vs. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs*<sup>13</sup>

This is the first case filed in the Nepali Supreme Court in which the litigant demanded repeal of discriminatory laws regarding distribution or partition of ancestral property between males and females and which sought to establish a right to the family property. Traditionally, married women received a right to property only from their husband, not from their father. Likewise, daughters were not allowed to own ancestral property nor did they have a right to paternal property. Litigant *Mira Dhungana* filed the case to establish the daughter's right on paternal property. The Court observed various issues for the first time and rendered the decision that "to make sudden changes in the traditional practices of society and the old social norms, which is adopted since a long time, may create problems in connection to adjustment between male and female in the society. However, this may cause such a situation, which may be beyond the perception. Therefore, before reaching in final conclusion and decision on the issues immediately, it will be better to make some provisions for wide and extensive discussion and deliberation taking into accounts the constitutional provision *vis-a-vis* equality. As the family law relating to property is to be wholly considered, it is hereby issued this directive order in the name of His Majesty's Government to introduce an appropriate Bill to Parliament within one year from the date of reception of this order, making necessary consultation with recognized women's organizations, sociologists, the concerned social organization and lawyers as well and by studying and considering the legal provisions in this regard on other countries." Hence in this decision, the Court could not directly declare *ultra vires* the legal provisions in question, because custom, culture, and Hindu religious rules guided society, so the Court gave instructions to the government to make laws or to amend the existing laws on the basis of gender equality after studying all the norms of the society. After some time, however, in response to other writ petitions filed pursuant to the CEDAW convention, the apex court decided to establish a right to property for women equal to the rights of men.

#### 3.2 *Dr. Chanda Bajracharya vs. The Secretariat of Parliament Singh Durbar et. al.*<sup>14</sup>

The petitioner challenged various provision of the Country Code saying they were unconstitutional because these provisions made discriminatory treatment of women in comparison to treatment of men, which was contrary to the right of equality under Article 11 of the Constitution of the Kingdom of Nepal, 1990. The Court abstained from declaring these provisions either inconsonant with or in contrary to Article 11 of the

13 Dr. Ram Krishna Timalaena (ed), [2003], *Landmark Decision of Supreme Court*, Kathmandu: Supreme Court, p. 164

14 Dr. Ram Krishna Timalaena (ed), [2003], *Landmark Decision of Supreme Court*, Kathmandu: Supreme Court, p. 139

Constitution. But the Court did observe that there are differential treatments of men and women and issued a directive order to the government of Nepal to introduce a bill in the Parliament considering those provisions and different aspects of society in a wholistic manner after necessary consultation with concerned persons, entities, organizations federations of sociologist and legal expert.

### **3.3 Lili Thapa vs. Prime Minister and Office of the Secretariat of Council of Ministers et al.<sup>15</sup>**

Section No. 2 of the Chapter of the Country Code on 'Women's Share and Property' legalized a woman's right to dispose of a half portion of immovable and a full portion of movable property to an unmarried woman, a woman having a husband or a widow who are separate from a joint family. A man, however, has the authority to dispose of the whole share of ancestral property. This discriminatory restriction imposed upon women was challenged as being against gender equality. After holding a hearing on the issue, the apex court found that gender inequality existed and the provision was contrary to Article 11 of the Constitution of 1990, thus the Supreme Court declared No. 2 of Chapter on 'Women's Share and Property' of Country Code to be ultra-vires. After this decision, a woman became able to dispose of her share of ancestral property without her husband or son's permission or consent. Today, women have full rights in their share of partitioned property as well as rights in the ancestral property to do transactions in accordance with their own wishes. However, a married woman or a widow requires the permission from her husband or son to sell the total of immovable property.

### **3.4 Advocate Prakashmani Sharma vs. Prime Minister and Office of the Secretariat of Council of Ministers et al.<sup>16</sup>**

Without a doubt, women activists, NGOs, INGOs, and social workers have fought to establish an equal right to property for Nepali woman after the commencement of the Constitution of 1990 that enshrined the extraordinary jurisdiction to hear PIL cases under Article 88. The Court also rendered the decision establishing women's right to property as being equivalent to that of men. The Eleventh Amendment of the Country Code was especially intended to reform gender discriminatory laws. But when the Country Code was amended, discrimination was still found in connection to the daughter's right to the paternal property. Section no. 16 of the chapter on 'Partition' provided a share of ancestral property to an unmarried daughter but it includes the language that after her marriage she should return that partitioned property to her parent or the brother. The same legal provision states that the ancestral property to be returned after marriage including whatever was saved from the daughter's expenditures during the duration of her unmarried state. The Petitioner raised the

15 NKP (2062), DN 7588, p. 1054

16 NKP (2062), DN 7577, p. 931

issue in the petition that a son has no need to return the paternal property after his marriage or he may use such property life long, but the daughter has to return the property when she has gotten married. The petitioner had filed a petition against this discriminatory law, claiming that it was discriminatory under the constitutional provision of right to equality pursuant to Article 11 of the Constitution of 1990. On this issue, the Court issued a directive order to the government to review the right of women to paternal property and to their equal share so as to reform the discrimination and gender inequality.

### **3.5 *Mira Kumari Dhungana vs. Council of Ministers et al.*<sup>17</sup>**

In this writ petition, the petitioner demanded to declare null Section No. 12a of the Chapter on 'Inheritance' of the Country Code, on the grounds that it is based on a discriminatory view of gender equality and against the right to equality enshrine under Article 11 of the Constitution of 1990 because it mentions that the property received by a unmarried girl via inheritance needs to be returned to her parent family after marriage. In this case, the Supreme Court held that the property acquired under inheritance is private property and it can be used without permission of other members of the same family pursuant to No. 18 of the Chapter on 'Partition' of the Country Code. The Court stated that such property did not need to be divided among the partition-holders, therefore, the provision under Section No. 12a of the Chapter on 'Inheritance' is inconsistent with Article 11 of the Constitution of 1990 and the Supreme Court declared ultra vires the provision in question from the date of its decision.

## **4. Right to protection from superstitious belief**

### **4.1 *Dil Bhadur Bishwakarma vs. Prime Minister and Council of Ministers et al.*<sup>18</sup>**

There is a peculiar superstitious belief in the far western part of Nepal that a woman during menstruation is an untouchable during that time period. When a mother, wife, daughter, or sister is menstruating, they live in a shed made for this purpose in an isolated place away from the home. The people of that area believe that their goddess will be furious if they keep menstruating women within their dwelling. For the duration, the women are given lower calorie meals and, even on very cold days, they are not given sufficient warm clothing and bedding. Many women and girls have died during this period from the extreme cold, from snake bite or from the attacks of other wild animals. People of these parts think that if a menstruating woman stays within the house in this period they would face curses which create harm to the whole family and their cattle. Petitioner *Dil Bhadur Bishwokarma* filed a writ

<sup>17</sup> NKP [2061], DN 7357, p. 377

<sup>18</sup> Writ no. 3303 of the Year of 2061



petition to protect women and girls from this superstitious belief. In this PIL case, the petitioner demanded the Court issue an order in the name of the government to stop such detrimental and conservative customs which are extremely harmful not only to the woman but also to the small babies who are dependent upon a mother for nourishment. The Court issued an order in the name of the government to educate against this superstitious belief and custom and ordered the government to circulate among the people to eradicate this harmful culture to women and girls. Further, the Court set a three months deadline to make directive measures to rescue the women victims from this peril. However, these are old customs and beliefs inextricably linked with people's behavior and they still continue in communities in the western part of Nepal. It does not seem that the government has made a meaningful effort to eradicate this superstitious belief. Multiple news sources have been publishing accounts of the lethal circumstances, and women and their children, and older girls are dying from cold, snakebite, wild animals or from infectious diseases even today.

#### **4.2 Reshma Thapa vs. Prime Minister and Office of the Secretariat of Council of Ministers et al.<sup>19</sup>**

The charge of witchcraft against women in rural Nepal is a common phenomena, and sometimes women are tortured in urban areas, too, as the result of a charge of witchcraft. This is a type of superstitious belief, but sometime a notorious person may use this charge as a means of revenge. If a man dies due to lack of proper treatment for a disease, from physical injury or for another reason, women who are active and forward-looking may be charged by the community with the death of such a person. When someone died in a remote area of the Tarai and in the villages of mountainous areas, some people still believe that this is the consequence of witchcraft, which killed the victim. Even in the twenty-first century, some Nepali people believe in witchcraft. In the name of witchcraft, many have women have lost their lives, and there are daily reports in the media of a certain woman in a certain village or in certain wards of urban areas suffering a physical attack or torture, sometimes from their own kith and kin. The cause of death of a person through witchcraft is not possible scientifically and witchcraft has not yet been proven to exist by any scientific test or research. The killing of a man through witchcraft is only a superstitious, traditional, uneducated and indecent notion of society having no justification. Bringing baseless and superstitious allegations of witchcraft against a woman, and then taking her naked around the village and feeding her excreta is an extremely inhumane

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19 Dr. Ram Krishna Timalnsena [ed], [2010], *Landmark Decision of Supreme Court*, Kathmandu: Supreme Court, p. 11

and degrading treatment that damages the women's prestige, dignity and reputation, etc. These activities fall under the label of offensive activity. The Supreme Court has issued an order and directed the government to enact proper laws to prosecute and punish the perpetrators as well as instructed the government to make efforts to enhance the awareness of the people against these superstitious beliefs.

## 5. Right to profession

### **5.1 Advocate *Prakashmani Sharma vs. Prime Minister and Council of Ministers et al.*<sup>20</sup>**

The petitioner launched this issue as a PIL petition to protect the interest of female workers at cabin dance bar restaurants and of waitresses of restaurant and the hotel bar. It makes a claim for their physical, professional, and economical protection as well as for professional securities, facilities, and guarantee of remuneration to ease their profession. In this litigation, it is alleged that huge masses of women have adopted this profession as a livelihood in Nepal. But in the absence of clear and concrete rules and regulations enacted by the government, women in this profession are not physically protected from tsexual harassment, attempted rape or rape nor they are getting expected remuneration from the job. Generally, women workers of dance bars and restaurants are physically, economically, and socially exploited. On this women workers' issue, the Court prepared a detailed report from a study by an investigative team before reaching its final decision in this writ petition. From the investigating report, it was found that dance bar restaurants, cabin restaurants, dance bars, and massage parlors are often not legally registered or operated under the domain of any specific law. Some business owners had not met the necessary preliminary physical infrastructure of the premises and other infrastructures. In addition, there is lack of any minimum discipline, manners, and codes of conduct followed by the business owners, workers, clients, and visitors. This mismanagement has forced female workers to tolerate exploitation, when have taken these jobs only for their livelihood. Many women workers have joined this profession due to poverty, scarcity, or merely to maintain their family and children's needs. In this case, the Supreme Court laid down a directive order and gave instructions to follow for the protection of those female community workers before the laws are enacted. The Court also directed the Parliament to enact the proper laws to protect these women from the atrocities which they are tolerating due to mismanagement in absence of effective laws.

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20 NKP (2065), DN 8005, p. 999

## 6. Right to reproductive health

### **6.1 *Prakashmani Sharma vs. Prime Minister and Secretariat of Council of Ministers et al.***<sup>21</sup>

In this case, the litigant has filed a PIL to protect women's reproductive and health rights. In this case, regarding widespread uterine prolapse in Nepal, the Supreme Court issued an order of mandamus in the name of Government of Nepal to bring about a special action plan for the protection of the reproductive health of victim women. In this decision, the Court also said that there must be free medical treatment, free distribution of medicines, contraception for controlling births, and free counseling should be given in all health posts, hospital centers, in a speedy way to protect the health of women. The Court asked why prolapse is so common in women? How can women be protected? What measures can protect women from prolapse? Awareness about prolapse and its prevention should be raised among all the people whether male or female and should be practiced to eradicate the problem of prolapse, especially in western Nepal.

### **6.2 *Achut Prasad Kharel vs. Council of Ministers et al.***<sup>22</sup>

There is an old concept in Nepali society that husband and wife are two entities by physical structure but mentally they are one. By mental state, by psychology and by property they are not separated. There is another concept in society that the husband is master and wife is his slave. Therefore the husband always decides about the birth of children, whether more are needed, or not. The wife has no right to decide about reproductive health, even whether she might die by the birth of children due to her weak and anemic position. The Supreme Court in its response to this writ petition established the reproductive health right of women. It gave women the power to decide the number of children needed, the time of giving birth, and birth spacing. It said these are absolute rights of woman according to the reproductive health right. A woman has the sole right to her own body. Under this concept, she has the right to determine her own birth processes. To enjoy this fundamental right, its purview cannot be narrowed down on the basis of only the numbers of the delivery of the woman. A woman has the right to their own physical body, therefore, pursuant to the reproductive health right, she is solely entitled to make decisions about the reproduction and the number of children.

### **6.3 *Laxmi Devi Dhikta vs. Prime Minister and Secretariat of Council of Ministry et al.***<sup>23</sup>

In this writ petition the Supreme Court held that a foetus has no independent existence; its existence is confined only within the mother's womb. If the foetus has

21 NKP [2065], DN 7991, p. 956

22 NKP [2067], DN 8384, p. 895

23 NKP [2067], DN 8464, p. 1551

any interest, it could not be said that this interest prevails against that of the mother. It can't be ruled out that, even if the claim has not been raised by the husband, he has the right to be a father; if so, then the wife's right to be a mother also must be addressed. If it's recognized that despite the physical risk, all of her disapprovals or adversity, if women are being compelled to have a child for the fulfillment of the husband's desire to be a father, a wife will lose control over her own life; consequently, [she] have to accept the continuity of direct or indirect subordination. While a woman cannot insist that her husband be a father or compelled him to enter into sexual relation, likewise a man too should not compel a woman. The right to reproduction cannot be understood as a compulsion to enter into reproduction, and the freedom of non-involvement in reproduction is included under the right to reproduction. As the right to work is recognized that it embraces the freedom of not to work, right to reproduction should be viewed accordingly.

## 7. Marital Rape

### **7.1 *Mira Dhungana vs. His Majesty's Government, Ministry of Law, justice & Parliamentary Affaires and other*<sup>24</sup>**

In this case, the Supreme Court declared marital rape as a punishable offense and issued a directive order to one of the respondents, namely, the Minister of Law, Justice and Parliamentary Affairs, to make concise and just legal provisions to criminalize marital rape because the consequences of a crime of rape by a husband differs from another perpetrators with respect to collection of evidence, circumstances, quantum of the punishment and its propriety. Legal provisions regarding marital rape should be given a completion considering the special circumstance of marital relations and status of the husband. Section No.8 of the chapter on "Rape" has envisaged the circumstances caused by rape by persons other than the husband. Measures should be adopted to provide immediate relief, such as provisions to live separately, divorce, as well as provisions to address rape caused by child marriage.

### **7.2 *Jit Kumari Pageni (Neupane) et al. vs. Prime Minister and Secretariat of Council of Ministry et al.*<sup>25</sup>**

In this issue the Supreme Court laid down a landmark decision about not only the issue of marital rape, but also interpreted about the gravity of punishment in criminal cases. In this writ petition, the petitioners raised the question of unequal punishments for offenders of rape, and whether rape committed by the husband should require substantially less punishment than the same crime committed by another person. The petitioners challenged this discriminatory provision as against to the basic norms and claimed it should be declared null. The Supreme Court held that

24 Dr. Ram Krishna Timalasena [ed], [2003], *Landmark Decision of Supreme Court*, Kathmandu: Supreme Court, p. 147

25 NKP [2065], DN 7973, p. 664

where rape has been declared a grave offence, discrimination between punishment for marital and non-marital rape cannot be made and there is no justifiable reason to provide a lesser punishment on the basis of relationship with regards to marital rape. The said that where the principal sentence is less than additional sentence in marital rape, the punishment prescribed under Section No. 3(6) of the Chapter on 'Rape' of the Country Code cannot be deemed to be just. In this case the Supreme Court issued a directive order to the Ministry of Law, Justice, and Parliamentary Affairs to coordinate the discriminatory sentencing policies for marital and non-marital rape.

## 8. The Right to Privacy

### **8.1 *Sapana Pradhan Malla vs. Prime Minister and the Council of Ministers et al.*<sup>26</sup>**

In this writ petition, the petitioner demanded to keep confidential the name and other information of women and children victims of certain specific cases to respect their right to privacy. The Supreme Court issued a directive order under the right to privacy not to disclose the names of children and women victims whose suits are being heard in the courts. Pursuant to this decision the information of victims of rape and trafficking and HIV-infected persons should be kept confidential and not disclosed publicly. This decision was not only made in the name of the respondent but also annexed a complete set of guidelines to be followed by the concerned courts and authorities.

### **8.2 *Sapana Pradhan Malla vs. Office of the Prime Minister and Council of Ministers et al.*<sup>27</sup>**

In this writ petition, the petitioner claimed that the punishment of imprisonment for one to five years for self-induced abortion caused by a pregnant woman in Section No. 28 of the Chapter on 'Homicide' of the Country Code is discriminatory and against the rights of women when compared with punishment for those performing abortion by coercion, threat, procurement or greed, in Section No. 28a of the same chapter, or when compared to the punishment of imprisonment of three to six months for persons whose action against a pregnant woman result in miscarriage in Section No. 32 of the same chapter. Thus petitioner asked that the former be declared void and that the Court issue a suitable order to formulate appropriate laws based on the principles of equality.

In this case the Supreme Court held that for the same offence of abortion, different punishments for a pregnant woman and for other persons who compel abortion do not seem rational and based on wisdom. Section No. 28 is the proviso for penalizing

26 Dr. Ram Krishna Timalsena [ed], [2010], *Landmark Decision of Supreme Court*, Kathmandu: Supreme Court, p. 426

27 *Ibid* p. 38

a pregnant woman and Nos. 28a and 32 are applicable to all, whether man or woman, so the provision cannot be regarded as discriminatory from a gender perspective, yet setting a greater penalty for a pregnant woman and a lesser penalty for those encouraging men or women to commit the offence of abortion is discriminatory. Based on the gravity of the offence, the penalty set for offenders other than a pregnant woman is minimal. Penalty for the offence should be rational and based on wisdom so as to make the same penalty for others as for a pregnant woman. The Court found the penal provision of Section No. 28 to be relatively appropriate. Therefore, the Court issued a directive order in the name of the respondent Council of Ministers and Office of the Prime Minister to carry out the necessary amendments to the penalty provisions of Nos. 28a and 32 or to enact appropriate penalty provisions for offences relating to abortion in harmonization with that provision..

## 9. Conclusion

After observing all of the preceding Supreme Court decisions, it can easily be said that many significant decisions concerning gender equality and gender justice have been rendered by the Supreme Court. Through these decisions, the Court has instructed the executive and legislative bodies of the state to enact gender based laws congruent with the provisions of the Convention on Elimination of all Forms of Discrimination Against Women. Large numbers of people had no knowledge or awareness of women's rights previously, and there was an absence of progressive and liberal gender-based laws in the country. Laws relating to women rights were often surrounded by provisos, sub-clauses or exceptions. No real law was in existence that could be taken as palatable from the viewpoint of gender justice. By illustration, a woman had the right to a share of her husband's property, but she had no right to dispose of the whole immovable property without the permission of her husband and son.

However, Nepali women have been granted the right to vote since 1950. They were also allowed to run for election beginning the same year. Before 1950, during the *Rana* regime, voting rights and the right to run for office were virtually banned, especially for women. If one observes the social structure of Nepal, there are more than 101 castes, ethnic groups, indigenous, tribal, backwards and marginalized people residing intermingled in the same geographical locations throughout the country. They have different cultures and customs. A major portion of the population is Hindu, and other religions followed are Buddhist, Islamic, Christian, etc. Notwithstanding, each and every caste has a different system of living--in some castes there are maximum freedoms and others place total restriction on female members of society. In the Tarai region, there is a culture of dowry; however, its impact is less in mountainous region. A major portion of Nepali women are hard working, free and frank, and one third of them are engaged in the the agriculture field

or labor market. The major problem of having underdeveloped conditions is more common for women, and their literacy percentage is very low compared to that of men. Vast numbers of women are living in rural areas. They have no facilities to help them advance and to raise their consciousness and awareness, at least for their basic rights. Kshetri and Brahmin women, who are considered as higher classes, have had to follow strict social rules and regulations which confine them within the home to a great extent while the other indigenous, ethnic, and tribal women's society is more open. As in the example of widow remarriage, choice marriage is allowed for most of the indigenous people but it is religiously and culturally discarded within Brahmin and Kshetri society. Today, the social scenario is gradually changing and society is slowly moving towards more advanced and changing concepts. To bring substantial change in this area, the role of the judiciary is notably significant, equal to the accomplishments of the civil society including INGOs, NGOs, women activists, social workers, law scholars and lawyers. Many decisions rendered by the Supreme Court, especially those concerning gender equality and gender justice, have provided guidance to the government or Parliament to constitute gender friendly laws and rules in favour of gender equality. The latest decades of the national legal history will be seen as a revolutionary phase of gender justice in the days to come, due to the contributions of the judiciary of Nepal.

# Women's Freedom from Want after Armed Conflicts: Does the Inclusion of Economic, Social and Cultural Rights in Transitional Justice Help Women?

Evelyne Schmid\*

## Abstract

*The author tries to discuss women's freedom from want after armed conflicts, she analyzes in particular reference to the inclusion of economic, social and cultural rights in transitional justice. This article aims to contribute to the analysis of civil society actors in their relationship with conflict and gender in order to foster understanding of the complex interactions between civil society, the invocation of human rights, and conflict dynamics. It starts with the assertion that transitional justice is an essentially discursive and definitional project. The article discusses on different sections. In the third section, it suggests four avenues for civil society and donors to positively influence the prospects of transitional justice to foster gender equality, and the concluding section briefly refers to the existing framework of the EU relating to transitional justice and gender.*

## 1. Introduction

Countries emerging from conflict and other situations of violence increasingly choose to establish a variety of mechanisms to respond to systematic or widespread human rights abuses. Women and girls have often been disproportionately affected by the effects and consequences of violent conflict. This paper deals with gender in transitional justice from the lens of women's "freedom from want", that is, women's enjoyment of basic economic, social and cultural human rights (ESCR), such as the right to freedom from hunger, and the right to non-discriminatory access to health-care, housing or work.

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In recent years, progress has been made in including gender considerations in approaches dealing with a violent past. Two of the most well-known transitional justice mechanisms – criminal prosecutions and truth commissions – have paid increased attention to gender and there is a growing recognition of gender-crimes within international criminal law.

However, the current approaches to dealing with gender issues in transitional justice suffer from important limitations. This paper focuses on one of them. It outlines the consequences of limiting transitional justice strategies to civil and political rights in so far as gender dimensions of the conflict are concerned. The article argues that by narrowly focusing on violations of civil and political rights, transitional justice mechanisms gloss over important gender dimensions of the past conflict. Conflicts, their termination, as well as efforts of transitional justice are gendered. As Bell and O'Rourke argue, "matters that address underlying issues of discrimination, domination and improvement of physical, social and legal security particularly with regard to gender, are often addressed as secondary, or not at all."<sup>1</sup> If it is true that women and girls are disproportionately affected by violations of ESCR – both during armed conflict and in peacetime – donor agencies, human rights organisations and governmental authorities must be convinced that narrow conceptions of what constitute human rights violations fail to meaningfully deal with women's experiences in conflict.

The prevailing model of transitional justice has been based on the assumption that transitional justice mechanisms would primarily, or exclusively, address violations of civil and political rights. The neglect of ESCR has important, but so far overlooked implications for the way transitional justice has addressed the manifold experiences of women in armed conflict. For instance, Tafadzwa Pasipanodya has argued how, in her view, the past conflict in Nepal can only be addressed meaningfully if the marginalization of women is addressed and if the protection of their economic, social and cultural rights is enhanced.<sup>2</sup>

Recently, voices have grown louder that transitional justice should no longer marginalize ESCR.<sup>3</sup> The gender implications of such an inclusion have not yet fully

1 Christine Bell and Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," *International Journal of Transitional Justice* 1, no. 1 (2007): 25 and 30.

2 Tafadzwa Pasipanodya, "A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal," *International Journal of Transitional Justice* 2, no. 3 (2008).

3 See for instance C. Chinkin. "The Protection of Economic, Social and Cultural Rights Post Conflict." [http://www2.ohchr.org/english/issues/women/docs/Paper\\_Protection\\_ESCR.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf), (last accessed 14 August 2012). See also the following book which is freely available on the Internet for download: P. de Greiff and R. Duthie, *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009). Available at: <http://www.ssrc.org/publications/view/1ED88247-585F-DE11-BD80-001CC477EC70/> (accessed 31 August 2012)

been explored. I hope to show that the debate on including ESCR in transitional justice can be linked with efforts to enhance gender equality. I suggest that civil society groups and their supporters could make a valuable contribution to improving both transitional justice as well as the fate of women and girls if they insist that transitional strategies not sideline considerations of ESCR.

This article aims to contribute to the analysis of civil society actors in their relationship with conflict and gender in order to foster understanding of the complex interactions between civil society, the invocation of human rights, and conflict dynamics. It starts with the assertion that transitional justice is an essentially discursive and definitional project. Civil society groups face considerable opportunities, but also responsibilities, when they influence the design of transitional justice strategies. Human rights norms—or rather the way they are invoked and perceived—delineate the acceptable from the unacceptable.<sup>4</sup> The way the vocabulary of international human rights law is used by transitional justice actors carries important consequences for shaping the narrative of the past conflict. By focusing on civil and political rights, the implicit message is that other human rights violations and inequalities were not relevant for addressing the past and for the project of building a new societal contract, but merely factors of contextual background. The article aims to suggest how civil society actors' influence on positively affecting gender equality can be enhanced. I hope to convince the reader that civil society groups aiming at gender equality in post-conflict or conflict-ridden societies may potentially advance their goals by paying increased attention to the inclusion of ESCR in transitional justice processes. If persuaded by this analysis, civil society organisations that lobby for the meaningful inclusion of ESCR in transitional justice processes deserve to be encouraged and supported in their endeavours.

The article proceeds as follows: Section I defines key terms used in this paper and introduces the idea of viewing transitional justice as a definitional project. Section II outlines how the prevailing approaches of transitional justice have so far dealt with a) gender and b) ESCR. It argues that the neglect of ESCR in transitional justice may have negative consequences for women and girls. Section III suggests four avenues for civil society and donors to positively influence the prospects of transitional justice to foster gender equality. The concluding section will also briefly refer to the existing framework of the EU relating to transitional justice and gender.

## **2. Transitional Justice as a Definitional Project**

Before defining key terms, it is important to mention a limitation of this paper. It has been written based exclusively on secondary sources. This essay is mainly

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4 Emily Pia and Thomas Diez, "Conflict and Human Rights: A Theoretical Framework," *SHUR Working Paper 01/07* (2007): 19.

concerned with silence, i.e. the marginalisation of the voices of women and girls affected by manifold inequalities. While the paper aims to support these voices, it does not automatically speak for them. The voices of those most concerned by the topics discussed in this paper are only present as far as they are moderated by those who reported about them in the secondary literature. It is crucial that any proposals made in this paper should be seen as proposals for reflection and not as ready-made action plans. Any sound planning of outside actors' involvement in a (post-) conflict environment should be preceded by contextual analysis, the collection of baseline data and most importantly, by a meaningful consultation of those who will be affected by the measures.

## 2.1 Transitional Justice

In the last few decades, transitional justice has become a global project. The term transitional justice has gained increased attention, but has not been conclusively defined. There is a general agreement that the central goals of transitional justice can be summarised as "coming to terms with the past in a way that helps to chart a future that moves beyond that past".<sup>5</sup> Transitional justice is rationalised as both an attempt to deal with the past as well as one of building a more just future. The literature often analyses transitional justice according to its institutional mechanisms.<sup>6</sup> The following four mechanisms are often mentioned: criminal prosecutions, truth commissions, reparations programs and institutional reform/vetting (illustration). Criminal prosecutions and truth commissions are undoubtedly the most well-known mechanisms. Reparations can encompass individual, collective, and material as well as symbolic aspects. Reparations are often the most tangible aspect of transitional justice, but past experience has shown that there are often too many promises and too little implementation. Vetting programs, i.e., the exclusion from public service of individuals responsible for abuse, are the mechanism of transitional justice for which the least analysis has been done.<sup>7</sup>

Transitional justice commonly pursues goals such as establishing the truth, providing reparations for harm suffered, restoring the victim's dignity, ensuring that perpetrators are held accountable, facilitating national reconciliation, reforming and legitimising state institutions, and preventing future abuses. It is important

5 Marta Minow, *Between Vengeance and Forgiveness* (Beacon Press Boston, 1998), 2. See also International Center for Transitional Justice, "What is Transitional Justice?," <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> (accessed 31 August 2012).

6 See Minow, *Between Vengeance and Forgiveness*, 2. or Neil J. Kritz and Nelson Mandela, *Transitional justice : How Emerging Democracies Reckon with Former Regimes*. (Washington, DC: USIP, 1995). And Priscilla Hayner, *Unspeakable Truths : Facing the Challenge of Truth Commissions*, (New York: Routledge, 2002).

7 But see: U. N. Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Vetting: An Operational Framework*, (Geneva: UN, 2006). and Alexander Mayer-Rieckh, *Justice as Prevention: Vetting Public Employees in Transitional Societies*, ed. Pablo De Greiff (New York: Social Science Research Council, 2007).

to note that the relationship between different goals may not necessarily always be harmonious, and much depends on how and by whom the (conscious or unconscious, explicit or implicit) decisions to emphasize one or another goal are made. Minow argues that the different mechanisms of transitional justice and the way they are designed have their respective strengths and weaknesses.<sup>8</sup> For instance, criminal prosecutions are better placed to deliver criminal accountability than to establish the truth about the complexities of the past conflict. On the other hand, truth commissions may be well placed to give a voice to previously silenced parts of society or to make recommendations to address a wide range of issues. In addition, each of the mechanisms can be tailored in multiple ways, and, two different truth commissions may be designed with entirely different priorities. The recent literature has stressed that much depends on how the various mechanisms of transitional justice are combined and whether they successfully complement each other.<sup>9</sup>

This essay identifies possibilities of influencing how the emphases of transitional justice are set by focusing on the scope of the subject matter of transitional justice: the violations of human rights and international humanitarian law to be investigated by transitional justice. The contemporary human rights law framework is broad, and just invoking 'human rights' does not tell us a lot about which and whose rights we are speaking. Hence, transitional justice is not only an endeavour to foster the rule of law, to defeat impunity or to build or strengthen legitimate democratic institutions. In Miller's words, transitional justice "also serves to narrate conflict and peace, voice and silence, tolerable structural violence and intolerable physical atrocity."<sup>10</sup> By designing the parameters of what will be investigated by transitional justice, who deserves punishment for which crimes, and who deserves recognition as victims, transitional justice defines or re-defines the narrative on the past abuses. This constructivist reading of transitional justice is the basis for the recommendations of this paper and for the acknowledgement of the power of civil society organisations to shape the discourse on the past and hence the future. In other words, by including ESCR in the analysis of a transitional justice mechanism, the implicit message is that violations of ESCR are as unacceptable as other human rights violations. This has particular relevancy for women and girls who are often disproportionately affected by denials and discriminations with regard to ESCR-related issues, such as in accessing land tenure, property, education or healthcare.

8 Marta Minow, "The Hope for Healing: What can Truth Commissions do?," in *Truth V. Justice: The Morality of Truth Commissions*, ed. R. Robert and D. Thompson (Princeton: Princeton University Press, 2000).

9 U. N. Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*, (Geneva: UN, 2006), 2. The same is stated in all other Rule of Law Tools for Post-Conflict States of the UN High Commissioner for Human Rights.

10 Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* (2008): 267.

## 2.2 Gender

For the purpose of this paper, gender is understood as a set of norms and practices constructed in a specific location and time, shaping individual, symbolic and structural subjectivities.<sup>11</sup> Gender refers to the socially constructed roles, behaviour, activities and attributes that a particular society considers appropriate for men and women.<sup>12</sup> Feminist scholarship has criticized the human rights movement's emphasis on civil and political rights.<sup>13</sup> The most important criticisms can be summarised under two headings: first, feminists have argued that the human rights movement neglected abuses occurring in the private sphere (abuses by non-state actors such as domestic violence) and second, that the human rights movement neglected ESCR to the detriment of women's experiences. This paper takes these feminist critiques to the field of transitional justice. Since gender is not an ontological given, the narrative of conflict can be expected to be influenced by the way a transitional justice strategy deals with gender issues.<sup>14</sup>

## 2.3 ESCR

Contemporary human rights law defines ESCR as those human rights that relate to economic, social, and cultural conditions necessary to living a life with dignity. ESCR are contained within the Universal Declaration of Human Rights, a range of international treaties, and international customary law. The widely ratified International Covenant on Economic Social and Cultural Rights (ICESCR) includes the rights to education, adequate housing, food, work, the highest attainable standard of health, as well as cultural rights.<sup>15</sup> Whether in armed conflict or in peacetime, the enjoyment of ESCR is often unequal within a society. According to the drafters of the Montreal Principles on Women's ESCR, a set of non-binding principles established by experts in 2002, "[t]he systems and assumptions which cause women's inequality in the enjoyment of ESCR are often invisible because they are deeply embedded in social relations, both public and private, within all States. Acknowledging this systemic and entrenched discrimination is an essential step in implementing guarantees of non-discrimination and equality."<sup>16</sup> This statement guides the

11 Cordula Reiman, "All you Need is Love and What About Gender? Engendering Burton's Human Needs Theory," *Centre for Conflict Resolution, Working Paper Series* 10, cited in Diana Copper, "Conflict and Human Rights: A Gender Analysis," *SHUR Working Paper* 02/07 (2007): 2.

12 World Health Organization, "Health Topics: Gender," <http://www.who.int/topics/gender/en/> [accessed 31 August 2012].

13 See for instance: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester, UK: Manchester University Press, 2000). Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge, 1997).

14 For a more detailed and sociological analysis, see Diana Copper, "Conflict Society and Human Rights. A Gender Analysis," *SHUR Working Paper* 04/07 (2007): 4.

15 "International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976."

16 In December 2002, experts met in Montréal to adopt a set of non-binding principles to guide the implementation of the guarantees of non-discrimination and equal exercise and enjoyment of ESCR. "Montreal Principles on Women's Economic, Social and Cultural Rights," *Human Rights Quarterly* 26, no. 3 (2004).

following sections of this article--arguing that the need to acknowledge systematic and entrenched gender discrimination should be taken into account in designing transitional justice processes.

### **3. Tacking Stock: How Transitional Justice has so far dealt with Gender and with ESCR**

It is important to keep in mind that this section distils a general picture of the "traditional" approach of transitional justice to gender and ESCR, but it is clear that transitional justice experiences have widely varied across space and time. It should also be noted that women's experiences differ depending on geography, ethnicity, social class, and other factors. At the same time, even in 2009, the year of the 30<sup>th</sup> anniversary of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), gender inequalities continue to be a problem concerning most, if not all, parts of the world.<sup>17</sup>

#### **3.1 Transitional Justice and Gender**

Women's agency in armed conflict has been significantly overlooked. Women have most often not been viewed as active shapers, interest holders, brokers and participants of the conflict.<sup>18</sup> If they have not been totally overlooked, they have been conceived as care-takers, victims or passive 'beneficiaries' of outside aid. In the last decade, some important progress has been made, but new challenges and disappointments have emerged.

##### **3.1.1 Progress made**

At the UN, harm inflicted on women has been explicitly recognised in a number of high-level documents. At the Fourth World Conference on Women in 1995, governments adopted the Beijing Declaration expressing their determination "to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity".<sup>19</sup> The 2004 Secretary General's Report on the Rule of Law and Transitional Justice identifies addressing women's experiences of domestic violence as priority for "filling the rule of law vacuum".<sup>20</sup> In 2000, the Security Council adopted landmark resolution 1325, calling all parties to armed conflict to "take special measures to protect women and girls from gender-based violence in armed

17 "Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, entered into force 3 September 1981, A/RES/34/180," United Nations General Assembly.

18 While this paper focuses on the suffering of women situations of conflict and violence, the role of women as perpetrators of human rights violations has been even more strikingly overlooked. See African Rights, *Rwanda, Not so Innocent: When Women Become Killers* (London: African Rights, 1995).

19 UN World Conference on Women, *Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995)*, A/CONF.177/20 (1990), para. 18.

20 "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," *Report of the Secretary-General, S/2004/616, August* (2004): see for instance para. 15.

conflict.”<sup>21</sup> Less than a year ago, the Council adopted resolution 1820, recognising rape as a weapon in war and urging the Secretary-General and his Envoys to invite women to participate in discussions pertinent to the prevention and resolution of conflict, the maintenance of peace and security, and post-conflict peacebuilding.<sup>22</sup>

Efforts to include gender considerations in transitional justice have been mostly centred at the level of criminal prosecutions. There is no doubt that international humanitarian law pertains to gender-based violence in armed conflict.<sup>23</sup> International tribunals today acknowledge that rape and other forms of sexual violence can constitute genocide,<sup>24</sup> crimes against humanity, or war crimes. They hence belong to the most serious international crimes. In 2001, the International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced three men for their abuse of women at a “rape camp” in Bosnia. This landmark decision analysed in detail the international humanitarian law pertaining to sexual violence.<sup>25</sup> In the *Furundzija* decision, the ICTY also held that rape is a form of torture.<sup>26</sup> The tribunal also adapted the rules of evidence specifically to limit the extent to which consent could be presented as a defence to sexual assault.<sup>27</sup> The ICTY created the position of a legal advisor for gender-related crimes and special procedural protections have been introduced to take into account the particular difficulties related to gender-related crimes. The number of female staff in international tribunals has increased. In addition, the prosecutor of the Special Court for Sierra Leone has made sexual violence one of the court’s priorities. A few months ago, members of the Revolutionary United Front were convicted for the crime of forced marriage.<sup>28</sup> With the adoption of the International Criminal Court’s statute, rape, sexual slavery, enforced prostitution, forced pregnancy, sexual persecution, enslavement, forced sterilisation and sexual violence are today explicitly recognised as war crimes or crimes against humanity.<sup>29</sup>

As far as truth commissions are concerned, most early commissions’ mandates have not explicitly included gender considerations. Despite this omission, women’s

21 S/Res/1325(2000), para. 10.

22 S/Res/1820(2008).

23 For an early article on the subject, see Theodor Meron, “Rape as a Crime Under International Humanitarian Law,” *American Journal of International Law* (1993). See also Christine Chinkin, “Rape and Sexual Abuse of Women in International Law,” *European Journal of International Law* (1994), or Eileen Meier, “Prosecuting Sexual Violence Crimes during War and Conflict: New Possibilities for Progress,” *International Legal Theory* 10 (2004).

24 *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998.

25 *Prosecutor v. Kunarac, Kovac and Vukovic (IT-96-23) (IT-96-23/1)*.

26 *Prosecutor v. Anto Furundzija (Trial Judgment)*, IT-95-17/1-T.

27 Bell and O’Rourke, “Does Feminism Need a Theory of Transitional Justice?” 27.

28 *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgment)*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009.

29 “Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002,” Articles 7 and 8.

advocates in South Africa for instance convinced the TRC to conduct special hearings on gender questions. More recently, mandates of truth commissions in Kenya and the Solomon Islands, for instance, contain explicit gender provisions.<sup>30</sup> Recent truth commissions have also used gender hearings or have disaggregated data on the basis of gender. At least at the rhetoric level, there is also greater focus on addressing gender crimes in reparations programs. As the next section shows, the formal inclusion of gender-related provisions in the mandate of a truth commission or a reparations program does not, however, guarantee that gender issues are fully addressed.

### **3.1.2 New Challenges and New Disappointments**

Most of these concerns with current approach to gender in transitional justice have been described in detail elsewhere and this article intends to focus on only one of the problems associated with the current way of thinking of gender problems, namely the marginalisation of ESCR. Nevertheless, two challenges shall be summarised here:

The first and well-documented problem concerns the difficulties involved in prosecuting gender-related crimes in criminal tribunals. As mentioned above, where transitional justice has focused on gender issues, this has been most remarkable in criminal tribunals. Nicola Henry argues that due to the sheer diversity and heterogeneity of wartime rape victims, the experience of giving testimony was likely to be mixed.<sup>31</sup> It is no new story that testifying in court can create an additional form of victimisation for people who have suffered sexual violence.<sup>32</sup> The tribunal's efforts to render the testimony of witnesses relevant and concise may clash with victims' need to narrate pain and suffering.<sup>33</sup> In formal proceedings, a specific vocabulary and form determine what is acceptable and 'useful' to bring a case forward. This can be a frustrating or even dehumanising experience.<sup>34</sup> Many have argued that proceedings in courts should, and could, be modified to accommodate survivors of gender-related crimes.<sup>35</sup> Others have cautioned that the main purpose of any judicial proceeding is

30 For Liberia: *Act Establishing the Truth And Reconciliation Commission of Liberia*, [May 12, 2005], Sections 4 a) and e). Kenya: *The Truth, Justice and Reconciliation Commission Bill*, [signed into law on November 28, 2008], Sections 2 and 5c. Solomon Islands: *Solomon Islands Truth and Reconciliation Commission Act*, Sections 2c, 3a and 6[4].

31 Nicola Henry, "Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence," *International Journal of Transitional Justice* 3, no. 1 (2009).

32 Katherine Franke, "Gendered Subject of Transitional Justice," *Columbia Journal of Gender and Law* 15, no. 3 (2006): 820.

33 *Ibid.*: 819.

34 *Ibid.*: 818.

35 Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* [The Hague: Nijhoff Publishers, 1997]. Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law," *McGill Law Journal* 46 (2000). B Bedont and K Hall-Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court," *Brown Journal of World Affairs* 6 (1999).



to decide on the binary question of legal guilt or innocence and to establish larger societal principles rather than to provide individual recognition or even healing.<sup>36</sup> In any event, it seems fair to conclude that even in the best of all cases, when a tribunal is most sensitive to gender issues, it will only succeed in recognising women as victims of sexual violence if the women coming before the judges conform their experience to a set of legal vocabulary and pre-determined stages of process. In addition, progressive jurisprudential developments are often insignificant advances for the society and individuals most directly concerned by the crimes. For instance, the *Akayesu* trial at the ICTR was a break-through in accepting sexual violence as an element of genocide, but the vast majority of cases were decided before the *gacaca* tribunals, where little or no effects of the ICTR's holding could be felt.<sup>37</sup>

The second concern with the current approaches to gender in transitional justice is their narrow focus on direct sexual violence. This concern is the starting point for my argument that transitional justice should address violations of ESCR in order to more fully take into account women's experiences in conflict. It is important not to limit gender issues to the incidence of direct sexual violence, although this has unfortunately been a devastating characteristic of many conflicts. It is very rare for criminal tribunals to deal with gender-based violations as anything other than direct sexual violence against women. Recent truth commissions with mandates on gender-related abuses have also tended to focus on direct sexual violence, understood to include *inter alia*, rape, sexual slavery, forced sterilisation. Addressing women's suffering exclusively through the lens of direct sexual violence however ignores the gendered dimensions of conflict and the obvious fact that women can also suffer any other human rights violations else than direct sexual violence. Moreover, it is well-known that men can also suffer gendered violence.<sup>38</sup> Nevertheless, there is a tendency to limit the analysis to direct sexual violence. As an acute illustration, the first volume of the final report of the Liberian TRC has dealt with women's experiences from the implicit assumption that when women suffered, it was necessarily from direct sexual violence.<sup>39</sup> By narrowly conceptualising harm suffered by women as relating to direct sexual violence, the Commission deals exclusively with the civil and political dimensions of women's rights violations. Even

36 Rosalind Dixon, "Rape as a Crime in International Humanitarian Law: Where to from Here?," *European Journal of International Law* 13, no. 3 [2002]. See also Minow, "The hope for healing: what can truth commissions do?," 238.

37 Franke, "Gendered Subject of Transitional Justice," 820.

38 Ibid.: 823.. See also: ESCR-Net, "Report from the Women and ESCR Working Sessions," in *Challenging Poverty and Inequality through Human Rights: International Strategy Meeting on Economic, Social and Cultural Rights and ESCR-NET* (Nairobi, 2008), 2.

39 Truth and Reconciliation Commission of Liberia, "Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume I: Findings and Determinations," [2008], 63. The commission states that 28% of reported violations were committed against women. The paragraph discussing this number seems to refer exclusively to instances of sexual violence.

if the TRC diagnoses issues such as limited access to education or land tenure as a root cause of conflict, it fails to discuss the ESCR dimensions of violations; and those of women in particular.<sup>40</sup> After having exclusively analysed direct sexual violence, the Commission concludes that, "as a group, men comprise a larger victim category than women."<sup>41</sup>

While this in no way says that we should ignore the reality of sexual violation of women,<sup>42</sup> concentrating on women's experiences of sexual violence should not come at the expense of silencing all other important aspects of women's experiences of conflict, in particular the long-term consequences of violations. Otherwise, by neglecting ESCR in transitional justice, one risks overlooking gendered dimensions of the past conflict. The following section contains a brief overview of how transitional justice has so far dealt with ESCR.

### 3.2 Transitional Justice and ESCR

ESCR are contained within the Universal Declaration of Human Rights, a range of international treaties, international customary law and national law. The widely ratified International Covenant on Economic Social and Cultural Rights (ICESCR) asks states to "undertake to ensure the equal right of men and women to the enjoyment of all rights set forth in the present Covenant."<sup>43</sup> It includes the rights to education, adequate housing, food, work, the highest attainable standard of health, as well as cultural rights.<sup>44</sup> During times of armed conflict, international humanitarian law, in addition to human rights law, for instance, prohibit the destruction of objects indispensable to the survival of the civilian population, such as foodstuffs or drinking water installations.<sup>45</sup>

In international legal discourse, particularly in the West, ESCR have, however, long been downplayed as "nothing more than objectives of social policy".<sup>46</sup> Many misunderstandings and myths persist. Whether in relation to transitional justice

40 For an analysis of the Commission's preliminary report, see Evelyne Schmid, "Liberia's Truth Commission Report: Economic, Social and Cultural Rights in Transitional Justice," *PRAXIS - The Fletcher Journal of Human Security* XXIV, 5-28 (May 2009).

41 Truth and Reconciliation Commission of Liberia, "Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume I: Findings and Determinations," 63.

42 Franke, "Gendered Subject of Transitional Justice," 825.

43 ICESCR, Article 3.

44 Ibid.

45 "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978," Article 54. According to a study by the International Committee of the Red Cross, this prohibition is part of customary international law and applies in all armed conflicts. See Jean-Marie Henckaerts, Louise Doswald-Beck, and International Committee of the Red Cross, *Customary International Humanitarian Law: Volume I*, [Cambridge: Cambridge University Press, 2007], Rule 54.

46 This is even true in some recent publications. See for instance Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. [Oxford: Oxford University Press, 2008], 110.

or the human rights field more broadly, there is a long way to go in translating the international rhetoric of the “indivisibility, interdependency and interrelatedness”<sup>47</sup> of all human rights into reality. Before taking stock on how transitional justice has so far dealt with ESCR, a few remarks shall be made on what I believe is a problematic understanding of ESCR. In some of the literature, commentators discuss the ideological dichotomy between civil and political rights on the one hand, and ESCR on the other, under the heading of “individual vs. group rights”.<sup>48</sup> In other words, it is sometimes believed that civil and political rights are individual rights, whereas socio-economic and cultural rights are group rights. However, this conception is inaccurate. ESCR can be viewed as individual rights just as any other human rights. The right not to be evicted from one’s home without any procedural guarantees (an economic and social right) can clearly be conceived as an individual right. At the same time, abuses of the right to housing can affect particular groups disproportionately and may in certain circumstances be claimed by groups.

Although Pia and Diez correctly explain that ESCR equally belong to the individual as a human being, it seems relevant to note that conceptual classifications of human rights have often proved unhelpful. For instance, Pia and Diez’ explanation that “civil and political rights primarily act as constraints on those who govern” while social, economic and cultural rights “stress the equality that an individual can claim as a citizen” is problematic. It is a misconception to believe that civil and political rights simply act as constraints on the authorities while ESCR necessarily require the state to take resource intensive positive action. As an example, the fair trial provision in the International Covenant on Civil and Political Rights (ICCPR) precisely also derives from the idea of equality (“[a]ll persons shall be equal before the courts and tribunals”<sup>49</sup>). The realisation of civil and political rights equally requires the state to devote resources. To stick with the example of fair trial, the right requires the state to take positive action to train and pay court staff and to establish a complex institutional framework. Practitioners involved in judicial reform activities around the world will agree that guaranteeing due process is no free lunch. At the same time, ESCR can equally act as constraints on the authorities. ESCR demand, for instance, that the state abstain from arbitrarily evicting people from their homes or from limiting state healthcare to certain social groups. Hence, binary compartmentalisations of human rights often derive from unhelpful assumptions and it seems more useful to think about specific challenges to the realisation of human rights. In this paper, the argument is made that the failure to analyze ESCR in transitional justice carries consequences on the realisation of gender equality.

47 United Nations, “World Conference on Human Rights: the Vienna Declaration and Programme of Action A/CONF.157/23, 12 July 1993,” in *New York: UN*, para. 5.

48 Pia and Diez, “Conflict and Human Rights: A Theoretical Framework,” 16.

49 “International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171,” Article 14(1).

Authors such as Louise Arbour, the former High-Commissioner for Human Rights, have observed that transitional justice has so far almost exclusively focused on violations of civil and political rights relating to personal freedoms and physical integrity.<sup>50</sup> As a consequence, transitional justice mechanisms have mostly dealt with torture, killings, arbitrary detention, and "disappearances," leaving violations of ESCR unaddressed in all but rare instances. Boraine, former deputy chair of the South African TRC, advocates for "a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation".<sup>51</sup> Arguably, this "deeper vision" is necessary because victims' needs are related to violations of ESCR as much as they are related to violations of civil and political rights. However, the transitional justice movement has had a narrow view of what constitutes human rights violations, and it is time to recognize that ESCR are not only part of existing international law but are, moreover, a decisive dimension of the past abuses to be addressed.

Looking at the different mechanisms of transitional justice, tribunals have very marginally touched upon violations of ESCR, although some limited progress has been made.<sup>52</sup> To mention just a few truth commissions, in Chile, the National Truth and Reconciliation Commission focused on 'serious violations' consisting of physical violence under international human rights norms.<sup>53</sup> The South African TRC had a broad mandate but decided to limit the inquiry to gross human rights violations which were defined as limited to severe physical mistreatment.<sup>54</sup> More recent commissions have sometimes explicitly mentioned economic, social or cultural dimensions.<sup>55</sup> The Liberian TRC for instance had a mandate tasking it to analyze all gross human rights violations, violations of humanitarian law and economic crimes. However, without much discussion, the TRC drew up a list of what it considered as gross human rights violations and did not include dimensions of ESCR violations in that list.<sup>56</sup> While

50 While it is often said that civil and political rights protect personal freedom and physical integrity, the same is true for ESCR. In the absence of food, water or healthcare, one's physical integrity can easily be harmed. This shows that classifying human rights into different groups is not only unhelpful, but does also not capture the complexity of human rights.

51 Alexander Boraine, "Transitional Justice: A Holistic Interpretation," *Journal of International Affairs - Columbia University* 60, no. 1 (2006): 17. Cited in Louise Arbour, "Economic and Social Justice for Societies in Transition," *New York University Journal of International Law and Politics* 40, no. 1 (2007): 2.

52 See in particular: "Prosecutor vs. Kupreskic et al, Trial Judgement," (IT-95-16-T, ICTY), holding that the widespread and systematic destruction of housing can amount to a crime against humanity.

53 Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," 276.

54 Ibid.: 277.

55 Apart from the Liberian TRC, the mandates of truth commissions in Sierra Leone, East Timor, and Chad have also included economic and social aspects. In October 2008, the Kenyan National Assembly adopted a bill which includes economic rights among the issues to be investigated by the planned Truth, Justice and Reconciliation Commission. *The Truth, Justice and Reconciliation Commission Bill*, Article 5. Available at [http://www.kenyalaw.org/Downloads/Bills/2008/The\\_Truth\\_Justice\\_and\\_Reconciliation\\_Commission\\_Bill\\_2008.pdf](http://www.kenyalaw.org/Downloads/Bills/2008/The_Truth_Justice_and_Reconciliation_Commission_Bill_2008.pdf) (accessed 31 August 2012).

56 Truth and Reconciliation Commission of Liberia, "Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume I," 35.

the report of the Liberian TRC diagnoses that the main causes of the conflict were “attributable to poverty, corruption, limited access to education, land tenure, etc.”,<sup>57</sup> the first volume of the TRC’s report fails to analyze whether and/or in what ways these diagnosed root causes of the conflict may have disproportionately affected the female inhabitants of Liberia,<sup>58</sup> although this neglect was finally corrected in a later version of the report issued by the TRC.<sup>59</sup>

As an example, in countries such as Liberia, women face greater difficulties in accessing land tenure. If a transitional justice mechanism investigates violations of civil and political rights, it will deal with the husband’s abduction or death, but it will likely fail to support the female spouse who may have subsequently lost her and her family’s means of subsistence.

As far as reparations programs are concerned, it is fair to say that they have so far rarely addressed ESCR dimensions. But advances are made, and recent efforts testify to increased attention to ESCR, but also to new challenges in implementing such reparations programs.<sup>60</sup>

Voices have grown louder to include ESCR in transitional justice work, in particular to ensure the sustainability of peace.<sup>61</sup> If one accepts that violations of ESCR were at the root of the conflict or played an important part of the experiences of those affected by the conflict, it is only reasonable to think that they should be addressed by the transitional justice strategy. Treating inequality or structural violence simply as the contextual background of a ‘transition’ may do harm. It may undermine a fragile peace and may cement the view that structural violence based on gender is nothing more than natural misfortune. The findings of a transitional justice mechanism such as a truth commission will draw the line between the acceptable and the unacceptable and such a body will present the history of the violent past in one way or another. Those who define the parameters of a transitional justice strategy must be conscious of their power to shape – and potentially limit – the discourse and interpretation of the past; which may have important consequences for the future.

<sup>57</sup> Ibid., 10.

<sup>58</sup> Evelynne Schmid, “Liberia’s Truth Commission Report: Economic, Social and Cultural Rights in Transitional Justice,” *PRAXIS - The Fletcher Journal of Human Security* XXIV, 5-28 (May 2009).

<sup>59</sup> See in particular the Annex to Volume 3 on “Women and Conflict”. Truth and Reconciliation Commission of Liberia, Final Consolidated Report [2009]. Available at <http://trcofliberia.org/reports/final-report> (accessed 31 August 2012).

<sup>60</sup> See for instance the literature on the experience on the Peruvian reparations program which attempted to include ESCR dimensions in reparations programs. Lisa J. Laplante and Kimberly Theidon, “Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru,” *Human Rights Quarterly* 29 (2007). Or Lisa Magarrell and Leonardo Filippini, *The Legacy of Truth: Criminal Justice in the Peruvian Transition* [International Center for Transitional Justice (ICTJ), 2006].

<sup>61</sup> See in particular the second last edition of the International Journal of Transitional Justice: *International Journal of Transitional Justice* 2, no. 3 (2008).

As this article suggests, this opportunity can be creatively used by gender advocates who have long argued that women tend to be disproportionately affected by economic, social, or cultural deprivations, whether before, during or after an armed conflict.<sup>62</sup> During conflict, they not only continue to suffer the pre-existing discriminations and inequalities,<sup>63</sup> but they moreover often suffer violations of multiple and interrelated human rights. For instance, a woman losing her husband or children not only suffers the direct violations of civil and political rights (e.g., the killing or disappearance of her loved ones), but often also endures dire economic, social, and cultural consequences by becoming the sole care-taker of the household. Once a peace agreement is signed, she might further be overlooked by outside actors who in the short-term tend to concentrate on disarmament programs which in turn tend to address the needs of former male combatants.

#### **4. Avenues for Civil Society and Their Supporters**

The observation of this paper is first, that transitional justice has so far not sufficiently dealt with ESCR, and second, that this omission has important gender implications. The proposal of the article is therefore that in order to advance gender issues, civil society can grasp interesting opportunities in linking the issues of gender and ESCR in transitional justice processes. The last section of this article details this proposal by outlining four avenues for action.

##### **4.1 First, civil society groups and donors agencies should pay conscious attention to the ways they help shape the discourse of transitional justice**

Putnam has famously defined civil society organisations as institutionalised associations of people that are both a product of existing power structures and an agent of political change.<sup>64</sup> As Copper has outlined, the relationship between civil society organisations and gender is tense and complex.<sup>65</sup> Moments of transition allow the re-negotiation of relations of power, and transitions open the possibility for recognising past injustice or for giving a voice to previously silent actors. The articulation of what and whose past needs to be uncovered by transitional justice is at the same time an opportunity to give a voice to previously silent parts of society, as well as an opportunity to point out the structural and long-standing issues affecting gender. Truth commissions in particular offer opportunities “for women to have a

62 “Montreal Principles on Women’s Economic, Social and Cultural Rights.”

63 One of the challenges for transitional justice is the fact that deeply rooted gender inequalities are seldom specific to outbreaks of war, but that the conflict often merely accentuates discrimination and violations that women suffered during peace. Fatima Ayub, Sari Kouvo, and Yasmin Sooka, *Addressing Gender-specific Violations in Afghanistan* (International Center for Transitional Justice, February 2009), 4.

64 Robert Putnam, Robert Leonardi, and Raffaella Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, Princeton University Press, 1993), cited in Copper, “Conflict Society and Human Rights. A Gender Analysis,” 2.

65 Copper, “Conflict Society and Human Rights. A Gender Analysis,” 3.

platform, to narrate their experiences of human rights abuse, address the nation – and reclaim the public sphere.”<sup>66</sup> They are often tasked to make recommendations to avoid the recurrence of abuses and they are often one of the most legitimate and visible bodies to address long-standing problems. This potential should be used by those who wish to advance gender equality.

The first recommendation is thus simply that civil society actors should be aware of the inherently political purposes of transitional justice. Civil society’s emphases have unavoidable effects on shaping the narrative of the conflict and thus what society needs to address to reach a more just future. ‘Uncovering the past’ can mean various things, depending on which and whose past transitional justice intends to uncover. As Miller explains, the “failure to include economic concerns in transitional justice mechanisms tend to make transition into a political rather than an economic story”.<sup>67</sup> Miller argues that it is no coincidence that the genocide in Rwanda has become a story of historic ethnic hatred between Hutu and Tutsi rather than a narrative of decades-long resource inequity, unequal land distribution and colonial constructions.”<sup>68</sup> In her words:

*The mandate of a commission or the list of crimes to be tried at a court means that, to some degree, the decision about what story to tell is predetermined, as is the manner of addressing the conflict (and sustainably resolving it for the future). Although a government may separately pursue development options, the redistribution of land or other plans for economic change, the argument here is that the divorce of those strategies from transitional justice mechanisms allows a myth to be formed that the origins of conflict are political or ethnic rather than economic or resource based. It suggests that inequality is a question of time or development rather than the entrenched ideology of elites, as well as that the need to memorialize the past does not require the narration of past economic oppression.*<sup>69</sup>

Hence, if analysis shows that denials of ESCR belong to the main root causes of a conflict and are a main part of women’s suffering, the idea of uncovering the past suggests the need to include an analysis of ESCR in the inquiries of transitional justice. If this is neglected, structural violence may be permitted to continue – which may in turn fuel violent conflict. On the other hand, if transitional justice successfully uncovers structural discriminations, marginalisation and the denial of ESCR, it has the potential to be the starting point of a debate on how to tackle these problems, including in terms of gender equality.

66 Vasuki Nesiah, “Gender and Truth Commission Mandates,” in *International Center for Transitional Justice* (2007).

67 Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” 280.

68 Ibid.: 281.

69 Ibid.: 268.

As an example, the Sierra Leonean TRC was tasked to focus on the experiences of women and in particular, the sexual violence that occurred in the conflict period. Thanks to the strong influence of gender advocates, the TRC also highlighted the structural injustices relating to gender inequalities in family and property law.<sup>70</sup> These findings were used to establish broad recommendations on how to address cultural, legal, social, and political factors which rendered women disproportionately vulnerable.<sup>71</sup> Now, the uphill task is to ensure the implementation of these recommendations. Continuous engagement of civil society will be required to translate the gains made during the commission's work into tangible improvements. But the example shows how civil society actors managed to bring deeply rooted structural gender issues to the surface and how the conscious acknowledgement of the importance of these factors helped the transitional justice mechanism to spur a debate on what would be needed to tackle the issues which have led to the outbreak of conflict.

#### **4.2 Second, civil society can creatively help to make visible the denial of ESCR**

Civil society groups can contribute to make discrimination and ESCR-related human rights problems visible during transitional justice as well as during other times. An interesting and concrete avenue for action was explored in 2007 by Peru's Estudio para la Defensa de los Derechos de la Mujer (DEMUS), an advocacy group for gender justice. To promote a process of political and legal enforceability of women's rights, in particular ESCR, this civil society group established mock tribunals which aimed at creating public awareness and acknowledgement of existing gender related denials of ESCR.<sup>72</sup> The tribunals were based on submissions of symbolic cases showing women's ESCR violations. The cases illustrated patterns of discrimination or the failure of the state to protect women's ESCR. The "juries" were made up of human rights experts. DEMUS managed to convince State representatives to be present at least during one of the hearings. The jury would then issue a "decision", including recommendations for the State and for civil society. While a systematic evaluation of the outcomes of such an innovative approach would be needed before conclusions on its effectiveness can be drawn, it seems safe to at least consider it a creative way to illustrate ESCR denials suffered by women, including long-standing structural discriminations. At the same time, the demonstration effect of tribunals dealing with ESCR may help to illustrate the feasibility of considering ESCR as entitlements which can be addressed in legal terms.

70 Franke, "Gendered Subject of Transitional Justice," 826..

71 Sierra Leone Truth and Reconciliation Commission, "The final report of the Truth & Reconciliation Commission of Sierra Leone," <http://www.sierra-leone.org/TRCDocuments.html> (accessed 31 August 2012).

72 ESCR-Net, "Report from the Women and ESCR Working Sessions," 4.



### **4.3 Third, civil society actors should be supported to insist on reparations programs which are both gender sensitive and attentive to violations of ESCR**

In international law, the concept of reparations as traditionally understood aims at restoring the situation that prevailed before a violation occurred.<sup>73</sup> This concept fits more easily with violations which are conceivable as discrete events. This explains why reparations for violations of civil and political rights such as rape, arbitrary detention or killings are easier to understand. It is more challenging to deal with deeply encroached structural problems such as women's marginalisation in accessing education or social security. Hence, repairing the situation prevailing before the outbreak of conflict may not be sufficient, and including sexual violence among the violations deserving reparations is addressing only one aspect of gender concerns. More than ten years after the notion of "gender mainstreaming" was tabled at the 1995 Beijing World Conference on Women,<sup>74</sup> the translation of the idea of mainstreaming gender into concrete action is still incomplete. An excellent book edited by Ruth Rubio Marin addresses the question on how to design gender sensitive reparations programs.<sup>75</sup> The publication identifies lessons from past experiences with reparations programs from a gender perspective, and it provides valuable insights into conceptual as well as practical and logistical considerations.

### **4.4 Fourth, civil society organisations and their supporters should strive to increase the participation of women in the design and decision-making of transitional justice mechanisms**

Women have largely been absent in negotiations ending armed conflicts or in designing the parameters of transitional justice. The argument has been made that changing the players will change the nature of the game, and different priorities will arise if women were granted a seat in the negotiations on transitional justice.<sup>76</sup> The Committee on ESCR emphasised in a General Comment that the obligation to fulfil the rights contained in the ICESCR "requires States parties to take steps to ensure that in

73 For a good introduction, see United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (Geneva: UN, 2008). For the 1928 landmark case: Permanent Court of International Justice, *Case concerning the factory at Chorzów (indemnity-merits): sixteenth (extraordinary) session* (1929), Série C, 1928). And: Commission United Nations. International Law and James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002), Articles 33-37. For the analysis on reparations in transitional justice contexts, see *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford; New York: Oxford University Press, 2006).

74 UN World Conference on Women, *Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995)*, A/CONF.177/20

75 Ruth Rubio-Marín, *What Happened to the Women? : Gender and Reparations for Human Rights Violations*, Advancing Transitional Justice Series (New York: Social Science Research Council, 2006).

76 Christine Chinkin, "Peace Agreements as a Means for Promoting Gender Equality and Ensuring the Participation of Women," *UN Division for the Advancement of Women* (2003): 10, cited by Bell and O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," 30.

practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include (E) to promote equal representation of men and women in public office and decision-making bodies.<sup>77</sup> Similarly, the Committee on the Elimination of Discrimination against Women emphasised the importance of women's participation in political and public life.<sup>78</sup> The Updated Principles on Impunity contain a number of principles which insist on women's participation in the decision making around transitional justice.<sup>79</sup>

A higher number of women participating in decision-making fora should not be assumed to automatically translate into transitional justice processes which are gender-sensitive at all levels. However, the meaningful inclusion of women in the decision-making process does seem to lead to the emergence of different emphases. In line with the argument of this paper, Chinkin observed the prioritisation of socio-economic rights in the agendas emerging from track two peace processes involving women's points of view in Afghanistan, East Timor and Burundi.<sup>80</sup>

Hence, external donors such as the EU should use their influence to insist on women's participation in negotiations around issues of transitional justice. While past experience has shown that to improve gender equality, a complexity of issues needs to be tackled, a compilation of EU documents pertaining to mainstreaming of human rights and gender into European Security and Defence Policy (ESDP) is encouraging.<sup>81</sup> The 2008 Council of the EU compilation contains reference documents on human rights, gender, transitional justice, as well as on civil society. In other words, all the ingredients of what has been suggested in this article are part of EU documents. It is to be hoped that the commitments will be implemented. In May 2009, an analysis of the EU's role in promoting justice in peacemaking in the DRC has concluded that its policy framework lags behind its political statements, and practice on the ground.<sup>82</sup> Nevertheless, the EU draft document on "Transitional

77 Social and Cultural Rights Committee on Economic, "General Comment No. 16 (2005), The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, E/C.12/2005/4," (2005), para. 21.

78 "UN Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 23: Political and Public Life, 1997,A/52/38."

79 Diane Orentlicher, *Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, E/CN.4/2005/102/Add.1 (Geneva: UN, 2005), Principles 6,7,32,35.

80 Christine Chinkin, "Peace Processes, Post-Conflict Security and Guarantees of Women's Rights: the International Context Considered" [paper presented at the 9th Torkel Opsahl Memorial Lecture, Queen's University of Belfast, 2004], cited by Bell and O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," 31.

81 Council of the European Union, "Mainstreaming Human Rights and Gender into European Security and Defence Policy: Compilation of Relevant Documents," [2008].

82 Laura Davis, "Small Steps, Large Hurdles: The EU's Role in Promoting Justice in Peacemaking in the DRC," [IFP Mediation Cluster, International Center for Transitional Justice, 2009].

Justice and ESDP" is a useful starting point for further elaboration.<sup>83</sup> It promises that the EU will consider developing further guidelines on how transitional justice could be taken into account in the context of its policies. While the proposals made in the draft document are vague, it is encouraging that there is an explicit statement to support collaboration with civil society.<sup>84</sup> The same complication of documents also "emphasizes the importance of including measures against sexual and gender based violence in transitional justice mechanisms",<sup>85</sup> as well as the insistence on promoting "the role of women as actors in peace building through their participation in peace negotiations as well as establishing transitional governments and reconciliation structures."<sup>86</sup>

In sum, there are existing EU frameworks to set into motion what is outlined in this paper. In order to make the best use of this existing framework, it might be useful for the EU to elaborate the draft document on transitional justice and for it to explicitly mandate its mediators to include transitional justice in their facilitation. Further, the EU could enhance the training of mediators by incorporating an introduction into the international legal framework on ESCR. Also, mandating mediators to directly engage with civil society at an early stage would certainly be helpful to support genuine participation of civil society.

## 5. Conclusion

Decoding the gendered nature of conflict and violations committed during a conflict is complicated by the fact that women are often overlooked both as actors and victims. This article has argued that if transitional justice embarks on an analysis of ESCR, it can potentially contribute to the decoding of gender dimensions of a conflict and therefore pave the floor for addressing them. While transitional justice should not be expected to solve all problems at once, its mechanisms can spur a debate on how to confront the deeper social forces that produce and reinforce gender inequality. Since socio-economic conditions and the denial of ESCR have been identified as the

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83 Political and Security Committee of the European Union, "Draft Document on Transitional Justice and ESDP, in view of the PSC Meeting on 20 June 2006 (doc. 10674/06)," [2006], para. F.. Para F states: "Further consideration could be given to ways in which the EU can benefit from the important experience gained by NGOs on transitional justice."

84 European Union, "Enhancing Cooperation with NGOs and CSOs in the Framework of EU Civilian Crisis Management and Conflict Prevention (doc. 15574/1/06)," [2006].

85 ———, "Check list to Ensure Gender Mainstreaming and Implementation of UNSCR 1325 in the Planning and Conduct of ESDP Operations (doc. 12068/06)," [2006], 10.

86 *Ibid.*, Point 1.

root causes of numerous contemporary conflicts,<sup>87</sup> civil society organisations which aim to address them in transitional justice should be encouraged and supported. As this paper has argued, it is more likely that transitional justice will positively affect gender equality if it acknowledges that structural differences have a negative effect on women and girls.

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87 As mentioned, the Liberian TRC has recently released its first part of the final report, arguing that the root causes of the violent conflicts were attributable to poverty; greed; corruption; limited access to education; economic, social, civil and political inequalities; identity conflict; land tenure and distribution (Truth and Reconciliation Commission of Liberia, "Final Report of the Truth and Reconciliation Commission of Liberia: Volume I: Findings and Determinations," 35). See also the findings of the following recent commissions: Truth and Reconciliation Commission for Sierra Leone, "Witness to Truth: Final Report of the Truth and Reconciliation Commission for Sierra Leone: Volume 2: Findings," [2007], emphasising marginalisation and economic injustices as the causes of conflict, see for instance para. 141 of Volume 2. And: Truth and Reconciliation in Timor-Leste Commission for Reception, "Chega! Final Report," in particular p. 141ff on ESCR.

# Thirty Five Day Limitation Clause: Statutory Barrier to Access Justice by Victim of Rape

Raju Prasad Chapagai\*

## Abstract

*This article provides an appraisal of 35 day statute of limitation clause in the Section 11 of the Chapter on Rape of Country Code. From a perspective of access to justice, the paper discusses national as well as international law and jurisprudence on rape and presents the 35 day limitation clause as a legal barrier to access justice by the victim of rape. Reflecting on the concerns expressed at different level towards addressing the problem, the article finally put forwards concrete suggestions in terms of addressing legal challenges and thereby paving the way for replacing the ongoing state of impunity with a measure of accountability.*

## 1. Background

“Violence against women must never be accepted, never excused, never tolerated. Every girl and woman has the right to be respected, valued and protected.”<sup>1</sup> However, gender based discrimination and violence against women remains one of the longstanding human rights challenges in Nepal. The entrenched discrimination and inequality against women was also recognized as one of the root causes of the ten-year armed conflict of Nepal.<sup>2</sup> There have been numerous national commitments made by Nepal including through insertion of a separate fundamental right against violence against women under the Interim Constitution<sup>3</sup> and ratifying the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW), 1979,<sup>4</sup> thereby obligating itself to act diligently to address discrimination and violence against women. On the contrary, the practical application of the

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1 Excerpt from the Press Statement of U.N. Secretary-General Ban Ki-moon dated 30 December 2012. This was released in response to the brutal rape and murder of a Delhi student two weeks ago, <http://liveactionnews.org/un-secretary-every-girl-and-woman-has-the-right-to-be-respected-valued-and-protected/>, accessed on 30 January 2013.

2 See, Opening the Door to Equality: Access to Justice for Dalits in Nepal, OHCHR Nepal, 2011, [http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2011\\_12\\_07\\_Opening\\_the\\_Door\\_to\\_Equality\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2011_12_07_Opening_the_Door_to_Equality_E.pdf), accessed on 25 January 2013.

3 Interim Constitution of Nepal 2063, article 20 reads: “1) No woman shall be discriminated against in any way on the basis of gender; 2) Every woman shall have right to reproductive health and other reproductive rights; 3) No physical mental or other forms of violence shall be inflicted on any woman and such an act shall be punishable by law

4 Since 1991, Nepal is a party to the Convention.

provisions of human rights is quite a different matter. Recent reports reveal that discrimination and violence against women is not declining; rather, it has been a rising trend in Nepal.<sup>5</sup> For most population of women, freedom from discrimination and violence remain significantly limited to the text of the constitution, human rights treaties and legislations.

Most importantly, culture of impunity is ever more becoming one of the features of post-conflict Nepali society. It prevails not only in relation to serious crimes and violations committed in the course of armed conflict but also ongoing violations and crimes including rape. Not prosecuting for perpetrators of gender-based violence is the norm in Nepal. Women rarely file complaints regarding violence due to a number of discouragements such as fear of stigma, lack of resources or legal aids, lack of safe shelter alternatives and other support services. The dependence on male relatives to access the legal system and fear of repercussions are other disincentives.<sup>6</sup> Even if crimes are reported, criminal cases including rape, human trafficking and polygamy where women are the victims are often dropped because of political threat and intimidation.<sup>7</sup> Other problems include denial of registering First Information Report (FIR) and lack of due diligence in investigating and prosecuting crimes against women. It is also linked to longstanding existence of unjust, unfair and unreasonable legal provisions including a provision that prescribe 35 day statute of limitation to prosecute offence of rape.

It appears that the recent highly publicized cases of rape, murder and disappearance of Nepali women have embarked non-partition agitation against the wider issue of violence against women and girls. This movement has been supported by national and international stakeholders including United Nations in Nepal.<sup>8</sup> It is noteworthy that one of the concrete demands chanted by the agitators of this movement (popularly known as “*Occupy Baluwataar*”)<sup>9</sup> is linked to the existence of 35 day statutory limitation clause, which is deemed to have contributed as a measure of *de facto* impunity for perpetrator of rape. The protesters have been demanding for

5 Facts on Violence against Women in Nepal,” WOREC Nepal, 2012, <http://www.worecnepal.org/sites/default/files/VAW-Fact-Sheet-2012-WOREC.pdf>, accessed on 29 January 2013.

6 “Nepal: The Search for Justice, 2013”, Amnesty International, Amnesty International Publications, United Kingdom, 2013, page [http://reliefweb.int/sites/reliefweb.int/files/resources/full%20report\\_182.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/full%20report_182.pdf), accessed on 30 January 2013.

7 Integrated or isolated? How state and non-state justice systems work for justice in Nepal [District assessment report], International Alert, May 2012, Page 51. <http://www.international-alert.org/sites/default/files/publications/201210NepalDistrictAssessment.pdf>, accessed on 28 January 2013.

8 UN Nepal Press Release, 15 January 2013, [http://un.org.np/sites/default/files/2013-01-15-UN%20Nepal%20statement%20on%20violence%20against%20women%20and%20girls%20in%20Nepal%20\(in%20English\)\\_0.pdf](http://un.org.np/sites/default/files/2013-01-15-UN%20Nepal%20statement%20on%20violence%20against%20women%20and%20girls%20in%20Nepal%20(in%20English)_0.pdf), accessed on 30 January 2013.

9 See, Press Release [15 January 2013] issued by a few volunteers of “Occupy Baluwataar” movement, [http://meroandolan.com/wp-content/uploads/2013/01/PRESS-RELEASE\\_15January2013.pdf](http://meroandolan.com/wp-content/uploads/2013/01/PRESS-RELEASE_15January2013.pdf), accessed 30 January 2013.

abolishment of this restrictive clause and thereby paving the way for access to justice to the victim of rape.

Against the stated backdrop, the article provides an appraisal of how the statutory limitation clause is contributing to impunity for rape, what have been concerns at national as well as international level over this particular legal provision and efforts made towards addressing this problem. This also discusses the seriousness of offence of rape in light of national and international law and jurisprudence. The article finally puts forwards suggestions in terms of addressing legal challenges and thereby paving the way for replacing the ongoing culture of impunity with a culture of accountability.

## 2. Crime of Rape under Nepali Law

The rape of women is a serious criminal offence in Nepal. By definition, rape does not apply to males under Nepali law. As defined under Nepali law, there are two elements of rape<sup>10</sup>- act of sexual intercourse, including the slight penetration of the vagina;<sup>11</sup> and lack of the victim's consent, whereby consent cannot be obtained through the use of fear, intimidation, threat or coercion, impersonation, abduction or force, or the victim is under 16 years of age.<sup>12</sup> The perpetration of crime of rape is subject to wide range of penalties depending upon the age of the victim of rape as the maximum range is 15 years imprisonment.<sup>13</sup> If specific circumstances exist, then the punishment for rape is higher: if a person participates in a "gang rape" of a woman, then he will receive an additional punishment of five years;<sup>14</sup> if a person rapes a pregnant, paralyzed or disabled woman, then he will receive an additional punishment of five years;<sup>15</sup> if a man commits rape of a woman knowing that he is HIV positive, he will receive an additional one year of imprisonment;<sup>16</sup> if any person commits or aids in committing "unnatural intercourse" with a female minor, he is liable up to an additional one year of imprisonment;<sup>17</sup> if any person commits or aids

10 Country Code, Chapter on Rape, Section 1.

11 Country Code, Chapter on Rape, Section 1(c).

12 Country Code, Chapter on Rape, Section 1(a).

13 Country Code, Chapter on Rape, Section 3. (Ten to fifteen year imprisonment if the victim is a girl who is below the age of 10 years; eight to 12 years if the victim is a girl who is above the age of 10 and below 14 years; six to 10 years if the victim is a girl who is above the age of 14 and below 16 years; five to eight years if the victim is a girl who is above the age of 16 and below 20 years; and five to seven years if the victim is a woman who is 20 years or older)

14 Country Code, Chapter on Rape, Section 3A. It should be noted that a "gang" is not defined in the Country Code.

15 Country Code, Chapter on Rape, Section 3A.

16 Country Code, Chapter on Rape, Section 3B.

17 Country Code, Chapter on Rape, Section 9A, prohibits "unnatural intercourse with any minor." In Nepalese dictionaries, "unnatural intercourse" is defined as any kind of intercourse between persons of the same sex as well as anal sex, oral sex. This definition is applied in the Nepalese courts as binding. The term "minor" is not defined in the Country Code but in the Child Labour (Prohibition and Regularization) Act, Section 2(a) as a girl or boy who has not completed the age of 16 years.

in committing “unnatural intercourse” with a minor, he is liable up to additional one year of imprisonment.<sup>18</sup> Similar to murder case, a self-defense rule does apply to the crime of rape. A rape victim enjoys immunity from criminal accountability in case she exercises her right to self-defense and that results in a death of the perpetrator.<sup>19</sup> Under Nepali legal tradition, the crime of rape is also considered to be a crime involving moral turpitude. From criminal procedure perspective, the crime of rape falls under the “state cases categories” under Schedule 1 of the State Cases Act, 1991. These all legal facts signify that rape is a gravest crime under Nepali legal system.

In addition, it is also important to note that the Supreme Court of Nepal explicitly described the gravity of crime of rape in its marital rape judgment.<sup>20</sup> Justice Laxman Aryal went on to say that:

*“Rape is one of the major offences amongst criminal offences of the serious nature. Rape is an inhuman act to be committed violating women’s human rights and the act directly causing serious impact on individual liberty and right to self-determination of victim woman. Not only it causes adverse impact on physical, mental, family and spiritual life of victim women, it also adversely affects on self-respect and existence of women. This offence is not only against victim women, but also against the society as a whole. Murder destroys physical being of a person but the offence of rape destroys physical, mental and spiritual position of victim women. Thus, it is a heinous crime.”<sup>21</sup>*

18 Since there are no other provisions in the Country Code’s Chapter on Rape that refer to male victims, the perpetrator of sexual abuse against a male minor is liable to only one year imprisonment, not one year in addition to other penalties.

19 Section 8 of the Country Code’s Chapter on Rape reads, “In cases where a person with intention to attempt rape assaults, rounds up (*chhekthun*), ties up (*bandchhand*) or uses force (*gorjulum*) by any other means to a victim and it is not possible to save the chastity (*dharma*) for the victim upon rescuing herself from the offender by shouting, requesting for the help or by any other means immediately, or where the victim is in a situation that if she does not do anything with her idea (*akkal*) or power (*barkat*) she may not be able to save her chastity due to serious fear or threat so created over there before the commission of rape or even after the commission of rape where she could do nothing due to lack of her power or force immediately, if such a victim, out of anger of such act, strikes a weapon, stick (*latho*) or stone at the place of commission of rape immediately or within one hour upon pursuing the offender from such place and the offender dies over there, such an act shall not be deemed to be an offence. In case the victim kills the offender after one hour, she shall be liable to a fine of up to Five Thousand Rupees or imprisonment for a term not exceeding Ten years.” (*emphasis added*)

20 *Meera Dhungana for FWLD v. HMG, Ministry of Law and Justice*, Writ No. 55 of the year 2058 BS [2001-2002].

21 *Ibid.*



This interpretation appears in line with the interpretation adopted by the Supreme Court of India in its numerous decisions.<sup>22</sup> Subsequently, Justice Kalyan Shrestha also expresses the understanding similar to that of Justice Aryal about the gravity of rape in the *Statutory Limitation Case*.<sup>23</sup>

### 3. Crime of Rape under International Legal Regime

The crime of rape has been prevalent regardless of the contexts, whether during the armed conflict or in peace time. Under three branches of international law - international human rights law, international humanitarian law and international criminal law- rape and other sexual violence are condemned and prohibited. It is also noteworthy that the ICRC considers that the prohibition of rape during conflict has attained the status of customary international law. It does not matter whether state is a party to the Geneva Conventions. The crime of rape is a punishable crime.<sup>24</sup> International law also obligates the states to ensure protection from rape, whether it is committed by a state agent or by an individual. Though prohibited by international law for considerably a long time, the efforts towards developing a concrete definition of the offence of rape has been a recent phenomenon to international law. As defined by Rome Statute of International Criminal Court, 1998,<sup>25</sup> elements of crime of rape in non-international armed conflicts are as follows:

- The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
- The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of

22 See *Delhi Domestic Working Women's Forum v. Union of India and Other* [1995]1 SCC 14, [Rape is an experience which shakes the foundation of the lives of the victim. For many it's effect is a long term one, impairing their capacity for personal relationship altering their behavior and values and generating endless fear]; *Bodhisattawa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490, [Rape is thus not only a crime against person of a women (victim), it is a crime against entire society, it destroys the entire psychology of a women and pushes her into deep emotional crisis. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt; Rape is therefore the most hated crime. It is a crime against basic human rights and is also violate of the victims most cherished of the fundamental rights, namely the Right to life contained in Article 21]; *State of Punjab v. Gurmit Singh and Other* [1996]2 SCC 384, [It is irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. A rapist not only violets the victims privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault- it is often destructive of the whole personality of victim. A murders destroys the physical body of the victim, a rapist degrades the very soul of the helpless female].

23 See *Infra* Note 51.

24 International Committee of Red Cross, *Customary International Humanitarian Law*, rule 93

25 See Rome Statute, article 8 [2][e][vi]-1. Other provisions of the the Rome Statute that refer to specified circumstances, under which sexual violence constitutes an international crime, are *articles 7 (1) (g) and 8 (2) (b) (xxii)*.

power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

- The conduct took place in the context of and was associated with an armed conflict not of an international character.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The contribution of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) in regard to crime of rape in conflict situations is commendable. In *Prosecutor v. Jean-Paul Akayesu*<sup>26</sup>, a trial chamber of the ICTR, for the first time, recognized rape as an act of genocide and a crime against humanity. In another landmark ruling, *Prosecutor v. Kunarac*<sup>27</sup>, a trial chamber of ICTY ruled that, under some circumstances, crimes of sexual violence constitute the crime against humanity of “enslavement”. In *Prosecutor v. Kvo*, a trial chamber of the ICTY also clarified the circumstances in which sexual violence constitutes the crime against humanity of “persecution.”

In reaching the conclusion that rape constitutes a war crime, these *ad hoc* criminal tribunals have also employed the Common Article 3 prohibition of “outrages upon personal dignity” as the basis for a rape conviction. Together with the development of stated jurisprudence, a number of perpetrators of international crimes of rape have been successfully prosecuted by ICTR and ICTY in the respective cases. In 1998, the ICTR convicted Akayesu<sup>28</sup> for the crime of genocide and crimes against humanity for his encouragement of the rape of Tutsi women in Rwanda.<sup>29</sup> On February 22, 2001, ICTY found three Bosnian Serb soldiers—Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic- guilty of committing crimes against humanity including torture and rape.<sup>30</sup> The verdict was applauded by the human rights organizations worldwide because wartime rape was unequivocally defined as both a crime against humanity and a war crime. Furthermore, it expanded the definition of slavery as a crime against humanity to include sexual slavery; previously, forced labor was the only type of slavery to be viewed as a crime against humanity.<sup>31</sup>

26 *Prosecutor v. Jean Paul Akayesu* (ICTR-96-4-T). 14

27 *Prosecutor v Kunarac and Others* (IT-96-23 and IT-96-23/1) ICTY.

28 Jean-Paul Akayesu, an ethnic Hutu and the mayor of Taba, a small Rwandan village, knowingly allowed the mass rape of hundreds of Tutsi women in 1994, even though as mayor he controlled the police and could have prevented the attacks.

29 The Appeals Chamber upheld that conviction in 2001

30 *Supra* note, 28.

31 For further information about the international jurisprudence pertaining to rape, see *James R. McHenry III, The Prosecution of Rape Under International Law: Justice That Is Long Overdue*, VANDERBILT JOURNAL OF TRANSNATIONAL LAW [Vol. 35:1269], 2002.

Subsequent development at the UN level is also mesmerizing. For instance, the UN Security Council, through its resolution no. 1820,<sup>32</sup> explicitly clarified that “rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide.” Stressing the need for “the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes,” the resolution also calls upon member states to comply with their obligations to prosecute those responsible for such crimes, and emphasizes “the importance of ending impunity for such acts.”<sup>33</sup> It is also important to note that, at present, crimes under international law such as torture, enforced disappearance, war crimes, crimes against humanity and genocide are not defined as criminal offences under Nepali law even though Nepal has acceded to the relevant international treaties which require their criminalization.<sup>34</sup> Pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the four Geneva Conventions of 1949 and international customary law [general practice accepted as law], Nepal is required to enact legislation to ensure that these offences as defined by these Conventions and international customary law, are punishable under domestic laws.<sup>35</sup>

Not only inadmissibility of any *de facto* or *de jure* measure of amnesty for international crime of rape, no statutory limitation is applied for prosecution of such crime. If rape is committed as a part of genocide, crime against humanity and war crimes, a person is prosecuted at any time after the alleged commission of

32 Adopted by the Security Council at its 5916th meeting, on 19 June 2008.

33 *Id.*, art. 4.

34 These include the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Nepal acceded to the Genocide Convention in January 1969 and to CAT in May 1991. In February 1964, Nepal had also ratified the four Geneva Conventions of 1949 [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War and Geneva Convention relative to the Protection of Civilian Persons in Time of War]. These conventions, in addition to the 161 “rules” identified and published by the International Committee of the Red Cross (ICRC, Customary International Law, Volume I: Rules (2005)) as constituting the norms of customary international humanitarian law, apply in Nepal, thus requiring the criminalization of these offences under its domestic laws. Any breach of these provisions is considered to be a war crime under international law. Customary international law “... consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.” (Shabtai Rosenne, *Practice and Methods of International Law* 55 (1984)). Under customary international law, Nepal is also obligated to prosecute crimes against humanity (see, among others, the Preamble of 1907 Hague Convention and the Charter of the International Military Tribunal at Nuremberg, 1945).

35 See Genocide Convention, Article 5, CAT, Article 4 and the four Geneva Conventions. Nepal's Treaty Act, Article 9, states that the provisions of any treaty which Nepal has ratified, acceded, accepted or approved trump any incompatible or contradictory provisions in its domestic law.

the criminal offence.<sup>36</sup> The rationale behind the prohibition on statutory limitation for such crimes is that the application of any statutory limitation for “the gravest crimes under international law” prevents their prosecution, which is an important element in preventing their future perpetration and in protecting human rights and fundamental freedoms.

#### 4. Section 11 of Chapter on Rape of Country Code: A Serious Flaw

The Section 11 of Country Code’s Chapter on Rape provides “If a suit on the matter of rape is not filed within 35 days from the date of the cause of action, the suit cannot be entertained.” If the prosecutor does not file a charge-sheet within the specified limitation, this section prevents the charge-sheet from being filed with the court, and the prosecution. In addition, there is a general provision in the Country Code<sup>37</sup> which states that any petition which is lodged after the specified limitation shall not be entertained.<sup>38</sup>

Post 1990 Constitution, the Country Code was massively amended to harmonize with right to gender equality guaranteed under the Constitution and international human rights instruments including CEDAW. Particularly, the 11th Amendment to the Country Code and an Amendment Act on Gender Equality have brought significant reform in the Country Code on gender perspective. However, unfortunately, Section 11 is still prevailing and have continued to date, and contributed in perpetuating *de facto* impunity for perpetrators of rape regardless of the seriousness of crime. By application of this provision, rapists can walk free and without fear of punishment after elapse of 35 day.

The short limitation does not commensurate with the seriousness of the crime. It results in extinguishing legitimate claims of victims by removing their ability to bring criminal actions. This should also be assessed in view of the socio-economic, cultural and geographical context of Nepal. First of all, most women of Nepal are unaware of their rights. Even if they are aware, they are not in a position to report a rape in time for numerous reasons, including social stigma and fear of re-victimization. Even if an incident is reported to the police within 35 days, it is very difficult for police

36 This approach comes from the Rome Statute of International Criminal Court (article 29) and many criminal codes, all of which exclude limitation period for these particular criminal offences. This is also consistent with the Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1970) and the European Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. See, Model Criminal Code, article 11.

37 See, Country Code’s Chapter on Court Proceedings; Section 39.

38 However, there is an exception that the Court shall ask whether there were genuine legal reasons for not being able to lodge case within the specified time-limit. If such reasons exist, that must be furnished within 15 days. If reasons submitted to the court are found genuine, the court shall register the charge sheet.

and prosecutors to complete all necessary criminal investigation process and file a charge-sheet within the given timeframe. The cumulative effect of all these factors is impunity for those responsible. What such a culture of impunity does is breed more instances of rape.<sup>39</sup>

The comparative state practices do not support this provision. Generally, under domestic criminal legislation in many states, the more serious the criminal offence, the more time is granted to prosecute a person liable for the crime. As stated by OHCHR-Nepal, in many countries the statute of limitation for rape is 10-15 year from the time of the commission of the offence; this includes Sweden and New Zealand. Moreover, in France and in a few U.S. states, there is no statute of limitation for rape. In India, there is no specific statute of limitation to file cases of rape. However, court interpretation provides that the cases should be filed “within a reasonable period of time<sup>40</sup>” and therefore the time frame is left to judicial interpretation. There is no statute of limitation for criminal offences in Bangladesh.<sup>41</sup> The need for a state to ensure long statutory limitation for more serious offences is also recognized in a number of international conventions, such as the United Nations Convention against Transnational Organized Crime<sup>42</sup>, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>43</sup>; and the United Nations Convention against Corruption.<sup>44</sup>

Model Criminal Code<sup>45</sup>, which was produced as a part of the assistance to criminal justice reform of the post conflict countries, recommends for the range of statutory limitation periods following a study of the comparative provisions on statutory limitations under the national jurisdictions and the international treaties. As provided by the article 9 of the Model Criminal Code, following are the range of statutory limitations:

39 See, Making Law Work, Republica Daily [10 February 2013]. Available at: [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=49686](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=49686)

40 See OHCHR-Nepal Press Release – 7 March 2008 [http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202008/MAR2008/2008\\_03\\_07\\_HCR\\_LimitDaysonFilingRape\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202008/MAR2008/2008_03_07_HCR_LimitDaysonFilingRape_E.pdf)

41 *Ibid.*

42 Article 11[5] reads, “Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.” [Emphasis added]

43 Article 3[8] reads, “Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.” [Emphasis added]

44 Article 29 reads, “Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.” [Emphasis added]

45 See, Vivienne O'Connor & Colette Rausch, Model Codes for Post Conflict Criminal Justice, Model Vol 1, Model Criminal Code, 1<sup>st</sup> ed., USIPP, Washington D.C., 2007, P. 56-60

- a) thirty years in case of a criminal offence for which a maximum penalty of thirty years or life imprisonment is prescribed;
- b) twenty five years in the case of a criminal offence for which a maximum penalty of twenty years or life imprisonment is prescribed;
- c) twenty years in the case of a criminal offence for which a maximum penalty of fifteen years is prescribed;
- d) fifteen years in the case of a criminal offence for which a maximum penalty of ten years is prescribed; and
- e) ten years in the case of a criminal offence for which a maximum penalty of five years is prescribed;

If the article 9 of the Model Criminal Code is followed, there must be twenty year statutory limitation instead of 35 day as maximum range of imprisonment for rape prescribed under Country Code is 15 years. Even the penalties go higher in certain circumstances that were discussed above. The limitation periods are generally fixed and they begin to run from the day on which the crime is committed.<sup>46</sup> However, if a crime was committed against a person when the victim was a child, the statute of limitations does not begin to run until the person reaches the age of eighteen years.<sup>47</sup> This is also called as doctrine of tolling. Statutory limitation period is tolled when one of the parties is under a legal disability—the lack of legal capacity to do an act—at the time the cause of action accrues. A child or a person with a mental illness is regarded as being incapable of instituting a legal action on his/her behalf. For instance, once a child reaches the age of majority, the counting of the limitation period will be resumed. The rationale behind this rule is that the basic limitation period should not run while a person who has a claim is presumed to be incapable of proceeding earlier because of his/her dependence on or intimate relationship with the defendant.

The Model Criminal Code reveals that, “The ‘freezing’ of the statute of limitations with respect to a criminal offence committed against a person under the age of eighteen is a common feature of domestic criminal law in many states.” Except the “age of minority” ground, the Code also prescribes four other grounds on which the statutory limitation period is suspended temporarily, which has become universal feature of states. Such recognized grounds for suspension or tolling of the statutory limitation include: when the prosecutor has formally suspended the investigation, when the suspect or the accused has evaded the administration of justice, when a request to obtain evidence located in a foreign jurisdiction is pending, or when there exists other valid grounds that bar the prosecution of the criminal offence.<sup>48</sup> Evading the administration of justice means that a person has left his or her home and has

46 Id, article 12[1].

47 Id, article 12[2].

48 See, *Supra* note 46.

concealed himself or herself to avoid punishment. The person doesn't have to leave the jurisdiction or the territory in order to evade justice. It is also suspended on the ground that the prosecution of a person is impossible for a period of time because he or she possesses certain immunities or other privileges that preclude it.<sup>49</sup>

## 5. Call for Action

Concerns have been raised over the flawed provision at different levels. Since the statutory limitation clause was proven as a big hurdle in accessing justice, Section 11 of the Chapter on Rape of the Country Code was put into the judicial scrutiny through public interest litigation (PIL) in 2004.<sup>50</sup> The Supreme Court was called upon by way of filing a PIL under article 88(2) of the 1990 Constitution. Though the constitutionality of the provision could have been challenged, the petitioners chose to call upon the court to direct the Government to secure amendment of the provision in line with the international human rights obligations and the Constitution.

As contended by the petitioners, the Supreme Court agreed on the fact that the said provision stands as a barrier in ensuring justice to the victim of rape due to extreme inadequacy of the statutory limitation in Section 11 of the Chapter on Rape of the Country Code. Asserting its power to make necessary judicial intervention in order to get the flaws in the criminal law fixed, a directive order was issued to the respondent government to extend the statutory limitation by amending the law. In the meantime, the Court also directed the respondents to bear in mind the psychosocial aspects of rape victim, the reasonable time needed for investigation, state of access to justice and the gravity of offence so as to ensure effective investigation and prosecution in the crime of rape.<sup>51</sup>

This is not the only intervention that the Supreme Court did in this regard. This issue was also brought to the Supreme Court in *Indira Basnet v. Prem Bahadur Shrestha*<sup>52</sup> too. Referring to its previous decision in *Sapana Pradhan Malla*, the Supreme Court again directed the government to amend the questioned provision to relax the statutory limitation to the crime of rape. This was followed by the recommendations of the Office of the Attorney General of Nepal in its annual reports, which repeatedly pointed out that the Section 11 of the Chapter on Rape is a barrier for effective prosecution of crime of rape. For instance, Annual Report for the fiscal years 2065/66 BS also underscored this problem and called for the relaxation of the provision through introducing the amendment.<sup>53</sup>

49 *Ibid.*

50 *Sapana Pradhan Malla for FWLD v. Government of Nepal*, Decided on 2065-03-27, WP number 3393 of 2061.

51 *Ibid.*, Para 13.

52 Writ Petition no 0402 of the Year 2063, decided on 2065-10-27)

53 Annual Report of the Attorney General of Nepal for the fiscal years 2065/66, Pp 64-67.

The National Women Commission (NWC) has also pointed out this in its recent report.<sup>54</sup> The NWC stated “the statute of limitation for filing a charge-sheet remains 35 days from the date of the commission of crime, which is largely inadequate taking into consideration the gravity of offence. The Government of Nepal has yet to review and extend the statute of limitation although the Supreme Court issued a directive order twice.”

Not only at the national level, it has been strongly raised at the international level in view of Nepal's international treaty obligation. Most importantly, CEDAW committee has expressed concern over this issue in its Concluding Observations. As stated by the Committee<sup>55</sup>, the statute of limitation for filing complaints relating to rape and other sexual offences could obstruct access to justice for women victim of rape and other sexual offences during the conflict. Similarly, the Committee strongly recommended the Government to “take immediate measure to abolish the statute of limitation to file cases of sexual violence to ensure women's effective access to the court in the crime of rape and other sexual offences”.<sup>56</sup> The recommendation made by the Committee in view of the duties set out under CEDAW is that:

*“States should take all legal and other measures that are necessary to provide women with effective protection against gender based violence, including effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence.”<sup>57</sup>*

In addition, UN High Commissioner for Human Rights has also pinpointed this issue in her Nepal Conflict Report 2012. According to the report, the 35-day statute

54 Nepal's Implementation Status of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Independent Report to supplement the Combined 4th and 5th Periodic Report Submitted to the CEDAW Committee by the Government of Nepal, National Women Commission, 2011, pp 8-10, <http://www.nwc.gov.np/uploads/Indipendent%20Report%20on%20CEDAW%20Implementation%20status%20of%20Nepal.pdf>, accessed on 29 January 2013.

55 CEDAW, Concluding Observations: Nepal, CEDAW/C/NEPAL/CO/4-5, Para 20 and para 35.

56 *Ibid*, Para 20(a).

57 Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 9. See also Annex to General Assembly resolution 52/86, Crime prevention and criminal justice measures to eliminate violence against women. Through this resolution, the UN General Assembly urges the states: Revise their laws to ensure that all acts of violence against women are prohibited [para. 6]; Revise their criminal procedure to ensure that the primary responsibility for initiating prosecution lies with prosecution authorities, that police can enter premises and conduct arrests in cases of violence against women, that measures are available to facilitate the testimony of victims, that evidence of prior acts of violence is considered during court proceedings, and that courts have the authority to issue protection and restraining orders [para. 7]; Ensure that acts of violence are responded to and that police procedures take into account the need for the safety of the victim [para. 8(c)]; Ensure that sentencing policies hold offenders accountable, take into account their impact on victims and are comparable to those for other violent crimes [para. 9(a)]; Adopt measures to protect the safety of victims and witnesses before, during and after criminal proceedings [para. 9(h)]; Provide for training of police and criminal justice officials [para. 12(b)].



of limitation is too short, especially where a victim is often too traumatized and frightened to come forward within such a short period of time and this has created obstacles to securing justice.<sup>58</sup> Marking International Women's Day of 2008 through issuing a press statement, the OHCHR-Nepal had earlier also urged to end to 35-day limit for filing rape charges. In its statement, OHCHR-Nepal reveals the fact that in many cases, a complaint against rape is not filed within 35 days after the crime is committed due to a number of reasons including that many women are not ready to talk about the crime that has been committed against them until some time has passed. Moreover, OHCHR stated "the statutory limit is often used as an excuse by police for not filing a complaint in cases of rape. Even when a complaint is lodged, the restrictive statute gives very little time for investigation [to the police] as well as for filing of the charge sheet at the Court, thereby undermining the chances of a successful prosecution."

Last but not least, continued impunity has also attracted the jurisdiction of UN Human Rights Committee (HRC). *Purna Maya v. Nepal* (registered 19 December 2012)<sup>59</sup> is a recent example. Referring to Section 11, *Purna Maya* (name changed)'s case of rape and torture during the conflict was not taken up by the government due to 35 day limitation clause, and consequently she has approached the HRC with the hope of securing justice.<sup>60</sup> This clearly signifies the repercussion of such an unjust provision.

58 See, OHCHR's Nepal Conflict Report 2012, An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006, Page 166

59 Communication filed with the Committee on 19 December 2012, <http://www.redress.org/case-docket/purna-maya-v-nepal>, accessed 1 February 2013.

60 See *Ibid.* This case concerns the arbitrary detention and torture of a woman by Nepali soldiers in 2004, during the period of armed conflict between State and Maoist forces. *Purna Maya* (her name has been changed to protect her privacy) ran a tea shop. Over a number of weeks, she was subjected to a series of threats from soldiers who were looking for her estranged husband. Among other things she was called a whore and told that if her husband did not present himself to the authorities she would suffer consequences. On 23 November 2004 *Purna Maya* was dragged out of bed by soldiers and taken into custody. At a nearby army barracks she was blindfolded, interrogated about her husband's activities, punched and kicked, told to drink urine, bitten, and raped repeatedly by at least four different soldiers. She lost consciousness, and was later dumped on the street outside the barracks. Despite reporting the crimes to the authorities, she has not had her case investigated, no person has been prosecuted, and she has not received any reparation. In 2011 her lawyers, Advocacy Forum Nepal, and local women's organizations attempted to file a criminal complaint with police on her behalf. However, the police refused to register the complaint because the law imposes a 35 day limit on filing complaints of rape. An appeal to the Chief District Officer and then further to the Supreme Court was not successful. Advocacy Forum and REDRESS are representing *Purna Maya* before the UN Human Rights Committee, alleging that Nepal is responsible for serious violations of her human rights. The communication examines the position of women in Nepalese society, and the complete inaction of the government on sexual violence cases from the conflict. It alleges that *Purna Maya* was a victim of torture, arbitrary detention, inhuman treatment, and discrimination, contrary to the International Covenant on Civil and Political Rights. In particular it examines the nature of rape as a form of torture, and the positive obligations states have to respond to it, and argues that the limitation period for filing rape complaints is contrary to Nepal's obligations under the Covenant.

## 6. Concluding Observations

By virtue of application of Section 11, the right of victim to effective judicial remedy against crime of rape guaranteed under the Interim Constitution and international human rights treaties including CEDAW and the Convention on the Rights of the Child (CRC) are suspended, eclipsed and derogated. As this doesn't commensurate with gravity of crime, there are reasons for urgent action from the State to make sure that such restriction on access to judicial remedy is lifted and fundamental right to access judiciary has been protected.<sup>61</sup>

Though the Government has recently taken a number of decisions in response to the ongoing movement against VAW, this key issue seems to have been forgotten. If the Government thinks that it has fulfilled its duty by incorporating a provision in the Draft Criminal Code that proposes for one year statutory limitation period to rape,<sup>62</sup> it is injudicious. The proposal for one year is definitely an improvement to the law in force but that does not correspond to the seriousness of the crime. It also fails to provide for suspension of such limitation periods for specific reasons including if a crime of rape was committed against a person who was a child, evasion of the administration of justice by the suspect or the accused, pending request to obtain evidence located in a foreign court and prevention of prosecution due to other valid grounds. There must be no further delay in responding this demand.

Since it is a desperate need to rectify this legal flaw, judicious solutions need to be explored diligently. Adoption of a constructive interpretation of Section 11 in harmonious with Section 40 of the Chapter on Court Proceedings of the Country Code is an option. Section 40 reads, "If a person who has to file a suit within the statute of limitation has not completed the age of sixteen years and the suit is filed until the limitation from the date on which the person has completed the age of sixteen years, the suit shall be entertained."

By virtue of this, there exists a "doctrine of tolling" that allows the suspension of the statute of limitation until the injured person attains the age of majority. This clause can be instrumental in bringing justice to underage victims. This is also significant in view of the fact that rapists frequently target minors. Hence, there is no reason for Criminal Justice System of Nepal to deny application of Section 40 while investigating and prosecuting rape cases. Such an interpretation will also give

61 See *Moise v Greater Germiston Transitional Council Minister of Justice and Constitutional Development*, 2001 (4) SA 491 (CC). Recognizing the victim's fundamental right to access courts, the Constitutional Court of South Africa highlighted, "*untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom. In the absence of such right the justiciability of the rights enshrined in the Bill of Rights would be defective; and absent true justiciability, individual rights may become illusory.*"

62 See Proposed Draft Criminal Code, 2067[B.S], article 229.

effect to the recognized “principle of best interest of the child” entrenched in the CRC to which Nepal is a party<sup>63</sup>. Under article 33(m) of the Interim Constitution 2063, it is also imperative for all state apparatuses to effectively implement international treaties enforceable in Nepal.

In order to fully rectify this injudicious provision and thereby pave the way for access to justice, consideration might also be given to go for an ordinance under article 88 of the Interim Constitution<sup>64</sup> given the fact that there is continued uncertainty of the Legislature-Parliament. It is not just, fair and reasonable for the government to consider such an issue of right to judicial remedy for the victim of rape on equal footing to other issues for legal reform. Such a Ordinance can provide three things: non-applicability of statutory limitation to serious international crimes (including rape when it is committed as part of such crime), statute of limitation period commensurate with the seriousness of rape (beyond the context of international crimes), and suspension of the statute of limitation period on the basis of age of minority and other legal disabilities including serious mental health problem.

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63 As provided by the article 3 (1) of the Child Rights Convention, “best interests of the child” must be a primary consideration “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. It is also notable that Article 19.1 of the CRC also requires States to take all appropriate measures to protect the child from all forms of abuse, neglect, or maltreatment while in the care of parents.

64 Article 88 (1) of the Interim Constitution reads, “If at any time, except when the Legislative-Parliament is in session, the President is satisfied that circumstances exist which render it necessary to take immediate action, without prejudicing the provisions set out in this Constitution, the President on the recommendations of the Council of Ministers, may promulgate any Ordinance it deems necessary.”

# Access to Justice for the Rape Victims: A Brief Study in Nepali Perspectives

Rajesh K Katuwal\*

## Abstract

*In this article, the author defines access to justice with support of concepts by various sources and describes three prerequisite for ensuring access to justice as substantive legal framework, institutional infrastructure and knowledge and attitude of the concerned stakeholders. It reviews the national and international legal provisions that ensure access to justice for the victims of rape and assesses the role of judiciary from that perspective. He analyses the provisions relating to ensuring access to justice during three phases; investigation, prosecution and adjudication and their application in practice; and concludes by recommending the need for the review of the existing law and institutional mechanism to make it more victim-friendly.*

## 1. Introduction

Crime knows no caste, gender, religion, ethnic group, age, rich and/or poor. Any individual in the society may be the victim of crime. It is settled in the criminological discourse that the society without crime could not be imagined. More or less, in every society, crimes exist. Therefore, it is to set up appropriate mechanisms to control and combat such anti-social activities so that social protection could be assured. Crime affects victims many ways. Particularly, sexual offence rather than other criminal offences affect victims harshly not only physically but also mentally. Moreover, rape is such a heinous crime, which has incurable impact to the entire life of victim. Therefore, legal system must be courteous and sincere to protect the victims of rape from being re-victimization and make their rest of the life to reverential care. Doubtlessly, it is the duty of every democratic state to make necessary provisions for the protection of the victims of rape when they are encountered with such hatred crime. At first, state is obliged to provide access to justice to the victims. All the provisions and arrangements designed to protect their rights become worthless, if access to justice to the victims of rape could not be ensured and the perpetrators could not be brought into justice. It will be a mere glittering stone for the victim having no meaning for them. This short article attempts to assess the legal provisions related to access to justice for rape victims in Nepal and their implementation status along with some specific recommendations.

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## 2. Meaning of Access to Justice

Access to justice means access to fair, respectful and efficient legal process, either through judicial administration or other public process, resulting just and adequate outcome. Further, Justice Sector Strategic Plan of United Nation Development Program has defined access to justice as the rights of individuals and groups to obtain a quick, effective and fair response to protect their rights prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable.<sup>1</sup> It indicates three prerequisite to provide proper access to justice to the victims. They are as follows:

- *Substantive Legal and Rights Framework:* It includes the establishment and/or existence of an adequate and appropriate national legal framework, which guarantees citizens certain rights, as represented by both domestic and international legal documents.
- *Institution, Human Resources and Infrastructure:* It implies ensuring the necessary physical 'supply' and existence of justice institutions including human resources, infrastructure and the practical functioning of such institutions, to effectively uphold guaranteed rights, and
- *Knowledge and Attitude:* It ensures the socializing laws and increasing knowledge and understanding of existing legal rights and relevant justice institutions, and building the concomitant cultural attitude underpinning demand for them.

## 3. Major International Instruments on Access to Justice

The Universal Declaration of Human Rights (UDHR), 1948 is the first international document committed to protect inherent dignity and equality and inalienable rights of all human beings, which is considered as foundation of freedom, justice and peace in the world. This holy document strives to establish a comprehensive system for the promotion and protection of human rights. Though, it is a declaration, no state could refrain from ensuring rights conferred on it. In practice, it is as binding as other international documents which are in force in the form of treaty. The UDHR does not directly speak of access to justice as right. However, some of its provisions do keep much concern in providing access to justice as a right. Guarantee against non discrimination<sup>2</sup>, right to life, liberty and security of person,<sup>3</sup> right to equal protection

1 Andrew Harrington, Access to Justice Concept Note, UNDP Justice System Programme, 2011, P. 2

2 Article 2, Universal Declaration of Human Rights, 1948.

3 *Ibid*, Article 3.

of the law,<sup>4</sup> right to an effective remedy by the competent national tribunals,<sup>5</sup> right to a fair and public hearing by an independent and impartial tribunal,<sup>6</sup> and right to privacy<sup>7</sup> are provisions relating to access to justice. These are such rights provided to the individuals, which ultimately safeguard from being prejudiced with any parties to the disputes. These provisions hold the state accountable for providing equal and impartial treatment in legal proceedings thereby compel to make necessary arrangements to promote access to justice for the needy people.

In 1991, Nepal ratified the International Covenant on Civil and Political Rights (ICCPR), 1966. This Covenant was adopted as hard law because the international community felt its necessity to give legal force, which could be enforced and implemented. The ICCPR guarantees rights that are of civil and political nature as have already been conferred by the UDHR in 1948. The right to fair trial conferred by Article 14 of the ICCPR could be regarded as one of the means to protect right to access to justice in the court processes.

For a long time, international community seemed to be reluctant to make arrangements in protecting rights of the victims. Only in 1967, Report of the Presidential Commission on Law Enforcement and Administration of Justice drew attention of international community on protecting rights of the victims because of severe threats posed by organized crime, which is transnational in nature. Then, issues of crime victims have been a major concern at international level.

In 1985, the United Nations showed deep concern by declaring basic principles of rights of the victims. The UN General Assembly adopted Resolution No. 40/30 passed by the Congress of UN held in Melina in 1985. This Resolution appeared as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which outlines international best practices for treatment of crime victims. It recognizes an offender's obligation to make fair restitution to his or her victim, acknowledges that victims are entitled to fair treatment and access to the mechanisms of justice, and generally draws attention to the need for victims' rights in the criminal justice process. By its name, it is a declaration having only a moral value, it was a step taken by United Nations to protect rights of crime victims. This Declaration, for the first time, introduced, ensured and protected rights of crime victims through international mechanism. Among them, access to justice and fair treatment is given first priority. This Declaration also aimed at to implement social, health, economical, educational and specific crime prevention policies to reduce victimization and encourage assistance to victims in distress. It also

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4 *Ibid*, Article 7.

5 *Ibid*, Article 8.

6 *Ibid*, Article10.

7 *Ibid*, Article12.

tends to promote community efforts and public participation in crime prevention. Under the heading of access to justice and fair treatment, right to be treated with compassion and respect for their dignity, right to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible, right to be informed of their rights in redress, right to be informed of their role, scope, timing and progress of the proceeding, right to present views and concerns in proceedings, minimize inconvenience, avoiding unnecessary delay in the disposition of cases and the execution of orders, informal mechanisms for the resolution of disputes be utilized if appropriate are included there.<sup>8</sup>

Similarly, UN has set up Guidelines in 1990 to support the Declaration of Basic Principles basically focusing on the role of prosecutors and training of police officers. The UN Guidelines on the Role of Prosecutors, 1990 has given due responsibility to the prosecutors while performing their duties to consider views and concerns of victims and to ensure that they are informed of their rights. The UN Guidelines for Training of Police Officers, 1990 aims to give users of the manual an understanding of the special responsibility of police to protect victims of crime, abuse of power and human rights violations, to treat them with respect, compassion and care, and to act with due diligence in providing them all available redress. These Guidelines set some essential principles, which are directly related with access to justice.<sup>9</sup>

The Statute of the International Criminal Court, 1998 has also incorporated some provisions relating to victim and witness protection and their participation in trial process.<sup>10</sup> In 2006, the UN has drafted a convention on 14 November 2006 titled United Nations Convention on Justice and Support for Victims of Crime and Abuse of Power so as to make the provisions relating to protection of rights of crime victims legally binding. However, this convention has not brought into force.

#### **4. Domestic Legal Provisions regarding Access to Justice for Rape Victims**

With regard to the domestic legal instruments, Nepal has a few legal provisions to ensure access to justice to the victims. Some provisions are common and equally applied to all victims of crime. However, some special provisions have been adopted for the rape victims to be applied in the investigation, prosecution and adjudication phase to ensure access to justice for them.

8 Articles 4, 5, 6 and 7 of the *UN Declaration of Basic Principle of Justice for Victim of Crime and Abuse of Power*, 1985.

9 High Commissioners for Human Rights, Center for Human Rights, Geneva, Professional Training Series No. 5, Human Rights and Law Enforcement, A Manual on Human Rights Training for the Police, United Nations, New York and Geneva, 1997, p.143& 148, Quoted from: Judges Society, Nepal, Crime-victims Women/Children and Witness Protection Manual, 2065, pp. 85-86.

10 Article, 68 of the Statute of International Criminal Court, 1998.

#### **4.1 Investigation Phase**

Investigation of crime is the foundation in criminal justice system to bring the culprit in the hands of justice as well as to satisfy the victims and to deter potential offenders by punishing the perpetrator. An impartial and comprehensive investigation helps the court to deliver fair justice. Therefore, it would not be wrong to say that investigation plays crucial role in justice delivery process. Fair and impartial investigation could be done if all investigation process is conducive to the victims and victim friendly atmosphere has been guaranteed. For this, accountable investigation system should be at first in the criminal justice system.

Legally, investigation starts when first information report (FIR) is registered in police office. FIR can be registered either by the victim or by a relative of the victim or police themselves who come to know the occurrence of crime. The process of registering FIR has been prescribed in the State Cases Act, 2049 BS.<sup>11</sup> Besides, there are some special provisions related to the investigation of rape as prescribed in Chapter on Rape of the National Code, 2020 BS. In the eleventh amendment to the Code, a distinct provision relating to obtaining statement from rape victim has been incorporated. During the investigation of the crime under this chapter, the section states that the statement of victim shall be taken by a woman police personnel and in case such personnel is not available, statement may be taken by other police personnel in the presence of a woman social worker.<sup>12</sup> This provision provides a conducive environment to the rape victim. The victims may feel free to give statement during investigation. The effective implementation of this provision will facilitate to promote access to justice to the rape victim.

The State Cases Act, 2049, as amended in 2066, has incorporated a provision, which makes an investigation officer more accountable for his/her conduct. This provision helps to bring an investigation officer for a departmental action if he/she intentionally or negligently conducts investigation or fails to give due consideration in collecting evidence during investigation process or misses to include evidence as a result of which the case becomes weak.<sup>13</sup> This provision provides ground to make the criminal justice system more accountable towards the victims.

#### **4.2 Prosecution Phase**

Like investigation, the prosecution is another crucial stage of the criminal justice system. After completion of the investigation, an investigation officer has to send an opinion before prosecutor clearly referring reasons whether the case is filed or not in courtroom. Whatever an opinion is given, the prosecutor has sole authority to

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11 Section 3 of the State Cases Act, 2049.

12 Section 10(a), The Chapter of Rape, *The Muluki Ain, 2020*.

13 *Supra* note 11, Section 34A [2].



decide whether to prosecute or not. While framing charge sheet, the prosecutor has to follow legal requirement as mentioned in the State Cases Act, 2049.<sup>14</sup> Apart from this, there is even not a single provision that insists prosecutor to have consultation with rape victim before framing charge sheet.

The State Cases Act, 2049, as amended in 2066, tries to make prosecutor accountable for his/her prosecution responsibilities. Departmental action could be brought against the prosecutor for his/her malafied prosecution.<sup>15</sup> Indirectly, the provision makes prosecutor accountable to protect the interest of the victim thereby promoting access to justice to the victim during the prosecution phase.

#### **4.3 Adjudication Phase**

There exist a few legislations to ensure access to justice to the rape victim during the adjudication phase. The rape law as well as rules governing court procedures has been amended to cope with upcoming situation. The Eleventh amendment to the National Code [Muluki Ain], 2058 B.S. has brought major change by incorporating in-camera proceedings in the rape case. The section reads: during proceedings of the case under this chapter, concerned lawyer, accused, victim and his/her guardians and those police and court staff permitted by the Presiding Officer of the Court may attend in the Court proceedings.<sup>16</sup> Similarly, the Gender Equality Act, 2063 provides compensation provision considering the physical or mental injury inflicted upon her. The Section further states that in the determination of the compensation, the Court shall take into account the seriousness of offence, loss and injury caused to minor dependants of the victim in case he/she dies.<sup>17</sup>

Likewise, the Gender Equality Act, 2063 has incorporated additional provision to mention amount of compensation in the decision and to make prevention order for stopping transformation of the property after lodging the case. The Section reads: while deciding the case under this chapter, compensation shall be given to the concerned woman by referring the amount of compensation in the decision when the accused found guilty of committing rape. For the purpose of providing compensation under this chapter, the Court shall give prevention order to stop transformation of share including other property of the accused immediately after lodging the case.<sup>18</sup>

Besides these provisions, the District Court Rules, 2052; the Appellate Court Rules, 2048 and the Supreme Court Rules, 2049, in their fourth and sixth amendment respectively, have incorporated in-camera hearing procedures to ensure access to

<sup>14</sup> *Supra* note 11, Section 18.

<sup>15</sup> *Supra* note 11, Section 34A [1].

<sup>16</sup> *Supra* note 12, Section 10 [b].

<sup>17</sup> *Supra* note 12, Section 10.

<sup>18</sup> *Supra* note 12, Section 10[c].

justice and to protect privacy of victims of crime especially children and woman. Similarly, the State Cases Rules, 2055 has also provided some provisions for the travel and daily allowances for the prosecution witnesses.<sup>19</sup> However, this provision still has not been implemented, despite many calls from governmental as well as non-governmental agencies and thereby posing a challenge to the justice delivery system. Above-mentioned statutory provisions are some legal means to ensure access to justice for rape victims.

#### **4.4 Execution Phase**

The execution of court decision is central to the whole criminal justice system. Especially, in rape case, getting compensation without undue delay give relief to the victim. However, the practice is not so. It takes long time to get compensation from the defendant because of victims' involvement is made necessary in execution of court decision. In some cases, the Supreme Court has set up guidelines for execution of court decision so that the compensation could be provided as soon as possible.<sup>20</sup> Except some decision, we have not yet arranged such provision to provide compensation with cost effective way.

### **5. Existing Situation of Application of Law in Practice**

As mentioned above, we have a few legal arrangements to ensure access to justice to the victim of rape in the entire process of criminal justice system. Despite this, we could ensure access to justice for victims, if we properly implement these provisions in practice. There is gap between law and practices. On the one hand, we don't have adequate legislative arrangement in this regard and on the other, we are lacking strict application of existing law. Some of the research conducted in this area unveiled that the application of existing law are not satisfactorily carried out in the investigation and prosecution phase.

Access to Justice and Advocacy of Rights (AJAR Nepal), a non-governmental organization, has conducted research in this area and concludes that behavior of the investigation officer toward victim is not respectful and courteous when victims belong to economically and socially backward section.<sup>21</sup> The research further states that investigation of the rape cases are often carried out by the male police personnel and statement of victims was also taken by male police.<sup>22</sup> However, the law provides to investigate by female police personnel, and if such female investigation officer is not available, only then male investigation officer may undertake the investigation in the presence of a woman social worker.

<sup>19</sup> Rule 15 of the State Cases Rule, 2055.

<sup>20</sup> *HMG vs Swasti Baral*, NKP, [2062], Vol. 47, Num. 11, Decision No. 7626, p. 1425, *Rakesh Kumar Singh v Government of Nepal*, NKP, [2064], Vol. 49, Num. 1, D.N. 7810, p.86.

<sup>21</sup> *Crime Victim and the Perspective towards Justice*, Access to Justice and Advocacy of Rights (AJAR, Nepal), 2063, p. 13.

<sup>22</sup> *Ibid*, p. 14.

The research report further states that the public prosecutors seldom get in touch with the victims in court proceedings.<sup>23</sup> Such a little concern to victim shows that they are not seemed serious while performing their legal duty to inform about proceedings since they are the real representative of the victim. With regards to the presence of victims in pre-trial hearing, the research concluded that right to be informed and participation in the pre-trial proceeding is not duly maintained.<sup>24</sup> Similarly, with regards to the hearing, the research concluded that there was mixed experience. In some cases, the presiding judge did not react when accused witness blames to the victims' mother. Similarly, during examination of witness, accused tried to intimidate the victims.<sup>25</sup>

The report of the WOREC Nepal revealed that the Nepali law on rape is both limited in scope and narrow. It does not address male or transgender victims, oral and anal sex and usages of other object in private part of the victim. By focusing so completely on penile-vaginal penetration, the written law ignores many aspects of rape that are now recognized by international court.<sup>26</sup> The research further concludes the absence of victim and witness protection mechanisms has contributed to the impunity, which prevails for past and present human rights violations in the country. The modalities of compensation for survivors are also not clear and left to the discretionary power vested in the judges and consequently survivors are rarely able to get compensation. The poor implementation of the written laws was a repeatedly reiterated problem and could be clearly observed with respect to the police, the government attorney's office, and during court proceedings. The lengthy and re victimization approach in administering justice further deprives women survivors of the timely and dignified justice to which they are entitled. With lack of support and protection mechanisms, justice continues to elude women.<sup>27</sup>

In addition to the findings of the various research reports, there are many instances where the Supreme Court has pinpointed the necessity of protection of victims in the entire phases of criminal justice system. In the case of *HMG v Swasti Baral*,<sup>28</sup> the Supreme Court ruled that during execution of this decision, the District Court when received the copy of the decision, it should summon and inform to the victim. Following the required procedure, victim should be compensated by providing half partition of the defendant's property. Such decision should be executed immediately. The Supreme Court directed to the lower court to take initiation *suo*

23 *Ibid*, pp.15-16.

24 *Ibid*, p. 16.

25 *Ibid*, p. 17.

26 WOREC Nepal and Isis-WICCE, Unveiling Justice: Rape Survivors Speak Out, A Research Report on Access to Justice for Rape Survivors in Nepal 2007-2010, p. xviii.

27 *Ibid*, p. xix.

28 *HMG vs Swasti Baral*, NKP, [2062], Vol. 47, Num. 11, Decision No. 7626, p. 1425.

*motu* to execute the decision without waiting victim's application in this regard. The Supreme Court issued directives to the Office of the Attorney General to make appropriate arrangements to provide half of the defendant's property as claimed in the charge-sheet. Basically, amount of the compensation should be duly mentioned in the charge-sheet, the court said.

In *Nepal Government v Dipak Tulsi Wakhya*<sup>29</sup> the Court, for the first time, spoke out traditional practice of court proceedings where there is no place for child-friendly atmosphere. The practice of conducting cross-examination is traditional and non-responsive method to the victim's plight. The Court did not lay down any process to conduct cross-examination in rape cases but pointed out the overall environment of court proceedings, which is not comfortable and tolerable to the victim of rape. Further, the Court realized the needs of separate procedure to be followed to provide half of defendant's property to the victim. Therefore, the Court directed to the lower court to take initiative to the execution of the decision without application from the victim. In *Rakesh Kumar Singh v Nepal Government*,<sup>30</sup> the Supreme Court has laid down procedures in the execution of the decision to provide compensation as half portion of the property of defendant to the rape victim. In *Sapana Malla Pradhan v Nepal Government*,<sup>31</sup> the Court laid down guidelines to protect rights of victims especially for the children and women. The Court directs the Government institutions to follow these guidelines until separate law is not enacted. The National Judicial Academy has been disseminating these guidelines to the stakeholders for its proper implementation. Similarly, in *Jyoti Lamsal v Nepal Government*,<sup>32</sup> the Supreme Court issued directive to the Government of Nepal to set up counseling center for providing necessary assistance to the woman victim in every district as per availability of resources.

In the case of *Triratna Chitrakar v Government of Nepal*,<sup>33</sup> the Supreme Court further stated that in-camera hearing procedures have not been implemented up to now in such sensitive case. On ward, therefore, judicial proceedings should be conducted in in-camera. While conducting in-camera hearing process, parties of the case, defense lawyer, witness, victim's friend and her relatives, prosecutor, and court officials should only be permitted to attend the proceedings. The Registrar of the Supreme Court is made accountable to disseminate this directive to all district courts. The decision also drew the attention of the Attorney General of Nepal to analyze incidents before prosecuting and according to the offence committed; the charge sheet must be produced before the court. Despite offence of pornography

29 *Nepal Government vs. Dipak Tulsi Wakhya*, NKP, [2063] Vol. 48, Num. 10, Decision No. 7772, p. 1294.

30 *Rakesh Kumar Singh v Nepal Government*, NKP [2064], Vol. 49, Num. 1, Decision No. 7810, p.86.

31 *Sapana Pradhan Malla vs Nepal Government et. al.*, NKP [2064], Vol. 49, Num. 9, Decision No. 7880, p. 1208.

32 *Jyoti Lamsal v Government of Nepal*, NKP [2067], Decision No. 8507, P. 1903.

33 *Triratna Chitrakar v Nepal Government*, NKP, 2066, Decision No. 8148, P. 784.

and oral sex is committed against the victim, charge sheet is not produced before the court as per the offence committed. Eventually, it created impunity culture to the victim and undermine the right to seek justice for the offence committed against her. The Supreme Court seemed to be more positive to uphold the rights of victims of rape. In some cases, where the law seemed silent, the Court went a step forward to protect their rights and to provide access to justice to victim of rape.

## 6. Conclusion

It is true that there are only a few legal arrangements to provide access to justice to the rape victims. It is being a tardy to make legal support for them covering all aspects. Despite this, the system could give them relief, if they are treated with compassion and respect in operation of justice system. We are lacking here. In each and every stage of the criminal justice system, components of the system found reluctant to strict adherence to existing law made for providing access to justice.

The role of the Supreme Court to protect rights and to provide access to justice to the rape victims is to some extent satisfactory in the sense that the Court has been showing deep concern in this regard. Though, the Court drew attention of the concerned authority to make the system accessible as well as victim friendly to the rape victims particularly in individual case, a great deal of efforts remain to be done to make the present situation more accessible and accountable in the area of protecting and providing accessible justice to rape victims through legal arrangement. For this purpose, some recommendations are offered as follow:

1. First and foremost, actors of the criminal justice system should be courteous and empathic towards victims' plight. It would help them to feel comfortable while dealing with justice system.
2. Legal assistance to the rape victim should be provided at police station while they come to register FIR. There should be the provision that such case will be dealt with legal representative. For this purpose, list of the lawyers who wants to act with victim could be enlisted at police station. The court as per their application shall appoint such lawyers.
3. There is procedural complexity in the execution of decision with regard to getting compensation from the defendant. Basically, victims are not able to get the compensation within the time. The law and procedure to provide compensation should be simplified and scheme of providing interim compensation should be introduced to normalize their livelihood.
4. The accused or defendant is getting legal services from court paid lawyers in every level of court. The state funding for this is to ensure fair trial if h/ she could not afford the lawyer himself. However, this service should be

extended to the victims as well which ultimately supports to promote access to justice.

5. In many instances, witness and even victim being hostile has adversely impact in the success of prosecution of the rape case, which is merely due to the lack of victim and witness protection mechanism. That's why; victim and witness protection mechanism should be introduced at earliest possible.
6. Attitude of the victim should be given due consideration while making charge-sheet and in sentencing process.
7. Fast track system should be introduced that could help to reduce delay decision thereby promote access to justice.
8. The state should be committed to provide compensation to the victims from the state fund, if the defendant is unable to pay compensation.
9. The statute of limitation to institute rape case is very short and impractical. This does not provide sufficient time for the effective investigation and proper preparation for the charge sheet resulting failure of the case. Therefore, statute of limitation for rape case should be reviewed and extended at least for 3 months.
10. Information of each and every stage of proceedings should be served to the victims. They should be aware of the court proceedings before giving testimony in the court room.
11. Separate waiting room should be made available in the court so as to make them detached from the accused.
12. Presiding officer should put the question to the victims during conducting cross-examination to the victim and witness.
13. In the extreme situation where the accused might pose severe threat to the victim, the venue of the trial should be changed if the court feels so necessary.

These are only some points, which have to put in place to make accessible justice to the rape victims. Further, much more supportive mechanism could be introduced to maintain and promote access to justice to rape victims. However, at least, if these mechanisms were made accessible to them, access to justice for rape victims would be maintained.

# Imperative to Realign the Rule of Law to Promote Justice\*

Dr. Livingston Armytage\*\*

## Abstract

*This article aims to provide a new vision and approach for justice reform in Nepal. It critiques the global approach to promoting 'the rule of law' in official development assistance (ODA) – foreign aid - over the past fifty years for the purpose of improving the judicial reform approach. International efforts to promoting justice and the rule of law have traditionally failed and that the rule of law enterprise is now poised on the brink of development failure. At its essence, the unmet challenge of development is to address mounting concerns about equity and distribution. Building on research and new evidence based in Asia, Dr Livingston Armytage argues that there is an immediate imperative to reposition justice more centrally in evolving notions of equitable development. This will require the international community to realign these endeavours in Nepal to promote justice as fairness and equity.*

## 1. Introduction

Justice is fundamental to human well being and core to any notion of development both in Nepal and around the world. In this article, I critique the global approach to promoting 'the rule of law' in official development assistance (ODA) – foreign aid - over the past fifty years for the purpose of improving the judicial reform approach which is presently being innovated in Nepal with the Supreme Court and the National Judicial Academy, with assistance from the International Commission of Jurists (ICJ).<sup>1</sup>

During this period, development agencies have spent billions of dollars around the world supporting reforms which grapple with the challenges of improving the rule of law for people, especially the powerless poor, who are routinely denied justice through impunity, corruption, abuse of power and the denial of rights. But the results of these endeavours have usually been underwhelming and sometimes dismal.

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\* This article extracts and adapts arguments from Armytage L, 'Reforming Justice: a journey to fairness in Asia', published by Cambridge University Press, 2012. [http://www.cambridge.org/gb/knowledge/isbn/item6658411/Reforming%20Justice/?site\\_locale=en\\_GB](http://www.cambridge.org/gb/knowledge/isbn/item6658411/Reforming%20Justice/?site_locale=en_GB) . This article is based on a chapter written by the author for a book on the global financial crisis to be published by the International Bar Association's Public and Professional Interest Division (IBA-PPID) in 2013.

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1 ICJ's Justice Sector Reform Project, Nepal, 2012 with funding from the German Embassy.

As evidenced most recently, the Global Financial Crisis (GFC) has particularly affected the poor in developing countries who are disproportionately vulnerable to injustice as well as economic hardship. The civic well being of the poor and their access to equitable opportunities are placed under mounting pressure in times of financial crisis.

International efforts to promoting justice and the rule of law have traditionally failed to address these problems effectively – and in this sense, the rule of law enterprise is now poised on the brink of development failure. At its essence, the unmet challenge of development is to address mounting concerns about equity and distribution.

Building on research and new evidence based in Asia published in *'Reforming Justice: a Journey to Fairness in Asia'*, (Cambridge University Press: June, 2012), I argue that there is an immediate imperative to reposition justice more centrally in evolving notions of equitable development. This will require the international community to realign these endeavours to promote justice as fairness and equity.<sup>2</sup>

## 2. The rule of law in international development

In this article, I argue that the rule of law and judicial reform should be realigned to promote justice which, at its essence, is the promotion of fairness and equity<sup>3</sup>. This is a hard-edged, pressing concern for reform-minded jurists which is neither abstract nor idealistic.

This argument focuses primarily on reforming justice in terms of rights that have been allocated in law - that is in the juridical sense - rather than in the executive sense of allocating political interests. While justice is clearly a political good, as much as it is juridical, I focus primarily on reforms which assist the judicial arm of the state - being the courts, judges and related personnel – to adjudicate the law and administer justice and, secondarily, more broadly on development as a whole.

There are infinite examples of injustices that blight people's lives, most recently as the result of the GFC. Too often, reform efforts have however been blind to these injustices in developing countries. An analysis of the history of development practice indicates that judicial reform has most commonly been charged to alleviate poverty through the promotion of economic growth, good governance and public

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2 In this article, I will focus in particular on the lack of any cogent theory with which to justify the purpose for promoting 'rule of law' reforms. In the book, I go further to examine the related lack of any established consensus on how to evaluate success, stemming in part from this confusion over purpose. These arguments are supported by three detailed case studies from the Asia Pacific experience. To address these shortcomings, I offer two solutions: first, the purpose of judicial reform should be to promote justice as fairness and equity. Second, the evidence of success should be measured using extant frameworks of law.

3 For a discussion of the meaning of 'the rule of law', see section, below.



safety. These are certainly worthy goals. But the evidence of this practice shows that success has been elusive. This is not to suggest that these reforms have failed altogether; rather that judicial reform has not worked as well as expected, as is indicated by the mounting chorus of disappointment in the literature. The judicial reform enterprise has been misdirected. The core critique of this article is that these endeavours suffer from foundational conceptual, empirical and political deficiencies. Existing approaches are based on inadequate theory, selective evidence and insufficient evaluation. By realigning reform endeavour to focus on promoting justice, there is a much greater prospect of measurable improvement across all aspects of civic wellbeing.

The goal of development is to promote civic wellbeing, which is usually formulated in terms of reducing poverty. In order to achieve this goal, judicial reform must promote justice because justice is both foundational and constitutive to social wellbeing. Justice in development embodies fairness and equity. It involves the exercise of rights, which are the political allocation of interests in law. In this sense, reforming justice is primarily concerned with enabling the exercise of rights or civic entitlements. These rights are embodied in law whether at the international, domestic or customary levels. Measurement of the success of these reforms is demonstrable through visible improvements in the access to and exercise of these normative rights.

Analysis of the disappointing experience of development agencies in promoting the rule of law indicates that there is now an imperative to realign their policy approach to invest in judicial reform for the purpose of promoting justice - that is, to promote outcomes that are more fair and just, rather than economic growth. By promoting justice, opportunities for economic growth and other benefits will improve. In a just society, there is equitable access to rights including the opportunity for economic wellbeing, accountable government and public safety. Crucially, the promotion of justice is as much the objective of development, where economic wellbeing may be seen as the consequence of equitable development, as it is a means of promoting it. This may not seem radical to the lay reader; but it will require a paradigm shift for those development agencies which have rendered justice as being instrumental to aggregate economic growth and indifferent to concerns about distribution to this point.

### **3. Context**

An overview of the history of promoting the rule of law and, more specifically judicial reform, over the past fifty years indicates that it has grown from modest beginnings to become an increasingly substantial though still exploratory enterprise. This history starts after post-war reconstruction, and spans the post-colonial period of

state-building, the thaw of the Cold War bringing democracy, and the 'Washington Consensus' era of free markets and structural adjustment, up to the current period of globalisation. This is a period of significant change in world politics and economic development, which saw massive increases in judicial assistance as a niche in international development assistance.

While niche - at some 2% of total official development assistance - judicial and legal reform has nonetheless grown rapidly and substantially over the past fifty years – some hundred-fold in aggregate.<sup>4</sup> Some indications are illuminating. Carothers describes this assistance as having 'mushroomed' in recent years, becoming a major category of international aid.<sup>5</sup> Hammergren notes that court assistance started in Latin America in the 1960s valued in hundreds of thousands of dollars, typically climbing to around \$5 million by the mid-1990s.<sup>6</sup> By 2001, Biebesheimer reports that the Inter-American Development Bank had conducted some 80 projects in 21 Latin American countries, valued at about \$461 million. During the 1990s, it is estimated that almost \$1 billion was spent in Latin America by the World Bank, the Inter-American Development Bank (IDB) and the United Nations Development Program (UNDP).<sup>7</sup> In 2001-2, I participated in implementing a single justice program loan from the Asian Development Bank valued at \$350 million.<sup>8</sup> In 2006, the global lending of the World Bank for law and justice and public administration was reported to be valued at \$5.9 billion.<sup>9</sup> By 2008, IDLO estimates that a total of USD 2.6 billion in aid was devoted to legal and judicial development assistance supplied mainly by bilateral donors, representing a 'remarkable' increase from the USD 1.7 billion which it estimates was invested globally in 2007 and USD 841.5 million in 2006.<sup>10</sup> This is substantial growth on any measure.

Analysis of this history illuminates patterns of crisis, fragility, growth and stability which provide some explanation about what drives judicial reform in its different renderings. Throughout this period, the global political economy – the early 1980s debt crisis, the 1992 end of the Cold War and the mid-late 1990s global economic crises, and most recently the events of '9/11' – provided the context for a huge sense of uncertainty, instability and most importantly 'threat' to the global-US economic

4 Using OECD data, it is estimated that judicial and legal reform may represent about 2% of total ODA, comprising \$2.6 billion of \$119 billion total ODA, below n 23. In 2009, total net official development assistance (ODA) from members of the OECD's Development Assistance Committee (DAC) rose slightly in real terms (+0.7%) to USD 119.6 billion; OECD 2010a.

5 Carothers 2006, 10.

6 Hammergren 2006; World Bank 2002, 34 and 55; and Messick 2002.

7 DeShazo & Vargas 2006, 1; see also Biebesheimer & Payne 2001, 3; and, Bhansali & Biebesheimer 2006, 303.

8 Armytage 2003.

9 World Bank 2006b, cited in Harris, 2007.

10 IDLO 2010, 4 and 11.

order. In this context, the promotion of the 'rule of law' appeared as part of a suite of actions designed to instil a sense of certainty, not just in legal contracts, but at the highest levels of global policymaking. In a sense, this reform was largely US-hegemonic in its overarching liberal orientation. This historical perspective provides a framework for showcasing the work of two major development agencies, viz. USAID and the World Bank, as exemplars in judicial reform. Each is among the largest and longest operating bilateral and multilateral agencies in judicial reform.

Judicial reform has evolved throughout this period. Trubek and Santos describe this evolution as comprising three iterations or moments. The *first* moment emerged in the 1950-60s when development policy focused on strengthening the role of the state in managing the economy, when law was seen as an instrument for effective state intervention in the economy. In the *second* moment in the 1980s, law moved to the centre of development policy, influenced by neo-liberal ideas which stressed the primary role of markets in economic growth, limiting the power of the state. They discern a *third* moment which is still in a formative phase, which contains a mix of policy ideas, e.g. that markets can fail, and require compensatory intervention by the state, when development means more than just economic growth and must be redefined to include human freedom. The role of judicial and legal reform shifted profoundly during this period within the changing political and economic context of development and an evolving vision of the role of the state in supporting the market.<sup>11</sup>

A study of two development actors is illuminating of what is both characteristic and distinctive in approaches to promoting the rule of law. USAID and the World Bank serve as exemplars of this endeavour in terms of leading the field as well as the size of their support. While their approaches vary, analysis reveals that their reforms have acquired an orthodoxy which has predominantly focused on promoting 'thin' or procedural notions of reform – as distinct from the substantive, qualitative or 'thick' aspects which are normative and values-based. These reforms have generally aimed to improve the efficiency of the judicial function and the administration of justice within the formal sector of the state, often featuring delay-reduction for example. Their foundational rationale has most commonly been grounded in judicial reform providing a means to support economic growth. Over the past twenty years, in particular, this rationale has cast judicial reform in an instrumental role to protect the institutions of property and contract as a means of promoting a neo-liberal (small state/free market) economic model of growth. This model is associated with the now largely discredited Washington Consensus. This instrumental approach to reform persists and has been variously conceptualised. More recently, the notion of promoting good governance through accountability has

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11 Trubek & Santos 2006, 7.

emerged in the political science discourse. The most recent rationales for reform aim to promote peace, security and civil empowerment. In sum, there has been an evolving range of justifications for judicial reform with various economic, political, social and humanistic renderings over this period. Sometimes these justifications are conflated and occasionally they compete.

### **3.1 USAID's approach**

The current phase of judicial reform commenced with American assistance to Latin American reform in the 'Law and Development' movement of the 1960s.<sup>12</sup> The guiding assumption of the law and development movement was that law is central to the development process. A related belief was that law was an instrument that could be used to reform society and that lawyers and judges could serve as social engineers.<sup>13</sup> The primary goal of 'Law and Development' was, according to Trubek and Galanter, to transform legal culture through legal education and the transplantation of select 'modern' laws and institutions, with an emphasis on economic or commercial law and the training of pragmatic business lawyers. They saw the movement as having rested on four pillars, all of which subsequently crumbled. These pillars were a cultural reform and transplantation strategy; an ad hoc approach to reform based on simplistic theoretical assumptions; faith in spill-overs from the economy to democracy and human rights; and a development strategy that stressed state-led import substitution. This potent critique of USAID's hegemonic approach was influential in causing the movement to wane for some years.<sup>14</sup>

In the ever shifting political economy of the Latin American debt crisis, judicial reform was repackaged in the 1980s as a part of larger programs of legal reforms, usually as a component of what became termed 'structural adjustment'. This described the fiscal and monetary policy changes which were implemented by the International Monetary Fund and the World Bank to provide assistance to developing countries and promoted state disengagement from the economy. These policy changes were conditions, or conditionalities, for financial assistance to ensure that the money would be spent in designated ways with a view to reducing the country's fiscal imbalances. In general, these loans promoted 'free market' programs aimed at reducing poverty by promoting economic growth, generating income, and paying off debt.

As the years passed, there was mounting disillusionment at the lack of visible success of the 'structural adjustment' conditionality which, in due course, was reframed in the early 1990s and emerged as what has become known as the 'Washington

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12 See: Trubek & Galanter 1974, and Blair & Hansen 1994.

13 Messick 1999, 125.

14 Trubek & Galanter 1974; Trubek 1996; Trubek 2003; and Merryman 1977.

Consensus', a term which is attributed to Williamson.<sup>15</sup> It connotes a development approach based on a trifecta of neo-liberal 'free market' policies of privatisation, fiscal rectitude and deregulation. The piety of the International Monetary Fund, the World Bank and the US Treasury to these policies - which are now in turn largely discredited - was intrinsically hegemonic. The language of 'structural adjustment' evolved into a new discourse of poverty reduction which increasingly became the 'raison d'être' of development, notably after the 'Asian Financial Crisis' of 1997/8.<sup>16</sup> Developing countries were now encouraged to draw up poverty reduction strategy papers which were intended to increase local participation and greater ownership. A number of commentators, such as Porter, argue that the poverty reduction discourse of the 1990s was little more than the earlier structural adjustment 'in drag', referring to its lack of results and its top-down exclusion of participation.<sup>17</sup>

During this period, analysis of the history of USAID's approach to judicial reform shows that it was served as an appetiser of supporting efficiency-based improvements in the criminal courts and judicial independence within a broader menu of securing the state's function of good order and economic development. This approach rested on a particular approach to the 'rule of law' and is associated with promoting democratic notions of good government.

After some years, the United States resumed engagement in judicial and legal reform in El Salvador in 1981 to help the democratic government prosecute human rights abuses. This political economy context explains why USAID assistance sought to advance democratic development by exposing human rights violations, increasing access to justice, strengthening justice sector institutions and decreasing impunity. This was due both to the political, social and economic conditions of the region, and to the chronically debilitated state of judiciaries across the region being, according to Hammergren, the 'Cinderella' institutions of government.<sup>18</sup> Biebersheimer describes this second wave of justice reform spreading 'like wild fire' across Latin America, usually centring on criminal justice reform linked to democratic institutions as much as to economic enhancement programs in the region.<sup>19</sup>

The mantra of consolidating judicial independence became a focal point of USAID assistance at this time, being seen to lie at the heart of a well-functioning judiciary and the cornerstone of democratic society based on the 'rule of law':

*If a judiciary cannot be relied upon to decide cases impartially, according to the law, and not based on external pressures and influences, its role*

15 Williamson 1990.

16 See discussion below, n 37 onwards.

17 Craig & Porter 2006, 5 and 63-94.

18 Hammergren 2003.

19 Bhansali & Biebersheimer 2006, 306; see also, Hendrix 2003.

*is distorted and public confidence in government is undermined. In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government.<sup>20</sup>*

In a related move, USAID developed an anti-corruption approach as a part of its broader governance strategies which focused on strengthening the capacity of the courts to serve as accountability mechanisms as well as to strengthen judicial integrity itself. USAID defined corruption as:

*[t]he abuse of public office for private gain. Corruption poses a serious development challenge. In the political realm, it undermines democracy and good governance by subverting formal processes. Corruption also undermines economic development by generating considerable distortions and inefficiency. and generates economic distortions in the public sector by diverting public investment away from education and into capital projects where bribes and kickbacks are more plentiful. These distortions deter investment and reduce economic growth.<sup>21</sup>*

By the 1990s, USAID expanded its support for judicial and legal reform into the post-Soviet transitional economies of Europe in what has become termed the 'rule of law revival'.<sup>22</sup> This phase rested on what Carothers describes as the orthodoxy of two controlling axioms: that the 'rule of law' is necessary for economic development and necessary for democracy.<sup>23</sup> He defines the 'rule of law' as:

*a system in which the laws are public knowledge, and clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the past half century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors and police, are reasonably fair, competent and efficient. Judges are impartial and*

20 USAID 2002, 6.

21 USAID 1999, 5.

22 Carothers 2006, 7.

23 Carothers 2003, 6.

*independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law abiding.*<sup>24</sup>

This relationship between development of the 'rule of law' and liberal democracy has been described as being profound:

*The rule of law makes possible individual rights which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy, such as property rights and contracts are founded on the law and require competent third party enforcement. Without the rule of law, major economic institutions, such as corporations, banks and labour unions, would not function, and the government's many involvements in the economy – regulatory mechanisms, tax systems, customs structures, monetary policy and the like – would be unfair inefficient and opaque.*<sup>25</sup>

This promise to remove the chief obstacles on the path to democracy and market economics during an era marked by massive transitions in the global political economy explains for Carothers why Western policy-makers have seized on the 'rule of law' as an 'elixir' for countries in transition.<sup>26</sup>

### **3.2 But what is the rule of law?**

Despite the centrality of this concept, there is a peculiar conceptual abstraction inherent to the notion of the 'rule of law' which contributes to confused and ultimately disappointed expectations. This abstraction is examined by various commentators. Upham, for example, argues that aiming to develop a 'rule of law', in both developed and developing countries, is an unproven myth which, nonetheless, has acquired that status of evangelical orthodoxy. He defines the core elements of this orthodoxy:

*The rule of law ideal might be summarised as universal rules uniformly applied. It requires a hierarchy of courts staffed by a cadre of professionally trained personnel who are insulated from political or non-legal influences. The decision-making process must be rational and predictable by persons trained in law; all legally-relevant interests must be acknowledged and*

<sup>24</sup> Carothers 2006, 4; see also, Carothers 1998, 96.

<sup>25</sup> Carothers 2006, 4-5.

<sup>26</sup> Carother 2006, 7; see also Carothers 1998, 99.

*adequately represented; the entire system must be funded well enough to attract and retain talented people; and the political branches must respect the law's autonomy.*<sup>27</sup>

The notion of the 'rule of law' is at its heart both politically evocative and yet so technically ambiguous as to sometimes become meaningless. Others have attempted to pin down what it is supposed to mean. Kleinfeld-Belton describes the 'rule of law' as looking 'like the proverbial blind man's elephant – a trunk to one person, a tail to another.'<sup>28</sup> She discerns a range of definitions that serve different purposes: government bound by law; equality before the law; law and order; predictable and efficient rulings; and human rights. These purposes – which are manifold, distinct and often in tension – are usually conflated and confused in practice. She observes that development agencies tend to define the 'rule of law' institutionally, rather than by its intended purpose, as a state that contains three primary institutions: laws, judiciary and law enforcement. This conceptual confusion has encouraged a technocratic and sometimes counterproductive approach to reform:

*By treating the rule of law as a single good rather than as a system of goods in tension, reformers can inadvertently work to bring about a malformed rule of law, such as one in which laws that overly empower the executive are applied and enforced more efficiently.*<sup>29</sup>

Others, like Kennedy, go further to observe that this ambiguity is no accident. It is precisely the vagueness inherent in this notion that renders it readily and conveniently amenable as a device to bridge over differences in the interests of development partners.<sup>30</sup>

This conception of judicial reform – embedded as it was in USAID promoting the political economy notions of the free market, democracy, good governance and the 'rule of law' – is to be compared with that of the World Bank.

### **3.3 World Bank's approach**

The approach of USAID is to be compared and contrasted to that of that World Bank. The Bank's current justice sector assistance and reform portfolio comprises nearly 2,500 justice reform activities with new lending valued at approximately US\$304.2 million in 2008.<sup>31</sup>

27 Upham 2006, 83. Upham also observes: 'If such a model exists, however, I have not found it,' Upham 2002, 8. For a more juristic discussion, see: Bingham, 2011.

28 Kleinfeld-Belton 2005, 5-6; and, Kleinfeld-Belton 2006.

29 Kleinfeld-Belton 2005, 28.

30 Kennedy 2006.

31 World Bank 2009a.



The Bank started to support judicial reform later than USAID in Latin America in the 1980s. It initially framed its approach narrowly to conform to its mandate as a state-centric means of enabling economic development. This approach has subsequently expanded to become more comprehensive, embodying related notions of governance, institutions, safety, security, equity and empowerment.

As the Bank's chief counsel at that time, Shihata was influential in conceptualising the initial approach to reform. He framed judicial reform within the 'rule of law', which he treated as a precursor to economic stability, and as the means of protecting property rights and honouring contractual obligations. He saw law providing credibility to government commitments, and the reliability and enforceability of applicable rules leading to favourable market conditions for investors. Law supported the broader economic policy framework that guaranteed free competition.<sup>32</sup> The Bank adopted this economic approach because of the reading then possible of its charter. Shihata wanted to avoid drawing reform activities into what he described as the 'risky trap of politicising financial institutions'. Owing to these formal constraints which he stressed prohibited engaging in 'political' activities, he directed the Bank narrowly to take 'only economic considerations' into account:<sup>33</sup>

*Included amongst these provisions are the notions that: [t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.*<sup>34</sup>

As a consequence, the Bank's reform strategy has historically been developed from a base of focusing tightly on promoting the 'rule of law' in an instrumentalist, 'thin' procedural manner. This base defined the 'rule of law' as: prevailing when the government itself is bound by the law; every person in society is treated equally under the law; the human dignity of each individual is recognised and protected by law; and justice is accessible to all. This concept of the 'rule of law' is built on the three pillars of rules, processes and well-functioning institutions. It comprised a well-functioning legal and judicial system which allows the state to regulate the economy and empowers private individuals to contribute to economic development by confidently engaging in business, investments, and other transactions. This concept was seen to foster domestic and foreign investment, create jobs, and reduce poverty.<sup>35</sup>

32 See, eg: Shihata 1995a; and Shihata 1997b.

33 Shihata 1992, 37.

34 Ibid, 30; also, *Articles of Agreement of the International Bank for Reconstruction and Development*.

35 World Bank 2003, 2 and 16-18.

The Bank's judicial reform strategy promoted three goals. These were: first to establish an independent, efficient and effective judicial system, and strengthening judicial effectiveness; second, to support the processes by which laws and regulations are made and implemented; and third, to improve access to justice by expanding the use of existing services and providing alternative dispute resolution mechanisms.<sup>36</sup> In terminology reminiscent of USAID's earlier rhetoric, the Bank described the 'rule of law' as being 'built on the cornerstone of an efficient and effective judicial system.'<sup>37</sup> This vision positioned judges as the key to an effective and efficient legal system. For such a system, judges had to be properly appointed, promoted and trained; observe high codes of conduct; and be evaluated and disciplined. Activities supporting such initiatives became common features in many of the Bank's projects.

While conceding its contestability, this institutionalist approach to justice reform was reaffirmed most recently by Leroy in 2011:

*Though the precise channels of causation are complex and contested, there is broad consensus that an equitable, well-functioning justice system is an important factor in fostering development and reducing poverty....The World Bank has supported the creation of robust investment climates, underpinned by a sound rule of law, in order to encourage investment, productivity and wealth creation as part of its main approach to combating poverty (itals added).*<sup>38</sup>

The Bank positioned judicial reform centrally in its emerging conceptualisation of good governance. As with USAID, it increasingly framed judicial reform within a larger governance dimension of development, usually hinging on notions of transparency and accountability. This dimension is relevant not just because judicial reform is a means of implementing governance policy by strengthening the capacity of the courts as accountability mechanisms. The notion of governance is integral to the prevailing institutionalist approach which is concerned with the quality of relationships between the citizen, state and market.

The Bank's definition of governance is broad. It refers to the exercise of power through a country's economic, social, and political institutions that shape the incentives of public policymakers, overseers, and providers of public services. Within this approach, judicial reform and strengthening is both instrumentally and constitutively relevant. The Bank's *Governance and Anticorruption Policy* of 2007 proclaims that good governance is positively associated with robust growth, lower income inequality, and improved competitiveness and investment climate.

36 Ibid, 6, and 19.

37 Ibid, 27.

38 Leroy 2011.

This policy posits that a capable and accountable state creates opportunities for poor people, provides better services, and improves development outcomes. This approach is explained by President Wolfowitz to support the Bank's mandate to reduce poverty:

*We call it good governance. It is essentially the combination of transparent and accountable institutions, strong skills and competence, and a fundamental willingness to do the right thing. Those are the things that enable a government to deliver services to its people efficiently.*<sup>39</sup>

This approach to governance is grounded in the vision of the capable and enabling state, articulated through the Bank's World Development Reports, first issued in 1978. These reports showcase the Bank's evolving policy approach and have, in the view of the *Economist*, made 'histories in miniature of development'.<sup>40</sup> The World Development Report of 2002, for example, highlighted the role of institutions in reform endeavours. More particularly, it articulated the governance rationale of institutionalism within which it conceptualised the role of judiciaries in development:

*The judicial system plays an important role in the development of market economies. It does so in many ways: by resolving disputes between private parties, by resolving disputes between private and public parties, by providing a backdrop for the way that individuals and organizations behave outside the formal system, and by affecting the evolution of society and its norms while being affected by them. These changes bring law and order and promote the development of markets, economic growth, and poverty reduction. Judicial systems need to balance the need to provide swift and affordable – that is, accessible – resolution with fair resolution; these are the elements of judicial efficiency ... The success of judicial reforms depends on increasing the accountability of judges; that is, providing them with incentives to perform effectively, simplifying procedures, and targeting resource increases ...*<sup>41</sup>

By 1999, the Bank elevated legal and judicial reform to one of the main pillars of its new Comprehensive Development Framework, as part of its evolving approach. This framework was introduced by President Wolfensohn as a reformulation of the Bank's strategy to poverty reduction. This strategy emphasised the interdependence of all elements of development – the social and human among the structural, governance, environmental, economic, and financial:

<sup>39</sup> Wolfowitz 2006.

<sup>40</sup> Yusuf, Dervish & Stiglitz 2008; also World Bank ndb.

<sup>41</sup> World Bank 2002a, 131-2.

*The Comprehensive Development Framework... highlights a more inclusive picture of development. We cannot adopt a system in which the macroeconomic and financial is considered apart from the structural, social and human aspects, and vice versa.*<sup>42</sup>

This new approach strove for a good and clean government, a social safety net and social programs, and an effective legal and justice system in which judicial reform was reframed:

*[W]ithout the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract... laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.*<sup>43</sup>

At that point, the Bank described its approach to judicial and legal reform as having 'evolved significantly' to emphasise empowerment opportunity and security in order to promote ways in which judicial programs can 'distribute more equitably the benefits of economic growth' to the poor.<sup>44</sup> The potential significance of this emphasis on the social dimensions to development in the Comprehensive Development Framework should not be under-estimated.<sup>45</sup> As we have seen, Shihata had earlier stressed avoiding the use of the term 'human rights' because of the constraining effect of the Bank's mandate which prohibited 'political' reform.<sup>46</sup> Less than a decade later, this position had evolved markedly when Danino, then chief counsel, saw judicial reform as an indispensable component of alleviating poverty through economic growth and social equity, which included a strong human rights dimension.<sup>47</sup> He built this argument on a broader interpretation of the Bank's 'evolving' mandate:

*While governance is a crucial concept, my personal view is that governance does not go far enough: we must go beyond it to look at the issues of social equity alongside economic growth... we should embrace the centrality of human rights to our work instead of being divided by the issue of whether or not to adopt a 'rights-based' approach to development.*<sup>48</sup>

42 Wolfensohn 1999, 7.

43 Ibid, 10-11.

44 World Bank 2004b, 5.

45 World Bank 2001; see also Narayan 1999; and Woolcock & Narayan 2000.

46 Shihata 1997a, 642.

47 Danino 2006, 305.

48 Danino 2007, 523.

The Bank's policy approach was further refined in the *World Development Report: Equity and Development* 2006 which focused on the issue of inequality of opportunity as a new or more important dimension of poverty reduction. This report built on the World Development Report of 2000 on poverty, and in particular on the work of Sen, below. It recommended addressing chronic 'inequality traps' by ensuring more equitable access to public goods, including improved access to justice systems and secure land rights among other initiatives. With a focus on 'equity gaps', this report highlighted the constitutive element of equity in poverty. Most importantly, it also introduced the notion of redistribution to the current discourse:

*Given that markets are not perfect, scope arises for efficient redistribution schemes... Equity and fairness matter not only because they are complementary to long-term prosperity. It is evident that many people – if not most – care about equity for its own sake.<sup>49</sup>*

This report reviewed modern theories of distributive justice to address the lack of concern with the distribution of welfare, and to adopt a notion of equity that focuses on opportunities.<sup>50</sup> It distinguished equity from law and propounded that the overarching concept of *fairness* embodies a multicultural belief that people should not suffer before the law as a result of having unequal bargaining power.<sup>51</sup> This focus on equity is consolidated by Sage and Woolcock who argue that a rules system that sustains an 'inequality trap' is a constituent element of such traps, and can perpetuate inequities.<sup>52</sup> The Bank's *Justice for the Poor* (J4P) program is presently researching a more equitably-focused approach.<sup>53</sup> This focuses on:

*creating new mediating institutions wherein actors from both realms can meet – following simple, transparent, mutually agreed-upon, legitimate, and accountable rules – to craft new arrangements that both sides can own and enforce. That is, J4P [sic] focuses more on the process of reform than on a premeditated end-state.<sup>54</sup>*

Notions of safety and security provide another significant rendition of the rationale for the rule of law and judicial reform. While we have already seen that criminal justice has been a part of the reform menu since its inception in the law and development movement, concerns over state fragility, failing states, terrorism and the breakdown of the states' capacity to control crime have grown markedly over

49 World Bank 2005, 74-75.

50 Ibid, 78.

51 Ibid, 175.

52 Sage & Woolcock 2006, 11.

53 Sage, Menzies & Woolcock 2009, 1.

54 World Bank 2007, 1; and, World Bank 2006d.

recent years. Most recently, the events of 11 September 2001 have galvanised the attention of governments and donors to the relationship between security and conflict and the development of political, economic and social goals. This has led to reform efforts which consolidate the internal (criminal) and external (terrorist) capacity of the state to provide security. This rendition is evident in the *Guidelines on Terrorism Prevention* (2003) and the *Guidelines on Security System Reform and Governance* (2004) issued by the development's umbrella body, the OECD-DAC. These guidelines are directed to overcome state fragility and conflict by reducing armed violence and crime thereby creating secure environments which are conducive to other political, economic and social developments. This approach aims at achieving four intermeshing objectives: (a) establishing effective governance; (b) improved delivery of security and justice services; (c) developing local leadership and ownership of the reform process; and (d) sustainability of justice and security service delivery.<sup>55</sup>

Most recently, growing recognition of the importance of improving justice reform is evidenced in the *World Development Report 2011*, which repositions justice more centrally in development. WDR 2011 focuses on exploring the links between security and development outcomes. Its central message is that strengthening institutions and governance to provide citizen security, justice and jobs is crucial to break cycles of state fragility, conflict or violence. Institutions and governance, which are important for development in general, work differently in fragile situations. Investing in justice is now seen as essential to reducing violence. It links security, justice and economic stresses to violence prevention and recovery, and advocates integrating justice with military and policing assistance in fragile situations. Justice sector reform should focus on the connections between policing and civilian justice, strengthening basic caseload processing; extending justice services and drawing on community mechanisms. Curiously, however, WDR 2011 is abstemious in withholding any definition of justice. This is significant because it clears a space to admit justice to the pantheon of political economy, and opens the dialogue on the role of justice and its relationship to development.<sup>56</sup>

In sum, this history reveals first that judicial reform is at a formative phase of endeavour. Its growth has been recent, rapid and very substantial over the past twenty years, in particular. Second, this endeavour has been variously justified on the basis of economic, political, social and human rationales. These major justifications, which may be theoretically interconnected and conflated in practice, are on occasion ambiguous and sometimes in conflict:

<sup>55</sup> OECD 2003; and OECD 2007, 21.

<sup>56</sup> World Bank 2011b.

- *Economic* – the oldest and most pervasive justification has two manifestations: first, the creation of wealth, based on notions such as ‘trickle down economics’ which involves the state supporting the markets to lift all boats, even the smallest; and second, more recently, the reduction of poverty, based on an alternative notion of empowerment by assisting the poor and the disadvantaged.
- *Political* – the promotion of democracy has been inextricably linked to enabling participation and inclusion in social affairs; freedom of opportunity; and self-destination; and more recently, to strengthening the governance and integrity of state institutions to oversee the polity through the ‘rule of law’, judicial independence, transparency and accountability.
- *Social* – this justification emphasises consolidating state capacity to provide the fundamental public goods of civic order, safety and security to citizens from internal threats of crime and, notably after 9/11, external threats of terrorism and state failure, sometimes termed securitisation.
- *Humanistic* – this justification rests on the validation of promoting fairness and access to justice based on an emerging concept of poverty as deprivation of opportunity and the human rights of the individual.<sup>57</sup>

#### 4. Nature of reforms

Analysis of the nature of reform activities undertaken during this period reveals what has been described as a ‘standard package’ of activities that support efficiency-based improvements to the formal administration of justice.

At their core, most activities have typically consisted of measures to strengthen the judicial branch of government. Messick describes these as having generally included making the judicial branch independent; increasing the speed of processing cases; increasing access to dispute resolution mechanisms; and professionalising the bench.<sup>58</sup> Dakolias agrees that reform programs usually include judicial independence, appointment and evaluation systems, discipline; judicial, court and case administration; budgets, procedural codes, access to justice, ADR, legal aid and training.<sup>59</sup> Projects have commonly focused on training judges, introducing case management systems to the courts, and occasionally establishing legal aid clinics and legal awareness programs – in what Sage and Woolcock have described as generally being ‘top-down technocratic solutions’ to institutional deficiencies.<sup>60</sup> The World Bank, for example, presently allocates 66% of the value of its ‘stand-alone’

57 This configuration is articulated in various ways in the literature; see, eg, Samuels 2006.

58 Messick 1999.

59 Dakolias 1995, 187 onwards.

60 Sage & Woolcock 2005, 12.

justice reform projects to what it terms direct judicial process support administering cases and caseloads, on court infrastructure, buildings refurbishment and related facilities, and just one tenth of this [6%] on training judicial and legal actors.<sup>61</sup>

Judicial reforms are classified by Carothers as falling into a class of activities aimed at increasing government compliance with law. These involve institutional reforms which centre on judicial independence, increased transparency and accountability; making courts more competent, efficient and accountable, often involving training.<sup>62</sup> In describing judicial and legal reform, Jensen refers to a 'standard package' of three elements: changing substantive laws; focusing on law-related institutions; and addressing the deeper goals of governance compliance with the law, particularly in the area of judicial independence. Donors have increasingly concentrated their assistance on making formal judicial institutions more competent, efficient and accountable, involving projects providing legal and judicial training.<sup>63</sup> Porter endorses this 'standard package' of court-centric reforms which he notes remain heavily supply-driven, with the focus on training judges, building more courtrooms, providing new equipment, and supporting case management. Training has often been treated as a cure-all for capacity-building, with little regard for educational effectiveness.<sup>64</sup>

## 5. Critique of practice

There is now a chorus of disappointment in the performance of these reforms emerging in the academic commentary. This chorus intones mounting concerns over the performance of promoting the rule of law which have been described as being *less than promised, elusive, in crisis, sobering, impotent, inconclusive and in serious doubt*.

Commentators offer a number of explanations for this disappointment. In essence, these relate to the conflation of the goals of reform, discussed above, that has confused expectations, dissipated resources and frustrated implementation; and the need for a considerably more nuanced approach to managing the change process. This critique reflects two major features: first, the insufficiency of knowledge to guide and support reform endeavours and, second, the lack of any cogent theory or justification for reform endeavour. In effect, there is a mounting concern that despite the provision of ever-increasing resources, we don't really know what we're doing.

61 World Bank 2011c, 3.

62 Carothers 1998, 99-100.

63 Jensen & Heller 2003, 349.

64 Porter 2005; see also, Armytage 2005.



In a critique of judicial reform performance over twenty years in Latin America, Hammergren acknowledges substantial changes in the sector's resources, composition and activities. These reforms - which have provided improved salaries, enhanced independence, new governance systems, and monies for computers and innovations - have transformed courts which were formerly the 'orphans' in what she calls the 'Cinderella branch of government'. But significantly they have not had any automatic impact on the quality of judicial output.<sup>65</sup> These judicial systems seem no closer to meeting citizen expectations of justice.<sup>66</sup> Change is one thing, but improvement is another. Her critique is essentially utilitarian, i.e. these reforms have failed to improve the situation. Two decades of reform had delivered a great deal less than promised. Despite some gains, basic complaints such as delay, corruption, impunity, irrelevance and limited access have not dissipated. Public opinion polls indicate no improvement in the courts' public image. As for contributions to the goals of reducing crime or poverty, or increasing economic growth, the best that can be said is that things would have been much worse without the reform.<sup>67</sup> This disappointing performance arises from the 'purely deductive conclusion' that there is a supposed - but largely unproven - connection between market-based growth and commercial law.

Hammergren endorses Carothers' metaphor that judicial reform has become an elixir for curing an increasing number of extra-judicial ills: poverty and inequality, democratic instability, and inadequate economic growth and investment:

*[I]t should be evident that [this] contains internal contradictions... Mix and match different objectives; goals relating to costs, access, efficiency, efficacy, and basic fairness at some point come into conflict with each other.<sup>68</sup>*

Anyone wishing to contest or even explore these assumptions risks attacking numerous sacred cows and their associated lobbies.<sup>69</sup> The theoretical discourse on judicial reform is, Hammergren observes, dominated by economists who have a natural predisposition to emphasise courts' economic role by clarifying the rules of the game: enhancing predictability, reinforcing juridical security and reducing transitional costs. Political scientists have then focused on the role of courts in supporting existing power structures to emphasise their potential accountability function in providing checks-and-balances on that power.<sup>70</sup>

65 Hammergren 2007, 279.

66 Ibid, 7.

67 Ibid, 306.

68 Ibid, 5.

69 Ibid, 308.

70 Ibid, 313-5.

It is timely to observe how muted lawyers' voices have been in contributing to this discourse. While academic lawyers have clearly produced theories, their contribution seems largely ghettoised in academe. Consequently, it is bizarre that articulation of the prevailing theoretical model for judicial reform endeavour has been dominated by economists and political scientists to this point.

Many commentators endorse this critique of the dubious conceptual foundations of reform endeavour. Barron, for example, reviews the experience of the World Bank to argue that it would do well to temper its enthusiasm for promoting the 'rule of law', given that many of the factors affecting it seem to be either unreformable or at least very difficult to reform.<sup>71</sup>

Some describe a crisis in law-and-development. They attribute this crisis to the inability of developmental theory to adequately account for reality. Tamanaha and Bilder believe its cause is the realisation that the ideals of development theorists are less than perfect and less than perfectly realised; that science does not have all the answers; and that the law simply cannot solve many problems confronting developing countries, causing a sense of mounting impotence. After thirty years of law-and-development studies, they observe that modern law is necessary, though not sufficient for economic development; that the 'rule of law' is helpful though not sufficient for political development; that beyond these minimums, the theoretical discourse is not of primary importance, beyond being 'largely a Western academic conversation'.<sup>72</sup>

Others debate the efficacy of the relationship between judicial and legal reforms and development, and challenge the utility of many reforms on empirical grounds. Trebilcock and Davis describe much of the empirical evidence as 'inconclusive' and argue that this explains why current endeavours are destined to have little or no effect on social or economic conditions in developing countries.<sup>73</sup> Others argue that given the diversity of competing definitions and concepts of 'rule of law', serious doubts remain about whether there is such a thing as 'a rule of law field'. Peerenboom critiques the law and development industry as having sought universal solutions to diverse local problems which have often reflected the latest intellectual trend and adopted a 'magic-bullet' approach: first legal education, then legislative reform, now institutions and good governance.<sup>74</sup> What he terms the 'less than spectacular results' of promoting the 'rule of law', calls into question the reform function of the 'rule of law':

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71 Barron 2005, 35. See also: Carothers 1999, 2003, and 2006; Jensen & Heller 2003; and Trubek & Santos 2006, among others.

72 Tamanaha & Bilder 1995, 484.

73 Davis & Trebilcock 2001, 27.

74 Peerenboom 2009, 13.

*Despite a growing empirical literature, there remain serious doubts about the relationship, and often the causal direction, between rule of law and the ever-increasing list of goodies with which it is associated, including economic growth, poverty reduction, democratization, legal empowerment and human rights.<sup>75</sup>*

The upside of this mounting disquiet is that it is spurring the current moment of reflection and impelling a process of reinvention of approach. This reinvention comprises three major renditions: convergence with human rights and empowerment characteristically evident in initiatives of UN agencies; (b) engagement in the informal and customary sectors, characteristically evident in the Bank's J4P exploration; and a more integrated political-economy approach, which is characteristically evident in DfID's approach to 'drivers of change'.<sup>76</sup>

This opportunity for reinvention is presently open, but the stakes are very high. It is no-understatement to observe that the rule of law enterprise is poised at the brink of development failure. This is evidenced by the recent decision of the Asian Development Bank to 'mainstream' – that is, to dismantle – its law and policy program after almost twenty years because the lack of visible results had rendered it under-competitive in the internal quest for funds.<sup>77</sup>

## **6. Purpose: what is justice - and why is it important?**

Any notion of the rule of law in international development without a clear focus on promoting justice is incomplete. Justice is fundamental to human wellbeing and is indivisible from development. Since Aristotle, justice has been recognised as core to any civilised notion of the good life, government and society: government without justice is tyranny; and society without justice is anathema to its citizens. Civic wellbeing is unattainable without justice. Justice is nonetheless routinely subverted in many countries. Citizens, usually the powerless poor, are routinely denied justice through the abuse of power, impunity, corruption and inefficiency. These are the usual challenges of reforming justice.

To address these challenges, international development and the rule of law must define justice – something which it has been loath to explicate to this point. While philosophers and political scientists may continue to debate the nature of justice and the role of judicial reform, even a four-year-old child will immediately recognise unfair treatment from its parents and know when justice is denied.<sup>78</sup>

<sup>75</sup> Ibid, 5.

<sup>76</sup> DfID (Department of Foreign and International Development) is the British aid agency. Dahl-Østergaard, Unsworth & Robinson 2005, ii; Unsworth 2009; see also: Moore, Schmidt & Unsworth 2009.

<sup>77</sup> ADB IED 2009b, 24. See also: Armytage, L 2011, 'Judicial reform in Asia: case study of ADB's experience: 1990-2007,' *Hague Journal on the Rule of Law*, 3.1: 70-105.

<sup>78</sup> Our innate sense[s] of justice may vary, which gives rise to the need to articulate a theory of justice precisely to bring reason into play in the diagnosis of justice and injustice.

Justice is the notion of rightness built on law, ethics and values of fairness and equity which are foundational to civic wellbeing. The purpose of justice is to protect human wellbeing. Justice protects humanity from Hobbesian notions of anarchy, societal breakdown and the brutishness of life in nature.<sup>79</sup> It embodies an ordered community governed by the rule of law. While there are many renditions of justice, most of the principles of justice are universal. These renditions embody the norms enshrined in Universal Declaration of Human Rights, which are constituted the core covenants of the United Nations, among other international instruments.<sup>80</sup>

All societies comprise some basic structure of institutions that embody renditions of justice, whether formal or informal. These renditions may be *political* (governance, social affairs and the allocation of interests), *economic* (opportunities for livelihood), *social* (civic order and safety) or *humanistic* (fundamental individual rights). There are numerous expressions of justice. Justice may be primarily utilitarian – concerned with maximising social outcomes; egalitarian - concerned with equality of opportunity, individual rights and freedoms; distributive - concerned with allocating interests in wealth, power or privilege; retributive - concerned with punishing wrongdoing; or restorative - concerned with restoring social harmony. Justice may be variously seen in terms of equality, need, reciprocity or deserts. Expressions of justice are sometimes distinguished from social justice. Potentially tautological, social justice is invoked in secular contexts to emphasise primacy of principles of equality and human rights to advocate more egalitarian opportunities and outcomes which are similar to the distributive expression above.

Justice embodies values which societies institutionalise through their laws and courts that administer those laws. Beyond the truism that law may not be just, promoting justice is concerned with enabling rights which are the political dispensation of interests in law. These rights are vested across the spectrum of human welfare, that is: political, civil, economic, social and cultural. For the purpose of this article, justice is considered in two qualitative dimensions: judicial and developmental. In the judicial context, this argument focuses on the promotion of justice through the administration of law by the courts, being the rights-based or humanistic rendition above. In the developmental context, it focuses more broadly on the promotion of justice in its other political, economic and social renditions.

<sup>79</sup> Hobbes 1651.

<sup>80</sup> The principal UN treaties comprise: the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of Racial Discrimination (ICERD); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC), plus optional protocols. Other international standards include: Basic Principles on the Independence of the Judiciary; Bangalore Principles of Judicial Conduct, 2002; Basic Principles on the Role of Lawyers; Guidelines on the Role of Prosecutors; and Basic Principles for the Treatment of Prisoners.

Justice in development should be concerned with bringing to life the rights which are enshrined in customary, domestic or international law. Development without a rights-based 'thick' concept of justice as fairness is not just insufficient, but perverse; focusing on improving the 'thin' efficiency of a captive court system does nothing more than accelerate the impunity of elite land-grabbing, as starkly evidenced in Cambodia.<sup>81</sup>

I have argued that even the allegorical four-year child knows that justice is important. But why is this so? This foundational concept of justice is universal, a priori, even visceral. Justice is essential to maintain civic harmony and resolve conflict, sustain peace and safety, secure growth and good governance, and enable rights. The importance of justice becomes apparent as soon as it is denied. Society without justice is the antithesis of any notion of equitable opportunity. Recognition of the importance of justice is only now entering the discourse in other than economic terms, as evidenced in the *World Development Report 2011*.<sup>82</sup>

This recognition creates the space to admit justice to the development pantheon of political economy, and frames a vital debate on the role of justice and its crucial relationship to promoting the rule of law.

## 7. Debate between institutionalism and humanism

Close analysis of the journey of judicial reform exposes an unresolved contest for an overarching theory for judicial reform. This contest exists between an economic or political instrumentalist justification and a more recent human-centred justification. The prevailing economic or political justification is based largely on the thinking of Weber and North, notable among others, which constitutes the 'new institutional economics' model.

Weber has been directly influential on the formulation of judicial reform approaches. He stands for the key developmental proposition that the modern legal doctrines of property and contract enforced by a politically independent and technically competent judiciary are the best means of managing the risks of transactions with

81 'Thin' definitions of justice are formal, minimalist and procedural. Raz and Fuller are leading exponents of 'thin' formal concepts of justice and thereby judicial reform. They argue that rational people need a predictable system to guide their behaviour and organise their lives. The precepts of the 'thin' approach are that law should be prospective, open, clear and stable. Raz 1979, 214-218; see also: Fuller L, 1958, and Fuller 1964. 'Thick' notions, on the other hand, equate the 'rule of law' as being elemental to a just society and are linked to concepts of liberty and democracy. 'Thick' reforms address substantive goals such as enhancing individuals' rights, strengthening political institutions and stabilising the economy. This concept guarantees basic individual freedoms, and civil and political rights while at the same time, requires the power of the state to be constrained. Dworkin is a noted proponent of this 'thick' approach, arguing in essence that justice and the 'rule of law' include universal moral principles, and are linked to freedom. Dworkin 1978.

82 World Bank 2011b.

strangers.<sup>83</sup> North extends this thinking with the notion of the ‘rules of the game’. He defines ‘institutions’ – not to be confused with organisations – as:

*the rules of the game in a society, or, more formally, the humanly devised constraints that shape human interaction. In consequence, they structure incentives in human exchange, whether political, social or economic.*<sup>84</sup>

These rules of the game constitute the foundation for the school of institutionalism which has been pervasively influential of development, particularly in governance, over the past 20 years. This is an elegantly powerful and influential theory which has spawned a generation of empirical inquiry to determine the economic determinants of growth.<sup>85</sup> This theory has been used to cast the state in the role of supporting the market through key institutions such as courts to secure property and contract which are necessary for investment-based economic growth, and to promote good governance.

But, *does it work?* At best, the available evidence is ambiguous. There is little consensus that this institutionalist approach to the rule of law leads to growth. To the contrary, Polanyi and Chang show that history reveals that growth leads to the rule of law, rather than vice versa.<sup>86</sup> While there is clearly some empirical evidence of correlation to show that institutions do indeed matter, correlation is not causation. Rodrik cautions that we have as yet little understanding of *how* they matter for the purpose of formulating development policy.<sup>87</sup> This goes some way to explaining the underwhelming performance of judicial reform to this point.

This ‘institutionalist’ approach to development is now under increasing challenge for failing to sufficiently meet the needs of the poor. Building on the thinking of Rawls, and Sen, in particular, a more recent human-centred theory now offers a rights-based alternative that focuses on the constitutive importance of promoting justice. This theory casts development in the role of providing capacity to the poor – people who have rights to freedom and opportunity.

The concept of justice as fairness is powerfully expounded by Rawls in *A Theory of Justice*. This concept builds on Aristotle’s notions of justice, and more recently on the notion of the social contract of the Enlightenment philosophers, in particular, Locke and Rousseau. Rawls argues that the principles of justice form the basic structure of society and are, moreover, the object of the original social contract. In

83 Weber 1918, and Weber 1954, in particular.

84 North 1990, 3.

85 North 1990.

86 Polanyi 2001; Chang 2002.

87 Rodrik, Subramanian & Trebbi 2002, 4. Problems of endogeneity and reverse causality plague any empirical researcher trying to make sense of the relationships among these causal factors [at 3]. And, Rodrik 2004, 10.

effect, questions of justice precede questions of happiness - that is, what is right precedes what is good. This he calls 'justice as fairness'. The notion of fairness may itself be variously defined in terms of equality, need, reciprocity or deserts.<sup>88</sup> For Rawls, justice as fairness is based on the idea that people were originally shrouded in a veil of ignorance, but were motivated by rational self-interest to collectively maximise opportunity to attain the good life.<sup>89</sup> This concept of justice as fairness is embodied in the '*difference principle*':

- i. Each person has an equal claim to a fully adequate scheme of basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
- ii. Social and economic inequalities are to satisfy two conditions: first they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second they are to be to the greatest benefit of the least advantaged members of society.<sup>90</sup>

Rawls' normative approach to rights is foundationally important in providing a contemporary notion of justice. Sen extends this thinking and is cardinally important for redirecting the development discourse away from the prevailing utilitarian paradigms with their economic concerns. He argues that the traditional economic focus on aggregate income and wealth shows a distributive indifference to notions of equality and a neglect of rights. An exclusive concentration on inequalities in income distribution cannot be adequate for an understanding of poverty and economic inequality. He treats poverty as an inability to develop and exercise one's personal capabilities, which reflect the actual freedoms and opportunities of a person.<sup>91</sup> Hence, well-being is a function of how fully an individual exercises his/her human capabilities.

The ground-shifting significance of this thinking rests on its potential to go beyond the prevailing neo-liberal, market-based rationale for judicial reform advocated by Weber and North. Sen's advocacy of rights-based development supplements the theory for judicial reform and places the human being – rather than the state, the market or the development agency – as the key actor in the development process. Economic development cannot sensibly be treated as an end in itself. Development must be more concerned with enhancing the lives we lead and the freedoms we

88 See, eg: Sandel 2009.

89 Rawls's veil of ignorance may be compared to Smith's notion of the impartial spectator. Smith asks instead, what would an 'impartial spectator,' someone observing from the outside, make of a particular state of affairs? Smith 1759.

90 Rawls 1971, 13. See also: Rawls 1978, 1985 and 2001.

91 Sen 2010.

enjoy.<sup>92</sup> For this fundamental proposition, he invokes Aristotle's rationale for the polis to contribute to the good life of its citizens:

*[Pursuit of] wealth is obviously not the good that we are seeking, because it serves only as a means – for getting something else.<sup>93</sup>*

In the seminal work, *Development as Freedom*, Sen initially builds on Rawls to position justice as a fundamental factor in improving the quality of life. This links closely with his view of the state's role to supply public goods such as health, education and effective institutions for the maintenance of local peace and order. In his latest work, *The Idea of Justice*, Sen expounds his theory of justice based on notions of liberty, equality and equity which he emphasises are not confined to the western 'enlightenment' canon. This consequentialist theory builds on a more recent critique of Rawls' theory of justice as fairness, in particular, as being overly concerned with just institutions, institutional libertarianism, and what he terms the 'contractarian' mode of thinking. Sen argues that 'utopian transcendental institutionalism' or absolute perfect justice is unattainable in the absence of any agreement on universal concepts of justice or global sovereignty. Instead, it is better to focus on how society can be improved from its current state, given its actual pattern of injustices. This inquiry addresses actual realisations of justice, rather than getting just institutions right, by asking: what international reforms do we need to make the world a bit less unjust? Sen's idea of justice is measurable in terms of remediable injustice and comparative enhancement to human lives, freedoms, capabilities and wellbeing.<sup>94</sup> He integrates an imposing philosophic discourse which acknowledges more globally pluralistic notions of justice to focus on assessments of social realisations and comparative aspects of enhancing justice. This powerful articulation may in part be understood as seeking to replenish the concept of justice from the hegemonic strictures of its neo-liberal appropriation outlined above.

The major implication of this reasoning is to introduce a 'constitutive' justification for justice being core to promoting the rule of law, with the rights of the individual as its central focus. This reasoning is profound in reconsidering the theory of judicial reform. First, it provides an alternative paradigm to the institutionalist approach to judicial reform. Second, it visibly influences the evolution of endeavour in the rights-based and access-to-justice approaches such as that of United Nations agencies, and the more recent justice-for-the-poor initiatives of the World Bank. Underpinning both approaches is a reform rationale which is based on the notion of empowerment, a notion now being taken up by numerous commentators.<sup>95</sup>

92 Sen 1999, 14.

93 Aristotle 1955, 9; 'The good life is the chief end, both for the community as a whole and for each of us individually.' Also, Aristotle 1958: Book 3, Constitutions, Chapter vi, at 111.

94 Sen 2009, 6 and 25.

95 See, eg: Anderson 2003; Golub 2006; and Brown & Stewart 2006, among others.



Economics cannot trump justice - though it is remarkable that this has been accepted in the discourse to this point. The tension between utility and aggregate wellbeing on the one hand, and equity and individual wellbeing on the other, lies at the fulcrum of reform policy. To the extent that emerging notions of equitable development may be superseding aggregate growth as the current mantra of development, it is clear that promoting the rule of law is now lagging the discourse.

## 8. Empirical evidence on economic determinants of growth

Passing reference is required to the scant empirical evidence that judicial reform has attained an economic purpose. While this does not indicate that past endeavours have been altogether dismal, it does highlight the pressing need for an improved approach. The fragility of this empirical evidence compels both further inquiry and a fundamental reframing of policy approach.

Close analysis of the available empirical evidence affirms only some elements of the instrumentalist policy for the rule of law serving economic or political goals. A synthesis of the empirical inquiry indicates that there is sufficient evidence to establish the following propositions:

- Aid is an important tool for enhancing the development prospects of poor nations.
- Institutional development may contribute to growth, and growth may contribute to institutional development, multi-directionally.
- Good governance contributes to investment and growth; however, aid erodes governance, and is not correlated with democracy; and corruption is associated with ineffective government and low growth.
- Growth and investment are increased in the presence of institutions which protect property and contract rights, and aid assists growth where there are good policies, though this relationship is described as small and fragile.
- Efficient, independent and accountable judiciaries are associated with growth; in effect, there is a linkage between judicial reform and economic development, but on all accounts this is yet to be fully understood.
- Domestic demand for change is more important than the origin of reform.<sup>96</sup>

For purposes of development policy-making, this evidence is however incomplete, qualified, often ambiguous and on occasion openly contested by its own adherents.

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<sup>96</sup> For a more detailed discussion of the empirical evidence see, in particular, Armytage 2012, chapter 5.

There is no consistent evidence available that judicial reform has attained its stated goal of alleviating poverty. Certainly, the global economy has grown. As many scholars including Stiglitz, Sachs and Collier emphasise, there has been unprecedented economic growth in many countries in the developing world.<sup>97</sup> But, equally, there is irrefutable evidence of a growing inequality gap which is highlighted in the *World Development Report* of 2006.<sup>98</sup> The rich have got richer, but the poor have either not got richer or they have got richer at a slower rate. Once the measurement of growth has been disaggregated, it becomes clear that the promotion of economic growth has failed to alleviate poverty. Moreover, it has had the perverse effect of exacerbating inequality.

The prevailing economic justifications for development policy do not rest on firm empirical foundations. The evidence is incomplete and increasingly internally contested. This revealed in the researches of Dollar and Kraay, Knack and Keefer, Djankov, Feld and Voigt, La Porta, North and Rajan whose collective work has been particularly influential in the formulation of the development policy of the World Bank and other major donors<sup>99</sup>. Over recent years, there has been extensive investigation of the key relationships between aid, government, the institutions of justice and growth. This inquiry validates the existence of some significant relationships between justice, good governance and economic growth. But, equally, it reveals that many important issues remain contested; much of the evidence is ambiguous; and there are numerous gaps in knowledge. As Rodrik stresses, fundamental questions over the chain of causation remain unanswered and centrally problematic.<sup>100</sup> While Kaufmann, for example, insists that good governance, as an institution, is a predeterminant of growth, others including Arndt and Oman directly challenge the integrity of this claim<sup>101</sup>. Chang persuasively presents the reverse argument that development causes good institutions, reminiscent of Polanyi's earlier thesis which Stiglitz revisits. Evidently, much more empirical research is required before we can understand the key determinants of the good life, and the role of judicial reform in promoting it. Additionally, there is a stark lack of any corresponding research into the equitable and distributive dimensions of justice as a determinant of wellbeing, which is a missing dimension in the empirical inquiry of poverty alleviation.

Collectively, the lack of compelling empirical justification and record of underwhelming results create the imperative to realign our approach to the rule of law and promoting justice.

97 Stiglitz 2000 and 2002; Sachs 2005; and Collier 2008; in particular.

98 World Bank 2005.

99 Dollar & Kraay 2000; Knack & Keefer 1995 and 1997; Djankov, La Porta, Lopez-de-Silanes & Shleifer 2002 and 2003; Feld & Voigt 2003; La Porta, R, Lopez-de-Silanes, F, Shleifer, A & Vishny, R, 1998, 1999, 2003, 2004 and 2008 – among others.

100 Rodrik 2004.

101 For example, Kaufmann D, Kraay A & Mastruzzi M 2007, in particular; see also World Bank's Worldwide Governance Indicators; and Arndt & Oman 2006.

## 9. Way forward - realigning the rule of law to promoting justice

It is now clear that there are a range of unresolved philosophical, conceptual and technical challenges in judicial reform. The above survey of the literature and an analysis of practice, indicates that the prevailing approach to promoting the rule of law is manifestly insufficient.

I redress this insufficiency by proposing a fundamental realignment in the purpose of the rule of law to promote justice as fairness and equity. This requires the inclusion of a human-centred, rights-based approach to improving justice constitutively. This realignment supplements the deficiency in the prevailing instrumental approach to judicial reform with a more 'thick' conception, and provides the powerless and poor with the means to exercise their substantive rights.

As a practitioner, it is important to stress that this proposed realignment is actionable in practice. Let me illustrate how this approach may be put into practice using a taxonomy for just development, which is outlined below. This taxonomy is indicative of injustices from the 'real world' of development practice which too often go unaddressed at the levels of either court-focused or broader development reform. It provides a sampling of common situations to illustrate their amenability to a justice-focused approach to development. It identifies rights and specifies indicators that measure justice across the major dimensions of development. These may involve crime (*social*), business and employment security (*economic*), good governance (*political*), and rights and opportunity (*humanistic*). It also nominates the data required to measure the relationships between justice-focused reform and its goal of improving civic wellbeing.

It provides examples of injustices affecting the rights of people – from Afghanistani girls, to Bangladeshi politicians, Nepali dalit women, Vietnamese businessmen, Palestinian labourers and Pakistani taxi drivers - together with performance indicators. These indicators specify the means by which reform success can be measurable. These are variously measurable in terms of the enablement of rights, for example, to contract and title, physical safety and security, fair trial, resolution of disputes and bureaucratic caprice.

# Taxonomy of Just Development

	Human situation	Injustice suffered	Right(s) to be exercised	Indicators of measurement	
				Development-wide	Court-focused
1.	Nepali dalit woman	Sexual assault	Actionable rights to physical safety and security of person – sources: domestic law, UDHR, ICCPR, CEDAW, CERD. <sup>1</sup>	Public standards of dignity, tolerance, and respect for rule of law.	Access to legal aid; rates of crime, conviction, compensation.
2.	Aboriginal Australian	Police harassment, and over-imprisonment	Actionable rights of Indigenous people to equal treatment and non-discrimination; sources - domestic law, UDHR, CERD.	Public / police standards of dignity, tolerance, and respect for rule of law.	Access to legal aid, convictions, diversion from arrest/prison.
3.	Vietnamese businessman	Breach of contract	Actionable rights to economic security, timely cost-effective redress; sources - domestic law, ICESCR.	Business productivity; business confidence.	Civil claims, compensation.
4.	Pakistani taxi driver	Extortion by public officials	Actionable rights to good governance, integrity and non-harassment; sources - domestic law, ICESCR, CAC.	Administrative redress; and disciplinary proceedings	Criminal prosecutions, compensation.
5.	Cambodian farmer	Dispossession	Actionable rights to habitat and economic security; sources - domestic law, ICESCR.	Political, media advocacy; public perceptions of governance.	Access to legal aid, repossession, compensation.
6.	Afghanistani girl	Barriers to education	Actionable rights to education; sources - domestic constitution / law, UDHR, ICESCR, CEDAW, CRC.	Educational enrolments; literacy; employment.	Judicial enforcement of constitution.
7.	Azerbaijani journalist	Detention and torture	Actionable rights of freedom of speech; sources - domestic law, UDHR, ICCPR, CAT.	Press freedom; political media advocacy; public perceptions of governance.	Complaints; judicial review and redress.
8.	Samoan villager	Banishment	Actionable rights to security of habitat; sources - domestic policy and law, UDHR, ICESCR.	Civic harmony, customary dispute resolution.	Complaints; judicial review and redress.
9.	Bangladeshi politician	Unfair trial	Actionable rights to fair trial, due process; sources - domestic law, UDHR, ICCPR, Bangalore Principles.	Democratic freedom; public perceptions of governance.	Complaints against judicial integrity.
10.	Palestinian labourer	'Closures' causing dismissal	Actionable rights to work and freedom of movement; sources - domestic law, UDHR, ICESCR.	Employment data.	Civil claims, compensation.

Each of us can readily identify other examples of injustices that blight people's lives. Rights-based remedies to these injustices exist across the economic, political, social and cultural dimensions of human wellbeing. This taxonomy is an analytic tool to help policy-makers to see and address these injustices. Its purpose is to conceptualise development through the organising paradigm of promoting justice as fairness and equity. It can be used to focus on improving specific aspects of justice, address particular human situations of injustice and the rights to be enabled, and specify how the improvements will be measured. In doing so, it can address innumerable situations to promote developmental values of equality, efficiency, integrity, transparency, accountability, access, legitimacy, among others. It is *not* a litigators' guide to pro-poor claims; it is intended to illuminate how development can dynamically promote justice across the spectrum of civic wellbeing.

In sum, this article argues that judicial reform should promote justice and that justice must be centrally concerned with fairness and equity. The core purpose of judicial reform is to enable those rights that are constituted in international, domestic and/or customary law. These rights span the spectrum of civic wellbeing, comprising the economic, political, social and humanistic dimensions of any society. Reaching a consensus on which rights to promote may be difficult where the interests of power-holders are jeopardised, which has often required donors to make pragmatic compromises in practice. It is for this reason that justice reforms should focus on enabling those rights which have already been dispensed politically into law.

This theory of rights-based development reframes the approach to the rule of law in international development and casts the human being – rather than the state, the market or the development agency – as the key actor in this process. To realise this vision of placing justice at the centre of development, promoting social wellbeing, requires a shift in paradigm. The prevailing focus on primarily promoting aggregate economic growth has put the cart before the horse. By emphasising utilitarian notions of efficiency, it has shown a distributive indifference to notions of equality and a neglect of rights. Economic development cannot sensibly be treated as an end in itself; markets are instrumental in providing social opportunity for transactions. But the pursuit of growth or wealth cannot be the goal of development. Development must provide the means to enhance the lives of people and improve civic wellbeing. To do this justice must lie at the heart of reform endeavour.

These propositions realign the rule of law to the immanence of justice in Nepal and the quest to promote fairness - notably for the poor who are most vulnerable to events such as the GFC - which has been recognised as elemental to human society since Aristotle:

*Man, when perfected, is the best of animals; but if he is isolated from law and justice he is the worst of all... Justice which is his salvation belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association.<sup>102</sup>*

*Justice and equity are neither absolutely identical nor generically different... This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality... It is now clear what equity is, and that it is just, and superior to one kind of justice.<sup>103</sup>*

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102 Aristotle, 1958, [1253 a 15], 7.

103 Aristotle, 1955, [1137a - 35] and [1137 b 25-35], 141.

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# Including the Community in Judicial Reform: an Initiative for Improving Women's Access to Justice in Nepal

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## Abstract

*This article describes an approach to justice sector reform in Nepal, which aims to improve women's well being by ensuring an effective right to remedy for victims of violence, and situates it in the current global and national context of justice sector reform. The author discusses the global context its goals, successes and challenges as introduction. The second part, Mr. Karna, summarizes the experience of judicial reform in Nepal. The third part describes a judicial reform initiative aimed at improving human well being by strengthening the relationship between the community and judiciary, and outlines some lessons learned from that experience. The final part, the author identifies the main questions identified by the project that should be addressed as part of ongoing and future justice sector reform initiatives.*

## 1. The global experience of judicial reform

For the purpose of this article, judicial reform is defined as a process to promote justice as fairness and the equitable exercise of rights<sup>1</sup>. The term “judicial reform” is often used interchangeably with the term “rule of law reform” and the purpose of the judicial reform has varied according to the time, actors involved and context. The independence and prestige of the judiciary is the primary theme of judicial reform whereas legal reforms, training to judicial staffs, enhancing the judicial institutions with the information technologies among others are the other facets of judicial reform. If it serves the original purpose of the judicial reform to improve human well-being is questionable though. Critics of rule of law reform efforts to date have claimed that there is very little evidence that rule of law reform efforts have benefited the poor.<sup>2</sup> Livingston Armutage, after analyzing theory and practices in many areas of judicial reform, concludes in his latest publication “Reforming Justice: a Journey to Fairness in Asia” that the existing instrumentalist approach to judicial

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1 Livingston Armutage, REFORMING JUSTICE, A JOURNEY TO FAIRNESS IN ASIA, Cambridge University Press, 2012, p. 286

2 Stephen Humphreys, THEATRE OF THE RULE OF LAW, Cambridge University Press, 2010, p. 218

reform is demonstrably insufficient, and that space must be opened to explore a more humanistic approach, which aims to promote justice as fairness and equity<sup>3</sup>.

At the regional and global level, in attempting to explain the lack of more positive results, observers have pointed to the fact that, for two decades in South Asia, and since the 1960s in Latin America, “justice” has not been viewed as an ‘end in itself’ of justice (or rule of law) reform, but as a byproduct. In other words, justice or rule of law reform has been seen as an instrument of ‘good governance’, useful primarily as a means to economic growth, poverty reduction, better security and human rights protections.

While all commendable goals, this approach has suffered from two key flaws. First, some of these goals may at times be mutually contradictory; for example, pursuing security by strengthening law enforcement while also seeking to protect rights against widespread police abuses; or liberalizing markets while also seeking to respond equitably to structural inequalities. The second flaw is the assumption that ‘looking inward’ at the needs of justice sector institutions (infrastructure, case management, training, appointments, promotions and discipline) will lead outward to responsive justice delivery. However, the evidence suggests that those historically marginalized and excluded from the State have not demonstrably benefited from these institutionally focused efforts. One problem may be that justice sector reform has been conceived in terms of ‘form’ rather than its actual ‘function’ within the complex political economy of local environments where injustices are daily experienced.<sup>4</sup>

Recent studies on judicial reform across the Asian region suggests that future success in justice reform efforts will require building a shared understanding of underlying principles of justice, judicial independence and local ownership, coordinated strategies by justice sector actors and donors, and coherent frameworks for monitoring and evaluating progress. “Searching for Success in Judicial Reform,” a regional analysis drawing in part upon the Nepal experience, offered the following recommendations:<sup>5</sup>

3 Supra note 2, p. 76

4 This point was made clearly in 2005 by Klaus Decker, Caroline Sage and Milena Stefanova, *Law or Justice: Building Equitable Legal Institutions*, World Bank, 2005. “The abstraction of the justice sector from broader normative and governance frameworks relates directly to [the concern that] JSR initiatives are predominantly based on a pre-determined ideal that is articulated in terms of its form, rather than being based on an understanding of the socio-economic and political functions it plays in any given society. This approach reflects a theoretical model that starts with a perfect ‘rule of law’ system, from which dysfunctional systems have deviated” (p.2). The World Bank Development Report 2011 repeats the same point: “A focus on legitimate institutions does not mean converging on Western institutions. History provides many examples of foreign institutional models that have proven less than useful to national development, particularly through colonial legacies, because they focused on form rather than function.” World Bank Development Report 2011: Conflict, Security, and Development, p 8.

5 Livingston Armytage (ed.), *SEARCHING FOR SUCCESS IN JUDICIAL REFORM: VOICES FROM THE ASIA/PACIFIC EXPERIENCE*, Oxford University Press, 2009, p 18-26.

### *Principles*

- a) Justice should be an end, in itself, not merely an instrument for achieving other diverse ends. This implies the need for a human-centered approach that looks beyond the needs of institutions to the needs of the most needy in society.
- b) Judicial independence does not mean isolation from citizens and communities. Institutional isolation undermines public trust and access to justice. It is possible for the judiciary to engage with the public without compromising their independence and impartiality on specific cases.
- c) Justice reform requires collaboration with citizens and communities who have a sense of ownership of the reform process.

#### *1. Strategy*

- a) *Leadership is vital and can make difference. The Supreme Court should lead the justice reform process.*
- b) *Justice reform activities should be integrated in a mutually reinforcing way [for example, linking training to broader capacity building efforts which are in turn linked to performance incentives.*
- c) *Donor assistance must be guided and coordinated by judiciary, while donors seek to ensure effectiveness and compliance with accepted standards.*

#### *2. Measuring success*

- a) *Reform activities should be knowledge-based, including clear baseline data.*
- b) *Monitoring and evaluation must be carefully designed and implemented in order to demonstrate results that become the foundation for further action.*

This article contends that despite a recent history of failure, judicial reform can improve civic well-being. Moreover, these improvements are readily measurable using an evaluative framework of indicators that monitor the successful impact of those reforms. To demonstrate this success will require the formulation of a reform-monitoring approach, normatively framed to promote specific rights, which are measured before and after the reform intervention.<sup>6</sup> The rest of this article will consider the experience to date in Nepal, and offer a preliminary analysis of how it measures up to the global experience, including the recommendations for reform offered in ‘Searching for Success’. As described below the results to date are mixed but there is reason to be optimistic.

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<sup>6</sup> *Supra* note 2, p. 288



## 2. Judicial reform in Nepal

In Nepal, donor funding for rule of law and human rights has been overwhelming targeted at peace-building, particularly in the post-conflict context. Justice reform efforts have primarily included supporting paralegal committees and community mediation. To the extent that rule of law promotion has been conceived as part of governance reform, most of it has been directed at encouraging democratic, inclusive, transparent and accountable governance, in part to address historical marginalization and exclusion - one of the main causes of the conflict. A third major theme of donor funding in Nepal has been poverty reduction, which since 2000 can be situated within broader efforts at assisting Nepal to achieve progress against the Millennium Development Goals.

While there have been separate donor efforts at capacity enhancement for the judiciary and other justice sector actors on the one hand, and awareness raising of right holders on the other, there is no known exercise that explicitly links both supply and demand to encourage responsive justice provision. Though justice sector actors have received gender sensitization trainings, especially in relation to gender-based violence, these also appear to have failed to make the explicit link between supply and demand. The initiative outlined below is innovative in its promotion of judicial leadership, through the strategic planning of the Nepali judiciary, to encourage a wide range of justice sector actors to adopt an outward-looking approach to providing remedies to those who suffer injustices and rights violations on a day-to-day basis. Importantly, these efforts at responsive justice delivery will stem from hearing and listening to the voices and justice demands of its clients at the most local level.

*The role of the Supreme Court:* Judicial leadership is a key factor in ensuring that justice sector actors take ownership of a homegrown reform process, and in this regard Nepal is a good example. Under the leadership of Supreme Court, the Nepali judiciary has developed two strategic plans for reforming the judiciary. It is important to note that first five year strategic plan of the Nepali judiciary (2004-2009) sets out important vision and mission statements that were retained in the second five year plan (2009-2014), which sets as its overall objective the creation of a justice system “worthy of public trust”. The second strategic plan of the Nepali judiciary acknowledges that “justice is not only slow and cumbersome, it is also expensive. The easy access to justice by the general public cannot experience reform through the reforms being made on the physical aspect of the courts. It is imperative that reforms should immediately be made from the initial stage of registration of case to the execution of judgments.”<sup>7</sup> The vision and mission of the strategic plan are:

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<sup>7</sup> Second Five Year Strategic Plan of the Nepali Judiciary (2009/10 - 2013/14), Supreme Court of Nepal (2009), p. 64

*Vision: To establish a system of justice which is independent, competent, inexpensive, speedy and easily accessible to the public and worthy of public trust and thereby to transform the concept of the rule of law and human rights into living reality and thus ensure justice to all.<sup>8</sup>*

*Mission: To impart fair and impartial justice in accordance with the provisions of the Constitution, the laws and the recognized principles of justice.<sup>9</sup>*

The plan also commits to “providing increased accessibility of the people including the disempowered, minorities and indigents to judicial services at the most local level”.<sup>10</sup> To achieve this goal, a number of important steps have been envisioned in the strategic plan including improving stakeholder communication<sup>11</sup> and enhancing public trust towards the court.<sup>12</sup> Taking a first step to enhance public trust, the strategic plan has introduced a concept to strengthen “public outreach.”<sup>13</sup> This initiative can be instrumental to enhance the relationship between the public and the judiciary, and shows the seriousness of the Supreme Court leadership to address this gap between communities and the court.

The Supreme Court in Nepal has shown its commendable leadership in promoting the value of justice through decisions in many Public Interest Litigation (PIL) cases that protect and promote the rights of vulnerable and marginalized citizens or communities, though the consistency of the Supreme Court’s decisions has at times been questioned.<sup>14</sup> Major steps forward taken by the Supreme Court in response to PILs include (a) repealing discriminatory laws, (b) directing the government to formulate laws and policies to meet the rights of women under the obligation of international laws and the constitution, and (c) providing special measures to be taken for improving women’s rights to a remedy.

This article limits itself to some landmark decisions in which the Supreme Court has provided direction on how to ensure an effective right to a remedy for women victims of violence. For example, the Supreme Court has suggested that policy measures be taken to effectively investigate cases of violence against women by requiring confidential hearings in rape cases.<sup>15</sup> The Supreme Court has also ordered that cases of sexual and gender-based violence (SGBV) be investigated by women police

8 *Ibid*, p. 11

9 *Ibid*.

10 *Ibid*.

11 *Ibid*, p. 34

12 Second Strategic Plan of the Nepali Judiciary (2009/10 - 2013/14) Mid Term Evaluation Report, Supreme Court of Nepal (2012), p. 115

13 *Ibid*.

14 Sapana Pradhan Malla, *From Equality to Gender Justice*, ELUSIVE EQUALITY, Indira Jaising [ed.] Women Unlimited, New Delhi 2011, p. 201

15 Jyoti Lamsal Poudel v. Government of Nepal, Writ no WO 0663/266, decision date 2067/8/15 B.S.

officers.<sup>16</sup> The Court has also ruled that free legal aid be ensured for women victims of violence.<sup>17</sup>

Generally, the Court limits its decisions to the issues plead in the petitions brought before the court, applicable laws and related precedent. But in some cases, the Supreme Court has looked beyond the issues specifically plead in the petitions, and as a consequence has developed some progressive jurisprudence. For instance, in a decision in a case of domestic violence, the Supreme Court not only analyzed the shortcomings of the Domestic Violence Act, but also suggested a special measure to be taken to provide effective and quick remedy to the victims of violence. The special measure that it suggested was the establishment of a fast track court system to adjudicate serious cases of violence.<sup>18</sup> The Court also directed the government to amend and extend the current 35 day statute of limitation that applies in rape cases.<sup>19</sup>

In reference to women victims of violence, addressing inadequacies in the law and legal institutions is not sufficient to ensure justice for the victims. Deep-rooted conservative societal values and superstitious beliefs at many times are the main obstacles to accessing judicial remedies. Acknowledging this fact, the Supreme Court ordered the government of Nepal to make arrangements for awareness-raising at the community level.<sup>20</sup> However, implementation of these decisions remains problematic in the absence of a system to ensure collaboration among justice sector actors and strong monitoring mechanisms.<sup>21</sup>

These decisions reflect the pro-active leadership role that the Supreme Court has played in promoting justice for women. In response to these decisions, the government of Nepal has adopted some legal, administrative and institutional policies and measures to improve justice delivery to women victims of violence. The establishment of the National Women Commission, the Women and Children Police Directorate, and the Gender Unit in the office of the Prime Minister are few examples of institutional measures. The government of Nepal has also started shelter homes and service centers for women victims of violence, and recruitment of more women police officers. Similarly, the judiciary itself has established, by introducing court rules, the Judicial Sector Coordination Committee (JSCC), which include civil society members. To execute and monitor the decisions of the Supreme Court and other courts, a Judgment Execution Directorate (JED) has also been established.

16 Jyoti Lamsal Poudel v. Government of Nepal, Writ no W0 0424/2064, decision date 2066/4/28

17 Jyoti Lamsal Poudel v. Government of Nepal, Writ no W0 0663/2066, decision date 2067/8/15

18 *Ibid.*

19 Sapana Pradhan Malla v. Prime Minister and Council of Minister, Writ no 3561/063, decision date 2064/9/10

20 Reshma Thapa vs Prime Minister and Council of Minister, Writ no 2899/058 decision date 2061/4/26

21 Supra note 16, p. 207

To ensure the speedy justice and avoid unnecessary delay in cases, provision of continuous hearing and calendar system has been incorporated in the district court regulation.<sup>22</sup>

Despite these positive developments, implementation of policies as well as judicial decisions remains a major problem. Official sources suggest that up to 40% of the decisions of district courts in Nepal remain unimplemented.<sup>23</sup>

*Non-government and community-based initiative:* In addition to these Supreme Court decisions, many of them brought by civil society organizations, and the government's response, since the 1960s there have been many community level interventions. A number of NGOs and government agencies have been involved in raising awareness, providing shelter to victims and witnesses, providing medical support and psychosocial counseling to victims of SGBV, establishing women groups foreconomic empowerment, women's pressure groups for justice demands, paralegal committees and mediation committees. However, a lack of coordination among actors including donors, the short term nature of donor funded projects, and non-ownership and insensitivity by government actors has hampered the effectiveness of these efforts. A large number of small to micro level projects supported by donors, which by virtue of their very limited budgets and short duration, are unlikely to have any significant or sustainable impact. In fact, if citizens' expectations are raised and not realized, the impact might prove to be negative.<sup>24</sup>

### 3. New approaches to judicial reform in Nepal

The International Commission of Jurists (ICJ), in support of the objective of the Strategic Plan of the Nepali Judiciary to enhance the relationship between the court and communities, initiated a judicial reform project in Nepal from 2011.

As part of the project, the ICJ conducted a research assessment in more than 14 districts, which revealed problems at every step in the formal justice system. Focus group participants identified problems including: (i) a lack of full recognition of rights in the constitution and laws; (ii) where rights are recognized by law, insufficient citizen awareness; (iii) where awareness exists, an inability to effectively make claims due to recalcitrance, incompetence or corruption of authorities, distances and costs of access, or cultural barriers that prevent women or *Dalits* from making claims; and (iv) where good decisions have emerged, they have been routinely ignored by local authorities. The overall conclusion of the assessment was that there is an insufficient link between community initiatives and policy level justice

22 See Rule 23(c) for continuous hearing and 85(b) for calendar system in the District Court Regulation 2052.

23 Paper presented by JED director at a program organized by the JSCC in Bara on 03 December 2012.

24 Access to Security and justice and Rule of Law in Nepal, an assessment report, 2011.

initiatives, which were often perceived as inconsistent with the values and priorities of communities.

Achieving more responsive justice delivery means overcoming the systematic denial of a remedy for rights violations suffered particularly by women and those marginalized and excluded on the basis of caste, economic status, or cultural [ethnic] identity. With this understanding, the ICJ sought to promote reform strategies, including those in the Supreme Court's Strategic Plan, on the basis of their potential to contribute to creating a justice system 'worthy of public trust'.<sup>25</sup>

In more concrete terms, the ICJ-supported approach promotes engagement, dialogue and collaboration between justice sector actors (including police and judges) and local communities on justice issues identified as priorities by local actors, with the aim of promoting reforms that impact positively on a much broader range of justice demands. This engagement is shaped and guided by the advancement of local justice agendas through policy research, collaborative leadership and dialogue among all stakeholders, advocacy and strategic legal action. The leadership of the Supreme Court, with support from the National Judicial Academy (NJA), is a key to this success, guided by the progressive vision and mission statement of the second strategic plan of the Nepali Judiciary.

A baseline survey<sup>26</sup> conducted in three districts by a research team in 2012 and its follow-up will provide indicators of the progress made by the approach in due course. While it is premature to reveal any concrete results of this approach, some observations from this experience may be outlined here:

*3.1 Community engagement:* The ICJ supported existing women leaders to facilitate dialogue in communities with the objective of diagnosing the causes, and developing a shared understanding, of the policy gap between justice service providers and communities for the purpose of ongoing reform.<sup>27</sup> To enter into a dialogue with community-level women's groups, a number of women leaders have been provided with support to facilitate community 'voice' for the purpose of developing a policy-based dialogue. To make the dialogue a platform for all participants to speak frankly, proper care was given to maintain the respect, dignity and confidentiality of

25 Supreme Court of Nepal Five Year Plan 2009-2014. On p, 11, the Plan articulates a vision of "a system of justice which is independent, competent, inexpensive, speedy, and easily accessible to the public and worthy of public trust and thereby to transform the concept of rule of law and human rights into a living reality and thus ensure justice to all".

26 ICJ has conducted a baseline survey in three districts (Mahottari, Dhading and Bardiya) in collaboration with Center for Research on Environment Health and Population Activities (CREHPA) in 2012, the report is yet to be published.

27 ICJ supported NGOs in four districts, (Mukti Nepal in Siraha, HRPC in Mahottari, Focus Nepal, Nari Jagaran Kendra and Sahyatri Samaj-WHRD Network in Dhading and Aawaz in Bardiya) to engage with community women for justice policy dialogue.

every participant. The preliminary findings of this work suggests that the dialogue has proven an effective platform at which justice issues can be raised by the community, and that continuous dialogue with the same women groups has given more confidence to the women participants to raise concerns. This process has also helped the community to understand their rights, the resources available to them, and led to an initial positive response to the community engagement.

*3.2 Community/stakeholder dialogues:* Dialogue between the community and government authorities helps to promote a shared understanding of justice problems and develop solutions that can enhance the relationship and build trust between rights holders and service providers. Through constructive engagement between government actors and the community, they can become aware of each other's problems and by acknowledging them, can make a collective effort towards solving them. Women activists in the project districts have come to understand that their earlier engagement with the authorities had resulted in a hostile relationship when they sought to engage with state actors in particular cases or on particular issues. However, this new approach of continuous engagement and discussion of justice barriers has provided a more conducive environment for realizing the needs of both communities and justice sector actors. In addition, this process has helped resolve some community level issues as well as individual problems after commitments were made by authorities during the dialogue process. This step-by-step process of engagement with the justice sector actors has promoted a shared understanding of policy problems and the need for improvement.<sup>28</sup> It has also helped to improve in the implementation of agreed changes.

*3.3 Ongoing Challenges:* The process has not been free of challenges. While both community and government authorities have welcomed the process of engagement and expect its expansion, some dangers remain for its sustainability. Like other donor-funded efforts, until and unless the process is owned as a government initiative, it is unlikely that community people will feel enough ownership to continue the process. It is also important to link this process with other existing initiatives such as para-legal committees, women groups and micro-credit initiatives.

The second challenge of the process is that the facilitators of the community-dialogue process need continuous support and guidance to link the results of the dialogue process with specific justice issues. Linking individual problems to shared justice policy issues is a real challenge requiring continuous engagement and expert support. Local leaders must develop some understanding of law and policy if they are to effectively translate the results of the dialogue process into policy reform

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<sup>28</sup> The observation of the community engagement in the four pilot districts.

that can be implemented. Increasing the capacity of the community to enable the exercise of rights to a remedy in cases of violence against women requires the continuous engagement of the community with justice sector actors.

The initial response of officials to public complaints is often that the complaint is wrong or that they are powerless to address it. But further engagement often leads to more constructive dialogue. Frequent transfer of government officers is another part of problem to make them understand the process and act accordingly. Continuous engagement through justice policy dialogue can help the concerned actors to realize the shared justice problem and their solutions. The JSCC-led interactions in the districts on improving the effectiveness of judgment execution may be a particularly important step forward. The participants at community and district levels have welcomed enthusiastically the court-led interactions with other justice sector actors and community leaders.<sup>29</sup> If conducted on regular basis and with concrete objectives, these interactions can be instrumental in improving judiciary-community relations. They can provide a platform not only to accelerate the execution of judgments but also to increase the public trusts in the courts. Wider dissemination of information about the purpose, structure and mandate of JSCC should be done. And to do all this sufficient budget is required.

#### **4. The Road Ahead: Key Questions to Be Addressed by Future Justice Reform Initiatives**

Based on a preliminary analysis of past justice sector reform experience in Nepal and globally, and specifically drawing upon the lessons learned thus far from the partnerships between the ICJ, the Supreme Court, through the National Judicial Academy, and district-level women groups, the last section of this paper sets out a number of key questions to be addressed by any ongoing or future initiatives.

*4.1 What are the obstacles that prevent community members and women victims of violence in particular, from approaching the justice system?* The findings of the justice sector reform experience so far suggest there is a lack of knowledge in community at large about the nature, existence and causes of injustice. Conservative and superstitious social values have led to adaptive preferences in relation to violence against women, and political interference has led to the mediation of even in cases of serious crimes. The police are often unduly influenced not to properly investigate. Corruption and power mongering is also rampant leading to an almost complete lack of trust in the system by the vulnerable section of community women. Social prestige and family pride may also become overriding factors sometimes leading community members to tolerate injustice. Judicial structures and processes are

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<sup>29</sup> Observation made in JSCC interaction in Siraha on 03.12.2012 and Bara on 04.12.2012.

also cumbersome, inefficient and lengthy. Lack of legal and institutional measures for protection of victims and witnesses and financial difficulties are addition to the victims preferring non-judicial measures to settle the cases. The lack of legal aid, professional medical examinations, and the need to appear frequently in court leads victims to drop cases, agree to have them mediated or in some cases, commit suicide. This state of affairs leads to further impunity.

*4.2 Where is the role of the court and how can trust be built?* Court may have a limited role or capacity to provide solutions to those problems beyond its knowledge or control. However, it is also clear that until and unless these barriers are addressed, even an efficient and speedy justice delivery system may not substantially reduce injustice. The court is limited to the evidence brought before it. It can only decide on the basis of evidence collected, documents produced and the statements of the witnesses.

Community consultations more often involve complaints about the police rather than courts. This is largely because the police having more presence in the community [or lack of presence of court in the community]. Because the courts are more remote, complaints tend to focus on them less. But in more detailed discussion it is clear that the public also perceive problems with the courts, which unaddressed, will further erode public trust.

How can the court build public trust under these circumstances? The justice problems raised in discussions identify many barriers in approaching the court, and barriers that create delays even when access has been obtained. Dialogue with civil society actors suggest that women victims of violence are particularly vulnerable to being denied access at the level of the police and the court system.

*4.2 What are the benefits and potential risks of establishing a formal judicial outreach program?* Despite the Supreme Court's acknowledgment that the court has a responsibility to reach out to the community through a formal outreach policy, judges and judicial officers vary in their understanding of what this process might entail. They express many concerns that it might ruin the independent image of judiciary, that judges might be viewed as biased, and that such engagement falls outside of the mandate of the courts. Others agree that public outreach is necessary, but that it should be approached with great caution, and that it is premature to adopt a formal policy.<sup>30</sup> There is fear among many justice sector actors that if the judges start going to the community and listening to them, they may be more vulnerable to attack by those with individual grievances.

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30 Interviews in Mahottari district on 18 July 2012; Interview with Appeal Court Judge Hon. Anand Mohan Bhattarai on Kantipur TV on 08 September 2012; Feasibility Study on Community Outreach program at Nawalparasi on 13 June and in Tanahu district on 14 September 2012.



One important factor is the lack of clarity about the concept of community outreach. Therefore, NJA has initiated some consultations on the concept and need of the judicial outreach and based on the concept developed it has carried out few judicial outreach<sup>31</sup> activities engaging with students, VDC secretaries and teachers. Initial response of the participants suggests this as a good endeavor by the judiciary and expects judicial outreach to wider community. In addition, some judges are exercising some level of external communication with community members either through discussions with the bar or through meetings of the Judicial Sector Coordination Committee. The JSCC, as a mechanism led by judiciary itself in which civil society is represented, is one potential mechanism for court-public communication. However, ensuring meaningful and inclusive representation from the civil society actors remains a challenge.<sup>32</sup>

*4.4 The Road Ahead:* While criticizing some aspects of the traditional institutional approach to judicial reform, it is premature to conclude that an integrated process of 'top-down' and 'bottom-up' justice sector reform will be a success. Nonetheless, positive signs indicate that this approach, if continued strategically under the leadership of the judicial sector, can pave the way for real improvements in justice delivery. In particular, at least five promising signs can be identified:

- a) Meaningful dialogue between communities and state actors on justice policy has already provided evidence of growing trust. In order for this dialogue process to become sustainable, the government should exercise more leadership in coordinating related initiatives through local governmental bodies.
- b) Preliminary findings suggest that court-led dialogue processes can promote a shared understanding of justice sector actors of their role and responsibility for policy reform as well as policy implementation. Building this process will require ongoing research and monitoring to help refine future approaches.
- c) The Justice Sector Coordination Committee appears to be a promising forum for the introduction of dialogue between justice sector actors and community. Regular meeting of JSCC can lead to better understanding of the court's roles and responsibilities, and will contribute to the search for common ground and potential solutions to overcome barriers to justice.
- d) The judiciary and the Supreme Court in particular have shown signs of leadership in the development of an outreach policy. Judicial leadership is essential for this outreach process. For that purpose, the court should develop detailed guidelines in consultation with the community.

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31 In December 2012 NJA has conducted three judicial outreach activities in Nawalparasi, Tanahu and Bhaktapur

32 Experience shared by Appeal Court Judge Keshari Raj Pandit on Strategic Litigation Training on 16 June 2012 at Kathmandu.

- e) Resources are beginning to be made available for community-based dialogue processes, and there are indications that support for a court-led initiative may be forthcoming. An effective process of dialogue and outreach requires the allocation of budget for training as well as the necessary logistics

This is just the beginning of a long process. Actors at the national institutions, civil society and community levels must all be engaged in dialogue with one another if real, measurable change is to become a reality. There is good reason to believe that a concerted effort to consider the lessons learned in Nepal and elsewhere in the world will reduce the risk that the notion of justice as the “will of the powerful” will persist.<sup>33</sup>

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33 CK Lal commented that justice in Nepal is the “will of powerful” in a “Policy Dialogue on Judicial Reform”, organized by THRD Alliance on 26 July 2012

# Judicial Community Outreach Program in Nepal: Enhancing Public Trust towards Judiciary and Promoting Access to Justice\*

Shreekrishna Mulmi\*\*  
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## Abstract

*Public trust and access to justice for poor and marginalized are fundamental for any system of justice. But, all the time, this has been a challenge for Nepali judiciary. Therefore, the authors explore a means to promote public trust and access to justice in the court system through judicial community outreach programs. The authors provide a brief overview of judicial outreach in other jurisdictions and identify some practices and initiatives for use in Nepal. They conclude with recommendations and modalities to make judicial outreach more effective and coordinated fashion.*

## 1. Introduction

A competent and independent judiciary is, of course, a 'must' for democracy and the rule of law. It is also required to ensure the institutional and judges' freedom to guarantee the rights of the people. In Nepal, the independent judiciary was established for the first time only after the promulgation of the Constitution of 1990. Only after that could the judiciary of Nepal achieve significant achievements in the administration of justice. First, the Constitution of 1990 was able to protect or preserve the people's human rights as well as the social and economic rights of the backward classes and/or marginalized communities, and therefore could establish constitutional supremacy by repealing many acts or other laws and reversing government decisions which were contravening the provisions of the Constitution, and after the promulgation of the *Interim Constitution of Nepal, 2007*, Judiciary of Nepal have been playing a proactive role by making various decisions upholding the rights of citizens—human rights in particular and providing transitional justice

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to the concerned as well as the rights to backward classes. However, they are not beyond criticism since public complaints about unfairness, partiality and delay are still prevalent among the general public. Legal and procedural complexities, lack of resources and including qualified personnel, loopholes in the process of investigation and prosecution and their complexities, and even the stakeholders--persons and institutions, which are not functioning so well effectively and impartially as per rules and regulations of the country – are some substantial factors responsible for those allegations.

The Nepali judiciary has initiated work through the Strategic Plan of Nepali Judiciary to address those allegations.<sup>1</sup> The Second Strategic Plan of Nepali Judiciary (2009/10–2013/14) aims to promote access to justice and public trust in the judiciary by improving public access of judicial information.<sup>2</sup> But it is often alleged that the judiciary is not only responsible for failing to deliver justice fairly, impartially, precisely or promptly, and effectively to the needy. As former Chief Justice Rt. Hon'ble Mr. Min Bahadur Rayamajhi, observed, judges should be bold enough to speak not only at courts but also to the community.<sup>3</sup>

Despite some reforms in the areas of physical infrastructure, communication system or interactions, trainings, among others; a positive change has not come about in the public trust in the judiciary--even after the implementation of the aforesaid Strategic Plan of Nepali Judiciary. In this context, a situation now exists in the country such that the judiciary is required to mull over a solid program. To this effect, the Public Outreach Program<sup>4</sup> as conceived in the Mid Term Evaluation Report of the Second Strategic Plan of Nepali Judiciary (2009/10–2013/14) is required to be taken by the judiciary in order to maintain good relations with the public for realizing justice among the general public.

## 1. Defining “Outreach”

The mid-term review of the Second Strategic Plan of Nepali Judiciary has introduced the term “Public Outreach”, which is considered to be identical to the term “Judicial Outreach” in the context of enhancing public trust towards court. The term “outreach” has broader meaning and could be interpreted in many ways based on the context.

- 1 The first five year Strategic Plan of Nepali Judiciary was introduced to the country in the year 2005. In the course of continuing the strategic plan, the Second Five Year Strategic Plan of Nepali Judiciary has been now in force based on the experiences and observations of and hurdles as encountered in the implementation of the First Strategic Plan of Nepali Judiciary.
- 2 Second Five Year Strategic Plan of Nepali Judiciary, Supreme Court, Nepal, 2009; Strategic intervention No. 11.
- 3 Based on the experience sharing of the participants and guests in the Consultation Meeting on Judicial Community Outreach Program: Concepts, Needs and Modalities held on November 12th, 2012 A.D. organized by the National Judicial Academy, Nepal.
- 4 Second Strategic Plan of Nepali Judiciary [Mid Term Evaluation Report], Supreme Court and National Judiciary Academy, Nepal, 2012; Strategic Intervention No: 8[2].

In general, outreach is the process of public engagement with individuals and organizations by entities or individuals with the primary purpose of improving service. Outreach is driven by two-way engagement and is not driven for immediate outcomes - but rather creating and sustaining mutually beneficial and sustainable relationships. There are different modalities of outreach. Providing public education is a common example of outreach. Above all - outreach is an activity of concerned with providing services to people, who might not otherwise have access to those services. In addition, outreach has an educational role and raising the awareness of existing services. It is usually intended to fill in gaps, which may exist between service providers and service users<sup>5</sup>.

In the judicial context, outreach could be considered as a planned effort undertaken by the judiciary itself to inform the broader community about the functions of the judiciary. There could be many forms of outreach, for example; dialogue, interaction, civil charter, TV program, Radio program, judicial education, awareness campaign, training, public hearing, establishment of resource/information center mobile court etc. The Nepali judiciary has been adopting many of these forms of outreach, without using the name of outreach itself. Hence, the meaning of the outreach is best understood as applied in the particular context.

## **2. Judicial Community Outreach – A developing concept in Nepal**

As discussed, the judiciary of Nepal has now concerned with justice reformation. It has introduced new concepts and adopted new approaches for the justice sector reform. The Supreme Court's Second Strategic Plan is an explicit example of this reform process. This aims to establish the judiciary as worthy of public trust through enhancing access to justice for the people specially disempowered, minorities and indigents to judicial services. Justice is to be dealt with collectively by all the concerned stakeholders including the judiciary with meaningful participation of the community. This requires strengthened communication among the justice sector actors for shared understanding and better coordination. The judiciary is now moving from its traditional role limited to the courtroom and is reaching out to the community, as embodied by the second strategic plan in the concept of Judicial Public Outreach.

The strength of the judiciary rests on public trust. If people have trust in the judiciary, they respect the verdicts of courts and comply with the execution of judgments. To this effect, the judiciary should acquaint the public with information on the functioning and proceedings of courts, and enable a dialogue between courts

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<sup>5</sup> See [http://en.wikipedia.org/wiki/Community\\_outreach#cite\\_note-dewson-3](http://en.wikipedia.org/wiki/Community_outreach#cite_note-dewson-3) (visited on Dec. 25, 2012)

and the people on the administration of justice. These changes could affect the entire judicial system. In this context, it is now a welcome step that the courts have started interacting with civil society, involving the general public and listening to their problems and ideas for reform. Recently the courts have initiated contacting the people in order to improve communication with the general public.

The Public Outreach Program is a powerful means of promoting public trust and confidence in the judiciary, whereby reform initiatives are communicated to the public through direct contact/meeting to the people. In this regard, the judiciary in Nepal has published a Civil Charter at entry of every court. Recently, public notices have also been broadcast to the public through a televised program called "Our Court."<sup>6</sup> Whether this has been a successful form of outreach in remote areas is a matter for evaluation. In a bid to communicate the administration of justice to the public, judicial journalism started in Nepal at the promulgation of the *Constitution of Nepal*, 1990. The judiciary has also been publishing its verdicts.

Court Regulations have provisions in relation to the Justice Sector Coordination Committees (JSCC) at three level; district, appellate and center represented by major justice sector actors including; judge, chief district officer, prosecutor, head of police office, representative of concerned bar, jailer, representative of civil society, and court registrar.<sup>7</sup> This mechanism is mandated to support court-related activities in a more systematic manner, by strengthening coordination among the justice sector actors, supporting for the effective implementation of strategic plan of the judiciary and implementation of the court judgments, and coordinating security management of the court. This mechanism strengthens stakeholder communication and increases access to justice as provided by the strategic intervention 10 and 11 of the second strategic plan of the Nepali Judiciary. With the establishment of mechanisms like JSCC, the judiciary is now viewing the issue of justice in a broader sense, recognizing that the issue of justice is not only concerned with the court but also includes all other justice sector actors. Better and quality justice could only be delivered, when these justice sector actors work together in a coordinated fashion. To this end, the JSCC, under the direct leadership of judiciary has initiated various dialogues among the justice sector actors including community to discuss on the effectiveness of the JSCC, identifying justice barriers, problems and challenges in judgment execution, and seeking solution. This initiative is a form of judicial outreach, which results in increasing meaningful participation of the community in the justice process.

6 This is a television program televised from Nepal Television (NTV) on every forth night on different issues of Judiciary of Nepal.

7 See Rule 4b of the District Court Regulation 2049 BS, Rule 112b of the Appellate Court Regulation 2048 BS and 13d4 of the Supreme Court Regulation 2049 BS.

Prior to 1970/71, there was a provision of 'mobile court' in Nepal, which might have facilitated the process of administration of justice. But to everyone's surprise, it was abolished on the basis of the recommendations in a report of the then Judicial Reform Commission (JRC). Since then, there has not been any institutional practice of making direct contact/meeting with the people or other communities by judges themselves nor by high ranking court-officials, nor has there been communication relating to court proceedings and facts about the judiciary. A few judges have however initiated a practice by visiting colleges on their own personal initiatives and inviting those students interested in judicial proceedings to their courts for observation-visits.<sup>8</sup>

In this context, a Judicial Community Outreach Program as it has been recently developed in Nepal is a new approach, which aims judiciary to reach out to the community directly educating them about judiciary and judicial system. Across the world, there are various modalities of Judicial Community Outreach programs (an extension of relations between the court and the community) being practiced in many countries.

### **3. Judicial Community Outreach in Other Jurisdictions**

In every democratic country, the constitution and core statutes guarantee and protect the human rights of all people and provide special protection to the rights of the vulnerable and marginalized. Despite these formal guarantees, the poor and marginalized are often unable to secure their rights and entitlements in practice, posing a serious challenge to the rule of law. Access to justice by the poor and disadvantaged remains a worldwide problem despite diverse approaches and strategies that have been formulated and employed to address it. One of the most common factors that bars marginalized groups from accessing justice is their lack of awareness of laws, rights, and capacity to access the same and unfamiliarity with the formal justice mechanism. Thus, a strategy to enhance access to justice is to promote awareness and understanding of their rights and how to use them.

Various concepts, strategies and programs have been developed to improve the legal awareness of women and other marginal groups around the world, though these problems persist in many countries.

To redress these problems, strategies must be adopted that will make the general public, including the marginalized and disadvantaged, aware of the prevailing laws and legal mechanisms, of rights as granted by the laws, and of mechanisms, including courts, for remedial measures in case of violations of their rights. Most

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8     *Supra* note 3.

importantly, these strategies should enable them to exercise their rights to justice, without which they shall be deprived of their fundamental rights to equality and fair opportunity as enshrined by the state. Initiatives such as Judicial Community Outreach have been carried out in many countries building on the notion that the judiciary is required to reach out to the communities and promote public trust towards judiciary.

#### **4.1 Judicial Community Outreach Programs in the US**

In the United States, Judicial Community Outreach programs have been initiated in different states in the form of civic education. The American Judicature Society has conducted a variety of programs to familiarizing the public with the role of the courts in society and court procedures, in partnership with Bar Associations and Civil Societies. These include court visits, internships, judges in the classroom, off-site courts, on the road (Judges), speakers' bureaus, teachers' institutes etc.<sup>9</sup>

The state of Hawaii conducts various programs with the co-operation of the judiciary. These include civil education, volunteer opportunities, judicial history center, divorce law in Hawaii, court tours, speakers' bureau and lunch'n'learn Law.<sup>10</sup> In order to reduce the existing distance between the community and the court, and to promote public trust and credibility in the courts, civic education is seen as the appropriate medium for creating awareness of the prevailing laws and legal mechanisms of the states. The practice of extending relations with the communities has been carried out through a civic education program. This program creates an opportunity for the direct contact/meeting with the communities, to raise awareness of the roles of courts, of how the judiciary works in relation to other organs of state, and to create an environment conducive to access to justice for communities or classes who are deprived of access to justice for various reasons in order to promote public trust.

The courts of California have recognized the significance of the public's voices, and incorporated them into its reform program.<sup>11</sup> In some states, judges visit schools and colleges, make speeches on court procedures, hold discussions, and perform mock trials for students. Where the judiciary creates opportunities to acknowledge the concerns of communities through such programs, it is promoting public trust and confidence in the judiciary. The District Court of South California invites court visits by students of secondary schools and other persons including teachers to familiarize them with court procedures. Other programs include: Judicial Community Officer, and Community Justice Workers, in many states of America and provinces in Canada.

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9 See Judicial Outreach Programs at [http://www.ajs.org/pe/pe\\_outreach.asp](http://www.ajs.org/pe/pe_outreach.asp) (visited on Nov. 15, 2012).

10 See Community Outreach at [http://www.courts.state.hi.us/outreach/community\\_outreach.html](http://www.courts.state.hi.us/outreach/community_outreach.html) (visited on Nov. 15, 2012).

11 See <http://www.courts.ca.gov/programs-commoutreach.htm> (visited on Sep.12<sup>th</sup>, 2012)



## 4.2 Practices in the Philippines

There are many forms of justice reform initiatives introduced and employed in Philippines. However, not as such judicial community outreach program. The Philippines Supreme Court has started a program called Enhancing Justice on Wheels (EJoW) from 2004. This was introduced in a bid to make justice more readily available and to promote access. The program is understood to have based on the mobile court of Guatemala.<sup>12</sup> To begin with, cases of children and youths were given priority, and this has been extended to the conciliation, compromise and verdicts of minor cases of the indigent.

### 4.2.1 What is EJoW?

In a bid to make justice easily and promptly available, EJoW is a travelling bus with a bench of the court and a Conciliation Center (actually a wheel-bench) functioning in it. Justice is enhanced under this scheme, which conveys a judge, a government attorney, court-officials, including the accused, to localities where verdicts are rendered before the parties and the local public. This scheme is designed to deliver prompt justice to the indigent. The general public may observe proceedings. Since its establishment, it has heard 1126 cases and released 391 detainees in 66 days, following which this scheme has been extended.<sup>13</sup>

A public dialogue program operates in the Philippines. The Registrar of apex court, stakeholders in the field of justice, government attorneys, police, and media persons participate in this program, which was initiated by the Chief Justice. This program listens to public complaints about the judiciary and verdicts rendered by it, and to other barriers of access to justice for the general public such as: budget deficiency, personnel's perks, their records, among others; and provides appropriate remedial measures.

## 4.3 Practices in India

In India, the Department of Justice is implementing a project on 'Access to Justice for Marginalised People' with UNDP support. The focus of this project is on empowering the poor and marginalized to be aware of their rights and demand legal services, while at the same time supporting national and local justice delivery institutions to bring justice to the poor. This initiative aims to enhance access to justice and undertake a justice sector diagnosis, identify entry points and support innovative small pilot initiatives.<sup>14</sup> The project covers the 7 States of Bihar,

12 Adolfo S. Azcuna, The Justice on Wheels of the Philippines, *See* at [http://jrn21.judiciary.gov.ph/forum\\_icsjr/ICSJR\\_Philippines%20%20\(A%20Azcuna\).pdf](http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_Philippines%20%20(A%20Azcuna).pdf) (visited on Sep.12<sup>th</sup>, 2012)

13 *Ibid.*

14 See Department of Justice of the Ministry of Law and Justice, India at <http://doj.gov.in/?q=node/107> (visited on Nov. 15, 2012)

Chhattisgarh, Jharkhand, Madhya Pradesh, Uttar Pradesh, Odisha and Rajasthan. Under the project, activities are being conducted in 87 districts and there has been collaboration with 25 local and national partners.<sup>15</sup> Apart from the traditional methods of conducting large scale public education and training of communities as well as service delivery bodies, innovative activities such as law school-based legal clinics, creating paralegal workers and using SMS, MMS, games, skits and community radio to generate awareness have been conducted in the project.<sup>16</sup> In addition, the courts are developing programs to create a congenial environment at courts, and approaching communities who are directly affected or deprived of access to justice owing to extreme poverty, lack of education and awareness, among others. The Judicial Academy based in the capital city of Delhi launched training packages and as part of their trainings, the participants are making spot-visits to the village communities, counseling them and learning of their troubles regarding access to justice.<sup>17</sup> In 2007, a mobile court was introduced to help provide rapid justice to the needy in less expensive ways. Programs such as Justice on Wheels are also operating in the states of Karnataka, Haryana, Maharashtra<sup>18</sup> to promote legal literacy at the doorstep, particularly for the poor.

#### **4. The Relevance of Judicial Community Outreach in Nepal**

As discussed above, some attempts have been made in Nepal to inform the general about the judiciary. Apart from those efforts, there are other measures to assist the judiciary with the issues of the court system and barriers to justice faced by the general public.

In a bid to facilitate access to justice for the people and to foster public trust in the judiciary, further measures are being adopted in the judicial sector. Since its establishment, National Judicial Academy (NJA) in Nepal has conducted trainings for judges and others in the field of law and justice and has provided resources on judicial education and judicial reform. In the initial phase, the NJA conducted training programs for District Judges and government attorneys in the execution of laws on gender equality and combating human trafficking. As a part of these trainings, participants made spot-visits to NGOs such as Maiti Nepal, ABC Nepal, among others, and availed themselves of the opportunity to comprehend the plight of victims of crimes including human trafficking.<sup>19</sup>

15 *Ibid.*

16 *Ibid.*

17 Training Calendar 2011, Delhi Judicial Academy, Delhi, India

18 See at <http://www.expressionindia.com/latest-news/justice-on-wheels-to-provide-legal-services-in-talukas/634812/> (visited Oct. 2<sup>nd</sup> 2012)

19 Judges' Workshop on Combating Trafficking in Women and Children (Gyananendra Raj Kaphle and Shreekrishna Mulmi, eds.) 19-20, National Judicial Academy, Nepal, Kathmandu (2006).

Currently, the NJA is hosting a program with technical support from ICJ Nepal to determine what can be done for the Judicial Community Outreach Program; what other programs can be designed; and what arrangements can be made for the preparation of those programs. In preparing the Judicial Community Outreach Program, the NJA has held consultation meetings in the districts with judges, court-officials, government attorneys, police officers, Chief District Officers (CDOs), and other stakeholders in the justice sector. These have produced the following recommendations: children/youth should become familiar with judicial procedure; there should be orientation programs on law and justice appropriate for students of schools and colleges; and, practicing lawyers rather than judges should involve in awareness-raising to the public.<sup>20</sup> The report recommends that judges and court-officers visit schools and colleges to familiarize students with judicial procedures; and invite students to observe court proceedings. Further, courts should hear and render verdicts on cases in the same location where disputes arose.<sup>21</sup>

Considering these experiences of Judicial Community Outreach, Nepal should reach out to the general public in order to increase familiarity with the prevailing judicial structure and justice system of Nepal. As the Second Strategic Plan of the Nepali Judiciary is pursuing mainly two strategies: to enhance dialogues between justice stakeholders, and to promote public trust by enhancing access to justice, it may be expected that this program will support that goal.

### 5.1 Objectives

Based on the experience and practices of Judicial Community Outreach in other countries, it is appropriate in the Nepali context to propose the following objectives:

- To increase public familiarity with Nepal's judicial structure, justice system, court proceedings, judicial efficacy, the roles of other stakeholders in the administration of justice and their impact, and as well as to identify hurdles and complexities, and to explore probable ways/measures for swift and smooth administration of justice;
- To make every citizen of the state familiar with the existing formal judicial mechanisms for the enjoyment of and remedies for violation of their rights as conferred by the Constitution and the prevailing laws of the country; as well as with the existing provisions and their *modus operandi* of the access to justice;

20 An unpublished report of the Consultation meeting held in Nawalparashi and Tanahun Districts on the need of Judicial Community Outreach: Concepts, Needs and Modalities.

21 *Ibid.*

- To create a conducive environment for access to justice for disadvantaged groups such as women, the *Dalit* (oppressed classes), helpless, indigent or incompetent people and the marginalized classes in the society; and thereby to promote public trust in the judiciary.

## **5.2 Some Probable Modalities of the Program**

- 5.2.1 In order to discuss and take counsel on the proceedings, nature of functioning of the judiciary and the aspirations of the local people, judges and senior officials of courts may arrange local level interaction programs
- 5.2.2 During the preparation/adoption of strategic plans of the judiciary, feedbacks could be sought from civil society and the public as a basis for judicial reform including for implementation of judicial outreach.
- 5.2.3 By holding discussion program with specific groups such as: HIV victims, Women's Groups; the judges and high level court-officials will promote understanding of the nature of courts, judicial proceedings and the aspirations of the general public in co-operation with those institutions or the persons working in those areas.
- 5.2.4 Media-related publications and activities; such as establishing Communication Delivery Center (CDC), Public Relation Office (PRO), and telecasting Television & Radio Programs, FM programs, performing dramas, publishing brochure, poster, bulletin relating to court proceedings, and arranging judge's tours to local levels, among others, may directly or indirectly promote public trust in the judiciary. These publications and activities shall be made in local languages.<sup>22</sup>
- 5.2.5 Upon visiting schools, colleges or universities, judges and court-officers may provide information on formal judicial mechanisms, legal provisions and their application to access to justice for students and how to exercise of their rights and remedies conferred by the constitution and prevailing law. They may also invite those students to observe court proceedings.
- 5.2.6 Any training program shall extend to other persons such as representatives of civil societies, general administration, NGOs. It shall be appropriate to invite judges, former judges and court-officials as resource person in training activities to promote the concept of judicial outreach.

22 *Supra* note 3.

- 5.2.7 Spot visit could be planed while the NJA conducts pre-service and in-service trainings for judges and other court-officials of different levels in order to strengthen public relation with different sectors.
- 5.2.8 Court-visits by students of schools, colleges or universities should serve two objectives: to familiarize students of court proceedings, and to provide opportunities for internships in the courts.

### ***5.3 Considerable factors for implementation of Judicial Community Outreach***

As stated above, the objective of Judicial Community Outreach is to promote public trust in the judiciary. In order to implement any program, the following matters should be taken into consideration:-

#### ***5.3.1 Resource Person***

Since through this program there shall be direct contact of the judiciary with the community, so the person representing the judiciary is to be capable, appropriate and prepared. It shall be appropriate to select the resource person from amongst judges or high judicial officers. S/he should possess interpersonal qualities including: having sound knowledge, skilled and experienced, unprejudiced and a 'crystal clear' person not involved in any disputed issues. Judges and court-officers from lower courts may also be selected for this role.

#### ***5.3.2 Discussion Method***

In the program, proactive participatory discussion method should be used. As the program involves two-way communication, the judges and court officers should exercise patience to listen openly to the community about their perceptions on the judiciary and encourage their support for the judicial process. Judges and judicial officers involving in this process should present themselves as simply as possible in order to provide conducive environment for the discussion.

#### ***5.3.3 Fair and neutral facilitator***

As the program is intended to reduce the gap between communities and courts, a fair and neutral facilitator is needed, who is well versed, experienced and having sound knowledge of communities and law courts, in order to manage and facilitate the program. If the court by itself could play the role of the facilitator neutrally, it could convey the message more positive and effective.

#### ***5.3.4 Subject-Matter/Contents***

The selection of subject matters/contents to be discussed in the program is of utmost importance. So far as the appropriate subject matters are concerned, they shall be informative and awareness raising. This may include; mitigating distance between the court and the community, hurdles of access to justice and causing

factors, and measures for solution etc. Again, existing or new laws, court structure, rights and duties of persons and communities, process of access to court, court proceedings, obligation of the concerned stake holder-institutions on the access to justice, problems and challenges in the execution of judgments all of these effecting public access to justice and trust in courts may be the relevant contents for the discussion. Topics to be avoided include: current cases before the courts, personal and private matters, biased and disputed issues, any issue of a particular cases, and issues of personal conduct and character.

### **5.3.5 Comfortable Place/Venue**

It is important to select a comfortable and secure venue for conducting outreach activities.

### **5.3.6 Participation**

Participation in the program should include members of the community who are most vulnerable and deprived of access to justice. Initially, it would be useful to approach organizations such as; women group, *Aama Samuha* (mothers' group), social workers, youth organization, *HIV* victims, sexual minorities, co-operatives, *Dalits* (oppressed group), etc. Schools and colleges should also be invited to participate.

### **5.3.7 Partnership and collaboration**

Judicial community outreach aims to bridging the gap between court and community, which is not an easy task. Justice is an issue of public concern. Hence a collaborative partnership approach is recommended. National Judicial Academy, Judge's Society, Judicial Officer's society are the potential partners. Others include, Bar Association, JSCC at different level, Law colleges, and other local bodies could be other effective partners. Such collaboration will increase the credibility of the program, directed through judicial leadership.

### **5.3.8 Co-ordination**

The successful implementation of such programs relies on the effective coordination among the concerned stakeholders. In addition to the judiciary, this will require co-ordination with other GOs and NGOs namely: police administration, government attorney office (GAO), District Administration Office (DAO), local civil societies, human rights defenders or their institutions and mass Media, among others. This co-ordination should include all relevant stakeholders, in an appropriately secure manner.

## 5. Conclusion

Undoubtedly, the concept of “Judicial Community Outreach” is increasingly recognized to be an important and groundbreaking initiative in the context of justice reform in Nepal, which the Nepali judiciary has introduced through its mid-term review of second strategic plan.

The judiciary has envisioned the concept of outreach in broader ways beyond the frequently applied modalities. For this reason, the NJA with the technical support of ICJ-Nepal has developed a concept paper, which has provided conceptual clarity to the notion for the judiciary.

Consequently, the judiciary is now reaching out directly to the community, organized group/organization, and school/colleges providing judicial education, on the judicial system and process, its functions, limitations, problems and challenges, as well as listening to public perceptions in order to promote public trust and enhance access to justice.

As targeted by the mid-term review of the second strategic plan, the NJA, in support of ICJ-Nepal has already initiated judicial outreach in three different districts; Nawalparasi, Tanahu and Bhaktapur as pilot in 2012. The effectiveness and impact of the program could be assessed from the views expressed by the participants of the program, which include, “I had seen judges only in the television, and heard only negative about judges and the judiciary. Meeting judges and interacting with them live has cleared my misconception. It is necessary to understand law in real sense and know the facts.”

Judicial outreach is an important method in promoting understanding and trust in the court system, and building public faith in judiciary. The judicial community outreach program is bringing judges closer to the community to educate the public on the role of judiciary and how the court system fits within the government as whole. It also provides information to educate the public and build trust and confidence in the judicial system. It helps increasing access to justice for all specifically to the marginalized groups who cannot access to justice for various reasons. It helps the courts to understand the community's concerns and also helps the community by increasing public awareness of justice system process through which the communication between the court and the community can be improved in various ways. In such judicial outreach programs, involvement of various sectors of the society including judges, judicial officers, lawyers, law school, civil society are each important for its effective implementation.

Justice is not an issue to be dealt only by judiciary alone. Rather, it requires a two way process – demand and supply, in which community engagement is an essential element. Civil society engagement including the meaningful participation of the community is crucial to facilitate the justice process and ultimately the support necessary to build a judiciary worthy of public trust and promote access to justice for the needy.



