

The Landmark Decisions of
THE SUPREME COURT, NEPAL
on

GENDER JUSTICE



NJA-Nepal

Publisher:

National Judicial Academy

Hariharbhawan, Lalitpur
Nepal

**The Landmark Decisions
of the
Supreme Court, Nepal
on
Gender Justice**

Editor
Dr. Ananda Mohan Bhattarai



NJA - Nepal

**National Judicial Academy
Hariharbhawan, Lalitpur
Nepal**

Advisor:

Hon. Tope Bahadur Singh, Executive Director, NJA

Translators:

Hon. Dr. Haribansh Tripathi, Judge – CoA

Mr. Shree Prasad Pandit, Advocate

Mr. Sajjan Bar Singh Thapa, Advocate

Management & Editorial Assistance

Hon. Narishwar Bhandari, Faculty/Judge – DC, NJA

Mr. Nripadhwoj Niroula, Registrar

Mr. Shree Krishna Mulmi, Research Officer

Mr. Paras Paudel, Statistical Officer

Mr. Rajan Kumar KC, Finance Coordinator

Assistants:

Mr. Bishnu Bahadur Baruwat, Publication Assistant

Ms. Poonam Lakhey, Office Secretary

Ms. Sami Moktan, Administration Assistant

Ms. Patrika Basnet, Personal Secretary

Copy Rights: © National Judicial Academy/ UNIFEM, Nepal, 2010

Publishers:

National Judicial Academy, Nepal

Harihar Bhawan, Lalitpur

&

United Nations Fund for Women (UNIFEM)

401/42 Ramshah Path, Thapathali, Kathmandu Nepal

Printing Copies: 500 Copies

Financial Assistance:

United Nations Fund for Women (UNIFEM)

401/42 Ramshah Path, Thapathali, Kathmandu Nepal

Tel No: 977-1-425510/4254899

Fax No: 977-1-4247265

URL: www.unifem.org

Printing: Format Printing Press, Hadigoan, Kathmandu

Editor's Note

The decisions in this volume basically represent the second generation cases relating to gender justice in Nepal. I call them second generation because in the first generation (1990-2005) the struggle was for securing women's right to parental property, their rights against discrimination, their reproductive rights etc culminating in the parliamentary enactment 2005/6 which repealed many provisions of the National Code and other laws, found to be discriminatory on the basis of sex. Now, this volume contains many splinter cases which have been filed challenging the very the amendment brought about to rectify discrimination. Besides, It brings cases in areas not covered by the first generation PIL petitions. The cause is again taken up by the same group of people who spearheaded the first generation cases- Sapana Pradhan Malla, Meera Dhungana, and Prakash Mani Sharma representing two leading civil society organizations, the FWLD and the Pro-Public. But others have also joined the struggle this time around.

In the first case *Sapana Pradhan Malla and Others*¹ challenged the amended provision of the National Code (*Muluki Ain*), Number 9 and 9(a) of the Chapter on Marriage, which still allowed the husband to have second marriage, if the wife suffered from any incurable contagious sexual disease, or was incurably mad. It is very selfish on the part of husband to desert the wife when she is in trouble. Thankfully the Supreme Court rejected this. According to the Court, such grave conditions of mental and physical disease required to be confronted by the husband and not run away from his responsibility. Creation of the possibility of another marriage and the validation of another marriage would create domestic violence which had to be stopped. No civilized society would envisage the provision of laws where a spouse would terminate her marital relationship due to her health and being incurably sick. Here, the Court however did not declare the provision *ultra vires* but took a pragmatic approach and issued a directive order to the Prime Minister and to the Council of Ministers asking them to see that the provisions prescribed under Section 9 and 9 (a) on the Chapter of Marriage are consistent with the Interim Constitution, 2063 and with the provisions prescribed in the Convention Against Elimination of All Forms of Discrimination against Women (CEDAW) and to amend the law and to make arrangement for appropriate laws.

¹ Sapana Pradhan and Others v Prime Minister and Council of Ministers and Others (Writ no 064-WS-0011)

In the second case in the volume, *Meera Dhungana and Others*² challenged Clause (1) of Section 1 of the chapter On Husband and Wife in the National Code (*Naya Muluki Ain*, 2020) which allowed the husband to seek dissolution of conjugal relation “if it is certified by a Medical Board recognized by His Majesty’s Government that no child was born within ten years of the marriage due to infertility of the wife” The petitioners claimed that it was discriminatory against women because the law does not even presume that a child may not be born even due to a male person. Here, the respondents had maintained that since the law also allowed the wife seek dissolution if the husband was impotent, the provision was not discriminatory. The Court distinguished the lexical meaning of infertility and impotency and took the view that separate treatment was meted to husband and wife on the same issue. The Court found the impugned provision of Section 1(1) of the Chapter “on Husband and Wife” discriminatory against women and inconsistent with the principle of equality enshrined in Art 11 of the 1990 Constitution and international human rights instruments and declared it *ultra vires*. The Court also issued a directive order to the respondents including the Office of the Prime Minister and the Council of Ministers to make appropriate provisions which are equally applicable to husbands and wives on the basis of equality and also not inconsistent with the Constitution of the Kingdom of Nepal, 1990 and the provisions of the international Covenants.

The third and the fourth case relate to Social Event Reforms Act where receiving and taking of dowry is prohibited. In *Meera Dhungana*³ the petitioner claimed that Section 4 of the said Act discriminated those who give and demand dowry when it came to imposition of punishment the Court observed that unless two parties agreed to take and give dowry the commission of the said offence would not be possible. No reasonable criteria existed to discriminate the bride and the groom side simply on the ground that one side paid and the other side asked for. The Court found the said legal provision to be inconsistent with the rights to equality as enshrined in Article 11 of the Constitution of the Kingdom of Nepal, 1990. It issued an order in the name of the Office of the Prime Minister and Council of Ministers of the Government of Nepal directing it to make the appropriate legal arrangement based on the principle of equality.

Similarly, in a petition *Rama Panta Kharel and Others*⁴, challenged Section 5 (2) of the said Act which allowed the payment of certain ornaments to the groom side. Section 11 which prohibited pompous display of dowry tacitly allowed the payment of the same whereas, the petitioner claimed, the need of the hour was to totally eradicate dowry. They also maintained that these provisions were inconsistent with Art 11 of the Constitution and human rights instruments including the provisions of CEDAW. The Court disagreed with the claim of the petitioners that the impugned sections were inconsistent with Art 11 of the

² Meera Dhungana and Others Vs Office of the Prime Ministers and Others, (Special Writ No. 64 of the Year 2061)

³ Meera Dhungana Vs Office of Prime Minister and Council of Ministers and Others (Writ No. 131 of the year 2063 BS)

⁴ Rama Panta Kharel and Others v Office of Prime Minister and Council of Ministers and Others (Writ no: 063-WS-0019 of the Year 2060)

1990 and Art 12 of the Interim Constitution. It nevertheless issued an order to incorporate the Social Practice Reform Act in the school and college curricula, in order to sensitize and raise awareness among school going children in particular the college going students on the intention, objective and provision of the Act along with its economic aspect. It asked the Nepal government to determine the level of students to be targeted in the Act. The Court also directed the government to uphold or cause to uphold the law in letter and spirit and establish mechanism deemed necessary for effective monitoring of the implementation of the provision of the Act. Further, the Court also issued a directive order in the name of the Prime Minister and Council of Ministers to include the provision prescribed under the Social Practice (Reform) Act, 2033, under the provision of code of conduct of the government employees to ensure its strict compliance. The Court directed that where any civil servant performed any thing contrary to the Act, such act should be deemed to be contrary to his conduct warranting departmental actions against such employee. It also required that each employee submitted his/her accounts pursuant to Section 15 of the Act where such employee performed any social events.

In *Sapana Pradhan Malla and Others*⁵, the petitioners challenged Section 4 (3) of the Marriage Registration Act, 2028 (1971 A.D) which prescribed different age for men and women (i.e. 22 and 18 years respectively) for solemnizing the marriage which was against the provision of the Constitution and international human rights instruments that guaranteed the right to equality and proscribed discrimination on the basis of sex. The petitioner cited a report prepared by the UNICEF⁶ which showed the danger of early marriage. She further claimed that the provision in the Marriage Registration Act also did not correspond to the provision of the National Code that prescribed a common age for both men and women.⁷ Accepting the contention that there seemed to be no consistency between the provisions enshrined in section 2 of the chapter On Marriage in the National Code and Section 4(3) of the Marriage Registration Act, 2028 the Supreme Court called upon the government to effect amendment to the relevant laws in order to bring about consistency and uniformity between them. The Court did not declare the provision of the Marriage Registration Act ultra vires but issued a directive order to the government to introduce amendments to the relevant laws with a view to acquiring consistency and uniformity between them.

The next two petitions relate to marital rape and the death of fetus. Among them *Jit Kumari Pangei (Neupane) and Others*⁸ is a case where the petitioner's husband had indulged in forceful sexual relationship wherein he had asked the petitioner to perform fellatio, and when the petitioner disagreed, the husband resorted to battery and perpetrated

⁵ *Sapana Pradhan Malla and Others v Office of Prime Minister and Others* Special Writ No. 98 of the Year 2062

⁶ The UNICEF report termed as Innocenti Digest No. 7, March 2001 on Early Marriage of Child Spouses. This report showed that whereas the maternal death rate among the pregnant young girls aged between 15 to 19 years was 20 times higher than the maternal death rate among the pregnant women belonging to the age groups of 20 to 24 years, the maternal death rate of pregnant young girls aged below 15 years was 500 times higher.

⁷ Number 2 of the Chapter on Marriage of the National Code provided required the candidate to be above 18 years with the consent of parent and 20 years where the consent of the parent is wanting.

⁸ *Jit Kumari Pangei (Neupane) and Others v Prime Ministers and Council of Ministers and Others* Writ No. 064-0035 of the Year 2063

sexual violence against her. The petitioner claimed that prevailing laws were insufficient to deal with such inhuman act and that the amended provision of clause 6 of No 3 on the Chapter on Rape, brought up by the Act Relating to Amendment of Some Nepal Act, 2063, which subjected the rapist husband only to imprisonment for a period of three to six months (vis-à-vis other rapists) was discriminatory. In this case the Court observed that where a spouse is considered as means of recreation and exploitation, and contrary to her desire health and needs, is raped by the closest person, then such a person committing such an offensive act, cannot be entitled to rebate in punishment merely because of his relationship with his spouse, and there is no jurisprudential basis with regards to such rebate in punishment. The Court further observed that there was no rationality in differentiating between marital and non-marital rape. ... the rebate on punishment to be provided pursuant to the status of the actor, would deem to be inconsistent with the right to equality as envisaged by the Constitution.⁹ The Court, referring to the principle of equality, issued a directive order in the name of the Ministry of Law, Justice and Parliamentary Affairs asking it to make provisions so as to create hermony between the discriminatory sentencing policies between marital and non-marital rape and ensure that the principle sentence is not less than the additional sentence.¹⁰

In *Achyut Prasad Kharel*¹¹ the Supreme Court dealt with the provision of No 28(B) of the National Code. The petitioner claimed that the said provision that provided for the abortion of fetus of maximum twelve weeks' maturity with the consent of women did not require the couple to decide the matter by evolving consensus. The petitioner maintained to the effect that the provision discriminated husband against the wife, and hence needed to be declared *ultra vires*. Rejecting the claim of the petitioner the Supreme Court observed that although on the face of it the provisions contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) that provided the rights to women seemed to be depriving man of the right to equality, but in practice it was based on spousal consent. The Court held that by taking any exceptional situation as mentioned above, the provision cannot be said to be inconsistent with Article 16(1)(e) of the CEDAW.

The next two petitions tried to address evil social practices that subjugated women and girl child. In *Somprasad Paneru and Others*¹², the petitioners drew the attention of the Supreme Court to the practice of “*Kamlari*” which subjected young, school-going-aged-girls, of Far-west and Mid-west Nepal to work as bonded labor. The petitioners claimed that the practice was against the provisions of Bonded Labor (Prohibition) Act, 2058 (2002 AD), Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) and human rights instruments

⁹ The court in the background also referred to *Meera Dhungana v Ministry of Law, Justice and Parliamentary Affairs*, re: Writ Petition No. 55 of the Year 2058 which called upon the government to enact law on marital rape. It also referred *Sapana Pradhan Malla vs. Ministry of Law, Justice and Parliamentary Affairs*, et.al. Writ No. 56 of the Year 2058, Date of order 2059/1/19)

¹⁰ In this case Justice Balam KC wrote the dissenting judgment.

¹¹ *Achyut Prasad Kharel v Office of Prime Minister and Council of Ministers and Others*, Writ No. 3352 of the year 2061 BS (2004 AD)

¹² *Somprasad Paneru and Others V Office of Prime Minister and Council of Ministers and Others*, Writ No. 3215 of the year 2061 BS.

including several provisions of the Convention on the Right of the Child, 1989. While agreeing with the petitioners that such a practice needed to be stopped, the majority in this case issued a directive order in the name of the respondents viz. the Council of Ministers and the Ministry of Education to incorporate in the curricula of the child, the contents of human rights related international Conventions such as the Convention on the Right of the Child, 1989, International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966, to which Nepal is a party, and which covered all aspects of human rights. Justice Balaram KC, through his dissenting opinion, called upon the government to bring out a comprehensive legislation banning the practice of keeping domestic servants and other forms of exploitation of children, advance an economic package to empower and ensure the social security of women and children affected by the practice of *Kamlari*.

In *Tek Tamrakar and Others*¹³ the petitioners brought up the plight of the people belonging to *Badi* community to the notice of the Supreme Court. People of this community, mostly inhabiting in Banke, Bardia and Dang districts of Mid-West Nepal, were eking out a precarious living. Women of this community were also compelled to be engaged in sex trade for survival. Because of this trade many children were born whose fathers could not be traced. As a result, many people were denied citizenship. The issue, *inter alia* hovered around the legality of the Birth, Death and Other Personal Event (Registration) Act, 2033 and Section 3 (1) under the Children Act, 2048, which according to petitioners was inconsistent with Art 11 of the Constitution of 1990. As the problems raised were many which required deeper study, the Supreme Court constituted a committee to study the matter and report to it within two months. And then, when the matter finally came before the bench for hearing, the Court declared that “the *Badi* people are vested with the right to live an honorable life pursuant to the Constitution of the Kingdom of Nepal, 1990, prevailing laws and pursuant to the international treaties relating to human rights to which Nepal is a Party.” It further observed that “for the purpose of establishing a just society based on fraternity, bond and social solidarity, the economic, social and political problems faced by the women and children of the *Badi* community should be resolved so that women and children of the *Badi* community and every one can live a respectable life”. The Court held Section 4(1) of the Birth, Death and Any Personal Events (Registration) Act, 2033 which required that the notice of birth to be given “from among male” as inconsistent with Art 11 of the Constitution. It applied the doctrine of severability and declared this expression as “defunct”. It did not however agree with the petitioners that Section 3(1) of the Children Act was *ultra-vires* the Constitution. More importantly, the Court reviewed the report of the Committee which revealed that the people of *Badi* community faced problems such as poverty, illiteracy and health related problems. According to the Committee the registration of birth and acquisition

¹³ Tek Tamrakar and Others V HMG Cabinet Secretariat and Others Writ No. 121 of the Year 2060

of citizenship, untouchability, racial discrimination and unemployment were serious issues and the people of this community had been the victim of political and the armed conflict .. The report also advanced a number of measures for the upliftment of *Badi* community. Since the government agreed to the suggestions advanced in the report, the Court issued the directive to the government to implement the same.

In *Pun Devi Maharjan*,¹⁴ the petitioners brought up the issue of the *Kumaris* of Kathmandu valley to the notice of the Supreme Court. *Kumaris*, young girls between the age of 4 to 12 belonging to the Shakya community, are chosen through a religious process and worshipped as living Goddesses by the people of Hindu and Buddhist faith in the Kathmandu valley and surrounding areas since the medieval period of Nepali history. But many aspects regarding the upbringing of *Kumaris* such as their education, health care and fooding got affected and neglected due to wrong belief of the people. The petitioner chiefly raised the issue of the protection of the human rights of the girls who became *Kumaris* and those girls and women who have acted as *Kumaris* in the past both needed guarantee of social security. The Court in this case employed a very versatile method for the collection of data. It constituted a Committee to study the matter and also allowed many people including the petitioner to file a rejoinder. When the matter came before the bench for hearing, it reviewed the contention that the practice contravened the rights guaranteed to the *Kumaris* by the Constitution and international human rights instruments. The Court acknowledged the practice of *Kumari* as a long cherished religious custom of Nepal. It rejected the claim that *Kumaris* were exploited. It observed that “because the *Kumaris* do not have to involve in work by investing their physical labour, it is not proper to say that the custom of *Kumari* is a custom prevailing in contravention of the children’s right granted by Art. 22, the right against torture enshrined in Art. 26 and the right against exploitation embodied in Art. 29 of the Interim Constitution of Nepal, 2063 B.S. The custom of *Kumari* appears to exist as an integral part of the religious, social and cultural rights of the Nepali people belonging to the Hindu and Bhuddhist religious faith.” Taking note of the divergent practices as to the education of *Kumaris* the Court observed that the fathers and guardians of *Kumaris* “do not seem to face any obstacle in sending them to school to get education provided that the former so desire” The Court further observed that “no law seems to have imposed any restriction on *Kumaris* preventing the enjoyment of all the fundamental and legal rights including the freedom of movement and visit to their families and the freedom of residence granted by the Convention on the Rights of the child and the Interim Constitution of Nepal, 2063 B.S. Therefore, it is clear that *Kumaris* can go to school to study and acquire education.” The Court held that “so long as the custom of *Kumari* does not infringe the rights of children granted by the Constitution and the international conventions, it should be treated as an integral part of the religious and cultural rights of its followers.” The Court also called upon the State to give thought to granting facilities like social security or pension benefits to the ex-*Kumaris* who had been deprived of their fundamental rights as well as their human right to education in their childhood. It issued a directive to the government to constitute a

¹⁴ Pun Devi Maharjan v GoN, Office of Prime Minister and Council of Ministers and Others, Writ No. 3581 of the year 2062 B.S.

committee within the framework it stipulated, and also issued a mandamus to the government to implement the report of the committee once submitted to the government. In other words, it issued a mandamus to implement a report which was yet to be prepared, an interesting strategic detour.

In *Prakash Mani Sharma and Others*¹⁵, the petitioners raised the problem created due to uterus prolapse, a very vital reproductive health related issue affecting thousands of women in Nepal. Citing a report the petitioners claimed that approximately six hundred thousand women were victims of this problem and from among these women; approximately two hundred thousand women needed immediate treatment.¹⁶ The problem had aggravated due to the lack of nutritious food at the time of pregnancy, lack of care and health services for lactating mothers, social and family discrimination against women, lack of awareness to reproductive health, lack of access to health camps or concerned units, lack of proper equipments and medical practitioners, unsafe abortion, poverty, and social customs against women. The petitioners claimed that reproductive health, being part and partial of the right to health, was protected by Art 12 of ICESCR Art 10 and 12 of CEDAW. In the instant case the Court observed that the right to live a dignified life is also a basic right to life. Where the State did not provide the basic facilities for the protection of health of a human being, then proper protection of the right to life could not be achieved. Therefore, it was necessary to link life with the right to health. Further explaining the linkage between the right to life and other rights the Court observed that “although, right to reproductive health has been termed as a health related matter, this has to be linked with the right to life, the right to freedom, the right to equality, the right against torture, the right to privacy and the right to social justice and the right of woman. Non-recognition of the right to reproductive capacity would not only lead to exploitation of the right of women but also create numerous encumbrances against the right of women.”

Further expanding the linkage the Court observed, “Where women are compelled to give birth to children, that would be a matter of torture and this being a personal event and if right to information on these matters are not protected, it would be an intervention against her right to privacy. Where proper management as deemed necessary regarding information, facilities and treatment on reproductive health is ignored and where investment is only made towards the health of the male or in other areas of health, which would create negative impact on the reproductive health then that would be deemed to be a case of inequality. Likewise, where women are prevented to exercise their legal rights voluntarily, and subjected to external pressure resulting in adverse conditions to their health, such instances can be deemed to be a violation to their right to freedom.” The Court then observed that the right to reproductive health, recognized as a fundamental right, needed to be protected whereby the problem of uterus prolapse, as stated by the petitioners, would be effectively addressed and in order to protect and implement these rights, it was necessary to formulate

¹⁵ *Prakash Mani Sharma and Others v GON, Office of Prime Minister and Council of Ministers and Others*, Writ No. 064WO0230

¹⁶ The petition cites a study conducted by In 2005, Safe Motherhood Network Federation, Nepal in 2005 in ten districts namely Dhankuta, Siraha, Bara, Nuwakot, Kapilvastu, Baglung, Banke, Surkhet, Kanchanpur and Baitadi. The study report underlines that 4,518 women had come to the health camps and from among these women, 415 suffered from the problem uterus prolapse.

laws as deemed necessary. Recognizing reproductive health as a right, the Court issued a directive order in the name of the Prime Minister and the Office of the Council of Ministers to hold consultation deemed necessary with health related experts and representatives of the society and to draft a Bill and submit it before the Legislature-Parliament as soon as possible. The Court also issued an order of mandamus in the name of the Ministry of Women, Children and Social Welfare and Ministry of Population and Health to prepare special work plans and to provide free consultation, treatment, health services and facilities to the aggrieved women and to set up various health centers and to initiate effective programs with the aim of raising public awareness on problems relating to reproductive health of women and the problem of uterus prolapse.

In the next two petitions *Meera Dhungana*¹⁷ raised the issue of sexual discrimination. The first petition related to Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2063 BS. Section 10 of the Rules discriminated married daughters against unmarried daughters and sons with regard to the family pension and educational benefits that would accrue to her as dependant. It also provided that such benefit would accrue to dependant till he attained the prescribed age or joined government service. However, the proviso to the same section stated, "Provided that, in case of a daughter she shall not be entitled to receive such pension or allowance after her marriage if she gets married prior to attaining the age as prescribed by the said rules." This, according to the Supreme Court was discriminatory and hence inconsistent to Art 11 of the Constitution. In the other petition, *Meera Dhungana*¹⁸ challenged Section 10(2) of the Bonus Act, on the ground that it discriminated women both on the ground of sex and marriage. While this petition was pending, the law was amended, but the discrimination persisted. So the petitioner filed a supplementary petition where she challenged the amended provision. In this case the Supreme Court observed that a daughter's relation with the joint family were severed upon her marriage. Pursuant to the present provision, the status of membership of the daughter with the joint family got severed upon her marriage and had no rights and obligations. Legal relation was limited by the law relating to succession. According to the Court, this was the nature of our family law till today. The Court observed that law could not be oblivious of social practices and values. It, therefore, held that the disputed legal provision was not inconsistent with Article 13 of the Interim Constitution, 2063 or international human rights instrument and hence could not be deemed to be *ultra-vires* and void as sought by the petitioner.

¹⁷ Meera Dhungana v Office of Prime Minister and Council of Ministers and Others Writ No. 01 063-00001 of the year 2063 BS (2006 AD); Meera Dhungana v Prime Minister and Office of Council of Ministers and Others Writ No. 112 of the Year 2062.

¹⁸ Meera Dhungana v Prime Minister and Office of Council of Ministers and Others Writ No. 112 of the Year 2062

*Punyabati Pathak*¹⁹ pertained to a case where women pursuant to the decision of the Cabinet were asked to produce a certificate from their guardians in which he approved the foreign tour and took full responsibility in case anything happened to her when she went abroad. The petitioners claimed that the additional requirement which was not there in the Passport Act and Regulation discriminated women. The Supreme Court observed that the Executive was not vested with the right to render executive decisions that may encumber the enjoyment of the fundamental rights and freedoms or create discriminations between males and females. It, therefore, held the decision dated 2052/9/10 to be contrary to the right to equality.

The last case in this volume is *Sapana Pradhan Malla*²⁰, which pertained to the right to privacy of children, women victim of rape, HIV/AIDS infected people. The Court, in this case issued a directive order to the respondent Prime Minister and the Office of the Council of Ministers as well as the Ministry of Law, Justice and Parliamentary Management to make a law comprising provisions which describe the rights and duties of the concerned parties and maintain the level of privacy as prescribed (by the law) in some special type of lawsuits in which victim women or children or HIV/AIDS infected persons are involved as a party. The Court ordered that privacy had to be maintained right from the time of registration of the case in the police office or its direct registration in a law court or in other bodies till disposal of the case or even in a situation following the disposal of that case. The Court also issued guidelines for the interim period till the law is enacted which required to be followed in all proceedings.

The decisions included in this volume are translated by Dr Haribansh Tripathi, Mr Shree Prasad Pandit and Mr. Sajjan Bar Singh Thapa and reviewed and edited by Dr Ananda Mohan Bhattarai. Ms. Chiara Letizia of Oxford University also volunteered to review the decision on *Kumari* case and Ms. Alpna Bhandari, at Judges' Society read the proof. The editor acknowledges and thanks them for making contribution in further refining the translation. These decisions closely follow the original text in Nepali, but deviate in places for the sake of clarity, consistency and cohesion in the text. They, therefore, should not be considered as official translations nor are they meant to be so. The Editor would consider their initiative of some worth, if the present volume, like several earlier publications of the NJA received warm response and wide readership.

Editor

¹⁹ *Punyabati Pathak and Others V Ministry of Foreign Affairs and Others* . Writ No. 3355 of the Year 2060

²⁰ *Sapana Pradhan Malla v Office of Prime Minister and Council of Minister and Others*,
Writ No. 3561 of the year 2063 B. S (2006)

Content

S.N. Name of Parties	Writ no	Case Relating to	P.N.
1 Sapana Pradhan and Others v Prime Minister and Council of Ministers and Others	Writ No. 064-WS-0011	Section 9 and 9 (a) on the Chapter of Marriage	1-9
2. Meera Dhungana and Others v Office of the Prime Ministers and Others	(Special Writ No. 64 of the Year 2061	Clause (1) of Section 1 of the chapter On Husband and Wife	10-19
3. Meera Dhungana v Office of Prime Minister and Council of Ministers and Others	Writ No. 131 of the year 2063 BS	(section 4.1 'of Social Events Reforms Act)	20-25
4. Rama Panta Rama Panta Kharel and Others v Office of Prime Minister and Council of Ministers and Others	Writ no: 063-WS-0019 of the Year 2060	Section 5 of the Social Practice (Reform) Act, 2033)	26-35
5. Sapana Pradhan Malla and Others v Office of Prime Minister and Others	Special Writ No. 98 of the Year 2062	Section 4 (3) of the Marriage Registration Act, 2028 (1971 A.D)	36-45
6. Jit Kumari Pangen (Neupane) and Others v Prime Ministers and Council of Ministers and Others (Marital Rape)	Writ No. 064-0035 of the Year 2063	Marital Rape	46-65
7. Achyut Prasad Kharel v Office of Prime Minister and Council of Ministers and Others.	Writ No. 3352 of the year 2061 BS	(No 28B) of Chapter on Life of the National Code	66-75
8. Somprasad Paneru and Others v Office of the Prime Minister and Council of Ministers and Others	(Writ No. 3215 of the year 2061 BS	Right of children kept as <i>Kamlari</i> (bonded labour)	76-94
9 Tek Tamrakar and Others V HMG Cabinet Secretariat and Others)	Writ No. 121 of the Year 2060	Right of Women belonging to <i>Badi</i> Community,	95-108

- | | | | | |
|-----|-------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|----------------|
| 10. | Pun Devi Maharjan v GoN,
Office of Prime Minister and
Council of Ministers and Others | Writ No. 3581 of
the year 2062
B.S. | Educational and other
rights of the <i>Kumaris</i> | 109-133 |
| 11 | Meera Dhungana v Office of
Prime Minister and Council of
Ministers and Others | Writ No. 01—
063-00001 of the
year 2063 BS
(2006 AD) | (Section 8,9,10 of Royal
Nepalese Army
(Pension, Gratuity and
Other Facilities Rules
2063 | 134-143 |
| 12 | Prakash Mani Sharma and
Others v GON, Office of Prime
Minister and Council of Ministers
and Others | Writ No.
064WO0230 | Reproductive Health
and Uterus Prolapse | 144-160 |
| 13 | Punyabati Pathak and Others v
Ministry of Foreign Affairs and
Others | Writ No. 3355 of
the Year 2060 | Freedom of Movement
of Women and Pre-
approval letter from
Guardians for visa | 161-173 |
| 14 | Meera Dhungana v Prime
Minister and Office of Council of
Ministers and Others | Writ No. 112 of
the Year 2062 | (S 10(2) of the Bonus
Act 2030) | 174-184 |
| 15 | Sapana Pradhan Malla v Office
of Prime Minister and Council of
Minister and Others | Writ No. 3561 of
the year 2063 B.
S (2006 | Right to Privacy | 185-216 |

**Supreme Court, Special Bench
Hon'ble Justice Anup Raj Sharma
Hon'ble Justice Ram Prasad Shrestha
Hon'ble Justice Gauri Dhakal**

**Order
Writ No. 064-WS-0011**

Subject: Certiorari/Mandamus

Advocate Sapana Pradhan Malla, self and on behalf of Forum for Women,
Law and Development located at Kathmandu District, Kathmandu
Metropolis Ward No. 11, Thapathali.....1
Advocate Mira Dhungana self and on behalf of Forum for Women, Law and
Development, located at Kathmandu District, Kathmandu Metropolis
Ward No. 11, Thapathali1

Petitioners

Vs.

Prime Minister and Council of Ministers, Singhadurbar1
Ministry of Law, Justice and Parliamentary Affairs, Singhadurbar1
Ministry of Women, Child and Social Welfare, Singhadurbar1
Interim Legislative Parliament, Singhadurbar1

Respondents

Anup Raj Sharma J: The merit and decision of the case submitted before this court pursuant to Article 32 and Article 107 (1) of the Interim Constitution, 2063 is as follows:

The writ petitioners contend that they being Nepali citizen have been associated with Forum for Women, Law and Development and that they have been working as legal professionals for a long period in the field for women's legal rights in particular for the rights of women, empowerment, upliftment, development and on other matters relating to women's legal rights. The petitioners contend that since Section 9 on the Chapter of Marriage under the Muluki Ain, 2020 (which has been implemented in the form of law pursuant to the amendment made under the Act relating to Gender Equality, 2063) and the legal provisions prescribed under Section 9 (a) under the Act relating to Gender Equality being contrary to Article 12, 13, 16, 18 (2), 20 (1), (2), and (3) of the Interim Constitution of Nepal which prescribes for the right to freedom, the right to social security, the right regarding environment and health, the right against discrimination on the basis of gender, and the right against physical, mental or any other form of violence which shall be punishable by law. The writ petitioners contend that since the above provisions are contrary to the Constitution, they have sought for the annulment of the said provisions through the order of certiorari.

The petitioners contend that Article 1 of the Constitution prescribes the Constitution to be the fundamental law and any laws inconsistent with the Constitution shall, to the extent of such inconsistency, be void. Likewise, Article 12 (1) prescribes every person the right to live with dignity, whereas Article 12 (2) guarantees the right to personal liberty. They further contend that Article 33 prescribes responsibilities for the State wherein the State is obliged to effectively implement international treaties and agreements and to repeal all discriminatory laws. The petitioners contend that under such provisions, where a spouse beyond recovery is unsound of mind and where she has contracted sexual disease, it is the husband's duty to provide medical treatment but seeking consent for another marriage does not seem to be rationale. Similarly, they contend that where consent is not given by the spouse then such spouse pursuant to Section 9 and 9 (a) on the Chapter of Marriage is subjected to additional violence. Likewise, where a spouse is paralyzed or is blind in both eyes, the spouse should be entitled to assistance and care but where consent for another marriage is sought and the same is not given by the spouse, consent from such spouse may be obtained through, fear, coercion and domestic violence wherein there could be the possibility of the victim being further neglected. The said provision prescribes that the husband can take a second wife provided no child is born due to the spouse but same right is not provided to the spouse in the event no child is born due to the husband and as such this provision is discriminatory against women. Likewise, where a spouse having obtained her share of property through partition and lives separately has to forsake her marital rights whereas the husband is entitled to marry and therefore, these legal provisions are discriminatory, illegal, and not only invites violence against women but also recognizes women as second class citizens.

The provisions prescribed under Section 9 and 9 (a) on the Chapter of Marriage are contrary to the treaties ratified by Nepal and in particular to Article 1, 2, 7, 8, 16 (1) of the Universal Declaration of Human Rights (UDHR), 1948, Article 2, 3, 7, 16, 23 of International Convention on Civil and Political Rights (ICCPR), Article 1, 2, 3 of International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, Article 1, 2, 3, 4, 15, 16 of Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979 and that the said provisions are contrary to Article 156 of the Interim Constitution, 2063 and Section 9 (1) of the Treaty Act, 2047.

In this regard, the honorable Supreme Court in writ petitioner Advocate Mira Dhungana vs. Government of Nepal had propounded precedents relating to Sub-section 1 of Section 1 on the Chapter of Husband and Wives and similarly in writ petitioner Lily Thapa vs. Government of Nepal, the court had propounded precedent wherein the court had declared that the provisions prescribed under Section 2 on the Chapter of Women's Property were discriminatory against women. The principles propounded by the court in the above two cases are also relevant in the said case.

The petitioners through the writ petition contend that where Section 9 and 9 (a) on the Chapter of Marriage under the Muluki Ain, 2020, being contrary to the fundamental rights, rights relating to property, rights relating to gender equality pursuant to international recognition and international law, right to self-determination, right against gender discrimination, women's

right to marriage, and women's property rights, they have sought for the annulment of the said provision through an order of certiorari and have sought the court to issue orders deemed necessary pursuant to the principle of equality and have sought the court to issue an interim order refraining the respondents to do or cause to do any works pursuant to Section 9 and 9 (a) on the Chapter of Marriage and have asked the court to place the case in priority.

An order had been set aside by a Single Bench on Sept. 30, 2007 asking the respondents as to why the order sought by the petitioner need not be issued. Likewise, the order had stated to present the case upon receiving the rejoinder within 15 days from the date of execution of the order excluding the period of travel or upon the expiry of the limitation.

Joint-Secretary Mr. Tek Prasad Dhungana on behalf of the Legislative-Parliament had submitted a rejoinder stating that leaving aside some exceptions, Section 9 on the Chapter of Marriage had prohibited polygamy and that these exceptions were the need of the society. He further stated that other than where a spouse pursuant to Section 9 (a) on the Chapter of Marriage was unsound of mind and was living separately upon receiving her share of property, a husband pursuant to Section 9 on the Chapter of Marriage, if desirous to marry needed the consent of his wife. He further contends that the writ petitioners have presented the said provision in a negative aspect and have envisaged that such a provision would entertain violence against women. A law that is made through the discretion of the legislative should be accepted positively until and unless proved otherwise by the honorable court and pursuant to the principles of jurisprudence and principles of judicial review such laws should be recognized as laws made pursuant to the Constitution. The respondent further contend that where a spouse is incapacitated and in order to fulfill the needs of a family, the provision of a second marriage with the consent of the wife cannot be deemed to be improper. This assists in strengthening the prestigious life of a woman. Consent signifies independent consent which is latent therein. Provided, consent is derived through undue influence and through violent means, the victims' opportunity to seek redressal against such action is always open. It would not be logical to presume and conclude that such a provision would invite violence. Since, the writ petition has been submitted on unconstitutional claims the writ petition should be quashed.

Secretary Punya Prasad Neupane on behalf of Ministry of Women, Child and Social Welfare contends that legal decisions are reached on the basis of the needs of the society and in order to fulfill these needs Section 9 and 9 (a) have been incorporated on the Chapter of Marriage under the Muluki Ain and as such prejudicial definition cannot be made on the basis of assumption. He further contends that the State has been proactive not only sensitizing and empowering women on the legal aspect but also on the economic, social and political field and as such the above provisions of the Act should not be quashed but rather the best alternative for the court would be to issue directive orders for the formulation and reformation of laws with provisions relating to the prevailing fundamental values and gender equality and as such the writ petition should be quashed.

Secretary Dr. Kul Ratna Bhurtel on behalf of the Ministry of Law, Justice and Constituent Assembly Affairs through his rejoinder contends that the legal provisions prescribed under Section 9 and 9 (a) on the Chapter of Marriage under the Muliki Ain is not against women but rather the provisions tends to discourage and control the traditional custom of polygamy that is prevalent in the society. Perusal of our laws and the cultural traditions does not signify creation only, nevertheless one of the purposes of a marital relationship is the production of offspring. Where a child cannot be born through the relationship between a husband and wife, the law subject to some conditions has provided some considerations to enter into another marriage. Section 9 prescribes and allows the husband to enter into a second marriage subject to the condition that consent pursuant to Section 9 (a) is obtained from his spouse and therefore, the legal provision prescribed under Section 9 (a) cannot be deemed to be discriminatory. He further contends that the writ petition being irrelevant should be quashed.

Secretary Madhab Paudel on behalf of the Government of Nepal, Prime Minister and Council of Ministers contends that the government in order to maintain gender justice and equality has pursuant to the Interim Constitution, 2063 issued and implemented Act Relating to Some Amendment of Nepal Act, 2063. Although the writ petitioners claim that Section 9 and 9 (a) on the Chapter of Marriage is contrary to the Constitution they have failed to state as to how the sections are contrary and as such the writ petition should be quashed. The above legal provisions are not contrary to the international treaties and agreements related to human rights to which Nepal is a Party. Since locus standi does not arise under the international law and where the contention made by the petitioners is not proper so the writ petition should be quashed.

Where the case pursuant to the rules has been submitted before this Bench, the learned advocates Ms. Sapana Pradhan Malla, Mr. Sabin Shrestha and Ms. Meera Dhungana stated that the commitment made towards gender equality has not been translated into practice. They further stated that the provisions prescribed under Section 1 on the Chapter of Marriage has been repealed whereas discriminatory provision relating to marriage provisioned under Section 9 has been maintained and that Section 9 (a) prescribes additional provision wherein consent is required from the spouse. The learned advocates opined that the above-mentioned provisions vest the husband with the right to enter into another marriage and as such the provision cannot be deemed to be justifiable. Consent should be for justifiable matter. Where the provision of second marriage on the basis of consent encourages polygamy, the said provision would also invite domestic violence against women with regards to procurement of consent from the spouse. Acquisition of coparcenary right is a legal right but the disputed provision creates for the separation of marital right at the time of acquisition of coparcenary right and as such these provisions do not suit a civilized society and these provisions have a discriminatory effect. Upon perusal of the legal provisions, male has been the focal point. Where polygamy is considered as an offence against the State, the same cannot be recognized merely on the basis of consent.

Likewise, Mr. Krishniji Ghimire, Joint Attorney on behalf of the Government of Nepal stated that the State was committed in removing all kinds of discrimination which can be

reflected in the provisions of the Interim Constitution. He further stated that through the rejoinder submitted by the respondent it is evident that the government is committed in formulating gender friendly laws. Provision prescribed under Section 9 on the Chapter of Marriage does not encourage polygamy but on the contrary it discourages it, which is evident from the provision prescribed under Section 10. He further opined that the Supreme Court had issued orders in relation to management of laws and on the basis of the orders, laws have been refined. He stated that one should not presume that consent for the purpose of marriage would invite domestic violence. Where consent is derived from coercion it would be deemed void wherein right to legal remedy is always secured against such person. There are certain limitations for judicial review and where laws are not contradictory, no laws should be declared void.

Since, the writ petition had raised various issues which needed to be discussed seriously and a decision therein had to be rendered by this Bench, the Bench had set aside this date for delivering its verdict. The Bench upon hearing the deliberation, perusal of the writ petition and the rejoinders and the case file, it has been found that the petitioners have sought for an order of Certiorari to declare void the provisions prescribed under Section 9 and 9 (a) on the Chapter of Marriage under the Muluki Ain, 2020, citing the said provisions to be contrary to the fundamental rights, right relating to equality, right relating to equality of women under international law, right to self-determination, right against gender discrimination, marital right of women and women's property right and have also sought for order deemed necessary for the management of laws based on principle of equality. In this regard, the Bench has also observed through the contents of the rejoinders, that the government is committed towards the formulation of gender friendly laws and that the State has been proactive not only in sensitizing and empowering women on the legal aspect but also on the economic, social and political field and that the legal provisions claimed by the petitioners are not male centric and neither is it discriminatory. The Bench deems that decisions should be rendered based on the following issues:-

1. As to whether or not Section 9 and 9 (a) on the Chapter of Marriage under the *Muluki Ain* invites domestic violence and as to whether or not it encourages polygamy?
2. As to whether or not the above mentioned legal provisions are contrary to the Constitution and international conventions related to human rights to which Nepal is a Party?
3. As to whether or not order as sought by the petitioners should be issued?

The Bench deems it favorable to consider the legal provisions prescribed in Section 9 and 9 (a) on the Chapter of Marriage before entertaining the issues determined hereinabove and therefore, both the provisions are mentioned hereunder:-

Section 9: Other than the provision prescribed herein, a husband shall not marry another woman or keep a woman as his spouse provided such spouse is alive or the relationship of a husband and wife have not been separated pursuant to law:-

- ◆ Provided, the spouse suffers from incurable contagious sexual disease.
- ◆ Provided, the spouse is incurably unsound of mind.

- ◆ Provided, a medical board recognized by the Government of Nepal certifies that the spouse is barren.
- ◆ Provided, the spouse is paralyzed and is unable to walk.
- ◆ Provided, the spouse is blind in both eyes.
- ◆ Provided, the spouse pursuant to Section 10 on the Chapter of Partition has acquired her share of property and is living separately

Section 9 (a): Other than where the spouse is unsound of mind and has acquired her share of property and living separately, provided a husband pursuant to Section 9 of this Chapter desires to marry shall acquire the consent of his spouse.

Having stated the legal provision deemed unconstitutional by the petitioner in the petition, the Bench deems it appropriate to focus on the issues determined hereinabove. With regards to the first issue, the Bench deems to discuss on the matters addressed by the international documents to which Nepal is a Party and also provisions relating to equality and gender justice as prescribed in the Constitution. Right to equality under Article 13, rights of women under Article 20 and right to social justice under Article 21 of the Interim Constitution, 2063 express its commitment in favor of gender justice. Likewise, Article 1, 2, 3 and Part (c) of Sub-article (1) of Article 16 under Convention against Elimination of all forms of Discrimination against Women (CEDAW) to which Nepal is a Party is also very relevant.

Article 1 of the Convention defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, whereas Article 2 prescribes that State Parties shall condemn discrimination against women in all forms and that they agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end shall undertake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, practices which constitute discrimination against women. Likewise, Article 3 prescribes that State Parties shall undertake in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Similarly, Article 16 prescribes that the State Parties shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations in particular ensure, on a basis of equality with men and in particular under Part (3) the same rights and responsibilities during marriage and at its dissolution.

The Interim Constitution of Nepal has prescribed for equality between female and male and as such has provided a strong basis for gender justice whereas CEDAW has also created some obligations to the State Parties. The government of Nepal should be strongly committed towards the commitment expressed by the Constitution and the international

conventions to which Nepal is a Party and in order to translate those commitments into practice, other laws of the State should also include the provisions expressed in those documents.

As far as the challenges made in the petition with regards to the legal provision, Section 9 on the Chapter of Marriage under the *Muluki Ain* prescribes some grounds for a male to enter into a second marriage or to keep a spouse. The provisions prescribed therein are as such: provided, the spouse suffers from incurable contagious sexual disease, provided, the spouse is unsound of mind and is such that it is incurable, provided, a medical board recognized by the Government of Nepal certifies that the spouse is barren, provided, the spouse is paralyzed and is unable to walk, provided, the spouse is blind in both eyes and provided, the spouse pursuant to Section 10 on the Chapter of Partition has acquired her share of property and is living separately. The grounds provided therein are related to the health of the woman. **Where a spouse suffers from an incurable contagious disease or is incurably unsound of mind, or is barren or is paralyzed and unable to walk and is blind in both eyes, the spouse under these circumstances requires love, assistance and cooperation and it should be the duty of the husband to fulfill certain duties. It cannot be presumed that a husband would be eager to take the opportunity of his spouse's problem and take such problems as a mean for solemnization of another marriage.** There may be exception to it but such exceptions should not be generalized. Nevertheless, Section 9 (a) of the said Chapter prescribes that other than where a spouse is incurably unsound of mind and has acquired her share of coparcenary right and is living separately, consent of the spouse shall be required for other conditions. **Where a spouse requires additional support, the provision for not requiring consent would generate the possibility of creating additional injury towards the spouse.** The issue as to whether or not Section 9 and 9 (a) on the Chapter of Marriage under the *Muluki Ain* would invite domestic violence is a matter of public debate to be initiated among right activists and law draftsmen and facts relating to domestic violence should be analyzed and a conclusion should be reached thereto. In this regard **violence against women or any doubts in this regard should come to an end.**

With regards to the second issue, the present Constitution prescribes for right to equality, and under this right the State expresses its commitment not to discriminate on the basis of gender and under rights of women it prescribes that women shall not be discriminated on the basis of gender and that no woman shall be subjected to physical, mental or other forms of violence and provided any such act has been committed, such act would be deemed punishable by law. Likewise, under right to social justice, the right prescribes that women who are economically or educationally backward shall have the right to participate in the State structures on the basis of principles of proportional inclusion. **The provisions that have been included in the Constitution stress for gender justice and it is the obligation of the State to put these provisions into practice. It is the obligation of the State to reform any rules, laws, traditions and customs which constitute discrimination against women or to undertake all appropriate measures to abolish and frame laws in this regard.** Likewise, the State cannot withdraw from its national

obligations created by the international conventions to which the State is a Party. **Matters that are attached with the health of a spouse and the diseases attached therein do create grave conditions which should be confronted by the husband but the possibility of another marriage and the validation of another marriage through the process described therein would create domestic violence which needs to be stopped. No civilized society would envisage the provision of laws where a spouse would terminate her marital relationship due to her health and being incurably sick.**

In order to put an end to such possibilities, the State should determine the development and promotion of women and should guarantee the enjoyment of the human rights and fundamental rights equal to that of men and in this regard the State should take appropriate measures in all relevant areas in particular in the political, social, economic and cultural field and frame appropriate laws and it is also deemed necessary that the State should create conducive environment in order to provide continuity to the relationship between a husband and wife and respect their desires. Provided, it is to be deemed that provision prescribed under Section 9 and 9 (a) on the Chapter of Marriage is contrary to the Constitution and international convention, one has to think of alternative provisions. When exercising its right with regards to judicial review, the court should also look into the possibilities of creation of legal vacuum and should also consider measures of fulfilling such vacuum. Article 107 (1) of the Constitution vests the Supreme Court with the right to judicial review. The Supreme Court pursuant to this Article may declare a law void either *ab initio* or from the date of its decision provided any law or any part thereof is inconsistent with the Constitution because it imposes an unreasonable restriction on the enjoyment of fundamental rights conferred by the Constitution or any other ground. Provided, the disputed laws are to be declared void, the impact that would be created should also be taken into consideration and on the other hand, the interest and concern raised by the relevant party (Government of Nepal) towards the matters raised in the writ petition should also be properly evaluated.

Law is dynamic in nature and as envisaged by the modern society, law should be reformed pursuant to the expectation of the society. Where the State is involved in the timely amendment of law, the court pursuant to the concept of judicial review and the judicial practices are also vested with the obligation to provide directives to the State. The petitioners have sought the court to declare the provisions under Section 9 and 9 (a) on the Chapter of Marriage void due to the provisions being contrary to the Constitution and international conventions whereas **the Government of Nepal has shown its commitment towards formulating gender friendly laws and has also stated that it has been the State's policy not only to sensitize and empower women on the legal aspect but also on the economic, social and political field and therefore rather than declaring the legal provisions void, the court should perform the role of a catalyst and invite the State towards fulfilling commitment made therein.** Nevertheless, the legal provisions prescribed under the Chapter of Marriage of the *Muluki Ain* may have the potential of creating encumbrances and there could be a potential of exercising such legal provisions in the interest of men and against women and therefore, it is necessary to diffuse such laws for a civilized society. **The State contrary to the commitment expressed by**

the law of the land and expectations expressed by the international conventions cannot give continuity to legal provisions that are discriminatory against women. Such provisions should be timely amended and reformed and in this regard the State should take into consideration the international convention to which Nepal is a Party and the social, cultural, and family structure.

Therefore, the Bench hereby issues a directive order against the Prime Minister and to the Council of Ministers directing the respondents to see that the provisions prescribed under Section 9 and 9 (a) on the Chapter of Marriage are consistent with the Interim Constitution, 2063 and with the provisions prescribed in the Convention against Elimination Of All Forms Of Discrimination Against Women (CEDAW) and to amend the law and to make arrangement for appropriate laws. It is hereby directed to notify the respondents of the order made herein through the office of the Attorney General and to maintain the case file accordingly.

s/d
Anup Raj Sharma
Justice

Consenting with the opinion

s/d
Gauri Dhakal
Justice

s/d
Ram Prasad Shrestha
Justice

Dated: Year 2065 of the month of Bhadra date 26 day 5 (Sept. 11, 2008).....
Bench Officer: Umesh Koirala

**Supreme Court Special Bench
Hon'ble Justice Kedar Prasad Giri
Hon'ble Justice Khil Raj Regmi
Hon'ble Justice Sharada Shrestha
Order
Special Writ No. 64 of the Year 2061(2004 A.D)**

Sub: Praying for an order seeking derecognition and annulment of a law repugnant to the Constitution as per Article 88(1) of the Constitution of the Kingdom of Nepal, 1990

On Behalf of Women, Law and Development Forum, located at Thapathali Ward No. 11 of the Kathmandu Metropolitan City and also on her own behalf Advocate Meera Dhungana, aged 371 **Petitioners**
On behalf of the above mentioned Forum and also on her order behalf Advocate Bishnu Gurung, aged 301

Vs.

Office of the Prime Minister and the Council of Ministers, Singhadurbar1
Ministry of Law, Justice and Parliamentary Management, Singhadurbar.....1
Ministry of Women, Children and Social Welfare, Singhadurbar.....1 **Respondents**
Office of the Speaker of the House of Representatives, Singhadurbar.....1
National Assembly, Singhadurbar.....1
Law Reform Commission, Singhadurbar.....1

Khilaraj Regmi J: The facts of the present writ petition submitted for hearing as per the rules and the order issued in the case are briefly as follows:

Arguing that as they, too, have got the rights available to every citizen to seek the annulment of any law inconsistent with the Constitution of the Kingdom of Nepal, 1990 as per Article 88(1) of the Constitution, and claiming to have been established with the objective of the protection of the legal rights and interests of women, women empowerment and the progress and development of women and representing the Women, Law and Development Forum which is actively working in that area, the petitioners seem to have entered the Court with the present petition. Clause (1) of Section 1 of the chapter on Husband and Wife in the New National Code (Naya *Muluki Ain*, 2020) provides that “if it is certified by a Medical Board recognized by His Majesty’s Government that no child was born within ten years of the marriage due to infertility of the wife, the husband may seek dissolution of conjugal relation.” It is a discriminatory legal provision against women because the State made law

has not even presumed that a child may not be born even due to a male person. This provision is inconsistent with Article 11(1),(2) and (3) of the Constitution of the Kingdom of Nepal, 1990. Likewise, that legal provision runs contrary to Articles 1, 2 and 7 of the Universal Declaration of Human Rights, 1948, Articles 1,2,3,5 and 23 of the International Covenant on Civil and Political Rights, 1966, Articles 1,2,3,4 and 16 of the Convention on Elimination of All Forms of Discrimination against Women, 1979, Recommendation no. 21 of the Committee on the Elimination of Discrimination against Women and the commitment made by Nepal to abolish by the year 2005, all discriminatory legal provisions against Women at Beijing -5 Convention of the General Assembly of UNO empowered to monitor the Beijing work plan. The aforesaid legal provision also contravenes the principle and value recognized by the apex court in *Reena Bajracharya & Others vs. His Majesty's Government & Others*, *Advocate Sapana Pradhan Malla vs. Ministry of Law, Justice and Parliamentary Management and Others*, *Advocate Meera Dhungana vs. Ministry of Law, Justice and Parliamentary Management & Others* etc. Therefore, the writ petitioners have prayed for the issuance of an appropriate order for making necessary legal provisions based on the principle of equality after declaring clause (1) of Section 1 of the chapter **On Husband and Wife** in the National Code, 2020 B.S. as void because the impugned clause is inconsistent with the fundamental rights to equality granted by the Constitution, the right to equality available to women under an international norm and international law, the right against gender discrimination and the conjugal right of women.

After the preliminary hearing of the petition a Single Bench of the apex Court issued an order directing the respondents to submit a written reply within 15 days and scheduling the case for further hearing. In the written reply submitted by the office of the Prime Minister and the Council of the Ministers, praying for the rejection of the writ petition, it has been contended that the petitioners have failed to clearly point out which type of right of the petitioners have been infringed by which act of the respondents and that they have framed the respondents as defendants without any ground or reason. As what type of law needs to be made or amended falls within the jurisdiction of the Legislature, there was no legal basis to frame that office as a respondent in connection with an issue relating to the law made by the Legislature. The Ministry of Women, Children and Social Welfare has also, besides advancing the above-mentioned pleas, argued in its written reply that His Majesty's Government has been, after the ratification of the International Conventions to which Nepal is a party, undertaking the liability regarding making amendments to the laws which seem to be discriminatory in accordance with the spirit of the treaties and Conventions. Although Section 1 of the chapter **On Husband and Wife** has made the relation between a husband and a wife as indissoluble, in the event of some unavoidable reasons clause (1) and clause (2) have made provisions for the conditions in which a husband or a wife may seek dissolution of the relation with the spouse. The respondents have further pleaded that as the above mentioned legal provision created a condition for the husband to wait for ten years in the event of the infertility of his wife whereas in the case of the wife she is not required to wait for that period for seeking dissolution of the relation, the impugned legal provision has made a positive discrimination in the case of women. Hence, the writ petition deserved to be rejected.

The Ministry of Law, Justice and Parliamentary Management, in its written reply, submitted that the provisions mentioned in Section 1 of the chapter **On Husband and Wife** should not be viewed separately but in totality. It appears from that provision that a husband can seek dissolution of relation with his wife in case, besides other reasons, it is certified by a Medical Board recognized by His Majesty's Government that the wife had failed to give birth to a child within ten years of their marriage due to her infertility and, similarly, a wife can also seek dissolution of the relation with her husband in case, besides other reasons, the husband was impotent. Thus, since the law has granted a right to both the husband and the wife to seek dissolution of their conjugal relation in specified conditions, it cannot be assumed that there exists inequality only on the ground that the provisions for dissolution of conjugal relation between a husband and a wife are literally not similar. Guided by the objective of eradicating inequality between men and women, separate provisions for allowing both a husband and a wife to seek dissolution of relation were made amending Section 1 of the chapter **On Husband and Wife** in course of making 11 the Amendment to the National Code. That provision was in consonance with the Constitution, the international values, the international law, various international covenants made for the protection of the women's rights and the concept of gender equality. It was, therefore, urged that the writ petition should be rejected.

Pleading for the rejection of the writ petition, the respondent Law Reform Commission contended that as it was not mentioned in the petition as to why it had been made a respondent and as there was already a legal provision in Section 1 Clause (2) of the chapter **On Husband and Wife** that "a wife can seek dissolution of the relation with her husband if he becomes impotent," and as the term "impotent" also suggests the absence of producing a child, the contention of the writ petitioners was meaningless.

A study of the writ petition, the written replies submitted by the respondents, the law relating to the present dispute, precedents and recognized values, the constitutional provision and also the provisions of the international treaties and Conventions suggest that the following issues need to be resolved in the present dispute:

- (1) Whether or not impotency and childlessness are synonymous terms or whether they are terms with different meanings?
- (2) Whether or not the impugned provision of the law, applied to men and women and made on the assumption by the State that impotency and childlessness were synonymous words, was inconsistent with the Constitution of the Kingdom of Nepal, 1990 and the international covenants to which Nepal is a party?
- (3) Whether or not the order as prayed for by the petitioners ought to be issued?

In the present dispute Advocates Meera Dhungana and Bishnu Gurung pleaded that 'infertility' and 'impotency' were the words having different meanings. The capacity to produce children (fertility) can be found both in men and women, and it can be present in both of them. However, assuming that fertility remains only in the women the provision if a child is not born for ten years due to the husband has been excluded from the chapter **On Husband and Wife** in the National Code. It has clearly discriminated against the women. Impotency is sexual inactivity or incompetence to make sexual relation whereas in the state

of childlessness or infertility there may be the presence of sexual activity but it may not result in giving birth to a child. Even from the medical viewpoint fertility or infertility is a quality which can be found more in the male than in the female. The impugned provision may impose restrictions on the husbands and wives who seek to promote their professional development in the modern times without producing any children for long. Hence, the legal provision contained in Section 1, Clause (1) of the chapter **On Husband and Wife**- “If it is certified by a Medical Board recognized by His Majesty’s Government that no child was born within ten years due to infertility of the wife” – was inconsistent with Art. 11 of the Constitution of the Kingdom of Nepal, 1990, Articles 1,2,3,5 and 23 of the International Covenant on Civil and Political Rights, and Articles 1,2,3,4 and 16 of the International Covenant on Eradication of All Forms of Discrimination Against Women,1979, to which Nepal is party and also the principles established by the apex court in the disputes relating to gender discrimination. Therefore, the petitioners pleaded for declaring the impugned provision ‘*ultra vires*’ of Art 88 (1) of the Constitution and issuing an appropriate order directing the respondents to make necessary legal provisions based on the principle of equality.

Appearing on behalf of the respondents, learned Deputy Attorney General Narendra Prasad Pathak pleaded that the government was endeavoring to eradicate gender discriminations. While deciding whether or not any legal provision is invalid the constitutional norms, spirit and all the provisions of the law need to be viewed in their totality. The impugned provision relating to the context of dissolution of relation between a husband and a wife must be viewed in the light of comparison to the previous provision in this regard. The previous legal provision did not talk about failure of the birth of a child due to the husband or the wife. Both the husband and the wife were entitled to seek dissolution of relation only on the ground of the failure to produce a child within ten years. But at present that legal provision has been amended to provide that a husband may seek dissolution of relation if it is recommended by a Medical Board that a child could not be born due to the wife. It does not seem to create any substantive difference in regard to the principle of equality. If the husband becomes impotent, the wife is entitled to seek dissolution of conjugal relation at any time. The term ‘impotency’ also embraces lack of competence to produce a child (infertility). The court has to take into consideration various things while declaring any provision of law as ‘*ultra vires*.’ There can be a solid ground to decline any provision of the law as ‘*ultra vires*’ only if it appears to be ‘prima facie’ in clear contravention of Article 11 of the Constitution. But since the impugned provision is not clearly inconsistent with the right to equality, it was submitted that the petition be rejected.

As the apex Court has to resolve several issues and it was not possible to decide those issues at once, the case was scheduled for today for delivering the judgment.

Let us, first consider the first issue. This issue is related to the question whether ‘impotency’ and the ‘incompetence’ to produce a child or ‘infertility’ are synonymous in meaning or have different meanings. In common parlance impotency means something which cannot assert its sexual identity or which indicates sexual inactivity. On the other hand ‘childlessness’ or ‘infertility’ indicates a state where one does not have the competence to produce a child

even though one's sexual identity is clear. From the Nepali Dictionaries in "the Nepali Brihat Sabdkosh" the word 'childless' has not been given a separate meaning and has been equated with the word barren which gives similar meaning such as failure to produce a child, failure to be present, not capable of having young ones etc. On the other hand the word 'impotent' has been used to describe a creature who cannot be identified either as a man or a woman, someone who does not have either the reproductive organ or whose sexual organ is not active at all. In "the Nepali Sabdsagar" of Basant Kumar Sharma Nepal the word 'impotent' has been used to mean a creature who can not be identified either as a man or as a woman, neither male or female, eunuch, one who does not have the reproductive organ or even though one has got the reproductive organ it is passive. On the other hand that dictionary notes the word barren male to mean not able to produce any crops, lacking the reproductive quality, not having the reproductive capacity, childless etc. Whereas the word barren female has been used to mean someone who cannot give birth to a child or cannot conceive, someone who is unproductive etc. In "the Nepali Sabdkosh" of Bal Chandra Sharma the word 'impotent' means a creature who can be hardly identified as male or female, neither male nor female, eunuch, someone without the reproductive organ or having inactive reproductive organ whereas the word "childless" means a person who does not have a son or a daughter, without any children.

In "the Kanooni Sabdkosh" of Tope Bahadur Singh the word 'impotent's has been used to mean a person lacking the reproductive organ or having an inactive reproductive organ, someone who is not competent to make sexual relation whereas both the words, childless and infertility are missing in that dictionary. In "the Nepali Kanooni Sabdkosh" of Shanker Kumar Shrestha the word childless has been described to mean childless, someone without a son or a daughter whereas the word 'impotent' has been described to mean having no productive organ or having an inactive productive organ. In the English language childlessness or being barren has been described as infertility whereas the incompetence to make sexual relation has been described as impotency. The Oxford Advanced Learner's Dictionary has described the word impotent to mean wholly lacking in sexual power and the word infertility to mean not fertile or barren. In Black's Law Dictionary there is no mention of the word infertility but the word impotence has been used to mean the inability to have sexual intercourse, particularly used for the male. In L.M. Harrison's Medical Dictionary impotence has been described as the inability in a man to have sexual intercourse; it may be erectile, in which the penis does not become firm enough to enter the vagina, or ejaculatory of semen, either kind of impotence may be due to physical disease, such as diabetes, or a psychological or emotional problem. And the word infertility has been described as inability in a woman to conceive or in a man to induce conception. Female infertility may be due to the failure to ovulate or due to obstruction of the fallopian tubes or due to disease of the lining of the uterus. Male infertility may be due to spermatozoa in the ejaculation being defective either in motility or in numbers or due to a total absence of sperm.

The meanings given by the Dictionaries of various sectors make it clear that impotency and infertility are not similar words but separate words which indicate separate conditions and give separate meanings. The law has not clearly defined

the words impotency and infertility. In such a situation the Dictionaries prepared by scholars of the concerned field in their capacity as specialists and published by various publications and the meanings of different words mentioned therein may prove helpful in course of interpretation of the Constitution and the law by the Court. Therefore, this Court may seek their help by using them. This is also a matter falling under the jurisprudential norms. As the description made in different Dictionaries mentioned above clearly shows that impotency and infertility are not synonymous but separate in meaning, no further analysis is required in this regard.

Now let us address the second issue. This issue relates to whether or not it will be constitutional if the State makes and implements a law based on the assumption that both the words 'impotency' and 'infertility' are of similar nature. Generally, the State makes and implements laws in order to regulate and control the conduct of citizens. It is also a universally accepted principle. The State is required to make laws not in an arbitrary way on the strength of the power or competence to make law but in consistence with the limits, values and principles prescribed by the Constitution. It is also not that all things are defined and embraced by the laws made by the State due to the dynamism of time, unprecedented developments in the field of technical knowledge etc. However, nothing can be imposed on the citizens in the form of law which is contrary to general knowledge or conscience. In the present context **it is a matter of common knowledge and understanding that both the words impotency and infertility seem to be different in their construction itself and they cannot be given similar meaning.** But it has been mentioned in the written replies that these two words are one and the same and the word infertility is also implied in the word impotency. Even the learned Deputy Attorney General has also emphasized on the same thing in course of his submission. Whereas the previous provision in the chapter **On Husband and Wife** had opened the way for both the husband and wife to seek dissolution of conjugal relation if no child was born within ten years of the marriage, the **Eleventh Amendment provided the ground for the husband to seek dissolution of relation if it was certified that no child was born due to the wife. But the same ground was not available for the wife. This clearly shows that separate treatment has been meted out to husband and wife in connection with the same issue.**

Thus, when it appears from common knowledge and reasoning that infertility and impotency are separate conditions, there seems to be no legal and reasonable ground to define that both the words are of the same nature and they have got the same meaning.

In fact, what needs to be taken into consideration is the issue whether or not the impugned provision contained in Section 1, Clause (1) of the chapter **On Husband and Wife** in the National Code. "If it is certified by a Medical Board recognized by His Majesty's Government that no child was born within ten years of the marriage due to infertility of the wife, the husband can seek dissolution of the conjugal relation" is inconsistent with the Constitution of the Kingdom of Nepal, 1990 and the International Covenants to which Nepal is also a party. It has been provided in Article 11 of the Constitution of the Kingdom of Nepal, 1990 that all citizens shall be equal before the law; no one shall be deprived of the equal protection

of the laws; the State shall not discriminate in the application of the general law against any citizen on the grounds of religion, colour, sex, caste, tribe, race, ideological belief or any one of these. In addition, it has also provided for making 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. The petitioners have claimed that the provision contained in Section 1, Clause (1) of the chapter **On Husband and Wife** discriminated between husband and wife on the ground of sex as the husband could seek divorce if no child was born within ten years of the marriage on account of the wife but there was no mention of the same ground in the law enabling the wife to seek divorce from her husband if no child was born within ten years of the marriage on account of the husband. A cursory glance shows that there seems to be no similar provision in the interest of the women. Such separate treatments meted out in regard to the same issue can not be approved also by the modern principle of equality. In fact, **the constitution has even accepted the principle of positive discrimination in order to provide special protection to women by law for their protection and advancement. As it is the duty of the State to provide special protection to women for the sake of women empowerment and advancement, instead of providing them special protection, it is certainly not consistent with the above –mentioned constitutional provisions and the principle of equality to make and implement laws on the assumption that the capacity to produce children remains only in women and not in men whereas the capacity to produce children may be present both in a husband and a wife. The impugned provision has clearly displayed discriminatory treatment between a husband and a wife.**

In the same way, the impugned provision needs to be examined in the context of the mechanism of the international covenants and Conventions to which Nepal is a party and which are applicable in Nepal as Nepal law as per Section 9(1) of the Treaty Act, 2047 (1990 A.D). That point has been forcefully raised also by the petitioners in their writ petition and in course of the arguments presented by them. Especially, some of the provisions of the International Convention on Civil and Political Rights, 1966 (ICCPR) and the Convention on the Elimination of All forms of Discrimination against Women, 1979 are relevant in the present context. For example, Article 2 (1) of ICCPR has provided that “Each State party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without discrimination of any kind, regarding race, colour, sex, language, religion, political or other opinion, rational or social origin, property, birth or other status”. Likewise, Article 3 of ICCPR says that “The State parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant “. Similarly, Article 5 (1) of ICCPR has mentioned that “Nothing in the present Covenant may be interpreted as implying for any State, group of person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.” Furthermore, Article 23(4) has provided that “ State parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

All the above mentioned provisions are such provisions which have imposed liability upon the State to implement them equally among all citizens. The State cannot make legal provisions contrary to those provisions or cannot evade its liability by failing to make those provisions. In the present context too, emphasis has been placed on ensuring the equality of the application of law in the case of both the husband and the wife.

Likewise, Articles 1, 2, 3 and 16 (1) (C) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) seem to be related to the issue of the present dispute. Article 1 of CEDAW, defining the term “discrimination,” says, “The term discrimination against woman shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” In Article 2 of CEDAW, the State parties have condemned all forms of discrimination against women: “State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end, undertake: to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Likewise, Article 3 of CEDAW states that “State parties shall take in all fields, in particular, in the political, social economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”. Similarly, Article 16 of CEDAW provides that “State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relation and in particular shall ensure, on a basis of equality of men and women, ... the same rights and responsibilities during marriage and its dissolution”.

The above mentioned provisions have been made with a view to ensuring the enjoyment of rights and freedoms by women at par with men and requiring the State to guarantee such an enjoyment. Nepal has also become a party to the above mentioned Covenants and Conventions without any reservation. After becoming a party to the Covenants and Conventions it becomes a duty as well as a liability of the State to get the provisions of those treaties implemented in the country. Because the judiciary as an organ empowered to enforce the judicial power for the State, it is its duty to implement and cause to be implemented the provisions of the treaties to which the State is a party. The judiciary can not shirk this responsibility. The provisions enshrined in the treaties including the above-mentioned Covenants and Conventions to which Nepal is a party, are not simply cosmetic things meant for presenting or displaying Nepal before the international community as a civilized and democratic country. What is essential to make the country affluent from the viewpoint of human rights and freedom by implementing those provisions in accordance with their meaning and spirit. Because the subject of building a human rights culture by adjusting such international instruments relating to human rights has also been included in the policy of the 10th plan and its Strategic Policy implemented by the State, the national

commitment and attachment to this issue is amply reflected. However, the trend of seeking judicial intervention signaling out such discriminatory provisions is gradually on increase rather on decrease. Therefore, it is highly essential on the part of the concerned bodies to focus their attention on decreasing such a trend in the coming days.

The impugned provisions challenged by the petitioners enshrined in Section 1 (1) of the chapter **On Husband and Wife** does not seem consistent rather it is inconsistent with the various provisions of the international treaties and Conventions mentioned in the various preceding paragraphs. They appear to be discriminatory and not equal. As per the provision made by Section 9(1) of the Nepal Treaty Act, 2047 (1990 A.D), the provisions of the national laws inconsistent with the provisions of international treaties are not valid to such extent and, in that case, the provisions of the treaties do prevail.

Now let us consider the third question, This question is directly concerned with the specific demand of the petitioners. The petitioners have prayed for the issuance of an appropriate order for making a necessary legal provision based on equality declaring “*ultra vires*”, as per Article 88 (1) of the Constitution, the impugned provisions contained in Section 1(1) of the chapter **On Husband and Wife** in the National Code which provides that “If it is certified by a Medical Board recognized by His Majesty’s Government that no child was born within ten years of the marriage due to infertility of the wife,” the husband may seek dissolution of conjugal relation. **As analyzed in the various preceding paragraphs, as the impugned provision seems to be inconsistent with not only the principle of equality and the right to equality enshrined in Article 11 of the Constitution of the Kingdom of Nepal, 1990 but also with the relevant provisions contained in Articles 2, 3, 5 and 23(4) of ICCPR and Article, 1, 2, 3 and 16 (1) (C) of CEDAW – which are effective as equivalent to Nepal law as per Section 9 (1) of the Nepal Treaty Act, 2047 (1990A.D). From the provision contained in Section 1(1) of the chapter On Husband and Wife in the National Code, the clause “or if it is certified by a medical Board recognized by His Majesty’s Government that no child was born within ten years of the marriage due to infertility of the wife” -is hereby declared as void effective from the date of today as per Article 88(1) of the Constitution of the Kingdom of Nepal, 1990. As the above mentioned provision is discriminatory because it is not applicable to men and women in an equal manner and tends to grant concession to men if it is deemed necessary, from the social and family viewpoint to make such a provision, a directive order is hereby also issued to the respondents including the Office of the Prime Minister and the Council of Ministers to make appropriate provisions which are equally applicable to husbands and wives on the basis of equality and which are also not inconsistent with the Constitution of the Kingdom of Nepal, 1990 and the provisions of the international Covenants.**

It is hereby further directed to forward a copy of this order to the respondents through the office of the Attorney General for their knowledge, and to deliver the case file as per the rules.

s/d
Khil Raj Regmi
Justice

We concur with the aforesaid verdict

s/d
Sharada Shrestha
Justice

s/d
Kedar Prasad Giri
Justice

Done on 17th day of the month of Chaitra, 2062 (2005A.D)

Supreme Court, Special Bench
Hon'ble Justice Anup Raj Sharma
Hon'ble Justice Ram Prasad Shrestha
Hon'ble Justice Pawan Kumar Ojha
Order
Writ No. 131 of the year 2063 BS (2006 AD)

Ms. Meera Dhungana, for her own behalf and by authorization for and on behalf of Women, Law and Development Forum located at Ward No. 11 of Kathmandu Metropolis, Kathmandu District **Writ Petitioner**

Vs.

Office of the Prime Minister and Council of Ministers, Singhadurbar.....1
Ministry of Law, Justice and Parliamentary Affairs, Singhadurbar..... 1
Ministry of Women, Children and Social Welfare, Singhadurbar1 **Opposite**
House of Representatives1 **Parties**
National Assembly1
Law Reforms Commission, Singhadurbar 1

Case: Let an order be issued for making or causing to be made the legal provision based on the principle of equality

Anup Raj Sharma J: The summary of facts and issues of the above mentioned writ petition filed before this Court under Article 88 (1)(2) of the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) are as follows: -

The writ petitioner states in her writ petition that the sub-sections (1) and (3) of section 4 of Social Events Reforms Act, 2033 brought into force prior to the promulgation of the Constitution of the Kingdom of Nepal, 2047 is still in force as usual. Section 4 under the heading “The bride side not permitted to receive” provide in sub-section (1) that the bride side while their daughter is to be married are not permitted to receive or give in exchange any cash or property from/to the groom’s side and in sub-section (3) it is provided that any person violating the provision of sub-section (1) shall be punished with a fine from Rs. 12 thousand to Rs. 25 thousand or an imprisonment of one year or with both, including the forfeiture of the monetary value of such dowry. Similarly, section 3 of the said Act under the heading “Control on dowry” in its sub-section (1) provides that no one should accept to give or receive dowry and in its sub-section (2) it provides that any person violating the provision of sub-section (1) shall be punished with a fine from Rs. 12 thousand to Rs. 25 thousand or an imprisonment for a period of up to thirty days or with both including the forfeiture of the monetary value of such dowry. While observing the arrangements made in

these two sections it is found that if the bride side demands for dowry the punishment is high and if the groom side demands for dowry the punishment is softer one which gives a clear glimpse of dominance of the patriarchal value and thinking. Since the said provision made in sub-sections (1) and (3) of section 4 is in contradistinction to the Article 11 of the Constitution of the Kingdom of Nepal, 2047, Universal Declaration of Human Rights, Articles 1, 2, 3, 5 and 26 of International Covenants on Civil and Political Rights, 1966, Articles 1, 2, 3 and 5 of the International Protocol of Economic, Social and Cultural Rights, 1966, Articles 2, 3 and 4 of the Convention on Elimination of All types of Discrimination Against Women, 1979, therefore, let the said provision be declared void and *ultra vires* under Article 88(1) of the Constitution of the Kingdom of Nepal, 2047 and let the appropriate order be issued directing to make the legal arrangement based on the principle of equality.

This Court had passed an order asking the opponent party to show cause as to what was the matter. The order further had directed to present the case file before the Bench, giving priority in the docket sheet, with the affidavits submitted by the opposite parties in case the affidavits are submitted within the prescribed time limit or after the expiry of the time limit prescribed for submission of the affidavits.

The writ petitioner had filed a supplementary petition before this Court under rule 29 of the Supreme Court Rules, 2049 as corrigenda to the main petition. In the supplementary petition the writ petitioner has stated that in the main text in Nepali version, it was inadvertently written in the fourth line of the paragraph No. 1 in page 2, as “let the said provision be declared void and *ultra vires*” instead of correctly to be written as “let the appropriate order be issued directing to make the legal arrangement for punishment based on the principle of equality”. In the same way, in the 16th line of the paragraph No. 11 in page 6, also it was inadvertently written as “let the said provision be declared void and *ultra vires*” instead of correctly to be written as “let the appropriate order be issued directing to make the legal arrangement for punishment based on the principle of equality”. Likewise, in the 6th line of the paragraph No. 14 in page 7, also it was inadvertently written as “let the said provision be declared void and *ultra vires*” instead of correctly to be written as “let the appropriate order be issued directing to make the legal arrangement for punishment based on the principle of equality”. Similarly, in the 4th line of the paragraph No. 15 in page 8, also it was inadvertently written as “let the said provision be declared void and *ultra vires* by issuing the order of certiorari inclusive of the order of mandamus” instead of correctly to be written as “let the appropriate order be issued directing to make the legal arrangement based on the principle of equality”.

The Office of the Prime Minister and Council of Ministers in its affidavit submitted before this Court states that it is the sole business of legislature to decide as to what type of legislation is to be made, therefore, the writ petition is liable to be dismissed on the ground that there does not exist any reason to make this office as the opposite party in the matter concerned with the law made by the legislature.

The Parliament Secretariat on behalf of the House of Representatives and the National Assembly in its affidavit submitted before this Court states that the Legislature is always aware and cautious to make timely reforms in the Nepal laws by incorporating the cultural values and norms of Nepalese society and the spirits and principles contained in the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) and international human rights instruments to which Nepal is a party. Therefore, the writ petition filed without considering the time and is liable to be dismissed on the ground that the writ petitioner has made the House of Representatives and National Assembly the unconcerned institutions as the opposite parties.

The Law Commission in its affidavit submitted before this Court states that the writ petitioner is unable to mention in the writ petition as to what the reasons were behind for making the Law Commission as an opposite party in the present case and therefore the writ petition is liable to be dismissed.

The Ministry of Defense in its affidavit submitted before this Court states that the Royal Nepalese Army Recruitment, Promotion and other Miscellaneous Arrangement (Eighteenth Amendment) Rules, 2031 are still in existence and the Ministry is bound to do as per the law prevailing for the time being, and therefore, the writ petition is liable to be dismissed. The Ministry of Law, Justice and Parliamentary Affairs in its affidavit submitted before this Court states that the provision made by section 4(3) of the Social Events Reforms Act, 2033 is seen to be concerned with the punishment for accepting a dowry in form of cash or kind by the bride side for getting its daughter or like person married. Any type of punishment is being used to be imposed on the basis of gravity and nature of crime, social view on such crime and social values, tradition and recognition regarding such crime. The question of making legal arrangement that the writ petitioner has raised has also been made on the same basis. Thus the legal provision made for imposing punishment to be awarded to the law violators cannot be linked with the fundamental right conferred by the constitution and gender discrimination. However it should not be construed that every provision of law relating to the punishment should be taken as valid even though it is inconsistent with the constitution. The punishment as mentioned in section 4(3) of the Act, is made for both parties the dowry giver and receiver and on such circumstances, the said legal provision has not infringed anyone's fundamental right or gender discrimination, rather it has tried to harmonize and regulate the practice on social events. Therefore, the legal provision in question is not inconsistent with the provisions made by the Constitution and international Treaties and agreements. Therefore, the pleas taken in the writ petition are illogical and unreasonable and hence the writ petition is liable to be dismissed.

The Ministry of Women, Children and Social Welfare in its affidavit submitted before this Court states that the making or amending the law is the business of the legislature and this Ministry was not involved in making or amending the law questioned by the writ petitioner and the said act does not fall under the jurisdiction of this Ministry. The writ petitioner is unable to indicate with evidential fact as to what type of work done by this Ministry infringed the petitioner's constitutional and legal right. Since the writ petition is based on hypothetical

logic and has made this Ministry an unconcerned institution in the matter raised in the petition, therefore the writ petition is liable to be dismissed, let it be dismissed.

In the present case docketed before this Bench as per rules, the writ petitioner the advocate Ms. Meera Dhungana submitted that the legal arrangements made in section 4(3) of the Social Events Reforms Act, 2033 has discriminated in the punishment between the bride side and the groom side while they commit the same offense. It is found that if the bride side demands for dowry the punishment is high and if the groom side demands for dowry the punishment is softer one and upon perusal it gives a clear glimpse of dominance of the patriarchal value and thinking. Since the said provision made in sub-section (3) of section 4 is inconsistent with the Article 11 of the Constitution of the Kingdom of Nepal, 2047, therefore, let the appropriate order be issued directing the opponents to amend the said legal arrangement based on the principle of equality. Learned Deputy Government Attorney Mr. Brajesh Pyakurel representing the opponents including the Office of the Prime Minister and Council of Ministers of the Government of Nepal submitted before the Bench that the act of receiving dowry and giving dowry are of quite different nature and cannot be construed as the same act, therefore there is no reason for issuance of writ as sought by the writ petitioner.

Upon perusal of the case file and hearing the arguments of the learned counsels representing both the sides of the case, the Bench has to resolve the following two questions before pronouncing its verdict:-

1. Whether or not the legal provision made by section 4(3) of the Social Events Reforms Act, 2033 is against the constitutional right of equality of women.
2. Whether or not the court should issue an order declaring the said provision *ultra vires* pursuant to Art 88(1) of the Constitution of the Kingdom of Nepal.

So far the first question is concerned, upon perusal of the section 4 of the Social Events Reforms Act, 2033 it under the heading “The bride side not permitted to receive” provides in sub-section (1) that the bride side while their daughter or like person is to be married is not permitted to receive or give in exchange any cash or property from/to the groom’s side and in sub-section (2) it provides that the bride side should not give pressure to the groom side putting demand specifying the quantity of ornaments, clothes, cash or kind or real estate. Similarly, in the sub-section (3) of the said section it is seen as provided that any person violating the provision of sub-section (1) shall be punished with a fine from Rs. 12 thousand to Rs. 25 thousand or an imprisonment of one year or with both including the forfeiture of the monetary value of such dowry. The person giving the dowry shall be punished with half of the said punishment.

The provision contained in sub-articles (1), (2) and (3) of Article 11 of the then prevailing Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) under the heading right to equality has provided as the following:-

- (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws

- (2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion, color, sex, caste, tribe, origin, language or ideological conviction or any of these.
- (3) The State shall not discriminate against citizens among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.

Provided that nothing shall be deemed to prevent the making of special arrangements by law for the protection, empowerment or advancement of women, children, aged and the disabled, those who are physically or mentally incapacitated or the people who are economically, socially or culturally backward.

Upon perusal of aforesaid constitutional provisions it is found that there does not exist any provision permitting the State to make a law providing more facilities to the groom side and less favoring the bride side. Upon examination of the provision of section 4(3) of the Social Events Reforms Act, 2033, it is found that in case the bride side demands dowry, the punishment for the dowry giver or the groom side shall be half of the punishment imposed for the dowry receiver or the bride side. Unless two parties agree to take and give dowry, the commission of the said offense is not possible. The learned government attorney could not clarify as to how giving and taking of dowry was materially different specifying reasons therefor. There does not exist any reasonable ground to discriminate the bride and the groom side simply on that reason, and impose higher punishment to the bride side. Apparently the said legal provision in question is found to be inconsistent with the Rights to equality as enshrined in Article 11 of the Constitution of the Kingdom of Nepal, 2047.

Since the aforesaid legal provision in question is found as inconsistent with the right to equality it will not be proper to continue with the said legal provision in the existing condition. This Court has on several occasions passed the orders directing to amend such discriminating laws in many cases [for example, Writ petitioner Meera Dhungana and Others vs. Ministry of Law, Justice and Parliamentary Affairs et al, Writ No. 3392 of the year 2050 BS (1993/94 AD), Nepal Law Reporter, 2052 (1995/96 AD) page 462); Writ petitioner Dr. Chanda Bajracharya vs. Ministry of Law, Justice and Parliamentary Affairs and Others, Writ No. 2816 of the year 2051 BS (1994/95 AD), Nepal Law Reporter, 2053 (1996/97 AD) page 537); Writ petitioner Sapana Pradhan Malla vs. Ministry of Law, Justice and Parliamentary Affairs and Others, Writ No. 2736, Nepal Law Reporter, 2053 (1996/97 AD) page 105) and since the writ petitioner has sought the issuance of order for making or causing to make necessary legal provision based on the principle of equality, **this order is hereby issued in the name of the Office of the Prime Minister and Council of Ministers of the Government of Nepal directing it to make the appropriate legal arrangement**

based on the principle of equality. Let the copy of the Order be given to the Office of the Attorney General and the case file be delivered as per rule.

S/d
Anup Raj Sharma
Justice

We concur with the above opinion.

s/d
Pawan Kumar
Justice

s/d
Ojha Ram Prasad Shrestha
Justice

Date:- Thursday, the 28th day of the month of Mangshir of the year 2063 BS (corresponding to 2006/12/14 AD)

Supreme Court, Special Bench
Rt. Hon'ble Chief Justice Kedar Prasad Giri
Hon'ble Justice Anup Raj Sharma
Hon'ble Justice Bala Ram K.C.

Order

Writ No. 063-WS-0019 of the Year 2060

Sub: Mandamus and any other appropriate order

Ms. Rama Panta Kharel, self and on behalf of Pro-Public.....1
Mr. Prakash Mani Sharma, self and on behalf of Pro-Public..... 1 **Petitioners**
Mr. Raju Prasad Chapagain, self and on behalf of Pro-public..... 1

Vs.

GoN, Prime Minister and Office of the Council of Ministers,
Singhadurbar1
Ministry of Women, Children and Social Welfare.....1
Ministry of Home1 **Respondents**
Ministry of Local Development, Pulchowk.....1
National Planning Commission, Singhadurbar1
Nepal National Human Rights Commission, Hariharbhawan1

Bala Ram K.C. The content and order of the writ petition submitted before this Bench pursuant to Article 23, and 88 (2) of the then Constitution of the Kingdom of Nepal, 1990 is as follows:-

Section 5 of the Social Practice (Reform) Act, 2033, prohibits the groom's party from coercing for procurement of cash, kinds, dowry or any parting gifts from the bride's party during or after marriage; and the said Section also prohibits the groom's party from denying to accept the bride provided dowry thereto is not given. Pursuant to the said Section, one set of ornaments and a maximum of ten thousand rupees may be provided in the form of dowry. Where a person contrary to the said Section performs any act, the person in question

shall be fined with ten thousand rupees or sentenced to 15 days imprisonment or both wherein the principal amount received therein shall be seized. Likewise, Section 11 prohibits pompous display of the dowry or any gifts provided thereto. Where a person performs any act contrary to this Section, the person in question shall be fined a sum of five thousand rupees or sentenced to seven days or both.

The petitioners contend that the said provision has been incorporated for the purpose of controlling the dowry culture rather than its eradication. Pursuant to the changed context and social need, dowry system should be eradicated but unfortunately the said provision fails to address this need. Whether the amount is ten thousand or more than ten thousand, social evil is social evil and law does not recognize such social evils. Irrespective of the quantity of the dowry, this culture will provide continuity to gender violence. Therefore, the legal provision prescribed under Section 5 (2) of the Social Practice (Reform) Act, 2033, is inconsistent with the Preamble of the Constitution and is also contrary and inconsistent with Article 11, 12 (1), 25 (1) of the Constitution and contrary and inconsistent with Article 1, 2 (b), (f), 3, and 5 of the Convention on the Rights of Women [i.e. Convention on the Eradication of All Forms of Discriminations Against Women 1979, CEDAW]. The petitioners further contend that where there are laws for controlling social malpractices, lack of proper initiatives for controlling malpractices relating to dowry provides further impetus to malpractices relating to dowry. Likewise, they contend that the order and directives issued by the Supreme Court has not been adhered to and have pursuant to Article 88 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990 have sought for the issuance of the following orders:

- (a) Issuance of an order for framing of appropriate laws in order to make the criminal and violent activities arising due to the dowry system punishable so as to generate a non-violent atmosphere.
- (b) That provisions prescribed under Section 5 (2) being inconsistent with Article 11, and 12 (1) of the Constitution and inconsistent with Article 1, 3, and 5 of CEDAW should to the extent of such inconsistency be declared void.
- (c) That an order of mandamus should be issued for operating public awareness programs against dowry through media.
- (d) That an order of mandamus should be issued for the purpose of initiating legislative methods so as to end gender discrimination on the basis of marital status with regards to ancestral property and to discourage the dowry system.
- (e) That an order should be issued for constitution of a high-level committee for the purpose of studying and making recommendations for the protection of the rights of the women and other orders deemed necessary should be issued on the basis of the report of the committee.

An order had been issued by this Bench on October 11, 2006 asking the respondents as to why the order sought by the petitioners need not be issued. Similarly, the order prioritizing the case had directed the court to present the case before the bench upon submission of the rejoinders from the respondents within 15 days or upon the expiry of the limitation prescribed for submission of rejoinder.

The rejoinder submitted by the Ministry of Home reads as such: As to what laws need to be formulated or amended or repealed falls within the domain of the Parliament and as such where the petitioners have made this Ministry a respondent, the respondent prayed to have the writ petition quashed.

Likewise the rejoinder submitted by National Human Rights Commission reads as such: That it cannot be disputed that violence perpetrated against women due to dowry is against the human rights of women and that everyone from their respective sectors should take initiative to control the violation of such rights. That majority of petitions submitted before this Commission highlights dowry as the principal element of violence against women and that the Commission has been initiating investigations against these petitions.

Similarly the rejoinder submitted by National Planning Commission reads as such: That where there is no reason for making the Commission a respondent, the respondent prayed to have the writ petition quashed.

The rejoinder submitted by the Ministry of Women, Children and Social Welfare reads as such: That Section 16 under the Chapter of Partition had been repealed and Section 2 under the Chapter of Women's Property had been amended so as to maintain gender equality. The respondent further state that it would have been more appropriate had the petitioners lobbied with the Parliamentarians rather than entering the jurisdiction of the court. That it is the responsibility of institutions represented by the petitioners to raise social awareness against the culture of dowry and the respondent prayed to have the writ petition quashed.

The rejoinder submitted by the Prime Minister and Office of the Council of Ministers reads as such: That the formulation or amendment of laws falls within the exclusive power of the Legislative and where such matters cannot be regulated by this office, there is no sufficient grounds for making this office a respondent. That dowry had been recognized as a bad system and for the purpose of controlling it Social Practice (Reform) Act had been promulgated and enacted from the year 2033. That Section 5 (2) of the Act limits and confines the system of dowry within their own culture and tradition and prohibits unnecessary pompous display during any social events. That in order to maintain gender equality, Some Nepal Amendment Act, 2063 had been enacted by the House of Representative wherein Section 16 under the Chapter of Partition had been repealed and Section 2 under the Chapter of Women's Property had been amended. That matters relating to treaties cannot be directly invoked by a person and where the writ petition has been submitted with regards to international treaties, the respondent prayed to have the writ petition quashed.

Where the case pursuant to the rules had been submitted before this Bench, the learned advocates, Mr. Prakash Mani Sharma and learned advocate Ms. Sarmila Shrestha for and on behalf of the petitioners made the following submissions: That the provision of providing one set of ornaments and a maximum of ten thousand rupees pursuant to their culture and tradition is a principal element of generating violence against women. That where dowry has been legally recognized, the said recognition is deemed to be inconsistent with Article 11 and 12 (1) of the Constitution and Article 1, 3, and 5 of CEDAW and the learned advocates prayed to declare the provision void and prayed for legal provisions deemed necessary for effective control of crimes and violent activities perpetrated against women. Furthermore, the learned advocates prayed for initiating awareness campaigns against dowry and also prayed for issuance of an order for the purpose of constitution of a high-level committee to conduct a study and make recommendations for eradication of the dowry system.

On behalf of the government of Nepal, Deputy Attorney General Mr. Narendra Prasad Pathak made the following submissions: That formulation or amendment of laws falls within the exclusive power of the Legislative and that the court cannot intervene on matters where legislative wisdom has been applied. That, dowry has been recognized as a malpractice wherein Social Practice (Reform) Act, 2033, had been enacted to control such practices. That, discriminatory laws identified by the petitioners as the principal element of violence against women has been amended. That were public awareness against dowry malpractices can be raised by institutions like the petitioners, the learned Deputy Attorney General prayed to have the writ petition quashed.

Today being the date scheduled for rendering a verdict, the Bench upon perusal of the writ petition and the deliberations made therein by the learned advocates deems that decision should be made on the following issues:-

- (a) As to whether or not Section 5 (2) of the Social Practice (Reform) Act, 2033 is inconsistent with Article 11, 12 (1) of the then Constitution of the Kingdom of Nepal, 1990 and inconsistent to Article 12 and 13 (1) of the present Interim Constitution, 2063 and inconsistent with Article 1, 3, and 5 of Convention on Elimination of All Forms of Discrimination Against Women, 1979?
- (b) As to whether or not the order sought by the petitioners need to be issued?

With regards to the first question, the petitioners contend that rather than eradicating the system of dowry by formulating laws and policies deemed necessary, the respondents pursuant to the Constitution and international treaties have failed to execute their legal obligations and on the contrary have enacted the Social Practice (Reform) Act, wherein Section 5 (2) of the said Act provides validity to the culture of dowry and have prayed that Section 5 (2) be declared void and have also sought for drafting of effective laws for eradication of the dowry system. Likewise, the petitioners have also prayed for operating awareness programs against dowry through the media and have also prayed for constitution

of high-level committee to conduct a study and make recommendations for eradication of the dowry system. On the contrary, the rejoinder submitted by the respondent Prime Minister and Office of the Council of Ministers contend that the State had recognized the dowry system as a malpractice and in order to control such practices had enacted the Social Practice (Reform) Act, 2033. That, Section 5 (2) of the said Act, limits the provision of dowry within one's own culture and tradition and curtails unnecessary pompous display during any social events. That where it is also the responsibility of the civil society and non-governmental organizations represented by the petitioners' in creating public awareness and the respondent prayed to have the writ petition quashed.

Section 5 (2) of the Social Practice (Reform) Act, 2033, sought by the petitioners to be inconsistent reads as follows: At the time of consummation of marriage, other than one set of ornaments, dowry may be provided up to a maximum of ten thousand rupees pursuant to their tradition. Sub-section (2) is related to Sub-section (1) and (3) of Section 5. Sub-section (1) prohibits the groom's side from coercing the bride's family to provide any dowry, donation, and parting gifts during or after consummation of marriage and also prohibits the groom from not accepting the bride provided no dowry is given thereto and also prohibits both the parties in pre-determining the quantum of dowry and parting gifts to be provided therein. Where provisions prescribed under Section 5 (1) and (2) is breached, Section 5 (3) prescribes for forfeiture of the capital amount and the person in question shall be fined ten thousand rupees or shall be imprisoned for a period of fifteen days or both.

The said provision raised by the petitioners is directed towards controlling the system of dowry during and upon consummation of marriage. Chapter on Women's Property and Chapter on Partition under the *Muluki Ain*, has provisions relating to dowry. Section 4 under the Chapter of Women's Property prescribes that any movable and immovable property provided by the maternal side and by the relatives and friends and any property increased therein shall be deemed to be dowry and Section 5 of the said Chapter provides such women the right to enjoy the dowry as per her wishes. The said law and this court have recognized such property to be self earned property that may be enjoyed as per her wishes.

Perusal of the Preamble of the Social Practice (Reform) Act, 2033, highlights that the said Act had been enacted to control pompous competition and unnecessary expenses during any social events. Construction of Section 5 (2) also highlights and indicates that the objective of the Section is to control the system of dowry. The provision that a maximum of ten thousand rupees may be given as dowry according to their tradition generally signifies and targets that dowry should not be given. Where in the absence of any such traditions, provided dowry is given then such act shall be deemed to be an act of criminal offense. In the absence of any such tradition and provided where such tradition exists, if the limitation prescribed under Section 5 (2) is breached, Section 5 (3) prescribes for forfeiture of the principal amount and the person in question shall be fined ten thousand rupees or shall be imprisoned for a

period of 15 days or shall be subjected to both punishment and therefore, it cannot be deemed that the said provisions provides continuity and refuge to the culture of dowry.

The petitioners contend that provisions prescribed under Section 5 (2) of the Social Practice (Reform) Act, 2033 are inconsistent with Article 11, 12 (1) of the Constitution of the Kingdom of Nepal, 1990, and inconsistent with Article 1, 3, and 5 of Convention on the Elimination of All Forms of Discrimination Against Women, 1979 [CEDAW]. The provisions prescribed in the former Constitution have been incorporated in the present Interim Constitution. It is not sufficient to merely state that laws are inconsistent with the Constitution; rather such allegations should be based on clear grounds and reasons. The writ petitioners have failed to state as to how and against whom Section 5 (2) of the Act is unequal. Likewise, the petitioners have failed to state as to how provision is contrary and inconsistent with the right to freedom guaranteed under Article 12 (1) of the former Constitution currently incorporated under Article 12 of the present Constitution. It is not sufficient to merely state that a certain section or provision of the law is inconsistent. It is the responsibility of the petitioners to prove that such laws are inconsistent.

With regards to the contention that Section 5 (2) of the Social Practice (Reform) Act, 2033, is inconsistent with Article 1, 3, and 5 of CEDAW, it is the obligation of the State to fulfill the responsibilities generated by the international treaties to which Nepal is a Party. Although, provisions of international treaties are equivalent to national law and where national laws are inconsistent, the provision of international treaties is deemed to prevail. Nevertheless, **this court pursuant to Article 88 (1) of the former Constitution and Article 107 (1) of the Interim Constitution cannot make a judicial review and see as to whether or not the national laws are inconsistent with the provisions prescribed under the international treaties. Judicial review of national laws is made pursuant to those Articles of the Constitution.** In addition to this, the petitioners have failed to clarify as to how the said provision is inconsistent with Article 1, 3, and 5 of the CEDAW.

Therefore, as stated hereinabove, the plea that Section 5 (2) of the Social Practice (Reform) Act, 2033 is inconsistent with Article 11, 12 (1) of the former Constitution and inconsistent with Article 12 (1) and 13 of the present Interim Constitution cannot be deemed to be inconsistent. The petitioners have failed to clarify and state the grounds of such unconstitutionality and provided the disputed provision is deemed void, it would have an effect in the application of other laws related to dowry and therefore the provision prescribed under Section 5 (2) of the Social Practice (Reform) Act, 2033 cannot be deemed to be unconstitutional and order as sought by the petitioners cannot be issued. The writ petition is deemed to be quashed.

Social Practice (Reform) Act, 2033, was enacted for the first time on October 20, 1976. The Preamble of the Act highlights that the objective of the Act was to control the increasing competitiveness and unnecessary expenses during social events. Section 2 (a) of the Act defines social practices wherein pursuant to the said definition social practice referred to

any marriage, thread wearing ceremony, rice feeding ceremony, naming ceremony, birth anniversary, and obsequious ceremony. In order to control unnecessary expenses and competition, the enactment of Social Practice (Reform) Act, 2033, is a commendable act made by the Legislative. The said Act can be deemed to be a welfare legislation.

There is a tradition of organizing parties during any social events and there is also the tradition of organizing social events for 2/3 days continuously wherein hundreds of people are invited. **Social events in particular during marriage there is the tradition of providing ornaments, household goods and luxurious items from the bride's family which is uncontrollable and widely prevalent and it seems that no law in this regard has been enacted. Social events in the Nepali society has become very pompous and extravagant** and it is evident from the fact that where one neighbor or any relative or member of a family causes to invite five hundred people his neighbor or member of another family tends to invite more than five hundred people. In other words, there is lack of implementation of law and lack of awareness among people that unnecessary expenses should not be done and as a result of the demonstration effect between various parties has a negative impact on the social practices. Rather than being affected by the demonstration effect, provided people were to follow the principle of cut your coat according to your cloth, then such unnecessary expenses and pompous display can be discouraged. The government needs to take necessary steps in this regard.

Where expenses in social events is done upon procuring loan or where such events are organized by spending one's life time saving will have an adverse effect on the education of the children, their welfare and daily life. Provided, the fact that unnecessary expenses based on competition should not be done is to be realized by all citizens, then probably laws in this regard may not be deemed necessary. The Act has been enacted since even an ordinary citizen tends to spend beyond his capacity and also because there is a lack of awareness among them. On the one hand, due to lack of education, tradition, recognition, custom, and superstition people tend to spend what is not within their capacity whereas on the other, due to ineffective implementation of the law, there is a tradition and practice of spending beyond their capacity. In this regard, it is not sufficient to merely draft laws but laws should be effectively implemented which is evident from the lack of effective execution of the Social Practice (Reform) Act, 2033. For ineffective implementation of laws there are three reasons which are as such: lack of effective execution of laws, lack of importance of laws and lastly is lack of awareness among us.

Social Practice Reform Act had been enacted in B.S. 2033 wherein cases instituted under the said Act was represented by the State and was investigated and submitted by the police. Upon perusal of other provision of the Act, it can be deemed that the Act in order to control unnecessary expenses had incorporated all necessary matters but in practice, the Act was never implemented. It is necessary to create awareness among people that unnecessary expenses should not be made during social events and that laws should not be breached but should rather be followed. **The custom of pre-marriage payment, custom**

of dowry, other financial obligations, invitation to many people, pompous display during parties has an adverse effect on the daily lives of people. These functions involve financial resources and such resources should be perennial. In a country like us where the implementation of law is weak and where there is a rebate in unnecessary expenses may invite corruption among civil servants and provided such a person is a citizen then such a person has no other option but to procure loans which has an adverse effect on the education, health and lives of the children.

Social Practice Reform Act has controlled the practice of receiving pre-marriage payment and dowry and has also controlled the number of invitee to a wedding procession and parties. These have been provisioned with the objective of maintaining the economic interest of the citizens. Where an Act has been enacted for the welfare of all citizens, the State should have taken effective measures for its implementation and likewise the society and each individual should have welcomed the Act and assisted in its successful execution. The spirit and intention of the Act is to curb and curtail unnecessary expenses during any social events. With regards to the effectiveness of the Act, the Act has been enacted for more than thirty years but there has not been any effective execution of the law in controlling unnecessary expenses. Therefore, for effective execution of law, there has to be awareness among the society and the citizens.

For resolution of any constitutional or legal issues, it is not sufficient to merely register a petition but alternative methods or recommendations for resolution of such disputes should also be submitted. A precedent in this regard has been propounded by this court in *Bal Krishna Neupane vs. Cabinet Secretariat* regarding privatization of Harisiddhi Brick Factory. In the present writ petition no alternatives for resolution of the issue has been presented by the petitioners. Nevertheless, **taking into consideration the importance and gravity of the issue raised by the petitioners and where the writ petition with regards to the issue of constitutionality has been quashed, the court deems it necessary to issue the following directive orders against the respondents.**

(a) In Nepal, social event is not that which is celebrated repeatedly. Pursuant to our society, our ancestors, tradition, religion and our culture, there is a concept that such events should be celebrated according to our tradition and culture. There is a practice of spending one's life time earning in a social event or there is also the practice of organizing such events by procuring loans. In order to minimize and control such practices, there is a need to raise awareness among citizens. Due to lack of awareness, their upbringing and the family environment, they are of the view that law will not bring any reforms and this is evident from the weak execution of the law. If we are to look into the marriage ceremony, other than the Hindu tradition there are other religious communities who conduct their marriage by inviting limited number of people and the marriage is consumed within few hours. Hindu tradition is just the opposite. Provided, the present generation can be sensitized on the issue of unnecessary expenses and can be sensitized that social events can be consumed without providing any pre-marriage payments or dowry or by inviting lesser people and that such

acts are not only wasteful expenditure but also a crime then this would assist in changing the mindset of the present generation.

From among the social events, marriage is deemed to be most pompous and expensive event. Even where the bride and groom are educated, they fall a victim to their parents who have influenced by tradition wherein marriages are consumed upon receiving pre-marriage payments and dowry. In order to control such practices it is necessary to raise awareness among the society and citizens. Therefore, **in order to sensitize and raise awareness among school going children, in particular the college going students, Social Practice Reform Act should be incorporated within their curriculum** and they should be educated on the intention, objective and provision of the Act and should be sensitized on the economic aspect which in the longer term would have an effect and would eventually assist in the effective execution of the Act and therefore, **Nepal government in this regard should determine the level of students to be targeted and thereby include the Social Practice Reform Act, 2033 in the curriculum.**

- (b) Where provisions of the Act are not implemented ipso facto signifies the administrative mechanism to be weak and irresponsible. Non-implementation of law signifies non-compliance of the law making function of the sovereign Parliament. Rule of law and breach of law are mutually exclusive. Daily violation of the Social Practice (Reform) Act, 2033, is a mockery to good governance and rule of law. There is no other alternative to the effective execution of law. Social events in particular the custom of pre-marriage payments, dowry, and inviting people more than that has been prescribed and pompous display has been criminalized by the Act but unfortunately where petition against breach of the Act has been made there is no initiative towards initiating any proceedings. Where such acts have been criminalized by the Act, either proceeding pursuant to law must be initiated or else such acts must be decriminalized. Can this be done and is it proper? Where a law is made by the Legislative, it is the responsibility of the Executive to implement the law in letter and spirit. The Executive cannot be a witness to the violation of the law. Therefore, **it is hereby directed to uphold or cause to uphold the law in letter and spirit and is also directed to establish mechanism deemed necessary for effective monitoring of the implementing of the provision of the Act.**
- (c) The practice of uncontrolled expenses during social events and the practice of not auditing the expenses and ineffective execution of the Social Practice (Reform) Act, 2033, tend to create corruption among the people. Social Practice (Reform) Act, 2033, is an Act enacted for controlling uncontrolled expenses and pompous display and therefore it is deemed necessary to create awareness about the law among the citizens so as to create conducive environment for implementation of the law. With regards to the effective implementation of law, laws regarding conditions of service for civil service employees, for police and army, for employees working in government owned and semi-owned institutions and for teachers have been enacted wherein the conducts prescribed under the Social Practice Reform Act, 2033, should be included in their

respective laws and breach of the Act should be deemed to be contrary to the prescribed conduct. Therefore, **a directive order is hereby issued in the name of the Prime Minister and Council of Ministers to include the provision prescribed under the Social Practice (Reform) Act, 2033, under the provision of conduct and provided any civil servant performs any act contrary to the Act, then such act should be deemed to be contrary to his conduct and provision of initiating departmental actions against such employee should also be included and it is also hereby directed to make provision for each employee to submit his accounts pursuant to Section 15 of the Act provided such employee performs any social acts.** It is hereby ordered to provide a copy of this order to the Prime Minister and Office of the Council of Ministers through the Office of the Attorney General and to maintain the case file accordingly.

s/d
Bala Ram K.C.
Justice

Concurring with the above opinion.

s/d
Anup Raj Sharma
Justice

s/d
Kedar Prasad Giri
Chief Justice

Bench Officer: Nripdwhoj Niraula

Dated: 26 day of the Month of Ashar of the Year 2065 (July 10, 2008 A.D.).....

**Supreme Court Special Bench
Hon'ble Justice Min Bahadur Rayamajhee
Hon'ble Justice Sharada Shrestha
Hon'ble Justice Badri Kumar Basnet**

**Order
Special Writ No. 98 of the Year 2062(2005 A.D)**

Sub: Praying for the issuance of an appropriate order including order of Certiorari, Mandamus etc. as per Article 88 (1) of the Constitution of the Kingdom of Nepal, 1990

On Behalf of Women, Law and Development Forum, located at Thapathali, Ward No. 11 of the Kathmandu Metropolitan City, and also on her own behalf Advocate Sapana Pardhan Malla1 **Petitioners**
On behalf of the above mentioned Women, Law and Development Forum and also on her own behalf Advocate Meera Dhungana.....1

Vs.

Office of the Prime Minister and the Council of Ministers of the Government of Nepal.....1
Ministry of Law, Justice and Parliamentary Management, Singhadurbar.....1
Office of the Speaker of the House of Representatives, Singhadurbar.....1
National Assembly, Singhadurbar.....1 **Respondents**
Ministry of Home Affairs, Singhadurbar1
Ministry of Women, Children and Social Welfare, Singhadurbar.....1
Ministry of Law, Justice and Parliamentary Management, Singhadurbar.....1
Ministry of Health and Population, Ramshahpath1

Min Bahadur Rayamajhee J: The facts and the decision delivered upon the writ petition filed in this Court as per Article 88(1) and (2) of the Constitution of the Kingdom of Nepal, 1990 are briefly as follows.

Citing the provisions of various national and international legal instruments, the petitioners contended that Article 11 of the Constitution of the Kingdom of Nepal, 1990 guaranteed the right to equality; Article 12 guaranteed the right to freedom, clause(7) of Article 26 directed the State to adopt a policy of causing the maximum involvement of progress in the national development by providing for making special provisions for education, health and employment of women, and clause(8) of the same Article directed the State to adopt a policy of making

necessary provisions for protecting the rights and interests of children by preventing their exploitation. Likewise, Article 16(2) of the Universal Declaration of Human Rights, 1948 provided that marriage shall be entered into only with the free and full consent of the intending spouses; Articles 1,2,3 and 16(b) guaranteed the equal right freely to choose a spouse and to enter into marriage only with their free and full consent. Articles 1,2,3 and 5 of the International Covenant on Civil and Political Rights, 1966 provided for ensuring equality of men and women and Article 23(3) provided that no marriage shall be entered into without the free and full consent of the intending spouses. Similarly, Article 2 of the Convention on the Child Rights, 1989 stipulated that the State parties shall ensure all the rights available for the children and shall also ensure that children are protected against all forms of discrimination. Article 3 of the said Convention provided that in all actions concerning children their best interests shall be a primary consideration; it has enjoined upon the State to undertake to ensure the children such protection and care as is necessary for their well-being, if their legal guardian failed to act in their interest. Article 12 (2) the International Covenant on Economic, Social and Cultural Rights, 1966 has provided for the steps to be taken for reduction of still-birth rate and of infant mortality and for healthy development of children. Likewise, Recommendation No. 21 relating to the International Convention on the Elimination of All Forms of Discrimination against Women, 1979 has been brought forward for effective implementation of Article 16 of the Convention. It has re-established the right to equality in marriage. Likewise, the Committee on Eradication of All Forms of Discrimination against Women has, in Recommendation No.3, displayed special concern about the ever-prevailing problem of child marriage. Nepal has ratified the above-mentioned International Conventions as a State party and, therefore, those conventions have become effective as Nepal law as per Article 126 of the Constitution of the Kingdom of Nepal, 1990.

The Eleventh Amendment to the National Code, 1963 (*Muluki Ain*, 2020) has brought about equality in regard to the marriageable age of men and women. Section 2 of the chapter **On Marriage** in the National Code has stipulated that “No marriage can be entered unless the age of man and woman is 18 years if the guardian has given consent and 20 years if consent of the guardian is not forthcoming and any marriage entered in contravention of that provision shall be punishable”. Thus even in spite of the provision of a penal law the practice of child marriage is rampant in the society but there is hardly any action taken against such a malpractice. But the State, which bears the obligation to monitor such things and implement and cause the implementation of law, has treated the issue of minor age purely as a personal issue and failed to take any steps for the implementation of the law. This has resulted in the violence of a child right.

Section 4 (3) of the Marriage Registration Act, 2028 (1971 A.D) has prescribed the completion of the age of 22 and 18 years respectively for solemnizing the marriage of men

and women. That provision is clearly inconsistent with the right to equality guaranteed by the Constitution and the international human rights instruments and thus discriminates on the basis of sex. On the one hand this law has been made in contradiction to the opinion of the Medical Science that a woman should have completed the age of 20 years to be physically able to become a mother. On the other hand it has also created discrimination on the basis of sex. Thus, the above –mentioned legal provision is inconsistent with the Constitution and, therefore, it deserves to be declared void.

The impugned clause (3) of Section 4 of the Marriage Registration Act, 2028 is incongruous with the aforesaid constitutional provision relating to equality and the relevant international Conventions. Hence, it ought to be declared void as per Article 131 of the Constitution of the Kingdom of Nepal, 1990. The petitioners further prayed for the issuance of the writ of Mandamus coupled with Certiorari or any appropriate order deemed proper whatsoever directing the implementation of Section 2 (1), (2), (3) and (4) of the chapter **On Marriage** in the National Code and also the suggestions made by Recommendation No. 21 and 231 of the Covenant relating to women.

The apex court issued an order directing the respondents to present a written reply explaining the issue raised in the petition and also why an order need not be issued as requested by the petitioners. The court further directed to present the case file after receipt of the written reply before the Special Bench.

The respondent Secretary to the Ministry of Health and Population contended in the written reply that as the petitioners had failed to point out which type of their right had been infringed by which act of the respondent, and as he had not infringed any rights of the petitioners, the baseless writ petition should be rejected.

Responding to the writ petition, the Office of Prime Minister and the Council of Ministers prayed for the rejection of the writ petition because, as it was the exclusive domain of the Legislature to decide what type of law needs to be legislated or what type of amendment needs to be introduced, there was no ground to frame that office as a respondent in that case.

The written replies submitted by the House of Representatives and the National Assembly stated that the process of timely amendment to the prevalent law including the Marriage Registration Act, 2028 impugned by the petitioners has become stalled due to non-existence of the House of Representatives at present. The legislative organ of the country is always conscious and aware of this issue. Therefore, the writ petition which has been unnecessarily filed without paying attention to the present time and circumstances must be rejected.

In its written reply the Ministry of Home Affairs prayed for the rejection of the writ petition stating that it had not committed anything unwarranted and also there was no legal basis for issuing the writ. Hence, the writ petition was without any justification.

Responding to the writ petition the Ministry of Women, Children and Social Welfare stated that the Marriage Registration Act, 2028 provided for the solemnization of marriage between

a male who had completed the age of 22 years and a female who had completed the age of 18 years. The age prescribed by that Act was the minimum age and even though that minimum age had been completed the law did not provide for a mandatory provision to enter necessarily into marriage or produce children. The legislature had simply provided for the feasibility of marriage at the completion of that minimum age. By this arrangement the Legislature has simply created the space for resolution of the obstacles and difficulties which may affect the society. Marriage is something which takes place between a man and a woman, and it cannot take place without their mutual consent. As such, consenting persons can be supposed to be capable of thinking about their personal interests and rights and also because there was no compulsion to enter into marriage at the completion of the minimum age prescribed by the law, it was not proper to assure that the discretionary provision of the law had created discrimination or it had ignored the aspect of women's health.

The Ministry of Women, Children and Social Welfare further stated that the Government had conducted the investigation and filed the prosecution charge sheet as the plaintiff, in a competent court within the stipulated time-limit in all cases relating to child marriage which were defined as a penal offence under the law to be prosecuted by the State and which had come to the notice of the Government. As the Government was also active in the implementation of the verdicts delivered in such cases, and the domestic and international laws were being complied with, there was no need of issuance of an order by the apex court for their implementation as asked for by the petitioners. Hence, the writ petition deserved to be rejected.

Another respondent, the Ministry of Law, Justice and Parliamentary Management, in its written reply, submitted that the Government was conscious of and active towards the implementation of the existing legal provisions relating to child marriage. Child marriage has been recognized as an offence and placed under Schedule 1 of the State Cases Act, 2049 (1992 A.D). Those responsible for entering into or causing the solemnization of child marriage were prosecuted for the offence seeking maximum penalty for one who was mature. In such a situation the petitioners' claim about the lack of effective implementation was unjustifiable. Similarly, the provision made in Section 4(3) of the Marriage Registration Act, 2028 was based on the assumption that women used to become adult earlier in comparison to men. The impugned provision did not intend to discriminate by pleading that the marriageable age of women should be lower than that of men. Rather it only intended to define the state of child marriage by prescribing the minimum age of men and women for marriage. Hence, the petitioners' claim was neither reasonable nor lawful and, therefore, it must be rejected.

Petitioners learned Advocate Sapana Pradhan Malla and Meera Dhungana, appearing before the Bench to defend their petition, which was scheduled for hearing as per the Rules, submitted that child marriage used to cast much adverse effect on the reproductive health of women. A study made by UNICEF in various countries and published as **Innocenti Digest No. 7, March 2001, Early Marriage of Child Spouses** showed that whereas the maternal death rate among the pregnant young girls aged between 15 to 19 years was

20 times higher than the maternal death rate among the pregnant women belonging to the age groups of 20 to 24 years, the maternal death rate of pregnant young girls aged below 15 years was 500 times higher. In our country also the statistics showed that the maternal death rate was 539 every one hundred thousand. Because male persons do not give birth they do not have to face the adverse effect. But the women who bear children have to face the adverse effect. The modern Medical Science does not believe that the sexual organs could become fully developed until and unless one reached the age of 20 years. Considering that the provision contained in Section 2 of the chapter **On Marriage** in the National Code discriminated between men and women regarding the age of marriage on the basis of sex, it was set right through the Eleventh Amendment by providing that the marriageable age for men and women ought to be 18 years with the consent of the guardian and 20 years without the consent of the guardian. But as the provision made in Section 4(3) of the Marriage Registration Act, 2028 stressed on the requirement of 22 years of age in case of men and 18 years of age in case of women for entering into marriage and as that law was still today into operation, it must be repealed as per Article 131 of the Constitution of the Kingdom of Nepal, 1990. Similarly, although Section 2 of the chapter **On Marriage** prevented child marriage, its actual implementation was ineffective. Even though the national statistics presented by a government body itself had recognized that the incidence of child marriage in Nepal was in abundance, the examples of legal action against the persons guilty of such an offence were very few as shown by the available data. The learned Advocates, therefore, called for the issuance of an appropriate order including the writ of Mandamus to the respondents for the effective implementation of Section 2 of the chapter

On Marriage.

Appearing on behalf of the respondent Government of Nepal, learned Deputy Attorney General Narendra Prasad Pathak argued that the petitioners had failed to point out clearly who were the officials responsible for implementation of the law. The Government was committed to control child marriage and to prosecute those responsible for assisting in the occurrence of child marriage. Such people were also getting punished for their acts of malfeasance. The Marriage Registration Act had simply prescribed the minimum age for getting married. The law has simply declared that a woman and a man were not eligible for getting married unless they had reached the age of 18 and 22 years respectively. That is to say, the law had granted freedom to a woman to decide about her marriage only at the age of 18 years whereas it had made a man to wait for 22 years, thereby prescribing the respective limits for them. Thus, the learned Deputy Attorney General submitted that there was no ground or justification for issuing the writ petition and, hence it must be rejected. Considering about the decision to be made in the case, the Bench observed that the petitioners had sought for the annulment of Section 4(3) of the Marriage Registration Act, 2028 as per Article 131 of the Constitution of the Kingdom of Nepal, 1990 as it was contrary to the International Covenant and Conventions to which Nepal was also a party and also Articles 11, 12, 26(7) and (8) of the 1990 Constitution of Nepal. Likewise, whereas the petitioners had also mainly prayed for the issuance of an appropriate order including the writ of Mandamus for the effective implementation of clauses (1), (2), (3) and (4) of the chapter

On Marriage on the National Code, it appeared from the written replies submitted by the respondents that the impugned Section 4(3) of the Marriage Registration Act was not incongruous with the Constitution and the international Covenants, to which Nepal was a party, and also the provisions contained in Clauses (1), (2), (3) and 4 of the chapter **On Marriage** were being implemented. Against that background the Special Bench decided to resolve the following issues for the sake of resolution of the dispute raised in the writ petition:

- (1) Whether or not the legal provisions contained in Section 4(3) of the Marriage Registration Act, 2028 was inconsistent with Articles 11 and 12 of the Constitution of the Kingdom of Nepal, 1990? Also, whether it deserved to be repealed as per Article 131 of the Constitution?
- (2) Did there exist a state of effective implementation of the provisions made in Clauses (1), (2), (3) and (4) of Section 2 of chapter **On Marriage**?, and
- (3) Whether or not it was proper and justified to issue the order as prayed for by the petitioners?

So far the first question was concerned, because the petitioners had contended that Section 4 of the Marriage Registration Act, 2028 was inconsistent with the Constitution of Nepal, the provisions contained in impugned Sec. 4 of the Marriage Registration Act and the relevant provisions of the international covenants and Conventions mentioned by the petitioners in the writ petition need to be considered. Those provisions are as the follows:

1. Section 4 of the Marriage Registration Act, 2028

4. Conditions of Marriage: Except the conditions in which marriage was not permissible by the prevailing Nepal Law, marriage can take place between the following men and women

- (1) Of the male and the female if any one does not have his wife or her husband,
- (2) If either of the male or the female is not insane, and
- (3) If the male and the female had completed 22 years and 18 years of age respectively.

2. The provision relating to marriage contained in Art.16 of the Universal Declaration of Human Rights, 1948:

1. Men and women of the full age, without any limitation due to race, nationality or relation, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. Article 23 (3) of the International Covenant on Civil and Political rights, 1966:

State Parties to the present covenant shall take appropriate steps to ensure equality of right and responsibilities of spouses as to marriage, during marriage and its dissolution.

4. Art.16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979:

1. State parties shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relation and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage,
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent,
- (c) The same rights and responsibilities during marriage and at its dissolution.

A study of the impugned provision of the Marriage Registration Act, for which the petitioners have sought annulment, shows that the petitioners had failed to point out in their petition and also the learned counsels appearing on their behalf had equally failed to explain in their oral arguments made before the Bench also how and which right to freedom granted by Article 12 of the Constitution had been infringed by the impugned provision. Similarly, because the above-mentioned legal provision relating to marriage guaranteed by Article 12 did not seem to cause any adverse effect on the freedom of thought and expression, the freedom to assemble peaceably without arms, the freedom to open unions and associations, the freedom to move through and reside in any part of the Kingdom, and the freedom to carry out any trade, occupation or business, there seemed to be no need to analyze this issue in further detail.

Now a look at the right to equality guaranteed by Article 11 of the Constitution shows that appear to be two types of legal provisions relating to marriage in the prevailing laws:

1. Marriage in accordance with the provision of the chapter **On Marriage** in the National Code
2. Registered marriage in accordance with the Marriage Registration Act, 2028.

The Eleventh Amendment to the National Code, introduced in the year 2058, (2007 A.D.) amended the existing legal provision relating to the marriageable age as 18 years for boys and 16 years for girls with the consent of their guardians and, if there was no consent of their guardians, 21 years for boys and 18 years for girls and prescribed the age as 18 years for both boys and girls with the consent of their guardians and, if there was no consent of their guardian 20 years for both boys and girls. Section 4 (3) of the Marriage Registration Act, 2028 provided that for a registered marriage a male and a female must have completed 22 years and 18 years respectively. The respondents have failed to give any justification or rational ground for the variance manifest in the legal provision prescribing 22 years for men and 18 years for women. Although the Ministry of Law and Justice had contended in its written reply that the age variance was based on the assumption that women used to become mature earlier than men. However, there was no solid ground to prove that assumption and, therefore, the said assumption could not be deemed as being scientific in itself. While interpreting and analysing any law in regard to the issue of equality, whether the impact caused by law among the people belonging to that class was positive or

negative ought to be also treated as a ground. The petitioners have also presented a copy of the study report titled “Innocenti Digest Vol. 2, March 2001, Early Marriage Child Spouse” prepared by UNICEF which showed that the maternal mortality rate among pregnant young girls of 15 to 19 years age group is twenty times higher than that of the pregnant women belonging to the age group of 20 to 24 years and the maternal mortality rate of the pregnant young girls aged below 15 years is five hundred times higher than that of the pregnant women of 20 to 24 years age group. As the learned Deputy Attorney General has failed to produce any ground to refute that finding, the report cannot be dismissed.

Now let us consider the plea taken by the Ministry of Women , Children and Social Welfare in its written reply that the age prescribed by the aforesaid Act is just the minimum age and it does not seem to have made a mandatory provision to compulsorily enter into marriage or produce children even after the completion of that age. It has just prescribed the minimum age when one may become eligible to marry. Marriage takes place between a man and a woman and that it is not at all possible without their mutual consent. And since the people giving such consent are supposed to be competent to think about their personal interests, they cannot be compelled to get married immediately after the completion of the age prescribed for marriage. It is just a discretionary provision which cannot be treated as responsible for creating discrimination and ignoring women. So far this plea is concerned, it is difficult to concur with such a plea in view of the fact that ours is a less developed country where the female literacy rate is lesser than that of the male and there is widespread gender discrimination in the society. Besides, the report prepared by UNICEF has also drawn the conclusion that early childbearing is detrimental to the health of women, and reproduction is an act which is possible only by women. This analysis shows that it cannot be denied that the provision contained in Section 4 (3) of the Marriage Registration Act, 2028 appears to be somewhat different in the context of men and women.

The petitioners seem to have claimed for the annulment of section 4(3) of the Marriage Registration Act, 2028 as per Article 131 of the Constitution of the Kingdom of Nepal, 1990 because it is inconsistent with the constitutional provision relating equality and the relevant international Covenants. While examining the constitutionality of any law, this Court has treated Article 1 and Article 131 as different conditions. If any law has been made in contravention of the Constitution such a law shall become void to the extent of its inconsistency with the Constitution as per Article 1. However, all laws in force at the commencement of this constitution shall remain in operation until repealed or amended and the laws inconsistent with the constitution shall, to the extent of such inconsistency, ‘ipso facto’ cease to operate one year after the commencement of the Constitution as per Article 131.

Even though the provision made by these two Articles of the Constitution appear to be similar, so far the issue of inconsistency with the Constitution is concerned, Article 1 makes a provision to invalidate any law to the extent of its inconsistency with the Constitution if the law is made in contravention of the Constitution whereas Article 131 makes a provision

to indicate that any provision existing in a prevalent law shall automatically cease to operate after one year to the extent of its inconsistency with the Constitution. There arises no need to declare any inoperative law as void because any law inconsistent with the Constitution shall automatically cease to operate as per Article 131 of the Constitution. A principle has been already enunciated by the apex Court in *Krishna Prasad Shiwakoti vs. Secretariat of the Council of Ministers and Others* (Nepal Law Reporter 2054 BS vol. 6, Writ No. 2948, P. 295) that the requirement of declaring any law void and invalid is applicable only in case of a law which is in operation. If any law is in implementation or operation it may be declared '*ultra vires*' as per Article of the Constitution. Article 131 of the constitution cannot be resorted to repeal or invalidate any law. If any aggrieved party enters the court seeking voidance of any law, which is in implementation or operation, on the ground of its inconsistency with the Constitution, the apex Court has exercised its constitutional power of judicial review to declare such a law as void and to provide relief to the aggrieved party. This judicial trend can be manifest from the verdicts delivered by the apex Court in *Dhan Kumari Gurung moving on behalf of Iman Singh Gurung vs. General Military Court of the Royal Army and Others* (Decision No.4597, Nepal Law Reporter 2049 BS, vol. 7, p. 710). Against the backdrop of such an approach of the apex Court, it shall not be proper to allow any unconstitutional law to remain in existence and to permit the continuation of any unconstitutional act simply by saying that the judicial review of the constitutionality of any law is not possible only because the petitioner had asked for the voidance of that law as per Article 131 in stead of Article 1 of the Constitution. In the case of the petition at hand as, on the one hand, the petitioners have failed to point out which person has been adversely affected by the exercise of which law, the respondents have contended that the works are being performed in accordance with the law and that law is constitutionally valid, Therefore, it cannot be assumed that the impugned law has already become inoperative as per Article 131 of the Constitution. Thus it appears that Section 4(3) of the Marriage Registration Act, 2028 is a law which is still in operation and implementation.

As regards the question whether or not Section 4(3) of the Marriage Registration Act, 2028 should be declared void as per Article 1 of the Constitution as it seems to have caused some discrimination between men and women and as that law still continues to remain in operation and as it is also inconsistent with the legal provision made in the chapter **On Marriage** in the National Code, although there appears to be some discrimination between men and women from the legal viewpoint in law relating to registered marriage, there does not seem to exist any law other than the Marriage Registration Act in regard to the administration of registered marriage. It shall be against judicial discretion to void all of a sudden, except when it is inconsistent with the Constitution, any legal provision made by the Legislature considering it essential for systematizing any matter. The Eleventh Amendment to the National Code shows that while entering into marriage the age of male and female must be 18 years if there is consent of their guardians and, if such consent is not forthcoming, it must be 20 years. That legal provision and the provision made by Section 4(3) of the Marriage Registration Act do not seem to correspond with each other. As any person, after attaining the age of twenty, is eligible to get married without the consent of his or her guardian as per the provision made by the Eleventh Amendment to the National Code, it

does not seem reasonable to consider such a person ineligible for the sake of registered marriage.

Now as regards the second question, the petitioners have claimed for the issuance of a writ of Mandamus for effective monitoring as the respondents have failed to conduct effective monitoring of child marriage which still continues to remain in practice even though clauses 1, 2, 3 and 4 of Section 2 of the chapter **On Marriage** in the National Code have prohibited child marriage and made it punishable by law. In the written replies filed by the respondents and in the submission made by the learned Deputy Attorney General it has been contended that the process of monitoring is under implementation. A look at pages 16 to 35 of the Population Census Results in Gender Perspective (Population Census, 2001) vol. 3 submitted along with an application presented by the National Statistics Department, entrusted with the duty of updating and maintaining the record of the national statistics, shows that the classification of the age of marriage has been made into three categories: age group of 10 to 14 years, age group of 15 to 49 years and age group of 50 and above. A region wise data reveals that in the 10 to 14 years group there seem to be 2,788 women and 1,481 men in the Eastern Region, 11,003 women and 4,228 men in the Central Region, 7,194 women and 3,696 men in the Western Region, 2,356 women and 1,305 men in the Mid Western Region and 1,738 women and 909 men in the Far Western Region. Whereas there is no dispute about the above mentioned data presented by the National Department of Statistics, it however cannot be said that all those responsible for conducting child marriage have been prosecuted. It appears from the above mentioned statistics that even though the national legal system has eradicated child marriage, it still continues to remain in practice. Mere enactment of law cannot impart the correct meaning until and unless it is not subjected to effective implementation. Child marriage has been considered to be a serious offence and, therefore, placed Annex- 1 to the State Cases Act. Although the respondents have contended that the State is serious about this issue, it cannot be agreed that the law has been implemented effectively in this regard.

Now considering the third question, **as regards the demand of the petitioners seeking annulment of Section 4(3) of the Marriage Registration Act, 2028 since there, seems to be no consistency between the provisions enshrined in section 2 of the chapter On Marriage in the National Code and Section 4(3) of the Marriage Registration Act, 2028 and, therefore, there appears to be a need to effect amendment to the relevant laws in order to bring about consistency and uniformity between them and also because it seems that child marriage is taking place and the Government needs to pay urgent attention towards its prevention, a directive order is hereby issued to the respondents to introduce amendments to the relevant laws with a view to acquiring consistency and uniformity between them and to implement and cause to be implemented effectively the relevant laws.** It is also

hereby directed that the registration no. of the case be deleted from the list and a copy of the order be sent to the Office of the Attorney General for the knowledge of the respondents and the case file be deposited in the archives.

s/d
Min Bahadur Rayamajhee
Justice

We concur with the aforesaid opinion.

s/d
Badri Kumar Basnet
Justice

s/d
Sharada Prasad Pandit
Justice

Done on the 29th day of the month of Ashad, 2063 (July 13, 2006).....

Supreme Court, Special Bench
Rt. Hon'ble Chief Justice Kedar Prasad Giri
Hon'ble Justice Anup Raj Sharma
Hon'ble Justice Bala Ram K.C.

Order
Writ No. 064-0035 of the Year 2063

Sub: Mandamus

Jit Kumari Pangeni (Neupane), resident of Nawalparasi district, Makar VDC Ward No. 4.....	1	
Advocate Sapana Pradhan Malla, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11	1	
Advocate Meera Dhungana, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11	1	
Advocate Bhupendra Khanal, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11	1	Petitioners
Advocate Sushma Gautam, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11	1	
Advocate Lok Hari Basyal, resident of Kathmandu District, Kathmandu Metropolis Ward No. 11	1	
Dhan Maya Giri, resident of Nawalparasi District, Makar VDC Ward No. 4.....	1	

Vs.

Prime Minister and Office of the Council of Ministers, Singhadurbar	1	
GoNepal, Ministry of Law, Justice and Parliamentary Affairs	1	
GoN, Ministry of Women, Children and Social Welfare.....	1	Respondents
Interim Legislative Parliament, Singhadurbar, Kathmandu... ..	1	
GoN, Law Reform Commission, Singhadurbar.....	1	

Bala Ram K.C. J: The content and order of the writ petition submitted before this Bench pursuant to Article 1, 107 (1) and 107 (2) of the Interim Constitution, 2063 is as follows:-

From among the petitioners Jit *Kumari* Pangeni (Neupane) contends that a marriage had been consumed between her and Bed Parasd Pangeni, resident of Nawalparasi district, Makar VDC Ward No. 4 in the year 2050, wherein three sons were born to her through their marriage. The petitioner contends that the relationship between her and her husband were very cordial till the year 2058 and thereafter, the petitioner's husband had resorted to fear, coercion, battery and had begun to indulge in forceful sexual relationship wherein the petitioner's husband had resorted the petitioner to perform fellatio and when disagreeing to such acts, the petitioner's husband had resorted to battery and perpetrating sexual violence against the petitioner. The petitioner further contends that on March 31, 2007, the husband tried to establish sexual relationship without the consent of the petitioner and upon refusal to comply with the husband's demand, the petitioner was subjected to violence wherein the petitioner was beaten on her eyes, face, breasts and was subsequently raped by the husband and having no other recourse, the petitioner had filed a first information report at the District Police Office in Nawalparasi on April 6, 2007. With the conclusion of the investigation and where a charge sheet had been submitted against the husband, the District Court on April 17, 2006 had directed the husband to furnish Rs. 4,500 as bail and since the bail amount could not be furnished, the petitioner contends that her husband is behind bars and the petitioner fears that she may be subjected to further violence, torture and insecurity upon release of her husband. The petitioner further contends that the prevailing laws are insufficient to punish the perpetrators and this not only has an impact on the victim but also has a negative impact on the children and friends.

The petitioner further states that owing to the prevailing legal provisions, her right to equality, right against exploitation, right against torture, right to be free from violence and her sexual rights had been exploited, wherein the petitioner pursuant to Article 32 of the Constitution has sought for constitutional remedy. Likewise, the other writ petitioners' state that they have been associated with Forum of Women, Law and Development and have been working as legal practitioners and have been advocating for the protection and preservation of women's right. They further contend that women pursuant to Article 32 and 107 of the Constitution are vested with the right to seek remedy against the violation of women's right.

The petitioners contend that Section 1 on the Chapter of Rape under the *Muluki Ain* defines rape as "Provided, intercourse is established with any women without her consent or where intercourse is established with a girl below 16 years of age with or without her consent shall be deemed to be rape." Furthermore, the petitioners state that Section 3 of the said Chapter prescribes for imprisonment on the basis of the age, wherein a perpetrator is sentenced from five years to fifteen years imprisonment whereas, provided, a spouse is raped by her husband, the perpetrator is sentenced for a period of three months to six months which according to the petitioners is insufficient and discriminatory. They contend that where punishment is prescribed on the basis of relationship and social relation, the said provision is contrary and inconsistent with the recognized principles of criminal justice and equality.

They further contend that the said inconsistent provision has further aggravated the problem, wherein a husband is instigated to commit an offence of rape against his spouse.

The writ petitioners further contend that consent has to be derived from both the parties during any sexual relationship, and absence of consent from one party would generate violence. Such violence has been defined as a crime under the criminal law and provision for punishment has been prescribed therein. The petitioners' further state that the prevailing laws denies women of her sexual rights and where the law prescribes for lesser punishment; there is the possibility of the accused being released on bail wherein the victim may be further victimized. The petitioners state that such a provision provides the husband the right to sexually exploit his spouse.

Likewise, the petitioners through their petition contend that a directive order had been issued by the honorable Supreme Court on May 2, 2002 in relation to marital rape case and in the course of implementing the directive order, Gender Equality Act, 2063 had been enacted and the provision prescribed therein are discriminatory. The provision prescribed in the Act, discriminates the offence of rape in relation to the person perpetrating rape against a married woman, which is inconsistent with Article 13 of the Interim Constitution, 2063. Proviso under Sub-article (3) of Article 13 of the Interim Constitution prescribes that the State shall make special provision by law for the protection, empowerment or advancement of women, whereas Article 20 prescribes that women shall not be discriminated against in any way on the basis of gender and as such the legal provision prescribing lesser punishment against a husband committing rape against his spouse is deemed to be discriminatory.

The petitioners contend that the said legal provisions are inconsistent with Article 1, 2, 3, 4, 6 and 15 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, Article 1, 2, 3, 5, and 17 of International Covenant on Civil and Political Rights, 1966, Article 1, 2, 3, and 5 of the International Covenant on Economic, Social and Cultural Rights, Article 1, and 12 of the Universal Declaration of Human Rights, 1948, Article 2 of the UN Declaration on the Elimination of Violence against Women to which Nepal has been a Party. Section 9 (1) of the Nepal Treaty Act, 1990, prescribes that where a treaty to which Nepal has become a Party following its ratification is inconsistent with the provision of prevailing laws, shall be deemed void to the extent of such inconsistency and that the provisions of the treaty shall be applicable as laws of Nepal. Likewise, Article 26 and 27 on the Vienna Convention on the Law of Treaties, 1969, to which Nepal has been a Party prescribes that every treaty shall be binding upon the parties and that the Parties shall not escape from its obligation. The petitioners citing Section 3 (6) on the Chapter of Rape under the *Muluki Ain* to being inconsistent with the constitutional rights, right to equality, right to procreation, sexual rights, right against violence against women, right against exploitation, right to privacy, right against torture, right to self-determination, right to freedom, right against gender discrimination have sought for an order of certiorari and have sought the court to issue any other appropriate order for formulation of equal laws.

An order had been set aside by this court on March 28, 2007 asking the respondents as to why the order sought by the petitioners need not be issued. Similarly, the order prioritizing the case, had directed the court to present the case before the bench upon submission of the rejoinders from the respondents within 15 days from the date of receipt of the order excluding the period of travel.

The rejoinder submitted by the Secretariat of the Legislative-Parliament states as such: that the laws have recognized any kind of rape as a grave criminal offence which is punishable by law. That the modern criminal jurisprudence does not envisage punishment for the sake of punishment but also envisages reformations thereto. That behind any criminal offence, backgrounds, reasons, status and circumstances of perpetrators is not the same and varies a lot and therefore, it would not be justifiable to render a uniform punishment for all kinds of offence. That, the fundamental elements vis-à-vis the status of the people involved in the offence, the circumstance therein that is prevalent during an offence determines the quantum of punishment and therefore, the principle of providing different punishment for an offence of similar nature has developed. That there is a difference between marital rape and other rape. That the effect of marital rape is limited within the family of the victim rather than with the society and is associated with the future life of the person in question and therefore, even where the result is the same, there is a huge difference between other rape and marital rape in terms of its impact, wherein the Legislature has provisioned for a lesser obligation in relation to marital rape. That it is the discretionary power of the Legislature to determine and prescribe the quantum of punishment for various offences and as such issues with regards to the concept of equality cannot be raised in a court. That where there is a basis for differentiating people and where there is a specific objective for prescribing different provisions and provided that objective is in itself justifiable, then laws can be formulated for different conducts. That where the issues, in relation to the legal provisions raised by the petitioners are not justifiable, the writ petition should be quashed.

Likewise, the rejoinder submitted by the Government of Nepal, Prime Minister and the Council of Ministers states as such: that where the writ petitioners have based their petition with the international treaties to which Nepal has been party, the treaty as a matter of right cannot be exercised by a person. That the human rights have been guaranteed by the Interim Constitution, 2063. That it is the recognized principle of criminal jurisprudence, that quantum of punishment for any criminal offence should be prescribed pursuant to the gravity of the offence and therefore, it is justifiable to prescribe different punishment pursuant to the age and conditions of the perpetrator during the perpetration of the offence. That the formulation or amendment of Act falls within the jurisdiction and ambit of the Legislature and as such is not a subject matter to be regularized by the court and therefore, the writ petition prima facie should be quashed.

The rejoinder submitted by the Ministry of Law, Justice and Parliamentary Affairs states as such: that Section 3 (6) on the Chapter of Rape under the *Muluki Ain* (Civil Code) has defined marital rape and punishment thereto has been provisioned. That marriage in a Nepali society has been accepted as a prestigious social conduct and therefore, when laws

are been formulated, social values, recognized principles and traditions are taken into considerations and subsequently punishments are provided thereto. That it is a policy matter of the State to determine the quantum of punishment in any offence and quantum of punishment and result is determined pursuant to the status of the person involved in the offence, nature and gravity of the offence. That the prevailing legal provisions, in relation to marital rape are not contrary and inconsistent with the Interim Constitution, 2063, and international treaties and conventions. That pursuant to a writ petition filed by writ petitioner Meera Dhungana against this Ministry re: Writ Petition No. 55 of the Year 2058, the honorable Supreme Court had propounded a principle wherein the Supreme Court had interpreted that the result of rape committed by an ordinary person and rape committed by a husband cannot be similar and therefore, pursuant to the principle propounded by the Supreme Court, the quantum of punishment in marital rape and in other kinds of rape should be different and justifiable and therefore the writ petition should be quashed.

The content of the rejoinder submitted by the Ministry of Women, Children and Social Welfare is as such: that the writ petitioners have not been able to state as to what acts which needed to be performed has not been performed by the Ministry or as to what act has been performed which should not have been performed whereby their fundamental or constitutional or legal rights have been violated, that as the contents of the writ petition are self explanatory, the writ petition should be quashed.

Where the case pursuant to the rules had been submitted before this Bench, the learned advocates, Ms. Sapana Pradhan Malla, Ms. Meera Dhungana, Mr. Lok Hari Basyal, Dr. Rajit Bhakta Pradhananga and learned advocate Mr. Sagun Shrestha made their presentation as such: that the offence of rape is a grave criminal offence and that there is no intelligible basis to prescribe lesser punishment for a rape committed by a husband against his spouse in relation to other rape committed by other person. That where an accused may be released on bail or guarantee for an offence having a sentence less than three years, the conduct of the accused shall remain the same, wherein violence against women may further be perpetrated and where Section 3 (6) on the Chapter of Rape under the *Muluki Ain* (Civil Code) is inconsistent and contrary to the provisions relating to the Interim Constitution and Convention on Elimination of all Forms of Discrimination Against Women, the writ petitioners have sought the court to declare the said provision void..

Deputy Attorney General Mr. Narendra Prasad Pathak on behalf of the Government of Nepal stated as such: that the Legislature has recognized rape as a grave criminal offence and as far as the issue of punishment is concerned, the quantum of punishment may be different pursuant to the status of the person involved in the offence and the circumstances therein. That, even where a criminal offence, may be perpetrated by persons under different conditions, the result would be of a similar nature but elements such as the status of the person involved in the offence, conditions and circumstances of the offence determines the quantum of punishment. That where the result is the same, there is a difference between other rape and marital rape and as such quantum of punishment in other rape and marital rape is different. That prescription of the quantum of punishment vests solely within the

jurisdiction of the Legislature and the writ petition should be quashed. A written memorial had been submitted by the petitioners.

Today being the date set aside for rendering a verdict, the Bench upon perusal of the writ petition, rejoinders and the submissions made therein by the learned advocates and the memorials submitted by the learned advocates, the Bench deems that decision should be made on the following issues:-

- (1) As to whether or not the current legal provision in relation to the punishment prescribed under marital rape is discriminatory? Provided, it is deemed discriminatory, as to whether or not such law can be deemed void by this court?
- (2) As to whether or not an order sought in the petition should be issued?

With regards to the first issue, amendment to Section 3 on the Chapter of Rape had been made so as to maintain gender equality by the Act Relating to Amendment of Some Nepal Act, 2063, wherein the following provision in relation to punishment had been prescribed in the said amendment. Section (6): “Notwithstanding anything contained elsewhere, provided a husband commits rape against his spouse, the person shall be subjected to imprisonment for a period of three months to six months.” The petitioners contend the provision to be discriminatory thereby encouraging violence against women and where the provision is contrary and inconsistent with Article 13 of the Interim Constitution, 2063, and Article 2, 3, 6, and 15 of the Convention on Elimination of All Forms of Discrimination Against Women, 1967, to which Nepal is a Party, an order of certiorari should be issued in the name of the respondents directing them to frame or cause to frame legal provisions prescribing for equal punishment. Likewise, the rejoinders submitted by the respondent claim that prescription of the quantum of punishment is a policy matter of the State and the quantum of punishment and result is determined by the status of the person involved in the offence, nature and gravity of the offence and therefore, it would not be justifiable to look into the provision with the concept of equality. That where there is a definite and justifiable objective in providing different punishment in relation to marital rape and other rape, the writ petition should be quashed.

It cannot be disputed that the offence of rape is a grave criminal offence. Such an offence not only creates a negative impact on the physical, mental and family life of the victim but also has an impact on the society and therefore, many countries prescribe for life-term imprisonment for offences relating to rape. In our context, this offence has been recognized as a deplorable and grave criminal offence and provision for punishment has been prescribed therein. Pursuant to a writ petition filed by petitioner *Meera Dhungana v Ministry of Law, Justice and Parliamentary Affairs*, re: Writ Petition No. 55 of the Year 2058, the petitioner had sought the court to declare void the said provision due to it being inconsistent with the Constitution. Section 1 on the Chapter of Rape prescribes that where an unmarried girl, widow or any married woman below 16 years of age is subjected to intercourse with or without her consent and those above 16 years of age is subjected to intercourse without her

consent by force or fear or through undue influence shall be deemed to be rape. The court had deemed that the said provision did not allow any immunity with regards to marital rape (see order dated May 2, 2002). Thereafter, amendment to Section 1 on the Chapter of Rape had been made wherein amendment to Section 3 on the said Chapter was made wherein the following provisions had been prescribed:

Section 3. Following punishment shall be levied for offence of rape:

- (1) Ten to fifteen years for commission of rape against a girl below 10 years.
- (2) Eight years to twelve years for commission of rape against a girl above 10 years and below 14 years.
- (3) Six years to ten years for commission of rape against a girl above 14 years and below 16 years.
- (4) Five years to eight years for commission of rape against a woman above 16 years and below 20 years.
- (5) Five years to seven years for commission of rape against a woman who is 20 years or above.

From the amended provision, a perpetrator pursuant to the age and condition (husband and wife) of the woman is subjected to imprisonment for a period of three months to fifteen years. The issue is not related to the difference in punishment on the basis of the age of the victim but is related to the difference in punishment owing to the relationship with the victim and as such the constitutionality of the said provision has been raised.

Quantum of punishment in criminal cases has been prescribed pursuant to the gravity of the offence. Provided, anyone with intention commits to take the life of another person is subjected to life imprisonment whereas, for accidental homicide the ratio of punishment is comparatively less. Pertaining to the nature of the offence, gravity and circumstances during the perpetration of the offence, there may be diversity or difference in punishment. Rape against a minor is recognized as a grave offence under Section 3 on the Chapter of Rape, and harsher punishment has been prescribed therein. Nevertheless, rebate of punishment in criminal cases on the basis of relationship with the victim has not been prescribed elsewhere in the laws. **Where, rape has been recognized as a grave criminal offence under the Chapter of Rape and where the result of such offence is the same, there is no rationality in differentiating between marital and non-marital rape. Offence is committed in lieu of any criminal act and provided, rebate on punishment is to be provided pursuant to the status of the actor, it would deem to be inconsistent with the right to equality as envisaged in the Constitution.** It is an assumption that love and good feelings reside between a husband and wife and conditions of rape does not exist but the circumstance may not always remain the same. **Where a spouse is considered as means of recreation and exploitation and contrary to the desires of the spouse, her health and needs, is raped by the closest person, then such a person committing such an offensive act, cannot be entitled to rebate in punishment merely because of his relationship with his spouse and there is no jurisprudential basis with regards to such rebate in punishment.** Legal provision

prescribed under Section 7 on the Chapter of Rape has been declared void by this court since the said provision prescribed rebate in punishment based on the character and profession of the victim and as such was deemed to be unequal among women. (Refer to: *Sapana Pradhan Malla vs. Ministry of Law, Justice and Parliamentary Affairs, et.al.* Writ No. 56 of the Year 2058, Date of order May 2, 2002). Therefore, based on his relationship, profession and character of the victim where rebate in punishment is provided to a person in any criminal offence is deemed to be discriminatory between women. Our criminal justice system prescribes for the release of the accused on bail or on guarantee for an offence having less than three years of imprisonment and also prescribes that the bail or guarantee may be accepted or rejected for an offence having three years or more punishment. Where the law for marital rape prescribes for punishment that is less than three years and in the absence of any judicial separation during the course of litigation, and where the accused may not stand trial in detention, the possibility of the victim being re-victimized and tortured cannot be denied.

Based on the nature of the offence, health of the victim and the age, the quantum of punishment in any offence may be increased and added to the principal sentence. In case of repeated theft, additional punishment is made for repetition of the same offence. Where a group of persons commit homicide, additional sentence is made in lieu of the involvement of the group for committing such homicide but jurisprudential principle underlines and recognizes that the additional sentence cannot exceed the principle sentence. Section 3 on the Chapter of Rape, prescribes punishment for each individual involved in the offence of rape. Likewise, Section 3 (a) on the Chapter of Rape prescribes additional five years imprisonment on the principle punishment for committing gang rape against a woman or for committing rape against a pregnant woman, or rape against an incapacitated or handicapped woman. Similarly, Section 3 of the said Chapter prescribes additional one year imprisonment for a person who being H.I.V. positive knowingly commits an offence of rape against a woman. Section 4 of the said Chapter prescribes for three years imprisonment for each abettor who knowingly assists in the commission of the offence and where such offence is committed against a woman below 16 years of age, the quantum of punishment is double fold. From the above-mentioned provision where a woman is gang-raped or where a pregnant woman is raped or an incapacitated or handicapped woman is raped or where a person who is H.I.V. positive, knowingly commits an offence of rape against a woman is subjected to a minimum of one year additional sentence on the principle sentence and the abettors are also subjected to three years imprisonment, whereas Section 3 (6) on the Chapter of Rape prescribes for lesser punishment and as such the said provision cannot be deemed to be proper. From the construction of the said provision, provided a husband commits an offence of rape against his spouse, he is subjected to imprisonment for a period of three months to six months and where an offence of rape is committed against his pregnant spouse, or offence of rape is committed against his incapacitated or handicapped spouse he is subjected to an additional sentence of one year. Likewise, where a husband is infected with H.I.V. and knowingly commits an offence of rape against his spouse he is subjected to an additional sentence of one year wherein the principle sentence is deemed to be less than the additional sentence which in itself is unnatural and unfit. Principally, the principle sentence cannot be

less than the additional sentence rather additional sentence may be levied on the principle sentence depending upon the gravity of the offence. Therefore, **where the principle sentence is less than the additional sentence, Section 3 (6) on the Chapter of Rape cannot be deemed to be proper and consistent with the principle of equality.**

Nevertheless, determination of quantum of punishment in relation to any offence is a matter of legislative wisdom and legislative wisdom as such cannot be intervened by the court. Where the Legislature has defined any act as an offence and has prescribed punishment thereto and provided such sentence is deemed unequal, the said provisions cannot be altered or repealed by this court and the same cannot be done pursuant to the principle of separation of power. Declaring any act as an offence and prescribing punishment thereto is purely a legislative act. Provision of punishment is made subject to the condition that an act has been declared to be an offence. Provided, the provision of punishment is deemed to be illegal, the same cannot be deemed to be void as long as the law declaring the act to be an offence exists. Provided, this is to be done, an act shall be deemed to be an offence whereas punishment thereto shall fail to exist thereby creating an atmosphere of impunity which is contrary and inconsistent to the concept of criminal law and justice. Therefore, **where pursuant to the principle of equality, the provision relating to punishment is deemed contrary, the said provision cannot be deemed otherwise or declared void by this court. Nevertheless, in cases where such provision is contrary to the constitutional principle and violates the fundamental right or is inconsistent with the principles of criminology and tends to encourage an individual to commit an offence and causes encumbrance in the development of the criminal law and the justice system, the court cannot escape from its obligation on the pretext that sentencing policy is purely a legislative matter.** As an interpreter of the Constitution and protector of the civil rights, the court in order to fulfill its obligations vested by the Constitution can provide directions deemed necessary or motion the government to frame provisions that are just, proper and unbiased.

Therefore, as discussed hereinabove, where rape has been declared as a grave offence, discrimination on punishment between marital and non-marital rape cannot be made and there is no justifiable reason in providing lesser punishment on the basis of relationship with regards to marital rape and where the principle sentence is less than the additional sentence in marital rape, the provision prescribed under Section 3 (6) on the Chapter of Rape cannot be deemed to be just. Therefore, pursuant to the principle of equality, the court hereby issues a directive order in the name of the Ministry of Law, Justice and Parliamentary Affairs to make provisions so as to bring coordination between the discriminatory sentencing policies between marital and non-marital rape and to make proper provisions where the principle sentence may not be less than the additional sentence. It is hereby

ordered to provide a copy of this order to the Ministry through the Office of the Attorney General and to maintain the case file accordingly.

s/d
Anup Raj Sharma
Justice

Consenting on the opinion

s/d
Kedar Prasad Giri
Chief Justice

Opinion of Hon'ble Justice Bal Ram K.C.

The principal contention of the writ petitioners is that where Section 3 (6) on the Chapter of Rape under the *Muluki Ain* (Civil Code) prescribes for imprisonment for a period of three months to six months for offence relating to marital rape, the said provision being inconsistent with the provision of the Constitution have sought to declare the said provision void. Where the petitioners have sought to declare Section 3 (6) on the Chapter of Rape void, they contend that Section 3 prescribes for harsher punishment for other kind of rape but where rape is committed by a husband against his spouse the said provision prescribes for imprisonment for a period of three months to six months and contend that the said provision provides discrimination between women who have been a victim of rape. Principle propounded in Writ Petition No. 55 of the Year 2058 re: *Meera Dhungana vs. Government of Nepal, Ministry of Law, Justice and Parliamentary Affairs*, Article 1, 2, 3, 4, 6, and 15 of CEDAW, Article 1, 2, 3, 5 and 17 of ICCPR, 1966, Article 1, 2, 35 of ICESCR, 1966, Article 2 on the Declaration on the Elimination of Violence Against Women, 1993 and decisions made by foreign courts in relation to marital rape have also been submitted along with writ petition and the memorials.

The proviso under Article 13 (3) of the Interim Constitution of Nepal, 2063, prescribes that special provisions by law shall be made for the protection, empowerment or advancement of women. Article 18 (2) prescribes for right to social security as provided for in the law whereas Article 20 prescribes the right to reproductive health and other reproductive rights. The Constitution also prescribes that no physical or mental or other form of violence shall be inflicted on any women and provided any such act has been committed shall be punishable by law. Article 21 prescribes the right to participate in state structures on the basis of principles of proportional inclusion. The above rights have been prescribed as fundamental rights and Part 4 of the Constitution prescribes that it shall be the policy of the State to make special provision for the development and advancement of the women.

Nepal has ratified CEDAW, 1979 in 22 April 1991, ICCPR, 1966 in 14 May 1991 and ICESCR 1966, in 14 May 1991. With the enactment of Nepal Treaty Act, 1990, Section 9 of the said Act prescribes that in case of the provisions of a treaty to which Nepal has become a Party conflicts with the provision of current laws of Nepal shall be held invalid to the extent of such conflict.

In order to end discrimination against women and for the protection of the interest of the women and for the protection of the rights and interests guaranteed by the Constitution and various Conventions, this court through various writ petitions has repeatedly issued various directive orders in the name of the government. This court is the guardian of the fundamental rights of the citizens and also the guardian of the rights and interest of the women and as such this court should be aware and alert towards the various rights and interests guaranteed by CEDAW, ICCPR, ICESCR and the Interim Constitution.

Notwithstanding anything contained in the petition and the international Conventions such as CEDAW, ICCPR, ICESCR which have been submitted along with the writ petition, the petitioners have not entered the court to exercise the rights guaranteed by these Conventions to which Nepal is a Party and the rights guaranteed by the Constitution and the laws of Nepal but rather they have invoked the extra-ordinary jurisdiction of this court and have sought for the increase in the quantum of punishment by citing that the provision of three to six months of imprisonment of a husband committing an offence of rape against his cohabiting spouse is less. Where the petitioners pursuant to Article 107 (2) of the Interim Constitution have entered this court challenging the legislative domain, it is for this court to measure as to whether the claim sought by the petitioners falls within the extra-ordinary jurisdiction of this court pursuant to Article 107 (1) and (2) and as to how relevant, logical and as to whether or not the claim sought by the petitioner is in line with the Constitution.

Section 3 (6) on the Chapter of Rape under the *Muluki Ain* (National Code) prescribes imprisonment for a period of three to six months provided a husband commits an offence of rape against his spouse whereas amendment to the definition of rape has not been made.

The sentencing provision prescribed under Section 3 on the Chapter of Rape has been amended pursuant to the directive order issued by the Special Bench of this court in connection to Writ Petition No. 55 of the Year 2058.

The legal interpretation made by this court is termed as precedent and precedents cannot be further interpreted. Precedents are used in disputes having the same subject matter. The above directive order made by court clearly differentiates a rape committed against a woman by any other person and an offence of rape committed by a husband against his spouse during their marital state and pursuant to this interpretation, a directive order had been issued for the purpose of framing legal provision. Pursuant to Writ No. 55, an order had not been issued to provide equal sentencing in the name of equality against a husband committing an offence of rape against his wife and such an order cannot be issued by the court. How can an order to lessen or increase the quantum of punishment be issued through

an extra-ordinary jurisdiction? Therefore, where reference to Writ No. 55 of the Year 2058 have been made by the petitioners and have interpreted marital rape and on the basis of the interpretation have sought for increase in the quantum of punishment, the same has not been interpreted in the said writ petition. Pursuant to the said writ petition, the court has interpreted that there is a difference in other rape and marital rape and as such this cannot be disputed.

The petitioners principal plea is that pursuant to a valid marriage and in the absence of any judicial separation provided, a husband commits an offence of rape against his cohabiting spouse, the quantum of punishment should be increased and should be in par to other rape committed against any other women. In this regard, various matters should be taken into consideration. Rape is a grave criminal offence and our laws have recognized this as a grave criminal offence. Section 8 on the Chapter of Rape, the right to self defense for a woman wherein a woman is vested with the right to take the life of the person committed rape and such an act is not deemed to be any offence and where the life of such person is taken within one hour of commission of the offence of rape, the woman is exonerated from such offence.

The body of a woman is inviolable. This right of self-defense is deemed necessary for the protection of the chastity of a woman. It is necessary to vest women with such rights to protect themselves against any attacks to their physical personality and chastity. Section 8 on the Chapter of Rape, is deemed to be a good law made by the legislative wisdom which cannot be disputed. **Rape leaves a devastating effect on a woman's mental, intellectual, physical, and family, social, economic life and her profession. Rape is considered as a grave offence where the gravity of the offence is greater than an offence of homicide. Rape is considered as an offence against the society and humanity and this fact is indisputable.** Taking into consideration the seriousness of such an offence, our Legislature has prescribed for immunity wherein a woman who in the process of protecting her chastity takes the life of the perpetrator her action is not deemed to be an offence. The necessity of Section 8 cannot be disputed.

Our laws has recognized rape has a grave criminal offence, wherein the State itself conducts the investigation, submits charge sheet and represents the case from the inception till the final disposal of the case. The offence of rape is included in the Schedule of the State Cases Act, 2049, wherein the plaintiff in such cases is the State. Where a decision to the Writ Petition No. 55 of the Year 2058 had been rendered, the definition of rape committed against any woman by any other person and rape committed by a husband against his cohabiting spouse is the same in the Act. Pursuant to the prevailing legal provision, Section 1 on the Chapter of Rape defines rape as an act that is committed without the consent of the woman through force, or fear or through undue influence. A third person cannot be a witness against a rape committed by a husband against his cohabiting spouse. Pursuant to our evidence law, provided, a victim who has been victimized by any act, event or circumstances expresses such event immediately or later, then such matters expressed

falls within the ambit of evidence. A spouse, pursuant to Section 10 (1) (b) of the Evidence Act, 2031, can be a witness to the offence of rape committed by her husband.

Provided, any one commits an offence of rape, the evidence that is obtained upon the examination of the clothes of the female and male, examination of their sexual organs and physical examination and examination of the scene of the crime is deemed to be irrefutable evidence. In the absence of any judicial separation, provided, sexual intercourse has been consumed between a husband and his cohabiting spouse with or without her consent, and provided any evidence thereto during the process of investigation is to be collected, the pubic hair, semen and fiber transfer of clothes can be obtained through laboratory examination wherein all evidence relating to rape can be obtained. In an offence of rape committed by a person against any woman, the evidence obtained through the physical examination of the perpetrator and the victim and the evidence obtained from the crime scene would be similar to the offence of rape committed by a husband against his spouse. Forensic science may not be able to segregate between rape and consensual intercourse. Where evidence from the bed shared by the husband and wife and from the physical examination of the spouse is obtained, what would be the basis for segregating as to whether the act was rape or a consensual intercourse between them? In the absence of judicial separation, where the marriage between a husband and wife is valid and are cohabiting and sharing the same bed and are not living separately or pending any divorce, and provided sexual intercourse consumed between a husband and wife is deemed to rape, the life and liberty of the husband would be at risk because the husband would not be able to prove that the act was a consensual sexual intercourse. It cannot be deemed that all women possess good character. Some women may also possess bad character. Provided, where such a woman pursuant to Section 8 on the Chapter of Rape takes the life of the husband within hour of the commission of sexual intercourse and takes the plea of self-defense, the life and liberty of the husband would be at risk. Therefore, clear provision of living apart and judicial separation should be made and clear definition of marital rape should be provided therein and therefore, marital rape should be defined under the present definition made in the Chapter of Rape.

In the absence of living apart or judicial separation, it is necessary to understand as to whether the definition of rape provided under the Chapter of Rape is applicable to a valid marriage where a husband and wife are cohabiting and sharing the same bed. At the time of prescribing the definition of rape under Section 1 on the Chapter of Rape, the concept of marital rape was not prevalent in Nepal and neither was it prevalent in other countries. The concept of marital rape was not prevalent to the draftsmen prescribing the definition of rape and the draft legislation that was submitted for enactment. Section 1 defines rape as act of sexual intercourse committed against any other woman other than his wife without the consent of such woman. At the time of drafting the definition, the offence of rape was defined as an act committed against any other woman other than his wife. At the time of drafting the definition of rape, the definition was made under the concept, principle, social structure and legal regime that marriage was “an implicit general consent to sexual intercourse by a wife on marriage to her husband.”

Section 1 on the Chapter of Rape does not recognize the sexual intercourse consumed between a husband and spouse as rape. Therefore, in order to increase the quantum of punishment for an offence of rape committed by a husband against his cohabiting wife, it is deemed necessary that the concept of living apart and judicial separation should be included in the Chapter of Rape and a separate definition of marital rape should be made therein. Definition of offence cannot be made by the extra-ordinary jurisdiction of this court, which would be contrary to the principle of devolution of power and recognized principles of interpretation of laws.

Rape has been recognized as a crime for centuries. The Hindu society as well as the Christian, Muslim or any other religion or society considers rape against a woman as a grave offence and stringent punishment has been provided therein. If we are to look into the historical development in relation to the punishment of rape, rape is considered as an act of sexual intercourse consumed against any other woman other than his wife without the consent of such woman. Historical Background of Rape prescribed under Part Two of the book entitled “The Consequences of Rape”, penned by Professor Charles W. Dean and Researcher Mary De Bruyn Kop of Hartford University mentions that rape was considered as a crime even before the birth of Christ whereas, there was no legal provision in relation to a rape committed by a husband against his spouse. The book underlines that “records show that rapist were subjected to punishment as far back as thousands of years before Christ. The Code of Hammurabi which was carved in Babylon around 1900 B.C. on an abelisk of Blackstone decreed that men should be punished if they raped. The early Hebrews considered rape a crime as did Assyrians. All these early civilization meted out punishment according to their own systems of justice. Justice however was a double edged sword then, as provisions were made for the punishment of not only the criminal but also to the victim.

Under the code of Hammurabi the Babylonians considered a married woman, who was raped to be guilty of adultery, bond her to the rapist and threw both of them in the river. Both the assailant and the victim could be saved from death, however the husband if he wished could pull his wife from the water in which case the King would pardon the adulterer. The Hebrews also considered some women to be responsible for their own rape. A married woman who was raped was stoned to death along with her assailant at the gates of the city. The same punishment was dealt to a virgin who was raped within the city walls, the reasoning being that she could have cried out and been heard and rescued if she had wanted.

The Assyrians went one step further. They also punished the wife of the rapist. If a man raped a virgin, her father was entitled to take the wife of the rapist. Rape was a crime for sure, not only against the woman rather against the women’s father and husband as well, since it was their property that had been defiled.

In the thirteenth century, England stated rape as a crime against society rather than woman but did not deem sexual intercourse consumed by a husband against his spouse to be rape. It is necessary to define that an offence of rape under a valid marriage can be committed

by a husband against his cohabiting spouse. The court can provide legal definition of the term offence but the court cannot provide criminal definition to the sexual intercourse consumed between a husband and spouse. Definition of criminal acts falls within the ambit and legislative domain of the legislature.

The definition of rape prescribed under Section 1 of the Chapter of Rape and provision of punishment prescribed under Section 3 (6) of the said Chapter are penal law. Pursuant to the principles of legal interpretation, where interpretation of the definition of a crime and the punishment prescribed by the legislation is to be made by the court, the general meaning that is derived from the use of the word should be made and interpreted. In other words, while interpreting the penal law, the expression derived by the use of the term expressed by the legislation should be considered and conclusion should be reached therein. It cannot be presumed that the intention of the legislation was otherwise and on this basis interpretation should not be made for the purpose of increasing or decreasing the quantum of punishment.

In relation to marital rape, it is necessary to make a perusal of the Medical Jurisprudence written by Modi. Marital rape has been defined under Section 376 A of the Penal Code of India which is as follows:

- (a) Who is living separately from him under a decree of separation or,
- (b) Under any custom or usage

Without her consent is punishable with imprisonment which may extend to two years.

Pursuant to the Penal Code of India, marital rape is deemed to be an offence provided, there is a judicial separation or the husband and wife are living apart and the sexual intercourse must have been consumed without the consent of the spouse and in terms of punishment, the Code also prescribes for an imprisonment for a period of two years.

Perusal of the laws and decisions of external countries in relation to marital rape submitted by the petitioners also underlines that an offence of rape is committed by a husband provided such sexual intercourse is consumed without the consent of his spouse and where they are living separately or by a decree of the court are judicially separated. In *People vs. Liberta*, a case referred by the petitioners, the order of the family court underlined that where a husband and wife are living apart and where sexual intercourse is consumed by the husband against the desires of his spouse, such an act is deemed to be an offence of rape. Likewise, the petitioners through the submission of their deliberation note and submission of Regina vs. Appellate, a decision rendered by the Court of Appeal Criminal Division dated 23 October 1991, take the plea that sexual intercourse consumed by the husband without the consent of his spouse has been recognized as an offence of rape and harsher punishment has been provided for such act.

In the case of Regina vs. Appellate submitted by the petitioners, the case of History of the Pleas of the Crown, Vol. 1736, R. vs. Clearance 1888 of Sir Mathew Hale, the case of S. vs. H. M. Advocate, 1989, H.M. Advocate vs. Duffy, 1983, H. M. Advocate vs. Paxton,

1985, Reg vs. Clearance, 1888, Reg vs. Miller, 1954, Reg vs. Jackson, 1981, Reg vs. Robert, 1986, Reg vs. Kowalski, 1987, Reg vs. H. 1990, Reg vs. J, 1991, Reg vs. Chopman, 1959, Reg vs. US, 1991, Reg vs. Sharples, 1990, Regina vs. O. Brien, 1979, Regina vs. Steal, 1986 and Reg vs. Clark, 1949, deals with the issue as to whether or not sexual intercourse consumed by the husband without the consent of his spouse constitutes the offence of rape. Upon perusal of the above-mentioned cases, where a marital relationship is established between a husband and a spouse, it is deemed that consent for sexual intercourse has been provided by the spouse and provided, the spouse desires to live separately and where through a decree of the court is living apart or is judicially separated, the consent for sexual intercourse provided by the spouse is ipso facto deemed to be revoked by the spouse and where sexual intercourse is consumed against a spouse living apart and without her consent, then such an act is deemed to be an offence of rape.

The plea taken by the petitioners is that where a husband consumes sexual intercourse with his spouse without her consent, the act should be recognized as an offence of rape and also take the plea that the punishment prescribed under Section 3 (6) on the Chapter of Rape is insufficient and that punishment should be equivalent to the punishment prescribed for other offences of rape otherwise, it would be contrary and inconsistent with the right to equality.

In relation to the plea taken by the petitioners, it is necessary to discuss as to whether or not right to equality, equal protection of law, Section 3 (6) on the Chapter of Rape, CEDAW, ICCPR, ICESCR are applicable. Firstly, it is necessary to see as to whether or not the current provision prescribed in Section 3 (6) on the Chapter of Rape, alienates the married women from the right to equality. Article 13 in relation to right to equality under the Constitution is as such:

13. Right to Equality: (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.

(2) There shall be no discrimination against any citizen in the application of general laws on grounds of religion, race, gender, caste, tribe, origin, language or ideological conviction or any of these.

(3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, gender, origin, language or ideological conviction or any of these.

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 ethnic tribes, Madhesi or farmers, laborers or those who belong to a class which is economically, socially or culturally backward or children, the aged, disabled or those who are physically or mentally incapacitated.

Article 13, prescribes that no discrimination shall be made on the basis of gender, religion, caste, class and language and that discrimination shall not be made between a male and female, provided reasonable classification can be made by making laws. Section 3 (6) on the Chapter of Marriage has classified a spouse cohabiting under a valid marriage under one classification and where any person commits an offence of rape against any other woman other than his spouse, then such a woman is classified under another classification. Therefore, it is necessary to understand that pursuant to reasonable classification a spouse cohabiting under a valid marriage is classified under one classification and any other woman other than a spouse is classified under another classification. Where under a valid marriage, provided, an offence of rape is committed by the husband against his cohabiting spouse and where such offence is proved, the punishment against such offence is less owing to their relationship and cohabitation, whereas provided an offence of rape is committed against any other woman, the quantum of punishment is higher. On the basis of classification of legal provision, this is deemed to be reasonable classification. Where a spouse, cohabiting with her husband becomes a victim of rape by her husband and where any other woman who becomes a victim of rape by any other person fall under different classification. This is the recognized principle of classification. It is a constitutional provision and recognized principles that reasonable classification can be made by law for obtaining certain objective which the petitioners have failed to take into consideration. Therefore, the plea that Section 3 (6) is contrary and inconsistent with the right of equality cannot be held.

Definition of a crime and prescription of quantum of punishment solely falls within the ambit and jurisdiction of the national legislation. Under a valid marriage, where the husband and spouse are not living separately or where there is no judicial separation and are cohabiting together, the consent for sexual intercourse from the spouse and sexual intercourse against any woman by any person without her consent cannot be looked upon from the same lenses. To deem sexual intercourse as an offence between a husband and a spouse sharing the same bed and cohabiting together and sexual intercourse with a spouse without her consent by the husband who is not divorced but is living apart through a judicial decree or under judicial separation, it is necessary for the legislation to frame laws in this regard. In the absence of legal provision regarding judicial separation and living apart provided, an offence of rape is to be recognized on the basis of the spouse's claim that sexual intercourse was consumed by her husband without her consent and in the absence of the definition of marital rape provided, the quantum of punishment as sought by the petitioners is to be increased by an order of this court, there would be a miscarriage of justice.

The criminal justice system is not a fool-proof against the crime anywhere in the world. In our system, in order to recognize any act to be grave criminal offence and to increase the quantum of punishment, careful consideration needs to be made by the legislature. Taking this matter into consideration, pursuant to Writ Petition No. 55 of the Year 2058, an order was issued by the court to amend the law in order to provide completeness to the issue of marital rape taking into consideration the special circumstances of marital relationship and the status of husband.

The articles of CEDAW, ICCPR, ICESCR and other international treaties cited by the petitioners are irrelevant. The petitioners' do not state that the rights guaranteed by the conventions have been infringed due to lack of sufficient laws or due to the negligence of the executive but rather have sought for the increase in the quantum of punishment for the offence of rape committed by the husband against his spouse. The articles of CEDAW, ICCPR, ICESCR cited by the petitioners are for the empowerment of women. Women in a country like ours that is infested with poverty, illiteracy, traditional customs, religion, culture have been deprived from all the opportunities receivable from the State. With the peoples' uprising in 2047, a new Constitution was promulgated and Article 11 (3) of the said Constitution prescribed that special provision by law shall be made for the advancement of women. The Interim Constitution has given continuity to the said provision. In the international level, after the Second World War, and in particular after the establishment of the United Nation, CEDAW and other human rights conventions had been enacted for the advancement of the women's intellectual, educational, economic, cultural and health rights and these instruments were enacted for the empowerment of the women. Nevertheless, these conventions do not provide any definition with regards to the offence of rape that would provide risk to the life and independency of the male class and neither does it arbitrarily provide for imprisonment.

The above conventions provide special provision and reservation for the women for their development and advancement particularly in the field of education, health, skills, profession wherein they need not compete with their male counterparts and the conventions provide more advantage to the women in all sectors. Where such provision has been prescribed, the males cannot object citing that the provisions discriminate between male and female. Nevertheless, in the name of empowering the women, criminal law cannot be constructed that would deem to create risk to the life and independency of the husband. The standard of criminal justice is equal for both men and women. On the basis of the first information report given by the spouse, the quantum of punishment cannot be increased which would risk the life and independency of the husband and this is not the objective and intention of the international conventions.

Therefore, consenting on the opinion of the majority in other matters, the plea for increasing the quantum of punishment as prescribed under Section 3 (6) on the Chapter of Rape, a directive order is hereby issued in the name of government to provide legal definition with regards to sexual intercourse consumed pursuant to a valid marriage and sexual intercourse between a husband and spouse who although are not divorced are living apart/judicial separation through the decree of the court and where sexual intercourse is consumed against a spouse living apart/judicial separation without her

consent then such an act should be deemed to be an offence of rape and under such circumstances the quantum of punishment should be reconsidered.

s/d
Bala Ram K.C.
Justice

Dated 26 of the Month of Ashadh of the Year 2065 of Day 5 (July 10, 2008).....

**The Supreme Court
Division Bench
Hon'ble Justice Bala Ram K.C.
Hon'ble Justice Tapa Bahadur Magar**

Order

**Writ No. 3352 of the year 2061 BS (2004 AD)
Subject: Including the order of Certiorari**

Advocate Achyut Prasad Kharel, resident of Kharelthok VDC – 4, Kavrepalanchok District 1 **Writ petitioner**

Vs.

Office of Prime-minister and Council of Ministers, Kathmandu.....1	
Ministry of Law, Justice and Parliamentary, Kathmandu1	
Parliament Secretariat, Kathmandu1	Respondents
Ministry of Health, Kathmandu1	Opponents
Ministry of Women, Children and Social Welfare, Kathmandu.....1	

Bala Ram K.C. J: The summary of facts and issues of the above mentioned writ petition filed before this Court under Articles 23 and 88(2) of the Constitution of the Kingdom of Nepal, 2047 (1990 AD) are as follows:-

The writ petition states that the National Code (*Muluki Ain*), 2020 (1963 AD) by its eleventh amendment made in 2058 BS (2001 AD) has made provision by amending the clause (1) of No. 28B of the Chapter on Life that after fulfilling the procedures as prescribed by His Majesty's Government, a health worker attaining the qualification as prescribed, may, with the consent of the concerned pregnant women, remove her fetus within 12 weeks of conception. According to the said legal provision, only with the consent of pregnant women a fetus may be removed within 12 weeks of the conception, and for this purpose, the consent of her husband is not required. Nature has not given men the capacity to conceive. In this context, during a period of conjugal life, regarding the bearing of children, determination of number of offspring, gap of birth of offspring, are the concerns to be determined mutually by the spouse. But the aforesaid amended provision has ignored the rights of a husband and granted the monopolistic discretionary power to women only to remove the fetus within 12 weeks which in principle is against the theory of gender justice. Article 16(1)(e) of the Convention on the Elimination of all forms of Discrimination Against Women, 1979 provides that the State Parties shall take all appropriate measures to eliminate discrimination against

women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women which shall include the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights. It has guaranteed the equal rights between female and male. The provision contained in aforesaid No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) has ignored the husband's right to determine the removal of fetus within 12 weeks of conception and vested unilateral power to take decision regarding such removal only to the wife, and therefore the said amended provision contradicts with Article 16(1)(e) of the Convention on the Elimination of all forms of Discrimination Against Women, 1979 to which Nepal has already been a party. Sub-section (1) of section 9 of the Treaty Act, 2047 (1991 A.D.) states that treaties and agreements, to which Nepal is a party shall be enforced as if it is the law of Nepal, and in case of divergence of the provision of treaties or agreement shall prevail over the provision of the national law to the extent of inconsistency. Therefore, the writ petitioner prays that as the provision made in No. 28B of the "Chapter on Life" in the National Code (*Muluki Ain*) is inconsistent with Article 16(1)(e) of the CEDAW, the said no. 28B pursuant to section 9(1) of the Treaty Act, 2047 be nullified by issuance of a directive order.

This Court had passed an order on 2061/09/23 BS (2005/01/07 AD) directing to issue and serve notices asking thereby to the respondents to submit their affidavits within 15 days excluding the time required for journey from the date of receiving of the said notices as to why an order should not be issued as sought by the writ petitioner, and that the case file be presented before the Bench after receiving the affidavits in case the affidavits are submitted within the prescribed time limit or after the expiry of the said time limit set for submitting the affidavits.

The Office of the Prime Minister and Council of Ministers, of His Majesty's Government, a respondent, in its affidavit submitted before this Court, has stated that as to what sort of law is to be enacted or amended is the subject matter falling under the Jurisdiction of Parliament, and therefore, the writ petition should be declared as dismissed on the ground that the writ petitioner has made this Office an irrelevant body in the present case as an opposite party on the matter relating to an Act enacted by the Parliament.

The Ministry of Law, Justice and Parliamentary Affairs of His Majesty's Government, a respondent, in its affidavit submitted before this Court, has stated that No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) has not checked the spouses to take decision by mutual consent on the matter related to removal of fetus, therefore, the pleas made by the writ petitioner alleging that this provision has infringed the rights of the male and has created the obstacles in married life is not logical. Therefore, the writ petition should be quashed.

The Secretary Mr. Mohan Bahadur Karki, Ministry of Health of His Majesty's Government, a respondent, in the affidavit submitted before this Court, has stated none of his act has infringed the writ petitioner's right and therefore, the writ petition should be quashed.

The Ministry of Women, Children and Social Welfare of His Majesty's Government, a respondent, in its affidavit submitted before this Court, has stated that the Convention on the Elimination of all forms of Discrimination Against Women, 1979, by its Article 4 has provided that adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination and these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. After the achievement of the practical objective of equality such steps are to be terminated. In the direction of getting substantial and practical equality, the proviso to Article 11(3) of Constitution is centered, to see the things with the view of relativity from such provision, hence the provision made in the 28B of the Chapter on Life in the National Code (*Muluki Ain*) is not contrary to the provision of the said Convention. The Bench took perusal upon the entire case file that was being enlisted in the daily docket in compliance with the rules and presented before this Bench.

The writ petitioner, the learned Advocate Mr. Achyut Prasad Kharel, putting his arguments before the Bench said that the decision on removing the fetus if granted absolutely to female only, the objective of equality cannot be achieved. It should not be ignored the fact that the male cannot conceive and bear a child, and therefore, the spousal consent should be made compulsory in the matter of taking decision on removal of fetus. The provision contained in Article 16(1) (e) of Convention on the Elimination of all forms of Discrimination against Women, 1979, is founded on the principle of equality but the provision inserted by amendment on 28B(1) of the Chapter on Life in the National Code (*Muluki Ain*) is contradictory to the principle adopted by the said Convention. Therefore, the order as sought by the writ petitioner should be issued. The counsel of the respondents, the Learned Acting Deputy Attorney General Mr. Tika Bahadur Hamal, representing the respondents put his arguments before the Bench stating that the provision of a Nepal Law cannot be declared as annulled under Article 88(2) of the Constitution by reason of being inconsistent with the provision of the Convention as sought by the writ petitioner. If the male is permitted to take decision on the matter regarding removal of fetus borne by his wife, the norms of the Convention on the Elimination of all forms of Discrimination against Women 1979 (CEDAW), and therefore, the provision contained in No. 28B(1) of the Chapter on Life in the National Code (*Muluki Ain*) is consistent with the provision of the said Convention. Similarly, the Learned Advocates Ms. Meera Dhungana, Mr. Sabin Shrestha and Mr. Lok Hari Basyal by obtaining permission granted under rule 42(2) of the Supreme Court Rules, 2049 to represent Women Law and Development Forum putting their arguments said that in case the spousal consent is made compulsory on taking decision on removal of fetus it would be contrary to the principle of right to equality and female's right to self-decision. Therefore, the writ petition is liable to be dismissed.

Taking into account the arguments put forward by the Learned counsels representing both sides the Bench has to give its verdict on the matter as to whether the order as sought by the writ petitioner is to be issued or not.

The main plea of the writ petitioner is the annulment of No. 28B(1) of the Chapter on Life in the National Code (*Muluki Ain*) under section 9(1) of the Treaty Act, 2047(1990 A.D.) on the ground that the said provision of No. 28B(1) is inconsistent with the Article 16(1)(e) of the Convention on the Elimination of all forms of Discrimination against Women, 1979. In this context, while perusing the provision contained in section 9(1) of the Treaty Act, 2047, it is seen that it has provided that in the event of any provision of any prevalent law being inconsistent with the provision of any such treaty to which Nepal or the Government of Nepal is a party, for the purpose of such treaty the inconsistent provision of such law shall be deemed as inoperative to the extent of such inconsistency and such matter shall be governed by the said treaty as if it is the provision of a Nepal law.

It is seen that the writ petition is filled under Article 88(2) of the Constitution of the Kingdom of Nepal, 2047(1990 A.D.). The said Article 88 had provided two types of extra-ordinary jurisdictions to this Court. Accordingly, Article 88(1) is seen to have given the power to declare any provision of the Nepal law as *ultra vires* in cases where the said provision imposes unreasonable restriction on the enjoyment of the fundamental rights conferred by the Constitution or is inconsistent with the provision of the Constitution, to the extent of inconsistency. Similarly, the provision in 88(2) is an extraordinary power of this Court under which it can issue necessary and appropriate order for the resolution of any constitutional and legal question in dispute involving public interest, or for the enforcement of any legal right where no alternative remedy is available. Under this, the Court may issue appropriate order for the resolution of constitutional or legal issue in disputes involving public interest for the enforcement of legal rights which is illegally violated.

There is no doubt that Nepal is a Party to Convention on the Elimination of all forms of Discrimination against Women, 1979 by ratifying the same. Thus, following the ratification, in the context of Nepal being a party to the said Convention, pursuant to sub section (1) of section 9 of the Treaty Act, 2047, where any provision of the national law of Nepal is inconsistent with the provision of the said Convention, the provision of Nepal law to the extent of such inconsistency is deemed as ipso facto inoperative and the Convention, and the provision of the Convention be operative as if it is Nepali law. For the purpose of doing complete justice under the extraordinary power conferred by Article 88(2) of the Constitution, this Court can issue any appropriate order that is seen necessary for the enforcement of the fundamental rights. However, in this context, Article 1 of the Constitution should be taken into consideration. Article 1 provides that the Constitution is the fundamental law of the country and all laws inconsistent with it shall, to the extent of such inconsistency, be void. As the said provision has institutionalized the principle of constitutional supremacy, the provision of the said Article 1 may be broadly treated as the clause for the supremacy of the Constitution.

As the said article has accepted the Constitution as the fundamental law, the supremacy clause connotes that every law of the state should be *intra vires* the provision of the Constitution. Thus, Article 88(1), which offers extra-ordinary power to this Court to declare any law inconsistent with the constitution as void, is directly related to the provision of

Article 1 of the Constitution. In other words, the power under the said Article 88(1) is a power that becomes relevant only when any provision of national law becomes inconsistent with the Constitution.

As claimed by the writ petitioner, this court does not seem to have power under Articles 1 and 88(1) of the Constitution and section 9(1) of the Treaty Act, 2047 to declare *ultra vires* in case a provision of any Nepal law is found to be inconsistent with any treaty or convention. This Court may examine as to whether any provision of national law is seen repugnant to the provision of an international treaty or not. Section 9(1) of the Treaty Act, 2047, provides that “in the event of any provision of any prevalent law being inconsistent with the provision of any such treaty to which Nepal or the Government of Nepal is a party, for the purpose of such treaty the inconsistent provision of such law shall be deemed as inoperative to the extent of such inconsistency” , Since it has been provided that in the event of any provision of any prevalent law being inconsistent with the provision of any such treaty to which Nepal or the Government of Nepal is a party, for the purpose of such treaty the inconsistent provision of such law shall, ipso facto, be deemed as inoperative to the extent of such inconsistency, therefore, in case any provision of a law is found contradictory to the provision of a treaty, in such condition it would be sufficient for this Court to issue a declaratory judgment under its extraordinary jurisdiction.

Now let us observe, for the purpose of ascertaining the fact as to whether the provision of Article 16(1)(e) of the Convention on the Elimination of all forms of Discrimination against Women, 1979 and No. 28B(1) of the Chapter on Life in the National Code (*Muluki Ain*) are seen contradictory with each other or not as claimed by the writ petitioner.

Number 28B(1) of the Chapter on Life in the National Code (*Muluki Ain*) reads as follows:-
“No. 28B Notwithstanding anything contained in foregoing No. 28, it shall not be deemed as abortion committed under this Chapter on Life on the following condition in case the fetus is removed by a licensed health-worker having attained the required qualification by adopting the procedure as prescribed by the Government of Nepal

Removing the fetus of less than 12 weeks maturity subject to obtaining the consent of the concerned pregnant women.”

Similarly Article 16(1)(e) of Convention on the Elimination of all forms of Discrimination against Women, 1979 reads as follows:

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (a) The same right to enter into marriage;
 - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, ward-ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

The aforesaid Article of 16(1)(e) of the CEDAW, the rights to decide freely and responsibility on the number and spacing of children have been ensured for both male and female equally. The writ petitioner has stated in his writ petition that No. 28B(1) of the Chapter on Life in the National Code (*Muluki Ain*) has made provision conferring the right to women to decide on the matter regarding removal of fetus of less than twelve weeks maturity therefore, the said provision is not based on the principle of equality as provided by the Article 16(1)(e) of the CEDAW. As the petitioner claims, in the matter of abortion while there should be an equal right to concerned male and female, the provision contained in aforesaid No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) has ignored the husband's right to determine the removal of fetus within 12 weeks of conception and vested unilateral power to take decision regarding such removal only on the wife. The writ petitioner also claims that such discriminatory law may create gulf in the happy conjugal and family life.

In this context, while examining the preamble of CEDAW, the said Convention was adopted, taking note of the fact that despite various resolutions declarations and recommendations being adopted to eliminate the discrimination between men and women, expected success was not achieved with regard to enjoyment of basic human rights by men and women on the basis of equality, and that there are numerous forms of discriminations existing in the world that discriminate women, therefore, CEDAW was adopted with an objective of institutionalizing equality based on the principle of equality. The Preamble of the said Convention states: "Discrimination against women violates the principles of equality of rights and respect for human dignity is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries that hampers the growth of the prosperity of society and the family and makes more difficult for the full development of the potentialities of women in the service of their countries and of humanity,". Thus, as any type of discrimination against women would be against the human dignity which may create obstacle to the entire family and impede social development, CEDAW seems to have been adopted with a view to creating environment, whereby

women would enjoy rights without any discrimination and fully illuminate their competence and capabilities.

For the purpose of attaining the aforementioned objectives, the state parties, pursuant to Art 16(1)(e) of the Convention, bear the responsibility of taking appropriate steps for the elimination of discriminations against women any discrimination against women, especially ensuring that both male and female freely enjoy equal rights with regard to determining the number and spacing of birth of children. By quoting this provision of the Convention, the petitioner claims that the right given to women by number 28 B (1) of the Chapter on Life to abort the fetus of up to 12 weeks single-handedly is inconsistent with Art 16(1)(e) of the CEDAW.

There is no doubt that the matter as regards to taking decision on the number and spacing the birth of children and/or conceiving and retaining of the fetus are such matters that are covered under the Article 16(1)(e) of the CEDAW under the subject “marriage and family matters”. But, the question in this regard is whether the provision contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) has violated principle of equality of men and women contained in the provision of Article 16(1)(e) of the CEDAW. **It is seen that the provision contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) provides for the abortion of fetus of maximum twelve weeks’ maturity with the consent of women. But it has not restricted the couple to decide the said matter by evolving consensus following mutual consultation. The conjugal relationship between a husband and a wife is based on intercourse with spousal consent.** If such mutual trust and understanding is lacking between the husband and wife, the conjugal life instead of continuing moves towards divorce. Therefore, **there are fundamental differences between the maintenance of conjugal relationship and divorce. In other words, the continuance or non-continuance of conjugal relation brings about substantial difference with regard to enjoyment of the rights and performance of duties of a man and woman. The significance of conjugal relation also lies on the maintenance of such mutual understanding.** Where a misunderstanding erupts between the married couple in any matter such conflict leads to the breach of conjugal relation rather than its maintenance. Therefore, in case any law provides either of the spouse an absolute right during the conjugal life, it is expected that the exercise of such rights shall be made in mutual consent and understanding. If there is misunderstanding in conjugal life, it will lead towards divorce. Therefore, where there is a conjugal relationship existing between a woman and a man, it is generally understood by the people that there exists a mutual understanding and mutual trust between them in running conjugal affairs. This is a simple rule and applies in most of the conjugal relationships.

In order to clearly decipher the question raised by the writ petitioner, the provision contained in Article 23 of the International Covenant on Civil and Political Rights, 1966 and Article 10(1) of the International Covenant on Economic Social and Cultural Rights, 1966 and Art 16(1)(e) should be read together and harmoniously interpreted.

Article 23 of International Covenant on Civil and Political Rights, 1966 is as follows:-

“Article 2

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. State Parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and in its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

Similarly, Article 10(1) of International Covenant on Economic, Social and Cultural Rights, 1966 is as follows:

“**Article 10**

The States parties to the present Covenant recognize that:-

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.”

From the observation of the foregoing provisions of the Covenants, family has been accepted as a natural and fundamental unit of society. It also accepts that marriage shall be entered into with free and full consent of the intending spouses. It provides that no marriage without independent and full consent of female and male be entered into. In other words, marriage can take place only with free and full consent of intending spouses. It is certain that marriage solemnized without the consent of the spouse such as unequal marriage, marriage done by misrepresentation, forced marriage, marriage done with coercion or undue influence cannot last for long. Such marriages can break. Marriage is an agreement entered into by spouses accepting the relationship- an agreement based upon mutual trust entered knowingly, voluntarily, willingly, consciously and without any outside pressure, illusion or any consideration. The foundation of conjugal relation is mutual trust. Following the solemnization of marriage with mutual consent, understanding and trust, matters such as determination of number of children to be procreated, their spacing are also the matters to be decided with mutual understanding and mutual trust of the spouses. Absent of mutual consultation and consensus a situation of mutual distrust emerges. Such marital relationship may not continue any further. Therefore, contentions that a woman takes decision on abortion without the consent of her husband or that a pregnant woman comes to the authorized health institution for abortion without the consent of her husband, seem to be hypothetical. It cannot be ruled out that in rarest of the rare cases such consent might be lacking but the same cannot be generalized. On the basis of such suspicion, the provision contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) cannot be declared as *ultra vires*.

It is argued in the petition that the provision contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) is inconsistent with Article 16(1)(e) of CEDAW. It has been clarified above that in case any Nepali law contradicts with any Treaty signed by Nepal, in such situation this court does not declare the law as void and *ultra vires*, instead it issues a declaratory judgment highlighting the fact of such repugnancy. It is not the contention of the writ petitioner that the provision contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) contradicts with the Constitution of the Kingdom of Nepal, 2047 and hence pursuant to Art 88(1) of the Constitution, should be annulled. No. 28B. of the Chapter on Life in the National Code (*Muluki Ain*) provides the right to woman to take decision on removing her fetus of maximum twelve weeks maturity. There are few reasons behind allowing pregnant woman to have such right on her own without the consent of the husband. There are a few legislative intentions behind this.

Nepali society still lacks in education and awareness. Superstitions, traditional customs and usages still prevail in the society. There is no substantial change in the male dominated family structure. Society is yet to transform in the way that women can enjoy their rights independently and without impediment as men can. The traditional belief that son is required than daughter for continuity of the family lineage still exist. While hormones determine whether a son or daughter is to be born, and it is said that the hormone to be donated by the male plays an important role for the birth of the son. The superstitions, traditional and conservative beliefs do not change overnight. In such social and family backdrop, women, whose physical and health status is vulnerable, should be necessarily vested with some rights. Women should have equal rights to say that she needs no more child. If the man is given the sole power to decide such matters, and if the wife does not have the right to say any thing on such matters, then how can we say that there is equality between man and woman. Moreover, reproductive health is an important right of women, a component of her right to life. No one has the right to forcefully deprive woman of the right to health. If any conditions are imposed whereby the woman is required to take the consent of her family especially her husband, women's empowerment and social progress would not be possible.

Thus, in the context of the foregoing discussion, it is found that the provisions contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) and the provision contained in Article 16(1)(e) of CEDAW cannot be considered absolutely. **Although on the face of it, the provisions contained in No. 28B of the Chapter on Life in the National Code (*Muluki Ain*) that provide the rights to women seem to be depriving man of the right to equality, but in practice, in most of the cases, this happens with spousal consent. Taking any exceptional situation as mentioned above, the provision cannot be said to be inconsistent with the provision contained in Article 16(1)(e) of the CEDAW.** Here, what cannot be forgotten is that CEDAW is an instrument for the protection of the interest of women themselves. As it is the aim of CEDAW to promote and protect the women's rights, based upon the principle of equality and empower them in public sector as equal as men, and for this reason too, the absolute interpretation of Article 16(1)(e) of the CEDAW cannot be construed in absolute terms, as sought by the

applicant. Therefore, the Bench holds that it is not necessary to issue any order as sought by the writ petitioner. Hence writ petition has been declared as dismissed. Let the case file be delivered as per rules.

s/d
Bala Ram K.C.
Justice

I concur with the above opinion.

s/d
(Tapa Bahadur Magar)
Justice

Bench Officer: Matrika Prasad Acharya
Computer Setting: Amir Ratna Maharjan

Date: Monday the 20th day of the month of Shrawan of the year 2065 BS (corresponding to 4th August 2008 AD).

**The Supreme Court
Division Bench
Hon'ble Justice Sharada Prasad Pandit
Hon'ble Justice Bala Ram K.C.**

Writ No. 3215 of the year 2061 BS (2004 AD)

Subject: Including the order of Mandamus

Som Prasad Paneru, the secretary of, the authorized person for and on behalf of the Friends of Needy Children (FNC), located at Ekantakuna, Ward No. 4, Lalitpur Sub-municipal Corporation, Lalitpur District..... 1
Bibek Sharma Poudyal, the incumbent student at the level of Bachelor of Laws, studying in the Kathmandu School of Law, Dadhikot -9, Bhaktapur 1
Abhilasha Risal, the incumbent student of the same as above1
Kirti Thapa, the incumbent student of the same as above1
Suresh Chapagain, the incumbent student of the same as above..... 1

**Writ
Petitioners**

Vs.

Office of the Prime Minister and Council of Ministers, Singhdurbar, Kathmandu1
Ministry of Law, Justice and Parliamentary Affairs, Singhdurbar Kathmandu.....1
Ministry of Labour and Transport Management, Singhdurbar, Kathmandu1
Ministry of Women, Children and Social Welfare, Singhdurbar, Kathmandu1
Ministry of Home Affairs, Singhdurbar, Kathmandu1
Office of the Children Welfare Central Committee, Singhdurbar, Kathmandu 1

Opposite Parties

Sharada Pandit J: The summary of facts and issues of the above mentioned writ petition filed before this Court under Articles 23 and 88(2) of the Constitution of the Kingdom of Nepal, 2047 (1990 A.D.) are as follows:-

The writ petitioners state in their joint writ petition as among us the writ petitioners, the association namely the Friends of Needy Children (FNC), is registered with the District Administration Office, Lalitpur bearing Regd. No. 702/2053-2054 BS in the year 2053 BS (1996 AD) and has been affiliated with the Social Welfare Council. The petitioner Association has brought about general assistance from various national and international donors and is being involved in providing assistance and emergency rescue service to those needy children of Nepal who are poor, helpless and poverty-stricken. This Association, for last 5 years,

has been conducting a program on the rescue and rehabilitation of those children who have been forced to work in the houses of other persons as domestic laborers from the age of 7/8 years under the “*Kamlari* custom” prevalent in the Tharu community of Dang District. In the course of identifying the problems and pain or suffering of domestic child laborers and pursuing possible measures for their resolution, we have filed this writ petition. Among the writ petitioners, the other petitioners are students of law faculty who are working for enforcement of the rights of the child in Nepal and domestic child laborers, they further state in the petition that we have serious concern over and interest in this matter. And Therefore, we have filed this writ petition, also on the basis of Section 9 of the Nepal Treaty Act, 2047 BS (1990 AD) and Article 11(1) and proviso to Article 11(3) of the Constitution of the Kingdom of Nepal, 2047 (1990 AD), praying that the extra-ordinary jurisdiction of the esteemed Supreme Court be invoked and an appropriate order be issued, under Articles 23 and 88(2), on the matter of public interest or concern such as the rights of the child, for the enforcement of the rights of the child.

The writ petition states that the United Nations General Assembly has unanimously adopted the Convention on the Rights of the Child on 2046/08/05 BS (1989/11/20 AD) for the protection of the basic rights of the child. In the course of making laws for the implementation of that Convention, the State has formulated the children Act, 2048 (1992 AD), Children Regulation, 2051 (1995 AD), The Children (Development and Rehabilitation) Fund Regulation, 2053 (1996 AD) and the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) (which came into force on 2057/03/07 BS (2000/06/21 AD) and, presently, these Acts and Regulations are prevailing in the field of the rights of the children. Among the foregoing legal arrangements, the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) appears to be applicable only in the formal sector of child labour especially in the case of those children who have attained the age of 14 years working in the enterprises established and operated in accordance with the prevalent Nepal law; nonetheless, these prevailing legal provisions are silent in case of the rights of those innocent children who are compelled to work as servants or slaves from the age of 7-8 years in the informal sector of child labor. Hence, such helpless children are deprived of the guardianship of parents from the age of 7-8 years and compelled to be involved in hateful child labor in the form of domestic servant or slave in the houses of the so-called wealthy persons, hotels or other persons' houses. By virtue of this, the rights of the children, particularly the following rights which have been guaranteed by the Convention on the Rights of the Child (CRC) to children are being infringed:-

- (a) Article 2 of the Convention on the Right of the Child provides that the State shall guarantee to each child irrespective of the child's or his/her parents' race, color, sex, language, religion and ethnic or social origin or other status equal rights. However, under the “*Kamlari* custom” which is widespread in Dang, Banke, Bardiya, Kailali, Kanchanpur and other districts in Tharu Community, the children of 7-8 years of age are sent by their parents to the house of the so called wealthy person as domestic servants in each “*Maghi*” (the first day of the month of Magh of each year corresponding

to mid-January). Hence, the children are being transacted as goods and animals. It is estimated, on the basis of a rough study, that there are ten thousands such *Kamlaris* only in the abovementioned five districts.

As an evidence, we have submitted herewith a VCD (being telecasted by Nepal Television on 2061/06/19 BS (2004/10/05 AD) and based on the observation of these materials, it is revealed that neither of the opponents in the present case has endeavored in prohibition and rehabilitation of these unbearable domestic child labor.

- (b) Unless traditional custom of domestic child labor which is extensively prevalent in Nepal is eliminated, it is not possible to ensure the right of the children as guaranteed by Articles 7, 9 and 11 of the Convention on the Right of the Child such as right of a child to be cared by his/her parents, the right to live together with his/her parents as far as possible, the right to visit with parents directly and at a desired time, and the right against illicit transfer of a child.
- (c) Furthermore, while observing the existing situation of domestic child labor, the Respondents are not seen cautious to fulfill the state obligations pertaining to the right of the child as provided by Articles 34, 32 and 35 of the Convention on the Right of the Child such as the right to rest and leisure, the right to recreation and entertainment, the right to health, education and development, to prescribe minimum terms and limitations of employment and right against sale. While Articles 3 and 4 of the Convention on the Right of the Child provides that the courts of law, administrative authorities and legislators of the state shall give primary consideration to the best interests of the child and undertake to ensure the child protection and care; and that the State shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention on the Right of the Child. Sections 4 and 5 of the Children Act, 2048 (1992 AD) ensure that the child has the right to be nourished by his/her parents. However, in view of the situation of domestic child labor, the situation is just reverse and the parents or guardians are themselves getting maintenance from the labor of their children.

On the one hand the precedent set by the Supreme Court, Nepal Law Reporter (NKP 2058 BS (2001 AD), Decision No. 7020 Writ full bench No. 174) has manifested positive attitude of the court towards the protection of the rights of the child as guaranteed by the Convention, while on the other hand not only so-called wealthy persons but also high ranking civil servants, dignified personalities of various professions and social workers, who are identified as the elite group in the society, are not internalized with the child labor deployed in their houses as cheap and convenience serve, linking it up with their honor and prestige. On this context, remarkable changes in respect of the enforcement of the rights of the child could be made through the declaration of emancipation and rehabilitation of domestic child labors including *Kamlari* would bring the fundamental change in the exercise of the children's right.

The Respondents have promulgated the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) targeting the children above 14 years working in the formal sector of labor market, but no such legal provisions or policies have been declared so far in relation to the prohibition and rehabilitation of the child labor below 14 years of age, who are being forced to work in the informal sector. Although Sections 3 and 4 of the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) provides that no person can engage a child as a labor who has not attained the age of 14 years and get him/her involved in work without his/her consent, but merely this provision has not served as a sufficient ground for the elimination of domestic child labor. While making comparative study of social conditions between *Kamlari* Custom which is a remains of slave system and domestic child labor. The *Kamlari* Custom, if comparatively considered, can not be said as not less damaging as the bondage labor prohibited and emancipated by the respondents and consequently the children are being denied equal protection of law.

The petition seeks that an order be issued in order to enforce the rights of the child as guaranteed by the Convention on the Rights of the Child, the Children Act and the Constitution of the Kingdom of Nepal, that is required to prohibit by law the horrible traditional custom of domestic child labor prevailing in Nepal and immediately make a declaration on the emancipation of children of below 14 years of age held under *Kamlari* Custom as domestic child labor. The writ petition further seeks an issuance of an order of mandamus directing the respondents, for setting up a national level's fund for the sake of rehabilitation of such children, and also to make adequate legal and administrative arrangements, as far as possible, for the protection of the rights of the children of the domestic labors, in view of social justice.

This Court had passed an order on 2061/08/07 BS (2004/11/22 AD) directing to issue and serve notices enclosing therewith a copy of this order in the name of the respondents, asking the Respondents to submit their affidavits within 15 days excluding the time required for journey from the date of receiving of the said notices as to why an order should not be issued as sought by the petitioners, and that the case file be presented before the Bench after receiving the affidavits in case the affidavits are submitted within the prescribed time limit or upon expiry of the said time limit set for submitting the affidavits.

The Office of the Prime Minister and Council of Ministers, of His Majesty's Government, a respondent, in its affidavit submitted before this Court, has stated that as the Petitioners have not clearly mentioned as to what type of their rights are infringed by the action of the Office of the Prime Minister and Council of Ministers, of His Majesty's Government, therefore, the writ petition filed without any concrete base and reason is worthy to be dismissed, hence, let it be dismissed.

The Parliamentary Secretariat, a respondent, in its affidavit submitted before this Court, has stated that the contents claimed by the writ petitioners are not based on factual ground rather they filed it on the basis of the news published in newspapers and the program transmitted by media. The affidavit further states that as the contents of the writ petition

are hypothetical basis and not based on concrete fact and evidence, therefore, let the petition be dismissed.

The Ministry of Home Affairs of His Majesty's Government, a respondent, in its affidavit submitted before this Court, has stated that the Government has made its best efforts, to the extent possible in view of available means and resources, for the welfare of children. The concerned bodies of His Majesty's Government are active for the effective implementation of the Children Act, 2048 (2000 AD), Children Regulation, 2051 (1995 AD) and other laws relating to the children. As the amendments and revisions are being made in national laws on the basis of the agreements concluded between His Majesty's Government and children related to international organizations, the claims made in the writ petition are unjust. Therefore, let the writ petition be declared as dismissed.

The Ministry of Women, Children and Social Welfare of His Majesty's Government, a respondent, in its affidavit submitted before this Court, has stated that the writ petitioners have stated in their writ petition that although Sections 4 and 5 of the Children Act, 2048 (1992 AD) provide for the right of children to be nourished by their parents, in situation of domestic child labor, it is the other way round. Parents themselves are being nourished relying on child labor. Thus, reaching a conclusion that parents do not take care of nourishment of their children as per their economic condition is only a subjective perception. Thus the writ petitioners have not stated categorically specifying as to which of the parents have violated which provision of the said Act. Moreover, the writ petitioners also fail to mention as to who are such parents involved in discriminating their children on nourishment. Hence, it is obvious that the writ petition is founded on a hypothetical framework. As per the commitment of His Majesty's Government to implement gradually the Convention on the Rights of the Child to which Nepal is a party, the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) is being brought into force immediately after its publication in the Nepal Gazette. Hence, the contention of the writ petition alleging that the Government has not made adequate and appropriate legal and administrative arrangements is only a subjective argument. Therefore let the writ petition be dismissed as the petition does not have any concrete basis and reason.

The Ministry of Law, Justice and Parliamentary Affairs of His Majesty's Government, a respondent, in its affidavit submitted before this Court, has stated that after enforcement of the Bonded Labor (Prohibition) Act, 2058 (2000 AD) the bonded labor system has been eliminated; and the Act also has provided that no person shall keep bonded labor, It is not necessary to repay debts taken by the bonded labor, the deed will be cancelled or property held in security should be returned. Hence, institutional arrangements required for the rehabilitation of bonded labor as well as the provision for punishment has been made if bonded labors are found to be kept. As there is a legal provision for the elimination of bonded labor like *Kamlari*, the writ petition filed stating therein that there is no sufficient law for the prohibition of *Kamlari* is not based on law and reasoning. Therefore the writ petition is liable to be dismissed.

The Ministry of Labor and Transport Management of His Majesty's Government, a respondent, in its affidavit submitted before this Court, has stated that in connection with the implementation of the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD), that the Ministry has, with the aim of eliminating child labor, prepared a national action plan following an extensive participation of the partners and stakeholders, and it is on the way for its implementation. According to this plan, programs are being launched to attain the goal of eliminating seven types of heinous child labors within a period of initial five years i.e. within 2066 BS (2009 AD) and to eliminate all kinds of child labors in next five years i.e. till 2071 BS (2014 AD). Time-bound programs are being conducted accordingly targeting the seven types of heinous child labors and their families like domestic child labor, bonded child labor, child labor working in carpet industries, child porter, orphan child, child victimized from making and carrying the pane etc; and upon concentrating it, various programs like registration of child labors formal or informal education, skill development drop-in center, income generating programs, including awareness programs are being run in twenty two districts. As the labors working in informal sectors are not covered under the Labor Act and Regulation, discussions are going on in different forums and a three-day national labor conference is going to be held in Kathmandu in the near future, and that Ministry is considering widening the policy and legal infrastructures on the basis of the findings and recommendations; hence, the writ petition is liable to be dismissed.

The Bench took perusal upon the entire case file that was being enlisted in the daily docket in compliance with the rules and presented before this Bench. The Learned Advocates Ms. Geeta Pathak Sangroula, Mr. Krishna Devkota and Mr. Prakash K.C., representing the writ petitioners put their respective arguments before the Bench stating that the domestic child labor is an informal labor which does not appear publicly and it is hidden, invisible and inaccessible to legal remedy. As per the report of Child Workers in Nepal (CWIN), almost 14 percent girl children have said that they are suffering from sexual harassment from male members of the landlord's house, their relative and friends where they are working. It is only a glimpse of harassment against the girl child. A number of such events occur in the dark which does not come out to public due to various reasons. On the other hand, vulnerable families of Tharu Community residing in various districts of western Nepal such as Dang, Banke, Bardiya, Kailali and Kanchanpur, send their minor kids of 7/8 years of age to the houses of so-called wealthy persons and urban-dwellers as domestic servants on the occasion of Maaghi (great festival to be celebrated by the Tharu community in the first day of the month of Magh (mid-January) annually). The children so sent are called as "*Kamlari*". It is also found that an implied or unwritten or informal agreement gets concluded between the guardians of such children and the so-called masters. In addition, brokers are also found being involved in these activities. Hence, children are silently being transacted as cattle.

Putting their arguments the Learned counsel on behalf of the writ petitioners further submitted that Section 3(1) of the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) has prohibited the engagement of children below 14 years of age on work. But, in practice, this legal provision regulates the child labor only in the formal sector. It is a weakness of the

respondents that they could not protect the children who are forced to work in the informal sector by developing appropriate legal provisions and strong mechanisms against illegal, inhuman and heinous form of exploitation of child labor. By virtue of this, it is certain that not only the children would be victimized but also the whole country would suffer irreparable loss. Laws have not been implemented in consistent with Articles 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13 15, 19, 27, 28, 31, 32, 34, 35 and 37 of the Convention on the Rights of the Child, 1989. Moreover, the concerned provisions enshrined in the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966 consistent with the CRC have also not been implemented effectively. Having said so, the Learned counsels submitted that an order of mandamus including any other appropriate order be issued directing the respondents to make appropriate and adequate legal and administrative arrangements as far as possible for the enforcement of the rights of domestic child labors. In support of their arguments the learned counsels also submitted the written memorials.

The Learned Government Attorney, Mr. Saroj Prasad Gautam representing the respondents put his arguments before the Bench stating that the Children Act, 2048 (1992 AD), Children Regulation, 2051 (1995 AD), Children (Development and Rehabilitation) Fund Regulation, 2053 (1996 AD) have already been enacted and practically implemented with the aim of protecting the interests of the children as well as developing their physical, mental and intellectual capacity. Schedule 2 of the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) has ensured the child-rights. Sub-section (1) of section 3 of the said Act provides that minor children shall not be involved in work. Those children below the age of 14 years are prohibited from being engaged in any work which includes domestic labor also. In addition, sub-section (2) of section (3) of the said Act provides that no child shall be engaged in hazardous works. Any form of child labor including *Kamlari* custom is, therefore, prohibited under these legal provisions. Furthermore, the Government of Nepal has expressed its commitment for gradual implementation of the Convention on the Rights of the Child, to which Nepal is a party, and various acts and regulations relating to the child-rights have also been enacted from time to time and are being implemented. In such a situation, the allegations made by the writ petitioners that there are no appropriate and adequate legal and administrative arrangements are not based on fact. Therefore, let the writ petition be declared as dismissed on the ground that it is not based on facts.

Taking into account the arguments put forward by the learned counsels representing both the sides and considering the written memorials submitted by them, it seems to us that the following questions have to be resolved for the purpose of delivering its verdict over the issues raised in the present writ petition.

- (1) Whether or not the implementation of legal provisions prevailing in Nepal in relation to the prohibition of child labor are consistent with the provisions of the Convention on the Rights of the Child and international instruments on human rights?
- (2) Whether or not an order should be issued as prayed by the writ petitioners?

While considering the first question, the writ petitioners seem to have filed the writ petition stating, *inter alia*, that the traditional improper customs relating to domestic child labor

existing in Nepal are not prohibited and eliminated in Nepal in order to ensure the rights of the child which are guaranteed by Articles 2, 3, 4, 5, 7, 9, 11, 31, 32 and 35 of the Convention on the Rights of the Child, 1989 and the Children Act, 2048 (1992 AD), the Bonded Labor (Prohibition) Act, 2058 (2002 AD) and Article 11(1), and proviso to Article 11(3) of the Constitution of the Kingdom of Nepal, 2047 (1990 AD). The writ petitioners have, therefore, prayed that the directory order including the order of mandamus or any other appropriate order be issued, in the name of the respondents for an immediate emancipation of the domestic child labors below the age of 14 years engaged in the informal sector including *Kamlaris*, and for the establishment of a national level fund to rehabilitate them, for making appropriate and adequate legal and administrative arrangements for the eradication of ten thousand *Kamlaris* who are extensively found in Tharu Community, specially living in Dang, Banke, Bardiya, Kailali and Kanchanpur Districts.

The respondents, in their defense, state *inter alia* that the responsibility of implementing the existing laws devolves on the Executive. The Bonded Labor (Prohibition) Act, 2058 (2002 AD) has regarded *Kamlari* and other similar labor as bonded labor. Section 3(1) of the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) provides that no child below the age of 14 years shall be involved as a labor in any work. A Master plan has been prepared with the support of all stakeholders for the eradication of child labor and is being implemented. As the Labor Act and Regulation do not cover the labors working in informal sectors, discussions are being undertaken in different forums regarding this. Hence, as the petition has been filed by the petitioners merely relying on the news published in newspaper and broadcasted through electronic media and as no solid facts have been adduced and the petition is based on assumptions the same should be dismissed.

While analyzing and considering the case, the United Nations General Assembly, recognizing the reality that protection and promotion of the children being the foundation aimed for their all-round development, had unanimously adopted the Convention on the Rights of the Child, 1989 AD (CRC) on November 20, 1989 AD for the sake of protection of the basic rights of the children. Nepal ratified the said Convention on September 14, 1990 AD. With the aim of immediate implementation of the Convention, the Constitution of the Kingdom of Nepal, promulgated after the restoration of democracy, has provided in its preamble that the State shall, in view of concept of the rule of law, provide equal opportunity to all through the independent and competent system of justice. Thus, with a view to protecting the interests of the children, Article 11 provides for the right to equality, Article 12 provides for the right to freedom and Article 20 provides for the right against exploitation. In addition, under clause (8) of Article 26, the State has expressed commitment for the successful implementation of the rights and interests of the children. This Article reads that the State shall make necessary arrangements to safeguard the rights and interests of the child and ensure that they are not exploited, and shall make gradual arrangements for free education. Furthermore, it is found that the Children Act, 2048 (1992 AD), the Children Regulation, 2051 (1995 AD), the Children (development and Rehabilitation) Fund Regulation, 2053 (1996 AD), the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) and the Bonded Labor (Prohibition) Act, 2058 (2002 AD) have been promulgated and the said Acts

and Regulations remain presently as the prevailing laws in the field of the rights of the child. Section 23 (2) (b) of the Children Act, 2048 (1992 AD), provides for “imparting education that would facilitate the development of intellectual capacity of the child”. The Children Act has been formulated for the development of physical, mental and intellectual capacity of children by protecting their rights and interests. Sub-section (2) of Section 4 of the said Act provides that the parents, pursuant to the financial condition of the family, besides raising their child, shall make arrangement for education, health care, sports and recreation of their children. Section 5 proscribes discrimination between son and daughter, son and son or daughter and daughter with regard to their nourishment and upbringing. Chapter 2 of the Act ensures the rights of the child. Despite being formulated, however they are not found to be enforced in practice. Since the provisions of the Acts and Rules have been confined to letters only, the writ petitioners have come to the Court seeking their enforcement. The mere mentioning in affidavits of those laws which are not enforced in practice, remind of an adage “law in book not in action” and the quotation of Benjamin Disraeli that “Justice is truth in action”. One cannot, thus, ignore the existence of evil practices of child labor including *Kamlari* custom.

In addition to the Children Act, 2048 (1992 AD), the Bonded Labor (Prohibition) Act, 2058 (2002 AD) has also been formulated with the aim of prohibiting bonded labor existing in Nepal and rehabilitating them. But the said Acts have not been implemented, and whereas the children should have been protected and nurtured pursuant to section 4 and 5 of the said Act, their condition has become more pitiable, and they are compelled to take up any kind of labor whatsoever. Moreover, whereas sections 3 and 4 of the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) provide that no person shall get a child below the age of 14 years engaged in work, and that no child shall be engaged in any work against his or her will, this provision has not been implemented in respect of the domestic child labors. In order to implement or cause to be implemented the abovementioned provisions, the State should be more active toward the provisions of the Convention on the Right of the Child and its implementation as well.

Article 2 of the Convention on the Rights of the Child provides that each child shall be given equal protection without any kind of discrimination, irrespective of the child’s or his/her parent’s or guardian’s race, color, sex, language, religion, ethnic or social origin.

Articles 7, 9 and 11 of the Convention on the Rights of the Child have provided that the children shall have the right to be cared for by their parents, the right to live together with their parents as far as possible, the right to meet their parents directly at their own will and the right against the illicit transfer of children.

Similarly, Articles 31, 32 and 35 of the Convention on the Rights of the Child provide that each child shall have the right to rest and leisure, to engage in play and recreational activities, the right to health and education and development and protection against exploitation. These provisions also provide that minimum terms and hours of the employment should be prescribed, and that no trafficking and abduction of the child shall be made.

For the effective implementation of all provisions of the Convention on the Rights of the Child including its preamble, the State has to effectively implement the related provisions of the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. The provisions of these covenants have guaranteed the development of family including children. Article 11 of the International Covenant on Economic, Social and Cultural Rights imposes an obligation on the State to ensure every one the right to adequate food, clothing and housing including improvement of living conditions of the family. As sub-article (1) of Article 13 of the International Covenant on Economic, Social and Cultural Rights is very much pertinent, it is quoted hereunder

“The state parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and further the activities of the United Nations for the maintenance of peace”.

Sub-article (2) of Article 7 of the Convention on the Rights of the Child states that national laws and relevant provisions of the above mentioned Covenants concerning the rights of the child shall be implemented. Sub-article (2) of Article 6 provides that State shall ensure the survival and development of the child to the maximum extent possible. To ensure survival (maximum extent possible) and development, physical means and education as well as other psychological necessities shall be available; the right to information and education for intellectual development falls under psychological necessities. The above mentioned rights are mentioned in Articles 11 and 13 of the International Covenant on Economic, Social and Cultural Rights, 1966, which recognize the right of everyone for upliftment of standard of living, individual liberty, dignity of human life, right to survive maximum extent possible and right to education among others.

In addition, Article 4 of the Convention on the Right of the Child states that with regard to economic, social and cultural rights, state parties shall undertake such measures, to the maximum extent of their available resources, and where needed, within the framework of international co-operation. Likewise, sub-article (1) of Article 2 of the International Covenant on Economic, Social and Cultural Rights, 1966 provides that state parties shall, if their available resources are not adequate for full realization of these rights, receive, especially economic and technical assistance, from developed countries. As Articles 42 and sub-article (6) of Article 44 of the Convention on the Right of the Child provide the below-mentioned provisions, these provisions should also be followed accordingly.

“Article 42 provides that “state parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”

Article 44(6) provides that “state parties shall make their reports widely available to the public in their own countries.”

A committee on the Rights of the Child, established pursuant to sub-article (1) of Article 43 of the Convention on the Rights of the Child, upon receiving report from the state parties pursuant to Article 44, shall invite the specialized agencies, the United Nations Children’s Fund and other United Nations organs to present a report of the implementation of the provisions falling within the scope of their mandate; the Committee may make suggestions and general recommendations to the concerned state party based on information received as mentioned above.

Where the state party has made any comments on the suggestions and recommendations made by the Committee, such comments shall be submitted to the General Assembly of the United Nations. Hence, it is necessary to have education and knowledge about these reports, Nepal laws, child rights mentioned in the Convention on the Rights of the Child and human rights guaranteed by other relevant international human rights instruments. In this context, Nepal has adopted the provision of Article 42 as well literally. It is expedient to make arrangements for education to that effect. But the situation reveals that it has not been implemented. Although the bonded labor system has been eliminated by the Bonded Labor (Prohibition) Act, 2058 (2002 AD), it has not been implemented effectively. The *Kamlari* custom is still prevalent. It is obvious and evident from the above mentioned submissions [of the government] that the *Kamlari* custom has not been eliminated nor effective implementation has been made. In addition, it is found that the method and procedure to be followed effectively for its elimination are not complied with.

So far the second question i.e. whether or not an order should be issued as sought by the writ petitioners is concerned, the writ petitioners have mainly stated that the *Kamlari* Custom is pervasive in the Tharu communities in Dang, Banke, Bardiya, Kailali and Kanchanpur Districts as well in the Kingdom of Nepal, under which children are sent by their parents to the houses of wealthy persons as domestic servants on the eve of each “Maghi” (the first day of the month of Magh of each year corresponding to mid-January) and the writ petitioners have stated that the number of such *Kamlaris* is at least ten thousand in the abovementioned five districts alone.

As the *Kamlari* Custom is inconsistent to Articles 7, 9, 11, 31, 32 and 35 of the Convention on the Rights of the Child and Article 11 of the Constitution of the Kingdom of Nepal, 2047 (1990 AD), the writ petitioners have sought the issuance of an appropriate order in the name of the respondents including the Government of Nepal to emancipate domestic labors below the age of 14 years who are suffering from the *Kamlari* custom and make an arrangement of the fund as well for their rehabilitation.

The affidavit submitted by the Ministry of Labor and Transport Management the respondent states that the time-bound program has been conducted targeting the domestic child labors, bonded child labors, and the child labors working in carpet industries as well.

The Ministry of Law, Justice and Parliamentary Affairs, another respondent, in its affidavit, states that legal arrangement has already been made to that effect.

The Ministry of Women and Children a respondent submitting the affidavit on behalf of the then Government submitted the written statement in Poush, 2061 BS (January, 2005 AD), stating therein that the writ petitioners were not able to indicate which of the parents has violated laws relating to children, and that all parents take care of their children to the extent possible in tune with their financial condition.

While observing the situation in the context of abovementioned questions of fact and law, it appears that the Bonded Labor (Prohibition) Act, 2058 (2002 AD) has come into force since Falgun 11, 2058 BS (February 23, 2002 AD), Section 2 of the said Act considers the *Kamlari* custom as the bonded labor, and as per Section 3, bonded labors are also *ipso facto* outlawed upon the enforcement of the Act. Section 4 of the said Act clearly prohibits the practice of bonded labor. On the contrary, the affidavit of the Government of Nepal states that the issues raised in the writ petition are not prevalent at the moment and nothing has been stated regarding the fund. Besides, the Ministry of Labor and Transport Management, in its affidavit, states that the time-bound program has been launched, but this program does not provide for any relief to those children who are victimized under the *Kamlari* Custom. Hence, although the Act is brought into force and the Convention on the Rights of the Child has also been effective as if it were a law of Nepal, the *Kamlari* custom is seen still prevalent in practice.

It is a legal and constitutional obligation and duty of the respondents to protect the rights of the child in line with the provisions of the Bonded Labor (Prohibition) Act, 2058 (2002 AD) and the Convention on the Rights of the Child. It is also an international commitment of Nepal pursuant to Nepal Treaty Act, 2047 (1990 AD) and Article 126 of the Constitution of the Kingdom of Nepal, 2047 (1990 AD).

As the *Kamlari* custom is in contravention with the rights guaranteed by, *inter alia*, Articles 9, 14, 15, 16, 18, 19, 28, 29, 31 and 32 of the Convention on the Rights of the Child, an order of Mandamus is hereby issued in the name of the respondent viz. the Government of Nepal for the effective implementation of the Bonded Labor (Prohibition) Act, 2058 (2002 AD). Further, by simply formulating an Act and making provisions in the Act cannot provide facility of education in a country like ours where poverty, illiteracy and ignorance are rooted with traditional and conservative ideas. Hence, provisions of the Act and the Convention on the Rights of the Child, alone cannot eradicate the child labor. As the stakeholders and target groups of the Children Act, Bonded Labor (Prohibition) Act and the Convention on the Rights of the Child, are children themselves, it is essential for the Government to facilitate them from higher level, and the stakeholders themselves should be aware towards their rights from the grassroots level. Only then, the Conventions including the Convention on the Rights of the Child, protecting the rights of the child and the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) could be implemented effectively.

Thus, a directive order is also issued in the name of the respondents viz. the Council of Ministers and the Ministry of Education to the effect that it would be appropriate to incorporate, in the curricula of the child, the contents of human rights related international Conventions such as the Convention on the Rights of the Child, 1989, International Covenant on civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966, to which Nepal is a state party, and which cover all aspects of human life. Let the case file be delivered as per the rules.

Mr. Justice Bala Ram K.C.

Having concurred with the aforesaid opinion of brother Honorable Justice, I have hereby expressed the following observations in relation to the issuance of a directive order.

The major contentions of the writ petitioners is seen, *inter alia*, that the practice of keeping *Kamlari* prevalent among the Tharu communities in Dang, Banke, Bardiya, Kailali and Kanchanpur districts of Nepal should be abolished and upon liberation of the domestic child labors held under that practice, the State should rehabilitate them by making arrangement for required fund. In this regard, the writ petitioners have sought for the issuance of the order of *mandamus* or other appropriate order in the name of the Government of Nepal directing it to make necessary legal and administrative arrangement to that effect as required for the protection of rights of the child.

Upon perusal of the affidavits submitted by different offices of the Government of Nepal, who are made respondents in this writ petition, it is revealed that all respondents except the Ministry of Labor and Transport Management have argued that the writ petition should be dismissed and have taken it like an litigation by remaining oblivious of the issues raised by the writ petitioners. But this petition is not a private interest litigation. It is a pro-bono publico petition under which the writ petitioners have sought for the issuance of appropriate order, in exercise of extra-ordinary jurisdiction of this Court under Article 88(1) of the Constitution of the Kingdom of Nepal, 2047 (1990 AD) to eliminate discriminatory practice like *Kamlari* custom based on traditional and conservative thinking, race, poverty, ignorance and illiteracy. Hence, it is a social action litigation filed for the welfare of all children who have been victimized by the practice of keeping *Kamlari* along with illiteracy, poverty and ignorance.

As the Government is committed to implement, in a phase-wise manner, the directive principles and policies of the State enshrined in Part 4 of the Constitution of the Kingdom of Nepal, 2047 (1990 AD), particularly Articles 25(3), 26(8)(9) and (10) and more especially the right against exploitation as enshrined in Article 20, the Government, in respect of such writ petition, must support the Court in the protection of fundamental rights and human rights of the people by bringing out real issues in its affidavit considering the fundamental rights of the people guaranteed by the Constitution and various human rights related instruments ratified by Nepal. To this end, narrow concept of *locus standi* is widened to all Nepalese citizens under Article 88(2) of the Constitution.

As the writ petition has been filed as social action litigation for the purpose of pro-bono publico, the Government should not submit a written statement guided by a conservative thinking and narrow outlook. The citizens may be deprived of the rights conferred to them by the Constitution and human rights instruments due to inadequate attention of the Government or lack of resources and other various reasons. Hence, in reference to the writ petition, the Executive should not feel any kind of hesitation to support the Court by presenting real facts in its written statement. It is also the constitutional duty and obligation of the Executive to support the Court by presenting real facts in such type of public interest litigation.

Major objective of the State shall be to promote the condition of welfare based on just system in social, economic and other aspects of life. In addition, the Constitution, pursuant to the Directive Principles and Policies of the State, calls for the establishment of a welfare state and strives to establish and develop, on the foundation of justice and morality, a healthy social life by eliminating economic and social inequalities and by establishing harmony amongst the various communities, it strives to make necessary arrangements for safeguarding the rights and interests of the child against exploitation, to make special arrangements for their education, health and employment, to make arrangements for their education, health and employment and to make other necessary arrangements for the promotion of the interests of economically and socially backward groups and communities. Likewise, the Constitution has conferred the fundamental right to every Nepali citizens including the rights against exploitation, prohibiting traffic in human beings, slavery, serfdom or forced labor in any form. Out of the directive principles and policies of the State, sub-articles (8) and (9) of Article 26 are important in relation to the present writ petition. The objective of sub-article (8) of Article 26 is to protect children against exploitation and to safeguard the rights and interests of the children; and the objective of sub-article (9) of Article 26 is to impose constitutional obligation on the government to make special arrangements for social security of the orphan children as well as their protection and welfare.

Nepal has ratified the Convention on the Rights of the Child, 1989 on 2047/05/29 BS (September 14, 1990 AD). By virtue of the provision of section 9 of the Nepal Treaty Act, 2047 (1990 AD), the said Convention has been held as good as Nepal law since that date. Articles 27(1) and (2), 28(1), 29(1)(1), 32 and 36 of the Convention on the Rights of the Child, 1989 are important. These Articles of the Convention on the Rights of the Child have conferred rights to physical and mental development of the children, right to obtain education and to pursue compulsory and free primary education. Moreover, the said Articles have provided that the children should have an opportunity of development of their personality, the right against economic exploitation, the right against interference with an opportunity of getting education including the right against employment at the age below the prescribed age and the right to involvement in work only in prescribed time and period. It is a major responsibility of the Government to implement the said provisions of the Convention by framing laws and policies.

The Government should not only refrain from doing anything against the fundamental rights of the people and directive principles and policies provided by the Constitution and the provisions of the Convention on the Rights of the Child, 1989, it also has a constitutional obligation to implement all provisions of the Convention on the Rights of the Child and directive principles of the state policies by framing laws. It seems from the affidavits of the respondents including the Ministry of Labor and Transport Management and Ministry of Law, Justice and Parliamentary Affairs that the Government has conducted some programs designed to eliminate child labor in 22 districts. It is also revealed that the Children Act, 2048 (1992 AD), the Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) have been formulated and enforced. Hence, it is revealed that some child welfare legislations have been framed. While observing the provisions of these Acts and programs, they could be perceivably be taken as the light at the end of a long tunnel. Mere formulation of Acts is not sufficient; specially, provisions relating to the prohibition of certain things in respect to those children who have suffered and are exploited. Punishment alone cannot, therefore, eliminate exploitation against the child. It is true that law is an important infrastructure. But along with it provisions covering all the issues should also be formulated. The effective implementation of laws and of children-centric economic plans is essential to that effect. Then only the aspiration of the Convention on the Rights of the Child and Constitution could be attained.

Even when one talks of the law, laws such as the Social Behavior Reform Act, 2033 (1976 AD), the Begging (Prohibition) Act, 2018 (1962 AD) and the Donation Act, 2030 (1973 AD) can be taken as examples of laws which could not be implemented effectively. More than over 30 years have passed since the Social Behavior Reform Act. This Act was enacted with a pious welfare objective of protecting people from ruining their economic condition and preventing them from unnecessary burden of the debt. The Act controls extravagant expenses by controlling the number of guests to be invited in marriage and *Bratavanda* (holy thread wearing ceremony) including the dowry to be given. The main objective of the Act is to control unnecessary expenses. However, even after so many years of its enactment, it is noticed that the general people including high level policy makers and bureaucrats, high level officials of law enforcement agencies, and judges as well, instead of abiding by this Act, participate in illegal banquet organized at Police Club located at the center of Kathmandu, which is owned by the police and who are responsible for implementing the laws as per the Police Act, while it is the duty of the state to effectively implement the Social Behavior Reform Act. Hence, mere formulation of laws cannot eliminate the *Kamlari* custom. Likewise, there is a law in place that prohibits begging but door to door and street begging is rampant and in front of police openly in a wider scale. Thus, mere formulation of decorative laws is not sufficient; their implementation is crucial. The major claim of the writ petitioners reads that under the *Kamlari* custom, children aged 7 or 8 years are sold to the wealthy persons by their own parents and get them involved in domestic labor. The *Kamlari* custom is covered under the definition of “bonded labor” by Section 2(b) of the Bonded Labor (Prohibition) Act, 2058 (2002 AD), and as Section 3 of the said Act provides that upon the promulgation of the Act, any person working as a bonded labor shall *ipso facto* be liberated from bonded labor. This implies indubitably that

the *Kamlari* custom is in existence in Nepal; they have been liberated only in law. The prohibition of *Kamlari* custom in law and its practical elimination through enhanced consciousness of the people are entirely different matters.

Mere enactment of law does not eliminate a long and widely held traditional custom prevalent since long ago. The above mentioned Social Behavior Reform Act clearly illustrates this. The Child Labor (Prohibition and Regulation) Act, 2000 AD (2056 BS) can also be taken as an example to drive home the point that the law alone cannot eliminate the customs widespread in the society. Section 3 of the Act clearly provides that the child not attaining the age of 14 years, means not entering into the age of 15 years, shall not be engaged in work as a laborer, but the children below the age of 14 years are being involved in the work of cleaning utensils in small hotels and restaurants, working as helpers, cleaners and ticket sellers in buses and mini buses etc. working in brick industries and most often working as domestic servants in various houses. Hence, this Court should take this matter in judicial notice.

The Nepalese society is a very traditional society. Lack of education, poverty, ignorance, illiteracy and unemployment are the causes behind the conservative and evil practices such as keeping *Kamlari*. It is considered a normal practice for the rich and the so called higher caste people to suppress the poor and the so called lower caste people and forcefully engage them in works. The provision of fundamental rights as enshrined in the Constitution, which have been enforced partially at the moment, the Bill of Rights of the American Constitution, the Rights of the Men of French Constitution and the statement like “all men and women are born equal” mentioned in the Universal Declaration of Human Rights bear the same meaning. All these rights are natural rights of the human beings. However, in households and societies afflicted by unemployment, lack of education, conservative tradition, poverty and ignorance, where the *Kamlari* custom, is prevalent mere framing of a few legislations and ensuring as fundamental right by the Constitution alone cannot eliminate all such evil practices. Such elimination is possible only with full implementation of comprehensive laws, accompanied by all-round programs on education, employment, economic planning, and knowledge about it.

While observing literacy rate of the year 2001 AD published by the Bureau of Statistics in 2005 AD, it is found that out of 1,92,55,808 people, both male and female above the age of six years, 76,54,244 people are unable to read and write. Of them, the population of women, unable to read and write, is much higher than that of men i.e. 49,34,007. Out of various districts pointed out by the writ petitioners where the *Kamlari* custom is widespread, in Nepalgunj 1,16,691 people, out of 3,25,513 people above the age of six years, and of them the number of illiterate women is 69,421. These statistics led to raise a question as to when those children who have been victimized by the *Kamlari* custom would get the light of education and be able to fight for their rights. Although only the data of Nepalgunj is presented here, but the data published by the Bureau of Statistics reveals the similar statistics regarding the literacy of women in other districts which are affected from the *Kamlari* custom. **This calls upon the Government to bring out comprehensive legislation along with an**

economic package and effectively implement the same with a view to address all these problems. Moreover, the Government should think towards the empowerment of women and girl children affected by such improper custom as *Kamlari* for the purpose of eliminating the *Kamlari* custom. Only then it will be easier to eliminate such customs.

As Nepal has ratified the Convention on the Rights of the Child, 1989 the said Convention has been effective as good as Nepal law by virtue of section 9 of the Nepal Treaty Act, 2047 (1990 AD). Therefore, no act could be done contrary to the Convention, and the Government of Nepal bears the obligation to frame laws and to do other works in accordance with the Convention. Even though the *Kamlari* custom has been eliminated in law, it is not found to be eliminated in practice. The writ petitioners claim that children aged 6 to 7 years are being involved as domestic servants. Lack of effective implementation of the laws designed to control the *Kamlari* custom, illegal practice of domestic labor and the right against exploitation as enshrined in Article 20 of the Constitution are mutually exclusive. It seems that the consumers of the services of girl children aged 6-8 years seem to be the wealthy people of the society, and it is revealed that the said minor girl children are forced to work as domestic servants under the *Kamlari* custom. Therefore, this directive order is hereby issued in the name of the Government of Nepal to do the following for the total elimination of the *Kamlari* custom:

(1) The prevailing Child Labor (Prohibition and Regulation) Act, 2056 (2000 AD) prohibits the *Kamlari* custom but no law has been formulated prohibiting the engagement of minor girls below the age of 14 years as domestic servants. On the one hand, the *Kamlari* custom is outlawed by the Child Labor Prohibition Act while on the other, in the absence of law relating to domestic servant, children are being extensively used as domestic servants even if not under the *Kamlari* custom. This, prohibition of child labor can be seen as filling water in a leaking pot. Article 20 of the Constitution has guaranteed the right against exploitation to every citizen including the child. By reason of the absence of law on domestic labor, the *Kamlari* custom and practice of domestic labor have encroached upon the right against exploitation of the people conferred by Article 20 of the Constitution. Unless law is framed to regulate the practice of domestic servant, it will be like filling water in a leaking pot where water is filled from above the pot but the pot can never be filled as water gets leaked from the bottom. Hence, even if the *Kamlari* custom would be eliminated in law, the children would be still suffering from the practice of domestic servant and the practice of *Kamlari*. So, mere formulation of law outlawing the *Kamlari* custom can eliminate neither the *Kamlari* custom nor the exploitation against the child.

Since the prayer of the petitioner relates to the formulation of appropriate legal framework for the abolition of *Kamlari* and since no law exists relating to domestic servant, it is imperative to regulate the practice of taking domestic servant and provide whether or not such a practice is allowed. **Hence, it is hereby directed that the government enact law pertaining to domestic servant not only for the abolition of *Kamlari* practice, but also for preventing the exploitation of children for any other ground, and for the protection of the rights of the child under the CRC.**

(2) Fundamental rights of the Constitution, other Nepal laws, Convention on the Rights of the Child, 1989, International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966, and other human rights related conventions have conferred various rights to the Nepalese children. But by virtue of such provisions of rights as enshrined in the Constitution, laws and human right related instruments cannot eliminate the exploitation of children. Similarly, exploitation against the child cannot be eliminated merely by organizing a symposium in a resort and hotel and concluding the same by presenting a working paper. To this end, the concerned children whom the rights are conferred to should be conscious and aware as to the rights. If the persons entitled to the rights are unaware about their rights, they may be victimized due to poverty and misconduct under domestic servant and the *Kamlari* custom irrespective of plans and laws formulated by the State. Article 20 of the Constitution recognizes that forced labor is an exploitation outlawed by the Constitution itself. Persons entitled to such important right are not even aware of it. Until and unless the concerned persons are conscious about their rights, misconduct such as the *Kamlari* custom and domestic labor prevalent in a traditional and conservative society like ours cannot be eliminated. As the petitioners have prayed for the issuance of an order for making administrative arrangement as well, **it is hereby ordered that, for the purpose of empowering minor children, such environment be created where the children would be conscious about their fundamental rights and human rights, and the provisions relating to the rights of the child as enshrined in the Convention on Rights of the Child, Covenant on Civil and Political Rights, Covenant on Economic, Social and Cultural Rights and other human rights related important covenants and conventions be incorporated in the curriculum to be imparted to the children.**

(3) The *Kamlari* custom including domestic servant are the outcome of illiteracy, poverty, conservative tradition and unemployment, among others. To liberate children from such malpractice and make them entitled to the rights, it is the constitutional and treaty obligation of the Government to frame laws and make necessary arrangements by implementing the prevailing laws entitling every child who is deprived of his/her rights of parents because of the inherent interests of the parents to the rights conferred by the laws of Nepal pertaining to the rights of the child and the Convention on the Rights of the Child. Partially implemented sub-article (3) of Article 11 of the Constitution has provided that special arrangements may be made as required for the protection and development of children. It is the duty of the Government to protect children against exploitation pursuant to sub-article (8) of Article 26 and to pursue necessary policy for the welfare of the child pursuant to sub-article (9) of Article 26 of the Constitution. The Petitioners have also prayed that an order should be issued to make provision of the fund for the rehabilitation of child liberated from the *Kamlari* custom. Upon enforcement of the Bonded Labor (Prohibition) Act and by virtue of section 3 of the Act, the *Kamlari* custom is *ipso facto* outlawed. So, it is the responsibility of the State to make necessary arrangement to that effect pursuant to sub-article (8) of Article 26 of the Constitution. However, nothing has been mentioned in the affidavit in this respect except that programs are being run in 22 districts. Now, therefore, **for the sake of protection and welfare of children liberated from the exploitation of the *Kamlari***

custom as well under the provision of sub-article (8) of Article 26, the Government should fulfill its constitutional duty and obligation under sub-articles (8) and (9) of Article 26.

Thus, the *Kamlari* custom is found eliminated in terms of law. However, laws relating to exploitation against the child are found insufficient since there is no legislation governing domestic helpers. Therefore, **a directive order is hereby issued in the name of the respondent Government of Nepal to frame laws relating to domestic servant, to implement laws effectively, to incorporate provisions of the CRC, ICCPR, ICESCR including other important Conventions in the curriculum of the child, to make necessary arrangements for attaining the constitutional obligation under sub-articles (8) and (9) of Article 26 of the Constitution, upon framing plans and policies for the protection of the interests and social security of the children who are emancipated from the *Kamlari* custom and other exploitation. Let the case file be delivered as per the rules.**

s/d
Bala Ram KC
Justice

Bench Officer:Thagindra Katel

Date: Sunday, the 25th day of the month of Bhadra 2063 BS (10th September, 2006 AD).

**Supreme Court, Special Bench
Hon'ble Justice Anup Raj Sharma
Hon'ble Justice Sharada Prasad Pandit
Hon'ble Justice Arjun Prasad Singh**

**Order
Writ No. 121 of the Year 2060**

Sub: Mandamus et.al.

Advocate Tek Tamrakar, resident of Kanchanpur district, Mahendranagar Municipality currently residing in Kathmandu district, Kathmandu Municipality Ward No. 15 for and on behalf of Pro-Public1
Advocate Sharmila Parajuli, resident of Kathmandu district Kathmandu Municipality Ward No. 10 for and on Pro-Public..... 1 **Petitioners**
Advocate Raju Chapagain, resident of Chitwan Municipality currently resident of Kathmandu district, Kathmandu Municipality Ward No. 10 for and on behalf of Pro-Public1
Prakash Mani Sharma, resident of Kathmandu district, Kathmandu Municipality for and on behalf of Pro-Public.....1

Vs.

HMG, Cabinet Secretariat, Singhadurbar 1
HMG, Ministry of Home, Singhadurbar..... 1
HMG, Ministry of Law, Justice and Parliamentary Affairs, Singhadurbar.....1 **Respondents**
HMG, Ministry of Women, Child and Social Welfare.....1
HMG, Ministry of Education, Culture and Tourism.....1
HMG, Ministry of Local Development, Pulchowk.....1
HMG, Ministry of Land Reform and Management, Singhadurbar.....1
HMG, Ministry of Residence and Physical Planning, Singhadurbar.....1
HMG, Ministry of Labor and Transport Management, Singhadurbar.....1

Anup Raj Sharma J: The content and order of the writ petition submitted pursuant to Article 23 and 88 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990 is as follows:-

The petitioners contend that the petitioner's organization has been registered pursuant to the Firm Registration Act, 2034 with the objective of enhancing access to social, economic and political justice. The petitioners' further contend that they have submitted the petition pursuant to Article 88 as a social action litigation to address the discrimination, social boycott and sexual exploitation faced by the *Badi* community.

The petitioners contend that the *Badi* community had migrated from Kumaon, Garwal and Awad provinces of India to Salyan, Musikot, Jakarkot in the 14th century and have been residing and eking their livelihood by performing dance and other forms of entertainment. With the intrusion of modern music, the traditional song and entertainment was deemed to be at risk, wherein the women of the *Badi* community were compelled to enter into the flesh trade for sustaining their family and have been living in the Far Western and Mid Western part of Nepal. The women of *Badi* community involved in the flesh trade have been neglected and are vulnerable. Due to poverty, illiteracy and social boycott, the male of this community lack any form of employment, wherein the women of this community are compelled to enter into the sex trade. Due to their compulsion of entering into the flesh trade and being exploited by the elites, the children born to the *Badi* women do not have any identification of their father, wherein such children are deprived of acquisition of birth certificate and citizenship. As such these children are deprived of their educational rights. The *Badi* women on the one side are arrested on charges of flesh trade and cases of public offences are initiated against them and provided any petition against sexual exploitation is registered by these people, proper hearing and legal protection are not provided to them. The *Badi* community within the *Dalits* fall within the backward class and pursuant to various data, it is evident that this community is deprived from the national mainstream.

Preamble of the Constitution of the Kingdom of Nepal, 1990, prescribes and recognizes social justice as an unchangeable component of the Constitution. Likewise, right to freedom prescribed under Article 12 (2) provides for the right to live honorably and humanly. Where the *Badi* community is deprived of any opportunity to alternative employment, this community is compelled to involve themselves in the flesh trade wherein social justice and right to freedom guaranteed by the Constitution becomes meaningless. Likewise, the State pursuant to the Article 11 of the Constitution of the Kingdom of Nepal, 1990, has failed to provide special provision for the development of the women and children of the *Badi* community who belong to the backward class. Similarly, Article 25 (1) prescribes the State's policy to provide social justice to the people whereas Article 26 prescribes for special provision with regard to education, health and employment of the women, provision to safeguard the children and ensure that they are not exploited and are provided free education and orphans and helpless women are provided with social security in the form of education and health. Regardless of these constitutional provisions and the State's obligation, the *Badi* community has not received any such facilities. Provided, the welfare laws related to the children,

backward class, orphans and helpless women prescribed in the Social Welfare Act, 2049, Chapter on Poverty under the *Muluki Ain*, Local Self-Governance Act, 2055, Act, Children Act, 2048, Education (Seventh Amendment) Act, 2058, were to be properly implemented, the compulsion of the *Badi* women to enter into the flesh trade would have to some extent changed but such act has not been implemented.

Articles 22, 23, and 25 of the Universal Declaration of Human Rights, 1948, prescribes that everyone as a member of the society is entitled to realization to the right of social security, free choice of employment and right to a standard of living adequately and prescribes protection from being unemployed. Article 6 of the International Covenant on Economic, Social and Cultural Rights, provides and recognizes right to work which includes the right to the opportunity to gain one's living by work and Article 11 prescribes that the State shall recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions and that the State will take appropriate steps to ensure the realization of this right. Likewise, in order to suppress prostitution against women and children, the Convention on the Suppression of the Traffic in Persons and of the Exploitations of the Prostitution of Others, 1951, had been promulgated wherein Article 16 of the said Convention prescribes that the State shall take appropriate measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and Article 20 prescribes that the State shall take appropriate measures and provide employment to prevent women from the dangers of prostitution. Likewise, Article 11 on the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, prescribes and guarantees the right to work and social security for women facing unemployment. The above mentioned conventions that are binding pursuant to Section 9 (2) of the Nepal Treaty Act, 2047 have not been implemented by the State. Therefore, it is the responsibility of the State to provide opportunity to alternative employment for the *Badi* women and to take appropriate measures and programs for their rehabilitation and free them from the clutches prostitution.

Article 9 (2) of the Constitution of the Kingdom of Nepal, 1990, prescribes that every child who is found within the Kingdom of Nepal and the whereabouts of whose parents are not known shall, until the father of the child is traced, be deemed to be the citizen of Nepal by descent. Similar provision has been prescribed under Section 3 (4) of the Nepal Citizenship Act, 2020. Pursuant to these provisions, the children of the *Badi* community have no reasons whatsoever to be denied from acquiring citizenship but nevertheless, the people of *Badi* community do not have any citizenship and as such have been denied from the enjoyment of social, economic and political rights. Where it is the constitutional and legal right of a child to acquire citizenship by descent in the event the father of such child is not traced, denial to register the birth of a child is unconstitutional and illegal. Section 4 (1) (a) of the Birth, Death and Any Personal Events (Registration) Act, 2055 prescribes that personal events such birth and death shall be notified by the principal person of the family and in the event of his absence the same shall be notified by the eldest person attaining majority. Pursuant to this provision registration of birth of a child whose father cannot be traced should not be denied. Likewise, Section 10 under the Children Act, 2048 prescribes for

naming of the father and grandfather on all formal works and documents and in the event the father is not traced the name of mother shall be stated and in the event both the parents cannot be traced, the person supporting the child or the organization shall state that the parents cannot be traced. Pursuant to this provision, even where the father cannot be traced, the legal right to register the birth and acquire the citizenship is deemed to be secured. Article 15 of the Universal Declaration of Human Rights, 1948, Article 24 (3) on the International Covenant on Civil and Political Rights, 1966, Article 10 (3) on the International Covenant on Social and Cultural Rights, 1966, Article (2) on Convention on Women Rights, Article 7 on the Convention on Rights of Child, 1989 has secured every person without discrimination the right to enjoy the right to registration of birth and possession of citizenship. Therefore, the birth registration and acquisition of citizenship of child of a *Badi* community whose father cannot be traced cannot be denied, the discriminatory provision prescribed under Section 4 (1) (a) of Birth, Death and other Personal Event Registration Act, 2033 and Section 3 (1) of the Children Act, 2048 is contrary to Article 11 of the Constitution.

Women of the *Badi* community are subjected to search and seizure and cases are initiated against them, wherein these women are subjected to punishment and persons perpetrating sexual violence against these women are exempted thereby creating an atmosphere of impunity which is contrary to the principle of positive discrimination and protection envisaged by Article 11 of the Constitution. Likewise, the women of the *Badi* community involved in the flesh trade pursuant to Article 22 of the Constitution vested with the right to privacy and pursuant to Article 14 (1) they are vested with the right not to be punished for an act which was not punishable by the law when the act was committed. On the one hand, the *Badi* women are arrested on the charges of prostitution and legal proceedings are initiated against them whereas, on the other, petitions alleging the establishment of sexual relations against their wish are not entertained and as such their right to equality, privacy and right to criminal justice have been infringed. Pursuant to the Universal Declaration of Human Rights and international treaties and covenants, the *Badi* women and children unlike other citizens cannot be denied from the equal protection of the law merely because of allegation of them being involved in the flesh trade.

Although, Article 11 (4) of the Constitution of the Kingdom of Nepal, 1990, and Section 10 under the Chapter of Equity of the *Muluki Ain* has made discrimination on the basis of caste punishable, the said provisions have not been effectively implemented. The *Badi* community has been a victim of social boycott and discrimination. For the development and protection of the *Badi* community, the State pursuant to Article 11 (3) of the Constitution of the Kingdom of Nepal, 1990, should initiate executive and legislative reformative measures in order to end discrimination and social discrimination. In order to establish the rights of the *Badi* community and to provide them with social and economic justice, the petitioners hereby seek the honorable court to issue the following orders pursuant to Article 88 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990:-

- (a) Issuance of an order of certiorari against the State to provide alternative employment and social security, skill oriented training and housing for the *Badi* community thereby

- releasing them from prostitution and reintegrating and rehabilitating them into the society.
- (b) Issuance of order of certiorari against the State to make necessary arrangements for birth registration and acquisition of citizenship for children of the *Badi* community and provided any application for birth registration and citizenship is made the same shall not be denied on the basis of non-identification of the father.
 - (c) Issuance of an order of certiorari against the State to provide equal legal protection against sexual exploitation and violence perpetrated against *Badi* women and children and that they should not be arrested and searched merely on the allegation of their involvement in flesh trade.
 - (d) Issuance of an order of certiorari against the State to effectively implement and take appropriate measures against discrimination made towards the *Badi* community.
 - (e) Issuance of an order of certiorari against the State for the effective implementation of the provisions of the prevailing welfare laws that is beneficial for the *Badi* community et.al.
 - (f) Article 4 (1) (a) of the Birth, Death and Other Personal Event Registration Act, 2033, and Section 3 (1) of the Act Relating to Children, 2048, have directly and indirectly contributed to the discrimination of the *Badi* community and these provisions being inconsistent to Right to Equality as prescribed under Article 11 of the Constitution of the Kingdom of Nepal, 1990, the petitioners seek the court to declare these provisions void to the extent of such inconsistency.
 - (g) Constitution of an expert committee comprising of representatives from governmental and non-governmental organization to undertake a factual study on the problems faced by the *Badi* community and issuance of any orders deemed appropriate by the said community.

An order had been set aside by the Single Bench of this court on April 23, 2003 asking the respondents as to why the order sought by the petitioners need not be issued. Similarly, the order prioritizing the case had directed the court to present the case before the bench upon submission of the rejoinders from the respondents.

The rejoinder submitted by the Cabinet Secretariat reads as such: That the Directive Principles and Policies prescribed under Article 24 of the Constitution of the Kingdom of Nepal, 1990, is formulated and implemented pursuant to the available resources and means and is not implemented by any court. That the *Muluki Ain*, Nepal Citizenship Act, 2020, Birth, Death and Other Personal Event Registration Act, 2033, Human Trafficking (Control) Act, 2043 and other laws have ample provisions for social and economic justice. That His Majesty's Government has shown its commitment towards the implementation of the provisions prescribed in the various treaties and covenants to which it has been a Party. That His Majesty's Government has been active in providing social security and development of the *Badi* community and hence the writ petition should be quashed.

Likewise, the rejoinder submitted by the Ministry of Home states as such: That Section 3 (4) of Nepal Citizenship Act, 2020, prescribes that every child who is found within the Kingdom of Nepal and the whereabouts of whose parents are not known shall, until the

father of the child is traced, be deemed to be the citizen of Nepal by descent and provided citizenship is sought the same is provided accordingly. That no person has been denied from the acquisition of citizenship merely because such a person was born through a woman belonging to a *Badi* community. That the *Badi* women have not been treated inhumanly by the local administration and provided they are treated inhumanly or they have been discriminated in the application of law, they shall be subject to harsh punishment. That discrimination has not been made in the equal protection of law merely because they belong to the *Badi* community and hence, the writ petition should be quashed.

Separate rejoinders having the same content had been submitted by the Ministry of Law, Justice and Parliamentary Affairs and Ministry of Labor and Transport which states as such: that Article 11 of the Constitution of the Kingdom of Nepal, 1990, prescribes that all citizens are equal before the law, no discrimination shall be made against any citizen in the application of the general laws and that special provisions shall be made for the backward class. That, Section 16 (d) (2) of the Education Act, 2028, provides for free education in community schools for *Dalit*, janajatis and women and other students below the poverty line. That, Section 4 (f) of the Social Welfare Act, 2049, prescribes for provisions deemed necessary for the interest of the backward community or class and that the Children Act, 2048, prescribes for various services and facilities for children belonging to the backward class. That, pursuant to the legal provision mentioned in Section 4 (4) of the Nepal Citizenship Act, 2020, the children of *Badi* women, whose father cannot be traced can acquire citizenship by descent and therefore the writ petition should be quashed.

The content of the rejoinder submitted by the Ministry of Women, Children and Social Welfare is as such: That Article 11 of the Constitution of the Kingdom of Nepal, 1990, prescribes that all citizens shall be treated equally and that the petitioners' contention that the rights and interest of the *Badi* community have been neglected is false. That beneficiary works according to the resources and means available have been undertaken on an equal footing for the interest of all communities or classes and that the *Badi* community has also been provided with equal protection of the law. That where the writ petitioners have failed to state as to which conduct was discriminatory against the *Badi* community, the writ petition should be quashed.

Likewise, the content of the rejoinder submitted by the Ministry of Local Development is as such: That for the protection and promotion of backward women, children, helpless, weak, neglected and the oppressed class of various sectors, various committees, commissions and institutions have been established and budget deemed necessary for such bodies have been disbursed and evaluation has been carried out. That where policy level decision is taken by the government, directions are given from time to time taken into consideration the interest of such classes and therefore, the writ petition should be quashed.

The rejoinder submitted by the Ministry of Education and Sports is as such: that the Education Regulation, 2059, prescribes for free education and various kinds of scholarships for poor, handicapped, women, *Dalit* and janajati students and as such the people belonging to the

Badi community can also acquire these facilities. That the Rural Education Committee to be constituted pursuant to Section 11 (k) of the Education Act, 2028, is vested with the authority to maintain a record of the families below the poverty line and is vested in making provision deemed necessary for the education of the children of such families and therefore, the order sought by the petitioners need not be issued and hence the writ petition should be quashed.

The rejoinder submitted by the Ministry of Land Reform and Management is as such: That various laws are formulated for the protection of the rights of the citizen guaranteed by the Constitution, that where the petitioners have failed to state as to how the rights protected by the Constitution and the laws have been infringed, and therefore, the writ petition should be quashed.

Similarly, the rejoinder submitted by the Ministry of Physical Planning and Construction is as such: That no act has been conducted wherein the rights of the *Badi* women guaranteed by the Constitution has been infringed and that the State carries out its activities pursuant to the Directive Principles and with the resources and capacity available therein and hence the writ petition should be quashed.

An order had been set aside by the Special Bench on November 27, 2003 which reads as follows: That it has come to the notification of this Bench that the issues and claims that have been raised in this writ petition in relation to the promotion of the fundamental rights of the *Badi* community had pursuant to Article 88 (2) been similarly raised by Dil Bahadur Biswakarma, President of DNF through Writ No. 3292 of the Year 2060 and since it is deemed appropriate to entertain both the petitions by a single Bench, order is hereby set aside to submit the said writ petition along with this petition.

Similarly, an order had been set aside by the Special Bench on May 20, 2004 which reads as follows: That pursuant to the proviso under Article 11 and Article 26 (1) of the Constitution of the Kingdom of Nepal, 1990, which prescribes for appropriate and special provision for the advancement of the mentioned classes and since the writ petition also mentions about provisions to be made by the State for the interest of those classes, the Bench in relation to the issues raised by the petitioners in their petition hereby deems it necessary to seek answers to the following questions. What are the current problems faced by the *Badi* community? What kinds of programs are being initiated or will be initiated by His Majesty's Government for the resolution of the problems and advancement of the *Badi* community? Provided, any program has been initiated, what has been the impact of such programs? How can the advancement of the *Badi* community be achieved? Furthermore, in order to seek answers to these questions the Bench through its order had directed for the formation of a Committee under the coordination of the Ministry of Women, Children and Social Welfare comprising of representative from the *Dalit* Commission, *Badi* community and representatives from the concerned Ministry and the Bench further ordered the Committee to be formed to submit its study report within two months from the date of receipt of the order and had directed the Bench to submit the case file upon receipt of the study report.

The Ministry of Women, Children and Social Welfare had sought for the extension of the period for submission of the report wherein the Special Bench through its order dated August 12, 2004 and November 18, 2004 had provided extension of the period wherein the Ministry was asked to submit its progress report every month.

Where the case pursuant to the rules had been submitted before this Bench, the learned advocates, Mr. Prakash Mani Sharma, Mr. Tek Tamrakar, Mr. Raju Prasad Chapagain and Ms. Rama Pant Kharel made the following submission: That the *Badi* community have been a victim of discrimination, social boycott and sexual exploitation and opportunity for alternative employment had not been provided to the women of the *Badi* community, wherein they had been compelled to enter into the flesh trade for sustenance of their livelihood; that where the father of the child born through the *Badi* women cannot be traced, these children have been unable to register their birth and have been denied from acquiring citizenship and education and opportunities of employment; that since the *Badi* community have been recognized as a low caste, they have not been able to receive social justice and neither have they been able to live an honorable life and have been denied from the enjoyment of human rights guaranteed to them; that the women of the *Badi* community, unlike other citizens' have been denied from the equal protection of the law; that pursuant to the order made by this Bench, a report has been prepared and submitted with the participation of the governmental bodies in relation to the programs initiated at the government level for the resolution of the problems faced by the *Badi* community wherein various recommendations have been forwarded for the advancement and development of the *Badi* community and women of this community and since there is no disagreement by the parties of the government, the time limit for the implementation of the report should be prescribed by the Bench. That where the father of the child born through a *Badi* women cannot be traced, such children have been denied of their birth registration and where the provision prescribed under Section 4 (1) (a) under the Birth, Death and Other Personal Event Act, 2033, creates discrimination between the eldest female and male of a family, and that where Section 3 (1) of the Children Act, 2048, also provides discrimination between a male and female, the said provisions are inconsistent with Article 11 of the Constitution of the Kingdom of Nepal, 1990 and therefore, order as sought should be issued.

Joint Attorney, Mr. Saroj Prasad Gautam on behalf of the respondents stated as such: that the State pursuant to the Constitution and the laws has not discriminated against any religion, cast, gender, race, profession domiciled within the Kingdom of Nepal. That the State has provided equal protection of the law to the *Badi* community or to the women of that community. That the petitioners have failed to explicitly state that the children born through the *Badi* women have been denied registration of their birth or have been denied from acquiring citizenship. That where procedures prescribed by the Act and laws have been fulfilled, denial against registration of their birth or denial against acquisition of citizenship cannot be made. That where pursuant to the order of this Bench, a Committee to study the problems encountered by the *Badi* community had been formed with the participation of His Majesty's Government and since there is no disagreement on the report, there would be no objection on behalf of the State against any appropriate order issued by this Bench in

relation to the protection and development of the rights and interest of the women of the *Badi* community.

Today being the date set aside for rendering a verdict, the Bench upon perusal of the writ petition and the deliberations made therein by the learned advocates deems that decision should be made on the following issues:-

- (1) As to whether or not Section 4 (1) (a) under the Birth, Death and Other Personal Event (Registration) Act, 2033 and Section 3 (1) under the Children Act, 2048, is inconsistent with Article 11 of the Constitution of the Kingdom of Nepal?
- (2) As to whether or not, children of the *Badi* community whose father cannot be traced can be denied from registration of their birth and acquisition of citizenship?
- (3) As to whether or not an order sought in the petition should be issued?

The Preamble of the Constitution of the Kingdom of Nepal, 1990, seeks to secure to the Nepalese people social, political and economic justice and guarantees basic human rights to every citizen and on the basis of equality seeks to promote the spirit of fraternity and the bond of unity. In order to achieve a just society, universal recognition relating to human rights have been prescribed under Article 11 of the Constitution wherein the said Article guarantees all citizens to be equal before the law and no one shall be denied the equal protection of the laws, no discrimination shall be made against any citizen in the application of general laws on the grounds of religion, race, sex, caste, tribe or ideological convictions or any of these. Likewise, the Constitution also provides for framing of special provisions 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. Similarly, the Constitution prescribes that no person shall, on the basis of caste, be discriminated as untouchables or be denied to access to any public place, or deprived of the use of public utilities and has declared such acts to be punishable by law. In addition to this, the Directive Principles and Policy prescribes certain principles and policies to be followed by the State. Article 25 (1) of the Constitution prescribes that it shall be the chief objective of the State to promote conditions of welfare on the basis of the principles of an open society, by establishing a just system in all aspects of national life, including social, economic and political life, while at the same time protecting the lives, property and liberty of the people whereas Article 25 (3) prescribes that the social objective of the State shall be to establish and develop, on the foundation of justice and morality, a healthy social life, by eliminating all types of economic and social inequalities and by establishing harmony amongst the various castes, tribes, religions, languages, races and communities. Under the policies to be followed by the State, Article 26 (2) of the Constitution prescribes that the State, while maintaining the cultural diversity of the country, pursue a policy of strengthening the national unity by promoting healthy and cordial social relations amongst the various religions, castes, tribes, communities and linguistic groups, and by helping in the promotion of their languages, literatures, scripts, arts and culture whereas Article 26 (1) that the State shall pursue a policy which will help promote the

interest of the economically backward groups and communities by making special provisions with regard to their education, health and employment.

From among the Directive Principles mentioned in the Constitution, the establishment and development of a just society based on justice and morality is one of the important principles. For a healthy and just society, there has to be fraternity and bond between all the members of the society. Where on the basis of religion, castes, gender, tribes or any other matter inequality and contemptuous behavior exists, a tolerant and coordinated society cannot be envisaged. Social solidarity cannot be maintained where a society is based on inequality and exploitation. For the development of a healthy society, a coordinated social order based on social solidarity is imperative and to achieve the same, it is imperative that inequality and exploitation is eradicated. In this regard, the State for the purpose of protecting and promoting the rights and interests of women, children and the backward classes has provisioned these matters in the policy of the State. No citizen of the Kingdom of Nepal should be denied from the rights guaranteed by the Constitution and universal principles of human rights and personal freedom.

The learned advocates through their writ petition have stated about the conditions of the *Badi* community and state that they have been subjected to prostitution, sexual exploitation and have been denied from education, health, employment, registration of birth, citizenship and that they lack equal protection of the laws and that there is discrimination in the application of the law and are subjected as untouchables and to other racial discrimination. **It cannot be deemed that the constitutional commitments that are applicable to the general citizens of the Kingdom of Nepal are not applicable to the *Badi* community. It cannot be disputed that the *Badi* people are vested with the right to live an honorable life pursuant to the Constitution of the Kingdom of Nepal, 1990, prevailing laws of the Kingdom of Nepal and pursuant to the international treaties relating to human rights to which Nepal is a Party. Therefore, for the purpose of establishing a just society based on fraternity, bond and social solidarity, the economic, social and political problems faced by the women and children of the *Badi* community should be resolved so that the women and children of the *Badi* community and every one can live a respectable life.**

Within this background, the fundamental problem expressed in the petition is the problem relating to the registration of the birth of child born through a *Badi* woman, wherein the petitioners have stated that Part (a) of Sub-section (1) of Section 4 under the Birth, Death and Other Personal Event (Registration) Act, 2033, provides unequal treatment between a female and a male of a family and have stated the said provision to be inconsistent with Article 11 of the Constitution. Article 11 of the Constitution guarantees all citizens to be equal before the law and that no one shall be denied the equal protection of the laws, and that no discrimination shall be made against any citizen in the application of general laws on the grounds of religion, race, sex, caste, tribe or ideological convictions or any of these and has adopted the universal recognition relating to right to equality. With regards to right to equality raised by the petitioners in relation to Section 4 (1) (a) under the Birth, Death and Other Personal Event (Registration) Act, 2033, Section 4 reads as follows:

Section 4: Notification of personal events:- The following persons shall on the following circumstances register personal events within thirty-five days of occurrence by notifying the office of the local Registrar pursuant to the form prescribed therein.

(a) Notification of birth and death shall be notified by the principal person of the family and in his absence by the eldest person from among the males of the family who have attained majority.

The above-mentioned provision vests the principal person of the family with the authority of notifying the birth and death in a family by notifying the office of the local Registrar pursuant to the form prescribed and in his absence the authority is vested in the eldest person from among the males. Part (d) of Section 2 defines the principal person as “the senior person of the family involved in the administration of the family or a person involved in the nurturing of the family.” It is evident from the Preamble of the Act, that the said Act had been promulgated with the objective of registering the birth, death, marriage, divorce and migration of people within the Kingdom of Nepal and to provide a certificate therein. It is also evident from the provision of the Act, that the principal person of the family pursuant to the legal provision is the authorized person to inform the local Registrar. **Generally, the principal person of a family could be a female or a male. Provided, where the principal person of a family is present, notification of birth and death to the local Registrar may be provided by the male or female but in the absence of the principal person, the provisions prescribes for notification to be provided by the eldest person from among the males having attained majority wherein the said legal provision clearly provides discriminatory practice between male and female members of the family.** There is no rationality in prescribing such discriminatory practices. The objective of the Act is to register the birth and death and provide certificate therein and for this purpose the law prescribes the principal person of the family or in his absence the eldest person from among the males of the family having attained majority to provide such notification and as such it is logical that the said provision has been prescribed to provide equal practices between the male and female members of the family.

As stated hereinabove, **Part (a) of Sub-section (1) of Section 4 under the Birth, Death and Any Personal Events (Registration) Act, 2033 prescribes the principal person of the family to provide notification of birth and death and in his absence the eldest person from among the males in the family attaining majority. The term “from among the males” provides discriminatory treatment between the female and male members of the family and as such the said term is inconsistent with the right to equality as prescribed under Article 11 of the Constitution of the Kingdom of Nepal, 1990. Where the disputed Act had been in force prior to the enactment of the Constitution, the term prescribed under Section 4 (1) (a) under the Act should pursuant to the doctrine of severability be severed from the other portion of the legal provision prescribed therein and the said term pursuant to Article 131 should be declared defunct.**

Likewise, the petitioners have sought the court to declare Section 3 (1) under the Children Act, 2048, void since the petitioners contend the said provision to be inconsistent with Article 11 of the Constitution. Sub-section (1) of Section 3 under the Children Act, 2048 reads as follows:

Section 3: Naming of the child and fixation of the date of birth: (1) Every child upon birth shall have a name according to his religion, culture and practice, which shall be provided by his father and in the absence of the father by the mother and in the absence of the mother by any other member of the family. Provided, the father, mother or any member of the family are not alive or cannot be traced, the person nurturing the child or the institution shall provide a name for the child.

The above provision relates to the right of naming a child and pursuant to the legal provision, the father, mother, other members of the family or person or institution nurturing the child shall name the child upon his birth. The legal provision does not directly or clearly signify unequal treatment between father, mother or male and female members of the family. The legal provision prioritizes the father while naming the child and as such the said provision cannot be deemed to be inconsistent with the right to equality as prescribed under Article 11 of the Constitution and therefore, the said provision need not be declared void.

With regards to the second issue as to whether or not, children of the *Badi* community whose father cannot be traced can be denied from registration of their birth and acquisition of citizenship? Article 9 (2) of the Constitution of the Kingdom of Nepal, 1990, prescribes that every child who is found within the Kingdom of Nepal and the whereabouts of whose parents are not known shall, until the father of the child is traced, be deemed to be a citizen of Nepal by descent. Pursuant to the constitutional provision, Section 3 (4) of the Nepal Citizenship Act, 2020 also prescribes that every child who is found within the Kingdom of Nepal and the whereabouts of whose parents are not known shall, until the father of the child is traced, be deemed to be a citizen of Nepal by descent. Pursuant to the constitutional and legal provisions, it would not be constitutional and legal to deny anyone in obtaining the citizenship of Nepal in accordance to his constitutional and legal rights. The issue as to whether or not registration of birth can be made even when a father cannot be traced, has been analyzed with regards to the first issue in relation to Section 4 (1) (a) under the Birth, Death and Any Other Personal Event (Registration) Act, 2033. Where a father of child cannot be traced and for the purpose of registration of the birth of a child, the principal person of the family or in his absence the eldest person from the family attaining majority shall on the basis of such notification register the birth of the child and therefore, the contention that registration of the birth of a child in the absence of the identification of the father cannot be done is not sustained by this Bench.

The petitioners contend that the children born through the *Badi* women are unable to register their birth and acquire citizenship since their father cannot be traced. In this regard, and pursuant to the deliberations made hereinabove, it would not be constitutional and legal to deny the registration of birth and acquisition of citizenship on the basis that the father of

such a child cannot be traced. Provided, such a person fulfills the legal procedures and submits an application for the registration of the birth and acquisition of citizenship, the same cannot be denied to the person.

The petitioners with the aim of providing an honorable life for the *Badi* community have through their writ petition sought for the issuance of an order on the matters stated in the petition. In this regard, an order had been issued by this Bench on May 20, 2004 wherein the Bench through its order had directed for the formation of a committee under the coordination of the Ministry of Women, Children and Social Welfare comprising of representatives from the *Dalit* Commission, *Badi* community and representative from the concerned Ministry and had directed the Committee to seek the answers to the following questions: What are the current problems faced by the *Badi* community? What kind of programs are being initiated or will be initiated by His Majesty's Government for the resolution of the problem and advancement of the *Badi* community? Provided, any program has been initiated, what has been the impact of such programs? How can the advancement of the *Badi* community be achieved? Pursuant to the order, and under the coordination of the Ministry of Women, Children and Social Welfares, a committee had been constituted comprising of representatives from the Ministry of Local Development, Planning Commission, National *Dalit* Commission, Community Assistance Committee, Kailali, Pro-Public and representatives from the gender mainstreaming program wherein a study report has been attached with the case file. On the basis of the report, the petitioners had contended that prostitution was one of the biggest problem faced by the *Badi* community and had sought for their emancipation from the profession and in order to provide an honorable life for them had sought for alternative employment, social security, skill oriented training and provision for residence for the *Badi* community. **The study report prepared pursuant to the order of this court states poverty and illiteracy to be prevalent within the *Badi* community, that the problem of health, registration of birth and acquisition of citizenship remains a big issue, problems of untouchability, racial discrimination, unemployment, and issue regarding residence remains unsolved and that the community have been a victim of political and the armed conflict.** The report also prescribes several recommendations to be implemented by His Majesty's Government. Therefore, **where the report has been unanimously accepted by the representatives of the concerned unit of His Majesty's Government and where the recommendations is deemed to be implemented, the claims other than the ones deliberated above shall be deemed to be fulfilled and therefore, for the proportionate development of the people of the *Badi* community, implementation of the said report is deemed imperative.**

On the basis of the deliberations made hereinabove, the following orders are hereby issued:

1. The term "from among the males" prescribed under Part (a) of Sub-section (1) of Section 4 of the Birth, Death and Any Personal Events (Registration) Act, which reads as follows: ""Notification of birth and death shall be provided by the principal person of the family and in his absence by the eldest male from among the males in the family having attained majority" is hereby declared defunct.

2. Denial shall not be made with regards to the registration of the birth of the child of the *Badi* women whose father cannot be traced and an order of certiorari is hereby issued in the name of the respondents to make necessary arrangements and to provide citizenship to such children pursuant to Article 9 (2) of the Constitution of the Kingdom of Nepal, 1990 and Section 3 (4) of the Nepal Citizenship Act, 2020.

3. Pursuant to an order of this court, a committee had been formed to study the problems encountered by the *Badi* community. The committee which was formed by the concerned units of His Majesty's Government, *Badi* community and organization such as Pro-Public had submitted a report underlying the prevalent problems and had unanimously recommended certain measures to be implemented to encounter those problems and therefore, **the Bench as such hereby issues directive orders in the name of His Majesty's Government to implement the recommendations on the basis of priority and to provide information of the same to this court.**

It is hereby ordered to provide a copy of this order to His Majesty's Government through the Office of the Attorney General and to maintain the case file accordingly.

s/d
Anup Raj Sharma
Justice

Consenting with the opinion

s/d
Arjun Prasad Singh
Justice

s/d
Sharada Prasad Pandit
Justice

Dated Year 2062 of the month of Bhadra Date 30 Day 5 (September 15, 2005)...

**Supreme Court Division Bench
Hon'ble Justice Bala Ram K.C.
Hon'ble Justice Tapa Bahadur Magar**

**Order
Writ No. 3581 of the year 2062 B.S.
Sub: Mandamus**

Advocate Pun Devi Maharjan 'Sujana', a resident of Lalitpur Sub-metropolis
Ward No. 2, Sanepa 1 **Petitioner**

Vs.

Govt. of Nepal, Office of the Prime Minister and the Council of Ministers,
Kathmandu 1
Govt. of Nepal, Ministry of Women, Children and Social Welfare, Kathmandu
..... 1 **Respondents**
Govt. of Nepal, Ministry of Law, Justice and Parliamentary Management,
Kathmandu 1
Govt. of Nepal, Ministry of Education and Sports, Kathmandu
Govt. of Nepal, Ministry of Culture, Tourism and Civil Aviation, Kathmandu
.1National Women's
Commission, Kathmandu 1

Bala Ram K.C. J: The facts and the decision of the present writ petition lodged as per Art. 88(2) of the Constitution of the Kingdom of Nepal, 1990 are as follows:
Facts of the Petition:

The custom of *Kumari* (Virgin Goddess) is believed to have continued in Nepal since the Middle Ages. The custom of *Kumari* enjoys special significance in the cultural and religious history of Nepal. The historical facts have shown that eleven Newar girls are worshipped as living Goddesses, four of whom reside in Kathmandu, three in Bhaktapur, two in Patan and one each in Devpatan and Bungamati. Among them, the *Kumari* of Basantpur (who is called a princess because she is worshipped by the King), the *Kumari* of Patan, the Akant *Kumari* of Bhaktapur and the *Kumari* of Bungamati are some of the more famous *Kumaris*. The comparative position of the various *Kumaris* is as follows:

***Kumari* of Basantpur:** The *Kumari* of Basantpur is worshipped daily in the morning. Food is cooked separately for her. She is entitled to play for a certain time with the children of the *Kumari* house. She is required to give 'darshan' to some ten to twelve devotees every day. She is taught daily all the subjects of her class for three hours by one of the lady

teachers of White Field School and is promoted to a higher class after completing the promotion requirements as dictated by the rules of the school.” This arrangement has been made by the Government. Restrictions are placed on the *Kumari* regarding her going outside the house. She is required to observe strict rules. She is entitled to move up and down only on the second and third floors of the house. She cannot be photographed or interviewed. She must always dress in red clothes, wear a ‘chwra’ (a kind of bangle) and put a ‘tika’ on her forehead. It is compulsory for her to be present on the occasion of important festivals. The *Kumari* continues to occupy her post until she reaches the age of puberty. The *Kumari* is provided with a monthly allowance of Rs. 6,000. A retired *Kumari* gets a monthly allowance of Rs. 3,000. She is granted Rs. 1,000 monthly to meet her educational expenses and Rs. 50,000 for matrimonial expenses.

Kumari of Patan: The personal house of the girl appointed as *Kumari* is treated as the *Kumari* house. She is prohibited to cross over the main gate of the house. She is worshipped daily. The *Kumari* is taken out of the house especially on the occasion of the festival of Rato Machhindranath and Bada Dashai. The *Kumari* is required to sit every day on a raised seat, dressed in her red clothes. She is also required to give her ‘darshan’ to the devotees. She is allowed to play and to do her homework. The *Kumari* is given tuition every day for two hours by a lady teacher of Basura School. The Guthi Sansthan provides the family of the *Kumari* every month with Rs. 1,800 to meet her educational and worship expenses. She is granted Rs. 1,000 as tuition fee and the school is paid Rs. 2,000 annually. Lalitpur Submetropolis yearly grants her Rs. 12,000.

Kumari of Bhaktapur: The Akanta *Kumari* of Bhaktapur enjoys the freedom to study and to go outside [for a short period]. She must stay inside the *Kumari* house. She continues to hold the post of *Kumari* until she starts menstruating. The incumbent *Kumari* and a retired *Kumari* are entitled to receive a monthly allowance of Rs. 450 and Rs. 100, respectively. There are no special restrictions on the *Kumari*. She is required to wear the red robe only on the occasion of ‘special pujas’. She enjoys the freedom to stay with her family at her house but she must stay inside the *Kumari* house from ‘Ghatasthapana’ to Purnima (full moon).

Kumari of Bungamati: The *Kumari* of Bungamati continues to hold the post of *Kumari* till she loses her milk teeth. The *Kumari* leads a simple life. The incumbent *Kumari* studies at Shikhar Boarding School in Bungamati. She wears the school uniform while going to school. The *Kumari* is required to perform a daily ‘puja’. On the occasion of every ‘Sankranti’, she is taken to the premises of the Bungamati Machhindranath temple where hundreds of devotees worship her. There is no Guthi (Trust) or organization entrusted with the operation and management of the Bungamati *Kumari* tradition. All this is done by the family of the *Kumari*. After her retirement from the post of *Kumari*, she is entitled to lead her life like any other girl.

Thus, all this shows that girls of a very young age are made ‘*Kumaris*’. Although the custom of *Kumari* is a religious and cultural heritage, the girls appointed as *Kumaris* have

been victims of exploitation and discrimination. They are required to abide by strict rules of discipline in regard to matters such as movements, playing sports, staying with the family, dress, going to school, studying, etc. Also, no adequate arrangements have been made for the social security and rehabilitation of retired *Kumaris*. Compared to the *Kumari* customs prevalent in other places, the custom of *Kumari* in Bhaktapur seems to be more liberal. The constitutional rights of *Kumaris*, especially the *Kumaris* of Basantpur and Patan, such as the right to personal liberty, the right to equality, freedom of movement and residence, freedom to assemble, freedom to eat and drink according to one's choice and at desired time, freedom to go to school and study there at par with other children, freedom of wearing clothes according to one's choice, the right to the privacy of body and the right to residence, etc., have been infringed. Since the *Kumari* girls have been deprived of the enjoyment of fundamental rights and freedoms granted by the Constitution, all this has caused an adverse effect on their physical and mental development. Likewise, due to the superstitious beliefs prevalent in the society, the married life of girls who have previously occupied the post of *Kumari* has been also affected. The state has not made any special provision for the social security and rehabilitation of ex-*Kumaris* as reparation for the infringement of their child rights and the discrimination and exploitation made against them. The State has failed to provide them with protection against the discrimination and exploitation being perpetuated against them. As a result, the life of *Kumaris* and ex-*Kumaris* is pitiable.

Article 26(8) of the Constitution has prescribed, as a duty of the State, that necessary provisions be made for safeguarding the rights and interests of children by preventing exploitation against them. But the young girls appointed as *Kumaris* have failed to receive protection from the State in contravention of the spirit of the Constitution. The custom of *Kumari* is also contrary to the Children Act, 1991, as it requires young girls to be offered in the name of gods and goddesses for fulfilling a religious purpose. The custom of *Kumari* is contrary to the rights granted and the duties imposed on the State by the Convention on the Child Rights, 1989, to which Nepal is also a signatory. The said convention has granted a right to children to get an affectionate family environment for the fuller development of their personality and for growth in an environment full of happiness and understanding. Articles 16, 24, 27, 28, 29, 31, and 32 of the convention have obligated the State parties to undertake appropriate legal, administrative and educational measures for the protection and promotion of the rights granted to children by those Articles. Similarly, the Convention on the Elimination of All forms of Discrimination Against Women, 1979, to which Nepal is also a party, has, guaranteeing the rights of women, imposed upon the State the obligation to undertake appropriate legal and other measures for eradicating all forms of discrimination against women. Notwithstanding all this, in the name of the custom of *Kumari*, the State has failed to carry out its obligation as laid down by the said convention with a view to eradicate traditional discrimination and exploitation against young girls (women). Therefore, the meeting of the 30th Session of the Committee on the Eradication of Discrimination against Women held from January 12 to 30, 2004 commented, on the report sent by Nepal on the status of the implementation of the Convention, that the custom of *Kumari* has discriminated against women and also recommended that measures be undertaken to eradicate such a discriminatory custom, as it was inconsistent with the convention.

The exploitation and discrimination perpetuated against young girls in the name of the custom of *Kumari* are also contrary to the International Covenant on Civil and Political Rights, 1966. Article 24(1) of the Covenant prohibits discrimination against children on the ground of religion, colour, sex, race, nationality, etc., and also grants them a right to seek from the family, the society and the nation protection of their rights as children. However, under the present custom of *Kumari*, the girl children have not been able to enjoy the aforesaid rights.

The custom of *Kumari* is a cultural heritage of the valley. Hence, it is better to reform this custom in accordance with norms and values that respect human rights than to abolish it. And only if it is so done shall it receive increased dignity and respect. Therefore, in order to reform the custom of *Kumari* through the enforcement and protection of the rights granted by the law and the Constitution to the women and the young girls who have been subjected to exploitation and discrimination in the name of the custom of *Kumari*, the petitioner prayed for the issuance of the writ of mandamus to the respondents asking them to undertake the measures mentioned below:

- A) To stop and cause to stop immediately the unconstitutional and unlawful activities being undertaken in the name of the custom of *Kumari*;
- B) To conduct public awareness oriented programs intended to create an environment congenial to the enjoyment of the concerned community's right to observe its religion and culture, through the custom of *Kumari*, but without casting any adverse effect on the best interests of the *Kumari* girls;
- C) To conduct adequate programs aimed at the social security and rehabilitation of the *ex-Kumaris*; and
- D) To conduct necessary programs aimed at making the custom of *Kumari* conform to values and norms that respect human rights, in coordination and consultation with the National Human Rights Commission and the experts of the concerned community.

Besides, the petitioner also prayed for the issuance of an interim order to prohibit at once the discrimination and exploitation being practised against the *Kumaris*.

Show Cause Notice

This court issued an order on May 12, 2005 instructing to issue notice to the respondents, asking them to submit written replies within 15 days if there were any reasons or grounds for not issuing the order as prayed for by the petitioner.

Written Replies

Responding to the writ petition, the office of the respondent Prime Minister and the Council of Ministers submitted that the writ petition deserved to be rejected as it did not clearly mention how and which act or activity of that office infringed which right of the petitioner.

The respondent Ministry of Law, Justice and Parliamentary Management submitted the written reply arguing that since that Ministry had not committed any act which infringed any constitutional legal right of the petitioner, the writ petitioner deserved to be rejected.

In its written reply the respondent Ministry of Culture, Tourism and Civil Aviation submitted that the custom of *Kumari* has retained a special cultural significance, because the practice of worshipping *Kumari* as a living Goddess has remained in vogue since the Middle Ages. As the petitioner has also accepted this fact, there is no need to repeal the custom of *Kumari*. Hence, the writ petition deserved to be dismissed.

The Ministry of Women, Children and Social Welfare replied that the custom of *Kumari* which has continued since the Middle Ages could not be abolished or banned and the petition, therefore, ought to be dismissed.

Replying to the writ petition, the respondent Ministry of Education and Sports contended that some specific facilities were being provided to *Kumaris* by the State by mobilizing the available means and resources. The law has not discriminated against any children in regard to their schooling; *Kumaris* have not been deprived of the right to education.

Order for Collection of facts

This court issued an order on February 10, 2006 asking the registry to write to the Ministry of Culture, Tourism and Civil Aviation to make available within three months, the details of the arrangements and facilities regarding *Kumaris* by holding consultations with the concerned bodies and the persons having special knowledge about the custom of *Kumari* as to how the custom of *Kumari* has been practised and on which religious occasions, and also what type of facilities have been granted to *Kumaris* after their retirement.

Petitions of Stakeholders

Ramita Mali and others presented a petition stating that since a girl who is appointed as *Kumari* is entitled to lead an ordinary life after her retirement from the post of *Kumari* in view of the biological condition and quality of her body, the *Kumari* culture does not cast any adverse impact on the girl becoming *Kumari* as well as on the development of the society. The custom of *Kumari* is, therefore, not a social evil. There should be no dispute about the need for the State to make available proper and necessary facilities for the protection and continuity of the custom of *Kumari*.

Likewise, the petition filed by Pramila Bajaracharya and others stated that after her retirement from the post of *Kumari*, the concerned girl lead a more respectable life after returning to normal life and being rehabilitated in the social life. The writ petition deserved to be rejected as it had asked for absolute freedom without taking into consideration the glorious prestige and honour of the *Kumari* culture.

Expenses and Facilities for *Kumaris*

The *Kumari* of Kathmandu is entitled to receive a monthly allowance of Rs. 300 as pension, Rs. 1,000 for 'Bel Bibaha' (a kind of symbolic marriage) and Rs. 10,000 towards marriage expenses. Likewise, the *Kumari* of Bhaktapur is entitled to get a monthly allowance of Rs. 450 during her tenure as *Kumari* and, after her retirement from the post, a monthly allowance of Rs. 100 until she gets married. Similarly, the *Kumari* of Lalitpur gets a monthly allowance

of Rs. 1,500. The letter submitted by the central office of Guthi Sansthan dated April 7, 2006 stated that in addition to the above-mentioned facilities provided by the Guthi Sansthan, other facilities are also made available by Kaushi Toshakhana.

A letter submitted by Kaushi Toshakhana, Tripureshwar dated May 17, 2006 stated that the incumbent as well as ex-*Kumaris* of Kathmandu, Bhaktapur, Lalitpur and Nuwakot were provided with the monthly allowances and facilities mentioned below:

Description	Allowance for Maintenance	Educational Allowance	Comments
<i>Kumari of Kathmandu</i>			Educational allowance has not been given since the fiscal year 2061/62 B.S. (2004/2005)
A) Incumbent <i>Kumari</i>	Rs. 6,000	Rs. 1,000	
B) Ex- <i>Kumari</i>	Rs. 3,000		
<i>Kumari of Lalitpur and Bhaktapur</i>			
A) Incumbent <i>Kumari</i>	Rs. 1,500	Rs. 200	
B) Ex- <i>Kumari</i>	Rs. 1,000		
<i>Kumari of Nuwakot</i>			
A) Incumbent <i>Kumari</i>	Rs. 1,500	Rs. 200	

Order for Constituting a Study Committee

This court, through its order issued on October 31, 2006, observed that the petitioner did not seem to have taken a plea for the total abolition of the custom of *Kumari*. On the other hand the stakeholders as well as the respondents, too, seemed to have consented for the promotion of the *Kumari* culture and for the protection of the rights of the girls becoming *Kumari*. Prior to the final decision of this writ petition, this Court felt the need to have clear knowledge about the issues, such as, what kind of impact has been made by the custom of *Kumari* on the religion, culture and society of the Kathmandu valley?; whether or not there is a need for introducing timely reform and changes in the continuation of its ‘status quo’?; and what is the status of the protection and enforcement of the human rights of the girls who have been made *Kumari*? This court, therefore, constituted a committee as mentioned below with a mandate to study those issues and submit a report on them within three months. The court also instructed to present the writ petition for further hearing after the submission of the report of the Committee.

The Composition of the Committee

- ◆ Joint Secretary to Nepal Government, Ministry of Culture, Tourism and Civil AviationConvener
- ◆ Writ Petitioner Pun Devi MaharjanMember
- ◆ On behalf of the stakeholders Dr. Chanda Bajracharya.....Member
- ◆ An expert on the history and culture of the Kathmandu ValleyMember

Mandate of the Committee

- 1) To study about the custom of *Kumari* and its historical, social, religious and cultural significance and impact.
- 2) To study about the state of the enforcement and protection of the rights of the girls who are made *Kumari*, available to them in accordance with the Constitution of the Kingdom of Nepal, 1990, the Children Act, 2048 B.S. (1991), and the universal principles of human rights.
- 3) To identify the areas regarding the custom of *Kumari* which need timely reforms.

Study Reports

The Study Committee constituted in accordance with the directive of this court submitted its report with the following observations:

The living Goddess *Kumari* has lived as an expressive institution of the Nepali culture. The custom of *Kumari* has continued to remain as a very important practice in the daily life of the Newar Culture of the Kathmandu Valley. Living Goddess *Kumari*, who has incessantly continued to be in existence right from the Malla period till present, occupies a higher position in the society. The people belonging to other religious sects also look at the *Kumari* with equal respect.

The study showed that, generally, girls are appointed as *Kumaris* at the age of four or even less. After attaining menstruation, a girl becomes ineligible to continue as *Kumari*. On the

basis of the respective status of *Kumaris* and the facilities made available to them, even though the state of education, food and recreation for *Kumaris* is not adequate, there does not seem to be any ground for dissatisfaction. The daily routine activities of a girl who becomes *Kumari* and those of ordinary girls cannot be compared. The prestige, honour and status of a girl becoming *Kumari* cannot be compared with those of other girls. The girls who have become *Kumaris* did not ever show by their conduct that an unnecessary burden had been imposed on them. On the contrary, they felt a sense of pride on becoming *Kumari*, and their facial expression showed that they had acquired some divine power. Even the parents were found to have experienced a sense of honour on the selection of their daughters as a *Kumari*. They only wished that the Nepal Government would make arrangements for granting a scholarship for the higher education of *Kumaris* and providing them with a job guarantee.

The state of the human rights of *Kumaris* seemed to be satisfactory. Compared to other girls, their status and standard of living should be considered as superior. They do not seem to be deprived of any rights granted by the provisions of the international human rights instruments including the Convention on the Child Rights, 1989 and the Interim Constitution of Nepal, 2063 B.S. (2006). However, the custom of *Kumari* is faced with a situation in which one has to part with some freedoms in order to obtain some incomparable rights.

There is a need to pay attention to expanding the scope of appointment of *Kumaris* from wider cross-section of society. It seems necessary to frame a clear procedure for the daily upbringing and care of *Kumaris*. The physical and psychological health of *Kumari* must be protected. There should not be any inadequacy in regard to qualitative and standard formal education for them. Qualified teachers need to be appointed for giving them quality education. Proper arrangements should also be made for providing recreation to *Kumaris*. The allowances and other facilities made available to *Kumaris* should be timely, adequate and transparent. Special scholarship quotas need to be fixed for ex-*Kumaris* by the Nepal Government for pursuing study in the areas of their interest according to their academic qualifications. Special priority should be given to their employment. It is essential to make timely reforms in the management of the activities to be performed daily, annually and on the occasion of festivals during the worship of *Kumaris* and the “rathyatra” (the chariot procession). It seems essential that the Nepal Government should make necessary arrangements for the residence of *Kumaris*. There must be proper arrangements for the basic facilities, repairs, painting, electricity and physical security of the residence of *Kumaris*. It seems desirable to maintain a modern account of the physical property, ornaments, land, offerings and donations related to the institution of *Kumari*. The *Kumari* culture ought to be included in the school curriculum for its protection. The government must conduct and cause to conduct the dissemination, publicity and additional study of the *Kumari* culture. It is also highly essential to constitute a separate Committee including experts on culture and ex-*Kumaris* for the management of the custom of *Kumari*.

Petitioner Pun Devi “Sujana” also submitted a research report which stated that a comparative study of the Basantpur *Kumari*, Patan *Kumari*, Bhaktpur *Kumari*, Kathmandu Kyabahal

Kumari, Kathmandu Mubahal *Kumari*, Bungamati *Kumari*, Kathmandu Kilagal *Kumari*, Kathmandu Makhan Tarani (*Kumari*) and Patan Michabahal *Kumari* showed that the condition of the human rights of Bhaktapur *Kumari*, Bunagmati *Kumari*, Kilagal *Kumari*, and Makhan Tarni (*Kumari*) was comparatively ordinary. The customs of Kathmandu Kyabahal *Kumari*, Kathmandu Mubahal *Kumari* and Patan Mikhabahal *Kumari* are found to have been discontinued at present. The state of the human rights of the girls becoming *Kumari*, especially from the viewpoint of their age, education, family environment, clothing, health, recreation and freedom is not satisfactory in respect of the custom of *Kumari* at several places. There seemed to be no guarantee of the basic child rights including the right to education, the right to movement, the right to family environment, the right to a balanced diet, the right to entertainment, etc., granted by the Constitution of the Kingdom of Nepal, 1990 and the international human rights instruments including the Convention on the Child Rights, 1989.

The concern of the girls becoming *Kumari* for the above mentioned rights and the scarcity of funds were found to be the main reasons for the discontinuation of the custom of *Kumari* at some places. If the human rights of the girls becoming *Kumari* are not fully guaranteed, this custom may eventually become extinguished. Hence, the respected *Kumari* culture needs to be made all the more respectable through the means of timely reforms and improvements on the basis of the principles and values of human rights.

Decision

The present writ petition, scheduled for hearing for today as per the rules, has been closely studied along with other related documents and the study report included in the case file. Appearing on behalf of the petitioner, the petitioner advocate Pun Devi herself and the learned advocates Chandra Kant Gyawali, Ravi Narayan Khanal and Meera Dhungana, submitted that the custom of the *Kumari* is a national heritage. There can be no divergence of opinions that the custom needs to be protected. However, because the state of human rights of the girls becoming *Kumari* and of those girls who have retired from the post of *Kumari* is not satisfactory, it is desirable to preserve and protect the *Kumari* culture by means of ensuring their human rights. Hence, they pleaded for the issuance of the order as prayed for. Appearing on behalf of the Nepal Government, the learned Deputy Government Attorney Brajesh Kumar Pyakurel pleaded for the rejection of the writ petition and argued that the custom of *Kumari* was not a custom established and conducted by the government. The government had no direct involvement or participation in the matters relating to the custom of *Kumari*. The petitioner had even no 'locus standi' to file the writ petition. As regards the question of the need for introducing timely reforms and modification in the custom of *Kumari*, the Nepal Government had no objection to that.

Issues to be Decided

After also hearing the submissions made by the various counsels the following issues need to be decided in regard to the present writ petition:

- 1) What are the historical background and the present condition of the *Kumaris*?
- 2) Whether or not the rights granted to *Kumaris* by the Interim Constitution of Nepal,

2063 B.S. and the various international human rights instruments, especially, the Convention on the child rights have been infringed?

3) Whether or not the order should be issued as prayed for by the petitioner?

Now, considering the first question, it seems that the present writ petition has been filed in connection with the various *Kumari* customs prevalent in the three cities of the Kathmandu Valley, i.e., Kathmandu, Lalitpur, and Bhaktpur. In the writ petition and the study reports, nothing has been mentioned about whether or not the *Kumari* custom is in practice outside Kathmandu valley. When we look at the beginning or the start of the custom of *Kumari* prevalent in the Kathmandu valley, there could be found no written historical document in this regard. No historical document such as a Trust document or 'tamraptra' (copper plate inscription), 'sanad' (circular) or 'sawal' (rule), etc, seemed to be mentioned in either of the study reports in connection with the question as to when the custom of *Kumari* started and in the regime of which ruler. It appears from the written replies, study reports and the opinions of experts on the custom of *Kumari* that this custom has remained in practice for many centuries as an inseparable part of the social, religious and cultural life of the Kathmandu valley and that the religious community following it has treated *Kumari* as a living Goddess. It also appears that *Kumari*, the family of *Kumari* and her relations feel proud due to the high respect shown by all the religious sects and the common people. Nonetheless, it seems that none was found to have been appointed as a *Kumari* either by compelling the concerned girl or her family or against their will.

A thorough study of the writ petition and the reports presented by the Study Committee constituted by this Court and the petitioner shows the comparative state of the *Kumaris* of various places within the Kathmandu valley as follows:

Kumari	Age	Education	Allowance	Family Environment	Eating & Drinking	Medical Treatment	Entertainment	Dress	Movement	Marriage	Social Status
Basantpur Kumari	Generally 3/4 years to 12 years until having menses	Taught alone at the Kumari house for three hours daily according to the school curriculum	Monthly- Rs. 6,000/ for ex-Kumaris Rs. 3,000/- and Rs. 50,000/- for marriage expenses	Must stay inside the Kumari house. Not allowed to go home	Fed twice in privacy	Not allowed to visit a doctor	Allowed to play only with family members	Must wear a red dress	Not allowed to go outside the Kumari house	No prohibition on marriage but marriage is not easy due to superstition	People of every religion and the common people express deep respect
Patan Kumari inactive since last 8 or 9 years.		Taught daily alone at the Kumari house for two hours according to the school curriculum	Monthly Rs. 1,500/-, Educational allowance Rs. 2000/-, from Lalitpur Submetropolis annually Rs. 1,200/- for ex-Kumaris monthly Rs. 1,000/	The personal residence of the Kumari is treated as the Kumari house	Fed twice daily only the food cooked at house		Freedom to play, no restriction			No problem in getting married	
Bhaktapur Ekant Kumari		Freedom to go to school like other boys and girls		Must stay at her own house	Except during dussehra, there is freedom to take food of her choice	No restriction on medical treatment	Freedom to play with her family members	Freed-om to wear dress of her choice while seated in the chair	Except during dussehra, no restriction on going outside	Despite superstition, no impossibility of marriage	

Kumari	Age	Education	Allowance	Family Environment	Eating & Drinking	Medical Treatment	Entertainment	Dress	Movement	Marriage	Social Status
Bungamati Kumari					Except during the time of worship, general-ly there is freedom to take food of her choice			Must wear red dress while seated in chair	No restriction on going outside		
Kathmandu Makhan Tarni Kumari		Freedom to go to school as any other boy or girl, but must wear red dress						Must wear red dress			
Kathmandu Kiliagal Kumari		Freedom to go to school like other boys and girls				Not allowed to visit a doctor					
Patan Mikhaabah Kumari		Freedom to go to school like other boys and girls but must wear red dress				No restriction on medical treatment					

Kumari	Age	Education	Allowance	Family Environment	Eating & Drinking	Medical Treatment	Entertainment	Dress	Movement	Marriage	Social Status
Kathmandu Kyabahal Kumari inactive since last 10 or 12 years.		Despite the belief against sending to school for study, her father sent her to school			She is given pure and fresh food as per the Kumari rules	Not allowed to visit a doctor			Not allowed to go outside the chowk (courtyard) of the house		
Kathmandu Mubahal Kumari inactive since last 18 or 19 years.		Not allowed to go to school							No permission to go outside	Marriage is difficult due to superstition	

It appeared from the study of the above mentioned report and the written reply included in the case file that there were variations and not uniformity in the status of the girls who were appointed as *Kumari* under the custom of *Kumari* practised at different places within the Kathmandu valley, the rights and interests of such *Kumaris* and the facilities provided to them and the discipline or the code of conduct to which they must comply. The *Kumaris* of all the places are generally required to be girls aged between 4 and 12. Even though the objective, contents and recognition of the custom of *Kumari* and its establishment are similar, various practices were discovered among the *Kumaris* of different places with regard to different subjects including the right to get education, the right to health, the right to family, the right to food, the right to maintenance, the right to entertainment, the right to clothing and the right to personal freedom. For example, in the case of the *Kumari* of Basantapur of Kathmandu and the *Kumari* of Patan, as their right to education is concerned, they enjoy the right to education, but they are not allowed to go to school, and they are thus required to study at home. Therefore, they are taught two to three hours daily at home by teachers. On the other hand, the *Kumaris* of Bhaktapur, Bungamati and Kilagal are free from any restriction in going to school for getting education, at par with other girls, whereas there are no restrictions on the *Kumaris* of Makhan Tarini and the *Kumari* of Mikhabahal in going to school but there is the practice of going to school wearing only the red dress. Similarly, in the case of the *Kumari* of Gabahal of Kathmandu, although there is the belief that she ought not to go to school for study, the father of the *Kumari* was found to have sent her to school. Besides, in spite of the belief that the *Kumari* of Mubahal ought not to go to school for study, there seems to be no restriction on imparting education to her at home.

As regards the financial resources for the *Kumaris*, Guthi Sansthan, Kaushitoshakhana and the Municipalities provide some amount to the *Kumaris* of Basantapur, Patan, and Bhaktapur and also to the ex-*Kumaris*. However, the report does not show that any financial help is provided by those institutions to the *Kumaris* of other places. A look at the other aspects of the social life and activities of the *Kumaris* concerning the right of movement and the right to stay with their families shows that there has been a custom which compels the Basantapur *Kumari* to stay inside the house and imposes restriction on her going out of the *Kumari* house. Although the personal house of the Patan *Kumari* is used as the *Kumari* house, the custom in practice prevents her from going out of the *Kumari* house. The *Kumaris* of other places are bound to stay inside the *Kumari* house. Even though the *Kumaris* of Gabahal and Mubahal are allowed to stay at their own house, they have been prevented from going out of the house. As regards their food, the *Kumaris* of Basantapur and Patan are served food twice every day whereas the *Kumaris* of other places are generally allowed to take food of their choice except on special occasions. So far as medical treatment is concerned, there has been a custom which does not allow the medical treatment of the *Kumaris* of Basantapur, Patan, Kilagal, Gabahal and Mubahal by medical doctors. However, there seems to be no such restriction in the case of the *Kumaris* of other places. As for sports and child recreation, there seems to be a practice of allowing the *Kumaris* of Basantapur, Patan, Gabahal and Mubahal to play and involve in recreational activities only with their relations within the *Kumari* house. However, there seems to be no such restriction

on the *Kumaris* of other places. As regards their dress, the *Kumaris* of Bhaktapur and Bungamati are free to wear the dress of their choice except while they are seated in their official chair. However, the prevailing custom compels the *Kumaris* of other places to wear only a red dress. Although, after their retirement, there seem to be no any specific problems in regard to the process of socialization of the *Kumaris* including their married life, experience shows that it is not easy for the Basantpur and Mubahal *Kumaris* to get married after their retirement. Even though there is a social belief at other places too that the *Kumaris* should not get married, there is no restriction imposed on their getting married. What is worth considering and important is the fact that the above mentioned *Kumaris*' right to get education, the right to family life, the right to movement, the right to entertainment, the right to medical treatment, the right to married life, the freedom of dress etc. [or restriction on them] are not based on any specific document such as 'tamrapatra' (copper plate inscriptions), 'shilapatra' (stone inscriptions), 'sacad' (circular), 'sawal' (rule), etc. Those rights have been continuously recognized till today only on the basis of traditions, customs, practices, beliefs, etc. What is worth considering and important is that there is no such law or written document having the force of law which imposes rules on not studying or going to school, on not going for medical treatment in case of illness, on staying alone after renouncing one's family and other similar restrictions on other rights related to the right to life.

As regards the second question, the study reports and the written replies also show that, except in the matters relating to the age of the girl and the role to be played by her in her capacity as *Kumari* after her selection for that post, variations that were due to separate beliefs and practices prevalent in the customs of *Kumaris* of different places were discovered in regard to other matters like study, residence, dress, food, medical treatment, movement, and family relation. It was also found that there were beliefs that the *Kumaris* of some places could study but should not go to school, should not stay at home with their families, must stay at the *Kumari* house and must wear red clothes; they should not go out of their house nor should they get treatment from a medical doctor or develop food habits according to their choice.

It is the main contention of the petitioner that the girls appointed as *Kumaris* have been deprived of the enjoyment of the rights granted by the Convention on the Child Rights, 1989, the Convention on the Elimination of All Forms of Discrimination against Women, 1979, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966, ratified by Nepal, and the Interim constitution of Nepal, 2063 (B.S.). Therefore, this Court should issue an appropriate order directing the State to make proper arrangements enabling them to enjoy those rights and also to make proper arrangements for the social security and rehabilitation of the ex-*Kumaris*. The petitioner has chiefly raised the issue of the protection of the human rights of the girls who become *Kumari* and those girls and women who have acted as *Kumaris* in the past and of the need to guarantee their social security. The respondents also appear not to be in disagreement with the need for the protection of the human rights and social security of the *Kumaris* and the ex-*Kumaris*. The *Kumaris* are also Nepali girls and citizens

of Nepal. The Interim Constitution of Nepal, 2063 B.S. has granted various fundamental rights to women and children, and has also provided for making special arrangements for their development and for empowering them, considering them as a disadvantaged and marginalized group. Besides this, as Nepal has ratified the convention on the Child Rights, 1989 on September 14, 1990 and the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 on April 22, 1991, it is essential to see whether or not those rights granted by the aforesaid international Conventions and the Interim Constitution of Nepal are infringed in the case of the girls who function as *Kumaris* under the *Kumari* tradition.

Article 12 of the Interim Constitution of Nepal, 2063 B.S. has granted to every citizen the fundamental right prohibiting the deprivation of personal liberty save in accordance with the law. Article 16 has granted the right to equality; Art 17 has granted the right to education and culture; Art. 20 has granted women's rights; Art. 21 has granted the right to social justice; Art. 22 has granted children's rights. Art. 23 has granted the right to religion and Art. 29 has granted the right against exploitation. In case of an infringement of those fundamental rights provided to women and children, Art. 107(2) of the Constitution has conferred on this Court extra-ordinary jurisdiction for the enforcement of those rights. In order to create an environment conducive to the enjoyment of those rights by the citizens, the Constitution itself has directed the State, especially the Executive, through the directive principles and policy of the State. According to this, Article 33(h) has prescribed as the duty of the state to establish the right of all the citizens in matters like education, health, housing, employment and food sovereignty. Likewise, Art. 33(m) and Art. 32 (n) have provided respectively that it shall be the duty of the State to make effective implementation of the international treaties and Conventions, to which Nepal is a party, and to end the discriminatory laws, if any. It has been mentioned in Art. 34(1) that it shall be the directive policy of the State to establish a just system in the society and to protect and promote human rights. It has been similarly mentioned in Art. 35(9) that the State shall adopt the policy of making special provisions of social security for the protection and promotion of the children.

The Convention on the Child Rights, 1989, ratified by Nepal, is an international instrument prepared for the multi- dimensional development and welfare of the children. The family is a collective group consisting of the parents and the children. The parents are not only the guardians of the children but also an integral part for the [development of] children. This Convention seems to have been introduced for the development of the family consisting of the parents and the children. Art. 1 of that Convention has provided for the children's right to get care and rearing from their parents, whereas Art. 8 grants to the children the right to establish family relations with their parents. Likewise, Art. 9 has provided for the children's right not to be isolated from their house, whereas Art. 12 grants them the right to express their opinion through any media. Similarly, Art. 14 ensures the right to receive guardianship and guidance from the parents and Art. 15 guarantees the right to assemble peaceably and get organized. Besides, Art. 16 guarantees the right to privacy and Art. 19 grants the right against any type of torture, misconduct, damage, neglect or exploitation. Furthermore, Art. 28 gives the right to get education and Art. 31 ensures the right to get rest and leisure and

to play and participate in the social life. Similarly, Art. 32 guarantees the right against economic exploitation and risk, and the right against any work which may prove detrimental to physical, mental, spiritual and family related development. In the same way, Art. 34 ensures the right against sexual exploitation and child pornography and Art.35 guarantees the right against trafficking and kidnapping. Likewise, Art. 37 guarantees the right against torture or any type of cruel or in human or degrading treatment and also ensures the right of personal freedom to every child.

In the context of child rights, Art. 10 of the International Convention on the Economic, Social and Cultural Rights, 1966 (ICESCR) and Articles 23 and 24 of the International Convention on Civil and Political Rights, 1966 (ICCPR) also seem to be significant. Art. 10(1) of ICESCR has provided that since the parents are required to play a significant role in regard to the care and upbringing and education of children, the State should provide as far as possible security to the family institution. Likewise, in order to protect the children against possible economic and social exploitation and against hazardous employment, clause (3) has enjoined upon the State to impose restrictions on paid employment of children who are below the specific age limit set for employment. Similarly, whereas there is provision in Article 23(1) of ICCPR for providing protection to family by the society and the State, Article 24 has provided for granting every child the right to equality against all types of discrimination.

Now it needs to be considered whether or not the custom of *Kumari* infringes the fundamental rights granted to children by the Interim Constitution of Nepal, 2063 B.S. and the rights granted by the Convention on the Child Rights, 1989. For this we shall have to examine what is the role of *Kumaris*.

Child labour has been prohibited not only by the legal system of Nepal but also by the Convention on the Child Rights. In some countries, one is not considered adult until he or she completes the age of 18, whereas in our country one is treated as an adult after the completion of the age of 16. There is a restriction on employing a minor in any type of work. The act of engaging any child who falls under the category of a minor as prescribed by the law in any work amounts not only to the infringement of the fundamental rights and the human rights of children, but such an act also virtually becomes a kind of exploitation. Therefore, it is unlawful to engage children below the age of 16 years in work with any amount of remuneration whatsoever, including other financial and material benefits, irrespective of whether they have been employed of their own will or consent or with the consent of their guardian or parents. Thus, the act of engaging any child below the age of 16 years causes an infringement to the fundamental rights and human rights of such minor, aside from involving Nepal in the violation of the human rights of its citizens, thereby leading to the derogation of its treaty commitments.

It is essential to analyze what we understand by the term “engaging in work” in regard to the issue of whether or not the fundamental rights and human rights of the young girls are infringed during the period when they function as *Kumaris*, when we consider whether or

not “the custom of *Kumari*” amounts to “work” for the girls who become *Kumaris*, the word “work” denotes any act to be accomplished fulfilled by someone. The term “engaging in work” denotes some or any act to be performed or accomplished by someone who, instead of doing it himself or herself, gets it done by someone else and pays him/her some amount or benefit as compensation for doing such a work on his/her behalf. Accomplishing any work involves the use of physical labour. During the period of work or so long as the designated work is not completed, the relation of master and servant is established between the employer and the person thus employed in the work. The worker must act according to the dictate of the master who engages him/her in that work. Whereas one may be expelled from the work in the event of failure to perform the work designated by the master, no one can abandon in mid-course the work thus designated by the employer and it must be completed. So long as the work is not accomplished, the person thus engaged in the work remains completely under the control of the master. To describe the term “to work” or “to engage in work” means accomplishing any act or matter designated by the master on his terms and conditions by investing physical labour and time for receiving the benefit agreed upon in advance.

A minor who has not attained the age of 16 years is not in a position to have attained full physical or mental development. He or she is not competent to decide about what is in or against his or her interest. Such minors should get an opportunity to be brought up with love and affection under the patronage of their parents. Because such minors need the patronage of their parents or guardians, it has been prohibited worldwide to engage minors in work and various rights have been granted to children for the development of their personality. Such rights can be enumerated as the right to get free education, the right to medical treatment, the right to residence, the right to stay with one’s family, the right not to be separated from one’s family, the right to opinion and expression, the right to free movement, the right to recreation etc. And a legal provision has also been made to punish a person engaged in any kind of exploitation of a minor. Engaging a minor in work is a kind of exploitation of the minor. Engaging a minor in work virtually means not only material and physical exploitation of the minor, but also mental exploitation. Article 22 of the Interim Constitution has granted to children the right against physical and mental violence and any other type of violence, besides the children’s right to their identity, the right to upbringing, the right to get basic medical services and the right to social security. It has also been mentioned in Art. 22 of the Interim Constitution and Art. 32 of the Convention on the Child Rights that children must not be engaged in any factory, mine or any other hazardous work. It is for this reason that the fundamental right against physical or mental exploitation granted to every child by Art. 22 of the Interim Constitution of Nepal, 2063 B.S. has the status of an enforceable right which enjoys protection from the court under Art. 107(2) of the Constitution.

It does not appear from the study report and the written replies that the *Kumaris* are required to work, under the custom of *Kumari*, for the sake of others by investing their labour. The petitioner also does not seem to have stated that under the custom of *Kumari* the *Kumaris* are required to work by investing labour. It is

also a matter to be taken into judicial notice by this court that the *Kumaris* do not have to involve themselves in “work”. *Kumaris* are not found to have done “work” nor have they been engaged in work. The study reports show that the “work” to be done by the *Kumaris* is to sit at a designated holy place or “mandap” wearing a specified dress as the living Goddess during the special religious or cultural festivals and to accept the worship and prayers offered by the devotees, treating them as “a living Goddess”. That is to say, *Kumari* is used to be worshipped with devotion as an incarnation of Goddess. Because the *Kumaris* do not have to involve in work by investing their physical labour, it is not proper to say that the custom of *Kumari* is a custom prevailing in contravention of the children’s right granted by Art. 22, the right against torture enshrined in Art. 26 and the right against exploitation embodied in Art. 29 of the Interim Constitution of Nepal, 2063 B.S. The custom of *Kumari* appears to exist as an integral part of the religious, social and cultural rights of the Nepalese people belonging to the Hindu and Bhuddhist religious sects. Every religion has got its own values and features. For example, the Christian people celebrate December 25 as the birthday of Jesus Christ whereas the Muslims celebrate ‘Eid-ul-Fitr’ and ‘Bakrid’. Similarly, the religious followers of the custom of *Kumari* celebrate their various festivals like ‘Dashain’ by worshipping *Kumari* as a Goddess. Thus, the rights available to those girls as per the Constitution and the rights granted by the international human rights instruments including the Convention on the Child Rights do not seem to have been infringed just because those girls function as *Kumaris*. It is a belief under the Hindu religion to worship idols and various creatures in the form of God on the occasion of various festivals. Worshipping various Gods and Goddesses apart, in accordance with our custom, among the Hindus, it has been a practice to worship the elder and the younger brothers as God on a specific day during the festival of ‘Tihar’. Even dogs and crows are also worshipped for one day. In the same way, *Kumaris* are also treated and worshipped as a Goddess. Thus every religion has got these types of specific features.

Another plea of the petitioner is concerned with the prayer for issuing an appropriate order for the enforcement of the *Kumaris* right to get education which has been infringed. Art.7 of the Constitution grants every child the right to get education in his /her own mother tongue. It has also granted every child the right to get education free of cost up to the secondary level. Article 28 of the Convention on the child rights has also provided for imparting to every child primary level education free of cost and made the attendance of children in school compulsory, thus making higher education accessible. Children’s right to education is treated as a fundamental and inherent right. Even if there is any belief or custom or practice prohibiting the acquisition of education, such an approach cannot be validated. Children are the human resources of the nation. The act of making a nation developed and prosperous is chiefly a function of the human resources. The children’s right to education provided by the Constitution cannot be allowed to be infringed in the name of any custom, practice, belief or conservative approach. No law has imposed any restriction on *Kumaris* against getting an education. And since the *Kumaris* can go to school to get education, thus this Court could not agree to the contention of the petitioner that the right of the *Kumaris* to get education had been infringed.

In the name of the right to religion, children cannot be deprived of their right to education. Nor can child labour be legalized in the name of the right to religion. In *people vs. Pierson* (1903)176N.Y.201, the American Judiciary has laid down the principle that “the right to practice religion freely does not include liberty to expose the children to ill health or death”. Likewise, in *Prince vs. Massachusetts* 321 US 158, (1944) it has been propounded that religious belief cannot stand in the way of state regulation of child labour.

Especially because the *Kumaris* of Basantapur, Patan and Mubahal are not allowed, according to the custom in practice, to go to school like other girls and they are taught daily for two to three hours at the *Kumari* house the petitioner claims that their rights are infringed. However, as mentioned above, not only is there no prohibition imposed by any law, but also no written historical document could be found which imposed any restriction on the *Kumaris* on going to school for study. The practice of not going to school seems to have been followed only on the basis of custom and tradition. However, this type of tradition, custom or belief also does not seem to exist uniformly in different places. There does not seem to exist any restrictive practice or belief forbidding *Kumaris* to go to school for study in the case of the custom of *Kumari* prevalent at Bhaktapur, Bungamati, Makhan Tarlni, Kilagal and Mikhabahal. Even though under the custom of *Kumari* prevalent at Kwabahal, there has been a belief against sending the *Kumari* to school, it has been clearly mentioned in the study report that the father of the *Kumari* had himself sent her to school for study. It also appears that the *Kumaris* of Basantapur and Patan have been getting their education at the *Kumari* house itself, the petitioner seems to have taken the plea that the *Kumaris*' right to get education had been violated. Since no historical or legal or religious documents seem to have imposed any restriction on the *Kumaris* by forbidding them to acquire an education, the *Kumaris* seem free to go school to get an education while at the same time performing their role as *Kumari*. Although there is a belief in the custom of *Kumari* of Gabahal forbidding her to go to school, it was found that the father of the *Kumari* himself had sent her to school. Ours is a society where tradition, custom, belief and conservatism have acquired recognition. These types of things have received recognition in the society due to lack of education. **Maintaining one's religious, social and cultural beliefs and traditions and remaining within the confines of the Constitution, is a matter to be decided by every citizen, every family and guardian of every child as to what is right and what is wrong. It is the guardians and the members of the concerned communities who, remaining within the confines of the Constitution, can become the agents of changes in their traditional customs and practices in tune with the times. Hence, like the father of this *Kumari*, the guardians of other *Kumaris*, too, do not seem to face any obstacle in sending them to school to get education, provided that the former so desire.** That is to say, since the *Kumaris* do not seem to face any obstacle in going to school to get education only because of their status as *Kumari*, there is no possibility of the infringement of the right of *Kumaris* to get an education. Hence, there is no need to issue any additional order by this court in regard to imparting education to *Kumaris*. The *Kumaris* can go to school to get their education, except during the period when they sit at the holy place as a Goddess on the occasion of some festivals. **No law seems to have imposed any restriction on *Kumaris* preventing the enjoyment of all fundamental**

and legal rights including the freedom of movement and visit to their families and the freedom of residence granted by the convention on the Child Rights and the Interim Constitution of Nepal, 2063 B.S. Therefore, it is clear that *Kumaris* can go to school to study and acquire education. This Court is empowered, as per Article 107(2) of the Interim Constitution of Nepal, 2063 B.S., to exercise its extraordinary jurisdiction to issue an appropriate order for the enforcement of any right if any law or any executive / administrative order of the government has caused infringement to any right of children. But if on the basis of tradition, custom, practice or belief, any person does not enjoy such a right, the society should be itself aware and conscious of enjoying such a right. **Furthermore, it is also a duty of the State to empower the people for the enjoyment of such rights by creating awareness in the society by conducting awareness raising programs.**

It appears from the writ petition, the written replies and the study reports that the custom of *Kumari* is an historical custom of the Kathmandu valley having religious and cultural significance. This matter has been also taken into judicial notice by this court. The custom of *Kumari* seems to be directly related to the right to equality granted by Art.13, the cultural rights granted by Art.17 and the right to religion granted by Art. 23 of the Constitution to the followers of that custom. Article 23 has provided that everyone has the fundamental right to follow, practise and protect their religion having due regard to the prevalent social and cultural traditions. According to this provision everybody is entitled to follow and practise their religious and culture practised since the olden times without interfering in the religion of others. Since Article 22(2) has granted every religious groups the right to preserve its own independent existence and to operate its religious places and trusts, everybody has the right to practice their own religion and culture individually or collectively in accordance with their belief, conscience and faith. No person or community should impose, in contravention of the Constitution, any undue restriction on the right to adopt and practice any religion granted by the Constitution. However, the State may make a law laying down reasonable restrictions on the right relating to religion in the interest of children under the “*parens patriae* doctrine”. That is to say, if any religion, belief, custom, tradition or practice seems to be contrary to the fundamental and human rights of children, the State in the capacity of guardian and under the “*parens patriae* doctrine” may make a necessary law imposing reasonable restrictions on religious and cultural rights for the protection of the interests of children. The State cannot also tolerate the activities creating anarchy in the society in the name of religious and cultural rights. In the public interest, the state is empowered to control such activities by making a law.

The custom of *Kumari* is a cultural practice deeply connected with the religious right of the majority of people of Nepal who follow the Hindu and Buddhist religions. The rights granted to children by the Constitution and the international instruments including the Convention on the Child Rights and the religious and cultural rights granted by the Constitution to the religious community are not at all mutually contradictory. Therefore, so long as the custom of *Kumari* does not infringe the rights of children granted by the Constitution and the international Conventions,

it should be treated as an integral part of the religious and cultural rights of its followers.

As there is no concrete historical written document regarding the establishment or beginning of the custom of *Kumari*, the life style, food habits, daily routine and the matters of discipline to be observed by *Kumaris* do not seem to be regulated by any historical document, custom or beliefs. Because those things seem to have evolved in accordance with some unwritten tradition, custom or beliefs, there could not be found any legal source for them. Custom may be a source of law but custom cannot take the form of law. Historical documents may also be treated as a source of law in regard to the religious and cultural rights. But because there is no such written document in respect of the custom of *Kumari*, this custom seems to exist in practice only in the form of a tradition.

If any custom or tradition has caused any infringement to the fundamental rights granted by the Convention on the Child Rights or any other Convention on Human Rights or the Interim Constitution of Nepal, this Court is competent to enforce the enjoyment of rights thus infringed by exercising its extraordinary jurisdiction under Art.107(2) of the Constitution and by issuing a directive order to act in accordance with the law or to take other necessary action. This court may also issue an order prohibiting such custom or tradition by law. **In case of conflict between religion and custom, tradition and practice, religion must yield to provide space for social reforms. Religious practices cannot be an impediment to social reforms. Social reform is virtually an eradication of traditional practices and dogmas. The State may prohibit such practices and dogmas if they tend to create impediments to any human rights.** The custom of *Kamlari* can be taken as an example. This custom is prevalent in the Western region of Nepal. Under this custom, poor parents send their children aged 5 or 6 years to the house of the landlords who use them in their household work. The minors used as '*Kamlari*' are supposed to work as lifelong domestic servants at the house of the masters who have purchased them. Under the custom of *Kamlari*, the rights granted to children by the Convention on the Child Rights and also the rights granted to them by the Constitution, such as, the educational and cultural rights (Art. 17), the rights relating to women (Art. 20), the right to social justice (Art. 29), etc., are infringed. ***Kumaris* don't have to do any work for anyone. Since the custom of *Kumari* seems to have been developed for the purpose of offering 'puja' (worship) treating girls as a living goddesses, and since the *Kumaris* are seen to only accept the 'puja' and devotion of the devotees the custom of *Kumari* does not seem to have infringed any rights of children.** *Kumaris* cannot be compared with priests of temples. The priests are required to perform daily worship and prayers in the morning and the evening being present in temples. But the *Kumaris* are required to be present only on special occasions and at festivals to accept the 'puja' of the devotees in their capacity as living Goddesses. And during the rest of the time, there seems to be no restriction imposed on them in regard to the activities such as spending time with the family according to their desire, going to school for study, engaging in recreation, moving about freely, etc. There is an obvious difference between a priest and a *Kumari*. A priest is appointed by a Trust or the director of a temple. In this sense, there exists a master and servant relationship between

the priest and the Trust or director of the temple appointing such a priest. But no such relationship is established in the custom of *Kumari*. The *Kumaris* are, in fact, appointed for the sake of offering ‘puja’ (workshop) and devotion as a living Goddess.

Now as regards the third question, the above-mentioned international instruments including the Convention on the Child Rights have enjoined on the State parties the duty of adopting necessary economic, social, administrative, legal and other appropriate measures for the effective implementation of the rights granted to children without making any discrimination. Similarly, Art.33 (m) of the Interim Constitution of Nepal also provided that the duty of effective implementation of the international treaties and Conventions to which Nepal is a party rests with the State. By virtue of being member State, Nepal must discharge its aforesaid international obligation as well as its constitutional duty.

The custom of *Kumari* seems to have continued in the form of a social belief, tradition and custom. It is a duty of the concerned society and the State to work for the promotion and enrichment of its religious and cultural custom and traditions practised from the time immemorial through the norms and values of human rights. Under the custom of *Kumari*, girl child are chosen as *Kumaris*, the State ought to do something for them during their tenure as *Kumari* and even after their retirement from that post. It has been a universal tenet of the child rights jurisprudence that the interests of children must be given the highest priority while undertaking any activity relating to an issue concerned with children. Therefore, Art.3 of the Convention on the Child Rights, 1989 has also laid down the rule that “In all actions concerning children, whether taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Accordingly, the community which follows the custom of *Kumari* must not prevent its children from enjoying any of the fundamental rights granted to them by the Interim Constitution of Nepal, 2063 B.S., and the rights granted by the convention on the Child Rights, 1989 and the other human rights instruments.

So far as the educational, maintenance related and other expenses of *Kumaris* are concerned, it appears from the study reports that such expenses are borne by the State only to a limited extent. *Kumaris* should be considered to have made contribution to the enjoyment of the religious and cultural rights of the religious community following the custom of *Kumari*. Appreciating the contributions made by them to the social, cultural and religious life of the nation in their capacity as *Kumaris*, the State must make appropriate and necessary arrangements for them, including arrangements for their social security. There can be no two opinions about this matter. The financial help made available by the State for the *Kumaris* of some places and for the ex-*Kumaris* seems to be meager and unequal.

Commenting on the report on the implementation of the Convention sent by Nepal, the meeting of the 30th Session of the Committee on the Eradication of All Types of Discrimination against Women held from January 12 to 30, 2004 observed that the custom of *Kumari* discriminated against women and was contrary to the

Convention and, therefore, it recommended for undertaking steps to eradicate such discriminatory traditional custom. But the analysis made above showed that since it did not appear that there was any restriction on the Nepali girl in regard to the enjoyment of the fundamental rights granted by the Interim Constitution of Nepal, 2063 B.S. and the rights granted by the international human rights instruments only due to their status *qua Kumari*, there was no scope for issuing the writ.

The analysis made above shows that the custom of *Kumari* seems to have existed as an integral part of the religious and cultural right of the Hindu and Buddhist people. Without the presence and participation of *Kumari*, it would be impossible to hold certain festivals, worships and cultural activities of the followers of the Hindu and the Buddhist religions of Kathmandu, Lalitpur and Bhaktpur. Since our society is traditional and also because there is a belief that after becoming *Kumari* a girl should not go for study, some *Kumaris* do not get an opportunity to study. Those *Kumaris* became victims of such a custom and tradition. Because they failed to get an opportunity for education, such *Kumaris* could not lead a self-dependent and self-reliant life after they retired, and thus they were bound to be dependent on their guardians, parents or husbands. This can be treated as an individual surrendering her rights in the interest of the society. Nevertheless, this situation has not been created by law; it has been brought about by social customs, practices, belief and tradition. However, the society of today is progressive and it is in a position to decide about what is right and what is wrong due to the increasing awareness among the people. The society of today has also reached a stage which recognizes the right of every person to get an education without causing any interference to the religious and cultural rights. That is to say, it is a reality accepted by the society of today that the act of acquiring education does not infringe the society's right to religion and culture. The present generation may not have any confusion about this due to the present state of affairs. But the *Kumaris* of yesterday have become victims due to the tradition. It is a reality. Therefore, **the State must give thought to granting facilities like social security or pension benefits to the ex-*Kumaris* who have been deprived of their fundamental right as well as their human right to education in their childhood.**

Hence, as it seems desirable to introduce timely reforms in the *Kumari* culture through the means of social security for the *Kumaris* and ex-*Kumaris* and also, as it is appropriate to conduct an extensive study of how their rights and interests and social security can be promoted by adopting which type of economic, social, legal and administrative measures, after renewing their existing condition and keeping in view the provisions of the Interim Constitution of Nepal and the international human rights instruments relating to the rights of women and children, signed by Nepal, it is appropriate to take action in accordance with that finding. Therefore, a directive order is hereby issued in the name of the respondent Ministry of Culture to constitute the following Study Committee to submit a report along with recommendations, after having consultations with the leaders of the community which follows the *Kumari* culture and its representative associations and organizations, and also the writ of Mandamus is also issued directing the Government of Nepal to implement that report after its submission.

Constitution of the Committee

- ◆ An officer of Joint Secretary level nominated by Nepal Government from the Ministry of Culture.....Convener
- ◆ A representative nominated by Guthi Sansthan..... Member
- ◆ A representative nominated by the Ministry of Child Affairs..... Member
- ◆ A representative nominated by Nepal Government from among the ex- *Kumaris*..... Member
- ◆ A renowned Cultural and Sanskrit expert nominated by Nepal Government.....Member

The Nepal Government shall have to constitute such a committee within one month of the receipt of this order. The committee shall have to submit a report along with its recommendations to the Nepal Government within one year of its Constitution, and the Nepal Government shall have to make one copy of that report available also to the Monitoring and Supervision Division of this Court.

It is hereby further directed that notice of this order be sent to the respondents and the Monitoring and supervision Division of this court, and also instructed that the case be deleted from the record of registration and that the case file be handed over as per the rules.

I concur with the opinion

s/d
Tapa Bahadur Magar
Justice

s/d
Bala Ram K.C.
Justice

Bench officer: Matrika Prasad Acharya
Computer setting: Amir Ratna Maharjan

Done on day 2nd of the month of Bhadra, 2065 B.S.(Aug. 16, 2008).....

Supreme Court, Special Bench
Hon'ble Justice Anup Raj Sharma
Hon'ble Justice Gauri Dhakal
Hon'ble Justice Tahir Ali Ansari
Order

Writ No. 01—063-00001 of the year 2063 BS (2006 AD)

Ms. Meera Dhungana, for her own behalf and by authorization for and on **Writ** behalf of Women, Law and Development Forum located at Ward No. 11 **Petitioner** of Kathmandu Metropolis, Kathmandu District

Vs.

Office of the Prime Minister and Council of Ministers, Singhadurbar	1
Ministry of Law, Justice and Parliamentary Affairs, Singhadurbar.....	1
Ministry of Women, Children and Social Welfare, Singhadurbar	1
Ministry of Defense	1
House of Representatives	1
National Assembly	1
Law Commission	1
Nepalese Army Head Quarter, Bhadrakali	1

Opposite Parties

Case: Certiorari

Anup Raj Sharma J: The summary of facts and issues of the above mentioned writ petition filed before this Court under Art 23 and 88(1) of the Constitution of Kingdom Nepal, 2047 BS (1990 AD) which is found justiciable under Article 162 of the Interim Constitution of Nepal, 2063 BS (2006 AD) are as follows: -

The writ petitioner states in her writ petition that the Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) has provided in its rule 8 for the family pension, in rule 9 for the educational allowance, in rule 10 for the period to entitle the receipt of the family pension and the educational allowance. Provision has been made in the said rule 10 as “Notwithstanding anything contained in foregoing rules 8 and 9, the dependent shall be entitled to receive the family pension or educational allowance for such period till s/he attains the age as prescribed by the said rules or till the date s/he joins the government service whichever is the earlier, *Provided that, in case of a daughter she shall not be entitled to receive such pension or allowance after her marriage if she*

gets married prior to attaining the age as prescribed by the said rules". The proviso made by the said rule 10 is inconsistent with the spirit of the provision of Article 11 of the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) and the Human Rights related international instruments ratified by Nepal that which expresses Nepal's commitment made against discrimination. Article 11 of the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) has guaranteed for right to equality and has accepted for making positive discrimination for the better interest of the women and girl-children. The aforesaid provision made by the proviso of rule 10 of the Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) which discriminates between the son and daughter of the army personnel depriving the daughters from the right of receiving the education is inconsistent with the spirit, values, norms and aim of the provision of Article 11 of the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) which guarantees the right to equality to all citizens. Therefore, let the wordings "*in case of a daughter she shall not be entitled to receive such pension or allowance after her marriage if she gets married prior to attaining the age as prescribed by the said rules*" contained in the said proviso being inconsistent with the provision of Article 11 of the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) be declared *ultra vires* by issuing an appropriate order including the order of certiorari under Articles 1 and 88(1) of the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD).

This Court had passed an order directing to issue the show cause notice in the name of the opposite parties asking them as to what was the matter. The order further had directed to present the case file before the Bench with the affidavits submitted by the opposite parties in case the affidavits are submitted within the prescribed time limit or after the expiry of the time limit prescribed for submission of the affidavits.

The Law Commission in its affidavit submitted before this Court states that the writ petitioner is unable to mention in the writ petition as to what the reasons were behind for making the Law Commission as an opposite party in the present case and therefore the writ petition is liable to be dismissed.

The Parliament Secretariat on behalf of the House of Representatives and the National Assembly in its affidavit submitted before this Court states that the Legislature is always aware and cautious to make timely reforms in the Nepal laws by incorporating the cultural values and norms of Nepalese society and the spirits and principles contained in the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) and the Human Rights related international instruments to which Nepal is a party. However, the rules in question are made by the government in exercise with the delegated legislative authority and it is irrelevant to make the House of Representatives and National Assembly as the opposite parties in the present case. Therefore, the writ petition is liable to be dismissed on the ground that the writ petitioner has made the House of Representatives and National Assembly the unconcerned institutions as the opposite parties.

The Ministry of Defense in its affidavit submitted before this Court states that the Royal Nepalese Army Recruitment, Promotion and other Miscellaneous Arrangement (Eighteenth

Amendment) Rules, 2031 are still in existence and the Ministry is bound to do as per the law prevailing for the time being, and therefore, the writ petition is liable to be dismissed. The Office of the Prime Minister and Council of Ministers in its affidavit submitted before this Court states that rule 10 of the Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) is made in exercise of the power vested by sections 11 and 165 of the Army Act, 2016 BS (1959 AD) and the provisions of the said rules are seen consistent with the provisions of the prevalent constitution and the Army Act. It is universally accepted fact that some control may be made and restrictions may be put as per the specific nature of some profession or occupation or employment in order to undertake such profession or occupation or employment. Therefore, the writ petition is liable to be dismissed on the ground that there does not exist any reason to make this office as the opposite party in the present case.

The Ministry of Law, Justice and Parliamentary Affairs in its affidavit submitted before this Court states that a daughter after her marriage gets her right to her husband's property and therefore the proviso was contained in the said Rule 10 accordingly and therefore it would be improper to say that the said proviso infringes the fundamental right of a daughter nor the proviso was put intending to minimize the self-respect of women or her right to education, rather, the said Rule 10 aims to provide for making necessary arrangement to financially assist the family of personnel of the Nepalese Army for bringing them up in case such army personnel is dead or physically impaired in course of fulfilling his/her duty. Therefore, the pleas taken in the writ petition are illogical and unreasonable and hence the writ petition is liable to be dismissed.

The Nepalese Army Head Quarter, Bhadrakali in its affidavit submitted before this Court states that the Nepalese Army Head Quarter, does not have any power to make, amend or repeal a law and it is illogical to make Nepalese Army Head Quarter as an opposite party in the present case on the matter relating to a law made by the legislature. Therefore, the writ petition is liable to be dismissed, let it be dismissed.

The Ministry of Women, Children and Social Welfare in its affidavit submitted before this Court states that this Ministry was not involved in making or amending the rules questioned by the writ petitioner and the said act does not fall under the jurisdiction of this Ministry. The writ petitioner is unable to indicate with evidential fact as to what type of work done by this Ministry infringed the petitioner's constitutional and legal right. Since the writ petition is based on hypothetical logic and has made this Ministry an unconcerned institution in the matter raised in the petition, therefore the writ petition is liable to be dismissed, let it be dismissed.

In the present case docketed before this Bench as per rules, the writ petitioner, the advocate Ms. Meera Dhungana submitted by stating that the proviso of Rule 10 of the Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) has by reason of marriage discriminated daughters against son on receiving the family pension or allowance. It would have been treated as constitutional had it made positive discrimination in favour of

the daughter. On the contrary, to say that daughters will not receive family pension and allowance would not be in consonance with Constitution. Learned Government Deputy-attorney, Mr. Brajesh Pyakurel representing the opponents including the Office of the Prime Minister and Council of Ministers of the Government of Nepal submitted before the Bench by saying that the legal provision relates to any army personnel who dies or sustains bodily injury that renders permanent disability, in such a case the dependents of the deceased or disabled army personnel would be entitled to receive family pension or educational allowance till such dependant attains the age of 18 years or joins the government service whichever is earlier. After attaining the age of 18 years s/he would cease to receive such allowance. It should be noted that the law also prohibits marriage prior to attaining the age of 18 years, and violation of the law by such person would deprive of the allowance and pension. Therefore, the said proviso apparently discourages daughters to marry prior to attaining the age of 18 years. Therefore, the writ petition is liable to be dismissed and let it be dismissed. After perusal of the case file and hearing the arguments of the learned counsels representing both the sides of the case, the Bench deems that the following two issues need to be resolved:

1. As to whether or not the proviso of rule 10 of the Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) is inconsistent to the provision of Article 11 of the then prevailing Constitution of the Kingdom of Nepal, 2047 BS (1990 AD).
2. As to whether or not there exists the situation for the issuance of the order as sought in the writ petition. As to whether or not such order should be issued.

So far the first question is concerned, the provision contained in Article 11 of the then prevailing Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) and the Article 13 of the present Interim Constitution of Nepal, 2063 BS (2006 AD) relate to the right to equality. The writ petitioner has sought the declaration of the provision made by the proviso of rule 10 of the Royal Nepal Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) categorizes son and daughter into two group and discriminates the daughter of the army personnel and deprives the married daughters from the right to receive education and hence inconsistent with the spirit, values, norms and aim of the relevant provision of the Constitution that guarantees the right to equality to all citizens and therefore, the expressions contained in the said proviso should be declared *ultra-vires*. Before reaching any conclusion it is pertinent to discuss the concept of equality and the way that the Constitution has prescribed for the exercise of this right.

While analyzing the concept of equality, it appears to us that in general terms the word “equality” means like treatment or a situation of non-discrimination. In the realm of justice “equality” means the non-discriminatory treatment by the state to its citizens on the basis of caste, race, sex, religion or ideology. In other words, it means the enactment of law to be equally applicable to all its citizens, to treat equally and to make facilities provided by the state equally available to all its citizens.

As a matter of fact, the concept of equality is not the outcome of present era but a concept gradually developed in some ways or the other from the very inception of human-civilization. Equality is a matter of interest and necessity because every human being is born in the form of human being and also dies in the same state. Therefore, equality has become a basic concern and a matter of vital necessity to human beings. Though varying in nature and extent, every human being has a will or interest, sensitivity, a desire to develop personality and an aim to live freely with honor and dignity. It is possible to achieve and realize all of the above only in an atmosphere of equality; accessible only in an environment of non-discrimination. Therefore, despite diversities, human being is effortful to creating the atmosphere of equality to the maximum extent possible.

The right to equality is considered as perennial and universal right. Therefore, it is said that the right to equality is a ubiquitous right and it must be present wherever law makes its appearance. For this reason, it is found that, almost all countries of the world, have guaranteed the right to equality in their Constitutions. A perusal of national laws and international treaties and covenants shows the following two concepts being developed under the equality principle and constitutional jurisprudence.

Equality before law, and the equal protection of law. The principle of equality before law is found to be based on the theory of rule of law propounded by the jurist Mr. A. V. Dicey. Hence, this has been accepted as one rule in the English Common Law System and is considered as the outcome of the system. This Court has in the case of *Babu Ram Paudel vs. Cabinet Secretariat and Others* taken it as a negative concept and observed that the concept does not provide any specific facility to a specific person and that all are equal in the eyes of law and equally protected in the general application of law [Nepal Law Reporter, 2051 (1994 AD) Decision No. 4875, page 143]. The first condition of the right to equality is the guarantee of the policy of equality in the eye of law and ensuring the same in practice. In other words, under the concept of the right to equality, discriminations against any citizen in the application of general laws on grounds such as religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these are proscribed. Therefore, this is called a negative concept. Further enlarging the concept of equality before law, learned jurist A.V. Dicey links it to “equal subjection of all classes to the ordinary law of the land and administered by the ordinary law courts”. this principle enunciated by Mr. Dicey, has been endorsed by this Court in the case of *Iman Singh Gurung vs. General Military Court, Royal Nepal Army Headquarters, and Others* has ruled that if one is deprived of the opportunity to seek and get justice from ordinary courts of law, and where there is no reasonable and discernible ground for such deprivation, such act is discriminatory and hence inconsistent with sub-article (1) of Article 11 of the Constitution (Nepal Law Reporter, 2049 (1992 AD) Decision No. 4597, page 710).

Another aspect of the principle of right to equality is the equal protection of law. As human beings are unequal due to various factors such as natural, economic, cultural, religious etc it is not possible to exercise full equality. Therefore, it is conceived that equals should be treated equally and unequal should be treated unequally; it is considered as the positive

aspect of the right to equality. Not only unequal treatment of similarly situated person but equal treatment of those unequally situated is also considered to be against this principle. Generally the same law should be equally applicable to everyone. However, it cannot be said that the same law should be applicable to each and everyone throughout the country without taking cognizance of the prevailing circumstances. This concept of right to equality is enshrined in Article 11(4) of the Constitution of the Kingdom of Nepal, 2047 and in proviso to the sub-article (3) of Article 13 of the Interim Constitution of Nepal, 2063 it embraces positive approach to equality, i.e. principle of equal protection of law and keeps women, *Dalits*, indigenous ethnic tribes, *Madheshi*, or peasants, laborers or those who belong to a class which is economically, socially or culturally backward and children, the aged, disabled and those who are physically or mentally incapacitated in the same bracket and aims to avail equal opportunity to them. It is possible that the people not covered by the said proviso may not be entitled to claim or enjoy such opportunity provided under the said proviso on the basis of the principle of right to equality. This cannot be claimed as discriminatory treatment as the groups of people given special treatment are considered as unequal. However, it should not be construed as allowing discriminatory treatment among persons falling under the same special group.

The enactment of laws that go against equality and practices that violate the right to equality are based on the assumption that the right to equality is a right against the State that behaves against equality. All the rights conferred to the people from ancient times to the present day are couched as the rights against the State which may, in other words, be recognized as the directives to the State. Although some rights seem to be against the individuals, as they [i.e. individuals] are protected by the State, these rights are also framed under the same principle. In the constitutional law the right to equality is considered to be concerned with the State Party. The Constitution adopts the principle that no discrimination is made between the citizens by the State or in the activities of the institutions established by the State. As a matter of fact, this right is a powerful weapon given to the people against the government arbitrariness. Since the constitutional declaration is being made by the State, the right to equality is not deemed as issued against the individuals.

Equality is not an absolute but a relative concept. Its relativity is concerned with the capacity, status, condition etc of the targeted class of people. People having similar capacity, status and condition fall under the same class. It has been discussed earlier hereinabove in the context of principle of equal protection that state should not discriminate in the treatment, offering facilities and opportunities to be provided to its citizens. Equal treatment should be made between the equals and unequal treatment may be made between unequals. In this sense, law can be enacted and applied classifying the people into different classes in a just, lawful and objective manner and be equally applicable amongst the people of similar classes while distinguishing dissimilar classes of the people and treat them differently. Several legal enactments generally try to bring a group together and treat those left out differently. Making reasonable classification for the purpose of protection of equality is neither easy nor unlimited. Nevertheless utmost care should be taken to avoid futile and discriminatory classification. Further, the legislative power to make reasonable classification should be

brought under the scope of judicial review. Although there lacks any hard and fast rule regarding reasonable classification, the same can be justified if contains the following conditions:-

Intelligible differentia: The class of the people that are to be treated differently must be distinct from the people of other classes. Such differentiation must be reasonable. It should never be artificial, vague and arbitrary. Since the purpose of classification is to differentiate the classes falling under a system, the classification should not be with a nature of herding but other classes that are going to be differentiated should actually be based on substantial distinction. In addition such classification should be reasonable from the point of view of public interest and justfulness. It is possible that classification may bring distinct separation between the people of one class and the people of another class, but such classification should be intelligible and judicious (*Baburam Regmi and Others vs. Ministry of Law and Justice and Others*, Nepal Law Reporter 2056 BS (1999/2000 AD), Decision No. 6749, page 504). The classification may be deemed as arbitrarily made in case it is not logically intelligible and acceptable to a person of general prudence (*Iman Singh Gurung vs. General Military Court, Royal Nepalese Army Headquarter and Others*, Nepal Law Reporter 2049 BS (1992/1993 AD), volume 7, Decision No. 4597, page 710).

Rational Nexus or objectivity:- The state is not prevented from enacting discriminatory laws that promote substantive and real equality. There should be specific objective behind such enactment. Mere classification of the targeted community for whom special arrangements or discriminatory treatment are to be made by law or by the state will not be sufficient. There should be clear relationship between the targeted class and the objective of the legislation that is going to make the special arrangement. If appropriate and reasonable relationship between the targeted class and the objective of the legislation that is going to make the special arrangement is lacking, such legislation may not be treated as the legislation to make positive discrimination. Such legislation shall be classified as the law providing unequal and discriminatory treatment and such law may be declared null and void. Where meaningful and just relationship is lacking, the classification may be construed as arbitrary.

Lawful Classification: The objective of the law brought for making discrimination between the people and the classification itself should be lawful. Even where the classification is based on intelligible differentia or where the classification has a nexus with the objective of the law intended to be enacted as mentioned hereinbefore, such law shall not be treated as just and lawful in case its objective is not intelligible. Illegal activity cannot be given continuity. The classification thus made by enacting law should compulsorily be consistent with the principles of law. In addition, such law should not be intended to restrict some specific class from enjoying such facilities or imposing unnecessary burden on another class. Also, it should not be of the nature of imposing legal pressure in course of implementation.

As a matter of fact, it would not be possible to describe the grounds of classification as objective principles nor describe them as precondition in the Constitution. This depends on the good faith of the legislature while in the judicial review subjective satisfaction of the Court would be taken as the main ground. Moreover, it is also a matter to be examined on

a case-wise basis. However, while examining, it should not be so rigidly taken that it would create hindrance to the State in making and implementing useful and appropriate law intended to solve several problems facing the society.

The other aspect of equality is the positive discrimination. While formal equality among individuals is one aspect of equality, the other aspect is the substantive equality amongst different classes. The concept of positive discrimination has evolved as a result of the idea of group equality. Here, one group is included, distinguished, restrained, excluded, or given special privileges and thus tried to be leveled up to equal status with another group. Such an attempt plays pivotal role to eliminate discrimination prevailing within the classes of people, and by embracing equality it gives an important feedback for attaining the social justice. In this sense, it should be looked upon as a legitimate means created within the Constitution to remove inequality prevailing in the society. The principle of positive discrimination is not just limited to creating equal opportunity rather it is a meaningful way for creating substantive equality that ensures equality of result. Besides creating strong legal provisions on positive discrimination many countries seem to have attached equal emphasis on effective implementation of such policies. Not only for the reason of emergent human values and norms, unless the backward community is brought in par with forward community by giving the former special facilities, privileges and opportunities, human progress and development would be meaningless.

The most powerful philosophical strength behind the principle of positive discrimination is the realization that the backward class could not come to the mainstream of national life due to the discriminatory policies adopted in the past that deprived them of reasonable opportunities in economic, social, educational sectors. By way of compensating the discriminatory treatment meted to them in the past, they should be provided with special facilities, exemption or opportunities. For this reason, this concept is also known as the compensatory discrimination or compensatory state action.

Upon perusal of the preamble of the Constitution of the Kingdom of Nepal, 2047, although it seems prima facie that it has supported formal equality, the expressions used in the first paragraph such as “securing social, political and economic justice to the Nepali people long into the future” suggest that it emphasizes not just the formal equality. In a society with extreme inequality and diversity the term “justice” aims to secure substantive justice to the people of backward class by making special arrangements. Thus it should be construed to have embraced the principle of substantive equality. This principle of substantive justice has been given place in the Constitution in sub-article (3) of Article 11 and sub-articles (7), (8), (9) and (10) of Article 26 in Part 4 of the Constitution under the heading Principles and Policies of the State in the Constitution.

Now, while considering the present subject matter, it would be proper to cite the legal provision made by Rule 10 of the Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) which reads as follows:-

“10. Duration for family pension and educational allowance:- Notwithstanding anything contained in foregoing Rules 8 and 9, the dependent shall be entitled to receive the family pension or educational allowance for such period till s/he attains the age as prescribed by the said rules or till the date s/he joins the government service whichever is the earlier. Provided that, in case of a daughter she shall not be entitled to receive such pension or allowance after her marriage if she gets married prior to attaining the age as prescribed by the said Rules.”

Upon perusal of the said legal provision, it seems to us that with regard to the family pension to be received by a family member of the deceased or disabled army man, it keeps unmarried daughter and son in one group and the married daughter in the other group, whereby the married daughter would be deprived of the family pensions and benefits following her marriage. Rule 9 of the said Rules provides that such family allowances would be given for such period until s/he attains the age of 18 years. From such legal arrangement it seems that in case of a daughter if she gets married prior to attaining the age of 18 years she would be deprived of the family pension and educational allowances. The prevalent Nepal law (no. 2 of the Law on Marriage of the Country Code) has prescribed the marriageable age for a girl as 20 years in case where guardian’s consent is obtained, otherwise 22 years. By this legal provision, it is found that the daughter cannot marry at the age as mentioned in the said Rules. In such circumstances, causing the marriage of the daughter prior to attaining the age of 18 years, depriving her from family pension and benefits on such ground does not carry any sense. The government side could not produce any logical basis for depriving the daughter of the family benefits and discriminating the daughter against the son. The proviso to Article 11 (3) of the Constitution of the Kingdom of Nepal, 2047 has provided that special provision may be made by law for the empowerment and development of women but they cannot be deprived of the facilities nor can be provided less facilities under any law. In this context **discriminating daughter upon marriage (that also against the prevailing law) against unmarried daughter, and against son, which is permitted by rule 10 of the Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) does not seem consistent with the provision made by Article 11 of the then Constitution of the Kingdom of Nepal, 2047.**

So far the second question as to whether or not there exists the situation of the issuance of the order as sought in the writ petition or not and whether or not such order should be issued is concerned, **the proviso to Rule 10 of the Rule 10 of the Royal Nepalese Army (Pension, Gratuity and other Facilities) Rules, 2033 BS (1977 AD) stating “Provided that, in case of a daughter she shall not be entitled to receive such pension or allowance after her marriage if she gets married prior to attaining the age as prescribed by the said Rules” being found contradictory with the provision of Article 11 of the Constitution of the Kingdom of Nepal, 2047, is hereby declared**

to be *ultra vires* with effect from today's date. Let the copy of the Order be given to the Office of the Attorney General and the case file be delivered as per Rule.

S/d
Anup Raj Sharma
Justice

I concur with the above opinion.

S/d
Gauri Dhakal
Justice

Done on day 14th of the month of Ashad, 2064 B.S.(Jun. 28, 2007).....

**Supreme Court, Division Bench
Hon'ble Justice Min Bahadur Rayamajhee
Hon'ble Justice Kalyan Shrestha**

**Order
Writ No. 064.....WO.....0230**

Sub: Mandamus

Advocate Prakash Mani Sharma, resident of Kathmandu District, Kathmandu Metropolis, Ward No. 14, Kuleshore, self and on behalf of Pro-Public.....1
Advocate Rama Pant Kharel, resident of Kathmandu District, Kathmandu Metropolis Ward No. 33, Gyaneshor.....1 **Petitioners**
Advocate Sharmila Shrestha, resident of Kathmandu District, Sakhu Pukulachi VDC Ward No. 8.....1
Advocate Kabita Pandey, resident of Kathmandu District, Kathmandu Metropolis Ward No. 34, Baneshor.....1
Advocate Basanta Prasad Adhikari, resident of Kathmandu District, Kathmandu Metropolis Ward No. 34, Baneshor.....1

Vs.

Government of Nepal, Prime Minister and Office of the Council of Ministers, Singhadurbar1
GoN, Ministry of Population and Health.....1
GoN, Ministry of Women, Children and Social Welfare.....1 **Respondents**
Nepal National Women's Commission, Singhadurbar1
Nepal National Human Rights Commission, Harihar Bhavan.....1

Kalyan Shrestha J: The content and order of the writ petition submitted before this Bench pursuant to Articles 32, and 107 (2) of the Interim Constitution, 2063 is as follows:-

Protection and promotion of women's reproductive health is a matter of interest for everyone since this right is directly related to the development of women's economic, educational, social, political and cultural rights. The problem of uterus prolapse which is prevalent in women not only has a negative impact on their reproductive health but also causes encumbrances to their social, family, and marital life and the child born through such women face many problems. In order to provide access to the right to reproductive health and in order to eliminate the problems related to reproductive health, Article 20 (2) of the Interim Constitution, 2063, has prescribed that every woman shall have the right to reproductive

health and other reproductive rights wherein reproductive health has been guaranteed as a fundamental rights in the Interim Constitution. Without the guarantee of this right, the women shall not be able to exercise other fundamental human rights enshrined in the Constitution. Therefore, it is the constitutional obligation of the State to provide basic minimum infrastructure for the practical execution of this right. Unfortunately, no effective programs have been initiated by the State for the prevention and redressal of the problem relating to uterus prolapse of women, wherein majority of the women in Nepal face premature death and some of the women and the children born through them face sickness and illness. A study report claims that approximately six hundred thousand women are a victim of this problem and from among these women; approximately two hundred women need immediate treatment. In 2005, Safe Motherhood Network Federation, Nepal had conducted a study on Uterus Prolapse: “A Key Maternal Morbidity Factor Amongst Nepali Women” in ten districts namely Dhankuta, Siraha, Bara, Nuwakot, Kapilvastu, Baglung, Banke, Surkhet, Kanchanpur and Baitadi. The study report underlines that 4,518 women had come to the health camps and from among these women, 415 suffered from the problem of uterus prolapse. A women’s health camp was organized in Doti and Acham districts by Nepal Family Planning Association in 2056 wherein 3,000 women had come to the health camps and out of the 3,000 women, 2,000 women suffered from reproductive problems, and out of the 2,000 women suffering from reproductive problems 25% suffered from the problem of uterus prolapse. The report also underlines that 30% of such problems were faced in Terai and 70% in the hilly districts. The study report further underlines that the principal reason for uterus prolapse is lack of nutritious food at the time of pregnancy, lack of care and health services for lactating mothers, social and family discrimination against women, lack of awareness on reproductive health, lack of access to health camps or concerned units, lack of proper equipments and medical practitioners, unsafe abortion, poverty, and practice of social customs against women. The petitioner further contend that where women are vested with the constitutional rights to exercise their rights relating to health services and facilities and where the fundamental human rights guaranteed by international human rights treaties and conventions entitles women to receive free consultation, treatment, health services and facilities, the petitioners have sought the Court to provide directive orders against the Ministry of Population and Health, Ministry of Women, Children and Social Welfare and against the Prime Minister and Council of Ministers, directing them to provide services or cause to provide services through the health centers, sub-centers and from health workers and subsequently provide an updated report in this regard to the Supreme Court and the petitioners furthermore have sought the Supreme Court to issue an order of certiorari against the respondents to draft a Bill on women reproductive health and table the same before the Parliament. Likewise, the petitioners have also sought for the constitution of a special committee under the coordination of the Ministry of Women, Children and Social Welfare, comprising of representative from the petitioner’s organization as well as representatives from other organizations involved in women’s health and have sought this Court to issue appropriate orders to implement informative programs through national media and to implement people oriented programs for the resolution of the problem relating to uterus prolapse.

An order had been set aside by this Court on September 30, 2007, wherein the said order had directed to provide a copy of the writ petition to respondents 1, 2, and 3 through the Office of the Attorney General seeking the respondents as to why the order sought by the petitioners need not be issued and had directed the respondents to submit their rejoinder within 15 days from the date of receipt of the order excluding the period of travel and likewise the order had directed to provide a copy of the writ petition to respondents 4 and 5 through the concerned District Court seeking the respondents as to why the order sought by the petitioners need not be issued and had directed the respondents to submit their rejoinder in person or through their representative within 15 days from the date of receipt of the order excluding the period of travel. Furthermore, the order had directed the prioritization of the case and had subsequently directed for the submission of the case for hearing upon receipt of the rejoinder or upon the expiry of the limitation for submission of the rejoinder.

The rejoinder submitted by the Ministry of Population and Health states as such: That the petitioners have failed to state as to what rights have been violated by actions undertaken by the Ministry and that since, the rights of the petitioners have not been violated by the act of the Ministry, the writ petition should be quashed.

Likewise, the rejoinder submitted by the National Human Rights Commission states as: That extensive programs needs to be initiated to create public awareness on the protection of women's reproductive health and reproductive rights by the concerned units and organizations of the Government of Nepal and by various national and international organizations involved in reproductive health sectors. That National Human Rights Commission is involved in the protection and promotion of human rights. That the Commission has not received a single petition alleging violation of the rights relating to reproductive health and reproduction and failure to receive medical treatment in relation to uterus prolapse. That the Commission has taken notice of the subject matters raised in the petition and that the Commission shall entertain this issue in the days to come wherein the Commission has requested the court to quash the writ petition.

The rejoinder submitted by the National Women's Commission states as such: That the Commission had been established in 2058 for the protection of the rights and interest of women. That the officers appointed therein have completed their tenure of two years, and in the absence of officers, the Commission, has failed to function pursuant to its objectives. That the Commission is active in formulating and implementing programs pursuant to the rights and acts guaranteed by the Act and that the Commission is serious in relation to women's reproductive right and to the women's right guaranteed by the international treaties and agreements to which Nepal has been a Party and where the Commission need not have been made a respondent, the writ petition should be quashed.

The content of the rejoinder submitted by the Prime Minister and Office of the Council of Ministers is as such: That in order to provide continuity to the allowance provided to lactating mothers, women health volunteers fund and motherhood and new born child fund shall be

established, that health programs relating to motherhood and new born child shall be transmitted in the local language, that in order to encourage female volunteers under the family planning and safe motherhood program, a fund shall be established in each Village Development Committee wherein programs related thereto shall be implemented, that 25 free mobile health camps shall be operated to resolve the problem relating to uterus prolapse and that governmental and non-governmental organizations shall be mobilized to operate such health camps. That the Government of Nepal through its budget for the fiscal year 2064/65 has earmarked some budget for this purpose and that the Government of Nepal through its various units has to the extent of its capacity and means extending acts deemed necessary. That the Government of Nepal is active towards determining and managing the reproductive health of women and providing them security. That pursuant to the principle of separation of power as prescribed in the Interim Constitution, 2063, the Legislative-Parliament is the sovereign body in formulating laws and as such no other body can directly or indirectly direct this body to frame laws. That the writ petition is not based on reality and that this office has been made a respondent on irrelevant matters. That Section 9 of the Nepal Treaty Act, 2047, prescribes the status of international treaties to which Nepal is a Party. That the subject matter of the treaty cannot be exercised by a person as a matter of right and that locus standi does not arise on the basis of the treaty and that the writ petition in relation to international treaty is irrelevant and as such the writ petition should be quashed.

The rejoinder submitted by the Ministry of Women, Children and Social Welfares states as such: That the Ministry is active with regards to the execution of policies in relation to empowerment of women. That program to be initiated by various women development offices in relation to reproductive health of young girls and budget for this purpose has been earmarked. That no budget and programs have been proposed or approved for this fiscal year in relation to the problem of uterus prolapse raised by the writ petitioners. That although the subject matter of health does not fall within the ambit of this Ministry, the Ministry would like to notify that the Ministry is serious in formulating policies and programs with regards to the empowerment of women.

Where the case pursuant to the rules had been submitted before this Bench, the Bench upon perusal of the case files had entertained and heard the submissions presented on behalf of the petitioners and respondent.

The learned advocates, Ms. Kabita Pandey, Prakash Mani Sharma and Rama Panta made their submission as such: That the reproductive health of a woman not only includes the birth of a child but also includes matters relating to healthy living. That the Interim Constitution 2063, prescribes matters relating to reproductive health as a matter of fundamental right. That various reports have underlined, that provided, woman during pregnancy and within 45 days of pregnancy are involved in heavy chores fall victim to the problem of uterus prolapse. That provided, the mother is healthy, the child also remains healthy. That investment made towards the health of woman is not a personal investment but is an investment for the future of the nation. That the State should show special interest in the reproductive health of woman and subsequently conduct and transmit public awareness and informative

programs. That where the problem of uterus prolapses is on the increase, ipso facto signifies the State failure in fulfilling its responsibility. That the women have failed to enjoy the reproductive rights although such rights have been guaranteed by the Constitution, that the economic and social tradition of Nepal has had an effect on women's reproductive health. That provided, public awareness programs and diverse health programs are operated, it is deemed to bring some reform and as such an order of certiorari should be issued.

Likewise, Acting Deputy Attorney General, Kumar Chudal on behalf of Prime Minister and Council of Ministers made his submission as such: That the problem of uterus prolapse is a grave and sensitive subject matter and for the resolution of the problem sufficient resources are deemed necessary and resolution of such problems would consume a considerable amount of time. That the underlying principle issue herein is the issue of sensitizing and orienting the general public on this matter. That the problem will be resolved slowly and hence it is not possible to eradicate the problem immediately. That where the Council of Ministers through a decision have decided to operate 25 camps and have also decided to raise public awareness in this regard and have for the year 2064/065 earmarked budget for this purpose clearly indicates the nation's commitment towards eradicating this problem and hence order as sought by the petitioners' need not be issued.

Upon hearing the submissions and plea presented therein, it is for this Court to decide as to whether or not the order as sought by the petitioners need be issued. The principal plea made by the petitioners in this regard is as such: That no effective programs have been initiated by the State to redress the problem of uterus prolapse wherein majority of the women face premature death and many women and children born from such women are sick and suffer from different ailments. That special provision should be made wherein women should be entitled to free consultation, treatment, health services from the medical centers, sub-centers and from health workers. That an order should be issued by the Court, directing the State to draft a Bill on women's reproductive health and submit the same before the Parliament and that various public awareness programs should be initiated through the national media for the resolution of the problem of uterus prolapse.

From the perusal of the writ petition, it can be deemed that the writ petition has been submitted as a public interest and that the organization has registered the writ petition with the purpose of obtaining judicial remedy. The said organization for some decade has been involved and has been active in the area of public interest wherein the issue of uterus prolapse has been raised by the petitioners and have sought this Court to address the responsibility of the State and as such the writ petition submitted by the petitioners organization is deemed to be an issue of public interest and that the subject matter does not involve the personal interest of the petitioners organization but rather it deals with the problems related to uterus prolapse faced by the women and hence the subject matter is deemed to be an issue of public interest. The respondents have not objected to the subject matter and neither have they raised the issue of uterus prolapse to be a personal matter. Right of women and reproductive rights is a matter of human rights which has been incorporated as one of the fundamental rights in the Interim Constitution. Provided, where

this writ petition has been submitted for the purpose of implementing those rights, if it cannot be deemed to be matter of public interest, then it would be difficult to define as to what matters would fall within the ambit of public interest. Therefore, pursuant to Article 107 of the Interim Constitution, 2063, the said matter is deemed appropriate to be entertained by this Bench.

Prior to entering into the claim sought by the petitioners, the Bench deems that it would be appropriate to make a general analysis of the matters raised by the petitioners with regards to the nature of the right to reproductive health and its execution.

Within the extensive periphery of human rights, human rights of women hold an important place. The concept of human rights envisages the diverse status and experience of human and prescribes conditions deemed necessary for living a life with respect or creates conditions thereof and encourages for the protection and preservation of such rights. **Although, human rights is applicable to humans only, there cannot be one single standard for execution of human rights since execution of rights depends upon a person's physical, economic and social status.** Although it is a common aim to be identified as a human being, due to the diversity in relation with regards to experience and the diversity in addressing the subsequent problems, there cannot be a common standard of human rights applicable for all. For example, **where a common standard of human rights were made applicable for oppressed class and an oppressor or where a common physical standard were to be prescribed for a person with disability and an able person, the result in terms of equality would not be as envisaged by the human rights philosophy.**

Therefore, the nature of human rights in relation to women should be specially considered. The writ petition raises the issue of exercising the right to reproductive health of women and resolution of the problem relating to health. In a wider context, reproductive health is not a subject matter that is confined and related to a women's issue but rather is an issue of all human beings and as such is also an issue of the males. But experience shows that this problem is faced by the women and that the State has not been able to address this problem as desired.

Reproductive health has a direct relation to the physical attribute of a woman and this should have been a social human cause with regards to the resolution of this problem but unfortunately it has been deemed otherwise. Women's health is different than the males due to their reproductive health. The health of a woman varies from the time of birth till their death. During the process of the development of the health of a male and female, various changes occur accordingly to their age and problems also develop differently. Provided, proper health facilities cannot be managed to address the physical attributes of a woman, the medical facilities designed for a male will fail to address the problems faced by the women. Female, male, minor, aged, handicapped, torture victim, and people who are economically, socially and culturally discriminated fall within the ambit of humanity. Therefore, it is necessary to address these experiences and recognition of such issues assists in the

protection of human rights, and hence it is deemed necessary to look into and understand this problem as a part and parcel of human rights of woman.

Reproductive health is an integral part of the health of a woman and is considered as a matter of human rights of a woman. Although, reproductive health initially was considered as a part and parcel of health facilities this is now considered as right to health. The right to health recognized by the Universal Declaration of Human Rights has also been recognized by Article 12 of the International Covenant on Economic, Social and Cultural Rights wherein the said Article recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The said Article also prescribes and emphasizes that the State Parties should take steps towards the reduction of still birth-rate and of infant mortality and for the healthy development of the child. Article 10 on The Convention on the Elimination of All Forms of Discrimination against Women prescribes the right to access to information on health whereas Article 12 prescribes that no discrimination shall be made against women in the field of health care and also guarantees and ensures women appropriate services in connection with pregnancy and post-natal period, free services where necessary as well as adequate nutrition during pregnancy and lactation.

Reproductive health pursuant to the definition made by International Conference on Population and Development (ICPD) is a state of complete physical, mental and social well-being in the absence of any sickness or infirmity. It implies that the provision of medical treatment for any particular illness or problem will not ipso facto address the necessity of the reproductive health in toto. In order to reflect reproductive health in its true form, freedom to decide on matters relating to the health of a woman, freedom to decide the number, spacing and timing of their children, access of information regarding family planning, right to access to health care services and privacy of information are deemed important. While considering the facilities on reproductive health, provisions relating to consultation on family planning, information, education, communication, education on pre-natal pregnancy, safe maternity services, post-natal services, breastfeeding, care of mother and child and safe and valid abortion are included.

Where there is any problem in any other points raised hereinabove, it creates an impact on reproductive health and subsequently on the health of the woman.

Due to deficiency in nutritious food, access to family planning, provision of leisure and facilities of health treatment can create complex problems relating to reproductive health. From among those problems is the problem of uterus prolapse raised by the petitioner. Although, the problem of uterus prolapse can be deemed as a part of the problem related to reproductive health, this problem in toto represents the problem of reproductive health as well as the health of woman and therefore, it is necessary to entertain this subject as a matter of constitutional and legal right and also the responsibility of the State and the strategy taken by the State should also be taken into consideration.

It is now for the Court to decide as to whether or not the question of uterus prolapse raised by the petitioner is based on the fundamental and legal rights and as to whether or not the said subject matter is justifiable.

As discussed hereinabove, the problem of uterus prolapse is a matter concerning the health of woman. Right relating to health of woman is a part of right to life. Except as provided for by law no person shall be deprived of his personal liberty. Likewise, the right to live a dignified life is also a basic right to life. Provided, the State does not provide the basic facilities or protection for the health of a human being, then proper protection of the right to life cannot be achieved. Therefore, it is necessary to link life with right to health.

Although, right to reproductive health has been termed as a matter of health, this has to be linked with the right to life, right to freedom, right to equality, right against torture, right to privacy and right to social justice and right of woman. Where, the right to reproductive capacity is not recognized, this would not only exploit the right of women but will also create numerous encumbrances against the right of women. Therefore, the right over one's body is an important right and on this basis, other elements on reproductive health must be evaluated. For example, the right as to whether or not to conceive, right to give birth and the number of children, use of family planning methods are all supplementary to those rights. Where women are compelled to give birth to children, that would be a matter of torture and this being a personal event and if right to information on these matters are not protected, it would be an intervention against her right to privacy. Where proper management as deemed necessary regarding information, facilities and treatment on reproductive health is ignored and where investment is only made towards the health of the male or in other areas of health, which would create negative impact on the reproductive health then that would be deemed to be a case of inequality. Likewise, where women are prevented to exercise their legal rights voluntarily, and are subjected to external pressure resulting in adverse conditions to their health, then such instances can be deemed to be a violation to their right to freedom. Therefore, rather than limiting the reproductive health to a particular right, it would be appropriate to relate them with other rights. Where, the rights are interpreted with the objective of displacing one another, this would create a conflict between the rights, which would result in the defeat of one's own right. Jurisprudence on rights does not allow for such kind of interpretation. Provided, where one's own right is to be refuted or where the appropriateness of such rights is deemed to be terminated, then placement of rights within the legal framework would have no essence. Therefore, it is necessary to take into consideration the interrelation of various rights and is also necessary to resolve through this case as to how these rights could be practically translated.

Women's right to reproductive health has been recognized by the UN Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention on

the Elimination of All Forms of Discrimination against Women. During the execution of these Conventions, various events such as the Iran Conference, Egypt Conference, World Women Conference in Beijing had been convened under the convenorship of the United Nations. These conferences not only emphasized on the recognition of these rights but also provided guidelines towards the extension and effective execution of these rights. The World Health Organization had conducted a special study on the nature of reproductive health and its limitations, and the report points out that reproductive health of women includes, physical, mental and social well being of a woman.

Nepal is a Party to the above human rights documents and by participating in various international assemblies; Nepal has formally expressed its commitment toward those instruments. Article 35 (21) of our Constitution expresses its allegiance towards the Charter of the United Nations. The Covenants and other legal documents made pursuant to the recognition and philosophy of the United Nations, and the responsibilities created by these treaties and the access to these benefits by the general public is a question that has been raised by the petitioners, and as such these questions needs to be addressed and can be addressed. Participation in the international Conventions related to human rights or ratification of these Conventions is deemed to be the acceptance of the responsibilities towards the execution of human right laws proposed by the international community. Although, recognition of human rights is universal and its subsequent execution is local, the Member State should exercise its capacity to the maximum and should prepare an infrastructure for the universal protection of human rights. Pursuant to the expectation of the global community and for the satisfaction of our own population, it is necessary that these treaties should be satisfactorily executed. Where such treaties are executed on a national level, we would not only be exercising our international responsibilities, but on the other hand we, pursuant to the direction provided by the international law relating to human rights, would be protecting the human rights of the people. Therefore, it is evident that adherence to the contemporary international laws is not only obligatory but also fruitful.

Likewise, Section 9 of the Treaty Act, 2047, has opened various avenues for the application of international treaties that has been ratified by Nepal and past decisions rendered by this Court have honored the provisions prescribed in the international treaties and taking cognizance of these treaties the court has interpreted national laws, and in many instances, the Court has issued directive orders to formulate laws pursuant to those treaties. Pursuant to the jurisprudence related to the treaties, our courts have without any bias accepted and recognized the contribution made by the international laws and tried to maintain coordination between the international and national law. This is in itself positive.

Matters relating to reproductive health is not only a right relating to health and a right recognized by the international treaties but is also recognized as a human right under Article 20 (2) of the Interim Constitution. The said Article prescribes that every woman shall have the right to reproductive health and other reproductive rights. The said Article prescribes this right as a fundamental right and prescribes no conditions to this right and therefore, meaningful and effective execution of this right is expected from the State.

Under the proviso prescribed under the Directive Policies and Principles of the State or under the proviso prescribed under the Right to Equality, the said proviso prescribes for special programs for the advancement of women and other class of people, whereas the said **Constitution has prescribed reproductive health under the fundamental rights of the Constitution which clearly expresses the State's priority. This right which has been prescribed as self-executionary nevertheless awaits sufficient legal provisions for its effective execution. Truly speaking, this right has been provided due respect and therefore, recognizing the fundamental right it is necessary to seek alternatives for the effective execution of this right. In other words, the right to reproductive health, recognized as a fundamental right, needs to be protected whereby the problem of uterus prolapse as stated by the petitioners would be effectively addressed and in order to protect and implement these rights, it is necessary to formulate laws as deemed necessary.** The right established as fundamental right should be made consumable by the State through the formulation of necessary laws and programs. In the absence of any mechanism, provided these self-executory right becomes ineffective, would constitute a breach of the obligations vested upon the State. Provided, such conditions arise, the court may issue necessary order or directive to fulfill those responsibilities.

Under the Interim Constitution, the right to reproductive health has been prescribed as a non-derogable and non-restrictive fundamental right. Prescription of the right to reproductive health in the Constitution is not in itself sufficient but rather it is equally important that this right is effectively enforced. Unfortunately, no laws till date in relation to reproductive health has been enacted and implemented and neither has it been defined in any law and nor any prescribed procedure has been prescribed for the enjoyment of this right. **Reproductive health is a right, mere recognition of which in the Constitution is not sufficient, rather physical facilities should also be made available for the enjoyment of this right. In the absence of any legal, institutional, procedural and result oriented infrastructure, this right would be limited to formalities.** Therefore, in order for people to realize this right, efforts should be made towards the formulation of policies (including formulation of laws), drafting of plans, its subsequent implementation, extension and evaluation.

This class of right is deemed as social, economic and cultural right. This right is different than the civil and political rights and mere declaration or recognition of this right is not sufficient for its execution, but rather there should be positive infrastructures for the execution of this right. In such rights it is not necessary to prove as to what rights the State violated, but rather it is necessary to see as to how active the State was or what positive programs did the State launch for the enjoyment of this right and is necessary to prove as to whether or not practical benefits were provided for this class of individual. Therefore, remedial jurisprudence of social, economic and cultural rights is different than the remedial jurisprudence of civil and political rights and therefore, the State pertaining to the nature and necessity of remedy should take into consideration appropriate remedial methods.

It is not possible to identify a breach committed by the State in the exercise of the right relating to reproductive health. Nevertheless, the Constitution has provided special recognition to this right and in the absence of any infrastructure provided; the targeted group cannot enjoy such right, declaration of such right has no particular importance and subsequently, the State should be held responsible for such situation.

Right to reproductive health and other rights are deemed to be important in the eyes of economic and social justice, and this right has been provisioned in the current Constitution. Therefore, the State should develop necessary approaches and create satisfactory and conducive environment for the exercise of such rights.

In short, the petitioners have sought for the promulgation of laws for regulating matters relating to reproductive health and for provision of basic facilities relating to reproductive health and this matters are incorporated under Article 20 of the Interim Constitution and the demand sought by the petitioners is also based on the international covenants relating to human rights that has been ratified by Nepal and this being a matter of legal right, the Court deems it justifiable to entertain the said issue.

As to whether or not the matter falls within the ambit of public interest, it is necessary to identify the problems lying therein.

Delivering social justice is the principal need for cases that are of social and economic nature. In such kind of issues, rather than evaluating the problem of an unidentified class it is appropriate to evaluate the problems of such class along with the problem of other classes and collectively address the prevailing problem. Otherwise, each party would enter the jurisdiction of the Court with their personal problems and if the Courts were to deliver remedy on this basis, social justice would not prevail. Social justice can be maintained through public interest cases where injustice experienced by many can be addressed collectively.

In the said case, the petitioners have not entered the Court due to personal problems or injustices experienced by them, but rather submitted the said case relating to the problem of uterus prolapse, which is based on various research reports.

However, question may arise as to how appropriate it would be to seek constitutional remedy on the basis of study report made by non-governmental organizations or on the basis of reports that have been submitted [by those] outside the judiciary. Such question may arise because in a judicial process every single evidence is thoroughly examined and upon such examination it is decided as to whether or not such evidence should be accepted by the court. But it is not possible to follow such legal process in relation to the study or reports made by private or non-governmental organizations, and there could be a risk in determining any conclusion on the basis of such reports. Nevertheless, the said case is not a case instituted at the private level between the plaintiffs and respondent, but rather it is an issue of public interest and as such collection and examination of evidence pursuant to the evidence law need not be made.

In order to depict the gravity of the problem, the petitioners have submitted various data and various study reports made by non-governmental organizations have been submitted in order to substantiate the data.

Rather than accepting the said report as evidence regarding the problem of uterus prolapse, it should be considered a report highlighting the nature and trend of the problem. And therefore, the factual data presented in the report need not be challenged. The study has been limited to 10 districts, and many of the questionnaires presented therein relate to the quantity and quality of the participants and therefore, it is not possible to conclude as to whether or not such report is dependable and scientific and as such the report cannot be accepted as the final indicator.

The respondents have not objected or questioned the information and the problems depicted through the report submitted by the petitioners, neither have they rejected or termed the conclusion of the report unnatural. Likewise, neither have the respondents denied the prevalence of the problem nor have they denied that legal or practical remedy should not be made available to redress it. Rather, from among the respondents, the Prime Minister and the Office of the Council of Ministers have given due recognition to the problem and expressed their commitment to redress the problem. With regards to the petitioners plea for promulgation of law in relation to reproductive privileges, the respondents have stated that since the matter falls within the ambit and jurisdiction of the Legislature and pursuant to the principle of separation of powers, the court in this regard cannot issue orders for promulgation of laws, and it as such cannot be a subject to be entertained by the court. With regards to the plea made by the respondent, it cannot be disputed that formulation and promulgation of law falls within the ambit and jurisdiction of the Legislature, whereas the petitioners by citing lack of adequate laws for enjoyment of rights relating to reproductive health have sought for the issuance of an order for the enforcement and enjoyment of those rights. The respondents have neither denied the existence of the problem nor have they stated that services related to reproductive health have been determined through the management and provision of law and privileges. **The plea that the right to frame laws is vested upon them is not sufficient in itself for the protection of the fundamental rights of the people. In a true sense, the Legislature is vested with the authority to frame laws but where the Legislature does not perform well pursuant to the provision of the Constitution, or fails to execute its responsibility with regards to the protection of the fundamental rights of the people, the court in this regard can call for attention for the execution of the States responsibility.**

The court in many instances has notified the Legislature and the Executive and has issued various orders or directives for the formulation of necessary laws and subsequently laws have been formulated or amended. Objective of the constitutional system is to protect the rights of the people and to provide dynamic governance. Although coordinate Branches established pursuant to the Constitution are separate according to the division of their work, the ultimate objective is to assist in the governance of the country. Therefore, the constitutional

bodies or wings should not consider themselves to be different from each other but rather they should consider themselves to be supplementary to each other.

Our Constitution envisages the principle of rule of law and recognizes the Constitution, laws and recognized principles of justice as the source of law and therefore, the plea taken by the petitioners pursuant to the Articles of the Constitution, laws relating to human rights and the concept of justice cannot be overlooked. Therefore, taking into consideration the necessity of laws, issuance of directives for proper management cannot be deemed to be otherwise.

Truly speaking, it would have been more appropriate had the Executive rather than recognizing the gravity of the subject matter and the appropriateness of its remedy provided a work plan regarding the avenues of remedy to be undertaken. The rejoinder submitted by the Prime Minister and the Office of the Council of Ministers underlines that the budget for the fiscal year 2064/65 prescribes for conducting mobile health camps for resolving the problem relating to uterus prolapse and that budget has been earmarked for various purpose but the execution is yet to be seen. The proposal envisaged by the State for resolving this problem is not important but rather what has been achieved is more important. In other words, it would have been more appropriate had the State stated its target and implemented the same.

The rejoinder submitted by the Ministry of Health and Population and Ministry of Women, Child and Social Welfare is deemed insensitive. The rejoinder submitted by the Ministry of Health and Population requests for the rejection of the writ petition by citing that the petitioners had failed to substantiate as to what rights had been violated by the act of the Ministry. A positive response was expected from the Ministry and it was envisaged that the Ministry through its rejoinder would underline its policies or programs to be implemented for the class represented by the petitioners and would also provide a timeline for the control of the problem. The petitioners had not submitted the petition in relation to their personal rights and therefore, it is not relevant for the petitioners to state the effect caused to them by the act of the Ministry. The Ministry of Health is vested with the responsibility of conducting a survey of the health condition of the population of the country and is also vested with the responsibility of evaluating the problems relating to health of people of various ages, gender and formulate short-term and long-term plans and proposal for resolving such problems and should implement the same but unfortunately the rejoinder submitted by the Ministry of Health has ignored all such responsibilities and the contents of the rejoinder indicates that the Ministry is not positive towards the problems submitted by the petitioner.

The court expected that the Ministry through its rejoinder would express its commitment in resolving the problems relating to health of the various classes through a judicious disbursement of the budget. It was also expected that the Ministry through its plan and legislative Act would have expressed its effort towards executing its responsibilities and would have also stated as to the extent of execution of the directive principles and policies of the State. Women centric remedy cannot be provided without a deep knowledge of the

health of women and their lives and their right to equality and right to reproductive health. Where problems relating to women's health is to be resolved on the basis and standard of the health of a male, then such an act would not bring about the desired result. Therefore, the Ministry of Health should seek to give priority to matters relating to women's health in all the programs to be initiated by public and private sectors and should play a lead role in mainstreaming matters relating to health. It is expected that the Ministry of Health should earmark the budget for health related services and from among the budget earmarked, should also prioritize the budget to be consumed in relation to women's health. Having so many expectations, the Ministry has been indifferent towards the principle issue raised by the petitioners and as such very little expectations can be expected from the Ministry with regards to the resolution of the problem.

Although, the Ministry of Women, Children and Social Welfare through its rejoinder has stated that training programs on reproductive health for teenage girls have been initiated, the Ministry states that programs and budget for the problem regarding uterus prolapse raised by the petitioners have not been proposed and they further take the plea that although matters relating to health does not fall within their Ministry, they state that the Ministry is serious towards the issue of women empowerment. From the rejoinder submitted by the Ministry, it can be deemed that pursuant to the division of labor there is a tendency between the Ministry of Health and Ministry of Women, Children and Social Welfare of alienating themselves from their responsibility. Pursuant to the current infrastructure, it is natural that the Ministry of Health being a Ministry related to health should be health centric and Ministry of Women, Children and Social Welfare should be women centric, but nevertheless there should be cooperation and coordination between the two Ministries on matters relating to health services of women. Unfortunately, neither has the Ministry of Health made reproductive health as its focal point nor has the Ministry of Women, Children and Social Welfare made any effort towards addressing the matter relating to the health of a woman. Although, the Ministry through its rejoinder expresses its commitment towards the empowerment of the concerned class, the statement in the absence of any particular policy, plan and program has no substance.

From among the respondents, the National Human Rights Commission has taken the plea that petition relating to reproductive health has not been submitted before the Commission and likewise the Women Commission expresses that the Commission has not been able to act in this sector. Human rights and women rights are interrelated and although this matter relates to both the Commission, it is unfortunate that both the Commission have failed to state their contribution towards addressing this issue. The Commissions' insensitivity towards this matter is clear and it is also evident that the general public is less sensitive or inactive towards obtaining the service of the Commissions. It is important that Commissions should identify themselves not by its mandate but by its contribution. Where issues relating to women and human rights are not effectively executed by the concerned Commissions, it is a matter of concern.

It is now for the court to decide as to whether or not the order as sought by the petitioners should be issued.

As stated hereinabove, the status of reproductive health of women in Nepal is in a serious state, and it is also clear that no plan has been made to address this problem. In the present context, there are approximately six hundred thousand women suffering from the problem of uterus prolapse and it is also evident that no preventive or remedial programs focusing on problems relating to reproductive health and uterus prolapse have been initiated. This is due to lack of nutritious food, leisure, lack of access to family planning, lack of awareness regarding rights relating to reproductive health and violence against women. In addition, lack of health centers or facilities required for women's physical and mental well being and its subsequent decentralization, availability of medicine, lack of public awareness regarding care during pre and post-natal pregnancy are some of the issues that pose a problem in resolving the problem.

Uterus is an important part of a women's body wherein an embryo during pregnancy develops and within a certain period the embryo develops into a child. Uterus provides nutritious elements from the body of the mother for the development of the embryo and as such uterus is considered as a preliminary stage of human life and recognized as a reproductive part of a woman. Where this part of the body is safe and healthy, the embryo within the uterus develops into a healthy human being and therefore, protection of the uterus of a woman is also the protection of the existence of human beings. Various medical write-ups state that during the period of pregnancy, the embryo develops within the uterus, causing the uterus to stretch wherein the muscles holding the uterus becomes weak and feeble. Where the muscles and the nerves holding the uterus becomes weak and feeble and where pressure is created on the uterus, this would result in uterus prolapse. Reasons for uterus prolapse have been cited in many articles, research, reports and books related to health. Some of the reasons cited are as such: long period of gestation or difficulty in the birth of a child, giving birth to many children, and pressure on the uterus, lifting of heavy articles during pre and post natal period, hard labor and formation of flesh in the pelvis region. Nevertheless, research on uterus prolapse cannot be denied or deemed to be otherwise.

Report made with regards to social conditions and conclusions made therein depicts a grave picture of the prevailing problem and the concerned sector has not been able to provide due attention towards this problem. Although, matters included in the social research report do not have direct relation with the case, the conclusion made therein can be deemed and considered to be an additional material for formulation of standard and policies in this regard. No objection has been made by the government against the information and subject matter raised by the petitioner and neither have they expressed the need for conducting an additional research by the court. The government is always capable to conduct additional research to open avenues for resolution of the problem for any particular place or class or people and to some extent this is expected from the government. The nature and extent of this problem should be a matter of priority for the State but the rejoinder submitted by the

respondents deems it to be otherwise. Article 20 (2) of the Interim Constitution, 2063 prescribes reproductive health as a fundamental right and in the absence of proper protection of reproductive health, the problem of uterus prolapse has been far reaching and as such the said right can be deemed to have been violated. **Since reproductive health is recognized as a matter of right, the following falls within the ambit of the right: decision regarding reproduction, voluntary marriage, decision as to conceive or not, decision to abort a child pursuant to law, period and determination of number of children, reproductive education, and freedom from sexual violence which have also been prescribed in various treaties and declarations.**

Although, this matter has been constitutionally recognized, there has not been any law, policy and programs to provide tangible results.

Where reproductive health has been included and provisioned in the Constitution, it can be deemed that women's health and rights have received philosophical recognition and in order to guarantee the rights laws should be formulated and facilities approved by the law should be provided wherein services and facilities should be decentralized and information in this regard should be disseminated thereby creating awareness among the people. Maternity services is a social and human service and any adverse effect would have an impact on the society and therefore, the State should accept its legal responsibilities and prioritize this matters which has been constitutionally recognized and determine the availability of services in this regard.

Although, right relating to reproductive health has been enshrined under Article 20 (2) of the Interim Constitution, the right other than being prescribed under the Constitution has not been defined and no laws have been formulated to define the right and neither has any institutional mechanism been developed for the execution of this right. As a result, this right although been constitutionally recognized, has not been enjoyed by the people. Therefore, a directive order is hereby issued in the name of the Prime Minister and the Office of the Council of Ministers to hold consultation deemed necessary with health related experts and representatives of the society and to draft a Bill and submit it before the Legislature-Parliament as soon as possible. Likewise, an order of mandamus is hereby issued in the name of the Ministry of Women, Children and Social Welfare and Ministry of Population and Health to prepare special work plans and to provide free consultation, treatment, health services and facilities to the aggrieved women and to set up various health centers and to

initiate effective programs with the aim of raising public awareness on problems relating to reproductive health of women and the problem of uterus prolapse. It is hereby ordered to provide the information to the respondents.

s/d
Kalyan Shrestha
Justice

Consenting on the above opinion.

s/d
Min Bahadur Rayamajhee
Justice

Bench Officer: Deepak Kumar Dahal

Dated 22 Day of the month of Jestha of the Year 2056 (June 5, 1999).....

Supreme Court, Division Bench
Hon'ble Justice Badri Kumar Basnet
Hon'ble Justice Bala Ram K.C.

Order
Writ No. 3355 of the Year 2060

Sub: Certiorari Mandamus

Punyawati Pathak, resident of Jhapa District Jalthal VDC Ward No. 4 currently residing in Kathmandu District, Kathmandu Metropolis Ward No. 10	Petitioners
1	
Mana Basnet Karki, resident of Kathmandu District, Bajrayogini VDC Ward No. 9	1

Vs.

HMG, Ministry of Foreign Affairs, Shitalniwas, Kathmandu.....	1
HMG, Ministry of Home, Kathmandu.....	1
HMG, District Administration Office, Kathmandu	1
HMG, Prime Minister and Cabinet Secretariat	1
.HMG, Ministry of Women, Children and Social Welfare.....	1

Bala Ram K.C. J: The content and order of the writ petition submitted before this Bench pursuant to Article 23, and 88 (2) of the Constitution of the Kingdom of Nepal, 1990 is as follows:-

The petitioners contend that they are Nepali citizen and that they have duly received certificate of Nepali citizenship of the Kingdom of Nepal. The petitioners further contend that owing to the early demise of their husband they have been living a life of a single woman and even in the absence of their husband and sufferings due to such separation they expect to live a life worthy of courage and determination and expect to go to foreign countries so as to enjoy the opportunities of personality development through education, employment and training.

They contend that the medium for exploring and enjoying the opportunities of personality development outside the country was through the procurement of passport. And in order to procure a copy of the passport, the petitioners had submitted an application form along with a copy of the citizenship certificate and a photograph, wherein the petitioners were informed that registration of the application could be made only when a woman below 35 years of age submitted a letter of approval letter from their respective guardian. The petitioners upon inquiring the basis for submission of pre-approval letter from their guardians, they

were provided with a circular from the Ministry which read as follows: “I hereby take full responsibility of the foreign tour and I hereby provide my approval for the foreign visit and request for issuance of the passport to the concerned person.” The circular provisioned that application for registration of passport would be effective only upon mandatory submission of the approval letter from the guardian.

The petitioners contend that whereas the Passport Act, 2024 and the Passport Regulation, 2059, did not prescribe any such provisions, the petitioners had addressed the Chief District Officer and the Secretary of the Ministry of Foreign Affairs for the procurement of the passport citing that the provision of submission of approval letter from the guardian was outside the purview of law and ipso facto arbitrary. They further contend that their constitutional and legal right regarding procurement of passport had been violated since their petition had not been entertained and further state that owing to the arbitrary and illegal act of the respondents, their rights and rights of other Nepali women had been violated. They contend that since the petitioners represent the rights and interest of the Nepali women in general and the matter being an issue of public interest have pursuant to Article 88 (2) of the Constitution entered the extra-ordinary jurisdiction of the honorable court.

The petitioners state that passport is an important medium of going abroad and exploring and enjoying the opportunities and privileges available and contend that provided, the State is to curtail illegal restrictions regarding the acquisition of passport, citizens would not be able to enjoy the opportunities available abroad and would cause encumbrance to the development of one’s multi-dimensional personality. Provision of acquiring approval from one’s guardian is arbitrary and unjustifiable. With regards to acquisition of passport, the Passport Act, 2024 and Passport Regulation, 2059, does not prescribe different standard and process for male and female. Rule 4 and 14 of the Regulation prescribes that a guardian may submit an application in case of a minor or for a person with unsound mind. Other than that, no restriction or conditions have been prescribed wherein any capable Nepali woman may apply for procurement of passport. Any legal provisions made to curtail restrictions against personal freedom and right to equality cannot receive validity. Owing to security reasons, legal provisions can be made to restrict a person traveling abroad but separate discriminatory conditions or restrictions cannot be prescribed and imposed merely because the petitioner is a woman and therefore, the restrictions imposed in the acquisition of the passport is contrary to the rule of law.

Although Article 11 (3) of the Constitution prescribes for positive discrimination with regards to empowerment of women, the Constitution nevertheless bans negative discrimination. The classification made in relation to acquisition of passport by a woman is not proper, justifiable and logical and as such, cannot acquire any validity. The purpose of special protection as envisaged and prescribed in the Constitution is not to limit the opportunities and freedom of women but rather, it is to make it more flexible. Provision of acquiring a consent from one’s guardian for the purpose of acquiring a passport will not enable a woman to be capable and will cause encumbrance to the enjoyment of other freedoms and rights and will restrict women from the opportunities coexistence, self-determination and

right to equal opportunities and will also cause encumbrance to live a dignified life. The said protection is based on the concept and recognition of *Badi* community and will cause encumbrance and hurdles to the personal development of women and such this provision cannot receive any validity.

Article 13 (2) of the Universal Declaration of Human Rights prescribes and protects the right to leave any country, including his own, and to return to his country. Likewise, the UN Covenant on Civil and Political Rights 1966 and Article 1 on International Covenant on Economic, Social and Cultural Rights, 1966, prescribes right to self-determination by people wherein people may freely pursue their economic, social and cultural development. Likewise, Convention on the Elimination of All Forms of Discrimination Against Women, 1979, defines discrimination and determines the responsibility to the State Parties. Article 15 of the Convention guarantees the freedom of movement without any discrimination.

Therefore, the provision of acquiring approval from one's guardian for a woman below 35 years creates illegal restrictions to her right to go abroad and to her right and freedom of movement and therefore, the said provision is not only inconsistent to the constitutional provision, judicial decisions, and mandatory responsibilities created by international treaties and agreements but is also contrary to justice and the petitioners pray for the decision and prevailing provision to be quashed and also seek the court to issue any order deemed necessary wherein women could procure passport like their male counterparts.

An order had been set aside by a single Bench on February 17, 2004, asking the respondent as to why the order sought by the petitioners need not be issued and had directed the respondents to submit their rejoinder within 15 days from the date of receipt of the order excluding the period of travel and likewise the Bench deeming the issue to be of public interest relating to gender justice had directed for prioritization of the case upon submission of the rejoinder.

The rejoinder submitted by the District Administration Office, Kathmandu states as such: that the respondent's office had been issuing passports pursuant to the authority prescribed under Rule 7 (3) of the Passport Regulation, 2059, and pursuant to the orders and directives provided from time to time by the Ministry of Foreign Affairs and Ministry of Home. That pursuant to the circular dated June 21, 1996 provided by the Ministry of Home, acceptance letter from the guardians was sought for issuance of passport for women below 35 years of age. That the petitioners' contention that they had submitted an application for procurement of passport before this office cannot be verified through the records and the respondents prayed to have the writ petition be quashed citing the contents of the writ petition is illusionary.

Likewise, the rejoinder submitted by the Prime Minister and Cabinet Secretariat states as such: that the petitioners have failed to state as to how their rights have been violated by the act of this office and had subsequently requested the court to quash the writ petition.

The rejoinder submitted by the Ministry of Home states as such: That the Council of Minister vide decision dated December 25, 1995 had directed for submission of acceptance letter from the guardian while issuing passport for women below 35 years of age and that a decision had been rendered to provide recognition to the acceptance letter provided by the husband, father-in-law, mother-in-law, father, mother, brother, sister-in-law or by a person under whose guardianship the concerned female was with.

The content of the rejoinder submitted by the Ministry of Women, Children, and Social Welfare is as such: That the petitioners have failed to state as to how their legal and constitutional rights had been violated by the act of the Ministry. That with the ratification of the Convention on Elimination of All Forms of Discrimination Against Women and other international Conventions to which Nepal has been a Party, a High Level Committee has been constituted to review the laws that are discriminatory and that the State has been executing its responsibilities as determined by the Conventions and that the petitioners contention that the act is contrary to the provisions prescribed in the convention is totally illusionary and erroneous and the respondents prayed to have the writ petition quashed.

The rejoinder submitted by the Ministry of Foreign Affairs states as such: That the Passport Regulation does not discriminate between a male and female while issuing a passport and there is no reason to provide such discrimination. That the Ministry of Home had corresponded to this Ministry requesting for a simple process for issuing passport for single women without any approval from the guardian wherein the Ministry vide its letter dated April 14, 2004 had directed the Ministry of Home and to all its Nepali High Commissions to remove the practice of obtaining a letter of consent from the guardian since such provision was not mandatory by law and the respondent prayed for the writ petition to be quashed.

Where the case pursuant to the rules had been submitted before this Bench, the Bench upon perusal of the case files had entertained and heard the submissions presented on behalf of the petitioners and respondent. The learned advocates, Prakash Mani Sharma, Raju Prasad Chapagain, Ms. Rama Panta Kharel and Ms. Kabita Pandey, made their submission as such: that the resolution adopted on right to development by the United Nations in 1985 provides women like their male counterparts the right to co-existence, self-determination and respect. That the decision rendered by the Council of Ministers dated December 25, 1993 regarding procurement of letter of consent from the guardian for women below 35 years of age is not only discriminatory but also causes encumbrance to their right of co-existence, self-determination and respect and also causes encumbrance to the development of their multi-dynamic personality. That where the world has been transformed into one village owing to the development of transportation and communication, illegal restrictions would deny a person from enjoying his fundamental rights and freedom. That the mandatory provision of procurement of letter of consent from the guardian for procurement of passport for women is discriminatory which is reflected in the rejoinder submitted by the Ministry of Foreign Affairs which also calls for amendment to such provision. That the Passport Act and Passport Regulation do not provide any discrimination between male and female while issuing passports and that the rejoinder also recognizes and accepts that there

is no reason behind such discriminatory practices. That the restrictive provision prescribed not only creates discrimination on the basis of gender but the said provision is illogical and illegal and therefore, such provision cannot be deemed to be valid. That, although Article 11 (3) of the Constitution, prescribes for special provision for women, such provisions should be for empowerment of women. That the provision of procurement of letter of consent not only creates encumbrance to the enjoyment of the rights and freedom but also sustains discrimination against women. That Universal Declaration of Human Rights, 1948, protects the right to travel and Convention on Civil and Political Rights, 1966 and Covenant on Economic, Social and Cultural Rights, 1966, prescribes and provides every citizen the right to self-determination. That the Covenant on Elimination of All Forms of Discrimination Against Women, 1979, prohibits all forms of discrimination against women and prescribes responsibilities for the State for elimination of such discrimination and the Covenant also prescribes and guarantees that discrimination on the basis of gender cannot be made with regards to travel. That the provision of procurement of letter of consent for the purpose of procuring a passport for a woman below 35 years of age curtails and restricts her right to go abroad and her right to travel and the provision being inconsistent with the Constitution, prevailing laws, precedents established by the honorable court and international conventions, the petitioners had prayed for issuance of an order of Certiorari so as to declare void the said decision and provision and had also sought the Court to issue any other appropriate order directing the authorities to make provision where a woman could receive passport like their male counterparts.

Likewise, Joint Attorney, Saroj Prasad Gautam on behalf of the Ministry of Home et.al. made his submission as such: That pursuant to the spirit of a welfare state, the State with the objective of providing and guaranteeing protection of women below 35 years of age had provisioned for the procurement of letter of consent from the guardians for procurement of passport. That decision to this effect had been rendered by the State so as to provide protection to them and prayed that the writ petition be quashed.

Today being the date set for rendering a decision on the writ petition, the petitioners have contended that the decision made by the Council of Ministers on December 25, 1995 regarding the procurement of letter of consent from the guardian for a woman below 35 years of age restricts and violates the petitioners right to go abroad and her freedom of movement and have sought for declaration such provisions void through an order of certiorari. Taking note of the submissions, argument and plea presented therein, decision has to be made on the following questions:

- a) Whether or not the decision dated December 25, 1995 rendered by the Council of Ministers directing for procurement of letter of consent from the guardians for the purpose of procurement of passport for women below 35 years of age is pursuant to the Constitution and law?
- b) Whether or not an order as prayed by the petitioner need to be issued?

While examining the first question, it is necessary and relevant to understand as to what a passport is and what is its purpose and importance? Definition of a passport has been prescribed under Clause (2) of the Passport Act, 2024, which reads as follows: “Passport means a document issued by His Majesty’s Government to a Nepali citizen desirous to go abroad that has a list of the countries eligible for visit along with the specific period.” Likewise, Black’s Law Dictionary defines passport as: “a formal document certifying a person’s identity and citizenship so that the person may travel to and from a foreign country.”²¹

Likewise, Encyclopedia Britannica defines passport as: “document issued by a national government identifying a traveler as a citizen with a right to protection while abroad and a right to return to the country of citizenship. It is normally a small booklet containing a description and photograph of the bearer. Most nations require entering travelers to obtain a visa, an endorsement on the passport showing that the proper authorities have examined it and permitting the bearer to enter the country and remain for a specific period.”²²

From the above definitions, passport is a document identifying the bearer along with his name and nationality. Such documents are issued by each sovereign nation to its citizen along with his name and personal descriptions and also request the concerned State to provide protection to its citizens as and when deemed necessary. Generally, a citizen cannot enter the jurisdiction of another nation in the absence of a passport but this does not imply that acquisition of a passport ipso facto guarantees the citizen the right to enter the jurisdiction of another nation. Passport merely provides identification of the concerned bearer and is an important travel document in whose absence one cannot travel beyond his country of domicile.

Although the Constitution of the Kingdom of Nepal, 1990, does not prescribe the right to travel abroad, Article 12 (1) of the Constitution prescribes and guarantees that except as provided by law no person shall be deprived of his personal liberty and Article 12 (2) prescribes and guarantees the following freedoms to its citizens:

- a) Freedom of opinion and expression
- b) Freedom to assemble peacefully without arms
- c) Freedom to form unions and associations
- d) Freedom to move and reside in any part of the Kingdom
- e) Freedom to engage in occupation, employment, industry and trade.

The principal contention of the writ petition is as such: That the decision rendered by the Council of Ministers dated December 25, 1995 directing for procurement of letter of consent for the purpose of procuring a passport for a woman below 35 years of age is not only contrary to the right to equality as prescribed under Article 11 of the Constitution but also restricts the petitioner’s right to go abroad for education and employment and the said

²¹ Black’s Law Dictionary, Eight Edition

²² Britannica Ready Reference Encyclopedia, 2005

provision being inconsistent with Article 11 and 12 of the Constitution, the petitioners pursuant to Article 88 (2) of the Constitution have prayed to declare the decision dated December 25, 1995 void through an order of certiorari. In this regard, it is for the court to decide as to whether or not the decision dated December 25, 1995 is inconsistent with Article 11 of the Constitution and creates discrimination between male and female and as to whether or not the right to freedom prescribed under Article 12 (2) Section (a) to (e) and guaranteed to the petitioners have been violated?

Definition of passport and nature of the document has already been dealt hereinabove. Passport is an important travel document which is issued by every sovereign nation to its citizens and is a document that identifies its citizens. Pursuant to our legal provisions, a passport is obtained when an application form pursuant to the format prescribed by law is filled and a copy of the Nepali citizenship certificate is attached and the same is attested by any gazetted government officer is submitted and where a prescribed fee is provided. In order to regularize the procedures relating to passport, the Passport Act, 2024, had been enacted and other procedures to be fulfilled for obtaining a passport has been prescribed under the Passport Regulation, 2059. The law that has been enacted to regularize the process of passport does not provide separate procedures and provisions for male and female but rather same procedures have been prescribed.

Decision rendered by the His Majesty's Government dated December 25, 1995 refers to acquisition of passport for woman below 35 years of age and the amended decision refers to acquisition of passport only upon procurement of letter of consent to be provided by the prescribed and listed guardians. From the said decision it is evident that provided a woman who has no guardian or even where such guardian is available but is reluctant to provide a letter of consent then such a woman would be denied from obtaining a passport. Passport is not required to travel within the Kingdom of Nepal. Passport is required provided one has to go abroad for education, for employment, participating in seminars, for study tours, participating in sports or for visiting their families. **Where passport cannot be obtained, one is deprived of the freedoms guaranteed under Article 12 (2) Section (a) to (e) of the Constitution. The Passport Act and Regulation and Article 11 and 12 of the Constitution does not prescribe any authority to His Majesty's Government to prescribe conditions for women only and therefore, the decision dated December 25, 1995 overrides the constitutional and legal provisions and as such the decision exceeds the executive right to be exercised by the Council of Ministers.**

Article 11 guarantees the right to equality. Article 11 (1) prescribes that all citizens shall be equal before the law and no person shall be denied equal protection of the laws. Likewise, Sub-article (2) prescribes that no discrimination shall be made against any citizen in the application of general laws on the grounds of sex. Likewise, Sub-article (3) guarantees that the State shall not discriminate among citizens on the grounds of sex but prescribes that special provision may be made by law for the protection and advancement of women. It is for the court to decide as to whether or not the decision dated December 25, 1993 provides protection and advancement of the women and as to whether or not the said decision falls

within the ambit of the proviso prescribed under Article 11 (3) of the Constitution. Provision prescribed under this Sub-article is deemed important. The Sub-article intends for prescription of laws for the advancement and protection of women and where such law is made then the provisions of such laws is not deemed to be discriminatory between male and female. **The decision dated December 25, 1993 made by the Council of Ministers is not a law but rather it is an executive decision rendered through the exercise of the executive rights. The Executive is not vested with the right to render executive decisions that may encumber the enjoyment of the fundamental rights and freedoms or create discriminations between males and females and therefore, the decision dated December 25, 1995 is deemed to be contrary to the right to equality.** Proviso prescribed under Sub-article (3) prescribes for special provisions made by law for the protection and advancement of women as well as other classes and as such this provision has special importance. In our society, women are confined within their house and due to erroneous customs; traditions and superstition, opportunities of obtaining education are denied to them and as such they are denied of any opportunities regarding intellectual advancement, employment and therefore, in order to provide them with an opportunity for their development special provisions have been prescribed under the proviso of Sub-article (3). Owing to the economic, social, historical and traditional system, the women in Nepal are denied of any privileges and opportunities in the field of education and employment and provided the women on the basis of competition are to enjoy the right and freedom guaranteed by the Constitution, it would not be possible for women to fully enjoy the freedom and the fundamental rights guaranteed by the Constitution. In order to enhance the capacity of woman so that they could enjoy the rights and freedom guaranteed by the Constitution, the proviso prescribed under Article 11 (3) provides for special provisions for the advancement and protection of the women and this is deemed to be the aim and objective of the said proviso. Education, employment, occupation, industry, trade and economic resources are deemed important for the advancement of any class. This reality had been envisaged by the founding fathers of our Constitution who had realized that provided competition be done between a class who was economically, socially, traditionally and academically stronger than the class who was economically, socially and academically weak it would be a competition between equal and unequal wherein the weaker class would fail in the realization and enjoyment of freedoms and rights enshrined in the Constitution and therefore, the proviso under Article 11 (3) prescribes for special provisions to be made by law for the protection and advancement of women. **The petitioners are women and the executive decision dated December 25, 1995 requiring them to submit a letter of consent from their guardian for procurement of passport cannot be deemed to be a decision made for the protection and advancement of the women but rather it is inconsistent to the letter and spirit prescribed in the proviso of Article 11 (3).** Such decisions are inconsistent with the Convention on the Elimination of All Forms of Discrimination against Women. Convention on the Elimination of All Forms of Discrimination against Women is a convention enacted to eliminate all forms of discrimination against women and upon ratification of the said Convention by Nepal on 22 April, 1991, the said Convention pursuant to the Nepal Treaty Act, 1990, has been enacted as Nepal laws. Article 2 of the Convention among others underlines that the State Parties condemn discrimination against women in

all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end undertake the following and subsequently in Article 2 (f) states that it shall take all appropriate measures including legislation to modify or abolish existing laws, regulation, customs and practice which constitute discrimination against women. Likewise Article 3 states that the State Parties shall take in all fields, in particular in the political, social, economic, and cultural fields all appropriate measures including legislation to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. With Nepal being a Party to the Convention, it is the obligation of the State to amend or repeal all discriminatory laws, customs, and traditions as deemed necessary in order to eliminate discrimination between male and female and should make proper arrangements in the political, social, economic and legal sector for the enhancement of the women. **The decision of the Council of Ministers dated December 25, 1995 is not only inconsistent to the provisions enshrined in the said Conventions but is also inconsistent to the proviso prescribed under Article 11 (3) and Article 12 of the Constitution. Rather than facilitating and encouraging women by formulating or amending necessary laws or formulating necessary policy for the enjoyment of the freedom guaranteed under Article 12, the State through the provision of guardianship has created conditions where women have been made dependent on male for the enjoyment of their freedoms.** His Majesty's Government cannot make any laws or any policies and neither can it make any executive decisions inconsistent to the provisions prescribed in Convention and the Constitution. Provided, such laws or policies or decisions are made then acts shall be deemed to be void. Provided, the Parliament rather than prescribing special provisions pursuant to the law and in accordance to the said convention and the Constitution renders any executive decisions which may be rendered with a bona fide intention, the said decision nevertheless would be deemed to be discriminatory, excess of power and arbitrary and contrary to the recognized principles of rule of law. Where a female unlike her male counterpart who need not submit any recommendation from his guardian, is subjected to submit recommendation from her guardian for procurement of passport is inconsistent to Article 11 and such conditions are discriminatory in itself. Provisions made on the basis of reasonable classification is not discriminatory and such provisions are not deemed to be inconsistent to the Constitution. **Although, the executive decision dated December 25, 1995 has been made with a bona fide intention and for the interest of the women, the said decision is not based on any intelligible differentia and the said decision is deemed to be discriminatory based on gender and as such the court deems the said decision to be inconsistent with Article 11 of the Constitution.**

The second plea taken by the petitioners is as such: That the conditions prescribed by the said decision with regards to procurement of passport causes encumbrance to women in going abroad for obtaining education and also curtails their freedom to return to their country and that the said conditions causes restrictions to the various freedoms prescribed under Article 12 and prayed that the said decision be quashed. The world today is vexed with various problems such as migrant worker, illegal immigrant, organized crime, trans border/

transnational crime, internally displaced persons, job opportunities and civil war wherein there is a trend of citizens of a nation going to another country which is more safe and has abundance of opportunities. It is not possible to enter into another country with the passport issued by one's country and even where a person possesses a valid passport he cannot enter into another country without a visa. Therefore, in the absence of a passport a person is restricted from going to another country for further studies, is unable to enjoy and exercise his freedom of opinion and expression in another country, is unable to return to his own country or is unable to exercise his freedom to engage in any occupation or be engaged in employment, industry and trade.

Article 13 (2) of the Universal Declaration of Human Rights which was ratified by the General Assembly of the United Nations in 10 December 1948 prescribes the following: "Everyone shall have the right to leave any country, including his own and to return to his country." Likewise, Article 12 on the International Covenant on Civil and Political Rights prescribes that everyone shall have the right to leave any country, including his own. The Covenant of 1966 was ratified by Nepal and therefore, the provisions of the Covenant pursuant to Section 9 of Nepal Treaty Act, 1990, is applicable as Nepal laws. Provided, the decision dated **December 25, 1995** in relation to the procurement of passport by women is to be implemented, it would be inconsistent to the provisions prescribed in the Covenant to which Nepal has been a Party. The State by enacting laws can prescribe conditions for obtaining passport. The Parliament which is the institution for enacting laws can enact laws and prescribe conditions where passport may be denied and provided such denial is made pursuant to the law, then such denial cannot be deemed to be inconsistent with the Constitution or cannot be deemed to be a restriction against the enjoyment of the freedoms guaranteed by the Constitution. Provided, the Passport Act or any other laws does not prescribe any conditions regarding procurement of a passport, then in such event any woman attaining 16 years of age and who is a Nepali citizen is entitled to enjoy the freedoms guaranteed under Article 12 of the Constitution and the State cannot make any discrimination and deny the issuance of passport to such women. By virtue of one's birth and in the absence of any laws, it is the obligation of the State to provide passport to its citizens without any discrimination between male and female and it is the legal duty of the State to provide passport to women in the same conditions as that of males. The Supreme Court of India in *Satwant Singh Sawney vs. Ramarathnam* has defined personal liberty enshrined in Article 21 of the Constitution as such: Personal liberty which occurs in Article 21 of the Constitution includes the right to travel abroad and no person can be deprived of that right except according to procedure established by law. Likewise, the freedom expressed in the Bill of Right has defined in *Best vs. United States*, as freedoms that are not only enjoyed within America but also outside the United States of America. Similarly, in *Kent vs. Dulles* freedom as been defined as freedom of movement across frontiers in either direction and inside frontiers as well as a part of our heritage. Travel abroad like travel within the country may be necessary for livelihood. It may be as close to the heart of the individual as the choice of what he eats or wears or reads. Freedom of movement is basic in our schemes of values. Furthermore, in *Maneka Gandhi vs. Union of India* the Indian Supreme Court has ruled the following: It was the vast conception of man in society and universe that animated the

formulation of fundamental rights and it is difficult to believe that when the constitution makers declared these rights they intended to confine them only within the territory of India. Take for example, freedom of speech and expression could it have been intended by the constitution makers that a citizen should have this freedom in India but not outside? Freedom of speech and expression carries with it the right to gather information as also to speak and express oneself at home and abroad and to exchange thoughts and ideas with others not only in India but also outside. The constitution makers have not chosen to limit the extent of this freedom by adding the words “in the territory of India” at the end of Article 19.1a. The ruling furthermore states that “we have therefore no doubt that the right to freedom guaranteed by Article 19 is exercisable not only in India but also outside.” Rights relating to freedom enshrined under Article 12 of our Constitution are similar to the rights and freedoms enshrined in Article 19 and 21 of the Indian Constitution, Article 12 of I.C.C.P.R and Article 13 of the Universal Declaration of Human Rights.

The third issue raised in the petition is as such: That due to the unavailability of a passport, the right to study abroad, freedom of opinion and expression and freedom to engage in any occupation and employment of the petitioners would be violated. In this regard, Article 12 (2) (a) (d) and (e) of our Constitution guarantees to its citizens the freedom of opinion and expression, freedom to move and reside in any part of Nepal and freedom to engage in any occupation, industry and trade. Like the Indian Constitution, our Constitution does not restrict the enjoyment of these freedoms within Nepal but also guarantees the enjoyment of these freedoms outside Nepal. **Other than by law, no restrictions can be made through an executive or administrative decision in the procurement of passport. Provided any restrictions have to be made for the enjoyment of these rights prescribed in Article 12 (2) (a) to (e) including the proviso therein, the Parliament should enact laws and reasonable restrictions can only be made therein. In the absence of law, the rights guaranteed by the Constitution cannot be restricted by an executive decision.** This right has not been restricted within Nepal but rather this right can be exercised and enjoyed outside Nepal and a person may express his opinion in any subject or may exchange his opinion by expressing the same in any platform or through publication. This right has not only been prescribed under the Universal Declaration of Human Rights but the same has been provided for under Article 19 of the International Covenant on Civil and Political Rights, 1966. Article 19 (2) states as follows: Everyone shall have the right to freedom of expression; this right shall include freedom to seek receive and impart information and ideas of all kinds, regardless of frontiers either orally in writing or in print in the form of art or through any other media of his choice. The terminology “regardless of frontiers” prescribed under this clause is important. This provision and the provision prescribed under Article 12 (2) of our Constitution are similar. Article 12 of our Constitution does not prescribe any political and geographical border and boundary for the enjoyment of this right. Likewise, Article under ICCPR also does not prescribe any political border but states the terminology regardless of frontier. Pursuant to Article 126 of our Constitution and Clause 9 of the Nepal Treaty Act, 1990, the provisions of the Convention should be incorporated in the Nepal law and therefore, no laws can be made contrary to those provisions. Article 12 (2) (e) guarantees the freedom to engage in any occupation, industry and trade. This freedom unlike other

freedoms is not restricted within Nepal and therefore, the petitioners in order to enjoy this right need not be confined within any boundaries and this is not possible in the present context. For example, where a crew member of an international airline service is denied from obtaining a passport or provided, passport is not issued to an intellectual or professor or where a businessman is not provided with a passport to advertise his product or where a student is not provided with a passport to study abroad or a sports person is not provided with a passport to compete in international competition, then it shall be deemed that these persons have been denied from enjoying their individual freedoms guaranteed by our Constitution and the covenant relating to human rights. From among the five freedoms guaranteed under Article 12 (2) Part (a) to Part (e), the freedom guaranteed under Part (b) probably can be exercised within Nepal but for the enjoyment of other freedoms, the Constitution has not prescribed any political or geographical border and boundaries and therefore, His Majesty's Government cannot and should not render any executive decisions through the application of its executive rights. Freedoms guaranteed by Article 12 of the Constitution are indispensable rights for a person to live as a human being. Where, these freedoms were to be separated from human life, human life would be without any freedom wherein they would be subjected to live like animals. The fact that the Executive cannot render any decision restricting the women from enjoyment of the freedoms prescribed under Article 12 is evident from the laws relating to Passport Act and other foreign laws and in particular the various specialized agencies of UN and international and regional organizations such as SAARC.

Passport Act and its Regulation prescribe for issuance of passport. Law relating to passport prescribes for issuance of passport so that a person may take part in various assemblies of the United Nations, Asian Development Bank, participation in SAARC assemblies and in other international conferences and also for a Nepali representative to travel to their respective Embassies or Commission and to allow a person to travel abroad for studies and therefore, for a woman to enjoy these rights such document should be issued. Selection of representatives for membership to the above mentioned international organization is done from among the citizens and citizen refers to both male and female. Pursuant to the decision dated December 25, 1995 and the conditions laid therein provided, female citizens are denied with a passport there would not be any representation from the nation and on the other hand, women would be not be able to enjoy the freedom prescribed and guaranteed by Article 12 of the Constitution. Women who are Nepali citizens can be sent as representative to the UN including other specialized agencies and other international and regional organizations and embassies. Provided, such women are sent, they would be enjoying their freedom of occupation and profession. Whether it is representing the State or for private purpose, the citizens through the medium of passport are enjoying the freedoms guaranteed by the Constitution and ICCPR. Where, women are denied passports, it would provide illegal restrictions to the enjoyment of those rights. In the absence of law, the Executive cannot render any decision restricting the women from the enjoyment of those freedoms.

Therefore, as discussed hereinabove, **the decision dated December 25, 1995 rendered by the Council of Ministers and the conditions laid therein regarding procurement**

of letter of consent from the guardian for obtaining a passport for women below 35 years of age is deemed to be contrary to the right to equality and right to freedom as enshrined under Article 11 and 12 of the Constitution and is also deemed to be contrary to the provisions enshrined in the International Covenant on Civil and Political Rights (ICCPR) and therefore, the decision is hereby quashed through an order of certiorari. Likewise, an order of mandamus is hereby issued in the name of the respondents directing them to provide passport to Nepali women pursuant to the law without procurement of letter of consent from their guardians. It is hereby directed to forward a copy of this order through the Office of the Attorney General for the information of the respondents and handover the case file as per the rules.

s/d
Bala Ram K.C.
Justice

Consenting on the aforesaid opinion

s/d
Badri Kumar Basnet
Justice

Dated 13th day of the Month of Mangsir of the Year 2062 (November 28, 2005).....

Supreme Court Special Bench
Hon’ble Justice Min Bahadur Rayamajhee
Hon’ble Justice Bala Ram K.C.
Hon’ble Justice Kalyan Shrestha

Order
Writ No. 112 of the Year 2062

Re: Declaration of laws void deemed inconsistent pursuant to
Article 88 (1) of the Constitution of the Kingdom of Nepal, 1990

Advocate Meera Dhungana, resident of Kathmandu District, Kathmandu
Metropolis Ward No. 11, Thapathali, self and on behalf Forum for Women,
Law and Development1 **Petitioner**

Vs.

Prime Minister and Office of Council of Ministers.....1
Ministry of Law, Justice & Parliamentary Affairs, Singhadurbar.....1
Ministry of Women, Children and Social Welfare.....1
Ministry of Finance.....1
Ministry of Labor and Transport.....1 **Respondents**
House of Representative, Office of the Speaker, Singhadurbar1
National Assembly, Singhadurbar.....1
Law Reform Commission, Singhadurbar.....1

Kalyan Shrestha J: Pursuant to Article 88 (1) of the then prevailing Constitution of Kingdom of Nepal, 1990, the fact and order of the writ petition is as follows:

The writ petitioner contends that Article 1 of the Constitution of the Kingdom of Nepal, 1990, states the Constitution to be the fundamental law of the country and any laws that are inconsistent with the Constitution shall be deemed void to the extent of such inconsistency. Likewise, Article 11 guarantees right to equality to all citizens. Provided, any law is discriminatory on the basis of gender, it is deemed to be contrary and inconsistent to the right to equality guaranteed under Article 11 of the Constitution. Right to equality as guaranteed by the Constitution has been violated by the provision prescribed under Section 10 (2) of the Bonus Act, 2030.

The writ petition further states that Section 10 (2) of the Bonus Act, 2030, prescribes discriminatory provision based on gender and marital status regarding acquisition of amount in lieu of bonus registered in the name of an employee upon the death of the employee, wherein women are discriminated and do not have the right to enjoy the financial services

and privileges prescribed by law. The conditional provisions prescribed in the law are direct discrimination based on gender.

Likewise, the writ petition contends that the legal provision prescribed under Section 10 (2) not only discriminates on the basis of gender but causes to discriminate on the basis of marital status wherein separate provision has been prescribed for sons and daughters, grandson and granddaughter, brothers and sisters. Pursuant to the provision, sons, grandsons, and brothers irrespective of their marital status are deemed capable to enjoy the amount in lieu of the bonus, whereas daughters, granddaughters, and sisters cannot enjoy the same provided they are married, and therefore the said provision is deemed discriminatory not only on the basis of gender but also on the basis of their marital status. Other than this, and in the process of defining the hierarchy between the first and second relationship, 'comma' has been used whereby relationship stated after the inclusion of 'comma' have been categorized as second generation, which is contrary and inconsistent with the law.

Article 1 of the Universal Declaration of Human Rights, 1948, guarantees that all members of the human community are equal before the law and are entitled to enjoy equal protection before the law. Likewise, Article 2 and 7 of the Declaration prescribes that discrimination shall not be made on the basis of caste, color, gender, language, religion, political or any other orientation. Similarly, Articles 1, 2, 3, 5, and 26 of the International Covenant on Civil and Political Rights, 1966, and Articles 1, 2, 3, and 5 of the International Covenant on Economic, Social and Cultural Rights, 1966, also guarantees similar kind of rights. Preamble and Articles 1, 2, 3, and 4 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, defines discrimination as distinction, restriction or exclusion made on the basis of sex. Likewise, provided, Nepal law is inconsistent with the above Convention to which Nepal has been a Party and that has been ratified by Nepal shall, pursuant to Section 9 of the Nepal Treaty Act, 2047, be deemed void and that the provision of the treaty shall prevail and the petitioners pray to quash and deem void the said disputed legal provisions.

Recommendation made on the preliminary, second and third shadow report of Nepal by the Committee on Elimination of Discrimination against Women, suggests existence of discriminatory laws with regards to property, coparcenary rights and marriage and recommends for reformation of these laws. The writ petitioner contends that the said legal provision is inconsistent and contrary to the precedents propounded by the honorable court.

The writ petition contends that where the legal provision contained in Section 10 (2) of the Bonus Act, 2030, is inconsistent and contrary to the fundamental right, i.e. the right to equality, international principles and laws relating to equality and also inconsistent with the right against discrimination, the petitioners pray that the said provision be quashed through an order of certiorari and that appropriate order be issued directing the respondents to make necessary legal provision based on the principle of equality. Likewise, the petitioner prays for issuance of an interim order directing the respondents not to do or cause to do anything pursuant to the disputed provision and have also sought for prioritization of the case.

An order had been issued by a single Bench of this court directing to submit the case for hearing upon submission of the rejoinder and the said order also directed for prioritization of the case.

The rejoinders submitted by the Office of the Speaker and National Assembly reads as follows: That where there is no clear grounds and reasons for making this office a respondent, the writ petition prima facie is deemed to be quashed. That, in the absence of the House of Representatives, the process of making timely amendments in the Nepal law has been hindered. That, the Legislature of the country is always conscious and alert in this regard and where the writ petition has been submitted without taking into consideration the time and the circumstances prevailing therein, the respondent prayed to have the writ petition quashed.

Separate rejoinders submitted by the Law Reform Commission, Prime Minister and Office of the Council of Ministers and Ministry of Women, Children and Social Welfare reads as follows: That, where there is no reasons and grounds for making this Commission a respondent and where the petitioners have failed to substantiate the reasons thereof, the respondents prayed to have the writ petition quashed.

Likewise, the rejoinder submitted by the Ministry of Law, Justice and Parliamentary Affairs reads as such: That, the person entitled to receive the bonus is vested with the right to designate his nominee upon his demise. With regards to designating a nominee, Section 10 (2) of the Bonus Act, 2030, does not discriminate between a male and female. That where a daughter or sister, upon marriage is entitled to receive property from her husband, categorization on the basis of their marital status cannot be deemed to be unjustifiable. That, where the petitioner contends that the application of 'comma' in between grandfather, grandmother, brother, grandson, granddaughter, nephew, niece categorizes those relatives after the application of 'comma' as second generation is erroneous. That, clarification made in the said Section prescribes that where there are more than one relative under the same category, the relatives prescribed therein are entitled to the bonus on a proportionate basis and therefore, such hierarchy does not create any discrimination to the enjoyment of their rights. That, where an aunt automatically is entitled to receive any property received by her husband, and pursuant to the provision prescribed under Section 10 (2) (k), the contention that the aunt is denied from receiving the bonus is baseless and erroneous. That, in the absence of the husband, the law entitles the widowed aunt to receive the bonus and as such the right of widowed woman is further protected. The respondent prayed to have the writ petition quashed.

A supplementary petition submitted by the petitioners before this Court reads as follows: That, where a writ petition had been filed seeking the court to deem void the provision prescribed under Section 10 (2) of the Bonus Act, 2030, and where the said case was sub-judice before the court, the government vide date November 3, 2006 had issued Act Relating to Some Nepal Amendment Act 2063, wherein the said Section had been amended. That where the Section had been amended, the petitioner deem the said Section to be

discriminatory. That Section 10 (2) (d) of the amended Act prescribes the following: Grandfather, grandmother and grandson and granddaughter from the son's side and as such clearly discriminates grandson and granddaughter from the daughter's side. Similarly, under Part (f) of the said Sub-section, prescribes for unmarried daughter, son, widow, daughter-in-law living separately and as such the said Section tends to discriminate daughters on the basis of gender and their marital status. The petition further contends that discrimination between grandson from the son's side and unmarried granddaughter living separately has been provisioned under Part (l) and that Part (o) further discriminates on the basis of gender and marital status between step-son and unmarried step-daughter. That, where an Act that has been enacted to uphold gender equality, further provides continuity to discrimination is a matter of concern. That, where the petitioners had prayed Section 10 (2) of the Bonus Act, 2030, to be inconsistent with Article 11 of the then Constitution of the Kingdom of Nepal, 1990, Articles 13, 20 (1) and (4) of the Interim Constitution, 2063, prescribes that discrimination against parental property shall not be made on the basis of gender and it also provides for framing of special laws for the protection, empowerment and advancement of women. That, where the amended Act provided continuity to discrimination on the basis of gender and marital status with regards to acquisition of bonus, the petitioner prayed to have the said provisions quashed and prayed the court to issue order for the formulation of appropriate law.

Where the case pursuant to the rules have been submitted before this Bench, learned advocate Meera Dhungana made the following submission: That in the process of prescribing the hierarchical order, Section 10 (2) of the Bonus Act, 2030, creates discrimination between sons and daughters with regards to acquisition of bonus. That where the petition was sub-judice, Some Nepal Amendment Act, 2063 had been promulgated with the purpose of maintaining gender equality, wherein Sub-section (2) of Section 10 had been amended. That Part (d), (f), (l) and (n) of amended Section 10 (2) further provides continuity to discrimination on the basis of gender and marital status. The petitioner prayed to quash and declare void the legal provisions citing the said provisions to be inconsistent with the provisions prescribed under the international conventions and Article 13 and 20 of the Interim Constitution, 2063 and also sought for an order of mandamus directing the respondents to frame appropriate laws.

Likewise, Deputy Attorney General Narendra Prasad Pathak on behalf of the government of Nepal made the following submission: That the government is committed towards fulfilling its commitment made at the international level and in this regard, the government had promulgated Some Nepal Amendment Act, 2063, wherein laws relating to gender inequality had been amended and repealed. That where an unmarried daughter like a son is entitled to parental property and where a married woman is entitled to coparcenary rights from her husband clearly proves that discrimination on the basis of gender has not been done. That where a married woman is entitled to coparcenary right from her husband, the law does not prescribe and entitle such woman and her children to be the successor to the maternal property. That where the said provision is judicious pursuant to our social construction, it cannot be deemed to be discriminatory and prayed to have the writ petition quashed.

Today being the date set aside for rendering a decision, and upon perusal of the writ petition and the rejoinders and deliberations made therein, the Bench deems that decision should be rendered on the following questions raised in the writ petition:-

- a. As to whether or not the various Parts prescribed under Section 10 (2) of the Bonus Act, 2030, regarding acquisition of bonus is inconsistent with Article 13 of the Interim Constitution of Nepal?
- b. As to whether or not the order sought by the petitioners should be issued?

With regards to the first question, the petitioners through their principal petition had contended and prayed to have the various Parts prescribed under Section 10 (2) of the Bonus Act, 2030, to be deemed void pursuant to Article 88 (1) of the Constitution of the Kingdom of Nepal, 1990, citing the said Parts to be inconsistent with Articles 1 and 11 of the said Constitution. Likewise, upon perusal of the rejoinder submitted by the respondent Ministry of Law, Justice and Parliamentary Affairs, the rejoinder contends that the said provision prescribes for acquisition of bonus of the deceased person and further contends that where a nominee has been designated by the deceased person, the said nominee is entitled to the bonus and where no such nominee has been designated, the legal provision prescribes the hierarchy of successors and since the legal provision is not discriminatory, the respondent prayed to have the writ petition quashed. It has also come to the notice of the Bench, that where the case was sub-judice, some Nepal Amendment Act, 2063 had been enacted to maintain gender equality wherein the disputed provisions prescribed under Section 10 (2) of the Bonus Act, 2030, had been amended. In response to the amended provision, a supplementary petition had been submitted wherein the petitioners had sought for declaring Part (d), (f), (l) and (n) of the amended Section 10 (2) void, citing the amended provisions to be inconsistent with Article 13 and 20 of the Interim Constitution, 2063.

Where the disputed law had been amended and in this changed context, the Bench does not deem it necessary to enter into the contents of the principal petition. The Bench deems it appropriate to enter into the contents of the supplementary petition and subsequently deems it proper to look into the amended legal provision. The principal contents of Section 10 (2) of the amended Section of the Bonus Act, 2030, deemed inconsistent with the Interim Constitution by the petitioner reads as follows:-

In the event of death of an employee, the person nominated by him shall be entitled to receive such amount. Provided, there is no nominee or provided where a nominee is dead, the following relatives of the employee who are alive, shall pursuant to the hierarchy be entitled to the amount and provided, there are more than one relative living the same shall be distributed proportionately:-

- (d) Grandfather, grandmother and grandson and granddaughter from the daughter's side,
- (f) Unmarried daughter, son, widowed daughter-in-law living separately,
- (l) Grandson, unmarried granddaughter from the son's side living separately,
- (m) Step-son and unmarried step-daughter living separately.

The petition contends that from among the legal provisions Part (d) discriminates between grandson and granddaughter from the daughter's side, whereas, Part (f), (l) and (m) discriminates daughters on the basis of their gender and marital status.

In this regard, the disputed legal provision has been amended to address the acquisition of the amount in lieu of bonus in the event of the death of any employee. Principal content of Section 10 (2) prescribes for the acquisition of bonus by a person or persons nominated by the employee in the event of his death. Where a nominee is alive, the said person is entitled to receive the bonus and as such the legal provision prescribed thereafter is deemed to be inapplicable. Provided, where a nominee is dead, or provided a nominee has not been designated by the deceased employee, the Act prescribes for acquisition of the bonus pursuant to the hierarchy prescribed under Part (a) to (o).

The disputed legal provision is not a legal provision enacted to regulate the provision prescribed under the Chapter of Partition and Succession but rather it is a special kind of law enacted regarding the acquisition of bonus by an employee. In this regard, the conditional provision of the law is applicable only in the absence of a nominee or in the event of the death of the nominee. With regards to designating a nominee, the Act does not provide any pre-conditions and as such the exclusive right to nominate a person solely vests upon the employee. The exclusive right of nominating or not nominating a person solely rests upon the employee and therefore, this legal provision does not regulate the general practice. Where the concerned person does not designate any nominee, the State in this regard has determined the hierarchy in order to regulate the process of acquisition of the bonus and therefore, should be considered as an alternative means.

By what kind of policy has the State been influenced while determining the hierarchy is a matter that falls within the ambit and jurisdiction of the Legislature? **The Court cannot intervene into the jurisdiction of the Executive and the Legislature vested by the Constitution and direct these bodies to include certain subject matters in the law. Before entering into the unconstitutionality of any law, the Court presumes that the Legislature has formulated the law pursuant to the Constitution.**

Where a party claims such provisions to be unconstitutional, it is the responsibility of such parties to refute the presumptions made by the court. Provided, issue of unconstitutionality is established by the party, the court cannot declare any law to be unconstitutional. Likewise, the claim regarding unconstitutionality of any law should not be illusory. It is necessary that such claims be based on reasonable grounds and reasons which are easily comprehensible to a general layman.

The family laws prescribed under the Chapter of Partition, Succession, Adopted Son, Marriage and Husband and Wife of the *Muluki Ain* contains social and cultural practices. Section 1 on the Chapter of Partition defines the term joint family and also categorizes the persons included within that terminology. Where a person does not fall within that category, the said person is not deemed to be within the joint family and as such is not entitled to

partition. Although, Section 1 on the Chapter of Partition recognizes unmarried daughter as a coparcener, Section 1 a. on the Chapter of Partition does not recognize married daughter as a member of the joint family wherein the legal provision does not prescribe coparcenary right to such daughter. The provision regarding prescription of coparcenary right to unmarried daughter like son was not a provision that was easily incorporated. Pursuant to Writ Petition No. 3392 of the Year 2050²³, the court had issued directive orders and pursuant to various orders issued by this court, reforms in laws relating to gender equality had been made wherein reforms in the legal provisions prescribed under the Chapter of Partition had been made whereby unmarried daughter by birth had been included as a coparcener of a joint family. Likewise, under the Chapter of Succession, the term successor has been defined wherein daughters under various circumstances have been included as a successor. Nevertheless, coparcenary and succession are not the same and there is a conceptual difference between these two terms. The first is a right that is acquired by virtue of being a member of the joint family whereas in the case of succession, this right is acquired by fulfilling certain conditions prescribed by law. Succession right is acquired by the prescribed persons upon fulfilling certain conditions.

Other than the rights prescribed by the law on succession, a daughter's relation with the joint family are severed upon her marriage. Pursuant to the present provision, the status of membership of the daughter with the joint family is severed upon her marriage and has no rights and obligations. Legal relation is limited by the law relating to succession. In case of a male and where a family is indivisible and living in a joint family, this right continues to be enjoyed for generations and has no significance as to whether or not they are married. But in case of a daughter, Section 1 under the Chapter of Partition does not provide continuity upon the marriage of a daughter. This is the nature of our family law as of this date. Laws are influenced by certain recognition and this is not only applicable in the case of Nepal law but is applicable in any legal system. In other words, law cannot be oblivious of social practices and values.

The nature of family law, constitution or dissolution of a family is determined on the basis of the social, economic, cultural and legal grounds. What is the construction of our family law or its validity is not a question of the present time. As to whether or not any portion of the family law contradicts with the fundamental law of the land and the fundamental rights and rights relating to human rights and judicial values or as to whether or not regulates any other legal rights or causes encumbrance is a matter to be entertained by the court and through this process the court protects the rights of the people. **In the name of providing justice, orders or directives for reconstruction of the social or cultural system cannot be issued by the Court. These are jurisprudential or policy matters to be decided by the Legislature.**

²³ Nepal Law Magazine, 2052, page 432

In the said case, the petitioner has not raised any philosophical questions on the law relating to Partition or Succession. Right activists like the petitioner and other petitioners have raised various questions regarding equality, wherein this court has repeatedly expressed its commitment on matters relating to human rights and right to equality.²⁴ In the process of implementing the orders or directives issued on various occasion has resulted in creating a great leap in the area of gender equality. Nevertheless, the journey of equality is such that it has no permanent resting place. In other words, this journey takes a different direction each time and in developed circumstances. This is an indicator of the developing trend of human beings. A few years back in *Meera Dhungana vs. Government of Nepal*,²⁵ the petitioner had prayed for prescription of coparcenary right to daughter equivalent to that of a son and currently the writ petitioner has sought for acquisition of bonus irrespective of their marital status and as such the issue of gender equality has traversed a long path.

Society is an organization which continues to influence the social, economic, cultural and legal aspects. Values determined by the society are expressed through laws, which is expressed in toto or in bits and pieces. For the purpose of maintaining the supremacy of the fundamental rights, various petitions have been submitted before this court. While challenging the validity of law, sometimes the law in toto and sometimes its portion is challenged. Such challenges are made pursuant to the need and necessity. The background of various laws prevalent in the society functions as a backbone of the societal process. Therefore, the various laws prevailing in the society is in one way or the other attached with values and recognition. Therefore, where social or cultural processes are expressed in the law, there has to be consensus in the reconsideration of such laws and it is appropriate to look into this matter through political or any other procedures.

In the present petition, the question of gender discrimination relating to acquisition of the bonus as provisioned under the various Parts under Section 10 (2) of the Bonus Act, 2030, has been challenged. Various provisions under the Chapter of Partition, Succession, Marriage, Adopted Son, and Husband and Wife which are a part and parcel of the family law assists in the preparation of the skeleton of the family law of Nepal and the effect of these provisions are reflected in various other laws.

Bonus Act, 2030, is an independent Act. This Act in particular circumstance, determines the hierarchy of successors in relation to acquisition of the bonus. The privileges prescribed under the Bonus Act, 2030 is personal in nature and as such there is no provision for family elements and therefore, the privileged person may devolve his right to any other person. Where a person does not devolve his right to any other person, the Bonus Act prescribes a separate and clear provision regarding devolution of one's right to another. The said Act has prescribed its own hierarchy. Provided, no hierarchy is determined, one need to look

²⁴ Nepal Law Reporter, 2053, Page 537, Nepal Law Reporter, 2053, Page 105, Nepal Law Reporter 2057, Page 376, Nepal Law Reporter, 2061, Page 377, Nepal Law Reporter, 2061, Page 387.

²⁵ Writ Petition No. 3392 of the Year 2050 Nepal Law Reporter, 2052, Page 462

into other prevailing legal provisions and such condition does not arise in this case. Therefore, regarding the hierarchy of devolution of right, the provisions prescribed under the various Parts of Section 10 (2) of the Bonus Act, 2030, is in itself very clear.

As far as the question of gender discrimination in relation to the marital status is concerned, principally discrimination on the basis of gender and marital status is not acceptable. Nevertheless, such discrimination should be clearly evident. **Discrimination on the basis of gender and on the basis of marital status is not same. Where any woman, male or a third gender is discriminated due to his categorization in a particular gender classification, then such discrimination is deemed to be gender discrimination. Provided, discrimination between same genders is made on the basis of the marital status or where different legal provisions are made therein, then it is deemed to be a separate issue. That should be considered to be discrimination on the grounds of marital status rather than on the basis of gender.**

What could be the rationality of the petitioner in bringing forth the issue of gender and marital status? **Primarily, the law discriminates a daughter on the ground of her being a daughter and thereafter, prescription of various proviso prohibiting an unmarried daughter from enjoyment of certain rights creates another categorization within daughters. Such kinds of questions are applicable against women and this question fundamentally is a question of discrimination between gender and marital status. Therefore, within the issue of gender lie various other sub-issues.**

Regarding the enjoyment of right prescribed under the Bonus Act, 2030, the petitioner prays for inclusion of unmarried daughters in the hierarchy list. The petitioner does not pray for amendment of the prevailing list nor does the petitioner pray for removal of particular person included in the hierarchy list. As far as the petitioner's plea regarding inclusion of unmarried daughters in the hierarchy list is concerned, the question of appropriateness of such provision and hierarchy of inclusion is a matter to be considered by the policy makers. It is but natural to hope that such questions based on the right and principle of equality prescribed by the Constitution are addressed by the Legislature.

International Covenant on Economic, Social and Cultural Rights, 1966 and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, and other international humanitarian laws that have been ratified by Nepal prescribe and guarantees that discrimination on the basis of sex and marital status shall not be made against women. Section 9 (1) of the Nepal Treaty Act, 2047, prescribes that provided provision of the treaty to which Nepal is party is inconsistent with Nepal law, then such law to the extent of such inconsistency shall be deemed void and provision of the treaty shall prevail as Nepal law.

Article 11 (1), (2) and (3) of the then Constitution of the Kingdom of Nepal, 1990 prohibits discrimination on the basis of gender. The same provision has been prescribed under Article 13 (1), (2) and (3) of the Interim Constitution, 2063. This has not only being guaranteed as a fundamental right but the proviso under Article 13 (3) prescribes for framing of special laws for the protection and empowerment and advancement of women. Article 20 (1) of the Interim Constitution goes a step further and prescribes that woman shall not be discriminated against in any way on the basis of gender and Article 20 (4) guarantees sons and daughters equal rights to ancestral property. There have been amendments and reforms in various laws which are evident from *Muluki Ain* 11th Amendment Act, 2058, Some Nepal Amendment Act, 2063 and *Muluki Ain* 12th Amendment Act, 2064.

Looking at the development of the said laws, it can be deemed that progressive changes in the area of gender equality has been achieved and in this regard the petition seeks for equal legal provision between marital status of son and daughter. The plea does not seek to substitute the existing hierarchy but rather seeks to include the status of married daughters and as such it cannot be deemed to be *ultra vires*.

Section 10 (2) of the Bonus Act, 2030, prescribes both the male or female belonging to different generation as successors. The petition fails to state as to how a person on the basis of their marital status and gender has been discriminated and therefore, it cannot be deemed that the hierarchy prescribed therein is gender discriminatory. In the absence of any clear reason and grounds, the Court cannot declare the hierarchy to be discriminatory and unconstitutional. In other words, status of discriminatory should not be illusionary but rather should be based on reality. Although, the petitioner prays for inclusion of various generations from the side of married daughter under the Bonus Act, 2030, the issue is a matter of policy to be determined by the Legislature. The Legislature in order to address the concern and initial challenge raised by the petitioner, had brought forward amendments to Section 10 (2) of the Bonus Act, 2030, while the issue was still sub-judice and therefore, the court does not deem it appropriate to intervene and declare *ultra-vires* the various Parts prescribed under Section 10 (2) of the Bonus Act, 2030. Provided, such declaration is made, then such declaration would create a legal vacuum and would also have an adverse effect to the provision of daughter, daughter-in-law and granddaughter currently included in the amended provision. **This would neither deem to be constitutional nor would it deem to be judicious. Therefore, where discrimination against a person cannot be established, it is not possible for the Court to declare such provision *ultra-vires* and substitute it with a new provision.** Therefore, with regard to the first question and as discussed hereinabove, the disputed legal provision cannot be deemed to be inconsistent with the international conventions to

which Nepal is a Party and with Article 13 of the Interim Constitution, 2063 and as such the said legal provisions cannot be deemed to be *ultra-vires* and void as sought by the petitioner. The said petition is hereby quashed. It is hereby directed to submit the case file accordingly.

s/d
Kalyan Shrestha
Justice

Concurring with the above opinion

s/d
Bala Ram K.C.
Justice

s/d
Min Bahadur Rayamajhee
Justice

Bench Officer: Narayan Subedi

Dated: 16 day of the Month of Shrawan of the Year 2065 (July 31, 2008).....

**Supreme Court Division Bench
Hon'ble Justice Khil Raj Regmi
Hon'ble Justice Kalyan Shrestha**

**Order
Writ No. 3561 of the year 2063 B. S (2006)**

Sub: Praying for the issuance of appropriate order or directive including mandamus as per Article 88(2) of the Constitution of the Kingdom of Nepal, 1990.

On behalf of Forum for Women, Law and Development, located at Kathmandu Metropolitan City, Ward No. 11, Thapathali and also on her own behalf Advocate Sapana Pradhan Malla1 **Petitioner**

Vs.

Prime Minister, Nepal Government and Office of the Council of Ministers, Singhadurbar1
Ministry of Law, Justice and Parliamentary Affairs, Singhadurbar1
Speaker, House of Representatives, Singhadurbar1 **Respondents**
Ministry of Women, Children and Social Welfare, Nepal Government, Singhadurbar1
Ministry of Health and Population, Nepal Government, Ramshahpath 1

The present writ petition appears to have been filed as Public Interest Litigation (PIL), pursuant to Article 88(2) of *the Constitution of the Kingdom of Nepal, 1990*, praying for the issuance of a directive order for the purpose of making and implementing the necessary law for the enforcement as well as protection of the right to privacy guaranteed by the aforesaid Constitution.

The present writ petition has been filed not because the petitioner herself or the organization (Forum for Women, Law and Development), which she represents, has itself become a victim due to the violation of the right to privacy mentioned in the petition but because the petitioner organization, by virtue of being an organization engaged in the advocacy of addressing through various means the legal rights and welfare of the classes such as women, children etc. and the community affected by problems like HIV/AIDS, seems to have entered the court for seeking relief by displaying its meaningful concern for the present issue.

Even though *the Constitution of the Kingdom of Nepal, 1990*, which has been shown as a basis for filing this petition, already stands repealed at present, and since the right to privacy mentioned by the petitioner has been enshrined also in Article 28 of the Interim

Constitution of Nepal, 2007 and as Art. 107 of this Constitution has also retained the extraordinary jurisdiction of this court in respect of granting judicial remedy in matters of public interest or concern, it is feasible to deliver justice in regard to the issue prayed for by the petitioner on the basis of the provisions of the 1990 Constitution which was in force at the time of the filing of this writ petition and those of the Interim Constitution of Nepal, 2007 which is currently in vogue. Hence, there is need of considering the issue raised in the petition in the light of the aforesaid provisions.

The summary of the writ petition and the verdict delivered thereupon are as follows:

Freedom, equality and self dignity are the inherent rights of the human beings. The rights of equality and self dignity provide guarantee for the individual liberty of the human beings. These rights of equality and self dignity have been accorded protection at the international level through various legal provisions relating to human rights including the Universal Declaration of Human Rights. These rights of equality and self dignity are guaranteed by Articles 11 and 12 of the Constitution of the Kingdom of Nepal 1990. The main basis for protecting the right to self dignity of an individual is his/her right to privacy. In the life of every individual there use to be some matters of personal concern which need not be exposed to public knowledge. The State must display concern for the protection of their privacy. The Preamble of the Charter of the United Nations has reaffirmed the basic human rights and the right to self dignity of all men and women. Whereas Art. 12 of *the Universal Declaration of Human Rights* has guaranteed dignity and respect for the individuals and the right to privacy of their residence, family and correspondence, Art. 17 of *the International Covenant on Civil and Political Rights, 1966* and Art. 16 of *the Covenant on the Child Rights* and its Optional Protocol have also recognized the right to privacy as an inalienable right of the individual. Art. 22 of *the Constitution of the Kingdom of Nepal, 1990* has enshrined the right to privacy as a fundamental right. Similarly, Section 49 of *the Child Rights Act, 2048* (1991) has provided for, during the proceedings of any case relating to a child, the presence in the court room, of the legal practitioner, the father, mother, relative or guardian of the child and, if the official trying the case deems it appropriate and allows, any other person or social organization engaged in activities aimed at the protection of the rights and interests of children. Likewise, Rule 46(b) of *the District Court Rules, 2052* (1997), Rule 60(a) of *the Appellate Court Rules, 2048* (1991) and Rule 67(a) of *the Supreme Court Rules, 2049* (1992) have provided for in-camera proceedings and the formulation of procedures for conducting the trial of cases relating to minors, rape, trafficking in human beings, establishing relation, divorce and also any other case which the court deems fit for trial in the camera court.

Even though all the Covenants and statutory Acts and laws mentioned above have recognized the right to privacy as an inalienable right of the individual, no clear legal provision has been made for protecting the privacy of the names and identity of the persons involved in the cases relating to women and children and the persons infected by contagious diseases like HIV/AIDS. Since due to the ever increasing threat of spread of diseases like HIV/AIDS, there is a state of infringement of the economic, social, cultural and property rights of such persons, and as those victims have found it difficult to get access to justice and as there has

also cropped up a situation in which they seem to be also deprived of the right to hearing by a competent court protected by international human rights law, the writ petitioner seems to have prayed for the issuance of an order directing for immediate enactment and enforcement of necessary law for guaranteeing the right to privacy granted by Art. 22 of *the Constitution of the Kingdom of Nepal, 1990*; for making appropriate provisions for maintaining privacy of the procedural formalities on the basis of gender sensitivity, taking into consideration the gender sensitivity of women and also the discriminations and allegations suffered by them, in cases relating to women in respect of the proceedings ranging from filing of the case to pleadings, submissions and delivery and publication of the judgment; for making appropriate provisions for maintaining privacy in cases relating to children right from the initial procedure of the cases in order to ensure juvenile justice to them, taking into consideration social stigma likely to be faced by the children in the future; for making necessary legal provisions for maintaining privacy in cases relating to the persons infected by HIV/AIDS right from the beginning of the process of registration of the case in view of the fact that the persons infected by HIV/AIDS are being victims of social discrimination and stigma and they are also being deprived of reasonable opportunities; and for making legal provisions for maintaining privacy in the case in the event of a party to the case moving a petition at the time of registration of the case or while it is in progress requesting the court for issuing an order for maintaining such privacy by showing special reasons and facts which justify such a demand; and also for making breach of such privacy by any person concerned with maintaining privacy in such cases punishable and also for providing reparation to the persons affected by that.

This Court, issuing an order on July 16, 2006, directed the issuance of a notice to the defendants asking them to explain within fifteen days why an order should not be issued as requested by the petitioner and, taking into consideration the issue raised in the petition, also granted priority status to the petition for the purpose of hearing.

Replying to the notice, the Prime Minister and the Office of the Council of Ministers contended that the writ petition should be rejected as the petitioner has also framed that office as a defendant without specifically mentioning which rights of the petitioner have been infringed.

In its written reply, the Ministry of Women, Children and Social Welfare maintained that the enactment of law or its amendment is a matter falling within the exclusive jurisdiction of the Legislature and, as the petitioner has failed to explain the reasons with justification as to which act of that Ministry has adversely affected the constitutional and legal rights of the petitioner, the petition was baseless and based on subjective logic and, therefore, it deserved to be rejected.

Likewise, in its written reply, the Ministry of Law, Justice and Parliamentary Management, praying for the rejection of the petition, contended that the right to privacy guaranteed by Art. 22 of *the Constitution of the Kingdom of Nepal, 1990* is in itself a law and, according to that provision, because it is inviolable except in the circumstances specified by the law and as an aggrieved person, in case of the infringement of such a right, can himself/herself

move the court for the enforcement of that right, the petitioner has failed to specifically mention who, and how, has infringed the fundamental right of any person. Furthermore, as the writ petition appears to be related to cases pertaining to the privacy of a person in which connection a provision has been already made in the Court Rules and, also the Supreme Court is competent to make additional provisions in that regard pursuant to Section 31 of *the Judicial Administration Act, 2048* (1991), the petitioner's claim appears to be baseless and unreasonable.

Speaker of the House, Subhash Nemwang, in his written reply, contended that no one can disagree to the claim of the petitioner that the State must implement the obligations prescribed by various International Covenants relating to human rights by making relevant laws. The State must be always cautious in this direction, and the House of Representatives has always remained committed to and active in drawing the attention of the State in this regard. Expressing the commitment that the Government of Nepal must ratify the treaties and covenants relating to human rights including the one concerning International Criminal Court, Rome Statute etc, the House of Representatives is also discharging functions such as issuing relevant directives to the Nepal Government. The Speaker further stated that if either the concerned Ministry of Nepal Government presented the relevant Bill or any other member of the House of Representatives presented a private Bill before the Parliament Secretariat for the enactment of law on any matter in accordance with *the House of Representatives Rules, 2006* in connection with making appropriate and effective law for the enforcement and guarantee of the rights to equality, privacy and self dignity equally ensured for women, children and HIV/AIDS infected persons, the House of Representatives stands committed to the enactment of that law by initiating the necessary legislative process.

As this court had directed the petitioner on March 9, 2007 to produce before the court the outlines showing which model and procedure shall be effective to ensure privacy in the context of the guarantee accorded to the right to privacy by the Constitution, the petitioner has submitted a model of the guidelines as per that order.

Appearing on behalf of the petitioner in course of hearing of the writ petition which has been presented before the Bench as per the Rules, learned Advocate Rup Narayan Shrestha pleaded that the Constitution has protected the freedom and equality of a person, besides also protecting the right to privacy, which can be viewed as the main basis for the protection of an individual's self-dignity. The international human rights law has also laid emphasis on protection of the right to privacy of an individual. Although the Constitution has protected the right to privacy, no exhaustive law has been enacted and implemented in this regard. Various international human rights laws have provided for making special provisions for the protection of the privacy of victim women, children and HIV/AIDS infected persons. As in our legal system, in the absence of any clear legal provision ensuring the privacy of the name and identity of women, children and HIV/AIDS infected persons involved in the legal proceedings, there is a scenario depicting the infringement of their economic, social and property rights and lack of access to justice, the learned Advocate pleaded for the issuance of the order as requested by the petitioner.

The written submission produced by the petitioner states that the rights to equality and self dignity are essential for a dignified living of the human person. Equality and self dignity guarantee freedom. It is the right to privacy which serves as the basis for the protection of self dignity. This is also linked with the privacy of information in a social, physical and mental manner. If the public exposure of some matters presented in course of a legal proceeding is not discouraged there is always the danger of deprivation of justice for the victims. In case of failure to protect the privacy of some matters the victim may be faced with a situation in which the rest of his/her life may be exposed to danger and s/he may also suffer from a social stigma. Particularly, if the privacy of the classes (of the people) exposed to risk is not protected, they cannot exercise their right to receive justice. Management of this right must be undertaken in order to protect against discrimination and stigma. If that is not done, it may result in restrictions also on the exercise of the right against exploitation, the right against violence, the right to property and the right regarding criminal justice. Besides, light has been thrown also on the various provisions made in the international human rights laws. On the basis of that it has been contended in the written submission that the order prayed for by the petitioner must be issued and, pending the enactment of relevant law as per that order, Guidelines for the protection of privacy should be issued.

Appearing on behalf of the defendant, Ministry of Law, Justice and Parliamentary Management, learned Advocate Narendra Prasad Pathak argued that the claim made by the petitioner in this petition is not clear. Since the Constitution has protected the right to privacy and provided for seeking judicial remedy from the apex court in the event of infringement of that right, and as provision has been made for in-camera trial of specific cases relating to women and the cases in which children are a party, there is no basis for the issuance of the writ and, therefore, it must be rejected.

As the present writ petition has been scheduled for today, for the delivery of judgment, in view of the submissions made by the learned counsels and the written submission presented by the learned counsels appearing on behalf of the petitioner, the following issues need to be addressed in this writ petition:

1. Whether or not one has got the right to maintain privacy about the identity or the other related information concerning the victim women, children or HIV/AIDS infected or affected persons involved in the legal proceedings? Whether or not it has any legal ground or justification?
2. What is the status of the existing legal provisions regarding the protection of privacy ? Are they adequate or inadequate ?
3. Does the claim for the right to privacy affect the other party's right to fair judicial hearing ?
4. Whether or not maintaining privacy of information in the judicial process casts any impact on the right to information ?
5. Whether or not the court possesses the power to issue an order to maintain privacy in the judicial process about the details of the party or the victim or the witnesses mentioned in the petition ? And whether or not it is proper to issue a directive order, as requested by the petitioner, to make law for protecting the information regarding their identity ?

6. Whether or not it is desirable to make some immediate provisions pending the formulation of adequate legal provisions ? If the interim provisions are to be made, what type of provisions can be included in those interim provisions ?

It looks essential to first consider the special nature of those sections of the victim women, children or HIV/AIDS infected or affected persons involved in litigation who have got their own personal special nature and needs, and for whom the petitioner has sought for maintaining the privacy about their introductory and related information. There are some specific circumstances for the protection of the privacy of the victim women. Likewise, the factors and circumstances necessary for the protection of the privacy of HIV/AIDS infected persons or children are of different nature.

Let us first consider the case of women. Women like men may also get involved in conflict with the laws. And in the event of violation of law by women generally there is no need of protecting the privacy of the identity and other related description of the concerned women. The legal liabilities of a woman are similar to those of others in a situation where she is involved in some crime.

Even though Art. 13 of *the Interim Constitution* has provided for equality before the law and equal protection of the laws under the right to equality, in view of the present social context of the country on account of various religious, social, economic and cultural reasons the women do not appear to be in a position to enjoy equal opportunities in the political, social, economic and educational fields nor can they acquire a status similar to that of their male counterparts on account of various religious, social, economic and cultural factors. There are several things to be done by the State to change that situation and to create an equitable condition. Particularly, the female community seems to be the victims of discrimination due to the existing discriminatory social, cultural and psychological factors, and besides other things, they also seem to be experiencing obstacles in the enjoyment of public rights or opportunities or facilities which are available according to the law. Consequently, not to talk of enforcing their rights, the women feel hesitant even to seek judicial remedy for violence or injustice committed against them, and, without enjoying their right relating to justice, they appear to be bound to surrender or tolerate the injustice. Such a situation is visible in the incidents of violence committed especially against women.

Given the nature of violence committed against women, they faced hindrances in getting access to justice by lodging complaints and appearing as witnesses for substantiation of their complaints due to threats given by the criminals or the criminal group or due to the fear of the society which might put allegations against the character or purity of the women themselves.

Children are another class for whom the petitioner has asked for maintaining privacy regarding their identity and the related information. The concept of juvenile justice seems to have developed on the basis of the need for giving a judicial treatment, different from the one meted out to the adults charged with a similar offence, to children in conflict with the

laws in view of some factors like the young aged children, evolving stage of their learning and understanding, positive social contributions expected from them in their long life in the future and the long-term impact on the society, in case of the increase in criminality or perversion in the children. Under this, in course of taking action against a child for violating any law, steps are taken to prevent him/her from repeating the violation of law in the future instead of sending him/her to detention or prison, to arouse the feeling of repentance in him/her for the act s/he has committed, to adopt alternatives to punishment like imprisonment, to provide the victim with relief and reparation also with the involvement of and under the responsibility of the parents of the child and to explore the possibility of reform in the child, besides, attempting in the rehabilitation of the child in the society, through the restorative justice measures. It is for this reason that the claim has been made seeking imposition of restrictions on the publication, for public purpose, of the introductory and other related description of a child recorded in the judicial proceedings involving children where s/he has acted either as a defendant or suffered as a victim.

If the violation of law committed by a child is recorded and made public in stead of keeping it confidential, the society, after having knowledge about that, may treat the child as an anti-social element and there may develop some distance between the child and the society or a situation of conflict may arise between them. Even though the child repeats the violation of law, taking into consideration the principle of the best interests of the child, there have been made legal provisions not to punish the child as a habitual offender and to protect the privacy of the introductory details of the child during the progress of the legal proceedings or even after the decision of the case in both the circumstances, whether the child is a defendant or a victim. If the fact of prosecuting the child for getting in conflict with the laws or punishing him/her is kept in the written form or published, it may cause obstacles to the career development and character building of the child in the future. Therefore, a system has been developed in some countries to destroy the records after the decision of such case.

Moreover, if the child happens to be the victim and his/her sensitive and vulnerable condition is published, other people may get thrilled at or attracted by such condition of the child and may also feel tempted to make additional exploitation or derive illegal benefits from the child. The violence committed against the child may haunt him/her life long and its publication may further increase the pain. If the privacy of the child is not protected there may arise a situation in which the child may not come forward to claim for judicial remedy against the violence or injustice committed against him/her or may not even participate in that process. Thus, the issue of the privacy of the children involved in the juvenile justice process appears to be of a different nature.

So far the question of protection of the privacy of the introductory information of HIV/AIDS affected or infected persons or the condition of their infection is concerned, this seems to be a problem of a different nature. It is relatively a new health related problem for which no curative remedy has been discovered so far, and as its infection is silently spreading in the society, this problem needs to be addressed in a strategic manner. The reasons

behind this infection and the problems experienced by the infected persons are of multi-dimensional nature. Some factors like poverty, illiteracy, lack of awareness, lack of medical treatment and facilities, the problem relating to discharge of duty by the persons responsible for providing public service etc. help in the spread of infection of this disease. On the other hand after becoming a victim of infection, the infected person is found to be suffering from violation of some human rights including discrimination, boycott, deprivation etc. in the family, community and public utilities. As a result, the infected person experiences a gradual decrease in his/her access to education, employment, health facilities, recreation, family assistance and property etc., and s/he becomes compelled to seek judicial remedy for acquiring those things. At a time when the judicial remedy is required against all kinds of injustice, due to the fear of being a victim of additional neglect and boycott in the event of disclosure of one's infected physical condition and identity coupled with systemic delay, one may opt for discarding the process of judicial remedy. If such a situation is created, the infected person has not only to face a threat to his/her life rather if such an infected person, who is incurable and dejected, behaves in a way as if s/he was not infected, a vicious circle of infection is created. This finally compels the society to bear an unexpected and unbearable burden.

The above description makes it clear that according to their respective condition and nature, there are specific needs of the classes for whom the petitioner has asked for protection of their privacy, and, consequently, the demand for maintaining such privacy needs to be considered exhaustively.

Now let us consider issue no. 1.

If it is to be considered whether or not the victim women, children or HIV/AIDS infected persons have got a right to the protection of their introductory information and if it is so granted, what are its legal grounds and justification. Besides the national constitutional and legal provisions made in this regard, the provisions contained in the international human rights conventions also need to be considered.

Under the fundamental rights provisions of *the Interim Constitution of Nepal, 2007*, several rights including the right to freedom (Art. 12), the right to equality (Art. 13), the right to privacy (Art. 28) and the right to constitutional remedy (Art. 32) have been included. Human rights or fundamental rights are the matters which need to be considered in the context of the relation of the individual with the State. It is the principle that the people accept the right of the State on the condition that the State shall also respect and safeguard the specific rights of the people or community such as freedom, equality etc. and shall not infringe those rights. As on the basis of this principle the State has legally recognized and guaranteed some natural necessities, these rights are treated as inviolable. The rights such as the right to life, the right to equality, the right to personal freedom, the right to property, the freedom of thought and expression, the freedom of publication, the right regarding justice etc. are treated as basic human rights. The right to privacy is directly or indirectly linked to all those rights in an indivisible manner, thereby prohibiting outside interference in the personal matters of an individual. For example, the right to life not only signifies an

individual's right to live a simple existence rather it also signifies one's right to live with dignity. If some highly personal information of an individual or citizen is subjected to disclosure except when its disclosure is essential for some specific legal purpose, the individual or the citizen is unnecessarily made to stand in the defense line and also falls in a position where s/he may not confidently do the work which s/he likes to do.

A demand for uncalled for openness regarding someone's personal information may lead to a situation where it shall be impossible to enjoy one's rights or to demand even for the fulfillment of one's legal obligations. For instance, in the event of taking any health service, even though the status of anybody is not directly related with that matter, if s/he is made to disclose whether or not s/he is married or whether or not s/he is infected with HIV/AIDS and, if s/he is a child, whether or not s/he has been charged with theft or whether or not s/he is involved in any litigation, simply that very reason may lead to a situation where it shall be difficult for him/her to enjoy the facilities provided by the law. If any pregnant woman wants to abort her unwanted pregnancy and the institution providing that service forces her to disclose the identity of the person who has made her pregnant or whether or not she is married, the pregnant woman may feel compelled to discard the abortion service as she may not want to disclose that information or such an act may make her feel uncomfortable. Such problems may be multiple and it is not possible to mention all the dimensions.

As a result of complexity of the problems like HIV/AIDS, the status, guardianship, health etc. of the parents of the children may also be dragged into controversy. For instance, while talking about protection of the privacy of the introductory information about a child affected by HIV/AIDS or also in a dispute about the guardianship of a child it may be essential to provide protection of privacy of the status of the parents of that child. Even if the introductory information about the child is protected, the disclosure of the identity of his/her parents may destroy the meaning and purpose of the privacy of the identity of the child. If a child has been brought up in a prison due to the imprisonment of his/her mother the information about such a rearing may also need to be protected. Such instances may be multiplied.

In the process of enjoyment of judicial remedy the petitioner seems to have requested for making provisions for protecting the privacy of the introductory information about women who have been victims of violence against women, of children who are parties to a case and of persons who are infected with HIV/AIDS. Article 28 of the *Interim Constitution* has provided that the person, residence, property, documents, data, correspondence, character etc. shall be inviolable except in the circumstances specified by the law. Since that provision has made the privacy of the above mentioned matters generally inviolable and has provided for specification of the conditions by the law for disclosure of their privacy, it appears that the law has made privacy a general matter whereas disclosure is an exception.

There is some special significance of various rights mentioned in the Constitution and their hierarchical order has not been fixed nor can it be possible to do so. No right is complete and absolute in itself, and for the enjoyment of any one right other rights may be related and subsidiary. The infringement of one right may cause obstruction to the enjoyment of another

right. Therefore, it is essential to consider any question relating to any right in the totality of the provisions regarding fundamental rights and also on the basis of their complementarity. For instance, even though only the right to privacy of the HIV/AIDS infected persons is to be considered, it may also become essential for the protection of their right to health. In order to prevent any otherwise impact on his/her personal or his/her family's right to education or employment or to prevent discrimination it becomes equally essential to protect the right to education, the right to labour, the right to property and the right to equality.

The right to privacy has got its own significance in the context of women or children. It has been mentioned in Art. 20(3) of the *Interim Constitution* that no physical, mental or any other type of act of violence shall be committed against women and that such an act shall be punishable by law. Because it has been mentioned in the Constitution that no discrimination shall be made against any person only because the person is a woman, if any woman involved in any specific litigation or placed in a particular situation does not feel the presence of a friendly environment for easy access to justice at par with men, the act aimed at bringing change in such a situation shall have to be treated as a part of the greater process of removing discrimination against women. The exercise of the right against torture guaranteed by Article 26 of the Interim Constitution is also relevant for safeguarding privacy in order to remove discrimination against HIV/AIDS infected or affected persons and to control torture or inhuman behaviour against them. If the treatment meted out to any party or victim creates a feeling of fear, threat or inferiority complex in the mind of such a party and makes him/her feel insulted such a treatment is considered to be insulting.²⁶

Thus, in the present case, in order to make the right to privacy mentioned by the petitioner effective and meaningful there is a need for considering this right in the relativity of other relevant rights, and, especially, in the present context it needs to be considered in the light of the right to life, the right to freedom, the right to health, the rights of women, the rights of children, the right to property, the right to information and, most importantly, the right to justice and judicial remedy.

In the context of the analysis made above, it becomes relevant to look at the provisions made by the international law, especially the international human rights law, and our Constitution and the laws.

Article 22 of the *Constitution of the Kingdom of Nepal, 1990* had afforded protection to the right to privacy by providing that the privacy of a person, home, property, document, correspondence or information of anybody shall be inviolable except in the circumstances specified by the law. Article 28 of the Interim Constitution has, expanding its sphere by also embracing other facets of the privacy of a person, guaranteed that "the privacy of the matters relating to the person, home, property, document, data correspondence and character of anybody shall be inviolable except in the circumstances specified by the law." Under the

²⁶ V. Vs. United Kingdom, European Court of Human Rights, 2000, 30 EHRR, 121.

provision of the right to privacy, the privacy of the person as well as his/her confidential information, too, seem to be protected. If the privacy of the data and the personal introductory description of an individual relating to his/her character and other related information is not protected, the right to privacy becomes extremely contracted and may not attain its objective.

The use of the word 'person' in Art. 28 of our *Interim Constitution, 2007* signifies not only the inviolability of the body but also the physical health and the personal introductory matters. The data of a person, irrespective of whether it is concerned with any case or health, are treated as inviolable except in the circumstances specified by the law. In other words, for open dissemination of such information permission should have been granted by the law itself. Otherwise, it shall be inviolable. So far as regards the question of whether or not the data received in the judicial process fall under this category, if it is argued that only because it is a judicial process all matters should be open and easily accessible, in that case the above mentioned constitutional provision shall become meaningless.

The right to privacy is found to have acquired recognition as one of the significant human rights at the international level. Article 12 of *the Universal Declaration of Human Rights, 1948* has provided, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has got the right to the protection of the laws against such interference or attacks". That Article seems to have ensured the right to privacy regarding an individual's honour, reputation and his/her residence, family and correspondence. Likewise, Art. 17 of the *International Covenant on Civil and Political Rights, 1966* has also provided, "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks." Thus this provision has also laid emphasis on the protection of the privacy of the honour, reputation, residence, family and correspondence of an individual.

Likewise, Article 16 of *the Convention of Rights of Child, 1989* has also provided, "No child shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, nor to unlawful attack on his/her honour and reputation," And, by further providing that "the child has the right to the protection of the law against such interference or attacks" it seems to have recognized the children's right to privacy.

Article 8(4) of *the Optional Protocol to the Convention of Rights of Child on the Sale of the Children, Child Prostitution and Child Pornography, 2000* seems to have included the matter of taking appropriate steps in accordance with the national law to remove undue flow of information regarding introductory matters relating to a child in order to protect his/her identity and privacy. ("Protection as appropriate to the privacy and identity of child victim and taking measures in accordance with the national law to avoid the inappropriate dissemination of information that lead to the identification of child victim." - Art. 8(6).

UN General Assembly, Special Session (UNGASS)²⁷ on HIV/AIDS has also stated that the governments need to make law and Rules and undertake other measures to ensure the rights of the persons infected with HIV/AIDS, and under this, their confidentiality and privacy should also be protected.

Article 9 of *UNESCO Universal Declaration on Bioethics and Human Rights* has also made special provision regarding privacy and confidentiality and observed in this regard as follows: “The privacy of the persons concerned and, the confidentiality of their personal information should be respected. To the greatest extent possible, such information should not be used or disclosed for purposes other than those for which it was collected or consented to, consistent with international law, in particular international human rights law.”

The human rights Conventions adopted and enforced by various regional groups, in accordance with the above mentioned Conventions, have also accorded respectable place to the right of privacy of a person and have thus guaranteed its protection. For example, the provisions made by Article 8 of *the European Convention on the Protection of Human Rights and Basic Freedoms* (1950) and Article 11 of *the American Convention on Human Rights* (1969).

It becomes clear that the above mentioned Conventions and Declarations have created obligations for the States to protect effectively the right to privacy of the individual by making laws. Even though the human rights Declarations do not carry mandatory force as exercised by treaties, the States should implement their spirit by relating them to the main treaties.

As Nepal has become a party to the international human rights Conventions and accepted the obligations imposed by them, there is no dispute that the State must implement those obligations by incorporating them in the Constitution, statutes, law and Rules and also various programmes. Several judgments delivered by this Court in the past have already made adequate interpretations regarding the national recognition of the treaties in the context of Section 9(1) of *the Treaty Act, 1990*. What is remarkable is that it is essential to consider the right to privacy and the right to access to justice from the view point of basic human rights. Besides the right to justice, the right to constitutional remedy has also been guaranteed in *the Interim Constitution of Nepal, 2007*. In addition to Articles 24 and 32, certain rights regarding judicial remedy also get mobilized in course of justice dispensation by the general Courts under their ordinary jurisdiction.

Out of the general and extra-ordinary jurisdictions available for the protection of fundamental and legal rights of a person, the proper jurisdiction is invoked as required by the situation. It is the regular remedies which are sought especially for the resolution of the question regarding

²⁷ Declaration of Commitment on HIV/AIDS, 2001.

juvenile justice, violence against women and also remedy for property or other rights of HIV/AIDS infected persons. So the right to privacy is limited not only to the application of the Criminal Law but also extends to the implementation of the Civil Law. If any person has filed a lawsuit asking for expenses or his/her share of property or compensation for medical treatment for having been infected with HIV/AIDS, information regarding such a situation, too, cannot be allowed for unrestricted dissemination. At least the relevant portion needs to be given protection up to a desirable limit. So there is a need for looking at the right to privacy as to how the judicial process can be made basically fair, free from discrimination and friendly for the Court users in course of judicial treatment.

The petitioner has, in her written submission, drawn attention to *the Declaration of Basic Principles for Victims of Crime and Abuse of Power* (29 Nov. 1985) which seems to be relevant also in the context of the present case. It has been mentioned in that Declaration that the victims should be given respectable and sympathetic treatment and their access to judicial mechanism should be ensured and speedy remedy should be provided to them in accordance with the law for the losses suffered by them. The same has also been stated in that Declaration

Irrespective of the way in which the victim has been made to suffer from injustice, our social outlook upon them may have, instead of making efforts to heal his/her wounds, turned negative for some fallacious belief. If it so happens, in addition to the violence suffered by the victim earlier, a situation may arise forcing such a person to further suffer continuously from the second stage of violence or pain as a result of publication or recording the physical condition of that person. The psychological tension or damage caused to a person on account of violence is treated as an additional recurring violence falling under the second category. In the absence of legal and other protection aimed at tackling such a problem, if obstacles are created in the way of enjoyment of other rights or facilities, the search for justice turns into a curse instead of a bliss for the victim.

Adverse social psychology still exists in our society in a religious or cultural form. An extensive movement needs to be launched for bringing about broad changes in such a type of thinking, but it has not taken place so far. By a mere declaration of rights in the law negative social psychology or obstacles existing in the way of enjoyment of the rights may not disappear automatically. If such a reality is ignored, there may be a danger of our findings becoming more technical than substantive. As a result, our services may not be automatically available to the people for whom they have been created or to whom they have been dedicated. If favourable conditions are not created, the parties, despite their willingness, may not have the capacity to accept our services. In that event a situation may arise where our services may not be available to those who need them most whereas, those who do not need them may get more benefited by them. Therefore, taking into consideration such a stark reality, it is necessary to, by ensuring an individual's right to judicial remedy, grant him/her effective and easy access to justice and to guarantee privacy of the personal identity of the parties involved in the judicial process through the protection of the right to privacy. Its main objectives are that the concerned party may not lose his/her

courage to seek remedy against injustice and s/he may not be made to experience any additional disqualification or disadvantage in practice for the reason of having raised one's voice against injustice. It is the belief of this Bench that if in the eyes of the incapacitated sections of the society our services lose attraction or do not carry conviction it shall have to be treated as an indication of the gradual end of the social utility of our services.

In fact, the right to access to justice is a right covering an expansive area which has got various complementary dimensions. Out of them, in addition to other matters, it is clear that the protection of the right to privacy of the victim is an important part. It is essential for the judicial system to always maintain a balance between the obligation to give fair treatment to the parties present in the judicial process and the right of the parties to have access to justice. In this context, without guaranteeing the personal privacy of the victims and their personal security and without taking into consideration the disadvantages confronted by the victims, justice cannot take a firm and expressive form in the midst of revenge and fear. For arousing this feeling of self-confidence and security among the persons who have come forward to seek justice, it is essential to give them guarantee of the privacy of their personal identity or other related information. If viewed in this way, the need and relevance of the protection of the privacy of the personal identity and other related information of the women, children or HIV/AIDS infected persons who have come to be present in the judicial process appears to be clearly important from the viewpoint of the enjoyment of the right to judicial remedy.

Let us now consider the second question - **What is the existing legal provision regarding the protection of the personal introductory information of the persons mentioned in the petition ? Is it adequate or not ?**

Although the right to privacy has been declared in Art. 28 of the Interim Constitution, it has been placed under the clause "except in the circumstances specified by the law," and no extensive provision of the law has been made so far. Till today extensive legal provisions regarding the right to privacy of the women, children or HIV/AIDS infected persons have not been made. As a result, the rights and interests of both the person seeking privacy and the person demanding information are virtually uncertain in practice and dependant on the administrative discretion.

As the right to privacy needs to be managed according to the nature and needs of the class seeking that right, it is not possible to make similar provisions for all classes or in all circumstances. Therefore, there is a need of regulating the right to privacy by first deciding the nature and extent of privacy on the basis of specific sections, classes or circumstances, and the Legislature and the Executive are needed to take special steps in this regard. As regards the question of the right to privacy of the victim women, children and HIV/AIDS infected persons who have entered the judicial process, in the recent days a provision has been made for in-camera trial of the cases relating to rape, trafficking in human beings, children, ascertainment of relation and divorce. Besides, it has been also provided that if the Court deems any other case fit for in-camera trial, it may issue an order accordingly.

Such a provision has been made by Rule 46(b) of *the District Court Rules, 2052* (1995), Rule 60(a) of *the Appellate Court Rules, 2048* (1991) and Rule 67(a) of *the Supreme Court Rules, 2049* (1992). In those Rules, as no mention has been made about the civil or criminal cases in which HIV/AIDS infected persons are involved as plaintiffs or defendants, those Rules do not seem to include such cases under this category.

It has been provided that while taking the statement of a victim woman in course of conducting investigation of any offence under the chapter on Rape in *Muluki Ain (the National Code)* a female police personnel must take that statement²⁸. Likewise, it has been further provided that during the trial of a case under that chapter only the concerned legal practitioner, the accused, the victim woman and her guardian, the police personnel granted permission by the official entrusted with the trial of the case and the Court employees may remain present in the court room.²⁹

The Children Act, 2048 (1991) has provided that during the trial of any case involving any child, the legal practitioner, parents, relation or guardian of the child and, if the official trying the case deems it proper and grants permission, any person or representative of any social organization involved in the activities concerning the protection of the rights and interests of children may remain present in the Court room³⁰. Besides, *the Children Act* has also imposed restriction on the publication, in any daily or magazine, of the description of any incident relating to such a case without the permission of the investigating officer or the official conducting the hearing of the case.³¹ The same Act has further provided that the police office must maintain, in a confidential manner, the record of the name of the child arrested in connection with the charge of any offence, his/her address, age, sex, family background, financial position, the offence committed by the child and the description of any action if taken in that connection,³² and if such data are published for the sake of any study or research it can be published only on the basis of age or sex, and that, too, without mentioning the name, family title or address of the child³³.

Although the above mentioned provisions have provided for in-camera proceedings and the protection of privacy in regard to publication in dailies and magazines, no thought has been given so far to the inclusion of a provision regarding maintaining privacy about the introductory information of the child also in the case file and the documents included therein. Moreover, there is no effective implementation of the existing law.

Even after making the provision for camera Court no exhaustive Guidelines have been prepared and issued for the purpose of conducting the proceedings in a camera Court. The physical environment and management aspects of camera Court have been almost forgotten. Not even initial work has been done in the direction of ensuring necessary sensitivity,

28. *Muluki Ain*, Sec. 10a of the Chapter on Rape.

29. *Supra*, f.n. 3, Sec. 10b.

30. Sec. 49(1).

31. Sec. 49(2).

32. Sec. 52(1).

33. Sec. 52(2).

awareness and skill in the mind of judges, employees and also the legal practitioners in regard to conducting the in-camera trial. Information has not been disseminated in an extensive manner about the provisions of the in-camera proceedings and its advantages. Camera Court does not simply signify a process restricting the unnecessary entry into the place where the Bench is physically operating. No formal provisions having theoretical and practical clarity have been formulated regarding the responsibility to be shouldered by those participating in the in-camera proceedings in accordance with the spirit of this trial, irrespective of whether they are inside or outside the camera Court or whether the in-camera proceedings are in progress or they are over.

One of the objectives of the camera Court is to protect the victim party to the case against a discouraging environment which dissuades him/her from bringing to light even the matter which she is willing to disclose only because the Bench is open, and thus to empower him/her to make his/her participation and presence in the judicial process in an effective and actual manner. But if the victim is made to face the accused even inside the camera Court or if there arises a situation in which the victim is not in a position to bear the fear or terror caused by his presence and if the victim could not be protected against all this, there shall be no possibility of the camera Court serving its purpose. Rather due to the presence of the limited number of persons inside the Court room the victim may feel additional insecurity from the defendants. If it so happens the advantages of the open Bench shall be lost whereas only the risk of the camera Court shall become obvious. Hence, in order to ensure the immediate and long term benefits of the camera Court necessary study, management, monitoring and evaluation are still to be undertaken, for which it is necessary that the concerned Courts themselves should first display special management and readiness on their own responsibility.

Even though the objective of the provision for setting up camera Court in some specific cases is to address the specific needs of the victims in the concerned cases and to prevent unnecessary disclosure, the victim women, children and HIV/AIDS infected persons have felt the lack of guarantee of the privacy of their introductory and other related information. Besides, no thought has been given in regard to the protection of the privacy of their introductory information following the disposal of the case.

The provision of camera court is a provision which can be activated only after the filing of the case. However, in a few sensitive cases there may arise a need for protecting the privacy of the introductory information of the complainant or the victim right from the time of lodging of the first information report (FIR). The victim may not feel like filing the FIR for the fear of the general people forming negative opinion about him/her by coming to know about his/her condition only because of the filing of the complaint and the unnecessary dissemination or publication of unwanted information through that means. The victim, therefore, thinks that the general people would not have learnt about his/her condition had s/he not filed the complaint leading to the initiation of the case, since after the start of the process of the case following filing of the FIR the victim is presented before the Court, his/her proofs and evidences are subjected to examination and they are also kept in the written form and brought to light.

All the criminal events taking place in the society are not found to be recorded as complaints only because of the failure to maintain and guarantee the privacy of the information relating to the victims. Such a trend is treated as an additional opportunity for the criminals to commit crimes and on the other hand it also aggravates the vulnerability of the victims. Therefore, it is essential to guarantee the identity and other information related to a sensitive class like victims and children right from the time of investigation of the offence. At present the prevailing scenario in our country shows a trend of disclosing all the information about the victim right from the time of filing of the FIR, disclosing the case file and the documents contained therein, the concerned party enjoying the freedom of demanding their copies and inspecting them and also the media having unlimited access to them. That is to say, the prevailing scenario shows that the needs and interests of the victims have been left unregulated. If all the problems relating to access to justice ranging from investigation to judicial adjudication, and, thereafter, publication and implementation of the decision are not addressed, the self confidence of the victims cannot be enhanced only by conducting proceedings in a camera Court which start in the middle and also end in the middle of the judicial process. In order to make the existing camera Court meaningful and to ensure the judicial guarantee of a high order for the victim and the sensitive party it is, therefore, essential to make additional provisions for protecting the privacy of their introductory personal information and other related information.

Let us now consider the issue No. 3.

It is necessary to consider in the present context what type of relation exists between the right to privacy and the right regarding justice to have fair hearing from a competent Court. Whereas the right to privacy compels to protect the privacy of certain specific information, everybody, under the right to justice which remains as an integral part of judicial remedy, possesses a right to information about any action taken against them and also to have fair hearing from a competent Court. Judicial impartiality and unbiasedness are the main prerequisites of the right to justice. The right to information, the right regarding justice and the right to judicial remedy can be viewed both as mutually independent and as complementary to each other.

Public information can be sought for under the freedom of speech and expression and the right to information, and the judicial information is also included under this. Our Constitution has guaranteed several matters under the right to justice enshrined in Art. 24. But under that provision it has not been specified that every trial must be made public nor has it been made mandatory that all the subject matters of judicial hearing should be also made accessible for the common people. Since it is the right of a defendant to seek, under the freedom of speech and expression, necessary information in order to examine the evidence and information presented against him/her, s/he is entitled to have the natural right to seek, receive and present his/her version in that connection. In addition to that, the matters regarding the enjoyment of one's rights granted by Art. 24 are also there. The rights of the victim, too, are another aspect in a case which need to be considered along with the rights of the defendant. His/her right to express himself/herself without any hindrance needs to be recognized in order to reach the goal of judicial remedy. Only in a proper environment and

with proper opportunities the victim may express him/herself in a proper manner and present all the available proofs. Hence, it is the duty of the state to manage the judicial trial ensuring guarantee for all this.

Although Art. 24 of *the Interim Constitution* has not provided for judicial dispensation only through an open Court as a necessary prerequisite for the enjoyment of the right regarding justice, our judicial procedures seem to be generally automatically oriented towards the system of open trial. In fact, it can be said that making judicial trial generally open seems to remain as a characteristic of our judicial system. And our judicial system seems to have conducted in accordance with the spirit pervading in Art. 11 of *the Universal Declaration of Human Rights*³⁴ and Art. 14 of *the International Covenant on Civil and Political Rights* which have been also ratified by Nepal.

According to the above mentioned Article 14 of ICCPR all persons are equal before the Courts and tribunals. It has also provided that in the determination of any criminal charge against any person or his/her rights and obligations in a suit of law s/he shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. It has further provided that the press and the public may be excluded from all or part of a trial for reasons for moral, public order or national security or if the interest of the private life of the parties so requires or in the circumstances where the Court is of the opinion that in special circumstances publicity would prejudice the interests of justice. Besides, it has also provided that any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juveniles requires otherwise or the proceedings are concerned with matrimonial disputes or the guardianship of children.³⁵

The above mentioned Article 14 has provided for imposing restriction on the presence of the press and the public during a trial in order to maintain public interests, national security, morals etc. Moreover, it has been also clearly mentioned that restrictions can be imposed on public hearing if, in the opinion of the Court, the purpose of justice may be defeated if open trial was allowed or the Court proceedings were published. Also, even while making any decision public it has been provided that exceptions can be made in the interests of children or in the issues relating to matrimonial disputes or guardianship of children.

Although the concept of public hearing has been included in *the International Covenant on Civil and Political Rights*, it is not proper to say that the very use of the term “public

³⁴. Article 11.1 (*UDHR*) - “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence.”

³⁵. Article 14 (ICCPR) - “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone, shall be entitled to a fair and public hearing by a competent, independent and impartial tribunals established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice, but any judgments rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

hearing” must necessarily be viewed as an open hearing. The hearing conducted in accordance with the law does not lose its public element only for the reason of restriction imposed on the entry of some particular person with a view to regulating hearing in certain specified circumstances or due to a hearing conducted in a camera court or due to not disclosing the identity of a particular party or witness. Even where the hearing is conducted after making such an arrangement, in actual, it is the public law which is being applied, and the judicial process is regularized. The main thing which needs to be considered in the judicial process is whether or not the concerned party was dealt with fairly and whether or not that party received adequate opportunity for his/her defence.

Our *Muluki Ain* (**the National Code**) and the laws and Rules relating to judicial administration have also granted it recognition to a desirable limit.³⁶ It has been already discussed above about the provision of camera Court in some particular cases. It is not that there shall be judicial fairness only when the Bench is open and that the judicial fairness would be a casualty the moment the hearing is conducted in a camera Court. For a fair hearing it seems essential to make a provision for some major prerequisites like opportunity provided to the party for presenting his/her claim or defence without any hindrance, procedural simplicity, opportunity for legal aid or representation, congenial environment, judicial impartiality etc. In fact, in our judicial system, the judicial process has been generally kept open and the in-camera proceedings are conducted as an exception only in some cases in which the parties of some specific conditions are involved. And while doing so, the approach remains that even in those sensitive circumstances the judicial flow must continue uninterrupted. It is necessary to view this, in fact, as an attempt at striking a balance between judicial fairness and judicial effectiveness.

Only because special type of protection has been afforded to the parties or witnesses there is no reason to believe that the dignity of open hearing shall be eroded only for that reason. If there is possibility of fear or influence in the open Court, justice may get obstructed even there. It is for this reason that there is generally no place for questioning the justification of public or open Court. Nonetheless there seems to be no reason to believe that fair judicial hearing may not be possible just because in special type of cases or in cases involving special type of people, hearing has been made public only after maintaining the confidentiality of some specific information or that hearing has been conducted in camera. If the necessary prerequisites or qualities required for fair judicial hearing are present, it should be presumed that there is fair judicial hearing irrespective of the fact whether there is an open Court or a camera Court.

In fact, the right to public hearing and the victim’s or the party’s right to privacy are a matter to be viewed in a balanced way. It is not correct to say that an accused person’s right to defence and fair hearing has always got precedence over the victim’s right to

³⁶ Sec. 49 of *The Children Act*, 2048; Sec.10b of *Muluki Ain*.

judicial remedy. For the guarantee of fair administration of justice, it is essential that the victims must present their evidence without any fear or obstacle and the decision maker must also issue the necessary orders for the same. (“The state has an interest in fair administration of justice. It requires that the victims and witnesses depose without fear and intimidation and that the judge is given sufficient power to achieve that object”).³⁷ In fact, under the right to judicial fairness, it is necessary to view in a coordinated manner the party’s right to defence of his/her innocence along with the victim’s right to seek judicial remedy for the injustice committed against him/her. When sometimes it becomes necessary, in view of the nature of the case, to provide protection to the privacy of the introductory information of also a party to the case (for example, children) as it appears compulsory in the interest of justice, it becomes all the more important in the case of the victim. It is not possible to say where this balance shall be struck. There is a need for continuous review of the circumstances for striking such a balance. In the present context a defendant’s right to defence does not mean that he can subject the victim’s evidence or the victim to cross examination in any manner or to any extent. Rather it simply signifies that s/he must be provided with a guarantee of the basic opportunities required for defence.

Nowadays due to the expanding nature of terrorism and in order to ensure, for the sake of fair justice, the desirable participation of all the concerned by protecting them from the emerging new trends seen in the world of crime, the procedures have been already adopted to conduct the trial in a camera Court after shifting the case from the open Court, and to record the evidence and statement of the witnesses, protecting the victim or the witness from confronting the defendant, through audio visual medium or close circuit television or by using a bar erected between the defendant and the victim. The Indian Supreme Court has ruled, in *Sakshi vs. Union of India*³⁸, that if any testimonial statement has been recorded by using video screen and the defence has watched it, the requirement of a defendant’s right to have the proofs examined in his presence should be treated as fulfilled. In order to deal with the menace of terrorism various legal provisions including Section 13³⁹ of the Indian Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) and Section 30⁴⁰ of the Prevention of Terrorist Act, 2002 (POTA) have been made.

³⁷. *Scott v. Scott*, 1913, AC 417.

³⁸. 2004(6), SCALE.

³⁹. Section 13 of TADA: (1) Notwithstanding any thing contained in the Code, all proceeding’s before a Designated Court shall be conducted in camera; provided that where public prosecutor so applies, any proceedings or part thereof may be held in open court.

(2) A Designated Court may, on an application made by a witness in any proceedings before it or by the public prosecutor in relation to a witness or on its own motion, take such measures as it deems fit keeping the identify and address of the witness secret.

⁴⁰. Section 30 of POTA: Protection of witness: (1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reason to be recorded in writing, be held in camera if the Special Court so desires.

(2) A Special Court, if an application made by a witness in any proceeding before it or by the public prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

Some new methods of examining a child witness, allowing a few exceptions to some general rules followed in course of examination of an adult witness, have started finding place in our system. For example, even the cross examination made by the defendant is indirectly conducted through the judge; informality is adopted while examining a child witness and the examination of the witness takes place in a suitable manner, after considering his/her mental level and after providing him/her with a friendly person or environment; the version of the child witness is recorded through an audio-visual means for presenting it in the Court. It is necessary to protect the privacy of the introductory information about the concerned party in certain conditions in the judicial process in order to ensure the act of seeking and receiving justice in view of basically sensitive cases or the sensitivity of the concerned party and the needs of justice. But it is equally necessary to take precaution against making such a situation adverse thereby allowing it to become prejudiced enough disabling the defendant to get justice. The need for a fixed procedure or Guidelines can be realized in order to ensure such a situation.

Let us now consider question No. 4.

While considering the question of whether or not the act of keeping the personal details of a party to the case or the victim secret contradicts the defendant's or the public community's right to information, as the right to information has also been accorded protection in the present Constitution, it cannot be said that the need for creating a demarcation line between the right to privacy and the right to information may not arise. The right to information is also treated as an integral part of a person's freedom of expression. For a meaningful enjoyment of one's freedom of thought and expression the act of seeking and receiving some information of public importance, which is felt necessary for some one, constitutes the inner contents of the right to information. It has been already mentioned in the law relating to information that the procedure of getting information of public importance should be provided in the law itself. A provision regarding giving other persons compulsory access to private information is neither in the law nor is it proper to do so. In fact, personal information is inviolable except where the law compels to do so. Imbibing this very spirit, *the Right to Information Act, 2004* (2007) has provided for giving protection against unauthorized publication and dissemination of any information of a personal nature.⁴¹

The Right to Information Act, 2004 has also provided for the use of personal information only after obtaining written consent except where it is necessary for the sake of preventing any serious danger to the health or security of the public or controlling corruption and where the law permits for such publication.⁴² Therefore, it does not seem that the utility of the provision regarding privacy guaranteed by the right to information can be obstructed. In fact, it is worth remembering that under the right to expression is also included the right of

⁴¹. Sec. 28(1).

⁴². Sec. 28(2).

a person who is not in a position to express him/herself Particularly, as the victim women and children exposed to risk and HIV/AIDS infected persons can express themselves or explore the judicial remedy for their judicial needs only if the privacy of their personal introductory information or other information is guaranteed, it is also the duty of the State and the society to provide guarantee for such things.

It is not proper to say that the right to privacy always obstructs the flow of information. The information for which legal protection is not considered essential does not fall under the confines of privacy, and even within the law relating to privacy relaxation can be given for allowing access to information. Also, under the right to information the provisions regarding refusal of access to a person's information declared inviolable may also be included. What is most important is to provide protection in the judicial process to the information regarding privacy of the introductory and personal information of the classes exposed to danger within a necessary and desirable limit in order to create a situation for the enjoyment of their rights.

Another right related to the right to information is the right regarding publication, transmission and press. The right regarding publication, transmission and press is considered as an enlarged form of the freedom of expression and publication. That right and the right to information both help in giving expression to a person's freedom of expression and publication. The above mentioned rights also help in the promotion of greater public interest. Nevertheless, in the hierarchical priority of rights, these rights are not considered as enjoying superiority over other rights. Under the right to publication, transmission and press embodied in Article 15 of the Constitution, a provision has been included which says that laws can be made with a view to imposing restrictions on the activities aimed at disturbing the good relation between various castes, races or communities, causing slander or contempt of Court or adversely affecting public etiquette or morality. Thus, it is clear that even while enjoying the right to information it must be enjoyed confining oneself within the area defined by that right.

If, through those rights, positive contributions are made to the enjoyment of a person's right to justice and the right to judicial remedy in an unhindered way, the meaningful protection of every right can become possible.

Now let us consider question No. 5.

In the context of analysing various questions, the status of the existing rights and the relevant laws relating to the protection of the privacy of the personal introductory information of the women, children or HIV/AIDS affected or infected persons mentioned in the petition has been analysed. This has made it clear that making legal provisions, addressing the necessities of all the sectors, regarding the enjoyment of privacy, which has been recognized as a fundamental right, has become necessary. Now a question arises whether or not an order can be issued for protecting the privacy of the introductory information of the persons who have come to join the judicial process in the capacity of a party or a victim. Actually, this question is very significant. It is necessary to consider whether or not such an order can be issued and, if yes, in which capacity such an order can be issued.

Article 100 of *the Interim Constitution of Nepal, 2007* has provided that the powers relating to justice shall be exercised in accordance with this Constitution, other laws and the recognized principles of justice. Besides, in Article 107(2), extra-ordinary jurisdiction has been granted to settle any dispute relating to a constitutional or legal question by issuing a necessary and appropriate order. For this purpose, this Court also possesses the power to issue appropriate orders with a view to imparting full justice and providing appropriate remedy. It is the duty of the Court to defend the people's right to justice by exercising, in a meaningful way, the jurisdiction created by the law relating to judicial administration in addition to the right to constitutional remedy granted by Article 32 and the extra -ordinary jurisdiction enshrined in Article 107 of the Constitution. Exercising such a right is not a mechanical work. The above mentioned jurisdiction needs to be adopted in the totality of the right of the party, the need or problem experienced in course of its enjoyment, the creation of infrastructure required for addressing it properly and also reasonable thinking and conduct.

No existing law seems to hamper the act of conducting any programme about the protection of the victim witnesses initiated in view of the special needs of the specific classes placed in a disadvantaged situation or the party exposed to risk provided that justice can be delivered by protecting the secrecy of specific identity or details or by adopting anonymous procedure in that course. No where it has been accepted that under an accused person's right to have information about the charge against him is also included his right to compel the victim witness to be present before him and the right to make public defence after obtaining all the information from the latter. Such a right is treated as a relative right which can be regulated to a desirable extent, and in totality it has been accepted by several countries that the right of the accused and the right of the victim ought to be viewed from the viewpoint of the balance of interests. Hence, in order to meet the needs of justice it has been recognized as an integral part of the Court's inherent jurisdiction regarding dispensation of justice to make necessary arrangements as an exception to the open Court and to issue an order under that provision protecting the privacy of any specific party or victim. And it is a general belief that the absence of any specific law does not create any obstacle to do so.

In the United Kingdom, the House of Lords, in *Attorney General Vs. Leveller Magazine*,⁴³ has explained about such a provision and declared that the Court, under its inherent right, retains the power to maintain secrecy about the name of the witness.

Also in *Taylor Vs. Attorney General*, the Court of Appeals of New Zealand has ruled that the Court reserves the right to issue a directive as to which extent publication about any case should or should not be allowed outside the Court.⁴⁴

⁴³. 1979, AC 440.

⁴⁴. 1975(2), NZLR, 675.

The Supreme Court of Canada has also, in *R. Vs. Dunett*⁴⁵, held that the right to fair hearing in a case is not absolute, and that anonymity can be permitted if disclosure of the identity of the complainant or an innocent person is detrimental to his/her interests, and that seems more essential than the interest of the defendant.

In several countries separate laws are found to have been made regarding protection of the personal information of the victims or witnesses as a part of the Victim/witness Protection Scheme. For example, mention may be made of *the Witness Protection Act, 1991 of Victoria* and *the Evidence (Witness anonymity) Amendment Act, 2000 of Queensland of Australia*, *the Witness Protection Ordinance (67 of 2000) of Hong Kong*, *the Witness Programme Act, 1996 of Canada*, *the Portugese Legislation Act (Act No.93/99 of 14 July, 1999) of Portugal* and *the Witness Protection, Security and Benefits Act (Republic Act No. 6981) of the Philippines*.

Besides, different provisions are found to have been made in several states of the United States of America in regard to the victim or witness protection. Article 706-57 and 706-63 of *the French Penal Procedure Code* has made the following provision:

“If it is found that there is danger to the life or the physical integrity of the witness or any member of his family or of a close relative then the examining magistrate – public prosecutor will be justified in authorizing declaration of such witness as protected without his identity appearing in the file of the procedure. In no circumstances can the identity or the address of such a witness be disclosed.”⁴⁶

In some countries like Japan, Netherlands, Germany, Italy, etc. also such legal provisions regarding protection can be found. This is an indication of the emergence of a new trend of the protection of privacy by law.

The above analysis shows that the Courts have, exercising their inherent judicial jurisdiction, issued orders for the protection of the personal privacy of the party to a case or the victim on the basis of necessity and appropriateness for the sake of fair dispensation of justice. However, it does not mean that a demand has been made for not allowing the defendant to know, even for the purpose of his defence, who are the witnesses against him in that case or to close all the ways of cross examining them. Rather the demand has been made only for the protection of the secrecy of the personal introductory information in the proceedings of a case right from its beginning. In such a situation where the privacy has been protected there is a need for conducting or regulating the presentation of evidence, the procedure of the examination of witness and some other related matters in a special manner in order to

⁴⁵. 1994 (1), SCR, 469.

⁴⁶. With acknowledgement to Law Commission of India, 198th Report, August 2006, P. 493

make such protection more effective. Not that comprehensive provisions regarding the privacy of a party to the case or the victim cannot be the subject matter of legislation. In fact, making a separate legal provision in this regard is not only desirable but also essential because such a need can be better addressed only through the means of effective law.

For this, it appears essential that the Executive and the Legislature must take initiatives to make law for the protection of privacy of the victim women, children and HIV/AIDS infected persons. It is necessary to include adequate provisions in the law and to implement such provisions including protection of the privacy of the personal information of the persons whose privacy needs to be protected, the information about their physical and medical conditions and the information which has come to light in the judicial process, providing necessary counseling, disclosing some information after obtaining informed consent, specifying the conditions when the information may be disclosed, protecting the privacy of information or prescribing the procedure and authority for disclosing such information, making provisions for necessary punishment, reparation and treatment for its effective implementation, providing for a record system equipped with necessary techniques and methods of monitoring and evaluation for controlling the misuse of that provision and also making provisions in the law, if so needed, for essential conduct.

The written replies submitted by the opponents do not show any ideological objection to the act of protecting privacy by making a law relating to privacy as requested by the petitioner. The Speaker of the Legislature Parliament has not only expressed his opposition to making law for the protection of privacy of the classes of people mentioned in his written reply but has also expressed his consent for the need of such a law and displayed his willingness to facilitate the process if the necessary Bill is presented by the government or the concerned party. The positive expression given by the speaker of the House of Representatives in his written reply in respect of the request made in the petition appears to be a praiseworthy beginning, notwithstanding the fact that no initiative seems to have been taken so far for making law in this regard.

Therefore, this directive order is hereby issued to the respondents Prime Minister and the Office of the Council of Ministers and also the Ministry of Law, Justice and Parliamentary Management to present, at the earliest, a Bill before the Legislature Parliament, also taking into consideration the aforesaid legal questions, for making law containing comprehensive legal provisions, after having consultations with a committee set up for this purpose and comprising as its members the concerned Court, Bar Association, women, children and the people representing the marginalized sections of the society including HIV/AIDS infected persons or the organizations working in their interest, the representatives of the civil society and also the petitioner Forum for Women, Law and Development.

Even though an order has been issued as mentioned above, since it would take some time for the law making process, let us now consider the last question whether or not some interim provisions should be made for immediate arrangements.

Women become involved in various cases, such as, rape, incest, abortion, claim for establishing relations, divorce etc., all of which are related to violence against women and which also cause birth to several other legal problems. Similarly, even today throughout the Kingdom of Nepal there are several cases involving children as petitioners or opponents and also cases involving the persons infected by HIV/AIDS which may have been registered in various Police Offices, Government Advocate Offices, District Administration Offices and other Judicial/quasi-judicial bodies and which may be currently passing through various stages ranging from investigation to prosecution and filing of the charge sheet or the trial being in progress. It is worthwhile to consider whether or not it would be proper to let the persons involved in the cases mentioned above continue to remain in the system followed earlier prior to the delivery of this decision, pending the formulation and implementation of a legal provision as mentioned above.

If, even after this decision, this Bench allows the continuing infringement of the right to privacy in the cases involving the persons, such as, victim women, children and HIV/AIDS infected people who have been recognised by this Bench as belonging to a sensitive category, even though the law to be made after the issuance of this order shall provide protection to the right to privacy, the damage caused to such persons due to the violation of privacy already suffered by them cannot be compensated. Hence, not only that the continuation of such a state of affairs shall be undesirable, rather it is also urgently necessary to stop such a process at the earliest. Pending the enactment and implementation of a comprehensive law for this purpose in accordance with the directive order issued in this case, it must be considered as to what type of interim provisions, and having which kind of structure, should be appropriate for formulation and implementation.

In the context of the totality of the requests made by the petitioner a Division Bench of this Court had sought the advice from the petitioner organization on March 9, 2007 to suggest which model or procedure shall be appropriate to protect the privacy guaranteed by the Constitution, and the latter, on the basis of its study, seems to have given some valuable assistance by presenting a model of the procedure relating to the protection of the right to privacy.

Because it is essential to make different types of provisions for the protection of privacy according to the nature of the specific needs of various concerned classes, it does not seem to be an easy task. Notwithstanding the fact that, as mentioned above, the privacy of any personal information even in regard to the cases involving victim women and children has not been protected so far by any concerned body including the Courts, now it does not seem proper to allow such a situation to continue any more. It is so because the people belonging to this class have got a fundamental and human right including the right to judicial remedy, and it is also the duty of the Court to safeguard such a right. Although the Court does not make law for this, it cannot be said that the Court cannot issue Guidelines or orders, without contravening the prevailing laws, in special circumstances for the purpose of the protection of the present legal liabilities, after identifying them, on the basis of the existing Constitution, laws and the recognized principles of law and various international

human rights laws to which Nepal is also a party. It has been provided by Art. 88 of the Constitution of *the Kingdom of Nepal, 1990* and Art. 107 (2) *the Interim Constitution, 2007* that the Supreme Court is equipped with extra-ordinary jurisdiction to issue appropriate orders with a view to imparting full justice. It has been clarified above that it is also an inherent right of the Court to issue necessary Guidelines or orders for enabling the party, which has come to it for seeking justice, to have effective access to justice. This court is found to have issued eight-point Guidelines regarding implementation of the right to information also in the case of *Gopal Shivakoti and others Vs. the Finance Ministry and others*.⁴⁷

The Indian Supreme Court has also, in *Vishaka Vs. State of Rajasthan*,⁴⁸ ruled that if the other political organs fail to discharge their duty of making law it becomes the duty of the Court to fill up such a lacuna, and also formulate and issue some Guidelines containing various provisions relating to definition of sexual harassment in order to control its occurrence at a public place, means of deterrence for its prevention, prosecution, disciplinary action, designating the authority for hearing such complaints, causing awareness about the rights of the women employees, protection of the rights of the third party etc.

These are only a few of the examples. Such Guidelines are issued not for the purpose of imposing restrictions on the rights granted to the parties by the Constitution, the Statutes and the laws but for facilitating the implementation of the existing law. Thus, by removing the unclarity at the stage of implementation of such rights or filling up the lacuna, thereby helping to make, at least to some extent, the law relating to rights more effective, it seems proper and permissible to issue some Guidelines of interim nature which shall remain effective till comprehensive legal provision are made.

While thinking about what type of guidelines should be issued for the protection of the privacy of the women, children and HIV/AIDS infected persons who are victims or a party in the context of a case, the issues which need to be addressed at the least include chiefly the classes to be covered by it, the duty of the concerned officials, the type of information that needs to be protected, the way of its protection, the condition in which the concerned party should be given information, the manner and the amount of information which should be given, the duty of the person receiving the information, the action to be taken against the persons including the officials or employees who violate the privacy of information, the procedure to be adopted while seeking the privacy of information and the right to disclosure of information in cases where the privacy of information is not required.

This provision must be implemented by all the related bodies including all the law Courts, police offices, the government attorney offices working under the Attorney General, the District Administration Offices etc. Recognition must be granted to the provisions like imposing restriction on demand for copies of the introductory or other private information made available in the process of the law suits relating to the persons or the classes included

⁴⁷ Nepal Kanoon Patrika, 2051, No. 4, Decision No. 4895, p. 255.

⁴⁸ AIR, 1997, SC, 3011.

in the Guidelines, not mentioning anything even in the rulings leading to the disclosure of such information, restricting publication of such information by the media, including newspapers and magazines, resulting in the violation of the privacy of such of information and permission granted even to researchers to get access only to the information about the details other than the personal information.

There is a need of making a provision which allows the concerned Court to treat the violation of the Guidelines as its own contempt and initiate action and slap punishment for the same. Even though the Constitution has provided for the right to privacy, still no legal provisions have been made so far which specify the circumstances in which protection should be granted to the privacy of the people belonging to some specific classes including the victim women, children or HIV/AIDS infected persons and also describe the circumstances where their personal information may be disclosed. Comprehensive provisions are yet to be made to address all this. Taking into consideration the above mentioned matter, a directive order has been issued to the respondent Prime Minister and the Office of the Council of Ministers as well as the Ministry of Law, Justice and Parliamentary Management to make a law including the above mentioned provisions which describe the rights and duties of the concerned parties and maintain the level of privacy as prescribed (by the law) in some special type of lawsuits in which victim women or children or HIV/AIDS infected persons are involved as a party to the case right from the time of registration of the case in the police office or its direct registration in a law Court or in other bodies till disposal of the case or even in a situation following the disposal of that case. And, therefore, this order is hereby issued to the aforesaid respondents to comply with and cause compliance with the Guidelines attached herewith pending the enactment of such a provision. The office of the Registrar of this Court is directed through this order to write to the concerned Courts, bodies and offices for its implementation and also to discharge the function of necessary monitoring and coordination.

Finally, this Bench wants to extend its thanks to Under Secretary Tika Ram Acharya, Secretary to the Judicial Council, Prakash Kumar Dhungana and Deputy Registrar of this Court Bipul Neupane for providing research oriented assistance in connection with the work

related to this order. A copy of *The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064* (2007), having six pages and issued today by this Bench, is attached herewith.

s/d
Kalyan Shrestha
Justice

I concur with the aforesaid verdict.

s/d
Khil Raj Regmi
Justice

Done on day 10th of the month of Poush, 2064 (Dec. 25, 2007).

Attachment

Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases 2064 (2007)

Preamble:

Even though *the Interim Constitution of Nepal, 2007* has, by including the right to privacy under the Fundamental Rights, also guaranteed the right to judicial remedy, since, for the want of a definite legal provision for its protection, it has been realized that the persons infected with HIV/AIDS in the event of such infection, the women in the event of violence committed against them and the children in the event of getting involved in conflict with the law are experiencing obstacles in seeking remedy against injustice or getting access to justice, and since they are also encountering additional crisis and inconvenience in living a life of self dignity due to the failure in providing protection to their personal introductory information in Course of the proceedings of law suits ranging from their investigation to the implementation of the decisions and also during the period ensuing thereafter; and as it has been decided by this Court to issue, by exercising the inherent power of this Court under the power granted by Article 107(2) of the Interim Constitution of Nepal, 2007, an order to the Government of Nepal to make legal provisions including also the procedure for protecting the privacy of the people belonging to such classes, these Guidelines for protecting the right to privacy, which shall be applicable to every stage of the proceedings of the above mentioned cases of special types, are hereby issued, pending the enactment of such a law, with a view to imparting full justice and providing a suitable remedy for the protection of the right to privacy.

1. Short Title and Commencement: -

- (1) The title of these Guidelines shall be “ *The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064 (2007)*.”
- (2) These *Guidelines* shall come into effect after thirty days from the date of today.

2. Definition:

Unless the subject matter or context requires otherwise, in these Guidelines :

- (a) ‘Lawsuit’ means, for the purpose of these *Guidelines*, the following types of cases specified by the concerned official after making a decision on protecting the privacy of the personal introductory information:-
 - (1) the criminal cases, requiring protection of privacy on the basis of the nature of the case and the impact that they can leave on the victims, having women as victims and including rape, abortion, sexual abuse, transactions in human beings, trafficking in human beings, incest and violence against women;
 - (2) the criminal cases having children as a party and tried by a juvenile Court or Juvenile Bench;

- (3) the cases related to HIV/AIDS affected or infected persons where such information has been disclosed;
- (b) 'Personal introductory information' shall signify,
 - (1) all the related description regarding disclosure of the identity including name, family title, address, etc. of the victim women in the context of the cases mentioned in sub clause (1) of clause (A);
 - (2) all the related description regarding disclosure of the identity including name, family title, address etc. of the children who are involved as a party in the context of the cases mentioned in sub clause (2) of clause (A);
 - (3) all the related information regarding disclosure of the identity of the persons affected or infected with HIV/AIDS in the context of the cases mentioned in sub clause (3) of clause (A).
- (c) 'The Concerned Official' shall signify the District Judge in the context of the District Courts, the Registrar of the concerned Court in the context of the Appellate Courts and the Supreme Court and the Officer-in-charge of the concerned office in the context of other bodies or offices.

3. Personal Introductory Information not to be Disclosed:

- (1) All the bodies including the investigating body, the body trying the case and the verdict implementing body shall have to protect the privacy of the persons appearing as a party to the cases mentioned in Section 2 in course of all the activities conducted right from the filing of the complaint to investigation, prosecution, trial, delivery of verdict, implementation of verdict and even during the period following the implementation of the verdict.
- (2) The privacy of the personal introductory information, not disclosed as mentioned in Clause (1), shall have to be protected in all conditions including the lawsuit, rejoinder, complaint, petition, report, appeal, decision or any public publication to be made by the Court or any other body.
- (3) The concerned person cannot be compelled to disclose the introductory information kept secret in accordance with clause (1).
- (4) Nobody, including any party or his/her counsel, expert, witness, judge or employee, who appears at any stage of the legal proceedings and comes to know about the personal introductory information kept secret, shall disclose to anybody the information thus kept secret.
- (5) The information kept secret according to these *Guidelines* shall not be disclosed even after the disposal of the case.

4. Disclosure of Private Personal Information:-

Permission may be granted for the disclosure of the personal introductory information, kept secret, to the extent considered necessary in the following circumstances:

- (1) if the official responsible for maintaining secrecy deems it legally fit for disclosure and grants permission accordingly;
- (2) if it looks necessary for the protection of fair judicial hearing; and

- (3) if the person, whose personal introductory information has to be kept secret, presents a written application stating that maintaining privacy of such information is no more essential.

5. Procedure for Maintaining Privacy:-

- (1) The personal introductory information kept secret in accordance with Section 3 must be recorded on a separate page and sealed in an envelope, and a separate introductory name or number or indication mark must be given to indicate the information kept private and that must be certified by the concerned authority.
- (2) If the privacy of any document or evidence needs to be protected for the sake of maintaining secrecy of the personal introductory information it must be sealed and its details mentioned on a separate sheet of paper and attached to the case file.
- (3) For the sake of protecting the privacy of the information kept secret, the concerned court or office must make arrangements for creating a separate roster of such case files, giving indication marks and preserving the records.
- (4) If any person requests for protecting the privacy of his/her personal introductory information, it shall be as decided by the concerned official whether or not to protect the privacy as requested. In case the personal information is to be kept secret as requested in any case, the reasons justifying such a decision must be mentioned in a written form.

6. Introduction: -

- (1) Notwithstanding the presence of a person, whose introductory information has been kept secret in course of investigation or proceedings of the case, the introductory matters relating to him/her shall be mentioned only by the name, number or indication mark assigned to him/her. His/her signature, too, shall have to be made by that very symbol, name, number or indication mark.
- (2) The person whose personal introductory information has been kept secret in accordance with these *Guidelines* must be given an identity card mentioning his symbol, name, number or indication mark.

7. Summons, Notice and Correspondence:-

While issuing any summons, subpoena or notice to or corresponding with the persons, whose introductory information has been kept secret, it must be executed by using his/her symbol, name, number or indication mark. If the other party asks for official introduction regarding such information, the information shall have to be given by opening the sealed particulars after making arrangements for preventing unnecessary disclosure of the personal introductory information thus kept secret, and after the completion of the work it must be resealed.

8. Restriction on Publication of Information:-

The information relating to the identity of a person kept secret in accordance with these *Guidelines* must not be brought to light or disseminated by any means.

9. Violation of Privacy to be Punishable:-

- (1) If, in contravention of these *Guidelines*, anyone discloses the name and information regarding someone, whose introductory information has been kept secret, resulting in the revelation of his/her real identity, such a person shall be considered to have violated an order of the Court and shall be subjected to the contempt of the Court proceedings.
- (2) No personal introductory information or information kept secret, which comes to the knowledge of any employee during the proceedings of the camera Court, shall be disclosed to any third party outside the camera Court. If any act is done in contravention of this provision, departmental disciplinary action also may be taken in addition to the action to be taken pursuant to clause (1).

10. Authority Designated for Entertaining Complaints:-

If a complaint is to be filed seeking action against any employee for the violation of these *Guidelines*, the complaint must be filed before the concerned officer-in-charge in case of an employee and before the concerned authority of a superior level in case of an officer-in-charge. Any complaint filed in this manner must be disposed within seven days.

11. Compliance with *the Guidelines*:

It is the duty of the concerned office, Court and all concerned to comply with these *Guidelines*.

12. Provisions Regarding Implementation of *the Guidelines*:-

- (1) These *Guidelines* must be disseminated by means of public media for the knowledge of the common people.
- (2) These *Guidelines* must be displayed on the notice board of the Courts of all levels, police offices and the government attorney offices.
- (3) If any impediment arises in the implementation of these *Guidelines*, the concerned official shall remove the impediment by adopting an appropriate method. But if the concerned official cannot remove that impediment, the Supreme Court shall settle the issue by removing the impediment on a report submitted before it.
- (4) The provisions contained in these *Guidelines* must be followed in the proceedings to be undertaken henceforth including in those cases which are currently in progress.

13. Existing Law to Prevail:

The matters other than those provided in these *Guidelines* shall be dealt with in accordance with the existing law.

Serial No. 19

Mailing Address:
National Judicial Academy (NJA)
Hariharbhawan, Lalitpur
Nepal
Tel: 977-1-5549057 / 5549067
Fax: 977-1-5530662
E-mail: info@njanepal.org.np
Website: njanepal.org.np