

**PREVENTIVE DETENTION IN NEPAL UNDER ITS  
CHANGING CONSTITUTIONS – A STUDY**

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**BY**

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**MAY, 2016**

## ***DECLARATION***

I, Shri Naresh Kumar Maharjan, do hereby declare that the thesis entitled '**Preventive Detention in Nepal under its changing Constitutions – A Study**', being submitted by me, for the award of the degree of Doctor of Philosophy in Law in Shivaji University, Kolhapur, is the original one, and has not submitted previously, either in part or in full to this or any other University, for any Degree or Diploma or Associateship.

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## **CERTIFICATE**

This is to certify that the thesis entitled “**Preventive Detention in Nepal under its changing Constitutions – A Study**”, being submitted herewith, for the award of the Degree of Doctor of Philosophy in Law of Shivaji University, Kolhapur, is the result of the original research work, completed by **Mr. Naresh Kumar Maharjan**, under my supervision and guidance and to the belief embodied in this thesis, has not formed earlier the basis for the award of any degree or similar title of this or any other University or Examining Body.

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## ABBREVIATIONS

AC	:	Apex Court
ACHPR	:	African Charter on Human and Peoples' Rights
AD	:	Anno Domini (it means number of years since the birth of Jesus Christ)
AFP	:	Australian Federal Police
AG	:	Attorney General
AP	:	Appellate Court
APF	:	Armed Police Force
ATCSA	:	Anti-Terrorism, Crime and Security Act
BC	:	Before Christ
BCE	:	Before the Common Era
BS	:	Bikram Sambat
CA	:	Constituent Assembly
CDO	:	Chief District Officer
CDSCNHC	:	Compilation of the Decisions by the Supreme Court of
CE	:	Common Era
CJ	:	Chief Justice of Nepal
CM	:	Council of Ministry
CPA	:	Comprehensive Peace Agreement
CPN (Maoist)	:	Communist Party of Nepal (Maoist)
CPN (UML)	:	Communist Party of Nepal (Unified Marxist Leninist)
CRC	:	Constitution Reforms Committee
CRPD	:	Convention on the Rights of Persons with Disabilities
DC	:	District Court

DSP	:	District Supretendant of Police
ECHR	:	European Convention for the Protection of Human Rights
EHHR	:	Innovating Human Services in Verginia
FRI	:	First Initial Report
GON	:	Government of Nepal
HMG	:	His Majesty Government
HR	:	House of Representative
ICCPR	:	International Covenant on Civil and Political Rights
ICDC	:	Interim Constitution Drafting Committee
ICPRMWF	:	International Convention on the Protection of the rights of All
ICRC	:	International Convention on the Rights of the Child
MHA	:	Ministry of Home Affairs
		Migrant Workers and Members of Their Families
MISA	:	Maintenance of Internal Security Act
NA	:	Nepal Army
NC	:	National Council
NC	:	Nepali Congress
		Nepal on Habeas Corpus
NGO	:	Non Government Organisation
NHRC	:	National Human Rights Commission
NKP	:	Nepal Kanoon Patrika
NLB	:	Nepal Law Bulletin
NPL	:	NEPAL
NSA	:	National Security Act
NYO	:	Nepal Youth Organisation

POTA	:	Prevention of Terrorism Ordinance
PSA	:	Public Security Act
PTA	:	Prevention of Terrorism (Temporary Powers) Act
PVA	:	Prevention of Violence (Temporary Powers) Act
RP	:	Rashtriya Panchayat
SC	:	Supreme Court
TA	:	Terrorism Act
TADA	:	Terrorist & Disruptive Activities (Prevention) Act or infamous
UDHR	:	Universal Declaration of Human Rights
UK	:	United Kingdom
USA	:	United States of America
ICC	:	International Criminal Court
CNAS	:	Centre for Nepal & Asian Studies
TU	:	Tribhuvan University

## CHAPTER – I

### Introduction

#### 1.1 In General

One of the most important indicators of a true democratic nation is the type and the quality of the freedoms assured to its citizens. In a democracy, for ordinary citizens, freedom is the most valuable right. The citizens cherishes freedom and the same can have different contour in different context, however the greatest concern of the ruling elite in any democracy is the obstruction and hindrances that may affect the efficiency of the governance of the State by these freedoms given to its citizens'.<sup>1</sup> Therefore, there is always an inherent conflict between the governing elite and the ordinary citizen of the State. The governing elite would always like to restrict the freedoms available to citizens which would hinder the government in the way the governing elite would like to govern the State. One of the most frequent freedoms which the governing elite would like to regulate / curtail is the freedom of movement of the citizens. In a State, governed by the rule of law such restriction and restraints on the freedom of movement of the citizens would not be possible without following the due process of the law.<sup>2</sup> The due process of law would scrutinise that, in any situation of conflict the nature of the restraint rather than the purpose of such restraint is an important indicator.<sup>3</sup> However, the governing elite are more concerned with the purpose of such restraints rather than the person or the nature of such restraint. The device created by the governing elites in various nations to circumvent these rights, results in pre-emptive actions by State, the same came to be popularly known as Preventive Detention. It was but natural for the State to achieve its ends, to use the language of law / legislation, thus resulting in the enactment of Preventive Detention laws. The mechanism, purposes and the nature of such laws is necessarily a study of the human rights violation and attempt by legislation to legitimize such violations.

This study regarding Preventive Detention laws is historically and geographically context to the State of Nepal. Nepal being an ancient kingdom with rich history and being land lock, has adopted its own system of Preventive Detention over the years. Nepal being a

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<sup>1</sup> Ted, Little. "**Democracy is most valuable freedom**" [http://www.oanow.com/news/article\\_5e94a33d-2ef8-5e4c-a217-568e7a5ace40.html?modejqm](http://www.oanow.com/news/article_5e94a33d-2ef8-5e4c-a217-568e7a5ace40.html?modejqm), downloaded on 14 Nov. 2014, at 9 : 45 am.

<sup>2</sup> David Cole, "**Out of Shadows: Preventive Detention, Suspected Terrorist, and War**" Research paper No. 3<sup>rd</sup> May, 2009, Georgetown University, California Law Review, vol. 97- 693, (2009) , p. 702

<sup>3</sup> V. Swaroop, "**Law of Preventive Detention**", DLT, Publications Law Publishers, 5335, Jawahar Nagar Kolhapur Road Delhi, 110 007, Ed. 1990, p. 9

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young democracy faces much travail, and one of the travails, historically was the various attempts by the ruling elites to restrict, the freedom of movement of its' citizens. The study therefore focuses on the historical evolution of the Preventive Detention laws in the State of the Nepal by the mechanisms of constitutional amendments and enactment of some legislation.

## 1.2 Significance of the Research

The significance of this research is as follows:

- a. The right to life and personal liberty are fundamental rights of every citizen. These rights should not be curtailed by the Executive Authority or Police Administration, but still, these incidents are happening in the respective countries. This study brings about an analysis of grass root situations.
- b. The study includes cases of unlawful custody without any criminal charges or an insufficient legal ground, but, only on suspicion by the authorities during the Panchayat regime, post democratic period, and during and after the Maoist insurgency in Nepal.
- c. The study focuses at exploring the possibility of compensation to detained persons by the executive authority in Nepal.
- d. The study espouses the differences between Constitution Rights of Nepal and the legal vacuum for protection and promotion of right to life and liberty.
- e. The study is of the legal and constitutional framework for the protection of individual rights in Nepal.

## 1.3 Statement of the Research Problems

The problem which resulted in this research study has certain historical basis which is peculiar to Nepal. In Nepal there existed the panchayat regime.<sup>4</sup> Under this government the Preventive Detention law came in to existence in the name of the Public Security Act, 2046 B.S. (1989 A.D.) under this Act, person could be detained in the name of the security of the State for the following reason:

- ❖ "If there is reasonable and adequate ground to immediately prevent a person from acting in any manner prejudicial to the sovereignty, integrity or public peace and

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<sup>4</sup> On 15<sup>th</sup> Dec., 1960, in an event that became known as the royal "*coup d'état*", King Mahendra invoked these emergency powers to dissolve the parliament, suspend the constitution, abolish the ten-year-old multiparty system, and assume responsibility for the administration of government, it was continued till on 10<sup>th</sup> Sept. 1990.

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order of Nepal, the local authority may issue an order to keep such person under Preventive Detention for a specified period and at a specified place".<sup>5</sup>

- ❖ "If there is reasonable and adequate ground to prevent a person from acting in any manner prejudicial to interest of general public or harmonious relations subsisting among various castes, tribes or communities, the local authority may issue any of the following orders for keeping such person under area confinement".<sup>6</sup>
  - Not to reside in a specified place of Nepal.<sup>7</sup>
  - Not to enter in a specified place of Nepal.<sup>8</sup>
  - To reside only in a specified place of Nepal.<sup>9</sup>
- ❖ "The Ministry of Home Affairs may, in order to prevent a person from doing any act which may cause an adverse effect on the security, peace and order of Nepal or on friendly relations with foreign nations or harmonious relations subsisting among the people of various class or regions, issue an order to prevent him/her from going outside the territory of Nepal".<sup>10</sup>

However, there were large scale abuses and misuse of the provision of the Public Security Act; resulting in indiscriminate arrest and detention, this lead to public outcry, various demonstrations, objections and newspaper reports projected these cases of unauthorized detentions. As result of this the Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.) was enacted providing protection against Preventive Detention in the fundamental rights. The enactment of this constitution resulted in certain changes in the procedures of Preventive Detention, consequently the Public Security Act, 2046 B.S. (1989 A.D.) was amended and the cases of Preventive Detention were reduced drastically; however Preventive Detention was revived in Nepal by the Ordinance in the 2058 B.S. (2001 A.D.) called the first ordinance, subsequently this ordinance became the Terrorist and Disruptive Activities (Prevention and Punishment) Act, 2058 B.S. (2002 A.D.).<sup>11</sup> Immediate provocation for the enactment the legislation was the emergence of the Maoist Insurgency. Though, the Terrorist and Disruptive Activities (Prevention and Punishment) Act, was to remain in force only for a duration of two years from the date of its commencement, the government extended the application of the Preventive Detention for six more months and further

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<sup>5</sup> Section 3 (1) of the Public Security Act, 2046 B.S. (1989 A.D.)

<sup>6</sup> Section 3 (2)

<sup>7</sup> Section 3 (2) (1)

<sup>8</sup> Section 3 (2) (2)

<sup>9</sup> Section 3 (2) (3)

<sup>10</sup> Section 3 (3) the Public Security (First Amendment) Act, 2047 B.S. (1990 A.D.)

<sup>11</sup> *Infra*, Chapter – IV, p. 82

extended for six months, by this process of extension continued nearly for the period of thirty months, thus, resulting in large number of unauthorized Preventive Detentions in Nepal.<sup>12</sup> It was in these circumstances the Supreme Court intervened in many cases of Preventive Detention by issuing the writs of habeas corpus and getting the detainee released. There were many attempts and negotiations by political leaders with the King's governmental officials to bring peace of these, the two major attempts for peace were in 2001 and 2003 A.D. but these negotiations also failed resulting in the complete collapse the of the Criminal Justice System. Though elections were promised many a times, after King Gyanendra suspended the constitution, he continued his autocratic rule till February, 2005.<sup>13</sup> This refusal and delay in reinstating constitutional democracy resulted in the people's moment call *Loktantar Andolan*, the King was compelled to restored the previous elected government this period from 2002 to 2005 A.D. saw the maximum numbers of the arrested suspended the Criminal Justice System and last came violation of the fundamental freedom.

Thousands of citizens were subjected to enforced disappearance. Large numbers of disappearances of peoples arrested on suspicion of being members or sympathizers of CPN (Maoist).<sup>14</sup> Besides, the members of CPN (Maoist) were also responsible for hundreds of abductions. Over 15,000 people were arbitrarily arrested and detained. Arbitrary arrest and detention of suspected members or sympathizers of CPN (Maoist) were widespread. Widespread practice of torture, and cruel, inhuman or degrading treatment by police, that is Armed Police Force (APF) and Nepal Army (NA), systematically practiced torture.<sup>15</sup>

There are several judgments given by the Supreme Court of Nepal for the preservation of law and order. But, the government was not responsive to implement law and order.<sup>16</sup> Therefore, there should be an emphasis on the protection and promotion on human rights and fundamental freedom of every citizens of Nepal as a part of fundamental right to create a just, responsible and receptive Criminal Justice Administration System. There is no limitation of the abuse of power to restraint the human rights, rule of law or legal procedurals safeguards are on one side and practice is another. Thus, the problem of the study is how to reduce or minimize and how to correlate or pursue respect for human rights between them.

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<sup>12</sup> Infra, Chapter – VI, Pp. 115-137

<sup>13</sup> Khanal, Rewati Raman, "**Nepal ko Kanooni Itihasko Ruprekha (An outline of Legal History of Nepal)**", Kathmandu: Saraswati Khanal, 2062 B.S. (2006 A.D.), p. 23

<sup>14</sup> Nepal Human Rights Report 2012, executive summary, p. 4 available at <http://www.state.gov/documents/organization/204619.pdf>

<sup>15</sup> Nepal 2013 Human Rights Report, executive summary, Pp. 4-6, available at <http://www.state.gov/documents/organization/220612.pdf>

<sup>16</sup> Infra, Chapter – IV, p. 159,



#### 1.4 Review of Relevant Literature

For the study regarding the Preventive Detention in Nepal under its changing constitutions, several books, articles, journals and research papers including unpublished research papers and websites have been reviewed thoroughly.

Since the study pertains to the Preventive Detention loss and its implementation under the various Constitutions of Nepal, the literature includes all materials relating to the Constitution and framing of the Constitutions. The study includes various comments and writings on the constitution specially relating to Preventive Detention. Some of the bibliography which the researcher has consulted and used for the thesis is as below:

1. Manoj Mate, **“The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases,”**<sup>17</sup> Berkeley Journal of International Law (BJIL), vol. 28, No. 1, 2010, Whittier Law School, 1<sup>st</sup> May, 2010, Number of Pages in PDF File: 45

This article explores the origins of the anomalous development of substantive due process in the Indian Supreme Court in the area of personal liberty and Preventive Detention cases, given that the framers of the Indian Constitution deliberately chose to omit a due process clause to preclude substantive due process jurisprudence. It proceeds to examine the important role of judicial "borrowing" in this process, in which justices relied on foreign precedent and legal scholarship, as well as International legal norms, to help overcome constitutional constraints.

2. Stella Burch Elias, **“Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects”**<sup>18</sup> Columbia Human Rights Law Review, vol. 41, 2009, University of Iowa - College of Law, 18<sup>th</sup> May, 2009, Number of Pages in PDF File: 137

The term 'Preventive Detention' has been used over-broadly, to describe a number of different kinds of detention, with very little acknowledgment of the fundamental differences between these alternative regimes. This Article seeks to advance the debate about 'Preventive Detention' by moving beyond each of these limitations. The Article constructs taxonomy of 'Preventive Detention,' based on core principles of International law, to distill the key attributes of the Preventive Detention regimes in each of the countries surveyed. The article concludes with the argument

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<sup>17</sup> <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1381&context=bjil>, downloaded on 2<sup>nd</sup> April, 2013, at 1:00 am.

<sup>18</sup> [http://digitalcommons.law.yale.edu/student\\_papers/87/](http://digitalcommons.law.yale.edu/student_papers/87/), downloaded on 2<sup>nd</sup> April, 2013, at 1:00 am.

that, once this determination is made, U.S. policymakers should conclude that a version of the pre-trial detention framework approach would be most suited for use in the United States.

3. Douglass Cassel, **“Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law,”**<sup>19</sup> *The Journal of Criminal Law and Criminology* (1973), vol. 98, No. 3, Pp. 811-852, Published by: Northwestern University School of Law.

This article analysis the procedure, grounds and conditions required for Preventive Detention. Article suggests that indefinite detention is primarily a violation of human rights. Article concludes that for Preventive Detention there should be some state emergency.

4. Adam Klein and Benjamin Wittes, **“Preventive Detention and the right to personal liberty and security under Article 5 ECHR,”**<sup>20</sup> *The International Journal of Human Rights*, vol. 10, Issue 3, 2006

'Preventive Detention' refers to detention by executive order as a precautionary measure based on predicted criminal conduct. Detention is without criminal charge or trial as detention is based on the prediction of a future offence. The article argues that Preventive Detention is specifically provided for under the second ground of detention in Article 5(1) (c). A person in Preventive Detention, however, must be brought promptly before judicial authority under Article 5(3).

5. Sean Aughey and Aurel Sari, **“Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence”**<sup>21</sup> *University of Exeter Journal*, 2015, vol. 91, *International law studies* 60-118, Number of Pages in PDF File: 60

The United Kingdom has seen a steady flow of legal challenges arising out of its involvement in the armed conflicts in Afghanistan and Iraq. Among these, the case of Serdar Mohammed, decided by the English High Court in May 2014, is of particular interest because of its' wider implications. In essence, the High Court's

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<sup>19</sup> <http://www.jstor.org/stable/40042788>, downloaded on 2<sup>nd</sup> April, 2013, at 1:00 am.

<sup>20</sup> <https://books.google.co.in/books?isbn=9004172386>

<sup>21</sup> <https://www.usnwc.edu/getattachment/39065c16-9f35-4f65-bdbb-233a5923a964/Targeting-and-Detention-in-NIACs--Serdar-Mohammed-.aspx>

judgment in Mohammed questions the existence of a legal basis under the law of armed conflict for the conduct of status-based operations in non-international armed conflicts. This article demonstrates that the restrictive approach adopted by the High Court in Mohammed is mistaken as a matter of law and undesirable as a matter of policy. In short, Mohammed drives the convergence between international human rights law and the law of armed conflict too far.

6. Purna Man Shakya.(1998). **“Right to Life and Personal Liberties: Challenges of Interpretation.”** Essay on Constitutional Law (1998). Kathmandu: Nepal Law Society. vol. 27, p. 33

The author has critically analysed right to life and personal liberty under the Constitution of Kingdom of Nepal 1990 A.D. The paper analyses personal liberty and Preventive Detention cases in order to gain a better understanding of the processes by which judges employ borrowing to advance "universalist" (versus particularist) legal norms, and then seeks to generalize from the court cases by proposing a theoretical approach for understanding how judicial borrowing can be understood as a dynamic process that changes over time in new developing constitutional systems. It helps to analysis the chapter four of the research liberties of the citizens' and their basic fundamental rights.

7. Stephanie Cooper Blum, **“The Necessary Evil of Preventive Detention in the War on Terror: A Plan for a More Moderate and Sustainable Solution”** ISBN 9781604975666, Page, 56

The Preventive Detention as a tactic in the war against terrorism, "if Preventive Detention is to be employed, it must surely be done within the law and subject to open accountability. The criteria must be clear and the procedures must assure fairness. This book sets out a balanced and moderate proposal that is worthy of serious consideration." Author has written a thoughtful, well documented, and responsible analysis of the legal and policy issues bearing on the sensitive subject of Preventive Detention of terrorist suspects.

8. Andrew Harding, John Hatchard, **“Preventive Detention and Security Law: A Comparative Survey”** Martinus Nijhoff Publishers, 19<sup>th</sup> Oct.1993, Law 312 pages, ISBN No: 0792324323

Preventive Detention law is a subject which continues to receive great international attention. In recent years the legal rights of detainees have been more and more frequently litigated, and significant new approaches have been developed. There is, however, no current publication which deals with the new Preventive Detention law. The purpose of this book is to provide a discussion of the new Preventive Detention law mainly in Asia and Africa, focusing on the practical operation of the law rather than the theoretical issues relating to the legitimacy of such laws. The book will be of practical assistance to those practicing or studying this important area of law. It will be of particular interest to human rights lawyers, activists and researchers. All the chapters are contributed by academics or practitioners specializing in the field of human rights law.

9. Lawrence Hill-Cawthorne, **“Detention in Non-International Armed Conflict”**<sup>22</sup>  
Oxford university Press, 2016, Pp. 300, ISBN : 0191067008

This book provides a comprehensive examination of the procedural rules that apply to detention in non-international armed conflict, with the focus on preventive security detention, or 'internment'. All relevant areas of International law, most notably International Humanitarian Law and International Human Rights Law, are analysed in detail and the interaction between them explored. It gives an original account of the relationship between the relevant rules of International Humanitarian Law and International Human Rights Law, which is firmly grounded in general international law scholarship, treating the issue as a matter of treaty interpretation, including Nepal, Sri Lanka, etc. it is demonstrated that the customary and treaty obligations of States under human rights law continue, absent derogation, to apply to detention in non-international armed conflicts.

10. Dhungel, Surya P.S. **"Commentary on the Nepalese Constitution"**, (1998 A.D.),  
Kathmandu: DeLF, Lawyer's Inc.

It is commenting on the provisions of the Constitution of the Kingdom of Nepal, 1990 A.D. It helps to analysis the Constitution of Nepal and civil liberties of the citizens' and their basic fundamental rights.

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<sup>22</sup> [https://books.google.co.in/books?id=dTncCwAAQBAJ&source=gbs\\_navlinks\\_s](https://books.google.co.in/books?id=dTncCwAAQBAJ&source=gbs_navlinks_s)

11. H.S. Martin, "**The Right to Liberty and the Prohibition of Preventive Detention: on the use of pre-trial Detention of Suspected Terrorists**". Toronto research Journal, 2010, vol. 21, Pp. 46-53

This article examines whether detention outside the scope of criminal proceedings is allowed under the European Convention of Human Rights and to what extent the European Court of Human Rights accommodates national security concerns when addressing unlawful curtailments on the right to personal liberty. Subsequently, challenges liable to be addressed in the near future by the European Court of Human Rights are identified by looking at how the Spanish judiciary order and review pre-trial detention of suspected international terrorists.

12. David Cole, "**Out of the Shadows: Preventive Detention, Suspected Terrorists, and War**"<sup>23</sup> Georgetown Law Faculty Working Papers, Georgetown University Law Journal, Year 2009, vol. 32, Pp. 120-194

Preventive Detention is inconsistent with basic notions of human autonomy and free will. We generally presume that individuals have a choice to conform their conduct to the law. Thus, we do not criminalize thought or intentions, but only actions. Respect for autonomy requires us to presume, absent a very strong showing, that individuals will confirm their behavior to the law. Human being on the prediction that he will undertake dangerous and illegal action if left free is, in an important sense, to deny his autonomy. Preventive Detention should be limited to situations that cannot be adequately addressed through the criminal justice system.

13. Dahal, Kasi Raj. "**Constitutional Law, (Sambaidhanic Kanoon)**" First Ed. Pairabi Prakashan, M. House, Ramshah Path, Kathmandu, (2049 B.S.), P. 238, Nepali Script.

This book presents a comparative analysis or study of the concepts on constitution development and practiced in the constitutional system of other countries, particularly in USA, UK, and India. Furthermore the author has comparatively studied and analysed the every fundamental theories of the constitution and their use and the basic process of the making of the constitutions. The book is divided into ten chapters with constitution and constitutionalism. Chapter two dealt with rule of law and chapter three dealt with fundamental rights as a whole in my study.

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<sup>23</sup> [http://scholarship.law.georgetown.edu/fwps\\_papers/106](http://scholarship.law.georgetown.edu/fwps_papers/106)

14. Bharat Raj Upreti, Kalyan Shrestha, and Kanak Bikram Thapa, "**Constitutional law of Nepal, (Nepalko Shambaidhanic Kanoon)**" Second Ed. (Abridged and updated with new materials) FREEDEL, Kathmandu. P. 646, Nepali Script.

This book has been published as a collection of articles contributed by different scholars, who belongs to different legal sub-disciplines, i.e., Professors, Judges, Practicing lawyers etc. Each writer has dealt with specific topic. This book covers almost all aspect of the constitution. It gives a full account of the Constitution of the Kingdom of Nepal, 2047 B.S. (1990 A.D.) with the background of the theoretical aspect developed in the well-known and developed democratic societies.

It has divided into sixteen chapters. First chapter introductory part, second chapter preamble and other preliminary issues, third chapter dealt with fundamental rights and constitutional remedies, fourth chapter dealt duties, directive principles, and policies of the State, fifth chapter is regarding the separation of powers and principles of check and balance, sixth chapter speaks about constitutional monarchy, principles and practices, seventh chapter talks about executive. Similarly, eighth chapter dealt with legislature and legislative procedure, ninth chapter regarding the judiciary, tenth chapter about constitutional bodies and councils, eleventh chapter political parties, twelfth chapter emergency powers, thirteenth chapter amendment of the constitution, fourteenth chapter discuss about constitutional provisions on treaty, fifteenth chapter the citizenship and the last sixteenth chapter provides bare acts as an Annex's.

The text covers the Constitution of the Kingdom of Nepal, 1990 A.D. and other two draft texts presented before the King and presented as a text of palace, report submitted by the Constitution Recommendation Commission and the Royal Proclamation.

Each Article focuses on the concept developed so far in the western model of democracy and the Indian experiences. The book compares and analyses foreign experiences relation to Nepalese reality. The writers also comment on various constitutional cases decisions of the Supreme Court of Nepal. This book has been relevant to my research.

15. Bhandari, Surendra. "**Constitutional Law (Sanbaidhanic Kanoon)**" Second Ed., Pairabi Prakashan, M. House, Ramshah Path Kathmandu, 2053 B.S., p. 505. Nepali Script.

This book has been covered a wide range of topics with a comparative study of constitutions and leading cases of India, United Kingdom and United States of America. First chapter deals with the theoretical aspects of the constitution i.e. meaning, classification, sources of constitution, constitutionalism and parliamentary democracy, theory and practice. Second chapter and three give a short account of history development and features of the Constitution of the Kingdom of Nepal respectively. Fourth chapter provides a vivid account of the executive, particularly with constitutional position of His Majesty the King, who in Nepal until few years back was constitutionally all in all and sovereign. This chapter also highlights the role of 'Representative and Responsible Government.' Composition, functions and parliamentary procedure of the parliament are dealt with in fifth chapter, along with the parliamentary privileges, role and position of political parties in the parliament. The Constitution of the Kingdom of Nepal, 1990 A.D. placed monarchy in a special status. Similarly, it has dealt with the political party in separate chapter.

On the whole, the book presents a complete picture and practice of Nepalese constitution what it does not cover at all the fundamental restriction theory and practices.

16. Regmi, Mukunda. "**Constitutional Development of the Constitution of the Kingdom of Nepal, 1990 A.D.**", Part -I & Part –II, Kathmandu, Mrs. Sita Devi, 2004 A.D., Pairabi Publication, Ramshahapath, Kathmandu, Nepal

Mr. Regmi wrote two volume entitled "Constitutional Development and Constitution of the Kingdom of Nepal, 1990 A.D.". He says that many constitutions of the world are functioning well. But these constitutions were not made through the Constituent Assembly. Therefore, he concluded that if the political parties have commitment to implement provisions of constitution, it is not necessary to make constitution through Constitution Assembly.

17. Priti Saxena, "**Preventive Detention and Human Rights**", Deep and Deep Publications Pvt. Ltd., First Ed. 2007 A.D., ISBN 81-7629-992-8

In the globally terroristic era the theme of this book is based on the very sound relationship between love and hate attitude between law abider and law violator towards detention laws. India's commitment to human rights is reflected in the chapter two of this book.

The author has analysed freedom and human rights have always been universal concepts. But there has been perennial conflict between freedom and slavery and human rights and their denial. Further stated that the Constitution of India guarantees various human rights and these rights are enforceable by extra-ordinary remedies by the High Courts and the Supreme Court of India. These rights are not absolute. They are subject to reasonable legislative restrictions. The judiciary has enviously protected the freedom and liberty by strict interpretation of each restriction. Freedom and liberty have been the cherished goals of human beings and., therefore, form the kernel of human rights.

The author has analysed historical background of Preventive Detention, Preventive Detention under the Constitution of India and positive judicial approach on individual's rights. Further, he has been explained analysed a jurisprudential aspect of balancing the interests under the part of Preventive Detention safeguard or violation of human rights. He concluded that, no human right is absolute, therefore, is that for the proper implementation and enforcement of laws in order to achieve the social goals envisaged in the constitution, the role of judiciary must be of paramount importance. This is book is help for historical background and International perspective of the study.

18. V. Swaroop, "**Law of Preventive Detention**", First Ed. Sanjay Bahi Publication, (1990).<sup>24</sup>

In this book, writer has explained precisely under the constitutional aspect which deals with Preventive Detention under the fundamental rights such as life and personal liberty and it has focused in how Preventive Detention curtails liberty. The writer further emphasis relation to Preventive Detention under the Indian Constitution and other statutes regarding the Preventive Detention and its procedures. This book helps in the introductory part and international perspective of the study.

19. B. V. Kumar, "**Preventive Detention Laws of India**" 1991, Konark Publishers Pvt. Ltd., Pp. 1261,

India's law relating to Preventive Detention now has been codified in Article 22 of the Constitution, but its earliest form can be traced to the East India Company Act of 1793. Article 22 provides protection against arrest and detention in certain

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<sup>24</sup> <http://ebook.google.co.in.books/1991/10/06/between-eJskgSe-and-hard-d>.



cases. A review of the general principles of Preventive Detention, constitutional rights, the basis for detention, subjective satisfaction and judicial review, grounds for detention, the detention order and procedure, and the detention of foreigners follows a discussion of personal liberty and the rule of law versus Preventive Detention. The book includes guidelines for the sponsoring and detaining authority

20. Lawrence Hill Cawthorne, **“Detention in Non-International Armed Conflict”**<sup>25</sup>  
Oxford university Press, 2016, Pp. 300, ISBN : 0191067008

This book provides a comprehensive examination of the procedural rules that apply to detention in non-international armed conflict, with the focus on preventive security detention, or 'internment'. All relevant areas of international law, most notably international humanitarian law and international human rights law, are analysed in detail and the interaction between them explored. It gives an original account of the relationship between the relevant rules of International Humanitarian Law and International Human Rights Law, which is firmly grounded in general international law scholarship, treating the issue as a matter of treaty interpretation. With that in mind, and with reference to State practice in specific non-international armed conflicts - including those in Sri Lanka, Colombia, Nepal, Afghanistan, and Iraq - it is demonstrated that the customary and treaty obligations of States under human rights law continue, absent derogation, to apply to detention in non-international armed conflicts. The practical operation of those rules is then explored in detail. The volume ends with a set of concrete proposals for developing the law in this area, in a manner that builds upon, rather than replaces, the existing obligations of States and non-State armed groups.

### 1.5 Objectives of the Study

The specific objectives of the study are as follows:

- a. To study the concept and classification of the Preventive Detention.
- b. To compare the study on Preventive Detention especially major legal provisions of the world such as India, United Kingdom, United States of America and Australia.

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<sup>25</sup> [https://books.google.co.in/books?id=dTncCwAAQBAJ&source=gbs\\_navlinks\\_s](https://books.google.co.in/books?id=dTncCwAAQBAJ&source=gbs_navlinks_s)

- c. To analysis the interpretation regarding detention and the changing Constitutions of Nepal.
- d. To observe the historical development of Preventive Detention in Nepalese legal provisions.
- e. To analytically study Nepalese legal system on Preventive Detention.
- f. To do a survey on Preventive Detention practice in Nepal.
- g. To study abuse of power by authoritative bodies regarding Preventive Detention, and their interference by the Supreme Court to protection and preservation for reestablishment of human rights.

### **1.6 Hypotheses of the Study**

The hypotheses and test in this study:

- a. Whether the arbitrary arrest and detention of persons resulted in depriving their personal liberty?
- b. Whether failure of police and executive authority to inform such arrested persons, about the grounds for their arrest, within the time prescribed by law, prevent in human rights?
- c. Whether a detained person has any choice to enjoy the basic fundamental rights?
- d. Has the judiciary played a significant role in identifying violation of human rights by the police or executive in such cases of detention?
- e. Whether the prison or custodial administrative authorities follow the prescribed procedural rules as per the State laws and the International laws?
- f. Does the law permit the executive authority to detain a person soon after the release by a judiciary order?
- g. Does the law provide compensation to any person wrongly detained if so, where the victimized person may claim for the compensation?

These major problems are vital for the substance and continuance of any democratic nation. The researcher proposes to conduct in-depth study of the above hypotheses in the republic democratic of Nepal for last three decades.

### **1.7 Research Methodology**

The researcher has adopted a multifaceted method of study the approach initially has been doctrinal in nature wherein the analysis of the meaning and the

import of the terms Preventive Detention followed by perusal literal on the subject is carried out. The study is also historical in the context that the comprehensive analysis is made on cases of Preventive Detention that came off before the Supreme Court of Nepal during the period of 1953 to 2006 A.D. The study is also empirical nature in the scene that to understand the impact of Preventive Detention on the profession on the society. A detail field study and then after analysis of such data so collected has also been carried out.

This research is based on the information gathered mainly from the literature available at various libraries, reported and discussed with a reference to the Constitutional Rights on the grounds of arrest and detention at national as well as International level. The main focus is on the fundamental rights of right to personal liberty and provision of Preventive Detention under the constitutional provisions in Nepal. The general survey of the relevant cases on arbitrary arrest without being informed of arrest and procedural followed by the authority body. The study shows a comparative approach with International legal provisions (especially United Kingdom, United States of America, Australia and Indian legal provisions), including a historical study of the method for tracing out, as to how the concept of Preventive Detention developed in Nepal.

The researcher carried out a case survey of those deprived of personal liberty and the role of the Apex Court to protection of the fundamental rights and reestablishment of personal liberty through writ petitions of *habeas corpus* in the different stages under the changing constitutional provisions.

The research is based on a comparative analysis under the changing constitutional provisions of Nepal as well as legislations on behalf of the protection and promotion to human rights as fundamental rights. However, other sources such as, International Declarations and Conventions on the right to life and liberty, the National Human Rights Commission, and different organisations reports on the ground of human rights violation and disappearance of citizens' as well as the internet sources have been fully utilized in making this study useful.

### **1.7.1 Nature of Data**

Both Primary and Secondary data have been used in this study. Primary data is collected through questionnaires, judicial decisions etc. The nature of data is qualitative as well as quantitative. Similarly, Secondary data is collected through

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published and unpublished materials such as books, journals, research report, articles, newspapers, and other official documents.

### **1.7.2 Sources of Data**

A comprehensive library study method was employed to become familiar with the problem and objectives of the study. National and International experts were consulted through interviews and discussions as far as possible.\

### **1.7.3 Data Collection, Analysis and Interpretation**

The data was collected through various sources using various data collection techniques and tools. Qualitative data was tabulated and analysed descriptively. Simple statistical methods have been used for processing the collected information. Data presentation has been made in tables, charts, and diagrams after examining its appropriateness.

Primary or empirical and secondary or doctrinal data has been presented on the basis of historic and comparative method wherever it was appropriate in this study. The same has been compiled in chapter number VI and sub point 6.5.

## **1.8 Limitation of the Study**

Attempt was made to conduct this research in the most comprehensive and scientific ways however any research by human being does suffer certain limitations of time, limitation of resources and the limitation of availability of correct information the limitation the researcher felt during this research could be as bellow:

- a. This research and the thesis though carried out in English language, all the materials and sources including Constitutions documents in Nepal are written and documented in Nepalese language only. No authentic or official translation is available in English. Therefore, the researcher had to undertake the onerous task of translating into English by himself. However for the sake of authentication such translations were verified and approved by few senior lawyers and law academicians in Nepal who had the necessary fluency both the English and Nepalese language.
- b. The second major limitation the researcher had to deal was in terms of obtaining authentic data from the government, resources thought the Nepal does have the Right to Information Act, in its basic form. Despite many

attempts the government, departments declined to provide any data pertaining to arrest and detention of any person even during the earlier regime it was surprising and dishearten to not that even the human rights commission of Nepal could not provide the data except the researcher was allocate browse through the document available to them that too in the presence of official only.

- c. The researcher therefore had to necessarily relay upon documents in the form of cases and materials available with the courts in Nepal mainly the Supreme Court of Nepal regarding incidence of Preventive Detention which may not have been subject to judicial intervention the researcher had to depend upon various newspaper reports, articles published by individuals & certain actions of NGOs etc.
- d. On the doctrinal front the researcher had limited himself in the discussion on the theoretical basis of Preventive Detention to the conceptual level only since the topic is largely oriented on the situation of Preventive Detention has it existed and its existing in Nepal.
- e. With the passing of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.) and presently, the new constitution, ‘the Constitution of Nepal’, 2072 B.S. (2015 A.D.) has seen a new face of the freedom of movement with no cases of Preventive Detention being reported. In the context of the about factual situation the researcher study of the Preventive Detention and its harmful effect on Nepal as a nation as a society has more or less remain historical. It should be noted the study has mainly focused in the large incidents of Preventive Detention which occurred during the Panchayat regime and during Maoist insurgency period.
- f. The comparative study independent democratic nations namely: India, United Kingdom, United States of America, and Australia, is carried out purpose of the drawing parallel to act has future guideline of the State of Nepal. Due to no existence of similar laws and situation in Nepal the comparative study is merely informatively.

## **1.9 The Scheme of Chapterisation**

In order to conduct and present this study in a clear and schematic way the study is presented in a well ordered chapterised format. The first chapter has discussed the scheme of

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the study, including the various concerns and the ambit of this study into the aspect of Preventive Detention as it existed in Nepal and the extend of human rights violations and deprivation of personal liberty and right to life during these actions of Preventive Detention. This chapter has also formulated the hypothesis for the study to make the study analytical and scientific. After this preliminary presentation in this first chapter, which includes review of the relevant literatures as well the second chapter lays down the theoretical basis of Preventive Detention by examining the various definitions of Preventive Detention as formulated by the judiciary, the political persons and also the academic view of Preventive Detention as postulated by various jurists.

The Second chapter traces the History of Preventive Detention and the various circumstances, socio-political, which resulted in the revival of Preventive Detention in Nepal. The geographical and historical discussion on Nepal is provided to provide that peculiar insight into the causes of Preventive Detention in Nepal. The historical and political happenings during the early to modern regime in Nepal provides an idea into the emergence of a legal system in Nepal, though proclaimed to be democratic in theory but differing in content and action places Nepal in a different perspective as compared to many other democratic Nations.

The third chapter discusses the International legal regime on Preventive Detention the chapter begins with the all-important Universal Declaration of Human Rights flowed by the various Covenants and treaties concerning Preventive Detention. This chapter further draws a comparative study of the Preventive Detention laws in some of the well-known democratic nations.

The fourth chapter brings out the Constitutional System under the different Constitutions in Nepal followed by the Law relating to Preventive Detention in Nepal.

The fifth chapter deals with the Judicial System of Nepal and thereafter with the Criminal Administration System. While discussing the Criminal Justice System the history of the Criminal Administration System for earlier times is traced.

The sixth chapter has dealt in detail first with the role of the judiciary in protection of human rights. This is done by way of discussion of the important cases where the Supreme Court has been called to decide. The aspect how the Supreme Court at times wavered in its responsibility to uphold human rights is also highlighted. After examining the role of the judiciary the second part of this chapter dealt with the filed study where in questionnaire were circulated to nearly 150 respondents. Their responses have been tabulated and statically analysed to provide an idea into the impact of Preventive Detention and the way in which the

judiciary responded to such Preventive Detention. This chapter thus provided a multidimensional view on Preventive Detention as it was practiced in Nepal

The seventh and the last chapter after briefly summarising the study have sought to prove the hypotheses followed by suggestions to ensure protection of Human Rights in Nepal.

## CHAPTER – II

### Origin, History and Practice of Preventive Detention in Nepal

#### 2.1 Introduction

Nepal had remained a monarchy, right from its inception, the rudiments of democracy and a system of the organized government could be seen with the passing of the Government Nepal Act, 2004 B.S. (1948 A.D.).<sup>1</sup> Then Rana government established a bicameral legislative body. However, one could rightly say that democracy took roots in Nepal only with the enactment of the Interim Government of Nepal Act, 2007 B.S. (1951 A.D.),<sup>2</sup> which was the result of the merger of the Nepali National Congress and the Nepali Democratic Congress. The constitution was promulgated by the King of Nepal called the Constitution of the Kingdom of Nepal, 2015 B.S. (1959 A.D.),<sup>3</sup> was then considered as a "royal gift to the people"<sup>4</sup> by the Monarch late His Majesty's King Mahendra. However, this constitution also brought the concept of Preventive Detention in the Nepal.<sup>5</sup> The parliament could make a law to keep any person in Preventive Detention; such power was provided by the constitution itself, wherever such a law enacted by the sovereign authority was required to follow all the procedural safeguards guaranteed by the constitution in the form of fundamental rights similar to that of the Indian Constitution.<sup>6</sup> Unfortunately, this constitution had a short life<sup>7</sup> with the royal "coup d'état".<sup>8</sup> His Majesty's King Mahendra radically reformed this constitution and announced the new constitution of Nepal, 2019 B.S. (1962 A.D.).<sup>9</sup>

The Constitution of Nepal, 2019 B.S. (1962 A.D.) was a stronger and more explicit statement of royal authority than did previous constitutions. Real power remained with the King, who was the sole source of authority and had the power not only to amend the

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<sup>1</sup> The Government Nepal Act, 2004 B.S. (1948 A.D.). In Nepal it's the Baidhanic Kanoon (Constitution), 2004 B.S., was come into force on 13<sup>th</sup> April, 1948.

<sup>2</sup> The Interim Government of Nepal Act, 2007 B.S. (1951 A.D.), was enforced on 11<sup>th</sup> April, 1951.

<sup>3</sup> The Constitution of the Kingdom of Nepal, 2015 B.S. (1959 A.D.), was promulgated on 12<sup>th</sup> Feb., 1959.

<sup>4</sup> Gupta, Aniruda. "Politics in Nepal", 1950-60, Kalinga Publication, Second Ed., 1993, p. 29.

<sup>5</sup> Article 3 (6)

<sup>6</sup> Article 3 (1), & 3(6) to (12)

<sup>7</sup> King Mahendra's on 15<sup>th</sup> Dec., 1960 dissolution of the elected parliament and suspension of the Constitution; prelude to the Panchayat regime.

<sup>8</sup> King Mahendra invoked emergency powers to dissolve the parliament, suspend the constitution, abolish the ten-year-old multiparty system, and assume responsibility for the administration of government. Prime Minister B.P. Koiral and most members of parliament were arrested (and remained in jail for the next eight years); but 10,000 others also were jailed. The King charged the Koiral government with corruption, misuse of power, and failure to maintain law and order. He said he would retain personal power "till such time as may be required for the installation of an alternative arrangement.

<sup>9</sup> The Constitution of Nepal, 2019 B.S. (1962 A.D.) announced on 16<sup>th</sup> Dec., 1962 by His Majesty's King Mahendra Bir Bikram Shahadev.



Constitution but also to suspend it, by royal proclamation during emergencies. This Constitution was the demise of democracy and resulted in the establishment of Panchayat System. The Constitution of Nepal, 2019 B.S. (1962 A.D.) was silent relating to provision of Preventive Detention so was fundamental rights that were guaranteed under by prior Constitution of 2015 B.S. (1959 A.D.). But, government enacted a new law for Preventive Detention by separate legislation which was known as the Public Security Act, 2018 B.S. (1961 A.D.),<sup>10</sup> with the objective of suppression of democratic elites, and the continuity of tyranny of the Panchayat System. This Act greatly restricted the freedom of people, imposed restraints on freedom of people's movements and sporadic arrest and detention of the citizens and also many higher political leaders of the State were carried out. Trials were not held in time during this period, the arrested persons often disappeared, no proper procedural precautions were mentioned, the strict enforcement of restriction on people's movement to such an extent that any gathering of people, or delivery of anti-government speeches by any person in any part of Nepal was considered sufficient reason for detention and arrest of persons. This extreme situation resulted in secret and underground organization of the people and the true beginning of a true people's movement. There were in fact two groups, slowly these groups and the protest of the public gathered momentum, resulting in the collapse of the Panchayat System and enactment of the new constitution. Thus, as result of first people's movement a multiparty democracy was established under the Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.),<sup>11</sup> which repealed the Constitution of Nepal, 2019 B.S. (1962 A.D.). This new constitution would preserve the King's status as Chief of the State under a constitutional monarchy but established a multiparty democracy with protection of fundamental human rights of citizens'.<sup>12</sup> This constitution conformed that 'the Right against Preventive Detention'<sup>13</sup> as a separate fundamental rights of the constitution for the first time in Nepal, along with it, the constitution guaranteed several fundamental rights of the citizens'.<sup>14</sup>

This system of multiparty, gave opportunity for the emergence of the Maoist party. Maoist party because of their preference to militant means remained underground but had organizational setup in the remoter and the inaccessible parts of Nepal. The Maoist party's

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<sup>10</sup> The Public Security Act, 2018 B.S. (1961 A.D.) came into existence, on 24<sup>th</sup> August, 1961.

<sup>11</sup> *Infra*, Chapter - IV, p.71

<sup>12</sup> Preamble of the Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.)

<sup>13</sup> Article 15

<sup>14</sup> Articles 11 to 23, Part – III, Fundamental Rights of the Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.)

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main objective was to overthrow the King and nullify his power and privileges. The Maoist insurgency resulted in the active involvement of the Nepal Army and Police, of arrest detention and disappearances of persons was a common occurrence during these times. After Nepalese royal massacre<sup>15</sup> finding this situation threatening and unmanageable, King Gyanendra promptly dissolved the parliament and proclaimed himself the absolute monarch of Nepal and declared a State of Emergency, this period is often known as the '*dark period*' of Nepal.<sup>16</sup>

## 2.2 Definition of Preventive Detention

Preventive Detention laws are repugnant to democratic Constitutions and they cannot be found to exist in any of the democratic countries of the world. Preventive Detention is unknown in U.S.A. It was resorted to, in England only during war time but no country in the world has made this an integral part of their Constitution.<sup>17</sup>

### 2.2.1 Judicial View

There is no authoritative definition of the term 'Preventive Detention' in law. The expression has its origin in the language used by Judges or the Law Lords in England, while explaining the nature of detention under Regulation 14 (B) of the Defence of Realm Consolidation Act, 1914, passed on the outbreak of the First World War; and the same language was repeated in connection with the emergency regulations made during the last World War. The word "Preventive" is used in contradistinction to the word 'punitive'.<sup>18</sup> To quote the words of Lord Finlay, in *Rex v. Halliday*,<sup>19</sup> "it, is not a punitive but precautionary measure." "The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and

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<sup>15</sup> The Nepalese royal massacre occurred on 1<sup>st</sup> June 2001, at a house in the grounds of the Narayanhity Royal Palace, and then Prince Dipendra became *de jure* King of Nepal upon his father's death and died in hospital three days after the massacre without recovering from a coma. Late King Birendra's brother Gyanendra became King after the massacre and the death of *de jure* King Dipendra.

<sup>16</sup> On 1<sup>st</sup> Feb. 2005 King Gyanendra suspended the parliament, appointed a government led by him, and enforced martial law, the King argued that civil politicians were unfit to handle the Maoist insurgency. Telephone lines were cut and several high-profile political leaders were detained.

<sup>17</sup> *Ibid.*, p. 14

<sup>18</sup> *A.K. Gopalan v. State of Madras*, AIR (37) 1950 S.C. 27:51 Cr. LJ 1383:1950 S.C.J. 174:1950 SCR. 88:1950 M.W.N. Cr. 127:1950-2M.L.J. 42:63 M.L.W. 638.

<sup>19</sup> [1917] UKHL 1, [1917] AC 260 at P. 269, 86 L.J.K. 1119.

not criminal conviction which can only be warranted by legal evidence.<sup>20</sup> Preventive Detention is an anticipatory measure and does not relate to an offence.<sup>21</sup>

### 2.2.2 Political View

It can be said that in itself Preventive Detention is a detestable evil, the very negation of liberty and self-government. Preventive Detention is an anathema of personal liberty.<sup>22</sup> "The right to personal liberty and immunity from wrongful detention is preserved in *Magna Carta* and is enforceable by the writ of *habeas corpus* and actions for false imprisonment.<sup>23</sup> A person may be arrested by warrant issued by a justice or, in certain circumstances, without a warrant. If a person is arrested without a warrant, he must be informed of the reason for his arrested without a warrant, he must be informed of the reason for his arrest and, if retained in custody, he must be brought before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and the arrested person shall not be detained in custody beyond the said period except on the order of such authority.<sup>24</sup>

### 2.2.3 Juristic View

According to A. V. Dicey, The right to personal liberty means, "A person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification."<sup>25</sup> Whereas, Wade and Phillips<sup>26</sup> emphasizes, two main aspects relating to individual liberty: first the grounds on which an individual may be deprived of his physical liberty; and Second, the remedies which and individual have if he wishes to contest the legality of such detention." Prof. De Smith focuses, "the traditional legal approach to civil liberties can be summed up in three propositions: First, freedoms are not to be guaranteed by statements of general principles. Secondly, they are residual. Freedom of public assembly, for example the liberty to gather wherever one chooses. Except in so far as others are legally entitled to prevent the assembly from being held or in so far as the holding

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<sup>20</sup> Lord Macmillan, in *Liversidge v. Anderson*, (1942) A.C. 206 at p. 253, quoted Mukerjee, J. in *A.K. Gopalan v. State of Madras*, AIR 1950 S.C. 27.

<sup>21</sup> *Commissioner of Police v. C. Anita*, 2004 AIR. SCW. 4750.

<sup>22</sup> *The New Encyclopedia Britannica* in 30 vol., *Micropedia* vol. 8, p. 201, Individual rights conflict 5:271g

<sup>23</sup> *Halsbury's Laws of England*, vol. 8 (4<sup>th</sup> Ed.) Para 832.

<sup>24</sup> Article 24 (3) of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.)

<sup>25</sup> Dicey, A.V. '*An Introduction to the Study of the Law of the Constitution*', Publisher, Elibron Classics, 10<sup>th</sup> Ed., 2000, Pp.207-08. (1402185553).

<sup>26</sup> A.W. Bradley, '*Constitutional and Administrative Law*', 9<sup>th</sup> Ed. 1977, cited by Saxena, Priti. **Preventive Detention and Human Rights**, Deep & Deep Publication, 2007, ISBN 81-7629-992-8 Pp. 2-3

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or the conduct of an assembly is a civil wrong or a criminal offence. "To define the content of liberty one has to subtract from its' totality the sum of the legal restraints; to which it is subject. Thirdly, for every wrongful encroachment upon one's liberty there is a remedy awarded by an independent court of justice *"Ubi jus ibi remedium."*<sup>27</sup> There is no wrong without a remedy. It is obvious that Preventive Detention necessarily involves the detention of a person. Detention means that the person detained is not at liberty to go anywhere. The detention of person is made without trial and conviction by a Court, but merely on suspicion in the mind of an executive authority.

### 2.3 Revival of Preventive Detention

As a result of extreme situation the public deeply disagreed and showed disobedience of the government. Due to this expression of dissatisfaction even by common people, the King had no alternative but attempt to revive the democracy resulting in the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.),<sup>28</sup> which repealed the Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.). The Constitution came into force till the new constitution was framed by the Constituent Assembly. Thereby the provisions relating to Preventive Detention was revived as in the previous Constitution.<sup>29</sup>

The revival of the Preventive Detention at this point of time happened accidentally due to extraneous reasons. The reason was the Chinese occupation and calming of the territoriality of part of Tibet, many Tibetan refugees flood to India and Nepal being the neighbouring countries. This resulted in many Tibetan settlements in Nepal. Dalai Lama and many of the Tibetan leaders where provided asylum and accommodated by the government of India. This kind of support and protection were not extended to Tibetans in Nepal. There were in fact large numbers of Chinese Tibetans in Nepal and Nepal had friendly relationship with China. These Tibetans who were supported by the International Human Rights Organizations carried out agitations for their cause for freedom. This was objected to by the Chinese government. The government of Nepal then carried out in-discriminate, sweeping arrest and detention of Tibetans. The intensity of governmental action were such that even Nepalese citizen who appeared like Tibetans or were Buddhist monks were also arrested. The action were such that any person who is seen as a monk and any women in Tibetan dress

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<sup>27</sup> De Smith, & Stanley, A. '**Constitutional and Administrative Law**'. Harry Street, de Smith, Rodney, Brazier Barbaraed, publisher by the University of Californiya, Penguin Books, 2<sup>nd</sup> Ed., p. 452.

<sup>28</sup> Infra, Chapter - IV, p. 74

<sup>29</sup> Article 25 of the Constitution of Nepal, 2047 B.S. (1990 A.D.)

were arrested without any rhyme or reason, whenever the Tibetan population gathered even for peaceful demonstration they were arrested on the justification that there were merely refugees and were not entitled to political demonstrations or any rights.

The Interim Constitution of Nepal only allowed Preventive Detention if there is evidence of “an immediate threat to the sovereignty and integrity or law and order situation in Nepal.”<sup>30</sup> The Public Security Act, 2046 B.S. (1989 A.D.)<sup>31</sup> allowed the use of Preventive Detention for ninety-days from the date of issuance<sup>32</sup> of the order by the Chief District Officer. This can be extended for six months on the approval of the Home Ministry<sup>33</sup> “to maintain sovereignty, integrity or public tranquillity and order.”

International human rights law makes provisions for circumstances in which the right to liberty can be temporarily abrogated. Such derogation, however, must be of exceptional character where the life of a nation is threatened, strictly limited in time, subject to regular review, and consistent with other obligations under International law.<sup>34</sup> Nepal has not asserted that the Tibetan protests posed such a threat to Nepal, nor has the Nepali authorities’ response met the standards required for derogation of fundamental rights.

#### 2.4 Preventive Detention as Preventive Action

Preventive Detention always curtails liberty of an individual is not a new thing. It represented a feature of higher values which mankind began to cherish in its evolutionary stages from a State of 'tooth and claw' to a civilised existence.<sup>35</sup>

Personal liberty is an essential fundamental right for the development of human life, and prosperity which is guaranteed by a constitution or a Statute in every democratic nation. It is meant to protect personal right against unlawful arrest, intervention, detention, abuse of the power, restraint of personal life and liberty by the executive authority. Personal liberty is the liberty of an individual to behave as one pleases except for those restraints imposed by laws and code of conduct of the society in which one lives to safeguard the physical, moral,

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<sup>30</sup> Article 25 (1) of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.)

<sup>31</sup> *Infra*, Chapter – IV, p. 86

<sup>32</sup> Section 5.1 of the Public Security Act, 2046 B.S. (1989 A.D.)

<sup>33</sup> Section 8.1, amended by first amendment.

<sup>34</sup> The ICCPR recognizes that in certain circumstances, temporary restrictions and limitations of liberty rights may be justified. Article 4 of ICCPR allows states to "derogate" from some of the standards in times of "public emergency which threatens the life of the nation and the existence of which is officially proclaimed." ICCPR, Art. 4(1). But such measures must be necessary and "strictly required by the exigencies of the situation." U.N. Human Rights Committee, General Comment No. 29 States of Emergency (Art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para.6.

<sup>35</sup> V. Swaroop, "**Law of Preventive Detention**," 1<sup>st</sup> Ed. Pushp Print Services, Delhi 1990, p. 4

political, and economic welfare of others. For instance, liberty of an individual which consists in the power of locomotion, of changing situation, or removing his person to whatsoever place his own inclination may direct, without imprisonment or restraint, unless by due process of law.<sup>36</sup>

Freedom of movement and personal liberty is the most cherished and pivotal fundamental human rights around which other rights of the individual revolve and, therefore, the study assumes great significance. The study of personal liberty is indeed a study of the Supreme Court as a guardian of fundamental human rights. It guarantees personal liberty under the rights to freedom to citizens' and aliens and is enforceable against the State. Further, the protection of this right is burning topics of the day. Hence, an attempt has been made in this study to examine the standards adopted for protecting the right to freedom and personal liberty.

It is to be noted that Nepal's constitutional history and political scenario took a new turn with the passing of a new "Constitution of Nepal"<sup>37</sup> with this new constitution, The Constitution of Nepal, 2072 B.S. (2015 A.D.) stands repealed however, the relevant provision regarding Preventive Detention and the structure and functions of judiciary and the overall justice administration system remains same. There are of course some minor changes proposed<sup>38</sup> in the hierarchical structure of the judiciary under the new constitution to effected this changes the constitution grand's a one year period from the date of commencement of the constitution.<sup>39</sup>

## 2.5 Brief History of Nepal

In order to understand the law it is important to understand the nature of people, their history and the geographical conditions in which they live. Nepal did have a peculiar history and being land locked had its own problems and historical background. Being a small state in comparison to the two big neighbours who followed a diametrically opposite system of governance, Nepal was impacted by its neighbours.

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<sup>36</sup> Dicey, A.V. 'An Introduction to the Study of the Law of the Constitution', Ed. 10<sup>th</sup>, Universal Law Publishing Co., ISBN : 978-81-7534-102-9, p. 98

<sup>37</sup> The Constitution of Nepal, 2072 B.S. (2015 A.D.) has been promulgated on 28<sup>th</sup> Sep. 2015

<sup>38</sup> Art. 300 of the Constitution of Nepal, 2072 B.S. (2015 A.D.)

<sup>39</sup> Art 300 (3)

### 2.5.1 The geographical land lock

Nepal is in a roughly trapezoidal shape, 800 kilometres (497 miles) long and 200 kilometres (124 miles) wide, with an area of 147,181 sq. km. (56,827 miles). It lies between latitudes 26° and 31° N, and longitudes 80° and 89° E.<sup>40</sup> Nepal is a small, landlocked country, surrounded by India on three sides and China towards the north or, in the words of the 18<sup>th</sup> century King Prithvi Narayan Shah, a “*yam between two rocks*.”<sup>41</sup> It is located in the Himalayas and bordered to the north by the People’s Republic of China, and to the south, east, and west by the Republic of India. Specifically, the Indian States of Uttarakhand, Uttar Pradesh, Bihar, West Bengal, and Sikkim border Nepal, while across the Himalayas lies the China’s Tibet Autonomous Region.<sup>42</sup>

### 2.5.2 The impact of the Himalayan Region

The history of Nepal has been influenced by its position in the Himalayas and its two neighbour countries, India and China.<sup>43</sup> The derivation of the word Nepal is the subject of a number of different theories: the Sanskrit word '*nipalaya*' means “at the foot of the mountains” or “abode at the foot,”<sup>44</sup> the term 'Nepal' may have been derived from this. The Tibetan word '*niyampal*' means “holy land.”<sup>45</sup> It is possible that the word Nepal may have been derived from it. Nep are the people that used to be cow herders (*gopal*) who came to the Nepal valley from the Ganges Plain of India. Combining the two words yields Nepal.<sup>46</sup> According to a Buddhist legend, the deity Manjusri drained the water from Nagadaha (a mythical lake that is believed to have filled the Kathmandu Valley).<sup>47</sup> The valley became inhabitable and was ruled by Bhuktaman, a cow-herder, who took advice from a sage named “Ne” Pala means “protector” or “taking care”,<sup>48</sup> therefore, Nepal reflected the name of the sage who took care of the place.<sup>49</sup>

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40 <https://en.wikipedia.org/wiki/Nepal>

41 [https://en.wikipedia.org/wiki/History\\_of\\_Nepal](https://en.wikipedia.org/wiki/History_of_Nepal)

42 Ibid.,

43 Ibid.,

44 Raj, Bandana. “**Gorkha: the warrior race**,” New Delhi: Publication, 2009, p. 178, ISBN: 9788178357768

45 Ibid.,

46 Ibid.,

47 Bhattarai, Krishna P. “**Nepal: New York**,” Chelsea House, 2008, p. 12. ISBN: 9781438105239

48 Shrestha, Nanda R. “**Nepal and Bangladesh**,” Santa Barbara, Calif.: ABC-CLIO. p. 22, ISBN: 9781576072851

49 Shaha, Rishikesh. “**Ancient and Medieval Nepal**,” Kathmandu, Ratna Pustak Bhandar, 1992, Pp. 6 – 7, ISBN: 9788185425696

## 2.6 The Nepali Calendar (Bikram Sambat)

The Bikram Sambat is a lunar calendar based on ancient Hindu tradition. The Bikram Sambat and Nepal Sambat derived from Nepal. The Bikram Sambat calendar is 936 years ahead of the Nepal Sambat, 135 years ahead of the Shaka Sambat and 56.7 years ahead (in count) of the solar Gregorian calendar.<sup>50</sup> For example, the year 2056 B.S. began in A.D. 1999 and ended in A.D. 2000. The New Year begins with the first day after the new moon, in the month of Chaitra, first day of Chaitra Shuddha or Chaitra Shukla Paksha Prathama; which usually falls in March-April in the Gregorian calendar.<sup>51</sup> After the rise of the Rana oligarchs in Nepal, Bikram Sambat came into unofficial use along with the official Shaka Sambat and Nepal Sambat for quite some time. They discontinued Shaka Sambat in its 1823<sup>rd</sup> year, and replaced it with Bikram Sambat for official use since then to date. Bikram Sambat came into official use in its 1958<sup>th</sup> years.<sup>52</sup>

## 2.7 Political and Legal History of Nepal

Nepal's recorded history begins in the seventh century BCE (Before the Common Era). The Kiratis, Mongolian people who came to Nepal from the east, are said to have been Nepal's first inhabitants. Little is known of the Kirati era other than that Buddhism was the dominant religion and that the Rai and Limbu people of eastern Nepal are the descendants of the Kiratis, who were probably of Kirat ethnicity lived in Nepal more than 2,500 years ago.<sup>53</sup> The Kirat are aboriginal tribe of Nepal who lived in the north. Other ethnic groups of Indo-Aryan and Dravidian origin had later migrated to southern part of Nepal. The history of the region that later became Nepal begins in 307 B.C., the time known as Kirat Kal (Kal is the term for “age”; Kirat is the name of the dynasty).<sup>54</sup> During this age, the Kings had absolute power to make laws and administer justice, power that for all practical purposes remains in place today. The governing legal principles were based on Hindu religious teachings, particularly *Ved*, the most sacred. Justice was usually meted out at the village level by a *muhkia*, or village head and a *bichari*, and appointee of the king. The criminal justice system

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<sup>50</sup> "Vikram Samvat should be declared national calendar". The Free Press Journal. 15 February 2012. Retrieved 28 March 2012.

<sup>51</sup> <http://en.wikipedia.org/wiki/VikramSakvat>, downloaded on 21st August 2014 at 23:00 pm.

<sup>52</sup> <http://en.wikipedia.org/wiki/VikramSakvat>, downloaded on 21st August 2014 at 23:00 pm.

<sup>53</sup> Shaha, Rishikesh. **Ancient and Medieval Nepal** (1992 A.D.), p. 7. Manohar Publications, New Delhi. ISBN 81-85425-69-8.

<sup>54</sup> D.B. Shrestha, & C.B. Singh, **"The History of Ancient and Medieval Nepal in a Nutshell with Some Comparative traces of Foreign History"** 1972 A.D., Book 1, Printed at H.M.G. press, Kathmandu, p. 24



was uncomplicated and harsh; the traditional punishment for stealing, for example, was amputation of the fingers.

Around 300 CE (Common Era) the Licchavis, Hindu people from north India, overthrew the Kiratis. Hinduism became the main religion, and the caste system was imposed.<sup>55</sup> The Licchavis were in power until 602 CE, when the Thakuris took over. The first Thakurian King, Amsuvarman, helped to bridge Nepal's relationship with Tibet when his daughter Bhrikuti married a Tibetan prince Tsrong Tsong Gympo.<sup>56</sup> The dowry he collected from this marriage added to his great wealth. Amsuvarman liked the location of the Kathmandu valley, tucked away within the towering Himalaya, and he decided to have his palace there.<sup>57</sup> The city of Kathmandu was founded around the tenth century with the building of Kasthmandap (House of Wood) in Durbur Square. This and many other ancient buildings are still standing in Kathmandu's Durbur Square. In this age, village heads still decided cases on the basis of Hinduism, with new teachings playing a dominant role, punishment was inflicted not only upon the criminal, but also upon members of the criminal's family.<sup>58</sup>

### 2.7.1 The Advent of the Malla Rule

Early Malla rule started with Arideva Malla in the 12<sup>th</sup> century. Over the next two centuries his kingdom expanded widely, into the Terai and Western Tibet, before disintegrating into small principalities, which later became known as the Baise. During the mid-1300 A.D. Nepal began dividing itself into many small city-States with disputing royal families. A Muslim invasion of the area left Nepal fairly unharmed, though several Hindu and Buddhist shrines were damaged. It was India that faced major destruction, which caused many Hindus to find sanctuary in Nepal. The new population surge created even more city-States. At this time there were a total of 48 separate city-States in Nepal, each with their own coined currencies and armies.<sup>59</sup>

In 1372 A.D., Kathmandu's King, Jayasthiti Malla, took over the neighbouring city-State of Patan, and, a decade later, the city-State of Bhaktapur. This unified the Kathmandu valley into one large kingdom as opposed to three smaller ones. Jayasthiti Malla, with whom

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<sup>55</sup> <http://www.angelfire.com/ca2/shammons/nepalhist.html>, downloaded on 21<sup>st</sup> August 2014 at 11:56

<sup>56</sup> [www.thamel.com/htms/history.htm](http://www.thamel.com/htms/history.htm), History of Nepal, downloaded on 21<sup>st</sup> August 2014 at 23:56 pm.

<sup>57</sup> Shrestha, D.B. & Singh, C.B. "**The History of Ancient and Medieval Nepal in a Nutshell with some Comparative Traces of Foreign History**". HMG Press, Kathmandu, 1972, p. 44.

<sup>58</sup> Ibid, p. 46

<sup>59</sup> History of Nepal: [www.princeton.edu](http://www.princeton.edu)., downloaded on 21<sup>st</sup> January 2014 at 11:58

the later Malla dynasty of the Kathmandu valley commences, began to reign at the end of the fourteenth century. Though his rule was rather short, his place among the rulers in the valley is eminent for the various social and economic reforms such as the ‘Sanskritization’ of the valley people, new methods of land measurement and allocation etc. Yaksha Malla, the grandson of Jayasthiti Malla, ruled the Kathmandu valley until almost the end of the fifteenth century. The reign of King Yaksha Malla in the mid-14<sup>th</sup> century saw Nepal's borders extend south to the Ganges River, and north through Tibet. However, after his death in 1482, Nepal split up into many small states which continued to battle with each other for more than 200 years. Even though, the valley was divided into three independent valley kingdoms namely Kathmandu, Bhaktapur and Patan, in about 1484 A.D. this division led the Malla rulers into internecine clashes and wars for territorial and commercial gains. The last Malla rulers were Jaya Prakasha Malla, Teja Narasingha Malla and Ranjit Malla of Kathmandu, Patan, and Bhaktapur respectively.<sup>60</sup> As the fighting continued amongst the Malla Kingdoms, a new dynasty came into power. The Shah Kings of Gorkha, a small kingdom located halfway in between Kathmandu and Pokhara, gradually extended their power. In 1768, they conquered the Kathmandu valley.<sup>61</sup> During this period no administrative justice system was derived from the *Dharmasastra*, a Hindu religious book, and the *Nitisastra*, a book on morals. Although this age of Malla Kings is usually considered somewhat more enlightened than those it preceded, physical torture was common. Punishment depended on caste, with members of the upper castes exempt from physical punishment or the death penalty.<sup>62</sup>

### 2.7.2. The Gorkha Rule

Ram Shah of the principality of Gorkha, whose rule began the age of Shah period in the eighteenth century, promulgated *Sutriya Riti Stite*, a 26 point doctrine of conduct, considered one of the most progressive legal works of Nepal’s early history. Another Shah Kal ruler, King Prithvi Narayan Shah in the 1760 A.D., after years of warfare, succeeded in uniting the area’s many principalities into one state which became known as Nepal.<sup>63</sup> King Prithvi Narayan Shah was quite aware of the political situation of the valley kingdoms as well as of the *Baise* and *Chaubise* principalities.<sup>64</sup> He foresaw the need for unifying the small

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<sup>60</sup> [http://en.wikipedia.org/wiki/History\\_of\\_Nepal](http://en.wikipedia.org/wiki/History_of_Nepal), downloaded on 21<sup>st</sup> August 2014 at 11:58

<sup>61</sup> <http://www.angelfire.com/ca2/shammons/nepalhist.html>, downloaded on 21<sup>st</sup> August 2014 at 11:56

<sup>62</sup> Regmi, D.R. “**Modern Nepal**” 1961, Pp.46

<sup>63</sup> In forming modern Nepal, the Shah family conquered more than sixty small princes and rajahs, and three Kings in the Kathmandu Valley alone.

<sup>64</sup> Regmi, D.R. “**Modern Nepal**” 1961, pp.1-42.

principalities as an urgent condition for survival in the future and set himself to the task accordingly. King Prithvi Narayan Shah's victory march began with the conquest of Nuwakot, which lies between Kathmandu and Gorkha, in 1744 A.D. After Nuwakot, he occupied strategic points in the hills surrounding the Kathmandu valley. The valley's communications with the outside world were thus cut off. The occupation of the Kuti Pass in about 1756 A.D. stopped the valley's trade with Tibet. Finally, King Prithvi Narayan Shah entered the valley after the victory of Kirtipur. King Jaya Prakash Malla of Kathmandu sought help from the British and so the East India Company sent a contingent of soldiers under Captain Kinloch in 1767 A.D. The British force was defeated at Sindhuli by King Prithvi Narayan Shah's army. This defeat of the British completely shattered the hopes of King Jaya Prakash Malla. The capture of Kathmandu on 25<sup>th</sup> Sep., 1768 A.D. was dramatic. As the people of Kathmandu were celebrating the festival of Indraajatra, Prithvi Narayan Shah and his men marched into the city. A throne was put on the palace courtyard for the King of Kathmandu. Prithvi Narayan Shah sat on the throne and was hailed by the people as the King of Kathmandu. Jaya Prakash Malla managed to escape with his life and took asylum in Patan, Tej Narsingh Malla took refuge in Bhaktapur, which was also captured after some time.<sup>65</sup> Thus, the Kathmandu valley was occupied by King Prithvi Narayan Shah and Kathmandu became the capital of the modern Nepal by 1769 A.D. After Shah's death, 1800 A.D. the heirs of Prithvi Narayan Shah proved unable to maintain firm political control over Nepal.<sup>66</sup> Rivalry between Nepal and the British East-India Company over the princely states bordering Nepal and India eventually led to the Anglo-Nepalese War (1814-16 A.D.),<sup>67</sup> in which Nepal suffered a complete rout. The Treaty of Sugauli was signed in 1816 A.D., ceding large parts of the Nepali territories of Terai, (nearly one third of the country), to the British, in exchange for Nepalese autonomy.<sup>68</sup>

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<sup>65</sup> [http://en.wikipedia.org/wiki/History\\_of\\_Nepal](http://en.wikipedia.org/wiki/History_of_Nepal), downloaded on 21<sup>st</sup> August 2014 at 11:58

<sup>66</sup> Jha, Dev Narayan. "Prithavi Narayan Shah ko Jivani" Shajha Publication, 2011, Nepali Ed., p. 43

<sup>67</sup> [https://en.m.wikipedia.org/wiki/Anglo\\_Nepalwse\\_War](https://en.m.wikipedia.org/wiki/Anglo_Nepalwse_War)

<sup>68</sup> Sugauli Treaty (1815) East India Company and Nepal, was signed on Dec. 2 1815 and ratified by march 4, 1816. This ended the second British invasion of the Himalayan kingdom during the Anglo-Nepalese War (1814-1816). The signatory for Nepal was Raj Guru Gajaraj Mishra aided by Chandra Sekher Upadhyaya and the signatory for the Company was Lieutenant-Colonel Paris Bradshaw. The treaty called for territorial concessions in which parts of Nepal will be given to British India, the establishment of a British representative in Kathmandu, and allowed Britain to recruit Gurkhas for military service. Under the treaty, about one-third of Nepales territory was lost, including Sikkim, territory to west of the Kali river like Kumaon (present Indian state of Uttarakhand), some territories to the west of the Sutlej River like Kangara (present day Himachal Pradesh);

### 2.7.3 The Shah Kings

From 1768 to 1846 A.D. the Shah Kings both reigned and ruled. Law and justice depended on the directives of the Kings. But after 1816 A.D., following Nepal's defeat in a war with the British, the Prime Minister of Nepal, Bhimsen Thapa,<sup>69</sup> greatly increased his power at the expense of the King. The strengthening of the Prime Minister's office and the failure of the Shah Kings to maintain firm political control over the country or to control the bitter in-fighting between the various noble families led to the establishment of the Rana line of hereditary Prime Ministers, which lasted from 1846 to 1951 A.D. The King continued to reign, though reduced to a figurehead. In 1846, an event known as the *Kot Massacre* occurred. On 15<sup>th</sup> September 1846, Jun Bahadur Rana invited hundreds of the country's top political and military officials to a party. He then massacred all of them. He gave himself the title of Prime Minister, which he said would be a hereditary position in Nepal. Jun Bahadur Rana rulers were titled '*Shri Teen*' and '*Maharaja*', whereas Shah Kings were '*Shri Panch*' and '*Maharajdiraj*'. Thus, the Ranas' became another '*royal family*' within the kingdom. They held a great amount of power for over a century. The Rana regime was a highly centralized autocracy, and decision making power was limited to a few members of the Rana family.<sup>70</sup>

### 2.7.4 The first codification of law

There was no constitution, and rule was by personal edict. In 1854 A.D. the Rana regime adopted the first codified law, known as the *Muluki Ain*, 1910 B.S. (General Code, 1854 A.D.), patterned after the Napoleonic Code by the ruling Prime Minister following a visit to Europe. The *Muluki Ain* was based on Nepali customary rules, religious practices and ordinances, and directives of the kings that had in the past been used to govern the country. It also was under Rana rule that sati, a widow's ritual suicide after her husband's death, and slavery were abolished.<sup>71</sup>

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<sup>69</sup> Bhimsen Thapa, Prime Minister of Nepal (1806 – 1837 A.D.)

<sup>70</sup> Pandey, Madhav Raj. '**How Jang Bahadur Established Rana rule in Nepal**', Regional Journal Article, Kathmandu, 1973, December. Publisher: Contribution to Nepalese Studies, Centre for Nepal & Asian Studies (CNAS), Tribhuvan University, vol. I, No. 1.

<sup>71</sup> Dhungel, S. P. S., Bajracharya, P. M., Bajracharya, B.B. "**The Legal System of Nepal**". Delhi: Laws Publication, 1986, p.119

## 2.8 Emergence of Successive Constitutions of Nepal

In the 1930s, traditional court politics in Nepal, with no mass participation in the process, began to break down. Anti-Rana activity was influenced by the democratic movement in neighbouring India. In 1936 A.D. an underground movement called "Praja Parishad" was formed in Kathmandu. The Praja Parishad had great symbolic value as the first organized movement by the common people against the Ranas'. It was also inspired by a sense of mission, rather than by family feuds or conspiracies by factions contending for power. While the Praja Parishad lacked skilled organizers and politically sophisticated members and eventually lost momentum, it laid the groundwork for future political movements.<sup>72</sup> Both internal and external pressures began to build up on the Ranas' during the 1940s. In 1947, the Nepali National Congress, a moderate socialist organization, was formed under the leadership of B.P. Koirala. He joined the first organized labour, strike, in the town of Biratnagar, and urged the people throughout the country to wage a mass movement against the Ranas.' The party urged a *satyagraha* against the government.<sup>73</sup> At the same time that the Nepali National Congress was emerging as a political force in Nepal, the British withdrew from India, and India gained its independence. The new government of India was not sympathetic to the Ranas' and allowed Indian Territory to be used as a base from which anti-Rana Nepalese could subvert the Nepali government. The next major effort at institutional development was initiated in 1947 A.D. by Padma Shamsher Rana, a liberal Prime Minister, who appointed a Constitutional Reform Committee to draft the first constitution, known as the Government of Nepal Act, (Constitution), 2004 B.S. (1948 A.D.).<sup>74</sup>

## 2.9 Conclusion:

This chapter has laid down a detailed matrix of Preventive Detention. The chapter has provided a theoretical basis by providing the definition of Preventive Detention in different perspective. The peculiar causes for the large number of Preventive Detention cases is explored in detail followed by providing a detailed history of the emergence of a legal system in Nepal, the process of its growth, hindrances and obstacles that Nepal faces in becoming a full-fledged democracy is also discussed. The peculiar occurrences of the successive constitutions, when many nations takes decades even to bring in an amendment to their

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<sup>72</sup> Gupta, Aniruda. "Politics in Nepal; A Study of post-Rana Political Developments and Party Politics", Allied Publishers, Bombay and New York 1964, p.28

<sup>73</sup> *Satyagraha* is a form of nonviolent, civil disobedience developed by Mahatma Gandhi in India.

<sup>74</sup> *Infra*, Chapter – IV, p. 64

constitution is also discussed thus providing a theoretical and historical basis for this study on Preventive Detention in Nepal. In order to draw a proper comparison as to the Preventive Detention in Nepal as compared to Preventive Detention in other democratic Nations. The next chapter begins with the International legal regime on Preventive Detention followed by discussion of the laws relating to Preventive Detention in some well know democratic Nations.

## CHAPTER – III

### International perspective relating to the Preventive Detention

#### 3.1 Introduction

Over the last one century and more International law has become predominant especially among the many democratic nations of the world, in order to protect the rights of individuals more especially human rights. The International community namely; United Nation Organisation has been played pivotal role to ensure protection of human rights and human being globally. For the purpose of discussion and the understanding global perspective one could begin from the stage of Universal Declaration on Human Rights. Nepal being a member of the United Nation Organisation, and having ratified many of the Treaties and Conventions regarding human rights is bound by International law on protection of human rights. This chapter has discussed briefly the International legal regime relating to Preventive Detention followed by a brief analysis of Preventive Detention laws in few selected countries namely; India, United Kingdom, United States of America and Australia. These countries are chosen for discussion mainly because these are traditionally democratic nations and have extensive judicial processes which uphold the rule of law and democratic values.

#### 3.2 The International Framework

*“Preventive Detention involves the deprivation of one of the most fundamental of all human rights recognized in International law – the right to personal liberty.”<sup>1</sup>*

Freedom of movement is widely recognized in International law and the bills of rights. Article 13 of the Universal Declaration of Human Rights provides: (1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country. Article 12 of the International Covenant on Civil and Political Rights provides, in part: 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 4. No one shall be arbitrarily deprived of the right to enter his own country.

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<sup>1</sup> Cook, Helena. "Introduction to Preventive Detention", Stanislaw Frankowski & Dinah Shelton, Ed., Kluwer Academic Publishers, 1992.

Arbitrarily depriving an individual of their liberty is strictly prohibited by the United Nations'. Article 9 of the 1948 Universal Declaration of Human Rights, decrees that "no one shall be subjected to arbitrary arrest, detention or exile"; that is, no individual, regardless of circumstances, is to be deprived of their liberty or exiled from their country without having first committed an actual criminal offense against a legal statute, and the government cannot deprive an individual of their liberty without proper due process of law.

Article 3 of Universal Declaration of Human Rights (UDHR),<sup>2</sup> states: "Everyone has the right to life, liberty and the security of person." Also relevant for the purposes of this research is Article 9: "No one shall be subjected to arbitrary arrest, detention or exile." This is the foundation for many International human rights treaties,<sup>3</sup> two of which are discussed here.

### **3.2.1 The International Covenant on Civil and Political Rights, 1966<sup>4</sup>**

The International Covenant on Civil and Political Rights specifies the protection from arbitrary arrest and detention by Article 9.

Article 9.1 of the ICCPR states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." The remainder of Article 9 sets out the procedural framework in the event of a detention. Article 14 is also relevant. It deals with various procedural and substantive rights in criminal trials.

The right is enshrined in Article 12 of the International Covenant on Civil and Political Rights<sup>5</sup>

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms

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<sup>2</sup> Adopted by the General Assembly of the United Nations on December 10, 1948. UDHR has not been formally adopted as a legally binding document but the International community has recognized its importance as the basis for fundamental human rights.

<sup>3</sup> Article 9 of the Universal Declaration of Human Rights, 1948

<sup>4</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>5</sup> <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.



of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

### **3.2.2 The Convention on the Rights of the Child**

Article 10 of this Convention, in accordance with the obligation of States Parties under article 9, paragraph 1, and applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

### **3.2.3 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families:**

Article 5 for the purposes of the present Convention, migrant workers and members of their families: (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to International agreements to which that State is a party;

(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

#### **Article 8**

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.
2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

#### **Article 39**

1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.

2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (order public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

### **3.2.4 The Convention on the Rights of Persons with Disabilities:**

#### Article 9

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

#### Article 18

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

- (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
- (b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

### **3.2.5 The African Charter on Human and Peoples' Rights**

The right is also contained under Article 12 of this Convention:

- 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
- 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

### 3.2.6 European Convention for the Protection of Human Rights<sup>6</sup>

The European Convention does explicitly set out situations when Preventive Detention may be used. Article 5 (1) provides: Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.<sup>7</sup>

Unlike the ICCPR, where individuals may only complain to the UN Human Rights Committee about breaches of the treaty if their country has signed the Optional Protocol, individuals may complain to the European Court of Human Rights (“ECHR”) about alleged violations of the treaty and seek clarification about the meaning of treaty terms.

The ECHR has considered the issue of whether detention is permissible to prevent terrorism in several cases, often in an immigration context.<sup>8</sup> Where authorities have sought to detain outside the specific situations set out in Article 5, this can only be done by using the mechanism of derogation pursuant to Article 15, which sets out situations where member states may depart from or derogate from their Convention obligations.<sup>9</sup>

Article 15(1) provides: In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under International law.

### 3.3 Preventive Detention in India

The history of Preventive Detention dates back to the early days of the British rule when under the Bengal Regulation - III of 1818 (the Bengal State Prisoners Regulation) the

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<sup>6</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sep. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on Sep. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 respectively.

<sup>7</sup> *Ibid.*, at Article 5 (1).

<sup>8</sup> *Chahal v. United Kingdom*, (1996) EHRR 413 (where a lengthy period of detention prior to deportation did not violate Article 5 (1) (f), but this detention is only permissible whilst deportation proceedings are pending).

<sup>9</sup> *Lawless v. Ireland* (No. 3), (1961) 1 EHRR 15; *Ireland v. United Kingdom*, (1978) 2 EHRR 25, *Brannigan & McBride v. United Kingdom* (1993) 17 EHRR 539; *Aksoy v. Turkey*, (1996) 23 EHRR 553; *Marshall v. United Kingdom*, Jul. 10, 2001, Appl. 41571/98. (In all of these cases the court found that the circumstances amounted to a public emergency justifying derogation and Preventive Detention.) (In the *Greek Case* (1969) 2 YB 1, the court held that the particular circumstances did not amount to a public emergency warranting derogation or Preventive Detention.)

government was empowered to detain anybody on mere suspicion. Rule 26 of the Rules framed under the Defense of India Act, 1939<sup>10</sup> allowed the detention of a person if it was “satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial” to the defense and safety of the country. Preventative Detention in India was continued with such laws as the Defense of India Act, 1939 and the Preventative Detention Act, 1950.<sup>11</sup>

However, with the enactment of the Constitution of India where the fundamental rights are considered the bill of rights of every citizen, there is a specific article i.e., Article 22<sup>12</sup> which guarantees protection to arrested persons.<sup>13</sup> Article 22 guarantees three rights. First, it guarantees the right of every person who is arrested to be informed of the cause of his arrest; Secondly, his right to consult, and to be defended by a lawyer of his choice. Thirdly, every person arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours and shall be kept in continued custody only with his authority. All these rights are without any qualifications and are, therefore, in absolute terms. There are, however, two exceptions to the universal application of the rights guaranteed under the first two clauses of Article 22. These relate to (1) Any person who is for the time being an enemy alien; or (2) Any person who is arrested or detained under any law providing for Preventive Detention. The first exception was accepted by the Constituent Assembly without any opposition as it embodied a sound principle. For instance, if India were at war with another country, considerations of national security may demand the arrest and detention of a person who is the citizen of the enemy country.

Dr. B.R. Ambedkar, the chairman of the constituent assembly however, pointed out the safeguards provided in the Constitution to mitigate the rigours of an apparently absolute power of Preventive Detention permitted under Article 22 (3).

- ❖ First, every case of Preventive Detention must be authorised by law. It cannot be at the will of the executive.
- ❖ Secondly, no law of Preventive Detention shall normally authorise the detention of a person for a longer period than three months.
- ❖ Thirdly, every case of Preventive Detention for a period longer than three months must be placed before an Advisory Board composed of persons qualified for

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<sup>10</sup> Act no 35 of 1935

<sup>11</sup> Act No. 4 of 1950, the Act ceased to have effect on the 31<sup>st</sup> Dec. 1969

<sup>12</sup> Article 22 of Indian Constitution, 1950

<sup>13</sup> Article 22 (1)

appointment as Judges of a High Court. Such cases must be placed before the Board within the three months period. The continued detention after three months should be only on the basis of a favourable opinion by the Board. The only exception to this provision is when Parliament prescribes by law the circumstances under which a person may be kept in detention beyond three months even without the opinion of the Advisory Board.

- ❖ Fourthly, no person who is detained under any Preventive Detention law can be detained indefinitely. There shall always be a maximum period of detention which Parliament is required to prescribe by law.
- ❖ Fifthly, in cases which are required to be placed before the Advisory Board, the procedure to be followed by the Board shall be laid down by Parliament.
- ❖ Sixthly, when a person is detained under a law of Preventive Detention, the detaining authority shall communicate to him the grounds on which the order has been made. It should also afford him the earliest opportunity of making a representation against the order.

The greatest safeguard, according to Dr. B.R. Ambedkar, is that Preventive Detention takes place only under the law. It cannot be at the will of the executive. It is also necessary to make a distinction between different categories of cases.

Article 22 makes the minimum procedural requirements which must be included in any law enacted by legislature in accordance of which a person is deprived of his personal liberty. Article 22(1) and (2) are also called Rights of an arrested person. A person cannot be arrested and detained without being informed why he is being arrested. A person who is arrested cannot be denied to be defended by a legal practitioner of his choice. This means that the arrested person has right to hire a legal practitioner to defend himself/ herself. However, Article 22(3) says that the above safeguards are not available to the following: If the person is at the time being an enemy alien. If the person is arrested under certain law made for the purpose of “Preventive Detention“ Under Article 22 of the Indian Constitution, 1950 Preventive Detention may be implemented any time and the constitution expressly allows an individual to be detained without charge or trial so it is a devastating blow to personal liberties of the citizens of the country. It obviates the Article 4 of the International Covenant on Civil and Political Rights which permits that rights can only be limited “in time of public emergency which threatens the life of the nation” because it allows detention in peacetime as well. It does not provide any procedural protections such as to reduce detainees’ vulnerability

to torture and discriminatory treatment; and to prevent officials' misusing Preventive Detention for subversive activities. The long period of detaining three months poses a threat of torture. Constitution of India allows the government to pass Preventive Detention laws against its own citizens in the name of national security and "maintenance of public order" as per Entry 9 of List I and Entry 3 of List III of the Constitution, this is quite unbelievable.

Preventive Detention laws a person can be put in jail / custody for two reasons. One is that he has committed a crime. Another is that he is potential to commit a crime in future. Thus Preventive Detention is done before the crime has been committed.

Every case of Preventive Detention must be authorized by law and not at the will of the executive. The Preventive Detention cannot extend beyond a period of 3 months. Every case of Preventive Detention must be placed before an Advisory Board composed of Judges of the High Court (or persons qualified for Judges of the High Court) the case must be presented before the Advisory Board within 3 months. A continued detention after 3 months must be having a "favours of the Advisory Board". The person will be given opportunity to afford earliest opportunity to make a representation against the Preventive Detention. No person can be detained indefinitely. Article 22 (7) provides exception to the above provisions. This Article mandates that: When parliament prescribes by law the circumstances under which a person may be kept in detention may be kept in detention beyond 3 months without the opinion of the advisory board. Parliament by law can also describe under the same law, the maximum period of detention. Historical background of Preventive Detention in India has a long history of "Preventive Detention".

The First Preventive Detention Act was passed by Parliament in 1950. The validity of the Act was soon challenged before the Supreme Court in **A.K. Gopalan v. the State of Madras**.<sup>14</sup> The case was heard by six Judges of the Court and each of the Judges wrote a separate opinion.

Each has examined in general the scope of fundamental rights under the Constitution besides analysing in detail the content of personal liberty. By a 4 : 2 majority, the Court upheld the Act except section 14 of the Act which was unanimously declared invalid. The invalidity of this section, however, did not affect the rest of the Act as it could be severed from the remaining provisions.

The Preventive Detention Act of 1950 was amended seven times, each time for a period of three years, thus extending it up to 31<sup>st</sup> December 1969. In 1971 Parliament passed

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<sup>14</sup> 1950 AIR 27, 1950 SCR 88, Date of Judgement 19/5/1950

a modified version of the old Preventive Detention Act under the title Maintenance of Internal Security Act (MISA) which continued to exist until 1978 when it was abolished. In 1980 however, a modified version of MISA was passed under the title of National Security Act which was upheld as I constitutional by the Supreme Court in 1981. A similar Act passed by Parliament subsequently in the wake of terrorist activities in Punjab is known as Terrorist and Disruptive Activities (Prevention) Act (TADA) and has been in operation enabling the Executive to take into custody and Preventive Detention of persons suspected of terrorist activities.

Looking back on the progress so far of Republican India, one may feel reasonably satisfied with the extent of personal liberty the Indian people at large have been enjoying. A short period of about two years, however, 1975-1977, was a rare exception from this point of view.

India won freedom from foreign rule as a result of great sacrifices by thousands of patriots. Many of them died in British jails in the course of the struggle for Independence, many others spent years of their lives in prison. Naturally freedom and liberty are gifts, too precious to all of them who lived to see India free.

The National Security Act<sup>15</sup> which is the latest of its kind. While upholding the Act the Supreme Court warned that unless the Act is used sparingly in "as few situations as possible", it would have "grave consequences to personal liberty".

Another law, Conservation of Foreign exchange and Prevention of Smuggling Activities (COFEPOSA)<sup>16</sup> was enacted in 1974 and it continued. In the heat of the terrorism in Punjab the Terrorist & Disruptive Activities (Prevention) Act<sup>17</sup> or infamous TADA was enacted in 1985. It was renewed in 1989, 1991 and 1993 and lapsed in 1995 due to increasing unpopularity due to widespread allegations of abuse. The main abuse was that a confession before a police officer, even though being given under torture, was admissible as evidence in court. Another similar act Prevention of Terrorism Ordinance (POTO)<sup>18</sup> of 2001 came into force. Both the TADA & POTO were later succeeded by another controversial Prevention of Terrorist Activities Act (POTA) during 2002-04. This act was supported by the NDA Government but later was scrapped by the UPA government. After the Bombay attacks of

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<sup>15</sup> Act No. 65 of 1980, 27<sup>th</sup> Dec. 1980

<sup>16</sup> Act No. 52 of 1974

<sup>17</sup> Act No. 28 of 1987, Amended by Act, 43 of 1993

<sup>18</sup> No 9 of 2001

November 26, 2008 parliament enacted another anti-terror law known as Unlawful Activities (Prevention) Act.<sup>19</sup>

### **3.4 Preventive Detention in the United Kingdom**

In England, the Preventive Detention law was resorted to only during the time of war. The “Preventive Detention” is unlawful in United Kingdom. Historically and currently, the United Kingdom has treated and continues to treat terrorism as a crime,<sup>20</sup> to be prosecuted in the regular criminal courts. Offenses criminalizing various acts of terrorism are enshrined in numerous statutes, together with details of the two main methods of Preventive Detention: detention without charge and control orders.<sup>21</sup> The United Kingdom has had to deal with terrorists for more than a century, mainly related to Ireland<sup>22</sup>, but the emphasis has now moved to terrorism from Islamic fundamentalists, including those born British.

#### **3.4.1 Brief history of law on Preventive Detention in United Kingdom**

Historically in Britain preventive legislation has been used to combat terrorism in the past. The Preventive Detention to combat terrorism in Britain was first introduced in the 1974 Prevention of Terrorism (Temporary Powers) Act (PTA). It was the 1939 Prevention of Violence (Temporary Powers) Act (PVA) which introduced powers to detain people for up to seven days. Initially this act was only to last for two years, but it was not allowed to expire until 1952 and only repealed in 1973. The Prevention of Terrorism (Temporary Powers) Act was a reintroduction of the Prevention of Violence (Temporary Powers) Act, mostly as a response the bombing of two pubs in Birmingham that year.

The 2000 Terrorism Act (TA). The TA incorporated the provision of similar powers to both the PTA and PVA allowing for seven days detention without charge on the grounds of reasonable suspicion. It is worth noting that although it did not grant extra powers, this making permanent of previously temporary legislation occurred before the attacks of 11<sup>th</sup> September 2001. It was only in 2003 that the TA was amended to include Preventive Detention for fourteen days. In additional “the reality behind the ‘temporary’ provisions

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<sup>19</sup> Act No. 37 of 1967

<sup>20</sup> Terrorism Act, 2000, 1 c. 11 (Eng.).

<sup>21</sup> Terrorism Act, 2000, c.11 (Eng.); Anti-Terrorism, Crime and Security Act, 2001 c.24 (Eng.); Prevention of Terrorism Act, 2005, c.2 (Eng.); Terrorism Act, 2006, c.11 (Eng.); Counter-Terrorism Act, 2008, c.28 (Eng.).

<sup>22</sup> Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism, Home office, Cm 7547, at 1.02 (Mar. 2009 Eng.); (3,500 people died in the United Kingdom as a result of Irish terror attacks between 1969 and 1998).



appears to be that for much of the twentieth century UK governments have kept emergency legislation on file or in suspension, ready to be brought into law at short notice."

After the events of 11<sup>th</sup> September 2001, the Anti-Terrorism, Crime and Security Act (2001) (ATCSA) was introduced which allowed for the indefinite detention or deportation of any foreign national suspected of being engaged in terrorist activity. However, as these powers did not survive as "The government ultimately repealed the provisions of Anti-Terrorism, Crime and Security Act, 2001 dealing with indefinite detention based on a House of Lords Judicial Committee December 2004 ruling that such powers were incompatible with Articles of the European Commission on Human Rights relating to the right to liberty and the right to freedom from discrimination.

A further Terrorism Act of 2006 (TA-06) created provisions for twenty-eight days Preventive Detention, but this was subject to strict judicial review of the detentions. Regulation 14B, which was enacted in 1915, gave powers which enabled the Home Secretary to order the detention of anyone they thought endangered public safety or the Nation. Similarly, Regulation 18B gave similar powers to the Home Secretary during World War - II, and, over 2000 people were detained under these powers.

#### **3.4.1.1 Detention without charge**

The persons reasonably suspected to be terrorists, (i.e. persons who are or have been concerned in the commission, preparation or instigation of acts of terrorism),<sup>23</sup> Suspects may be detained initially without charge for forty eight hours, with their status subject to review every twelve hours by a police officer who has not been involved in the investigation. After forty eight hours, a senior police officer must apply to a judicial authority for a warrant to extend the detention for a period no longer than seven days from the date of arrest. After seven days an extension of the warrant can be sought from a judicial authority for up to a further fourteen days, and thereafter extensions may be sought for further periods not

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<sup>23</sup> Terrorism Act, 2000, c.11, 40 (Eng.), (terrorism means the "use or threat of action" involving, inter alia, serious violence against a person, endangering a person's life, creating a serious risk to the health or safety of the public or a section of the public. Terrorist offenses include 11 to 13 (offenses relating to proscribed organizations), 15 to 19, 21A and 21D (offenses relating to terrorist property), 38B and 39 (disclosure of and failure to disclose information about terrorism), 54 (weapons training), 56 to 58A (directing terrorism, possessing things and collecting information for the purposes of terrorism) 59 to 61 (inciting terrorism outside the United Kingdom), 14 of Sch. 5 (order for explanation of material: false or misleading statements), 1 of Sch. 6 (failure to provide customer information in connection with a terrorist investigation), 18 of Schedule 7 (offenses in connection with port and border controls). The definition of "terrorism acts" has been further extended in Anti-Terrorism, Crime and Security Act, 2001 113 (1)(c) c.24 (Eng.); Terrorism Act, 2006, 34 c.11 (Eng.); and Counter-Terrorism Act, 2008, 27 c.28 (Eng.).

exceeding an additional seven days. Thus a suspect may be detained for up to twenty eight days in total,<sup>24</sup> but the suspect or his attorney are entitled to contest each application to extend the detention in court.

The British government's attempt to increase the twenty-eight day period to forty-two days was defeated by the House of Lords in October 2008. However, there is an emergency Bill providing for a longer period lodged in the Library of Parliament, in the event that it is needed.<sup>25</sup> The United Kingdom's attempt to lock up 'Suspected International (i.e. Alien) Terrorists' indefinitely pending deportation was struck down in December 2004 by the House of Lords who ruled that indefinite detention was incompatible with Article 5 ECHR.<sup>26</sup> Whilst detained, a suspect has the right to have a person informed of the detention. There is access to counsel but in certain circumstances access may be delayed for up to forty eight hours as well as restricted to having to take place within the sight and hearing of the 2008 Counter-Terrorism Act introduced the concept of post charge questioning and extended the application of drawing adverse inferences from silence, to this stage of questioning.<sup>27</sup>

### 3.4.2 Control Orders

“It is not always possible to prosecute people who intelligence indicates are engaged in terrorist related activity: for this reason the government has developed a range of non-prosecution actions to protect the public, including control orders. These powers directly affect only a very small number of individuals.”<sup>28</sup>

This is a useful weapon that may be used before a crime is committed if there is reasonable suspicion that a person may be involved in some terrorist activity, even at the earliest stage, including at the point of making threats. A control order is an order that may be made against an individual imposing obligations, (such as curfews<sup>29</sup>) connected with preventing or restricting involvement by that individual in terrorism related activity, which is

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<sup>24</sup> Non terrorist suspects may be detained for up to an initial period of forty eight hours, and this can be extended up to ninety six hours – Police & Criminal Evidence Act 1984, 44, c.60 (Eng.).

<sup>25</sup> Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism, Home office, CM 7547 at 8.42 (Mar. 2009 Eng.).

<sup>26</sup> A (F.C.) and Others (F.C.) v. Secretary of State for the Home Department, [2004] UKHL 56 (Eng.).

<sup>27</sup> Counter-Terrorism Act 2008, c.28, 22 (Eng.).

<sup>28</sup> Pursue, Prevent, Protect, Prepare: the United Kingdom's strategy for countering International terrorism, home office, CM 7547, at 0.26 (Mar. 2009 Eng.).

<sup>29</sup> LORD CARLILE OF BERRIEW, fourth report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005, at 15, 3<sup>rd</sup> Feb, 2009; (in 2008 twenty two people were subjected to curfews, on average of thirteen hours duration per day).

viewed as criminal in British law.<sup>30</sup> There are two distinct species of control order derogating and non-derogating. The former contains obligations incompatible with the right to liberty under Article 5 of the European Convention on Human Rights<sup>31</sup>. The latter can impose conditions that fall short of actual deprivation of liberty under Article 5.

Non derogating control orders may only be made against a person reasonably suspected of involvement in terrorist-related activity,<sup>32</sup> whether a British national or not, and whether the terrorist activity is domestic or International. In 2007 the House of Lords reviewed the case of a controlee who claimed that the making of a control order based on entirely undisclosed material, without any specific allegation of terrorism-related material in open material, violated Article 6 of the European Convention which guarantees a right to a fair trial.<sup>33</sup>

In June, 2009 the House of Lords acknowledged the requirement to give a controlee sufficient information to enable him to give effective instructions to his lawyer in judicial review proceedings, or in any court hearings. Lord Phillips stated: “provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.”<sup>34</sup>

### 3.5 Preventive Detention in the United States of America

The habeas guarantee in Anglo-American law emerged out of the “constitutional struggles of the seventeenth century as a remedy against political arrests by the King’s council and ministers.”<sup>35</sup> In 1640, in response to the abuses of Charles I, the Habeas Corpus Act of 1640 abolished “conciliar courts,” including the infamous Star Chamber, and specifically provided that anyone imprisoned by order of the King of Council should have

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<sup>30</sup> Prevention of Terrorism Act, 2005, c.2 (Eng.), sets out control order regime. See, 1(4) for examples of obligations that may be imposed.

<sup>31</sup> This is because the obligations do not fall within the exceptions set out in the Article, and such a control order will only be lawful if the United Kingdom derogates from the European Convention.

<sup>32</sup> Prevention of Terrorism Act 2005, c.2, 2 (Eng.).

<sup>33</sup> Secretary of State for the Home Department v. MB (FC), [2007] UKHL, 46 (Eng.).

<sup>34</sup> Secretary of State for the Home Department v. AF (FC) [2009] UKHL 28, 59 (Eng.).

<sup>35</sup> Cook, Helena. "Introduction to Preventive Detention", Stanislaw Frankowski & Dinah Shelton, Ed., Kluwer Academic Publishers, 1992.

habeas corpus and be brought before the court without delay with the cause of imprisonment shown. “The struggle between subject and crown” in that century “culminated in the Habeas Corpus Act of 1679, described by Blackstone as a ‘second *magna carta*, and stable bulwark of our liberties.’<sup>36</sup> The Act prescribed various procedures for asserting one’s right to habeas corpus in order “to ensure that prisoners entitled to relief would not be thwarted by procedural inadequacy.”<sup>37</sup>

### 3.5.1 Preventive Detention and the Constitution

The Constitution itself neither expressly forbids nor expressly authorizes Preventive Detention. The Supreme Court’s constitutional jurisprudence reflects a healthy skepticism on the subject, tempered by the pragmatic acknowledgment that the Criminal Justice System cannot adequately address all of the dangers that individuals may pose to society, and that therefore Preventive Detention, narrowly confined, is sometimes appropriate.

### 3.5.2 Due Process

Most of the Supreme Court’s decisions concerning Preventive Detention have addressed the issue through the lens of due process. In a 2001 decision surveying the landscape and articulating the constitutional preference for criminal prosecution of socially dangerous behavior, the Supreme Court stated that “government detention violates the (Due Process) Clause” unless it is imposed as punishment in a criminal proceeding conforming to the rigorous procedures constitutionally required for such proceedings, or “in certain special and ‘narrow’ non-punitive ‘circumstances.’”<sup>38</sup>

Three general principles are common to all of the Preventive Detention regimes that the Court has upheld. First, the purpose and character of the detention must not be punitive; punishment requires a criminal trial. Second, the detention must be temporally limited. Indefinite detention is an especially drastic measure, and accordingly most Preventive Detention regimes that have been upheld have an articulable endpoint for example, a trial, deportation, treatment of a mental disability, or termination of a military conflict. Third, with narrow and questionable exceptions, the justification for detention must be particularized to the individual, and generally requires probable cause of some past wrongdoing as well as

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<sup>36</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting) (citation omitted).

<sup>37</sup> David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War, 97 California Law Review 693 (2009), Pp. 698

<sup>38</sup> Zadvydas, 533 U.S. at 690.

proof of some future danger or risk warranting prevention. Just as the state cannot impose criminal sanctions on individuals absent a determination of individual culpability,<sup>39</sup> The Court also held that the Bail Reform Act’s “extensive safeguards” satisfied procedural due process.<sup>40</sup>

### 3.5.3 Material witness Statute<sup>41</sup>

The Material Witness Statute is used to preventively detain people who have not committed a crime and who are not even suspected of committing a crime. Material witness warrants can be used to arrest and detain persons believed to be material witnesses to a crime, and there is evidence that such a person would flee if served with a subpoena to testify at grand jury proceeding or a trial. An order for detention is therefore made solely on the basis that the person might seek to avoid his civic duty of giving evidence. Although probable cause is required for a warrant, the authorities merely have to show probable cause that the person may have information relevant to a criminal investigation. Commentators suggest that this is a lower standard than that required to arrest suspected criminals generally.<sup>42</sup>

### 3.5.4 Material Support Statutes<sup>43</sup>

These laws make it a crime to support the acts of others without establishing any sort of involvement by suspect in a terrorist act other than a suspect's provision of material support to a foreign terrorist organization. The wording of 18 U.S.C. 2339B does not suggest that a person could be detained pursuant to this law in order to stop an offense being committed absent a showing of conspiracy or actions sufficiently advanced to amount to attempt.<sup>44</sup>

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<sup>39</sup> NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (civil liability for group membership requires a showing of an individual intent to further illegal aims of the group); United States v. Robel, 389 U.S. 258, 264-65 (1967) (finding unconstitutional a statute because it: “quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it”); Scales v. United States, 367 U.S. 203, 224-25 (1961) (due process requires showing of individual culpability for criminal sanction).

<sup>40</sup> A detention may be deemed impermissibly punitive not only if it has a punitive motive, but also if, even if properly motivated, it is excessive in character. *Id.*

<sup>41</sup> 18 U.S.C. 3144 (2006).

<sup>42</sup> STIGALL, *supra* note 12 at 51 (citing Ronald L. Carlson, Distorting Due Process for Noble Purposes: The Emasculation of America's Material Witness Laws, 42 GA. L. REV. 941, 973-74 (2008)).

<sup>43</sup> 18 U.S.C. 2339B; 50 U.S.C. 1701.

<sup>44</sup> 18 U.S.C. 2339B, (“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in

### 3.5.5 Laws relating to Aliens

If the suspects in the Hircheur or Hasan scenarios were aliens, the following detention tools might be relevant, but of limited use.

### 3.5.6 Immigration Laws

“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>45</sup>

If any Aliens are working in the U.S.A. without proper visas, they could be detained. Aliens can be detained without charge, without a showing of probable cause of any crime, merely to determine their immigration status, including in situations where there are visa violations.<sup>46</sup> Therefore, the invidious position of immigration detainees as regards, not being informed of rights (the deportation proceedings are civil and thus criminal law protections of due process are inapplicable) and their inequitable position as to bail.<sup>47</sup>

Aliens can be detained for a ninety day removal period and this period can be extended, if the alien has been ordered removed and the attorney general has certified the alien to be a risk to the community or unlikely to comply with the removal order. If there are connections with terrorism, the period can be even longer.<sup>48</sup> However the detention cannot be indefinite. In **Zadvydas v. Davis** the Supreme Court held that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”<sup>49</sup> Such continued detention would then be arbitrary, contrary to Article 9 of International Covenant on Civil and Political Rights.

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section 212(a)(3)(B) of the Immigration and Nationality Act [8 USCS 1182(a)(3)(B)], or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 [22 USCS 2656f(d)(2)])”.

<sup>45</sup> DAN E. STIGALL, *Counterterrorism and the Comparative Law of Investigative Detention*, 55 (Cambria Press 2009), citing *Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976).

<sup>46</sup> 8 U.S.C. 1226 (2008).

<sup>47</sup> Preventive Detention and security law, a comparative survey, 4-5 (Andrew Harding & John Hatchard, eds., Kluwer Academic Publishers) (1993) (hereinafter *Security Law*), defines the terms as “ a situation where a person is detained for reasons either political or connected with national security or public order or safety”; DAN E. STIGALL, *Counterterrorism and The Comparative law of Investigative Detention*, (Cambria Press) (2009), uses the term “investigative detention”; & Nepal: Terror Law Likely to Boost ‘Disappearances’, Hum. Rts. News, Oct. 26, 2004, <http://hrw.org/english/docs/2004/10/26/nepal9562.htm>; see also p, supra note 1, at 773 (discussing Preventive-Detention regimes and reactions to them in the United States, United Kingdom, Canada, and New Zealand).

<sup>48</sup> Cook, Helena. "Introduction to Preventive Detention", Stanislaw Frankowski & Dinah Shelton, Ed., Kluwer Academic Publishers, 1992. P. 343

<sup>49</sup> 533 U.S. 678, 701 (2001).

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### 3.5.7 Section 412 USA PATRIOT Act<sup>50</sup>

This section empowers the attorney general unilaterally to detain aliens for seven days without charge if he certifies that he has reasonable grounds (as opposed to probable cause) to believe that the person is a national security threat. This is the purest form of Preventive Detention in the current law but there is no equivalent law to deal with the homegrown U.S citizen/national/resident terrorist threat. The detainee has a right of appeal to the U.S. Court of Appeals for the District of Columbia Circuit. After seven days either charge must be filed or deportation proceedings begun. If removal is unlikely in the foreseeable future, the alien can still be detained if the attorney general recertifies the national security risk every six months, thus raising the prospect of indefinite detention. Daniel Prieto notes that Section 412 has never been used (so the indefinite detention point has not been tested against Zadvydas).

### 3.5.8 Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.<sup>51</sup>

While Preventive Detention has most often been analyzed through the lens of due process, the Fourth Amendment also imposes limits on the practice. Its requirement that all seizures be “reasonable” has long been interpreted to mean that arrests (seizures of the person) generally require a showing of probable cause that the arrestee committed a criminal offense.<sup>52</sup>

As a procedural matter, the Fourth Amendment requires either a judicially approved warrant in advance of arrest, or, where warrantless arrests are permissible,<sup>53</sup>

In current U.S. law there is a period of forty eight hours which theoretically can be used as a period of detention without charge to prevent an imminent crime. If there is no probable cause to detain then the suspect will have to be released at the end of the period. In the United States of America, the Sixth Amendment to the Constitution of United States of America guarantees the right to "a speedy and public trial".

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<sup>50</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) 412, P.L. 107-56 (2001).

<sup>51</sup> U.S. CONST. Amend. IV.

<sup>52</sup> U.S. Const. amend. IV; *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>53</sup> The Court permits warrantless arrests where there is probable cause and an arrest takes place in public, or where there are exigent circumstances. *United States v. Watson*, 423 U.S. 411, 417 (1976).

The Sixth Amendment to the United States Constitution is the part of the United States Bill of Rights that sets forth rights related to criminal prosecutions. The Supreme Court has applied the protections of this amendment to the states through the Due Process Clause of the Fourteenth Amendment. The amendment as proposed by Congress in 1789 reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The "dangerous offender" approach is constitutional in the United States where a person convicted of a crime may be held past the statutory maximum for a crime if the courts deem such person to be a "dangerous offender", as defined by the statute in the state of prosecution. "Dangerous Offender" statutes are defined on a state by state basis. The constitutionality of these has been upheld by the United States Supreme Court in **Smith v. Doe**.<sup>54</sup>

The glorification of freedom as the essential characteristic of American life in a struggle for global dominance opened the door for others to seize on the language of freedom for their own purposes.

In the aftermath of the terrorist attacks of September 11, 2001, the language of freedom once again took center stage in American public discourse as an all-purpose explanation for both the attack and the ensuing war against "terrorism." "Freedom itself is under attack," President George W. Bush announced in his speech to Congress on September 20. Our antagonists, he went on, "hate our freedoms: our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other."

In 1984 the U.S. Congress adopted a Preventive Detention act allowing federal courts to detain arrestees pending trial if the government could show that no release conditions could protect the safety of persons and the community. The act was challenged before the U.S. Supreme Court in **United States v. Salerno**, decided in 1987. The court held that the Preventive Detention bill violated neither the due process clause of the Fifth Amendment nor

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<sup>54</sup> USA SC, 2003



the excessive bail language of the Eighth Amendment. After Salerno, Preventive Detention laws were adopted in a number of U.S. states.

The Preventive Detention procedure has been used sparingly. Courts may often effectively detain arrestees by setting bail sums low enough not to be constitutionally “excessive” but high enough to make it impossible for the arrestee to gain release on bail. In other cases, bail is granted but with highly restrictive conditions.

Preventive Detention is not prohibited by U.S. law or especially frowned upon in tradition or practice. The circumstances in which it arises are not isolated exceptions to a strong rule against it; rather, they are relatively frequent. The federal government and all 50 states together possess a wide range of statutory Preventive Detention regimes that are frequently used, many of which provoke little social or legal controversy.

The diverse statutes and regimes authorizing the Preventive Detention of individuals not convicted of a crime to prevent harms caused by that person range widely in purpose and subject matter:

- ❖ Wartime detention powers cover not merely prisoners of war and unlawful enemy combatants but also the nationals of countries against which the United States finds itself in a state of armed conflict;
- ❖ The Constitution’s Suspension Clause specifically contemplates that Congress might in crises suspend normal constitutional presumptions limiting detention a power which has been invoked several times in American history;
- ❖ Detention authorities ancillary to the criminal justice system include both pretrial detention and the detention of material witnesses not even facing criminal charges;
- ❖ The immigration law permits the detention of aliens facing deportation and “arriving aliens” denied entry to the United States;
- ❖ State and federal laws permit the detention of the seriously mentally ill, when they pose a danger to themselves or to the public at large, as well as the detention of sex offenders even after they have completed their criminal sentences;
- ❖ State and federal statutes provide broad authority to quarantine people who have communicable diseases; and

- ❖ States and localities have a variety of protective custody powers, permitting the noncriminal detention—often for their own protection—of, among others, the intoxicated, alcoholics, drug addicts, the homeless, and pregnant drug users.

The United States does not have a statute authorizing Preventive Detention of suspected terrorists without charge.<sup>55</sup> Others hail the absence of such a preventive-detention law as a testament to the United States' commitment to individual liberty.<sup>56</sup>

After 9/11, for example, without ever invoking a USA PATRIOT Act provision authorizing Preventive Detention of foreign nationals suspected of terrorist ties,<sup>57</sup> the executive branch implemented far-reaching Preventive Detention by employing preexisting immigration law, the material witness statute, pre textual prosecution, and an asserted power to detain “enemy combatants.”<sup>58</sup>

Preventive Detention is in fact an established part of U.S. law. Federal and state statutes authorize Preventive Detention of those facing trial on criminal or immigration charges, and of those whose mental disabilities warrant civil commitment. All juvenile detention is, at least in theory, preventive rather than punitive.

The post 9/11 roundups of thousands of persons with no proven ties to terrorism<sup>59</sup> reveal the need for reform aimed at restricting the use of *sub rosa* or *de facto* Preventive Detention powers.

The most common form of Preventive Detention is of persons formally accused of violating criminal or immigration law. Under the Bail Reform Act, a judge may deny bail and keep a criminal defendant detained pending trial if he poses either a risk of flight or a danger to others.<sup>60</sup> When an individual has been charged with an immigration violation, she may be preventively detained pending resolution of the proceedings if there is a risk that she will flee or pose a danger to others in the interim.<sup>61</sup>

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<sup>55</sup> David Cole, 'Out of the Shadows: Preventive Detention, Suspected Terrorists, and War', California Law Review, 2009, vol. 97, p. 693

<sup>56</sup> Kenneth Roth, After Guantanamo, HUFFINGTON Post, May 5, 2008 (arguing that Preventive Detention would be a "massive loophole to our basic due process rights, worse than the Guantanamo problem"), available at [http://hrw.org/english/docs/2008/05/05/usint18752\\_txt.htm](http://hrw.org/english/docs/2008/05/05/usint18752_txt.htm).

<sup>57</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 312, 8 U.S.C. 1226a(a) (2006).

<sup>58</sup> David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 22-46, 88-128 (2005).

<sup>59</sup> David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 22-46, 88-128 (2005).

<sup>60</sup> Bail Reform Act of 1984, 18 U.S.C. 3142(d)(2) (2006).

<sup>61</sup> David Cole, 'Out of the Shadows: Preventive Detention, Suspected Terrorists, and War', California Law Review, 2009, vol. 97, p. 700

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There are three important constraints on these forms of Preventive Detention. First, they apply only to persons charged with violation of criminal or immigration law. Second, the detention is temporally limited it ends once the criminal trial concludes, or once a foreign national is either removed or determined to be not subject to removal.<sup>62</sup> Third, these forms of Preventive Detention generally require an individualized hearing in which the government bears the burden of demonstrating that the individual poses a danger that warrants his detention.

Some states also authorize Preventive Detention of individuals who have been convicted of sex offenses and have fully served their sentences but have a mental disability and pose a risk of repeat offending.<sup>63</sup>

In addition, the Enemy Alien Act, enacted in 1798 as part of the Alien and Sedition Acts and still part of the U.S. Code today, authorizes the detention of anyone who is a national of a country with which we are engaged in a declared war.<sup>64</sup>

Section 412 of the USA PATRIOT Act authorizes the Attorney General to detain foreign nationals he certifies as terrorist suspects without a hearing and without a showing that they pose a danger or a flight risk.<sup>65</sup>

### **3.5.9 Reform of Existing Law**

The history of Preventive Detention, both before and after 9/11, suggests that there is more need for restricting than for expanding its existing scope. The United States of America has survived for more than two hundred years without a Preventive Detention law directed at terrorists or other serious criminals.

The vast majority of persons detained in antiterrorism measures in the wake of 9/11 were foreign nationals detained pursuant to immigration law.<sup>66</sup>

If the government is unable to meet its burden of demonstrating that an individual poses a danger to the community or risk of flight, release on bond or the individual's own recognizance should be ordered.

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<sup>62</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that foreign nationals ordered deported who cannot in fact be removed must be released from custody).

<sup>63</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997 A.D.); *Varner v. Monohan*, 460 F.3d 861 (7th Cir. 2006 A.D.); see also David J. Gottlieb, Essay, Preventive Detention of Sex Offenders, 50 Kan. L. Rev. 1031 (2002 A.D.); Meagan Kelly, Note, Lock Them Up-And Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany, 39 Geo. J. Int'l L. 551 (2008 A.D.).

<sup>64</sup> 50 U.S.C. 21 (2000 A.D.).

<sup>65</sup> 8 U.S.C. 1226 a (a) (2006 A.D.)

<sup>66</sup> David Cole, 'Out of the Shadows: Preventive Detention, Suspected Terrorists, and War', California Law Review, 2009, vol. 97, p. 719

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Finally, immigration law should be clarified to make explicit that immigration detention must end once removal can be effectuated.

### **3.6 Preventive Detention in Australia**

Unlike the other nations which became democracy or gained independence where the country had to go through some kind of independent war or struggle, Australia was not subject to any such situation the transition to democracy therefore, the kind of domestic conflict a struggle the other nations faced must totally absent in Australia, secondly and most importantly Australia by itself being an independent isolated continent was not subject to any terrorist movement like United States of America, United Kingdom and India therefore one could safely say Australia has a minimum amount of Preventive Detention law.

#### **3.6.1 The Legislative Scheme for Preventative Detention Orders**

Under division 105 of the Criminal Code Act, an initial preventative detention order may be sought for up to twenty-four hours by a member of the Australian Federal Police (AFP) and made by a senior member of the AFP. If detaining someone in connection with an imminent attack one that will take place within 14 days the AFP has to be ‘satisfied’ that:

- a. There are reasonable grounds to suspect that the subject:
  - I. will engage in a terrorist act; or
  - II. possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
  - III. has done an act in preparation for, or planning, a terrorist act; and
- b. making the order would substantially assist in preventing a terrorist act occurring; and
- c. detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

If detaining someone in connection with a recent attack one that has taken place within the last twenty eight days the AFP has to be ‘satisfied’ that:

- a. a terrorist act has occurred within the last twenty eight days; and
- b. it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and
- c. detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

The initial Preventative Detention order may be extended and further extended, so long as the total period of detention does not exceed twenty-four hours.

A continuing Preventative Detention order may then be issued by a Federal Judge or Magistrate, a State or Territory Supreme Court Judge, a retired Judge, or the President or Deputy President of the Administrative Appeals Tribunal (provided the latter two persons are lawyers) sitting in a personal capacity. The entire period of detention under the initial and continuing Preventative Detention order is a maximum of forty-eight hours.

### **3.7 Conclusion:**

The discussion on the International legal regime and especially the human rights approach to Preventive Detention has brought out the impact of Preventive Detention on human rights. Preventive Detention is seen in this chapter more as a human rights issue than as a security issue, which is the platform that is being used by many governments to impose Preventive Detention. The change in attitude after the 9/11 incidents especially in the Western Nations is very clear. However, Preventive Detention needs to be looked at in the human rights perspective. The discussion on Universal Declaration of Human Rights and the International Covenant Civil and Political Rights brings forth this argument. The Preventive Detention laws of some of the prominent democratic Nations are discussed to bring out a comparison as to how a democratic Nation would approach the issue of Preventive Detention as compared to what had happened in Nepal after thus, understanding the international priorities and concerns about Preventive Detention. The next chapter examines Preventive Detention laws in Nepal beginning with the provisions of Preventive Detention in the successive Constitutions. It will be shown that despite the Constitutional provisions the specific legislations have successfully promoted Preventive Detention on one pretext or the other.

## CHAPTER – IV

### Constitutional and Legal Approach Relating to Preventive Detention in Nepal

#### 4.1 Introduction

Nepal has been struggling to become a democratic country. The struggle and the problems faced by Nepal in coming out of the Shingles of Monarchical rule to a system of democracy has been unique, resulting in the enactment of successive constitutions and at times reverting back to autocratic rule. This struggle has been unique as it got intertwined with the freedom of individuals and often imposition of Preventive Detention. Nepal has not yet established a complete system of constitutional governance due to various factors. This struggle of the State of Nepal and the Nepalese people is critically analyzed in this chapter.

#### 4.2 Constitutionalism in Nepal a Historical Perspective

In any democracy the existence of a valid constitution and governance of the State as per the constitution including respect for the constitution by all the three constituents of the State namely legislature, executive and judiciary is the hall mark of any democracy. The typical illustration of the existence of constitutionalism could be identified in Great Britain despite the existence of the Monarchy in the form of a titular head. This inner element of the all-pervading aspect of a democracy is indicative of the maturity and stability continued existence of a democracy. Nepal in fact aspired to become a constitutionally governed democracy right from the year 1948 A.D. But, unlike many other democracies this process did not begin and sustain with the enactment of the constitution but resulted in enactment of successive constitutions one repealing the other. The process could be likened to changing the fundamental basis rather than bringing in changes by amendments to an existing constitution as is the usual practice. Therefore the study of successive constitution brings out the peculiar situation which was unique to Nepal.

##### 4.2.1 The Government of Nepal Act, 2004 B.S. (1948 A.D.)

In 1948, as part of a strategy to forestall a revolution, the Rana Government promulgated the Government of Nepal Act, 2004 B.S. (1948 A.D.).<sup>1</sup> It established a

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<sup>1</sup> The Baidhanic Kanoon (Constitution), 2004, address of the Rana Prime Minister Padma Shamsher of Nepal upon the Inauguration of the Government of Nepal Act, 2004 B.S. came into force on 13<sup>th</sup> April, 1948)

bicameral legislative body. The entire membership of one house and a majority of the other were selected by the prime minister, who could reject any measure that the legislature might pass. There was a cabinet of at least five members, of whom at least two were chosen from among the few elected members of the legislature.

It provided certain fundamental rights and duties, such as freedom of personal liberty, freedom of speech, freedom of press, freedom of assembly and organisation, freedom of religion, complete equality before the law, affordable and speedy justice, universal and equal suffrage for adults, security for private property, and the right to free elementary education.<sup>2</sup> These rights quickly proved more illusory than real as they were never implemented. The act also specified that a Panchayat system of local self-government would be inaugurated in the villages, towns, and districts. Despite the appearance of reform, the alterations made in the Rana system by the constitution were slight. The more conservative Ranas perceived the constitution as a dangerous precedent, forced Padma Shamsher to resign, and suspended promulgation of the constitution. The Constitution did not change the basic power structure of the Rana oligarchy, the purpose of the Constitution “was to give constitutional sanction to the arbitrary rule of the Prime Minister and to confer non-justifiable formal rights on the people.”<sup>3</sup> The constitution became effective in September 1950 but remained in force only until February 1951, when the Rana monopoly was broken and the creation of a new constitutional system began.

#### **4.2.2 The Interim Government of Nepal Act, 2007 B.S. (1951 A.D.)**

In 1950 A.D., two anti-Rana organizations, the Nepali National Congress and the Nepali Democratic Congress merged to form the Nepali Congress.<sup>4</sup> On 26<sup>th</sup> - 27<sup>th</sup> September, 1950, the Nepali Congress held a conference at the Indian town of Bairgania and decided to wage an armed struggle against the Ranas. It explained the move away from the non-violent stance of the Nepali National Congress by arguing that the prevailing political and social climate of Nepal made *satyagraha* an exercise in futility.<sup>5</sup> At this point one of the inherent weaknesses of the Rana regime took center stage: the possibility of conflict between the

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<sup>2</sup> Section 4 of the Government of Nepal Act, 2004 B.S. (1948 A.D.)

<sup>3</sup> Fisher & Rose, "The Politics of Nepal: Periodical Journal of Government and Politics" vol. - I, Pp.87-88.

<sup>4</sup> The Nepali Democratic Congress was formed in 1940 A.D. by disaffected members of the Rana elite then living in self-exile in India. Their purpose in forming the organization was to work toward overthrowing Rana rule.

<sup>5</sup> Leo E. Rose and Margaret W. Fisher, "The Politics of Nepal: Persistence and Change in an Asian Monarchy". Oppositional Politics. I, 1970, vol. - I, p.166

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hereditary offices of prime minister and the King. Much to the surprise of the Ranas', on 6<sup>th</sup> November, 1950, King Tribhuvan, along with members of his family, took political refuge in the Indian Embassy in Kathmandu, in the belief that the anti-Rana Indian Government would side with the King over the Rana Prime Minister. The King was flown by the Indians to Delhi. On 11<sup>th</sup> November, the Nepali Congress launched an armed insurrection against the Ranas by attacks from across the Indian border on several government headquarters in the Terai. Many of those who took part were the famous 'Gorkha', soldiers.<sup>6</sup>

The anti-Rana forces now had a unifying figure in the King, and the rebels won a series of victories. In a compromise reached in New Delhi among the Ranas', the King, and the Nepali Congress, under pressure from India, the Nepali Congress terminated its armed insurrection on 15<sup>th</sup> January, 1951. On 15<sup>th</sup> February King Tribhuvan returned to Nepal, and on 18<sup>th</sup> February the Rana regime ended with the historic words of the King: "The people shall be ruled by a democratic constitution formed by a constituent assembly elected by the people."<sup>7</sup>

'The Delhi compromise' released five forces which have continued to play important roles in the politics of Nepal in the succeeding years: the King, the Nepali Congress, the Rana revivalists, the communist party, and a number of "mini-parties" led by personalistic leaders. While one legacy of the Delhi Compromise was the restoration of the traditional power of the King, another was the awkward position in which it placed the Nepali Congress. The Nepali Congress claimed to be the representative of the people, but found to its chagrin that after its struggle, power remained in the hands of the elite. As Nepali Congress president B.P. Koirala put it, "the so called proclamation does not contemplate a transfer of real authority into the hands of the people." Following the Delhi compromise, the Interim Government of Nepal Act, 2007 B.S. (1951 A.D.) also called the Interim Constitution, was promulgated.<sup>8</sup> It was designed to consolidate the gains of the 1950-51 revolution and to create conditions as early as possible for elections for a constituent assembly to draft a new constitution. The Interim Constitution, based on principles of the Constitution of India and entitled the Interim Government of Nepal Act, 1951 A.D. ratified the end of the authority of the Prime Minister and the system surrounding that office. The King exercised his executive authority through,

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<sup>6</sup> Nepalese soldiers have a worldwide reputation as fierce fighters. They have fought in the British army since the 19<sup>th</sup> century and in the Indian army since 1947. The British and Indian armies continue to recruit in Nepal.

<sup>7</sup> 1957, p.167)

<sup>8</sup> The Interim Government Act, 2007 B.S. was promulgated on 11<sup>th</sup> April, 1951 A.D.



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and was aided and advised by, a Council of Ministers, which he appointed and which served at his pleasure.

The King also appointed an advising assembly to sit until the Constituent Assembly was elected. The King retained sovereign and plenary legislative powers. The advising assembly was, with certain exceptions, authorized only to discuss matters and to recommend measures to the King for enactment into law, the final authority to approve any legislative measure lay with the King. The constitution also established a Supreme Court, which was the first judicial institution of Nepal. Although the Interim Constitution recognized the concept of individual liberty for the first time in Nepal, that liberty was limited. The King as a supreme commander of the armed forces, reiterated and enlarged upon the fundamental rights, included in the Rana Constitution, and proclaimed numerous social and economic objectives of the government. These objectives were to promote the welfare of the people by securing a social order in which social, economic, and political justice pervaded all the institutions of national life. The Interim Government of Nepal expressly guaranteed individual freedom. It stated that "No person shall be deprived of his life or personal liberty except according to procedure established by law or rules made by Government for the public goods, or for the maintenance of public order or the security of the State."<sup>9</sup>

However, the defects of the Interim Constitution might have been remedied by the new constitution to be framed by an elected constituent assembly, but elections for this body were never held. The government claimed this was due to the political confusion caused by a proliferation of parties with different ideologies and feuding leaders. The Nepali Congress Party continued to demand elections for a constituent assembly, and emphasized the importance of the sovereignty of the people and that the King could not be above criticism. On 1<sup>st</sup> February, 1958 King Mahendra (Who had succeeded to the throne upon the death of his father, King Tribhuvan in 1955 A.D.) decreed that general elections would be held, but that these would not be for a constituent assembly to draft a new constitution, but rather for a bicameral legislature that would govern within the framework of a constitution to be drafted by a Royal Commission.<sup>10</sup>

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<sup>9</sup> Section 19 of the Interim Government Act, 2007 B.S., (1951 A.D.)

<sup>10</sup> Greenberg, Jack. "Human Rights Violations in Nepal, An Asia Watch", United States of America, 1989. p.19. S. No. 0-929692-31-4.

### 4.2.3 The Constitution of the Kingdom of Nepal, 2015 B.S. (1959 A.D.)

The Constitution was promulgated by the King on 12<sup>th</sup> February, 1959 as a “royal gift to the people.”<sup>11</sup> The most significant aspect of this constitution was that, it was granted by the King rather than drawn up by elected representatives of the people as had been a democratically elected parliamentary system under a constitutional monarchy; the King retained ultimate sovereignty, even though the document itself did not explicitly grant this power. This constitution, modeled on British and Indian Constitutional custom, vested executive power in the King, who was advised and assisted by a Council of State (Raj Sahbha) and a Council of Ministers ex-officer, former Ministers, and royal appointees, advised the monarch on legislation and handled the details of regency and succession in the event of his death or disability. The general direction and control of the government were entrusted to the Council of Ministers, headed by a Prime Minister required to command a majority in the lower house of parliament, to which the council was collectively responsible.

The King was an integral part of the legislative arm of the government. Parliament was defined as consisting of the King; the House of Representatives, composed of 109 popularly elected members; and the Senate, composed of 36 members of whom half were elected by the house and half were nominated by the King. All bills approved by the two houses required the assent of the King to become law. The constitution granted the King wide latitude to nullify the parliamentary system. The King could suspend the operation of the cabinet and perform its functions himself if he determined that no person could command a majority in the house as prime minister. In the event of a breakdown of the parliamentary system or of any one of a number of emergency conditions, the King could suspend either or both houses of parliament, assume their powers, and suspend the constitution in whole or part.

It granted adult franchise for parliamentary elections, established the Supreme Court of Nepal, enumerated the fundamental rights and liberties of the people including the writ of *habeas corpus*, and provided redress if these rights were violated. These laudable reforms were largely illusory, since Article 55 of the Constitution<sup>12</sup> also granted absolute power to the King who tolerated neither infringement on his power nor criticism of his rule. The first general parliamentary elections ever held in Nepal took place one week after the new

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<sup>11</sup> Gupta, Aniruda. "Politics in Nepal", 1950-60, Kalinga Publications, 2, 1993, p.29.

<sup>12</sup> Emergency Powers proclamation in His Majesty's discretion under Article 55 of **The Constitution of the Kingdom of Nepal, 2015 B.S. (1959 A.D.)**

constitution was promulgated. Nepali Congress leader B.P. Koirala became the first Prime Minister of Nepal chosen by an elected parliament. King Mahendra's initial reaction to the new government was positive. On 27<sup>th</sup> May, 1959 the King issued a proclamation that in order to "found democracy on a more solid basis and to raise the standard of living of the masses, and to develop the country within the framework of laws enacted."<sup>13</sup>

The new government lasted 18 months. Immediately after the election the parliament attempted to increase democracy and limit the power of the monarchy. By October 1960 the parliament had established a law commission to review the entire legal system to recommend reforms that would guarantee "the fundamental rights of the people." The government also began a land reform program that, had it succeeded, would have led to the redistribution of wealth and power in Nepal. On 15<sup>th</sup> December, 1960, in an event that became known as the royal "*coup d'état*,"<sup>14</sup> King Mahendra invoked these emergency powers to dissolve the parliament, suspend the constitution, abolish the ten-year-old multiparty system, and assume responsibility for the administration of government. Prime Minister Koirala and most members of parliament were arrested (and remained in jail for the next eight years); about more than ten thousand others also were jailed. The King charged the Koirala government with corruption, misuse of power, and failure to maintain law and order. He said he would retain personal power "till such time as may be required for the installation of an alternative arrangement."<sup>15</sup> He asserted that what Nepal needed was a democratic political system closer to Nepali traditions, and promised to "build democracy gradually, layer by layer from the bottom upwards."<sup>16</sup> The result was party-less system of government that was codified in the Constitution of Nepal, 1962 A.D. and became known as "Panchayat Democracy."

#### 4.2.4 The Constitution of Nepal, 2019 B.S. (1962 A.D.)

On 16<sup>th</sup> December, 1962 A.D. King Mahendra announced a new constitution that radically reformed the 1959 constitution but also adopted many features of the Rana System. Known as the Panchayat Constitution, it was the fourth constitution in the fifteen years. It also provided that the Prime Minister would be nominated by the King, and prohibited political

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<sup>13</sup> His Majesty King Mahendra Bir Vikram Shah Deva, **Proclamations, Speeches and Messages** (HMG, 1967 A.D.), 1:143, quoted in "**Oppositional Politics in Nepal**."

<sup>14</sup> King Mahendra's December 1960 A.D. dissolution of the elected parliament and suspension of the Constitution; prelude to the Panchayat Regime.

<sup>15</sup> His Majesty King Mahendra Bir Bikram Shah Deva, **Proclamations, Speeches and Messages** (HMG, 1967 A.D.), 2:1-2, quoted in "**Oppositional Politics in Nepal**", p.48.

<sup>16</sup> *Ibid*, p.9

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parties. It declared Nepal an “independent, indivisible and sovereign Monarchical Hindu Kingdom,”<sup>17</sup> and embraced the Hindu concept of authority vested in the King. Under Article 20, the King was declared the ultimate source of executive, legislative and judicial powers and special provision for constitutional amendments.<sup>18</sup>

The Panchayat system was an institution of great antiquity. Historically, each caste group system of Nepal formed its own Panchayat, or council of elders, a socio-political organization operational on a village level that could expand to include neighboring districts, or even function on a zonal basis. Although it could be argued that the Panchayat system was adopted from India, King Mahendra had argued for its incorporation at the national level as an exponent of Nepalese culture a worthy and historically correct representation of cultural expression.

The Constitution of Nepal, 1962 A.D. was based on some elements from other "Guided Democracy" constitutional experiments notably "Basic Democracy" in Pakistan, "Guided Democracy" in Indonesia, and the "Dominant Party System" in Egypt. The Panchayat Constitution not only codified the irrelevance of political parties, but also declared them illegal.<sup>19</sup> It contained a stronger and more explicit statement of royal authority than did previous constitutions. Real power remained with the King, who was the sole source of authority and had the power not only to amend the constitution but also to suspend it by royal proclamation during emergencies.<sup>20</sup> The Council of Ministers, selected from the members of the legislative (Rashtriya Panchayat, or National Panchayat), served as an advisory body to the King. Members of the Rashtriya Panchayat were elected indirectly by the members of local Panchayat as well as by the members of professional and class organisations such as the Nepal Workers' Organisation, the Nepal Ex-servicemen's Organisation, and the Nepal Youth Organisation. The constitution abolished all political parties.

The Constitution of Nepal, 1962 A.D. was amended several times, primarily to increase the power and prerogatives of the monarch against the increasing popular demand for liberalization of the political institutions and processes. In view of the mounting criticism against the Panchayat Constitution, King Birendra, who had succeeded his father in 1972 A.D., pursuant to recommendations of a specially created Constitutional Reform

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<sup>17</sup> Article 3 of the Constitution of Nepal, 2019 B.S. (1962 A.D.)

<sup>18</sup> Article 20 (1) and (2), Part - V, His Majesty, the Constitution of Nepal, 2019 B.S. (1962 A.D.)

<sup>19</sup> Savada, Andrea Matles. Constitutional Development. "Nepal: A Country Study. Washington" : GPO for the Library of Congress, 1991 A.D.

<sup>20</sup> Agrawal, Hem Narayan. "Nepal: A Country Study in Constitutional Change." New Delhi: Oxford & IBH, 1980, p. 68

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Commission, announced in 1975 A.D. that the constitution would be amended to include provisions governing the amending procedure itself. Previously, the King could not amend the constitution unless two-thirds of the Rashtriya Panchayat ratified the proposed amendment. Under the proposed amendment, the King would have to consult a special committee of the Rashtriya Panchayat before amending the constitution. In addition, the term of a delegate to the Rashtriya Panchayat was reduced from six years to four years. King Mahendra died in 1972 A.D. His successor, the King Birendra, has had no more success in ending political agitation. In 1976 A.D., the Nepali Congress leader Koirala returned from exile in India urging “National Reconciliation.”<sup>21</sup> He was jailed immediately and charged with treason and sedition.<sup>22</sup> Numerous demonstrations, and outbreaks of armed resistance to the government, were led by underground party organisations and students. This resistance culminated in a series of riots in 1979 A.D., and in a major student revolt in Kathmandu. In an attempt to defuse the situation, in the spring of 1979 A.D., the King announced a National Referendum to decide the future of government of Nepal. He offered two choices: a continuation of the party less Panchayat system, with prospects for further reform; or a multiparty system. The Panchayat system was chosen with a majority of the percent of the votes.<sup>23</sup> On 21<sup>st</sup> May, 1980, the King appointed as eleven-member Constitution Reforms Commission to be chaired by the acting Chief Justice of the Supreme Court. On 15<sup>th</sup> December, the King promulgated three constitutional amendments: direct elections to the Rashtriya Panchayat would be held every five years for 112 seats, with 28 additional seats filled by the King's personal nomination; the Prime Minister would be elected by the Rashtriya Panchayat; the cabinet would be appointed by the King on the recommendation of the Prime Minister and would be accountable to the Rashtriya Panchayat; and Nepal would commit to the Nonaligned Movement as a zone of peace. These provisions, with a few minor modifications, remained in operation until early 1990 A.D., when the prodemocracy movement successfully agitated for a multiparty democratic system.<sup>24</sup>

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<sup>21</sup> Koirala, Bishweshwar Prasad. **'Jail Journal,'** Ratna Pustak Bhandar, 1<sup>st</sup> English Ed. 2001, ISBN 9993313084, p. 56

<sup>22</sup> Human Rights Violations in Nepal. Human Rights Watch Publications Department, An Asia Watch Report. New York, NY 10017-6104, United States of America., August 1989. p. 24, International. (ISBN 0-929692-31-4)

<sup>23</sup> Baral, Lok Raj. **"Nepal's Politics of Referendum: A Study of Groups, Personalities and Trends"**, Vikas Publishing House, Ltd., 1983, pp.103-4.

<sup>24</sup> Achary, Upendra Dev. "Constitutionalism and Democracy in Nepal: What went Wrong," Gonzaga Universtiy Law School, Journal 1989, vol. 1, p. 180

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There was dissatisfaction with alleged widespread government corruption and the government's harsh treatment of its critics. In May 1985 the Nepali Congress launched a *satyagraha* calling for the reestablishment of a multiparty system and the release of political prisoners. The government reacted swiftly and arrested over thousands of people and hundreds were held without trial for several months.<sup>25</sup>

The *satyagraha* was called off after several bomb explosions rocked Kathmandu and other areas in mid June 1985. Two groups outside Nepal claimed responsibility for the bombings which were followed by mass arrests and the enactment of a strict criminal law, the Destructive Crimes (Special Control and Punishment) Act, 1985.<sup>26</sup>

#### 4.2.5 The Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.)

The prodemocracy protests collapsed the Panchayat system in April 1990. The King appointed an Independent Constitution Recommendation Commission to represent the main opposition factions and to prepare a new constitution to accommodate their demands for political reform. On 10<sup>th</sup> September, 1990 the commission presented King Birendra with the draft of a New Constitution, which would preserve the King's status as Chief of State under a constitutional monarchy but establish a multiparty democracy with separation of powers and human rights. As agreed upon earlier, the King turned the draft constitution over to Prime Minister K.P. Bhattarai and his cabinet for review and recommendations. The draft was discussed extensively and approved by the interim cabinet. A major obstacle to approval was avoided when the commission removed a disputed provision under which both the constitutional monarchy and multiparty system could have been eliminated by a three quarters majority vote of parliament.<sup>27</sup>

On 9<sup>th</sup> November, 1990, King Birendra promulgated the new constitution and abrogated the Constitution of Nepal, 1962 A.D.<sup>28</sup> The Constitution of Kingdom of Nepal, 1990 ended almost thirty years of absolute monarchy in which the palace had dominated every aspect of political life and political parties were banned. The constitution, broadly

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<sup>25</sup> A Pattern of Human Rights Violations. Amnesty International Report, November 1987 A.D. (ASA/31/08/87), p. 9.

<sup>26</sup> *Infra*, p. 71

<sup>27</sup> Savada, Andrea Matles 'Constitutional Development. Nepal & Bhutan: A Country Study', Washington, D.C.; Federal Research Division, Library of Congress: For Sale by the Supt. of Docs, U.S. Govt. Print. Office, First, May, 1993 A.D., p.424. 978-1579801439.

<sup>28</sup> Article, 133 (2) of the Constitution of the Kingdom of Nepal, 2047 B.S. (1990 A.D.)

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based on British practice, is the fundamental law of Nepal.<sup>29</sup> It vests sovereignty in the people<sup>30</sup> and declares Nepal a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom.<sup>31</sup> Although Nepal still is officially regarded as a Hindu Kingdom, the constitution also gives religious and cultural freedom to other religious groups, such as Buddhists, Muslims, and Christians.<sup>32</sup> The preamble of the constitution recognizes the desire of the Nepalese people to bring about constitutional changes with the objective of obtaining social, political, and economic justice. It envisages the guarantee of basic human rights to every citizen, a parliamentary system of government, and a multiparty democracy. It also aims to establish an independent and competent system of justice with a view to transforming the concept of the rule of law into reality.

Other safeguards include the right to property; the right to conserve and promote one's language, script, and culture; the right to education in the student's mother tongue; freedom of religion; and the right to manage and protect religious places and trusts. Traffic in human slavery, serfdom, forced labour, or child labour in any form is prohibited. The right to receive information about matters of public importance and the right to secrecy and inviolability of one's person, residence, property, documents, letters, and other information also is guaranteed. Although some elements of fundamental rights guaranteed in the Constitution of Nepal, 1962 A.D. were reflected in the Constitution of Kingdom of Nepal, 1990 A.D.<sup>33</sup> The latter provided new safeguards in unequivocal language and does not encumber the fundamental rights with duties or restrictions purported to uphold public good. All citizens are equal before the law, and no discrimination can be made on the basis of religion, race, sex, caste, tribe, or ideology. No person shall, on the basis of caste, be discriminated against as an untouchable, be denied access to any public place, or be deprived from the use of public utilities. No discrimination will be allowed in regard to remuneration for men and women for the same work. No citizen can be exiled or be deprived of liberty except in accordance with the law; and capital punishment is disallowed.

In addition, sections on fundamental rights provide for freedom of thought and expression; freedom to assemble peacefully and without arms; freedom to form unions and

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<sup>29</sup> Article 1

<sup>30</sup> Article, 3

<sup>31</sup> Article, 4 (1)

<sup>32</sup> Article 11 (3)

<sup>33</sup> Articles 11 to 23, the Fundamental Rights, under Part – III of the constitution,

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associations; freedom to move and reside in any part of Nepal; and freedom to carry out any profession, occupation, trade, or industry.<sup>34</sup> Similarly, prior censorship of publications is prohibited, and press and publication right are guaranteed.<sup>35</sup> Unfettered cultural and educational rights also are guaranteed.<sup>36</sup> Articles twenty-three and eighty-eight provide for a citizen's right to constitutional remedy. Any citizen can petition before Supreme Court to declare any law or part thereof as void if it infringes on the fundamental rights conferred by the Constitution.<sup>37</sup> The Rights regarding criminal justice include the guarantee that no person will be punished for an act unpunishable by law or subjected to a punishment greater than that prescribed by the laws in existence at the time of commission of the offense;<sup>38</sup> no person will be prosecuted more than once in any offense;<sup>39</sup> and no one will be compelled to bear witness against himself or herself. Inflicting cruelty on a person in detention is prohibited, as is detaining a person without giving information about the grounds for such detention. Further, the person in detention must be produced within twenty four hours of such arrest before the judicial authorities. Any person wrongly detained will be compensated.<sup>40</sup>

The constitution laid down various directives in matters of political, economic, and social development, and foreign policy. These lofty policies are guidelines to promote conditions of welfare on the basis of the principles of an open society. One objective is to transform the national economy into an independent and self-reliant system by making arrangements for the equitable distribution of the economic gains on the basis of social justice. The constitution stresses the creation of conditions for the enjoyment of the fruits of democracy through the maximum participation of the people in governance of the country. Other aims include the pursuit of a policy in international relations that will enhance the dignity of the nation and ensure sovereignty, integrity, and national independence and the protection of the environment from further ecological damage.<sup>41</sup>

Until 1990 A.D., Nepal was a constitutional monarchy running under the executive control of the King.<sup>42</sup> Faced with a people's movement against the absolute monarchy, King Birendra, in 1990 A.D., agreed to large-scale political reforms by creating a parliamentary

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<sup>34</sup> Article 12 (2)

<sup>35</sup> Article 13

<sup>36</sup> Article 18

<sup>37</sup> Article 1 (1)

<sup>38</sup> Article 14 (1)

<sup>39</sup> Article 14 (2)

<sup>40</sup> Article 15 (1) & (2)

<sup>41</sup> Shrestha, Mohan, "**Multiparty Democracy in Nepal**" available at <http://www.oocities.org/suresthamohan/multiparty-democracy.htm>, downloaded on 12<sup>th</sup> May 2014 at 2 : 00 pm.

<sup>42</sup> Article 35 of the Constitution of the Kingdom of Nepal, 2047 B.S. (1990 A.D.)



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monarchy with the King as the Head of State and a Prime Minister as the Head of the Government. Nepal's legislature was bicameral consisting of a House of Representatives and a National Council. The executive comprised the King and Council of Ministers (the Cabinet). The leader of the coalition or party securing the maximum seats in an election was appointed as the Prime Minister. The Cabinet was appointed by the King on the recommendation of the Prime Minister. The Government in Nepal has tended to be highly unstable; no government has survived for more than two years since 1991, either through internal collapse or parliamentary dissolution by the monarchy.

It should be noted that this is a first time in the Constitutional History of Nepal that 'Right against Preventive Detention' has been expressly incorporated<sup>43</sup>. In the form of Article 15 stated that "No person shall be held under Preventive Detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal."<sup>44</sup> "Any person held under Preventive Detention shall, if his detention was contrary to law or in bad faith, have the right to be compensated in a manner as prescribed by law."<sup>45</sup>

### **4.2.6 The Interim Constitution of Nepal, 2063 B.S. (2007 A.D.)**

Nepal adopted its fifth and first fully democratic constitution. Although there were many good features about that constitution, it failed to satisfy the demands of many Nepali people. There was also a sense that the 1990 A.D. constitution had limited involvement of the people in its making, and that it came formally into being not as an act of the people's sovereignty but as a gift of the King. Among the shortcomings of the Constitution in the eyes of many were the insistence that Nepal is a Hindu kingdom; the inclusion of many important economic and social rights as "directive principles" only, which means they were not able to be used as the basis for legal claims; inadequate provisions for civilian control of the army; excessive power given to the King; and provisions that were not clear enough about the King's powers, thus making it possible for those powers to be abused. Unfortunately, over the years no attempt was made to remedy the deficiencies of that constitution by amendment. To the faults of the constitution itself, and insufficient royal commitment to democracy, must be added grave failures of leadership, failure of political parties to make any serious effort to be representative of the nation as a whole, excessive domination of many sectors of national life

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<sup>43</sup> Article 15 of the Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.)

<sup>44</sup> Article 15(1)

<sup>45</sup> Article 15(2) Ibid.,

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by a minority of the community, and excessive concentration of powers in the hands of the Kathmandu authorities. All these were compounded by the ten-year Maoist insurgency. Matters were brought to a head by the King's seizure of all power in 2005 A.D.

The actions of the King finally led to a people's movement, *jana andolan*, in April 2006, and the King ultimately recalled the parliament originally elected in 1999 A.D. By then the Maoists had begun negotiations with the major political parties, in which the Maoists' main demands were republicanism and the convening of a Constituent Assembly to draft a new constitution. But the hundreds of thousands who came out on the streets were demanding more than a restoration of democracy; they demanded greater inclusion of the various sectors of society marginalized in the past, including Dalits, Janajatis (ethnic groups), Madhesis (from the terai) and women. So the insistence was on breaking the monopoly of power by the certain privileged groups, inclusion of all groups in decision making, including in the Constituent Assembly, and rights for all. The Maoists in particular insisted that the 1990 A.D. Constitution could not continue to be the legal basis for governance, even for a transitional period. A decision was made to have an Interim Constitution.

An Interim Constitution Drafting Committee was formed in June 2006, chaired by retired Supreme Court Justice Laxman Aryal. Originally it comprised 7 prominent lawyers, including former presidents of the Nepal Bar Association. When it was realized that 5 of these were male Brahmins, the Committee was expanded to bring in a few women, and members put forward by the various parties including the Maoists. It clearly found its work very difficult. The first draft that was made contained many incomplete provisions, or provisions with alternatives, many of them showing clear signs of Maoist conceptions of government including severe undermining of the independence of the judiciary, and the placing of excessive powers in the hands of the Council of Ministers. Maoist contributions to the draft included the stress on land reform, which survives into the final version. Another sign of the difficulty of the task was the considerable extent to which the Interim Constitution Drafting Committee had recourse to the Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.)<sup>46</sup>

Although about 5000 suggestions were made to the Interim Constitution Drafting Committee from various civil society groups, it is not known whether they were even read. The changes that were made from the 1990 constitution did however reflect the concerns of

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<sup>46</sup> Agrawal, Hem Narayan. "Nepal: A Country Study in Constitutional Change". New Delhi: Oxford & IBH, 1980, p. 125

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those calling for inclusion, most notably in some new directive principles, and in the provisions for the Constituent Assembly. Also some new fundamental rights are to be found, some of which were formerly in the directive principles chapter. And the State is to be secular, no longer a Hindu Kingdom. The position of the monarchy was placed on ice, as it were. Previously kingly functions are now given to the Speaker or to the Prime Minister. But the third amendment to the Interim Constitution, in December 2007, took the further step of saying that Nepal is to be a republic, and this is to be implemented by the first sitting of the Constituent Assembly. The fourth amendment declared Nepal to be a federal democratic republic, created the post of President as Head of State,<sup>47</sup> a Vice-President and a national trust to which royal property is to be transferred. The Fifth Amendment introduces the requirements of political consensus for the election of President, a two-third majority to amend the Interim Constitution,<sup>48</sup> recognition of the aspirations of indigenous and backward communities for autonomous regions, local self-governing bodies and for social inclusion in the army.

The basics of the existing governmental, parliamentary, system remain. However, there is no longer a second house of parliament, but most of its members (other than royal nominees) are merged into the House of Representatives. While the Interim Constitution was being drafted, negotiations with the Maoists were proceeding, and a Comprehensive Peace Agreement was signed in November 2006. This agreement meant that there had to be provision for nominated Maoist members of the house. At the same time forty-eight other new members were to be nominated, ostensibly to broaden the membership, though in the end the parties mostly brought in people of the old rather than a new mold. The interim nature of the arrangements is also signified by the insistence that decision making is to be by consensus, including the selection of the Prime Minister. This was carried to the extent that there was no provision for a vote of any confidence in the government. This was changed in the second amendment in June 2007. The same amendment introduced recognition of the opposition another change that perhaps hints at a weakening consensus.

An important aspect of the Interim Constitution which gives it its interim nature is that which provides for the setting up of the Constituent Assembly and the preparation of the new Constitution. The provisions are not very detailed. The provisions for membership of the

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<sup>47</sup> Article 36 A (2) of the Interim Constitution of Nepal, 2063 B.S. (2007A.D.)

<sup>48</sup> Amended on 2065 Ashad 28 B.S. (12<sup>th</sup> July, 2008) by the Interim Constitution of Nepal (Fifth Amendment) Act 2065. Originally 36 (b), "Election of the President: The Constituent Assembly shall elect the President."

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Constituent Assembly, though superficially appearing inclusive, proved on closer examination to guarantee little. After agitation in the Terai, and talks with Madhesi groups, the government agreed to amend the Constitution to provide for some redrawing of the boundaries of the geographical constituencies, to ensure greater Terai representation. This was done in June 2007. More detail about inclusion in the Constituent Assembly through proportional representation lists, under the second election in the mixed system, was left to the Constituent Assembly Election Act.

There is little detail in the Interim Constitution about how the Constituent Assembly will operate, other than for some rules about adoption of the final new constitution, and about achieving consensus, if possible, on the content of the constitution, and an imprecise provision about possible reference to the people through a referendum “on any matters of national importance”. It seem unlikely that there will now be an Act on the Constituent Assembly before the elections, so details are left to be fleshed out by the Constituent Assembly itself which will adopt its own procedural rules. The Constituent Assembly will act as the Legislature Parliament as well (though it can delegate a lot of the legislative work to a committee). The inclusion of provisions about the Human Rights Commission in the Constitution is new. And there are some new provisions about the army, including about democratization.

Nepal new governed under the Interim Constitution of Nepal, 2007 A.D. It came into force on 15<sup>th</sup> January, 2007. It replaced the Constitution of the Kingdom of Nepal, 1990 A.D. The Interim Constitution was drafted to facilitate and manage the Nepali constitutional transformation process that started with the massive people’s movement against the monarchy in April 2006. The Interim Constitution was also drafted to manage the transition of Nepal from a unitary, constitutional monarchy country to a federal republic.

The Interim Constitution provides for a Constitution Assembly, which was charged with writing Nepal’s permanent constitution. Under the terms of the Interim Constitution, the new constitution was to be promulgated by 28<sup>th</sup> May, 2010; but the Constituent Assembly changed the deadline of 28<sup>th</sup> May, 2010 by a year because of many points of disagreement between the political parties. On 25<sup>th</sup> May, 2011 the Supreme Court of Nepal ruled that the 2010 extension of the Interim Constitution was not right. After 29<sup>th</sup> May, 2011 the Constituent Assembly kept on extending the Interim Constitution by a few months at a time.

In **Bharatmani Jungam & Others v. Office of the President & Others**,<sup>49</sup> (2011 A.D.) The Supreme Court held that while framing the Interim Constitution, its framer had a fine speculation on the necessity of time specification in order to cause the timely promulgation of it. If this truth is undermined and attempted to draw an archaic interpretation of the original spirit of Article 64 of the Constitution<sup>50</sup> to mean that the right to amend constitution includes also the right to extend time period again and again by pushing the task of promulgating into uncertainty constitution into uncertainty shall go against the mandate given by the people. It is also unreasonable through the view point of the constitutional jurisprudence to unusually extend its time period by the Constituent Assembly itself so as to create a limitless and uncertain situation. The Supreme Court declared that, those State organ exercising the power delegated by the sovereign people shall have no right to use the doctrine of necessity as a tool of defense for concealing there repeated omission of duty and long indecisiveness having direct impact on the fate of nation and her people.

On 28<sup>th</sup> May, 2012, Prime Minister Baburam Bhattarai dissolved the Constituent Assembly after it failed to finish the constitution in its last time extension, ending four years of constitution drafting and leaving the country in a legal vacuum. Elections to a second Constituent Assembly were held on 19<sup>th</sup> November, 2013 and political leaders have pledged to draft a new constitution within a year.

#### **4.2.7 The Constitution of Nepal, 2072 B.S. (2015 A.D)**

It is very interesting to note that just as the researcher has completed his research and is in the process of submitting his thesis; Nepal has enacted a new constitution, the Constitution of Nepal, 2072 B.S. (2015 A.D.).<sup>51</sup> This constitution has come into effect from 20<sup>th</sup> September 2015.<sup>52</sup> But unfortunately the arrival of this constitution was welcomed by agitation by certain sections of Nepali population, their claim they were left unrepresented but as regards.<sup>53</sup> This studies the relevant provisions relating to fundamental rights and Preventive Detention remains unchanged. The only change that would effect in the immediate future is only regarding the abolition / change in the judicial structure as the

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<sup>49</sup> N.K.P, 2011, vol. 53, No. 8, p. 1257, Writ No. 68-WS-0014, Decision No. 8662, date on 25<sup>th</sup> Nov. 2011

<sup>50</sup> Article 63 stated that, "A Constituent Assembly shall, subject to this Constitution, be constituted for the making of a new constitution by the people of Nepal themselves".

<sup>51</sup> Nepal Gazette, published on 20<sup>th</sup> September, 2015 (2072/6/3 B.S.)

<sup>52</sup> Article 307 (2)

<sup>53</sup> There were some political parties opposition to promulgate the Constitution of Nepal, 2072 (2015 A.D.) viz., Madeshi Morcha, Madeshi Loktantrik Forum, Adibashi Janjati Party etc.

appellate courts stands abolished. With this change there will be only District Court, High Court and then the Supreme Court, but these changes are not yet effective and are expected to be effective any time within the next year.<sup>54</sup>

The purpose of discussing the various constitutions as it emerged in Nepal use to bring out the fact that basis rights called it fundamental rights or human rights always have a constitutional rooting. Preventive Detention is an aberration of these basis rights therefore the prevalence and extend of Preventive Detention would naturally depend upon the constitutional provisions and safeguards. The purpose of this subchapter has been to bring out the development of constitutionalism through various constitution and what extend individual rights where protected in each of those Constitution.

### 4.3 Fundamental rights under the Nepalese Constitutions

The history of Nepalese Constitution is relatively short. Seven Constitutions have been promulgated till now. The right to personal liberty was inserted first time in Nepalese Constitution, in the Interim Government Act, 2007 B.S. (1951 A.D).<sup>55</sup> It stated that, "No person shall be deprived of his life or personal liberty except according to procedure established by law or rules made by Government for the public goods, or for the maintenance of public order or the security of the State."<sup>56</sup> The Constitution of the Kingdom of Nepal, guaranteed personal liberty stating "No person shall be deprived of life or personal liberty saves in accordance with the law."<sup>57</sup> The Constitution of Nepal, 2019 B.S. (1962 A.D.) followed the same provisions under the Part three fundamental duties and rights.<sup>58</sup>

After the restoration of the Democracy in 1990, Nepal has entered a new Democratic era and promulgated the new Democratic Constitution. It has included so many Articles on fundamental rights. Article 12(1) of the Constitution of the Kingdom of Nepal, 2047 B.S. (1990 A.D.) guaranteed that no person shall be deprived of his personal liberties save in accordance with law and no law shall be made which provides for capital punishment.<sup>59</sup> Another most crucial fundamental right was introduced first time in constitutional history of Nepal, under the part three of fundamental right "the rights against Preventive Detention"<sup>60</sup> it

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<sup>54</sup> Article 300 (3) of the Constitution of Nepal, 2072 (2015 A.D)

<sup>55</sup> This was promulgated on 18<sup>th</sup> Feb. 1951

<sup>56</sup> Article 19 of the Interim Government Act, (Constitution) 2007 B/S/ (1951 A.D.)

<sup>57</sup> Article 3 (1) of the Constitution of Kingdom of Nepal, 2015 B.S. (1958 A.D.)

<sup>58</sup> Article 11 (1) of the Constitution of Nepal, 2019 B.S. (1962 A.D.)

<sup>59</sup> Article 12 (1)

<sup>60</sup> Article 15

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stated, "No person shall be held under Preventive Detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal",<sup>61</sup> and "any person held under Preventive Detention shall, if his detention was contrary to law or in bad faith, have the right to be compensated in a manner as prescribed by law".<sup>62</sup>

However, in this Constitution unlike the previous Constitution of Nepal this Constitution did not mention about the right to life. It may be noted that Article 12(1) of the draft Constitution seemed to have taken care of the need to include 'right to life' however it missed to get approval during the period of promulgation (which was approved by the Interim Government and promulgated by King). It is difficult to trace the intention behind the exclusion of the word "life" from Article 12(1)<sup>63</sup>. Such question as always is very difficult to answer.

Similarly, after the 2<sup>nd</sup> People's movement of 2062/2063 B.S. (2005/2006 A.D.), the Interim Constitution of Nepal, 2007 has promulgated. Article 25 (1) and (2) of the Interim Constitution provided for the right against Preventive Detention and its procedure safeguards. Although the provisions mentioned in the Article 25 of the Interim Constitution were followed by all the provisions of the Constitution of Kingdom of Nepal, 2047 (1990 A.D.).

Clause (1) of Article 25 of the Interim Constitution of Nepal, 2007 A.D. stipulates that "no person shall be held under Preventive Detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the State of Nepal." this Clause (1) has determined the conditions and grounds for enacting a law authorizing the Preventive Detention of a person. On the other hand it has specified the precondition under which a man can be held under Preventive Detention, namely "immediate threat to the sovereignty, integrity or law and order situation of the State of Nepal." Thus if someone is detained under Preventive Detention without "a sufficient ground of existence of an immediate threat" to the preconditions mentioned in clause (1), the detenu can move the Supreme Court under Article 107 (2) for the protection of his infringed fundamental right. Thus, an order of Preventive Detention is subject to judicial review. Besides, clause (2) of Article 25 has also provided for seeking damage for such an infringement. "Any person held under Preventive Detention shall, if his detention was contrary to law or in bad faith, have the

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<sup>61</sup> Article 15 (1)

<sup>62</sup> Article 15 (2)

<sup>63</sup> Purna Man Shakya.(1998). **“Right to life and personal Liberties: Challenges of Interpretation.”** Essay on Constitutional Law (1998). Kathmandu: Nepal Law society. vol. 27, p. 33

right to be compensated in a manner as prescribed by law." The Constitution makers have created this safeguard with a view to curbing the tendency of the misuse and arbitrary exercise of the power of Preventive Detention as very often indulged in by the executive authorities in the previous during the Panchayat regime and the Maoist insurgency.

However, the right to personal liberty is the most precious, inalienable and fundamental of all the fundamental rights of the citizens. Therefore, every individual person by and large tends to value for his life pre-eminently and any society must place a high value on preserving it. It is one of most essential basic human rights in a democratic state and is a back bone of several human right movements.<sup>64</sup> All freedom and liberties are only for the living beings. That's why protection of human lives is at the heart of all the constitutional system. The visions towards the upliftment of human values and dignities through just and valid system of governance are minimum each and every Constitution.<sup>65</sup>

#### **4.4 Preventive Detention laws and Procedure in Nepal**

The existence of provision for Preventive Detention in the Nepalese laws was indeed a short in the arm of the executive to curb dissent and eliminate opposition. The executive very often used this law unscrupulously and even for wholly unconnected reason setting in the minds of ordinary citizens a fear of imminent arrest and detention even if they were indulging in a perfectly lawful activity. The Public Security Act was one such law the officials used indiscriminately. The enumeration and analysis of different Public Security Acts that existed time to time and the various procedural safeguards prescribed therein would give an idea that there were adequate procedural safeguards in the statute books but the later chapter would reveal rampant misuse or non-use of such procedural safeguards.

##### **4.4.1 Nepal Public Security Act, 2007 B.S. (1951 A.D.)**

Nepal Public Security Act, 2007 B.S. (1951 A.D.) come into effect on 11<sup>th</sup> April 1951. The Act had 13 Sections and the Act to provide for provisions on keeping in detention or control the assembly, procession, camp, *kabayad*, parade and other activities for maintaining public security, law and order and security of the nation.<sup>66</sup> According to this Act the government of Nepal may issue an order to prevent a person from involving in any

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<sup>64</sup> Binod Bashyal. "Concept of Right to Life and liberty in the context of making the New Constitution". Nepal law review (2009), Kathmandu: Nepal Law campus volume 21, p.169

<sup>65</sup> Bishal Khanal. "Regeneration of Nepalese Law" 1<sup>st</sup> Ed. 2000. Kathmandu: Bhrikuti Academic Publications, p.191

<sup>66</sup> Preamble of the Nepal Public Security Act, 2007 B.S. (1951A.D.)



activity which was opposed to national interest or public order or supplying basic common goods and commodities to the community or running any public work.<sup>67</sup> In this Act, if there was any reasonable and adequate ground to immediately prevent a person from action for sovereignty, integrity or public peace and order of Nepal.<sup>68</sup> The power is given to local authority who is the Chief District Officer to issue and order a Preventive Detention the order should mention the specific person and the specific place where the person has to be detained.

#### 4.4.2 The Public Security Act, 2017 B.S. (1961 A.D.)

The Public Security Act, 2017 B.S. (1961 A.D.) was enacted in the wake of the "*royal coup*"<sup>69</sup> and "the biggest hindrance to human rights."<sup>70</sup> The Public Security Act provides for administrative detention without trial of up to three years to safeguard the following:

- a) Security of the Kingdom of Nepal.
- b) Peace and tranquillity inside the Kingdom of Nepal.
- c) Amicable relations between the Kingdom of Nepal and other States, or
- d) Amicable relations among people of different classes or regions in the Kingdoms of Nepal.

The Public Security Act was supplemented by the Public Security Rule 1963, which required the authority making the arrest to serve the detainee with an internment order within twenty four hours.<sup>71</sup> The order need not state the reasons for arrest.

The detainee can challenge his arrest by submitting a petition for his release to the authority who has been arrested him within thirty five days.<sup>72</sup> In submitting such a petition, the detainee may consult his attorney, but only in the presence of a Government officer. In case such a petition is denied, the responsible local authority must send an explanation to the Home Ministry,<sup>73</sup> which has the power to confirm or repeal the order.<sup>74</sup>

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<sup>67</sup> Section 2 of the Nepal Public Security Act, 2007 B.S. (1951 A.D)

<sup>68</sup> It should be noted that under Article 25 of the Interim Constitution of Nepal, 2063 (2007) the power of preventive detention is available in case of 'threat to law and order' but in this Public Security Act, 2046 (1989) it is mention as 'public peace and order' however the original Nepalese language version terms are same.

<sup>69</sup> The "*royal coup*" was King Mahendra's 1960 dismantling of the elected Parliament and the abolition of all political parties.

<sup>70</sup> The Public Security Act, 1961 was promulgated on March 6, 1961. On March, 10 the Home Ministry defended the Act in a circular which said: "it is quite natural for fifth columnists, anti-nationalists and anti-government elements to find themselves in a difficult position because of the ordinance promulgated on March 6, 1961. It was in order to put them in check that the government enforced the ordinance." *Oppositional Politics*, p.60, quoting from Gorkahpartra, March 10, 1961.

<sup>71</sup> Rule 3 of the Public Security Rule 1963

<sup>72</sup> Rule 4

<sup>73</sup> Rule 5

<sup>74</sup> Rule 7

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Detention orders could be issued under the Public Security Act directly by the Home Ministry or by local officials, namely the Chief District Officer or the Zonal Commissioner. Those issued by the Home Ministry are for a period of eighteen months. Those issued by local administrators were for nine months and could be extended to eighteen months if confirmed by the Home Ministry. If the government wishes to detain a person beyond eighteen months, it must nominate "except in special circumstances" a three-member advisory board, consisting of a Supreme Court Justice, and one official each from the case based on a report by the government and a petition by the detainee, if the desires, and then reports back to the government.<sup>75</sup> The recommendation of the advisory board is not binding on the government. The maximum period of detention under the Public Security Act, 1961 A.D. is three years.

The Public Security Act and related laws have given to the executive clear predominance over the judiciary. The advisory board, for instance, was nominated by the Government and two of its three members are government officials; it could not be considered independent and impartial. The detainee had no right to appear in person before the advisory board nor to have legal representation when the case is discussed.<sup>76</sup>

The terms of the Public Security Act, was vague, granting wide discretion to government officials. Moreover, the Public Security Act leaves the detainee with scant opportunity for redress. "No complaint, charge, or legal action shall be made against any person in respect to any action taken or sought to be taken by him with good intent under this act."<sup>77</sup> In addition, that no order issued under the act may be questioned in a court of law.<sup>78</sup>

Detention orders are usually issued by local officials who have little legal training and, especially in the countryside, little accountability or supervision. Provisions of the Public Security Act themselves are frequently violated.<sup>79</sup> In many cases, detention orders are not served within twenty four hours. Prisoners are held for more than nine or eighteen months without confirmation by the Home Ministry or consideration by the advisory board. In cases of detention for more than three years and of cases where a prisoner was released within the time limit in the Public Security Act, only to be promptly re-arrested. Although the re-arrests

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<sup>75</sup> Rule 9

<sup>76</sup> Section 14 of Public Security Act, 1961 A.D.

<sup>77</sup> Section, 10 of Public Security Act, 1961 A.D.

<sup>78</sup> Section, 11

<sup>79</sup> AI Report, p.13.

themselves may be within the letter of the law, they make a mockery of the three-year limit and amount to indefinite detention without trial.

#### **4.4.3 The Treason Act, 2017 B.S. (1962 A.D.)**

The Treason Act, known in Nepal as *Raj Kaj* Act and sometimes also translated as the State Affairs or State Offense Act, severely restricts freedom of opinion in Nepal.

Section, 6 of the Act, is most frequently used against teachers, students, political leaders, and others who criticize the monarchy or the political system. Section, 6 (1) state:

In case any person foments hatred, malice, or contempt towards His Majesty's the King or the royal family, directly or indirectly, by letters, words or signs or postures, or in any other manner, or causes this to be done, or attempts to do so, he shall be punished with imprisonment for a maximum term of three years or with a fine not exceeding Rs. 3,000, or, with both.

According to Section 6 (2) of the Act, similar offenses against the Government are punishable by imprisonment for up to two years and / or a fine of up to Rs. 2,000. Section 6 (3) provides for up to three years imprisonment for, 'action which foments hatred, malice or contempt on the basis of class, community, religion, or region so as to undermine the sovereignty or integrity of the Kingdom of Nepal.' Section 6 (2) excludes from punishment criticism of the government “made in a healthy language with the objective of bringing about changes in any governmental policy or administrative action by legal means without fomenting hatred, malice or contempt for His Majesty’s Government.” The Treason Act, 2017 B.S. (1962 A.D.) provided severely restricts the peaceful expression of opinion and has frequently been enforced for this purpose. The vague wording allowed local officials to determine the bounds of criticism.

As with the Public Security Act, the Zonal Commissioner is initially responsible for enforcing the Treason Act. He could have arrest suspects but also serves as judge in such cases, clearly contravening the guarantee of “a fair and public hearing by an independent and impartial tribunal” in the Universal Declaration of Human Rights. Decisions of the Zonal Commissioner may be appealed before a regional court, but appeals often involve lengthy delays.

#### 4.4.4 The Destruction Crimes (Special Control and Punishment) Act, 2042 B.S. (1985 A.D.)

The Destruction Crimes (Special Control and Punishment) Act, 2042 B.S. (1985) was passed shortly after the bomb explosions and was made retroactive under Section 11 (2) which states:

*Notwithstanding anything contained in current Nepal law, legal action shall be taken, and punishment inflicted under this act in respect to any destructive crime which had occurred before the commencement of this act but in which no case had yet been filed in the court according to the then current Nepal law. This retroactive application of a law for a crime committed prior to the enactment of the law was widely criticized by Nepali lawyers and violates internationally recognized human rights standards.<sup>80</sup>*

The Destruction Crimes (Special Control and Punishment) Act, 2042 B.S. (1985 A.D.) which was initially to be in effect for three years, applies to the attempted or actual destruction of property through the use of weapons, bombs, or explosives with: *the motive of harming or disturbing the security, tranquility, and order of the Kingdom of Nepal or its administrative system or to actions resulting in loss of life, disability or injury.*<sup>81</sup>

The Act gives extensive powers to the Zonal Commissioner and the Chief District Officer, including to use force, to arrest a suspect without a warrant (a warrant has subsequently to be issued with three days) and to search the suspect and his house without prior notice.

The Act also provides that the accused can be kept in custody for Ninety days from the time of his arrest for the purpose of investigation. If necessary, he can be kept in police custody for another ninety days with permission of the court. There is no statute of limitations for cases under this Act, and like the Public Security Act, it grants the government “immunity for actions performed in good faith” under the act.

The Act provides for the establishment of Special Court. Upon order of the government, trials can be held in *camera* and all documents related to such cases can be classified. The convicted person has the right to appeal to the Supreme Court within seventy

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<sup>80</sup> The UDHR in Article 11(2) and ICCPR in Article 15(1) both prohibit *ex post facto* laws. In addition, as the Act was justified under Article 17 of the Constitution to make laws controlling the exercise of basic freedoms for the public good, it is another example of how Article 17 is used to negate fundamental human rights found elsewhere in the Constitution. Article 11(3) of the Constitution states that “no person shall be punished for an act which was not punishable by law when the act was done, nor shall any person be subjected to a punishment greater than that prescribed by law for an offense when the offense was committed.”

<sup>81</sup> Section 2 (a) (i)

days. The treatment accorded those arrested for involvement in the bomb explosions highlights some of the iniquitous provisions of the Act.

#### **4.4.5 The Public Security Act, 2046 B.S. (1989 A.D.)**

The Public Security Act, 2046 B.S. (1989 A.D.)<sup>82</sup> came into effect on 27<sup>th</sup> September 1989. This Act was subject to 4<sup>th</sup> amendment. The first amendment was on 12<sup>th</sup> April 1991, second amendment was on 14<sup>th</sup> November 1991, the third amendment was on 20<sup>th</sup> April 1992 and fourth amendment was 21<sup>st</sup> January 2010.

The Public Security Act, 1989 A.D. has 15 Sections, Sub-section 3.1 of this Act, deals with Preventive Detention. As per the section if there is any reasonable and adequate ground to immediately prevent a person from action for sovereignty, integrity or public peace and order of Nepal.<sup>83</sup> The power is given to local authority who is the Chief District Officer to issue and order a Preventive Detention the order should mention the specific person and the specific place where the person has to be detained.

Section 4 of this Act, laid down the procedure for the issue on such order Sub-section 4.1 required the local authority issuing the order to specify the reason the grounds for such order and the same should be provided to the concern person. The local authority is respected to submit to the same information to the Ministry of Home affairs along with a copy of the order. Sub section 4.2 if further requires the local authority to forward and notice along with the copy of the order immediately to the District Court in whose jurisdiction order is the issued. If the reasons on the which order is issue does not exist for the any further period Subsections 4.3 required abrogation (cancellation) of such order within twenty-four hours. Section 5.1 says that any such Preventive Detention order shall be effective only for the maximum for the Ninety days from the date of issuance. However, Section 5.2 authorizes to local authority to extend the order for the more than Ninety days if such authority forward and writing to the Ministry of Home Affairs for such extended along with the reason for seeking such extension. The Ministry of Home Affairs can extend the order of detention up to period of Six months from the date of issuance. Further Section 5.2.2 says if it is necessary to extend beyond Six months the Ministry of Home Affairs to see the advice of the advisory

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<sup>82</sup> Act No. 5 of 2046 B.S. (1989 A.D.)

<sup>83</sup> It should be noted that under Article 25 of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.) the power of preventive detention is available in case of 'threat to law and order' but in this Public Security Act, 2046 B.S. (1989 A.D.) it is mention as 'public peace and order' however the original Nepalese language version terms are same.

board constituted under Section 7. Only the advisory board advice further extend with the reasons for the same then the detention can be extended up to Twelve months from the date of issuance.

Section, 8.1 says if the Ministry of Home Affairs in a case of extension beyond six months where a detainee with the government of Nepal, that such complaint has to forward to the advisory board with reasons and grounds. The advisory board is accepted to make inquiry with the detent person before submitting its recommendation. Section 9.2 gives super numeral power to the government of Nepal to abrogate any order of the Prevention Detention without any reason what so ever. Similarly, power is also given local authority to abrogate its order of detention in any time. Section, 11 makes such order of detention under the act unquestionable in any court.

Section 12 requires whenever such detainee person is released, he/she has to be released only in front of the district court judge or in absent of district court judge in front of the registrar.

The Act also provides that claiming compensation if such preventive detention carried out in contravention of this Act or in *bad faith*, by the suitable application before the district court within a period of thirty-five days from his/her release of the such person. In case the order issue in the *bad faith* claiming for compensation from the local authority who issued such order and detention order issued by local authority under this Act was issued in bad faith such authority shall be subjected to departmental action and be punished.<sup>84</sup>

#### **4.4.6 Terrorist and Disruptive Acts (Prevention and Punishment) Act, 2058 B.S. (2002 A.D.)<sup>85</sup>**

The Act was promulgated on 10<sup>th</sup> April 2002. This Act provides for prevention and punishment of terrorist and disruptive acts. The Preamble of this Act was to expedient to make legal provisions on the prevention of terrorist and disruptive acts for the maintenance of peace and order and for the security of the general public in the kingdom of Nepal.

The Act contains in all twenty-six sections. Section 1 dealt the short title, and commencement, the Act was in force and for two years from the date of promulgate. Section 2 has defined various terms such as Arms, Ammunition, Bomb, Explosive substance, Poisonous substance, Security personnel, terrorist and disruptive action, terrorist etc. Section

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<sup>84</sup> Section 13 of the Public Security Act, 2046 B.S (1989 A.D.)

<sup>85</sup> Act Number 23 of the year 2058 B.S (2002 A.D.)

3 dealt with terrorist and disruptive crimes. Section 4 had mentioned extra-territorial application of the Act, it was mentioned "if Any person who had committed a terrorist and disruptive act targeting the nation or a citizen or any property belonging to the nation staying outside the State subject to the action and punishment under the Act as if such person committed that crime within the State."<sup>86</sup> Section 5 was related to Special Power to the government security official, in the area within his/her jurisdiction, can order to prevent the terrorist and disruptive crime, carried out as mention in the section 5. Similarly, Section 6 was Power to Requisition Property, section 7 related to power to declare terror affected area and terrorist. Section 8 gives power to prohibit carrying Arms or Ammunition. Section 9 empowered detention. Section 10 penalties, if any person committed crime under mention in the Act or involved any activities the person who was commit or any person who has ordered to commit such a crime was liable to imprisonment of life with confiscation entire property. Section 11 to hold in detention for trial, section 12 was permission to hold assembly and exercise the freedom of expression.

Section 13 is as for monitoring and coordination committee, Section 14 had power of confiscation, if any person has committed any crime was punishable under this Act and used any property, equipment or vehicle for the commission of such crime, such property, equipment or vehicle would be confiscated.<sup>87</sup> Section 15 was adjudicating authority and appeal and section 16 was related to State cases, section 17 was related to special procedures, section 18 was control in the means of communication. Section 19 was provision relating to treatment expenditure and compensation to the victim and section 21 dealt with limitation, lastly section 22 Power to give reward to any person who arrests, or renders assistance in arresting, a person who played the main role in the commission of the terrorist and disruptive act and other sections were in general legal provisions.

#### **4.4.7 The Terrorist and Disruptive Activities (Control and Punishment) Ordinance, 2061 B.S. (2004 A.D.)**

With the expiry of the Terrorist and Disruptive Activities (Punishment and Control) Act, 2058 B.S. (2002 A.D.) on 12<sup>th</sup> October 2004, His Majesty's Government of Nepal was introduced a more severe and draconian version of the same law namely; the Terrorist and Disruptive Activities (Control and Punishment) Ordinance, 2004 A.D. Clause 9 of the

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<sup>86</sup> Section 4 of the Terrorist and Disruptive Acts (Prevention and Punishment) Act, 2058 B.S. (2002 A.D.)

<sup>87</sup> Section 14 (1) of the Terrorist and Disruptive Acts (Prevention and Punishment) Act, 2058 B.S. (2002 A.D.)

Ordinance stated that "If a security official feels the need to prevent a person from carrying out any terrorist and disruptive activity, such a person can be kept under house arrest for a maximum period of one year, six months at his [Security Officials] discretion and another six months after obtaining permission from the home ministry, in any place after fulfilling common humanitarian conditions."

This legislation was a clear indication that the government of Nepal had surrendered its authority to the military, and given it a green signal to continue with gross human rights violations including arbitrary detentions, torture, disappearances, and extrajudicial and summary executions. Most of the victims of the abuses committed by the State security forces working under the Joint Command of the Royal Nepal Army as well as those committed by the Maoists were ordinary people innocent of any crimes. The security forces were also targeted journalists, lawyers, human rights defenders, victims and witnesses of their atrocities during period and this ordinance was extended every six months before the expiry of time during the absent of legislature.

#### **4.5 Conclusion**

The purpose of the sub chapter was to bring out how despite the existence of constitutional protection Preventive Detention was practice in Nepal by means of various legislations discussion above it could be notice that the Public Security Act, is the main legislation based on which Preventive Detentions where carried out. The succeeding chapter brings out in the form of various case discussions to what extent the administration took shelter under the Public Security Act to justify Preventive Detention arrest. The chapter also brings out the role of the judiciary in either validating of invaliding such acts of Preventive Detention by the administration.



## CHAPTER – V

### Judicial and Criminal Justice System in Nepal

#### 5.1 Introduction

The judicial system in Nepal basically follows Common Law System though Nepal was never under the dominance of the British Empire. The reason may be the strong democratic influence in the neighboring country of India, these linkages might have been further reinforced because of the commercial transactions between the two States and the also because of the common religious base where the majority of the Nepalese population are Hindus. Hinduism has its religious, social, cultural and economic impact on Nepal. The other respective religion Buddhism also has strong links with India. The geographical and cultural proximally lead to greater influence in the Constitutions making system in Nepal. Therefore, many of the common laws, principles including the principle of the precedent came to be incorporated in the Nepalese legal and judicial system. Added to this was the fact that, most of the lawyers and the judges of those days had their basic legal education in India. Therefore, the ideas and the principles of the common legal systems were conveniently and automatically adopted into the Judicial System in Nepal.

It is pertinent to note that the impact of the Indian legal system and judiciary on the Nepalese judicial system was so deep rooted and subterranean that the first Chief Justice of Nepal was from India<sup>1</sup> and many of the lawyers used to practice in India and Nepal concurrently, mainly those lawyers who had their practice in North and North-East part of India. Prior to the democratic developments of 1951 A.D., the justice system was administered under the indigenous customary practices and religious rules<sup>2</sup>, which was influenced by the Hindu religious scriptures, customs and customary practices which were incorporated into the code which was promulgated in the year 1854 A.D. by the then King Surendra Bir Bikram Sahadev. This code was the main instrument to administer justice in the country for nearly a century.

The Government of Nepal Act, 1948 A.D. was considered the first constitutional instrument which incorporated some of the democratic ideals. However, this Act never came into force because of the continued reluctance of the then Rana rulers and also because of the

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<sup>1</sup> Hari Prasad Pradhan, as First Chief Justice of Nepal appointed by Late. King Tribhuvan. Appointed date on 22<sup>nd</sup> July, 1951, as per the section 8 (b) of Nepal Pradhan Nayayalaya Act, 2008 B.S. (1951 A.D.). He was citizen of Sikkim State of India.

<sup>2</sup> The Code commonly known as Muluki Ain promulgated by the late King Surendra Bir Bikram Shah in 1854 AD

prevailing unrest which was in the nature of a freedom struggle, launched by the people. Because of this unrest which was revolutionary in nature, the Interim Government of Nepal Act, 1951 was promulgated incorporating the principles of personal liberty, checks and balances, independent judiciary, rule of law and so on.

By this instrument of the Interim Government of Nepal Act, 1951 Nepal came to adopt the adversarial system of adjudication through the courts. It may also be mentioned here that even the earlier legislation namely, the Government of Nepal Act, 1948 A.D. though was not enforced had adopted the same system of adjudication. Having thus adopted the common law system of adjudication it became the legal tradition of Nepal. Consequently, the subsequent constitutions namely; the Interim Government Act, 1951 A.D., the Constitution of Kingdom of Nepal, 1959 A.D., the Constitution of Nepal, 1962 A.D., the Constitution of Kingdom of Nepal, 1990 A.D., and also the Interim Constitution of Nepal, 2007 A.D., had established the common law legal system of adjudication as the Judicial System of Nepal. One of the basic objectives of the Interim Constitution of Nepal, 2007 A.D., was to establish an independent and competent system of justice administration so as to transform the concept of rule of law, into a living reality for the people of Nepal.

The Interim Constitution of Nepal, 2007 A.D. issued in the form of Sixth constitutional instrument, follows the adversarial legal tradition in a Constitutional Monarchy. To establish an independent and competent system of justice, viewing for the purpose of transforming the concept of the rule of law, into a living reality is one of the basic objectives of the constitution. The constitution has granted all powers, relating to justice administration to the courts and other quasi-judicial institutions like tribunals, administrative courts, labour courts, etc. to functions in accordance with the Constitution and to uphold the Principles of Justice.

## **5.2 The Judicial System in Nepal**

Part 10 of Interim Constitution of Nepal, 2063 B.S. (2007 A.D.) is relating to the judiciary and its powers.<sup>3</sup> Article, 100 of the Constitution mandates the judiciary to exercise its authority in accordance with the Constitution, laws of the State and the recognized the Principle of the Justice. The Article 100 (2) guarantees independence to the judiciary in the spirit of democracy and the aspiration the '*Jan Andolan*'.

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<sup>3</sup> Article 100 to 118 of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D)

### 5.2.1 Judicial Hierarchy and Structure

The Interim Constitution of Nepal, 2063 B.S. (2007 A.D.) provides three tiers of court<sup>4</sup>, which include the Supreme Court of Nepal, the Courts of Appeal and the District Courts. Supreme Court is the Apex Court<sup>5</sup>. All other courts and judicial institutions of Nepal, other than the Constituent Assembly Court, shall be under the Supreme Court.<sup>6</sup> In addition to this there is also a Constitutional Assemble Court which according to Article, 102 functions independently and has separate jurisdiction.

There are sixteen Appellate Courts situated in different zones each having, a group of districts spread across the whole of Nepal. The District Courts are situated in every district. There are in all seventy five such District Courts. It should be noted that there are no separate civil and criminal courts but these courts exercises both civil and criminal jurisdictions, the procedure for the court proceeding are as prescribed by Geneal Code, 1963 A.D.<sup>7</sup> and the Administration of Justice Act, 2048 B.S. (1991 A.D.).<sup>8</sup>

### 5.2.2 The Supreme Court of Nepal

The Supreme Court is constituted as per Article, 102 of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.) and is headed by a Chief Justice of Nepal with the maximum of fourteen other judges.<sup>9</sup> The Supreme Court also has *ad hoc* judges appointed as when necessary for a fixed term. The Chief Justice of the Supreme Court is appointed by The President as per the recommendations of the Constitutional Council.<sup>10</sup> The Chief Justice appoints other judges of the Supreme Court on the recommendation of the Judicial Council.<sup>11</sup> The Chief Justice has fix tenure of Six years<sup>12</sup> however, the Chief Justice ceases to hold office if he/she attains the age of Sixty-five years<sup>13</sup> during the term or is removed by an impeachment proceeding of the parliament<sup>14</sup> or by death.<sup>15</sup> In case of any reason that the

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<sup>4</sup> Article 101

<sup>5</sup> Article 102(1)

<sup>6</sup> Article 102 (2)

<sup>7</sup> No. 29 of Court Proceeding of General Code, 1963 A.D.

<sup>8</sup> Section 7 of the Administration of Justice Act, 2048. B.S. (1991 A.D.)

<sup>9</sup> Article 102 (5) of the Interim Constitution of Nepal, 2063 B.S., (2007 A.D.)

<sup>10</sup> Article 103

<sup>11</sup> Article, 103(1)

<sup>12</sup> Article, 105

<sup>13</sup> Article 105(1)(b)

<sup>14</sup> Article 105 (1) (c)

<sup>15</sup> Article 105 (1) (d)

Chief Justice is unable to carry his duty the senior most judge of the Supreme Court will function as the Chief Justice.<sup>16</sup>

❖ **Qualification of the Chief Justice**

As regard the Chief Justice, any person who has worked as a judge of the Supreme Court for the period of three years is eligible to be appointed as the Chief Justice of the Supreme Court.<sup>17</sup> As regard the other judges of the Supreme Court the qualification is that the person should has worked as a Judge of an Appellate Court or any equivalent post of the judicial service for the minimum period of the seven years or has worked as a Gazette officer of the first class or in the judicial service for twelve years or as a practicing lawyer of the minimum fifteen years or is the distinguish jurist in the judicial or legal field for fifteen years or more.<sup>18</sup>

❖ **Jurisdiction of the Supreme Court**

Any Nepalese citizen can approach the Supreme Court to declare any law as invalid on the grounds of such law is imposing unreasonable restriction on the enjoyment of Fundamental Rights thus makes the law unconstitutional.<sup>19</sup> The Supreme Court enjoys extraordinary powered, can, either the law declare the *void-ab-intio*. The main responsibility of Supreme Court as mentioned in the Article, 107 (2) is the enforcement of the fundamental rights and the enforcement of any other legal rights for which no other remedy is available or that such remedies are inadequate. The Supreme Court can deals with any dispute, any public interest involving any constitutional and legal question. The Supreme Court has extraordinary power to issue any such order which in its view is necessary for imparting full justice. The Article also empowers the Supreme Court to issue appropriate 'writs' including the writ of '*habeas corpus*', '*mandamus*', '*certiorari*', '*Prohibition*' and '*quo-warranto*'. However, the Supreme Court is barred from interfering in the proceeding and the decision of the parliament in violation its privilege or imposition of the any penalty.

The Supreme Court is entrusted with original as well as appeal jurisdiction or can conform or review any cases or petitions. In addition to the above the Supreme Court can reviews its own judgment and final orders if the circumstances demand. However, such review has to be carried out by judges other than those who were involved in the earlier

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<sup>16</sup> Article 103 (4)

<sup>17</sup> Article 103(2)

<sup>18</sup> Article 103 (3)

<sup>19</sup> Article 107 (1)

decision.<sup>20</sup> Additional powers are entrusted to the Supreme Court by the Supreme Court Act, 2048 B.S. (1991 A.D.).

### 5.2.3 Constituent Assembly Court

Article 118 of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.) empowers the Constituent Assembly Court deal with complaint regarding election to the Constituent Assemble. The constitution has provided jurisdiction and powers of the Constituent Assembly Court by a Separate law<sup>21</sup> namely; the Constituent Assembly Court Act, 2064 B.S. (2007 A.D.)<sup>22</sup> The Interim Constitution of Nepal, 2007 A.D. has provided jurisdiction to the Constituent Assembly Court, other courts are barred for the entertaining any matter when within the preview and jurisdiction of the Constituent Assembly Court.<sup>23</sup>

### 5.2.4 Appellate Court

Article 108 of the Interim Constitution of Nepal, 2007 A.D. empowers the establishment of Appellate Courts, District Courts and other courts which are subordinate to the Supreme Court and shall function subject to the Constitution.<sup>24</sup> The judges of the Appellate Courts and judges of District Courts are appointed by the Chief Justice of the Nepal on the recommendation of the Judicial Council.<sup>25</sup>

#### ❖ Qualification of Judges of Appellate Court and District Court

Any Nepali citizen who has a Bachelor's Degree in law and has worked as a District Judge or worked in any post as a Gazetted first class officer in the judicial service for minimum seven years; or hold a Bachelor's Degree in law and has practiced for ten years or has taught law or has conducted research for ten years or worked in any other field of law.<sup>26</sup> In addition to the above it is important that such a person has a reputation in public life and has high moral character.<sup>27</sup>

#### ❖ Terms of Services

A judge of Appellate Court shall hold office till he/she reaches the age of Sixty-three years or till his removed by the Chief Justice in accordance with a decision of the judicial

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<sup>20</sup> Article 107 (4)

<sup>21</sup> Article 118 (2)

<sup>22</sup> Act No. 11 of the year 2064 (2007 A.D.) notified by Nepal Gazette on 19<sup>th</sup> August 2007

<sup>23</sup> Article 118 (3)

<sup>24</sup> Article 108

<sup>25</sup> Article 109 (1)

<sup>26</sup> Article 109 (2)

<sup>27</sup> Article 109 (5)

council for reasons of incompetence, misbehavior or failure in the discharge of his duties or incapacity, physical or mental or deviation from the task of dispensing justice.<sup>28</sup> For any such removal there has to be a committee constituted by the judicial council and the committed should be given opportunity to hearing. Article, 110 bars the judge for taking any other engagements.

The Court of Appeal is empowered to hear appeals against the judgments delivered by the District Courts and various quasi-judicial bodies, issue the writs of *Habeas Corpus* and *Mandamus* in the cases of violation of civil rights of individual and try certain cases under their respective jurisdiction. Similarly, the Court may issue an order of *Injunction* for this purpose. The Court of Appeal has the power to try certain cases as specified by law and to try cases transferred by the Supreme Court (from among the cases filed in the District Courts) taking into consideration the complexity of the issue, or to provide speedier justice in a prolonged dispute.

### **5.2.5 District Court**

The District Courts are the Court of first instance. The District Courts are responsible for trying all the civil and criminal cases. Section 7 of the Administration of Justice Act, 1991 A.D. has empowered the District Courts to try all the cases under their respective jurisdiction.

#### **❖ Appointment**

According to the Article 109 of the Interim Constitution of Nepal, 2007 A.D. the judges of the District Court are appointed by the Chief Justice of Nepal on the recommendation of the Judicial Council.

#### **❖ Qualification**

Any Nepali citizen who has Bachelor's Degree in law and has a three years' experience worked as Gazetted officer second class in the judicial service or has practiced law for at least eight years as an advocate after obtain in Bachelor's Degree in law is eligible for appointment as a District Court Judge.

In addition to the above there is provision for direct recruitment of an advocate holding Bachelor's Degree in law by passing a written and oral examination conducted by the judicial council.

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<sup>28</sup> Article 109 (10) the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.)

### 5.2.6 Special Court

The Interim Constitution of Nepal, 2007 A.D. also provides for Special Courts in Nepal including Administrative Court, Inland Revenue Tribunal, Debit Recover Tribunal, and Labour Court etc.<sup>29</sup>

### 5.3 The Constitutional Framework

In Nepal's current constitutional framework, the constitution has been declared as the Supreme law.<sup>30</sup> Having accepted the principle of constitutional supremacy by laying down that other laws shall be null and void to the extent they are inconsistent with the constitution,<sup>31</sup> it is declared that it shall be the duty of each and every person to abide by the constitution.<sup>32</sup>

The Interim Constitution of Nepal, 2007 A.D. laid down, that powers relating to justice in Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of the Constitution, the laws and the recognised principles of justice.<sup>33</sup> The constitution provides three tiers of court<sup>34</sup> including the Supreme Court of Nepal,<sup>35</sup> the Courts of Appeal<sup>36</sup> and the District Courts<sup>37</sup> and other Courts, and it stipulates that judicial bodies or tribunals may be established<sup>38</sup> and constituted under the prevailing law for hearing and settling special types of cases.<sup>39</sup>

The constitution stipulated that the Supreme Court shall be a highest court of the judicial hierarchy.<sup>40</sup> All other courts and judicial institutions other than the Constituent Assembly Court shall be under the Supreme Court.<sup>41</sup> The Supreme Court shall be Court of Record,<sup>42</sup> that is, it may impose penalties for contempt of itself and of its subordinate courts or judicial bodies, and that the final authority for interpreting the constitution and other prevalent laws except on the matters that fall under the jurisdiction<sup>43</sup> of the Constituent Assembly (CA) is vested in it. If a Nepalese citizen files a petition to have any law or any

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<sup>29</sup> Article 101 (2)

<sup>30</sup> Article 1 of the Interim Constitution of Nepal, 2063 B.S. (2007 A.D.)

<sup>31</sup> Article 1 (1)

<sup>32</sup> Article 1 (2)

<sup>33</sup> Article 100 (1)

<sup>34</sup> Article 101

<sup>35</sup> Article 101 (1) (a)

<sup>36</sup> Article 101 (1) (b)

<sup>37</sup> Article 101 (1) (c)

<sup>38</sup> Article 101 (2)

<sup>39</sup> Article 101 (2)

<sup>40</sup> Article 102 (1)

<sup>41</sup> Article 102 (2)

<sup>42</sup> Article 102 (3)

<sup>43</sup> Article 102 (4)

part thereof declared void on the ground that it imposes unreasonable restrictions on the enjoyment of a fundamental right conferred by the constitution or contradicts it on any ground,<sup>44</sup> the Supreme Court has the extraordinary power to declare that law *void-ab-initio* or from the date of its decision if it appears that the law in question is inconsistent with the constitution. The Supreme Court has been described as an upholder of the fundamental rights that are conferred by the constitution. The constitution empowers the Supreme Court to issue appropriate orders and writs, including the writs of *habeas corpus*, *mandamus*, *certiorari*, *prohibition* and *quo warranto*, for the enforcement of the fundamental rights conferred by the constitution or any other legal right for which no other legal remedy has been provided or, even if provided, is inadequate or ineffective for settling any constitutional or legal question involved in a dispute of public interest or concern.<sup>45</sup> The Supreme Court is equipped with various writs for the protection of citizens' fundamental rights or for the protection of public rights by resolving public concerns that entail a constitutional or legal question.

In addition to the extraordinary jurisdiction mentioned above, the constitution has conferred the Supreme Court with the general right to hear original and appellate cases, to examine referrals, review cases and hear petitions.<sup>46</sup> There is even a provision for the Supreme Court to review its own judgements or final orders subject to the conditions and in the circumstances prescribed by law.<sup>47</sup>

#### **5.4 The Legislative Framework**

The system of criminal administration is being carried out in Nepal through a number of legislations. Each of these legislations often dealt with different aspect of the criminal administration system. Discussion of these legislations brings out a realistic idea as to how the Criminal Justice System functions in Nepal

##### **5.4.1 Administration of Justice Act, 2048 B.S. (1991 A.D.)<sup>48</sup>**

The Act has undergone six amendments; latest amendment was on 21<sup>st</sup> Jan. 2010. The Preamble of the Act specially refers to the purpose of the Act, that, is to establish the jurisdiction of the courts in order to render inexpensive and accessible justice. This Act is

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<sup>44</sup> Article 107 (1)

<sup>45</sup> Article 107 (2)

<sup>46</sup> Article 107 (3)

<sup>47</sup> Article 107 (4)

<sup>48</sup> Act No. 6 of the year 2048 B.S. (1991 A.D.) notified by Nepal Gazette on 30<sup>th</sup> May 1991.



promulgated under Article 129 of the Constitution of Kingdom of Nepal, 2047 B.S. (1990 A.D.).<sup>49</sup> The Act has thirty three sections divided into four chapters and a schedule.

The first chapter deals with the title followed by the name<sup>50</sup> and definitions, such as District Judge<sup>51</sup>, Judge of the Appellate Court.<sup>52</sup> The second chapter, deals with the establishment of District Court<sup>53</sup> and Court of Appeals,<sup>54</sup> and also deals with power to entrust jurisdiction of other area to district judge.<sup>55</sup> It also speaks about power to specify other location of Court of Appeal.<sup>56</sup>

The Chapter three deals with jurisdiction of the courts and exercise thereof, jurisdiction of District Court,<sup>57</sup> jurisdiction of Court of Appeal,<sup>58</sup> and an appeal may lie in the Supreme Court,<sup>59</sup> provision of the reference of cases<sup>60</sup> and further provisions of the review<sup>61</sup> as well as revision.<sup>62</sup> It has also discussed provision of compromise<sup>63</sup> the powers of court while hearing appeal and also court hearing reference<sup>64</sup> have been spelt out. Situation of the withdrawal of cases from subordinate courts,<sup>65</sup> contempt of court and finality of decisions of the Court<sup>66</sup> are specified therein. This chapter also gives Court of Appeal power of inspection and evaluation<sup>67</sup> of the subordinate courts, and the power of the Court of Appeal of hearing of *habeas corpus* petitions.<sup>68</sup>

The last chapter that is chapter four elaborates the way in which the judges have to functions or perform their duties in matters relating appeal to the Court of Appeal,<sup>69</sup> power of

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<sup>49</sup> Article 129 After the commencement of this Constitution, His Majesty shall have the power to enact laws as required on the recommendation and advice, and with the consent of the Council of Ministers until the commencement of the first session of Parliament.

<sup>50</sup> Section 1 of Administration of Justice Act, 2048 (1991 A.D.)

<sup>51</sup> Section 2 (b)

<sup>52</sup> Section 2 (c)

<sup>53</sup> Section 3 (1)

<sup>54</sup> Section 5 (1)

<sup>55</sup> Section 4A inserted by the first amendment on 13<sup>th</sup> August, 1991)

<sup>56</sup> Section 5A amended by the second amendment on 11<sup>th</sup> December, 1996)

<sup>57</sup> Section 7

<sup>58</sup> Section 8 (1)

<sup>59</sup> Section 9 (1)

<sup>60</sup> Section 10

<sup>61</sup> Section 11

<sup>62</sup> Section 12

<sup>63</sup> Section 13A Inserted by the Judicial management and Administration of Justice Related Some Nepal Acts (Amendment) Act, 2058 B.S. (2001 A.D.)

<sup>64</sup> Section 14

<sup>65</sup> Section 15

<sup>66</sup> Section 19

<sup>67</sup> Section 20

<sup>68</sup> Section 23

<sup>69</sup> Section 27

the Supreme Court to issue direction<sup>70</sup> and finally the Act has repealed the earlier legislation namely, the Administration of Justice Act, 2031 B.S. (1974 A.D.).<sup>71</sup>

The Administration of Justice Act, provides that an appeal may lie in the Supreme Court against the judgments or final orders made by the Court of Appeal<sup>72</sup> and it may reverse, fully or partially, the decisions of the Court of Appeal in the cases that were originally heard or settled by Court of Appeal,<sup>73</sup> cases that entail punishment of imprisonment of ten years or more, or decisions of the District Court or officer and the appeal against that decision.<sup>74</sup> The Act has made provision for the Supreme Court to hear cases that entail punishment of imprisonment for ten years or more along with confiscation of property or life imprisonment,<sup>75</sup> delivered by the Court of Appeal, if the case is referred to it or if a party files an appeal. The Supreme Court may review its verdict or final order only<sup>76</sup> if a party concerned discovers a fact that may have material implications as evidence for the judgement of the case<sup>77</sup> or if its verdict or final order is contradictory to a precedent set by it or to legal principles.<sup>78</sup> Likewise, pursuant to petitions for review of the case, the Supreme Court may review the judgement or final order of the Court of Appeal in cases where appeal cannot be heard by the Supreme Court against the decision of the Appellate Court upholding the decision of a lower court.<sup>79</sup>

Whereas, Court of Appeal has the authority to hear the initial decision or final order in a case heard by any authority or officer within its territorial (provincial) jurisdiction,<sup>80</sup> examine referrals and, if any authority or officer infringes on the lawfully granted right within its territorial jurisdiction, to issue the writs of *habeas corpus*, *mandamus* or *injunction*,<sup>81</sup> an amendment to Section 8 of the Act for Amending Some Nepal Acts Related to Judicial Administration, 2067 B.S. (2010 A.D.) has added the writs of *certiorari*, *prohibition* and *quo warrant* by amending Section 8 of the Administration of Justice Act, 2048 (1991 A.D.).<sup>82</sup> There is a provision granting district courts the right to initiate

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<sup>70</sup> Section 30

<sup>71</sup> Section 33 (1)

<sup>72</sup> Section 9 (1)

<sup>73</sup> Section 8 (3) (a)

<sup>74</sup> Section 9

<sup>75</sup> Section 9 (1) (c)

<sup>76</sup> Section 11

<sup>77</sup> Section 11 (1) (a)

<sup>78</sup> Section 11 (1) (b)

<sup>79</sup> Section 12 (1) (a)

<sup>80</sup> Section 8 (1)

<sup>81</sup> Section 8 (2)

<sup>82</sup> Amendment of Some Nepal Acts Related to Judicial Administration, 2067 B.S. (2010 A.D.), Nepal Gazette, Section 60, Kathmandu, on 28<sup>th</sup> March 2011, Supplementary Issue 37

proceedings and settle all cases within its area of jurisdiction, except when a prevalent law has made other provision.<sup>83</sup> The Act amending Some Nepal Acts has decentralized jurisdiction with the District Court having the right to issue writs of *habeas corpus* or *injunction*<sup>84</sup> within its jurisdiction. The law provides that the territory delineated for administrative purposes shall be the jurisdiction of the District Court.<sup>85</sup>

#### 5.4.2 The Supreme Court Act, 2048 B.S. (1991 A.D.)<sup>86</sup>

This Act was passed on 14<sup>th</sup> Nov. 1991 this Act has twelve Sections and schedule. The Preamble of this Act, says the purpose of the Act is to provide suitable legal provisions for the Supreme Court to function. Section 1 of this Act, deals with the title and section 2 defines the to like Chief Justice<sup>87</sup> and Justice<sup>88</sup> etc., the location of the Supreme Court is prescribed under section 3 and section 4 empowers the Supreme Court to exercise the jurisdiction either as a single judge bench or division bench, full or special bench<sup>89</sup> as well as full court.<sup>90</sup> The Court may encourage attendance of the concern parties while fixing the date (*Tarikh*) under section 5; section 6 has been repealed.<sup>91</sup> Section 7 deals with contempt of Supreme Court and Subordinate Courts.<sup>92</sup> In section 8 is relating to the oath of office of Chief Justice and other Judges. Section 9 is regarding powers and the function of the Registrar of the Court, section 10 is the annual report of the Supreme Court, section 11 deals with power to frame rules to regulate the exercise of its jurisdiction and systematize the procedure<sup>93</sup> and section 12 is repealing the earlier Act.<sup>94</sup>

#### 5.4.3 The Government cases Act, 2049 B.S. (1992 A.D.)<sup>95</sup>

The Act came to existence on 21<sup>st</sup> January 1999; it has two amendments the last amendment was on 14<sup>th</sup> Oct. 2006. The Preamble of the Act clarifies that this Act, specifically deals with, in those situations where the Government is plaintiff and in relation to

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<sup>83</sup> Section 7 Ibid.,

<sup>84</sup> Inserted Section 7 (2) in this Act, amendment made by the Act amending Some Nepal Act, 2067 B.S. (2010 A.D.)

<sup>85</sup> Section 7 (1) the Administration of Justice Act, 2048 B.S. (1991 A.D.)

<sup>86</sup> Act No 29 of the year 2048 B.S. (1991), an Act enacted to provide for Supreme Court notified by the Nepal Gazette

<sup>87</sup> Section 2 (b) of the Supreme Court Act, 2049 B.S. (1992 A.D.)

<sup>88</sup> Section 2 (c)

<sup>89</sup> Section 4 (1)

<sup>90</sup> Section 4 (2)

<sup>91</sup> *Ipsa facto* ceased to operate since the declaration of House of Representative on 18<sup>th</sup> May, 2006 A.D

<sup>92</sup> Section 7 (1)

<sup>93</sup> Section 11 (1)

<sup>94</sup> The Supreme Court Act, 2019 B.S (1962 A.D.) hereby repeal,

<sup>95</sup> Act No. 43 of the year 2049 B.S. (1992 A.D.) notified by the Nepal Gazette

the defense of cases filed against the Government. The Act has in all 38 Sections and also 2 Schedules. Section 1 of this Act deals with the short title and commencement, section 2 gives the definition of terms the Government Attorney, Court, Office of the Government Attorney etc. Section 3 deals with the information about crime, as specified in Schedule - I, by a person who comes to know about same to the nearby Police Office. This section also mandates the kind of details of information, to be provided by such person, Section 4 is about the duty of the Police Officer upon receiving such information to act, so as to ensure that the evidence does not disappear or is destroyed and perpetrator does not escape. Section 5 cast an obligation on the police officer to inform such Police Office, if the crime is outside of his jurisdiction. Section 6 mandates the police officer to submit the preliminary report and Section 7 prescribe the matters that should be in such reports.<sup>96</sup> Sections 8 and 9 provide the manner of obtaining statement from the witness or any other person.

Similarly, section 10 provides the procedure to be followed in such cases, section 11 is relating to procedural for report of the corpse, section 13 is about opinion and expert evidence, section 14 is regarding arrest. Section 15 prescribes the procedure for detention, for investigation and the procedure. Section 16 is regarding identification; Section 17 is submitting report with opinion, section 18 relating to filing charge sheet. Section 21 speaks of release of the person kept in the custody, section 22 of this Act is regarding procedure for inquiry of the Civil case and case filing procedure, for appeal or review regarding the Nepal Government prescribe under Sections 23 and 24. Section 26 is about giving time period for appeal and section 27 deals with determining the concerned person as party. Similarly, Section 28 is relating to mitigation in punishment for complaint. Section 29 deals with withdrawal of the Government case or reconciliation and other sections deal with minor matters when government is involved in litigation procedure.

### **5.5 The Criminal Justice System in Nepal**

The Criminal Justice System in Nepal has a strong historical basis. There was an effective Criminal Justice System even during the earlier period, followed by codification of the criminal law. The Criminal Justice System as it exists today is a very comprehensive system consisting of number of legislation apart from the General Code which deals crime and punishment. However, Nepal having declared itself a constitutional democracy the discussion on the Criminal Justice System begins with the constitutional provision which of

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<sup>96</sup> Section 7 (2) of the Government cases Act, 2049 B.S. (1992 A.D.).

course forms the fundamental basis of the Criminal Justice System.

The Constitution stipulates that rights regarding justice,<sup>97</sup> no person shall be detained in police custody without being informed of the ground for such an arrest,<sup>98</sup> the arrested person shall have the right to consult a legal practitioner of her or his choice at the time of the arrest and she or he shall not be deprived of the right to be defended by her or his lawyer.<sup>99</sup> The Constitution further stipulates that the arrested person shall be produced before a judicial authority within twenty-four hours of such arrest, excluding the time of travel, and such person shall not be held in custody except under an order of such authority.<sup>100</sup>

The Constitution has been laid down that no person shall be made to suffer a punishment in lieu of an act for which no prevalent law prescribes a punishment and no punishment may be handed down exceeding what is prescribed in the prevalent law.<sup>101</sup> It stipulates that no person accused of any offence shall be assumed guilty<sup>102</sup> until proven guilty.<sup>103</sup> Apart from this, no person shall be prosecuted or punished for the same offence in a court of law more than once.<sup>104</sup> A fair trial has been guaranteed to a person who has been accused of any offence by granting her or him<sup>105</sup> the right to not to be compelled to give testimony against herself or himself.<sup>106</sup> In addition, it has been guaranteed that a person shall have the right to a fair trial by a competent court or judicial authority and that any indigent person shall have the right to free legal aid<sup>107</sup> in accordance with law.

In addition to the aforementioned rights, it is provided that no woman shall be inflicted physical, mental or any other form of violence and that such an act shall be punishable by law.<sup>108</sup> It is guaranteed that no child shall be subjected to physical, mental or any other form of exploitation; any such acts of exploitation shall be punishable by law and any child so treated shall be compensated as determined by law.<sup>109</sup> Provision has been made that no person shall be subjected to physical or mental torture during investigation, trial or interrogation or in detention and she or he shall not be treated in a cruel, inhuman or

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<sup>97</sup> Article 24

<sup>98</sup> Article 24 (1)

<sup>99</sup> Article 24 (2)

<sup>100</sup> Article 24 (3)

<sup>101</sup> Article 24 (4)

<sup>102</sup> There is a provision that the Attorney General shall have the right to make the final decision on whether or not to initiate proceedings in any court or judicial authority and the Attorney General may delegate such right to a subordinate officer (Article 135) of the Interim Constitution of Nepal, 2007 A.D.

<sup>103</sup> Article 24 (5)

<sup>104</sup> Article 24 (6)

<sup>105</sup> Article 24 (9)

<sup>106</sup> Article 24 (7)

<sup>107</sup> Article 24 (10)

<sup>108</sup> Article 20 (3)

<sup>109</sup> Article 22 (3)

degrading manner; any such act shall be punishable by law<sup>110</sup> and any person so treated shall be compensated in a manner determined by law.<sup>111</sup> Likewise, constitutional guarantee has been made that every person shall have the right against exploitation,<sup>112</sup> that no person shall be exploited in the name of custom, tradition and practice or in any other way,<sup>113</sup> and that nobody shall be engaged in work against her or his will.

The Directive Principles and Policies of the State mentioned that the International treaties and agreements to which the State is party shall be effectively implemented, and that provision shall be made for appropriate relief, recognition and rehabilitation for the families of those killed or wounded in the course of the armed conflict, that relief shall be made available to the families of disappeared persons, on the basis of the report of the Investigation Commission constituted to investigate the cases of persons who were the subject of enforced disappearance in the course of the armed conflict, and that a High Level Truth and Reconciliation Commission shall be constituted<sup>114</sup> to investigate facts about those persons involved in grave violations of human rights and crimes against humanity in the course of the armed conflict and to create an atmosphere of reconciliation in society.<sup>115</sup>

## 5.6 Historical Evolution of Criminal Law in Nepal

The *Gopal* dynasty<sup>116</sup> was first ruling dynasty of Nepal followed by *Mahishpal*<sup>117</sup> dynasty. The history of Nepal is dark during these two ruling dynasties, therefore, criminal law of the then Nepal is unknown. After *Mahispal*, *Kiarat*, *Lichchavi*, *Malla* and *Shah* ruled Nepal respectively before codification of first unified Code of Nepal.<sup>118</sup> The period of Kirat who ruled Nepal in 7<sup>th</sup> century B.C. and the early 6<sup>th</sup> century B.C.<sup>119</sup> is considered as beginning of *Kirata* Rule in Nepal. During this period crime were not defined but enumerated viz., murder, incest, theft, looting, quarreling, cheating, greediness, etc. all these crimes were

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<sup>110</sup> Article 26 (1)

<sup>111</sup> Article 26 (2)

<sup>112</sup> Article 29 (1)

<sup>113</sup> Article 29 (2)

<sup>114</sup> Article 33 (R) of the Responsibilities, Directive Principles and Policies of the State in Part 4 of the interim Constitution of Nepal, 2007.

<sup>115</sup> Article 33 (S)

<sup>116</sup> *Supra*, Chapter - II, p. 28

<sup>117</sup> *Supra*, Chapter – II, p. 29

<sup>118</sup> The History of Nepal, <http://www.angelfire.com/ca2/shammons/nepalhist.html>, downloaded on 21<sup>st</sup> August 2014 at 11:56

<sup>119</sup> *Supra*, Chapter – I, **Introduction, Political and Legal History of Nepal**, p. 11

the traditional crimes continued with the existence of human civilization.<sup>120</sup> However, accused was not punished until he is found guilty in alleged crime.

### 5.6.1 Crime and Punishment in during Lichchhavi Period

The Kirat dynasty was followed by the Lichchhavi rule. There was concept of *Panchaparadh*, various crimes were considered as *Panchaparadh* such as murder, rebel against King or State, theft, adultery, giving company to them or any one of them were considered as five major crimes popularly also known as *Panchkhat*.<sup>121</sup> During this period, the punishments were based on Hindu Religious text. Capital punishment was frequently meted out for grievous types of crime like treason, murder, sexual offences, theft and so on.<sup>122</sup> Exile could also be meted out in such heinous crimes, if criminal could not be sentenced to death due to religious cause since Brahmin and female were not punished to death.<sup>123</sup> Hence, it appears that the Lichchhavi's Criminal Justice System was not reformatory but totally punitive so as to deter the others.<sup>124</sup> So much so, even the family members of the criminal were punished. Hence, it can be said that the criminal law of Lichchhavi's was based on *Dharmasastra*.<sup>125</sup> Punishment could be varied on the basis of severity of crime, intention, place, time, power of criminal, age of criminal, nature of crime, economic condition of crime.

### 5.6.2 Crime and Punishment during Malla Period

By 1200 A.D., new ruling dynasty of the Mallas' emerged, when Ari Malla (1257-1283 BS) started to rule Nepal.<sup>126</sup> They ruled until 1769, when Prithvi Nayan Conquered the Nepal Valley. In fact the history of Nepal from 1200 A.D. to the 18<sup>th</sup> century was the history of the Newar under Mallas'. During the 'Malla', period a written codified law was introduced called *Manavnyayashastra*<sup>127</sup> based on Hindu religious text. This code was highly influenced by *Naradasmriti* along with other *Smirtis* like *Manusmriti* and *Yagyabalkyasmriti*

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<sup>120</sup> Petech, Luciano. "**Mediaeval History of Nepal**" (ca.750-1480) 2 Ed. Serie orientale, toma 54, Rome: Institutio Italiano per il Medio Oriente, 1984 A.D.

<sup>121</sup> Khanal, Rewati Raman, "**Nepal ko Kanooni Itihasko Ruprekha (An outline of Legal History of Nepal)**", Kathmandu: Saraswati Khanal, 2059 B.S., p. 25

<sup>122</sup> Vaidya, Tulsi Ram and Manandhar, Tri Ratna, "**Crime and Punishment in Nepal: A historical Perspective**," Kathmandu: Bini Vaidya and Purna Devi Manadhar, 1985 A.D., p. 19).

<sup>123</sup> Gyaindra Bahadur Shrestha, "**Hindu Jurisprudence and Nepalese Legal System**", Kathmandu: Pairavi Prakashan, 2056 B.S., p. 195

<sup>124</sup> Bajracharya, Dhannbajra "**Lichchhavi kal ko Naya Vyavastha ko Ek Ehalak**" in Purnima, 4, no. 4 Kathmandu: Samshodhan Mandal, 2024 B.S., Pp. 345-55

<sup>125</sup> Supra, f. n. No. 80, p. 17

<sup>126</sup> Acharya, Shri Krishna, "**Nepalko Sankshipta Brittanta**", Kathmandu, Ratna Pustak Bhandar", 2063, p. 53.

<sup>127</sup> Laws made by King Jayasthitaraj Malla in Bikram Era, 1436 (Nepal Era 500) NYAYAVIKASINI (Manavanayashastrat)

*etc.*<sup>128</sup> It was all pervasive because it covers various aspect of law. A commentary on this code was also prepared in Nepal Bhasa at that time. Sexual offence was one of the heinous crimes during this period. Sexual offence, generally, included incest, other sexual offences like rape and adultery, unnatural sexual offences including sodomy, bestiality, having sexual intercourse during monthly period, having sexual intercourse in improper place, masturbation, and passing urine in the female organ. Capital punishment was common in this period; however, Brahmins were not sentenced to death due to religious reasons but Brahmin were shaved and exiled if they committed capital crime.<sup>129</sup> The system of beheading of adulterer by the husband was also common except in Newar Community.

### 5.6.3 Shah Period before Unification during Ram Shah Regime

Ram Shah was the fourth King of Shah Dynasty. He ruled Gorkha kingdom, while Malla Kings were ruling Kathmandu valley, and his name spread far and wide for his sense of Justice and Judicial System beyond his kingdom. During his reign, he promulgated many "Edicts"<sup>130</sup> known as *Sthities*. However, the Hindu religious scriptures were the main basis of his legal and judicial reforms. During his time, the *Dharmadhikara* was the main judicial official. Only a Brahmin Pundit could become a principal judicial authority (*Dharmadhikara*).<sup>131</sup> However, Shah himself heard cases of serious nature and had the responsibility of supervising the lower judicial institutions. Ram Shah's reform was directed especially towards the betterment of administration of justice. He was so popular for his justice system, that, the bordering states used to refer complicated disputes to his court.

The famous expression is still in public, i.e., "*Vidyā hārāyā kāshā jānu, nishāp hārāyā gorkhā jānu*"<sup>132</sup> which meant that "*if knowledge is lost, go to Kashi, if justice is lost, go to Gorkha.*" During this period murder, sexual crimes like adultery, incest, having sexual relation with upper or lower caste, crimes against King and State, crimes against property including theft, burglary and crime against religion. Witchcraft was also punishable. Fading trees around water source i.e. public tap was forbidden. Excessive interest on loan and disregard to cast system was also punishable. To participate in reconstruction of inland

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<sup>128</sup> Shrestha, Sabita "Historical Evolution of Criminal law in Nepal," [lawsabita.blogspot.com/.../historical-evolution-of-criminal-law-in.html](http://lawsabita.blogspot.com/.../historical-evolution-of-criminal-law-in.html)

<sup>129</sup> Supra, Khanal. p. 38

<sup>130</sup> Theodore Riccardi, Jr. "The Royal Edicts of King Rama Shah of Gorkha," New york, p.32

<sup>131</sup> Supra, Kautilyante Arthasastram, p. 20

<sup>132</sup> Yogi Naraharinath, "Gorkhavamshavali," Kashi, B.S. 2021, p. 39



waterway (canal) was considered public duty and breach of such duty was punishable.<sup>133</sup> King Ram Shah introduced new theory of punishment to reform the Criminal Justice System by not punishing the family members of a criminal if they did not take part in the crime. He had prepared a Code (*Sthiti*) which had the provision '*Jasko pap usako gardhan*' which reflected the modern concept of punishment.<sup>134</sup> The terms *pap* (sin) refers to crime and *gardhan* refers to punishment which could be extended to capital punishment. It shows that only criminal who indulged in criminal activities would only be punished and his family members won't be punished, who are not involved in criminal activities. Previously, family members of offenders were also punished. This is one of his major reforms which established doctrine of personal penal liability in Gorkha. Physical (capital and corporal) and pecuniary (fine up to the confiscation of the entire property) punishments were main forms of punishment. Banishment and social denunciation also existed. *Chautariyas*, *Bhaibhars*, *Sagotri*, *Sanyasi* (hermit), *Bairagi* (sant mahants), *Bhat*, old-aged, juveniles, women and *Brahmins* were not sentenced to death even if they committed capital crimes and other heinous crimes. They could be banished and male criminals were shaved their heads. These types of punishment were based on *Dharmashastra*.<sup>135</sup>

The punishment was based on the degree of the criminality and justice was done by King and by his successors, by touching the stone (taking oath to do justice). Royal family members would not be sentenced to death for murder rather they would be banished from the country, however, people of *Khas*, *Newar*, *Magar* and other communities who committed capital crimes would be sentenced to death with confiscation of whole of their property.<sup>136</sup> In that era, identity of crime, *mens rea*, degree of crime, time period, strength, age, job, economic status of criminal etc. were taken into consideration while making judgment. This was based on *Yagyabalkyasmriti*. Criminals were punished by the King impartially and the concept of equality before law was accepted. Besides, the provision of *Sukaraniti*, which believed that crime dies with criminal, was well recognized.<sup>137</sup> Criminal Justice System of Ram Shah was based on *Dharmashastra*.

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<sup>133</sup> Khanal, Rewati Raman, *Nepal ko Kanooni Itihasko Ruprekha (An outline of Legal History of Nepal)*, Kathmandu: Saraswati Khanal, 2059 B.S., p. 63

<sup>134</sup> Supra, Chapter – II, p. 30

<sup>135</sup> Ibid., Pp. 63-64

<sup>136</sup> Yogi Naraharinath, "Itihas Prakash," No. 2, Part – III, Kathmandu 2013 B.S. (1952 A.D.), Pp. 419-426

<sup>137</sup> Ibid., p. 65

#### 5.6.4 Shah Period after Unification

The judicial system of this period has its origin in the legal contribution of Ram Shah, Prithivi Narayan Shah and the legal and judicial systems thereafter i.e. before the advent of the Ranas' in the Political scene. The unification of Nepal did not bring about any considerable change in the system of the country.<sup>138</sup>

King Prithvi Narayan Shaha promulgated the Code (Ain) in 1825 B.S. just after conquering Kathmandu valley. The provisions of General Code, 1854 relating to confiscation the property of offenders of crime against State, proved the existence of the Code.<sup>139</sup> During his regime, crime against peace was a serious type of crime. Bribery was one of the heinous types of crime.<sup>140</sup> Other crimes which were considered as crime before his regime also continued in this period. *Panchkhat* was also accepted as a serious crime, however, it is not clear what types of crimes were fall under this category. Traditional types of crime like murder, bribery, sexual offences, crime against peace, crime against King and State, crime against property like looting, theft were major crimes. Getting married with widow sister in law by Brahamins was prohibited. Taking alcohol by upper castes people (*tagadhari*) were also punishable.<sup>141</sup> The offence of espionage against State during war time was a serious crime.<sup>142</sup>

The judiciary system with the King at the apex could, award various types of punishments to the criminals like confiscation of the whole property, banishment of the whole family, degradation of the whole family by putting them lowest caste, maiming of limbs, death by cutting the throat.<sup>143</sup> The objective of punishment was based on deterrence and such deterrence was specific and general. He instructed that for serious types of punishment likes bribery be dealt with death sentence and confiscation of property. Capital punishment was prevalent for murderer, however, *Brahamins*, *Sanyasi*, *Jogi*, *Bairagi* and females were not sentenced to death, therefore, they were punished with other than capital punishment. A Royal family member had to be banished from the Kingdom if he was found guilty of murder. Adulterers were cut by the victim in case of Jari, however, those people, who could not be punished with death, were banished. During the Shah period, imprisonment

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<sup>138</sup> Prakash Osti, "**Kanoon Sambandhi Kehi Eitihask Abhilekhaharu**", Kathmandu: Kanoon, Ed. 2063 B.S., p. 96

<sup>139</sup>Section 16 and 17, Chapter on Document Scrutiny, Muluki Ain, 1910 B.S.

<sup>140</sup> Acharya, "**Shri Panch Badamaharajadhiraj Prithivi Narayan Shahko Sankshpta Jivani**", Kathmandu: Shri Panch Maharajadhirajka Sambad Sachivalaya, 2061 B.S., p. 449.

<sup>141</sup> Ibid., p. 454

<sup>142</sup> Khanal, Rewati Raman, "**Nepal ko Kanooni Itihasko Ruprekha (An outline of Legal History of Nepal)**", Kathmandu: Saraswati Khanal, 2059 B.S., p. 65

<sup>143</sup> Supra, Yogi Narharinath, f.n. No. 108, p. 38

was also a form of punishment, however, it is not clear that whether regular types of prison system existed or not?

The punishment system of Shah Period was both retributive and punitive; though the penal policy before that period was retributive. Penal policy was based on the caste status, gender status and religious status of criminals. Personal revenge was allowed. It was believed that the punishment should have the general and specific deterrent effects. The reformatory approach of punishment was not recognized, however, some humanitarian grounds were taken into consideration while fixing the quantum of sentence like age, *mens rea*, economic status, strength of the criminals. The regular prison system was not established, but, a system of imprisonment existed and facts show that special prisons were created for specific criminals. Some form of punishments were inhumane and barbaric like mutilation, down grading to lower caste, feeding inedible things, individual revenge by the victim, forced to wear disgusting things, enslavement, banishment from country etc. However, some changes in penal system were made, which are equivalent to modern concept of punishment like punishment only for wrongdoer, no harsh punishment for juveniles and females. Thus, criminal law of Shah Period marched towards modernization and humanization.

## **5.7 Codification of Criminal Law**

It is interesting to note that following the continental system Nepal attempted to implement a comprehensive Code as it existed in the civil law countries. But Nepal happened to be a mix of Common Law System and also the Civil Law System, this being so the Code did not achieve the required purpose as it happened in the civil law countries but the code did come into existence and that makes Nepal unique in its own right.

### **5.7.1 The Muluki Ain, 1910 B.S. (General Code, 1854 AD)**

Muluki Ain, 1910 (General Code, 1854 A.D.) was the first comprehensive and consolidated Code in Nepalese legal history. The General Code was original accompanied by three special enactments one relating to the throne known as the *Gadiko Ain*, another relating to the affairs of the affairs ate known as the *Rajako Ain* (the law of the King) and the third one relating to affairs of the armed forced known as the *Jangi Ain*.<sup>144</sup>

The preamble to the General Code throws light on the conditions of those times particularly in respect of the administration of criminal justice and thereby shows the

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<sup>144</sup> Supra, f.n. 142 (R.R. Khanal, p. 301)

necessity of the legislation. The Code encompasses both the criminal and civil matters after the political unification of Nepal.<sup>145</sup> The Code provided that the punishment shall be awarded uniformly in accordance with crime and caste of the offender.<sup>146</sup>

Consequently, code had reformed and codified then prevailing laws scattered in different sources of law such as *Sanadas, Sawal, Rukka* etc., along with rules of criminal law together with rules of other branches of law in a single Code. The creation of *Ain Kausal* to codify, consolidate, unify, make and amend laws was, therefore, itself a progressive and radical move in a traditional Hindu Society. The codification of General Code, 1854 A.D. ended the era of un-codified law and started the new era of codification of Nepalese laws in the legal history of Modern Nepal. General Code, 1854 A.D. had made no substantial changes either to substantive law or to the rules of evidence and procedure because Nepal, at that time, was not in a position to introduce reforms that were alien to the traditional legal system and the then Nepalese society. It has some features, like, if someone saw an offence being committed but did not report it, he would be punished. Persons who brought a violation of law to the notice of the court were rewarded if their allegations were proved, but punished if their claims could not be proved. Code made every citizen of the country responsible in the maintenance of law and order.

### **5.7.2 Recognition of caste based Punishment System**

Code incorporates the principle of caste system for the purpose of criminal law as handed down from the early period of Modern Nepal. General Code, 1854 A.D. had clearly laid down the principle of punishment to be determined both by the degree of seriousness of the offence and the caste of the offender. The General Code had only legislatively recognized the caste system and its classification which already existed in Nepalese society since the early period of modern Nepal.

### **5.7.3 Relatively Human and Progressive**

The General Code 1854 A.D. was considered more human and progressive. It reduced savagery and severity of punishments like sentence on death penalty, mutilation and banishment which were common punishments even for minor crimes in the beginning of modern Nepal.

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<sup>145</sup> Dr. Rajibhakta Pradhanaga, "An overview of Efforts towards Codification of Criminal Laws in Nepal", Nepal Law Review, Kathamandu: Nepal Law Campus, vol. 16, 2003, p. 74

<sup>146</sup> Preamble of the Muluki Ain (General Code) 1910 B.S., (1854 A.D.)

#### 5.7.4 Prohibitive Approach

The General Code, 1854 A.D. had followed prohibitive approach i.e., it means that it had prohibited certain human behavior and declared certain kinds of punishments in case of violation of such criminal law norms. It had been legalized and codified various kinds of traditional procedural institutions such as; *Niya Bhakaune* (trial by order), or *Dharma Bhakaune* (trial by Religion). In the case where absence of any evidence in the favours of both parties in such case the court may collect twenty-five gentlemen to decide such case. Among the criminal case there were no classification of State case and private case, General Code had not fixed and developed any mode and format of criminal procedure. This code had mainly given emphasis on criminal laws and procedures.

#### 5.7.5 Muluki Ain, 2020 B.S. (General Code 1963 A.D.)<sup>147</sup>

The Muluki Ain (General Code 1963 A.D.) is the general law of the country. This was promulgated on 12<sup>th</sup> April, 1963 and came into force on 15<sup>th</sup> August 1963. This law is recognized both as the civil and criminal code.<sup>148</sup> In all matters on which separate laws have been enacted, action shall be taken as provided in these laws. In case no specific provision exists in these laws, action shall be taken in accordance with this code.<sup>149</sup> This general law includes the general rules of procedure to be followed by the courts and law enforcement agencies.<sup>150</sup> The provisions are also related to civil liberties, such as the provisions on imprisonment, bail<sup>151</sup> etc. by the amendments to the code the twenty-seventh amendment<sup>152</sup> is significant, and in regard to the compliance of International obligations outlined in the major human rights instruments.<sup>153</sup>

The General Code, 1963 A.D. is based on the Napoleonic Code. The preamble of this act has clearly mentioned that though religious literatures (*Shastra*) cannot deals with all aspect of human transactions and the court. The code is an attempt to consolidate various laws and regulations that then existed in Nepal. It also mentions that Code was issued

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<sup>147</sup> Act No. 67 of the year 2019 B.S. (1963 A.D.) notified by Nepal Gazette on 12<sup>th</sup> April, 1963.

<sup>148</sup> Muluki Ain (General Code) Part 2 Part 3, Chapter No. 1 to 22 deals with Civil law and Part 4, Chapter No. 1 to 19 deal with Criminal law.

<sup>149</sup> Part 1, on Preliminary Matters

<sup>150</sup> Part 2, Chapter No. 1 On Court Proceedings No. 29

<sup>151</sup> Part 2, Chapter No. 1 On Court Proceedings No. 118

<sup>152</sup> Act No. 8 of 2072, the amendment was made by the Abolish of Violation against Gender Discrimination Act, 2072 B.S. (2015 A.D.) notified by Nepal Gazette 2072, vol. 65, additional 15 (d) on 1<sup>st</sup> Oct. 2015 A.D.

<sup>153</sup> Ibid.,

pursuant to Article 93 of the Constitution of Nepal, 1962 A.D.<sup>154</sup> The Code is numbered numerals such as 1, 2, 3 etc. The code is basically divided into five Parts. The enumeration of various crimes and punishment etc. is in part four of the Code. Basically, this part enumerates twenty different kinds of crimes. The procedure to be followed on court proceedings,<sup>155</sup> and on the punishment,<sup>156</sup> Part two of the Code has two chapters. Chapter first deals with the court proceeding, and Chapter two deals with punishment.

#### 5.7.6 Prisons Act, 2019 B.S. (1963 A.D.)<sup>157</sup>

This Act was passed on 4<sup>th</sup> February, 1963 and published on 5<sup>th</sup> February, 1963. The Act is undergone five different amendments. The latest of the amendment was on 21<sup>st</sup> Jan. 2010<sup>158</sup>. The Preamble of Act mentions that the Act is relating the prison in order to, maintains law and order; and is enacted in accordance with Article, 93 of the Constitution of Nepal, 2019 B.S. (1962 A.D.)<sup>159</sup>

This Act, contains in all twenty eight sections the first section gives the name of the Act.<sup>160</sup> The second section defines various terms including Court,<sup>161</sup> Prisoner,<sup>162</sup> Detainee,<sup>163</sup> Prison,<sup>164</sup> Jailer,<sup>165</sup> Prison office,<sup>166</sup> Community service,<sup>167</sup> Open Prison<sup>168</sup> etc. The third section speaks about detainee or prisoner slip. A person who is an under trail detained for a crime, such person should be given a detention slip is called '*Thunuwa Purji*'.<sup>169</sup> If any person is to be detained under the judgement of any court he has to be issued an imprisonment slip called '*Kaidi purji*'.<sup>170</sup> Section 4 speaks about the obligation of the Prison office to admit

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<sup>154</sup> Article 93 says After the commencement of this Constitution and prior to the sitting of the first session of the National Panchayat His Majesty, in exercise of full legislative powers under this Constitution, may make Acts as may be necessary and the authority specified in such acts may as required make rules, orders or bye- laws having the force of law, under such Acts.

<sup>155</sup> Chapter 1, Part 2, of the Muluki Ain, 2020 B.S. (General Code, 1963 A.D.)

<sup>156</sup> Chapter 2, of Muluki Ain, 2020 B.S. (General Code, 1963 A.D.)

<sup>157</sup> Act No. 46 of 2019 B.S. (1963 A.D.) notified by Nepal Gazette.

<sup>158</sup> The amendment was made by the Republic Strengthening and some Nepal Laws Amendment Act, 2066 (2010 A.D.)

<sup>159</sup> Supra, Chapter – IV, p. 62

<sup>160</sup> A Notification was published in the Nepal Gazette on 19<sup>th</sup> August 1963 A.D. notifying the Commencement of this Act 17<sup>th</sup> August 1963 A.D.

<sup>161</sup> Section 2 (a) of Prisons Act, 2019 B.S. (1963 A.D.)

<sup>162</sup> Section 2 (b)

<sup>163</sup> Section 2 (c)

<sup>164</sup> Section 2 (d)

<sup>165</sup> Section 2 (f)

<sup>166</sup> Section 2 (g)

<sup>167</sup> Section 2 (i)

<sup>168</sup> Section 2 (j) Inserted by the Second Amendment

<sup>169</sup> Section 3 (1) of Prisons Act, 2019 (1963 A.D.)

<sup>170</sup> Section 3 (2)

persons, only through the about mentioned slips.<sup>171</sup> Section 5 speaks that the jailor has to take position as all the goods which admitted precede detain.<sup>172</sup> Section 6 mentions arrangements for keeping detainees, that has to be made separate for males and females prisoners,<sup>173</sup> the Prisoner or a detainees under age of twenty one years and those above age of twenty one years,<sup>174</sup> civil and criminal case prisoners,<sup>175</sup> and Sick prisoners shall be separated as far as possible.<sup>176</sup> Sections 7 speak about the provision of fetter and handcuffs not to be used except for those who try to abscond from the Prison.<sup>177</sup> The section 8 speaks about the child's care in Prison, child below two years of age<sup>178</sup> and twelve years of age is detained, special care need to be taken.<sup>179</sup> Section 9 is provision relating to food and clothing of detainees and prisoners. Section 10 relates to employment of the detainee or prisoner, section 10 (A) relating to sending a prisoner for community service, 10 (B) elaborate open Prison system and 10 (C) deals with certain kinds of prisoners, not to be send for community service or open Prison.<sup>180</sup> Section 11 deals with health and treatment, such as the treatment of physically or mentally sick detainees, that procedure need to be followed etc.<sup>181</sup> Similarly, section 12 deals pregnant women detainee or prisoner, section 13 deals of the procedure, in case of death of prisoners,<sup>182</sup> section 14 regulates visits and correspondence by the prisoners. Section 15 speaks about the procedure that has to be followed to produce the prisoners before the court. Sections 16 and 17 deal with the organizational structure<sup>183</sup> and functions of Prison authority,<sup>184</sup> section 18 prohibits continuance of detention of any person beyond the authorised term. Section 19 speaks about examination and inspection of Prison and action to be taken details is under section 20.<sup>185</sup> Section 21 speaks about procedures for submission of petition, application etc. by prisoner or detainee.<sup>186</sup> Section 22 is relating to offence in prisoner and punishment thereof, section 23 deals with placement of detainee. Section 24 deals with punishment where prisoner absconds or is assisted in absconding by other

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<sup>171</sup> Section 4 (1)

<sup>172</sup> Section 5 (1)

<sup>173</sup> Section 6 (1) (a)

<sup>174</sup> Section 6 (1) (c)

<sup>175</sup> Section 6 (1) (d)

<sup>176</sup> Section 6 (1) (e)

<sup>177</sup> Amended by the First Amendment of the Act, on 27<sup>th</sup> September, 1989 A.D

<sup>178</sup> Section 8 (1)

<sup>179</sup> Section 8 (3)

<sup>180</sup> Inserted by the Second Amendment of the Act, on 20<sup>th</sup> April, 1992 A.D

<sup>181</sup> Section 11 (1)

<sup>182</sup> Section 13 (1)

<sup>183</sup> Section 16 (1)

<sup>184</sup> Section 17 (1)

<sup>185</sup> Section 20 (a), (b), (c)

<sup>186</sup> Section 21 (1)

prisoners.<sup>187</sup> Section 25 prescribe punishment to employees of Prison for failure to perform his duty, section 26 says district court has jurisdiction to try offences under the Act, section 27 is regarding the power of government and various authority to frame rules.<sup>188</sup>

The Act has repealed by Section 28 the then existing laws regarding Prisons, namely;

- a. The Chapter on Jail of the General Code (*Muluki Ain*),
- b. All Orders (*Sawal Sanad*) on Jail,
- c. No. 51 of the Chapter on Court Proceedings of the General Code (*Muluki Ain*).<sup>189</sup>

Thus, the Prisons Act is comprehensive legislation dealing with all aspects of prisons administration which of course part of the Criminal Justice System.

### **5.7.7 Some Public (Crime and Punishment) Act, 2027 B.S. (1970 A.D)<sup>190</sup>**

This Act was passed on 4<sup>th</sup> Oct. 1970A.D. The Act has undergone five different amendments. The latest amendment was on 21<sup>st</sup> Jan. 2010 A.D.<sup>191</sup> The Preamble of Act mentions the purpose of the Act is the controls some public crime and to provide punishment thereof, the Act has in all eight sections only. First section has given the name and title of the Act, extent and commencement of the Act. Section 2 of the Act, enumerates the prohibition to commit certain public crimes.<sup>192</sup> There are in all twelve such specified acts of crimes which have been classified as public offenses.<sup>193</sup> Section 3 deals with power of the police officer to arrest in cases of public offense. Section 4 makes it clear that the case is to be filed from the date of the commission of an offense, specifies adjudicating authority.<sup>194</sup> Section 5 speaks about adjudicating authority and procedure, under this section the Chief District Office has power of original jurisdiction to initiate the proceeding and adjudicate<sup>195</sup> a case, to follow the procedure pursuant to Special Court Act, 2059 B.S. (2002 A.D.).<sup>196</sup> Section 6, penalty to be the imposed, section 7 says Government of Nepal to be plaintiff under this Act, and Section 8 says that the case may be filed under other existing Nepal law for the offence under this Act, if it is also punishable under such existing laws. It could be noted all such

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<sup>187</sup> Section 24 (1) (a)

<sup>188</sup> Section 27 (1)

<sup>189</sup> Section 28 of the Prisons Act, 2019 B.S. (1963 A.D.)

<sup>190</sup> Act No. 12 of the year 2027 B.S. (1970 A.D.) notified by Nepal Gazette on 4<sup>th</sup> Oct. 1970.

<sup>191</sup> Omitted by Republic Strengthening Some Nepal Laws Amendment Act, 2066 B.S. (2010 A.D.)

<sup>192</sup> Section 2 (1)

<sup>193</sup> Section 2 (1) (a) to (k)

<sup>194</sup> Section 4 (2)

<sup>195</sup> Section 5 (1)

<sup>196</sup> Section 5 (2)



cases that automatically come under the Government cases Act, 2049 B.S. (1992 A.D.) such the cases could be filed by following the procedure prescribed in this Act.

### **5.7.8 The Compensation Relating to Torture Act, 2053 B.S. (1996 A.D.)<sup>197</sup>**

The Compensation Relating to Torture Act, 2053 B.S. (1996 A.D.) came to existence on 18<sup>th</sup> Dec. 1996. The Act has thirteen Sections; the purpose of this Act is to provide for compensation to the person for torture while in detention. The Preamble of this Act, says it is expedient to make provisions on compensation for inflicting physical or mental torture upon any person in detention in the course of custody

Section 1 deals with short title and commencement of this Act,<sup>198</sup> section 2 defines meaning of 'torture'<sup>199</sup> and 'victims'.<sup>200</sup> Section 3 prohibits torture of the person, in course of detention, and medical examination report to be submitted along with the detention before the concerned court.<sup>201</sup> Section 4 makes the provision for compensation to the victim. Section 5 is relating to limitation of filing of complaint;<sup>202</sup> section 6 speaks about the procedure of the proceedings on complaint and compensation. The district court has been provided with the jurisdiction on a complaint filed under legal provisions of this Act.<sup>203</sup> The procedure referred is the Summary Procedures Act, 2028 B.S. (1972 A.D.). Section 7 of this Act speaks about if any governmental employees involved in torture, the departmental action to takes place against his/her under the existing law. Section 8 is about compensation amount, section 9 is relating to execution of the decision, after the final decision to provide such compensation to the victim or his/her legal heirs.<sup>204</sup> Section 10 is regarding defense by the government attorney before court on behalf of such employee. Section 11 speaks about what is torture, section 12 says there are restriction on taking action under existing law and section 13 provides power to frame rule necessary to carry out the purpose of this Act.

## **5.8 Investigate and prosecution**

The process of investigation of crime begins when information is received by the Police. Police should immediately take measures to prevent the crime from taking place,

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<sup>197</sup> Act No. 14 of the Year 2053 B.S. (1996 A.D.)

<sup>198</sup> Section 1 (1) of the Compensation Relating to Torture Act, 2053 B.S. (1996 A.D.)

<sup>199</sup> Section 2 (a)

<sup>200</sup> Section 2 (b)

<sup>201</sup> Section 3 (3)

<sup>202</sup> Section 5 (1)

<sup>203</sup> Section 6 (1)

<sup>204</sup> Section 9 (1)

prevent disappearance or loss of evidence and prevent perpetrators from escaping. Before starting investigation into a crime, the police official should submit a preliminary report to the Office of the Attorney General concerned, disclosing the matters to be investigated, and carry out investigation according to the necessary instructions regarding procedure, report submission etc.

In the course of investigation, the police official should prepare an affidavit, describing the crime scene, nature of the crime, scene and its association with the crime or criminal, other remarkable things seen or found at or around the crime scene, and collect other necessary evidence. Similarly, if, in the course of investigation into a crime, the police official has to record the statement of the accused concerned in the presence of the public prosecutor; or search a person or place; examine a corpse, in case a person has died; examine the blood, semen or any other part of the body of the arrested person or any other thing; seek the advice of experts on a matter related to the crime; hold in custody a person arrested in relation to a crime for more than twenty-four hours, etc., the arrested person should be held in custody only after producing her or him before a court and obtaining the permission of the court. After completing the investigation, decision should be taken on whether or not a case should be instituted and a charge sheet prepared and, along with the file of the case, is sent to the office of the Attorney General, keeping in mind the time it takes to file a case at the court.<sup>205</sup>

While receive the file of the case from the investigation agency conducting the investigation and examination, and after the file, together with opinion, is sent to the Office of the Attorney General, the public prosecutor should make a decision, whether to file a case or not. While studying the case file, the public prosecutor, if she or he deems it necessary, should issue orders to the investigating police officials to collect additional evidence or ask any personal questions and if a lawsuit is warranted without any such inquiries, she or he may file a charge sheet at the relevant court, mentioning, among others, the charge against the accused and relevant evidence, with a description of the case file, the punishment the accused is liable to under the law, and, if compensation is to be paid to the victim of the crime, the amount of such compensation. If the police do not investigate or the public prosecutor does not prosecute those who seem to have committed grave violations of human rights there is no provision for the victim or their representative to file a complaint or appeal to bring the guilty to book in case the national mechanism concerned is incompetent, unwilling or incapable to

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<sup>205</sup> Section 17 of the Government Cases Act, 2049 (1992 A.D.)

investigate or prosecute, apart from the fact that the Supreme Court can issue a writ of mandamus to initiate prosecution.<sup>206</sup>

### 5.8.1 The Trial Proceeding

Whenever, the investigation or inquiry is completed, the public prosecutor initiates prosecution. An accused person can be held in custody for more than twenty-four hours only after obtaining permission for extension of time.<sup>207</sup> After make provision for recording the statement of the accused, decision is taken to hold the accused in judicial custody or to summon by warrant to report at the end.

In case the nature of crime a punish made by imprisonment for life or imprisonment for three years or more, any accused appears to be guilty of the offence or if there are reasonable grounds based on such evidence for believing that such person is guilty, there is provision for trying the case by holding the accused in detention.<sup>208</sup> Similarly, if, on the basis of available evidence, there are reasonable grounds to believe that an accused who is not a permanent resident of Nepal is guilty of a crime that entails punishment of six months or more, the court can hold her or him in custody during the trial.<sup>209</sup> Apart from this, the court can to demand security or guarantee bail to accused.<sup>210</sup> Several special acts make special provision for holding an offender and an accused in custody during trial. The Arms and Ammunition Act, 2019 B.S. (1963 A.D.) provides for keeping an accused of a case under this Act in custody during trial based on the evidence available there and then, notwithstanding what is mentioned in any prevalent act.<sup>211</sup> Whereas, the Human Trafficking and Transportation (Control) Act, 2064 B.S. (2007 A.D.) has a provision for holding a defendant in custody. In **Advocate Kamalesh Dwivedi v. Government of Nepal**,<sup>212</sup> the Supreme Court held that the provision of Section 8 that stipulates trying with the case by keeping the accused in detention therefore repealed this provision.

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<sup>206</sup> The Supreme Court, acting on writ petitions demanding issue of mandamus alleging that investigation proceedings have not been initiated or prosecution has not taken place in accordance with the FIR filed with the police, has issued writs of mandamus to the police and public prosecutor to file FIR and initiate investigation and proceeding and institute prosecution.

<sup>207</sup> No. 94, 99 and 118, of the chapter 'On Court Proceedings' of the Muluki Ain 2020 B.S. (General Code, 1963 A.D.)

<sup>208</sup> No. 118 (2) of the Chapter 'On Court Proceedings' of Muluki Ain, 2020 B.S. (General Code, 1963 A.D.)

<sup>209</sup> No. 118 (3)

<sup>210</sup> No. 118 (6)

<sup>211</sup> Section 24 (a) The Arms and Ammunition Act, 2019 B.S. (1963A.D.)

<sup>212</sup> NKP 2064 (2007 A.D.) vol. 49, No. 7, p. 827 Writ Number 064-WS-0027, including certiorari, Special Bench, Order No. 7866, on June 25, 2006.

### 5.8.2 In Camera Hearing

There is a general provision for the court to try and adjudicate cases in open bench.<sup>213</sup> However, for maintaining confidentiality of the parties to a case, the practice of hearing cases in camera is increasing. Many of laws have made provision for in camera hearing. The Children's Act, 2048 B.S. (1992 A.D.), Domestic Violence (Offence and Punishment) Act, 2066 B.S. (2008 A.D.), and Human Trafficking and Transportation (Control) Act, 2064 B.S. (2007 A.D.) provide for hearing such cases in in-camera. In **Advocate Sapana Pradhan Mall v. Government of Nepal and Others**,<sup>214</sup> the Supreme Court issued guideline for hearing cases involving child victims, women and HIV/AIDS infected persons in in-camera sessions.

### 5.8.3 Expert Verdict

If the accused does not produce herself or himself or cannot be arrested within six months, there is provision for attaching her or his property pending settlement, or until she or he is arrested or presents herself or himself, and if, even after two years of attachment of property, she or he does not present herself or himself before the court, the court may issue a verdict according to the available evidence.<sup>215</sup>

### 5.8.4 Verdict and Appeal

If the case enters the decision phase, for the judge hears arguments, discusses them and reaches a conclusion. In criminal cases that have government as plaintiff, the losing party may file an appeal within seventy days of receiving the verdict. The subpoena may be postponed for up to seventy days. An appeal may lie in the Supreme Court in cases liable to a punishment of imprisonment of ten years or more.<sup>216</sup> Also, if the accused is acquitted by the trial court, the defendant who is in detention has to be immediately set free even if the prosecuting party files an appeal that is there are no conditions for waiting for an appeal to be filed or for the verdict by the appellate level. The Supreme Court may review its judgment or final order in certain circumstance.<sup>217</sup>

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<sup>213</sup> No. 6 of the Chapter 'On Court Proceedings' of Muluki Ain, 2020 B.S. (General Code 1963 A.D.)

<sup>214</sup> NKP 2064 (2007 A.D.), vol. 49, No. 9, Writ No. 3561, p.1208

<sup>215</sup> No. 190 of the Chapter 'On Court Proceedings' of Muluki Ain, 2020 B.S. (General Code 1963 A.D.)

<sup>216</sup> Section 9 of the Administration of Justice Act, 2048 B.S. (1991 AD)

<sup>217</sup> Section 11

### 5.8.5 Withdrawal of Case

The public prosecutor may, with order of the Government of Nepal and with the consent of the opponent party, negotiate reconciliation of cases that have it as plaintiff under the prevalent Nepal law or that have been instituted by the Government of Nepal or that have been instituted against it, or, with permission of the court, may withdraw criminal cases that have it as plaintiff among such cases.<sup>218</sup> This provision of the Government cases Act, 2049 B.S. (1992 A.D.) allowing withdrawal of criminal cases of even grave nature at the order of the Government of Nepal and on the approval of the court and its indiscriminate exercise are not above controversy. It is difficult to institute cases in a number of crimes that have political hues, and the trend of withdrawing cases after they are filed is widespread.<sup>219</sup> Seeking the opinion of Attorney General is not mandatory for withdrawing cases.

### 5.9 Conclusion

An attempt has been made in this chapter to provide a reasonable understanding of the Criminal Administration of Justice System in Nepal. Though, most of it may not come in the category of Preventive Detention understanding of the Criminal Administration of Justice System would give an idea as to how the system functions even in Preventive Detention cases.

This chapter has attempted to provide an idea about the judicial system and its hierarchal setup in Nepal. Like in many other democracies the basic authority of the judiciary is drawn from the constitutional provision bringing to for the idea that the judiciary is as important as the other organs of the State namely; Executive and Legislative. The judiciary therefore has drawn its basis on the constitution itself and at least in paper the judiciary is answerable only to the constitution but in the functioning of and young democracy like Nepal this may not be fully true the discussion of the various legislations was for the purpose of the explaining the various function that has been interested to the judiciary and how they are expected to fulfill those functions. Since, the research topic of the Preventive Detention

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<sup>218</sup> Section 29 (1) of the Government Cases Act, 2049 B.S. (1991 A.D.)

<sup>219</sup> Although under Section 116(2) of the Penal Code of the proposed Penal Code 2067 prohibits withdrawing of cases of forged passport or citizenship, immigration, corruption, human trafficking and transportation, drugs, illegal hunting of and trade in wildlife, mixing of toxic substances in public consumption goods, killing by using poison, cases related to the Ancient Monument Conservation Act and Public Property or Public Morals, offences related to arms and ammunition, offences related to explosive substances, offences related to public and national heritage, offences related to marriage, offences related to life, offences related to forced disappearance of person, offences related to kidnapping and holding hostage, offences related to rape, offences related to currency, offences related to stamps, cases, which withdrawn, might have adverse effect on the property rights of any person and which do not have the approval of such person to the extent of such effect. (p.192)

which is of course part of the criminal administration attempted is also made to explain the Criminal Justice System in Nepal has mentioned earlier Criminal Justice System also has the Constitutional basis. The Criminal Justice System in Nepal has a long and peculiar history its' shown. The period when the *dharmashastra* was prevalent and the system of punishments have been brought out of explain the antecedent of the present Criminal Justice System in Nepal. The later attempted to codify and existence and Napoleonic Code shows the procedural aspect of the Criminal Justice System. Having discussed the justice as well as the Criminal Justice System the study now has proceeded to the nature and system of Preventive Detention that existed in Nepal.

## CHAPTER – VI

### Judicial observation on Preventive Detention - An analysis

#### 6.1 Introduction:

In any democracy, it is the judiciary which functions as a protector and preventer of administrative excuses and abuse of due process of law. Nepal having a systematic hierarchy of courts with the Supreme Court being the Apex Court has also tried to fulfill this obligation as protector of human rights and preventer of administrator abuses. At this point it should be noted, though the Constitution of Nepal proclaims judiciary as independent, the deep rooted monarchical system of centuries, have created psyche mind set where often the administrative official believe that they are only answerable to their administrative heads irrespective of what the court says or what is be laid down in law in terms of procedural safeguards, especially regarding arrest and detention of a person. Therefore, a tendency to discard judicial directive was prevalent especially during 1950 to 2006 A.D. Similarly, the analysis of the cases also brings to light the fact that at times the judiciary has also suffered from restraints and there are attempts by judiciary itself not only to justify detention but to take slightly or as minor deviation the violation of procedural safeguards by the executive. One can attribute this to the primitive stage of democracy in Nepal, where often the assurance of people's rights and liberties merely remained on the statutes books and there is wide gap between the letter of the law and the law in action. This was especially true during the particular stage in the constitutional history of Nepal, during which time Preventive Detention and mass arrest were common. The cases are discussed as far as possible in the chronologically order to bring to light the stages of transformation in the mindset of the judiciary regarding of its role as a protector of the citizens and the mindset of administration in understanding and accepting, that in a democracy, law is supreme and therefore procedural norms have to be followed strictly, when it effects the rights of the citizens.

#### 6.2 Analyses of Important Cases

##### **In Phulwar Khawas v. Subba Sharad Prasad Pokharel, Biratnagar Appeal, (1953 A.D.)**

The Pradhany Nyayalaya declared that if a person was put into detention without letting him know about the cause of his detention, the detaining authority shall be liable to punishment.<sup>1</sup>

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<sup>1</sup> Prdhan Nayayalaya, writ No. 889/2010, decided on 6<sup>th</sup> August, 1953 unreported.

In **Subha Shamsher Thapa v. the Magistrate of Kathmandu**, (1954 A.D.)<sup>2</sup>

The Pradhan Nyayalaya held that an order of detention issued under the Public Security Act, 1951 was also justiciable. It laid down the principle that in case a detention made under the Public Security Act, did not conform to legal procedures such a detention could be judicially scrutinized. The court further observed that no law nor or the Interim Government of Nepal Act,<sup>3</sup> precluded the court from entertaining the petition of a prisoner held under the Civil Rights Act, 1955 A.D. to scrutinize whether the person put behind the bar had been detained as per the provisions of the Public Security Act or he had been detained illegally by a person not empowered to exercise the powers under that Act. The same principle regarding the justiciability of the scope of Section 12 of the Public Security Act, 1951 A.D. was further reaffirmed by the Pradhan Nyayalaya in the case of **Chakra Pani Sharma v. the Magistrate of Kathmandu**, (1954 A.D.) and **Ranadhir Subba v. the Magistrate of Kathmandu**, (1954 A.D.)

In **Ganesh Man Shrestha v. the Magistrate of Kathmandu**, (1954 A.D.)

The Pradhan Nyayalaya observed that the act of putting somebody into detention without completing the due process of law or without complying with the letters of law would render that act illegal, and a person could not be deprived of his highly sensitive freedom like individual liberty through such an illegal action.

Likewise, in **Hark Bahadur Chhetri v. Bada Hakim Riddi Bikram Rana**, (1954 A.D.)

The court was held that contrary to the objectives of the Public Security Act, 1951 A.D. it was illegal to put a person behind the bars for unrelated offences by exercising the powers under such a serious action.

In **Janak Man Shrestha v. the Magistrate of Kathmandu**, (1954 A.D.) the Pradhan Nyayalaya observed that the powers under the Public Security Act should be exercised cautiously only in a special case of the probability of public disorder in the country. The court held that it was completely illegal on the part of understanding its letter and spirit. Hence, the detaining authority was fined.

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<sup>2</sup> Compilation of the Decisions by the Supreme Court of Nepal on Habeas Corpus (CDSCNHC), 1990, vol. 1, p. 35.

<sup>3</sup> The Interim Government of Nepal Act, 2007 B.S. (1951 A.D.) was fundamental law of the Nepal enforced on 11<sup>th</sup> April, 1951.



In **Goma Padhyayani v. D.S. P. Office Kathmandu**,<sup>4</sup> (1956 A.D.)

The court observed that as the detained person had not been produced before a law court within twenty-four hours of his arrest as required by Section 15 (2) of the Civil Rights Act, 1955 A.D., the Kathmandu D.S.P. Office deserved to be warned and cautioned against not committing such a mistake in the future.

In **Gauri Shankar Amatya v. D.S. P. Office Kathmandu**,<sup>5</sup> (1956 A.D.)

The Supreme Court declared that since the impugned circular of the Home Ministry had not been formulated in accordance with any law, it could not acquire the force of law and, therefore, the detention of the petitioner on the basis of the circular was unlawful.

In **Chhatra Prakash Malla v. Office of the I.G. Police**,<sup>6</sup> (1956 A.D.)

The petitioner challenged the detention of his father Padma Sundar who had been arrested under orders from the Magistrate of Kathmandu on the charge of committing breach of peace and making attempts at subversion of the Government in Power. Although initially arrested under the Public Security Act, 1951 A.D., on reference, the Home Ministry of Nepal had directed the Kathmandu Magistrate to prosecute the detenu under the Kathmandu Magistrate Regulation. Only then he was provided with a letter of detention almost seventeen days after his arrest. In spite of the apparent irregularities and flagrant violation of the procedural law and the constitutional guarantees, the Supreme Court refused to issue a writ of habeas corpus on the lame plea that since the accused had been detained under the Public Security Act his detention appeared to be in conformity with law and, hence, a writ of habeas corpus could not be allowed in the case of a detention made under the Public Security Act.

Likewise, In **Dhanendra Bahadur Karki v. the Magistrate of Kathmandu**,<sup>7</sup> (1956 A.D.)

The Pradhan Nyayalaya refused to proceed with the writ petition and rejected it outright on the ground that since there was a provision that complaints regarding detention under the Public Security Act shall be heard by a Board constituted by the Home Ministry consisting of one judge and one influential person it was, therefore, not appropriate for the court to pass verdict in a case involving the Public Security Act. The same principle was

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<sup>4</sup> NKP, (1961), vol. 4, No. 7. p. 120

<sup>5</sup> CDSCNHC, 1990, vol. 1, p. 108

<sup>6</sup> CDSCNHC, (1990), vol. 1, p. 95.

<sup>7</sup> CDSCNHC, (1990), vol. 1, p. 107.

further reaffirmed in rejecting the writ petition in the case of **Hari Govind and Others v. the Magistrate of Kathmandu**.<sup>8</sup>

In **Bimala Devi Upadhaya v. D.S. P. Office Kathmandu**, (1957 A.D.)<sup>9</sup>

A division bench presided by C.J., Anirudh Prasad Singh heard the petition of Bimala Devi filed on behalf of one Vishwa Nath who had been arrested by the police without any warrant, and kept in custody without a letter of detention. The Kathmandu D.S.P. Office vainly tried to justify the act of not providing the detenu with a letter of detention on the ground that many other people detained earlier were also not given letters of detention. Declaring the detention as illegal, the court observed that Section 15 (1) (a) of the Civil Right Act, 1955 A.D. provided that 'no person shall be detained without informing him', at the earliest, of the grounds for his arrest and without producing such a person before a competent judicial authority within twenty four hours of such arrest excluding the time consumed 'en route' and no person could be detained beyond that period without the order court of law. As the detenu, Vishwa Nath, had been neither informed of the grounds for his arrest nor produced before a competent law court, the Pradhan Nyayalaya ordered his immediate release from the illegal detention.

In **Nepal Government v. Acting Senior Clerk of Jhapa Amini, Laxmi Prasad and Another**,<sup>10</sup> (1958 A.D.)

The Supreme Court even penalized the two defendants who were employees of Jhapa Amini by imposing a ban on increase of their salary for one year for having kept some prisoners in detention in contravention of the law.<sup>11</sup>

Similarly, in **Bansh Raj Ahir v. Bhairahawa Police Inspector's Office**,<sup>12</sup>(1959 A.D.)

The Supreme Court declared the detention of the petitioner as illegal on the ground that although he had been arrested earlier; his statement was recorded only after four days in clear violation of the legal provision made by Section 15 (2) of the Civil Rights Act, 1955 A.D. Bhairahawa Police Inspector's Office was also warned not to commit such errors in the future.

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<sup>8</sup> Ibid., p. 125.

<sup>9</sup> CDSCNHC, (1990), vol. 1. p. 102

<sup>10</sup> (CDSCNHC), 1990, vol. 1, p. 102

<sup>11</sup> CDSCNHC, 1990, vol. 1, p. 132

<sup>12</sup> CDSCNHC, 1990, vol. 1, p. 159

**In Bada Hakim Hari Prasad Giri, Morang Biratnagar Gaswara v. Kanak Bahadur Karki,**<sup>13</sup> (1960 A.D.)

A writ of habeas corpus was filed on behalf of Kanak Bahadur Karki who had been detained by the Bada Hakim Hari Prasad Giri under the Public Security Act, 1951 A.D. In response to the two show cause notices issued by the Eastern High Court the defendant (Bada Hakim) at first submitted a vague and incomplete reply that the detenu had been placed under the detention under the Public Security Act. But when pressed further by the High Court to explain the grounds for his detention and to produce the detenu before the court, the defendant refused to comply with the order of the court taking the plea that his action could not be called into question in any law court as per Section 12 of the Public Security Act,. The Eastern High Court had, ordering the release of the detenu, observed that if the court was precluded from entering into the Justification and legality of any detention order made under the Public Security Act, the executive authorities might feel free to arrest any person arbitrarily and deprive him of his invaluable freedom. However, that was not the intention of the law. If an official exercised the power of detention under the Public Security Act in his discretion without justifiable conditions he shall be guilty of misuse of his power granted by the law. But when the defendant (the Bada Hakim) appealed to the Supreme Court, reversed the well-reasoned and courageous verdict delivered by the justices of the High Court. The Supreme Court maintained that Section 12 of the Public Security Act precluded the justiciability of an order in any law court. Also, the court further opined that it was an exclusive right of the authority exercising the powers under the Public Security Act to decide as to whether or not there existed any reasonable ground for the issuance of such an order.

Personal freedom is regarded as the most precious and invaluable asset of mankind. Hence, it is an accepted Principle of Justice Administration that a law court needs to be always alert and active to safeguard an aggrieved person's right to personal freedom in case of its infringement. It is also one of the accepted principles of Constitutionalism that the writ jurisdiction of the Supreme Court is a compulsory one which cannot be denied in any case by the Supreme Court simply on the ground that the proper writ has not been prayed for or other legal alternatives for securing relief are also present.

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<sup>13</sup> NKP, (1960). vol. 3, No. 9, p. 125

In **Bisheshwar Prasad Koirala v. the Magistrate of Kathmandu**,<sup>14</sup>(1959 A.D.)

The Supreme Court asserted that Section 1 of the Regulation Relating to the Commissioner / Magistrate of the Kathmandu Valley, 1953 A.D. as '*ultra vires*' of the Constitution.

The petitioner B. P. Koirala, on whom restrictions were imposed by the magistrate of the Kathmandu valley not to go outside the valley, moved the Pradhan Nyayalaya asking the court to quash various provisions of the Regulation relating to the Commissioner / Magistrate of the Kathmandu valley, 1953 which imposed restrictions on his fundamental right of free movement throughout the Kingdom of Nepal in contravention of the Interim Government of Nepal Act, 1951. The alleged restriction had been imposed on the free movement of the petitioner on account of an objectionable letter written by him to one Bhawani Bhakta describing the miserable economic and political plight of the country, sufferings and hardships of the Nepalese people and rampant corruption in every walk of life, and asking for his support for a minimum program to be launched by the Nepali Congress to raise voice against all this. The letter was intercepted by the administrative authorities '*en route*'. The activities of B. P. Koirala were considered unwanted and detrimental to the security of the State Consequently; a seven day summons was issued directing him to appear before the Magistrate and in the meantime imposing internment on his going out of the Kathmandu valley pending disposal of the proceedings initiated against him. The respondent (the Magistrate) submitted that the alleged restrictions were imposed with a view to maintaining law and order. It was also contended that the action taken by the respondent could not be justiciable in any law court as per Section 1(s) of the impugned Regulation.

Overruling the objections raised by the respondent, the court observed, that irrespective of whosoever discharges justice related functions, it is the prime duty of the Judiciary to review those functions. Since, it has been mentioned in Section 30 of the Pradhan Nyayalaya Act, 2008 B.S. (1951 A.D.) that all "the Acts, regulations and Circulats contravening this Act and issued prior to its promulgation of the Pradhan Nyayalaya Act there is freedom to make any type of law. After the emergence of an independent judiciary in accordance with the Act and Royal Proclamation it is the duty of this court to declare any Act '*ultra vires*' if it has been enacted in contravention of this constitutional provision. As per this constitutional principle, Section 1(s) of the Regulation relating to the Commissioner /

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<sup>14</sup> NKP (1959) vol. 2, No. 4, p. 123.

Magistrate of the Kathmandy valley is, by virtue of being inconsistent with Section 30 of the Pradhan Nyayalaya Act, declared '*ultra vires*'.

In **Lieutenant General Mrigendra Shamsher v. the Magistrate of Kathmandu**,<sup>15</sup> (1959 A.D.)

The Pradhan Nyayalaya once more asserted its power and jurisdiction to examine as to whether or not the administrative actions of the Executive were carried out in accordance with the law. The petitioner, Mrigendra Shamsher, filed a writ in the Pradhan Nyayalaya against the alleged detention of his two sons, Bharat Shamsher and Jagdish Shamser. The respondent replied that the two detenus had been charged with the breach of law and order and impairing the friendly relations between India and Nepal by physically assaulting and manhandling the visiting members of the Indian delegation, and therefore, detained under various provisions of the Regulation Relating to Commissioner / Magistrate of the Kathmandu valley 1953 A.D. and the Nepal Public Security Act, 1951 A.D. Appearing on behalf of the respondent, the Attorney General of Nepal submitted that since the action had been taken under the Public Security Act, it could not be called into question in a law court, nor could any proceedings be undertaken under the Civil Rights Act, 1955 A.D. Overruling the submission, the court held that "no law precluded the Pradhan Nyayalaya, from examining, under Section 4 of the Civil Rights Act, 1955 A.D.,<sup>16</sup> whether or not the acts of the Magistrate were carried out in accordance with the law" the court further observed that although as per Section 1 of the Regulation Relating to Commissioner / Magistrate of the Kathmandu valley the powers under the Nepal Public Security Act could not be exercised by the Assistant Magistrate, the Assistant Magistrate had, in contravention of that provision, exercised that power by ordering for the detention of the two sons of the petitioner. Only when his act had been challenged in the court another decision was duly made adding a clause that there prevailed strong possibility of breach of security. The apex court also passed a stricture against the Executive censuring its reckless and illegal activities. The court further observed that instead of exercising the powers under the Public Security Act on time. Its application in regard to a particular event only after that event had already taken place was tantamount to abuse of that Act. The court, therefore, held the controversial detention as illegal, and asked the Magistrate to initiate formal legal proceedings against the accused for

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<sup>15</sup> NKP, (1959), vol. 2. P. 197.

<sup>16</sup> Section 4 of the Civil Rights Act, "**No discrimination on the ground of Religion, Caste, Tribe or Gender:** In the course of providing appointments, the Government of Nepal shall appoint only in the ground of merit and no citizen shall be discriminated on the ground of religion, colour, gender, caste, tribe or any of them in the appointment of government or any other Public Service."

the offence committed by them instead of putting them into illegal detention under the Public Security Act on charges of mere baseless probability.

In **Krishna Khatri Chhetri v. the Magistrate of Bhaktapur**,<sup>17</sup> (1959 A.D.)

The Pradhan Nyayalaya appears to be struggling to assert its supremacy and authority against the Executive. The facts of the case are briefly as follows. The petitioner filed a writ petition in the Pradhan Nyayalaya seeking the release of his nephew, Tara Bahadur, who was illegally detained by the respondent for distributing a pamphlet entitled 'Let us raise our voice against the discriminatory policies of the Government' issued by the People's Right Protection Committee of Bhaktapur containing seven-point demands for introduction of social and educational reforms. Interestingly, the alleged pamphlet had been duly approved by the Home Department of the Government. The detenu had been charged under Section 1(b) of the Regulation Relating to Commissioner / Magistrate of the Kathmandu Valley which empowered the respondent to award a jail term up to a maximum of three years to a person who was proved guilty of attempting at incitement of disaffection or bad feelings in any manner towards, His Majesty the King and the Royal family or the Government in power. Despite two successive orders by the Pradhan Nyayalaya to produce the detenu before the court and to reply why the respondent should not be prosecuted for committing the contempt of court, the respondent expressed his reluctance to comply with the court orders on one excuse or the other first justifying the detention and thereafter advancing the plea that the case had been referred to the government for further instructions. A full bench of the Pradhan Nyayalaya overruled all the pleas of the respondent on two grounds. First, the court found nothing objectionable in the alleged pamphlet as it was protected by Section 1(b) of the aforesaid Regulation which provided that constructive criticism aimed at introduction changes through lawful means in the affairs of the government could not be construed as inciting disaffection or hatred against the government. Secondly, since the alleged pamphlet had been already approved by the concerned Home Department, the liability for the same, if any, should be borne by the concerned official and not by the detenus who had simply distributed them. The court expressed strong exception to the respondent's deliberate act of not carrying out the orders of the judiciary in violating of Section 27 of the Pradhan Nyayalaya Act, 1951 A.D. which enjoined upon the Executive to carry out the orders of the Judiciary. The court, however, observed that in spite of its refusal to cooperate with the Judiciary the court was duty-bound to discharge its functions and, therefore, it decided to fine

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<sup>17</sup> NKP, (1959) vol. 2, No. 6, p. 208.

the Magistrate of Bhaktpur a total of Rs. 24/- of which Rs. 19/- for keeping the detenus in illegal detention and Rs. 5/- for committing contempt of the court. In subjecting the Magistrate only to a token pecuniary fine for committing contempt of the court, the Pradhan Nyayalaya had also taken into consideration the mitigating factor that the former had been only recently appointed to that post and, therefore, lacked experience. Thus, the verdict of this case bears testimony to the judicial restraint exercised by the court in face of blatant provocation and disregard shown by the respondent for the court orders. Considering the fact that it was still a transitional period with fluid political conditions prevailing in the country and the bureaucrats still not mentally prepared to forsake the autocratic tendencies of the yester years and imbibe the legal culture of the rule of law, the judiciary had to play its cards cautiously, thereby exercising judicial restraint without compromising its powers and authority.

In **Chakraman Shakya and Others v. the Secretary to Home Ministry and Others** (1961 A.D.)<sup>18</sup>

The court observed in this case that the act of detaining a person without any proof was illegal in itself. Also, carrying out a particular act on the orders of the "Bada Hakim" (the Executive Chief of a District) but without legal sanctions was not only unjust and illegal but also warranted issuing of strict warning to the concerned authorities.

Likewise, in **Kuber Prasad Upadhyaya v. the Nepal Government**,<sup>19</sup> (1962 A.D.)

The Supreme Court of Nepal<sup>20</sup> rejected the writ petition stating that as the petitioner had been detained under section 18 of the Public Security Act, 1961 A.D.<sup>21</sup> precluded the raising of any question in any law court regarding an order issued under that Act.

### 6.3 Supreme Court on Preventive Detention - Summary Review

In the footsteps of the Constitution of the United States of America which provided for "the due process of law" clause and the Indian Constitution which provided for "the procedure established by the law" for the deprivation of personal liberty. In Nepal, the Constitution of Kingdom of Nepal, 1962 A.D. guaranteed that "no personal shall be deprived

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<sup>18</sup> NKP (1961), vol. 4, No. 7 p. 120.

<sup>19</sup> Ibid., p. 24.

<sup>20</sup> The Supreme Court of Nepal constituted under the Supreme Court Act, 1956. Then after, the Pradhan Nyayalaya was repealed. [Nepal Gazetted, Act No. 1, Publication on 31<sup>st</sup> May, 1956]

<sup>21</sup> The Public Security Act, 2017 came into force on date 2017/11/23 (6<sup>th</sup> March, 1961) and the Public Security Act, 2007 (1951 A.D.) is, hereby, repealed.

of his life or personal liberty saves in accordance with the law."<sup>22</sup> The Supreme Court of Nepal was called upon to dispose of scores of habeas corpus cases under its extra-ordinary jurisdiction granted by Article, 71 of the Constitution.<sup>23</sup> A perusal of the writ petitions filed in the Supreme Court for restoration of personal liberty shows that such petitions were generally of the following nature or types:

1. Seeking restoration of personal liberty infringed violation of jurisdiction or procedure established by the law;
2. Seeking restoration of personal liberty deprived through the exercise of orders under the Public Security Act, sometimes being motivated by 'mala fide' intention and abuse of jurisdiction; and
3. Seeking release of convict from the prison in cases where the court have, while fixing the terms of their imprisonment, committed error by totaling the jail sentence awarded to them in different cases instead of fixing, as Section 41 of the Chapter On Punishment in the Civil Code<sup>24</sup> requires, the longest jail term awarded in any one case.

The Supreme Court of Nepal has issued the writ of habeas corpus releasing the detenues from illegal detention propounding the following principles:

- a. If a person has been illegally detained without authority granted by the law, the detenu must be freed from illegal detention through a writ of habeas corpus.<sup>25</sup>
- b. The writ of habeas corpus prevails if a detention is made by exercising a power not granted by the law.<sup>26</sup>
- c. A detenu must be set free through a writ of habeas corpus, if he has been deprived of his personal liberty without complying with the procedure established by the law.<sup>27</sup>
- d. If somebody is detained without passing the proper order, the court shall always be committed to safeguard the personal liberty through a writ of habeas corpus.<sup>28</sup>

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<sup>22</sup> Art. 11 (1), The Constitution of Nepal, 2019 B.S. (1962 A.D.)

<sup>23</sup> Art. 71. **Extra-ordinary jurisdiction of the Supreme Court:** Subject to the Provisions of this Constitution, 1962, the Supreme Court shall have power to issue directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* for the enforcement of rights conferred by Part 3 or for the enforcement, in cases where no other remedy is provided, of rights conferred by any other law for the time being in force.

<sup>24</sup> Section 41 of the chapter o Punishment in the Civil Code, 2020 B.S. (1963 A.D.)

<sup>25</sup> Damber Bahadur khatri v. Kathmandu Valley D.S.P., NKP, (1964 A.D.), vol. 6, No. 8, p. 148.

<sup>26</sup> Aditya Kumar Thapa v. District Police Office, Kathmandu and Others, NKP, (1986 A.D.), vol. 28, No. 9, p. 946.

<sup>27</sup> Krishna Bahadur Thapa v. Forest Preservation Special Court, Kathmandu and Others, NKP, (1980 A.D.), vol. 22, No. 6, p. 129.

<sup>28</sup> Kedar Bhakta Shrestha v. D.S.P. Kathmandu and Others, NKP (1977), vol. 19, No. 7, p. 212



- e. The detention should be made in accordance with the law; nobody should be arrested without giving him the proper reason for his arrest; an arrested person must be produced before a judicial authority within twenty four hours from the time of his arrest excepting the time consumed 'en route'. In case of violation of these legal formalities the detention becomes illegal and unconstitutional.<sup>29</sup>

#### 6.4 Case Review on Supreme Court of Personal Freedom

The Supreme Court, in several cases, expressed its sensitivity to the deprivation of personal liberty under the Public Security Act, relevant to deal with some of these cases:

The personal liberty is regarded as the most precious and invaluable asset of mankind. Hence, it is an accepted principle of justice Administration that a law court needs to be always alert and active to safeguard an aggrieved person's right to personal liberty in case of its infringement. It is also one of the accepted principle of constitutionalism that the writ jurisdiction of the Supreme Court simply on the ground that the proper writ has not been prayed for or other legal alternatives for securing relief are also present. However, in **Bharat Shamsher v. First Rifle's Bharat Keshari Singh and Others**,<sup>30</sup> (1990 A.D.) a division bench of the Supreme Court refused to issue a writ of habeas corpus in favour of the petitioner simply on the ground that a writ of habeas corpus could be allowed under the extraordinary jurisdiction of the Supreme Court as per Section 11 of the Supreme Court Act, 1956 only if there was no other remedial provision in the law. Since there was an alternative legal remedy available to the petitioner to move the High Court under Section 9 of the Judicial Administration Act, 1959 A.D. praying for a writ of habeas corpus, the petitioner's writ petition deserved to be rejected. Actually speaking, this decision of the Supreme Court amounted to virtual denial of restoring a person's fundamental right to personal liberty.

In **Khadg Prasad v. Land Reform Officer, Santanu Pant**,<sup>31</sup> (1965 A.D.)

The Supreme Court, interpreting the Public Security Act, enunciated the principle that if the objective could be met by the exercise of an ordinary law it was not proper to take recourse to a special law such as the Public Security Act. The court observed, "Any official having the authority to exercise the Public Security Act which invests extra-ordinary power to usurp an invaluable asset like the personal liberty of a citizen must exercise such an extra-

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<sup>29</sup> Jagan Lal Amatya v. His Majesty's Government, Police Headquarters and Others, NKP, (1977), vol. 19, No. 7, p. 212.

<sup>30</sup> CDSCNHC, (1990), vol. 2. p. 17.

<sup>31</sup> NKP, (1965), vol. 7, No. 11, p. 268.

ordinary power with utmost care and caution. It is not at all desirable to resort to such a special Act if the exercise of an ordinary Act is sufficient to serve the purpose. It causes deprivation of personal liberty which is a vital element of the rule of law. Hence, detaining (the petitioner) by exercising the Public Security Act in a dispute arising out of crop harvesting is contrary to the law and the detenu is freed.

**In Tripurbar Singh v. the Magistrate of Kathmandu, (1967 A.D.)<sup>32</sup>**

The Supreme Court had rejected the petition of habeas corpus filed on behalf of petitioner by his mother Prem Sakhi Pradhan. Tripurbar Singh, a political Leader, had been taken into custody under the Public Security Act, 1961 on 24<sup>th</sup> January, 1961 after the dismissal of the B.P. Koirala government. The court, upholding the detention order, observed that no section of the Public Security Act, enjoined on the detaining authority to give information to the detained person explaining the reason as to what activities of that person caused the possibility of breach of peace and public order. Hence, the Supreme Court did not accept the petitioner's plea that the reason for arrest must be mentioned in the order of detention as it was not based on law and, therefore, upheld the detention.

The reason of detention must be clearly mentioned in the detention order. Such reason should not be written in ambiguous manner. The Supreme Court ordered to release the accused on the ground that the "detention order was not clear" in **Prem Prasad Pande v. Judge, Bagmati Zone Special Court and Special Police Department, (1969 A.D.)<sup>33</sup>**

It shall not be out of context to discuss a few other leading cases, especially **Rishikesh Shah v. Acting Deputy Zonal Commissioner, Bagmati Zonal Commissioner's office and Others, (1969 A.D.)<sup>34</sup>**, the majority opinion of the Supreme Court of Nepal also reaffirmed the same judicial principle that the court was not competent to scrutinize whether or not the grounds mentioned in an order issued by a competent authority were sufficient enough to justify the Preventive Detention. But the present Supreme Court of Nepal has through its recent rulings, reversed this judicial trend and held that the order of Preventive Detention issued by the detaining authority should be reviewed objectively. The Supreme Court has discussed in detail the gravity and sensitivity of the Public Security Act.

Rishikesh Shah, a former Foreign Minister and one of the authors of the 1962 Panchayat Constitution and a sitting member of the Rastiya Panchayat, was detained by the Acting Deputy Bagamati Zonal Commissioner on 10<sup>th</sup> July, 1969 under the Public Security

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<sup>32</sup> NKP, (1967), vol. 8 No. 11. p. 278.

<sup>33</sup> Habeas Corpus Writ No. 498 of 2026 B.S. (1969), decided on 2026/07/22 B.S. (7<sup>th</sup> Nov. 1968 A.D.)

<sup>34</sup> NKP, (1969), vol. 11 No. 8-9. p. 352,

Act. His detention followed an alleged public address made by him criticizing the Prime Minister and His Majesty's Government on 29<sup>th</sup> June, 1969. Before a gathering of local and foreign journalists, his detention was challenged by his spouse Sidhant Rajyalaxmi Shaha on his behalf. The petitioner's main contention was that her husband had been detained with 'mala fide' intention without complying literally with the legal formalities required by the law. He had been served with a letter of detention dated on 10<sup>th</sup> July, 1969 but no detaining order had been passed under Section 3(1) of the Public Security Act explaining the reasons for detention. The defendant had taken the plea that the letter of detention issued under Section 3 (2) (k) of the Act was itself the main order and he had not felt the need of issuing another order. So the bone of contention before the court was whether the letter of detention was suffice or entering a preceding order for arrest under Sec 3 (1) of the Act was simultaneously required. The Supreme Court ruled that orders to be issued under Section 3 (1) and 3 (2) (k), though mutually interdependent and complementary to each other, contained two separate legal requirements to be fulfilled before detaining any person under the Public Security Act.

If a competent authority felt the need of detaining any person under the Public Security Act to prevent him from committing any act specified in Section 3 (1) of the Act first of all he must enter an order under Section 3 (1) and Section 3 (2) (k) of the Act and thereafter a notice to the effect in the format prescribed in the Schedule of the Public Security Rules, 1962 could be given to the concerned person as per Section 3(1) of the Act, and Rule 3(1) of the Rules. Hence, the Plea of the defendant that there was no need for issuing separately an order under Section 3(1) and 3 (2) (k) was overruled by the court. The court also objected to the defendant not adhering to the format of letter of detention prescribed by the Schedule of the Public Security Rules, 1962 and inserting some extra words in the letter of detention in contravention of the prescribed format. Besides, the court observed that the order of detention passed by the defendant on 10<sup>th</sup> July, 1969 in the capacity of Acting Deputy Zonal Commissioner was illegal due to lack of jurisdiction because the Nepal Gazette on 1<sup>st</sup> September, 1969 showed that the defendant was appointed Acting Deputy Zonal Commissioner by His Majesty's Government only on 7<sup>th</sup> August, 1969.

In spite of all its sensitivity and earnestness displayed by the Supreme Court to the issues involving the exercise of the Public Security Act for depriving the people of their personal liberty, it is inexplicable why some time later the Supreme Court rejected another writ petition filed on behalf of Rishikesh Shaha. Shaha had kept in almost continuous custody

on the basis of another letter of detention issued to him under the Public Security Act on the same day on 12<sup>th</sup> Oct. 1969, which the Supreme Court had declared his release from the illegal detention and thereafter on the basis of a third letter of detention issued to him on 26<sup>th</sup> Oct. 1969. Mrs. Sidhant Rajya Laxmi Shaha, the spouse of Rishikesh Shaha, had filed another writ petition of habeas corpus on behalf of her husband in which she charged the Government with 'mala fide' intention in re-arresting her husband even before he could come out of the court premises, and then some time later making him sign an acknowledgement of a letter of release on 26<sup>th</sup> Oct. 1969 but after signing the letter of release next day again serving him with another letter of detention signed by the Acting Deputy Bagmati Zonal Commissioner. A division bench heard the petition but it could not come to unanimity. Justice Naya Bahadur Khatri ordered the release of the petitioner's husband whereas J., Dhanendra Bahadur Singh rejected the writ petition. On reference this writ petition was heard by a five-member full bench presided by C.J., Bhawati Prasad Singh. Rejecting the writ petition by a majority of three to two, it was strange that C.J., Bhagwati Prasad Singh, J., Rang Nath Uprety and J., Babbar Prasad Singh, in spite of the presence of facts like repeated detention letters served on Rishikesh Shaha, taking him prisoner from inside the premises of the court itself in flagrant violation of the court order of release and thus keeping him virtually in continuous custody, could not find any proof of alleged 'mala fide' intention of the defendants and observed:

*"If someone makes an allegation of detention made with a 'mala fide' intention, the burden of proof rests on the petitioner. But, the petitioner has failed to give any proof to substantiate that charge. No matter for whatsoever little time the prisoner had been set free he may have been re-arrested after that by the order of the Acting Deputy Zonal Commissioner. Once after having signed the paper acknowledging one's release, the prisoner's statement alone that he has not been released cannot be relied on."*

Besides, the majority decision also propounded a very negative principle which curtailed the Supreme Court's power of examining whether or not a 'prima-facie' ground existed for a prisoner's detention under the Public Security Act:

*"Although the court may consider whether or not a 'prime facie' condition existed for the detention, the court is not competent to look into the adequacy of the basis of satisfaction. And since there is no constitutional and legal provision for showing the prisoner the ground for his arrest, it cannot be said that the arrest has been made without reason or ground".*

However, the two dissenting Justices, J., Lok Raj Joshi and J., Prakash Bahadur K.C. in their separate minority verdicts, had ordered for the release of the prisoner. J., Lok Raj Joshi observed that for the sake of release only receiving a letter of release and making an acknowledgment for the same were not adequate enough,. The act mentioned in the paper must have been executed in practice. Hence, the learned Judge doubted the sincerity of the detaining order and dubbed it as an action lacking proper and clean intention. On the other hand J., Prakash Bahadur K.C. asserted the inherent power, competence and jurisdiction of the Supreme Court, at least, to ask for showing the grounds of detention. His remarks in the context deserve to be quoted:

*"If a competent official has, after being satisfied with the materials showing the existence of 'prima facie' condition, issued the order, the court cannot scrutinize whether the materials present before him are adequate or not to make him convinced about issuing the order. This is a subjective matter of the competent authority. However, the consequence of saying that there is no need of any ground at all and that the satisfaction of the concerned authority is sufficient would be that the exercise of the fundamental rights protected by the Articles of the Constitution and Articles 16 and 17 meant for enforcing them shall become not only ineffective but also turn into negation and a mirage."*

The learned Judges, therefore, observed, "If a petition is filed in the Supreme Court of Nepal alleging that somebody's personal liberty has been infringed, the court may ask the competent officer to show the grounds for detaining such a person. In order to discharge justice the court has a right to ask for grounds (reasons)."

**In Yagya Murti Banjade v. the Chairman of Bagmati Special Court, Durga Das Shrestha and Others, (1970 A.D.)<sup>35</sup>**

The petitioner had been detained on the charge of forming a nationwide union call Nepal Students Union without securing the permission from His Majesty's Government under Section 6 of the then National Directive Act, 1970 A.D. The summary trial of the petitioner was held in the evening in unseemly haste and hush at a closed session of the Bagmati Special Court presided by Durga Das Shrestha and the petitioner was convicted. The Supreme Court ruled that the controversial Students Union could not be called Union within the purview of Section 2(a) and 3(5) of the National Directive Act, as students union had been removed from those clauses through the Second Amendment of 2014 B.S. (1967 A.D.). Annuling the decision of the Bagamati Special Court on the ground that the Special Court

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<sup>35</sup> NKP, (1970), vol. 12, No. 7, p. 157.

lacked jurisdiction, the Supreme Court made some notable observation with respect to the protection of personal liberty of the citizens:

“Why some action is taken in such unseemly haste at the dead of night”? In violation of the principles propounded by the Supreme Court that the exercise of the law should be made with great caution with respect to matters like deprivation of a citizen’s personal liberty, it was not seemly on the part of Durga Das Shrestha to deliver, as if in collusion with the police, judicial verdict awarding jail term and fine without waiting till the time when a legal practitioner could be hired, the right to seek legal counsel is a right guaranteed by Article 11(6) of the Constitution. In such a case of possible infringement of the fundamental right, instead of informing the accused about his right to hire a legal practitioner, the writ of habeas corpus mainly scrutinizes whether the prisoner is in illegal detention or legal detention. If the detention appears to be illegal an order to release the prisoner is issued immediately. A writ of habeas corpus does not bother in such a case as to what will happen about the (previous) verdict of records.” Thus, the Supreme Court held that, if the sentencing official lacks jurisdiction and the judicial procedure has not been adhered to, the writ of habeas corpus prevails.

Thus during those days of the repressive Panchayat regime the Supreme Court had done a tremendous job to rise the occasion by not only restoring the personal liberty of the aggrieved students but also by protecting their democratic right to unite and form a nation-wide Students Union for the protection of their interest. The Supreme Court again declared the detention illegal in case of not informing the ground of detention to detained person in **Hem Kuar v. Land Reform Officer, Jhapa**, (1971 A.D.)<sup>36</sup>

In case of **Kameshwar Marik Yadav v. Land Administrator Pramod Prasad Koirala and Another**, (1971 A.D.)

The Supreme Court could not refuse its obligation to safeguard fundamental rights by pointing out the availability of alternative legal remedies and the Court held, “The right against illegal detention was not only a legal right it was a constitutional right, too, and this right has been guaranteed by Article 11 (1) of the Constitution. It has been made crystal clear by Article 71 of the Constitution of Nepal, 1962 A.D. that no restriction can be placed on the exercise of the extra-ordinary jurisdiction of the Supreme Court with regard to such a right on account of the provision of another legal remedy. If the detention is illegal, it is not proper for

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<sup>36</sup> Habeas Corpus, Writ No. 876, decided on 5<sup>th</sup> May, 1971

the Supreme Court to evade its constitutional obligation of protecting the fundamental rights granted by the Constitution by pointing out alternative legal remedy.<sup>37</sup>

In **Omkar Prasad Shrestha v. the Jailor of the Central Jail Kathmandu and Others**, (1971 A.D.)<sup>38</sup>,

The Supreme Court observed that “as tribunal constituted under the Prevention and Suppression of the Subversive Activities Act was not empowered to award sentence under the Royal Affairs (Offence and Punishment) Act, the writ of habeas corpus would prevail,” the petitioner was arrested on 22<sup>nd</sup> Oct. 1962 and convicted for life by a tribunal constituted under the Prevention and Suppression of the Subversive Activities Act, 1961 A.D. on charges framed under the Royal Affairs (Offence and Punishment) Act, 1962 A.D. The central issue to be decided was: “*Was the tribunal competent to convict the petitioner*”? And, “*whether or not the conviction made through a final verdict could be interfered with through a writ of habeas corpus*”? On the first issue, the division bench held that “the tribunal constituted under the Prevention and Suppression of the Subversive Activities Act, 1961 A.D. lacked jurisdiction to award punishment under the Royal Affairs (Offence and Punishment) Act, 1962 A.D.” As regards the second issue, the Supreme Court opined, “as Article 11 (1) of the Constitution guaranteed that ‘a person shall not be deprived of his life or personal liberty save in accordance with the law,’ any order of decision of any court or organ or official lacking jurisdiction cannot be treated as a decision or order executed “in accordance with the law” and any person who has been put in detention or prison under such an order of decision cannot be deemed as detained or imprisoned “in accordance with the law.” No matter in whatsoever way the personal liberty of a person has been usurped; if the usurpation is illegal it can be remedied through an order of habeas corpus.”

In **Tika Bahadur Khadka and Others v. Chief District Officer, Kavrepalanchowk and Others**, (1976 A.D.)<sup>39</sup>

The petitioners had been arrested on 27<sup>th</sup> Oct. 1976 but the respondents had issued them letters of detention on 4<sup>th</sup> Nov. 1976 only after the show cause notice was served, the court had refused to issue a writ of habeas corpus on an unpalatable ground that since the petitioners had failed to produce any proof to substantiate their accusation of having been arrested earlier than the filing of the writ petition, the writ of habeas corpus could not be issued in a case where the detention has been made only after the filing of the writ.

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<sup>37</sup> CDSCNHC, (1990), vol. 2, p. 375

<sup>38</sup> NKP (1971), vol. 13, No. 5, p. 177

<sup>39</sup> NKP. (1976), vol. 18, No. 10, p. 180.

The interpretation made by the Supreme Court in the subsequent cases the court propounded the principle of justiciability of the '*prime facie*' conditions and displayed its activism to safeguard and enforce the personal liberty in case of violation. **In Krishan Bahadur Karki Chhetri v. Chief District Officer, Lalitpur and Others, (1977 A.D.)**

The Supreme Court observed, "it cannot be presumed that '*prime facie*' condition of detention existed simply by mentioning in the order of detention that there was possibility of opposition to the matters contained in Section 3 (1) (b) of the Public Security Act. If there is no '*prime facie*' condition for detention, the order of detention cannot be deemed as in accordance with the law."

**In Yuv Raj Belbase v. Acting Chief District Officer of Kathmandu and Others, (1979 A.D.)<sup>40</sup>.**

The Supreme Court reemphasized the principle of justiciability of the existence of apparent '*prima facie*' conditions enunciated in the case of Krishna Bahadur Karki Chhetri. Ordering the release of Yuv Raj Belbase from illegal detention under the Public Security Act, the Supreme Court remarked: "In the written rejoinder presented by the Acting Chief District Officer there is no mentioned of the reason why it is essential to detain the petitioner and what alleged activities of the petitioner caused the suspicion about the possible breach of peace or order. Since there is no mention of the reason there seems to be no '*prima facie*' condition to keep him in detention. When somebody is deprived of his personal liberty through the exercise of a serious Act like the Public Security Act, the detaining authority must exercise his power with utmost care, for want of this it shall be tantamount to abuse of power. Even though the court is not empowered to examine whether or not the reason for detention is adequate, however, the question whether or not the exercise of power is based on any reason must be looked into. If even that becomes a matter outside the purview of this court, the right to personal liberty guaranteed by the Constitution shall turn into a matter confined only to paper."

**In Ram Bahadur Poudel v. the Deputy Zonal Commissioner of Bagmati Zonal Commissioner's Office, (1987 A.D.)<sup>41</sup>**

The Supreme Court made a significant observation that "the order issued by an official under the Public Security Act, exercising his subjective power must be objective. That is to say, while exercising his power under the Public Security Act to detain somebody

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<sup>40</sup> NKP. (1979), vol. 19, No. 5, p. 85.

<sup>41</sup> NKP. (1987), vol. 29, No. 9, p. 730.



the competent authority is obligated to show justifiable reasons." Likewise, the Supreme Court also propounded in **Ani Singh Thakuri v. Bagamati Zonal Commissioner's Office and Others**,<sup>42</sup> It appeared that the detention had been made with 'mala fide' intention by exercising the power under the Public Security Act in order to influence the court proceedings the detention shall be termed all illegal. The petitioner Ain Singh Thakuri was, immediately after his release from the prison by the decision of Bheri Zonal Court on 6<sup>th</sup> April, 1986, rearrested by the police. A writ of habeas corpus was filed on his behalf on 8<sup>th</sup> April, 1986. The defendants replied that the petitioner had been detained under the Public Security Act since 20<sup>th</sup> April, 1987. The writ of habeas corpus was filed on 8<sup>th</sup> April, 1986 and the show cause notice was issued by the single bench of the Chief Justice on 9<sup>th</sup> April, 1986. As it appears from the rejoinder of the Chief District Officer of Kathmandu and a copy of the letter of detention that Ain Singh Thakuri has been put into detention only since 20<sup>th</sup> April, 1987 the proceedings cannot as clean. Hence, as the order of the Chief District Officer on 20<sup>th</sup> April, 1987 affecting a sub judicial matter seems illegal the writ of habeas corpus is issued to release Ain Singh Thakuri."<sup>43</sup>

In **Gopi Krishan Dahal v. Assistant Zonal Commissioner of Janakpur Zone and Others**,<sup>44</sup> the petitioner had been detained by the defendant in connection with a private land dispute with one of the defendants who had lost the case at the law court. Although the petitioner was arrested on 2<sup>nd</sup> September, 1987 he was kept in custody without any letter of detention. It was only when a writ of habeas corpus was filed on his behalf on 13<sup>th</sup> September, 1987 that a letter of detention under the Public Security Act, 1961 was issued to him. Pointing out this apparent irregularity and the discrepancies in the facts and the charge made against the petitioner, the Supreme Court outright dismissed the alleged charge that the petitioner intended to harm the prevailing political system by inciting the people. Since the facts of the case did not corroborate the charge made against the petitioner issuing the writ, the Supreme Court observed that merely by mentioning in the letter of detention the alleged possibility of opposition to the matters pointed out in Section 3 (1) of the Public Security Act it could not be presumed that there existed a prima facie condition. Once more the Supreme Court reasserted the principle regarding the correlation between the gravity of the Public Security Act and the Sensitivity of personal liberty of a person in the following words:

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<sup>42</sup> NKP. (1987), vol. 29, No. 7, p. 762.

<sup>43</sup> NKP. (1987), vol. 29, No. 7, p. 764.

<sup>44</sup> NKP (1987), vol. 29, No. 9, p. 923.

"if the sensitive personal liberty of a citizen is usurped through the exercise of a grave Act like the Public Security Act, the detaining authority must exercise his power with at most care. Exercising his power in a contrary way will be tantamount to abuse of his authority. If somebody's fundamental freedom is infringed by the 'mala fide' act of the concerned official, the Judiciary is always committed to protect it at any cost.

While analyzing the legal provisions and the pronouncements of the Supreme Court it is necessary to serve the detention order to the detained person to keep him inside the prison bar. Despite all the prior decisions taken by the Supreme Court did not take into consideration of these decisions and legal provisions while deciding the case.

In **Harihar Birahi v. Bagamati Zonal Commissioner's Office**, (1987 A.D.)<sup>45</sup>

The Supreme Court did not interpret the Article 11 (6) of the Constitution of Nepal, 1962 and Section 121 according to the principle of criminal justice. Mr. Harihar Birahi was arrested on 13<sup>th</sup> August, 1987 and his arrest was kept secret till the Minister for Communication informed the House i.e. Rastriya Panchayat. The news of his arrest was published only on 15<sup>th</sup> August, 1987. Mr. Birahi moved writ of habeas corpus to the Supreme Court and claimed that he had not been informed of grounds of his arrest as per requirement of the Article 11(6) of the Constitution of Nepal, 1962 A.D. and Section 121 of the Court Procedure of Muluki Ain, 2020 B.S. (General Code, 1963 A.D.). The Supreme Court quashed the writ of habeas corpus without any hesitation arguing that the detention order, according to Section 121, is not required to serve someone arrested and detained in connection with the investigation. The argument is not consistent with the intention of the constitutional and legal provisions and the principle of criminal justice. Also, the Supreme Court overlooked the Section 3(1) of the Prison Act, 1962 A.D.<sup>46</sup> which specifically emphasized that the detention order is to be served according to Nepal Law to the person arrested and detained in connection with the investigation. The phrase "Nepal law" of this Section indicates the Section 121 of the Court Procedure of Muluki Ain, (General Code). The Supreme Court rectified its Harihar Birahi rulings in the case of **Jagdish Chudal v. One member, Forest Conservation Special Court, Taplejung District**, (1990 A.D.)<sup>47</sup> Court held that the arrested person required to be served with the detention order by the authority who orders to detain the accused. This decision was consistent with the principle of criminal justice and

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<sup>45</sup> NKP (1987) vol. 29. No. 10, p. 609.

<sup>46</sup> The Act entered into force on 17<sup>th</sup> August, 1963 and is still in force.

<sup>47</sup> NKP (1990), vol. 31. No. 1, p. 70.

constitutional and legal provisions. Indeed, the objective of the right to be informed of the ground of arrest can be fulfilled by serving the detention order.

In **Krishna Bahadur Thapa Chhetri v. Gandaki Zonal Commissioner's Office and Others**,<sup>48</sup> (1988 A.D.)

The Supreme Court held that keeping someone in detention by issuing repeated letters of detention one after another without the presence of any valid reasons or 'prima facie' conditions amounted to a 'mala fide' act, and the person whose sensitive fundamental rights such as his personal liberty has been infringed by such a 'mala fide' act or order of the respondents must be freed from their illegal detention through a writ of habeas corpus.

In **Tilu Ghale v. District Police Office, Kathmandu**, (1994 A.D.)<sup>49</sup>

The Supreme Court emphasized the constitutional obligation of seeking judicial remand of a detenu by producing him before a judicial authority within twenty four hours of his arrest, failing which a writ of habeas corpus would prevail. In this case the apex court also declared the proceedings against the petitioner who had been illegally detained for an offence relating to drugs with an ulterior motive of implicating him in a forged case. These judgements clearly show that there is no uniformity about the approach and outlook of the Supreme Court in regard to antecedent illegality of an act of detention vis-a-vis its subsequent legality. On the whole it can be said that Supreme Court is very much anxious to afford protection to the personal liberty of citizens'. But at the same time the Supreme Court is also concerned about the prospect of a likely increase in the number of crimes causing danger to the society if real culprits are let loose by giving them benefit of misconduct or negligent acts of the police in not conforming to the required rules while taking them into custody. Thus the approach of the Supreme Court in this regard can be very well described as an attempt at harmonizing the personal freedom with the need for social security.

Under clause (7) of Article 14 there is a specific prohibition that "nothing in clauses (5) and (6) shall apply to a citizen of an enemy State and nothing in clause (6) shall apply to any person who is arrested or detained under any law providing for Preventive Detention."

In **Sita Ram Agrawal v. District Police Office, Kathmandu** (1995 A.D.)<sup>50</sup>

The Supreme Court held that antecedent illegal police detention would vitiate the detention even if the detenu had been subsequently remanded to police custody as per the law. In this case the petitioner who was detained by the police was produced before the

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<sup>48</sup> NKP, (1988), vol. 30, No. 7, p. 696.

<sup>49</sup> NKP, (1994), vol. 36, No. 11, p. 097

<sup>50</sup> NKP, (1995), vol. 37, No. 7, p. 597

judicial authority for remand only after twenty days and misrepresenting before the court that he had been arrested only the previous day. On the basis of a false report the defendant secured the remand of the petitioner on the charge of theft. Deciding the case the Supreme Court observed that on the basis of various documents presented in the case it was clear that the petitioner had been arrested earlier than the date shown by the defendant and placed in illegal detention in contravention of the protection guaranteed by Article 14 (6). The Supreme Court further held that "when the initial illegal detention was in continuation an act of hiding that fact by showing a different date of arrest and putting the detenu into further detention was bound to be adversely affected by the initial illegal detention." Thus the antecedent illegal detention vitiated the subsequent detention of the accused in police custody and in such a case the writ of habeas corpus would prevail.<sup>51</sup>

In **Vishnu Pukar Shrestha v. His Majesty's Government and Others**, (1998 A.D.)<sup>52</sup>

The petitioner had been detained by the Chief District Office of Bhaktpur for committing the offence of fund-raising in the name of Maoists by using threat and possessing various objectionable pamphlets. These acts were treated as having the potential of disturbing public security. Voiding his detention as illegal and violation of the right against Preventive Detention guaranteed by Article 15 of the Constitution of Kingdom of Nepal, 1990 A.D., the court observed that it should be considered on objective grounds whether or not there are sufficient grounds to put somebody in detention in order to prevent him from committing any act which may at once affect the sovereignty or integrity of Nepal or public order. "A detaining authority is not empowered to determine subjectively the just and sufficient grounds." The Supreme Court further held that the petitioner should be prosecuted for illegal fund-raising in accordance with the law. "Any grounds or proofs prepared in connexion with any criminal offence cannot be treated as a basis for the purpose of Preventive Detention." And as for carrying the pamphlets regarding the Maoist ideology, the court observed that since the right to freedom of opinion and expression was guaranteed by Article 12 (2) (a) of the Constitution, carrying of those pamphlets cannot be treated as a ground for detention as specified in Article 15(1) of the Constitution of Kingdom of Nepal, 1990 A.D. and Section 3(1) and 4 (1) of the Public Security Act, 1989 A.D.

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<sup>51</sup> NKP, (1995), vol. 37, No. 7, p. 604

<sup>52</sup> NKP, (1998), vol. 40, No. 1, Pp. 11-15.

Earlier in **Krishna Dhwoj Kadka v. His Majesty's Government and Others**, (1998)<sup>53</sup>

A special bench of the Supreme Court held that as nobody could be put in Preventive Detention until and unless there was sufficient ground for immediate threat of disturbance to the national sovereignty or integrity of the Kingdom of Nepal or the public order as per Article 15(1) of the Constitution of Kingdom of Nepal, 1990 A.D, the court must review whether or not there were sufficient grounds for such detention. The Supreme Court also observed that since the legal provision of Section 11 of the Public Security Act, 1989 A.D. as had been already held, contravened the relevant provisions of the Constitution there was no further need to invalidate the impugned Section. Thus, the court observed, "The Nepalese Constitution does not give legal immunity to anybody to put any one in detention without complying with the legal provisions and without any appropriate and solid grounds, thereby violating his sensitive right like personal freedom. In such a case every organ must comply with the procedure clearly laid down by the law itself while implementing that law."

In **Benoj Adhikari and Others v. His majesty's Government and Others**, (1998 A.D.)<sup>54</sup>

The petitioners had been detained under the Public Security Act, 1989 since the police had recovered some unlicensed and objectionable weapons like hand grenades, petrol bombs, explosive materials etc. from their possession. Differentiating between punitive detention and Preventive Detention the Supreme Court observed that under punitive detention a person was put in prison after he was condemned guilty to undergo his sentence whereas Preventive Detention was resorted to in order to at once prevent somebody from committing any act meant for disturbing peace and order of the Kingdom. As there was a fundamental difference between these two acts of detention, one could not be legally used in order to achieve the object of another. It was also held that the act of detaining under the Public Security Act, in connexion with an offence which should be prosecuted under the relevant law also did not conform to the general legal principle that a particular law enacted for a specified objective must be utilized only for that very objective. So the detention was held illegal.

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<sup>53</sup> SAB, (1998), No. 1, p.1.

<sup>54</sup> NKP, (1998) vol. 40, No. 1, Pp. 1-8.

In **Khimlal Devkota v. His Majesty's Government, Home Ministry and Others**, (2006 A.D.)<sup>55</sup>

The Supreme Court held that, the reason of detention must be clearly mentioned in the detention order and letter of detention of grounds must be given to the detained person. Such reason should not be written the detention order cannot be treated as procedural followed by the law.

It is clear from the above discussion that Nepal did go through a stage of crisis in protection of right of individual, when there was rampant violation of human rights during the period of 1951 to 2006 A.D. But, slowly one could notice the judiciary did assert its role and there are cases when the judiciary went to its' extend of penalizing the official for not following procedural safeguards. As mention elsewhere in this thesis the judicial system and especially the judicially reasoning have been heavily drawn from the judicial form the neighboring country in India. The one restraint that could be ascertained is the strong and overpowering administrative system which often considers the legal process and the constitutional safeguard as unnecessary inconvenience to them in the fulfillment of their administrative functions.

#### **6.5 Preventive Detention – Opinion of Judges, Advocates, and Non-Judicial persons**

It was felt that the research would be incomplete by merely analyzing the judicial process on Preventive Detention. Since, the judicial process is limited to only those cases which have come up before the court, and which court had opportunity of decide. There was a further restraint on this study due to the non availability of case materials. Therefore, being a democracy peoples' view and perspectives the law and enforcement is equally important.

This part is the study is carried out though the process of administration of a questionnaire to various segments and the public, who would normally have some opinion and views on the functioning of the law enforcement agencies and the judicial review of such functions of the law enforcement agencies which affects the basic fundamental rights of individual citizens for the purpose of the study the following sections of the society where administered the questionnaire namely; Judges, Advocates, Non-judicial persons.

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<sup>55</sup> NKP, (2006), vol. 1, no. 10, p. 16

**[Selection of the sample Table No: A]**

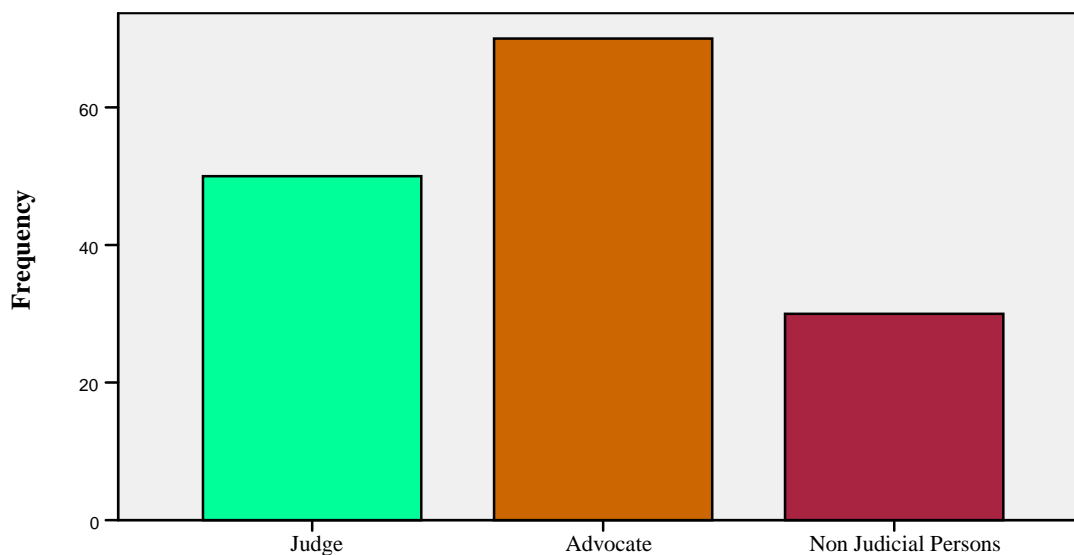
<b>Name of the Respondent</b>	<b>Number of Respondents</b>	<b>Percentage</b>
Judges	50	33.3
Advocates	70	46.7
Non- Judicial Officers	30	20.0
Total	150	100.0

In all hundred and fifty questionnaires were administered, out of this 33.3 percent of the questionnaire were administered to the judicial officers. A representative sample from each category of the judicial officials namely; Judges of the Supreme Court, Judges of Appellate Courts, Judges of Special Court, and Judges of District Courts were taken. The questionnaires to the judicial officer were the formulated appropriated to their functioning. Similarly 46.7 percent questionnaire where administered to Advocates who are practicing in various courts in Nepal namely; Supreme Court, Appellate Courts, Special Court, and District Courts. This questionnaire were also formulated keeping in mind the role of the advocates in the judicial process an especially those advocates who dealt with Preventive Detention cases and 20 percent of the questionnaires were administered to non-judicial persons including member of public who are involved in the court process. This questionnaire also was suitably formulated. Due to time constraint the questionnaire received were subjected to statistical analysis. The responses received from respondents, where standardized and tabulated for the purpose of analysis as given below:

**Table No. 1**

**Distribution of Respondents according to profession**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Judges	50	33.3	33.3	33.3
Advocates	70	46.7	46.7	80.0
Non Judicial Persons	30	20.0	20.0	100.0
Total	150	100.0	100.0	



**Bar Graph No. 1**

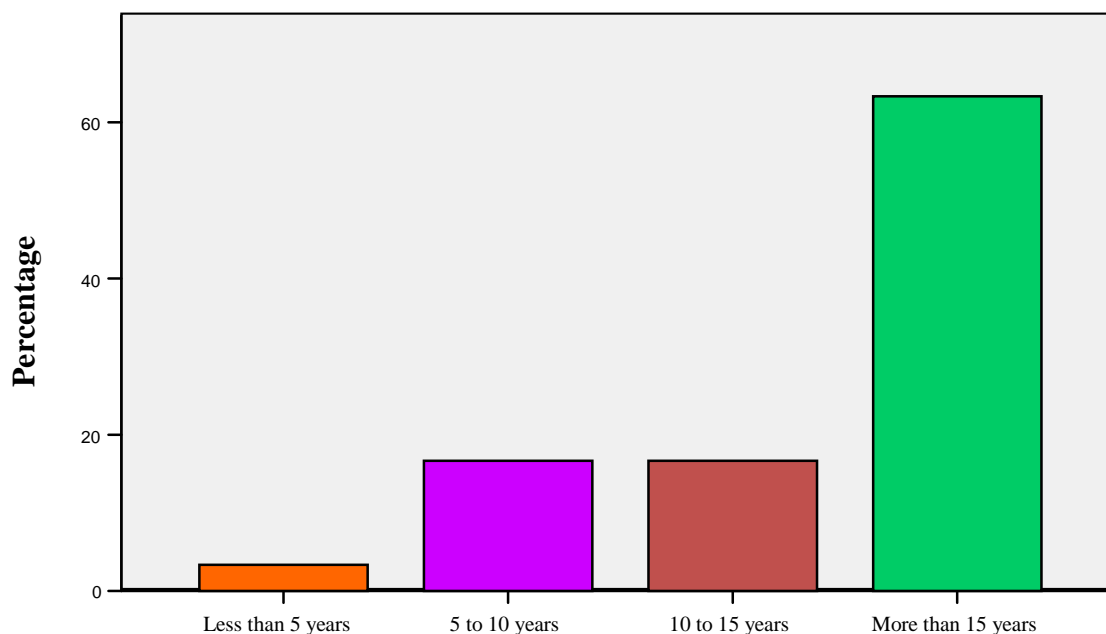
The questionnaire was administered to persons are connected to the Judicial system as given above in [Table No. 1, and Bar Graph No. 1.]. Out of total sample collected 33.3 percent of the respondents were Judges, 46.7 percent of the respondents were Advocates, 20 percent of the respondents were Non-Judicial persons including with member of public, whereas member of public have not mention their profession.



**Table No. 2**

**Distribution of Respondents according to experience**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Less than 5 years	5	3.3	3.3	3.3
5 to 10 years	25	16.7	16.7	20.0
10 to 15 years	25	16.7	16.7	36.7
More than 15 Years	95	63.3	63.3	100.0
<b>Total</b>	<b>150</b>	<b>100.0</b>	<b>100.0</b>	

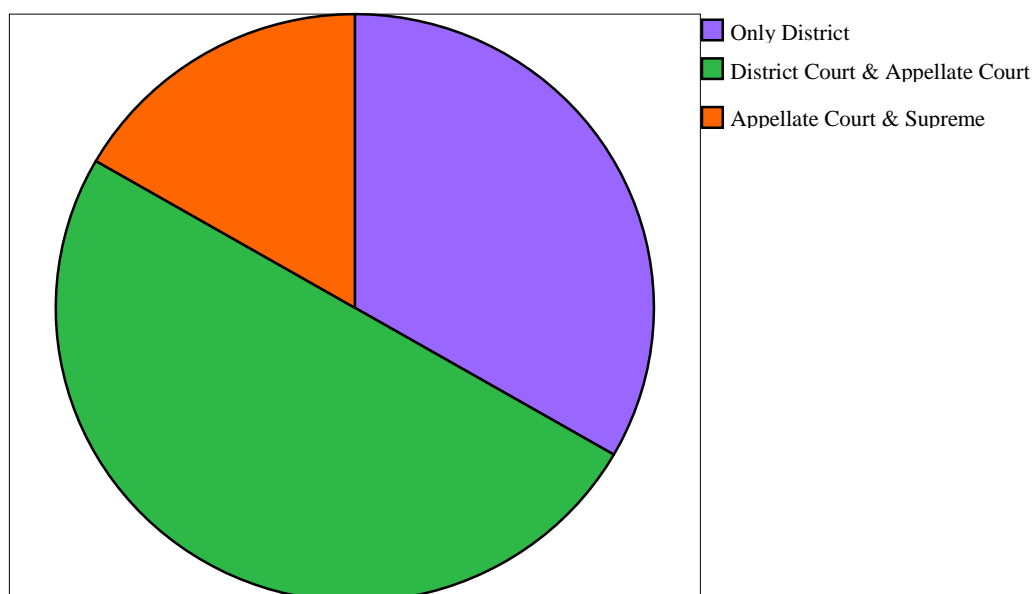


**Bar Graph No. 2**

Out of total sample collected 3.3 percent of the respondents have experience of less than 5 years, 16.7 percent of the respondents have experience of 5 to 10 years, 16.7 percent of the respondents have experience of 10 to 15 years and 63.3 percent of the respondents have experience more than 15 years shows in [Table No. 2, and Bar Graph No. 2]

**Table No. 3**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Only District Court	50	33.3	33.3	33.3
District & Appellate Court	75	50.0	50.0	83.3
Appellate Court & Supreme Court	25	16.7	16.7	100.0
Total	150	100.0	100.0	

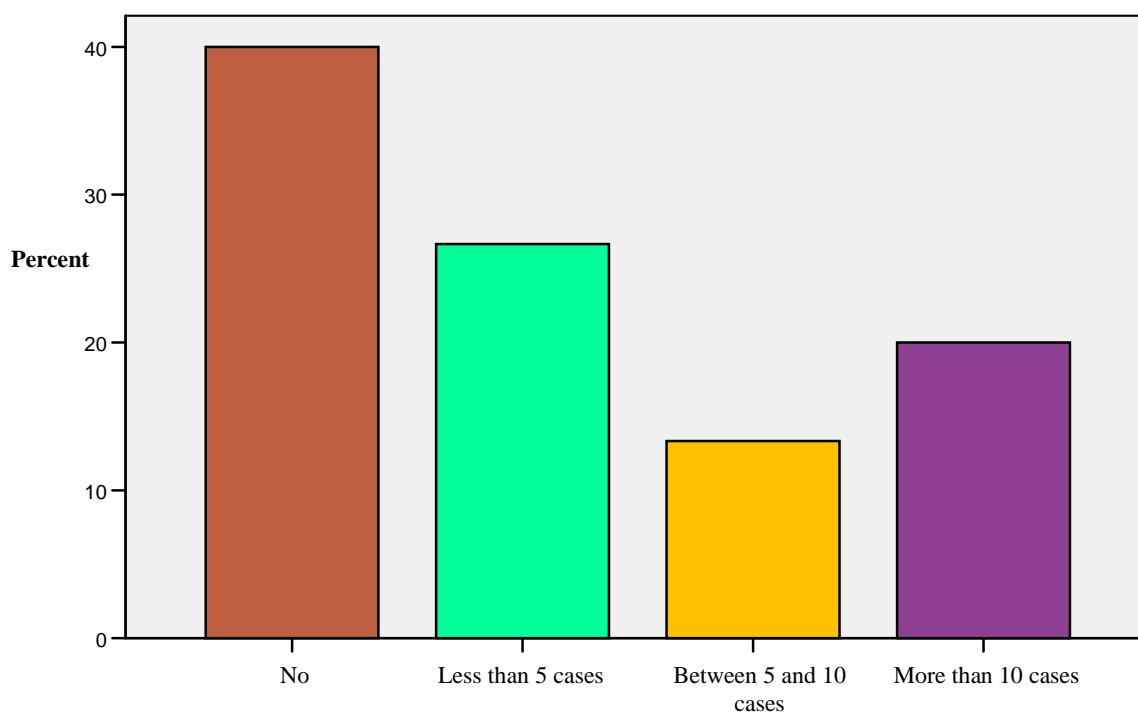


**Pie Chart No. 1**

Out of total sample collected 33.3 percent of the respondents have been practiced District Courts, 50 percent of the respondents have been practiced District Court as well as Court of Appeal and 16.7 percent of the respondents have been practiced Supreme Court and Court of Appeal [Table No. 3 and Pie Chart No. 1].

**Table No. 4**  
**Distribution of Respondents as per experience and dealing with Preventive Detention cases**

Respondents	Frequency	Percent	Valid Percent	Cumulative Percent
No	30	40.0	40.0	40.0
Yes less than 5 cases	20	26.7	26.7	66.7
Between 5 and 10 cases	10	13.3	13.3	80.0
More than 10 cases	15	20.0	20.0	100.0
Total	75	100.0	100.0	



In above [Table No. 4 and Bar Graph No. 3] shows, the subjects experience and dealing with the Preventive Detention cases show that 75 samples having Advocate as profession, 40 percent have not dealt with any case on Preventive Detention during their practice, 26.7 percent have less than 5 cases, 13.3 percent have less than 10 cases and 20 percent have more than 10 cases.

**Table No. 5**

**Distribution of Respondents and their opinion regarding extend of Preventive Detention**

Respondents	Frequency	Percent	Valid Percent	Cumulative Percent
Not Aware	20	13.3	13.3	13.3
Yes few cases	70	46.7	46.7	60.0
Yew many cases	50	33.3	33.3	93.3
Yes some cases of mass arrests	10	6.7	6.7	100.0
Total	150	100.0	100.0	



**Pie Chart No. 2**

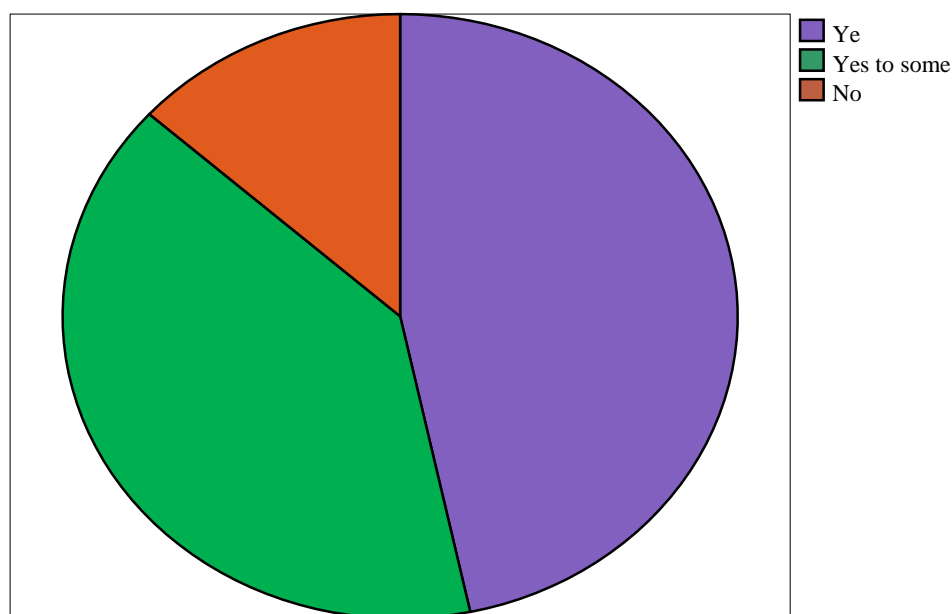
The next question to the respondents was regarding their views on the existence of Preventive Detention during the '*panchayat regime*' that is thirty year's period (1960 to 1990 A.D.) from the above [Table No. 5 and Pie Chart No. 2.] it is clear that the most of them were aware about the imposition of the Preventive Detention during the '*panchayat regime*'. The large majority of respondents nearly 35 percent opined that there were many cases of Preventive Detention during this period from their responses. It is clear that during that period in the history of Nepal known as the '*panchayat regime*', there were many cases of Preventive Detention. In fact this period came to be known in the history of Nepal in the '*dark period*'. This study in fact focuses on this particulate period when there were maximum Preventive Detention cases and the courts were helpless as many of these cases did not come

up for judicial scrutiny. This kind of administrative nepotism seems to be the major road block in Nepal's evolution as a human rights respecting and upholding nation.

**Table No. 6**

**Opinion regarding the unfairness and Preventive Detention arrest**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Yes	70	46.7	46.7	46.7
Yes to some extent	60	40.0	40.0	86.7
No	20	13.3	13.3	100.0
Total	150	100.0	100.0	



**Pie Chart No. 3**

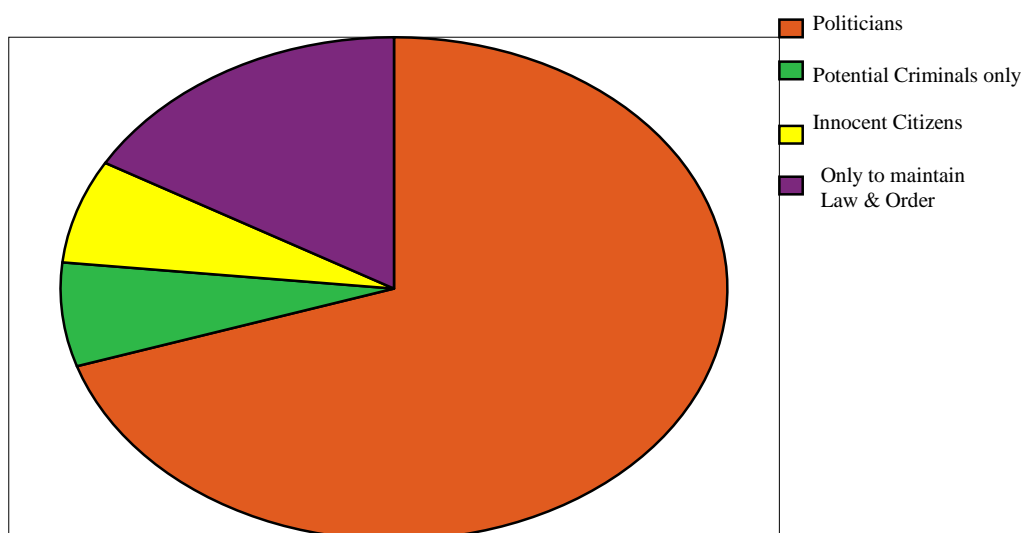
While examining the fundamental reason as to why such a situation arose in Nepal during the '*panchayat regime*' in thirty years, large majority that is nearly 86 percent of them where of the opinion that the then existing laws of Preventive Detention were unfair and unjust. It is hardly above 10 percent of the responded who felt otherwise. Therefore, it could be gathered there was inadequacy in the law relating to Preventive Detention which has of course, resulted is large number of the Preventive Detention in Nepal. One need to realize

that added to the fact of administrative nepotism, the law did not provide adequate protection and safeguard to the unlucky victims of Preventive Detention during those three decades.

**Table No. 8**

**Opinion regarding Preventive Detention arrest of different fields**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Politicians	105	70.0	70.0	70.0
Potential Criminals only	10	6.7	6.7	76.7
Innocent Citizens	10	6.7	6.7	83.3
Only to maintain Law & Order	25	16.7	16.7	100.0
Total	150	100.0	100.0	



**Pie Chart No. 4**

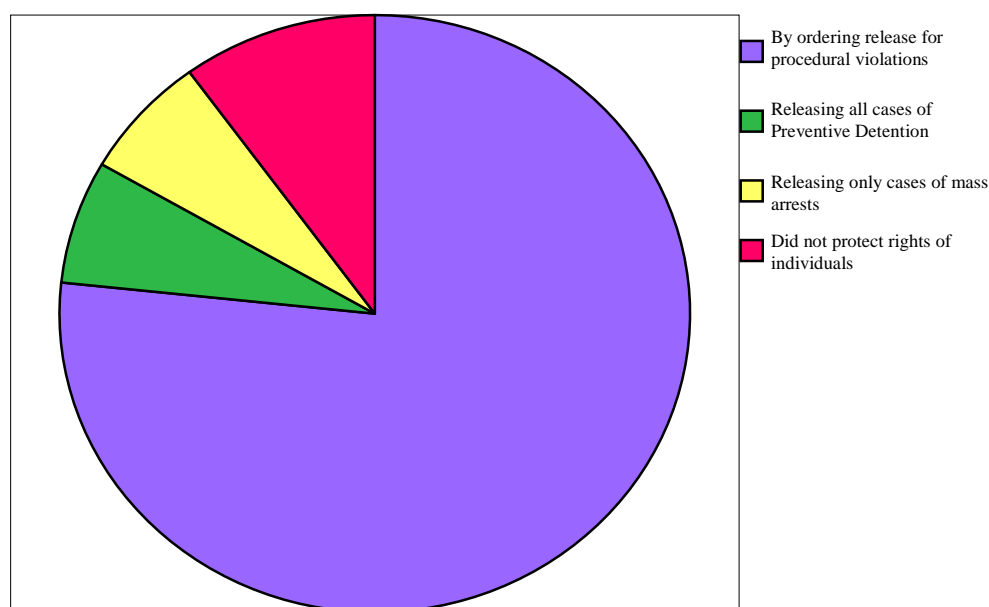
The questionnaire further probed into reasons for such large number of Preventive Detention during the '*panchayat regime*' the responses seems to reveal that the underlying motive behind such Preventive Detention arrest. In above mentation [Table No. 8 and Pie Chart No. 4] shows that the underlying reason for the large majority were political victims, such arrest were of that, who are either involved or supported or sympathized with the political ideology. It is therefore clear that the Preventive Detention machinery in Nepal was mainly used to suppress and eliminate the voice of decent, a matter of grave human rights concern. It is therefore clear that in the professional circles and in public domain there was general

awareness that decent and differences' opinions were not tolerated in Nepal. This has been threat to the democratic process and the full-fledged the implementation of democracy in Nepal.

**Table No. 9**

**Opinion regarding effectiveness of the role of judiciary in cases relating to Preventive Detention**

Respondents	Frequency	Percent	Valid Percent	Cumulative Percent
By ordering release for procedural violations	115	76.7	76.7	76.7
Releasing all cases of Preventive Detention	10	6.7	6.7	83.3
Releasing only cases of mass arrests	10	6.7	6.7	90.0
Did not protect rights of individuals	15	10.0	10.0	100.0
Total	150	100.0	100.0	



**Pie Chart No. 5**

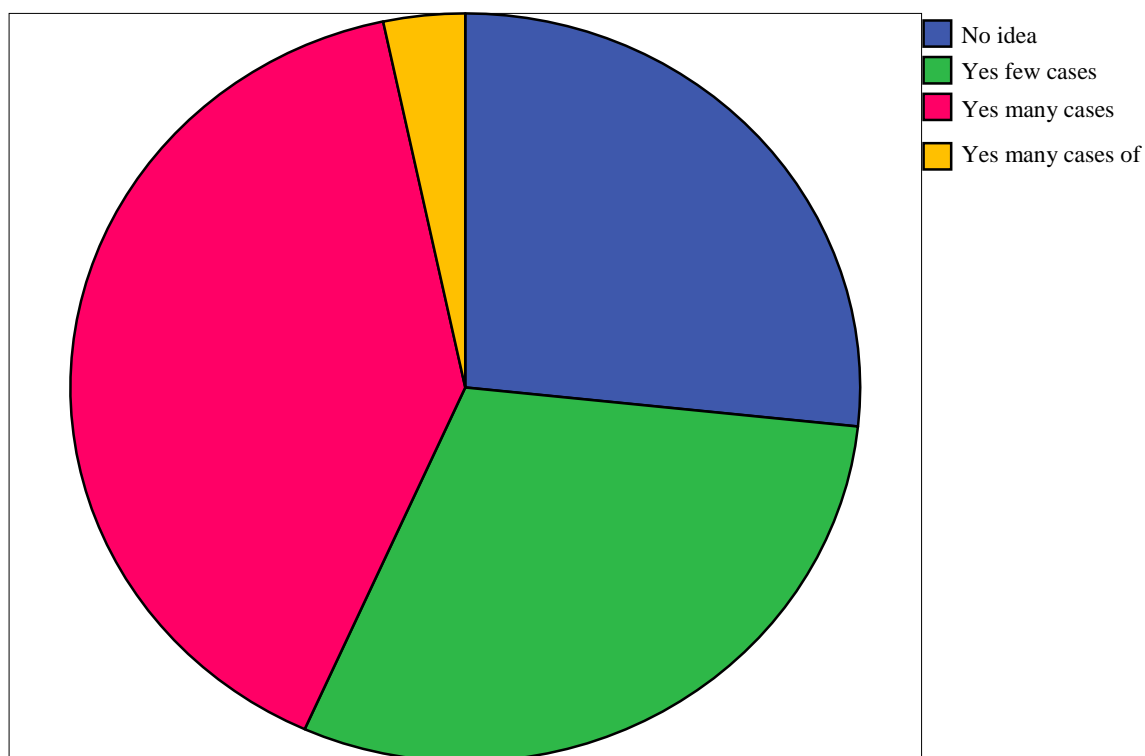
Judiciary being the guardian and the protector of rights of the citizens the natural concerns when the administrative official exercise uncontrolled power, is to check such administration exercise. It gratifying, the note that to a greater extend, the Nepalese judiciary

withstood the pressure and the pulls of the ruling elites. [Table No. 9. And Pie Chart No. 5] that is why, shows a large majority is nearly 80 to 90 percent of the respondents opinioned that the judiciary played the crucial role and ordered release of the detenus wherever and whenever it was possible. Especially, in the cases of mass arrests and the tool used by the judiciary was the close scrutiny of the procedural norms and ordering release, wherever and whenever there was violation of these procedural norms.

**Table No. 10**

**Opinion of Respondents regarding arrest and detention of innocent person**

Respondents	Frequency	Percent	Valid Percent	Cumulative Percent
No idea	40	26.7	26.7	26.7
Yes few cases	45	30.0	30.0	56.7
Yes many cases	60	40.0	40.0	96.7
Yes many cases of mass arrest	5	3.3	3.3	100.0
Total	150	100.0	100.0	





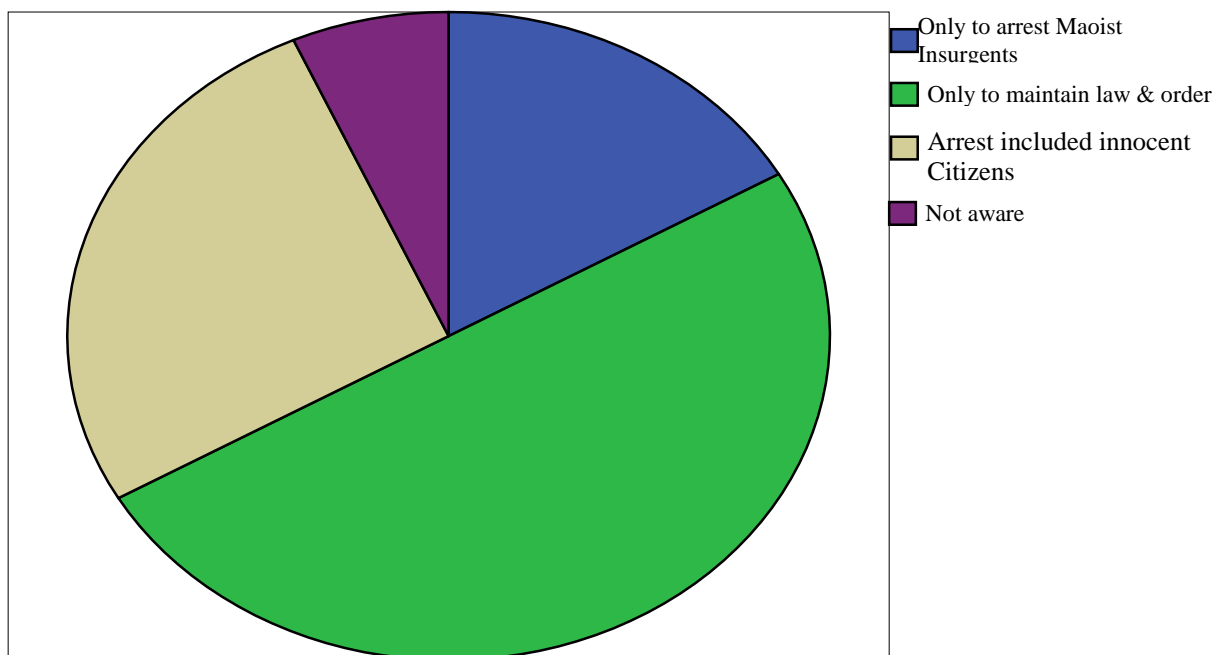
**Pie Chart No. 6**

In order to understand and evaluate the impact and evolution of the Preventive Detention there respondents are further asked their opinion on Preventive Detention (1996 to 2006 A.D). That is the period of Maoist Insurgency in Nepal. It is found even during the Maoist Insurgency the opinion generally was there were many cases of indiscriminate in addition to there being arrest of mass arrest. From these 2 chart 1 could easily summaries that the Nepal as a nation has been subject to the evolves of Preventive Detention resulting the human rights violation repeatedly under differing circumstances therefore the concern of the protection of human rights and that the uphold of the rules and law is the matters of the concern the all people living in Nepal who have their aspiration of personal and profession growth and enjoying of the freedom.

**Table No. 11**

**Opinion of Respondents regarding the impact of Maoist insurgency for imposition a Preventive Detention**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Only to arrest Maoist insurgents	25	16.7	16.7	16.7
Only to maintain Law & Order	75	50.0	50.0	66.7
Arrest included innocent citizens	40	26.7	26.7	93.3
Not aware	10	6.7	6.7	100.0
Total	150	100.0	100.0	



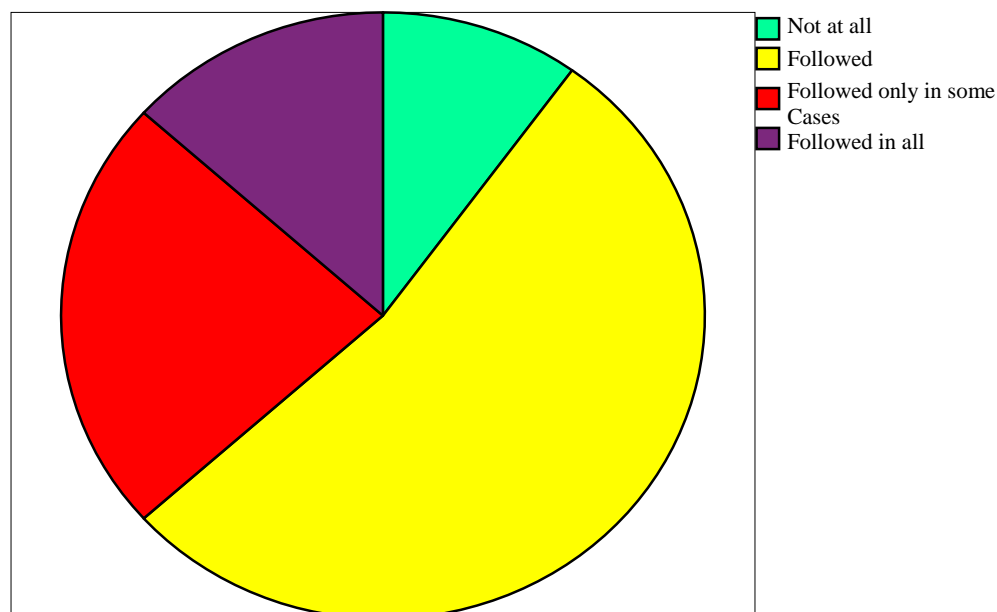
**Pie Chart No. 7**

The further inquiry was directed to ascertain the cause of the Preventive Detention during the Maoist insurgency. Table No. 11 and Pie Chart No. 7 show there are two types of predominant opinion that comes out of the survey as shown in the chart. It is that many of them were of the opinion that during those days Preventive Detention arrests were used mainly to detain Maoist insurgents 16.7 percent, and also to maintain law and order 50 percent. These responses raises the fundamental issues as to the mode of government, which is to say whether the law of Preventive Detention can be used as often as used to be done in the name of maintain law and order, if the answer is affirmative then there is a lurking possibility that more often than not, innocent persons may became victims of such arrest.

**Table No. 12**

**Opinion of Respondents regarding the effects of safeguard in Preventive Detention**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Not at all followed	15	10.0	10.0	10.0
Followed partially	80	53.3	53.3	63.3
Followed only in some cases	35	23.3	23.3	86.7
Followed in all cases	20	13.3	13.3	100.0
Total	150	100.0	100.0	



**Pie Chart No. 8**

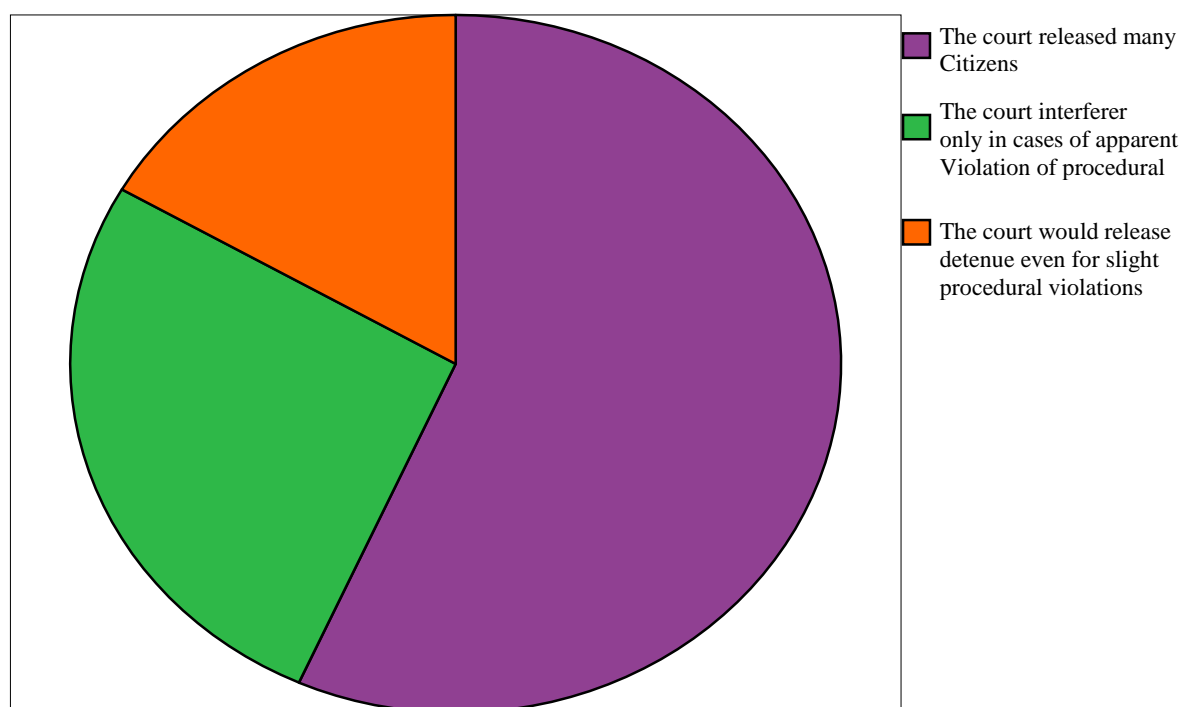
To substantiated the earlier view that there was often danger of the misuse of law relating Preventive Detention if the same is used frequent and commonly in the name of law and order therefore while opinion was sort as to the following of procedural norms and safeguards during the Preventive Detention is the during the period of Maoist insurgency, a vast majority of them were of their opinion that the procedural safeguard were not followed in most of the cases. [Table No. 12 and Pie Chart No. 8] Only about 10 percent of the respondents were of the view that the procedural safeguard were followed this raise a fundamental questions as to whether the exercising of power of the Preventive Detention by

itself is the human rights violation or the violation of the procedural norms during the Preventive Detention is the cause of the human rights violation.

**Table No. 13**

**Opinion regarding role of judiciary during the Maoist insurgency**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
The court released many citizens	85	56.7	56.7	56.7
The court interferer only in cases of apparent violation of procedurals	40	26.7	26.7	83.3
The court would release detenue even for slight procedural violations	25	16.7	16.7	100.0
Total	150	100.0	100.0	



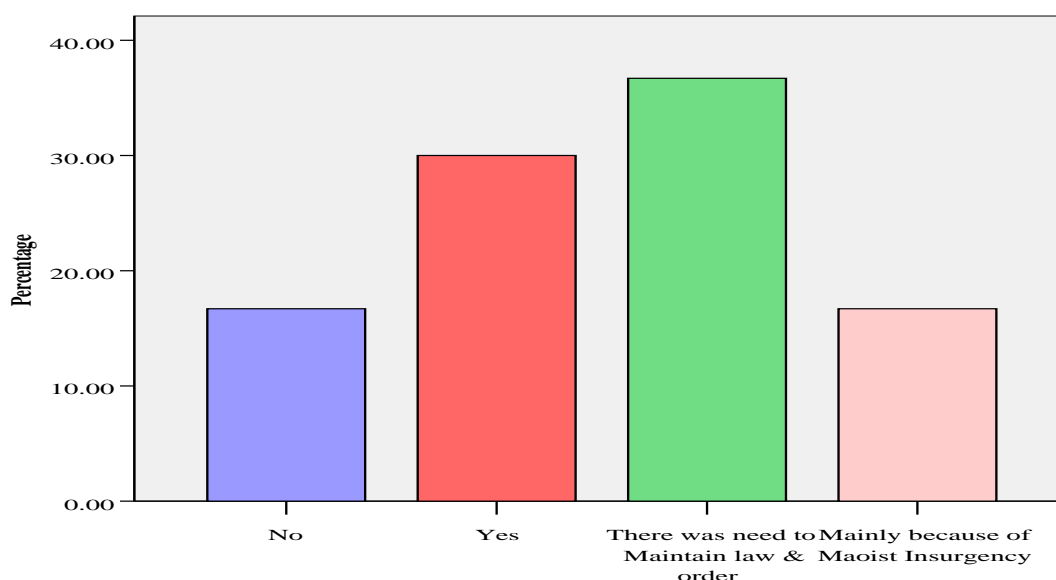
**Pie Chart No. 9**

The further analysis that the lead to procedural safeguard in protecting to human rights. Almost 100 percent of the respondent were of the view that court played the pivotal role in the ensuring the release of detenues wherever possible the courts were instrumental in the release the many citizens from the clutches of Preventive Detention Table No. 13 and Pie Chart No. 9]. This question shows the judiciaries had played its role well do so even, in future as instrumentality to uphold human rights in Nepal.

**Table No. 14**

**Opinion regarding impact of Monarchy a Preventive Detention**

Respondents	Frequency	Percent	Valid Percent	Cumulative Percent
No	25	16.7	16.7	16.7
Yes	45	30.0	30.0	46.7
There was needed to maintain Law & Order	55	36.7	36.7	83.3
Mainly because of Maoist insurgency	25	16.7	16.7	100.0
Total	150	100.0	100.0	



**Bar Graph No. 4**

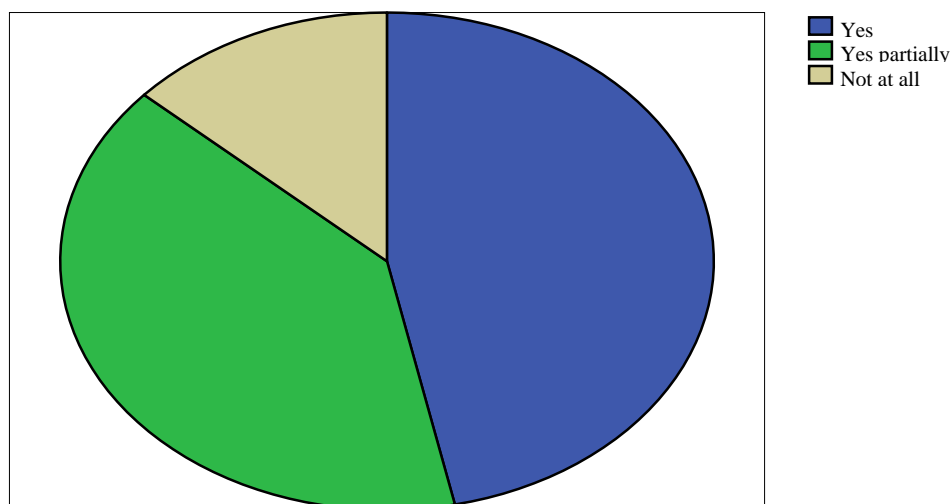
One should not forget the fact that Nepal has been a monarchy and yet aspiring to becoming democracy. Centuries ago, Great Britain successfully affected this transition by the

signing of the famous '*Magna Carta*'. It was a case of monarchy understanding the pulse of the people and then peacefully acceding to people's demand resulting in the royalty becoming a token titular head; to the query in this case whether one could anticipate a similar situation or repeat of history in Nepal. Opinion seems to be divided, the large majority did feel that the monarchy usurped the power, mainly because the Maoist insurgency resulting in law and order. Yet, from the above Bar Graph No. 4 can notice that the almost 50 percent of the respondents felt that there is a strong eliminated of monarchy wanting to usurp absolute power and thus interfering in the constitutional process, on the protect and maintain law and order. In these contexts, one should remember that one of the reasons for the constant change of the Constitution of Nepal was mainly because of the interferer of the monarchy. The monarchy in Nepal unlike in the Great Britain and other nations seems to be most unwilling to share and surrender power. It is because of the very same reason; presently the monarchy in Nepal has become power less and redundant.

**Table No. 15**

**Opinion regarding the effect of the Interim Constitution in Preventive Detention arrests**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Yes	70	46.7	46.7	46.7
Yes partially	60	40.0	40.0	86.7
Not at all	20	13.3	13.3	100.0
<b>Total</b>	<b>150</b>	<b>100.0</b>	<b>100.0</b>	

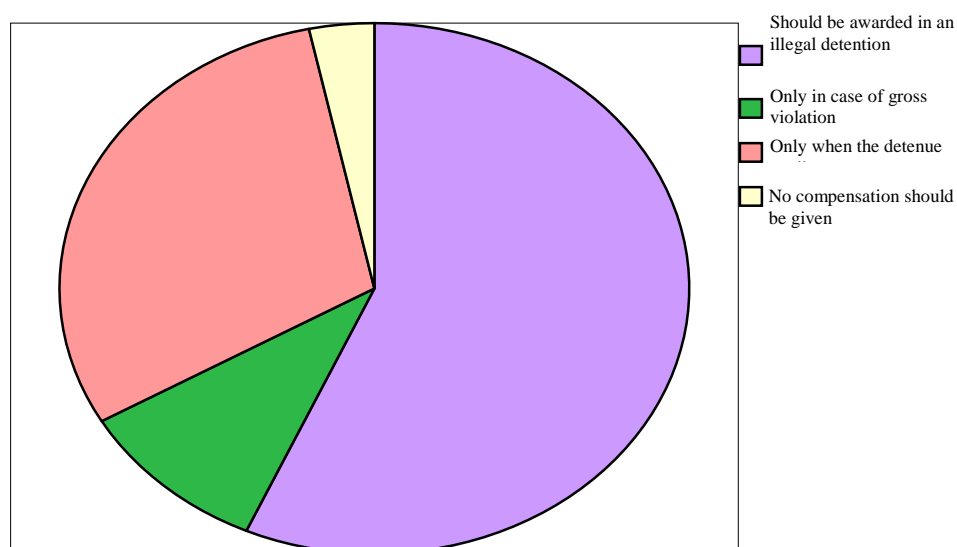


**Pie Chart No. 11**

Further substantiation of the earlier mentioned premises that one of the reasons for indiscriminate Preventive Detention arrest may be because of interference of the monarchy and their reluctance to part with power, is clear from the respondents' next response to the as indiscriminate Preventive Detention with the passing of the Interim Constitution of Nepal. In above [Table No. 15 and Pie Chart No. 11] shows, nearly 85 percent seem to agree that the passing of the constitution almost culminated the cases of indiscriminate Preventive Detention in Nepal. This is a gentle reminder that upholding and implementation constitutional values have positive impact on the protection of human rights.

**Table No. 16**  
**Opinion regarding Compensation payable for Preventive Detention arrest**

Respondents	Frequency	Percent	Valid Percent	Cumulative Percent
Should be awarded in an illegal detention	85	56.7	56.7	56.7
Only in case of gross violation	15	10.0	10.0	66.7
Only when the detenué applies	45	30.0	30.0	96.7
No compensation should be given	5	3.3	3.3	100.0
Total	150	100.0	100.0	



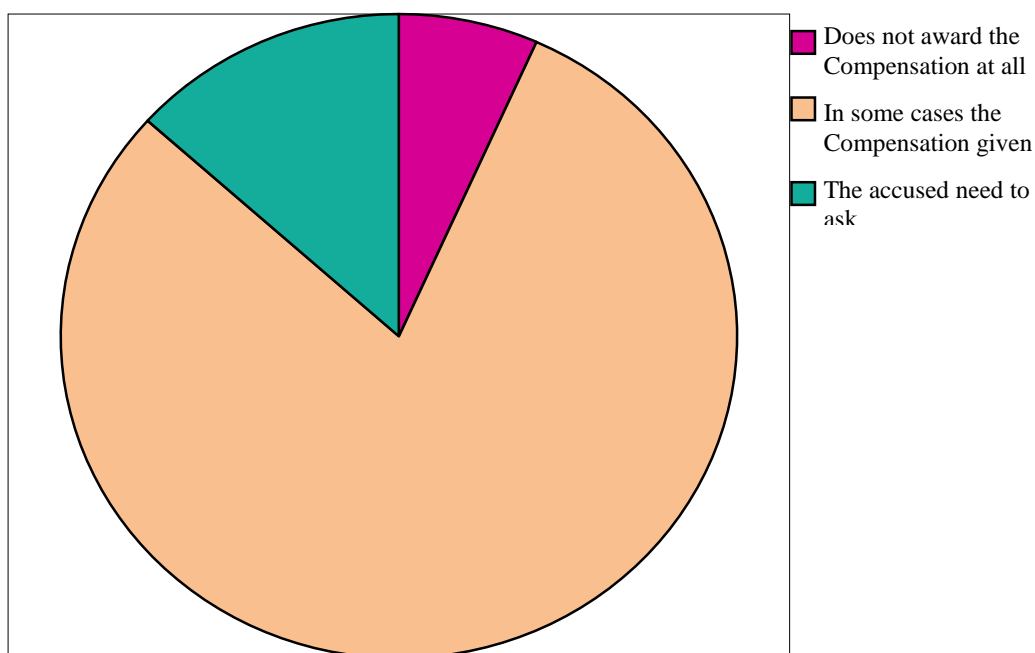
**Pie Chart No. 12**

The next issue that was the responsibilities of the state to compensate those who on detained, it should be noted that [Pie Chart No. 12] nearly 60 percent of the respondent were of the opinion that state needs to take responsibility in the all case of illegal detention and accordingly compensate the victims of the illegal State action. Victim's compensation has been recognized as an essential Criminal Jurisprudence Principle. Therefore the thinking of the respondent towards compensating of the illegal detenus is in tune of the internationally accepted Principle of the Criminal Jurisprudence. This shows that the thinking of legal professionals in Nepal is in tune with the International Jurisprudential evolution.

**Table No. 17**

**Opinion regarding Compensation under the Torture Act for detention**

Respondents	Frequency	Percent	Valid Percent	Cumulative Percent
Does not award the compensation at all	10	6.7	6.7	6.7
In some cases the compensation given	120	80.0	80.0	86.7
The accused need to ask for the compensation	20	13.3	13.3	100.0
Total	150	100.0	100.0	



**Pie Chart No. 13**

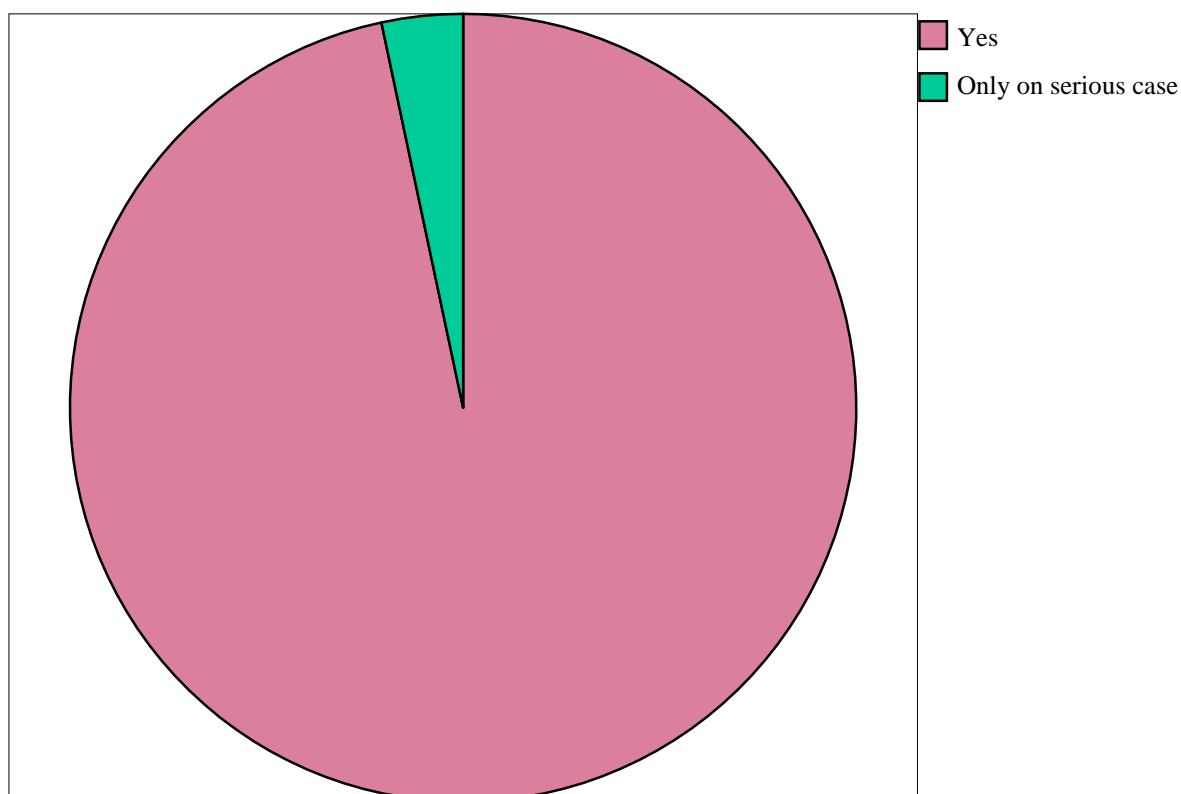


The further query into this aspect of compensation all most, all the respondents were of the opinion that the existing legal instrument in Nepal namely Compensation Relating Torture Act, could be used to compensate victims of illegal detention. The overwhelming responses of nearly 97 percent of the respondent clearly expressed their concern that the state should compensation the victims of the state illegal action [Table No. 17 and Pie Chart No. 13]

**Table No. 18**

**Opinion regarding District Court power to issue writ of habeas corpus**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Yes	145	96.7	96.7	96.7
Only on Serious case	5	3.3	3.3	100.0
Total	150	100.0	100.0	



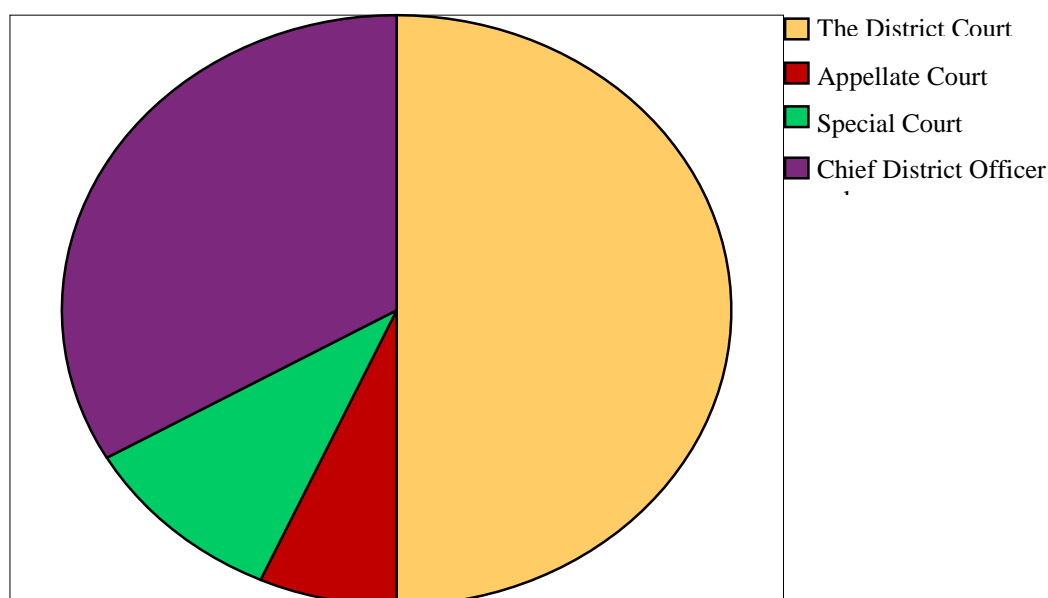
**Pie Chart No. 14**

It is well accepted principle of law that the issue of the writ of *'habeas corpus'* is often, the best and the most appropriate remedy, in cases of illegal detention. The issue that was raised was concerning the larger utility of such a writ, whether the power to issue such a writ could be devolved even if the district court. Nearly the 97 percent of them felt that if district court is given power to issue *'habeas corpus'* writ, many case of illegal detention could easily be rectified or may not even take place [Pie Chart No. 14]. This shows their concerns for the disadvantages and the poor victims of Preventive Detention who may not have capacity to approach the Appellate Courts.

**Table No. 19**

**Opinion regarding vesting a power of *'habeas corpus'* on various courts**

Respondents	Frequency	Percent	Valid Percent	Cumulative Percent
The District Court only	75	50.0	50.0	50.0
Appellate Court	10	6.7	6.7	56.7
Special Court	15	10.0	10.0	66.7
Chief District Officer only	50	33.3	33.3	100.0
Total	150	100.0	100.0	



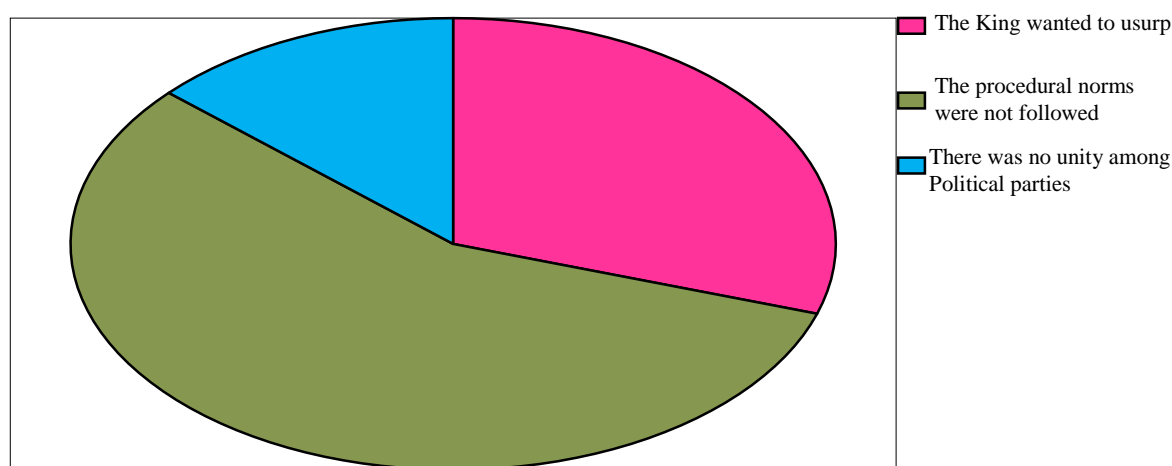
**Pie Chart No. 15**

Going a step further, the inquiry directed towards whether there was appropriate and justifiable to entrust the power to issue writ of 'habeas corpus' even to other like Chief District Officer their seem to be general consciences the power to issue writ should be retained with judiciary. That is up to District Court only that exhibits the truth in the Nepalese judicial system by the professionals. Meaning is that the judicial system of Nepal will be able to effectively deal with cases of illegal detention if such power is available to the District Court [Table No. 19 and Pie Chart No. 15].

**Table No. 20**

**Opinion regarding the reason for large number of Preventive Detention cases**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
The King wanted to usurp	45	30.0	30.0	30.0
The procedural norms were not followed	85	56.7	56.7	86.7
There was no unity among political parties	20	13.3	13.3	100.0
Total	150	100.0	100.0	



**Pie Chart No. 16**

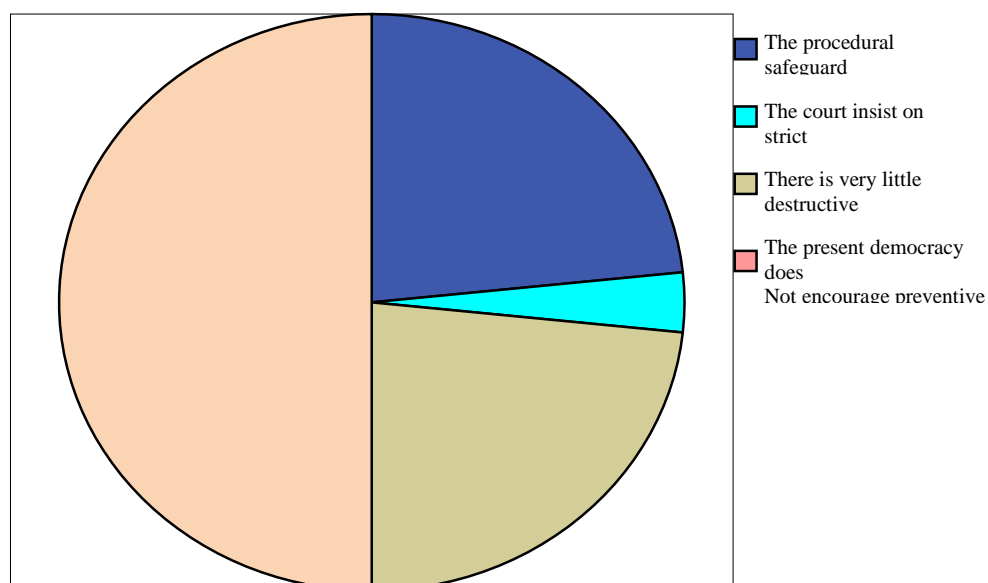
Probing once again into the underlying reasons for the large number of Preventive Detention that took place in Nepal, considering that most to the respondent were well

experienced lawyers and judicial officers, the consensus seems to be that if appropriate norms are laid down, the illegal detention would be less, meaning these professional are aware the importance of "procedural established by law" as a useful means of protection of human rights. As mentioned earlier some of the respondents did feel that the attempted and the monarchy to usurp power might have resulted in large number of illegal detention [Table No. 20 and Pic Chart No. 16].

**Table No. 21**

**Opinion regarding present day's statues the Preventive Detention**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
The procedural safeguard strictly followed	35	23.3	23.3	23.3
The court insist on strict procedural complain	5	3.3	3.3	26.7
There is very little destructive activities in Nepal	35	23.3	23.3	50.0
The present democracy does not encourage preventive detention	75	50.0	50.0	100.0
<b>Total</b>	<b>150</b>	<b>100.0</b>	<b>100.0</b>	



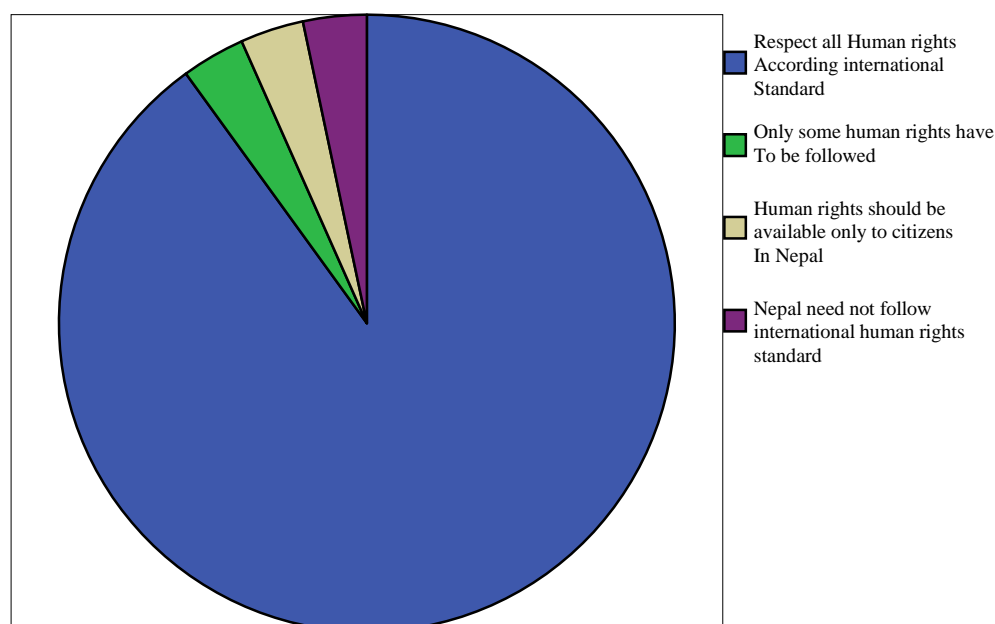
**Pie Chart No. 17**

Bringing to the present situation in Nepal where the Preventive Detention arrest have become minimum in numbers the commonly accepted reason by the majority of the respondents is that the present system of democracy does not encourage Preventive Detention. This exhibits and confirms the faith of the people in democracy, as an affection means to uphold the human rights [Table No. 21 and Pie Chart No. 17].

**Table No. 22**

**Opinion Regarding Nepal's obligations to respect to International rules regarding Human Rights**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Respect all Human Rights according International Standard	135	90.0	90.0	90.0
Only some Human Right have to be followed	5	3.3	3.3	93.3
Human Rights should be available only to citizens in Nepal	5	3.3	3.3	96.7
Nepal need not follow international human rights Standard	5	3.3	3.3	100.0
Total	150	100.0	100.0	



**Pie Chart No. 18**

It is of course gratifying to note that the Nepal has signatory to the two important International Human Right Covenants which have emanated from the Universal Declaration of Human Rights, 1948 namely, International Covenant Civil and Political Rights, 1966 and International Covenant Social Economic and Cultural Rights, 1966. [Table No. 22 and Pie Chart No. 18] It should be noted that nearly 90 percent of the respondents are of the opinion that the Nepal should uphold human rights according to the international standard. This rather expresses the innate desire of the people of the Nepal to live in peace, at promote and protect human rights as per the international norms and convention.

#### **6.6 Conclusion:**

The analysis of the field study based on the respondent provided by various subjects, it is clear that the practice of Preventive Detention arrest and the disappearance of the people arrested have affected the views and opinion of the members of the judiciary as well as practicing advocates is that the arrested and detention has greatly inferring on people's right of freedom of movement there has been rampant violation of the human rights during the particular period their of the opinion that these event happens because of the peculiar political situations that existed in Nepal. In spite of these violation of human rights all the subjects are hope full that Nepal can emerge as democracy where rule of law takes predominant by ensuring protection of people's rights.

## CHAPTER – VII

### Conclusion and Suggestions

#### 6.1 Findings and Conclusions

The study on Preventive Detention in Nepal has turned out more or less to be a study in a historical perspective because of the fast changing constitutional and social political situation in Nepal. The journey of Nepal in the area of constitutional development and the protection of human rights has more or less been like “see-saw” situation. One reason for this kind of development may be the great reluctance of the monarchy to hand over power to the elected government. This is evident in the way in which Monarchy returned to power in 1962 A.D.

Secondly, Nepal has a unique demographic distribution and as such there are many tribal groups and indigenous people with the different social and cultural many that excess in Nepal. Unlike, the United Kingdom when despite the subtle pressure on the monarchy resulting in the signed *magna carta*, the general system of being subject to law rule of law is found lacking in Nepal. This study of Preventive Detention in Nepal is carried out in seven chapters

The first chapter has endured to introduce the topic of research by bringing out its relevance, the importance of the research in terms of human rights protection and thereafter the research problem is discussed in detail bringing out the main reason why this study has been undertaken mainly due to the large scale unauthorized detention and disappearance of persons. Thereafter the relevant literature is reviewed followed by postulation of the relevant hypothesis for the study. The chapter also discusses the research methodology used in the study and gives a complete out line of various chapters.

The Second Chapter of the study deals with the theoretical basis and the definition of Preventive Detention in various different perspectives. The chapter explores the reasons for revival of Preventive Detention in Nepal and how Preventive Detention was meant only to be a preventive action but in reality the objectives were found to be different. The chapter then traces the history of Nepal it geographical and demographic peculiarities followed by the history as Nepal underwent different transitional rules culminating ultimately the enactment of the general code and there after the emergence of successive constitutions in Nepal. The Chapter provides realistic basis of the socio-economic and legal situation in Nepal, thus attempting to understand and explain the occurrence of Preventive Detention

The Third Chapter has brought in an International dimension of the laws related to Preventive Detention. This chapter has dealt with briefly the International legal regime on Preventive Detention by citing relevant Conventions / Declaration and discussing their particular provisions relating to Preventive Detention or like situation. This chapter also carried out a brief comparative study of the Preventive Detention laws of other democratic nations mainly that of, India, United Kingdom, United States of America, and Australia. This is mainly to bring out and highlights the various procedural safeguards that exist in those Nations and how strictly these procedural safeguards are carried out. This chapter brings out the view that existence of Preventive Detention laws in a democracy is not unused. That such Preventive Detention laws have to be monitored and controlled and regulated by the strong and independent judiciary, by enforcing procedural safeguards and ensuring that unnecessary violations of personal liberty and misuse of abuse of power by the administrative officials.

The fourth chapter discusses the various Constitutions in chronological order of their enactment and also brings to light the various grounds for transformation from one Constitution to the other. This chapter brings to light the difficulty in establishing proper democratic principle and constitutional values. There seems to inherently lack of the force in democratic Institutions. The over whelming influence of the monarchy to somehow underwritten so that whenever the monarchy that the functioning of the government is not in a way that they would desire. Even now it is reported that despite Nepal now having an entirely new constitution that is the Constitution of Nepal, 2072 B.S. (2015 A.D.), there are rumors of the King wanting to be, involved in the governmental process on one pretext or the other. The system fails to realize that discussion and opposition are part of their democracy and that democracy can exist and flourishes only it dissention and opposition are allowed to voice the grievance and complaints. Even if the system does not provide reflect to such grievance and complaints.

The fifth chapter is devoted to understanding the judicial system in Nepal in general which is followed by a detailed discussion on the criminal justice system in Nepal, The judicial system, it should be noted though based on the constitution is incorporated through various statutes which gives them various powers and functions. The evolution of the Criminal Justice System has an historical content tracing back to the earliest period called the '*Lichhavi*' period. The chapter traces how the Criminal Justice System evolved during the various different rulers. The chapter also in miniscule discusses the investigation and prosecution procedures.



The Chapter sixth forms the core of this thesis. This chapter has provided an in-depth analysis into how the judicial system functions, in terms of protections of citizen rights against administrative excesses, especially in the area of Preventive Detention. Various cases are discussed to show how the courts have endured in protecting citizen rights against Preventive Detention. This chapter also throws light on how the courts have failed to protect citizens' rights, mainly due to extraneous circumstances like, particular judge being a presiding officer of the court or a particular administrative officer refusing to abide by the directive of the courts etc. This chapter further reports the result of the field study carried out by the process of administering a questionnaire to various authority and also members of the public to mainly understand and analyses the impact of Preventive Detention action by the administration and the review of such action by the judiciary. This chapter thus, provides a suitable analytical framework for understanding Preventive Detention in Nepal. However, it should be noted that most of the Preventive Detentions took place during the period of the Constitution of the Nepal, 2019 B.S. (1962 A.D.) that is between the years 1959 to 2006 A.D. considering this perspective the study has predominantly, an historical context. This chapter has also provided the outcome of an empirical study into the impact of Preventive Detention in Nepal. The statically analysis provides a detailed matrix as to the impact of Preventive Detention on the Nepalese people. The study was undertaken and representative sample of professionals. With this chapter the research study has come to the conclusion with this final chapter reporting on the finding, proving of hypothesis and finally coming out with appropriate suggestions so that Nepal will remain a truly democratic nation upholding human rights at all times .

## **6.2 The Hypothesis of the research stands proved:**

- a. There has been number of instances of arbitrary arrest and detention of a person during 1957 to 2006 this has clearly shown in the various discussion and analyses in Chapter - IV of this study while dealing of the role of the judiciary.<sup>1</sup>
- b. In Nepal there has been, a number of cases where a police and the executive authority has failed to inform the arrested person,<sup>2</sup> the grounds of their arrest despite their being appropriate law prescribing such procedural safeguards. This has resulted in many

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<sup>1</sup>Chapter No. VI, Pp. 123-145

<sup>2</sup>Bimal Devi Upadhaya v. D.S.P. Office Ktahmandu, (1957 A.D.) CDSCNHC, (1990), vol. 1. P, 102

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violations of human rights of arrested persons as well as members of their family and friends.<sup>3</sup>

- c. It is once again clear from that, from almost the cases of the Preventive Detention that came up before the Supreme Court of Nepal that, the detained persons were deprived of their basic fundamental rights.<sup>4</sup>
- d. It is clear from the cases that the judiciary has played very important role in declaring such arrest and detention, violating the basic procedural norms, as violation of Human Rights and as an Unconstitutional act. In addition that there are also cases, when the judiciary has penalized such erring if they fail to follow basic procedures, in cases of Preventive Detention.<sup>5</sup>
- e. The cases cited and explained have shown that despite Nepal being a signatory of International Covenants on Civil and Political Rights,<sup>6</sup> and other relevant Conventions, the action of the executive has proved to be not only in violation State laws but International law as well.<sup>7</sup>
- f. There are some cases where the executive authority, as against the order of release of a detainee, have once again arrested the detainee immediately thereafter the courts have frowned upon such conduct and have unequivocally expressed their displeasure.<sup>8</sup>
- g. Presently, there is a legal provision to compensate that detainee in case of unlawful detention. But it is seen so far there is no such a case where the detainee has claimed compensation.<sup>9</sup>

### 6.3 Suggestions

As mentioned earlier, because of prevalence of large number of cases of Preventive Detention in Nepal, that happened during the period of 1959 B.S. to 2006, A.D. The study has become predominantly historical in this context. It is of course gratifying to note that after this period there has not been and such a case, wherein the Courts have been intervening those laws permitting Preventive Detention in Nepal. One could even call this phase of

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<sup>3</sup>NKP, 2063 (2007 A.D.) vol. 48, No. 2, p. 145, Ramesh NathaPandey v. Prime Minister and Others, Decision no. 7645, 4<sup>th</sup> June, 2006

<sup>4</sup>Chapter No. VI, Pp. 131-132

<sup>5</sup>Krishna KhatriChhetri v. the Magistrate of Bhaktapur, NKP, (1956 A.D.) vol. 2, No. 6, p. 208, chapter

<sup>6</sup>Vishnu Pukar Shrestha v. His Majesty's Government and Others, NKP, (1998), vol. 40, No. 1, Pp. 11-15.

<sup>7</sup>NKP 1998, vol. 40, No. 1, pp. 11-15, Vishnu PukarShrestha v. His Majesty's Government and Others

<sup>8</sup>RishikeshShaha v. Bagmati Zonal Commissioner's Office and Others, NKP 1969, vol. 11, No. 8, p. 435

<sup>9</sup>Chapter – VI, Pie Chart No. 13

Preventive Detention in Nepal as an historical accident in the constitutional and legal history of Nepal. Through this study of Preventive Detention could be called historical, the impact and causes for such Preventive Detention cannot be, evaded by such classification.

It is in this context the research would like to suggest the following as an outcome of this study:

- a. Nepal needs to build a constitutional culture by getting away from the past history of monarchical dominance and monarchical interference in the functioning of the Nation State.
- b. The Constitution of values can be cultivated by ensuring proper propagation and dissemination of the importance of the values of personal liberty, freedom of expression and of free movement of persons.
- c. This kind of awareness building regarding human rights and fundamental rights should be first carried out at all levels of education, so that the upcoming generation of Nepal is fully aware about the values contexts, and the importance of Human Rights.
- d. Nepal being a nascent democratic State, all government officers and public establishment should display in prominent places basic citizen's rights in Nepalese language and also provide information as to whole effective recreation, if there is violation of their rights effective remedy.
- e. It should made incumbent on all political parties and on all elected representative that they should publically swear an oath that they will always respect and uphold human rights of the citizens.
- f. The government has to create machinery for providing free legal aid in all cases of violation of human rights and the existence of such machinery and the procedure for approaching such authority by private citizens should be duly notified.
- g. The government and the University should incorporate in the curriculum for law degree program, participation of the law student in free legal aid and creating awareness regarding human rights, especially poor and in remote areas of the State.
- h. The High Courts and Supreme Court should be willing to consider any request or petition by any member of the public regarding any violation of human rights as a Public Interest Litigation case, and ensure that appropriate remedies is melted out to the affected persons at the earliest.
- i. Judicial officers at the all levels should be encouraged and to organise human rights awareness programs, in their jurisdictions.

- j. Organizing and participation in such Human Rights promotion events government officers should be considered one of the requirements for their, promotion to the next stage.
- k. Advocates all over Nepal should be encouraged to participate in human rights awareness program and encouraged to provide free legal service whenever the case of relating to violation of human rights comes to them.
- l. They should be intensive sensitization and training program for all administrative officials and compulsorily for police officers on human rights, protection of human rights, and the need to follow the procedural safeguard in all cases of arrest and detention. Participation in such training program should be made mandatory.
- m. The State authority organise human rights competitions like quiz and essay competitions for schools and University students, of district, and National level. Winners of such competition should be given certificate, cash awards and trophies etc.
- n. The survival and flourishing of the democracy wholly depend on respecting human rights values, by the State authorities. State authorities ensure that such human rights culture is created in Nepal. So that democracy and rule of law can flourish.

This study was under taken with the intention to understand the necessity and importance of human rights and provide suitable suggestions. So that violation of personal rights in the name of Preventive Detention does not happen in Nepal, as it happened during the period 1959 to 2006 A.D.

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- ❖ [www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)
- ❖ [www.ohchr.org/en/professionalinterest/pages/crc.aspx](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx)
- ❖ [www.un.org/disabilities/convention/conventionfull.shtml](http://www.un.org/disabilities/convention/conventionfull.shtml)
- ❖ <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>
- ❖ [http://www.gktoday.in/article-22-and-preventive-detention-in-india/#Rights\\_of\\_an\\_Arrested\\_Person\\_Article\\_221\\_and\\_222](http://www.gktoday.in/article-22-and-preventive-detention-in-india/#Rights_of_an_Arrested_Person_Article_221_and_222)
- ❖ [http://www.legislation.gov.uk/ukpga/2008/28/pdfs/ukpga\\_20080028\\_en.pdf](http://www.legislation.gov.uk/ukpga/2008/28/pdfs/ukpga_20080028_en.pdf)
- ❖ <http://www.amnesty.org/en/library/info/ASA31/072/2010>
- ❖ <http://www.amnesty.org/en/library/info/ASA31/016/2002/en;>
- ❖ <http://www.amnesty.org/en/library/info/ASA31/072/2002>
- ❖ <http://www.hrw.org/asia/nepal;>

### **List of Reports**

- ❖ International Commission of Jurists, Nepal: National Security Laws and Human Rights Implications, August 2009,
- ❖ Nepal Human Rights Report, " Arbitrary or Unlawful Deprivation of Life," 2013,
- ❖ Shambhu Ram Simkhada, Daniel Warner and Fabio Oliva, The Maoist Insurgency in Nepal: A Monograph, Kathmandu: November 2005
- ❖ Paul Donnelly, "Access to Security, Justice & Rule of Law in Nepal," UKaid, Danida HUGOU
- ❖ Amnesty International, generally on Nepal, <http://www.amnesty.org/en/region/nepal>;
- ❖ Nepal: A Spiralling Human Rights Crisis', 3 April 2002, available at: <http://www.amnesty.org/en/library/info/ASA31/016/2002/en>;
- ❖ Nepal: A Deepening Human Rights Crisis', 19 December 2002, available at: <http://www.amnesty.org/en/library/info/ASA31/072/2002>
- ❖ Human Rights Watch, generally on Nepal, <http://www.hrw.org/asia/nepal>;
- ❖ Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War', 6 October 2004, available at: <http://www.amnesty.org/en/library/info/ASA31/072/2010>

## QUESTIONNAIRE

Instructions: Your name need not be mention

Name :

Address :

Court :

Contact no:

Respondents are requested to [ √ ] mark one option for each questions. Whenever the respondent is not aware or is not willing to answer a particular question the same may be left out.

**1. Please! Mention your profession :**

- a) Judge [     ]                      c) Government Officer [     ]  
b) Advocate [     ]                      d) Others [     ]

**2. Your Experience / Service / Profession :**

- a) Less than 5 years [     ]                      c) 10 to 15 years [     ]  
b) 5 to 10 years [     ]                      d) More than 15 years [     ]

**3. In which Court have you practiced :**

- a) Only District Court [     ]                      c) Only Appellate Courts [     ]  
b) District & Appellate Court [     ]                      d) Appellate Courts & Supreme Court [     ]

**4. Have you dealt with any case on preventive detention during your practice?**

- a) No [     ]                      c) Yes more than 5 cases [     ]  
b) Yes less than 5 cases [     ]                      d) Yes more than 10 cases [     ]

**5. In your opinion, during the "panchayat regime [1960 to 1990 A.D.]" there were preventive detention arrests in Nepal :**

- a) Not aware [     ]                      c) Yes many cases [     ]  
b) Yes few cases [     ]                      d) Yes some cases of mass arrests [     ]

**6. In your opinion, the law relating to preventive detention that existed in Nepal during "panchayat regime" was unfair and unjust :**

- a) Yes [     ]                      c) No [     ]  
b) Yes to some extent [     ]                      d) Not at all [     ]

**7. The preventive detention arrests during "panchayat regime" were used to arrest, mainly :**

- a) Politicians [     ]                      c) Innocent Citizens [     ]  
b) Potential Criminals only [     ]                      d) Only to maintain Law & Order [     ]

**8. In your opinion, during this "panchayat regime" the judiciary played its role effectively :**

- a) By ordering release for procedural violations [     ]  
b) Releasing all cases of preventive detention [     ]  
c) Releasing only cases of mass arrests [     ]  
d) Did not protect rights of individual [     ]

9. In your opinion, during the years [1996 to 2006 A.D.] there were many indiscriminate and unfair arrest and detention of innocent citizens in Nepal :
- a) No idea [ ] c) Yes many cases [ ]  
 b) Yes few cases [ ] d) Yes many cases of mass arrests [ ]
10. In your opinion, during the period of Maoist insurgency [1996 to 2006 A.D.] the preventive detention law was used :
- a) Only to arrest Maoist insurgents [ ] c) Arrest included innocent citizens [ ]  
 b) Only to maintain Law & Order [ ] d) Not aware [ ]
11. In your opinion, during this period [1996 to 2006 A.D.] the procedural safeguard against during preventive detention were :
- a) Not at all followed [ ] c) Followed only in some cases [ ]  
 b) Followed partially [ ] d) Followed in all cases [ ]
12. In your opinion, during the Maoist insurgency the judiciary role in upholding individual freedom was crucial to the survival of democracy in Nepal :
- c) The court released many citizens [ ]  
 d) The court interferer only in cases of apparent violation of procedurals [ ]  
 e) The court would release detenuue even for slight procedural violations [ ]  
 f) The court was reluctant to release detenuue [ ]
13. In your opinion the preventive detention arrests took place in Nepal because of the monarch wanted absolute power and interfered in the constitutional process :
- a) No [ ] c) There was need to maintain Law & Order [ ]  
 b) Yes [ ] d) Mainly because of Maoist insurgency [ ]
14. In your opinion, the era of indiscriminate preventive detention came to an end with the passing of the Interim Constitution of Nepal, 2063 (2007) :
- a) Yes [ ] c) Not at all [ ]  
 b) Yes partially [ ] d) Not aware [ ]
15. In your opinion, whenever there is illegal detention compensation :
- a) Should be awarded in all illegal detention [ ]  
 b) Only in cases of gross violation [ ]  
 c) Only when the detenuue applies [ ]  
 d) No compensation should be given [ ]
16. In your opinion, there is a provision to award compensation for illegal detention under the Compensation Relation to Torture Act, 2053 (1996) the district court :
- a) Does not award the compensation at all [ ]  
 b) In some cases the compensation given [ ]  
 c) The accused need to ask for the compensation [ ]  
 d) Not aware about such provision [ ]



17. In your opinion, the power to issue the writ of 'habeas corpus' against preventive detention should be made available to the district court also :

- a) Yes [       ]                      c) To be available to Appellate Court [       ]  
b) Only on Serious case [       ]                      d) No opinion [       ]

18. In case of preventive detention to ensure that power is exercised only in the exceptional cases the power to approve and order detention of arrested person should vest with :

- a) The District Court only [       ]                      c) Special Court [       ]  
b) Appellate Court [       ]                      d) Chief District Court only [       ]

19. In your opinion, the main reason for the large numbers of preventive detention took place in Nepal because :

- a) The King wanted to usurp [       ]  
b) The procedural norms were not followed [       ]  
c) There was no unity among political parties [       ]  
d) There was a threat of sovereignty of Nepal as a nation [       ]

20. In your opinion, in the present days there are only few preventive detention in Nepal because :

- a) The procedural safeguard strictly followed [       ]  
b) The court insist on strict procedural complain [       ]  
c) There is very little destructive activities in Nepal [       ]  
d) The present democracy does not encourage preventive detention [       ]

21. In your opinion, Nepal is a Signatory to the Universal Declaration of Human Rights, 1948 and also to International Covenant on Civil and Political Rights, 1966 therefore, Nepal should :

- a) Respect all Human Rights according International Standard [       ]  
b) Only some Human Right have to be followed [       ]  
c) Human Rights should be available only to citizens in Nepal [       ]  
d) Nepal need not follow international human rights Standard [       ]

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## APPENDIX – II

### LIST OF TABLE OF QUESTIONNAIRE

Table No. 1

**Q. No. 1 Please! Mention your Profession :**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Judges	50	33.3	33.3	33.3
Advocates	70	46.7	46.7	80.0
Non-Judicial persons	30	20.0	20.0	100.0
Total	150	100.0	100.0	

Table No. 2

**Q. No. 2 Your Experience/ Service / Profession :**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Less than 5 years	5	3.3	3.3	3.3
5 to 10 years	25	16.7	16.7	20.0
10 to 15 years	25	16.7	16.7	36.7
More than 15 years	95	63.3	63.3	100.0
Total	150	100.0	100.0	

Table No. 3

**Q. No. 3 In which Court have you practiced :**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Only District Court	50	33.3	33.3	33.3
District & Appellate Court	75	50.0	50.0	83.3
Appellate Court & Supreme Court	25	16.7	16.7	100.0
Total	150	100.0	100.0	

**Table No. 4**

**Q. No. 4 Have you dealt with any case on Preventive Detention during your practice?**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
No	30	40.0	40.0	40.0
More than 5 cases	20	26.7	26.7	66.7
Between 5 and 10 cases	10	13.3	13.3	80.0
More than 10 cases	15	20.0	20.0	100.0
Total	75	100.0	100.0	

**Table No. 5**

**Q. No. 5 During the 'Panchayat regime' there were Preventive Detention arrests:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Not Aware	20	13.3	13.3	13.3
Yes few cases	70	46.7	46.7	60.0
Yew many cases	50	33.3	33.3	93.3
Yes some cases of mass arrests	10	6.7	6.7	100.0
Total	150	100.0	100.0	

**Table No. 6**

**Q. No. 6 The law relating to preventive detention that existed during 'Panchayat regime' was unfair and unjust:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Yes	70	46.7	46.7	46.7
Yes to some extent	60	40.0	40.0	86.7
No	20	13.3	13.3	100.0
Total	150	100.0	100.0	

Table No. 7

**Q. No. 7** The Preventive Detention arrests during '*Panchayat regime*' were used to arrest, mainly:

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Politicians	105	70.0	70.0	70.0
Potential Criminals only	10	6.7	6.7	76.7
Innocent Citizens	10	6.7	6.7	83.3
Only to maintain Law & Order	25	16.7	16.7	100.0
Total	150	100.0	100.0	

Table No. 8

**Q. No. 8** The judiciary played its' role effectively:

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
By ordering release for procedural violations	115	76.7	76.7	76.7
Releasing all cases of preventive detention	10	6.7	6.7	83.3
Releasing only cases of mass arrests	10	6.7	6.7	90.0
Did not protect rights of individuals	15	10.0	10.0	100.0
Total	150	100.0	100.0	

Table No. 9

**Q. No. 9** There were many indiscriminate and unfair arrest and detention of innocent citizens:

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
No idea	40	26.7	26.7	26.7
Yes few cases	45	30.0	30.0	56.7
Yes many cases	60	40.0	40.0	96.7
Yes many cases of mass arrest	5	3.3	3.3	100.0
Total	150	100.0	100.0	

Table No. 10

**Q. No. 10 During the period of Maoist insurgency the Preventive Detention law was used:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Only to arrest Maoist insurgents	25	16.7	16.7	16.7
Only to maintain Law & Order	75	50.0	50.0	66.7
Arrest included innocent citizens	40	26.7	26.7	93.3
Not aware	10	6.7	6.7	100.0
Total	150	100.0	100.0	

Table No. 11

**Q No. 11 The procedural safeguard against and during Preventive Detention were:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Not at all followed	15	10.0	10.0	10.0
Followed partially	80	53.3	53.3	63.3
Followed only in some cases	35	23.3	23.3	86.7
Followed in all cases	20	13.3	13.3	100.0
Total	150	100.0	100.0	

Table No. 12

**Q. No. 12 During the Maoist insurgency the judiciary role in upholding individual freedom was crucial to the survival of democracy:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
The court released many citizens	85	56.7	56.7	56.7
The court interferer only in cases of apparent violation of procedurals	40	26.7	26.7	83.3
The court would release detinue even for slight procedural violations	25	16.7	16.7	100.0
Total	150	100.0	100.0	

Table No. 13

**Q. No. 13 The Preventive Detention arrests took place because of the monarchy wanted absolute power and interfered in the Constitutional process:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
No	25	16.7	16.7	16.7
Yes	45	30.0	30.0	46.7
There was needed to maintain Law & Order	55	36.7	36.7	83.3
Mainly because of Maoist insurgency	25	16.7	16.7	100.0
Total	150	100.0	100.0	

Table No. 14

**Q. No. 14 The era of indiscriminate Preventive Detention came to an end with the passing of the Interim Constitution of Nepal:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Yes	70	46.7	46.7	46.7
Yes partially	60	40.0	40.0	86.7
Not at all	20	13.3	13.3	100.0
Total	150	100.0	100.0	

Table No. 15

**Q. No. 15 Whenever there is illegal detention compensation:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Should be awarded in an illegal detention	85	56.7	56.7	56.7
Only in case of gross violation	15	10.0	10.0	66.7
Only when the detinue applies	45	30.0	30.0	96.7
No compensation should be given	5	3.3	3.3	100.0
Total	150	100.0	100.0	

Table No. 16

**Q. No. 16** There is a provision to award compensation for illegal detention under the Compensation Relation to Torture Act:

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Does not award the compensation at all	10	6.7	6.7	6.7
In some cases the compensation given	120	80.0	80.0	86.7
The accused need to ask for the compensation	20	13.3	13.3	100.0
Total	150	100.0	100.0	

Table No. 17

**Q. No. 17** The power to issue the writ of *habeas corpus* against Preventive Detention should be made available to the district court also:

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Yes	145	96.7	96.7	96.7
Only on Serious case	5	3.3	3.3	100.0
Total	150	100.0	100.0	

Table No. 18

**Q. No. 18** To ensure that power is exercised only in the exceptional cases the power to approve and order detention of arrested person should vest with:

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
The District Court only	75	50.0	50.0	50.0
Appellate Court	10	6.7	6.7	56.7
Special Court	15	10.0	10.0	66.7
Chief District Officer only	50	33.3	33.3	100.0
Total	150	100.0	100.0	

Table No. 19

**Q. No. 19** The main reason for the large number of Preventive Detention took place:

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
The King wanted to usurp	45	30.0	30.0	30.0
The procedural norms were not followed	85	56.7	56.7	86.7
There was no unity among political parties	20	13.3	13.3	100.0
Total	150	100.0	100.0	

Table No. 20

**Q. No. 20** In the present days there are only few Preventive Detention:

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
The procedural safeguard strictly followed	35	23.3	23.3	23.3
The court insist on strict procedural complain	5	3.3	3.3	26.7
There is very little destructive activities in Nepal	35	23.3	23.3	50.0
The present democracy does not encourage preventive detention	75	50.0	50.0	100.0
Total	150	100.0	100.0	



Table No. 21

**Q. No. 21 Is a Signatory to the Universal Declaration of Human Rights and also to International Covenant on Civil and Political Rights:**

<b>Respondents</b>	<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Respect all Human Rights according International Standard	135	90.0	90.0	90.0
Only some Human Right have to be followed	5	3.3	3.3	93.3
Human Rights should be available only to citizens in Nepal	5	3.3	3.3	96.7
Nepal need not follow international human rights Standard	5	3.3	3.3	100.0
Total	150	100.0	100.0	

## APPENDIX – III

### GOVERNMENT OF NEPAL ACT 2004 B.S. (1948 A.D.)

**PREAMBLE:** Whereas by virtue of the supreme authority vested through the instruments of their sacred *Panja-patras* by Shree *Panch Maharajadhirajas* of Nepal, dating from the *Sambat* year 1903 onwards, delegating all powers of the State upon the contemporaneous *Shree Teen Maharajas*.

And whereas I, *Maharaja Padma Shum Shere Jung Bahadur Rana*, and now carrying on the administration of the country by virtue of the authority vested in me by the aforesaid *Panja-patra*,

And whereas it is our fervent desire, through all social, economic and political developments to bring Nepal, this sacred country of *Lord Pashupatinath*, in line with the advanced nations of the world and give our beloved motherland her rightful place in the comity of nations,

And whereas through the resurrection of our ancient ideals of the *Panchayat* and other similar institutions, it is our declared policy to provide for the increasingly closer association of our dear people in every branch of administration and thus bring about enhanced prosperity and happiness to our people,

And whereas progress in giving effect of this policy can only be achieved by successive stages and must be guided by the cooperation received from those to whom new opportunities have been offered and by the extent to which further confidence can be reposed upon their sense of responsibility.

And whereas we consider it expedient that immediate steps in this direction should now be taken,

I, *Maharaja Padma Shum Shree Jung Bahadur Rana*, do hereby ordain and promulgate that Constitutional Act in the thirty-sixth year of the reign of His Majesty *Shree Panch Maharajadhiraja Tribhubana Bir Bikram Shah*.

**PART- I**  
**PRELIMINARY**

1. This Declaration may be cited as the "Government of Nepal Act, 2004 (1948 A.D.)".
2. This Act shall come into force on 1<sup>st</sup> *Baisakh*, 2005, *Sambat*. Provided that if it appears to His Highness that through local circumstances or other causes, it could not be practicable or convenient that all the provisions of this Act should come into force simultaneously on that date, he may, notwithstanding anything in this Section, fix an earlier or later date for the coming into force, either generally or for particular purposes or areas, of any particular provisions of this Act. All provisions of this Act shall, however, come into force throughout the Kingdom before the end of the year 2005, *Sambat*.
3. The rule of succession relating of His Majesty the *Maharajadhiraja Shree Panch* and *Shree Teen Maharaja*, shall continue as hereto force in accordance with law, custom and usage in their behalf and shall for all time be inalienable and unalterable.

**PART- II**  
**FUNDAMENTAL RIGHTS**

4. Subject to the principles of public order and good practices this Constitution guarantees to the citizens of Nepal freedom of personal liberty, freedom of speech, freedom of press, freedom of assembly and organization, freedom of religion, complete equality before the law, affordable and speedy justice, universal free compulsory elementary education, universal and equal suffrage for all adults, security of private property as defined by the prevailing laws and laws and Rules to be made hereunder.
5. Subject to their physical, mental and economic capacity it shall be the duty of every citizen to promote public welfare, to contribute to public funds, to be in readiness to labour physically and intellectually for the safety and well-being of the Realm and bear true allegiance to His Majesty the *Maharajadhiraja Shree Panch* and *Shree Teen Maharaja* and be faithful to the State and its Constitution.

**PART – III**  
**THE EXECUTIVE COUNCIL**

Sections 6 to 15 are not relevant for the research

**PART- IV**  
**THE LEGISLATURE**

A. THE PANCHAYAT ASSEMBLY (Sections 16 to 21 are not relevant for the research)

B. CENTRAL ASSEMBLY (Sections 22 to 471 are not relevant for the research)

**PART -V**  
**ADMINISTRATION OF JUSTICE**

48. Justice shall be affordable and speedy. Elementary civil and criminal justice shall be administered by the village *panchayats* in such manner and subject to such restrictions and supervision as may be prescribed by law.
49. Justice shall be administered by Judges in public courts, established for the purpose. The court shall comprise courts of first instance and also courts of appeal.
50. Subject to the provisions of this Act, the organization and management of courts, the distribution of jurisdiction and business among the court judges, the method of recruitment, terms and conditions of service of Judges and all other matters relating to administration of justice shall be regulated by law.
51. Special courts may, in extraordinary circumstances, be established by *Shree Teen Maharaja*, if he considers that the procedure of ordinary courts would not be adequate to secure the preservation of public peace and order.
52. (a) *Shree Teen Maharaja* shall appoint from among the members of the Legislative Assembly, a Judicial Committee, which shall consist of not more than twelve members including two members with special qualifications from outside the Legislative Assembly.
- (b) The Committee shall have Authority-

- (i) To frame Rules and *Sawals* (Regulations) to secure justice for all, regarding composition of the benches, proceeding of the Hearing, in the special cases so prescribed.
    - (ii) To carry out the provisions as specified in Section 67 of this Act.
  - (c) Subject to the provisions of this Act, Rules regarding the composition and functions of this Committee shall from time to time be framed by the Government.
53. (a) There shall be a Supreme Court for Nepal (Pradhan Nyayalaya).
- (b) The Supreme Court shall consist of a Chief Justice and such other Judges, not exceeding twelve in numbers, as *Shree Teen Maharaja* may from time to time deem it necessary to appoint. Provided that *Shree Teen Maharaja* may, on the recommendation of the Chief Justice, appoint to act as additional judges of the Supreme Court, for such period, not exceeding two years, as may be required; and the judges so appointed shall, while so acting, have all the powers of a judge of the Supreme Court.
54. Every permanent judge of the Supreme Court shall hold office until he attains the age of sixty-five years:
- (a) A judge may by resignation under his hand addressed to *Shree Teen Maharaja* resign his office;
  - (b) *Shree Teen Maharaja* shall not remove any judge from his office unless the joint sessions of the Legislative Assembly do not pass a resolution on the ground incapacity and misbehaviour.
  - (c) *Shree Teen Maharaja* shall remove a judge, if the Judicial Committee recommends to him that a judge is incapacitated or incapable, on the ground of committing High Crimes on being mentally or physically incapable to discharge his duty.
  - (d) The judges of the Supreme Court shall receive such remuneration as *Shree Teen Maharaja* may fix; but the remuneration shall not be altered during their continuance in office.

55. The Supreme Court shall maintain the classification of cases and its record and shall have the jurisdiction and authority over the subordinate courts and matters relating to justice as prescribed in the law.
56. The Supreme Court shall have supervisory authority over all Courts within its jurisdiction and may do any of the following things,-
- (a) To hear case upon call for returns and cause to do so;
  - (b) Direct to transfer of any suit or appeal from any such court to any other Court of equal or superior jurisdiction;
  - (c) Make and issue Rules and prescribe forms for regulating the practice and proceedings of such courts;
  - (d) Prescribe forms in which books, entries, accounts and case files shall be kept by the Courts;
- Provided that such rules and forms shall be consistent with the provisions of any law for the time being in force.
57. Until steps have been taken *in* regard to any matter Covered by the provisions of this chapter, the existing laws and regulations in regard to that matter shall continue to be in force.
58. Act shall be made for the protection of judges and other officers acting judicially, for acts done or ordered to be issued by them in good faith in the discharge of their duties.
59. Nothing contained in this Act shall derogate from the right of *Shree Teen Maharaja* to grant pardons, reprieves, respites, or remission of punishments.

## **PART -VI**

### **MISCELLANEOUS**

Sections 60 to 68 are not relevant of the research

## APPENDIX – IV

### THE INTERIM GOVERNMENT OF NEPAL ACT 2007 B.S. (1951 A.D.)

#### Preamble

Whereas, it is necessary till such time, as the Constitution is not framed and promulgated, the administration of the country should function according to a Constitution and certain rules and principles:

Now, therefore, His Majesty, the King of Nepal, on the advice of his Council of Ministers, is accordingly pleased to ordain and promulgate the following Act.

#### Part - I

- 1. Short title and Commencement:** (1) This Act shall be called the Interim Government of Nepal Act.  
(2) It shall come into force immediately.<sup>1</sup>
- 2. Interpretation:** The Nepal laws (Interpretation) Act shall apply in the interpretation of this Act.

#### Part - II

##### Directive Principles of State Policy

(Sections 3 to 9 are not relevant of the research)

- 10. Civil Code:**  
His Majesty's Government shall Endeavour to secure for the citizen a uniform civil code throughout Nepal.

(Sections 11 to 13 are not relevant of the research)

- 14. Equality before law:**  
His Majesty's Government shall not deny to any person equality before the law or the equal protection of the laws within the territory of Nepal.

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<sup>1</sup> 29<sup>th</sup> Chaitra, 2007 B.S. (11<sup>th</sup> April, 1951)

**15. Discrimination on grounds of religion, race, cast, sex, etc.:**

- (1) His Majesty's Government shall not discriminate against any citizen on grounds only of religion, race, cast, sex, and place of birth or any of them.
- (2) Nothing in this section shall prevent the Government from making any special provision for women and children.

**16. Equality of opportunity:**

- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the Government.
- (2) Nothing in this section shall prevent the Government from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which, in the opinion of the Government, is not adequately represented in the service under the Government.
- (3) Nothing in this section shall effect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the Governing body there of shall be a person professing a particular religion or belonging to a particular denomination.

**17. Fundamental principles of law: Fundamental principles of law:**

- (1) No tax shall be levied or collected except under the authority of law.
- (2) Subject to the laws for the time being in force, all citizens shall have the rights.
  - (a) To freedom of speech and expression;
  - (b) To assemble peaceably and without arms;
  - (c) To form associations and unions;
  - (d) To move freely throughout the territory of Nepal;
  - (e) To reside and settle in any part of Nepal;
  - (f) To acquire, hold, and dispose of property;
  - (g) To practice any profession or to carry on any occupation, trade, or business.



**18. Rule of Law:**

His Majesty's Government shall ensure that:-

- (1) No person is convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor is subjected to a penalty greater than that which might have been inflicted under the law in force the time of the commission of the offence.
- (2) No person is prosecuted and punished for the same offence more than once.
- (3) No person accused of any offence is compelled to be a witness against himself.

**19. Personal liberty:**

No person shall be deprived of his life or personal liberty except according to procedure established by law or rules made by Government for the public goods, or for the maintenance of public order or the security of the state.

(Sections 20 to 21 are not relevant of the research)

**Chapter – III**

**Chapter – 1**

**The Executive**

(Sections 22 to 29 are not relevant of the research)

**Chapter – 2**

**Legislature power**

**30. Legislative power of the king:** For the avoidance of doubt, it is hereby declared and affirmed that, notwithstanding anything contained in any Nepal law or in any judgment of any court, the king has and continues to have sovereign and plenary powers to make laws for the peace, order, and good Government of Nepal.

**31. Legislation initiated by the council of ministers:** (1) In enacting laws for the peace, order and good Government of Nepal, the king may act on the advice of the council of ministers, in accordance with the provisions of this section.

(2) It shall be lawful for the council of ministers to submit a bill for the consideration of the king.

(3) The king may assent to a Bill submitted to him under Subsection (2), or he may withhold his assent thereto, or he may return the Bill with a message requesting that the council of ministers will reconsider the Bill or Any specified provisions thereof, and, in particular, consider the desirability of introducing any such amendment as he may recommend, and the council of ministers shall reconsider the Bill accordingly.

(4) If the king assents to any Bill so submitted, the Bill shall become law and have effect accordingly.

(5) This section shall have effect subject to the provisions of chapter IV. Provided that, it shall be lawful for the council of ministers to submit, for the consideration of the king, a Bill which has not been considered and approved of by the advisory Assembly-

- (i) If no Advisory Assembly has been constituted under the provisions of chapter IV; or
- (ii) If the Advisory Assembly constituted under the provisions of chapter IV is not in session and the council of ministers consider that it is necessary, in the public interest, immediately to enact a law as proposed in the Bill.

### **Chapter - 3**

#### **Judiciary**

#### **32. Pradhan Nyayalaya:**

- (1) There shall be a *Pradhan Nyayalaya*.
- (2) The constitution, powers and functions of the *Pradhan Nyayalaya* shall be as determined by law.

### **Chapter – 4**

#### **The Advisory Assembly General**

(Sections 33 to 58 are not relevant of the research)

#### **59. Rule Making:**

His majesty the King may make Rules for regulating, subject to the provisions of this act, the procedure and the conduct of business of the Assembly.

**Chapter – 5**  
**Comptroller and Auditor General of Nepal**

(Sections 60 to 62 are not relevant of the research)

**Part – IV**

**63. Public Acts, Records, Judicial Proceedings:** (1) Full faith and credit shall be given throughout the territory of Nepal to public Acts, records and judicial proceedings of the country.

(2) Final judgment or order delivered or passed by civil courts in Nepal shall be capable of execution anywhere in Nepal according to law.

**Part – V**  
**Public Service Commission**

(Sections 64 to 67 are not relevant of the research)

**Part – VI**  
**Elections**

(Sections 68 to 72 are not relevant of the research)

**Part-VII**

**73.** The Government of Nepal Act, 2004 *Sambat* (1949A.D.) is, hereby, repealed.

## APPENDIX – V

### THE CONSTITUTION OF KINGDOM OF NEPAL, 2015 B.S. (1959 A.D.)

#### Preamble

Whereas His late Majesty King Tribhuvan Shah Dev, father of the nation and revered descendant of illustrious King Prithvi Narayan Shah, adherent of Aryan Culture and Hindu religion, having led a Great revolution for the rights and welfare of His subject, earned immortal fame in the history of the world and was firmly resolved to establish real democracy in Nepal by giving fundamental rights to the people;

And Whereas We also being firmly resolved to help our subjects to attain all-round progress and achieve the fullest development of their personality; to ensure to them political, social and economic justice; and cement the unity of the nation by bringing about political stability through the establishment of an efficient monarchical form of government responsive to the wishes of the people;

And whereas for the said purpose it is desirable to enact and promulgate a Constitution for the Sovereign Kingdom of Nepal, I, King Mahendra Bir Bikram Shah Deva in the exercise of the Sovereign powers of the Kingdom of Nepal and prerogatives vesting in US in accordance with the traditions and custom of our country and which devolved on US from Our August and Respected forefathers, do hereby enact and promulgate this fundamental law entitled “The Constitution of the Kingdom of Nepal.”

#### Part - I

#### Preliminary

1. **The Constitution as the Fundamental Law :** (1) this Constitution is the fundamental law for Nepal and all laws inconsistent with it, shall, to the extent of the inconsistency, and subject to the provisions of the Constitution, be void.
  - (2) Nothing in this Constitution shall affect the law custom and usage relating to the succession to the throne by the descendants of His Majesty the King.
  - (3) In this constitution, His majesty means the King for the time being reigning, being a Shahi descendant of His late Majesty King Prithvi Narayan Shah and adherent of Aryan culture and Hindu religion.

## Part - II

2. **Appointed Day:** Article 73 and Article 75 of this Constitution shall come into operation at once; and the other provisions of this Constitution shall come into operation on a day to be fixed by His Majesty by Proclamation, and such day is hereinafter referred to as “the appointed day”.

## Part – III

### Fundamental Right

3. **Personal Liberty:** (1) No person shall be deprived of his life or personal liberty save in accordance with the law.

(2) Traffic in human beings, slavery and forced labour are forbidden, but provision may be made by law compulsory service for public purposes.

(3) No person shall be punished for an act which was not punishable by law when the act was done, nor shall any person be subjected to a punishment greater than that prescribed by law for an offence when the offence was committed.

(4) No person shall be prosecuted and punished more than once for the same offence.

(5) No person accused of any offence shall be compelled to be a witness against himself.

(6) No person who is arrested shall be detained in custody without being informed, as soon as is practicable, of the grounds of such arrest, nor shall be denied the right to consult and be defended by a legal practitioner of his choice.

**Explanation:** For the purposes of this clause, a legal practitioner includes any person, who, under the law for the time being in force, is authorized to represent any other person in court.

(7) Every person who is arrested and detained in custody shall be produced before the nearest judicial authority, within a period of twenty-four hours from such arrest, excluding the time necessary for the journey from the place of arrest to the court of the judicial authority, and no such person shall be detained in custody beyond the said period except on the order of a judicial authority.

(8) Nothing in clause (6) or clause (7) shall apply to a person who-

(a) is an enemy alien; or

- (b) is arrested or detained under any law providing for preventive detention.
- (9) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless
  - (a) An Advisory Board consisting of persons who are or have been or are qualified to be appointed as judges of the Supreme Court has reported before the expiration of the said period or three months that there is in its opinion sufficient cause for such detention; or
  - (b) Such person is detained in accordance with provisions of any law made in accordance with clause (12).

Provided that nothing in sub-clause (a) shall authorize the detention of any person beyond the maximum period prescribed by law providing for preventive detention.
- (10) When a person is detained in pursuance of an order made under any law for preventive detention, the authority making the order shall as soon as may be, communicate to such person the grounds on which the order has been made and shall afford the earliest opportunity of making representation against the order.
- (11) Nothing in clause (10) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest and security of the country to disclose.
- (12) The following matters may be prescribed by law:
  - (a) The circumstances under which, and class or classes of cases in which, a person may be detained for a period longer than three months without obtaining the opinion of an Advisory Board; and
  - (b) The maximum period for which any person may in any class or classes of cases be detained; and
  - (c) The functions and the procedure to be followed by an Advisory Board constituted under sub-clause (a) of clause (9).

- 4. Equality:**
- (1) All citizens are entitled to equal protection of the laws.
  - (2) In the application of general laws there shall be no discrimination against any citizen on grounds of religion, sex, race, caste or tribe.
  - (3) In respect of appointments to the service of the Crown there shall be no discrimination against any citizen on grounds only of religion, race, caste or tribe,

and in respect of appointments to the service of the Crown which are open to both sexes, there shall be no discrimination on grounds of sex.

- (4) No person shall disseminate hatred, contempt or create enmity between people belonging to different areas, or between different classes of people, castes and tribes of the Kingdom of Nepal.

**9. Right to Constitutional Remedies:** (1) The right to file a petition in the Supreme Court for appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

- (2) Where any petition is filed under clause (1) the Supreme Court shall have power to issue directions or Orders or writs including Writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari, whichever may be appropriate for the enforcement of the rights.

- (3) Without prejudice to the power conferred on the Supreme Court (1) and (2), law may empower any other court subordinate to the Supreme Court to exercise within the local limits of its jurisdiction all or any of the powers to issue such directions or Orders or Writs as is prescribed in Clause (2).

**53. Constitutional Amendments:** (1) Parliament may amend or repeal any of the provision of this constitution by a bill passed by both house of Parliament and assented to by His majesty and to which the Red seal is affixed.

Provided that

- a) A Bill to amend the Constitution shall be so described and shall contain no provisions other than those relating to the amendment of the Constitution;
  - b) The bill shall be deemed not to have passed the House of Representatives and the Senate unless it was supported on its final reading in each House by not less than two-thirds of all the members thereof;
  - c) The Bill shall, when presented for the Royal Assent of His Majesty have endorsed on it a certificate by the Speaker of the House of Representatives and the President of the Senate that the provisions of this clause have been complied with; and
  - d) In granting or withholding His assent, His Majesty shall act in His discretion.
- (2) A certificate of the Speaker and the President under clause (1) shall be conclusive for all purposes and shall not be questioned in any court.

- 54. Invalid Laws:** without prejudice to any other remedy, a person who alleges that any provision of an Act or any other law is void for inconsistency with this constitution, may move to Supreme Court to-
- (a) Declare the said law to be invalid, to the extent of its inconsistency; and
  - (b) Grant such incidental and supplementary relief as the Supreme Court may deem appropriate.

**Part - VI**  
**The Judiciary**

- 57. The Judges of the Supreme Court:** (1) the Chief Justice of Nepal shall be appointed by His majesty in his discretion, after consulting the Prime Minister and some other judges of the Supreme Court as He may deem necessary.
- (2) The other Judges of the Supreme Court shall be appointed by His Majesty in His discretion, after consulting the Chief Justice of Nepal and such other judges of the Supreme Court as He may deem necessary.
  - (3) Subject of the Provisions of clause (4) the Chief justice or other judges of the Supreme Court shall hold office until he completes the tenure of his office.
  - (4) The Chief Justice or other Judges of the Supreme Court:-
    - (a) May resign his office by notice to His Majesty;
    - (b) May be removed from office by His Majesty in his discretion if any Commission appointed by His majesty on reference to it by His Majesty, report that the judge is unable to perform his duties due to misbehavior or incapacity. But such Chief Justice or the Judge charged with misbehavior or incapacity shall not be denied the right of defending himself before the Commission.
  - (5) A Commission appointed under sub-clause (b) of clause (4) shall have the power to summon witnesses, take evidence and punish for contempt of itself.
  - (6) The remuneration, tenure of office and other conditions of service of the Chief Justice or other judges shall be determined by Act, or until so determined by order of His Majesty, and such remuneration and tenure of office shall not be varied to his disadvantage during his period of office and the remuneration shall be charged to the Consolidated Fund.
  - (7) Clause (1) and (6) shall apply to an Acting Chief Justice, and clause (2) and (6) to an Acting or Additional Judge of the Supreme Court.
- 58. Transfer of Certain Cases to Supreme Court:** if the Supreme Court is satisfied that a case pending in a subordinate court involves a substantial question of law as to the interpretation of



this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may either:

- (a) Dispose of the case itself; or
- (b) Determine the said question of law and return the case to the court from which the case has been withdrawn, together with a copy of the judgement of the Supreme Court; and the subordinate court shall on receipt thereof proceed to dispose of the case in conformity with such judgement.

## APPENDIX – VI

### THE CONSTITUTION OF NEPAL, 2019 B.S. (1962 A.D.)

WHEREAS it is desirable in the best interest and for all-round progress of the Kingdom of Nepal and of the Nepalese people to conduct the government of the country in consonance with the popular will;

AND WHEREAS we are firmly convinced that such arrangement is possible only through the partyless democratic Panchayat System rooted in the life of the people in general, and in keeping with the national genius and tradition and as originating from the very base with the active cooperation of the people and embodying the principles of decentralization<sup>1</sup>;

AND WHEREAS the happiness and prosperity of our beloved subjects have always been our only objective for the accomplishment of which we are solemnly resolved;

AND WHEREAS it is desirable for the said purpose to enact and promulgate a Constitution for the Kingdom of Nepal;

Now THEREFORE, I, King Mahendra Bir Bikram Shah Deva, in exercise of the sovereign powers and prerogatives inherent in us according to the constitutional law, custom and usage of our country as handed down to us by our august and revered forefathers, do hereby enact and promulgate this Constitution.

#### PART - 1

#### PRELIMINARY

Constitution as the Fundamental Law: This Constitution is the fundamental law of Nepal and all laws inconsistent with it shall, to the extent of such inconsistency, and subject to the provisions of this Constitution, be void.

(Article 2 is not relevant of the research)

3. **Kingdom:** (1) Nepal is an independent, indivisible and sovereign<sup>2</sup> Monarchical Hindu Kingdom.<sup>3</sup>
- (2) The territory of Nepal shall comprise of-
- (a) the territory at the commencement of this Constitution; and

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<sup>1</sup> Amended by First Amendment

<sup>2</sup> Amended by Third Amendment

<sup>3</sup> Ibid.,

- (b) such other territory as may be acquired after the commencement of this Constitution.

(Articles 4 to 6 are not relevant of the research)

## **PART - 2**

### **CITIZENSHIP**

(Articles 7 to 8 are not relevant of the research)

## **PART - 3**

### **FUNDAMENTAL DUTIES AND RIGHTS**

- 9. Fundamental Duties of the Citizen:** Following shall be the fundamental duties of every citizen<sup>4</sup>.
- (a) Devotion and loyalty to the kingdom of Nepal;
  - (b) To exercise one's rights with due regard to the law and without infringing upon the rights of others;
  - (c) to obey the provisions made by the constitution; and
  - (d) to maintain harmony in society by not doing anything to entice hatred, derision, violent act or damage to the public or private property among caste, ethnicity, region, community, class, religion or any other such matters affecting the sovereignty, indivisibility and unity of Nepal,
- 10. Right to Equality:** (1) All citizens shall have the right to equal protection of the laws.
- (2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe or any of them.
  - (3) There shall be no discrimination against any citizen in respect of appointment to the government service or any other public service only on grounds or religion, race, sex, caste, tribe or any of them.
- 11. Right to Freedom:** (1) No person shall be deprived of his life or personal liberty saves in accordance with the law.

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<sup>4</sup> Amended by the Third Amendment

<sup>5</sup>(2) Subject to the other provisions of this part all citizens shall have the right to the following freedoms.

(a) freedom to speech and expression;

(b) freedom to assemble peaceably and without arms;

(c) freedom to form unions and associations;

(d) freedom to move to or reside in any part of Nepal; and

(e) freedom to acquire and enjoy property or to dispose it off by sale or otherwise.

<sup>6</sup>(2a) Notwithstanding anything contained in clause (2), no political party or any other organisation, union or association motivated by party politics shall be formed or caused to be formed or run.

(3) No person shall be punished for an act which was not punishable by law when the act was done, nor shall any person be subjected to a punishment greater than that prescribed by law for an offence when the offence was committed.

(4) No person shall be prosecuted and punished more than once for the same offence in any court.

(5) Except voluntarily, no person accused of any offence shall be compelled to be a witness against himself.

(6) No person who is arrested shall be detained in custody without being informed, as soon as possible, about the grounds of such arrest, nor shall he be deprived of the right to consult and be defended by a legal practitioner of his choice.

**Explanation-** For the purpose of this clause, “legal practitioner” includes any person who, under the law for the time being in force, is authorised to represent any other person in any court.

(7) Every person who is arrested and detained in custody shall be produced before a judicial authority within a period of twenty-four hours of such arrest, excluding the period of journey from the place of arrest to such authority, and so such person shall not be detained in custody beyond the said period except on the order of such authority.

(8) Nothing in clauses (6) and (7) shall apply to person who-

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<sup>5</sup> Amended by the First Amendment

<sup>6</sup> Amended by the First Amendment

- (a) is a citizen of an enemy state; or
- (b) is arrested or detained under a law providing for preventive detention.

(Articles 12 to 15 are not relevant of the research)

- 16. Right to Constitutional Remedies:** Right to proceed in accordance with Article 71, for the enforcement of the rights conferred by this Part, is guaranteed.

(Article 17 not relevant of the research)

#### <sup>7</sup>PART - 4

#### DIRECTIVE PRINCIPLES OF PANCHAYAT SYSTEM

(Articles 18 and 19 are not relevant of the research)

#### PART - 5

#### HIS MAJESTY

- 20. His Majesty-the Source of Power:** (1) In this Constitution the words ‘His Majesty’ mean His Majesty the King for the time being reigning, being a descendant of Great King Prithivi Narayan Shah and adherent of Aryan culture and Hindu religion<sup>8</sup>.

(2) The sovereignty of Nepal is vested in His Majesty and all powers executive, legislative and judicial emanate from Him. These powers are exercised by His Majesty through the organs established by or under this Constitution and other laws for the time being in force keeping in view the interest and wishes of His Majesty’s subjects according to the highest traditions of the Shah dynasty.

- <sup>9</sup>**20(a) Coordination Commission:** (1) His Majesty the King may constitute a coordination commission to coordinate among the executive, legislature, judiciary and other organs to protect national independence, sovereignty and indivisibility and to maintain national security, law and order, peace and justice by uniting all the Nepalese in one bond through Partyless Democratic Panchayat System.

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<sup>7</sup> Amended by the First Amendment

<sup>8</sup> Amended by Second Amendment

<sup>9</sup> Inserted by the Third Amendment. As this provision was stated to commence with the publication of notice in Gazette, it was commenced on 2038/1/29 B.S.

(2) Formation, functions, duties, procedure and other necessary matters relating to Coordination Committee shall be in accordance with the regulation approved by the his majesty and no question shall be raised in any court regarding the implementation of this regulation.

(Articles 21 and 22B are not relevant of the research)

## **PART - 6**

### **RAJ SABHA**

(Articles 22 and 23 are not relevant of the research)

## **PART - 7**

### **COUNCIL OF MINISTERS**

(Articles 24 and 29 are not relevant of the research)

## **PART - 8**

### **LOCAL PANCHAYATS AND NATIONAL PANCHAYAT**

#### **CHAPTER - I**

##### **LOCAL PANCHAYATS**

(Articles 30 and 33 are not relevant of the research)

#### **CHAPTER - 2**

##### **NATIONAL PANCHAYAT**

(Articles 34 and 54 are not relevant of the research)

## **PART - 9**

### **LEGISLATIVE PROCEDURE**

(Articles 55 and 57 are not relevant of the research)

## **PART - 10**

### **FINANCIAL PROCEDURE**

(Articles 58 and 67 are not relevant of the research)

**PART - 11**  
**SUPREME COURT**

**68. Supreme Court:** (1) There shall be a Supreme Court of Nepal consisting of a Chief Justice and, unless a larger number is specified by law, not more than six other judges.

(2) The Supreme Court, subject to the provisions of this Constitution, shall be a court of record and shall have the power to impose punishment as prescribed by law for contempt of itself or of courts subordinate to it.

**69. Judges of the Supreme Court:** (1) His Majesty shall appoint the Chief Justice after consulting, if he so desires, such members of the Raj Sabha as he may deem appropriate and also after consultation with other Judges of the Supreme Court, and other judges of the Supreme Court shall be appointed by Him after consultation with the Chief Justice.

<sup>10</sup>(2) Subject to the provisions of clause (4), the term of office of the Chief Justice and other Judge of the Supreme Court shall be ten years. His Majesty may, if he deems it proper, re-appoint a person for such term as may be specified by Him

**Explanation:** For the purpose of calculating the term of office of any Judge of the Supreme Court who has been appointed the Chief Justice, the term which he has already served as judge of the Supreme Court shall also be reckoned.

<sup>11</sup>(2A) Subject to the provisions of clause (2) the Chief Justice and any other Judge of the Supreme Court shall hold office until he attains the age of sixty five years.

Provided that he shall be relieved of his office on the date either of his attaining the maximum age under this clause or of the completion of his term specified in clause (2), whichever is earlier.

<sup>12</sup>(2B) The provisions of clause (2) and (2A) shall apply also in the case of the Chief Justice and the other Judges of the Supreme Court holding office at the time of the commencement of this clause.

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<sup>10</sup> Amended by the Second Amendment

<sup>11</sup> Inserted by the Second Amendment

<sup>12</sup> Ibid.,

Provided that for the purpose of calculating their term of office under clause (2), the term shall be deemed to commence from the date on which this clause comes into force.

<sup>13</sup>(3) A person shall not be qualified for appointment as a judge of the Supreme Court unless he has attained the age of forty five and-

(a) has been for at least five years the Judge of a Regional Court or an equivalent judicial post or:

(b) has been for at least seven years a government or private advocate; or

(c) is, in the opinion of His Majesty, a distinguished jurist.

<sup>14</sup>(4) The Chief Justice and any other Judge of the Supreme Court-

(a) shall be relieved of his office if his resignation in writing is accepted by His Majesty, or

(c) may be relieved of his office by His Majesty if a Commission appointed by his majesty recommend like that for not performing his duties due to incapacity or misbehaviour or malafide acts.

Provided that the Chief Justice or any other Judge of the Supreme Court so charged shall not be denied a reasonable opportunity for defending himself before the commission.

(5) The Commission appointed under sub-clause (b) of clause (4) shall have power similar to that of a court to summon witness, to take evidence and to punish for its contempt.

(6) The remuneration and other conditions of service of the Chief Justice and the other Judges of the Supreme Court shall be determined by an Act and until so determined shall be as determined by Rules made by His majesty. The remuneration and the other conditions of service of the Chief Justice or any other Judge of the Supreme Court shall not be varied to his disadvantage during his term of office.

(7) When the office of the Chief Justice is vacant or when the Chief Justice is, by reason of ill- health or otherwise, unable to perform the duties of his office, the duties of that office shall be performed by such one of the other Judges of the

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<sup>13</sup> Amended by the Second Amendment

<sup>14</sup> Ibid.,



Supreme Court as may be appointed by His Majesty to be the Acting Chief Justice.

- (8) His Majesty may, after consulting the Chief Justice, appoint as many ad hoc or additional Judges as may be necessary for the Supreme Court for such period and with such remuneration and facilities as His Majesty may specify.

Provided that such Judges shall be required to possess the same qualifications as laid down in clause (3).

- (9) No person who has held office as a permanent Judge of the Supreme Court shall plead Court or before any authority.

**71. Extra-ordinary jurisdiction of the Supreme Court:** *Subject to the Provisions of this Constitution<sup>15</sup>*, the Supreme Court shall have power to issue directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of rights conferred by Part 3 or for the enforcement, in cases where no other remedy is provided, of rights conferred by any other law for the time being in force.

Provided that nothing in this Article shall apply in relation to matters falling within the jurisdiction of a *Court-Martial*.<sup>16</sup>

**72. Supreme Court not to overrule its own decision:** The Supreme Court shall not itself overrule its final decision.

Provided that the Supreme Court-

- (a) may *review*<sup>17</sup> any decision made by it on such terms and conditions as may be prescribed by law; and
- (b) may revise its previous decision in a case and finally decide in accordance with law if His Majesty issues a command for the revision of that case (already decided by the Supreme Court) on the recommendation of a Judicial Committee (... ...  
...)<sup>18</sup> on the application of the concerned party within the time fixed by law.

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<sup>15</sup> Inserted by the Second Amendment

<sup>16</sup> Changed by the First Amendment

<sup>17</sup> Ibid.,

<sup>18</sup> Omitted by the Second Amendment

**1972A. Judicial Committee:** The constitution, functions, duties, powers and procedure of the Judicial Committee shall be as prescribed in the Rules made by His Majesty.

**73. Legal Principle declared by the Supreme Court to be binding:** The legal principles declared by the Supreme Court in cases within its jurisdiction as conferred by this Constitution or other laws for the time being in force, shall be binding on all courts.

Provided that the legal principles declared by the Supreme Court before the commencement of this Constitution may not be binding on the Supreme Court as precedent after the commencement of this Constitution.

**74. Judicial Service Commission<sup>20</sup>** (1) There shall be a Judicial Service Commission consisting of the Chief Justice, *The Minister for Law and Justice or when the Minister for Law and Justice has not been appointed the Minister of State for Law and Justice acting as the minister<sup>21</sup>* and the Chairman of the Public Service Commission. His Majesty Government may, on the recommendation of this Commission and in accordance with law, may make permanent appointment, transfer and promotion to the gazetted posts of the Judicial Service, and give departmental punishment to officials of such posts.

Provided that His Majesty's Government shall consult the Public Service Commission before making permanent appointment for first time of any person, not in the government service, to a gazetted post of the Judicial Service or for promoting a person from a non-gazetted post in the Judicial Service to gazetted post in that Service.

(2) Other powers, functions and procedures, of the Judicial Service Commission shall be as prescribed by law.

## **PART - 12 AUDITOR-GENERAL**

(Articles 75 and 76 are not relevant of the research)

## **PART: 13 PUBLIC SERVICE COMMISSION**

(Articles 77 and 78 are not relevant of the research)

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<sup>19</sup> Inserted by the Second Amendment

<sup>20</sup> Amended by the First Amendment

<sup>21</sup> Amended by the Second Amendment

**PART 14**  
**ATTORNEY-GENERAL**

(Articles 79 and 80 are not relevant of the research)

**PART 15**  
**<sup>22</sup>SPECIFIC SITUATION AND EMERGENCY POWERS**

(Articles 80 and 86 are not relevant of the research)

- 87. Bar of Jurisdiction of Courts:** His Majesty shall not be amenable to any court for the exercise of the power or the performance of the duties of His office, or for any other act done by Him.

Provided that nothing in this Article shall be construed as restricting any right conferred by law to bring appropriate proceedings against His Majesty's Government or any officials of his Majesty.

(Articles 88 and 89 are not relevant of the research)

- 90. Residuary Powers of his Majesty:** All inherent powers relating to matters not provided for in this Constitution or in other laws for the time being in force shall continue to vest in His Majesty.

**PART 20**  
**SHORT TITLE AND COMMENCEMENT**

- 91. Short Title and Commencement:** (1) This Constitution shall be called “The Constitution of Nepal”

(2) This Constitution shall come into force on Sunday the First of Poush, Two Thousand and Nineteen Year of the Bikram Sambat.

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<sup>22</sup> Inserted by the Third Amendment. As this provision was stated to commence with the publication of notice in Gazette, it was commenced on 2038/1/29 B.S.

## **APPENDIX – VII**

### **THE CONSTITUTION OF THE KINGDOM OF NEPAL 2047 (1990 A.D.)**

#### **PREAMBLE**

WHEREAS, We are convinced that the source of sovereign authority of the independent and sovereign Nepal is inherent in the people, and, therefore, We have, from time to time, made known our desire to conduct the government of the country in consonance with the popular will; AND WHEREAS, in keeping with the desire of the Nepalese people expressed through the recent people's movement to bring about constitutional changes, We are further inspired by the objective of securing to the Nepalese people social, political and economic justice long into the future;

AND WHEREAS, it is expedient to promulgate and enforce this Constitution, made with the widest possible participation of the Nepalese people, to guarantee basic human rights to every citizen of Nepal; and also to consolidate the Adult Franchise, the Parliamentary System of Government, Constitutional Monarchy and the System of Multi-Party Democracy by promoting amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality; and also to establish an independent and competent system of justice with a view to transforming the concept of the Rule of Law into a living reality;

NOW, THEREFORE, keeping in view the desire of the people that the State authority and sovereign powers shall, after the commencement of this Constitution, be exercised in accordance with the provisions of this Constitution, I, KING BIRENDRA BIR BIKRAM SHAH DEVA, by virtue of the State authority as exercised by Us, do hereby promulgate and enforce this CONSTITUTION OF THE KINGDOM OF NEPAL on the recommendation and advice, and with the consent of the Council of Ministers.

#### **Part I – PRELIMINARY**

- 1. Constitution as the Fundamental Law:** (1) This Constitution is the fundamental law of Nepal and all laws inconsistent with it shall, to the extent of such inconsistency, be void.

(2) It shall be the duty of every person to uphold the provisions of this Constitution.

(Articles 2 to 7 are not relevant of the research)

## **Part II – CITIZENSHIP**

(Articles 8 to 10 are not relevant of the research)

## **Part III – FUNDAMENTAL RIGHTS**

**11. Right to Equality:** (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, race, sex, caste, tribe or ideological conviction or any of these.

(3) The State shall not discriminate citizens among citizens on grounds of religion, race, sex, caste, tribe or ideological conviction or any of these:

Provided that special provisions may be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.

(4) No person shall, on the basis of caste, be discriminated against as untouchable-, be denied access to any public place, or be deprived of the use of public utilities. Any contravention of this provision shall be punishable by law.

(5) No discrimination in regard to remuneration shall be made between men and women for the same work.

**12. Right to Freedom:** (1) No person shall be deprived of his personal liberty save in accordance with law, and no law shall be made which provides for capital punishment.

(2) All citizens shall have the following freedoms:-

- a. freedom of opinion and expression;
- b. freedom to assemble peaceably and without arms;
- c. freedom to form unions and associations;

- d. freedom to move throughout the Kingdom and reside in any part thereof;
- e. freedom to practice any profession, or to carry on any occupation, or trade:

Provided that-

(1) nothing in sub-clause (a) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of the Kingdom of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities, or on any act of sedition, defamation, contempt of court or incitement to an offense; or on any act which may be contrary to decent public behavior or morality;

(2) nothing in sub-clause (b) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty, integrity or law and order situation of the Kingdom of Nepal;

(3) nothing in sub-clause (c) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of the Kingdom of Nepal, which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities, which may instigate violence, or which may be contrary to public morality;

(4) nothing in sub-clause (d) shall be deemed to prevent the making of laws which are in the interest of the general public, or which are made to impose reasonable restrictions on any act which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities;

(5) nothing in sub-clause (e) shall be deemed to prevent the making of laws to impose restrictions on any act which may be contrary to public health or morality, to confer on the State the exclusive right to undertake specified industries, businesses or services; or to impose any condition or qualification for carrying on any industry, trade, profession or occupation.

(Article 13 is not relevant of this research)

- 14. Right Regarding Criminal Justice:** (1) No person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be

subjected to a punishment greater than that prescribed by the law in force the time of the commission of the offense.

(2) No person shall be prosecuted or punished for the same offense in a court of law more than once.

(3) No person accused of any offense shall be compelled to be a witness against himself.

(4) No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law.

(5) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall be denied the right to consult and be defended by a legal practitioner of his choice.

Explanation:- For the purpose of this clause, the words “legal practitioner” shall mean any person who is authorized by law to represent any person in any court.

(6) Every person who is arrested and detained in custody shall be produced before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such person shall be detained in custody beyond the said period except on the order of such authority.

(7) Nothing in clauses (5) and (6) shall apply to a citizen of an enemy state, and nothing in clause (6) shall apply to any person who is arrested or detained under any law providing for preventive detention.

**15. Right against Preventive Detention:** (1) No person shall be held under preventive detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal.

(2) Any person held under preventive detention shall, if his detention was contrary to law or in bad faith, have the right to be compensated in a manner as prescribed by law.

(Articles 16 to 22 are not relevant of this research)

23. **Right to Constitutional Remedy:** The right to proceed in the manner set forth in Article 88 for the enforcement of the rights conferred by this Part is guaranteed.

#### **Part IV - DIRECTIVE PRINCIPLES AND POLICIES OF THE STATE**

(Articles 24 to 26 are not relevant of this research)

#### **Part V - HIS MAJESTY**

27. **His Majesty:** (1) In this Constitution, the words “His Majesty” mean His Majesty the King for the time being reigning, being a descendant of the Great King Prithvi Narayan Shah and an adherent of Aryan culture and the Hindu religion.

(2) His Majesty is the symbol of Nepalese nationality and the unity of the Nepalese people.

(3) His Majesty is to preserve and protect this Constitution by keeping in view the best interests and welfare of the people of Nepal.

28. **Provision Relating to Succession to the Throne:** (1) Nothing in this Constitution shall affect the custom, usage and tradition relating to the order of succession to the Throne by the descendants of His Majesty.

(2) His Majesty shall have the exclusive power of enacting, amending and repealing the law relating to succession to the Throne by His descendants.

29. **Expenditures and Privileges Relating to His Majesty and the Royal Family:** Expenditures and privileges relating to His Majesty and the Royal Family shall be as determined by law: Provided that no law shall be made having the effect of reducing the expenditures and privileges being provided by the existing law.

30. **Income and Property of His Majesty to be Exempt from Tax and Inviolable:** (1) The income and personal property of His Majesty shall be exempt from all kinds of tax, fee or other similar charge.

(2) The property of His Majesty shall be inviolable .

31. **Question not to be Raised in Courts:** No question shall be raised in any court about any act performed by His Majesty:



Provided that nothing in this Article shall be deemed to restrict any right under law to initiate proceedings against His Majesty's Government or any employee of His Majesty.

**32. Royal Representative.** Council of Royal Representatives. Regency and Council of Regency:

(1) In this Constitution, any reference to His Majesty shall, unless the subject or context otherwise requires, include reference to a Royal Representative or Council of Royal Representatives exercising powers pursuant to clause (2), and to a Regent or Council of Regency empowered pursuant to Article 34.

(2) His Majesty may, by warrant under His Royal Seal, appoint any person or council as His Royal Representative to exercise, subject to such conditions as may be specified in the warrant, such functions as His Majesty is to perform pursuant to this Constitution or the existing law during His Majesty's absence from Nepal or during any specified period. The functions exercised by such Royal Representative within the terms and limits specified in the warrant shall, for the purpose of this Constitution and the existing laws, be deemed to have been exercised by His Majesty.

**33. Royal Standard and Salute:** (1) Square in shape and crimson in color having borders in white, the Royal standard is traditionally comprised of a crescent moon, in the upper corner near the flag staff with eight out of sixteen rays shown in white color, and a white sun with twelve white rays in the upper corner opposite to the flag staff, and a white flag showing a six-angled figure and a sword in the middle of the standard with an upright white lion facing the flag with both its paws holding, and the right hind leg supporting, the flag staff.

(2) The national anthem of Nepal is the Royal salute.

**Part – VI - RAJ PARISHAD**

(Article 34 is not relevant to this research)

**Part VII - EXECUTIVE**

(Articles 35 to 43 are not relevant to this research)

**Part VIII - LEGISLATURE**

(Articles 44 to 67 are not relevant to this research)

**Part IX - LEGISLATURE PROCEDURE**

(Articles 68 to 72 are not relevant to this research)

**Part X - FINANCIAL PROCEDURE**

(Articles 73 to 83 are not relevant to this research)

**PART XI - JUDICIARY**

**84. Courts to Exercise Powers Related to Justice:** Powers relating to justice in the Kingdom of Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of this Constitution, the laws and the recognized principles of justice.

**85. Courts of Kingdom of Nepal:** (1) Courts in the Kingdom of Nepal shall consist of the following three tiers:

- a. Supreme Court;
- b. Appellate Court; and
- c. District Court.

(2) In addition to the courts referred to in clause (1) above, the law may also establish special types of courts or tribunals for the purpose of hearing special types of cases:

Provided that no special court or tribunal shall be constituted for the purpose of hearing a particular case.

**86. Supreme Court:** (1) The Supreme Court shall be the highest court in the judicial hierarchy. All other courts and judicial institutions of Nepal, other than the Military Court, shall be under the Supreme Court. The Supreme Court may inspect, supervise and give directives to its subordinate counts and other judicial institutions.

(2) The Supreme Court shall be a Court of Record. It may initiate proceedings and impose punishment in accordance with law for contempt of itself and of its subordinate courts or judicial institutions.

(3) The Supreme Court shall, in addition to the Chief Justice of Nepal, consist of up to a maximum of fourteen other Judges. If at any time, the number of existing Judges

becomes insufficient due to an increase in the number of cases in the Supreme Court, ad hoc Judges may be appointed for a fixed term.

**87. Appointment, Qualifications and conditions of Service of Judges of the Supreme Court:** (1) His Majesty shall appoint the Chief Justice of Nepal on the recommendation of the Constitutional Council, and other Judges of the Supreme Court on the recommendation of the Judicial Council. The tenure of office of the Chief Justice shall be seven years from the date of appointment.

(2) Any person who has worked as a Judge of the Supreme Court for at least five years is eligible for appointment as Chief Justice.

(3) Any person who has worked as a Judge of an Appellate Court or in any equivalent post of the Judicial Service for at least ten years; or has practiced law for at least fifteen years as a law graduate advocate or senior advocate; or who is a distinguished jurist who has worked for at least fifteen years in the judicial or legal field is eligible for appointment as a Judge of the Supreme Court.

**Explanation:** For the purpose of this clause, services rendered prior to the commencement of this Constitution as a Judge of a Regional Court or Zonal Court shall be deemed as service rendered in an Appellate Court.

(4) If the office of the Chief Justice becomes vacant, or the Chief Justice is unable to carry out the duties of his office due to illness or any other reason, or he cannot be present in office due to a leave of absence or his being outside of Nepal, His Majesty may designate the senior most Judge to act as the Acting Chief Justice.

(5) The Chief Justice or any other Judge of the Supreme Court shall hold office until he attains the age of sixty five years.

(6) The Chief Justice or any other Judge of the Supreme Court may, by submitting to His Majesty his resignation in writing, resign his office at any time.

(7) The Chief Justice or any other Judge of the Supreme Court shall be removed from his office if, for reasons of incompetence, misbehavior or failure to discharge the duties of his office in good faith, the House of Representatives, by a two-thirds majority of the total number of its members, passes a resolution for his removal and the resolution is approved by His Majesty.

(8) The Chief Justice or any other Judge of the Supreme Court charged pursuant to clause (7) shall be given a reasonable opportunity to defend himself, and for this

purpose, the House of Representatives may constitute a Committee of Inquiry consisting of its members and legal experts for the purposes of recording the statement of the Judge, collecting evidence and submitting its findings. The working procedure of the Committee shall be determined by law.

(9) The Chief Justice or the Judge of the Supreme Court against whom impeachment proceedings are being initiated pursuant to clause (7) shall not perform his duties until the proceedings are final.

(10) Except as otherwise provided for in this Constitution, the remuneration, allowances, leave, pension, gratuities and other conditions of service of the Chief Justice and other Judges of the Supreme Court shall be regulated by law.

(11) The remuneration, privileges and other conditions of service of the Chief Justice and other Judges of the Supreme Court shall not be altered to their disadvantage.

(12) Any person who has once held the office of Chief Justice or Judge of the Supreme Court shall not be eligible for appointment in any Government Service, nor shall he be entitled to practice law before any office or court:

Provided that nothing in this clause shall be deemed to be a bar to his appointment to a political position, to a position concerning judicial inquiry or to a position in which his responsibility extends to giving his advice, opinions and recommendations on the basis of study, research and investigation in the field of justice or law.

(13) The Chief Justice may, on the recommendation of the Judicial Council, appoint a retired Judge of the Supreme Court or any person who is qualified to be appointed Judge of the Supreme Court pursuant to this Article, as an ad hoc Judge for a fixed term. The ad hoc Judge thus appointed shall, in carrying out his duties in the capacity of Judge, be entitled to remuneration, allowances, leave and transportation facilities similar to that of a Judge of the Supreme Court:

Provided that the Chief Justice shall obtain approval from His Majesty before making an appointment under this clause.

**88. Jurisdiction of the Supreme Court:** (1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other

ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.

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

Provided that the Supreme Court shall not be deemed to have power under this clause to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against or punishment given to, a non-military person for an act other than an offense relating to the Army.

Except on the ground of absence of jurisdiction, the Supreme Court shall not interfere under this clause with the proceedings and decisions of Parliament concerning penalties imposed by virtue of its Privileges.

(3) The Supreme Court shall have original and appellate jurisdiction as defined by law.

(4) The Supreme Court may review its own judgments or final orders subject to the conditions and in the circumstances prescribed by law.

(5) If His Majesty wishes to have an opinion of the Supreme Court on any complicated legal question of interpretation of this Constitution or of any other law, it shall, upon consideration on the question, report to His Majesty its opinion thereon.

(6) Other powers and procedures of the Supreme Court shall be as prescribed by law

**89. Establishment and Management of Appellate Courts and District Courts:** The establishment, management and jurisdiction of the Appellate Courts, District Courts and other courts subordinate to the Supreme Court shall be determined by law subject to this Constitution.

**90. Qualifications for Judges of Appellate Courts and District Courts:** (1) Any person who is a Nepali citizen shall be eligible for appointment as Chief Judge or other Judge of an Appellate Court if he, having a Bachelor's Degree in law, has worked as a District Judge or worked in any other equivalent post for a period of at least seven years; or has practiced law for at least ten years as a law graduate advocate or senior advocate; or has taught law or done research thereon or has worked in any other field of law or justice for at least ten years.

(2) A person who is a Nepali citizen, who has a Bachelor's Degree in law, and has worked for at least four years as a second class gazetted officer in the Judicial Service is eligible for appointment as a District Judge:

Provided that nothing herein shall prevent the continuance or reappointment of the Judges who at the commencement of this Constitution are working as Judges.

(3) Unless the subject or context otherwise requires, the word "Judge" as mentioned in this Article and ensuing Articles shall mean and include an Additional Judge.

**91. Appointment and Conditions of Service of the Judges of Appellate Courts and District Courts:**

(1) His Majesty shall, on the recommendation of the Judicial Council, appoint any Chief Judge and Judges of the Appellate Courts and any Judges of the District Courts:

Provided that His Majesty may delegate His authority to the Chief Justice for the appointment of the District Judges to be made on the recommendation of the Judicial Council.

(2) The Chief Justice may transfer a Judge of an Appellate or District Court from one court to another on the recommendation of the Judicial Council.

( 3 ) If the Judicial Council recommends that a Chief Judge or any other Judge of an Appellate Court or any Judge of a District Court be removed from his office for

reasons of incompetence, misbehavior or failure to carry out the duties of his office in good faith, or if it recommends that it is necessary and expedient to initiate proceedings against such Judge in accordance with law for reasons of misbehavior, and if such recommendation is accepted by His Majesty, such Chief Judge or Judge shall be so removed from his office or proceedings will be initiated against him in accordance with law:

Provided that the Chief Judge or any other Judge who is facing such charge shall be given a reasonable opportunity to defend himself before the said recommendation is made and for this purpose, the Judicial Council shall cause an investigation to – be made by a Committee of Inquiry under the Chairmanship of a Judge of the Supreme Court for the purposes of recording the statement of the Judge, collecting evidence and submitting its findings.

(4) A Chief Judge or a Judge of an Appellate Court, or a Judge of a District Court may, by submitting to His Majesty his resignation in writing, resign his office.

(5) A Chief Judge and other Judges of an Appellate or District Court shall continue to hold office until the age of sixty three.

(6) The remuneration, allowances, leave, pension, gratuities or other privileges and other conditions of service of a Chief Judge and other judges of an Appellate or District Court shall be as determined by law.

(7) The remuneration, privileges and conditions of service of a Chief Judge and other Judges of an Appellate Court or District Court shall not be altered to their disadvantage.

**92. Judges not to be Transferred to or Engaged in any other Assignment:** A Judge shall not be transferred to, engaged in, or deputed to, any work except that of a Judge:

Provided that His Majesty may, in consultation with the Judicial Council, depute for a specified period a Judge of the Supreme Court or a Chief Judge of any Appellate Court to work concerning judicial inquiry, to legal or judicial investigation or research, or to any other work of national concern. With regard to other Judges of the Appellate Courts and District Courts, the Chief Justice may, in consultation with the Judicial Council, depute them to the above works, including election works.

(Articles 93 to 96 are not relevant to this research)

**PART XII - COMMISSION FOR THE INVESTIGATION OF ABUSE OF AUTHORITY**

(Articles 97 to 99 are not relevant to this research)

**PART XIII - AUDITOR-GENERAL**

(Articles 99 to 100 are not relevant to this research)

**PART XIV - PUBLIC SERVICE COMMISSION**

(Articles 101 to 102 are not relevant to this research)

**PART XV - ELECTION COMMISSION**

(Articles 103 to 108 are not relevant to this research)

**PART XVI - ATTORNEY GENERAL**

(Articles 109 to 111 are not relevant to this research)

**PART XVII - POLITICAL ORGANIZATIONS**

(Articles 112 to 114 are not relevant to this research)

**PART XVIII - EMERGENCY POWERS**

(Article 115 is not relevant to this research)

**PART XIX - AMENDMENT OF THE CONSTITUTION**

(Article 116 is not relevant to this research)

**PART XX - MISCELLANEOUS**

(Articles 117 to 127 are not relevant to this research)

**PART XXI - TRANSITIONAL PROVISIONS**

(Articles 128 to 131 are not relevant to this research)

**PART XXII - DEFINITIONS AND INTERPRETATION**

(Article 132 is not relevant to this research)

**SCHEDULES - I & II**



## APPENDIX – VIII

### THE INTERIM CONSTITUTION OF NEPAL, 2063 B.S. (2007 A.D.)

Date of Authentication and publication

2063-10-01 (15 January 2007)

#### Amendments

- |   |            |
|---|------------|
| 1. The Interim Constitution of Nepal<br>(First Amendment ), 2063 (2007) (14 March 2007)     | 2063-11-30 |
| 2. The Interim Constitution of Nepal<br>(Second Amendment), 2063 (2007) (13 June 2007)      | 2064-2-30  |
| 3. The Interim Constitution of Nepal<br>(Third Amendment), 2064 (2007) (28December 2007)    | 2064-9-13  |
| 4. The Interim Constitution of Nepal<br>(Fourth Amendment), 2065 (2008) (29 May 2008)       | 2065-2-16  |
| 5. The Interim Constitution of Nepal<br>(Fifth Amendment), 2065 (2008) (13 July 2008)       | 2065-3-29  |
| 6. The Interim Constitution of Nepal<br>(Sixth Amendment), 2065 (2008) (15 Dec. 2008)       | 2065-8-30  |
| 7. The Interim Constitution of Nepal<br>(Seventh Amendment), 2066 (2010) (January 31, 2010) | 2066-10-17 |
| 8. The Interim Constitution of Nepal<br>(Eight Amendment), 2067 (2010) (May 28, 2010)       | 2067-02-14 |

#### **PREAMBLE: WE, THE SOVEREIGNTY AND STATE AUTHORITY INHERENT PEOPLE OF NEPAL,**

Respecting the people's mandate expressed in favour of democracy, peace and progression through historical struggles and people's movements launched by the people of Nepal at various times since before 2007 (1951) to till the date ; Pledging to accomplish the progressive restructuring of the State in order to solve the problems existing in the country relating to class, ethnicity, region and gender; Expressing our full commitment to democratic values and norms including the competitive multi-party democratic system of governance, civil liberties,

fundamental rights, human rights, adult franchise, periodic elections, complete freedom of the press, independent judiciary and concepts of the rule of law; Guarantee the basic rights of the people of Nepal to make a constitution for them on their own and to take part in a free and fair election to the Constituent Assembly in an environment without fear; Putting democracy, peace, prosperity, progressive socio-economic transformation and sovereignty, integrity independence and prestige of the country in the center; Declaring Nepal as a federal, democratic republican state upon duly abolishing the Monarchy;<sup>1</sup>

HEREBY DECLARE, with a view to institutionalizing the achievements made through the revolutions and movements till now, the promulgation of this Interim Constitution of Nepal 2063 (2007), which has been made through a political understanding and to be in force until a new constitution is framed by the Constituent Assembly.

### **Part - 1 Preliminary**

- 1. Constitution as the Fundamental Law:** (1) This Constitution is the fundamental law of Nepal. Any laws inconsistent with it shall, to the extent of such inconsistency, be void.  
(2) It is the duty of every person to uphold this Constitution.
- 2. Sovereignty and State Authority:** The sovereignty and the state authority of Nepal shall be vested in the people of Nepal.
- 3. Nation:** Having multiethnic, multilingual, multireligious and multicultural characteristics with common aspirations and being united by a bond of allegiance to national independence, integrity, national interest and prosperity of Nepal, all the Nepalese people collectively constitute the nation.
- 4. State of Nepal:** (1) Nepal is an independent, indivisible, sovereign, secular, inclusive and federal, democratic republican state.<sup>2</sup>  
(2) The territory of Nepal shall comprise of:
  - (a) The territory existing at the commencement of this constitution; and
  - (b) Such other territory as may be acquired after the commencement of this Constitution.

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<sup>1</sup> Inserted by the Fourth Amendment.

<sup>2</sup> Amended by the Fourth Amendment

(Articles 5 to 7 are not relevant to this research)

**Part - 2  
Citizenship**

(Articles 8 to 10 are not relevant to this research)

**Part - 3**

**Fundamental Rights**

**12. Right to freedom:** (1) Every person shall have the right to live with a dignity, and no law shall be made which provides for the death penalty.

(2) No person shall be deprived of his or her personal liberty save in accordance with law.

(3) Every citizen shall have the following freedoms:

- (a) Freedom of opinion and expression;
- (b) Freedom to assemble peaceably and without arms;
- (c) Freedom to form political parties;
- (d) Freedom to form unions and associations;
- (e) Freedom to move and reside in any part of Nepal; and
- (f) Freedom to practice any profession, carry on any occupation, industry and trade.

Provided that:

(1) Nothing in Sub-clause (a) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religions or communities, or on any act of defamation, contempt of court or incitement to an offence, or on any act which may be contrary to public decency or morality.

(2) Nothing in Sub-clause (b) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty, integrity or public peace and order of Nepal.

(3) Nothing in Sub-clauses (c) and (d) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religions or communities, or which may incite violent activities, or which may be contrary to public morality.

(4) Nothing in Sub-clause (e) shall be deemed to prevent the making of laws which are in the interest of the general public, or which are made to impose reasonable restrictions on any act which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religions or communities.

(5) Nothing in Sub-clause (f) shall be deemed to prevent the making of laws to impose restrictions on any act which may be contrary to public health or morality of the general public, to confer on the State the exclusive right to undertake any specific industry, business or service, or to prescribe any condition or qualification for carrying on any industry, trade, profession or employment.

**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) 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 provisions by law for the protection, empowerment or advancement of women, *Dalits*, indigenous peoples (*Adibasi, Janajati*), *Madhesi* or farmers, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated.

(4) No discrimination in regard to remuneration social security shall be made between men and women for the same work.

**14. Right against untouchability and racial discrimination:** (1) No person shall be discriminated against as untouchable and subjected to racial discrimination in any form, on grounds of caste, race, community or occupation. Such discriminatory treatment shall be punishable, and the victim shall be entitled to such compensation as determined by law.

(2) No person shall, on grounds of caste or race, be deprived of the use of services, facilities or utilities available to the public or of the access to any public place or public religious sites or of the performance of any religious function.

(3) In producing or distributing any goods, services or facilities, no person belonging to any particular caste or tribe shall be prevented from purchasing or acquiring such goods, services facilities nor shall such goods, services facilities or facilities be sold or distributed only to the persons belonging to any particular caste or tribe.

(4) No such act as to purport to demonstrate any superiority or inferiority of the person or persons belonging to any caste, tribe or origin or to justify social discrimination on the ground of caste or race or to publicize ideology based on racial superiority or hatred or to encourage caste discrimination in any manner shall be allowed.

(5) Any act contrary to clauses (2), (3) and (4) shall be punishable by law.

(Articles 15 to 23 are not relevant to this research)

**24. Right relating to justice:** (1) No person who is arrested shall be detained in custody without informing him or her of the reasons for such arrest.

(2) Every person who is arrested shall have the right to consult a legal practitioner of his or her choice at the time of such arrest. Any consultation made by such person with his or her legal practitioner and advice given by such practitioner shall be secret; and such person shall not be deprived of the right to be defended by his or her legal practitioner.

**Explanation:** For the purpose of this Clause, the expression "legal practitioner" shall mean any person who is authorized by law to represent any person in any court.

(3) Every person who is arrested shall be produced before the case trying authority within a period of twenty-four hours of such arrest, excluding the time

necessary for the journey from the place of arrest to such authority; and any such person shall not be detained in custody except on the order of such authority.

Provided that nothing in Clauses (2) and (3) shall apply to preventive detention and to a citizen of an enemy state.

(4) No person shall be punished for an act which was not punishable by law when the act was committed nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence.

(5) Every person charged with an Offense shall be presumed innocent until proved guilty of the offense.

(6) No person shall be prosecuted or punished for the same offense in a court more than once.

(7) No person charged with an offense shall be compelled to testify against him/herself.

(8) Every person shall have the right to be informed of any proceedings taken against him or her.

(9) Every person shall have the right to a fair trial by a competent court or judicial body.

(10) Any incapable party shall have the right to free legal aid, as provided in law.

**25. Right against preventive detention:** (1) No person shall be held under preventive detention unless there is a sufficient ground of the existence of an immediate threat to the sovereignty, integrity or law and order situation of the State of Nepal.

(2) Any person held under preventive detention shall, if he or she has been held under such detention by the authority making preventive detention contrary to law or in bad faith, have the right to such compensation as may be prescribed by law.

**26. Right against torture:** (1) No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment.

(2) Any act referred to in Clause (1) shall be punishable by law, and any person so treated shall be provided with such compensation as may be determined by law.

27. **Right to information:** (1) Every citizen shall have the right to demand or obtain information on any matters of concern to himself or herself or to the public.

Provided that nothing in this Article shall be deemed to compel any person to provide information on any matter about which confidentiality is to be maintained according to law.

(Articles 28 to 31 are not relevant to this research)

32. **Right to constitutional remedies:** The right to proceed in the manner set forth in Article 107 for the enforcement of the rights conferred by this Part is guaranteed.

#### PART 4

### RESPONSIBILITIES, DIRECTIVE PRINCIPLES AND POLICIES OF THE STATE

(Articles 33 to 36 are not relevant to this research)

#### PART (4A)

### THE PRESIDENT AND VICE-PRESIDENT

(Articles 36A to 36K are not relevant to this research)

#### PART 5

### THE EXECUTIVE

(Articles 37 to 44 are not relevant to this research)

#### PART 6

### LEGISLATURE-PARLIAMENT

(Articles 45 to 62 are not relevant to this research)

#### PART 7

### CONSTITUENT ASSEMBLY

(Articles 63 to 83 are not relevant to this research)

#### PART 8

### LEGISLATIVE PROCEDURE

(Articles 84 to 88 are not relevant to this research)

#### PART 9

### FINANCIAL PROCEDURE

(Articles 89 to 99 are not relevant to this research)

#### **PART 10**

### **JUDICIARY**

100. **Courts to exercise powers relating to Justice:** (1) Powers relating to justice in Nepal shall be exercised by courts and other judicial bodies in accordance with the provisions of this Constitution, other laws and the recognised principles of justice.

(2) The Judiciary of Nepal shall remain committed to this Constitution by pursuing the concepts, norms and values of the independent judiciary and realizing the spirit of democracy and the people's movement

**101. Courts:** (1) There shall be the following Courts in Nepal:

- (a) Supreme Court;
- (b) Appellate Court; and
- (c) District Court.

(2) In addition to the Courts referred to in Clause (1), any other courts, judicial bodies or tribunals may be established and constituted by law for the purpose of trying and disposing cases of special types and nature.

Provided that no court, judicial body or tribunal shall be constituted for the purpose of trying and disposing any particular case.

**102. Supreme Court:** (1) The Supreme Court shall be the highest court in the judicial hierarchy.

(2) All courts and judicial bodies of Nepal, other than the Constituent Assembly Court, shall be under the Supreme Court. The Supreme Court may inspect, supervise and give necessary directives to its subordinate courts and judicial bodies.

(3) The Supreme Court shall be a court of record. it may initiate proceedings and impose punishment in accordance with law for contempt of itself and of its subordinate courts or judicial bodies.

(4) The Supreme Court shall have the final authority to interpret this Constitution and the laws in force, other than on any matter falling under the jurisdiction of the Constituent Assembly Court.

(5) The Supreme Court shall consist of the Chief Justice and of not more than fourteen other Judges. If, at any time, the number of existing Judges becomes insufficient by the reason of an increase in the number of cases in the Supreme Court, *ad hoc* Judges may be appointed for a fixed term.



**103. Appointment and qualification of Judges of the Supreme Court:** (1) The President<sup>3</sup> shall, on the recommendation of the Constitutional Council, appoint the Chief Justice of the Supreme Court, and the Chief Justice shall, on the recommendation of the Judicial Council, appoint other Judges of the Supreme Court. The tenure of office of the Chief Justice shall, subject to Sub-clause (b) of Clause (1) of Article 105, be six years from the date of appointment.

(2) Any person who has worked as a Judge of the Supreme Court for at least three years shall be eligible for appointment as the Chief Justice of the Supreme Court.

(3) A person who has worked as a Judge of an Appellate Court or in any equivalent office of the Judicial Service for seven years or has worked in the post of Gazetted First Class or a higher post of the Judicial Service for at least twelve years or has practiced law for at least fifteen years as a law graduate advocate or senior advocate or who is a distinguished jurist having worked for at least fifteen years in the judicial or legal field shall only be eligible for appointment as a Judge of the Supreme Court.

(4) If the office of the Chief Justice becomes vacant or the Chief Justice is unable to carry out the duties of his or her office by reason of illness or otherwise or he or she cannot be present in the Supreme Court by reason of a leave of absence or his or her being outside of Nepal, the senior most Judge of the Supreme Court shall act as the Acting Chief Justice.

(5) The Chief Justice or any other Judge of the Supreme Court shall hold office until attain he/she the age of sixty-five years.

**104. Conditions of service and facilities of Chief Justice and Judge:** (1) The Chief Justice, and permanent Judges of the Supreme Court, who have served for at least five years, shall, on retirement, be entitled to such pension as may be provided for in the law.

(2) Save as otherwise provided in this Constitution, the remuneration, leave, allowances, pension and other conditions of service of the Chief Justice and Judges of the Supreme Court shall be provided by law.

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<sup>3</sup> Amended by the Fourth Amendment.

(3) Notwithstanding anything contained in Clauses (1) and (2), the Chief Justice or any Judge of the Supreme Court who has been removed from office by way of impeachment shall not be entitled to gratuity or pension.

(4) The remuneration, facilities or other conditions of service of the Chief Justice or a Judge of the Supreme Court shall not be altered to their disadvantage.

**105. Chief Justice and Judge of Supreme Court to be relieved of office:** (1) The Chief Justice or any other Judge of the Supreme Court shall be relieved of his or her office in any of the following circumstances:

(a) if the Chief Justice tenders resignation in writing before the President<sup>4</sup> and the Judge tenders resignation in writing before the Chief Justice;

(b) if he or she attains the age of sixty-five years;

(c) if a motion of impeachment is passed by the Legislature-Parliament; or

(d) If he or she dies.

(2) A motion of impeachment against the Chief Justice or any other Judge may be moved in the Legislature Parliament on the grounds of his or her incompetence, misbehavior or failure to discharge the duties of his or her office in good faith or his or her inability to discharge his or her duties because of physical or mental reason; and if the motion is passed by a two-thirds majority of the total number of the then members, he or she shall *ipso facto* be relieved of his or her office.

Provided that, the Chief Justice or the Judge being so charged shall not be deprived of an opportunity to defend him/herself.

(3) The Chief Justice or the Judge against whom impeachment proceedings are being initiated pursuant to Clause (2) shall not perform the duties of his or her duties until the proceedings are completed.

**106. Chief Justice and Judge not to be engaged in any other assignment:**

(1) No Chief Justice or Judge of the Supreme Court shall be engaged in or deputed to any assignment other than that of Judge.

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<sup>4</sup> Amended by the Fourth Amendment.

Provided that the Government of Nepal may, in consultation with the Judicial Council, depute the Chief Justice or any Judge of the Supreme Court to work concerning judicial inquiry, or to legal or judicial investigation or research, or to any other work of national concern, for a specified period.

(2) No person who has once held the office of Chief Justice or a Judge of the Supreme Court shall be eligible for appointment to any government office other than the office as referred to in Sub-clause (a) of Clause (1) of Article 131 nor shall such person be entitled to practice law before any office or court.

**107. Jurisdiction of the Supreme Court:** (1) Any citizen of Nepal may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground; and the Supreme Court shall have extra-ordinary power to declare that law to be void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with this Constitution.

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

Provided that, except on the ground of absence of jurisdiction, the Supreme Court shall not under this Clause interfere with any proceedings and decisions of the Legislature-Parliament concerning violation of its privileges and penalties imposed therefor.

(3) The Supreme Court shall have jurisdiction as prescribed by law to try original cases, to hear appeal references, to revise cases or hear petitions.

(4) The Supreme Court may review its own judgments or final orders subject to such conditions and in such circumstances as may be, prescribed by law. Judges other than those having handed down the previous judgment shall make such review.

(5) Other powers and procedures of the Supreme Court shall be as prescribed by law.

**108. Establishment, management and jurisdiction of Appellate Courts and District Courts:** The establishment and management of the Appellate Courts, District Courts and other courts and judicial bodies subordinate to the Supreme Court shall be determined by law subject to this Constitution.

**109. Appointment, qualification, conditions of service and facilities of Judges of Appellate Courts and District Courts:** (1) The Chief Justice shall, on the recommendation of the Judicial Council, appoint any Chief Judge and Judges of the Appellate Courts and any Judges of the District Courts.

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

(3) Any citizen of Nepal who has a Bachelor's Degree in law and has worked in the post of Gazetted Second Class of the Judicial Service for at least three years or has practiced law for at least eight years as a law graduate advocate shall be considered eligible for appointment as a District Judge.

(4) In appointing a law graduate advocate as a District Judge pursuant to Clause (3), a person who has passed the written and oral examination conducted by the Judicial Council shall be so appointed. The method of such examination and other procedures shall be as determined by law.

(5) The Judicial Council shall, taking into account, *inter alia*, his or her qualification, competency, experience, dedication and contribution to justice, reputation gained in public life and high moral character, recommend any person who is qualified

under this Article for appointment to the office of Judge of the Appellate Court and the District Court.

(6) Unless the subject or the context otherwise requires, the expression "Judge" as mentioned in this Article and ensuing Articles shall include an Additional Judge.

(7) The remuneration, allowances, pension, leave, gratuities and other facilities and other conditions of service of the Chief Judges and other Judges of the Appellate Courts or the Judges of District Courts shall be as determined by law.

(8) The remuneration, facilities and conditions of service of the Chief Judges and Judges of the Appellate Courts and the Judges of District Courts shall not be altered to their disadvantage.

(9) Notwithstanding anything contained in Clause (7), any Judge of an Appellate Court or of a District Court who has been removed from office pursuant to Sub-clause (c) of Clause (10) shall not be entitled to gratuity and pension.

(10) A Judge of an Appellate Court or of a District Court shall be relieved of his or her office in any of the following circumstances:

- (a) if he or she tenders resignation in writing before the Chief Justice;
- (b) if he or she attains the age of sixty-three years;
- (c) if, by virtue of a decision of the Judicial Council to remove him or her from office on the grounds of incompetence, misbehavior or failure to discharge the duties of his or her office in good faith or his or her inability to discharge his or her duties because of physical or mental reason or his or her deviation from justice, he or she is removed by the Chief Justice from his or her office; A Judge of an Appellate Court or of a District Court who is facing a change pursuant to this Sub-clause shall be given a reasonable opportunity to defend himself or herself, and for this purpose, the Judicial Council may form a committee of inquiry for the purposes of recording the statements of the Judge, collecting evidence and submitting a report accompanied by its findings. The Rules of procedure of the committee shall be as determined by law.
- (d) if he or she dies.

(11) The Judge of an Appellate Court or of a District Court against whom the proceedings are being initiated pursuant to Sub-clause (c) of clause (10) shall not perform the duties of his or her office until the proceedings are completed.

**110. Judge of Appellate Court and District Court not to be transferred to or engaged in any other assignments:** (1) No Judge shall be transferred to or engaged in or deputed to any office other than that of Judge.

Provided that, the Government of Nepal may, in consultation with the Judicial Council, depute any Judge of the Appellate Court and of the District Court to work concerning judicial inquiry, or to legal or judicial investigation or research, or to any other work of national concern, for a specified period. In the case of the Judges of the Appellate Courts or the District Courts, the Chief Justice may, in consultation with the Judicial Council, depute them to the aforesaid work, including work relating to elections.

(2) The Chief Justice may, on the recommendation of the Judicial Council transfer a Judge of an Appellate or of a District Court from one court to another.

(3) Taking into consideration, *inter alia*, the case-load and matters of dispute to be settled judicially, the Chief Justice may depute a Judge of a Court to act as a Judge of another Court of the same level for a certain period of time.

(4) The Supreme Court may, as provided for in law, authorise a Judge in any area to issue, through electronic or other media, a preliminary or interim order in the course of proceedings of a case pending in another Court of the same level situated in a geographically nearby area.

**111. Transfer of cases:** If the Supreme Court is satisfied with the reason that there exists a situation where justice can be adversely affected if a case filed in a Court is tried by that Court, the Supreme Court may order such case to be tried by another Court of the same level.

(Articles 112 to 117 are not relevant to this research)

**118. Constituent Assembly Court:** (1) A constituent Assembly court shall be constituted to resolve the complaints regarding election of the constituent Assembly .

(2) The composition, jurisdiction and other matters of the Constituent Assembly Court as referred to in Clause (1) shall be as determined by law.

(3) Notwithstanding anything contained elsewhere in this Constitution, no question may be raised in any court in respect of any election to the members of the Constituent Assembly unless a petition is filed in the Court as referred to in Clause (1) as prescribed by law.

(4) Notwithstanding anything contained elsewhere in this Constitution, no question may, after the process of election to the Constituent Assembly has commenced, be raised in any Court in such a manner as to interrupt such election.

**PART 11**  
**COMMISSION FOR THE INVESTIGATION OF ABUSE OF AUTHORITY**  
(Articles 119 to 121 are not relevant to this research)

**PART 12**  
**AUDITOR GENERAL**  
(Articles 122 to 124 are not relevant to this research)

**PART 13**  
**PUBLIC SERVICE COMMISSION**  
(Articles 125 to 127 are not relevant to this research)

**PART 14**  
**ELECTION COMMISSION**  
(Articles 128 to 130 are not relevant to this research)

**PART 15**  
**NATIONAL HUMAN RIGHTS COMMISSION**  
(Articles 131 to 133 are not relevant to this research)

**PART 16**  
**ATTORNEY GENERAL**  
(Articles 134 to 137 are not relevant to this research)

**PART 17**  
**STRUCTURE OF STATE AND LOCAL SELF GOVERNANCE**  
(Articles 138 to 139 are not relevant to this research)

**PART 18**  
**POLITICAL PARTIES**  
(Articles 141 to 142 are not relevant to this research)

**PART 19**  
**EMERGENCY POWERS**  
(Article 143 is not relevant to this research)

**PART 20**  
**PROVISIONS REGARDING THE ARMY**  
(Articles 144 to 147 are not relevant to this research)

**PART 21**  
**AMENDMENT TO CONSTITUTION**

(Article 148 is not relevant to this research)

**PART 22**  
**MISCELLANEOUS**

(Articles 149 to 158 are not relevant to this research)

**PART 23**  
**TRANSITIONAL PROVISIONS**

(Articles 159 to 161 are not relevant to this research)

**162. Provisions relating to Judiciary:** (1) The Supreme Court, Appellate Courts and Districts Courts existing at the time of the commencement of this Constitution shall be deemed to have been established under this Constitution, and this Constitution shall not be deemed to bar the disposal by the respective Courts of the cases filed prior to the commencement of this Constitution.

(2) The Judges serving in the Supreme Court, Appellate Courts and Districts Courts shall, after the commencement of this Constitution, take an oath of commitment to this Constitution in such form as determined by the Government of Nepal. Any Judge who refuses to take the oath shall ipso facto be relieved of his or her office.

(3) Necessary legal provisions shall be made to keep on making reforms in the judicial sector based on democratic values and norms for the independent, fair, impartial and competent Judiciary.

(Article 163 is not relevant to this research)

**164. Existing laws to remain in force:** (1) All decisions, acts and proceedings made and carried out by the reinstated House of Representatives shall be deemed to have been made and carried out under this Constitution to the extent that they are not inconsistent with this Constitution.

(2) The laws existing at the time of the commencement of this Constitution shall continue to be in force unless and until such laws are repealed or amended.

Provided that, any law which is inconsistent with this Constitution shall *ipso facto* be invalid to the extent of such inconsistency, after three months of the commencement of this Constitution.



**PART 24**  
**DEFINITIONS**

(Article 165 is not relevant to this research)

**PART 25**  
**SHORT TITLE, COMMENCEMENT AND REPEAL**

**166. Short title and commencement:** (1) This Constitution may be called "Interim Constitution of Nepal, 2063(2007)".

(2) This Constitution shall be promulgated by the House of Representatives and ratified by the Interim Legislature-Parliament. The details in relation to its implementation shall be as mentioned in Schedule-

(3) The Comprehensive Peace Accord and the Agreement on Monitoring of the Management of Arms and Armies concluded between the Government of Nepal and CPN (Maoist) on 5 Mangsir 2063 (21 November 2006) and 22 Mangsir 2063 (8 December 2006), respectively, are in Schedule-4.

(4) This Constitution shall come into force on Monday, the first day of the month of Magha of the year 2063 Bikram Sambat (15 January 2007).

**167. Repeal:** The Constitution of the Kingdom of Nepal, 2047 (1990) is, hereby, repealed.

**SCHEDULE - 1**  
**(Relating to Article 6)**  
**NATIONAL FLAG**

(Schedules 1 and 1A are not relevant to this research)

**SCHEDULE - 3**  
**Relating to clause (2) of Article 166**

This Constitution shall be promulgated by the House of Representatives and be ratified by the Legislature-Parliament after the beginning of the monitoring of arms and army management in accordance with the "Comprehensive Peace Accord" concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) on Mangsir 22, 2063 [November 21, 2006], and "Agreement on the Monitoring of the Management of Arms and Armies" reached on Mangsir 5, 2063 [8 November 2006].

**SCHEDULE - 4**  
**(Relating to Clause (3) of Article 166)**  
**COMPREHENSIVE PEACE ACCORD CONCLUDED BETWEEN THE**  
**GOVERNMENT OF NEPAL AND THE COMMUNIST PARTY OF**  
**NEPAL (MAOIST)**

**Preamble**

Respecting the people's mandate expressed in favour of democracy, peace and progress by the Nepali people through the historic struggles and people's movement, launched from time to time, since prior to 1950 to till now,

Reaffirming full commitment towards the 12-points Understanding, the 8-points Agreement reached between the Seven Political Parties and the Communist Party of Nepal (Maoist), the 25-points Code of Conduct agreed between the Government of Nepal and the CPN (Maoist), the decisions of the meeting of high level leaders of the Seven Political Parties and the CPN (Maoist) held on November 8, 2006 including all agreements, understandings, code of conducts concluded between the Government of Nepal and the CPN (Maoist), and correspondence of similar view point sent to the United Nations Organisation,

Expressing determination to carry out a progressive restructuring of the state to resolve the existing problems based on class, caste, region and gender,

Reiterating the commitment towards the competitive multiparty democratic system of governance, civil liberty, fundamental rights, human rights, full press freedom and concept of rule of law including democratic values and norms,

Remaining committed to the Universal Declaration of Human Rights, 1948 and international humanitarian laws and basic principles and values relating to human rights,

Guaranteeing the fundamental rights of the Nepali People to participate in the elections of the Constituent Assembly in a free, impartial and fearless environment,

Keeping democracy, peace, prosperity, progressive socio-economic change and freedom, integrity, sovereignty and dignity of the country at the center,

Expressing determination to implement the commitment to holding an election to the Constituent Assembly in a free and impartial manner by June 14, 2007,

Declaring the beginning of a new chapter of peaceful collaboration by ending the armed conflict that existed in the country since 1995, on the basis of the political understanding reached between both parties in order to fulfill the guarantee of sovereignty of the Nepali people,

progressive political outlet [solution], democratic restructuring of the state and socio-economic and cultural transformation through the Constituent Assembly,

Now, therefore, this Comprehensive Peace Accord has been concluded between the Government of Nepal and CPN (Maoist) with a commitment to transform the ceasefire reached between the Government of Nepal and CPN (Maoist) into a long term peace.

## **1. Preliminary**

1.1. This Accord shall be referred as the "Comprehensive Peace Accord, 2006." In short, the Accord shall be referred as Peace Accord.

1.2. The Accord shall come into force from today through a public declaration of the Government side and the Maoist side.

1.3. Both sides shall issue necessary directives to all the agencies under them to immediately implement and abide by this Accord and, shall implement or cause it to be implemented.

1.4. All the agreements, understandings, code of conducts and decisions reached between the Seven Political Parties, the Government and the Maoist sides attached as an annex shall be deemed to be an integral part of this Accord.

1.5. The understandings and agreements to be reached in future as per necessary for the implementation of this Accord shall also be deemed to be a part of this Accord.

## **2. Definitions:** Unless the subject or context otherwise requires, in this Accord

(a) "Ceasefire" means the act to prohibit all terms of attack, kidnapping, act of disappearance, detention, mobilization, strengthening, aggression and violent activities of armed forces and the activities spreading destruction, incitement and instigation in the society through whatsoever means carried out between the Government of Nepal and the CPN (Maoist) by aiming at each other.

(b) "Interim Constitution" means the "Interim Constitution of Nepal, 2007" to be promulgated for the period until a new constitution is drafted and promulgated by the Constituent Assembly.

(c) "Interim Council of Ministers" means the Interim Council of Ministers to be constituted under the Interim Constitution.

(d) "Both sides" mean the Government of Nepal side and the Communist Party of Nepal (Maoist) side.

(e) "Law in Force" means the Interim Constitution of Nepal, 2007 and the Nepal laws in force that are not inconsistent with it. Provided that this definition shall not obstruct the legal provisions that existed before the promulgation of the Interim Constitution 2007.

(f) "Verification" means the matter of preparation of exact record after verification of army, combatants and arms by the United Nations Organization.

### **3. Political-Economic-Social Transformation and Conflict Management**

Both sides agree to adopt the following policies and programmes for the political, economic and social transformation and to manage the existing conflict in the country in a positive manner.

3.1. To ensure progressive political, economic and social transformation in the country on the basis of the decisions reached at the meeting of high level leaders of Seven Political Parties and CPN (Maoist) on November 8, 2006.

3.2. To constitute an Interim Legislature-Parliament on the basis of the Interim Constitution, and to hold an election of the Constituent Assembly in a free and impartial manner by the Interim Government by June 14, 2007 and to ensure practically the sovereignty vested in the Nepali people.

3.3. No powers to rule the country shall be vested in the King. The properties of late King Birendra, late Queen Aishwarya and their family shall be transferred to the Government of Nepal and be utilized for the national interest by forming a trust. All properties (like the palaces located in different places, forest and parks, heritages of historical and archeological importance etc.) acquired by King Gyanendra in that capacity shall be nationalized. Matter whether or not to maintain the institution of monarchy shall be decided by a simple majority in the first meeting of the Constituent Assembly.

3.4. To adopt a political system that fully abides by the universally accepted concepts of fundamental human rights, multiparty competitive democratic system, sovereignty vested in the people and supremacy of the people, constitutional checks and balances, rule of law, social justice and equality, independent judiciary, periodic elections, monitoring by the civil society, complete press freedom, people's right to information, transparency and accountability in the

activities of political parties, people's participation, impartial, competent, and fair bureaucracy and to maintain good governance by ending corruption and impunity.

3.5. To carry out an inclusive, democratic and progressive restructuring of the State by eliminating the current centralized and unitary form of the State in order to address problems related to women, Dalit, indigenous ethnic [Adivasi Janajati] people, Madhesi, oppressed, neglected and minority communities and backward regions by ending discrimination based on class, caste, language, gender, culture, religion and region.

3.6. To decide, through mutual agreement, a minimum common programme for the socio-economic transformation that ends all forms of feudalism and to implement it gradually.

3.7. To adopt a policy to introduce a scientific land reform programme by ending feudal land ownership.

3.8. To follow a policy to protect and promote the national industries and resources.

3.9. To adopt a policy to establish the rights of all citizens to education, health, housing, employment and food sovereignty.

3.10. To adopt a policy to provide land and other economic and social security to the economically backward classes including landless, bonded labours [kamaiyas], tillers[haliyas] pastoral farmers [farm labourers and shepherds] [haruwa charuwa].

3.11. To adopt a policy of severe punishment to any person who acquires unjust wealth through corruption while holding a government office of profit.

3.12. To build a common development concept for socio-economic transformation and justice as well as to rapidly develop the country and make it economically prosperous.

3.13. To ensure the professional [occupational] rights of the labourers and follow a policy for massive increase in employment and income generation opportunities by increasing investment in industries, trade, export promotion etc.

#### **4. Management of Armies and Arms**

In order to hold the election of the Constituent Assembly in a peaceful, impartial environment, free of fear, and for the democratization and restructuring of the army, to carry out the following tasks in accordance with the 12-points understanding, eight-points agreement and

25-points code of conduct concluded in the past, the five-points letter sent to the United Nations and the decision taken in the meeting of high level leaders held on November 8, 2006.

### **Regarding the Maoist Army**

4.1. As per the commitment expressed in the letter sent to the United Nations on behalf of the Government of Nepal and the CPN (Maoist) on August 9, 2006, combatants of the Maoist army shall be confined within the following temporary cantonments in the following places. They shall be verified and monitored by the United Nations.

The main cantonments shall be located in the following places

1. Kailali
2. Surkhet
3. Rolpa
4. Nawalparasi
5. Chitwan
6. Sindhuli
7. Ilam

The sub-cantonments around the main cantonments shall be located at the rate of three each.

4.2. After confining the Maoist combatants within the cantonments, all arms and ammunition except those required for the security of the cantonments shall be securely stored in the cantonment itself and the key shall be kept by the concerned party after installing a single lock. In the process of installing such a lock, a device with a siren for the monitoring by the United Nations for its record shall be assembled. While carrying out the necessary inspection of the stored arms, the United Nations shall do it in the presence of the concerned party. Other technical details related to this process along with the camera monitoring shall be prepared through an agreement between the United Nations, CPN (Maoist) and the Government of Nepal.

4.3. When the Maoist combatants stay in the temporary cantonments, the Government of Nepal shall provide ration supplies and other necessary arrangements.

4.4. The Interim Council of Ministers shall work to supervise, integrate and rehabilitate the Maoist combatants.

4.5. Security provisions for the Maoist leaders shall be made through the understanding with the Government.

## **Regarding the Nepal Army-**

4.6. The Nepal Army shall be confined within the barracks as per the commitment expressed in the letter sent to the United Nations. It shall be guaranteed that their arms are not used for or against any one. The Nepal Army shall also store their arms in equal numbers as that of the Maoists and it shall be sealed with a single-lock and the key shall be kept by the concerned party. In the process of installing the lock, a device shall be used along with a siren for its record for monitoring by the United Nations. While carrying out the necessary inspection of the stored arms, the United Nations shall do it in the presence of the concerned party. Other technical details related to this process along with camera monitoring shall be prepared through an agreement between the United Nations, the CPN (Maoist) and the Government of Nepal.

4.7. The control, mobilization and management of the Nepal Army shall be done by the Council of Ministers in accordance with the newly enacted Military Act. The Interim Council of Ministers shall prepare and implement a detailed action plan for the democratization of the Nepal Army having also taken suggestions from the concerned committee of the Interim Legislature. Under this scheme activities like determining appropriate number of the Nepal Army, its democratic structure and national and inclusive character, shall be developed and the army shall be based on democratic and human rights values and other related works shall also be performed.

4.8. The Nepal Army shall continue to perform functions like border security, security of the conservation areas, protection of parks, banks, airports, power houses, telephone towers, central secretariat and security of very important persons.

## **5. Ceasefire**

### **5.1. Termination of military action and armed mobilization**

5.1.1. Both sides express their commitments not to carry out the following activities -

- a.) An act of using any type of arms and weapons targeted against each other in direct or indirect way or any attack;
- b.) Searching or confiscating weapons belonging to either side with or without weapons at the place where the arms have been stored as per the understanding reached between the two sides;
- c.) An act of hurting and exerting mental pressure on any person;
- d.) An act of setting up ambush targeting each other;

- e.) Murder and violent activities;
- f.) An act of kidnapping/arrest/detention/disappearance;
- g.) Damaging public/private/government or military property;
- h.) Aerial attack or bombardment;
- i.) An act of land mining and sabotage;
- j.) An act of spying on military activities of each other.

5.1.2. Both sides shall not recruit additional military forces and shall not transport arms and ammunitions and explosives or conduct military activities against each other;

Provided that the Interim Government may, in order to prevent illegal trafficking of materials like arms and weapons, explosives or part or raw materials thereof, conduct patrolling, search or confiscate them at international borders or custom points by mobilising security forces.

5.1.3. No individual or group shall travel with illegal arms, ammunitions and explosives.

5.1.4. Both sides shall assist each other to mark landmines and booby traps used during the time of armed conflict by providing necessary information within 30 days and defuse and excavate the same within 60 days.

5.1.5. Armies of both sides shall not be present with arms or combat dress in any civil gathering, political meeting or any public programme.

5.1.6. The Nepal Police and Armed Police Force shall continue to act to maintain law, order and peace and conduct criminal investigation as per the spirit and letter of the people's movement and the Peace Accord according to the prevailing [existing] law.

5.1.7. Both sides shall issue circulars to their respective armed agencies or personnel to stop addressing as 'enemy' any armed person of the other side and also to treat them in similar manner.

5.1.8. Both sides express their consent to create an inventory of governmental, public and private buildings, land and other properties occupied, locked up or not allowed to be used in course of the armed conflict and to return them immediately.



## **5.2. Measures for Normalization of the Situation**

- 5.2.1. It is not allowed to collect cash or kind and levy tax against one's will and contrary to the law in force.
- 5.2.2. Both sides agree to make public the status of the people taken in their custody and to release them within a period of fifteen days.
- 5.2.3. Both sides agree to make public the information about the real name, surname and address of the people who were disappeared by both sides and who were killed during the war and to inform also the family about it within 60 days from the date on which this Accord has been signed.
- 5.2.4. Both sides agree to maintain peace in the society while normalizing the adverse situation created by the armed conflict and to form a National Peace and Rehabilitation Commission to carry out relief work for the people victimized and displaced by the war and to rehabilitate them.
- 5.2.5. Both sides agree to constitute a High-level Truth and Reconciliation Commission through mutual agreement in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliation in the society.
- 5.2.6. Both sides pledge to renounce war, attack, counter-attack, violence and counter-violence of all forms in the country with a commitment to ensure democracy, peace and progressive change in the Nepali society. There is an understanding between the two sides in the matter of assisting one another in peace building and maintaining law and order.
- 5.2.7. Both sides guarantee to withdraw accusations, claims, complaints and cases under consideration alleged against various individuals due to political reasons and to make immediately public the state of those who are in detention and to release them immediately.
- 5.2.8. Both sides express their commitment to allow the persons displaced due to the armed conflict to return back voluntarily to their respective ancestral or previous places of residence without any political prejudice, to reconstruct the

infrastructure destroyed as a result of the conflict and to rehabilitate and socialize the displaced persons with due respect.

- 5.2.9. Both sides agree to resolve the problems occurred in the above mentioned context on the basis of mutual agreement and to take responsibility in an individual and collective manner for the task to create favourable environment for normalization of mutual relations and reconciliation and to implement it with the help of all political parties, civil society and also local organizations.
- 5.2.10. Both sides express their commitment not to discriminate against and place any kind of pressure on other members of the family for associating with a member of the family of one or the other side.
- 5.2.11. Both sides agree not to create any kind of obstacle and not to allow any kind of obstruction to be created for the employees of the Government of Nepal and public agencies in the course of travelling freely to any part of the country to fulfill their duties and to perform their business and to extend cooperation to them to perform their duties.
- 5.2.12. Both sides agree to allow the United Nations, International Donor Agencies and Diplomatic Missions based in Nepal, national and international non-government organizations, press, human rights activists, election observers and foreign tourists unrestricted movement in the State of Nepal in accordance with law.
- 5.2.13. Both sides are committed to operate publicity programmes in a decent and respectable manner.

## **6. End of War**

- 6.1. We hereby declare the end of the armed war going on since 1995, giving permanency to the ongoing ceasefire reached between the Government and the Maoists on the basis of the historic agreement concluded between the Seven Political Parties and the CPN (Maoist) on November 8, 2006.
- 6.2. The decision taken by the meeting of high level leaders of the Seven Political Parties and the CPN (Maoist) on November 8, 2006 shall be the main policy basis for long term peace.
- 6.3. After confining the Nepal Army in the barracks and the Maoist Army combatants in the cantonments, holding and displacing the arms, creating fear and threat and

use of any type of violence and arms contrary to the understanding, agreements and law shall legally be punishable.

- 6.4. Armies of both sides shall not be allowed to publicize for or against any party and to go for or against of any side. However, they shall not be deprived of their voting rights.

## **7. Observance of Human Rights, Fundamental Rights and Humanitarian Law**

Remaining committed to the Universal Declaration of Human Rights, 1948, international humanitarian law and fundamental principles and norms concerning human rights, both sides express their consent to the following issues-

### **7.1. Human Rights**

- 7.1.1. Both sides reconfirm their commitment to the respect and protection of human rights and commitment to the international humanitarian law and accept that nobody shall be discriminated on the basis of colour, gender, language, religion, age, race, national or social origin, wealth, disability, birth or any other status, opinion or faith.
- 7.1.2. Both sides agree to create an atmosphere for the Nepali people to enjoy their civil, political, economic, social and cultural rights and are committed to create an atmosphere where such rights are not violated in the future under any condition.
- 7.1.3. Both sides express the commitment that impartial investigation and action shall be carried out in accordance with law against the persons responsible for creating obstructions to exercise the rights stated in the Accord and ensure that impunity shall not be encouraged. Apart from this, they also ensure the rights of the victims of conflict and torture and the rights of the family of disappeared persons to obtain relief.
- 7.1.4. Both sides shall not carry out acts of torture, kidnapping and forced labor against the public in general and shall also take necessary action to discourage such acts.
- 7.1.5. Both sides shall, on the basis of norms and values of secularism, respect social, cultural and religious sensitivity, religious sites and the religious faith of individuals.

## **7.2. Right to Life**

7.2.1. Both sides respect and protect an individual's fundamental right to life. No one shall be deprived of this fundamental right and no law shall be made that provides for capital punishment.

## **7.3. Right to Individual Dignity, Freedom and Movement**

7.3.1. Both sides respect and protect the right to individual dignity. In this connection, no person including those deprived of their freedom in accordance with the law shall be subjected to torture or any other cruel, inhuman or degrading treatment or punishment. The citizens' right to privacy shall be respected by law.

7.3.2. Both sides shall, respecting fully the individual's right to freedom and security, not keep anyone under arbitrary or illegal detention, kidnap or take hostages. Both sides agree to make public the status of every disappeared person and those held captive and inform the family members, legal advisors and other authorized persons of matters related thereto.

7.3.3. Both sides respect and protect right to freedom of movement, freedom to choose the place of residence, subject to legal norms and express the commitment to respect the right of the persons displaced by the conflict and their families to return back to their original residence or to settle in any other places of their choice.

## **7.4. Civil and Political Rights**

7.4.1. Both sides are committed to respect and protect every person's freedom of opinion, expression, to form union and association and to assemble peaceably and the right against exploitation.

7.4.2. Both sides respect the right of every citizen to take part directly or through one's nominated representative in the matters of public concern, to cast vote, to be elected and to enjoy the right to equality of entering into public service.

7.4.3. Both sides are committed to respect the person's right to be informed.

## **7.5. Socio-economic Rights**

- 7.5.1. Both sides are committed to respect and protect a person's rights to livelihood through freely chosen or accepted employment.
- 7.5.2. Both sides are committed to respect and guarantee the rights to food sovereignty of all people. They ensure that no interference shall be made in use, transportation and distribution of food grains and food products.
- 7.5.3. Both sides acknowledge that the right to health of the citizen must be respected and protected. Both sides shall not hinder the supply and assistance of medicine and health related campaigns, and express their commitment to the treatment and rehabilitation of those injured during the conflict.
- 7.5.4. Realizing that the right to education for all should be ensured and respected, both sides are committed to maintain appropriate academic environment in educational institutions. Both sides agree to guarantee that the right to education shall not be violated. They agree to immediately put an end to activities like taking educational institutions under control and using them, causing teachers and students to be disappeared or taking them under control or abduction and not to establish military barracks in the schools and hospitals in a way so that it would affect them.
- 7.5.5. Both sides agree that private property of any person shall not be seized or controlled except in accordance with law.
- 7.5.6. Both sides believe in giving continuity to productive activities without disturbing the industrial environment in the country, respecting the right to collective bargaining and social security in the industrial enterprises, encouraging industrial enterprises and labourers to solve problems that arise between them, if any, in a peaceful manner and respect the right to work determined by the International Labor Organization.

## **7.6. Rights of Women and Children**

- 7.6.1. Both sides fully agree to provide special protection to the rights of women and children, to immediately prohibit all types of violence against women and children, including child labor, as well as sexual exploitation and harassment, and

not to include or use children who are eighteen years or below. Children so affected shall, be rescued immediately and necessary and appropriate assistance shall be provided for their rehabilitation.

### **7.7. Right to Personal Liberty**

7.7.1. Both sides agree to the freedom of belief and opinion, freedom of speech and publication, freedom to assemble peaceably and without arms, freedom of movement, freedom to practise any profession or occupation of one's choice, freedom to acquire and use property, freedom to participate in peaceful political activities, freedom to be equal before the law; and to operate or cause to be operated a tolerant system of justice.

### **8. Mechanism for Dispute Settlement and Implementation**

- 8.1. Both sides express their consent to be individually and collectively responsible for not repeating past mistakes in the future, and for correcting them gradually.
- 8.2. The National Peace and Rehabilitation Commission may create mechanisms as necessary to make the peace campaign a success. The constitution and procedures of the Commission shall be as determined by the Interim Council of Ministers.
- 8.3. Both sides are committed to resolve all types of mutual differences or problems that may arise at present and in the future through mutual dialogue, understanding, agreements and negotiations.
- 8.4. Both sides express their commitment to the fact that the Interim Council of Ministers shall, in order to implement this Accord, the Interim Constitution and all the decisions, agreements and understandings concluded between the Seven Political Parties, the Government of Nepal and the CPN (Maoist), constitute the National Peace and Rehabilitation Commission, the Truth and Reconciliation Commission, a High-level Recommendation Commission for the Restructuring of the State and other mechanisms as needed, and may determine their working procedures.

## **9. Implementation and Monitoring**

Both sides agree to the following arrangements for the implementation and the monitoring of the agreement referred to in this Accord -

- 9.1. Both sides agree to give continuity to the task for monitoring provisions concerning human rights referred to in this Accord by the Nepal based United Nations Office of the High Commissioner for Human Rights.
- 9.2. Both sides agree to cause to be monitored the management of armies and the arms by the United Nations Mission in Nepal as referred to in the five-point letter sent to the United Nations earlier and in this Accord and express their commitment to assist therein.
- 9.3. Both sides agree to cause the election of the Constituent Assembly to be supervised by the United Nations. [Both sides agree to cause the election of the Constituent Assembly to be observed by the United Nations.]
- 9.4. The National Human Rights Commission shall, in addition to its responsibilities as determined by law, also carry out such works as are related to the monitoring of human rights as referred to in this Accord. The said Commission in the course of performance of its business may coordinate with national and international institutions concerning human rights and obtain necessary help.
- 9.5. Both sides agree to receive the reports submitted by all abovementioned bodies, to provide information requested by them, and to implement the suggestions and recommendations provided by them on the basis of agreements and discussions.

## **10. Miscellaneous**

- 10.1. Both sides agree not to operate parallel or other forms of mechanism in any areas of the State or Government machinery as per the spirit of the decisions of November 8, 2006 and the essence of the Peace Accord.
- 10.2. Both sides agree to sign any complementary agreements, as per necessity, for the implementation of the present Accord.
- 10.3. This Accord may be amended at any time with the agreement of both sides. Both sides agree to provide the other party with a written notice of the amendment if a party desires to amend it. Amendment to the Accord may be made with the

agreement of both sides after receiving such a notice. The provisions to be made by such an amendment shall not be below than that of the minimum standards of recognized international human rights and humanitarian laws and the main spirit for establishment of peace.

- 10.4. If any dispute arises in the interpretation of this Accord, a joint mechanism consisting of both sides shall make the interpretation on the basis of the preamble and the documents included in the annex to this Accord, and such an interpretation shall be final.
- 10.5. The concept of "two sides" and the "situation" as referred to in this Accord shall, *ipso facto*, cease after the constitution of the Interim Legislature-Parliament. Thereafter, all responsibility for implementing the obligations referred to in this Accord shall be as per the arrangements made by the Interim Council of Ministers. It shall be the duty and responsibility of all political parties to extend cooperation in the compliance and implementation of the Accord.
- 10.6. At a time when the entire country is centered on the main campaign of the election to the Constituent Assembly, we hereby heartily request all to resolve their problems and demands through dialogue and negotiation and to extend cooperation to the election of the Constituent Assembly and to the peace and security situation.
- 10.7. We hereby heartily appeal to civil society, professional groups, people's class organizations, media communities, intellectuals and all Nepali people to actively participate in this historic campaign to build a New Democratic Nepal and to establish sustainable peace through the elections of the Constituent Assembly by ending the armed conflict.
- 10.8. We heartily urge all the friendly nations and also the International Community including the United Nations Organization to extend their support to Nepal in this campaign for establishing full democracy and sustainable peace in the country. Taking cognizance of the responsibility for the future of the country and people, and being fully committed to the text of this Comprehensive Peace Accord, we hereby execute this Peace Accord on behalf of the Government of Nepal and the



Communist Party of Nepal (Maoist), and make this Comprehensive Peace Accord public.

Prachanda  
Chairperson  
Communist Party of Nepal (Maoist)

Girija Prasad Koirala  
Prime Minister  
Government of Nepal

Done on November 21, 2006

## Appendix - IX

### Nepal Public Security Act, 2007 (1951)

An Act to provide for provisions on keeping in detention or control the Assembly, Procession (*Julus*), Camp, *Kabayad*, Parade, and other activities.

Whereas, it is expedient to make arrangements regarding detention and to control the assembly, Procession, Camp, *Kabayad*, Parade and other similar activities for maintaining public security, law and order and security of the Nation.

Be, it enacted by His Majesty the King on the Advice of the cabinet.

1. (a) This Act shall be called as the "Nepal Public Security Act, 2007".  
(b) This Act shall come into force throughout Nepal.  
(c) This Act shall come into force from Wednesday, 29<sup>th</sup> Chaitra, 2007 B.S. (11<sup>th</sup> April 1951)
2. (1) The Government of Nepal, if finds it necessary, may issue an order (*Aganaya*), to prevent a person from involving in any activity which is in against of maintaining national interest or public order or supplying essential goods and commodities (*mal saman*) to the community or running any public work, as following -
  - (a) To keep such a person in detention;
  - (b) To restrict a person to reside (stay) in a particular place or area without the permission of an Authority or person as prescribed in the order so issued or the order itself;
  - (c) To command to a person to stay in a particular place or area as prescribed in the order or to reach to such prescribed place o area within the time frame as prescribed in the order if he or she is not at that place on that point of time;
  - (d) To control in transmitting any news or expressing any opinion as referred to in the order;
  - (e) To continue to act upon as referred to in the order.

- (2) The order issued pursuant to Clauses (b), (c), (d) and (e) of Sub-Section (1) of this Section (Number) may, to a person in relation to whom such an order has been issued, cause to do a *Kabuliyat* with or without any bail/guarantee (*Jamanat*), to abide by the restrictions or terms and conditions as prescribed in such an order.
  - (3) Anyone, who acts against the order issued pursuant to this Section or who does not submit or furnish the *Kabuliyat* or guarantee (*Jamanat*) as referred to in Sub-section (2) of this Section (Number), he/she shall be liable for an imprisonment not exceeding One year or a fine or the both. If a person, who has entered into a *Kabuliyat* or furnished a *Jamanat* as referred to in the same Sub-Section, and violates any of the order so issued pursuant to that Section, the *Jamanat* so furnished shall be forfeited.
3. The order issued by the Government pursuant to section (Number) 2, shall remain valid up to a period not exceeding Six months for the first time or for a period of Six months when it is handed over to a person for whom it was issued in case no time is mentioned in such order. The Government may, from time to time, increase the period of such detention.

Provided that, no one shall be detained for a period of more than Six months at a time and continuously for a period of more than One year.
4. Until the order issued to keep a person into detention is valid, the government may keep a person in a particular place or a particular condition and may shift such person from one to another place, or order him/her to maintain discipline or impose penalty for a breach of discipline, as prescribed in the order issued generally or particularly from time to time.
5. (a) When a person is kept into detention following an order of detention, the government shall inform such person as soon as possible stating the reasons thereof, for issuing such an order, and shall also provide an opportunity, as soon as possible to furnish his/her application (*Nibedan*) regarding such an order.

- (b) If the Government finds it inappropriate to make public any fact/matter in the public interest, the Government shall not be compelled to publish such a matter in the course of taking action as referred to in Clause (a) of this Section (Number).
- 6.
  - (a) If an application is filed, the government shall appoint a Two Member Advisory Committee. Such a committee shall have, at least, a person having experience in the field of law; and this committee shall, correctly (Ramro) inquire into matter and submit its report to the Government.
  - (b) Upon receiving the advice from the Advisory Committee, Government may issue an order, as it thinks appropriate.
  - (c) The application of the detainee and the documents thereof shall be forwarded to the Advisory Committee within Two months of such detention. The Advisory Committee shall also submit its opinion (advice) to the Government within three months of such a detention.
- 7.
  - (a) The Government, may revoke or alter any order issued to keep on someone in detention, at any time, with or without considering the application of such a detainee.
  - (b) It shall be considered sufficient to issue new order pursuant to Section (Number) 2, in a case the same person has to be detained again after the revocation of the detention order issued earlier.
- 8.
  - (a) The Government may prohibit to conduct any meeting or assembling or procession (Julus) to a particular class of persons or any organization, by a general or special order, to maintain public security or order.
  - (b) If someone violates any order issued pursuant this Section (Number), such a person shall be liable to an imprisonment up to One year or a fine or the both.

9. (a) The Government, upon issuing an order, may prohibit or put some restrictions to the persons of some particular class or organization/s in conducting camping or parade, with or without taking any weapon or any instrument to be used as a weapon to maintain public security or order.  
  
(b) If someone violates any order issued pursuant to this Section (Number), such a person shall be liable to an imprisonment up to One year or a fine or the both.
10. The Government may issue an order, to exercise any authority or fulfill any duty provided to the government under this Act, to an officer so prescribed in such an order, in a circumstance or condition as prescribed in the order.
11. (a) If a person takes or purports to take any action pursuant to this Act or the Rules thereunder in a good faith, no civil, criminal or any other action shall be taken/initiated against such person.  
  
(b) If any action is taken or purported to be taken, pursuant to this Act and Rules framed hereunder, in a good faith, no case or action shall be filed or initiated against the Government for any compensation, for any types of actual or probable loss.
12. [The Government] may frame Rules to meet the objectives of this Act by maintaining any condition prescribed by the order issued under the authority as provided by this Act or Rules framed hereunder.
13. The Government may frame Rules to meet the objectives of this Act by maintaining the terms and conditions as prescribed in this Act.

## APPENDIX – X

### Prisons Act, 2019 B.S. (1963 A.D.)

	Date of Authentication 2019/10/22 (4 February 1963)	Date of Publication 2019/10/23 (5 February 1963)
Amending Acts:		
1.	Prisons (First Amendment) Act, 2046 (1989)	(27 Sep.1989) (27 Sep. 1989)
2.	Some Nepal Acts Amendment Act, 2048 (1992)	(20 April 1992) (20 April 1992)
3.	Punishment Related Some Nepal Acts Amendment Act, 2055 (1998)	(29 April 1999)
4.	Prisons (Second Amendment) Act, 2064 (2007)	(17 Aug. 2007)
5.	Republic Strengthening and Some Nepal Laws Amendment Act, 2066 (2010)	(21 Jan. 2010)

Act No. 46 of 2019 (1963)  
**An Act Made to Provide for Prisons**

**Preamble:** Whereas, it is expedient to amend and codify Nepal laws pertaining to prison in order to maintain law and order;

Now, therefore, be it enacted by His Majesty the King Mahendra Bir Bikram Shah Dev, in accordance with Article 93 of the Constitution of Nepal.

- 1. Short Title, Extent and Commencement:** (1) This Act may be called as the "Prisons Act, 2019 B.S. (1963 A.D.)".
  - (2) This Act shall extend throughout Nepal.
  - (3) This Act shall come into force on such date as the Government of Nepal may appoint, by a Notification in the Nepal Gazette.<sup>1</sup>
- 2. Definition:** Unless the subject or the context otherwise requires, in this Act,-

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<sup>1</sup> A Notification was published in the Nepal Gazette on 19<sup>th</sup> August 1963 notifying the commencement of this Act on 17<sup>th</sup> August 1963.

- (a) "Court" includes any commission, tribunal or office having the same power to perform judicial functions as a court has.
- (b) "Prisoner" means a person detained in a Prison under sentence by a judgment of any Court.
- (c) "Detainee" means a person held in the custody of a court, police or other authority for the inquiry and investigation or trial of a crime or a person detained under<sup>2</sup> the Public Security Act, 2046 B.S. (1989 A.D.).
- (d) "Prison" includes a house or room or similar other place built or prescribed for the detention of Prisoners and the land appurtenant to such a house, room or place.
- (e) "Prescribed" or "as prescribed" means prescribed or as prescribed by the Rules framed under this Act.
- (f) "Jailer" means any person appointed or designated to carry out the functions of Jailer pursuant to this Act.
- (g) "Prison Office" means the Office of the Jailer.
- (h) "Hospital" means any government hospital, dispensary or pharmacy (*Ausadhalaya*).
- (i)<sup>3</sup> "Community service" means the service to be made in a school, hospital, local body, temple (*Debalaya*), elderly home, orphan as well as similar other body and social organization.
- (j)<sup>4</sup> "Open prison" means any such place as specified by the Government of Nepal to hold a prisoner in such a manner that the prisoner is allowed to go outside the place where he or she is detained and do any work during the time as specified.

**3. Detainee or Prisoner Slip:** (1) If a person is to be held in custody for the investigation or trial of a crime, such person shall be given a detention slip (*Thunuwa Purji*) pursuant to the pre vailing Nepal Law and if that person is to be detained in a Prison under the control of another authority, an information thereof shall also be given to the concerned Prison Office.

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<sup>2</sup> Amended by the Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

<sup>3</sup> Inserted by the Second Amendment

<sup>4</sup> Inserted by the Second Amendment

(2) If any person is to be imprisoned under the judgment of any Court, a imprisonment slip (*Kaidi Purji*) specifying, *inter alia*, the crime which that person has committed, the relevant law, the kind of punishment and its term, and the time of imprisonment as mentioned in the judgment and the imprisonment has to be given not later than three days from the date of that judgment, and a slip written in the name of the Prison Office and setting out those matters and the address, age, colour and identification of that person has to be sent to the Prison.

(3) If any person detained or imprisoned refuses to acknowledge the slip given pursuant to Sub-section (1) or (2), the slip has to be retained by recording that matter and by getting the slip signed by the In-charge of any one nearby office as a witness thereto.

**4. Detainee or Prisoner to be admitted:** (1) The Prison Office has to receive a person sent to be held in custody or detained in Prison after fulfilling the procedures pursuant to the prevailing Nepal Law and hold in custody or detain that person.

(2) If any person is sent to be imprisoned or detained in the Prison without fulfilling the procedures pursuant to the prevailing Nepal Law, the Prison Office has to receive and hold in custody or detain that person as per the slip, and make a request, setting out the matters in respect of which the requisite procedures have not been fulfilled, to the concerned authority to fulfill the procedures.

**5. Detainee or Prisoner to be Searched:** (1) When any Detainee or Prisoner is entered into a Prison, that Detainee or Prisoner has to be searched and any weapon or prohibited article, if found, has to be seized.

(2) The Jailer shall so take the custody of such goods which a Detainee or Prisoner may bring into the Prison and as may be sent into the Prison for his/her daily use pursuant to the prevailing Nepal Law and as are in excess of that required for his/her daily use that such goods shall be provided to the Detainee or Prisoner in the event of necessity.

**6. Arrangements for keeping Detainees or Prisoners:** (1) While detaining or imprisoning the Detainees or Prisoners, they shall be detained or imprisoned as follows:



- (a) The males and females shall be separated and kept in separate houses to the extent available and where they are to be kept in one house since a separate house is not available, they shall be kept in different parts of the house in such a manner as to prevent their meeting or conversing.
  - (b) Where there is an arrangement to keep the Detainees and the Prisoners in one Prison, the Detainees and the Prisoners shall be separated and kept in separate parts as far as possible, subject to Clause (a).
  - (c) The Prisoners or the Detainees under Twenty One years and those above Twenty One years shall be separated and kept in different parts as far as possible, subject to Clauses (a) and (b).
  - (d) The civil case and criminal case Prisoners shall be separated and kept in different parts as far as possible, subject to Clauses (a) and (c).
  - (e) Sick Detainees or Prisoners shall be separated and kept in different parts as far as possible.
  - (f)<sup>5</sup> Insane and half-minded Detainees or Prisoners shall be separated and kept in different parts as far as possible.
- (2) The convicted Prisoner may be kept alone in a separate room as per necessity.

**7.<sup>6</sup> Fetter and Handcuffs Not To Be Used:** No Detainee or Prisoner, other than the Prisoner who has absconded from the Prison and been arrested or who attempts to abscond the Prison or who commits any activities as referred to in Sub-section (2) of Section 22, shall be fettered or handcuffed in the Prison.

**8. Child's Care in Prison:** (1) If any detained or imprisoned woman gives birth to a child in Prison or has a minor child under Two years of age and wishes to bring up the child by keeping the child with her, she may keep the child in the Prison even though there is any person outside to look after the child. After the child completes the age of Two years, the custody of the child has to be handed over to that person except in the event of necessity.

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<sup>5</sup> Inserted by the Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

<sup>6</sup> Amended by the First Amendment

(2)<sup>7</sup> If any Detainee or Prisoner has a child to be maintained by him/her and there is no one, other than him/her, to maintain and subsist that child, all the care, education, maintenance and subsistence of such a child shall be carried out at the expense of The Government of Nepal as prescribed until that Detainee or Prisoner remains detained or imprisoned.

(3) If any child below Twelve years of age is detained or imprisoned, his/her parents or other relative shall not be allowed to stay in Prison to look after him/her even if they so wish.

**9. Provision relating to food and clothes of Detainees and Prisoners:** The Detainees or Prisoners detained or imprisoned in Prison and the minor children of such Detainees and Prisoners as referred to in Sub-sections (1) and (2) of Section 8 shall be provided with such food and clothes as prescribed.

Provided, however, that-

(a) A Detainee detained in custody for a period of One year or less without specification of imprisonment shall be provided with clothes.

(b)<sup>8</sup> If any Detainee or Prisoner wishes to make arrangement for his/her food and clothes at his/her own cost, he/she shall be allowed to make such arrangement, as prescribed.

**10. Employment of Detainee or Prisoner:** Unless the prevailing Nepal Law otherwise requires, no Detainee or Prisoner shall be engaged in any work against his/her will.

Provided that, if the Government of Nepal considers it necessary for the health, economic progress or improvement of the Detainees and Prisoners, arrangement may be made to engage any Detainee or Prisoner in a work.

**10A.<sup>9</sup> Power to send for community service:** (1) Notwithstanding anything contained in this Act or the prevailing Nepal Law, the case Adjudicating Authority may send an offender sentenced to imprisonment for a term not exceeding Three years in any case for community service.

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<sup>7</sup> Amended by the First Amendment

<sup>8</sup> Amended by the First Amendment

<sup>9</sup> Inserted by the Second Amendment

Provided that, any authority other than a court established or formed in accordance with the prevailing Nepal Law shall obtain the permission of the concerned District Court for sending the offender for community service pursuant to Sub-section(1).

(2) An offender sent for community service shall not be entitled to a remuneration and facility for rendering such a service.

(3) If an offender engaged in community service does not perform the work entrusted to him or her, such an offender may, within the approval of the concerned District Court, to the Prison to serve the remaining imprisonment.

**10B.<sup>10</sup> Power to hold in open Prison:** (1) Notwithstanding anything contained in this Act or the prevailing Nepal Law, the prescribed authority may permit a prisoner who has been sentenced to imprisonment for a term of more than Three years and already served at least one-thirds thereof to remain in open Prison.

(2) The period of stay in open Prison pursuant to Sub-section (1) shall be deemed as the service of imprisonment.

(3) A prisoner who stays in open Prison pursuant to Sub-section (1) shall not be entitled to such ration, clothing and medical treatment expenses as to be obtained pursuant to this Act.

(4) The other provisions relating to Open Prison shall be as prescribed.

**10C.<sup>11</sup> Not to send for community service or open Prison:**

Notwithstanding anything contained in Sections 10A. and 10B., no person held to be offender of the following case shall be sent for community service or open Prison:

- (a) Human trafficking and transportation (control),
- (b) Rape,
- (c) Absconding Fleeing from Prison,
- (d) Smuggling of imports and exports of goods,
- (e) Transaction of narcotic drugs,
- (f) Corruption,
- (g) Case related to espionage,

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<sup>10</sup> Inserted by the Second Amendment.

<sup>11</sup> Inserted by the Second Amendment.

- (h) Case relating to protected wildlife,
- (i) Relating to archaeological goods.

**11. Health and Treatment:** (1) Treatment of the physically or mentally sick Detainees or Prisoners shall be done by the government doctor.

Provided that, if any Detainee or Prisoner wishes to have his/her treatment done by any other doctor at his/her own cost, permission shall be granted to have such treatment as prescribed.

(2) If any Detainee or Prisoner becomes extremely sick and the government doctor makes his/her reasoned opinion in writing determining that it is necessary to keep the said Detainee or Prisoner in a hospital for better treatment, the handcuff and fetter, if put on the said Detainee or Prisoner, shall be taken off, and his/her treatment shall be done by keeping him/her in a hospital as prescribed.

<sup>12</sup>(3) If the government doctor makes his/her reasoned opinion indicating that any Detainee or Prisoner who has seriously fallen sick is at the critical stage of death and the heir to that Detainee or Prisoner wishes to take him/her to the nearby burial site, the heir shall be permitted to take that Detainee or Prisoner to the nearby burial site from the Prison where he/she is detained in, after having the heir execute a deed of guarantee(*Hajir Jamani*) covenanting that he/she shall bring that Detainee or Prisoner back to the Prison if he/she is recovered from the disease. The heir who assumes the custody of the Detainee or Prisoner and takes him/her to the burial site shall provide the concerned Prison with a report on the health of the concerned Detainee or Prisoner each week.

(4) The Detainee or Prisoner taken to the hospital or the burial site under Sub-section (2) or (3) shall be considered to have remained in the Prison and the said period shall be deducted from the term of imprisonment which he/she is to serve.

(5) If the Detainee or Prisoner as referred to in Sub-section (2) or (3) is recovered, he/she shall be held in Prison again except in cases where he/she is not required to be detained or the term of his/her imprisonment has expired<sup>13</sup> .....

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<sup>12</sup> Amended by the First Amendment

<sup>13</sup> Repealed by the First Amendment

**12. Provision on Pregnant Woman Detainee or Prisoner:** (1) If any woman Detainee or Prisoner is pregnant, the woman, other than the woman Detainee or Prisoner detained or imprisoned in a case relating to .....<sup>14</sup> state affairs or sentenced to life imprisonment or branding or the murderer woman, shall be released on bail after she has become Six months pregnant, and such a woman who has been so released on bail shall be held in Prison again after Two months of her delivery except in cases where she is not required to be detained or the term of her imprisonment has expired (2) If any pregnant woman stays outside the Prison pursuant to Sub-section (1), she shall be treated as if she were in the Prison and the period during which she has remained outside the Prison shall be deducted from the term of imprisonment which she is to serve.

**13. Action to be done in the event of death of Detainee or Prisoner:** (1) If any Detainee or Prisoner dies and the government doctor certifies his/her death after examination, the Jailer shall execute a deed to that effect, as well as a deed on inventory of his/her entire property, witnessed by the guard soldier who is on duty at that time and by at least Four Detainees or Prisoners, if available, credit the property of the deceased Detainee or Prisoner to the security deposit and give information thereof to the Office or Court through which he/she has been detained or imprisoned and to the heir to the deceased Detainee or Prisoner.

(2) If the heir applies for the property of the deceased Detainee or Prisoner within Thirty Five days, except the time required for journey, after the service of the information as referred to in Subsection (1), the said heir shall be provided with the said property by fulfilling the prescribed procedures. If no heir applies within the said time-limit, such property shall be auctioned and proceeds of the sale shall be credited to the cash revenue and paid to the government fund.

(3) If the heir to a deceased Detainee or Prisoner wishes to take away the dead body, the dead body shall be handed over to the heir unless it is necessary to do otherwise. If the heir does not so take away the dead body or there is no heir, action shall be taken as prescribed.

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<sup>14</sup> Deleted by Republic Strengthening and Some Nepal Laws Amendment Act, 2066 B.S. (2010 A.D.)

- 14. Visits and correspondences:** (1) If a Detainee or Prisoner desires to visit or correspond with any other person or *vice versa*, such visit or correspondence shall be allowed as prescribed, except in prescribed circumstances.

Provided that, nothing contained in this Sub-section shall prevent the legal practitioner of any Detainee or Prisoner from visiting such a Detainee or Prisoner as prescribed.

(2) If any correspondence or communication is made contrary to the provision contained in Sub-section (1), all such correspondence or communication may be destroyed.

**15. Making presence of Detainee or Prisoner in Office or Court:**

(1) If any Office or Court needs to require any Detainee or Prisoner to be present in order to examine evidence or enquire as to any necessary matter in any law suits, it shall be dealt with as follows:

- (a) In the case of a Court, it shall send a requisition slip directly to the Prison Office where such a Detainee or Prisoner is detained or imprisoned,
- (b) In the case of other Office, it shall send a requisition slip to the Office or Court through which that Detainee or Prisoner is detained or imprisoned.

(2) Upon receipt of the slip as referred to in Clause (b) of Subsection (1), the Office or Court which has ordered for the detention or imprisonment of such Detainee or Prisoner shall send a slip to the concerned Prison Office to present such Detainee or Prisoner before the Office having sent the slip.

(3) Upon receipt of the slip as referred to in Clause (a) of Subsection (1) or Sub-section (2), the Jailer shall make such Detainee or Prisoner present as prescribed.

- 16. Provisions relating to Prison Administration:** (1) It shall be the duty of the concerned Chief District Officer<sup>15</sup> to carry out general supervision of the administration of Prison under its jurisdiction, as well as all other arrangements pertaining thereto.

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<sup>15</sup> Amended by the Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

(2) Each Prison shall consist of one Jailer and other subordinate employees in such number as may be specified by the Government of Nepal.

**17. Duties of Jailer and other employees:** (1) The duties of the Jailer shall be as follows:

- (a) To retain safely all the files, books, documents and goods of the Prison and all the things and goods handed over to him/her pursuant to this Act or the Rules framed hereunder,
- (b) To make arrangements for guarding in such a manner that no Detainee or Prisoner can escape, and to supervise and monitor as to whether the persons assigned for such guarding are on their duty or not or have properly fulfilled their functions and duties or not
- (c) To perform such other duties as referred to in the other Sections of this Act or the Rules framed hereunder or other prevailing Nepal Law.

(2) Each Jailer shall reside at a place specified by the government for him/ her and shall not generally leave the Prison and go to another at night, without permission of the concerned Chief District Officer.<sup>16</sup>

(3) The guard or soldier on duty at the moment in the Prison shall examine any things or goods carried in or outside the Prison and also search a suspect, and if any person is found carrying any prohibited goods in or outside or carrying outside any property of the Prison, the guard or soldier shall give an information thereof to the Jailer at once.

(4) No employee of the Prison shall remain absent from the Prison without permission of the Jailer or the concerned Chief District Officer.<sup>17</sup>

(5) Other duties of the employees of the Prison shall be as prescribed.

**18 No detention or imprisonment in excess of the term:** (1) The Jailer shall release from detention or confinement the Detainee or Prisoner, who has been detained or imprisoned for any specified term, after the expiry of such term, and shall release the Detainee or Prisoner in respect of whom a release order issued by a competent authority under the Nepal Law has been received, no later than Twenty Four hours, pursuant to that order.

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<sup>16</sup> Amended by the Some Nepal Acts Amendment Act, 2048 (1992). Inserted by Sub-section (4) of Section 18 is inserted by the First Amendment

<sup>17</sup> Amended by the Some Nepal Acts Amendment Act, 2048 (1992). Inserted by Sub-section (4) of Section 18 is inserted by the First Amendment

(2) If, in the case of a Detainee detained for trial, the term of his/her imprisonment is not specified or any order is not received to release him/her from detention even until Six months after his/her being detained in the Prison, the Jailer shall make a report, setting out all the matters related thereto, to the court empowered to hear an appeal of the Court issuing the order to detain such Detainee, within Three days after the expiry of that period of Six months.

<sup>18</sup>(3) If any order or judgment is made to release any Detainee or Prisoner, a notice thereof shall be sent to the concerned Prison as soon as possible.

<sup>19</sup>(4) The Chief Judge or Judge of the Court of Appeal shall inspect the Prisons within jurisdiction of the Court of Appeal at least once a year; and if, on such inspection, any person is found imprisoned in excess of the term of imprisonment as specified and awarded to that person or detained for a period in excess of the period during which that person can be detained pursuant to the prevailing law, he/she may give an order to release such Detainee or Prisoner immediately. It shall be the duty of the concerned Jailer to observe the order, if any, so given. If the Chief Judge or Judge of Court of Appeal gives an order to release any Detainee or Prisoner immediately and if he/she finds, upon inspection of the Prison, any other matter not done or taken pursuant to this Act, he/she shall forward a report, setting out these matters, to the Supreme Court and the Government of Nepal, Ministry of Home Affairs.

<sup>20</sup>(5) If it appears that any Detainee or Prisoner has remained in detention or imprisonment for a period of time in excess of that specified by the prevailing law as a result of the recklessness of any employee or that any other matter has not be done or taken pursuant to this Act, such employee shall be subject to departmental action and punished accordingly.

**19. Examination of Prison:** (1) Each<sup>21</sup> Chief District Officer shall personally examine or cause any assistant subordinate to him/her to examine the Prison. He/ she shall examined,

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<sup>18</sup> Inserted by the First Amendment

<sup>19</sup> Amended by Some Nepal Acts Amendment Act, 2048 B.S. (1991 A.D.)

<sup>20</sup> Inserted by the First Amendment

<sup>21</sup> Amended by the Some Nepal Acts Amendment Act, 2048 B.S. (1991)



or cause to be examined, the Prisons under his/her jurisdiction once in Six months and at any time if he/she so deems necessary.

(2)<sup>22</sup> The Chief District Officer or the assistant making examination under Sub-section (1) shall examine the following matters:

- (a) Whether the Prisoner whose term of imprisonment is specified has been released on the day of expiration of his/her term,
- (b) Whether any other act or action required to be done or taken pursuant to the prevailing Nepal Law have been done or taken accordingly.

(3) If, upon examination of the matters as referred to in Subsection (2), any act or action appears to have been done or taken in contravention of the prevailing Nepal Law, any matter mentioned in Section 20 shall be dealt with accordingly, and in the case of any other matters not mentioned in that Section, such act and action as prescribed shall be done and taken.

**20. Action to be taken after examination of Prison:** The Chief District Officer<sup>23</sup> or the assistant examining a Prison pursuant to Section 19 shall, after examination of the Prison, deal with the following matters as follows:

- (a) If any Detainee or Prisoner appears to have been detained or imprisoned for a period of time in excess of that specified, to immediately release such Detainee or Prisoner from detention or imprisonment and to give information thereof to the Office or Court detaining and imprisoning such Detainee or Prisoner.
- (b) If the Jailer has failed to take action pursuant to Sub-section (2) of Section 18 in respect of the person detained for trial, to required the Jailer to take such action.
- (c) If it appears that any employee of the Prison has failed to fulfill his/her duties or has fulfilled his/her duties recklessly and if a case is to be instituted or action taken against him/her, the Chief District Officer or the assistant shall take such action if he/she is authorized to take such action

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<sup>22</sup> Amended by the Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

<sup>23</sup> Amended by the Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

pursuant to the prevailing Nepal Law, and shall give information thereof to the concerned authority if he/she is not so authorized.

**21. Procedures for submission of petition, application etc. by Detainee or Prisoner:** (1) If any Detainee or Prisoner submits such a plaint, note of defense, appeal, petition, application, information etc. as required to be filed by him/her in any Office or Court in respect of any case/law suit to the Prison Office where he/she has been detained or imprisoned for the purpose of filing the same with such Office or Court, the Prison Office shall, within Three days, forward the same, accompanied by a dispatch, to the Office or Court where the same is to be forwarded to, after getting the same signed by him/her where it is within the required time-limit, collecting the required fee, if any, chargeable by virtue of the prevailing Nepal Law; and a receipt thereof, indicating the date of submission of the document and fee, shall be given to such Detainee or Prisoner.

(2) The concerned Office or Court shall receive the documents dispatched by the Prison Office pursuant to Sub-section (1) and take action pursuant to the prevailing Nepal Law.

(3) If a Detainee or Prisoner files and deposits the documents and fees as referred to in Sub-section (1) with the Prison where he/she is detained or imprisoned within the set time-limit, the time-limit shall not be expired.

**22. Offense Relating to Prison:** (1) If any person carries any things or goods in or outside the Prison or attempts to do so or gives or supplies any prohibited things or goods to any Detainee or Prisoner or attempts to do so, or makes a correspondence to any Detainee or Prisoner, in contravention of the Rules framed under this Act, or if any employee of the Prison has intentionally or recklessly allowed the commission of such act or if any person abets any offense as set forth above, such a person or employee may be punished with imprisonment for a term not exceeding Six months or a fine not exceeding Two Hundred Rupees or with both.

(2) Any Detainee or Prisoner who commits any of the following acts may be warned or may be deprived of any such facility for exemption from punishment as may be granted for good conduct or may be detained in a lonely place or room for a period not exceeding Fifteen days or may be imposed with fetters where he/she was not imposed

with a fetter previously, with a handcuff where he/she was imposed with a fetter previously and with a manacle where he/she was imposed with a fetter and handcuff previously, for a period not exceeding One month, except in the case of a woman or sick Detainee or Prisoner.

- (a) Using criminal force against any person in any manner,
- (b) Using insulting or threatening language against any person,
- (c) Bearing immoral or indecent or disorderly conduct,
- (d) Taking off or breaking fetters or handcuffs,
- (e) Intentionally damaging or destroying any property of the Prison,
- (f) Defacing, tempering or tearing any file or document,
- (g) Receiving, holding or transferring any prohibited things or goods,
- (h) Intentionally bringing a false accusation against any employee or Detainee or Prisoner,
- (i) Pretending to be sick,
- (j) Omitting to report or refusing to report, as soon as it comes to his/her knowledge, the occurrence of any fire, any plot, any escape, attempt or preparation to escape, and any attack or preparation for attack upon any Detainee or Prisoner or any employee of the Prisoner,
- (k) Assisting in escaping any Prisoner or Detainee or making an attempt thereto,
- (l) Committing any other activity in contravention of the Rules framed under this Act.

(3) A separate book shall be maintained as prescribed in respect of the offenses as referred to in Sub-section (1); and if any punishment is inflicted on a Detainee or Prisoner this Section, the Jailer shall enter the record thereof in and initial the book.

**23. Dispatch of Detainee or Prisoner:** A Detainee or Prisoner shall be dispatched from one place to another as prescribed.

**24. Punishment where Prisoner or Detainee absconds or is assisted in absconded:** (1) If any person, other than a Detainee or Prisoner, assists a Detainee or Prisoner in absconding or attempts thereto, such person shall be punished as follows:

(a) If any employee of the concerned Office or Court or Prison has got the Prisoner or Detainee to abscond (flee) , by taking a bribe or by flattering, the amount of bribery shall be forfeited where he/she has taken the bribe, and he/she:

(1)<sup>24</sup> .....

(2) Shall be punished with imprisonment for a term of Ten years if he/she has got absconded (fled) a Prisoner serving a sentence of branding (*Damal*) or life imprisonment or a Detainee accused of a crime carrying such punishment,

(3) Shall be punished with imprisonment for a term from Two years to Six years and with a fine equivalent to the amount of bribe, if any, taken, if he/she has got absconded (fled) other Detainee or Prisoner.

(b) If any government employee, other than that mentioned in Clause (a) has got a Prisoner or Detainee to abscond (flee), by taking a bribe or by flattering, the amount of bribe, if any taken by him/her, shall be forfeited, and he/she:

(1)<sup>25</sup> .....

(2) Shall be punished with imprisonment for a term of Six years if he/she has got absconded (fled) a Prisoner serving a sentence of *Damal* or life imprisonment or a Detainee accused of a crime carrying such punishment,

(3) Shall be punished with imprisonment for a term from Two to Six years and with a fine equivalent to the amount of bribe, if any, taken, if he/she has got absconded other Detainee or Prisoner.

(c) If any employee of the concerned Office or Court or Prison has got absconded (fled) a Prisoner or Detainee not by doing the acts mentioned in Clause (a) but only by recklessly performing his/her duties, such employee shall be punished

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<sup>24</sup> Deleted by Punishment Related Some Nepal Acts Amendment Act, 2055 B.S. (1998 A.D.)

<sup>25</sup> Deleted by Punishment Related Some Nepal Acts Amendment Act, 2055 B.S. (1998 A.D.)

with imprisonment for a term not exceeding Six months or a fine not exceeding Two Hundred Rupees or with both.

(d) If any person, other than a government employee, has got absconded (fled) a Prisoner or Detainee, he/she:

(1) Shall be punished with imprisonment for a term of Five years if he/she has got absconded (fled) a Prisoner serving a sentence of .....<sup>26</sup> or *Damal* or life imprisonment or a Detainee accused of a crime carrying such punishment,

(2) Shall be punished with imprisonment for a term not exceeding Two years or a fine not exceeding Five Hundred Rupees if he/she has got absconded other Detainee or Prisoner.

Provided that, while imposing punishment pursuant to this Clause, no punishment shall be imposed in a manner to exceed the half of the remaining term of imprisonment which has been imposed or may be imposed on the fleeing or absconding Prisoner or Detainee.

(e) If any person attempts to get any Detainee or Prisoner absconded (fled) and the matter is reported prior to the absconding of such Detainee or Prisoner, he/she shall be punished with imprisonment for a term not exceeding Six months or a fine not exceeding Two Hundred Rupees.

(2) If the person as referred to in Clause (a), (b) or (c) of Subsection (1) has got any Detainee or Prisoner absconded (fled) and if any amount is also to be received or recovered, the same shall be recovered from that person.

(3) If a Prisoner whose term of imprisonment is specified absconds (flees), he/she shall be punished with imprisonment for additional term of One and half of the remaining term of imprisonment, after he/she has been apprehended.

(4) If any Detainee absconds (flees), the punishment to be imposed on him/her shall be fixed by adding One and half to the punishment to be set by deducting the period during which he/she had remained in detention prior to his/her absconding (fleeing) from the punishment awarded to him/her by judgment in the case, and by deducting a total period of time during which he/she remained in detention before

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<sup>26</sup> Deleted by Punishment Related Some Nepal Acts Amendment Act, 2055 B.S. (1998 A.D.)

or after his/her absconding (fleeing), and he/she shall be liable to the punishment to be set after such deduction.

- (5) Notwithstanding anything contained in Sub-section (3) or (4), while setting the punishment by increasing One and half as referred to in these Sub-sections, no punishment shall be fixed in such a manner as to exceed One Hundred Twenty Five percent of the upper ceiling of the punishment that may be imposed for the crime for which the absconding Detainee or Prisoner is imprisoned.
- (6) Notwithstanding anything contained in Sub-section (3), (4) or (5), while imposing punishment pursuant to these Sub-sections, no punishment shall be imposed in such a manner that the term of imprisonment exceeds Twenty years.

**25. Punishment to employee of Prison for failure to perform duty:** If the Jailer or any other employee of the Prison fails to perform his/her duty by violating this Act or Rules framed under this Act or order given by the competent authority or recklessly performs his/her duty knowingly or is found to have left his/her job and gone outside or remained absent without permission, the Jailer or such other employee shall be liable to the specific punishment, if any, mentioned in other sections of this Act for any specific matter, and, failing the mentioning of such specific punishment, be punished with imprisonment for a term not exceeding Three months or a fine not exceeding Two Hundred Rupees or both according to the circumstance.

**26. Powers to institute and try cases under this Act:** (1) Notwithstanding anything contained in the other prevailing Nepal Law, the powers to try and settle cases on the absconding (fleeing) of a Detainee or Prisoner or aiding such absconding or the case as referred to in Sub-section (1) of Section 22 shall vest in the District Court having territorial jurisdiction over the Prison where the Detainee or Prisoner is in detention or imprisonment.

(2) The Jailer shall have powers to impose punishment after making a summary inquiry into the crimes as referred to in Subsection (2) of Section 22; and no appeal shall be entertained against any order given by him/her under this Sub-section.

Provided that, if the Jailer punishes any Detainee or Prisoner under this Sub-section, information thereof shall be given to the concerned Chief District Officer.<sup>27</sup>

(3) Notwithstanding anything contained in the other prevailing Nepal Law, the concerned Chief District Officer<sup>28</sup> shall have the powers to try and settle cases on the offenses as referred to in Section 25.

(4) It shall be the duty of the concerned Jailer to institute cases by investigating the offenses as referred to in Sub-section (1) of Section 22, Section 24 and Section 25; and while making such investigation, the Jailer shall have all such powers including the powers to arrest any person charged with an offense, to search any person or place, to take statement of the accused and to execute a public enquiry deed (*Sarjamin Muchulka*) as the Police have under the prevailing Nepal Law, and, in the course of such investigation, the Jailer shall, as required, also have the same powers about requiring the accused, other than one who has already remained in detention or imprisonment, to make presence or releasing the accused on bail as the Court has.

(5) If any person arrested by the Jailer under Sub-section (4), other than one who has already remained in detention or imprisonment, is to be detained for more than twenty four hours except the time required for journey, the Jailer may detain him/her for a period not exceeding Seven days after obtaining approval from the adjudicating authority.

**27. Powers to frame Rules:** (1) The Government of Nepal may frame Rules to implement the objectives of this Act. (2) Without prejudice to the generality of the powers conferred by Sub-section (1), such Rules may in particular provide for the following matters:

- (a) Control of entry of Detainees or Prisoners into the Prison and their release,
- (b) Classification of Detainees or Prisoners
- (c) Clothes, food as well as other facilities to be provided at governmental expense to the Detainee or Prisoners,
- (d) Provisions relating to visits and correspondences to and with the Detainees or Prisoners and vice versa,

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<sup>27</sup> Amended by the Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

<sup>28</sup> Amended by the Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

- (e) Provisions relating to the transmission of petitions, applications, complaints, notes of defense or appeals filed by the Detainees or Prisoners to the concerned Office or Court,
- (f) Provisions on maintaining records of the conduct of Detainees or Prisoners and provisions and powers to lessen the punishment inflicted on the Detainees or Prisoners who have good conduct,
- (g) Provisions relating to the education, health, decency and economic interests of the Detainees or Prisoners,
- (h) Provisions on using arms against the Detainees or Prisoners in such circumstance where they attempt to abscond or create disturbance or disorder in the Prison,
- (i) Provisions on prohibiting any goods from being brought into or taken out of the Prison,
- (j) Arrangements and action to be made and taken while dispatching or carrying Detainees or Prisoners,
- (k) Arrangements and action to be made and taken in the course of examination or after the examination of the Prison by the<sup>29</sup>Chief District Officer or his/her assistant,
- (l) Procedures to be followed by the Jailer while punishing any Detainee or Prisoner under Subsection (2) of Section 22, and the book to be retained to that effect.
- (m) Action to be taken where any Detainee or Prisoner is to be released for his/her falling in serious sickness or for other reason.

**28. Repeal:** The following prevailing Nepal Laws are, hereby, repealed.

- (a) The Chapter on Jail of the General Code (*Muluki Ain*),
- (b) All Orders (*Sawal Sanad*) on Jail,
- (c) No. 51 of the Chapter on Court Proceedings of the General Code (*Muluki Ain*).

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<sup>29</sup> Amended by the Same Nepal Act Amendment Act, 2048 B.S. (1992 A.D.)



## Appendix XI

### The Muluki Ain, 2020 B.S (General Code, 1963 A.D.)

Date of Authentication and Publication

2019.12.30(.....)

#### Amending Acts:

1. The Muluki (First Amendment) Act, 2021(...)	2021.6.17(.....)
2. The Contract Act, 2023(...)	2023.6.9(.....)
3. The Muluki (Second Amendment) Act, 2024(...)	2024.6.11(.....)
4. The Muluki (Third Amendment) Act, 2025(...)	2025.7.9(.....)
5. The Muluki (Fourth Amendment) Act, 2027(...)	2027.5.10(.....)
6. The Muluki (Fifth Amendment) Act, 2031(...)	2031.6.20(.....)
7. The Evidence Act, 2031(...)	2031.7.5(.....)
8. The Muluki (Sixth Amendment) Act, 2033(...)	2033.4.28(.....)
9. The Muluki (Seventh Amendment) Act, 2034(...)	2034.9.27(.....)
10. The Muluki (Eighth Amendment) Act, 2042(...)	2042.6.23.4(.....)
11. The Muluki (Ninth Amendment) Act, 2043(...)	2043.7.23.2(.....)
12. The Some Nepal Acts Repealing Act, 2047(...)	2047.3.28(.....)
13. Amended by the Court Proceedings Related Some Nepal Acts Amendment)Act, 2047 (1991)	2047.4.10(.....)
14. Some Nepal Acts Amendment Act, 2048(...)	2049.9.18(.....)
15. The Children Act, 2048(...)	2049.2.7(.....)
16. The Muluki (Tenth Amendment) Act, 2050(...)	2050.9.5(.....)
17. Some Nepal Acts Amendment Act, 2055(...)	2055.10.7(.....)
18. The Slaughtering House and Meat Inspection Act, 2055(...)	2055.12.8(.....)
19. The Punishment Related Some Nepal Acts Amendment Act,2055 (...)	2056.1.16(.....)
20. The Contract Act, 2056(...)	2057.3.14(.....)
21. The Court Proceedings Related Some Nepal Acts Amendment)Act, 2058 ()	2059.5.27(.....)
22. The Muluki (Eleventh Amendment) Act, 2058(...)	2059.6.10(.....)
23. Some Nepal Acts Amendment Act, 2063(...)	2063.6.28(.....)
24. Some Nepal Acts to Maintain Gender Equality Amendment Act, 2063(...)	2063.7.17(.....)
25. The <i>Muluki</i> (Twelfth Amendment) Act, 2641(...)	2064.8.14(.....)
26. Republic Strengthening and Some Nepal Laws Amendment Act, 2066(...)	2066.10.7(.....)

**Preamble**

Whereas, it is not possible to deal with all transactions only through religious literatures (*Shashtra*) over the course of time, and alterations and amendments have been made, to the tune of the country, time and circumstance, from time to time, to the *Muluki Ain* (General Code), which was prepared by an order issued by our great ancestor the then His Majesty to then Prime Minister and came into force on the Seventh day of the month of Poush of the year 1910; and whereas, it is expedient also to make other amendments to the *Muluki Ain*, in view of the existing political, economic and social systems, while consolidating these alterations and amendments;

Now, therefore, we, His Majesty King Mahendra Bir Bikram Shah Dev, have made and issued this Act, pursuant to Article 93 of the Constitution of Nepal, with great object to, *inter alia*, maintain peace and order in Nepal and to maintain harmonious relations between the people of various classes, castes, tribes and regions.

**Part-1  
On Preliminary Matters**

- Number 1. This Act shall be cited as the "*Muluki Ain* (General Code)".
- Number 2. This *Muluki Ain* (County Code) shall come into force on the first day of the month of Bhadra of the year 2020(.....)
- Number 3. Unless the subject or the context otherwise requires, in this *Muluki Ain* (General Code):
- (a) "Nepal" means the State of Nepal,
  - (b) "Law" means the Nepal law in force for the time being,
  - (c) "Office" means and includes a court,
  - (d) "Chief of office" means and includes a judge, and
  - (e) "Suit" means and includes a complaint, and this term also includes a police report (charge sheet) on a criminal case.
- Number 4. The matters set forth in separate laws made in specific subjects shall be governed by such laws and those matters not set forth in such laws shall be governed by this *Muluki Ain* (General Code).

**Part-2**  
**Chapter-1**  
**On Court Proceedings**

Number 29. The following cases shall be tried only by the offices in the territories as mentioned below:

The civil cases shall be tried as follows.....1

Cases of concealment of land, concealment of land revenue, ditches, borders, roads, exits, easement, and cases which would, as it appears from the nature of plaint, require the examination or survey of land, house or place or cases which have been filed on the understanding, as appearing from the writing of the plaint, that the examination or survey of land, house or place would not be required but it appears from the nature of the statement of defense that judgment can be made only upon making such examination or survey shall be tried by the office in the territory in which such house or land is situate.....1

All the cases other than those set forth in paragraph 1 of this section shall be tried by the office in which plaint is filed, out of the office in the territory where the act is done or the office in the territory where the defendant is staying/residing.....2

If both plaintiff and defendant do any transaction in other place within Nepal, other than those as set forth in section 3 below, cases relating to such transaction shall be tied by the office in which plaint is filed, out of the office in the territory where the transaction has been done or the office in the territory where the plaintiff is staying/residing.....3

Where a suit can be filed, pursuant to the Chapter on General Transactions, on the matter of transaction done abroad, it shall be tried by the office in which plaint is filed, out of the office in the territory where the defendant is staying/residing or where the plaintiff is staying/residing.....4

Where both litigants are residing elsewhere than the proper territory, on the matters set forth in paragraphs 2, 3 and 4 of this section, even the office in the territory where they are residing may receive and try the suit. If the defendant, prior to the filing of the statement of defense, or both parties, after the filing of the statement of defense, makes or make an application for the transfer of the suit to the office in the proper territory and if both litigants have left that place, the suit shall be transferred to the office in the proper territory .....5

The criminal cases shall be tried as follows.....2

The cases relating to state affairs shall be tried by such office as specified by the Government of Nepal.....1<sup>1</sup>

The following cases shall be tried by the office in the territory where the crime is committed .....2

Cases carrying punishment under the Chapter on Homicide..... 1

Rape cases .....1

Cases carrying punishment under the Chapter on Theft .....1

Cases of arson .....1

Cases relating to killing of cow .....1

Cases relating to loss or embezzlement of governmental or other public property 1

Cases relating to arms and ammunitions.....1

Cases of counterfeiting coins or using counterfeit coins.....1

Cases relating to forgery of governmental seal or signature or paper bearing such seal or signature or paper bearing the seal or signature of any government employee in government business.....1

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<sup>1</sup> Amended by the Strengthening Republic and Some Nepal Laws Amendment Act, 2066 B.S. (2010 A.D.)

Cases carrying punishment under number 1 of the Chapter on Decency.....1

Cases relating to gambling .....1

The criminal cases, other than those set forth in paragraph 2 of this section, shall be tried by the office in which a plaint is filed, out of the office in the territory where the crime is committed or the office in the territory where the defendant is staying.....3

The phrase "territory where the defendant is staying", used in various sections above, shall mean the place where the defendant is residing or engaged in government employment.....3

In filing a plaint in the office in the territory where the defendant is residing, as mentioned in various sections above, if there are many defendants staying in different jurisdictions, the plaint shall be filed in the office in the territory where more defendants are staying. Where the number of defendants staying in such different territories is equal, the plaint may be filed in the office in any territory .....4

Where a government employee has to file a suit or statement of defense, the employee may file it in such kind of case trying office, if any, available near the territory where he or she is in service or deputation, and if such an office is not available, in the office hearing appeals from such office, if any available, and if even such an office is not available, in other nearby office. If a suit or statement of defense is so produced for filing, the office shall fix the date for his or her presence in it and dispatch and forward the suit or statement of defense to the proper office in the territory. The office trying the case has to try it by showing any documents in original to the litigant who has to make presence on the fixed date in the territory where he or she is in service, it may summon his or her presence and take his or her deposition. Where he or she is so summoned, he or she has to make presence in person, or through an attorney in accordance with law, in the office trying the case. Where any employee who is required to make

presence on the fixed date in the office in the territory where he or she in service discontinues such presence, the concerned office shall give information thereof to the case trying office. Where the employee is deputed to another territory from the territory of the office in which he or she has to make presence on the fixed date, that office shall give a notice to him or her to make presence on the fixed date in the office within the territory of his or her deputation and give information thereof to the office trying the case.....5

Where a case is being tried by an office in the territory where both plaintiff and defendant are in service and both parties make an application that the case be tried by the office in the territory where they have abode, the office shall forward the case to the office in such territory out of the territories as set fort in sections 1 and 2 above as both parties agree, except where the case has matured for disposal following the examination of evidence.....6

Where a plaint is produced for filing in an office in an improper territory except in proper territory, the office shall immediately make endorsement, with affixation of the office seal, on the reserve side of the plaint setting down that he or she may go the such-and-such office in the proper territory, and return the plaint. Where it is produced within the time-limit specified by law, the office in proper territory shall receive the plaint even if the plaint so endorsed is so produced and try the case. Even where dispatching a case to another office after the filing of plaint, as mentioned in various sections above, the date shall be fixed for presence by the litigant and a memorandum of the court that the case be tried in accordance with law by the office which is competent to try the case shall also be forwarded. The office shall also receive the case so dispatched and shall not return it despite that it is not competent to try it. In the event of difficulty, the office shall make a report through its appeal hearing office and do accordingly as sanctioned. The office making such sanction shall also make such a sanction as may be reasonable in accordance with law.....7

In making a suit against a government employee or against other persons along with such employee on any act or matter relating to the office,

notwithstanding anything contained in the various sections above, such case has to be filed in the appellate court in the territory where the plaintiff is staying or where such act or matter was done or performed, and it is not necessary to require such employee to keep on making presence on the fixed date<sup>2</sup> .....8

A person who files a suit lying that an improper territory is the proper one or who makes a false complaint on the lying of territory shall be fined five thousand rupees. Where a suit is filed lying the territory, and it is so filed that the days required for the arrival by post of documents in the proper office dispatched by the office where the suit has been so filed making such a lie are remaining, for the time for journey, the case-file and litigants shall be dispatched to the office in the proper territory as mentioned in various sections above immediately where such a lie is established, and such proper office shall try the case<sup>3</sup> .....9

Number 118.<sup>4</sup> The following cases shall be tried in accordance with the following provisions in relation to the persons involved in such cases:

.....1<sup>5</sup>

If, based on the evidence available for the time being, any person accused of the following offence appears to have been guilty of the offence or there are reasonable grounds based on such evidence to believe that such person has been guilty of the offence, the office shall, unless proved to the contrary, try the case by holding the accused in detention.....2

<sup>6</sup>.....An offence punishable with imprisonment for life.....1

An offence instituted on being the Government of Nepal as plaintiff and punishable with imprisonment for a term of Three years or more .....1

An offence of attempt to, abetment of, or criminal conspiracy to commit, or being accomplice to, the offence mentioned above .....1

If, based on the evidence available for the time being, there are reasonable grounds to believe that any accused charged with an offence punishable with

<sup>2</sup> Amended by the First Amendment.

<sup>3</sup> Deleted by the Ninth Amendment.

<sup>4</sup> Amended by the Ninth Amendment.

<sup>5</sup> Deleted by the Strengthening Republic and Some Nepal Acts Amendment Act, 2066 B.S. (2010 A.D.)

<sup>6</sup> Deleted by the Punishment Related Some Nepal Acts Amendment Act, 2055 B.S. (1999A.D.)

imprisonment for a term of Six months or more has no permanent abode in Nepal has been guilty of the offence, the office shall try the case by holding the accused in detention .....3

Notwithstanding anything contained in sections 2 and 3 above, if the office holds that it is not justifiable to hold in detention any accused because of the accused being a minor or infirm due to physical or mental disease, the office may release the accused on bail or security (surety). If, in consideration of the circumstances of the commission of the offence, the age of the accused, physical or mental condition, and previous behavior of the accused, the office does not think it justifiable to hold the accused in detention, the office may release the accused on bail or security (surety), with the exception of an accused charged with .....<sup>7</sup> an offense punishable with imprisonment for life or an offence of attempt to, abetment of, or criminal conspiracy to commit, or being accomplice to, that offence.....4

Except as otherwise provided in section 2 or 3 above, the office shall try the case by taking a bail or security from the accused if there are reasonable grounds, based on the evidence available subsequently, to believe that the accused has been guilty of the offence .....5

If there are reasonable grounds, based on the evidence available subsequently, to believe that an accused, who has not been held in detention nor a bail or security has been taken from him or her, has been guilty of the offense, the office may, irrespective of the stage of case, hold the accused in detention or, as the case may be, take a bail or security from him or her, in accordance with sections 2, 3 or 5 above. The court shall not be deemed to be barred from holding the accused in detention or taking a bail or security from him or her as mentioned above by the reason only that the accused was not held in detention or a bail or security was not taken from him or her originally.....6

If there are reasonable grounds, based on the evidence available subsequently, to believe that the accused, who has been held in detention in accordance with sections 2, 3, 8 or 9, is not guilty of the offence, the office may

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<sup>7</sup> Deleted by the Punishment Related Some Nepal Acts Amendment Act, 2055 B.S. (1998 A.D.)



release him or her from detention, irrespective of the stage of proceedings of the case .....7

The office shall try the case by holding in detention the accused who furnish such bail or security as demanded by the office pursuant to this Number.....8

Where it appears subsequently that the bail or security taken from any accused is insufficient, the office may demand additional bail or security from the accused, and if the accused fails to furnish the additional bail or security so demanded, the office may hold the accused in detention .....9

The amount of a bail or security to be taken pursuant to various sections above shall be fixed, having regard to the following matters:

The nature of offence ..... 1

The economic and family condition of the accused or the offender .....1

The age of the accused or the offender, and whether he or she was previously convicted of any offence and sentenced for the same or not ...1

The amount of compensation to be borne by him or her ..... 1

If any party to the case makes a petition to the appealing hearing office showing the reasons that the amount of a bail or security demanded from any person under various sections above is lesser or excessive, the appeal hearing office may increase or decrease the amount of such bail or security .....11

## Appendix XII

### Some Public (Crime and Punishment) Act, 2027 (1970)

Date of Authentication and Publication  
4<sup>th</sup> Oct. 1970

#### Amendments:

1. Some Public (Crime and Punishment) (1<sup>st</sup> Amend.) Act, 2031 B.S. (1974 A.D.) 6<sup>th</sup> Oct. 1974
2. Some Nepal Acts (Amendment) Act, 2039 B.S. (1982 A.D.) 21<sup>st</sup> Nov. 1982
3. Administration of Justice Act, 2048 B.S. (1991 A.D.) 30<sup>th</sup> May 1991
4. Some Public (Crime and Punishment) (2<sup>nd</sup> Amend.) Act, 2049 B.S. (1992 A.D.) 2<sup>nd</sup> Nov. 1992
5. Republic Strengthening Some Nepal Law Amend. Act, 2066 B.S. (2010 A.D.) 21<sup>st</sup> Jan. 2010

#### An Act made to Control Some Public Crime and to provide Punishment thereof

**Preamble:** Whereas it is expedient to control some public crimes and to provide punishment thereof to maintain peace and order in different parts of <sup>1</sup>.....Nepal and in order to maintain convenience, good conduct and morality of general public.

Now, therefore, His Majesty King Mahendra Bir Bikram Shah Dev has, on advice and with consent of the National Panchayat enacted this Act.

- 1. Short title, extent and commencement:** (1) This Act may be called "Some Public (Crime and Punishment) Act, 2027 B.S. (1974 A.D.)  
(2) This Act shall extend all over <sup>2</sup>.....Nepal.  
(3) This Act shall come into force immediately.
- 2. Prohibition to commit some public crime:** (1) No person shall commit any of the following acts:
  - (a) To hinder or obstruct any public servant from discharging his/her official duty by committing battery or riot or by any other way;
  - (b) To break public peace by committing battery or riot in any public place;

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<sup>1</sup> Omitted by Republic Strengthening Some Nepal Laws Amendment Act, 2066 B.S. (2010 A.D.)

<sup>2</sup> Omitted by Republic Strengthening Some Nepal Laws Amendment Act, 2066 B.S. (2010 A.D.)

- (c) To break public peace or to make obscene show by using obscene speech, word or gesture in public place.
- <sup>3</sup>(c1) To print or publish any obscene materials by using obscene language or by any word or picture which denotes obscene meaning; or to exhibit or sell or distribute such obscene publication in public place other than the purpose of public health or health science;
- (d) To cause undue hindrance in the regular operation of postal service, communication, transportation, electricity supply or any other such essential social service;
- (e) To trespass on any governmental or non-governmental office or anyone's building or land by committing riot; or to stay or remain there in without any authority;
- <sup>4</sup>(f) To damage any public or private property by committing riot or pelting stone or by any other way.
- (g) To insult women in public place by committing molestation (*Hatapata*);
- <sup>5</sup>(h) To make undue behaviour in public place.
- <sup>6</sup>(i) To hinder or obstruct anyone or to stop his/her pathway or passage in a condition when he/she is staying anywhere or walking on the road or traveling by any vehicle; or to commit riot, molestation, battery, nuisance or misconduct; or to capture or damage any property or vehicle of such person having with him/her in the said condition with keeping intention to harass or cause trouble him/her;
- <sup>7</sup>(j) To threat or scold or tease or to commit any undue act or to express any undue thing to anyone through telephone, letter or any other means or medium with keeping intention to intimidate, terrorize or cause trouble or to insult or defame or harass to him/her;

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<sup>3</sup> Inserted by Some Nepal Acts (Amendment) Act, 2039 B.S. (1982 A.D.)

<sup>4</sup> Inserted by Some Public (Crime and Punishment) (Second Amendment) Act, 2031 B.S. (1974 A.D.)

<sup>5</sup> Inserted by Some Public (Crime and Punishment) (First Amendment) Act, 2031 B.S. (1974 A.D.)

<sup>6</sup> Inserted by Some Public (Crime and Punishment) (First Amendment) Act, 2031 B.S. (1974 A.D.)

<sup>7</sup> Inserted by Some Public (Crime and Punishment) (First Amendment) Act, 2031 B.S. (1974 A.D.)

<sup>8</sup>(k) To commit any act or express anything, which causes intimidation or terror in general public and breaks public peace, by entering or not entering in any public gathering, assembly or demonstration; or to show weapon.

**3. Power to arrest:** (1) The police staff may arrest the person without a warrant if he/she finds him/her on the spot committing any of the crimes mentioned Section 2.

(2) The chief police officer of a local police station not below the rank of the sub-inspector may, in the course of investigation based on a reasonable complaint lodged by anyone which gives reliable information or there is reasonable doubt that a person has committed any of the crime defined under Section 2, issue a warrant to arrest him/her Provided that, the person so arrested shall be produced before the adjudicating authority within a period of Twenty Four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority and such person shall not be detained in custody beyond the said period except on the order of such authority.

<sup>9</sup>**4. Limitation to file a case:** (1) Any case under this Act shall be filed within a period of Seven days from the date of the commission on an offence.

(2) Notwithstanding anything contained in Sub-section (1) if an aggrieved person intends to file a case under this Act, he/she shall lodge a complaint with the police against an offender within a period of Seven days excluding the time of journey, from the date of the occurrence of the offence. In such case, the limitation to file a case pursuant to Sub-section (1) shall be deemed to be commenced from the date when the complaint has been lodged.

Provided that, the adjudicating authority may, if he/she is satisfied with reasonable ground that the case cannot be filed within a period of Seven days from the commission of the offence, extend the limitation in order to file the case upto Thirty Five days from the date of commission of the offence.

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<sup>8</sup> Inserted by Some Public (Crime and Punishment) (Second Amendment) Act, 2049 B.S. (1992 A.D.)

<sup>9</sup> Inserted by Some Public (Crime and Punishment) (First Amendment) Act, 2031 B.S. (1974 A.D.)

**5. Adjudicating authority and procedure:** (1) The Chief District Officer shall have the power of original jurisdiction to initiate the proceeding and adjudicate case under this Act.

(2) The Chief District Officer shall, while initiating the proceeding and adjudicate a case, follow the procedure pursuant to Special Court Act, 2059.

(3) An appeal against the decision made by the Chief District Officer pursuant to Sub-section (1) shall lie before the Court of Appeal.<sup>10</sup>

**116. Penalty:**<sup>12</sup> (1) In a case tried under this Act, the Chief District Officer may, upon depending on the gravity of the offence, impose a fine of upto Ten Thousand Rupees to the offender and order the offender to provide compensation to the victim as per the actual damage, loss, injury etc; and issue an order of detention to keep the offender in a custody for a period not exceeding Thirty Five days if finds reasonable ground or cause in the course of investigation upon mentioning the cause thereof in the order. Such case shall be decided within a period of Three months.

Provided that, if the Chief District Officer finds reasons to impose imprisonment to the offender as only the penalty of a fine is not adequate, he/she shall refer the case before the Court of Appeal in order to impose the penalty of imprisonment for a period not exceeding Two years. The Court of Appeal shall decide the matter in such case.

(2) Adjudicating Authority may, by considering the gravity of the offence, release the offender if it is proved that he/she has committed the offence for the first time, without imposing the penalty pursuant to Sub-section (1) upon causing him/her to sign on a document which reads that the offender pledge not to commit such offence again from the date onwards.

**7. Government of Nepal to be plaintiff:** Government of Nepal shall be plaintiff in a case under this Act.

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<sup>10</sup> Administration of Justice Act, 2048 B.S. (1991 A.D.)

<sup>11</sup> Inserted by Some Public (Crime and Punishment) (First Amendment) Act, 2031 B.S. (1974 A.D.)

<sup>12</sup> Administration of Justice Act, 2048 B.S. (1991 A.D.)

- 8. Case may be filed under prevailing laws:** A case may be filed under other prevailing Nepal law in the offence under this act if it is also punishable under any other prevailing law.

Provided that, no person shall be prosecuted and punished under other laws for the same offence <sup>13</sup>..... in which he/she has already been prosecuted and punished under this Act.

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<sup>13</sup> Omitted by Some Public (Crime and Punishment) (Second Amendment) Act, 2049 B.S. (1992 A.D.)

**Appendix XIII**  
**Public Security Act, 2046 (1989)**

Date of Authentication and Publication  
2046-6-11 (27 Sept. 1989)

**Amendments,**

1. Public Security (First Amendment) Act, 2047 B.S. (1991 A.D.) (12<sup>th</sup> April 1991)
2. Public Security (Second Amendment) Act, 2048 B.S. (1991 A.D.) (14<sup>th</sup> Nov. 1991)
3. Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.) (20<sup>th</sup> April 1992)
4. Republic Strengthening and Some Nepal Laws Amendment Act, 2066 (2010)<sup>1</sup> (21<sup>st</sup> Jan 2010)

Act Number 5 of the Year 2046 B.S. (1989 A.D.)

**An Act made to provide for provisions to maintain public security**

**Preamble:** Whereas, it is expedient to provide for timely provisions<sup>2</sup> to hold a person under preventive detention or under an area confinement for the purpose of maintaining sovereignty, integrity or law and order situation of Nepal or for interest of general public or harmonious relations subsisting among the people of various caste, tribe or communities.

Now, therefore, be it enacted by His Majesty the king Birendra Bir Bikram Shah Dev, on advice and with consent of *Rastriya Panchayat*.

**1. Short Title and Commencement:**

- 1.1 This Act may be called "Public Security Act, 2046 (1989)".
- 1.2 This Act shall come into force immediately.

**2. Definition:**

- 2.1 In this Act, unless the subject or context otherwise requires;
  - 2.1.1. "An order of preventive detention" means an order issued pursuant to

<sup>3</sup>Sub-section 3.1.

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<sup>1</sup> This Act came into force on 15 *Jestha* 2065, (28<sup>th</sup> May, 2008) "*Prasasti*" and the word "Kingdom" has been deleted

<sup>2</sup> Amended by Second Amendment

<sup>3</sup> Amended by Second Amendment

2.1.2 An order of area confinement means an order issued pursuant to<sup>4</sup>  
Subsection 3.2....<sup>5</sup>

2.1.3 Local Authority means "Chief District Officer and this expression also  
include an authority who discharges the functions of chief district officer  
in his/her absence.

**63. Power to issue an order:**

3.1 If there is reasonable and adequate ground to immediately prevent a person from  
acting in any manner prejudicial to the sovereignty, integrity or public peace and  
order of Nepal, the Local Authority may issue an order to keep such person under  
preventive detention for a specified period and at a specified place.

3.2 If there is reasonable and adequate ground to prevent a person from acting in any  
manner prejudicial to interest of general public or harmonious relations subsisting  
among various castes, tribes or communities, the Local Authority may issue any  
of the following orders for keeping such person under area confinement.

3.2.1 Not to reside in a specified place of Nepal.

3.2.2 Not to enter in a specified place of Nepal.

3.2.3 To reside only in a specified place of Nepal.

<sup>7</sup>3.3 The Ministry of Home Affairs may, in order to prevent a person from doing any act  
which may cause an adverse effect on security, peace and order of Nepal or on friendly  
relations with foreign nations or on harmonious relations subsisting among the people of  
various class or regions, issue an order to prevent him/her from going outside the territory  
of Nepal.

**4. Procedures relating to an order:**

<sup>8</sup>4.1 The Local Authority shall while issuing an order pursuant to Subsections

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<sup>4</sup> Amended by Second Amendment

<sup>5</sup> Omitted by Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

<sup>6</sup> Amended by Second Amendment

<sup>7</sup> Inserted by First Amendment

<sup>8</sup> Amended by Second Amendment



3.1 or 3.2 set out the reasons and grounds and provide the said order to the concerned person. The Local Authority shall also submit the information thereof to the Ministry of Home affairs along with a copy of the order.

4.2 If an order is issued for holding a person under preventive detention the Local Authority shall forward a notice thereof along with a copy to the District Court of the district where the said order was issued.

<sup>9</sup>4.3 If the reasons and grounds of an order issued Pursuant to Subsections 3.1 or 3.2 no longer exist, the Local Authority shall abrogate such an order within Twenty Four hours from the date of cause of action.

5. **Validity period of the order of preventive detention:**

5.1 Unless abrogated earlier, an order of preventive detention issued Pursuant to Section 3.1<sup>10</sup> shall be effective for a term not exceeding with Ninety days from the date of issuance.

<sup>11</sup>5.2 Notwithstanding anything contained in Sub-section 5.1, the duration of preventive detention order shall be as follows in the following circumstances,-

5.2.1 In case the Local Authority deems it necessary to extend the duration of preventive detention for more than Ninety days to hold a person under preventive detention, he/she shall forward it in writing to the Ministry of Home affairs along with the reasons and grounds thereof. If the Ministry of Home Affairs approves it, the order of preventive detention shall be remained valid for a term not exceeding with Six months from the date of issuance.

5.2.2 If it deems necessary to hold a person under preventive detention for a period longer than Six months, the Ministry of Home Affairs shall take advice with the Advisory Board constituted pursuant to Section 7. If the said Board forwards its opinion to the said Ministry stating it is reasonable to extend the duration of preventive detention, the order of preventive detention shall be extended for a period not exceeding Twelve months from the date of issuance.

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<sup>9</sup> Inserted by Second Amendment

<sup>10</sup> Amended by Second Amendment

<sup>11</sup> Amended by First Amendment

6. **Duration of an order of area confinement order:**

6.1 Unless abrogated earlier, an order of area confinement shall remain valid for a period not exceeding Thirty days from the date of issuance.

<sup>12</sup>6.2 Notwithstanding anything contained in Sub-section 6.1, if it is necessary to extend the duration of an order of area confinement issued pursuant to this Act for more than Thirty days, the Local Authority shall forward it in writing to the Ministry of Home Affairs along with reasons and grounds thereof. If the Ministry of Home Affairs deems it reasonable and approves it the said order shall be extended for a period not exceeding Ninety days from the date of issuance.

6A.<sup>13</sup> .....

7. **Constitution of an Advisory Board:** For the purpose of this Act, Government of Nepal may, on consultation with the Chief-Justice, constitute an Advisory Board under the chairpersonship of a sitting judge of the Supreme Court and two other members shall be from sitting or retired judges of the Supreme Court.

8. **Procedures of the Advisory Board:**

8.1. If the Ministry of Home Affairs deems necessary to hold a person under preventive detention for more than Six months<sup>14</sup> it shall submit a report to the Advisory Board along with reasons and grounds thereof, an advice given by Local Authority in this regard, If any, and the complaint lodged on behalf of detainee, if any, with Government of Nepal.

8.2 The Advisory Board shall, upon considering the report as well as other document received pursuant to Sub-section 8.1 and statement or clarification submitted by detainee pursuant to Sub-section 8.3 if any, forwards its opinion as to whether it is necessary to extend the duration of preventive detention or not.

8.3 The Advisory Board, if it deems necessary, may make an inquiry with the person held under preventive detention, or seek his/her clarification in this regard.

9. **Power to abrogate order:**

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<sup>12</sup> Amended by First Amendment

<sup>13</sup> Omitted by Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

<sup>14</sup> Amended by First Amendment

- 9.1 The Local Authority may abrogate any order issued by him/her at any time before the termination of the duration of an order.
- 9.2 The Government of Nepal may abrogate any order of preventive detention <sup>15</sup>and any order of area confinement.
10. **Penalty:**
- 10.1 The Local Authority....<sup>16</sup> may impose an imprisonment for a term not exceeding Six months or impose a fine up to One Thousand Rupees on a person who violates an order issued pursuant<sup>17</sup> to Subsection 3.2.
- 10.2 An appeal may be filed in <sup>18</sup>Court of Appeal against an order of punishment made pursuant to Sub-section 10.1.
- 10.3 If an appeal is filed pursuant to Sub-section 10.2 <sup>19</sup>the Court of Appeal shall dispose the appeal upon confining only in the matter as to whether the said order is contravened or not.
11. **No question may be raised in any court:** No question may be raised in any court against an order issued <sup>20</sup>under this Act.
12. **Procedures to be followed in the course of release:** In the course of releasing a person held under preventive detention, such person shall be released in front of concerned district court judge or the Registrar (*Shrestedar*) of the said court in the absence of a judge.
- <sup>21</sup>12A. **Entitlement to get compensation for *mala fide* preventive detention:**
- 12A.1 Notwithstanding anything contained in Section 11, if a person held under preventive detention deems that he/she was kept under preventive detention in contravention of this Act or in *bad faith*, may file a case before District Court during a term of detention or within a period of Thirty Five days from his/her

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<sup>15</sup> Amended by Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

<sup>16</sup> Omitted by Some Nepal Acts Amendment Act, 2048 B.S. (1992 A.D.)

<sup>17</sup> Amended by Second Amendment

<sup>18</sup> Amended by Administration of Justice Act, 2048 B.S. (1991 A.D.)

<sup>19</sup> Amended by Administration of Justice Act, 2048 B.S. (1991 A.D.)

<sup>20</sup> Amended by First Amendment

<sup>21</sup> Inserted by Second Amendment

release upon claiming for a compensation from the Local Authority who issued such order.

12A.2 If the claim mentioned in complaint lodged pursuant to Sub-section 12A.1, is proved, the district court may pass a judgment for providing a reasonable compensation to the complainant from the Government of Nepal upon considering the factors such as the duration of preventive detention, the age and social prestige of detainee and economic loss faced by him/her due to preventive detention.

12A.3 The Local Authority may request the office of government attorney to defend him/her in relation to the complaint lodged pursuant to Sub-section 12A.1 and government attorney shall defend him/her in court of law.

13. **Departmental action:** If it is proved that an order issued by Local Authority under this Act was issued in *bad faith*, such authority shall be subjected to departmental action and be punished.

14. **Power to frame Rules:** The Government of Nepal may frame necessary Rules to carry out the objectives of this Act.

15. **Repeal and saving:**

15.1 Public Security Act, 2018 B.S. (1961 A.D.), is, hereby, repealed.

15.2 The provisions of this Act shall be applied with respect to the order issued under Public Security Act, 2018 B.S. (1961 A.D.).

## Appendix XIV

### Supreme Court Act, 2048 B.S. (1991 A.D.)

Date of Authentication and Publication  
2048.07.28 (1991.11.14)

#### Act No 29 of the year 2048 B.S. (1991 A.D.)

#### An Act enacted to provide for Supreme Court

**Preamble:** Whereas, it is expedient to make some legal provision relating to Supreme Court,

Now, therefore, be enacted by the Parliament in the Twentieth year of the reign of His Majesty's the King Birendra Bir Bikram Shahadev.

1. **Short title and commencement:** (1) This Act may be called "Supreme Court Act, 2048 B.S. (1991 A.D.)  
(2) This Act shall come into force immediately.
2. **Definitions:** In this Act, unless the subject or context otherwise requires,-
  - (a) "Constitution" means the Interim Constitution of Nepal, 2063.
  - (b) "Chief Justice" means the Chief Justice of Nepal and this expression also includes the Acting Chief Justice of the same.
  - (c) "Justice" means the Justices of the Supreme Court and this expression also includes the Chief Justice and *ad hoc* judges of the same.
  - (d) "Prescribed" or "as prescribed" means prescribed or as prescribed by the Rules framed under this Act.
3. **Location of Supreme Court:** The Supreme Court shall be situated in Kathmandu.  
Provided that, the Supreme Court may establish its bench and exercise its jurisdiction or carry out other functions in the place specified the Chief Justice with the approval of the Government of Nepal.
4. **Application of the jurisdiction of the Supreme Court:** (1) The power of the Supreme Court to hear and dispense judgment in the cases shall be exercised by the Single Bench of one Judge or Division Bench, Full or Special Bench of more than one Judges.

(2) Except otherwise provided in Sub-Section (1), the exercise of other powers of the Supreme Court shall be made by the Full Court, Committee or by the Registrar of the Supreme Court as prescribed.

**5. Special provision about the date of attendance (*Tarikh*):** In cases except the case heard by the Supreme Court under original jurisdiction, if a party wishes, not to be present at the date of attendance (*Tarikh*) for hearing with the permission of the court; If the party has appointed legal practitioner, the Court may consider him/her as the representative of the party and hear the case.

Provided that, if the party wishes again to be present at the date of attendance or appoint an attorney (*waresh*) gent and the Court may keep in presence or keep in the date of attendance if deems necessary.

**6.** <sup>1</sup>...

**7. Contempt of Supreme Court and Subordinate Courts:** (1) Supreme Court may impose punishment up to one year imprisonment or fine up to ten thousand rupees or both to the person convicted, in case wherein the Supreme Court has initiated the proceeding of its own contempt or contempt of subordinate courts or judicial authorities

(2) Notwithstanding anything contained in Sub-Section (1), if the accused or convict apologize to the satisfaction of the court, the Supreme Court may pardon or excuse, remit the punishment imposed or may suspend the punishment with conditions determined by the Court and if the conditions as are fulfilled the court may order not to execute the penalty.

**8. Oath:** The Chief Justice shall take oath of the office before the President and other judges shall take oath of the office before the Chief Justice as specified in the schedule.

**9. Registrar:** (1) The Registrar shall act as an administrative chief of the Supreme Court under the general direction and control of the Chief Justice.

(2) The function, duties and power of the Registrar shall be as prescribed.

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<sup>1</sup> *Ipsa facto* ceased to operate since the declaration of House of Representative of 4<sup>th</sup> Jestha 2063 (16<sup>th</sup> May, 2006)

- (3) The Registrar may delegate the power conferred to him/her powers to his subordinate officers.
- 10. Annual Report:** The Supreme Court shall publish an Annual Report relating to the functions and activities carried out by it and subordinate courts.
- 11. Power to frame Rules:** (1) The Supreme Court may frame the Rules to regulate the exercise of its jurisdiction and systematize the procedure.
- (2) Without prejudice to generality of the powers conferred by Sub-Section (1) the Rules particularly may provide for the following matters:
- a) The matter relating to the exercise of the jurisdiction of the Supreme Court by Single Bench of one Justice or Division Bench, Full or Special Bench of more than one Justice.
  - b) The matter relating to the appeal, reference (*sadhak*) and filing of petitions in the Supreme Court for review and revision.
  - c) The matter relating to the petition to be filed pursuant to the Sub-Article (1) and (2) of Article 107 of the Constitution.
  - d) The matters whether to keep in detention, imprison or release in bail or guarantee to the appellant who files an appeal in the Supreme Court challenging the conviction incurred by the decision of the subordinate court.
  - e) Procedure relating to the contempt of court,
  - f) Any matter relating to the court proceeding.
- 12. Repeal:** Supreme Court Act, 2019, is, hereby, repealed.

## Appendix XV

### Government Cases Act, 2049 B.S. (1992 A.D.)

Date of Authentication and Publication  
2049.09.08 (1992.12.23)

#### Amendment

- |   |            |              |
|---|------------|--------------|
| 1. Some Nepal Acts Amendment Act, 2049 B.S. (1999 A.D.) | 2055.10.07 | (1999.01.21) |
| 2. Some Nepal laws Amendment Act, 2063 B.S. (2006 A.D.) | 2063.6.28  | (2006.10.14) |

### Act No 43 of the year 2049 (1992)

#### An Act made to provide for the Government cases

**Preamble:** whereas, it is expedient to make appropriate legal provision in relation to the cases where the Government is plaintiff and in relation to the defense of cases filed against the Government

Now therefore, Parliament has enacted this Act in the 21st year of the ruling of His Majesty King Birendra Bir Bikarm Shah Dev.

**1. Short title and commencement:** (1) This Act may be called " Government Cases Act, 2049"

(2) This Act shall come into force immediately.

**2. Definitions:** In this Act, unless the Subject or the context otherwise requires,-

(a) "Government Attorney" means the Attorney General, Deputy Attorney General, Joint Government Attorney, Deputy Government Attorney, District Government Attorney and Assistant District Government Attorney and any Officer or civil servant designated by the Attorney General to work as the Government Attorney.

(b) "Court" means the bench of the judge and this term shall include the Officer authorized to undertake judicial works relating to any case pursuant to the prevailing laws.



- (c) "Office of the Government Attorney" means the Office of the Attorney General and Office of the Appellate Government Attorney and District Government Attorney there under.
- (d) "Prescribed" or "as prescribed" means prescribed or as prescribed in the Rules framed under this Act.

**3. Information of crime:** (1) Any person who knows about a crime stipulated in Schedule 1, committed, being committed or going to be committed shall verbally or in writing inform about such crime to nearby Police Office with necessary information or evidence s/he possesses relating to the crime.

(2) Any person filing an application pursuant to Sub-Section (1) shall include the following information in his/her application:

- (e) Date, time and place of the crime committed or being committed or likely to be committed.
- (f) Name, address and description of the person committing the crime
- (g) Evidences relating to the crime
- (h) Nature of the crime and other descriptions relating to the crime.

(3) If the person informs about the crime verbally, the concerned Police Officer shall record in writing all such information and the matters as per Sub-Section (2) and read out it before the person and keep the signature of that person.

(4) The information received as per Sub-Section (1) or the information relating to the crime received from anywhere else by the Police personnel, shall be registered in the registration book in the prescribed format.

(5) In case of the refusal to register the information of the crime by the concerned Police personnel as per Sub-Section (4), the informer, disclosing this, may give the information of the crime to concerned Chief District Officer or the upper level Police Office than that Office which is prescribed to register the information. The Chief District Officer or the Police personnel of the Police Office receiving such information shall keep the record of this, and with necessary directions, forward in writing the information of such crime to concerned Police Office for necessary actions.

(6) The concerned Police Office shall register as per Sub-Section (4) the information of the crime received as per Sub-Section (5).

- 4. Arrangement for evidences not to disappear or destroy and perpetrator not to escape:** (1) If any Police personnel receives information about a crime stipulated in Schedule-1 committed or being committed or going to be committed, then s/he as soon as possible shall try to make an arrangement to prevent the crime, not to let any evidence relating to the crime disappear or destroy, and not to let the criminal escape or flee. In case of the possibility of crime to take place or evidence to disappear or destroy, or criminal to escape or flee if immediate action is not taken, then the Police personnel may, as per necessity, go to the jurisdiction of the next Police Office and take necessary actions in this regard.

Provided that, any action is taken entering into the area of any other Police Office, that Police Office shall be informed as soon as possible.

(2) A Police personnel may seek help from any person or authority in order to prevent from any crime, stop any evidence to disappear or destroy, or to arrest the perpetrator.

- 5. Giving information to concerned Office if the crime has taken place in the area of any other Police Office:** If the information received in any Police Office relating to any crime stipulated in Schedule-1, shows that the crime is committed, being committed or going to be committed in the area of any other Police Office, then the Police Office receiving such information shall as soon as possible forward such information to the concerned Police Office; and the informer shall be notified as per necessity, to be present in such Police Office.

- 6. Sending preliminary report:** (1) Before starting investigation of any crime as per Section 7, the Police personnel undertaking the investigation shall send the preliminary report relating to the crime to the concerned Government Attorney Office explaining the matters to be investigated.

(2) After receiving the preliminary report pursuant to Sub-Section (1), the Government Attorney may give necessary directions relating to the investigation of the crime to the Police personnel undertaking the investigation.

**7. Collecting evidence through investigation:** (1) If, any Police Office receives information regarding any crime stipulated in Schedule-1, committed, being committed or going to be committed, then the Police personnel of at least Assistant Sub-Inspector level of the Police Office shall, as soon as possible, investigate and collect evidence.

(2) The Police personnel investigating as per Sub-Section (1) shall prepare *muchulka* (recognizance/deed) explaining the following information to the best possible extent.

(a) description of the crime scene,

(b) situation of the crime scene and the relation of that place to the crime or the criminal, and

(c) any other remarkable thing seen or found at or around the crime scene.

(3) Apart from preparing the *muchulka* (recognizance/deed) pursuant to Sub-Section (2), the investigating Police personnel may, to the best possible extent, also take the picture of the place, collect the finger print or the foot mark or any other important fact seen or found in the crime scene.

(4) The investigating Police personnel shall take into possession any document or object relating to the crime.

(5) While investigating pursuant to this Section, if the concerned Police personnel seek the advice of the Government Attorney, it shall be the duty of the Government Attorney to provide the advice.

**8. Keeping in presence:** In the course of any investigation, while preparing a *muchulka* (recognizance/deed) relating to the situation of any house or place, or while making a search of any individual, object or place, or while examining a corpse, at least two local people present in the place and a member of concerned Village Development Committee or Municipality, or if such member is not available, then any civil servant of the Government Office and accused if available and the informer of the crime shall be kept in presence (*Rohabar*).

Provided that, such action shall not be considered invalid only on the ground that the accused or the informer of the crime have not been kept in presence.

**9. Taking statement and inquiry:** (1) The investigating Police personnel relating to the crime stipulated in Schedule-1 shall take the statement of the concerned accused in front of the Government Attorney.

(2) The investigating Police personnel may inquire a person and if deems necessary, record the statement of such person if the person is suspected in relation to any crime or there is reasonable ground to believe that the person possesses important information about the crime.

**10. Search:** (1) If the investigating Police personnel, in relation to any crime, find reasonable ground to suspect a person or place to have possessed any person or physical evidence in relation to the crime, s/he may search the person or place in the prescribed manner.

Provided that, the act of search of a woman shall be conducted only by a woman police or any other woman.

(2) If the person or place to be searched falls under the jurisdiction of any other Police Office, the investigating Police personnel may make a written request for the search of such person or place to such Police Office, and if such request is made, the Police personnel of at least Assistant Sub-Inspector level of the Police Office receiving such request shall make search of such person or place and send to the requesting Police personnel the *muchulka* (recognizance/deed) prepared pursuant to Sub-Section (3).

Provided that the Police personnel conducting investigation deems that while making such a written request to another Police Office may cause any evidence disappear or destroy, s/he him/herself may go and search the person or place pursuant to this Section and inform about to the concerned Police Office.

(3) The personnel conducting such search shall prepare two copies of *muchulka* (recognizance/deed) regarding the description of the objects found relating to the crime in the search, the place where such objects were found and their condition as and when found; give a copy of it to the concerned person and keep a copy in the case file. If the

personnel conducting search wants to take some object with him/her, s/he shall take the object only by giving a receipt of it to the concerned person.

**11. Examining the corpse:** If any information is received about a death caused by homicide or by accident or by suicide or in a suspected circumstance as a result of any crime in the area of any Police Office, at least the Police personnel of the Sub- Inspector level of the Police Office of that area shall, as soon as possible, go to the place where the corpse was found, examine the corpse and prepare a *muchulka* (recognizance/deed) disclosing the following information to the best possible extent, and if possible, take the photo of the corpse and the concerned place:

- (a) description of the corpse identifying it,
  - (b) place where the corpse is lying and the condition of the corpse, (c) if any wound, injury, bruise or discolored spot is seen on the corpse, description of each of such wound, injury, bruise, or contusion with their place, length, breadth and depth,
  - (d) possible means causing the death and symptoms thereof seen on the corpse,
  - (e) any other symptom seen on the corpse that may be helpful in tracing the cause of death, and
  - (f) any other remarkable fact.
- (2) Notwithstanding anything contained in Sub-Section (1), this provision shall not hinder the examination of corpse by the authorized person pursuant to no. 2 of the Chapter on Homicide of General Code (*Muluki Ain*).
- (3) While examining the corpse as per Sub-Section (1), if the death seemed to have been caused as a result of any crime, or occurred in suspicious circumstance, the concerned Police personnel shall send the corpse for autopsy to the Government Medical Practitioner in Government expense.
- (4) If the corpse is seen or found to have decomposed to be unable for examination, the concerned Police personnel shall prepare a *muchulka* (recognizance/deed) explaining the same and it shall not be required to carry on the process mentioned in Sub-Section (3).

- (5) After the examination of corpse or preparation of *muchulka* (recognizance/deed) pursuant to Sub-Section (4), the concerned Police personnel shall handover the corpse to the claimant taking a receipt. If the claimant refuses to receive the corpse or no claimant is present, then the concerned Police personnel shall cremate the corpse in the Government expense pursuant to the Police Act.
12. **Examining blood, semen etcetera:** From the nature of the crime, if there is reasonable ground to believe that examination of blood, semen or any organ of body or any other thing of the person arrested may produce evidence relating to the crime, the investigating Police personnel may examine such blood, semen, organ or any other thing by a Government Medical Practitioner or in laboratory.
- Provided that if it is necessary to examine the body-part of a woman it shall be conducted if possible, by a female Medical Practitioner or by a woman at the instruction of a male Medical Practitioner.
13. **Taking opinion of expert:** The Police personnel investigating the crime may take the opinion of expert relating to any aspect of the crime, if s/he deems so necessary.
14. **Arrest:** (1) Police personnel conducting investigation relating to any crime under this Act may arrest a person if there is reasonable ground to suspect about the involvement in the crime, and the person so arrested shall not be detained without giving the notice explaining the cause of arrest.
- (2) Any witness to a crime may take into custody of the person committing the crime and hand over that person to the nearby Police Office.
- (3) In case, it requires arresting a person pursuant to Sub-Section (1) an order shall be given to him/her to voluntarily surrender explaining the cause of the need for such arrest. If such person does not surrender and tries to escape or avoid the arrest, then the Police personnel may use force to arrest such person.
- (4) Incase it requires to arrest a woman, as far as possible, woman police personnel shall be caused for the same.
- (5) While conducting a body search of the arrested person, the Police personnel involved in arrest shall take into possession any evidential document or any other object

or arms and ammunition, weapons recovered in such search and prepare a *muchulka* (recognizance/deed) thereof.

- 15. Limitation of the period of detention for investigation and its procedure:** (1) No person shall be detained for more than twenty four hours for investigation purpose unless otherwise provided in this Section.

**Explanation:** The period of journey, be taken for the detainee to produce before the court to bring to the Police Office or from Police Office to the court pursuant to Sub Section (2), shall not be included in the period of detention for the purpose of this Section.

(2) In the course of investigating a crime stipulated in Schedule-1, if it is deemed that the investigation relating to the person arrested and detained may not be completed within twenty four hours and that the investigation has to be continued keeping him/her in detention, then the investigating Police personnel shall keep him/her in detention by taking the permission of the court producing that person before the court. While seeking remand of this kind from the court, the charge against the detainee with the grounds, reason for investigation to be continued by keeping him/her on remand, and if his/her statement has been recorded, the details of the statement shall be clearly specified.

(3) While the person produced before the court for the permission of remand pursuant to Sub-Section (2) may make an application to the court for his/her physical examination.

(4) If the permission of remand is sought pursuant to Sub-Section (2) by reviewing the documents, considering whether the investigation is being conducted in a satisfactory manner, and if it is found to have been carried out in satisfactory manner, the court may grant a remand of maximum twenty five days at once or time and again.

- 16. Identification:** (1) If any accused has to be identified in any case, Police personnel of at least Assistant Sub-Inspector level may make such identification in accordance with the prevailing laws.

(2) The Police personnel of at least Assistant Sub-Inspector level may make identification of any material evidence or objects related to any case by following the prescribed rules.

**17. Submitting report with opinion:** (1) After the completion of the investigation of any crime stipulated in Schedule-1, if the investigating personnel finds that the crime had occurred, but deems the evidence insufficient to prosecute all or some accused, s/he shall explaining that, and if s/he does not find that the crime had taken place or though the crime had taken place, the accused could not be identified or the evidence are insufficient to prosecute any accused, s/he explaining that and with his/her opinion, if the case does not have any detainee then fifteen days before the limitation as per the concerned law, and if the detainee is there in the case, then taking into consideration the time needed to decide about whether the case is fit to be filed or not, and the time needed to prepare and file the charge sheet before the court, Submit the original and a copy of the file and material evidence to the Office of the Government Attorney.

(2) Having received the file with the opinion of the Police pursuant to Sub-Section (1) the Government Attorney shall study the documents and send them to the Attorney general for final decision as to whether to file a case or not.

Provided that, if the Attorney general has delegated the authority to the Government Attorney pursuant to Clause (5) of the Article 110 of the Constitution, conferred to him/her by the Clause (2) of same Article, then the concerned Government Attorney shall make decisions in accordance with the delegated authority.

(3) During the study of file to decide pursuant to Sub-Section (2) whether a case is fit to be filed or not, if the Government Attorney deems it necessity to collect additional evidence or to inquire any person, then s/he may give direction to the investigating Police personnel to collect such evidence or to inquire with such person. It shall be an obligation of the concerned Police personnel to abide by such direction.

**18. Filing charge sheet:** (1) In the context of making decision pursuant to Sub-Section (2) of Section 17 as to whether file a case or not, if the study of the file suggests that a case may be filed, then the Government Attorney shall prepare the charge sheet in the prescribed format stipulating the following information and Submit it to the concerned court along with evidence (exhibits) and any objects relating to the crime, and if there is any detainee, also with that charge sheet:

(a) full name, surname and address of the accused,



- (b) description of information of crime,
- (c) description relating to crime,
- (d) charge on the accused and evidence thereof,
- (e) concerned law,
- (f) punishment to be inflicted to the accused, and
- (g) if there is any compensation to be paid to victim, the amount of such compensation.

(2) While specifying the charge in the charge sheet pursuant to Sub-Section (1), if the crime has a nomenclature in the prevailing laws, it shall be mentioned accordingly. In case of the crime without any nomenclature in the prevailing laws, elements of the crime shall be clearly mentioned so that the accused can clearly understand the charges made against him/her.

(3) If the accused has to bear more punishment on the reason that s/he had already received punishment before on any other crime, the date of such punishment and the name of the court inflicting such punishment shall be mentioned.

(4) While filing charge sheet before the court pursuant to Sub-Section (1), if any approval is needed from the Government of Nepal or authorized Officer of the Government of Nepal or any Officer prescribed by law, the document of such approval, file of investigation and the evidences found during investigation shall also be Submitted; and if the accused has been arrested, s/he shall also be produced before the court.

**19. Keeping Safe:** In case, the Government Attorney decides not to file the case, the case file and objects relating to evidence (exhibits) shall be sent back to the concerned Police Office, and the Police shall keep them safe until the prescribed time.

**20. Informing the informer:** If any decision is made not to file a case, the concerned Police Personnel shall inform the informer accordingly.

**21. Police may release the person kept in the custody:** If any person kept in the custody for investigation under this Act is deemed not necessary to be kept any more in custody, the Police personnel may release such person on guarantee of attendance (*Hajeer Jamani*) by taking the approval of the Government Attorney as prescribed, or depending on the

situation, by preparing a note with reasonable grounds even without the approval of Government Attorney.

**22. Inquiry of civil case and case filing:** (1) Anyone interested to file a case stipulated in Schedule-2 and the civil case in which the prevailing laws prescribe the Government as plaintiff, shall mention about the evidences or information s/he has relating to the case, shall produce the written application or verbal information to the Officer mentioned in the Nepal Gazette or the Officer prescribed by prevailing law. In case of verbal information, the concerned Officer shall write it in the form an application and get the signature of the informer on it.

(2) Any application received pursuant to Sub-Section (1), the concerned Officer shall make cadastral survey or make other inquiries as required, include the evidence collected to decide whether to file a case or not, and with his/her own opinion, forward the original and duplicate copies of the file to concerned Government Attorney of the District fifteen days prior to the limitation for case filing as provided in the concerned law.

(3) Even if no application is filed by anyone, if the concerned Officer him/herself finds it reasonable to file a case, s/he shall collect required evidences and send the file to the Government Attorney by fulfilling the procedures pursuant to Sub-Section (2).

(4) The concerned Officer, while sending the file to Government Attorney pursuant to Sub-Section (2) or (3), shall do it taking into consideration the time needed for Government Attorney to decide whether the case be filed or not, and also the time needed to file a case by preparing a law suit in case of a decision to file a case.

(5) Section 17 of this Act shall be applicable to decide whether to file a case or not for the file received pursuant to Sub-Section (2) or (3).

(6) If the Government Attorney deems it fit to file a case while reviewing the file received as per Sub-Section (2) or (3), s/he shall prepare a law suit (*Firad Patra*) and file a case in the concerned court enclosing evidences.

(7) If the Government Attorney decides not to file a case, then the file and evidence thereof shall be returned to the concerned Officer and such Officer shall keep such file and evidence safe until the prescribed time.

- 23. The Government of Nepal as plaintiff:** The Government of Nepal shall be the plaintiff in the cases stipulated in Schedule 1 or 2, and any person giving information about such case shall be considered as the witness of the plaintiff.

Provided that in the course of investigation, if the crime or the situation does not seem to fall under the crimes stipulated in Schedule 1 or 2, and as per law it is deemed that the aggrieved party (person) him/herself has to file a case, then the Government Attorney, by explaining it and including his/her decision, shall inform the Police or concerned Officer asking to inform the concerned person about the decision. On behalf of the person receiving such information, the limitation as per the prevailing laws shall be counted from the date of the receipt of such information by him/her.

- 24. Procedure for appeal or review:** (1) In the cases stipulated in Schedule 1 or 2 and in any Act where the Government of Nepal is mentioned as plaintiff, any application or appeal or review or of any related matter shall be produced by the concerned Government Attorney.

(2) Except otherwise provided in Sub-Section (1), in cases where the Government of Nepal is plaintiff or defendant, any application or appeal, review or any related matter may be produced by the concerned Officer or the Office incharge him/herself.

Provided that if the concerned Officer or Office in-charge makes a written request, the concerned Government Attorney may file an application or appeal or review on any matter relating to the case.

(3) In any case relating to Governmental affairs in which any civil servant is plaintiff or defendant, if needed to appeal, review or file an application and the concerned civil servant is no more holding that post, then such appeal or review or application may be filed in the name of such person who is in that very post at present.

- 25. Filing a complaint or case against the Government of Nepal or any civil servant and serving summon or notice etcetera:** (1) While filing complaint or case relating to any affair of the Government of Nepal, the Government of Nepal shall be made party.

(2) In the cases mentioned in Sub-Section (1), the Government of Nepal shall be served a notice or summon through Government Attorney.

(3) In case of a complaint or case against any civil servant relating to Government affair, the notice or summon shall be served to the concerned civil servant or the person replacing him/her. In such summon or notice, it will suffice if the post and the address of the Office are mentioned.

Provided that in case of personal complaint against any civil servant relating to Government or non-Government affair, any matter of this Section shall not be applicable while summoning or informing.

**26. Giving time period:** (1) The court shall provide a time period of seventy days while providing the period as provided in Sub-Section (1) for appeal in the cases stipulated in Schedule 1 or 2.

(2) After the expiry of the time period if the concerned party has made an application to the court with reasonable grounds, the court may provide additional thirty days in the cases where the time period may be extended as per the prevailing laws.

(3) If the Government of Nepal requires to file a civil case against any person, such case shall be filed within the limitation as mentioned in prevailing laws, and if, such limitation is not mentioned, it shall be filed within two years from the date of its knowledge of the case or fact.

Provided that, if the prevailing laws do not provide for any limitation to file a complaint or case and it provides for an unlimited limitation the complaint or case may be filed at any time.

**Explanation:** The notice received by concerned Officer of the Government of Nepal would be considered as the notice received by the the Government of Nepal.

**27. Determining the concerned person as party:** In a case filed under this Act in which government of Nepal is the plaintiff, if it deems later on that such case does not fall under Schedule 1 or 2 of this Act the court may issue an order to the concerned party to appear before the court and if such person agrees to continue the case, the court may convert such person as a party of the case and shall proceed and dispose the case from the same case file in accordance with the prevailing laws.

**28. Mitigation in punishment for complaint:** (1) There shall be no punishment for complain in the cases stipulated in Schedule 1 or 2.

(2) Notwithstanding anything contained in Sub-Section (2), having proceeded a case in the court by registering complaint, becoming a witness and by credibly showing evidences to the Government of Nepal, Police personnel or other Officer, if later on it is found that such fact or evidence are fake, the court may impose the following punishment:

(a) The witness writing such a fake fact or producing fake evidence may be imposed a fine of Three Thousand Rupees or Three months of imprisonment or the both.

Provided that, such penalty or punishment shall not be more than half of the punishment that may be imposed on the offender of that crime.

(b) If the witness writing such a fake fact or producing fake evidence is deemed by the court to have acted not on reasonable grounds rather with enmity, the court may order for compensation of up to Five Thousand Rupees to the acquitted defendant from the case taking into consideration the situation of the case.

**29. Withdrawal of the Government case or reconciliation:** (1) In the cases where the Government of Nepal has to be a plaintiff or where the Government of Nepal has filed a case or where the Government of Nepal is defendant pursuant to the prevailing laws, if there is an order of the Government of Nepal, the Government Attorney, with the consent of other parties, may make a deed of reconciliation or with the consent of the court, may withdraw the criminal case in which the Government of Nepal is plaintiff. If so happens, the following matters shall happen as following:

(c) if reconciliation is done, no one shall be charged any fee for the same.

(d) in case of withdrawal of the case, the criminal charge or the Government claim ceases and the defendant gets release from the case.

(2) Notwithstanding anything contained in Sub-Section (2), if the case has an effect on the property of any civilian, such case shall not be withdrawn from the court under this Section.

**30. Other works of Government Attorney:** (1) The Government Attorney shall examine the witness and Submit the evidence in the cases stipulated in Schedule 1 or 2 and in any other cases which has concern to the Government of Nepal.

(2) It shall be the duty of the Police to produce the witness and evidence in the cases stipulated in Schedule 1, through Government Attorney at the expense of Government on a date fixed by the court.

(3) It shall be the duty of the concerned Officer to produce the witness and evidence in the case stipulated in Schedule 2 and in the case in which the Government of Nepal is plaintiff or defendant, through Government Attorney at the expense of Government on a date fixed by the court.

**31. Matters related to cases other than stipulated in Schedule 1 or 2:** In the cases to be filed by the Government of Nepal, except the cases stipulated in Schedule 1 or 2, if any Officer has been designated by the Government of Nepal or by law to file a case or to collect evidence, then through that Officer, and if no such prescription has been made, the concerned Office in-charge shall collect the evidences and produce to the Government Attorney the file and evidence with his/her opinion considering the limitation to file law suit (*Firad Patra*) or charge sheet for a decision whether to file a case or not.

(2) Sub-Section (2) of Section 17 of this Act shall be applicable to make a decision whether to file a case or not on the basis of the file received pursuant to Sub-Section (1).

(3) After receiving the file pursuant to Sub-Section (1), the decision whether to file a case or not shall be made, and if a case is to be filed, the received file shall be returned within the period not exceeding the time period to file a case, clearly mentioning under which law, who shall be prosecuted under which charge.

(4) After receiving a decision to file a case from the Government Attorney pursuant to Sub-Section (3), charge sheet or law suit (*Firad Patra*) shall be prepared and get it signed by the person designated by the prevailing laws and if there is any detainee, s/he shall be produced before the court and the case shall be filed within time period; and a duplicate copy of the file shall be made available to the Government Attorney.

(5) In case the Government Attorney decides not to file a case, the file shall be kept safe until the prescribed period.

**32. Sending to the concerned authority:** Notwithstanding anything contained elsewhere in this Act elsewhere, if any case presumably coming into the cases stipulated in Schedule 1 or 2 is found later on, in the course of investigation not to be falling under this Act, it may be forwarded to the concerned authority.

- 33. Government Attorney to plead:** (1) In the cases stipulated in Schedule 1 or 2 and in any case in which the Government of Nepal is specified in law to be a plaintiff, the Government Attorney shall plead and defend. Other than this, in the cases in which the Government of Nepal has been made defendant or it has filed a case by being a plaintiff, the Government Attorney may plead and defend if any request is made by the concerned authority.
- (2) In any case other than stipulated in Sub-Section (1) concerning the Government of Nepal, if the concerned Officer directly requests the Attorney general for defense, the Attorney general may designate the Government Attorney for pleading or defense in such case.
- 34. Power of the higher authority:** The functions, which may or has to be carried out by a Government Attorney or the Police Personnel pursuant to this Act or Rules framed there under , may be carried out by the following Government Attorney or Police Personnel:
- (a) the Police personnel of the higher rank of the same area or any Government Attorney of the higher rank.
- (b) at the request of such Police personnel, by the Police personnel of the same or higher rank from another Police Office or Government Attorney of higher rank from another Office.
- 35. Alteration in the Schedules:** The Government of Nepal, by producing notice in Nepal Gazette, may add or delete the cases stipulated in Schedule 1 or 2.
- 36. Right to frame Rule:** (1) The Government of Nepal may frame Rules to implement the objectives of this Act.
- (2) The Rules may be formed in the following sectors, not making any adverse effect in the universality of the powers stated in Sub-Section (1):
- (a) prescribing rights, duties and obligations of the Government Attorney,
- (b) Filing and defending a case in which the Government of Nepal,
- (c) Matters relating to investigation
- 37. Repeal:** Government Cases Act, 2017 is, hereby, repealed.

## Appendix XVI

### Terrorist and Disruptive Acts (Prevention and Punishment) Act, 2058 (2002)

Date of Royal Seal and Publication

28th *Chaitra* 2058 (10 April 2002)

The below-mentioned Act enacted by Parliament in the first year of reign of His Majesty King Gyanendra Bir Bikram Shah Dev is published for information to the general public.

#### Act Number 23 of the year 2058 (2002)

#### An Act made to provide for the prevention and punishment of terrorist and disruptive acts

**Preamble :** Whereas, it is expedient to make legal provisions on the prevention of terrorist and disruptive acts for the maintenance of peace and order and for the security of the general public in the Kingdom of Nepal; Now, therefore, be it enacted by Parliament in the first year of reign of His Majesty King Gyanendra Bir Bikram Shah Dev.

1. **Short Title and Commencement:** (1) This Act may be called as the "Terrorist and Disruptive Acts (Prevention and Punishment) Act, 2058 (2002)".  
(2) This Act shall come into force immediately.  
(3) This Act shall remain in force until Two years from the date of its commencement.
2. **Definitions:** Unless the subject or the context otherwise requires, in this Act;
  - (a) "Arms" means any rifle, gun, cannon, pistol, revolver, machinegun, rocket, rocket launcher or similar other means or device of any kind, or spear, knife, *Khukuri* or any other risky weapon with or without sharp edge, which is fatal to the body.
  - (b) "Ammunition" means any fog-signal, fuse, gunpowder, cap, bullet, shot, detonator, cartridge and other ammunition of similar kind.
  - (c) "Bomb" means any grenade made of any kind of substance or means and which goes off automatically or with the help of any other means, which is used in military or non-military uses, or land-mines or any other kind of shell filled with explosive substance or any kind of substance to explode or causing explosion.
  - (d) "Explosive substance" means tri-nitro-toluene (TNT), amatol, *barotol*, *pentolight*, RDX, *torpekus*, plastic explosives, dynamites, gunpowder, nitro-glycerin,



gelignite, *stemite*, *selsite*, gun-cotton, blasting powder, mercury or other metal *flunite* that causes loss and damage when exploded and any other substance produced or used with intent to cause effect with explosion whether or not such substance is equivalent to those mentioned.

- (e) "Poisonous substance" means any kind of poison or solid or liquid substance with which such poison is mixed and also includes any kind of noxious flame or gas.
- (f) "Security personnel" means the Police or Armed Police or Royal Nepal Army or the person designated by His Majesty's Government in the prevention and control of terrorist and disruptive acts.
- (g) "Terrorist and disruptive act" means the terrorist and disruptive act as referred to in Section 3.
- (h) "Terrorist" means any person or group involved in the terrorist and disruptive act as referred to in Section 3.
- (i) "Accomplice" means the following person:
  - (1) Any person who is in contact or involved with any person or group involved in the terrorist and disruptive act,
  - (2) Any person who gives any information to any person or group involved in the terrorist and disruptive act or who transmits information of the person or group involved in the terrorist and disruptive act,
  - (3) Any person who knowingly gives financial, physical assistance or assistance by giving shelter, directly or indirectly, to the person or group involved in the terrorist and disruptive act, except in cases of being under coercion.
- (j) "Property" means governmental or public or private movable or immovable property situated in or outside the Kingdom of Nepal.
- (k) "Informer" means any person who gives information to, or assists in giving information to, the security personnel and His Majesty's Government in respect of the terrorist and disruptive acts and explosive substances.
- (l) "Security official" means the Chief District Officer or such gazetted officer-level employee of His Majesty's Government as may be specified by His Majesty's Government by publishing a Notification in the Nepal Gazette.

(m) "Order" means an order issued by His Majesty's Government or the security official.

**3. Terrorist and Disruptive Crime:** (1) If any person commits any of the following acts, such person shall be deemed to have committed the terrorist and disruptive crime:

- (a) Any act to cause loss of, or damage to, or destruction of, the property in any place or make such plot or any act to cause death of, or injuries to any person in such place or to set fire on such place or any act to cause physical or mental loss or damage in any other manner or any act to cause death of, or injuries to, any person by using a poisonous substance in daily consumable goods or in a public place or any act to terrorize the general public or passer-bys or assembling people by committing any of the above-mentioned acts, by using any kinds of arms, bombs, explosive substances or any other devices or articles, with intent to undermine or jeopardize the sovereignty and integrity of the Kingdom of Nepal or security or peace and order of the Kingdom of Nepal or any part thereof or the security of a Nepalese diplomatic mission or property situated abroad, or
- (b) Any act to detain or manhandle or terrorize any person in any place or any type of vehicle or to kidnap any person from such place and vehicle or kidnap any person who is traveling by such vehicle, with or without such vehicle, or terrorize with such act by threatening to kill, mutilate, injure any person or cause any other kind of destruction to such person by using, or threatening to use, the substance mentioned in Clause (a), for the purpose referred to in that Clause, or by using, or threatening to use, any substance or device other than such substance, or
- (c) Any act to produce, distribute, store, transport or export or import, sell, carry or install any kind of arms or bombs or explosive substances or poisonous substances or knowingly aid and abet in such act, with the intention referred to in Clause (a) or (b), or

(d) Any act such as to gather people, give trainings for the object as referred to in Clause (a) or (b), or (e) Any act to forcefully collect cash or goods in-kind, to loot property for the object as referred to in this Sub-section.

(2) Any person who attempts or conspires to commit a terrorist and disruptive act or instigates or compels any other person to commit that act or gathers more than one person to commit, or to cause the commission of, that act or establishes any gang or group to commit such act or makes arrangement to commit such act or takes part in such act with or without receiving remuneration or publicizes or causes to publicize such act or causes obstruction in the public (governmental) communication system shall also be deemed to have committed the terrorist and disruptive crime.

Provided that, any act caused to be committed through coercion shall not be deemed to be a terrorist and disruptive act.

(3) Any person who commits any act referred to in Sub-section (1) or (2) shall be liable to action and punishment under this Act.

**4. Extra-territorial Application of the Act:** Any person who commits a terrorist and disruptive act targeting the Kingdom of Nepal or a Nepalese citizen or any property belonging to the Kingdom of Nepal staying outside the Kingdom of Nepal shall also be subject to the action and punishment under this Act as if such person committed that crime within the Kingdom of Nepal.

**5. Special Power To Prevent Terrorist and Disruptive Act:**

Notwithstanding anything contained in the prevailing law, His Majesty's Government, in any or all parts of the Kingdom of Nepal, and the security official, in the area within his/her jurisdiction, may in order to prevent the terrorist and disruptive crime, order to carry out any or all of the following acts:

(a) To arrest any person, on adequate and reasonable ground of suspicion on such person's involvement in a terrorist and disruptive act, and give a notice accompanied by the reason for arrest as soon as possible,

(b) In the event of a suspicion that any illegal arms, ammunition, bombs or explosive substances are stored or any suspect related with a terrorist is hiding out, to search any house, shop, warehouse, transport vehicle or any other place belonging to any

person whomsoever at any time, by giving a notice, and if any goods are seized in the course of searching, give a receipt thereof,

(c) For purposes of preventing the terrorist and disruptive act, to search any person or goods that the person is carrying with him/her or any means or motor vehicle used by him/her in any place or road or junction,

(d) If any person objects to or obstructs in making arrest under Clause (a) or doing search or taking any other action under Clause (b) or (c), to use necessary force or use arms where such person objects or obstructs by using arms,

(e) If it appears that any person who commits or is committing the terrorist and disruptive act will go away or escape or cannot be arrested, to use necessary force or use arms,

(f) In the course of setting free any place or motor vehicle, or aircraft or ship or any other means of transport forcefully detained or possessed by any person committing the terrorist and disruptive act or setting free any persons being taken hostages in such vehicles, to use necessary force or arms to save them from any possible bodily damage, risks or other loss or damage,

(g) In cases where any person or group of persons attacks any security personnel in the course of carrying out the duty, to use necessary force or use arms,

(h) In cases where any person or group of persons with arms gives or attempts to give threat to any security personnel on duty in any particular place with intent to cause bodily harm to such personnel, to use necessary force or use arms, (i) In cases where any person or group of persons makes an attack with intent to cause bodily injuries to those persons to be guarded by the security personnel or to the general public, employees on governmental duty, or governmental property being guarded by the security personnel or to the security personnel, to use necessary force or use arms,

(j) In cases where there is an encounter with any armed person or group or where any person or group of persons with or without arms causes obstruction to the security personnel in carrying out the specified act, to use necessary force or use arms,

(k) The security personnel is to use necessary force or use arms on or against any person or group of persons carrying arms, in the area where arms are stored or trainings launched with intent to commit the terrorist and disruptive act,

(l) The security personnel is to take control of the arms with any armed person or group of persons or disarm such person or group, as per necessity,

(m) To have surveillance of any suspicious person or place and, if required, arrest such person or lockout or blockade the suspicious place,

(n) To withhold the bank account or passport of any person suspected, on adequate and reasonable ground, of being involved in the terrorist and disruptive act, for a certain period.

**6. Power To Requisition Property:** His Majesty's Government or the security personnel may requisition such private or governmental vehicle, food or other things or property as may be required in the course of prevention and control of the terrorist and disruptive act, on condition of providing compensation that is proper and equal to the prevailing rate or returning such requisitioned things subsequently.

**7. Power To Declare Terror Affected Area and Terrorist:** (1) His Majesty's Government may declare any area that is or might be affected by the terrorist and disruptive activities as the terror affected area.

(2) His Majesty's Government may declare any person, organization, association or group involved in the crime punishable under this Act as the terrorist.

(3) Notwithstanding anything contained in this Section, in cases where a state of emergency has been declared or ordered in accordance with the Constitution of the Kingdom of Nepal, 2047 B.S. (1990 A.D.), the declaration of terror affected area shall be deemed to have *ipso facto* been made.

**8. Power To Prohibit Carrying Arms or Ammunition:** (1) Notwithstanding anything contained in the prevailing law, His Majesty's Government may so issue an order as to prohibit any person from carrying any arms or ammunition licensed under the prevailing law in the terror-affected area declared under Section 7 for a specified period of time or to require such person to surrender such arms or ammunition in such place and for such period of time as may be specified.

(2) Any arms or ammunition held by a person who violates the order referred to in Sub-section (1) shall be confiscated.

- 9. Power To Hold in Detention:** If there is a reasonable ground for believing that any person has to be prevented from committing any activity that could result in the terrorist and disruptive act, the security official may issue an order to detain such a person in any human friendly place for a period not exceeding Ninety days.
- 10. Penalties:** (1) If any terrorist and disruptive act punishable under this Act has resulted in the death of any person, the principal who has committed, or caused the commission of, or conspired to commit, such a crime and any person who has ordered to commit such a crime shall be punished with imprisonment for life, with confiscation of his/her entire property.
- (2) In cases where the crime has already been committed but it has not resulted in the death of any person, the principal who has committed, or caused the commission of, or conspired to commit, such a crime and the person who has ordered to commit such a crime shall be punished with imprisonment for life.
- (3) If any person attempts to commit, or instigates or compels any one to commit, or gathers more than one person or establishes a group to commit, a crime referred to in this Act or makes arrangement to commit or causes the commission of such act or is involved in such act with or without taking remuneration or produces or distributes or holds or transports or imports or exports or otherwise exchanges arms, bombs, explosive substances or poisonous substances with intent to commit such act or propagates or causes to propagate such act, such person shall be punished with imprisonment for a term from Five to Ten years according to the gravity of the offence.
- (4) In cases where any person having committed the terrorist or disruptive act has caused loss of, or damage to, any property, such loss or damage shall be recovered from proceeds of confiscation of the property that belongs to such person as his partition share. If the amount of compensation to be paid cannot be fully recovered from his property, the offender has to undergo imprisonment for the period to be set as if the remaining amount were the amount of unrealized fine, in accordance with the prevailing law.
- (5) Any accomplice of any offence punishable under this Act shall be punished with half a punishment to be imposed on the principal.

- (6) If any person knowingly obstructs in making a search under Clause (b) or (c) of Section 5, such a person shall be punished with imprisonment for a term not exceeding one month or with a fine of up to Five Hundred Rupees or with both.
- 11. To Hold in Detention for Trial:** In trying a person who is accused of having committed the crime under this Act, such accused shall generally be tried by holding him in detention, taking into account of the gravity of the crime.
- 12. Permission To Hold Assembly and Exercise the Freedom of Expression:** Nothing contained herein shall prevent the holding of assembly peacefully and without arms, the exercise of the freedom of opinion and expression in the terror-affected area declared under Section 7 or making movement in any part of the Kingdom of Nepal, without prejudice to this Act.
- 13. Monitoring and Coordination Committee:** (1) Any person who has suffered from any activity carried out by the competent authority in the course of investigating the terrorist and disruptive crime, in exercise of the powers conferred by this Act or any one on behalf of such person may make a petition to the monitoring committee with the chairman and the members as follows:
- (a) A retired judge designated by His Majesty's Government from amongst the retired judges of the Supreme Court - Chairman
  - (b) Secretary, Ministry of Defense - Member
  - (c) Secretary, Ministry of Home - Member
  - (d) Secretary, Ministry of Law, Justice and Parliamentary Affairs - Member
  - (e) Deputy Attorney General, Office of the Attorney General of the Kingdom of Nepal - Member
- (2) The monitoring committee shall set its procedures on its own.
- (3) If, in making inquiry as to the petition made under Subsection (1) by the monitoring committee, it appears that the petitioner has suffered, it shall give necessary advice to the concerned body in order to remove such suffering and also give necessary suggestion to His Majesty's Government on the problem having noticed and resolution of such problem.

- (4) Information of the activities carried out by the monitoring committee under Sub-section (3) shall be given to the State Affairs Committee of the House of Representatives.
- (5) There shall be formed one coordination committee under convenorship of the concerned Regional Administrator or the Chief District Officer, and comprising the Royal Nepal Army, Nepal Police, Armed Police, National Investigation and the chief of other governmental body as its members as per necessity, so as to maintain coordination among the Royal Nepal Army, Nepal Police, armed Police and other necessary governmental bodies in order to prevent or control the terrorist and disruptive acts in its jurisdiction.
- (6) The coordination committee referred to in Sub-section (5) shall set its procedures on its own.

**14. Confiscation:** (1) If any person has committed any crime punishable under this Act and used any property, equipment or vehicle for the commission of such crime, such property, equipment or vehicle shall also be confiscated.

Provided that, in cases where such property, equipment or vehicle has been used without consent of the owner, such property, equipment or vehicle shall not be confiscated.

- (2) The means of publicity, arms, cash and goods in-kind that have been intentionally used in the commission of, or in assisting the commission of, the act punishable under Section 3 shall all be confiscated.
- (3) If any person is held to have committed any act punishable under this Act from any place outside the Kingdom of Nepal, in addition to imposition of the punishment referred to in Section 10 on such person, the movable and immovable property belonging to such person as his partition share situated in the Kingdom of Nepal shall also be confiscated.

**15. Adjudicating Authority and Appeal:** (1) A court constituted or designated by His Majesty's Government by publishing a Notification in the Nepal Gazette shall have the power to try the cases relating to the offences under this Act.



- (2) The court referred to in Sub-section (1) shall, while trying and disposing the cases under this Act, follow the procedures referred to in the Special Court Act, 2031 (1975).
- (3) An appeal against a judgment or a final order made by the court referred to in Sub-section (1) may be made to the Supreme Court.

**16. To Be State Cases:** A case under this Act shall be a state case and that case shall be deemed to be included in Schedule-1 of the State Cases Act, 2049 (1993).

**17. Special Procedures:** (1) Notwithstanding anything contained in the prevailing law, if any person who commits any act considered as the terrorist and disruptive crime under this Act is not found and is absconding, a Fifteen days warrant, setting out his identification to the extent possible, shall be issued to arrest such person. Nothing shall prevent taking action against the person who has not been found or arrested even within that time-limitation.

- (2) Any person, employee or security personnel may be used as an informer in any group committing the terrorist and disruptive act; and that person, employee or security personnel shall not be held liable to any punishment under the prevailing law on the ground of such involvement in that group.
- (3) The identity of an informer shall be kept confidential.
- (4) Notwithstanding anything contained in the prevailing law, if an accused charged in a case instituted under this Act discloses any important matter or evidence to His Majesty's Government, Police employee or other official in a believable manner, or renders direct assistance in finding out the main offender who has really led the crime, such an accused may be taken as a governmental witness; and if such an accused is so taken as a governmental witness, he shall not be punished under the prevailing law.

Provided, however, that if such person sets down a false matter or furnishes a fabricated evidence or appears to have so acted with premeditation in absence of any reasonable ground, such person shall be deemed to be an accused, and the adjudicating authority may punish him/her if punishment has been claimed.

- (5) Notwithstanding anything contained in the prevailing law, an accused charged in the crime under this Act may be held in police custody for investigation for a period not exceeding Sixty days from the date of arrest, with the approval of the adjudicating authority.
- 18. Control in the Means of Communication:** His Majesty's Government may control the means of communication such as letters, telephones or faxes that belong to any person or group involved in the terrorist and disruptive activities.
- 19. Provisions Relating to Treatment Expenditure and Compensation:** (1) If any security personnel or police deputed in controlling and investigating the terrorist and disruptive acts dies or sustains injuries, His Majesty's Government shall provide reasonable medical expenditure and compensation.
- (2) His Majesty's Government shall make provision on necessary medical treatment of any person affected or victimized from the terrorist and disruptive activities and on relief to be granted to such person.
- (3) His Majesty's Government shall provide reasonable compensation to the dependent families of the *bona fide* general public who have died as a result of action taken by any person involved in the terrorist and disruptive activities and by the security personnel.
- (4) If this Act is proved to have been used with ulterior motive, a reasonable compensation shall be given to the victim in the course of making judgment in the concerned case.
- 20. Saving for the Act Done in Good Faith:** Any official or person shall not be liable to punishment for any activity carried out or attempted to be carried out in good faith under this Act or the Rules framed under this Act.
- 21. No Application of Limitation:** No limitation shall apply to the filing of cases under this Act.
- 22. Power to Give Reward:** His Majesty's Government may give proper reward to any person who arrests, or renders assistance in arresting, a person who plays the main role in the commission of the terrorist and disruptive act.

23. **Delegation of Powers:** His Majesty's Government may, as per necessity, delegate any of the powers conferred on it under this Act to any official or may withdraw the delegated power.
24. **Power to Frame Rules:** His Majesty's Government may frame necessary Rules in order to carry out the objective of this Act.
25. **Saving:** The matters contained in this Act shall be governed by this Act, and the other matters shall be governed by the prevailing law.
26. **Consequence of Ineffectiveness of the Terrorist and Disruptive Acts (Prevention and Punishment) Ordinance, 2058 (2001):** (1) After the Terrorist and Disruptive Acts (Prevention and Punishment) Ordinance, 2058 (2001) has become ineffective, unless a different intention appears, the ineffectiveness shall not-(a) Revive anything not in force or existing at the time when the Ordinance became ineffective.
- (b) Affect any matter which came into operation in accordance with the Ordinance or any act duly operated previously under or any matter already suffered under, the Ordinance.
  - (c) Shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under that Ordinance.
  - (d) Affect any penalty, punishment or forfeiture made under that Ordinance.
  - (e) Affect any activity or remedy carried out in respect of any of such right, privilege, obligation, liability or punishment mentioned above, and any such legal proceeding or remedy may be instituted, continued or enforced as if the Ordinance were in force.

## **Appendix XVII**

### **Compensation Relating to Torture Act, 2053 (1996)**

Date of Authentication and Publication  
2053-9-3 (18 Dec.1996)

Act Number 14 of the year 2053 (1996)

### **An Act made to Provide for Compensation to the Person subjected to Torture while in Detention.**

**Preamble :** Whereas, it is expedient to make provisions on compensation for inflicting physical or mental torture upon any person in detention in the course of investigation, inquiry or trial or for any other reason or for giving cruel, inhuman or degrading treatment to such a person;

Now, therefore, be it enacted by the Parliament in the 25th year of reign of His Majesty King Birendra Bir Bikram Shah Dev.

**1. Short Title and Commencement:** (1) This Act may be called as "Compensation Relating to Torture Act, 2053 (1996)."

(2) It shall come into force immediately.

**2. Definitions:** Unless the subject or the context otherwise requires, in this Act,- (a) "Torture" means physical or mental torture inflicted upon a person in detention in the course of investigation, inquiry or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her.

(b) "Victim" means any person upon whom torture is inflicted.

**3. Prohibition on Torture:** (1) No person in detention in the course of investigation, inquiry or trial or for any other reason shall be subjected to torture.

**Explanation:** For the purposes of this Sub-section, the words "in detention" shall include the situation of being taken into custody in accordance with the prevailing law.

(2) In detaining and releasing any person, the concerned official shall get such person examined physically by a medical practitioner engaged in the governmental service as far as possible and him/herself examine such person in cases where no such medical practitioner is available, and maintain records thereof.

**Explanation:** For the purposes of this sub-section, "medical practitioner" shall include a Doctor, *Kabiraj* (Senior Ayurvedic Practitioner), health assistant, assistant health worker or *Vaidhaya* (Junior Ayurvedic Practitioner).

(3) One copy of the report on examination of physical or mental situation referred to in Sub-section (2) has to be sent to the concerned District Court.

**4. Provision of Compensation:** If any employee of Government of Nepal is held to have inflicted torture upon any person, the victim shall be provided with compensation as referred to in this Act.

**5. Filing of Complaint:** (1) A victim may, within 35 days from the date of inflicting torture upon him/her or of his/her release from detention, file with the District Court of the District, where he/she has been detained, a complaint making a claim for compensation.

(2) Notwithstanding anything contained in Sub-section (1), in the event of death of a victim or failure of the victim for any other reason to file a complaint in person, any one of his/her family members having attained the required age or his/her legal practitioner may, setting out reasons therefor, file a complaint under Sub-section (1).

(3) Any one of the detainee's family members having attained the required age or his/her legal practitioner may, if he/she thinks that torture has been inflicted on the detainee, file a petition with the concerned District Court. If such application is filed, the court may order for physical or mental examination of the person in detention within three days. If, upon such examination, it appears that his/her medical treatment is to be done, his/her treatment shall be done on behalf of Government of Nepal.

(4) Any complaint to be filed under Sub-section (1) or (2) shall also contain the following matters, as far as possible:-(a) Reason for detention and period of time spent in detention.

(b) Description of torture inflicted while in detention.

(c) Description of loss resulted from torture.

(d) Amount of compensation claimed.

(e) Any other details which may be ancillary to substantiate the claim.

- 6. Proceedings on Complaint and Compensation:** (1) The District Court shall proceed with a complaint filed under Section 5 by following the procedures referred to in the Summary Procedures Act, 2028 (1972), and if the contents of such complaint are found to be true and correct, make a decision requiring Government of Nepal to pay compensation in a sum not exceeding One Hundred Thousand Rupees to the victim.
- (2) If, in the course of the proceedings under Sub-section (1), a complaint is held to have been made with *mala fide* intention, the complainant may be punished with a fine not exceeding Five Thousand Rupees.
- 7. Action against the Person Involved in the Commission of Torture:** If it is held that torture has been inflicted as mentioned in this Act, the District Court may order the concerned body to take departmental action against the governmental employee who has inflicted such torture, in accordance with the prevailing law.
- 8. Fixation of Amount of Compensation:** In fixing amount of compensation for purposes of Sub-section (1) of Section 6, it has to be fixed taking into account of the following matters :-
- (a) Physical or mental pain or suffering inflicted on the victim and its gravity.
  - (b) Depreciation occurred in income-earning capacity of the victim as a consequence of physical or mental injury.
  - (c) In the case of physical or mental injury of incurable nature, the age of the victim and his/her family obligation.
  - (d) In the case of an injury of curable nature, estimated expenditure for its treatment.
  - (e) In the event of the death of the victim as a result of torture, number of his/her family members dependent on his/her income and minimum expenditure required for their livelihood.
  - (f) The matters deemed proper and just, out of the matters claimed by the victim.
- 9. Execution of the Decision:** (1) After the final decision on provision of compensation to a victim, the victim or his/her nearest heir, in the event of his/her death, has to make an application, accompanied by a copy of the decision made by the District Court on provision of compensation, to the Chief District Officer of the District where the victim

has been detained, for having amount of compensation within one year from the date of receipt of a notice of such decision.

(2) The Chief District Officer has to provide the amount of compensation to the applicant within thirty five days of receipt of the application referred to in Sub-section (1).

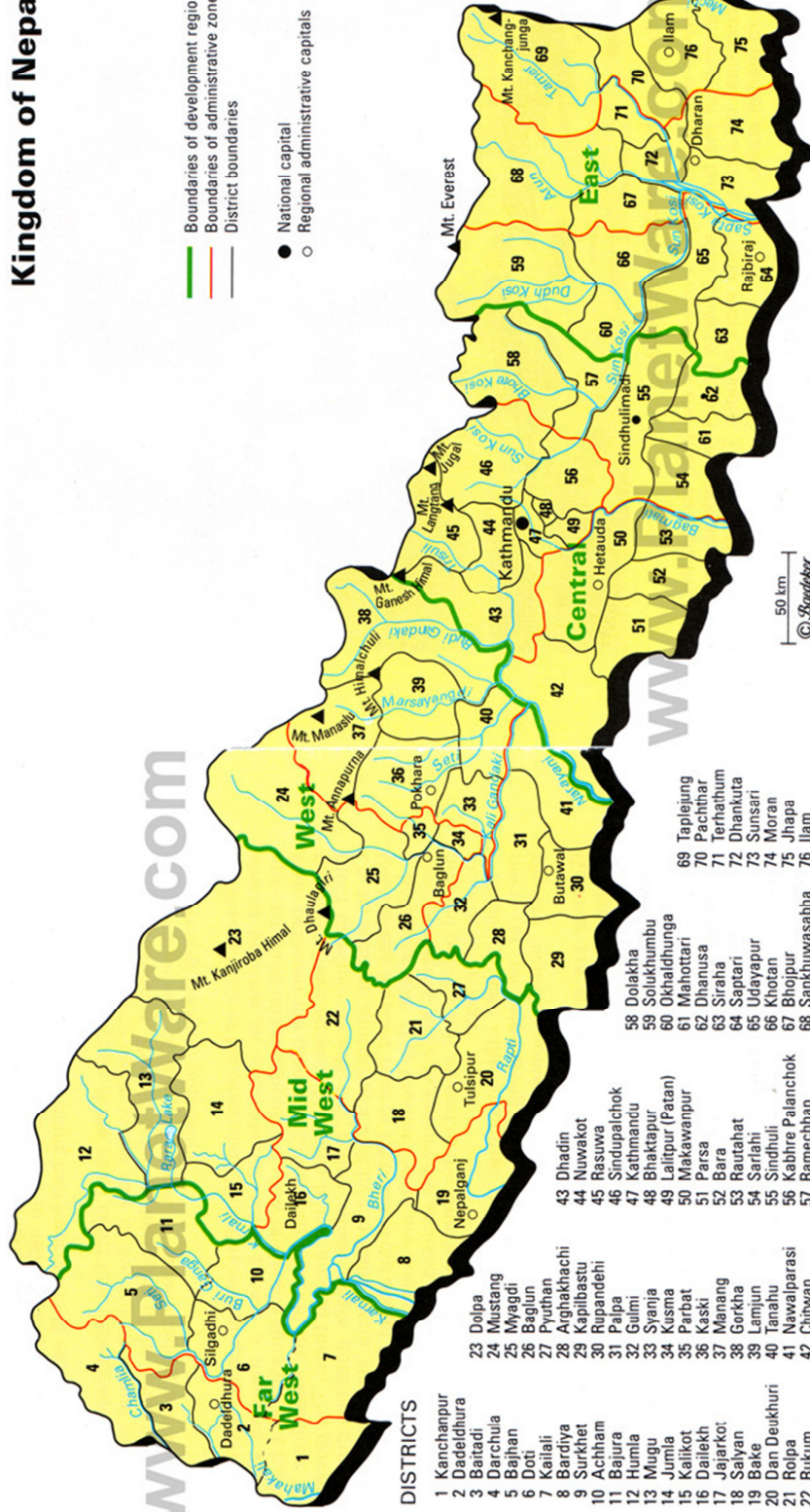
(3) No amount of compensation shall be provided if any application is not made within the time-limit referred to in Sub-section (1).

- 10. Defense by Government Attorney :** The Government Attorney shall, if so requested by the concerned Office In-charge, appear in the Court on behalf of such employee and defend him/her on the complaint filed under Section 5.
- 11. Not to Be Deemed Torture :** Notwithstanding anything contained elsewhere in this Act, any pain or suffering arising naturally from being detained in accordance with the prevailing law shall not be deemed to be an act of torture for the purposes of this Act.
- 12. No Restriction on Taking Action under Prevailing Law:** Nothing shall be deemed to prevent the taking of separate action in such matter as may be deemed to be an offence under the prevailing law only by virtue of the fact that action has been taken under this Act for compensation for torture or that compensation has been received.
- 13. Power To Frame Rules :** Government of Nepal may frame necessary Rules in order to carry out the objectives of this Act.

# Kingdom of Nepal

- Boundaries of development regions
- Boundaries of administrative zones
- District boundaries

- National capital
- Regional administrative capitals



## DISTRICTS

- 1 Kanchanpur
- 2 Dadeldhura
- 3 Baitadi
- 4 Barchuia
- 5 Bajhan
- 6 Doti
- 7 Kailali
- 8 Bardiya
- 9 Surkhet
- 10 Achham
- 11 Bajura
- 12 Humla
- 13 Mugu
- 14 Jumla
- 15 Kalikot
- 16 Dailekh
- 17 Jajarkot
- 18 Salyan
- 19 Bako
- 20 Dan Deukhuri
- 21 Rolpa
- 22 Rukum

- 23 Dolpa
- 24 Mustang
- 25 Myagdi
- 26 Baglung
- 27 Pyuthan
- 28 Arghakhachi
- 29 Kanikhastu
- 30 Rupandehi
- 31 Palpa
- 32 Gulmi
- 33 Syanja
- 34 Kusma
- 35 Parbat
- 36 Kaski
- 37 Manang
- 38 Gorkha
- 39 Lamsun
- 40 Tanahu
- 41 Nawalparasi
- 42 Chitwan

- 43 Dhadin
- 44 Nuwakot
- 45 Rasuwa
- 46 Sindhupalchok
- 47 Kathmandu
- 48 Bhaktapur
- 49 Lalitpur (Patan)
- 50 Makawanpur
- 51 Parsa
- 52 Bara
- 53 Rautahat
- 54 Sarlahi
- 55 Sindhuli
- 56 Kabhre Palanchok
- 57 Ramechhap

- 58 Dolakha
- 59 Solukhumbu
- 60 Okhaldhunga
- 61 Mahottari
- 62 Dhanusa
- 63 Siraha
- 64 Saptari
- 65 Udayapur
- 66 Khotan
- 67 Bhojpur
- 68 Sankhuwasabha
- 69 Taplejung
- 70 Panchthar
- 71 Terhathum
- 72 Dhanuosa
- 73 Sunsari
- 74 Morang
- 75 Jhapa
- 76 Ilam